DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Ave., Suite 100 Fort Collins, CO 80521 **Plaintiff: VIRGINIA FARVER,** **v.** **Defendants: CITY OF FORT COLLINS, FORT COLLINS ELECTRIC UTILITY; and DOES 1-100.**	DATE FILED: February 9, 2017 4:29 PM FILING ID: 9B5E9BDEA737B CASE NUMBER: 2016CV144 COURT USE ONLY
Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC 323 South College Avenue, Suite 3 P.O. Box 2166, Fort Collins, CO 80522 Phone Number: (970) 482-4011 E-mail: kschutt@wicklaw.com FAX Number: (970) 482-8929 John R. Duval, #10185 FORT COLLINS CITY ATTORNEY'S OFFICE P.O. Box 580 Fort Collins, CO 80522 Phone: (970) 221-6520 Email: jduval@fcgov.com	Case Number: 2016 CV 144 Courtroom: 5B

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW the above-named Defendants ("Defendants"), by and through counsel, Kimberly B. Schutt of Wick & Trautwein, LLC, and John R. Duval of the Fort Collins City Attorney's Office, and respectfully submit the following reply brief in support of their motion for summary judgment:

I. PLAINTIFF HAS FAILED TO CARRY HER BURDEN UNDER C.R.C.P. 56, REQUIRING ENTRY OF SUMMARY JUDGMENT IN DEFENDANTS' FAVOR

The Defendants submitted a Motion for Summary Judgment (the "Motion"), setting forth specific undisputed facts and supported by multiple affidavits, carrying their initial burden as to the propriety of the Court granting summary judgment in their favor on the Plaintiff's claims challenging the City's Advanced Meter Fort Collins Project ("Project"). As discussed at length

in the Motion, the undisputed facts demonstrate that the Project was adopted and implemented in accordance with the City Charter, Code and state law. The extensive documentation supporting the Motion clearly shows that the Project was implemented over the course of several years through multiple City Council actions in consideration and furtherance of the Project, with the City Manager and the City's Utility Services ("Utility Services") carrying out the day-to-day aspects of the Project pursuant to that direction and oversight. Again, as reflected in the relevant sections of the City Charter and Code discussed in the Motion, this is precisely how City projects of this nature are supposed to be adopted and implemented by the City. Further, the Motion establishes, by way of undisputed facts and applicable legal authority, that Plaintiff's claims asserting violations of due process and of the Colorado Sunshine Act and the Colorado Open Meetings Law ("COML") fail as a matter of law.

Once the moving party satisfies its burden of establishing the non-existence of a disputed material issue of fact, as the Defendants did here, the burden of proving the existence of a genuine factual issue then shifts to the non-moving party. *Gifford v. City of Colo. Springs*, 815 P.2d 1008. 1010 (Colo. App. 1991); *Avicomm, Inc. v. Colo. Pub. Utilities Com'n*, 955 P.2d 1023, 1029 (Colo. 1998). The non-moving party may not rest on the mere allegations of its pleadings, but must adduce specific facts, **through affidavit or otherwise**, demonstrating that a real controversy exists. *Victorio Realty Group, Inc. v. Ironwood IX*, 713 P.2d 424, 425 (Colo. App. 1985); *GTM Investments v. The Depot, Inc.*, 694 P.2d 379, 381 (Colo. App. 1984). **A genuine issue of material fact cannot be raised simply by argument or suggestion.** *Sullivan v. Davis*, 474 P.2d 218 (Colo. 1970); *People in the Interest of F.L.G.*, 563 P.2d 379 (Colo. App. 1977). The failure of the non-moving party to satisfy its burden entitles the moving party to summary judgment as a matter of law. *Gifford*, 815 P.2d at 1010.

