DATE FILED: October 21, 2015 5:25 PM
FILING ID: 7E5BC8CCAFAA0
CASE NUMBER: 2015CV32427

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 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 **v.** **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).	**▲COURT USE ONLY▲**
Attorneys for Defendant, Cedar Metropolitan LLC: 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	Case Number: 2015cv032427 Courtroom: 269

DEFENDANT CEDAR METROPOLITAN, LLC'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO SERVE DOCUMENT SUBPOENAS AND TAKE BRIEF DEPOSITIONS

Defendant, Cedar Metropolitan, LLC ("Cedar"), hereby responds to Plaintiffs' Motion for Leave to Serve Document Subpoenas and Take Brief Depositions ("Motion"). Cedar joins in the arguments asserted by Defendant, the City and County of Denver ("City") in its Response to Plaintiffs' Motion, and further states as follows:

Background

1. Plaintiffs' Motion seeks leave to serve document subpoenas and take depositions to obtain evidence concerning alleged *ex parte* communications with City Council members ("Motion").

2. The City's response to the Motion includes argument that discovery is barred in this action because Plaintiffs have not made the threshold showing of impropriety required under *Whelden v. Bd. of County Com'rs of the County of Adams*, 782 P.2d 853, 857 (Colo. App. 1989).

3. Plaintiffs filed a reply to the City's Response on October 13, 2015 ("Reply").

4. Cedar joins the City's Response and adopts the arguments set forth therein as its response to Plaintiffs' Motion.

5. Additionally, Cedar here expands on the City's argument that discovery is barred in this action pursuant to *Whelden*.

Argument

I. Discovery is Barred Because Plaintiffs Fail to Make the Requisite Threshold Showing of Impropriety Required Under *Whelden*

A. Legal standard

It is well-settled that district court review of an administrative action is generally limited to review of the record before the administrative body. *Whelden*, 782 P.2d at 857. Only under narrow circumstances is discovery allowed in the district court action. *Id.* Specifically, the administrative record may *only* be supplemented by discovery if the party challenging the administrative action makes "a threshold showing that members of the [agency] improperly considered ***evidence*** not before the [agency] or that they engaged in ***improper conduct*** which affected the result." *Id.* (emphasis added).

Whelden cites *City of Colorado Springs v. The District Court in and for the County of El Paso*, which holds the party seeking discovery must make its showing through "facts, [alleged] either in the petition for review or in the supporting affidavits. . . ." 519 P.2d 325, 327 (Colo. 1974). "Bald conclusions of impropriety" will not suffice, because "[a] presumption of (validity and) regularity supports the official acts of public officials and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.*

Plaintiffs have not met the threshold showing required under *Whelden*.

B. Plaintiffs fail to allege facts demonstrating that City Council members considered *evidence* not before the Council

Plaintiffs allege no facts demonstrating that individual City Council members improperly considered ***evidence*** not before the entire City Council.

In Plaintiffs' Reply to the City's arguments on this issue, Plaintiffs point to the allegations articulated in paragraphs 36 and 49 of the Complaint to argue they met the *Whelden* requirements. However, neither of those paragraphs alleges any City Council members improperly considered any evidence not put before the larger Council.

"Evidence" is "[s]omething that tends to prove or disprove the existence of an alleged fact. . . ." BLACK'S LAW DICTIONARY (10th ed. 2014). Paragraph 36 states Cedar's representatives engaged in *ex parte* communications with City Council members in which they simply arranged to reschedule the date of the City Council Hearing. Discussions regarding procedural scheduling do not relate to the facts of the case and are therefore not ***evidence***.

Plaintiffs also erroneously argue Paragraph 49 of the Complaint alleges facts demonstrating that individual Council members considered improper evidence. In that paragraph, Plaintiffs only allege that at the hearing, the City Council members "failed to base their votes on the legally relevant factors for rezoning, and instead cited personal preferences and extraneous political considerations." "Thus," Plaintiffs conclude, "the [Council] appear[s] to have considered improper or irrelevant evidence." This argument is not persuasive. The *Whelden* test does not test whether City Council members engaged in a thought process that involved personal experience and politics; it requires a showing that the City Council "improperly considered ***evidence*** not before the agency." Plaintiffs' allegation in no way suggests the members based their decisions on *ex parte* ***evidence***.

C. Plaintiffs fail to allege facts demonstrating that City Council members engaged in improper conduct

Plaintiffs pled no facts suggesting individual Council members engaged in improper conduct. First, Plaintiffs ask this Court to infer impropriety from the mere fact that the hearing was rescheduled to a date shortly following municipal elections. Such inference is inappropriate and baseless. By the logic of Plaintiffs' argument, discovery should be granted in any C.R.C.P. 106 appeal of a quasi-judicial action taken shortly following municipal elections. This argument does not accord with the presumption that public officials properly discharge their duties. *See City Colorado Springs*, 519 P.2d at 327.

Second, Plaintiffs argue the alleged *ex parte* communications regarding the hearing date were improper. However, Plaintiffs' cited authorities and secondary sources do not support their

argument. On the whole, Plaintiffs' cited authorities demonstrate that *ex parte* communication and/or evidence is improper where it ***relates to the merits of the dispute***. *See, e.g.*:

- "*Ex parte* contacts and communications related to the **merits** of an administrative zoning decision are considered highly improper and may be held sufficient to prejudice the affected person's procedural due process rights. . . ."

