DATE FILED: October 27, 2015 3:43 PM
FILING ID: ABF4475C483C8
CASE NUMBER: 2015CV32427

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).

Attorney for Plaintiffs
Gregory J. Kerwin
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
Telephone: 303.298.5700
E-mail: GKerwin@gibsondunn.com

▲ COURT USE ONLY ▲

Case Number: 2015cv032427

Ctrm: 269

PLAINTIFFS' RESPONSE TO CERTAIN ARGUMENTS IN DEFENDANT CEDAR METROPOLITAN LLC'S BRIEFS CONCERNING PENDING MOTIONS FILED ON OCTOBER 21, 2015

Plaintiffs submit this Brief to respond to a few of the arguments raised in the Response briefs that Defendant Cedar Metropolitan LLC ("Cedar") filed on October 21, 2015 concerning several pending motions. Plaintiffs' response here addresses issues Plaintiffs did not already cover in their response to the City's arguments. The briefing on these three motions had already been completed before Cedar filed its briefs on October 21, 2015.

Plaintiffs' September 9, 2015 Motion for Stay Under C.R.C.P. 106(a)(4)(V)

1. Cedar argues in Para. 5 (p. 3) of its Response to Plaintiffs' motion for a stay under C.R.C.P. 106(a)(4)(V) that Cedar should be able to apply for building permits consistent with the original zoning for the Mt. Gilead Parcel.

Plaintiffs have no objection to the Court limiting any stay that it grants in order to allow the City to review and approve, while this action is pending, applications for building permits for new buildings that are consistent with, and limited to, the previous zoning on the Mt. Gilead Parcel of E-SU-DX (Urban Edge, Single Unit), which was in place before the 195 S. Monaco Zoning Change challenged here. *See* Pl. Complaint ¶¶ 1, 2.

2. Cedar presents no evidence or information in its Response to Plaintiffs' motion, to demonstrate the amount of "the probable damages attributable to the cessation of activity during the preliminary phase of the case." *See Zoning Board of Adjustment v. DeVilbiss*, 729 P.3d 353, 358 (Colo. 1986). Instead, Cedar just presents a generic argument for a preliminary injunction bond in an unspecified amount, speculating without explanation that it would suffer "substantial losses – potentially millions" from a stay being in place while this Court decides Plaintiffs' claims. Cedar Response at ¶¶ 7-15.

Plaintiffs served their September 9, 2015 motion on Cedar, and it chose not to file a timely response to that motion. Cedar has been aware of Plaintiffs' request for a stay for more than six weeks. Despite Cedar's dilatory conduct, the Court allowed it additional time, until October 21, 2015, to respond to Plaintiffs' motion. Yet Cedar still has not provided any information to support a bond greater than the $100 bond Plaintiffs proposed. The Court should not allow Cedar to complicate and delay this case further with its request for a bond hearing to present unspecified evidence.

Plaintiffs' September 28, 2015 Motion For Leave To Serve Subpoenas and Take Brief Depositions

1. Cedar tries to block discovery into its representatives' *ex parte* communications with City Council members concerning the proposed rezoning for the Mt. Gilead Parcel, including communications by Cedar's own lawyer, David Foster, by arguing the merits of whether such communications were proper. The Court should reject those merits arguments as premature. First, the Court should direct the City to supply the evidence in its possession and also allow the limited discovery Plaintiffs seek. The Court will encourage future dissembling by City Council members and lobbyists/lawyers if it allows a developer to avoid scrutiny of its representatives' private communications with Council members because the developer contends the communications did not present "evidence," did not relate to the "merits" of a requested zoning change, or did not impact the Council member's vote.

a. Tellingly, Cedar's Response does not deny that *ex parte* communications with Council members occurred, although Cedar's evasive Answer dodges the issue with a general denial of the allegations in Paragraphs 2(a) and 36 of Plaintiffs' Complaint. (In comparison, the City's Answer to Paragraph 36 indicates the City "does not have sufficient information to admit

or deny the allegations of ¶ 36"—demonstrating the City's lawyers have not asked the Defendant City Council members what undocumented *ex parte* communications occurred. And the City's September 23, 2015 motion to amend admits (at p. 7) that items "might have been received [by individual Council members] but that were not considered by the entire body of the City Council.") Paragraph 36 of Plaintiffs' Complaint alleges "extensive *ex parte* contacts" with City Council members between January 21, 2015 and June 8, 2015. That paragraph's allegations are not limited to communications by Cedar's representatives solely to arrange to move the Council hearing to the June 8, 2015 lame-duck session. It should not be surprising that Plaintiffs cannot provide admissible evidence at this stage to prove what was said behind closed doors between Cedar's representatives and the City Council members with whom they communicated. That is why Colorado law puts the onus on the administrative decisionmakers to disclose information on all such private communications that occur.

