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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

Ctrm: 269

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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR 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

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Plaintiffs submit this Reply Brief in support of their "Motion For Leave To Serve Document Subpoenas And Take Brief Depositions . . ." filed September 28, 2015 ("Pl. Motion"), and in response to the City's October 6, 2015 Response brief. For the reasons Plaintiffs explain in their Motion and in this Reply Brief, the Court should allow Plaintiffs to issue the document subpoenas and take short depositions to memorialize for the administrative record evidence of the *ex parte* communications that occurred between the developer's representatives and the City Council members and their staff.

1. The Information Plaintiffs Seek Concerning *Ex Parte* Communications Is Relevant To This Court's Review Under C.R.C.P. 106(a)(4); The City Council Should Have Placed Evidence About Such Communications In The Hearing Record Before The June 8-9, 2015 Public Hearing.

The Colorado and general legal authorities Plaintiffs cite in Paragraph 8(a) to (g) of their Motion demonstrate the information Plaintiffs seek on *ex parte* communications between the developer's representatives and Denver City Council members and their staff is relevant to this Court's review of Plaintiffs' Rule 106(a)(4) claim. These authorities also show that the Denver City Council should have placed evidence about the private *ex parte* communications between the developer's representatives and City Council members or their staff in the public record before the June 8-9, 2015 public hearing. The City's failure to do so violated due process under applicable Colorado principles governing quasi-judicial hearings, denying the members of the public the opportunity to review and respond to the information City Council members privately received in such *ex parte* communications.

As Plaintiffs demonstrate in their Motion, private, *ex parte* communications by the property owner/developer's representatives with the administrative decisionmakers (City Council members) about the proposed rezoning of the Mt. Gilead Parcel must be included in the

administrative record. Under Colorado law the City had an affirmative obligation to place such communications into the public record before the June 8-9, 2015 public hearing and failed to do so. As noted in Plaintiffs' Motion:

- *Ex parte* communications 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. *See* Pl. Motion at 4 (¶ 8(a)). Thus, such evidence is clearly relevant to the Court's consideration of Plaintiffs' Rule 106(a)(4) claim and belongs in the administrative record..
- Colorado court decisions require quasi-judicial decisionmakers to disclose *ex parte* communications to colleagues and interested parties attending the administrative hearing, and the occurrence of such communications may require that a decision be set aside. *See* Pl. Motion at 6 (¶ 8(e)). For example, in *Colorado Energy Advocacy Office v. Public Service Co*, 704 P.2d 298, 302-04 (Colo. 1985), the Colorado Supreme Court directed that: "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." In *Zuviceh v. Industrial Comm.*, 544 P.2d 641, 642-43 (Colo. App. 1975), the Colorado Court of Appeals remanded an administrative decision because the administrative record did not disclose a telephone conversation between one of the litigants and an administrative decisionmaker. In addition, the State Administrative Procedure Act now forbids an agency from considering any kind of *ex parte* material or representation that is "offered without notice." C.R.S. § 24-4-105(14)(a).

- As explained in the referenced *Colorado Lawyer article*, undisclosed *ex parte* communications deny due process to opponents of an administrative application because the other party is not present to hear and rebut statements made to the decision-maker. *See* G. Dahl, Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and Ex Parte Contacts, 33 *Colorado Lawyer* No. 3 at p. 69 (March 2004). *See* Pl. Motion at 5 (¶8(b)).
- And as shown in the City of Lakewood's legal memo, the correct practice under Colorado law is: "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." *See* Pl. Motion at 6. That did not happen with the June 8-9, 2015 Denver City Council hearing at issue here.

