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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St., Room 256
Denver, CO 80202

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

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 López, 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, Brittney 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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Case Number: 2015cv032427

Courtroom: 269

PLAINTIFFS' MOTION FOR LEAVE TO SERVE DOCUMENT SUBPOENAS AND TAKE BRIEF DEPOSITIONS TO OBTAIN EVIDENCE CONCERNING *EX PARTE* COMMUNICATIONS WITH CITY COUNCIL MEMBERS THAT SHOULD BE MEMORIALIZED IN THE ADMINISTRATIVE RECORD

Plaintiffs move under C.R.C.P. 106(a)(4)(I) & (IV), and C.R.C.P. 16(a) and 26(b), for leave to: a) serve document subpoenas and b) take brief depositions (not to exceed one-hour of direct examination per witness or corporate entity) in order to obtain documents and brief testimony from non-parties to memorialize evidence of *ex parte* contacts with Denver City Council members that should be included in the administrative record in this case.

Before filing this motion, counsel for Plaintiffs conferred with counsel for the City Defendants and understands they will oppose this motion.

In support of this motion, Plaintiffs state as follows:

1. Plaintiffs allege in Paragraphs 2(a), 36 and 82(a) of their Complaint that *ex parte* contacts occurred between certain lobbyists and lawyers for the owner of the Mt. Gilead Parcel and Denver City Council members, which violated the quasi-judicial procedures the Council was required to follow:

> Para. 2(a) and 82(a): Quasi-judicial procedures not followed: . . . The Denver City Council failed to follow proper quasi-judicial procedures and failed to base its decision to approve the proposed new zoning on the criteria listed in Section 12.4.10 of the Denver Zoning Code for approval of a new zone map amendment. Instead, the Council members who voted in favor of the rezoning treated the process as a political and legislative decision, and were influenced before the public hearing by *ex parte* contacts.
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> Para. 36: "On information and belief, hired representatives of Cedar Metropolitan LLC and Peter Kudla had extensive *ex parte* contacts with District 5 Councilperson Mary Beth Susman and her staff members, and with other City Council members during the period between January 21, 2015 (after Planning Board approval) and June 8, 2015. In those *ex parte* contacts, the developer's representatives arranged to have the City Council postpone its public hearing on the 195 S. Monaco Zoning Change. Those developer representatives arranged to have the City Council hearing on the Zoning Change scheduled for June 8, 2015—after the Denver municipal elections of members of City Council. This had the effect that Council members' votes would not become an issue in the Council elections, and would be made before the new City Council members would be sworn in on July 20, 2015. Thus the voting would be made, in part, by a "lame duck" body. Councilmember Susman warned community members at her regularly scheduled neighborhood discussion meeting approximately one week before the June 8, 2015 hearing not to expect other Council members to vote with her. It will be necessary for Plaintiffs to obtain discovery to ascertain the full extent of those *ex parte* contacts, which may have affected the outcome quasi-judicial process of the City Council on June 8-9, 2015."

2. The Court's July 29, 2015 "Order Granting Plaintiffs' Motion Under C.R.C.P. 106(a)(4)(III) Requiring Certification of Record Within 28 Days After Defendants File an

Answer" approved, without any timely opposition from Defendants, Plaintiffs' request to include in Paragraph 5 the following category of documents in the administrative record for Rule 106(a)(4) review in this case:

> "5. All notes, emails, memos, letters, or other records of any written communications created between January 21, 2015 and June 9, 2015 concerning Cedar Metropolitan LLC's proposed zoning change for the Mt. Gilead Parcel between: a) any Denver City Council member or his or her staff persons; and b) any representative of Cedar Metropolitan LLC (including without limitation, Peter Kudla, Jim Bershof, Sean Maley (CRL), Kim Kucera (CRL), David Foster, Marcus Pachner, and Phil Workman)."

The City filed a Motion on September 23, 2015 seeking to eliminate that category of documents from the Court's July 29, 2015 Order. Plaintiffs will be filing a brief opposing the City's motion.

