<table>
<tr><td>FORT COLLINS MUNICIPAL COURT
214 N. Mason
Fort Collins, CO 80521
Phone: (970) 221-6800

Plaintiffs: Eric Sutherland; and J&M Distributing d/b/a Fort Collins Muffler and Automotive
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.</td><td>COURT USE ONLY</td></tr>
<tr><td>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</td><td>Case Number:

2018-CIVIL01</td></tr>
<tr><td colspan="2">CITY'S RESPONSE TO PLAINTIFFS' COMBINED MOTION FOR DISQUALIFICATION OF JUDGE AND MOTION FOR EXPANSION OF TIME</td></tr>
</table>

COMES NOW the City of Fort Collins ("the City"), on behalf of the City Council of the City of Fort Collins and the improperly named "Administration Branch of the City of Fort Collins," through its counsel, Kimberly B. Schutt of Wick & Trautwein, LLC, and respectfully submits the following response to the Plaintiffs' combined motion to disqualify the judge appointed to hear this case, and their motion for an expansion of the deadline to respond (further) to the City's Motion to Dismiss. In support hereof, the City states as follows:

I. INTRODUCTION

Plaintiffs have filed this action pursuant to C.R.C.P. 106, requesting declaratory and injunctive relief related to the City Council's decision upholding the Planning & Zoning Board approval of the Preliminary Development Plan for the Johnson Drive Apartments Project, PDP #170034. The City has moved to dismiss the action based on several legal flaws with the Plaintiffs' Complaint, which the Plaintiffs refused to voluntarily address previously. That

Motion to Dismiss is still pending with the Court.

The Plaintiffs have now submitted an Amended Complaint (not accompanied by a motion seeking leave to amend) addressing to some extent the issues raised in the Motion to Dismiss, along with a response to the City's motion. Further, the Plaintiffs have filed a motion pursuant to C.R.C.P. Rule 97 seeking to disqualify Judge Ayraud from hearing this case, and further move the Court for an expansion of time in which to amend the response to the motion to dismiss that they submitted with the Rule 97 motion.

Suffice it to say that the Plaintiffs have greatly complicated the procedural aspects of this case based on the manner in which they have submitted these various items to the Court. The City thus responds to the various requests for relief as set forth below, and seeks further guidance from the Court to address the procedural complications caused by the Plaintiffs.

PLAINTIFFS' MOTION TO DISQUALIFY

The City will first address the Plaintiffs' motion made pursuant to C.R.C.P. 97 to disqualify the appointed judge, David Ayraud, from hearing this case. Plaintiffs argue that Judge Ayraud should be disqualified because Plaintiff Eric Sutherland has filed a different action against several Larimer County officials, now pending in the Larimer County District Court. They also assert that Plaintiff Sutherland has made open records requests to Larimer County, and has such a records request currently pending. According to the Plaintiffs, because Judge Ayraud provides legal representation to the County and has dealt with Plaintiff Sutherland both in legal proceedings and in the context of these pending matters, Judge Ayraud is "so related or so connected" to Plaintiff Sutherland that it would be improper for him to hear this case.

Plaintiff is correct that he conferred with defense counsel prior to the filing of this motion, but provides just part of a sentence taken out of context from an email response from

defense counsel in stating the City's position on the motion. It was respectfully suggested that the Plaintiffs attach a copy of defense counsel's email to their motion, which they did not do. According, it is attached here as ***Exhibit 1*** and better articulates the City's complete position on this motion, as discussed below.

Further, while Plaintiffs provide the text for Rule 97, they provide no other legal authority to support their position or to assist the Court in resolving the issue of disqualification. Accordingly, the City provides more of that legal framework below.

Again, as defense counsel previously advised Plaintiffs, the fact that a particular judge has had other dealings with a party to the case, or has represented a party adverse to the plaintiff, is not in and of itself improper or grounds for disqualification under Rule 97. *See, Board of Com'rs of Pitkin County v. Blanning*, 479 P.2d 404, 405-06 (Colo. App. 1970). If that was true, any prosecutor appointed to the bench could never hear a case involving a defense attorney who regularly opposed him or her.

Rather, the rule requires a moving party to prove that the appointed judge has such an interest in the subject matter of the litigation that it would disqualify him from being fair and impartial, or that he is otherwise prejudiced to hear the case. *Id.* Or, the judge can disqualify himself based upon similar concerns under the rule. But, the moving party has to demonstrate something more specific about why the judge is interested in the subject matter or prejudiced in a way that makes him disqualified to hear this case (or the judge has to conclude *sue sponte* that he cannot fairly preside over these proceedings), not just that he has had prior dealings with one of the parties.