The City's response to these authorities does not prove such *ex parte* communications were proper and does not explain why the City should not have placed evidence of such communications in the June 8-9, 2015 public hearing record. *See* City's Response at 6-7. The City incorrectly dismisses these authorities as just a "cobbling together" of citations. *Id.* at 6.

a. First, the City dismisses as mere "generalities" that do "not discuss discovery for a Rule 106(a)(4) review," the *Rathkopf* zoning treatise's specific statement about the impropriety of *ex parte* communications, which can prejudice the affect parties' right to a fair hearing, and the Colorado authorities Plaintiffs cite, Pl. Motion at ¶8(a)-(e). City's Response at 6. The City's analysis blurs together the question of whether such communications were proper and should have been documented in the public record, with whether discovery is allowed. The City cites no authority that justifies the fact of such *ex parte* communications or the City's failure to place

evidence of them in the public record. City's Response at 6-7. It merely states that "the City believes they [these authorities] are not" binding on the Denver City Council." *Id.* at 6.

b. Second, the City argues the additional authorities from the model State Administrative Procedure Act and federal cases "do not apply here" and do not "discuss procedure under Rule 106." *Id.* at 6-8. Plaintiffs do not contend those advisory authorities are binding on this Colorado court. Rather these authorities show that the Colorado authorities Plaintiffs cite about *ex parte* communications are consistent with state quasi-judicial administrative procedures nationwide and with procedures federal agencies must follow.

c. Third, the City distinguishes the Colorado cases Plaintiffs cite (*Colorado Energy Advocacy Office* and *Zuviceh*) as involving claims under the Colorado Administrative Procedure Act and not in a C.R.C.P. 106(a)(4) case. City's Response at 7. That is true, but it does not explain why the Denver City Council should be exempt from such basic due process principles of administrative fairness recognized by the Colorado appellate courts. Those courts did not base their findings on the impropriety of *ex parte* communications on the language of the Colorado Administrative Procedure Act, or limit their rulings to quasi-judicial actions by state agencies vs. a home-rule municipality like Denver. Their rulings were based on due process principles that apply in adjudicatory/quasi-judicial administrative proceedings. See *Colorado Energy Advocacy Office,* 704 P.2d at 303 (citing state and federal cases); *Zuviceh*, 544 P.2d at 642 (discussing denial of due process). And the City's explanation of the *Zuviceh* case as allowing *ex parte* communications to be cured with cross-examination on the subject at a hearing is not accurate. The City neglects to mention that the court of appeals remanded the case to the agency to re-open the underlying unemployment case because the reviewing court was "unable

to determine the basis for the Commission's decision" due to the lack of disclosure of the *ex parte* communication. *See* 544 P.2d at 642-43. *Zuviceh* did not address a request for discovery, but it does indirectly support Plaintiffs' request for additional information through discovery by demonstrating the need for complete information before the reviewing court makes its decision. *Colorado Energy Advocacy Office* also provides such indirect support for discovery because the examiner (Examiner Temmer) conducted a hearing on reconsideration of the PUC's decision after the "clearly improper" *ex parte* communications came to light. 704 P.2d at 304-05.

Plaintiffs also note that the City does not deny such *ex parte* communications occurred. The City's counsel have access to all the current and former Council members and their staff and should have interviewed those people already to preserve their documents that are relevant to the administrative record as defined in the Court's July 29, 2015 Order, including the Council members who left office in July 2015. The City's silence on this issue is therefore telling. The City argues that Plaintiffs have only alleged *ex parte* communications between the developer's representatives and District 5 Councilwoman Susman (whose Council district covers the Mt. Gilead Parcel). City's Response at 5. Plaintiffs know those communications occurred because, at the developer's request, the Council changed the original March 31, 2015 public hearing date to June 8-9, 2015, a date after the City Council's May 5, 2015 election and June 2, 2015 run-off election, when the Council members voting on the rezoning application would either be lame ducks or no longer facing a re-election vote. *See* Complaint ¶ 34, 36. Plaintiffs have information indicating the developer's lobbyists and lawyers also met with other Council members too, but unlike the City Attorney's office, Plaintiffs' counsel lacks access to interview the represented witnesses involved. The City tries to minimize the significance of Councilwoman Susman's

