DATE FILED: October 7, 2015 3:58 PM
FILING ID: 709649E6117D9
CASE NUMBER: 2015CV32427

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).

Attorney for Plaintiffs
Gregory J. Kerwin
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
Telephone: 303.298.5700
E-mail: GKerwin@gibsondunn.com

▲ COURT USE ONLY ▲

Case Number: 2015cv032427

Ctrm: 269

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION UNDER C.R.C.P. 106(A)(4)(V) 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

Plaintiffs submit this Reply Brief in support of their September 9, 2015 motion ("Motion") seeking a stay of actions by the City to allow any new construction on the Mt. Gilead Parcel, and in response to the City's September 30, 2015 opposition brief ("City Opp."). Plaintiffs mailed a copy of their Motion to the registered agent for the property owner (Defendant Cedar Metropolitan LLC, referred to below as "Cedar"), which is aware of this lawsuit, yet it did not file a timely response to the Motion. In light of the Court's October 7, 2015 Order allowing Cedar 14 days to respond to all pending motions, Plaintiffs may seek leave to briefly address any new arguments Cedar presents concerning their stay request.

For the reasons explained in the Motion and this Reply, the Court should grant the stay Plaintiffs request.

I. The Court has authority to grant the stay Plaintiffs request under C.R.C.P. 106(a)(4)(V) and 65.

The City does not directly contest this Court's authority to grant a stay under C.R.C.P. 106(a)(4)(V) and 65. But before addressing the "*Rathke*" factors, the City raises some general objections to Plaintiffs' stay request. The Court should reject those arguments.

First, the City presents conflicting arguments on the need for a stay. Plaintiffs seek a stay because Colorado law appears to require them to do so to preserve their rights pending this Court's review. *See Zoning Board of Adjustment v. DeVilbiss*, 729 P.3d 353, 359 (Colo. 1986). Yet, the City argues that the developer proceeds at its own risk with any building on the site, even if the Court does not grant a stay. *See* City Opp. at 2 (if Cedar "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.") & 12 ("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"). If this Court denies the stay, it should adopt the City's position and direct that Cedar proceeds at its own business risk with any work to plan and construct a new building undertaken while this case is pending.

Second, without citing legal authority, the City draws a distinction between a stay under C.R.C.P. 106(a)(4)(V) and 65. City Op. at 3 (¶¶ 2, 3) (arguing Rule 65 allows for an injunction outside of Rule 106). This argument does not make sense when C.R.C.P. 106(a)(4)(V) specifically provides authorizes a stay "pursuant to Rule 65 of the Colorado Rules of Civil Procedure."

Third, the City appears to quibble over what City action should be stayed here, contending that the requested stay "does not stay implementation of the City Council's decision" and asks for "different relief." City Opp. at 3 (¶ 3). The City does not explain how the City Council's rezoning decision for the Mt. Gilead Parcel can effectively be stayed if a new site development plan and building permit premised on that rezoning are allowed to go forward. Plaintiffs asked for a stay of the two obvious City actions that can occur based on the rezoning decision. If based on the City's concern, the Court prefers to issue a stay of the City Council's rezoning decision for the Mt. Gilead Parcel, Plaintiffs have no objection to that relief as long as it is clear such a stay will bar the City from taking any further action to implement the rezoning while the stay remains in place (such as approving a site development plan or building permit for the Mt. Gilead Parcel).

Fourth, apparently still holding out hope that the Court will grant the City's motion to dismiss, City Opp. at 3-4 (¶ 4), the City declares that the Court should not consider Plaintiffs' Rule 106(a)(4) and declaratory judgment claims at the same time and therefore the stay should

not remain in effect while the Court is considering Plaintiffs' declaratory judgment claim. The Court already denied the City's motion to dismiss on September 18, 2015, including the City's challenge to Plaintiffs' declaratory judgment claim.

