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. **Intervenor:** NEXT CHAPTER PROPERTIES, LLC	▲ **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	
OPENING BRIEF	

Plaintiffs, Eric Sutherland and Brian Dwyer, file this Opening Brief as ordered by the Court.

Notes on the Amendments: A listing of all substantive changes to the text of the Original Opening Brief has been compiled and is found in Exhibit 3 of this Brief. Like the original, this Brief has not been reformatted to include double spacing and other formatting prescribed by the C.R.C.P.

I. INTRODUCTORY CELEBRATION

Good cause exists to now celebrate the occasion of actually having a duly appointed judicial officer review the merits of an action in which a few of the

many deficiencies of the City of Fort Collins development review process are presented. In the only previous action properly filed with the Municipal Court of the City of Fort Collins, case no. 2018civil01, the Plaintiffs were forced to simply cease litigation because an unappointed person insisted on presiding over that matter. It was claimed that this person, Geri Joneson, had been appointed by virtue of an Intergovernmental Agreement between Fort Collins, Greeley and Loveland. Yet, even if appointment by virtue of some IGA were construed to be consistent with the provision of the city Charter of the City of Fort Collins, Article XII section 1, and this could never be the case, the IGA was never duly approved by the City Council of the City of Fort Collins. Truth is stranger than fiction.

II. FOLLOWED BY MORE OF THE TYPICAL DISPAPPOINTMENTS

The defendants in this case have long since left the rails of any track to a successful outcome. This failure is unquestionably due to the Defendant City 1) refusing to abide by the plain and simple requirements of the Land Use Code and 2) standing for the idea that somehow prevailing in litigation, regardless of the outcome, is equivalent to successful pursuit of the general interests of the public and the participants in the development review process.

The procedure began to come apart from the very beginning. The claims for relief that Mr. Dwyer and Mr. Sutherland brought to this court were, by design, intended to be as reasonable as possible and crafted with intent to eliminate any and all obstacles to extremely speedy resolution of all matters. In other words, we tackled only those problems that met the following criteria; 1) each claim presented a simple solution that could be obtained in short order, 2) each claim was facially sufficient to be decided in our favor on the merits, and 3) the relief requested represented the absolute minimum that could reasonably be expected from the protections afforded by the Land Use Code.

From a practical standpoint, our claims militated a quick remand to the Planning and Zoning Board where, with the exception of the relief requested in Claim 5[1], actions could be taken to eliminate every single objection to the proposed project that we had presented in short order. It was also hoped for, but without expectation, that the Planning and Zoning Board would also be persuaded to apply conditions, as is their authority under the LUC, that might eliminate future headaches for the business that Mr. Dwyer operates in the vicinity and also address the need for improved bicycle and pedestrian connections in the area.

Nothing doing. At this point, there may be no question that the Defendants have interposed frivolous and meritless opposition. Ironically, the Defendants are apparently the ones to suffer. See especially *Affidavit of Patrick Quinn* filed July 12. Co-operative discussions leading to agreements to simply follow the plain and simple requirements of the Land Use Code, eliminate ambiguities in expectations and set this project on a path toward success could have taken place. They did not.

This proceeding truly left the rails upon the filing of *Next Chapter's Motion to Expedite Briefing Schedule,* filed with this court on July 12 with a proposed Order filed on July 18th, 2018. In this *Motion,* Next Chapter held for a position similar to one stated earlier by Counsel for Administrative Branch and Council of City of Fort Collins, the "City Defendants", in conference. This position lumped the claims for declaratory judgment, Claims 3,4 and 5, in with the claims alleging

[1] The relief requested in Claim 5 could not be resolved to allow the applicant's project to move forward without legislation from City Council to provide a mechanism of enforcement for conditions that were applied and only useful if expected to run in perpetuity. However, the necessary legislation is something that is; 1) well within the authority of a Home Rule municipality to enact, 2) desirable for the purposes of enabling predictability by virtue of ease of enforcemnt for a general range conditions that may be attached to the approval of development applications, and 3) long past due as a much needed step forward in the evolution of development review in Fort Collins. In other words, this is something that is widely regarded as a necessary improvement to the development review process.

abuse of discretion, Claims 1 and 2, and insisted all claims were subject to adjudication under Rule 106. Despite our protestations, the Defendants insisted on taking this path. Not only were Claims 3,4 and 5 framed as requests for declaratory judgment in the 2nd Amended Complaint, these claims could not possibly be construed as allegations of abuse of discretion subject to judicial review under C.R.C.P Rule 106. See *Snyder v. City of Lakewood* 542 P. 2d 371 189 Colo. 1975.[2] This deficiency in the Defendant's position is better explained in ARGUMENT below, but is also mentioned here to explain how impossibly impractical the Defendant's position has become.

