FORT COLLINS MUNICIPAL COURT 215 N. Mason Fort Collins, CO 80521 Phone (970) 221 6800	
Plaintiffs: Eric Sutherland, J & M Distributing, DBA Fort Collins Muffler and Automotive v. **Defendant :** 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. **Indispensable party:** Craig Russell, Applicant	▲ **COURT USE ONLY** ▲ Case Number: 2018civil01
Parties without attorney Eric Sutherland 3520 Golden Currant Fort Collins, CO 80521 (970) 224 4509 sutherix@yahoo.om Brian Dwyer 2001 S. College Ave. Fort Collins, CO 80525 (970) 484 0866 bdwyer1199@gmail.com	
2ND AMENDED COMPLAINT BROUGHT UNDER C.R.C.P. RULE 106, AND REQUEST FOR DECLARATORY JUDGMENT	

Plaintiffs, Eric Sutherland and J & M Distributing, in this Complaint alleging abuse of discretion by the City Council of the City of Fort Collins and request for declaratory judgment, hereby state and allege as follows:

Introduction

The City of Fort Collins (the City) is a home rule municipality in the state of Colorado. Pursuant to authority granted Article XX section 6 of the Colorado Constitution, the City of Fort Collins has adopted a City Charter. By adoption of a home rule City Charter (the Charter), the City has claimed authority over all planning and zoning issues in the City. All powers of the city and the

determination of all matters of policy pertaining to planning and zoning are vested in the Defendant City Council. See Charter Article II section 5 (b) (8).

The powers of the City in the field of planning and zoning include the exclusive authorization for the construction of improvements on real property within the corporate limits of the City and no improvements may be constructed without such authorization. The process of granting authorization for the construction of improvements, also referred to as vested rights, is generally known as development review and is defined and controlled by the laws of the City of Fort Collins as adopted by Ordinance of the Council and amended from time to time in the City Code, the Land Use Code and the zoning map.

Article VII section 1 of the Charter states, in relevant part:

> There shall be a Municipal Court vested with original jurisdiction of all causes arising under the City's Charter and ordinances. …
>
> Rules of procedure, costs and fees shall be enacted by the Council upon recommendation of the Municipal Judge.

The Supreme Court of the State of Colorado has ruled that language substantially similar to that of Article VII section 1 means precisely what it says. The Municipal Court of the City of Fort Collins has exclusive original jurisdiction over this matter. *See Town of Frisco v Baum,* 90 P. 3d 845 (Colo 845). In response to the first ever civil suit filed in this court in 2017, 17civil01, defendant City Council did adopt procedures for adjudicating civil matters brought to the municipal court. *See* Ordinance 052, 2017 adopted on 2nd reading April 18th, 2017. The effect of Ord. 052 was to adopt the Colorado Rules of Civil Procedure C.R.C.P. to govern the procedures in this court in all civil matters arising from Charter, Code and City Ordinances.

The City of Fort Collins has, for a long period of time, conducted its administrative and quasi-judicial affairs in the arena of development review with a general disregard for rule of law. The legislative intent of the standards for development review and the very modest protections that such standards provide the citizens of Fort Collins are ill observed. The present case brought before the Municipal Court brings the bad faith and exploitation into view and exposes various deficiencies in process at the same time. The failure to refine and evolve process and the absence of fidelity to the purpose of the ordinances that control development review may be traced to an administrative paradigm that has lost sight of the public interest.

Parties

1. The City of Fort Collins is a home rule municipality located in Larimer County, Colorado and organized by a City Charter adopted in accordance with Article XX section 6 of the Colorado constitution.

2. The Defendant Administrative Branch of the City of Fort Collins is under the supervision and control of the City Manager, Darin Atteberry, pursuant to Article III of the Charter. In particular, the administrative affairs of the Defendant Administrative Branch include the granting of final vested rights in development review proceedings including but not limited to the execution of a development agreement with the City, re-platting of land and the approval of a Final Development Plan (FDP) in accordance with Division 2.5 of the Land Use Code.

3. The Defendant City Council of the City of Fort Collins is the governing body of the City of Fort Collins pursuant to Article II of the charter. In particular, the Defendant City Council's review of appeals from development review hearings conducted by the Planning and Zoning Board lies in mandamus and is quasi-judicial in nature.

4. Although individually named, both the Administrative Branch and City Council are components of the City of Fort Collins, an independent sub-division of the state of Colorado. Whether these two parties are named individually or collectively is of no consequence in this matter in terms of the relief requested. This court has jurisdiction over both. However, the municipal corporation as a whole may not be named in this action for the simple reason that the Municipal Court is, itself, a component of the municipal corporation and it would be absurd to name the court that is adjudicating a lawsuit as a party to the lawsuit.

