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.** **Intervenor: NEXT CHAPTER PROPERTIES, LLC, an Illinois Limited Liability Company.**	COURT USE ONLY
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	Case Number: 2018-CIVIL01
CITY'S ANSWER BRIEF	

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 Answer Brief:

I. INTRODUCTION

This matter is before the Court for review under C.R.C.P. 106, through which the Plaintiffs have challenged the City's approval of a Preliminary Development Plan ("PDP") for the Johnson Drive Apartments Project, PDP #170034 ("the Project"). Plaintiffs' seek this further review after Plaintiff Eric Sutherland appealed the City's Planning and Zoning Board ("the Board") approval of the Project to the City Council, which heard the appeal on February 27,

2018. Following the hearing, the City Council denied the appeal and upheld the Board's approval of the Project, specifically finding 1) the Board did not fail to properly conduct a fair hearing and 2) the Board did not fail to properly interpret and apply certain sections of the City's Land Use Code ("LUC") in its approval of the PDP with conditions. *See, Resolution 2018-023. Record E.*

The Court's role in this action is to determine whether the City Council abused its discretion or exceeded its jurisdiction in upholding the Board's approval of the Project. As discussed further below, the Plaintiffs have the burden to prove such an abuse of discretion or act in excess of its jurisdiction, and the City's decision is entitled to great deference on review.

Simply put, the Plaintiffs have fallen far short of meeting that burden, such that the Court must reject the Plaintiffs' baseless challenges and uphold the City's approval of the Project.

II. STATEMENT OF FACTS

The following statement of the pertinent facts are reflected in the certified record and should be undisputed:

1. The subject Project proposes a five-story mixed-use building at the southwest corner of Johnson Drive and Spring Court in the central part of Fort Collins, Colorado, near the Colorado State University ("CSU") campus. The project includes a total of 192 dwelling units and 412 bedrooms, which are expected to be occupied primarily by college students. *Record A, Item 1 Part 7, at p. 40.*[1]

[1] The Certified Record was submitted to the Court in PDF format. The citations to the record within this Answer Brief will generally refer to the page number of the particular PDF document constituting that part of the record. However, for the Court's convenience, the references to the page numbers for the transcript of the Board hearing will also indicate the number as it is reflected on the bottom of each page of the actual transcript, which differs from the page number of the PDF document since it is one of many items included within that part of Record A. For the City Council hearing transcript, the page numbers for the transcript correspond with the page numbers of the PDF document in Record D, so there is no distinction made there.

2. The proposed site includes a total of 2.5 acres within the General Commercial (C-G) Zone District and the Transit-Oriented Development (TOD) Overlay Zone, which is explained below. A total of 261 off-street parking spaces are proposed within a parking garage located within the first two levels of the building. *Record A, Item 1 Part 7, at p. 40.*

3. The Board reviewed the PDP for the Project at a hearing held on January 18, 2018. At the hearing, the City Planning Staff presented its report on the Project [*Record A, Item 1, Attachment 8, at p.20*], consisting of 18 narrative pages outlining details of the Project, the Staff conclusions that the Project met applicable provisions of the City's LUC, and its recommendation that the Board approve the Project with two specific conditions:

> "1) 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 of the Land Use Code.
>
> 2) The applicant shall provide, no later than Final Plan approval, material samples and colors to ensure compliance with Section 3.10.5(C) of the Land Use Code."