Finally, the usefulness, necessity and efficacy of certifying any part of the record of the court below seemed to completely have escaped the Defendants. This subject led to the conclusion made by the City Defendants that we, the Plaintiffs, had "shirked" our responsibilities in this case by failing to request that a record be certified. See *City Defendants' Designation and Submission of Certified Record*. We disagree. We did not avoid any responsibility or jeopardize either our position or any practical element of this procedure by electing not to have any element of the record of the court below certified or entered into this proceeding.

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[2] The *Snyder v. Lakewood* decision laid out 3 requirements that must be met in order for an action of a governing body to be deemed quasi-judicial. The third of these requirements was stated as "(3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law. " *Snyder*, supra at 374. In the case of the 3 and 4th Claims, "transit passes" and "car sharing" are unconstitutionally vague. The only reasonable approach is to conclude that there is no criteria established by law for either of these two so-called mitigation strategies. Applying the Rule 106 standard for abuse of discretion would be absurd in this situation. An abuse of discretion may only occur when a criteria has been established. Of course, there was nothing preventing either the P & Z Board or City Council upon appeal from essentially 'legislating from the bench' and applying a meaningful definition to 'car share' and/or 'transit passes' such that expectations were established, ambiguities vanquished and permanently effective mitigation strategies were attached to approval. This was requested upon appeal. This did not happen. Finally, no forward looking condition that represents a business practice as opposed to an element of the construction of a project has any meaning without some mechanism for enforcement in perpetuity. This is the basis of the 5th Claim, which could never be imagined in a dream to be an allegation of an abuse of discretion.

First off, only 2 of our 5 claims alleged abuse of discretion and were, therefore, subject to the requirements of Rule 106 where certification of the record is implicated. Secondly, those 2 claims unmistakably alleged that an abuse of discretion had occurred by virtue of a *complete absence*[3] of any showing that a requirement of the Land Use Code had been complied with. Third and lastly, no provision of Rule 106 precludes reliance upon the normal rules of evidence in a civil proceeding. To the very limited extent that any evidence that might be found in the record of the court below may be needed to support our argument, it may be entered into the proceeding.

It is impossible to prove a *complete absence* of compliance with a specific provision of the Land Use Code has occurred without an analysis of every single component of the record to show that … '*nope … it did not happen here either*.' Thus, it is our expectation and should be the conclusion of this Court that an allegation of a *complete absence* of compliance shifts the burden of proof away from the Plaintiffs to the Defendants. If there is any evidence in the record or in any other form that anything that a *complete absence* of compliance exists in the two instances where we allege it does exist, then the Defendants are free to point that out. This position had been shared with the Defendants by email and it is perplexing beyond our capacity to understand why it was not understood and, if objected to, refuted in conference. We can only conclude that the Defendants found that the very expensive process of certifying an entire record only to show that, nope, there is absolutely no evidence to refute the allegation that a *complete absence* of compliance with a legal standard is, indeed, the truth of the matter was

[3] As a general rule of thumb, allegations of abuse of discretion in which a *complete absence* of compliance with a legal standard are the only claims that have a decent chance of succeeding in a Rule 106 proceeding. The applicable standard for reviewing an abuse of discretion allows for judicial reversal in a quasi-judicial matter only when there is a showing of a complete disregard for the standard or malfeasance. Otherwise, the reviewing court is obliged to defer to the discretion of the decision maker.

just to great a temptation to ignore. This must be especially true since it afforded the opportunity to allege that we were shirking our responsibilities.

Remarkably, this Court appears to have no other option at this juncture than to Order the remand we sought to stipulate to from the beginning. In other words, the meritless opposition entered by the Defendants has delivered no advantage to them. It can also be said that the public benefit that Mr. Dwyer and I aspired to with the filing of this case is no closer at hand either. Sad situation all around.

