DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202	DATE FILED: October 6, 2015 12:33 PM FILING ID: DBDCE6CD86F66 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 v. **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).	**▲COURT USE ONLY▲** Case Number: 2015CV032427 Division: 269
Attorneys for the City Defendants Nathan Lucero, Atty. No. 33908 Tracy Davis, Atty. No. 35058 Assistant City Attorneys Denver City Attorney's Office Municipal Operations Section 201 W. Colfax Avenue, Dept. 1207 Denver, Colorado 80202 Telephone: (720) 913-3275; Fax (720) 913-3180 E-mail: nathan.lucero@denvergov.org E-mail: tracy.davis@denvergov.org	

CITY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO SERVE SUBPOENAS AND TAKE DEPOSITIONS ON ITS RULE 106(a)(4) CLAIM

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 submits this Response in opposition to 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 conflate their Rule 106(a)(4) claim for review of the rezoning decision with the merits of their Rule 57 claim for a declaratory judgment. These are two distinct claims, with different procedures and discovery rules. A Rule 106(a)(4) claim is a certiorari claim asking the Court to review a public entity's final decision, as provided in that Rule. A Rule 57 claim is appropriate where Rule 106(a)(4) relief is unavailable because the review of the record does not provide a sufficient remedy. *Tepley v. Public Employees Retirement Ass'n*, 955 P.2d 573, 581-2

(Colo.App. 1997). The introduction of other evidence may be proper on the Rule 57 claim. *Id.* at 582. Plaintiffs' Rule 106 claim proceeds on an expedited basis as provided in Rule 106(a)(4)(VII) and the Rule 57 claim will proceed on a separate procedural schedule either pursuant to C.R.C.P. 16 or as determined by the Court pursuant to Rule 106(a)(4)(VI).

Plaintiffs request this additional discovery for the purposes of their Rule 106 claim. As discussed below, the discovery should not be permitted at this time on Plaintiffs' Rule 106 claim. However, it might be part of the discovery allowed by Rule 26 on Plaintiffs' Rule 57 claim once discovery commences on that claim.

1. Discovery should not be permitted on Plaintiffs' Rule 106 claim

The Certified Record that Plaintiffs seek to supplement relates to Plaintiffs Rule 106(a)(4) claim for review of the rezoning decision. See C.R.C.P. 106(a)(4)(III)-(IV). C.R.C.P. 106(a)(4)(I) states, in relevant part (emphasis added):

> Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy, and adequate remedy otherwise provided by law:
>
> (I) Review 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.

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). "Under C.R.C.P. 106(a)(4), a

reviewing court can reverse an agency decision only when there is no competent evidence to support the decision, *see Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308–09 (Colo.1986), or when the agency has 'exceeded its jurisdiction,' as the rule's plain language states." *City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008). No competent evidence means the "ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross*, 713 P.2d at 1308-9. Thus, the only inquiry appropriate in the Rule 106(a)(4) appeal is whether there exists in the record any competent evidence supporting the decision of the City Council. In addition, an agency can abuse its discretion or exceed its jurisdiction when the agency misinterpreted or misapplied the governing law. *Shupe v. Boulder County*, 230 P.3d 1269, 1272 (Colo.App. 2010).

The Court generally cannot take additional testimony or evidence, even when faced with an inadequate record below. *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). Rather, the Court should rule on the petition 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 Colorado Court of Appeals previously faced this same question and applied a narrow exception to the rule: in order to obtain limited discovery for the purposes of a Rule 106(a)(4)

review, the party challenging the action must make a threshold showing that "members of the Board improperly considered evidence not before the Board or that they engaged in improper conduct which affected the result." *Whelden v. Board of County Com'rs of County of Adams*, 782 P.2d 853, 857 (Colo.App. 1989). Plaintiffs have not met this burden. *See City of Colorado Springs v. District Court*, 519 P.2d 325, 327 (Colo. 1974) (district court abused its discretion in allowing discovery based on bald conclusions of impropriety and discrimination). Plaintiffs' Complaint, ¶ 36, makes allegations "on information and belief" and Plaintiffs have proffered no affidavit or documents, including the extensive records contained in the City's SIRE system, which is publicly available, known to Plaintiffs and, the City asserts, contains the documentation which will be the Certified Record regarding the Rule 106 review of the City Council's decision. *See* City's Motion to Amend the Court's Order Requiring Certification of the Record, filed 9/23/15. Plaintiffs' allegations regarding certain City Council members' statements when they voted also do not contain any evidence that they improperly considered evidence not before the City Council or otherwise engaged in improper conduct. Complaint at ¶ 49.