5. Plaintiff Eric Sutherland is a citizen of Fort Collins. Sutherland was an interested party in the review of the application for vested rights by the Fort Collins Planning and Zoning Board by virtue of appearing at the Planning and Zoning Board hearing and providing public comment. Sutherland was one of two appellants who filed a joint appeal of the Planning and Zoning Board decision.

6. Brian Dwyer is the President of J & M Distributing, an S-corporation with operations in Fort Collins proximate to the subject property doing business as Fort Collins Muffler and Auto. Mr. Dwyer is also a co-owner of J & M Distributing and has financial interests in the continued success of the business. Brian Dwyer, represented the company with comments to Council on the occasion of the appeal of the Planning and Zoning Board decision in PDP#170034. J & M Distributing was an interested party for purposes of appeal by virtue of property owned by the company within the notification area of for the Planning and Zoning Board hearing.

Venue

7. The Municipal Court of the City of Fort Collins has original jurisdiction of all matters arising from the Charter and ordinances of the City of Fort Collins. (See Introduction and Article VII of the Charter). All matters complained of and all requests for injunctive relief here arise from the Charter and ordinances of the City. All actions of the Defendant City Council complained of herein are matters of exclusively local interest. All controlling laws in this matter are local laws that have been duly adopted in a field of exclusively local interest. All administrative actions of the Defendant Administrative Branch sought to be modified and restrained by the Plaintiffs are exclusively matters of local control. Venue is proper in this court.

Jurisdiction

8. The Plaintiffs herein allege an abuse of discretion by the Defendant City Council in failing to ensure that the laws of the City of Fort Collins applicable to review of a proposed construction of improvements on property within the city limits were applied uniformly and fairly. Said laws create for the Plaintiffs a legally protected right to the use and enjoyment of the Fort Collins community whether on public or private property. The Plaintiffs further allege that this abuse of discretion will deprive Plaintiffs of property rights and rights under law. The Land Use Code of the City of Fort Collins creates legally protected rights for citizens. All citizens of Fort Collins have the legal expectation that the community they live in or own property in will develop in the manner agreed to by the adoption of the Land Use Code. Any development that proceeds in a manner inconsistent with the requirements of the Land Use Code creates an injury-in-fact whether it be a tangible or intangible injury. The Muncipal Court of the City of Fort Collins has subject matter jurisdiction over this dispute.

9. The Defendant Administrative Branch of the City of Fort Collins is required by Article III section 2 (f) to enforce the laws and ordinances of the city. The award of vested development rights to a party for a proposed construction of improvements that is inconsistent and incompatible with the standards of the Land Use Code is a failure to enforce the laws and ordinances of the city. The Municipal Court of the City of Fort Collins has jurisdiction over the Defendant Administrative Branch in this dispute.

10. The decisions of the Defendant City Council of the City of Fort Collins, when acting in a quasi-judicial capacity for the purposes of reviewing matters of exclusively local interest is subject to further judicial review by a superior court.

The Municipal Court of the city of Fort Collins is a superior court by virtue of Article VII of the Charter and the decision of the Colorado Supreme Court in *Town of Frisco v. Baum*, supra. The Municipal Court of the City of Fort Collins has jurisdiction over the Defendant City Council in this dispute.

General allegations

11. On January 18th, 2018, the Planning and Zoning Board (the "Board") reviewed and approved the Johnson Drive Apartments Project Development Plan PDP#170034 (the "PDP" or "Project").

12. A Notice of Appeal of the Board's approval of the PDP was filed with the City Clerk on February 1, 2018, pursuant to Chapter 2, Article II, Division 3, of the City Code by Eric Sutherland and another citizen of Fort Collins. See exhibit 1.

13. Generally, the appeal noted in the preceding paragraph alleged that the Planning and Zoning Board had failed to apply relevant standards of the Land Use Code. *See* Grounds for the Appeal 1-4. A fifth Grounds alleged that standards appearing in the LUC were unconstitutionally vague and were also unenforceable and were therefore insufficient for the purposes of protecting the rights of the public set forth in the LUC. Also, the appeal alleged that the Board received and considered evidence that was substantially false or misleading.

14. On February 27, 2018, the defendant City Council, after notice given in accordance with Chapter 2, Article II, Division 3, of the City Code, considered the Appeal. As is the custom of Defendant Administrative Branch, the staff of the City of Fort Collins planning department participated in the appeal process in a substantial capacity with an undisputable bias shown to the position of the opponent of the Appeal.