III. ARGUMENT

This Court must grant the relief requested on Claims 1-5 in the 2nd Amended Compaint for the reasons outlined below. We begin with a short discussion of how the burden of proof must be apportioned in the courts below and also in this proceeding in accordance with the requirements of the Land Use Code. Next, a simple examination of the 5 claims is made.

A. Sufficient Allegation and Burden of Proof in Development Review Hearings and Appeals.

To begin, we note here that Mr. Sutherland has, for years, raised questions and concerns about how the burden of proof should be apportioned in a hearing of a development review application before the Planning and Zoning Board or Hearing Officer[4]. It makes absolutely no sense to commence any quasi-judicial or judicial proceeding without first having firmly apportioned the burden of proof. The absence of a standard to be followed in this regard has been a constant source of confusion for everyone involved, especially for the members of the Planning

[4] Mr. Sutherland has elevated these concerns to the so-called citizen representatives that happen to take seats on Council. Blank looks there as well. Of course, the present Council is not unlike previous Councils in that it is composed entirely of people who see their *raison d'etre* as rubber stamping things that are put in front of them by city staff. No independent legislative purview is known to exist anywhere in City Council, even though issues such as legislating on apportionment of burden of proof in quasi-judicial proceedings and other similar topics lie well within the authority of Council under the City Charter.

and Zoning Board itself. The number of times the issue has been raised is equal in number to the times that every face in the room has gone blank. This is either simply a bridge to far for the staff members of the planning department and the city attorneys, or else there is great apprehension about actually apportioning the burden of proof where it belongs… squarely on the shoulders of the applicant.

This entire case is not justiciable without a determination of how burden of proof must be apportioned in the courts below. Fortunately, this question of law may only be reasonably settled by finding that the burden of proof for showing that a development proposal complies with ***all*** requirements of the Land Use Code lies exclusively with the applicant. The burden may fall on no other shoulders. Applicants have access to city staff and their resources, citizen participants do not. Applicants have the exclusive discretion over if and how a development proposal may be modified to comply with the requirements of Code, citizen participants do not. Etc.

Having determined where the burden of proof lies, it is then necessary to determine upon what circumstances the proof must be shown by an applicant. Again, this case is not justiciable without such a determination. This question of law may also be reasonably settled by holding for a two part methodology; 1) any allegation of a substantive failure to comply with a requirement of the Land Use Code must be met with a showing of proof satisfactory to the decision maker, and 2) in the absence of a showing, the application must be deemed to be insufficient.

Having now determined the criteria for sufficient allegation, it is also necessary to determine when such allegation must be made by a citizen participant in the process. Here, the conclusion is not as readily apparent. Upon careful examination of the alternatives, we urge this Court to conclude that the time to enter an allegation must be no later than the filing a Notice of Appeal for review by City Council. This may seem a bit out of time in that appeals of development

review decisions brought before Council are not *de novo* hearings. In other words, concluding in accordance with the theory of law presented here allows a citizen participant, *aka* party in interest, to allege insufficiency of a development application at a time, appeal to Council, where the applicant may not respond with an amendment to his application. In this event remand to the tribunal of origin is the only alternative.[5]

The similarities between the apportionment of burden of proof presented here and other areas of Colorado law are obvious. Citations are unnecessary. All the same, this is a matter of first impression for this court and the ultimate resolution of the questions of law necessary to adjudicate this matter lie in the sound discretion of this court. If there is another standard for sufficient allegation or burden of proof that serves the purposes of judicial efficiency and the ends of justice, this Court is free to adopt that instead. However, in the absence of a competing theory of law, we urge this Court to adopt something substantially similar to that presented here for adjudicating this matter and also recommend adoption of these principles as a matter of precedent in the Municipal Court of the City of Fort Collins for all future actions. May it be hereafter known by all parties to quasi-judicial proceedings that the burden of proof lies with the applicant and by what means a sufficient challenge may be made by a party in interest.

B. Claims 1 and 2 must be decided in favor of Plaintiffs.

The following facts may not be disputed; 1) on appeal to Council, Sutherland and Patterson alleged failure to comply with the relevant provisions of the Land Use Code for trash enclosures and bicycle/pedestrian connectivity,[6] 2) no refutation of the allegations were made by the applicant or even city staff on behalf

[5] For whatever reason, remand to the P & Z or Hearing Officer to correct for insufficiencies (or, in the alternative, denial of the application) is avoided like the plague. Yet, this is the only outcome that is consistent with the procedures defined in City Code for conduct of an appeal.

