

DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO
City and County Building
1437 Bannock Street, Room 256
Denver, Colorado 80202

DATE FILED: September 23, 2015 3:34 PM
FILING ID: B1C10E8B52F3B
CASE NUMBER: 2015CV32427

Plaintiffs: ARTHUR KEITH WHITELAW, III; JOHN DERUNGS; KATHERINE K. MCCRIMMON; LAURA PITMON; DENISE SIGON f/k/a DENISE L. SAGER; ALAN SINGER and RITA SINGER

▲ COURT USE ONLY ▲

v.

Case Number: 2015CV032427
Division: 269

Defendants: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity: Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul Lopez, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman); THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity); THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith); THE CITY AND COUNTY OF DENVER; and CEDAR METROPOLITAN LLC (the Property Owner/zoning applicant).

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**CITY’S MOTION TO AMEND THE COURT’S ORDER REQUIRING CERTIFICATION
OF THE RECORD**

The Denver City Council, including the individual Council members in their official capacity: Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul Lopez, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, and Mary Beth Susman (collectively, the “City Council”); the Manager of Community Planning and Development, Brad Buchanan, in his official capacity; the Denver Planning Board, including the individual Board members in their official capacity: Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith (collectively, the “Planning Board” or “Denver Planning Board”); and the City and County of Denver (all collectively, the “City” or “City Defendants”), through their undersigned attorneys, respectfully request that the Court vacate or amend its order entered July 29, 2015 requiring certification of the record because Plaintiffs’ request contains irrelevant material and because the record could contain differing material if the Court grants all or part of the City Defendants’ Motion to Dismiss. In support of this Motion, the City Defendants state as follows:

Certification Pursuant to C.R.C.P. 121, § 1-15: The undersigned certifies that the City has had several conversations with Plaintiffs’ counsel regarding the contents of the Certified Record and the parties do not agree.

INTRODUCTION

This case is about the rezoning of a parcel located at 195 S. Monaco Parkway in Denver. The Denver City Council approved the rezoning in the early morning of July 9 after a public hearing that lasted over seven hours. *See* Complaint at ¶¶ 8, 49. Plaintiffs object to that decision and filed this lawsuit to contest it. Plaintiffs' claims include a claim pursuant to C.R.C.P. 106(a)(4) seeking review of "the quasi-judicial decisions of the Denver City Council and Denver Planning Board to approve the 195 S. Monaco Zoning Change." *Id.* at ¶ 90. Plaintiffs also ask the Court to consider certain actions of Community Planning and Development, a department of the City, and "City representatives." *Id.* at ¶ 91.

Plaintiffs also filed a Motion Requiring Certification of Record within 28 Days After Defendants File an Answer (the "Motion"). The Motion asks that the Court order the City to certify an extensive array of documents. Many of the documents requested are not part of the record for review under Rule 106(a)(4) and, therefore, should not be included in the certified record. The certified record for review under Rule 106(a)(4) is not the same as discovery pursuant to Rule 26. While some of the documents listed in Plaintiffs' Motion might be discoverable pursuant to Rule 26 for Plaintiffs' claims other than its Rule 106(a)(4) claim, they should not be part of the certified record.

C.R.C.P. 106(a)(4)(IV) authorizes any party to move to correct the record at any time. The City Defendants request that the Court modify its order.

ARGUMENT

A. **In a Rule 106(b)(4) review, the Court considers only the record before the decision-maker.**

Under C.R.C.P. 106(a)(4), the Court is limited to reviewing a government agency's quasi-judicial decision to determine whether it exceeded its jurisdiction or abused its discretion. *City of Colo. Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1246–47 (Colo.2000). The Court must determine whether there is sufficient evidentiary support for the agency's decision. *City of Colo. Springs v. Givan*, 897 P.2d 753, 756 (Colo.1995). The “[r]eview shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.” C.R.C.P. 106(a)(4)(I); *Feldwerth v. Joint School Dist. 28-J of Counties of Adams and Arapahoe*, 3 P.3d 467, 470 (Colo.App. 1999).

The Court should rule based only on the record before the decision maker. *Garland v. Board of County Com'rs, Larimer County*, 660 P.2d 20, 23 (Colo.App. 1982). The Court cannot take additional testimony, even when faced with an inadequate record below, or make findings of fact. *Hazlewood v. Saul*, 619 P.2d 499, 501 (Colo. 1980) (“in a certiorari proceeding pursuant to C.R.C.P. 106(a)(4), the district court's review is limited to a review of the record before it. Introduction of new testimony is not appropriate.”); *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203 (Colo.App. 2000) (refusing to consider evidence from district court hearings except as relevant to whether the city's decision was a quasi-judicial act and the trial court had subject matter jurisdiction); *Feldwerth*, 3 P.3dat 470.

B. The City Council was the final decision-maker and only the records before it at the City Council meetings where the ordinance was heard should be part of the certified record.

The City Council made the final, reviewable decision to rezone 195 S. Monaco Parkway. *See* Denver Zoning Code (“DZC”) § 12.2.1.2 (City Council responsible for final action regarding map amendments and text amendments); Complaint at ¶¶ 2, 47-51. The Planning Board (including its individual members), the Manager of Community Planning and Development (“CPD”), Brad Buchanan, and CPD staff, do not have the authority to make the final zoning decision. *See* City Charter § 3.2.9; § 12-17(8) (CPD advises the mayor and City Council on proposed zoning amendments); DZC § 12.2.2 (Planning Board “shall review and make recommendations to the authority responsible for final action” regarding map amendments and text amendments); DZC § 12.2.3.4 (Manager “shall review and make recommendations to the City Council” on map amendments and text amendments). Neither the Planning Board nor the Manager are responsible for final action on map amendments and text amendments and the City Council only is required to “consider” the Planning Board’s and the Manager’s recommendations. City Charter § 3.2.9; DZC §§ 12.2.1.2B, 12.2.2.2, 12.2.2.3.B, 12.2.4.2 and 12.4.11.3.G.