15. Defendant City Council, by motion and affirmative vote, found that the Appeal was without merit as to all allegations. The practical effect of that decision was made official pursuant to City Code by the adoption, at its next regular meeting held on March 6, 2018, of RESOLUTION 2018-023 OF THE COUNCIL OF THE CITY OF FORT COLLINS ADOPTING FINDINGS OF FACT AND CONCLUSIONS MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE APPEAL OF THE PLANNING AND ZONING BOARD'S DECISION APPROVING THE JOHNSON DRIVE APARTMENTS PROJECT DEVELOPMENT PLAN PDP170034. See exhibit 2, the Resolution.

First claim for relief

16. The Plaintiffs incorporate the General Allegations as if fully set forth herein.

17. The first of five grounds for the appeal generally alleged that deferring the sufficiency of any aspect of a development controlled by the Land Use Code runs counter to the legislative intent of the Code and alleged that a determination of the sufficiency of a design for a trash enclosure as controlled by LUC section 3.10.5(C) had been deferred. This allegation is unquestionably an allegation that the Board had failed to properly interpret and apply LUC section 2.4.2(H), Step 8. *See* Exhibit 1.

17. The materials presented to the Planning and Zoning Board did not include a design schematic or specifications of any kind that described the trash enclosure other than a plan view that indicated the location and approximate size of the footprint of a proposed trash enclosure.

18. As it applies specifically to this claim, the specifications for the sufficiency of a trash enclosure require compatibility with adjacent land uses. *See* Land Use Code section 3.10.5(C).

19. The adjacent land uses of the proposed trash enclosure are a well-traveled pedestrian and bicycle trail and a real gem of a public park. In particular, the trail passes right next to the proposed site of the trash enclosure as it makes a tight curve. The presence of a potential trash enclosure, if added to this location, will be the dominant feature proximate to any user of the trail.

20. The transcript of the January 18, 2018 Planning and Zoning Board hearing clearly indicates that the Board did not pass any judgment let alone a judgment on the compatibility of the proposed design with adjacent land uses.

21. Instead, the record of the hearing shows the Board deferring a decision on compatibility to others.

22. Under the Land Use Code, a determination of the compatibility of a trash enclosure lies exclusively in the sound discretion of the Board.

23. In considering the matter of the abdication of the Board to judge the sufficiency of a design for a trash enclosure as to its compatibility, defendant City Council abused its discretion by disregarding the preponderance of evidence that indicated that the Board had abdicated its exclusive discretion over compatibility to others in a manner that is inconsistent with the requirements of Land Use Code section 2.4.2(H) step 8.

24. It is without question that the record on appeal shows the defendant City Council misapprehending the allegation and relying upon fraudulent assurances and mistaken representations from city staff to conclude that somehow the Board, which had not seen a design for trash enclosure, had somehow judged the sufficiency of the trash enclosure as to its compatibility with adjacent land uses. In fact, city staff erroneously represented that the trash enclosure, which had never

been documented with design specifications, met the requirements of the Land Use Code.

25. The First grounds for Appeal was a correct and accurate representation of the requirements of the Land Use Code and the failure of the Board to properly interpret and apply these requirements. Defendant City Council abused its discretion by disregarding matters of fact and law and finding that the First Grounds for Appeal was without merit. This matter must be remanded to defendant City Council with instructions to remand this matter back to the Board for a determination of the sufficiency of a design for a trash enclosure.

Second claim for relief

26. The Plaintiffs incorporate the General Allegations and the First claim for relief as if fully set forth herein.

27. The Second grounds for the appeal generally complained that the PDP was not in compliance with the requirements of the General Commerical Zone, Land Use Code section 4.21. Specifically, the Appeal noted the absence of a pedestrian/bicycle pathway from the subject property to the adjacent property to the South and points beyond including the MAX BRT station, (Spring Creek Station.) The suggested remedy for the deficiency brought forth in the Second grounds was, at a minimum, a dedication of public right of way.

28. Although suggested as a remedy, the failure to dedicate a right of way was the crux of the allegation in the Second grounds for the Appeal.

29. In addition to the requirements for the General Commercial Zone, the Land Use Code contains many requirements for connectivity of subject parcels to adjacent and proximate parcels and areas. Specifically, Land Use Code section 3.2.2 contains several requirements for connectivity that operate harmoniously and in support of the General Commercial Zone requirements.