The Staff report also included extensive attachments consisting of building plans, traffic impact studies, landscape and lighting plans, etc. Planning Staff and representatives of Next Chapter Properties addressed Board questions at the hearing, and members of the public (including Plaintiff Eric Sutherland) also spoke at the hearing, as is reflected in the transcript of that hearing found in the record. *Record A, Item 1, Part 7, at p. 15.*

4. At the conclusion of the hearing, the Board voted unanimously to approve the PDP subject to the two conditions recommended by the City Planning Staff. *Record A, Item 1, Part 7, pp. 36-37 (pages 21-22 of the transcript).*

5. On February 1, 2018, Plaintiff Eric Sutherland and another individual not a party this action, Paul Patterson, filed an appeal to the City Council seeking review of the Board's approval of the Project. *Record A, Item 1, Attachment 7, p. 13.*

6. The City Council considered the appeal in a quasi-judicial hearing held February 27, 2018, as is reflected in the transcript included in the record. *Record D.* At the hearing, City Council had before it all of the information considered by the Board, including a transcript of the hearing held January 18, 2018, and also took testimony from City Planning Staff, representatives of Next Chapter Properties, the two appellants and Plaintiff Brian Dwyer.

7. At the conclusion of the February 27th hearing, based upon the evidence before it, the City Council voted unanimously to uphold the Board's decision approving the PDP, finding it properly interpreted and applied the relevant provisions of the LUC. *Record D, at. pp. 36-37.* That decision was embodied in Resolution 2018-023, adopted by City Council at its next regular meeting on March 6, 2018, and found in the record. *Record E.*

The Plaintiffs subsequently filed this action in the Fort Collins Municipal Court, seeking review of the City Council's decision and further challenging the City's approval of the Project. The various issues raised and argued by the Plaintiffs in this appeal will be addressed in turn below. The Plaintiffs have failed to provide sufficient grounds for this Court's reversal of that decision, particularly in light of the high standard of review applicable to these proceedings.

III. STANDARD OF REVIEW

Plaintiffs' Opening Brief completely ignores the important standard of review that applies to this type of action, which provides a very high hurdle for the Plaintiffs to obtain reversal of the City's decisions below. The Colorado appellate courts have repeatedly cited this high standard of review in the Rule 106 context, emphasizing that the governmental agency

decision is entitled to deference, and made clear the parties challenging that decision carry the burden of establishing that the high standard for reversal has been met.

As expressly stated in Rule 106(a)(4), the district 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. *Civil Service Commission v. Doyle,* 424 P.2d 368, 371 (Colo. 1967); *City of Colorado Springs v. Bd. of County Commissioners,* 895 P.2d 1105, 1109 (Colo. App. 1994). The Court is required to uphold the agency's decision unless there is absolutely no competent evidence in the record 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). The phrase "no competent evidence" means that the decision of the agency is so devoid of evidentiary support that it could only be explained as arbitrary and capricious. *Ross v. Fire and Police Pension Ass'n,* 713 P.2d 1304, 1309 (Colo. 1986); *Pueblo v. Fire and Police Pension Ass'n,* 827 P.2d 597, 601 (Colo. App. 1992); *Board of County Comm'rs of Routt County v. O'Dell,* 920 P.2d 48, 50 (Colo. 1996). The Court cannot consider whether the governmental agency's findings are right or wrong, substitute its judgment for that of the agency, or interfere in any manner with the agency's findings if they are supported by any competent evidence in the record. *State Civil Service Commission v. Hazlett,* 119 Colo. 173, 201 P.2d 616, 619 (1948); *O'Dell, supra,* 920 P.2d at 50; *Corper v. City & County of Denver,* 191 Colo. 252, 552 P.2d 13, 15 (1976). In addition, the Court must search the record for evidence which will sustain the governmental body's decision, and view the record in a light most favorable to the governmental body. *Colorado Municipal League v. Mountain States*

Telephone & Telegraph Co., 759 P.2d 40, 44-45 (Colo. 1988); *Morey v. Public Utilities Commission*, 629 P.2d 1061, 1068 (Colo. 1981).

Further, in applying this standard of review, governmental proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of the governmental body's rulings must be resolved in its favor. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008). The person challenging the governmental action carries the burden of overcoming the presumption that government's action was proper and demonstrating that this standard has been met for reversing the government's decision. *Id.*

For the reasons discussed further below, the Plaintiffs have failed to carry that burden here.

