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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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PLAINTIFFS' BRIEF IN OPPOSITION TO CITY'S MOTION TO AMEND THE COURT'S ORDER REQUIRING CERTIFICATION OF THE RECORD

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Plaintiffs submit this Brief in opposition to the City's Motion to Amend the Court's Order Requiring Certification of the Record (filed September 23, 2015).

The Court should deny the City's motion because: 1) the City's request is untimely when the City could have raised any of these concerns in response to Plaintiffs' original July 6, 2015 motion seeking certification of the record; and 2) the limitations the City now seeks to impose on the scope of the administrative record would exclude relevant information and are contrary to applicable law.

1. The City's Motion Is Untimely.

The City's motion is untimely because it could have raised any of these arguments in a timely response to Plaintiffs' July 6, 2015 motion seeking certification of the record. Rule 106(a)(4)(III) encourages a Rule 106 plaintiff to seek immediate certification of the record. See C.R.C.P. 106(a)(4)(III) ("If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record"). To expedite an eventual ruling on the merits, Plaintiffs filed their motion for certification of the record with the Complaint and personally served it on all Defendants with the Summons and Complaint. None of the Defendants filed any response to that motion, and therefore the Court issued its July 29, 2015 Order concerning certification of the record. Plaintiffs' motion and that Order put all Defendants on notice, for purposes of document retention, that emails and other documents concerning *ex parte* communications with City Council members may be relevant to the claims in this case. Thus the City should have taken steps to preserve emails and other documents for the City Council members who left office in late July 2015 with the expiration of their terms.

The City relies on C.R.C.P. 106(a)(4)(IV) to seek to amend the Court's July 29, 2015 Order. Although the Court can correct the administrative record at any time, the Court should not construe that rule as allowing the City to raise arguments for limiting the scope of the record now, which it could have raised in response to Plaintiffs' July 6 motion. The City's motion goes beyond a request to "correct" the record.

2. The City's Proposed Limitations on the Administrative Record Would Exclude Relevant Information and Are Contrary to Applicable Law.

Plaintiffs agree with the City that this Court's review under C.R.C.P. 106(a)(4) is "based on the evidence in the record before the defendant body or officer." *See* C.R.C.P. 106(a)(4)(I). Plaintiffs disagree with the City, however, about what documents should comprise that "record."

Plaintiffs explain each relevant category of information below:

A. Evidence of the developer's *ex parte* communications with Council members should be part of the administrative record.

Private, *ex parte* communications by the property owner/developer's representatives with the individual administrative decisionmakers (City Council members) about the proposed rezoning of the Mt. Gilead Parcel must be included in the administrative record. Indeed, under Colorado law the City had an affirmative obligation to place information about such communications into the public record before the June 8-9, 2015 public hearing and failed to do so. Plaintiffs explain at length the relevance of evidence of such *ex parte* communications in their September 28, 2015 Motion and their October 13, 2015 Reply Brief in support of that motion. Without repeating the detailed argument there, Plaintiffs note the following:

- *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* Plaintiffs' September 28, 2015 Motion at 4-8 (¶ 8(a)-(g)). 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* Plaintiffs' September 28, 2015 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). These principles of Colorado law should guide this Court's review under C.R.C.P. 106(a)(4).
- 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).

- 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* Plaintiffs' September 28, 2015 Motion at 6. That did not happen with the June 8-9, 2015 Denver City Council public hearing at issue here.

The City attempts to dismiss these requirements about disclosing *ex parte* communications as irrelevant requirements of federal or Colorado administrative law that do not apply to administrative procedures in the City of Denver. *See* City's October 6, 2015 Response at 6-7. The City is mistaken. Denver's quasi-judicial administrative actions are subject to the same rules for due process and integrity as other government entities in Colorado.

The City cites the *Hazelwood* and *Prairie Dog* cases for the proposition that the Court cannot "take additional testimony" even if the record is inadequate. Motion at 4. Plaintiffs already distinguished these cases in their October 13, 2015 Reply Brief in support of their motion for limited discovery (at pp. 8-9), and will not repeat that analysis here. Plaintiffs are seeking to include information that should be part of the administrative record in the first instance, as information the individual Council members considered, and also information the each of the Planning Board members considered (as part of Plaintiffs' challenge to its decision), and CPD considered for its Protest Petition decision challenged here. They are not seeking to expand the record.