The City incorrectly contends that Plaintiffs' pending request for information concerning the *ex parte* contacts that occurred between Cedar's lobbyists, lawyers and other representatives and Denver City Council members relates only to Plaintiffs' declaratory judgment claim and not to their Rule 106(a)(4) claim because evidence of such *ex parte* contacts would be "outside of the administrative record." City Opp. at 3-4 (¶ 4)—referring also to the City's ¶¶ 8-9). This argument ignores that the Court's July 29, 2015 Order concerning the administrative record for Rule 106(a)(4) review already correctly requires inclusion in that record of evidence concerning such *ex parte* contacts. Plaintiffs will separately oppose the City's September 23, 2015 motion seeking to amend that Order. In addition, the legal authority Plaintiffs already cited in their September 28, 2015 motion seeking leave to obtain evidence documenting the *ex parte* contacts that occurred, amply demonstrates that the government entity assembling the administrative record (i.e., the City here) must include within the administrative record for judicial review any evidence of *ex parte* contacts that occurred and that such contacts may require a court to set aside the administrative decision. *See* Pl. "Motion for Leave to Serve Document Subpoenas . . ." at 4-8 (¶8(a)-(g)) (Sept. 28, 2015).

Thus, the City is mistaken in contending the Court cannot consider Plaintiffs' Rule 106(a)(4) and declaratory judgment claims at the same time, or that a stay should not last until both claims are resolved on the merits.

II. Plaintiffs meet the requirements for a stay under Rule 65 and the "Rathke" factors.

The City does not dispute the relevant factors under the "Rathke" test for whether the Court should grant a stay. City Opp. at 4 (¶ 5). The Court should reject the City's argument that no stay is warranted based on analysis of those factors.

Factor 1: Reasonable Probability of Success on the Merits

The City relies on arguments from its motion to dismiss to contend Plaintiffs have not established a reasonable probability of success on the merits, but fails to acknowledge the Court already denied that motion to dismiss 12 days before the City filed its brief. City Opp. at 4 (¶ 6). Plaintiffs filed a detailed Complaint that does explain in detail the factual and legal basis for their claim. *See, e.g.,* Complaint ¶¶ 2(a)-(f), 82(a)-(f). The City ignores those detailed allegations when it argues Plaintiffs "do not address the legal standards," do not "point to any particular facts" to support their claims, and "do not make a substantive argument explaining why the facts they pled show they are likely to prevail on the merits." City Opp. at 4 (¶ 6), 5 (¶ 8). For example, the City overlooks Plaintiffs' contention, separate from any issue concerning campaign contributions, that the City Council failed to follow proper quasi-judicial procedures. *See* Complaint ¶¶ 2(a), 49, 63-69, 82(a). And the City also overlooks Plaintiffs' detailed argument—independent of spot zoning rules—for why the Denver Zoning Code criteria for rezoning were not met here. *See* Complaint ¶¶ 2(a), 52-62, 72-74, 82(b).

The City's response does not present any evidence to contest the accuracy of any of the facts Plaintiffs allege in their Complaint, and the City does not request an evidentiary hearing concerning Plaintiffs' stay request. Therefore, the Court should assume Plaintiffs can prove the fact allegations pled in their Complaint.

The City devotes nearly three pages to arguing that "the law does not support [Plaintiffs'] claims." City Opp. at 5-8 (¶ 9). The Court should reject those arguments because Plaintiffs' claims have a solid legal foundation. The City's argument does not address all the arguments Plaintiffs articulate in Paragraph 2(a)-(f) of their Complaint, but here is a brief response to the City's merits arguments in Paragraph 9 of its response brief. The stay Plaintiffs seek is warranted if Plaintiffs have a reasonable probability of success on any of the arguments they are presenting to challenge the Mt. Gilead Parcel rezoning.

a. Bershof's conflict of interest: The fact that Cedar's architect and advocate, current Denver Planning Board member Jim Bershof, did not attend the January 21, 2015 Planning Board meeting to personally lobby his Planning Board colleagues during that meeting, does not mean there was no improper conflict of interest for the Denver Planning Board and Denver City Council in having a current Planning Board member serve as Cedar's "Property Owner Representative" and point of contact for the Mt. Gilead Parcel rezoning application. The Court will need to decide that issue based on the evidence and legal arguments. And the test for whether there is a conflict is not limited to Denver's lax ethics standards but rather should take into account Colorado standards for quasi-judicial decisonmakers, as described in Paragraphs 57, 63-68 of the Complaint and Paragraph 8(a)-(g) (pp. 4-8) of Plaintiffs' September 28, 2015 motion seeking evidence of *ex parte* contacts. Plaintiffs have articulated facts and a legal argument to showing a reasonable probability of success on this argument.