IV. ARGUMENT

Plaintiffs' Opening Brief consists largely of rhetoric which has no bearing on the claims alleged in the Second Amended Complaint. That Complaint generally asserts five claims for relief, alleging City Council abused its discretion in upholding the Board's approval of the Project on the following grounds:

1) The PDP allegedly did not contain a detailed schematic or specifications for the trash enclosure for the Project, and the Board's condition of approval requiring further design details was improper (First Claim for Relief);

2) The PDP did not include a pedestrian/bicycle pathway from the subject property to commercial properties to the south, and therefore allegedly did not contain sufficient "connectivity" with surrounding areas under the LUC (Second Claim for Relief);

3) The parking mitigation strategies for "car shares" and "transit passes" embodied in the PDP are allegedly too vague and contain no guaranty that such strategies will be employed (third, fourth and fifth claims).

Based on these alleged abuses of discretion, the Plaintiffs seek reversal of the City Council's decision upholding approval of the Project and ultimately a remand of the entire Project back to the Board to address these alleged deficiencies in the PDP.

However, a review of the record below demonstrates that City Council's decision was well-supported by competent evidence in the record and consistent with the pertinent provisions of the LUC. It is far from being arbitrary and capricious as needed to find an abuse of discretion here. Thus, based on the legal authority discussed below, the Court must deny the relief sought by the Plaintiffs and uphold the City Council's decision and, thereby, the Board's approval of the PDP with conditions.

A. The City Council did not abuse its discretion in upholding the Board's approval of the Project subject to a condition relating to the further design of trash enclosure for the Project.

The staff report contained in the record [*Record A, Item 1, Part 1 at p. 30*] and considered by the Board at the January 2018 hearing indicated that the Project provided sufficient trash and recycling space with accordance with the standards of LUC Section 3.2.5. *Record H.* That standard states, "[a]ll development, to the extent reasonably feasible, shall provide adequately sized, conveniently located, accessible trash and recycling enclosures to accommodate the specific needs of the proposed use." While the PDP did not contain a specific design schematic for the trash enclosure itself, the staff report indicated that the trash and recycling enclosure plans would be "further refined with the final plan submittal." As noted above, the Board approved the

PDP with the two conditions recommended by Staff, one of which required the applicant to provide further *design* specifications relating to the trash enclosure for the Project.

As reflected in transcript of the Board's January 2018 hearing, conceptual plans had been discussed with Staff and were presented to the Board at the hearing, and were deemed to be generally consistent with the LUC requirements and a "workable solution" for the design of the enclosure. *Record A, Item 1, Part 7, p. 24:1-6 (p. 9 of the transcript).* Jason Holland from the City Planning Staff indicated they would require the trash enclosure to be designed with the same quality as what was shown in the building design, commensurate with the brick material shown in the design plans for the ground level exteriors of the building. *Record A, Item 1, Part 7, p. 33:6-11 (p. 18 of the transcript).* Certain members of the Board gave further suggestions for what they would like to see with regard to the design of the enclosure. *Record A, Item 1, Part 7, p. 36:4-13 (p. 21 of the transcript).* The Board thus made a condition of approval of the PDP that Next Chapter Properties submit for approval a detailed design for the trash and recycling enclosure in a manner consistent with what was discussed at the hearing.

The Board's approval of the Project with this minor design condition was entirely consistent with the relevant provisions of the LUC. Section 2.2.9 of the LUC specifically authorizes the decision maker to "impose such conditions on approval of the development application as are necessary to accomplish the purposes and intent of this Code, or such conditions that have a reasonable nexus to potential impacts of the proposed development, and that are roughly proportional, both in nature and extent, to the impacts of the proposed development."

The Board's authority, as the decision maker here, to consider and impose these conditions is also reflected in Section 2.2.5 of the LUC, which describes the staff report to be

prepared for a hearing such as this one:

> "the Staff Report shall indicate whether, in the opinion of the Staff, the development application complies with all applicable standards of this Code. *Conditions for approval may also be recommended to eliminate any areas of noncompliance or mitigate any adverse effects of the development proposal."* [Emphasis added].

