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| DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO<br>City and County Building<br>1437 Bannock Street, Room 256<br>Denver, Colorado 80202 | DATE FILED: September 30, 2015 3:20 PM<br>FILING ID: D74A988D71E52<br>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<br><br>v.<br><br>**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);<br>THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity);<br>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);<br>THE CITY AND COUNTY OF DENVER; and<br>CEDAR METROPOLITAN LLC (the Property Owner/zoning applicant). | **▲COURT USE ONLY▲**<br><br>Case Number: 2015CV032427<br>Division: 269 |
| *Attorneys for the City Defendants*<br>Nathan Lucero, Atty. No. 33908<br>Tracy Davis, Atty. No. 35058<br>Assistant City Attorneys<br>Denver City Attorney's Office<br>Municipal Operations Section<br>201 W. Colfax Avenue, Dept. 1207<br>Denver, Colorado 80202<br>Telephone: (720) 913-3275; Fax (720) 913-3180<br>E-mail: nathan.lucero@denvergov.org<br>E-mail: tracy.davis@denvergov.org | |

**CITY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STAY**

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 Under C.R.C.P. 106(A)(4)(V) [*sic*] and 65 for Stay of Actions by City of Denver to Allow Any New Construction on Mt. Gilead Parcel Pending this Court's Ruling on the Merits of Plaintiffs' Claims in their Complaint ("Motion").

The City believes that it complied with the law. Despite Plaintiffs' objection to it, the City Council properly passed the rezoning of the Mt. Gilead Parcel. If Cedar Metropolitan wants to take the risk of obtaining approval of its Site Development Plan and a construction permit, and even commencing construction, it should be permitted to take that risk. Clearly, it is aware of this lawsuit. *See* Defendant Cedar Metropolitan, LLC's Motion to Dismiss and Response to Motion for Interim Default, filed 9/10/15. The requested stay should not be granted.

1. Plaintiffs' certification misrepresents the City Defendants' position somewhat.

*See* Motion at 2-3. At the time Plaintiffs' counsel conferred with the City Defendants' counsel, the City Defendants were not prepared to take a position on the proposed stay because Cedar Metropolitan is the party most likely to be financially harmed by the stay and the City Defendants believed its status should be resolved. After further review, the City Defendants oppose the Motion.

2. Plaintiffs move pursuant to C.R.C.P. 106(a)(4) and 65 for a stay of any approval or recording by the City of a Site Development Plan or any approval and issuance of a building permit for work at the Mt. Gilead Parcel "pending this Court's ruling on the merits of Plaintiffs' claims in their Complaint." Motion at 2. Pursuant to C.R.C.P. 106(a)(4)(V), the Court, applying Rule 65, may stay the decision at issue pending resolution of the Rule 106 review. Rule 65 allows for an injunction outside of Rule 106.

3. While Plaintiffs propose a "stay" pursuant to Rule 106, their Motion proposes an injunction pursuant to Rule 65. This is the case for two primary reasons: (a) the requested "stay" does not stay implementation of the City Council's decision, it asks for different relief in the nature of enjoining the City from approving plans and issuing permits and (b) Plaintiffs request that the "stay" continue until the conclusion of the entire case rather than until the Court's decision on the Rule 106 claim.

4. Plaintiffs also assert a claim for a declaratory judgment but they combine it with their Rule 106 claim. *See* Complaint at ¶¶ 32-35; Motion, *generally*. If the Court does not dismiss Plaintiffs' entire declaratory judgment claim, any remaining issues should proceed separately and discovery will be required. Plaintiffs admit as much in their Motion, at 3, stating "Subject to obtaining evidence for the administrative record documenting the timing and

substance of the *ex parte* contacts that occurred…" Well-settled law regarding Rule 106(a)(4) claims generally prohibits the introduction of evidence outside of the administrative record when the Court reviews a governmental action. *See* ¶¶ 8-9, below. However, this does not prohibit discovery in a declaratory judgment claim. As a result, any declaratory judgment claims not dismissed could not proceed on the expedited schedule that applies to the Rule 106 claim.