b. City's refusal to consider adverse parking and traffic impacts: The City argues that its interpretation of the Denver Zoning Code is correct when City attorneys advise the City Council not to consider adverse parking and traffic impacts when evaluating a rezoning

application. City Opp. at 6 (¶ 9(b)). Plaintiffs specifically plead this is a legal error in Paragraph 2(b)(iii) of the Complaint (page 2), noting that a zoning change that creates traffic and parking problems for surrounding neighborhoods does not "further the public health, safety and general welfare of the City" in violation of DZC § 12.4.10.7. The fact that real estate developers have persuaded the Hancock administration and its City Attorney's office to advise the City Council not to consider adverse traffic and parking impacts in rezoning decisions, does not make the City's narrow legal interpretation of the Denver Zoning Code correct. Plaintiffs have articulated facts and a legal argument to showing a reasonable probability of success on this argument.

c. Protest Petition procedure: inclusion of City-owned park land: Plaintiffs explain their argument that the City unlawfully blocked the protest petition/super-majority procedure in Paragraphs 2(d) and 37-46 of their Complaint. Plaintiffs address the *Burns* decision from 1988 in Paragraph 46, noting they are asking to have the Colorado courts reconsider that precedent in the context of the unique facts presented in this case. Plaintiffs have articulated facts and a legal argument to showing a reasonable probability of success on this argument.

d. Campaign contributions to Council members serving as quasi-judicial decisionmakers: The City argues that the Denver Code and Colorado Constitution allow certain campaign contributions to City Council members. City Opp. at 7 (¶ 9(d)). The Court already denied the City's motion to dismiss concerning such contributions. The City's argument here dodges the legal issue of how Council members who are functioning as quasi-judicial decisionmakers under Colorado law can maintain their required independence when they are simultaneously receiving payments of money or in-kind donations from people and organizations representing a rezoning applicant. The City's argument that there cannot be any impropriety

here reflects the same erroneous legal advice the City provides to Council members, which creates the underlying problem: Council members who receive money from representatives for entities seeking rezoning set up a pathway for payments to influence their exercise of quasi-judicial power, because Council members vote on zoning applications in their capacity as quasi-judicial decisionmakers, not political officials.

The City cites the case of *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983), to justify Council members' receipt of contributions from zoning applicants or their representatives. City Opp. at 7 (¶ 9(d)). But the court of appeals decision in that case does not validate all conflicted decisions by a city council functioning in a quasi-judicial capacity, and instead recognized that the presumption of integrity and honesty "is overcome by a showing that there is a conflict of interest on the part of a participating decisionmaker." 672 P.2d at 227. In that case the court looked carefully at the context of the council's actions and held: "the conduct of Neal [the conflicted council member] without more, was not sufficient to cast an unconstitutional taint upon the proceeding." *Id.* at 228. Plaintiffs alleged in detail in Paragraph 49 of their Complaint how the explanations from individual Denver council members concerning their vote on the Mt. Gilead Parcel did not address relevant factors for rezoning. Plaintiffs also alleged that the Council received *ex parte* contacts from the developer's representative about the zoning that were not disclosed on the public record and which, if proven, would support the existence of a conflict. Thus, the *Soon Yee Scott* decision does not demonstrate that Plaintiffs cannot prevail in showing the City Council here failed to honor its quasi-judicial obligations. Plaintiffs have articulated facts and a legal argument to showing a reasonable probability of success on this argument.

e. Unlawful spot zoning: The City's argument challenging Plaintiffs' "spot zoning" argument assumes the City's conclusion on contested facts that the Mt. Gilead Parcel rezoning was made for the purpose of furthering a comprehensive plan, rather than merely done to relieve a particular property owner from zoning restrictions. *See* City Opp. at 7-8 (¶ 9(e)). Plaintiffs' Complaint explains the spot zoning claim (Para. 82(f)). The City cannot cite any Denver "comprehensive plan" that authorized this Mt. Gilead Parcel rezoning. "Blueprint Denver" treats the Mt. Gilead Parcel and surrounding neighborhoods as "areas of stability" and the new 2010 Zoning Code specifically confirmed the single-family residence zoning for this Parcel after substantial public input. *See* Complaint ¶¶ 2(b)(i), 7(d), 18, 35, 60. Therefore the City's spot zoning argument is not accurate. Plaintiffs have articulated facts and a legal argument to showing a reasonable probability of success on this argument.

