

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p>DATE FILED: October 21, 2015 5:25 PM FILING ID: 7E5BC8CCAFAA0 CASE NUMBER: 2015CV32427</p>
<p>Plaintiffs: ARTHUR KEITH WHITELOW, III, JOHN DERUNGS, KATHERINE K. McCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER</p> <p>v.</p> <p>Defendants: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, 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, Brittney Morris Saunders, Joel Noble, Susan Pearch, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith); THE CITY AND COUNTY OF DENVER; and CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant).</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for Defendant, Cedar Metropolitan LLC:</i> Chip G. Schoneberger, #41922 Melanie MacWilliams-Brooks, #45322 Foster Graham Milstein & Calisher LLP 360 South Garfield Street, 6th Floor Denver, Colorado 80209 Phone: (303) 333-9810 Email: cschoneberger@fostergraham.com mbrooks@fostergraham.com</p>	<p>Case Number: 2015cv032427 Courtroom: 269</p>
<p style="text-align: center;">DEFENDANT CEDAR METROPOLITAN, LLC'S RESPONSE TO PLAINTIFFS' MOTION FOR STAY</p>	

Defendant, Cedar Metropolitan, LLC (“Cedar”), hereby submits its Response to Plaintiffs’ 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. Cedar joins in the arguments asserted by Defendant, the City and County of Denver (“City”), in its Response to Plaintiffs’ Motion to Stay, and further states as follows:

Summary

The Court should deny Plaintiffs’ motion for several reasons. Foremost, Rule 106(a)(4) only authorizes a stay of the “decision of the body or officer.” C.R.C.P. 106(a)(4)(V). However, Plaintiffs are not requesting a stay of the underlying zoning decision. They are requesting an order *enjoining* the City and County of Denver (“City”) from issuing any building permits and *enjoining* Cedar from constructing on the subject property. Rule 106(a)(4) does not authorize such injunctive relief.

Moreover, Plaintiffs fail to satisfy the elements for such a preliminary injunction. The City filed a response to Plaintiffs’ motion on October 6, 2015 establishing Plaintiffs’ failure to satisfy the requisite elements, and Cedar hereby joins in and adopts those argument asserted by the City.

Finally, Plaintiffs fail to offer the bond required for a preliminary injunction based on their erroneous assumption that “Cedar ... has forfeited its right to participate as a party in this case[.]” (Pl’s Mot. for Stay at ¶ 23). That is patently false, pursuant to this Court’s October 7, 2015 Order denying Plaintiffs’ motion for default and allowing Cedar to file its answer or responsive pleading to Plaintiffs’ complaint and all other pending motions (which Cedar filed simultaneously with this response).

Accordingly, the Court should deny Plaintiffs’ motion for a preliminary injunction. If the Court is inclined to grant Plaintiffs’ motion, the Court should order Plaintiffs to provide a bond sufficient to secure Cedar’s prospective resulting losses and damages. Cedar will submit affidavits and/or documentary evidence establishing the costs and damages it will sustain so the Court can set an appropriate bond amount. Alternatively, Cedar requests a bond hearing to present such evidence.

Facts and Argument

1. In a C.R.C.P. 106(a)(4) action, the underlying “decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.” C.R.C.P. 106(a)(4)(V).

2. The decision underlying this action is the Denver City Council’s decision to rezone the Mt. Gilead parcel.

3. In their motion, Plaintiffs never request a stay of the City Council's zoning decision. Instead, Plaintiffs request an order *enjoining* the Denver Department of Community Planning and Development ("CPD") from (1) approving or recording any Site Development Plan for the Mt. Gilead Parcel, or (2) approving or issuing any building permit allowing any new construction at the Mt. Gilead Parcel. (emphasis added).

4. Rule 106(a)(4)(V) does not authorize Plaintiffs' requested relief. Under that Rule, Plaintiffs may only seek a stay of the City Council's rezoning decision, which they did not do.

5. Further, Plaintiffs' requested relief presumes that reversal of the re-zoning decision precludes issuance of any building permits or construction. The subject parcel was zoned before City Council's re-zoning decision and thus presumably still eligible for building permits and new construction of some kind on that site. However, those are legal arguments that Plaintiffs have not presented to the Court – much less proven any likelihood of success on them. Thus, Plaintiffs are not entitled to the injunctive relief they seek.

6. For the foregoing reasons and those set forth in the City's response brief filed on October 6, 2015, Plaintiffs' motion should be denied.

7. Alternatively, if the Court is inclined to grant Plaintiffs' motion, Cedar requests the Court set an appropriate bond amount.

8. Under Rule 65(c), an injunction "*shall not* issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." C.R.C.P. 65(c) (emphasis added).

9. Plaintiffs fail to offer such a bond – based on their mistaken assumption that "Cedar ... has forfeited its right to participate as a party in this case[.]" (Pl's Mot. for Stay at ¶ 23). That is patently false pursuant to this Court's October 7, 2015 Order denying Plaintiffs' motion for default and allowing Cedar to file its answer or responsive pleading to Plaintiffs' complaint and all other pending motions (which Cedar filed simultaneously with this response).

10. Because Cedar is a party in this action and owner of the subject parcel, and stands to incur substantial damages if the injunction is granted, Plaintiffs' proposed bond of \$100 is insufficient under Colorado law.

11. The amount of security required must bear a reasonable relationship to the potential costs and losses occasioned by an injunction that is later determined to have been improperly granted. *Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 796 (Colo. App. 2001). This is because the purpose of requiring a bond is to ensure that the party seeking the injunction will be able to pay the party's damages in the event that the enjoined party prevails in the action. *City and County of Denver v. Ameritrust Nat. Ass'n*, 832 P.2d 1054, 1056 (Colo. App. 1992).

12. Here, the requested injunction would cause Cedar substantial losses – potentially millions. Thus, Plaintiffs’ proposed bond of \$100 is not reasonably related to the costs and damages Cedar will sustain if the injunction is granted and is insufficient to ensure that Plaintiffs will be able to pay Cedar’s damages in the event Cedar prevails.

13. Cedar is currently in the process of evaluating and calculating the anticipated losses if an injunction were to issue.

14. If the Court is inclined to grant Plaintiffs’ motion, Cedar will submit affidavits and/or documentary evidence establishing the resulting costs and damages it will sustain so the Court can set an appropriate bond amount.

15. Alternatively, Cedar requests a bond hearing to present such evidence.

WHEREFORE, Defendant Cedar Metropolitan, LLC requests this Court deny Plaintiffs’ 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. However, if this Court grants Plaintiffs’ Motion, Cedar requests that this Court either consider affidavits and/or documentary evidence Cedar will submit establishing the costs and damages it will sustain, or that the Court set a bond hearing. Cedar also requests any further relief this Court deems just and proper.

FOSTER GRAHAM MILSTEIN
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By: /s/ Chip G. Schoneberger
Chip G. Schoneberger
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Attorneys for Defendant, Cedar Metropolitan LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of October, 2015, a true and correct copy of the foregoing **DEFENDANT CEDAR METROPOLITAN, LLC'S RESPONSE TO PLAINTIFFS' MOTION FOR STAY** was served via ICCES upon the following:

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Original signatures on file at the offices of Foster Graham Milstein & Calisher, LLP pursuant to C.R.C.P. 121 §1-26(7).