3. Through the instant Motion, Plaintiffs are seeking leave to obtain, through document subpoenas, evidence of the same types of communications directly from the property owner and its lobbyists and lawyers who were communicating with City Council members, to ensure that a full set of documents concerning the *ex parte* contacts will be included in the administrative record – not just the documents from the files of City Council members. They are also seeking brief depositions, with one-hour or less per witness of direct examination, to confirm what *ex parte* communications occurred with Denver City Council members or their staff, including oral communications that would not be reflected in documents that are produced.

Document subpoenas and depositions requested

4. If the Court grants this Motion, Plaintiffs will serve document subpoenas and deposition subpoenas on the following people and entities:

a) Peter Kudla (principal of Cedar Metropolitan LLC);

b) Jim Bershof of OZ Architecture and a current member of the Denver Planning Board;

c) CRL Associates, Inc. (as a corporate entity) and its individual lobbyists who worked on the Mt. Gilead Parcel zoning: Sean Maley and Kim Kucera;

d) Foster Graham Milstein & Calisher, LLP (as a corporate entity) and one of its attorneys, David Wm. Foster; and

e) Lobbyists Marcus C. Pachner (of The Pachner Company), and Phil Workman (of Workman & Associates LLC).

5. Plaintiffs' proposed document request to each of these people and corporate entities will be:

Produce a copy of all notes, emails, memos, letters, or other records of any communications between January 21, 2015 and June 9, 2015 concerning Cedar Metropolitan LLC's proposed zoning change for the Mt. Gilead Parcel (located at 195 S. Monaco Parkway, Denver, Colorado) between: a) you or anyone in your company; and b) any Denver City Council member or his or her staff persons. [This request is not intended to cover public statements to all members of the City Council that were recorded on videotape at the June 8-9, 2015 public hearing in the City Council chambers, but does cover any private communications during that hearing.]

6. This document request and accompanying deposition testimony does not seek privileged information. No privilege would apply to written or oral communications between representatives of a property developer (Cedar Metropolitan) and members of the Denver City Council or their staff.

7. It should not be burdensome for the recipients of these subpoenas to locate and produce responsive documents. The document request is specific and each of these individuals or companies should know exactly what communications they had with City Council members concerning the 195 S. Monaco Zoning Change

***Ex parte* contacts in this quasi-judicial zoning proceeding would be "highly improper"**

8. Information on the *ex parte* contacts that occurred in connection with the 195 S. Monaco Zoning Change is highly relevant to this Court's review of Plaintiffs' claims in this case. *Ex parte* contacts with Denver City Council members concerning a quasi-judicial zoning change like the 195 S. Monaco Zoning Change, are "considered highly improper" and may be held to deprive the public of a fair hearing and require that the administrative decision be reversed:

a. The *Rathkopf* zoning treatise explains how such *ex parte* contacts can taint a zoning decision like the one challenged here:

> When a zoning body takes administrative action affecting a person's property rights with respect to the use of a specific tract of land, procedural due process requires that the affected person be given notice and a fair opportunity to be heard. This due process right to a "fair hearing" on the issues involved clearly prohibits any use of secret evidence or secret reports that have the effect of denying the person involved a fair opportunity to proffer rebuttal testimony and evidence. **Ex parte contacts and communications related to the merits of an administrative zoning decision are considered highly improper and may be held sufficient to prejudice the affected person's procedural due process rights to a "fair hearing" or a similar statutory right to a "public hearing."**
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> 2 A. Rathkopf, D. Rathkopf, and E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, § 32:13 (4th ed. June 2015) (emphasis added; footnotes omitted) (copy attached as Exhibit A).

b. A 2004 Colorado Lawyer article explains the problem with ex parte contacts with quasi-judicial decisionmakers:

> *Ex parte* contacts involve communications between a board member and a party or member of the public that take place outside a noticed public hearing. **These contacts deny due process to both applicants and opponents of the application because the other party is not present to hear and rebut statements made to the decision-maker.** An *ex parte* contact may not necessarily result in invalidation of the ultimate decision. Nevertheless, **the appearance of impropriety undermines the integrity of the governing body itself**. Thus, the local government attorney should advise quasi-judicial decision-makers to avoid *ex parte* contacts in quasi-judicial matters.
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> G. Dahl, Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and Ex Parte Contacts, 33 *Colorado Lawyer* No. 3 at p. 69 (March 2004) (emphasis added).

