

<p>FORT COLLINS MUNICIPAL COURT  214 N. Mason  Fort Collins, CO 80521  Phone: (970) 221-6800</p>	<p>COURT USE ONLY</p>
<p><b>Plaintiffs: Eric Sutherland; and J&amp;M Distributing d/b/a Fort Collins Muffler and Automotive</b></p> <p>v.</p> <p><b>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.</b></p> <p><b>Intervenor: NEXT CHAPTER PROPERTIES, LLC, an Illinois Limited Liability Company.</b></p>	
<p>Kimberly B. Schutt, #25947  WICK &amp; 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>Case Number:   2018-CIVIL01</p>
<p style="text-align: center;"><b>ANSWER</b></p>	

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 for its Answer to Plaintiff’s Second Amended Complaint filed June 18, 2018, states to the Court as follows:

1. The first section of the Plaintiffs’ Complaint, entitled “Introduction,” does not make factual allegations that require a response in the way of an admission or denial; rather, it is comprised of several paragraphs summarizing the Plaintiffs’ general legal arguments with references to the Colorado Constitution, the Fort Collins Home Rule Charter, the Fort Collins Municipal Code and Land Use Code (“LUC”). The extensive legal argument made in the Introduction is not a short and plain statement of the claim and is thus improper under Rule 8 of the Colorado Rules of Civil Procedure. The legal sources cited in the Introduction speak for themselves. The City generally denies the other arguments and assertions made by the Plaintiffs in the Introduction, particularly their assertions that the City has disregarded the law and engaged in bad faith in its development review process.

2. Beginning under the heading “Parties”, the City admits the allegations of Paragraph 1 of the Second Amended Complaint.

3. With respect to Paragraph 2 of the Second Amended Complaint, the City admits that, pursuant to Chapter 2, Article III, Section 1, the City Manager, who is currently Darin Atteberry, is the chief executive officer and head of the administrative branch of the city government. The powers and duties of the City Manager and the administrative branch of government, particularly as they relate to planning and zoning issues, are set forth in numerous provisions of the City Charter, City Code and Land Use Code, which provisions speak for themselves. However, the City denies that the “Administrative Branch of the City of Fort Collins” is a properly named defendant, as the administrative branch of the City is not a legal entity capable of being sued separate and apart from the City of Fort Collins itself. All departments and branches of its government are part of the municipal corporation, such that the City itself is the only proper defendant under the circumstances alleged. *See*, City Charter IV, § 2 and City Code Chapter 2, Article V. It thus answers this Complaint on behalf of the improperly named defendant.

4. With regard to the allegations of Paragraph 3 of the Plaintiffs’ Second Amended Complaint, the City denies that the City Council’s review of appeals from the development review hearing by the Planning and Zoning Board lies in mandamus. The City admits the remaining allegations of Paragraph 3 of the Plaintiffs’ Second Amended Complaint.

5. With regard to paragraph 4 of the Plaintiffs’ Second Amended Complaint, the City admits that the Administrative Branch and the City Council are branches of the municipal government and thus “components” of the municipality. The City also admits that it is a home rule municipal corporation in the State of Colorado, with its “independence” and powers as such set forth in Article XX, Section 6, of the State Constitution. The City denies the remaining allegations of Paragraph 4.

6. The City generally admits the allegations of Paragraph 5 of the Second Amended Complaint.

7. With regard to the allegations of Paragraph 6 of the Second Amended Complaint, the City admits that J&M Distributing is a Colorado Corporation doing business in Fort Collins as Fort Collins Muffler and Auto, and that Brian Dwyer is a registered agent of the corporation. The City also admits that Brian Dwyer addressed the City Council during the appeal hearing on February 27, 2018, and represented himself as speaking on behalf of Fort Collins Muffler and Auto. The City is without sufficient information and belief to either admit or deny the remaining allegations of Paragraph 6, and therefore must deny the same.

8. With regard to the allegations of Paragraph 7 of the Plaintiffs’ Second Amended Complaint, under the heading “Venue,” the City admits that Article VII, Section 1 of the City Charter confers original jurisdiction on the municipal court to hear all matters arising under the City’s Code and Charter. The City further admits that the issues raised in this action arise under the City’s Code and Charter, such that that this Court has original jurisdiction and is the proper venue for this action, though the Plaintiffs also had an available remedy in state district court

under C.R.C.P. 106 and 65.