Likewise, LUC Section 2.2.7(A)(2), which establishes the Planning and Zoning Board review process, describes it as a process "wherein certain development applications shall be processed, reviewed, considered and approved, *approved with conditions*, or denied by the Planning and Zoning Board..." [Emphasis added]. LUC Section 2.2.7(D) further states that, "...[a]fter consideration of the development application, the Staff Report and the evidence from the public hearing, the Chair of the Planning and Zoning Board shall close the public hearing and the Board shall approve, *approve with conditions*, or deny the development application based on its compliance with the [applicable development standards]."

Accordingly, the Board's approval of the PDP with the condition relating to the further specifications for the trash enclosure was consistent with the procedure specifically authorized in the LUC. As discussed at the hearing before City Council, since this type of review occurs at the preliminary design phase, it is not unusual at all to have some design issues that still need to be worked out prior to the developer's submission of the final development plan. *Record D, at pp. 27:3-23; 28:13-37; 31:32-39; 32:1-5.* That is particularly true for design issues, such as this one, which are minor in nature relative to the overall size of the Project. *Record D, at pp. at 26:37 to 27:1-6.* Nevertheless, the record makes clear that the Board still considered the general concepts for the design of the enclosure, as presented at the hearing, and approved the Project subject to the condition and the direction given by Board members.

Therefore, there was no abuse of discretion here in the City Council's upholding of the Board's approval with this condition, particularly where the exterior design of the enclosure is but one minor component of the regulations contained in LUC Section 3.2.5. As recognized by City Council-Member Ken Summers, "that's pretty minimum when you're talking about a multi-million-dollar project like this." *Record D, at p. 35:15-17.* Indeed, Plaintiffs' assertions that the City's approval of the PDP must be reversed and the entire Project remanded back to the Board for further approval of the specific trash enclosure design is not just without merit, but is frivolous, groundless and vexatious.

B. The City Council did not abuse its discretion in upholding the Board's approval of the Project simply because the PDP did not include the bicycle/pedestrian path urged by Plaintiff Eric Sutherland to provide an additional connection to commercial properties to the south of the Project; competent evidence in the record supports the conclusion that the Project complied with the connectivity requirements of the LUC, and the additional connection to the commercial properties to the South urged by Sutherland was simply not feasible.

Plaintiffs' second claim for relief asserts the City Council's decision upholding the approval of the Project should be reversed and the PDP ultimately remanded back to the Board because the Project allegedly did not meet the connectivity requirements of the LUC. Specifically, at the Board hearing, Plaintiff Eric Sutherland decried the lack of a bicycle/pedestrian path connecting the site to the commercial development to the South, and Plaintiffs argue in their brief there was a "complete absence" of compliance with the connectivity provisions of LUC, citing Sections 3.2.2(B) and 3.6.2(O). However, Plaintiffs' assertions are wholly without merit and contrary to the record, which provides ample evidence that the Project complied with the relevant provisions of the LUC relating to connectivity and pedestrian levels of service required by the LUC:

1) The staff report considered at the Board's January 2018 hearing [*Record A, Item 1, Part 1, p. 20*] outlined in detail the ways in which the Project complied with the relevant Code provisions and design standards. Beginning on page 4 of the report, it addresses the "Access, Circulation and Parking" requirements/standards of LUC Section 3.2.2, stating,

> "[i]n conformance with the Purpose, General Standard, and Development Standards described in this section, the parking and circulation system provided with the project is adequately designed with regard to safety, efficiency and convenience for vehicles, bicycles, pedestrians and transit, both within the development and to and from surrounding areas." [*Record A, Item 1, Part 1, p. 24*]

It then outlines, over the next two-and-a-half pages, how the Project meets those various standards. On Page 13 of the staff report, it goes on to address the bicycle/pedestrian path urged by Eric Sutherland, explaining why such a "more convenient route" to the commercial properties to the south of the Project is not presently feasible:

