

<p>FORT COLLINS MUNICIPAL COURT 214 N. Mason Fort Collins, CO 80521 Phone: (970) 221-6800</p>	<p style="text-align: center;">COURT USE ONLY</p>
<p>Plaintiffs: COLLEEN HOFFMAN, RICK HOFFMAN, and ANN HUNT,</p> <p>v.</p> <p>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.</p>	
<p>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</p> <p>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</p>	<p>Case Number: 2017-CIVIL01</p>
<p style="text-align: center;">RESPONSE TO PLAINTIFFS' MOTION FOR DISQUALIFICATION AND MOTION FOR EXPANSION OF TIME FOR FILING OF OPENING BRIEF</p>	

COMES NOW the above-named City of Fort Collins Defendants (jointly, "the City"), by and through their 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 submit the following response to the Plaintiffs' Motion for Disqualification of Judge Pursuant to Rule 97 C.R.C.P. and Motion for Expansion of Time for Filing Opening Brief.

1. The Plaintiffs have filed a joint motion that seeks disqualification of Judge Theresa Ablao as the judge in this case, and further seeks a motion for enlargement of the time in which to file their opening brief. For the reasons discussed below, the motion to disqualify is without merit for multiple reasons. Further, the motion for expansion of time to file their opening brief, on which the Plaintiffs never conferred with defense counsel, should also be denied for the reasons stated below.

2. First, with regard to the motion for disqualification, it should be noted that the Plaintiffs cite no legal authority other than C.R.C.P. 97 itself, and the sole basis for the alleged disqualification is that the judge was formerly employed by the City of Fort Collins in the City Attorney's Office.

3. However, the motion must fail as a matter of law based upon Plaintiffs' failure to comply with the requirements of C.R.C.P. 97. That rule provides as follows:

"A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party may move for such disqualification and ***a motion by a party for disqualification shall be supported by affidavit.*** Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court administrator who shall obtain from the Chief Justice the assignment of a replacement judge." [emphasis added].

4. It should be undisputed that the Plaintiffs have failed to support their motion with any affidavit, which is a specific requirement of Rule 97. The motion is simply comprised of unsupported assertions and rhetoric. Where, as here, a party brings a motion for disqualification and fails to support the allegations in that motion with the required affidavit, such a motion is properly denied. *People v. Taylor*, 131 P.3d 1158, 1166-67 (Colo. App. 2005) (in a criminal case governed by the comparable recusal statute in the criminal setting, in the absence of the affidavits required by the statute, the Court of Appeals was unable to determine whether defendant alleged sufficient facts that would warrant a finding that the judge had bias or prejudice which would prevent him from fairly dealing with the defendant, and thus the Court of Appeals concluded the trial court properly denied the motion).

5. Notwithstanding that fatal flaw, the Plaintiffs' position that the judge must recuse herself simply because she was formerly employed by the City of Fort Collins is directly contrary to the holding of the Court of Appeals in *Board of Com'rs of Pitkin County v. Blanning*, 479 P.2d 404, 405-06 (Colo. App. 1970). There, the defendants contended the judge presiding over the case should be disqualified from hearing that quiet title action involving Pitkin County, because the judge had been the county attorney for a period of five years. *Id.* at 405. However, the Court of Appeals held that the judge's prior employment as an attorney for the County several years earlier did not, in and of itself, disqualify the judge under C.R.C.P. 97 from hearing the case, where no action of any nature was taken relative to the property in question during the period of time the judge was the county attorney. *Id.* Rather, according to the Court of Appeals,

“[t]he intent of the rule under which a judge should disqualify himself from a case if he has served as counsel for either of the parties is to insure a fair and impartial hearing of the issue involved. [cite omitted] *In the absence of a valid reason for disqualification relating to the subject matter of the litigation, the trial judge has the duty of presiding over the case.* [cite omitted].

In the instant case the subject matter of the litigation concerned title to certain property located in Pitkin County, Colorado. *No showing has been made that in his duty as county attorney seventeen years prior to the institution of this action, the trial judge was in any manner concerned with the question of title to this property*, or that the defendant’s right to a fair and impartial hearing was in any manner affected by the refusal of the trial judge to disqualify himself.” *Id.*, at 206. [emphasis added].