Moreover, the only City Councilperson who Plaintiffs allege (even on information and belief) specifically to have had *ex parte* contact with the developer is Ms. Susman, who voted against the rezoning and whose district includes the Mt. Gilead Parcel. *See* Complaint at ¶¶ 36, 50. Thus, even if Ms. Susman had *ex parte* contacts with the developer, they clearly did not affect the result. Further, Plaintiffs have not alleged that any City Council members, including Ms. Susman, considered any evidence not before the City Council, particularly given the extensive record and many hours of testimony from parties on both sides. Indeed, Plaintiffs' dissatisfaction with the result and unsupported allegations of bias and improper *ex parte*

communications should not be enough to overcome the general rule that discovery is not permissible on a Rule 106 review.

Plaintiffs only citation to any authority for the proposition that it should be able to conduct discovery is Federal Ninth Circuit case law and a law review article, all related to the Federal Administrative Procedures Act ("APA"). *See* Motion at 10. The Court should not adopt this statutory and case law in the face of Colorado law on point.

2. Plaintiffs' citations do not support their request for discovery

Plaintiffs' Motion primarily addresses the merits of their legal assertion that *ex parte* contacts are improper, cobbling together citations to policies and procedures of other jurisdictions, unrelated case law, and treatises to support their argument. That, however, is not the issue at this stage of the case. Rather, the issue is whether it is permissible for Plaintiffs to obtain discovery to add to the Certified Record for their Rule 106(a)(4) claim. As discussed above, it is not.

Plaintiffs' legal and other citations do not require a different result. 2 Rathkopf's The Law of Zoning and Planning, § 32:13, cited in Plaintiffs' Motion at 4 and attached to it as Exhibit A, discusses the generalities of hearings and does not discuss discovery for a Rule 106(a)(4) review. Likewise, Plaintiffs' citations to the Colorado Lawyer, the Colorado Judicial Code of Conduct, and the City of Lakewood's "publicly disseminated article" likewise do not discuss whether discovery regarding alleged *ex parte* contacts is permissible in a Rule 106 review, even assuming they are binding law applicable to the City Council (which the City believes they are not). *See* Motion at 5-6. The State Administrative Procedures Act, C.R.S. § 24-4-105(14)(a), cited by Plaintiffs at 6, does not apply here; nor does the "model state

administrative procedure acts for states adopted by the Uniform Law Commission" or the Federal Administrative Procedure Act, 5 U.S.C. § 557. *See* Motion at 6-8. And none of these discuss procedure under Rule 106.

Colorado Energy Advocacy Office v. Public Service Co., 704 P.2d 298 (Colo. 1985) and *Zuviceh v. Industrial Comm.*, 544 P.2d 641 (Colo.App. 1975), also do not support allowing discovery. *See* Motion at 6. *Colorado Energy Advocacy Office* involved a claim that *ex parte* communications violated the State Administrative Procedures Act, C.R.S. § 24-4-105(14), but it was not a claim brought under Rule 106. 704 P.2d at 303-5 (Public Utilities Commission hearing). Further, the Court found that any issues with *ex parte* contacts were cured because the information was discussed and cross-examination on the subject occurred at the hearing. *Id.* at 305. *Zuviceh* also did not involve a Rule 106(a)(4) proceeding. 544 P.2d at 642 (unemployment compensation appeals in Colorado Department of Labor, Division of Employment).

3. <u>If Plaintiffs are entitled to discovery, the City should be also</u>

If the Court concludes that discovery is permitted on Plaintiffs' Rule 106(a)(4) claim, then the City also should be permitted to take discovery.

THEREFORE, the City Defendants respectfully request that the Court deny Plaintiffs' Motion to conduct discovery on its Rule 106(a)(4) claim

Respectfully submitted this 6th day of October, 2015.

/s/ Tracy Davis
Nathan Lucero, # 33908
Tracy Davis, # 35058
Denver City Attorney's Office
201 W. Colfax Avenue, Dept. 1207
Denver, Colorado 80202
Tele.: (720) 913-3275
Email: nathan.lucero@denvergov.org
Email: tracy.davis@denvergov.org

ATTORNEYS FOR THE CITY DEFENDANTS

In accordance with C.R.C.P. 121 §1-26, 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 6th day of October, 2015, a true and correct copy of the foregoing was filed with the Court and served electronically by ICCES to:

Gregory J. Kerwin
Gibson, Dunn & Crutcher LLP
GKerwin@gibsondunn.com
Attorney for Plaintiffs

Chip S. Schoneberger
Foster Graham Milstein & Calisher LLP
cschoneberger@fostergraham.com
Attorney for Cedar Metropolitan, LLC

/s/ Kimberly Molenhouse