The Supreme Court articulated the proper analysis for disqualification under Rule 97 in *Johnson v. Dist. Court In & For Jefferson Cty.*, 674 P.2d 952, 955–56 (Colo. 1984), stating in pertinent part as follows:

> "Ordinarily, the question of whether a judge should be disqualified in a civil case is a matter within the discretion of the trial court. *In re Marriage of Mann*, 655 P.2d 814 (Colo.1982)…'The motion and supporting affidavit speak for themselves and the only question involved is whether the facts alleged are sufficient to compel the judge to disqualify himself.' *Kovacheff v. Langhart*, 147 Colo. 339, 343–44, 363 P.2d 702, 705 (1961). The motion and affidavits are legally adequate if they 'state facts from which it may reasonably be inferred that the judge has a bias or prejudice that will prevent him from dealing fairly' with the party seeking recusal. *People v. Botham*, 629 P.2d 589, 595 (Colo.1981)."

The Supreme Court then went on to say that, in order to be legally adequate to meet this standard, the facts set forth in the affidavit submitted in support of the motion to disqualify cannot be based on mere "suspicion, surmise, speculation, rationalization, conjecture, [or] innuendo," nor can they be "statements of mere conclusions of the pleader." *Id.*, citing *Carr v. Barnes*, 580 P.2d 803, 805 (1978).

The purpose and principles underlying C.R.C.P. 97 are to guarantee that no person is forced to litigate before a judge with a "bent of mind." *Johnson, 674 P.2d at 956.* "Although the trial judge is convinced of his or her own impartiality, if it nonetheless appears to the parties or to the public that the judge may be biased or prejudiced, the same harm to public confidence in the administration of justice occurs. *Id.*

As was stated in *People v. District Court*, 560 P.2d 828, 831–32 (Colo. 1977):

> "Basic to our system of justice is the precept that a judge must be free of all taint of bias and partiality. The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Moreover, not only the actuality of fairness must concern us, but the appearance of fairness as well. A trial judge must 'conduct himself at all times in a

> manner that promotes public confidence in the integrity and impartiality of the judiciary. Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but 'to retain public respect and secure willing and ready obedience to their judgments."

It is thus the Court's "duty to eliminate every semblance of *reasonable* doubt or suspicion that a trial by a fair and impartial tribunal may be denied." *Johnson,* 674 P.2d at 956,

The City wants the issues raised in this case, including in its now pending Motion to Dismiss, to be decided on the merits and in a fair and impartial manner. The City will defer to the Court to determine whether that can occur in this case, based upon the applicable standards and principles of Rule 97 discussed above, and in light of the concerns raised in the Plaintiffs' motion and affidavit (or based on any concerns the Judge himself may have, if applicable).

<u>PLAINTIFFS' MOTION FOR EXPANSION OF TIME</u>

Plaintiffs' Motion to Disqualify also includes a motion for expansion of time which is both confusing and inaccurate. The motion appears to seek leave to file a supplemental or amended response to the motion to dismiss filed by the Plaintiffs, at the same time as filing the motion to disqualify. However, as indicated above, the Plaintiffs have created a great deal of procedural complications given all the things they have done here.

First, when Plaintiff Sutherland contacted undersigned counsel to discuss a proposed motion for expansion of the deadline to file a response to the motion to dismiss, it was with the representation that he intended to file a Rule 97 motion to disqualify, and he wanted the motion for enlargement of time ruled upon prior to the filing of the Rule 97 motion because of concerns about the stay of proceedings that comes with the filing of a Rule 97 motion. He proposed extending the plaintiffs' deadline for their response to the motion to dismiss to 5 days after a ruling on the motion to disqualify. As reflected in the email communications attached to this

response as ***Exhibit 2***, defense counsel indicated the City would not object to such a request for an enlargement of the deadline (contrary to what the Plaintiffs have represented). However, that is not what the Plaintiffs did here.

The Plaintiffs' response to the Motion to Dismiss was due on May 16, 2018, namely 21 days after the motion was filed on April 25, 2018. The Plaintiffs neither filed a response to the motion nor a motion for an enlargement of the deadline on or before May 16th. Therefore, technically speaking, the Plaintiffs could be deemed to have confessed the City's Motion to Dismiss.

