FORT COLLINS MUNICIPAL COURT 214 N. Mason Fort Collins, CO 80521 Phone: (970) 221-6800 **Plaintiffs: COLLEEN HOFFMAN, RICK HOFFMAN, and ANN HUNT,** **v.** **Defendants: THE CITY COUNCIL OF THE CITY OF FORT COLLINS, the governing body of a Colorado municipal corporation; and THE ADMINISTRATION BRANCH OF THE CITY OF FORT COLLINS, by and through its City Manager, Darin Atteberry.**	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: 2017-CIVIL01

DEFENDANT CITY'S RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER

COMES NOW the above-named City of Fort Collins Defendants (jointly, "the City"), by and through its counsel, Kimberly B. Schutt of Wick & Trautwein, LLC, and John R. Duval of the Fort Collins City Attorney's Office, and on behalf of the City, respectfully submits the following response to the Plaintiffs' Motion to Reconsider Order to Submit Motion for Certification of Record:

1. The Court entered an Order that was formally received for filing May 30, 2017, properly denying the Plaintiffs' motion for entry of default. As part of that order, the Court instructed the Plaintiffs to file a motion and proposed order for certification of the record in this case, pursuant to C.R.C.P. 106(a)(4)(III), no later than June 5, 2017.

2. On June 5, 2017, instead of filing the required motion and proposed order for certification of the record, the Plaintiffs instead filed a "motion to reconsider," taking issue with the fact they are being made to take appropriate steps to get the record certified for this matter to proceed. They claim there is no requirement in Rule 106 for them to have to file a motion to certify the record. They further claim they do not yet know what parts of the record they want included, even though they have been aware of the need to get a certified record before the reviewing court since defense counsel first discussed this case with Plaintiff Colleen Hoffman several months ago. Simply put, the Plaintiffs' "motion to reconsider" is without merit and only further delays this matter being considered on the merits of the claims that the Plaintiffs themselves have asserted by bringing this action.

3. First, it should be noted that a "motion to reconsider" is not specifically authorized anywhere in the Colorado Rules of Civil Procedure, which now apply to this case. *Stone v. People,* 895 P.2d 1154, 1155-56 (Colo. App. 1995). Therefore, the Colorado appellate courts have not condoned their use in the trial courts, and in fact have discouraged their use. *Id.* For purposes of review, such reconsideration motions have generally been treated as a C.R.C.P. 59 motion to alter or amend the findings or the judgment of the court, which is committed to the trial court's sound discretion. *Id.; Catlin v. Tormey Bewley Corp.,* 219 P.3d 407, 415 (Colo. App. 2009); *Blood v. Qwest Services Corp.,* 224 P.3d 301, 320 (Colo. App. 2009). Here, the Court would be exercising very sound discretion in denying the Plaintiffs' motion.

4. In short, Plaintiffs' contention that they are not required to have a record certified pursuant to C.R.C.P. 106 for purposes of deciding the issues raised in their Complaint is illogical. They allege that the City Council abused its discretion in deciding their appeal of the development review decision for the Landmark Apartments Expansion Project. "An abuse of discretion occurs when a governmental body issues a decision that is not reasonably supported by any competent evidence in the record." *Canyon Area Residents for the Env't v. Bd. of Cty. Comm'rs of Jefferson Cty.,* 172 P.3d 905, 907 (Colo.App. 2006), *as modified on denial of reh'g* (Nov. 9, 2006); *Van Sickle v. Boyes,* 797 P.2d 1267 (Colo.1990); *Carney v. Civil Serv. Comm'n,* 30 P.3d 861 (Colo.App.2001). "'No competent evidence' means that the governmental body's decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.'" *Bd. of County Comm'rs v. O'Dell,* 920 P.2d 48, 50 (Colo.1996)(quoting *Ross v. Fire & Police Pension Ass'n,* 713 P.2d 1304, 1309 (Colo.1986)).

5. Thus, it is axiomatic that in order for this Court to determine whether there was an abuse of discretion as asserted by the Plaintiffs (and denied by the City), the Court must review the record considered by City Council to assess whether there is support for its decision. In fact, the express language of C.R.C.P. 106(a)(4)(I) specifically states that the court's review shall be limited to a determination of whether an abuse of discretion occurred "based upon the evidence in the record before the defendant body or officer." The Rule then goes on to provide in Sections III and IV, a process for that record to be identified, certified as authentic, and brought before the Court for review, along with briefing by the parties.

6. The Colorado appellate courts have likewise emphasized the court's review of the decision by the underlying governmental body or agency is based solely on the record that was before the governmental entity. *Prairie Dog Advocates v. City of Lakewood,* 20 P.3d 1203, 1206 (Colo.App. 2000), *as modified on denial of reh'g* (July 20, 2000); *Ross v. Fire & Police Pension*

Ass'n, 713 P.2d 1304 (Colo.1986). Thus, even if that record is inadequate, the reviewing court errs if it holds any further evidentiary hearings or attempts to gather additional evidence to supplement that record. *Prairie Dog Advocates,* 20 P.3d at 1206.

7. Accordingly, Plaintiffs' contention in their Motion to Reconsider that they have no obligation to ensure that a record for review is certified to this Court is contrary to both the letter and purpose of Rule 106. As stated in defense counsel communications to the Plaintiffs, which they quoted in their motion, their failure and refusal to ensure that a record is timely submitted to this Court is to their own detriment. Without a complete record, this Court cannot assess the Plaintiffs' claims of abuse of discretion. The Court could thus properly find that the Plaintiffs have failed to take appropriate steps to prosecute their claims, requiring dismissal of their Complaint.

8. Finally, to the extent the Plaintiffs complain that the Court entered its order for them to certify the record before they submitted their Reply brief in support of their Motion for Entry of Default, it should be noted that the Reply that they submitted later that same day did not in any way mention the City's request in its response for the Court to enter an order requiring them to take appropriate steps to get a record certified. Therefore, the Plaintiffs cannot claim any prejudice in the Court allegedly not having considered their Reply brief before issuing its order.

WHEREFORE, based upon the multiple reasons set forth above, the City respectfully requests the Court to deny the Plaintiffs' Motion to Reconsider.

DATED this 14th day of June, 2017.

Respectfully submitted,

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And

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER was SERVED via email this 14 day of June, 2017, on the following:

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