

<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: Eric Sutherland; and J&M Distributing d/b/a Fort Collins Muffler and Automotive</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>Intervenor: NEXT CHAPTER PROPERTIES, LLC, an Illinois Limited Liability Company.</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>Case Number: 2018-CIVIL01</p>
<p>CITY DEFENDANTS' MOTION FOR CLARIFICATION</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 respectfully moves the Court to clarify its Order dated July 23, 2018, as set forth below:

1. Undersigned counsel respectfully advises the Court that she attempted to confer with all of the other parties to this action via email late yesterday afternoon, in an effort to discuss this proposed motion. Counsel for Next Chapter Properties, LLC has advised that his client consents to the proposed relief. As of the filing of this motion, the Plaintiffs have not responded. Due to the expedited need to have this issue addressed and, in light of the deadlines set by the Court, the City is proceeding with the filing of this motion.

2. The Court recently entered an Order on Monday, July 23rd, setting forth an expedited briefing schedule for this action and making certain orders with respect to certification of the record. Specifically, the Order states: “All parties shall certify and file with the Court and to all

other parties those portions of the record concerning PDP #1700034 that they wish the Court to review no later than Tuesday, July 31, 2018.”

3. Though filed in municipal court, it is agreed that this action is governed by Rule 106(a)(4) of the Colorado Rules of Civil Procedure. That rule sets forth the framework and procedure by which this Court shall conduct its review of the City Council’s decision being challenged by the Plaintiffs.

4. As expressly stated in Rule 106(a)(4)(I), the reviewing court is strictly limited to determining whether the governmental agency exceeded its jurisdiction or abused its discretion. In making this determination, the Court's evaluation of the case is limited to an examination of the record of the administrative proceedings below. Under this standard of review, the Court is required to uphold the agency's decision unless there is absolutely no competent evidence to support it. *Abbott v. Board of County Comm'rs of Weld County, Colo.*, 895 P.2d 1165, 1167 (Colo. App. 1995); *Sellon v. City of Manitou Springs*, 745 P.2d 229, 235 (Colo. 1987); *Bd. of County Commissioners of Routt County v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). Further, the persons challenging the governmental action carries the burden of proving the governmental body exceeded its jurisdiction or abused its discretion, and in doing so must overcome a presumption that the government’s action was proper. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008).

5. Rule 106(a)(4)(III)-(IV) reflects the burden placed on the plaintiffs in the manner by which it sets forth a specific procedure and timeline for designation and certification of the record for review. Those provisions of the rule place the obligation with the plaintiffs to first designate those portions of the record they deem necessary for review, typically done by including a motion and proposed order for certification of the record when the complaint is filed. These provisions also place the burden on the plaintiffs to advance the costs for such portions of the record designated. The Court is to then issue an order for the defendant body to file with the court those portions of the record designated by the plaintiffs by a date certain, along with a certificate of authenticity. The defendants are also given 21 days after the court issues an order for certification to set forth additional items they deem necessary.

6. The plaintiffs thus far have failed to designate any record for this Court’s review for purposes of carrying their burden of proof on the claims they have made. They do so at their own peril, and the defendants do not legally have to carry this burden of creating the record or advancing the costs for the same. By ordering “all parties” to certify and file any portions of the record with the Court that they deem necessary for the Court’s review, the City is concerned that the Court has inadvertently shifted this burden to the defendants, particularly to the City as the governmental body charged with certifying portions of the record designated by the plaintiffs.

7. Accordingly, the City would respectfully ask the Court to further clarify in its order that the plaintiffs have until Tuesday, July 31st in which to designate any portions of the record that they want the City to certify and file for the Court’s review, and to also advance the costs of same. If the Plaintiffs actually designate a record, then the City would ask the Court to give the defendants 3 additional days in which to respond to designate any additional items not listed by the plaintiffs, recognizing that they would ordinarily be entitled to 21 days, but they understand

this matter needs to proceed on an expedited timeframe. Most of the items from the proceedings below can be produced within a short timeframe, with the exception of a transcript of the City Council proceedings, which may take some brief additional time to prepare.

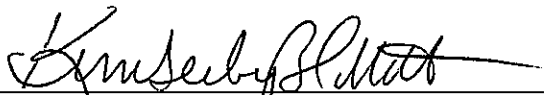
8. Of course, the Plaintiffs may elect to proceed without designating a record, which is contemplated by the provisions of Rule 106(a)(VII). If they choose to proceed in this manner, or fail to advance the costs for preparation of any portions of the record designated, then the matter can simply proceed on the briefing schedule outlined by the Court's July 23rd order. The plaintiffs will then have to make their arguments subject to the applicable legal presumptions that come into play when no record has been provided for the Court's review.

WHEREFORE, for the reasons set forth above, the City respectfully requests the Court to clarify its July 23rd order by placing the initial obligation on the plaintiffs, rather than "all parties," to first designate any portions of the record they deem necessary for the Court's review, and to advance the costs of the same.

DATED this 25th day of July, 2018.

Respectfully submitted,

WICK & TRAUTWEIN, LLC

By: 
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 CITY DEFENDANTS' MOTION FOR CLARIFICATION was served this 25TH day of July, 2018, via email transmission on the following:

Eric Sutherland
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Fort Collins, CO 80521

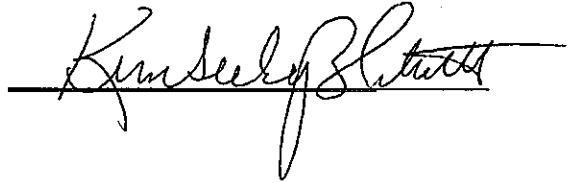
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A handwritten signature in cursive script, appearing to read "Kimberly Blatnik", is written over a horizontal line.