30. Under modern rules of pleading, courts look to the "essence of a claim regardless of how it is denominated." *Bainbridge, Inc. v. Travelers Casualty Co*., 159 P.3d 748, 755 (Colo.App.2006); see also *Hutchinson v. Hutchinson*, 149 Colo. 38, 41, 367 P.2d 594, 596 (1961) ("The substance of the claim rather than the appellation applied to the pleading by the litigant is what controls."); *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714, 718 (Colo.App.2009) ("the claim's substance rather than [its] appellation ... controls"). Although specific citations of provisions of the Land Use Code such as 3.2.2 were not presented upon appeal, the essence of the claim was unquestionably clear.

31. The defendant City Council misapprehended the requirements of the Land Use Code in regards to the failure of the Board to require connectivity of the subject parcel with the area to the South including Spring Creek Station.

Specifically, defendant City Council, at the urging of Councilman Gerry Horak, invented a theory that connectivity is only required when a sub-area plan has been developed that prescribes certain trails or other public rights of way. Reliance on this theory, as opposed to the actual requirements of the Land Use Code was misplaced and resulted in an abuse of discretion when finding the allegations of the Second grounds for the Appeal to be meritless.

32. Additionally, several members of Defendant City Council voiced support for improved connectivity in this area and the deficiencies of pedestrian and bicycle connections that presently exist.

33. The Second grounds for Appeal was a correct and accurate representation of the requirements of the Land Use Code and the failure of the Board to interpret and apply these requirements. Defendant City Council abused its discretion by disregarding matters of fact and law and finding that the First Grounds for the Appeal was without merit. This matter must be remanded to defendant City Council with instructions to remand this matter back to the Board for inclusion of proper design and right of way conveyance in keeping with the requirements of connectivity for bicyclists and pedestrians as specified in the Land Use Code.

Third claim for relief

34. The Plaintiffs incorporate the General Allegations and the First and Second claims for relief as if fully set forth herein.

35. The Fifth grounds for the Appeal generally alleged that allowances that provide for a reduction of the number of parking spaces built into a residential housing project in the Transit Oriented Development ("TOD") zone are unconstitutionally vague and unenforceable. Reliance upon unconstitutionally vague and unenforceable allowances, which are also referred to as mitigation strategies, subverts the legislative intent of the Land Use Cole and abridges the rights of all citizens within the community in general and residents and business of neighboring properties in particular.

36. The PDP was not clear as to what mitigation strategies the applicant was claiming, however, it was assumed that 1.) Car sharing and 2.) transit passes were claimed and responsible for a reduction in the number of parking spaces that were otherwise required. The requirements for parking in the TOD and the mitigation strategies that may be employed to reduce the number of parking spaces are found in Land Use Code section 3.2.2 (K).

37. No operational understanding of what "Car Share" means or requires of the applicant was adduced by the Board during the hearing of the PDP. No

expectation of what could be expected was defined or explained. No conditions for approval relating to this issue were imposed.

38. The mitigation strategy for "Car Share" in the TOD is unconstitutionally vague. As such, it is improper to rely upon any claim that the requirements for parking may be reduced as a result of compliance with this standard in the absence of definitions or operational understandings that are captured in the course of development review, most likely as the imposition of conditions.

39. The Defendant City Council misapprehended the sufficiency of the mitigation strategy pertaining to "Car Share" while failing to note that the Board had taken no steps to assure compliance with the legislative intent of the parking requirements in the TOD in light of an unconstitutionally vague mitigation strategy and the absence of any attempt to define the necessary elements of the strategy.

40. The Fifth grounds for the Appeal was a correct and accurate representation of the vagueness of the mitigation strategy described only as "Car Share" and the failure of the Board to properly specify conditions to ensure that a reduction in required parking spaces did not compromise the legislative intent of the parking requirements for residential housing in the TOD. Defendant City Council abused its discretion by disregarding matters of fact and law and finding that the Fifth Grounds for the Appeal was without merit as it pertained to the vagueness of the "Car Share" allowance. This matter must be remanded to defendant City Council with instructions to remand this matter back to the Board for the specification of conditions for "Car Share" commensurate with the reduction of parking spaces associated with the claimed level of "Car Share" upon which the reduction was based.

41. The Plaintiffs respectfully request that this court issue a declaration that the mitigation strategy for "Car Share" is unconstitutionally vague and that without further clarification presented in codified ordinance of the City of Fort Collins do not represent an adequate means for effecting a reduction of parking spaces that would otherwise be required in the TOD.

Fourth claim for relief

42. The Plaintiffs incorporate the General Allegations and the first, second and third claims for relief as if fully set forth herein.

43. No operational understanding of what "Transit Passes" means or requires of the applicant was adduced by the Board during the hearing of the PDP. No expectation of what could be expected was defined or explained. No conditions for approval relating to this issue were imposed.