5. A preliminary injunction is designed to preserve the status quo or to protect a party's rights pending the final determination of the claim. *City of Golden v. Simpson,* 83 P.3d 87, 96 (Colo. 2004); *see* C.R.C.P. 65(a) and (b). To obtain a preliminary injunction, the moving party must satisfy six factors:

a. a reasonable probability of success on the merits;
b. the danger of real, immediate and irreparable injury which may be prevented by injunctive relief;
c. lack of a plain, speedy and adequate remedy at law;
d. no disservice to the public interest;
e. the balance of equities favors the injunction; and
f. the injunction will preserve the status quo pending a decision on the merits.

*City of Golden*, 83 P.3d at 96, *citing Rathke v. McFarlane*, 648 P.2d 648, 653-54 (Colo. 1982); *see* Motion at 4.

Probability of Success on the Merits

6. For the reasons discussed in the City Defendants' Motion to Dismiss and Reply, Plaintiffs' claims should be dismissed and, therefore, Plaintiffs are not likely to prevail on the merits of their Rule 106(a)(4) or declaratory judgment claims. Plaintiffs assert that they have "demonstrated in their Complaint that they have a reasonable probability of success on the merits" of their claim but do not address the legal standards for either their Rule 106 or their declaratory judgment claims or point to any particular facts which support this conclusion.

Motion at 4.

*Plaintiffs' Rule 106 Claim*

7. 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 v. Fire and Police Pension Ass'n*, 713 P.2d 1304, 1308-9 (Colo. 1986).

8. Plaintiffs do not make a substantive argument explaining why the facts they pled show they are likely to prevail on the merits. *See* Motion at 4. Indeed, Plaintiffs do not address the standard of review under Rule 106, the facts that support their argument or provide any other guidance for the Court. Plaintiff should not obtain the requested stay when they left the Court to try to pick through the Complaint to find facts that support their claims for relief.

9. Even assuming the well pled facts in Plaintiffs' Complaint are accurate, Plaintiffs still will not prevail on the merits because the law does not support their claims. The record in this case has not been certified pursuant to C.R.C.P. 106(a)(4) but, for the purposes of this

Motion only, we will assume that the well-pled facts are accurate and we will not consider legal or factual conclusions, assumptions or hyperbole.

a. Mr. Bershof did not attend the Planning Board meeting or vote on the proposal to rezone 195 S. Monaco Blvd. Complaint at ¶ 30 ("Mr. Bershof did not attend the January 21, 2015 Planning Board meeting" at which the 195 S. Monaco Blvd. hearing and vote was held by the Planning Board) and Exh. 3 (showing Mr. Bershof was not present at the meeting). Therefore, even if Plaintiffs could appeal the Planning Board's decision, it was not "tainted" by his presence and Plaintiffs are not likely to prevail on this claim. *See* Complaint at ¶ 90.

b. Plaintiffs are not likely to prevail on their claim that the City Council was required to consider specific adverse parking and traffic impacts from the revised zoning because these are not items the City Council is to consider as provided in the Denver Zoning Code ("DZC"). *See* Complaint at ¶ 95(a); DZC § 12.4.10.1 (official map amendment can be made to correct an error in the map, or because of changed or changing conditions in a particular area or the City generally, or to change the regulations and restrictions of an area as reasonably necessary to promote the public health, safety or general welfare); § 12.4.10.4.G.2 (City Council's final decision shall consider Planning Board and Manager's recommendations, any other comments received, and review criteria in §§ 12.4.10.7 and 12.4.10.8).

c. The City Council did not err in implementing the Protest Petition procedure by including City-owned land or creating a procedure to allow signatures from the

City and, therefore, Plaintiffs are not likely to prevail. *See* Complaint at ¶¶ 92, 95(b); DZC § 12.4.10.5 (Protest Petition procedure); *Burns v. City Council of the City and County of Denver*, 759 P.2d 748 (Colo.App. 1988) (holding that including city owned property within the 200 foot perimeter of area proposed for rezoning for purposes of computing whether a protest had been made by 20% of owners within the 200 foot perimeter was neither arbitrary nor capricious).

d. Campaign contributions to City Council members are not illegal or improper and, therefore, even if Plaintiffs could prove that City Council members accepted contributions from "developers or their lobbyists, lawyers or other agents," this did not cause the City Council's decision to be arbitrary and capricious and not supported by competent evidence. *See* Complaint at ¶¶ 91 95(c); DRMC § 2-60(b)(2) (prohibiting certain gifts to public officials but permitting legal campaign contributions); *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo.App. 1993); *also* Colorado Const. Art. XXIX (also prohibiting certain gifts to public officials but permitting legal campaign contributions). Therefore, Plaintiffs are not likely to prevail on this claim either.