undocumented *ex parte* communications because she ultimately voted against the rezoning. Susman's vote appears to have been part of a pre-arranged understanding where other Council members would provide the votes the developer needed to approve its application. In making this argument, the City overlooks Plaintiffs' allegations about Susman's communications, where she indicated to constituents she did not expect other Council members would follow her vote (a common Denver City Council practice called "courtesy zoning"). *See* Complaint ¶ 36. That allegation suggests Ms. Susman had spoken with her colleagues about the rezoning application and may have relayed information to her colleagues that she received through *ex parte* communications. Given the City's failure to have placed evidence in the June 8-9, 2015 public hearing record of the developer communications with Ms. Susman, Plaintiffs have no way to know which of her colleagues she spoke with about the rezoning application. That is why they seek leave to conduct limited discovery.

2. This Court Has Authority To Allow The Limited Discovery Plaintiffs Seek To Assure The Administrative Record Is Complete, Or Alternatively To Supplement That Record With Relevant Information.

Plaintiffs' Motion already cites the authority this Court has through C.R.C.P. 16(a) and 26(b) to allow limited discovery on Rule 106(a)(4) claims to assure the administrative record is complete. The City does not argue this Court lacks authority to allow such discovery.

The City cites *Whelden v. Board of County Commissioners*, 782 P.2d 853, 857 (Colo. App. 1989), which involved a request for "discovery to inquire into alleged *ex parte* contacts between persons associated" with the applicant and the County commissioners. The court of appeals held there that "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." *Id.* at 857. In that case, the plaintiffs did not make that threshold showing. *Id.* *Whelden* supports Plaintiffs' request for limited discovery here.

Here, Plaintiffs have met the threshold burden described in *Whelden*. To the extent the Court believes further evidence is necessary beyond the allegations in Plaintiffs' Complaint, Plaintiffs request that they be allowed to present affidavits or live testimony to show what they know about *ex parte* communications that occurred with the Council members here. The City's separate motion seeking to amend this Court's July 29, 2015 Order concedes that "[i]tems might have been received" by individual City Council members that were not included in the City's SIRE system City's Motion to Amend at 7 (Sept. 23, 2015). The City's contention that the only information comprising the administrative record is information presented to the entire body of Council members and not individual members, *id.*, overlooks the fact that *ex parte* communication that presented information to individual Council members is also relevant and such information should have been disclosed to the public and the entire Council.

The City also cites *City of Colorado Springs v. District Court*, 519 P.2d 325, 327 (Colo. 1974), in which the Colorado Supreme Court discussed "the scope of discovery permitted in a certiorari proceeding." The Court there held as follows: "In the absence of some showing of facts, either in the petition for review or in the supporting affidavits, which would tend to indicate that the city council's action was arbitrary or an abuse of discretion, the district court's review under C.R.C.P. 106(a)(4) is limited to the record before it and may not be supplemented through discovery." In that case the Court said the basis for discovery was just "bald conclusions of impropriety and discrimination." *Id.* Here Para. 36 of Plaintiffs' Complaint

presents specific information on the *ex parte* communications that occurred, which caused the City Council hearing date to be postponed to a post-election/lame-duck session. And Para. 49 of Plaintiffs' Complaint demonstrates that when the City Council members explained their votes at the June 8-9, 2015 hearing, they failed to base their votes on the legally relevant factors for rezoning, and instead cited personal preferences and extraneous political considerations. Thus, the quasi-judicial decisionmakers do appear to have considered improper or irrelevant evidence.

In addition, in moving to amend this Court's July 29, 2015 Order calling for the City to include evidence of *ex parte* communications in the administrative record, the City admits the record its seeks to present will omit information that "might have been received" by individual Council members. City's Motion to Amend at 7 (Sept. 23, 2015).

The cases the City cites on pp. 4-5 of its Response involve the principle that Rule 106(a)(4) is based on the administrative record. Plaintiffs do not dispute that. The issue here is that the record the City seeks to tender to this Court is not complete because the City failed to document in the June 8-9, 2015 public hearing record the *ex parte* communications that occurred.