Notwithstanding that problem, the Plaintiffs then went ahead and filed a Rule 97 motion at the same time they filed an untimely response to the motion to dismiss, along with a motion seeking leave to amend or supplement that response at a later date. The Plaintiffs provided no good cause explanation for the late filing of the response to the motion. Their only justification for the request to later supplement their response is because of alleged ongoing discussions about the indispensable party issue.[1] They filed all of these things together, notwithstanding the prior concerns expressed by Mr. Sutherland about the stay of proceedings that would go into effect under Rule 97.

At the same time, the Plaintiffs filed an Amended Complaint which, contrary to what is represented in the motion for expansion of time, was not accompanied by a motion for leave to

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[1] The Plaintiffs assert the City Defendants "have not identified who that [indispensable] part [sic] is despite numerous inquiries by the Plaintiffs seeking information as to that identity." However, Defense counsel for the City has made it clear to Plaintiffs on multiple occasions that it is not the City's obligation to investigate and identify the proper names of the applicant owner who is the indispensable party here. That is a legal determination to be made on the facts readily available to the Plaintiffs based on public records from the development application and other materials presented at the Planning and Zoning Board hearing, and in discussions with the parties listed in those documents. The Plaintiffs have elected to represent themselves in this proceeding; the City's attorneys cannot provide them with legal advice as to how they should proceed.

amend the Complaint. Nor did Plaintiffs ever confer with the City about an intent to file an amended pleading at this point. In fact, in every conversation prior to the filing of the City's Motion to Dismiss, the Plaintiffs refused to take proper action to amend their Complaint to address the issues raised by the City. The City thus had to file its motion as the defendants' responsive pleading. Therefore, it is an understatement to say that the Plaintiffs have unnecessarily expanded and complicated these proceedings, for which the City now seeks further guidance from the Court

It is true that C.R.C.P. 97 specifically provides for a stay of proceedings upon the filing of a motion to disqualify the judge hearing the case. However, that stay precludes the judge from determining any *substantive* matter then pending before the Court, such as a motion for change of venue or a motion to dismiss, which would affect the substantial rights of the parties. Arguably, based on this language, the Court can still rule on procedural matters that do not affect the substantive rights of the parties, and the City submits that the requests outlined below do not have any such effect. Rather, they preserve the status quo and provide certainty to all parties while the Motion to Disqualify is pending. The requested guidance is as follows:

1) Since the Plaintiffs' Amended Complaint was not accompanied by a motion for leave to amend, as represented by the Plaintiffs, that the Plaintiffs may file a motion for leave to amend within 5 days of the motion to disqualify being ruled upon. The City will then have the usual 21 days to file its response to the motion to amend;
2) That the Amended Complaint has not been accepted for filing, and the City has no obligation to file a responsive pleading to it, unless and until such a motion is submitted to the Court and a judge grants said motion. Obviously, no such ruling on

that issue can be made until the motion to disqualify is resolved and, if granted, a new judge is appointed to hear the case; and

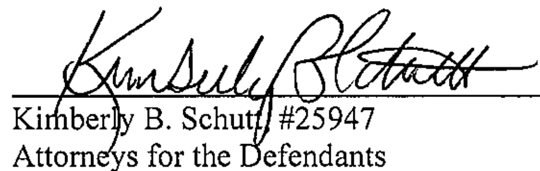
3) The City has no obligation at this time to file a Reply in support of the Motion to Dismiss, until it is determined whether the Plaintiffs are granted leave to supplement their response to the motion and these other issues are sorted out. Because of the untimely filing of the plaintiffs' response to the motion to dismiss, the City believes the request for leave to supplement that response is a substantive issue which must be deferred until the Motion to Disqualify is addressed

WHEREFORE, the City respectfully requests the Court issue an order clarifying these issues as set forth above, in order to alleviate the complications caused by the manner in which the pro se Plaintiffs have proceeded here.

DATED this 22 day of May, 2018.

