

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

DATE FILED: November 3, 2015 3:38 PM

**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**

**(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)**

This matter is before the Court on 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. The Court, having reviewed the motion, the responsive briefs, and the applicable legal authority, finds, concludes and orders as follows:

In their motion, Plaintiffs seek leave to obtain, through subpoena *duces tecum* and depositions, evidence of alleged contacts between members of the City Council and the property owner and its lobbyists and lawyers. Plaintiffs contend that evidence received from these discovery procedures should be included in the administrative record. This Court disagrees.

First, on November 2, 2015, the Court issued its Order regarding the scope of the administrative record. There, the Court broadly construed the definition of the “record” for this Rule 106(a)(4) proceeding. The Court thus required the record to include any alleged *ex parte* contacts considered by Defendants.

Second, and most significantly, in the Rule 106(a)(4) proceeding, the Court’s review is limited to the record that was before the governmental body. *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008). Indeed, even when faced with an inadequate record, “the district court is not permitted to take testimony or evidence, or to remand the matter to the lower tribunal for further findings or proceedings.” *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1206 (Colo. App. 2000); *see also Hazelwood v. Saul*, 619 P.2d 499, 501 (Colo. 1980) (“[i]ntroduction of new testimony is not appropriate” in a C.R.C.P. 106(a)(4) proceeding). Thus, “[i]n order to avoid strict application of this rule, the party challenging the action must make a threshold showing that members of the [governmental body] improperly considered evidence not before [it] or that they engaged in improper conduct which affected the result.” *Whelden v. Board of County Comm’rs*, 782 P.2d 853, 857 (Colo. App. 1989).

Here, Plaintiffs have failed to make that requisite threshold showing. In their motion, Plaintiffs relied on the following allegations in their Complaint:

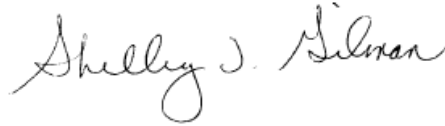
36. On information and belief, hired representatives of Cedar Metropolitan LLC and Peter Kudla had extensive *ex parte* contacts with District 5 Councilperson Mary Beth Susman and her staff members, and with other City Council members during the period between January 21, 2015 (after Planning Board approval) and June 8, 2015. In those *ex parte* contacts, the developer’s representatives arranged to have the City Council postpone its public hearings on the 195 S. Monaco Zoning Change. Those developer representatives arranged to have the City Council hearing on the Zoning Change scheduled for June 8, 2015—after the Denver municipal elections of members of City Council. This had the effect that Council members’ votes would not become an issue in the Council elections, and would be made before the new City Council members would be sworn in on July 20, 2015. Thus the voting would be made, in part, by a “lame duck” body. Councilmember Susman warned community members at her regularly scheduled neighborhood discussion meeting approximately one week before the June 8, 2015 hearing not to expect other Council members to vote with her. It will be necessary for Plaintiffs to obtain discovery to ascertain the full extent of those *ex parte* contacts, which may have affected the outcome [sic] quasi-judicial process of the City Council on June 8-9, 2015.

These allegations are insufficient to allow the requested discovery procedures. Notably, in Paragraph 36, Plaintiffs only allege, with some specificity, that Councilperson Susman had *ex parte* contact with the developer. Councilperson Susman, however, voted against the rezoning. Plaintiffs do not provide any specificity, other than “upon information and belief,” that other members engaged in *ex parte* contacts with the developer.

Accordingly, the Court denies 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.

DATED: November 3, 2015

BY THE COURT:



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SHELLEY I. GILMAN  
District Court Judge