> "Bicycle and Pedestrian levels of service were also evaluated. There is an interest in providing a bicycle and pedestrian connection from the intersection of Spring Court and Arthur Drive directly to the south to provide a more convenient route to both the MAX station and the commercial shopping area; however, the existing steep incline and grade change surrounding the Sherwood Lateral and off-site private property to the south of the Sherwood Lateral currently prevent this applicant from constructing the connection. The City will continue to pursue construction of a bicycle/pedestrian connection at this location when opportunities arise." [*Record A, Item 1, Part 1, p. 33*]

2) Further, at the Board hearing held in January 2018, there was ample evidence presented to support the conclusion that the Project provided various means of connectivity to surrounding areas:

a) Craig Russell, the planner representative for Next Chapter Properties, did the applicant presentation which was reflected in a power point overview with various plans, maps and schematics. *Record A, Item 1, Part 6, p. 27-50.* Russell explained that the Creekside

Park was directly to the north of the Project, with the Spring Creek Trail connecting to the Mason Trail. Also, he pointed out that there is an underpass in the vicinity providing very convenient access to the CSU campus along Center Avenue, along with a number of conveniently located MAX bus stops and an overpass that provides a safe path of travel to the bus stop. *Record A, Item 1, Part 7, p. 17:31-37; 18:1-3; 20:39-43; 21:16 (pages 2-5 of the transcript).* Like the staff report, his presentation also discussed the "fairly significant grade differential" from the commercial properties to the South to the project site which, along with the Sherwood lateral easement, created some constraints on development. *Record A, Item 1, Part 7, p. 19:3-14 (pages 4 of the transcript).*

b) Joe Delich, who did the traffic impact study, also addressed the connectivity issue, explaining that because this area is part of the "transit corridor" with the MAX bus in close proximity, it requires a "connectivity of level of service C." He stated that, in order to meet that level of service C, there has to be a continuous pedestrian network, and that this Project had such a network to the commercial properties to the south using College Avenue. *Id., p. 28:7-11 (page 13 of the transcript).* He then went on to answer the Board questions relating to his conclusion that the Project met that connectivity standard, indicating that it was actually somewhere in the B level of service range, based on his calculations. *Id., at 28:25-28 (page 13 of the transcript).* His extensive Traffic Impact Study detailing his calculations and conclusions in this regard, with multiple appendices, was also before the Board at the hearing as Attachment 11 and 12 to the Staff Report. *Record A, Item 1, Part 2, p. 47-50; Part 3, p. 1-50.* His memorandum regarding his pedestrian level of service evaluation was likewise part of the record at Attachment 10 to the Staff Report. *Record A, Item 1, Part 2, at pp. 44-46.*

c) City Planner Jason Holland likewise testified at the hearing that Staff concurred that the Project met the level of service standards, describing two different ways that currently exist for getting from the commercial developments to the south of the Project. He then went on to state that City staff would like to eventually see some additional better connection in that direction, but cited the challenges presented by the Sherwood lateral easement and the need to obtain easements from different property owners in the area. He indicated that any better connection would entail a significant capital improvement project on the part of the City. *Record A, Item 1, Part 7, at p. 29:1-18 (hearing transcript page 14).* The Planning Staff's power point presentation from the hearing also summarized these points. *Record A, Item 1, Part 5, p. 36-50.*

3) These same issues and conclusions were again discussed at the hearing before City Council (which also had before it all of the same materials considered by the Board, as well as the transcript of the Board hearing):

a) A member of the applicant's team testified that the site was specifically pursued "for its connectivity, for its access to campus, for the fact that you can get anywhere you want, either by virtue of walking along an already established pedestrian path that is well-lit and serviced by a street signal by going down College [Avenue], or by accessing a trail which is already established and well-used by just about everybody in Fort Collins. Not only that, you can access the MAX, which will get you anywhere in town." *Record D, at p. 23:14-19.*

b) A member of the applicant's team also reiterated that the pedestrian level of service standards C were met with the Project, as well as the fact that the developer could not pursue the bicycle/pedestrian path to the southern commercial properties, as urged by Eric