Here, the Plaintiff has altogether failed to carry her shifted burden under the applicable standards set forth above. Her "Response to the Defendants' Motion for Summary Judgment" ("Response") consists solely of several circular and strawman arguments by which she attempts to dispute the undisputed facts, doing so through rhetorical questions, references to allegations in her Complaint or other matters outside the pleadings, the Motion and Response. Significantly, she has not supported her Response with any counter-affidavits or other documentation to evidence her assertions. Further, the assertions she makes, particularly her insistence that City Council somehow never actually authorized the Project, fly in the face of the well-established and documented history of Council actions outlined in the Motion. Accordingly, under the applicable standards for this Court's determination of a motion for summary judgment set forth above, the Plaintiff has failed to meet her burden to prove a triable issue of fact on the claims alleged.

This conclusion is further bolstered by the legal presumptions governing the Court's review of the governmental actions here. Again, as discussed on page 6 of the Defendants' motion, it is a long-established, fundamental principle of Colorado law that "…courts presume the validity and regularity of official acts of public officials and entities . . . . [and] presume that public officials discharge their duties properly and in compliance with the law." *Crested Butte South Metropolitan District v. Hoffman,* 790 P.2d 327, 329 (Colo. 1990). Thus, the courts have repeatedly stated that a plaintiff challenging the acts of government officials, including administrative officials, must overcome this presumption through "clear evidence." *Jensen v. City and County of Denver*, 806 P.2d 381, 386 (Colo. 1991); *see also, Ellis v. City of Arvada*, 695 P.2d 784, 785 (Colo. App. 1984) ("absent fraud or bad faith in the exercise of his authority,

the [city] manager's decision is not subject to judicial interference."); 3 McQuillin Mun. Corp. § 12:173.8 (3rd ed. 2016).

The Plaintiff acknowledged this presumption in her Response, arguing that the presumption should not be broadly construed and that it can be rebutted, stating that she would do so. However, the fact is that her unsupported and fragmented arguments do not provide the clear evidence required to overcome that presumption here, particularly given the showing made in the Motion.

Accordingly, while the Defendants will address below some of the individual arguments/assertions made in Plaintiff's Response, the Court must conclude that those arguments as a whole fail to meet the Plaintiff's shifted burden to establish a triable issue of fact, such that the Defendants are entitled to summary judgment as a matter of law.

II. PLAINTIFF'S ARGUMENTS FAIL AS A MATTER OF LAW

A. Plaintiff's Arguments

Plaintiff's Response asserts several different arguments. However, each seems focused on the notion that the Project was in some way not approved in accordance with the City Charter, City Code or state law. These arguments appear to be that: (1) the Council failed to adopt a resolution or ordinance expressly authorizing the Project; (2) even if the Council did expressly authorize the Project after 2007, it lacked the power to do so because in 2007 it delegated that power to Utility Services; (3) to the extent Utility Services had the power to authorize the Project, it did so in violation of the Colorado Sunshine Act and the COML; and (4) to the extent the Council authorized the Project, there is no evidence that "full notice" of its approval proceedings was provided to the public as required by the COML. Each of these arguments will be addressed in turn.

B. *Council Properly Authorized the Project*

The Plaintiff contends that the resolutions and ordinances City Council adopted related to the Project, whether considered together or separately, failed to contain the needed language, "such as, 'The Council hereby authorizes the Advanced Meter Fort Collins Project'" (Response pg. 2). She later adds: "[i]n fact none of them contains a policy decision to authorize the Project" (Response pg. 6).

The resolutions she points to as insufficient to authorize the Project are Resolution 2008-122 adopting the City's "2008 Climate Action Plan" (the "Climate Action Plan Resolution") and Resolution 2009-002 adopting "Fort Collins Utilities Energy Policy 2009" (the "Energy Policy Resolution").[1] The ordinance she points to as insufficient is Ordinance No. 043, 2010, which appropriated the needed funds for the Project (the "Appropriation Ordinance").[2]

Interestingly, the Plaintiff essentially ignores in her Response Council Resolution 2010-030 approving the "Assistance Agreement" with the United States Department of Energy (the "DOE"), which provided a $15.7 million grant to the City to partially fund the Project (the "DOE Grant Resolution").[3] She also ignores Ordinance No. 001, which Council adopted acting as the Board of the City's Electric Utility Enterprise, authorizing the issuance of the $17 million in revenue bonds to provide the balance of funds the City needed for the Project (the "Bond Ordinance").