Respectfully submitted,

WICK & TRAUTWEIN, LLC

By: 

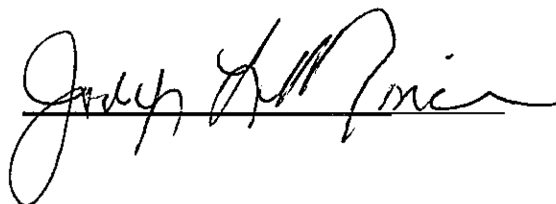
Kimberly B. Schutz #25947
Attorneys for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing RESPONSE TO THE PLAINTIFFS' MOTION FOR DISQUALIFICATION OF JUDGE AND MOTION FOR EXPANSION OF TIME via email to the addresses listed below, this 22 day of May, 2018, on the following:

Eric Sutherland
3520 Golden Currant
Fort Collins, CO 80521 *Via email to sutherix@yahoo.com*

Brian Dwyer
J&M Distributing, dba Fort Collins Muffler and Automotive
2001 S. College Avenue
Fort Collins, CO 80525 *bdwyer1199@gmail.com*



kschutt@wicklaw.com

From: kschutt@wicklaw.com
Sent: Monday, April 30, 2018 6:26 PM
To: 'Eric Sutherland'; 'bdwyer1199@gmail.com'
Cc: CDAGGETT@fcgov.com; 'John Duval (jduval@fcgov.com)'; 'Cary Alton'
Subject: RE: conference on rule 97 Motion

Good evening, Mr. Sutherland - I apologize it took until late in the day to respond, but we had a case of competing schedules here today. I just now finally had a meaningful opportunity to discuss the City's position on your proposed motion.

Let me begin by saying that, under Rule 97 and the case law interpreting it, the fact that Judge Ayraud has defended several legal matters you have pursued against the County does not in and of itself make him disqualified to hear this case. If that was true, any prosecutor appointed to the bench could never hear a case involving a defense attorney who regularly opposed him or her.

The rule requires a moving party to prove that the appointed judge has an interest in the subject matter of the litigation that would disqualify him from being fair and impartial, or is otherwise prejudiced to hear the case. Or, the judge can disqualify himself based upon similar concerns under the rule. But, you have to demonstrate something more specific about why he is interested in the subject matter or prejudiced in a way that makes him disqualified to hear this case (or he has to conclude sue sponte that he cannot fairly preside over these proceedings) not just that he has had prior dealings with you on behalf of the County. Moreover, disqualification is not something to which parties can stipulate in a motion; the required showing of interest or prejudice has to be made, with a record as to the basis for the disqualification.

So, with that said, I would respectfully suggest you articulate your concerns in your motion and make the required showing under Rule 97. The City will not necessarily oppose the relief if you outline valid concerns, and will respect Judge Ayraud's decision if he decides to disqualify himself on his own volition. The City may respond to the motion if it feels necessary to provide the judge with further facts or legal authority to make that determination. However, the City cannot properly "consent" or stipulate to disqualification of the judge.

For purposes of your motion, you may indicate you conferred on this issue and that the City will not necessarily oppose the motion if a proper showing is made for disqualification under Rule 97. It would probably be helpful for you to attach a copy of this email to your motion.

Please let me know if you have any questions, and have a good evening.

Kimberly B. Schutt, Esq.

Wick & Trautwein, LLC
323 S. College Avenue, Suite 3

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P: 970-482-4011 * 866-686-1410
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From: Eric Sutherland <sutherix@yahoo.com>
Sent: Monday, April 30, 2018 4:01 PM
To: kschutt@wicklaw.com
Cc: Brian Dwyer <bdwyer1199@gmail.com>; Carrie Daggett <cdaggett@fcgov.com>
Subject: Re: conference on rule 97 Motion

There is no reason why the relief requested should be opposed.

From: "kschutt@wicklaw.com" <kschutt@wicklaw.com>
To: Eric Sutherland <suther

ix@yahoo.com>
Cc: Brian Dwyer <bdwyer1199@gmail.com>; Carrie Daggett <cdaggett@fcgov.com>
Sent: Friday, April 27, 2018 2:03 PM
Subject: RE: conference on rule 97 Motion

Mr. Sutherland - I am in receipt of your email. I am in meetings this afternoon and will need to confer with my City clients. I probably won't have a meaningful chance to do so until Monday. I will respond with the Ciry's position in due course.

Kim Schutt
-----Original Message-----
From: "Eric Sutherland" <sutherix@yahoo.com>
Sent: Friday, April 27, 2018 12:30pm
To: "K. Schutt" <kschutt@wicklaw.com>
Cc: "Brian Dwyer" <bdwyer1199@gmail.com>
Subject: conference on rule 97 Motion

Ms. Schutt,

I do not think that better evidence could ever be presented to support the allegation that Kathleen Lane simply is not taking the administration of her court seriously than the appointment of David Ayraud.