Thus, the first step is for the City to place all evidence in the administrative record of the developer's *ex parte* communications that occurred here. Then the Court can decide what must be done as a result of such *ex parte* communications that were not included in the public record available on the City's "SIRE" system at the time of the June 8-9, 2015 City Council hearing.

B. All information presented to Council members in advance of their June 8-9, 2015 public hearing should be part of the administrative record.

The City is obligated to take reasonable steps to gather documents memorializing all information the City Council members considered before they voted on the rezoning of the Mt. Gilead Parcel. The City cannot exclude information that was presented to the Council members in advance of the June 8-9, 2015 public hearing. That information may well have influenced the vote of individual Council members. And the City cannot just rely on what documents happened to have been included in the "SIRE" record for the June 8-9, 2015 public hearing, without demonstrating to Plaintiffs and the Court that the procedures for assembling that SIRE record yielded a complete record of information considered by Council members (and we know it did not pick up the developer's *ex parte* communications described above).

The City contends that whatever documents happened to end up being included on its SIRE system should comprise the entire record, Motion at 6-7. The City describes the SIRE system as the City Council's software system into which "the City Council staff uploads bills, supporting or related material, and emails and other comments received from the public." *Id.* at 7. That explanation begs the question, however, of what instructions guide those Council staff members' decisions, whether all the Council members and their staff forwarded all relevant information, and thus whether the Council staff added to the SIRE system all the information Council members received concerning the proposed rezoning of the Mt. Gilead Parcel. The

SIRE record for the Mt. Gilead rezoning hearing does include a large amount of information including CPD staff reports and many public comments that surrounding residents submitted to City officials by email. But the City undermines confidence in the completeness of the information in the SIRE database by arguing: "Items that might have been received but that were not considered by the entire body of the City Council should not be included in the certified record as they were not part of the record on which the City Council made its decision." *Id.* at 7. It is exactly those additional materials that the City admits "might have been received" by individual Council members or their staff that the City needs to also include in the administrative record. The City Council is a group of individuals, each of whom votes and communicates with colleagues before voting. That is exactly why the Colorado legal authorities noted above require Council members to disclose on the public hearing record all private communications they received in advance of a hearing about the contested matter. The City does not cite authority to support its contention that only information presented to the entire group of City Council members should be included in the administrative record for purposes of judicial review. That is like arguing that when private *ex parte* communications occur with only five members of the 13-member council, the Court cannot consider evidence of those communications just because those five members failed timely to disclose the communications to the public and other Council members.

Thus, Plaintiffs agree that the information on the City's SIRE system belongs in the administrative record. But they disagree that information that "might have been received" by Council members or their staff and never reached the SIRE system, need not also be gathered and placed in the administrative record for purposes of this Court's judicial review.

C. Documents concerning the Planning Board's January 21, 2015 public hearing and CPD's Protest Petition decision should be included in the administrative record.

Documents relating to the separate administrative determinations Plaintiffs also challenge here by the Planning Board (at its January 21, 2015 meeting) and the CPD Manager (on the Protest Petition) also should be included in administrative record for this case. The City's continued argument that those determinations are not relevant here ignores the Court's September 18, 2015 Order denying the City's motion to dismiss, in which the Court already rejected that argument.

In addition, given the mandatory public hearing and recommendation of the Planning Board for a zone map amendment (*see* DZC § 12.4.10.4.E), it is also irrational for the City to contend that no documents concerning the Planning Board's actions, including citizen comments presented to the Planning Board, should be part of the packet of information the City Council receives. That is one of several aspects of the Denver City Council's procedures for rezoning that is currently broken.

D. The Court should reject each of the City's proposed categories for narrowing the July 29, 2015 Order.

Based on the principles explained above in Sections 2(A) to (C), Plaintiffs respond below, to each specific amendment the City seeks to the Court's July 29, 2015 Order:

General materials

July 29, 2015 Order Paragraph 1. The original or certified copies of all pleadings, applications, evidence, memoranda, exhibits, and other papers presented to, or considered by, the City Council or the Denver Planning Board.