In addition to arguing that the language in the Climate Action Plan Resolution and Energy Policy Resolution (jointly, the "Resolutions) was insufficient to establish the policy authorizing the Project, the Plaintiff argues that any such policy adopted in the Resolutions was required to be adopted by ordinance, citing City Charter Article II, § 6. Concerning the

[1] Attached as Exhibits G and H, respectively, to the Motion.
[2] Attached as Exhibit K to the Motion.
[3] Attached as Exhibit M to the Motion.

Appropriation Ordinance, she argues that even if its language was sufficient to authorize the Project, it could not do so because that would violate the City's single-subject requirement for ordinances in Charter Article II, § 6.

1. *Language in Resolutions and Appropriation Ordinance Insufficient for Approval of the Project*

Addressing first the Plaintiff's argument that the language in the Resolutions and the Appropriation Ordinance is insufficient, the Plaintiff has clearly applied a hyper-technical and strained analysis of the language and intent of these measures. She cites no legal authority supporting such an analysis. In fact, the courts have been clear that the rules of construction that a court is to apply when interpreting local government ordinances and resolutions are the same as those used for statutes.[4] As relevant here, these rules include: (1) the primary task of the court is to determine and give effect to the intent of the body enacting the measures and the court must refrain from rendering a judgment inconsistent with that intent; (2) the court is to look to the language employed and, if unambiguous, apply the measures as written unless doing so would lead to an absurd result; (3) if the measures' language is clear and unambiguous, the language should not be subjected to a strained or forced interpretation by the court; and (4) the court should read the measures as a whole giving consistent, harmonious and sensible effect to all parts.[5]

The intent of the Council in the Resolutions and the Appropriation Ordinance could not have been any clearer. The Climate Action Plan Resolution approved a plan that included a list of "New Measures" naming "Smart Grid" and "Advance Metering Infrastructure" as strategies to help the City in achieving its goal of reducing greenhouse gases. The Energy Plan Resolution reinforced the City's future use of these strategies by adopting a "2009 Energy ***Policy***" (emphasis

[4] *MDC Holdings, Inc. v. Town of Parker,* 223 P.3d 710, 717 (Colo. 2010).
[5] *Id.; Jackson & Co. (USA), Inc. v. Town of Avon,* 166 P.3d 297, 299-300 (Colo. App. 2007).

added), which policy described as a goal that "smart grid innovations are expected to have an increasing role in the electric system" and listed as an objective associated with that goal of creating "a smart grid roadmap by the end of 2009, defining specific objectives and implementation plans." Then, in 2010, after the adoption of the Resolutions, the Council adopted the Appropriation Ordinance making available "for expenditure in the Light and Power Fund for the Advanced Metering Infrastructure (AMI) and smart grid technology project" the $30 million received from the DOE grant and the issuance of the Electric Utility Enterprise revenue bonds.

If, as the Plaintiff argues, these measures are not enough to show that the Council's intent was to authorize the Project, the Council also adopted the DOE Grant Resolution and the Bond Ordinance when it adopted the Appropriation Ordinance. The recitals in the DOE Grant Resolution describe how the grant funds would be used to "develop smart grid technology (the "Project")," and state: "the City's focus in implementing the Project will include installation of an Advanced Metering Infrastructure ("AMI") System." Section 1 of the DOE Grant Resolution then states: "That the City Manager is hereby authorized to enter into an Assistance Agreement with DOE for the receipt of funds, to be used for the installation and deployment of smart grid technology in Fort Collins . . . on terms and conditions consistent with the terms of this Resolution." To complete the funding for the Project, the Council then adopted the Bond Ordinance authorizing the issuance of $17 million in revenue bonds.