Factor 2: Danger of Irreparable Harm

The City calls "irreparable harm" a "pliant term" and reiterates the same argument it presented in its motion to dismiss that Plaintiffs will not be injured by the Mt. Gilead Parcel rezoning. City Opp. at 8-9 (¶¶ 11-13). The City ignores that the Court already denied that motion to dismiss.

The City also offers a contradictory argument that it may take six months just for the City to approve a site development plan, and that as a result no irreparable harm may "come to pass" before the Court rules on the merits of Plaintiffs' claims. City Opp. at 9-10 (¶ 14). This argument demonstrates that the stay Plaintiffs request is not likely to cause any harm to the developer. But this argument does not prove Plaintiffs would not suffer irreparable harm if,

contrary to the City's predictions, the City allows construction of the developer's proposed high-density building to proceed.

Factor 3: Adequate Legal Remedy

The City does not dispute that Plaintiffs lack an adequate legal remedy to prevent the harm they allege. City Opp. at 10 (¶ 16).

Factor 4: Preserve the Status Quo

The City also does not dispute that the stay Plaintiffs seek will preserve the status quo, although the City tries to cloud the issue by arguing no stay is needed to prevent construction of the proposed new building. City Opp. at 10 (¶ 17).

Factor 5: The Public Interest

The City fails to articulate how the public interest favors no stay here. City Opp. at 10-11 (¶¶ 18-20). The fact that the City "would be required to monitor and enforce any stay entered," City Opp. at 11 (¶19), does not demonstrate the public interest favors no stay. The City can easily honor a stay order from this Court and prevent approval of a site development plan or a building permit by having the City Attorney notify the director of the City's Community Planning and Development department, Brad Buchanan, and his deputies, that the City cannot approve such a plan or permit while this lawsuit is pending.

And the City's parting conclusion that the public's "overall interest" is to have the actions of the City Council enforced in a timely way, City Opp. at 11 (¶ 20) represents a vacuous argument. If the City Council's rezoning decision was unlawful here, there is no public interest in rushing to enforce it.

Factor 6: <u>Balance of Equities</u>

The City reiterates its other flawed arguments to contend that the balance of equities does not favor a stay. City Opp. at 11-12 (¶¶ 20-25). The City continues to hope the Court will grant its motion to dismiss (¶ 22) and reprises its argument that the stay should not last until all claims are decided (¶ 23). The discovery about *ex parte* contacts that Plaintiffs seek need not take long to complete. *See* Pl. Motion (September 28, 2015). The Court has now denied the City's motion to dismiss, but that motion did cause some delay here.

The City's argument suggesting that Cedar is helping the neighborhood by demolishing the historic Mt. Gilead Church building (¶ 24) is not accurate or relevant. To minimize the conflict caused by a stay, Plaintiffs do not seek to stay such ongoing demolition. That is not a reason for denying a stay of a site development plan and permit for new construction on the site.

The City's argument that it is "enforcing its duly enacted ordinances, including the zoning code" (¶ 25) is a meaningless statement that does not demonstrate no stay is warranted here.

III. <u>The City does not dispute Plaintiffs' proposed injunction bond of $100.</u>

The City's response does not comment on, or contest, Plaintiffs' proposed injunction bond of $100. Therefore, the Court should set that amount as the bond under C.R.C.P. 65(c) here.

IV. Conclusion.

For the reasons stated in Plaintiffs' Motion and this Reply Brief, the Court should grant the stay Plaintiffs request under C.R.C.P. 106(a)(4)(V) and 65.

Dated: October 7, 2015.

/s/ Gregory J. Kerwin
Gregory J. Kerwin, No. 14161
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
(303) 298-5700
Email: GKerwin@gibsondunn.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2015, I caused a copy of the foregoing PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION UNDER C.R.C.P. 106(a)(4)(v) 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 was served on the parties listed below through the ICCES system:

Nathan Lucero
Tracy Davis
Assistant City Attorneys
Denver City Attorney's Office
Municipal Operations Section
201 W. Colfax Ave., Dept. 1207
Denver, CO 80202

(counsel for City Defendants)

Chip Schoneberger
Foster Graham Milstein & Calisher LLP
360 S. Garfield Street, 6th Floor
Denver, CO 80209

(counsel for Cedar Metropolitan LLC)

s/ Loretta Howard
Loretta Howard

102004568.1