

DISTRICT COURT, CITY AND COUNTY OF DENVER,  
COLORADO  
1437 Bannock Street,  
Denver, CO 80202

DATE FILED: November 2, 2015 11:08 AM

**Plaintiffs:**

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

v.

**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, 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)

▲ COURT USE ONLY ▲

Case Number:  
15CV32427

Courtroom: 269

**ORDER**  
**(City's Motion to Amend the Court's Order Requiring**  
**Certification of the Record)**

This matter is before the Court on the City's Motion to Amend the Court's Order Requiring Certification of the Record. The Court, having reviewed the motion, the responsive briefs, and the applicable legal authority, finds, concludes and orders as follows:

## INTRODUCTION

On June 9, 2015, the Denver City Council voted to rezone a parcel located at 195 South Monaco Parkway, on the eastern edge of Crestmoor Park, to allow “suburban multi-unit” three story buildings. In this action, Denver residents in the Crestmoor neighborhood challenge the processes of and decisions by the Defendants, the Denver City Council, the Manager of Community Planning and Development, and the Denver Planning Board, and the City and County of Denver (collectively the “City Defendants”). These residents allege, in part, that the processes were tainted by *ex parte* communications between City Council members and the property owner and property developer’s representatives.

## PROCEDURAL BACKGROUND

1. On July 6, 2015, Plaintiffs filed their Complaint for Relief under C.R.C.P. 106(a)(4) and for Declaratory Judgment.

2. On that same date, Plaintiffs filed a Motion under C.R.C.P. 106(a)(4)(III) Requiring Certification of Record within 28 Days after Defendants File an Answer.

3. On July 8, 2015, the Denver City Attorney’s Office entered its appearance on behalf of the City Defendants.

4. The Court granted Plaintiffs’ motion requiring certification of the record on July 29, 2015.

5. Meanwhile, on July 28, 2015, the City Defendants filed their Motion to Dismiss. There, the City Defendants argued for the dismissal of the claims against the Manager of Community Planning and Development (“CPD”) and the Denver Planning Board as well as the claim asserting alleged bias of the City Council and its individual members.<sup>1</sup>

6. The Court denied the City Defendants’ Motion to Dismiss on September 18, 2015.

7. The City Defendants filed the instant motion on September 23, 2015.<sup>2</sup> In their motion, the City Defendants argue that many of the requested documents are not part of the record for review under Rule 106(a)(4).

8. On October 21, 2015, Defendant Cedar Metropolitan, LLC, joined in the City Defendants’ Motion to Amend the Court’s Order Requiring Certification of the Record.

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<sup>1</sup> In that motion, the City Defendants also challenged Plaintiffs’ standing to assert their claims and the viability of the Rule 57 claim.

<sup>2</sup> The Court recognizes that the City Defendants did not file a timely response to Plaintiffs’ Motion Requiring Certification of the Record. Nevertheless, the Court rejects Plaintiffs’ argument that the City’s Motion to Amend the Court’s Order Requiring Certification of the Record is untimely. Under C.R.C.P. 106(a)(4)(IV), “[a]ny party may move to correct the record at any time.”

## ANALYSIS

### 1. Scope of the Record

The City Defendants and Cedar Metropolitan, LLC, challenge the inclusion in the record of the following items: documents presented to and considered by the Denver Planning Board and the Manager of CPD; documents received by individual city council members; the CD of the City Council Neighborhoods and Planning Committee Meetings on February 18, 2015, and March 4, 2015; and documents created between January 21, 2015, and June 9, 2015, concerning Cedar Metropolitan, LLC's proposed zoning change for the parcel between City Council members or their staff and representatives of Cedar Metropolitan, LLC. Defendants maintain that the record should only include documents presented to and considered by the City Council, the CD and transcript of the July 8–9, 2015 City Council hearing, documents received by the City Council related to the rezoning of the parcel and part of the City Council's SIRE system,<sup>3</sup> and documents related to the rezoning of the parcel and part of the record of the City Council when it considered the rezoning ordinance.

In a C.R.C.P. 106(a)(4) proceeding, the court's review is limited to determining whether the governmental body abused its discretion or exceeded its jurisdiction in exercising its quasi-judicial functions. *Colorado Airport Parking, LLC v. Dept. of Aviation*, 320 P.3d 1217, 1219 (Colo. App. 2014). “[A] reviewing court must uphold the decision of the governmental body ‘unless there is not competent evidence in the record to support it.’” *Bd. of County Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996), (quoting *Sellon v. City of Manitou Springs*, 745 P.2d 229, 235 (Colo. 1987)). The court thus must base its review solely on the record that was before the governmental body. *IBC Denver II, LLC v. City of Wheatridge*, 183 P.3d 714, 717 (Colo. App. 2008). Here, the question raised by Defendants is the extent of the “record.”

The Court concludes that a broader definition of the “record” is appropriate. Here, Plaintiffs challenge the decisions of the quasi-judicial functions of the Manager of the CPD, the Denver Planning Board and the City Council, including its individual members. Plaintiffs further have asserted that these functions were influenced and compromised by *ex parte* contacts. The Court has found, by denying the City Defendants' Motion to Dismiss, that these claims are legally sufficient. Thus, the record must include the documents considered by these governmental bodies, including the Manager of the CPD, the Denver Planning Board and the individual members of the City Council, and not just the documents actually considered and presented at the meeting on July 8–9, 2015. Accordingly, the Court denies the City Defendants' motion.

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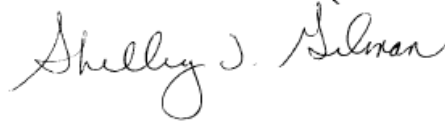
<sup>3</sup> SIRE is the City Council's software system into which documents, including emails and comments from the public, are uploaded.

**II. Transcription of the City Council Neighborhoods and Planning Committee Meetings**

Upon this Court's inclusion of the February 18, 2015 and March 4, 2015 City Council Neighborhoods and Planning Committee meetings in the record, Cedar Metropolitan, LLC, requests an order requiring Plaintiffs to transcribe such meetings. The Court denies that request.

DATED: November 2, 2015

BY THE COURT:



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SHELLEY I. GILMAN  
District Court Judge