  2 A. Rathkopf, D. Rathkopf, and E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, § 32:13 (4th ed. June 2015) (emphasis added; footnotes omitted).

- "[T]he 'judges' on the City Council are prohibited from obtaining **evidence** from either side of the dispute outside of the public hearing. . . . This rule . . . ensure[s] that everyone with an interest in the case, and all members of the decision-making body, hear the same **evidence** at the same time, from the same sources."

  "The Quasi-Judicial Process and Citizen Access to the City Council," available at City of Lakewood's website: https//www.lakewood.org/Documents/City_Council/The _Quasi-Judicial_Process_and_Citizen_Access_to_the_City_Council.aspx (emphasis added; footnotes omitted).

- "In adjudicatory proceedings . . ., 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."

  Colorado Energy Advocacy Office v. Public Service Co., 704 P.2d 298, 302-04 (Colo. 1985) (emphasis added).

- "[A] presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any **issue** in the proceeding, while the proceeding is pending, with any party . . . ."

  Model State Administrative Procedure Act (1981), § 4-213(a).

- "[N]o interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency . . . an ex parte communication relevant to the **merits** of the proceeding."

  5 U.S.C. §557(d)(1)(A).

As Rathkopf explains, and the Colorado Court of Appeals echoes, the purpose of prohibiting *ex parte* communications related to the merits is to ensure that all interested parties have the opportunity to proffer rebuttal testimony and evidence. Rathkopf, § 32:13; *Colorado Energy Advocacy Office*, 704 P.2d at 302-04. Here, the alleged *ex parte* communications regarding the scheduling of the hearing are unrelated to the merits of the case. Accordingly, Plaintiffs did not need the opportunity to proffer rebuttal testimony or evidence.

Plaintiffs speculate that perhaps these alleged communications discussed other matters related to the case. They point to Paragraph 36 of the Complaint, which alleges Councilwoman Susman told her constituents she did not expect other Council members would vote the same way she would. According to Plaintiffs, "[t]hat allegation suggests Ms. Susman had spoken with her colleagues about the rezoning application and may have related information to her colleagues that she received through *ex parte* communications." This argument makes no sense and is a *non sequitur*. Nothing about Councilwoman Susman's predictions regarding her colleagues' votes suggests she related *ex parte* communications to them, much less that any such communications discussed the merits of the case.

D. Plaintiffs never allege the *ex parte* communications impacted the vote

Even assuming, *arguendo*, that the alleged *ex parte* communications regarding the scheduling of the hearing were improper, Plaintiffs allege no facts demonstrating that the changed date affected the vote. Nowhere have Plaintiffs alleged facts showing the result would have been different had the hearing taken place on its originally scheduled date of March 31, 2015.

II. Plaintiffs Should Not Be Given an Opportunity to Cure Their Failure to Make the Threshold Showing of Impropriety Required Under *Whelden*

Though Plaintiffs offer to submit affidavits to support their Complaint allegations, the proposed affidavits will simply support allegations that fail to meet the *Whelden* requirements. Plaintiffs have now had three opportunities to provide Defendants and this Court with a compelling reason why discovery should be allowed under *Whelden*—their Complaint, their Motion, and their Reply. If Plaintiffs could have alleged any facts sufficient to meet the *Whelden* threshold showing, they would have done so by now. They should not be given yet another opportunity to manufacture allegations to make a threshold showing of impropriety.

Moreover, Plaintiffs already had an opportunity to put any alleged *ex parte* communications in the record. They could have submitted a request to the City for any *ex parte* materials, pursuant to the Colorado Open Records Act. C.R.S. §§ 24-72-201-206. Plaintiffs should not be allowed to waste Defendants' resources in search of alleged records they could have obtained before the hearing.

Finally, it is worth noting that Plaintiffs never allege they notified the City Council of any objection to the rescheduled hearing date. When the hearing was rescheduled, Plaintiffs were

aware that early June falls after municipal elections. If they thought this was unfair, they could have requested a different date. Plaintiffs cannot go on a fishing expedition for evidence of impropriety when they did not even notify City Council of their objection to the rescheduled date. Accordingly, the Court should not allow Plaintiffs to continue burdening this action with their pursuit of discovery.

Conclusion

WHEREFORE Defendant Cedar Metropolitan, LLC requests that this Court deny Plaintiffs' 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.

FOSTER GRAHAM MILSTEIN
& CALISHER, LLP

By: */s/ Melanie MacWilliams-Brooks*
Chip G. Schoneberger
Melanie MacWilliams-Brooks

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 LEAVE TO SERVE DOCUMENT SUBPOENAS AND TAKE BRIEF DEPOSITIONS** was served via ICCES upon the following:

Gregory J. Kerwin
Gibson Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, Colorado 80202
Attorneys for Plaintiffs

Nathan Lucero
Tracy Davis
Denver City Attorney's office
Municipal Operations Section
201 W. Colfax Avenue, Dept. 1207
Denver, Colorado 80202
Attorneys for The City Defendants

/s/ *Tiffany A. Noel*
Paralegal

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