Plaintiffs' Response: The Court should reject the City's proposed narrowing of this category. The Court already denied the City's motion to dismiss where it contended the

Planning Board's decision cannot be challenged here. *See also* Section 2.C of this brief, above, concerning the relevance of Planning Board materials.

City Council materials

July 29, 2015 Order Paragraph 2. A CD with the entire videotape of the June 8-9, 2015 public hearing on the 195 S. Monaco Zoning Change [currently available on the City's SIRE website], together with a complete transcript of the City Council's deliberations in the early morning of June 9, 2015 after the close of the June 8-9, 2015 public hearing on the 195 S. Monaco Zoning Change. [Plaintiffs will retain a court reporter to prepare a transcript of the deliberations by the City Council members in the early morning of June 9, 2015 after the close of that public hearing.]

Plaintiffs' Response: The City does not appear to disagree with Paragraph 2 of the July 29, 2015 Order concerning a CD with the entire hearing videotape and a transcript of the City Council's deliberations.

July 29, 2015 Order Paragraph 3. A certified copy of all letters, emails, petitions, or other public comments received by the Denver City Council or CPD before the beginning of the June 8-9, 2015 City Council public hearing concerning Cedar Metropolitan LLC's proposed zoning change for the Mt. Gilead Parcel.

Plaintiffs' Response: The City seeks to limit this category by only including documents that happened to have been included by the City Council staff in the "SIRE" software system. As noted above, the City admits that other documents fitting this category "might have been received" and not included in the SIRE system. Plaintiffs believe the entire group of documents described in Paragraph 3 should be included in the administrative record. This means the City should ask CPD and each of the City Council members to check their files and provide to the City Attorney's office for inclusion in the record all documents received before the June 8-9, 2015 public hearing relating to the proposed rezoning. City officials can gather such documents using date restrictions and a few key word search times like: "Gilead," "Mt. Gilead," "Monaco," "Cedar Metropolitan," "Crestmoor Park," "Kudla," "Maley," "Kucera," "Foster," and similar

terms. It is the City that is proposing to present an incomplete administrative record by relying on the random factor of what documents City Council staff members happened to send to the SIRE database. Plaintiffs are relying on a correct definition of the administrative record in asking that all documents received in advance of the June 8-9, 2015 public hearing be included. The administrative record for judicial review should include all information that each of the quasi-judicial administrative decisionmakers considered when making his or her decision, not some incomplete subset of materials that the City happened to assemble for public review at the time of the public hearing.

The City also proposes to omit communications with CPD concerning the proposed rezoning for the Mt. Gilead Parcel during the time between the January 21, 2015 Planning Board hearing and the June 8-9, 2015 City Council public hearing. CPD had already recommended approval of the rezoning before the January 21, 2015 Planning Board hearing. All communications CPD received about this rezoning application after that date necessarily related to the City Council's upcoming consideration of the application. If members of the public sent their concerns about the proposed rezoning to CPD (which is consistent with the City 's notice of the Council public hearing, which lists the email address and phone number of CPD planner, David Gaspers, as the contact person for people seeking information– *see* Exhibit 1, attached hereto [CPD May 18, 2015 email], CPD should have forwarded any public comments it received to the City Council. And if the developer's representatives were communicating with CPD about the application and CPD's continued role in the Council hearing, including the Council's unexplained announcement that changed the hearing date from the originally scheduled March 31, 2015 date to June 8-9, 2015 (after the City Council elections—so lame duck members and

members no longer subject to re-election would be voting), the Court should direct those communications to be included in the administrative record so Plaintiffs can assess whether the developer used back-door communications with CPD to communicate privately with Council members or their staff.

Plaintiffs further note that they should not have to pay for the City's time in gathering such documents. As explained above in Section 2(A) & (B), these documents, including *ex parte* communications between Council members or their staff and the developer, should have been placed in the record before the June 8-9, 2015 public hearing, so all participants in that hearing could see and respond to them.

July 29, 2015 Order Paragraph 4. A CD with the entire videotape of the meetings of the Denver City Council Neighborhoods and Planning ("NAP") Committee concerning Cedar Metropolitan LLC's proposed zoning change for the Mt. Gilead Parcel including the NAP committee meetings on February 18, 2015 and March 4, 2015..