9. Beginning under the heading “Jurisdiction,” as to the allegations in Paragraph 8 of the Plaintiffs’ Second Amended Complaint, the City admits the Plaintiffs’ Complaint alleges an abuse of discretion on the part of the City Council. The City also admits that the Plaintiffs allege in their Complaint that they were caused certain damages or deprived of certain rights by the purported abuse of discretion. However, the City denies that any such abuse of discretion or deprivation/damage occurred here. The City admits the Municipal Court has subject matter jurisdiction over the matter based on what has been alleged in the Plaintiffs’ Complaint. The City is without sufficient information and belief to either admit or deny the remaining allegations of Paragraph 8 of the Plaintiffs’ Second Amended Complaint, and therefore must deny the same.

10. The City denies the allegations of Paragraph 9 of the Plaintiffs’ Second Amended Complaint, as stated. Article III, Section 2 of the City Charter sets forth the powers and duties of the City Manager, in the proper administration of the affairs of the City, including the power to enforce the laws and ordinances of the City. Those provisions speak for themselves. Further, as stated in Paragraph 3 of this Answer above, the City denies that “the Administrative Branch of the City of Fort Collins” is a properly named defendant, because it is not a separate legal entity, such that the Municipal Court does not have jurisdiction over it as an individual branch of government. The City admits, however that the Municipal Court does have jurisdiction over the City of Fort Collins, which is answering this Complaint on behalf of the improperly named defendant. To the extent that the remaining allegations of Paragraph 9 of the Second Amended Complaint assert that the City, through its City Manager, failed to enforce the laws and ordinances of the City, the City hereby denies the same.

11. With regard to the allegations of Paragraph 10 of the Plaintiffs’ Second Amended Complaint, the City admits that the decisions of the City Council, when acting in a quasi-judicial capacity, are subject to further review by a superior court, and that the Municipal Court has jurisdiction to conduct such review under Article VII, Section 1, of the City Charter. To the extent Paragraph 7 of the Plaintiffs’ Second Amended Complaint contains any further allegations, the City denies the same.

12. With regard to the allegations of Paragraph 11 of the Plaintiffs’ Second Amended Complaint, under the heading “General Allegations,” the City admits that, on January 18, 2018, the City’s Planning and Zoning Board (“Board”) reviewed and approved the Johnson Drive Apartments Project Development Plan PDP#170034 (“the PDP” or “Project”). To the extent Paragraph 11 of the Plaintiffs’ Second Amended Complaint contains any further allegations, the City denies the same.

13. The City admits the allegations of Paragraph 12 of the Plaintiffs’ Second Amended Complaint.

14. With regard to the allegations in Paragraph 13 of the Plaintiffs’ Second Amended Complaint, the City admits that the appeal generally alleged that the Board failed to properly interpret and apply relevant standards of the LUC, and that the standards in the LUC were vague and unconstitutional. The appeal, which was not actually attached to the Plaintiffs’ Second

Amended Complaint as an exhibit (as alleged by Plaintiffs), speaks for itself. While the City admits the appeal made these assertions, the City generally denies those assertions made.

15. With regard to the allegations in Paragraph 14 of the Plaintiffs' Second Amended Complaint, the City admits that the City Council heard the appeal in a hearing held on February 27, 2018, after giving proper notice pursuant to Chapter 2, Article II, Division 3 of the City Code. The City also admits that the City planning staff also presented information at the appeal hearing. The City denies the remaining allegations of Paragraph 14 of the Plaintiffs' Second Amended Complaint.

16. With regard to the allegations of Paragraph 15 of the Plaintiffs' Second Amended Complaint, the City admits that, at the City Council hearing on February 27, 2018, the City Council by motion and affirmative vote found that the subject appeal was without merit as to all allegations. The City further admits that the City Council at its next regular meeting on March 6, 2018, adopted Resolution 2018-023. That Resolution, which was not actually attached to the Plaintiff's Second Amended Complaint as an exhibit (as alleged by Plaintiffs), speaks for itself.

17. In answer to paragraph 16 of the Plaintiffs' Second Amended Complaint, under the heading "Plaintiffs' First Claim for Relief," the City incorporates herein by reference the answers set forth above in paragraphs 1 through 16 of this Answer.

18. The Plaintiffs' Second Amended Complaint erroneously contains two paragraphs numbered "17." With regard to the first paragraph numbered "17" at the top of page 6 of the Second Amended Complaint, the generally denies the allegations stated therein. The appeal speaks for itself.