44. The mitigation strategy for "Transit Passes" in the TOD is unconstitutionally vague. As such, it is improper to rely upon any claim that the

requirements for parking may be reduced as a result of compliance with this standard in the absence of the definitions or operational understandings that are captured in the course of development review, most likely as the imposition of conditions.

45. The Defendant City Council misapprehended the sufficiency of the mitigation strategy pertaining to "Transit Passes" while failing to note that the Board had taken no steps to assure compliance with the legislative intent of the parking requirements in the TOD in light of an unconstitutionally vague mitigation strategy and the absence of any attempt to define the necessary elements of the strategy.

46. The Fifth grounds for the Appeal was a correct and accurate representation of the vagueness of the mitigation strategy described only as "Transit Passes" and the failure of the Board to properly specify conditions to ensure that a reduction in required parking spaces did not compromise the legislative intent of the parking requirements for residential housing in the TOD. Defendant City Council abused its discretion by disregarding matters of fact and law and finding that the Fifth Grounds for the Appeal was without merit as it pertained to the vagueness of the "Transit Passes" allowance. This matter must be remanded to defendant City Council with instructions to remand this matter back to the Board for the specification of conditions for "Transit Passes" commensurate with the reduction of parking spaces associated with the claimed level of "Car Share" upon which the reduction was based.

47. The Plaintiffs respectfully request that this court issue a declaration that the mitigation strategy for "Transit Passes" is unconstitutionally vague and that without further clarification presented in codified ordinance of the City of Fort Collins do not represent an adequate means for effecting a reduction of parking spaces that would otherwise be required in the TOD.

Fifth claim for relief

48. The Plaintiffs incorporate the General Allegations and the first, second third and fourth claims for relief as if fully set forth herein.

49. The adoption of a mitigation strategy for either "Car Share" or "Transit Passes" is meaningless in terms of effecting the legislative intent of the parking requirements in the TOD without a guaranty that these strategies will be employed.

50. With the exception of those requirements allowing and disallowing for specific uses of property in different zone districts that are found in Article 4 of the Land Use Code, all other standards of development are enforceable by the defendant City Administration by virtue of the ability to deny a certificate of occupancy to a development that has not complied with the standards.

51. Article 4 standards for use are enforceable under a paradigm of local and state laws for the maintenance of zone districts.

52. "Car Share" and "Transit Passes" can not be construed to be a use in keeping with the uses defined and in Article 4. Furthermore, "Car Share" and "Transit Passes" are not specific to a zone district as they are only relevant in the context of parking standards in the TOD. "Car Share" and "Transit Passes" may not be enforced by the application of state and local laws in the event of a failure to comply with whatever "Car Share" and "Transit Passes" may be deemed to be.

53. No other means of enforcing "Car Share" or "Transit Passes" exists that may be relied upon for assurance that the mitigation presumed to compensate for a reduction in the number of parking spaces will fulfill the legislative intent of the parking standard for residential development in the TOD.

54. In the Appeal, city staff erroneously suggested that relief would be available by virtue of language added to a development agreement. This statement is only accurate to the extent that a court of law may order specific performance for a breach of contract. Such a remedy is unacceptable in that it relies upon state courts for enforcement, requires civil action on the part of the City of Fort Collins and provides for no disincentive or penalty for non-compliance.

55. As a Home Rule City, defendant City Council has the authority to legislate in the area of enforcement of terms of development agreements including the imposition of fines and/or imprisonment for violations of terms of development agreements. However, defendant City Council has not so legislated.

56. The Fifth grounds for the Appeal was a correct and accurate representation of the unenforceability of the mitigation strategies described only as "Car Share" and "Transit Passes". Defendant City Council abused its discretion by disregarding matters of fact and law by finding that the Fifth Grounds for the Appeal was without merit as it pertained to the unenforceability of the "Car Share" and "Transit Passes" allowance.

57. The Plaintiffs respectfully request that this Court issue a declaration that the unenforceability of "Car Share" and "Transit Passes" precludes any reduction in the number of parking spaces required of residential housing in the TOD as a mitigation strategy.

Prayer for relief

WHEREFOR, Plaintiffs pray that this Court issue the aforementioned declarations; enter judgment for Plaintiffs on each operable claim; and provide such other and further relief as the Court deems just and proper.

Respectfully submitted this 15th day of June, 2018

Eric Sutherland

Eric Sutherland

Brian Dwyer

Brian Dwyer

Address of Lead Plaintiff
3520 Golden Currant
Fort Collins, CO 80521