Plaintiffs' Response: The Court should reject the City's objection to this category. The City Council Neighborhoods and Planning Committee consists of City Council members, who participated in a committee hearing on the rezoning application and then made the final administrative decision at the June 8-9, 2015 public hearing. The fact that some City Council members and their staff received information about the rezoning application in a committee hearing does not make that information irrelevant. Having the rezoning application receive Committee approval was a necessary administrative step for the application to go to the full Council for consideration. *See* DZC § 12.4.10.4.F (consideration of application by Council Committee; committee is required to examine the application, the CPD Manager's recommendation, and the Planning Board's recommendation, and "may at that time require additional information" from the applicant or others including other city agencies).

Once again the City is making an inaccurate argument about the proper scope of the administrative record. What matters is information any of the individual Council members received or considered before they voted, not only what information the City presented to the public and entire Council through the SIRE system.

July 29, 2015 Order Paragraph 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).

Plaintiffs' Response: The Court should reject the City's objection to Paragraph 5 for the same reasons as for Paragraph 3. The test for what belongs in the administrative record should be what information about the rezoning application any of the individual Council members received, not solely what the City presented to the public and entire Council for the June 8-9, 2015 public hearing through the SIRE system.

Planning Board materials (July 29, 2015 Order Paragraphs 6-10)

6. A CD with the entire audiotape of the Denver Planning Board public hearing on January 21, 2015 concerning Cedar Metropolitan LLC's proposed zoning change for the Mt. Gilead Parcel.

7. A certified copy of all letters, emails, petitions, or other public comments received by CPD or the Denver Planning Board before the beginning of the January 21, 2015 Denver Planning Board public hearing concerning Cedar Metropolitan LLC's proposed zoning change for the Mt. Gilead Parcel.

8. A certified copy of any written materials provided to the Planning Board, or any of its individual members, by CPD, representatives of the zoning applicant (Cedar Metropolitan LLC), or Jim Bershof, before the January 21, 2015 hearing or during the hearing.

9. A certified copy of any "Meeting Record" or other notes or minutes concerning the January 21, 2015 Planning Board Meeting.

10. A record of any findings made by the Planning Board at the January 21, 2015 hearing apart from statements made by the members at the January 21, 2015 hearing as reflected in the audiotape of the hearing.

Plaintiffs' Response: The City's argument that the Planning Board's decision is not at issue here ignores the Court's September 18, 2015 order denying the City's motion to dismiss, which presented that same argument. The materials relating to the Planning Board's January 21, 2015 hearing, including the information Planning Board members received, are relevant to Plaintiffs' challenge here to that Board's action. Plaintiffs will not repeat here the arguments on this issue they already presented in opposition to the City's unsuccessful motion to dismiss that claim. *See also* Section 2.C of this brief, above, concerning the relevance of Planning Board materials.

CPD materials

July 29, 2015 Order Paragraph 11. All documents relating to CPD's June 2015 decision declining to apply the Protest Petition procedure in Denver Zoning Code 12.4.10.5 and Article 3.2.9.E of the Denver Charter at the June 8-9, 2015 public hearing on the 195 S. Monaco Zoning Change, including documents created in March 2015 when CPD representatives first discussed the protest petition procedure with neighborhood representatives.

Plaintiffs' Response: The Court should also reject the City's challenge to Paragraph 11. The City's argument again ignores the Court's September 18, 2015 order denying the City's motion to dismiss. The City contended in its motion to dismiss that the Court cannot review CPD's decision concerning the Protest Petition procedure and the Court denied that motion. Plaintiffs' challenge to CPD's decision on the Protest Petition is part of their Rule 106(a)(4) claim, not just part of their claim for a declaratory judgment under Rule 57.

3. Conclusion.

For the reasons explained above, the Court should deny the City's motion to amend the Court's July 29, 2015 Order concerning certification of the administrative record.

Dated: October 14, 2015.

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Exhibit 1: May 18, 2015 email notice from CPD concerning June 8, 2015 public hearing on proposed 195 S. Monaco zoning change

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2015, I caused a copy of the foregoing PLAINTIFFS' BRIEF IN OPPOSITION TO CITY'S MOTION TO AMEND THE COURT'S ORDER REQUIRING CERTIFICATION OF THE RECORD was served on the parties listed below through the ICCES system:

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