6. Likewise, the Plaintiffs here have made no showing whatsoever that Judge Ablao was involved in any way with the Landmark Apartments Expansion Project that is the subject of this lawsuit. In fact, according to the City records, Judge Ablao left employment in the City Attorney’s Office in May 2010, long before this Expansion Project started the development review process and came before City Council on appeal. Thus, under the principles enunciated by the Court of Appeals above, the judge has a duty of presiding over this case where the Plaintiffs have not provided a valid reason for disqualification relating to the subject matter of this litigation – and simply cannot make that required showing.

7. The City would note that the *Blanning* court’s interpretation of Rule 97 is a logical and necessary one, given the number of attorneys who have worked for municipal, county and state governments who later go on to become judges in the trial and appellate courts. If these judges were required to recuse themselves any time one of their past governmental clients was involved in court proceedings before them, regardless of whether the judge’s past work for the entity had any connection to the subject matter of the litigation, it would create significant administrative problems in the courts and create a disincentive for appointing past government attorneys to the bench. For instance, such a rigid application of the law would preclude any judge who was formerly employed as a district attorney or a public defender from hearing any criminal case for the duration of that judge’s career.

8. Accordingly, for these reasons, the Plaintiffs’ unsupported motion for disqualification is without merit and must be denied.

9. Likewise, their motion for an expansion of time to file their opening brief is without merit. Noticeably absent from the Plaintiffs’ motion in this regard is any discussion of when their opening brief is due to be filed. C.R.C.P. 106(a)(4)(VII) provides in pertinent part as follows:

“A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within 42 days after the date on which the record was filed. *If no record is requested by the plaintiff, the plaintiff shall file an opening brief within 42 days after the defendant has served its answer upon the plaintiff.*”

10. As discussed at length in prior motions and responses before this Court, the Plaintiffs have, at their peril, refused to designate a record to be certified for this Court’s review and consideration of the Plaintiffs’ claims that City Council abused its discretion. Accordingly, under the express provision of Rule 106 set forth above, the Plaintiffs’ opening brief was due within 42 days after they were served with the City’s Answer. The Court’s record will reflect that the Plaintiffs were served with the Answer on May 12, and thus their Opening Brief was due to be filed on June 23, which not coincidentally is the date on which they filed their motion for disqualification and motion for enlargement of the deadline to file their opening brief.

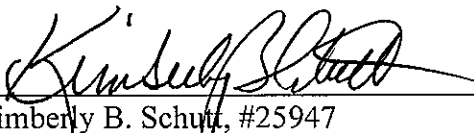
11. The Plaintiffs have provided no basis for the additional time requested to file their opening brief, other than the cited provision about the filing of a motion for disqualification under Rule 97 serving to suspend all proceedings in the case. Since, as discussed above, that motion for disqualification is without merit, the Court should deny both motions and order the forthwith submission of the Plaintiffs’ opening brief, unless the Plaintiffs can demonstrate some real need for the additional seven days beyond the extra time they have already received by virtue of the delay caused by their unsupported motion for disqualification.

WHEREFORE, the City respectfully requests the Court deny the Plaintiffs’ motions for the reasons set forth above.

DATED this 28th day of June, 2017.

Respectfully submitted,

WICK & TRAUTWEIN, LLC

By: 
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And

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CERTIFICATE OF SERVICE

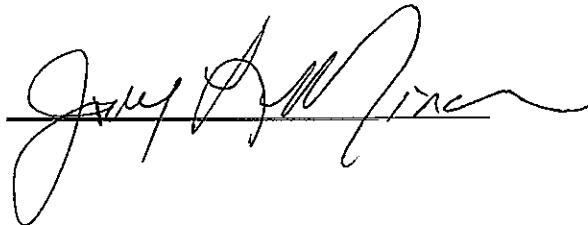
The undersigned hereby certifies that a true and correct copy of the foregoing **RESPONSE TO PLAINTIFFS' MOTION FOR DISQUALIFICATION AND MOTION FOR EXPANSION OF TIME FOR FILING OF OPENING BRIEF** was submitted via email to the Fort Collins Municipal Court at PNetherton@fcgov.com and also served via email this 28th day of June, 2017, on the following:

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A handwritten signature in black ink, appearing to read "Gina L. Tincher", written over a horizontal line.