c. As noted in Paragraph 67 of Plaintiffs' Complaint here, the Colorado Judicial Code of Conduct should be deemed to apply to the Denver City Council when it is functioning in a quasi-judicial role on zoning decisions. This Code applies to: "anyone who is authorized to perform judicial functions, including an officer such as a magistrate, referee, or member of the administrative law judiciary." *See* Colorado Code of Judicial Conduct, Application, Section "I. Applicability of This Code" (July 1, 2010) (copy posted at Colorado Judicial Branch website at: https://www.courts.state.co.us/Courts/Education/Conduct.cfm

Rule 2.9 of that Code forbids *ex parte* communications: "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows [noting certain exceptions that do not apply here because Council Members did not disclose their pre-hearing contacts with the developer and its lobbyists and lawyers].

d. A publicly disseminated article prepared by the Lakewood, Colorado City Attorney's office explains in detail the prohibition on *ex parte* contacts in quasi-judicial matters that come before the Lakewood City Council:

> Just as a judge in a civil or criminal case cannot speak to one party without the other party or parties present, the "judges" on the City Council are prohibited from obtaining evidence from either side of the dispute outside of the public hearing. This rule, referred to in legal terms as regulating "ex parte" communication, has been developed over the years to ensure that everyone with an interest in the case, and all members of the decision-making body, hear the same evidence at the same time, from the same sources. Ex parte communication includes not only oral communication, but written, electronic, and graphic communication as well.
>
> The rule prohibiting "ex parte" communication can be frustrating to citizens who assume that they always have access to their elected officials. However, it is important to

remember that this rule is designed to protect the rights of all involved – applicants, opponents, and other interested parties – affording the opportunity for a fair hearing before unbiased decision makers.

If and when a Council member does receive information about a case outside of the public hearing, the member is expected to disclose the communication, in as much detail as possible, to the entire Council at the beginning of the public hearing. If the Council member sincerely believes that the "ex parte" communication did not affect his or her ability to decide the case fairly, impartially and based solely on the evidence presented at the hearing, the member can participate in the hearing after the disclosure; otherwise, the member must "recuse" or remove him or herself from the discussion and the vote.

"The Quasi-Judicial Process and Citizen Access to the City Council," available at City of Lakewood's website: https://www.lakewood.org/Documents/City_Council/The_Quasi-Judicial_Process_and_Citizen_Access_to_the_City_Council.aspx (footnotes omitted) (copy attached as Exhibit B).

e. Colorado court decisions require *ex parte* communications with quasi-judicial decisionmakers to be disclosed and the occurrence of such communications may require that a decision be set aside.

i. In *Colorado Energy Advocacy Office v. Public Service Co*, 704 P.2d 298, 302-04 (Colo. 1985), the Colorado Supreme Court reviewed a quasi-judicial proceeding before the Public Utility Commission and held "the PUC's contact with PSCo in the instant case, even though made through an intermediary staff member, was clearly improper." The Court explained: "In adjudicatory proceedings such as the PUC hearing of complaint, an agency may not base its decision on ex parte information of which the parties are not given notice and an opportunity to cross-examine or rebut. [citations omitted] Decisions in adjudicatory proceedings must be made on a public record to assure that a reviewing court will be able to determine whether there was sufficient evidence to support the agency decision." *Id.* at 303.

ii. Similarly, in *Zuviceh v. Industrial Comm.*, 544 P.2d 641, 642-43 (Colo. App. 1975), the Colorado Court of Appeals held in an unemployment compensation case that *ex parte* contacts tainted the administrative proceeding. The court of appeals reversed and remanded the administrative decision because the claimant contended the agency had relied on an *ex parte* communication from its adversary (the employer), and the court was unable to determine the basis for the agency's decision. The agency record did not disclose the phone conversation between the employer and the commissioner.

iii. The Colorado "State Administrative Procedure Act" now expressly forbids *ex parte* contacts from occurring: "No ex parte material or representation of any kind offered without notice shall be received or considered by the agency, the administrative law judge, or by the hearing officer." C.R.S. § 24-4-105(14)(a).