b. Cedar misconstrues Colorado law concerning *ex parte* communications with quasi-judicial decisionmakers with its purported summary of those authorities "[o]n the whole," Cedar Response at 4. Cedar contends, without proof, that the communications by its representatives did not present "evidence" to the Council members, did not relate to the "merits" of the zoning decision, did not "impact" their vote, or Council members did not "base [their] decision" on such communications. The Colorado authorities Plaintiffs cite in their motion and reply brief demonstrate that the City Council members were obligated, as a matter of due process, to affirmatively disclose at or before the administrative hearing all *ex parte* communications they received concerning the subject of their quasi-judicial decision. Once information on such communications is disclosed, then the significance of those communications

can be evaluated by the parties and the public, at the administrative hearing, and by the reviewing court, if necessary. For example:

i. The City of Lakewood legal memo explains at p. 2: "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 Exh. B (filed 9/28/15) (emphasis added). .

ii. The Colorado Court of Appeals set aside an agency's decision based on an undocumented "phone conversation [by a Commissioner] with the employer." *Zuviceh v. Industrial Comm'n*, 544 P.2d 641, 643 (Colo. App. 1975). The court did not require proof that the conversation related to the merits, or presented "evidence."

iii. The *Colorado Lawyer* article's summary of due process law explains that *ex parte* communications are forbidden, and does not limit the prohibition in the way Cedar attempts to do. The article states: ""*Ex parte* contacts involve communications between a board member and a party or member of the public that take place outside a noticed public hearing. These contacts deny due process to both the applicants and opponents of the application because the other party is not present to hear and rebut statements made to the decision-maker." G. Dahl, Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and Ex Parte Contacts, 33 *Colorado Lawyer* No. 3 at p. 69 (March 2004) (quoted at p. 5 (¶ 8(b) of Plaintiffs' Motion).

c. It is premature for the Court to decide the significance of Cedar's *ex parte* communications that occurred here. First, the City needs to gather the evidence of such

communications from City Council members, which under Colorado law, the City Council members were supposed to disclose at or before the June 8-9, 2015 hearing. Second, so this Court has a complete administrative record, Plaintiffs should be allowed to compel Cedar's representatives to disclose information on their private communications with City Council members through the requested document subpoenas and deposition.

City's September 23, 2015 Motion To Amend July 29, 2015 Order re Administrative Record

1. Cedar tries to expand the City's motion to amend the Court's July 29, 2015 Order concerning the scope of the administrative record by asking the Court to require Plaintiffs to obtain a court reporter's transcription of the City Council NAP Committee meetings and the entire eight hour June 8-9, 2015 public hearing, rather than just the City Council's deliberations at the end of the hearing.

This is a transparent attempt by Cedar to drive up Plaintiffs' costs in pursuing their claims. As reflected in Plaintiffs' July 6, 2015 motion and the July 29, 2015 Order, which granted that motion, Plaintiffs requested a CD with the recording of those meetings and a partial transcript for the June 8-9, 2015 Council deliberations. Plaintiffs did this because they do not expect to rely in their briefing on specific statements at the Committee meetings and specific citizen comments at the June 8-9, 2015 public hearing. The specific arguments Plaintiffs detailed in Paragraphs 2 and 82 of their Complaint should not require citation to such transcripts.

If Cedar considers those additional transcripts important for arguments it intends to present, it can incur the substantial expense (thousands of dollars) itself to obtain such transcripts and provide them to the City for inclusion in the administrative record. *Compare* C.A.R. 10(b) (describing the procedure when the appellee contends additional transcripts are necessary for an

appeal beyond the transcripts the appellant has ordered—the appellee can order the additional transcripts).

Dated: October 26, 2015.

Respectfully submitted,

/s/ Gregory J. Kerwin

Gregory J. Kerwin, No. 14161
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
(303) 298-5700
Email: GKerwin@gibsondunn.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2015, I caused a copy of the foregoing PLAINTIFFS' RESPONSE TO CERTAIN ARGUMENTS IN DEFENDANT CEDAR METROPOLITAN LLC'S BRIEFS CONCERNING PENDING MOTIONS FILED ON OCTOBER 21, 2015 was served on the parties listed below through the ICCES system:

Nathan Lucero
Tracy Davis
Assistant City Attorneys
Denver City Attorney's Office
Municipal Operations Section
201 W. Colfax Ave., Dept. 1207
Denver, CO 80202

(counsel for City Defendants)

Chip Schoneberger
Melanie MacWilliams-Brooks
Foster Graham Milstein & Calisher LLP
360 S. Garfield Street, 6th Floor
Denver, CO 80209

(counsel for Cedar Metropolitan LLC)

s/ Loretta Howard
Loretta Howard

102016044.1