Additionally, the City Council Neighborhoods and Planning Committee is not the final decision maker on a rezoning application. DZC § 12.4.10.4.F. The Neighborhoods and Planning Committee directs any further action on the application required for the rezoning review process and, when deemed ready for hearing, forwards the application to the City Council.

Therefore, records that were not before the City Council at the June 8-9 public hearing at which the City Council considered the ordinance and voted on it should not be part of the

certified record, including records that were created, received by or otherwise before the Planning Board and/or the Manager and/or the Neighborhoods and Planning Committee. See, C.R.C.P. 106(a)(4)(I).

C. **Some of Plaintiffs' requested documents exceed the scope of the certified record pursuant to Rule 106(a)(4).**

We will address each of Plaintiffs' numbered categories of documents in turn.

1. Pleadings, applications, evidence, memoranda, exhibits and other papers presented to, or considered by, the City Council or the Denver Planning Board.

Response. The City Defendants agree that documents presented to or considered by the City Council at the two meetings where it considered the rezoning ordinance should be in, and indeed are, the certified record for this Court's review.

The City Defendants object to this category to the extent it involves the items presented to or considered by the Denver Planning Board because the Planning Board's decision is not on appeal here.

2. CD and transcript of City Council hearing.

Response. The City Defendants agree that a transcript of the June 8-9 City Council meeting should be part of the certified record. The City Defendants already have provided a copy of the video from the June 8-9 City Council meeting to Plaintiffs' counsel so that it can be transcribed.

3. Letters, emails, petitions or other public comments received by the Denver City Council or CPD before the beginning of the June 8-9 City Council hearing.

Response. The City Defendants agree any such documents received by the City Council and included in the record as reflected on the City Council's SIRE system, through

the date and time of the City Council's vote in the early morning of June 9, 2015 should be part of the certified record to the extent they were provided to the City Council, and were part of the evidence considered by the City Council. SIRE is the City Council's software system into which the City Council staff uploads bills, supporting or related material, and emails and other comments received from the public. The information in SIRE is available to all City Council members and to the public on the City Council's web site. Items that might have been received but that were not considered by the entire body of the City Council should not be included in the certified record as they were not part of the record on which the City Council made its decision. Therefore, letters, emails and other correspondence or materials received by an individual City Council person but not provided to the entire Council are not included in the certified record because the City Council, as a body, did not consider them.

Further, as discussed above, since CPD did not make the final decision, documents received by CPD should not be part of the certified record and the City Defendants object to their inclusion. If CPD forwarded any documents to the City Council for the City Council's consideration, these documents would be provided as part of the City Council's records.

4. CD of City Council Neighborhoods and Planning Committee meetings dated February 18, 2015 and March 4, 2015.

Response. The City Defendants object to this category because the Committee was not the decision maker and the documents before the committee were not necessarily before the City Council when the City Council made its decision.

5. Notes, emails, memos, letters, or other records of written communications created between January 21, 2015 and June 9, 2015 concerning the zoning change between City Council members or their staff and representations of Cedar Metropolitan, LLC.

Response. As with No. 3, above, the City Defendants agree any such documents created or received by the City Council and included in the City's SIRE system through the date and time of the City Council's vote in the early morning of June 9, 2015 should be part of the certified record. Again, items that were not provided to and considered by the entire body of the City Council should not be included in the certified record as they were not part of the record on which the City Council made its decision.

6-10. Planning Board materials.

Response. The Planning Board's decision is not at issue here and these materials were not part of the record considered by the City Council. Therefore, the City Defendants object to including them in the certified record.

11. CPD materials.

Response. The CPD's decisions are not at issue in the Rule 106 claim and these materials were not part of the record considered by the City Council. Therefore, the City Defendants object to including them in the certified record. To the extent this material exists and was provided to the City Council, it would be included in the materials to which the City Defendants agreed above.

The City Defendants recognize that, to the extent Plaintiffs' claim pursuant to C.R.C.P. 57 proceeds separately, discovery may be required that includes documents and information not

included in the Certified Record. However, for the purpose of the Rule 106(a)(4) review, the relevant documents are limited to the Certified Record.

CONCLUSION

For the reasons discussed above, the City Defendants request that the Court amend its July 29, 2015 Order and that it order the City Defendants to certify the record within 28 days after the City Defendants answer the Complaint and that the record contain:

1. Pleadings, applications, evidence, memoranda, exhibits and other papers presented to, or considered by, the City Council to the extent they can be identified and located;
2. A CD and transcript of City Council hearing conducted July 8 – 9, 2015;
3. Letters, emails, petitions or other public comments received by the Denver City Council related to the rezoning of 195 S. Monaco Parkway and part of the record of the City Council when it considered the rezoning ordinance; and
4. Notes, emails, memos, letters, or other records of written communications related to the rezoning of 195 S. Monaco Parkway and part of the record of the City Council when it considered the rezoning ordinance.

WHEREFORE, the City Defendants respectfully request that the Court amend its July 29, 2015 Order requiring the City Defendants to certify the record.

Respectfully submitted this 23rd day of September, 2015.

/s/Nathan Lucero
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ATTORNEYS FOR DEFENDANTS, DENVER
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DEVELOPMENT, THE DENVER PLANNING
BOARD AND THE CITY AND COUNTY OF
DENVER

In accordance with C.R.C.P. 121§1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I certify that on this 23rd day of September, 2015, a true and correct copy of the foregoing was filed with the Court and served electronically by ICCES as follows:

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