f. The model state administrative procedure acts for states adopted by the Uniform Law Commission, forbid *ex parte* communications with officers in adjudicative proceedings:

i. Section 4-213 of the Model State Administrative Procedure Act (1981),[1] available at http://www.uniformlaws.org/Act.aspx?title=Model State Administrative Procedure Act (1981), contains strong prohibitions on *ex parte* communications with officers in adjudicative proceedings and requires that if such communications occur they be disclosed and made a part of the record of the pending matter (emphasis added):

> § 4-213. [Ex parte Communications].
>
> (a) Except as provided in subsection (b) or unless required for the disposition of ex parte matters specifically authorized by statute, **a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding**, or with any person who presided at a previous stage of the proceeding, **without notice and opportunity for all parties to participate in the communication**.
>
> (b) A **member of a multi-member panel of presiding officers** may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer **may receive aid from staff assistants if the assistants do not (i) receive ex parte communications of a type that the presiding officer would be prohibited from receiving** or (ii) furnish, augment, diminish, or modify the evidence in the record.
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> (c) Unless required for the disposition of ex parte matters specifically authorized by statute, **no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer, without notice and opportunity for all parties to participate in the communication**.
>
> (d) **If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e)**.

[1] This 1981 Model Act has been enacted in 11 states: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Iowa, Kansas, Montana, Tennessee, Wyoming. *See* http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Model State Administrative Procedure Act (1981).

(e) **A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record**. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within [10] days after notice of the communication.

(f) If necessary to eliminate the effect of an ex parte communication received in violation of this section, **a presiding officer who receives the communication may be disqualified** and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.

ii. Section 408 of the "State Administrative Procedure Act, Revised Model" (2010) available at http://www.uniformlaws.org/Act.aspx?title=State+Administrative+Procedure+Act,+Revised+Model, forbids *ex parte* communications with the final decision maker in a contested case and requires that if such communications occur they be disclosed and made a part of the hearing record.

g. The federal Administrative Procedure Act defines an *ex parte* communication as: "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. § 551(14). That Act directs that for agency proceedings subject to 5 U.S.C. § 557 (where a hearing is required under § 556): no ex parte communications relevant to the merits of the proceeding may occur, and if a prohibited communication does occur, it shall be placed on the public record of the proceeding, and if in the interests of justice, the agency may require the party involved "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." 5 U.S.C. §§ 557(d)(1)(A)-(D).

9. Although the City of Denver does not publicly disclose the legal guidance the Denver City Attorney's office provides to Denver City Council members about avoiding *ex parte* contacts when making quasi-judicial zoning decisions, Denver Council members are subject to the same prohibitions as City of Lakewood Council members. The law in this area is well-established and should not be a surprise to the City of Denver. The City should have an interest in preparing a complete administrative record in this case, which discloses information about *ex parte* contacts that occurred.

Evidence of *ex parte* contacts should be included in the administrative record

10. The information Plaintiffs seek through this motion about any *ex parte* contacts with City Council members that occurred here should be included in the administrative record for this case. C.R.C.P. 106(a)(4)(I), (III) & (IV) do not define what information should be included as "evidence in the record before the defendant body or officer." The legal authorities concerning *ex parte* contacts discussed in Paragraph 8 above demonstrate that evidence of *ex parte* contacts with a quasi-judicial decisionmaker is important and relevant to judicial review of the administrative decision. Therefore, the Court should allow Plaintiffs to obtain, and include in the administrative record here, evidence about such *ex parte* contacts.