When all of these measures are considered together, as well as the other facts listed in the "Statement of Undisputed Facts" in Section III of the Defendants' Motion, the only consistent, harmonious and sensible conclusion is that the Council intended to and did, in fact, approve the Project as a policy of the City and authorized its implementation by Utility Services.

The Plaintiff, however, asks this Court to conclude that the language in the Resolutions was never intended by Council to be an expression of policy contemplating the Project as a future City action, even though later in 2010 Council adopted the DOE Grant Resolution authorizing the City to accept millions of dollars to be used for the Project under an agreement with the DOE, it adopted the Bond Ordinance authorizing the City to go $17 million into debt for the Project and it adopted the Appropriation Ordinance authorizing over $30 million to be spent for a Project, and that Council did all this never intending for the Project to happen.

The Plaintiff is asking this Court to adopt a strained and forced interpretation of all these measures that leads to an absurd result.

2. *Resolutions and Appropriation Ordinance Not Sufficient Approval of Project Under Charter Article II, §6*

As noted earlier, the Plaintiff also argues that even if the Resolutions are a clear expression of Council's policy approving the Project, the Council could not adopt that policy by resolution but was required by Charter Article II, § 6 to adopt it by ordinance. Article II, § 6 reads in relevant part:

> "The Council shall act by ordinance, resolution, or motion. . . . **All legislative enactments and every act** creating, altering, or abolishing any agency or office, fixing compensation, **making an appropriation**, **authorizing the borrowing of money**, levying a tax, **establishing any rule or regulation for the violation of which a penalty is imposed**, or placing any burden upon or limiting the use of private property, **shall be by ordinance** . . . ." (Emphasis added.)

As this Section 6 relates to the Project and the acts Council has taken related to the Project, some of these acts were certainly required to be taken by ordinance, such as appropriating the money for the Project (the Appropriation Ordinance), borrowing money for the Project (the Bond Ordinance) and requiring in Code Section 26-396 that Utility Services' electric

customers use City-owned and provided electric meters.[6] However, a Council policy concerning the Project does not fit any of the listed categories of acts in Section 6 that must be taken by ordinance unless that policy is a "legislative enactment." For the reasons discussed below, such policy is not a legislative enactment but an "administrative" or "executive" act that Council can adopt by resolution.

The Colorado Supreme Court has observed that the governing bodies of municipalities frequently act in "an administrative capacity as well as a legislative capacity by the passage of resolutions and ordinances."[7] The Court has said that determining whether a matter is legislative or administrative (or executive) in nature is to be decided on a case-by-case basis applying certain tests and the principles underlying those tests.[8] These tests, as most recently articulated and applied by the Court, are: (1) a legislative act is "defined by the work product it generates, namely the promulgation of laws of general applicability" and when a governing body legislates, "it weighs broad, competing policy considerations, not the specific facts of individual cases"; and (2) an administrative (or executive) act is typically "not based on broad policy grounds, but rather on 'individualized, case-specific considerations'. . . . [and] 'case specific evaluations'----not the policy-based promulgation of the rules to be applied," so these are decisions that usually require careful study, specialized expertise, consideration of specific data and facts, and knowledge of fiscal and other affairs of government necessary to make an rational, fair and accurate decision in the matter.[9]

[6] A similar provision requiring the use of the City-owned and maintained electric meters is found in Section 8.1.2 of Utility Services' Electric Service Rules and Regulations adopted by Council in Ordinance No. 194, 2006 (attached as Exhibit Z to the Motion).

[7] *Vagneur v. City of Aspen*, 295 P.3d 493, 504 (Colo. 2013).
[8] *Id.* at 507.
[9] *Id.* at 506-07.

