

DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO
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CASE NUMBER: 2015CV32427

Plaintiffs: ARTHUR KEITH WHITELOW, III; JOHN DERUNGS; KATHERINE K. MCCRIMMON; LAURA PITMON; DENISE SIGON f/k/a DENISE L. SAGER; ALAN SINGER and RITA SINGER

▲ COURT USE ONLY ▲

v.

Case Number: 2015CV032427

Division: 269

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).

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CITY DEFENDANTS' REPLY IN SUPPORT OF MOTION TO AMEND ORDER

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 Reply in support of its Motion to Amend the Court’s Order Requiring Certification of the Record (“Motion”).

Plaintiffs concede that Rule 106(a)(4) does not provide a deadline for the City to file a motion to correct the record. Indeed, under Rule 106(a)(4)(III), the Court does not have to wait for a response and could grant the motion to certify the record immediately upon receipt, leaving the public entity to file a motion to correct it once the arguments and issues are known.

The crux of Plaintiffs’ argument is on page 5 of their Response:

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.














Thus, Plaintiffs' argument is based entirely on speculation – that other evidence not in the written record or presented as testimony exists and that one or more of the City Council members considered it before voting. *See* Complaint at ¶ 36 (pleading impermissible *ex parte* contacts between the developer and City Council members, particularly Ms. Susman, on “information and belief”). Despite attending the public hearing, quoting or summarizing voting statements by various City Council members, and having access to the entire SIRE record for the hearing, Plaintiffs have not pointed to any missing documents or information, nor to any specific Council member's vote that appears to have been “influenced” by *ex parte* contacts with anyone. *See Whelden v. Board of County Com'rs of County of Adams*, 782 P.2d 853, 857 (Colo.App. 1989) (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.”).

Plaintiffs' sarcasm notwithstanding, the record contained in SIRE is a comprehensive database containing the bill, the rezoning application, staff reports, presentations, letters sent to City Council members and the City's Department of Community Planning and Development (“CPD”), the developer's presentation, and other materials. *See* Response at 5-6. The public feedback files contain numerous emails and letters to City Council members (primarily Ms. Susman) and to CPD from members of the public both for and against the rezoning. Indeed, many of those files are well over 50 pages and one is over 400 pages long. The documents called OPPOSITION ## are individual documents containing photographs of visual and graphic

materials presented by opponents of the rezoning, such as photographs and presentation boards.

The list of documents, which are links to the pdfs themselves, on the City Council's web site are:

 BR15 0056 CPD 195 S Monaco ORD REQ FORM.docx
 195 S Monaco_NAP_021815_PPT presentation.pptx
 Staff Report_Committee_195 S. Monaco_2-18_3I00044_NAP Packet_Final_02122015.pdf
 195 S Monaco_Public letters thru 021215 .pdf
 Public feedback provided by CPD at Committee 2-18-15 for 195 S Monaco.pdf
 Neighborhood Feedback for 195 S. Monaco provided at Committee 2-18-15.pdf
 195 S Monaco_NAP_030415.pptx
 CB15-0056_Bill_195SMonaco.docx
 195 S Monaco_Public letters thru 021215 .pdf
 195 S. Monaco_Opposition letters sent to CC through 060315.pdf
 195 S. Monaco_Support letters send to CC through 060315.pdf
 195 S. Monaco_13i_44_Protest Petition Sheets.pdf
 195 S. Monaco_Map_13i_44_Protest (2).pdf
 Legal Protest Staff Report 195 S Monaco_pdf (2).pdf
 CB15-0056_195 S. Monaco Pkwy_Final Staff Report_3I00044_CCPacket_06042015 (2).pdf
 NEUTRAL_195 S. Monaco.pdf
 OPPOSED 195 S. Monaco.pdf
 SUPPORT_195 S. Monaco.pdf
 Instructions for viewing NEUTRAL, OPPOSED and SUPPORT.pdf
 OPPOSE_195 S. Monaco_Monday Packet.pdf
 SUPPORT_195 S. Monaco_Monday Packet.pdf
 AddtlMaterialsRecdCB015-0195.pdf
 OPPOSITION1.JPG
 OPPOSITION2.JPG
 OPPOSITION3.JPG
 OPPOSITION4.JPG
 OPPOSITION5.JPG
 OPPOSITION14.JPG
 OPPOSTION6.JPG
 OPPOSTION7.JPG
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http://www.denvergov.org/sirepub/meeting.aspx?cabinet=published_meetings&docid=27823

Given the extensive materials, Plaintiffs’ or their representatives presence at the City Council’s hearing (based on their ability to quote or summarize City Council members’ voting statements in the Complaint), and own communications with the City, Plaintiffs’ failure to proffer any evidence to support limited discovery on their Rule 106(a)(4) claim is telling.

Plaintiffs argue that materials received by the City but not considered by the City Council should be included in the record. Response at 6. The Rule 106(a)(4) review asks whether there was any competent evidence before the decision-making body to support the decision. C.R.C.P. 106(a)(4)(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.”). Thus, if the City has materials that were not before the City Council, then they should not be part of the certified record for review of the rezoning, since that decision was made by the City Council. It is common sense that the City Council members could not have made a decision based on evidence or materials they did not know about.

Once the record before the City Council is determined, then, the question is whether there is any evidence in that record to support the City Council's decision. If there is, then the decision should be upheld. *See City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008) (a reviewing court can reverse an agency decision only when there is no competent evidence to support the decision or when the agency exceeded its jurisdiction); *Ross v. Fire and Police Pension Ass'n*, 713 P.2d 1304, 1308-9 (Colo. 1986) (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.").

Finally, many of Plaintiffs' arguments are policy arguments, not arguments for a Rule 106(a)(4) proceeding. If Plaintiffs believe that all so-called *ex parte* contacts between decision-makers and the public (both for and against) should be banned in Denver's City Council, then they should advocate to change the rules legislatively.¹ If Plaintiffs do not like that the City Council is not required to receive or consider material provided to the Planning Board and that the Planning Board's decision is not a final, appealable decision, then they also should advocate for that legislatively *See* Response at 7. The propriety of the rezoning process is not the issue

¹ Plaintiffs would first need to define "ex parte contacts." Here, Plaintiffs apparently believe that any communications between the developer and a City Council person are *ex parte* but Plaintiffs never explain who would need to be present to make them not *ex parte*. In a court context, an *ex parte* communication occurs when one party communicates with the judge outside the presence of the other party. There, though, positions and representatives are known. In a rezoning, if the proponent talks to the City Council person about a proposed rezoning, who must also be present for the communication not to be *ex parte*? Any person opposed to the rezoning? All people opposed to it? A person or persons somehow appointed to represent opponents? Other City Council members? Likewise, if a citizen calls, emails or speaks with a City Council person regarding the rezoning or the City Council person holds or attends a neighborhood or other community meeting at which the rezoning is discussed, must a proponent or person in favor of the rezoning be present? The other City Council members? Presumably, Plaintiffs would be unhappy with their elected officials if constituents could not raise such issues outside a document placed in the record, at a hearing or at an organized event with others present.

here. The issue is whether there was any competent evidence before the City Council when a majority of its members voted to rezone the Mt. Gilead Parcel.

For the reasons discussed above, and in the City's Motion, the record should be limited as proposed in the City's Motion.

Respectfully submitted this 20th day of October, 2015.

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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 20th day of October, 2015, a true and correct copy of the foregoing was filed with the Court and served electronically by ICCES to:

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