Hazelwood v. Saul, 619 P.2d 499 (Colo. 1980), did not involve a request to include evidence of *ex parte* communications with the agency decisionmaker to assure a complete administrative record. Instead, it apparently involved a request to introduce "new testimony" into a dispute about the sufficiency of circulators' oaths for recall petition signatures. 619 P.2d at 501.

Prairie Dog Advocates v. City of Lakewood, 20 P.3d 1203 (Colo. App. 2000), *cert. denied* (2001), also did not involve a request to include evidence of *ex parte* communications with the agency decisionmaker to assure a complete administrative record. Instead, *Prairie Dog*

Advocates involved a situation where "no record was made of the alleged hearing before the city." *Id.* at 1206. The "district court conducted several hearings to attempt to establish the basis for the city's decision." *Id.* And the court of appeals held the "district court is not permitted to take testimony or evidence, or to remand the matter to the lower tribunal for further findings or proceedings, when faced with an inadequate record." *Id.*[1] The court of appeals did not have to explain there what happens to the agency decision when there is no record available because it held that the city's decision at issue was not a quasi-judicial one, and therefore not subject to review under C.R.C.P. 106(a)(4). *Id.* at 1207-08. *Prairie Dog Advocates* does not stand for the proposition that when an agency fails to document in the administrative record improper *ex parte* communications that occurred, the reviewing court simply proceeds with its Rule 106(a)(4) review knowing the record is incomplete. As discussed in Section 1 above, the *Colorado Energy Advocacy Office* and *Zuviceh* cases indicate the evidence of such communications is relevant and that a remand or the equivalent may be necessary to document them.

The City also relies on *Garland v. Board of County Commissioners*, 660 P.2d 20, 23 (Colo. App. 1982), which stated that "a district court may not, on its own motion, order a remand to supplement the record where the evidence has been presented on all issues necessary for a determination of the validity of the action taken." That case cites *Cline v. City of Boulder*, 532 P.2d 770 (Colo. App. 1975), for that proposition. But in *Cline* the court' s conclusion included the findings that the "record is complete," and that evidence had been presented on all issues necessary for the court to determine the validity of the challenged assessment. 532 P.2d at 772.

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[1] That holding is at odds with the current language of C.R.C.P. 106(a)(4)(IX), which provides: "In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law."

In addition, it is not clear why the court in *Garland* did not allow a remand. *Cf. Johnston v. City Council of Greenwood Village*, 493 P.2d 651, 653 (Colo. 1972) (remand is proper in a certiorari proceed on "clear-cut issues involving documentary evidence"; allowing remand when city council failed to make specific findings concerning the City's boundaries contiguous to territory to be annexed).

Here, Plaintiffs are not seeking at this time a remand to the Denver City Council. They are seeking judicial review based on a complete administrative record that includes evidence of *ex parte* communications that occurred with the quasi-judicial decisonmakers that are not documented in the administrative record the City seeks to present to this Court. Under the precedents in *Colorado Energy Advocacy Office* and *Zuviceh*, this Court should not proceed with judicial review when it knows the administrative record the City seeks to present lacks information about certain *ex parte* communications with the Council members and their staff.

3. Plaintiffs Have No Objection To Allowing The City To Take Comparable, Limited Discovery To Assure The Administrative Record Is Complete.

The City argues in the alternative that the Court should allow the City comparable limited discovery on Plaintiffs' Rule 106(a)(4) claim, although it fails to explain in advance what discovery the City believes is necessary. The City needs to explain what information it seeks. But Plaintiffs have no objection to the Court allowing the City comparable limited discovery (third-party document subpoenas and third-party depositions not to exceed one-hour each of direct examination) that is reasonably calculated to assure the administrative record is complete.

4. Conclusion.

For the reasons explained above and in Plaintiffs' Motion, the Court should grant Plaintiffs' "Motion For Leave To Serve Document Subpoenas And Take Brief Depositions . . ." filed September 28, 2015.

Dated: October 13, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2015, I caused a copy of the foregoing PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR 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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