e. The rezoning was not "spot zoning" and, therefore, was not arbitrary and capricious or unsupported by competent evidence and Plaintiffs are not likely to prevail. *See* Complaint at ¶ 95(d); *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961) (test is whether the change was made with the purpose of furthering a comprehensive plan or design merely to relieve a particular property form the restrictions of the zoning code); *King's Mill Homeowners Ass'n, Inc. v. City of*

*Westminster*, 557 P.2d 1186, 1191 (Colo. 1976) (rezoning is not spot zoning if it is for the purpose of furthering a comprehensive zoning plan or because there are changed conditions in the area). Indeed, there is evidence in the Complaint to show that the rezoning furthers a comprehensive plan or because there are changed conditions and it is consistent with the DZC. For example, the new zoning is more consistent and compatible with adjacent Plaintiffs, Ms. Pitmon and Ms. Sigon, so that it furthers the City's comprehensive plans and recognizes that conditions have changed in the area. Ms. Sigon's townhome is in a development zoned R-2-A (with waivers) and E-TH-2.5 which permits 2.5 story townhouses. *See* Exhibit A at 2-3 (Existing Zoning for parcel to the North) (this staff report was part of the record before the City Council, is available on the City Council's web site, and would be part of the Certified Record should Plaintiffs' 106(a)(4) claim survive the pending motions to dismiss). Ms. Pitmon's parcel also is zoned S-MU-3, the same zoning as now applies to the Mt. Gilead Parcel. *Id*.

*Plaintiffs' Rule 57 Claim*

10. Further, Plaintiffs also are not likely to prevail on their declaratory judgment claim for the reasons described above regarding Plaintiffs' Rule 106 claim. Indeed, its declaratory judgment claim essentially asks the Court to consider and make a determination regarding the same issues in its Rule 106 claim. *See* Complaint at ¶¶ 92, 95.

Real, Immediate and Irreparable Harm

11. Irreparable harm is a "pliant term" adaptable to the unique circumstances of each case. *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo.App. 2007). "Generally, irreparable harm

has been defined as certain and imminent harm for which a monetary award does not adequately compensate." *Id.* (internal quotations and citations omitted). Plaintiffs assert that the irreparable harm they will face are the litany of speculative harms they assert in their Complaint – increased traffic, parking problems, harm to their use and enjoyment of Crestmoor Park, harm to their property values and harm from "loss of the protections" of the Zoning Code, harm to townhome owners near the Mt. Gilead Parcel and harm to Ms. Pitmon, who owns the Crestmoor Learning Center across the street. Motion at 5.

12. Plaintiffs argue that these harms are irreparable because "once a new high-density apartment building is constructed on the Mt. Gilead Parcel, that new building and its new residents will continue to cause harm to the surrounding neighborhoods for the life of that building." Motion at 5. Elsewhere, Plaintiffs admit that the only work on the property presently is, apparently, asbestos removal from the existing church building and demolition of the church. Motion at 3.

13. There is no certain and imminent harm from the rezoning. The harm alleged, like increased traffic, new people using Crestmoor Park and unsavory people living across from Ms. Pitmon's day care, should not be the type to support certain and imminent harm for the purposes of an injunction.

14. Plaintiffs correctly state that, as of September 2, 2015, the owner of the parcel, Defendant Cedar Metropolitan, had not filed a proposed Site Development Plan or applied for a building permit.[1] *Id.* No building can be built, whether the "high-density apartment building" Plaintiffs assert will be built, or any other building that would be permitted under the new

[1] The undersigned confirmed that continues to the be the case as of the date of this Response.

zoning, without these approvals. Certainly, building a "high-density apartment building" does not happen in a few months and approval of a Site Development Plan can take six months or longer. Thus, this alleged real, immediate and irreparable harm certainly would not come to pass before the Court's decision on Plaintiffs' Rule 106 claim.

15. Even if some or all of Plaintiffs' declaratory judgment claim continues after a decision on the Rule 106 claim, a stay or preliminary injunction can be revisited based on the outcome of the Rule 106 claim.