[6] See Exhibit 2, Notice of Appeal by Sutherland/Patterson.

of the applicant in which a showing of compliance was indicated, indeed, a *complete absence* of compliance was present.

In regard to the allegation of insufficiency of the design of the trash enclosure, LUC section 3.2.5(A) states:

> " *Purpose.* The purpose of this Section is to ensure the provision of areas, compatible with surrounding land uses, for the collection, separation, storage, loading and pickup of trash and recyclable materials."

Because no design details, other than a basic outline of the footprint of the proposed trash enclosure, had been submitted to the P & Z board, it is axiomatic that the P & Z board abused its discretion by approving the project in a manner that is inconsistent with the requirements of Land Use Code section 2.4.2(H) step 8. It is impossible for an assessment of compatibility with surrounding land uses to be made with only a diagram showing a footprint. Similarly, it is axiomatic that Defendant City Council also abused its discretion by failing to acknowledge the sufficiency of the allegation made by Sutherland and Patterson and find the *complete absence* of compliance with LUC section 3.2.5(A). [7]

In regard to the allegation of insufficiency of the connectivity between the subject property and the commercial and transit area to the south, LUC section 3.2.2 (B) states:

> ***General Standard*** . The parking and circulation system within each development shall accommodate the movement of vehicles, bicycles, pedestrians and transit, throughout the proposed development and to and from surrounding areas, safely and conveniently, and shall contribute to the attractiveness of the development. The on-site pedestrian system must provide adequate directness, continuity, street crossings, visible interest and security as defined by the standards in this Section. The on-site bicycle system must connect to the City's on-street bikeway network. Connections to the off-road trail system shall be made, to the extent reasonably feasible.

Also Land Use Code section 3.6.2 (0) states:

[7] Although not necessary for the purposes of a judicial determination that Council abused its discretion, the record does show that P & Z collectively, without a vote, abdicated their authority and responsibility to make an assessment of compatibility by telling staff to just come up with something please. See Exhibit 1 which conveniently excises the only piece of the record with any relevancy to this claim for this Court's easy access.

> *Easements.* Easements shall be controlled by the following requirements:
> …..
> (2) Pedestrian and bicycle paths shall be provided to accommodate safe and convenient pedestrian and bicycle movement throughout the subdivision and to and from existing and future adjacent neighborhoods and other development; …

Furthermore, numerous other sections of the Land Use Code may be interpreted to require connectivity for bicycles and pedestrians.

No design details were provided indicating any intent to comply with these standards. No easement on the existing property was indicated, let alone dedicated, for this purpose. A *complete absence* of compliance was present. It is axiomatic that the P & Z board abused its discretion by approving the project in a manner that is inconsistent with the requirements of Land Use Code section 2.4.2(H) step 8. Similarly, it is axiomatic that Defendant City Council also abused its discretion by failing to acknowledge the sufficiency of the allegation made by Sutherland and Patterson and find the *complete absence* of compliance with LUC secton 3.2.2(B) and all other sections of the LUC requiring adequate bicycle and pedestrian connectivity.

C. Claims 3 and 4 must be decided in favor of Plaintiffs.

The third and fourth claims for relief in the 2nd Amended Petition speak for themselves. A test for vagueness must be applied. A statute which either requires or forbids an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates the first essential of due process of law. *Memorial Trusts, Inc. v. Beery*, 144 Colo. 448, 356 P.2d 884 (1960) Rules and procedures for interpreting statutes also apply to the interpretation of local ordinances and codes. *MDC Holdings, Inc. v. Town of Parker*, 223 P. 3d 710 - Colo: Supreme Court 2010 (*The rules of statutory construction apply in the interpretation of statutes and local government resolutions and ordinances.*)

Here, the terms "car share" and "transit passes" could mean many, many different things. Very few of these available meanings might equate to a strategy

for reducing the need for onsite parking in a manner equivalent to the reduction that has been granted in this development application.