Applying these tests in *Vagneur v. City of Aspen*,[10] the Court decided that a proposed citizen-initiated municipal ordinance that would mandate "a specific proposal for the location, design, and construction of a state highway corridor" was administrative in nature because it related to "a process that entailed case-specific evaluation based on careful study and specialized expertise." In arriving at this decision, the Court cited and discussed with approval several of its past decisions finding similar actions to be administrative and not legislative in nature. This included an ordinance setting the rates and charges for a city's water utility,[11] an ordinance approving an amendment to Canon City's lease of its Royal Gorge Bridge to allow its lessee operator of the Bridge to make improvements to it[12] and a citizen-initiated ordinance to repeal and nullify a city council's decisions to purchase certain real property and to move a historic building to the site to be renovated for use as the city hall.[13]

Applying these tests and past decisions, the Council's decisions in the Resolutions to improve the City's electric utility system by incorporating into it "smart grid" and "advance metering infrastructure" technology are decisions that are more characteristic of administrative and not legislative decisions. Making decisions about using such technology certainly requires case-specific evaluation and consideration, careful study, consideration of facts and data, and special knowledge and expertise in order to make a rational and accurate decision on its use. These decisions are also certainly not "the promulgation of laws of general applicability." To the extent the Council has adopted such laws, they can be found in Code Section 26-396 and the regulations that Council adopted by ordinance that require the City's electric customers to use the electric meters owned and maintained by the City. These are clearly legislative

[10] *Id.* at 507-08.
[11] *City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977).
[12] *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986).
[13] *City of Idaho Springs v. Blackwell*, 731 P.2d 1250 (Colo. 1987).

enactments, while the choice of what particular kind of electric meter is to be used by customers is an administrative decision.

Concerning the Appropriation Ordinance and its authorization of the Project, the Plaintiff argues that the Appropriation Ordinance cannot both appropriate the funds for the Project and authorize the Project. As authority for this, the Plaintiff cites the following provision in Charter Article II, § 6: "All ordinances, except the annual appropriation ordinance and any ordinance making a general codification of ordinances, shall be confined to one (1) subject which shall be clearly expressed in the title." A provision such as this is commonly referred to by the courts as a "single-subject rule or requirement."[14]

The single-subject rule is also found in Article V, § 1(5.5) of the Colorado Constitution, which imposes this rule on citizen initiatives of state statutes and constitutional amendments, and it is found in the codes and charters of other municipalities. As interpreted and applied by the courts, the single-subject rule is violated when a measure (here a City ordinance) relates to more than one subject and has at least two distinct and separate purposes.[15] However, if the measure tends to achieve or carry out one general object or purpose, it constitutes a single subject.[16]

The Appropriation Ordinance, by appropriating the funds for the Project from the "Light and Power Fund . . . for expenditure in the Light and Power Fund for the Advance Metering Infrastructure (AMI) and smart grid technology project," clearly expressed the Council's intent that "one general object or purpose" be achieved---that the City proceed to spend this money to implement the Project. This interpretation is further supported by the definition of "appropriation" in Charter Article XIII, which is defined to mean "the authorized

[14] *Bruce v. City of Colorado Springs,* 252 P.3d 30, 31-32 (Colo. App. 2010).
[15] *Id.* at 34.
[16] *Id.*

amount of funds set aside for expenditure during a specified time for a ***specific purpose***" (emphasis added). It is also supported by Code Section 8-77, which established the Light and Power Fund and states that expenditures from the Fund "shall be made for ***approved purposes*** in connection with furnishing electric services" (emphasis added). Clearly, when Council adopts an appropriation ordinance it intends and expects that the money appropriated will be spent for the specific purpose approved in the ordinance.

Consequently, the Appropriation Ordinance did not violate the single-subject rule in Article II, § 6 when it appropriated funds to be used for the one specific and approved purpose of implementing the Project.