Sutherland, because of its inability to dedicate rights-of-way or easements on other people's property, the challenges presented by the Sherwood lateral and concerns about lighting issues that would impact pedestrian safety *Record D, at p. 24:1-33.*

c) The City Staff report presented to City Council at the appeal hearing also addressed these connectivity issues raised by the Plaintiffs, stating that the bicycle/pedestrian connection urged by Eric Sutherland was outside the boundary of the PDP and was not being recommended by City Staff, because the Project otherwise met the applicable standards with rights-of-way and street improvements along Johnson Drive and Spring Court, and also met the bicycle and pedestrian level of service standards. *Record A, Item 1, Part 8, at p. 5.*

d) City Council-Member Ross Cunniff specifically found at the hearing that the pedestrian traffic impact requirements were clear and were found to have been met, such that the appellants failed to provide compelling evidence that the LUC was improperly interpreted. *Record D, at p. 33:14-17.*

e) City Council-Member Kristin Stephens likewise found there were sufficient connections because of the sidewalk connections along College Avenue and the access to the bike path, and that Eric Sutherland's idea of putting an additional path over the Sherwood lateral would be "bridge to nowhere, it's kind of putting people out, then, into some dark parking lots." *Record D, at p.* at 34:1-11.

Accordingly, the Plaintiffs' assertion that the record contained a "complete absence" of evidence to support compliance with the connectivity standards is patently false. The fact that City Staff, the Board and City Council all considered Sutherland's urging for an additional connection to the commercial properties to the south and rejected the idea does not constitute an "absence of evidence" or grounds for reversal, when the record otherwise supports the

conclusion that the applicable standards were met. Therefore, the Court must reject the Plaintiffs' false assertions and their second claim for relief as being completely without merit.

C. The City Council did not abuse its discretion in finding the TOD parking space requirements were met for this Project and in rejecting the appellants' arguments, also made here in the third, fourth and fifth claims for relief, that the mitigation strategies for "car shares" and "transit passes" were too vague and not subject to enforcement by the City.

Plaintiffs' third, fourth and fifth claims for relief all seek reversal of the City Council's decision on grounds relating to the off-site parking standards for the Project, which were found to have been met through 255 single parking spaces in the plan, combined with 6 additional car share spaces and the provision of transit passes for each tenant. *Record A, Item 1, Part 6, at p. 11, pp. 33-38; Item 1, Part 8 at p. 30.* The car share spaces and transit passes were acceptable parking mitigation strategies under the relevant provisions of the LUC for developments in the TOD Overlay Zone, as discussed below.

The purpose of the TOD Overlay Zone is to encourage transit-supported, compact, walkable infill and redevelopment projects. *Record A, Item 1, Part 7, at p. 5.* Adopted in 2006-07, the TOD Overlay Zone development standards removed minimum parking requirements for mixed use and multi-family dwellings, with the intent to incentivize redevelopment on challenging infill sites, show commitment to the MAX Bus Rapid Transit investment and to encourage compact growth. *Id.* These principles are reflected in Section 3.10 of the LUC, which states the purpose of the TOD Overlay Zone as to "modify the underlying zone districts south of Prospect Road to encourage land uses, densities and design that enhance and support transit stations along the Mason Corridor. These provisions allow for a mix of goods and services within convenient walking distance of transit stations; encourage the creation of stable and attractive residential and commercial environments within the TOD Overlay Zone south of

Prospect Road; and provide for a desirable transition to the surrounding existing neighborhoods."