19. With regard to the allegations in the Second Paragraph 17 of the Plaintiffs' Second Amended Complaint, the City admits that the initial materials presented by the applicant to the Board did not include a design schematic or detailed specifications for the trash enclosure for the Project. The City Staff recommended as a condition of approval of the PDP that "the applicant shall provide, no later than Final Plan approval, a detailed trash and recycling enclosure design, including truck access and circulation, compactor and/or dumpster locations, in a manner substantially compliant with the Planning and Zoning Board approval and in accordance with adopted Engineering Standards and Trash and Recycling Standards in Section 3.2.5." Additional details regarding the anticipated design of the enclosure were discussed by the applicant and City Staff at the hearing before the Board, and the Board approved the PDP for the Project subject to that condition.

20. With regard to the allegations in Paragraph 18 of the Plaintiff's Second Amended Complaint, the City states that LUC section 3.10.5 addresses character and image requirements for development projects and that section (C) specifically discusses materials and colors, but the City denies that this LUC provision specifically discusses requirements for trash enclosures, which are addressed in LUC section 3.2.5. Those Code sections speak for themselves.

21. With regard to the allegations of Paragraph 19 of the Plaintiffs' Second Amended Complaint, the City admits that the site of the Project is adjacent to a public park. The City denies any remaining allegations of Paragraph 19 of the Second Amended Complaint, as stated by the Plaintiffs.

22. The City generally denies the allegations of Paragraphs 20, 21, 23, 24 and 25 of the Plaintiffs' Second Amended Complaint. While the City admits the allegation in Paragraph 22 of the Second Amended Complaint that, under the LUC, the compatibility of the trash enclosure lies in the sound discretion of the Board, the City specifically denies that the Board abdicated its discretion or that the City Council abused its discretion with regard to issues relating to the design and compatibility of the trash enclosure. The Board properly exercised its discretion in approving the PDP for the Project with the condition recommended by City Planning Staff, as set forth in Paragraph 19 of the Answer above. The City further denies that this matter must be remanded back to the City Council with instructions to remand the matter back to the Board for a determination as to the sufficiency of the trash enclosure. The hearing transcript and LUC speak for themselves.

23. In answer to paragraph 26 of the Plaintiffs' Second Amended Complaint, under the heading "Plaintiffs' Second Claim for Relief," the City incorporates herein by reference the answers set forth above in paragraphs 1 through 22 of this Answer.

24. With regard to Paragraphs 27 and 28 of the Plaintiffs' Second Amended Complaint, the City generally admits that the second grounds for the Plaintiffs' appeal generally made those assertions, but denies the substance of those complaints. The appeal speaks for itself.

25. With regard to Paragraph 29 of the Plaintiffs' Second Amended Complaint, the City generally admits that the LUC embodies requirements for connectivity. The LUC and specifically LUC section 3.2.2 speak for themselves. To the extent Paragraph 29 contains any further allegations, the City denies said allegations as stated by the Plaintiffs.

26. The City generally denies the allegations of Paragraph 30 of the Plaintiffs' Second Amended Complaint, which consists largely of legal argument rather than factual allegations. The cited legal authority speaks for itself.

27. The City generally denies the allegations of Paragraph 31 and 33 of the Plaintiffs' Second Amended Complaint. The City is without sufficient information and belief to either admit or deny the allegations in Paragraph 32 of the Plaintiffs' Second Amended Complaint, and therefore must deny the same. The City further denies that this matter must be remanded back to the City Council with instructions to remand the matter back to the Board for further review of the design and right of way conveyance issues.

28. In answer to paragraph 34 of the Plaintiffs' Second Amended Complaint, under the heading "Plaintiffs' Third Claim for Relief," the City incorporates herein by reference the answers set forth above in paragraphs 1 through 27 of this Answer.

29. With regard to Paragraph 35 of the Plaintiffs' Second Amended Complaint, the City generally admits that the fifth grounds for the Plaintiffs' appeal generally made those assertions, but denies the substance of those complaints. The appeal speaks for itself. The City denies the remaining allegations of Paragraph 35.

30. With regard to Paragraph 36 of the Second Amended Complaint, the City admits that LUC section 3.2.2(K) outlines the required number of off-street parking spaces for all types of development within the City, including in developments within the Transit-Oriented Development Overlay Zone. That LUC section speaks for itself. The City generally denies the remaining allegations of Paragraph 36, as well as Paragraphs 37 to 41 of the Second Amended Complaint. The City further denies that the Court should remand this matter back to the City Council with instructions to the Board for a further specification of "Care Share" conditions. The City also denies all allegations that the mitigation strategy for "Car Share" is unconstitutionally vague, and denies that the Court should issue the declaration sought by the Plaintiffs.