C. *Council Did Not Delegate Away Its Authority to Approve the Project*

The Plaintiff's second argument is that when the Council adopted Code Section 2-504 in 2007, it delegated away to Utility Services any authority Council had to subsequently approve and authorize the Project. As a consequence, the Plaintiff contends that the actions Council took in 2008, 2009 and 2010 concerning the Project were without legal effect even if those actions purported to approve the Project. Code Section 2-504 reads:

> "Utility Services shall be and is hereby created. Utility Services shall be in the charge of a Director who shall be directly responsible to the City Manager for the functions and duties of Utility Services, including, without a limitation, the functions and duties necessary to provide for the design, construction, reconstruction, addition, repair, replacement, operation and maintenance of the City's electric, water, wastewater and stormwater utility services, and shall have control and supervision over such agencies, service units, departments, divisions, offices or persons as may be deemed appropriate by the City Manager."[17]

This Code Section does nothing more than create Utility Services as a department of the City and to provide for its administration by the City Manager and the Director of Utility Services.

[17] This Code section reads as it was adopted by Council in Ordinance No. 005, 2007, and in effect during the years relevant to Plaintiff's argument here (2008-2014), but minor, non-substantive amendments were made to it in 2015 in Council Ordinance No. 108, 2015.

This is all consistent with the City's council-manager form of government as discussed in Section IV.A. of the Defendant's Motion.[18] It is also consistent with the Council's delegation of administrative authority related to certain aspects of Utility Services' operation of the City's electric utility, as discussed in Section IV.B. of the Motion.

However, regardless of what authority Council delegated in Code Section 2-504, it was certainly the case that until the Council actually took its formal actions adopting the DOE Grant Resolution, the Bond Ordinance and the Appropriation Ordinance, that the Project would not happen. Council's control of the City's purse strings, which authority it clearly did not delegate in Section 2-504, guaranteed that Utility Services, the City Manager and the Utility Services Director had no authority to approve the Project. Therefore, even after the adoption of Section 2-504 in 2007, the Council retained the ultimate authority to approve or not the Project.

D. ***Utility Services Did Not Violate the COML***

Following up on her second argument that the Council delegated away in 2007 to Utility Services its authority to approve the Project, the Plaintiff argues that Utility Services, in allegedly approving the Project under its delegated authority, violated the COML, which is found in C.R.S. § 24-6-402.[19] It apparently did this, according to the Plaintiff, by not noticing and opening to the public under the COML the various meetings that were held by the administrative staff of Utility Services to discuss and allegedly approve the Project.

The Plaintiff bases her argument on the contention that Utility Services is a "local public body," as defined in C.R.S. § 24-6-402(1)(a)(I), which reads:

[18] Please note that in footnotes 6, 7 and 8 of the Motion, the cites to the Charter are incorrect. In footnote 6 the cite should be "Charter Article I, Section 2"; in footnote 7 it should be "Charter Article II, Section 5"; and in footnote 8 it should be "Charter Article II, Section 6."

[19] The Defendants discuss this statute and its application here in detail in Section VI.D. of their Motion.

> "Local public body" means any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, **has delegated a governmental decision-making function *but does not include persons on the administrative staff of the local public body***." (Emphasis added.)

She argues that Utility Services has been "delegated a governmental decision-making function," so by definition it is a "local public body." What the Plaintiff misses in her argument is that Section 24-6-402(1)(a)(I) expressly excludes from the definition of "local public body" those "persons on the administrative staff of the local public body."

Therefore, even if Utility Services could be considered a "local public body" under the COML, which the Defendants do not here concede, if the members of that "local public body" are its administrative staff members, when those administrative staff members meet to discuss any public business, they are **not** considered a "local public body" under COML and, therefore, not subject to the COML's notice and open meeting requirements.

Were this not so, this would require prior public notice and the opening to the public of every meeting of three or more administrative staff members of every department of every local government in the state to which any "governmental decision-making function" had been delegated. In some sense it can be said that every local government delegates a "governmental decision-making function" to all of its departmental and administrative units. If the administrative staff of all local governments were required to comply with these requirements of the COML, this would bring to a grinding halt local governments' provision of critical governmental services to their citizens. The Plaintiff's interpretation of what is required under the COML, cannot be what the Colorado General Assembly intended in defining "local public body" as it did in the COML.