Inadequate Legal Remedy

16. The City Defendants agree that Plaintiffs do not have an adequate legal remedy as Rule 106(a)(4) is the proper means for challenging the rezoning and it does not provide for monetary damages. Likewise, Rule 57 also does not provide for monetary damages.

Status Quo

17. Plaintiffs reference but do not really make an argument regarding preservation of the status quo. *See* Motion at 5. The status quo Plaintiffs appear to desire is that no "high-density apartment building" has been constructed on the Mt. Gilead Parcel. As discussed above, Cedar Metropolitan has not filed a proposed Site Development Plan or requested a building permit for a new building of any type at the Mt. Gilead Parcel. Therefore, even if no stay is issued, the status quo likely will stay in place for the time being without the proposed stay.

Disservice to Public Interest

18. Plaintiffs argue the public interest implicated is the public's interest in "having city boards, departments, public servants, and the City Council make decisions with integrity…." Motion at 6. Certainly, the City wants to ensure that all of its processes are undertaken properly

but, respectfully, that is not the public interest question at issue in deciding this motion. The question is whether the public's interest is served or not served by the requested stay. Plaintiffs have not proven that the City Council or anyone else acted without integrity or that the proper rezoning process was not followed.

19. The proposed stay would disserve the public interest. Plaintiffs are concerned about the construction of a high-density apartment building on the Mt. Gilead Parcel but Cedar Metropolitan has not yet proposed a specific project for the City to consider. Thus, the Court and the City must address this Motion and would be required to monitor and enforce any stay entered even though there is no present threat of construction commencing, let alone the alleged harm coming to pass.

20. Further, the public's overall interest is in having the actions of its City Council enforced in a timely way.

Balance of the Equities

21. The balance of the equities does not favor the requested stay.

22. Plaintiffs assert that the stay will be short-lived because their claims will be decided "within a few months." Motion at 6. This is not the case. If the Court decides the City Defendants' Motion to Dismiss in the City's favor, the case will end. If the Court does not, and some part of Plaintiffs' Rule 106 claim survives, the City Defendants' will have to answer, the Certified Record must be filed and the Rule 106 must be briefed. This probably will not occur "within a few months." Further, Plaintiffs filed a motion to default Cedar Metropolitan and Cedar Metropolitan filed a competing motion to dismiss. These issues also must be resolved before the case can move forward. Finally, Plaintiffs requested stay is for the duration of the

case, not just the Rule 106 portion, and the declaratory judgment claim could take much longer since Plaintiffs indicate they will want discovery. Thus, if any part of the declaratory judgment claim proceeds, the case will not be decided "within a few months" but may take many months or even over a year.

23. Plaintiffs also argue the equities favor them because the City Defendants caused a delay by filing the Motion to Dismiss. The City Defendants should not be penalized for undertaking legal and legitimate means to defend the City Defendants and to ensure that the correct claims and defendants, if any, are before the Court.

24. The Court also should not credit Plaintiffs' self-serving argument that it is not "challenging" the asbestos removal and demolition they state are occurring at the Mt. Gilead Parcel or their unfounded assertions that somehow Cedar Metropolitan will be better off with an "empty lot." Motion at 7. Plaintiffs apparently are willing to "allow" Cedar Metropolitan to undertake the cost and business risk of this work, which cleans hazardous materials and a blighted building from the property. Nevertheless, it also is Cedar Metropolitan's business risk to complete plans and file for a Site Development Plan and building permit with the City, while this action remains unresolved.

25. Plaintiffs also argue that the "City Defendants do not have a valid interest in rushing to get a new high-density building constructed" and that its interest should be the same as the "public interest," which Plaintiffs appear to assume is their interest. Motion at 7. The City Defendants complied with the law and the City Council passed the rezoning. The City Defendants' interest is in enforcing its duly enacted ordinances, including the zoning code.

26. Consideration of the *Rathke* factors does not support the requested stay and,

therefore, the City Defendants request that the Court deny Plaintiffs' Motion.

Respectfully submitted this 30th day of September, 2015.

*s/ Tracy Davis*
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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 30th day of September, 2015, a true and correct copy of the foregoing was filed with the Court and served electronically by ICCES to:

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