Certainly, the opportunity existed for the Planning and Zoning board or City Council to apply conditions to the approval of the development application that would have defined what these ambiguous terms mean, but that did not happen. Of course, the entire intent underlying Claims 3 and 4 is a remand in a manner that this Court finds proper so that sufficient definitions and conditions could be adopted and imposed. It seemed so simple at the time of crafting the complaint and still seems so simple now. But look where we ended up. Intervenor Next Chapter Properties now complains of significant financial losses attributable to this litigation. Would a speedy remand have been so onerous? Would the costs of resolving this dispute through compromise and access to the proper channels have cost nearly as much as the applicant now claims to have lost?

D. Claim 5 must be decided in favor of the Plaintiffs.

Claim 5 as presented in the 2nd Amended Complaint speaks for itself. Of all the claims presented, this is the only claim for relief that could not have been resolved by a simple remand to a lower tribunal. This is because the laws of the City of Fort Collins provide for no means of enforcing a forward looking[8] condition like an effective car sharing plan or a requirement that all residents of a development be perpetually granted annual transit passes. In the hearing of the appeal before Council, a member of the planning staff did make reference to the concept that a forward looking condition or requirement of the LUC might be

[8] A "forward looking condition" for the purposes of this brief and others, is a condition or requirement that is intended to be in effect after the issuance of a certificate of occupancy, "CO" and survive in perpetuity thereafter. All requirements of the original LUC were designed to be verifiable at the time of issuance of a CO and were, thus, enforceable by virtue of withholding a CO if the requirements had not been met. Some recent additions, such as mitigation strategies for parking requirements in the Transit Oriented Development district, were legislated without thought given to how they would be enforced. The same is often true for last minute conditions applied to development applications by decision makers or Council on appeal.

included as a provision of a contractual agreement between the developer and the City of Fort Collins. The inference made on that occasion may have been that such a provision would be enforceable by the City of Fort Collins upon suit seeking specific performance of the contract provision, which is a procedure that must be taken in the district court.

In contrast, laws enacted by City Council could easily provide for relief for noncompliance in this Municipal Court. Fines and other penalties for noncompliance are a much more expedient means of enforcement than specific performance. This area of law is not pre-empted by the state and there is reason to speculate that the General Assembly may not legislate in this area as it lies in the area of planning and zoning and may be deemed to be exclusively of local concern. *City and County of Denver v.* State, 788 P. 2d 764: Colo. 1990. Certainly nothing proscribes Council from legislating in this area.

Regardless of whether or not City Council should elect to legislate[9] in this area, the simple truth of the situation is that the public is currently deprived of the protections that the parking standards for development in the TOD are intended to provide when unenforceable "mitigation strategies" are employed and/or granted to reduce the number of parking spaces required. A brief look at the history of another multi-unit housing development that was built adjacent to the subject property shows just how much pain is felt in the surrounding area when residential construction does not include adequate parking.

In the absence of any accessible means of enforcing a forward looking condition, and a civil lawsuit for the purposes of claiming specific performance is not an acceptable means of enforcement, forward looking conditions may not be

[9] By elect to legislate, we mean be obliged to rubber stamp legislation originating in the halls of the city administration in the incredibly unlikely event that someone actually attempts to address the enforceability of forward looking conditions which are frequently applied as conditions to the approval of development applications without any understanding of how such conditions will be enforced..

relied upon to serve the purposes of reducing the total number of parking spaces required in the development. Thus, even if non-vague and meaningful standards for "car share" and "transit passes" were to be developed and imposed as conditions of this project, the public would still not be protected without adequate enforcement mechanisms.

Of course, it lies far outside the jurisdiction of this court to Order the City Defendants to pass legislation providing for an effective enforcement mechanism. However, issuing declaratory judgment as requested does lie within this courts jurisdiction as a court of record in the State of Colorado. C.R.S. 13-51-105.

IV. CONCLUSION

For the reasons stated above, we respectfully request that this Court grant the 3 claims for declaratory relief requested, claims 3,4 and 5, and also make findings consistent with the allegations of abuse of discretion in claims 1 and 2.

Respectfully submitted this 30th day of August, 2018

Eric Sutherland

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing AMENDED OPENING BRIEF was served by electronic mail on this court and the following along with 3 supporting exhibits.

Jeffrey Cullers
Kim Schutt

Eric Sutherland