E. ***"Full" Notice Was Provided of Council's Actions***

The Motion, as supported by the affidavits and other undisputed facts submitted by the Defendants, established the numerous instances in which City Council addressed issues relating to the Project. As specifically attested in the affidavit of City Clerk Wanda Winkelman attached to the Motion as Exhibit V, proper public notice was given prior to all such Council meetings and work sessions addressing the issues related to the Project, including publication of the agenda item summaries on the City's website several days prior to those Council meetings.

In the Response, the Plaintiff accepts Ms. Winkelman's affidavit as true (Response pg. 2). She nevertheless asserts that a copy of the notice for the May 18, 2010, Council meeting is required to determine whether there indeed was "full" notice given for Council's consideration of the Appropriation Ordinance and the DOE Grant Resolution, and suggests that without a copy of that notice the Court cannot make a determination as to whether the City provided proper legal notice. She makes similar assertions regarding the Council's 2008 and 2009 actions on the Resolutions adopting the Climate Action Plan and Energy Policy. However, she provides no affidavits or other evidence to rebut the City's Clerk's affidavit (which she accepted as true) attesting that proper notice was indeed given before all of these meetings.

Again, as discussed above, the Plaintiff has not met her shifted burden to demonstrate a triable issue of fact. As a matter of law, she cannot do so merely by argument or suggestion, but that is exactly what the Plaintiff is doing with regard to her assertions on this notice issue.

Notwithstanding her failure to meet her shifted burden, the agenda item summary from that May 18, 2010, Council meeting is still available on the City's website (as are all of the agenda items dating back to 2000), and were (and still are) readily available to the Plaintiff. Defendants are hereby attaching as ***Exhibit DD*** a copy of agenda item summary No. 26 relating

to City Council's May 18, 2010, consideration of "Items related to the Smart Grid Investment Project." As reflected in Exhibit DD, that summary consisted of 15 pages of detailed information relating to exactly what City Council would be considering with regard to the Appropriation Ordinance and DOE Grant Resolution being considered that date. Defendants also attach as ***Exhibit EE*** (132 pages), ***Exhibit FF*** (24 pages) and ***Exhibit GG*** (29 pages) of the agenda item summaries for the December 2, 2008, and January 6, 2009, meetings where City Council's adopted the Climate Action Plan Resolution and Energy Policy Resolution. Together, those three agenda item summaries provided over 175 pages of information as to the issues relating to the Climate Action Plan and Energy Policy that Council would be considering at those meetings.

Therefore, while the Plaintiff has not met her shifted burden to show a triable issue of fact in the first instance, the actual evidence closes the door on her mere suggestion there was not full notice. Given the flexible legal standard applied by the courts in determining whether full and timely notice was provided, as discussed on pages 27-28 of the Motion, the undisputed facts lead to only one conclusion: the public (including Plaintiff) was provided with full and fair notice of the issues to be discussed and decided at those meetings.

III. CONCLUSION

For the reasons discussed above, the Court can and should find that the Response, as a whole, fails to meet the Plaintiff's shifted burden of establishing a triable issue of fact. Further, her individual arguments fail as a matter of law, such that the Defendants are entitled to summary judgment on all of the Plaintiffs' claims for the reasons set forth in the Motion and this reply. Such relief is supported by the undisputed facts and legal authority set forth in the Motion and exhibits thereto. It is also consistent with the express provisions and purpose of C.R.C.P. 56.

Defendants submit that the Court can properly grant this relief based upon the submissions of the parties already before the Court. However, to the extent the Court determines that oral argument would be helpful, the Defendants are open to participating in the same.

DATED this 9th day of February, 2017.

WICK & TRAUTWEIN, LLC

This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by Kimberly B. Schutt is on file at the offices of Wick & Trautwein, LLC

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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was filed via Integrated Colorado Courts E-Filing System (ICCES) and served this 9th day of February, 2017, on the following:

Sent by U.S. Mail to:

Virginia L. Farver
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Pro se Plaintiff

/s/ Jody L. Minch

[The original certificate of electronic filing signed by Jody L. Minch is on file with the law offices of Wick & Trautwein, LLC.]