11. Alternatively, under established state and federal administrative law principles, the Court should allow Plaintiffs to "supplement" the administrative record the City of Denver prepares based on the Court's July 29, 2015 Order with evidence of any *ex parte* contacts with City Council members that occurred here, because information conveyed in such *ex parte* communications was "considered" by the particular City Council member and possibly shared by that member with other members:

a. By analogy, under the Colorado "State Administrative Procedure Act" the record is defined to include all information "presented to or considered by" the agency and the state allows a procedure to correct omissions in the record assembled by the agency: "In every case of agency action, the record, unless otherwise stipulated by the parties, shall include the original or certified copies of all pleadings, applications, evidence, exhibits, and other papers presented to or considered by the agency, rulings upon exceptions, and the decision, findings, and action of the agency. Any person initiating judicial review shall designate the relevant parts of such record and advance the cost therefor. As to alleged errors, omissions, and irregularities in the agency record, evidence may be taken independently by the court." C.R.S. § 24-4-106(6).

b. Under the model state administrative procedure acts for states adopted by the Uniform Law Commission discussed above in Paragraph 8(f) of this Motion, evidence documenting any *ex parte* contacts is to be included in the agency record. *See* Section 4-213(e) of 1981 Model Act (quoted above), and Section 408 of the "State Administrative Procedure Act, Revised Model" (2010). In addition, under the 1981 Model Act, the administrative record for judicial review may include information beyond what is contained in the "agency record" that is necessary for the court to evaluate the "unlawfulness of procedure or of decision-making process." *See* Section 5-114 of 1981 Model Act. And under Section 507(b) of the "State Administrative Procedure Act, Revised Model" (2010), the agency record for judicial review consists of: "the unprivileged materials that agency decision makers directly or indirectly considered, or which were submitted for consideration by any person, in connection with the action under review, including information that is adverse to the agency's position." And under Section 507(c) the court can supervise the agency's compilation of the record and allow discovery or other evidentiary proceedings to ensure the agency record is complete. The Comment to Section 507 explains: "The section contains an exception to the closed record on

review where petitioner alleges error, such as ex parte contacts, that does not appear in or is not evident from the record."

c. Under federal administrative law, courts recognize certain categories for supplementing the administrative record, a federal agency presents for judicial review including: when the agency has relied on documents or materials not included in the record, and when plaintiffs allege that an agency has acted in bad faith. *See generally* D. Rohlf, "Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions," 35 *Ohio Northern University L. Rev.* 575, 587-88 (2009) (discussing exceptions recognized in *Public Power Council v. Johnson*, 674 F.2d 791, 794-95 (9th Cir. 1982)); *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

12. This Court has authority under C.R.C.P. 16(a) to allow limited discovery so information can be obtained to include in the administrative record. Rule 16 does not apply to a case under C.R.C.P. 106 "unless otherwise ordered by the court." *See generally Public Power Council v. Johnson*, 674 F.2d 791, 794-96 (9th Cir. 1982) (allowing limited discovery subpoenas for documents and depositions to supplement agency record). Federal courts allow evidence of improper *ex parte* contacts with an agency decisionmaker to be obtained if the administrative record the agency tenders does not include such information. *See Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1549-50 (9th Cir. 1993) (remanding case for evidentiary hearing before ALJ concerning *ex parte* contacts).

WHEREFORE, Plaintiffs respectfully request that the Court grant this Motion and grant Plaintiffs leave to:

a) serve document subpoenas on the individuals and entities listed in Paragraph 4 with the document request stated in Paragraph 5; and

b) take brief depositions (not to exceed one-hour of direct examination per witness or corporate entity) of the individuals and entities listed in Paragraph 4 in order to obtain documents and brief testimony from non-parties to memorialize evidence of *ex parte* contacts with Denver City Council members that should be included in the administrative record in this case.

Plaintiffs are submitting a proposed order with this motion.

Dated: September 28, 2015.

/s/ Gregory J. Kerwin

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Exhibits:

A. 2 A. Rathkopf, D. Rathkopf, and E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, § 32:13 (4th ed. June 2015).

B. "The Quasi-Judicial Process and Citizen Access to the City Council," available at City of Lakewood's website.

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015 a copy of the foregoing PLAINTIFFS' PLAINTIFFS' MOTION FOR LEAVE TO SERVE DOCUMENT SUBPOENAS AND TAKE BRIEF DEPOSITIONS TO OBTAIN EVIDENCE CONCERNING *EX PARTE* COMMUNICATIONS WITH CITY COUNCIL MEMBERS THAT SHOULD BE MEMORIALIZED IN THE ADMINISTRATIVE RECORD was served on the parties listed below through the ICCES system:

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