In all sincerity, I appreciate Mr. Ayraud's interest in participating in the municipal court. However, the idea of having any person employed by the Office of the County Attorney preside over a matter in which I am a party is simply nuts.

I have many legal disputes with Larimer County. They apply an unlawful "abatements and refund" levy. The Treasurer places delinquencies from the BBRSA on property tax notices without due process. The entire ... and I do mean entire ... circumstances underlying the diversion of 5% of tax revenue attributable to County mill levies to TIF scams is plagued by either incompetence on the part of the County Attorney's office or corruption somewhere above. There is not a single dollar that is diverted that does not suffer one or more infirmities that should preclude its diversion.

David Ayraud, of course, works for a public entity that is in the middle of all of this. Furthermore, Mr. Ayraud has, for all practical purposes, served as the custodian of records of every single public records request I have made of Larimer County except for a handful that were answered directly by the Treasurer or the Assessor. In the last such request (four weeks ago), Mr. Ayraud failed to include a critical email from a request for records. The email was written by Steve Johnson in which Johnson told the TDA that it did not need to reform the Board of Commissioners to include school, county and special district representatives prior to the occasion of creating an additional $25 million in debt, which is ironic because Johnson was the source of the legislative initiative to have county representatives on URA boards. Mr. Ayraud, like yourself, would have no problem understanding that the TDA's action was not consistent with law. However, there are times where attorneys are compromised. This was one of them.

As all of the issues mentioned here and maybe more are headed into litigation, it is implausible to hold that Mr. Ayraud should adjudicate this matter. I would be very surprised to learn that Mr. Ayraud disagrees, but life is full of surprises.

Please provide your position on a Motion to disqualify.

Eric Sutherland

kschutt@wicklaw.com

From:	kschutt@wicklaw.com
Sent:	Tuesday, May 15, 2018 1:13 PM
To:	'Eric Sutherland'
Cc:	'Brian Dwyer'; CDAGGETT@fcgov.com; 'John Duval (jduval@fcgov.com)'
Subject:	RE: Conference: Motion for expansion of time to file Response
Attachments:	DOC008.PDF

Good afternoon, Mr. Sutherland -

The City will not object to the plaintiffs' request for an enlargement of time as you have outlined below. You may indicate it is unopposed.

As for your latter question, I cannot give you legal advice as to how to frame your claims with regard to the indispensable party. For your information, however, I am sharing a copy of an order which was just entered yesterday by Judge Odell in a similar situation pending in the Larimer County District Court, which you may find somewhat instructive on these issues and supportive of the City's position in this case. That order is attached to this email.

I trust you will be filing your motion for enlargement of time very soon, and will provide us with a copy of the motion when it is submitted to the municipal court.

Sincerely,

Kimberly B. Schutt, Esq.

Wick & Trautwein, LLC
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F: 970-482-8929
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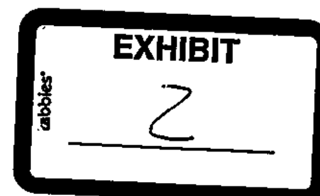

From: Eric Sutherland <sutherix@yahoo.com>
Sent: Monday, May 14, 2018 3:14 PM
To: K. Schutt <kschutt@wicklaw.com>
Cc: Brian Dwyer <bdwyer1199@gmail.com>
Subject: Conference: Motion for expansion of time to file Response

Ms. Schutt,

Please provide your position on a Motion for expansion of time to file response to the city's Motion to dismiss.

I wish for the court to grant an expansion of time that will allow a minimum of 5 business days after a ruiling on the Rule 97 motion for the Response to be filed.

I wish for the court to rule on this motion prior to the stay that will go into effect upon filing the Rule 97 motion.

I request that this Motion be unopposed by the City.

I still have not been able to determine the identity of the party which you believe should be named as an indispensable party. I still do not know whether you think this party should be named as a defendant or plaintiff. If defendant, can you explain why you believe that the interests of this party are not adequately represented by the City?

My only thoughts here are that the interests of the party are separate and different from the city in that this party would miles ahead to have this matter remanded back to P & Z, have the issues we raised addressed, and then get on with things. The city's objection to this course of action recommends that I name this party as a plaintiff, does it not?

Eric Sutherland