Toward this end, Section LUC 3.2.2(k)(1)(a)-1-a provides that multi-family and mixed-use developments within the TOD zone may reduce the number of parking spaces otherwise required by the LUC by instead including certain demand mitigation elements as outlined in a table contained in that section. *Record A, Item 1, Part 6, at p. 10; Record A, Item 1, Part 8, p. 29.* Among the accepted mitigation elements are a 10% parking requirement reduction allowed for "transit passes," and a reduction of 5 required parking spaces for every one "car share." *Id.*

In the appeal to City Council, Sutherland argued, as the Plaintiffs do here couched in requests for "declaratory relief" in their third, fourth and fifth claims for relief, that the terms "car share" and "transit passes" are unconstitutionally vague and not subject to enforcement by the City. The City Council considered and rejected those vagueness arguments, and that legal conclusion is not subject to de novo review on appeal in this Rule 106 action, but rather must be affirmed if supported by a reasonable basis. *Quaker Court Ltd. Liability Co. v. Board of County Com'rs of County of Jefferson,* 109 P.3d 1027, 1030 (Colo. App. 2004). This Court can find such a reasonable basis, based upon the evidence in the record, the common sense meaning of those terms (particularly as applied in this context) and the applicable legal authority discussed below.

The Colorado appellate courts have discussed the test for vagueness on multiple occasions, finding a statute or ordinance to be unconstitutionally vague "if persons of common intelligence must necessarily guess as to its meaning and differ as to its application." *Kruse v. Town of Castle Rock,* 192 P.3d 591, 597 (Colo. App. 2008). The language used in an ordinance must "provide fair notice and set forth sufficiently definite standards to ensure

uniform, nondiscriminatory enforcement." *Id.* The *Kruse* court then went on to further discuss the test to be applied in the face of a vagueness challenge:

> "Municipal ordinances, like statutes, often contain broad terms to allow their applicability to varied circumstances." [cite omitted]. [G]enerality is not the equivalent of vagueness, and...terms used need not be defined with mathematical precision in order to withstand a vagueness challenge." [cite omitted]. If a challenged ordinance lends itself to alternate constructions, one of which is constitutional, the constitutional interpretation must be adopted. [cite omitted].
>
> Where fairness can be achieved by a commonsense reading of the statute, we will not adopt a hypertechnical construction to invalidate the provision. [cite omitted]. Words and phrases used in statutes and other official regulations are to be accorded their generally acceptable meaning, and courts have a duty to interpret such language in a reasonable and practical manner so as to impart a rational and cogent meaning to it. [cite omitted].
>
> Appellate courts do not require that every word or phrase be specifically defined, and have 'often made reference to standard dictionaries and to the case law to determine the probable legislative intent in using a particular word.'" [cite omitted].
>
> *Id.*

S*ee, e.g., Price v. City of Lakewood*, 818 P.2d 763, 766 (Colo. 1991) (fact that municipal code provision did not specifically define the term "store" or "storage" did not satisfy the appellants' burden to show the provision was unconstitutionally vague beyond a reasonable doubt, where the term could be given its commonly accepted definition with reference to a standard dictionary).

Further, as discussed in *Robertson v. City and County of Denver,* 978 P.2d 156, 159 (Colo. App. 1999), the level of scrutiny in reviewing a vagueness challenge depends on the nature of the enactment. For economic regulations, such as a zoning ordinance, less scrutiny is required, whereas statutes imposing criminal or civil penalties or inhibiting exercise of a constitutional right would require much greater scrutiny. *Id.* Also, since a presumption of

validity attaches to zoning decisions of municipal authorities, "a party challenging a zoning ordinance on constitutional grounds assumes the burden of proving the asserted invalidity beyond a reasonable doubt." *Trailer Haven MHP, LLC v. City of Aurora,* 81 P.3d 1132, 1137 (Colo. App. 2003).