31. In answer to paragraph 42 of the Plaintiffs' Second Amended Complaint, under the heading "Plaintiffs' Fourth Claim for Relief," the City incorporates herein by reference the answers set forth above in paragraphs 1 through 30 of this Answer.

32. The City generally denies the allegations of Paragraph 43 through 47 of the Plaintiffs' Second Amended Complaint, and further denies that the Court should remand this matter back to the City Council with instructions to the Board for a further specification of "Transit Passes" conditions; the City specifically denies all allegations that the mitigation strategy for "Transit Passes" is unconstitutionally vague. The City thus denies the Court should issue the declaration sought by the Plaintiffs.

33. In answer to paragraph 48 of the Plaintiffs' Second Amended Complaint, under the heading "Plaintiffs' Fifth Claim for Relief," the City incorporates herein by reference the answers set forth above in paragraphs 1 through 32 of this Answer.

34. The City generally denies the allegations of Paragraph 49 through 57 of the Plaintiffs' Second Amended Complaint. The City is without sufficient information and belief to either admit or deny the allegations of Paragraph 51, and therefore must deny the same. While the City admits the allegation in Paragraph 55 that the City, as a home rule municipality, can legislate through its Council with regard to issues of development requirements and enforcement, the City is without sufficient information and belief as to whether it can impose fines and imprisonment as enforcement mechanisms, as alleged by the Plaintiffs. This is a legal question. The City also denies the Court should issue the declaration sought by the Plaintiffs.

35. The City hereby denies each and every allegation of the Plaintiffs' Second Amended Complaint not expressly admitted hereinabove.

**AFFIRMATIVE DEFENSES**

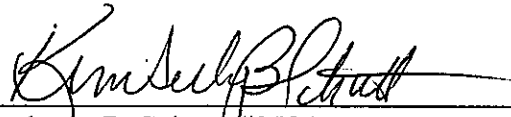
1. The Second Amended Complaint fails to state a claim upon which relief can be granted.
2. The City Council's Resolution is supported by controlling provisions of the Fort Collins Municipal Code and LUC, and competent evidence in the record and, therefore, the City Council has not exceeded its jurisdiction or abused its discretion.
3. One or more of the Plaintiffs' claims may be barred by the doctrine of waiver and/or estoppel.
4. Plaintiffs' allegations consist largely of legal conclusions and interpretations of the LUC and other documents, all of which speak for themselves. The City generally denies the legal conclusions and interpretations asserted by the Plaintiffs, or that they are entitled to the declaratory relief and other relief sought in their Second Amended Complaint.
5. Plaintiffs' allegations attempting to incorporate by reference the allegations contained in other appeal documents are improper under C.R.C.P. 8, which requires simple, concise and direct averments. The City cannot be made to admit or deny factual statements not specifically set forth in this Second Amended Complaint, particularly where the Plaintiffs have failed to attach referenced exhibits to their Second Amended Complaint.
6. One or more of the Plaintiffs' claims are frivolous, groundless and vexatious, entitling the City to an award of its actual costs and attorney's fees.
7. The City reserves the right to add or delete affirmative defenses based on information gathered in the further investigation of this case.

WHEREFORE, the City respectfully prays that the Court enter judgment in its favor and against the Plaintiffs, upholding all of the actions of the City Council and denying the declaratory relief improperly sought by the Plaintiffs, and further award the City its reasonable attorney's fees and costs, and for such further relief as the Court shall deem just and proper.

DATED this 9<sup>th</sup> day of July, 2018.

Respectfully submitted,

WICK & TRAUTWEIN, LLC

By:   
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Kimberly B. Schutt, #25947  
Attorneys for the improperly named  
defendants

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing ANSWER was served this 9<sup>th</sup> day of July, 2018, via email transmission on the following:

Eric Sutherland  
3520 Golden Currant  
Fort Collins, CO 80521

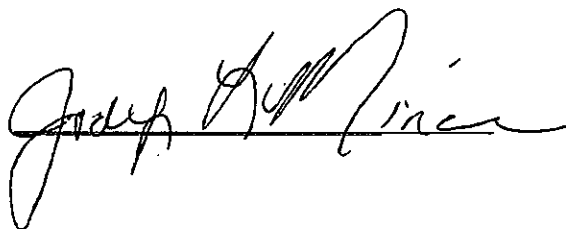
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A handwritten signature in black ink, appearing to read "Jeffrey Cullers", written over a horizontal line.