Here, the appellants failed to meet that burden at the hearing below. The record showed that the City Council considered and rejected the vagueness argument at the February hearing, with specific discussion of the applicable standards with City Attorney Brad Yatabe. *Record D, at 30:19-33.* While City Council-Member Kristin Stephens indicated there could be some vagueness when the terms were considered in the abstract, she rejected the notion that they were unconstitutionally vague, stating "I think we all generally agree what car share and transit pass is," especially when considered in the context of this particular student-oriented project. *Record D, at* 33:*36-40.*

Indeed, "car sharing" and "transit passes" are commonly understood concepts, particularly in the planning context. Common sense interpretations of those simple terms would cause a person of reasonable intelligence to conclude that "car share" involves a method for sharing use of or transportation in an automobile, and a "transit pass" is a ticket that allows a passenger to take a certain number of pre-paid trips via some method of public transportation. In Fort Collins, that mode of public transportation would be via bus, since there is no public train system. If there was some reasonable question about the meaning of those terms, one could certainly refer to a standard dictionary or to other secondary sources used by planning professionals to decipher their meaning in this context.[2] It is thus absurd for the

[2] In fact, LUC Section 5.1.1 specifically states: "For words, terms and phrases used in this Land Use Code that are not defined in Section 5.1.2, below, or elsewhere in this Land Use Code, the Director shall have the authority and power to interpret or define such words, terms and phrases. In making such interpretations or definitions, the Director may consult secondary sources related to the planning and legal professions, such as Black's Law

Plaintiffs to have asserted below that these terms were unconstitutionally vague, and to now renew those arguments in this action. Such assertions are frivolous, groundless and stubbornly litigious, like their other arguments.

As stated by the Court in *Kruse*, the fact that such simple, general terms can encompass a range of options based on varying circumstances does not make the terms unconstitutionally vague; rather, it simply makes them flexible depending on the particular development project to which in which they are applied. In this particular context, the record showed the "car share" strategy was being met here through a car share service the developer was being required to provide, though City Staff indicated it was not going to specify in the PDP a particular service provider or exactly how the developer was going to do that, because the service could change in the future. *Record D, at 25:9-21.* With regard to the "transit pass" mitigation strategy, because this Project was student-oriented, the transit passes consisted of student bus passes obtained by all students through CSU as well as passes provided by the developer. The City staff would enforce that mitigation strategy by ensuring that the developer is advertising and openly providing transit passes for residents who might not have student transit passes from CSU. *Id.*

Accordingly, the City Council's rejection of the vagueness challenge was supported by a more than reasonable basis, and its decision upholding the Board's approval of the Project with these parking plans did not constitute an abuse of discretion requiring reversal and remand here.

Dictionary (West Publishing Company, St. Paul, Minn., most current edition), A Survey Of Zoning Definitions - Planning Advisory Service Report Number 421, edited by Tracy Burrows (American Planning Association, Chicago, Ill. 1989) and The New Illustrated Book Of Development Definitions, by Harvey S. Moskowitz and Carl G. Lindbloom (Center For Urban Policy Research, Rutgers University. N.J. 1997, or most current edition), for technical words, terms and phrases, or Webster's Third New International Dictionary (Unabridged) (Merriam-Webster, Inc., Springfield. Mass. 1986), as supplemented, for other words, terms and phrases."

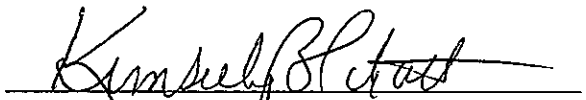
V. CONCLUSION

In short, the Plaintiffs' claims and arguments are wholly without merit, particularly in light of the standards of review discussed above. Accordingly, this Court should reject those claims and affirm the City Council's decision upholding the Board's approval of the Project. The Court may also conclude that the Plaintiffs' claims and arguments are frivolous, groundless and stubbornly litigious (vexatious) so as to justify an award of the City's reasonable attorney's fees incurred in the defense of this action.

DATED this 20th day of September, 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'S ANSWER BRIEF was served this 20TH day of September, 2018, via email transmission on the following:

Eric Sutherland
3520 Golden Currant
Fort Collins, CO 80521 *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*

Jeffrey Cullers
Herms & Herrera, LLC
3600 S. College Avenue, Ste. 204
Fort Collins, CO 80525 *jeff@hhlawoffice.com*