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	
REPLY IN SUPPORT OF PLAINTIFFS' *AMENDED* OPENING BRIEF	

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

I. OVERVIEW

The Defendants in this matter have both filed Answer Briefs. This Court has allowed the Plaintiffs an opportunity for Reply. Here it is.

It is tiresome and frustrating to deliberate or litigate with anyone who plays their role as a fountain of bad faith. The Defendants mischaracterize the nature of

Plaintiff's claims. The Defendants invent creative interpretations of law with absolutely no basis. The Defendants ignore arguments that are presented and then point accusingly, "*they have never made argument*". The Defendants overlook the advantage that service of the public interest would bring to all. It is soul defeating to engage with others that lead with bad faith. It takes its toll.

However, in the service of the public interest, the Plaintiffs do herein make Reply for the purposes of preserving some respect for the Laws of the City of Fort Collins and the rights enjoyed by the citizens thereof.

II. PLAINTIFFS HAVE ACKNOWLEDGED AND OBSERVED LIMITATIONS ON RULE 106 ACTIONS.

Here is an excellent example of bad faith on the Part of the Defendant City of Fort Collins. Licensed Attorney Kimberly Schutt, while writing for the City, has stated that the Plaintiffs completely ignored the standard that must be applied to allegations of abuse of discretion under Rule 106 C.R.C.P. See *City's Answer Brief* at p. 4 "*Plaintiffs' Opening brief completely ignores the important standard of review that applies …"* Ms. Schutt then proceeds to provide an ***excellent, concise*** treatment of the standard of review for Rule 106(a)(4) actions.

There is a problem with Ms. Schutt's statement. Plaintiffs did acknowledge and observe the standard of review. Very simply, Plaintiffs conceded that the standard of review is overwhelmingly construed to preserve the discretion of decision makers in quasi-judicial proceedings. There is nothing that Ms. Schutt has said in her ***excellent, concise*** treatment of this matter of law that was not already conceded and then some in Plaintiffs Opening Brief. See especially footnote #3, *Amended Opening Brief* at p. 5.

There is another problem with Ms. Schutt's statement. Only two of the 5 claims made by the Plaintiffs were Rule 106-type abuse of discretion allegations. Claims 3,4 and 5 were not abuse of discretion claims. See *Amended Opening Brief* at p. 5.

There is no doubt that Ms. Schutt absolutely, positively knew what was going on. When one does not have facts and law on their side, one makes false statements and proceeds in a manner as though nothing going on in the rest of the Universe has any bearing on the case.

III. A CONDITON MAY NOT FUNDAMENTALLY CHANGE THE DEVELOPMENT REVIEW PROCEDURE AS LAID OUT IN CHAPTER 2 OF THE LAND USE CODE.

The City is arguing that the Planning and Zoning Board may dispose of any application for development review merely by approving the application with conditions that staff shall, henceforth, be tasked with any and all determinations as to the compatibility of designs, compliance with standards and all other responsibilities that are assigned by Code to the Planning and Zoning Board.

The preceding statement is not hyperbole, it is a sensible conclusion that may be drawn from the position that the City of Fort Collins is arguing. If it is not sensible, then the City has an obligation here to explain what limitations exist for the application of conditions.[1] The Plaintiffs' argument, very simply, is that the P & Z Board abdicated its decision making authority as to the compatibility of a trash enclosure to others. By doing so P & Z effectively eliminated any opportunity for review of this issue by citizens who had a right under the LUC and City Code to challenge a deficient finding of compliance. In response, the City of Fort Collins is now arguing that a condition of approval may allow the responsibility to be abdicated to others. See City's *Answer Brief* at p. 7.

To put a more technical spin on it, the City is arguing that a single citation of the LUC, 2.2.5, which only allows for staff *recommendations* for conditions to eliminate areas of noncompliance, is dispositive of the ability of the P & Z to

[1] Plaintiffs hereby state, in advance, that they do not oppose a surreply brief made by the city to address the limitations that might exist, if any, on the use of conditions to subvert the legislative intent and letter of the law of the LUC.

subvert any and all requirements of the LUC by applying conditions. No other citation regarding 'conditions' is provided by the City or exists in the LUC that might be construed to mean 'conditions' defeat 'law'. This can not possibly be a proper interpretation of the purpose of 'conditions' or else any and all standards and procedures of the LUC could all be selectively or summarily vanquished by the application of conditions.

Furthermore, the 'condition' that the City insists was properly applied to the approval of the application has the effect of modifying ***procedure*** not the substane of requirements. Abdication of duly delegated responsibility for making a decision on a matter of compatibility to another is a change in procedure. The P & Z may not be considered to be vested with legislating changes to procedure under any circumstances. Nothing in any City Law vests the P & Z with that authority. Rather, City Council is the sole authority to make changes to the development review procedure by Ordinance adopted in a manner consistent with the City Charter.[2]

As if to totally immerse themselves in bad faith, the City has even gone to the trouble of citing the wrong portion of the LUC 3.2.5, sub-section (H), in order to deflect attention from the actual substance of the claim that Plaintiffs had actually made. See sub§ A. of *City's Answer Brief* at p. 7. Plaintiffs specifically cited LUC 3.2.5 (A) and its requirements for compatibility of trash enclosures with adjacent land uses. See *Amended Opening Brief* at p. 9. Plaintiffs' only interest in this issue was the failure of the P & Z to make a finding of compatibility because they had been given no information on which to base a decision. Similarly, the

[2] Comppiance with the Charter requirements for enacting Ordinances is something that the City has been quite challenged to do this year. This has lead to false representations being made to the purchasers of $144 million in bonds. Nothing could be more screwed. Plaintiff Eric Sutheralnd is way ot of his pay grade in that matter but is still attempting as best as possible to look after the public interest. See 8th District Court Case No. 2018CV149.

citizens who participated in the development review process were also deprived of the ability to play their role.[3]

The City appears to justify the improper actions of the P & Z and also City Council by holding that not all design details must be completed upon the time of development review. This position, of course, runs counter to the requirement of the LUC, 2.4.2(H) step 8, that Plaintiffs have averred was ignored by P & Z and City Council leading to abuse of discretion. *All standards of the LUC must be met with the exception of those addressed by modifications of standards.* Here, all means all. All does not mean some. Contrary to the City's knowing, willing misinterpretation of the LUC, a deficiency in a development review application such as the failure to produce a design of a trash enclosure should be met with a continuance of the item until a subsequent meeting, not an impermissible condition attached to the approval.

IV. THE ENTIRETY OF PLAINTIFFS POSITION ON CONNECTIVITY IS MISUNDERSTOOD BY CITY DEFENDANTS.

The City Defendants begin their examination of Plaintiffs' second claim for relief by stating: "*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 Eric Sutherland ....*" City's *Answer Brief* at p. 10.

In reality, Plaintiff Eric Sutherland did not request or seek a bicycle pedestrian path. Plaintiffs (pl) Eric Sutherland and Brian Dwyer did not file this lawsuit seeking a bicycle/pedestrian path. Here again, the attorney for the City

[3] It was argued by the Plaintiffs that the *complete absence* of any determination by the decision maker tasked with making decisions was unmistakably an abuse of discretion. The Defendants were encouraged to confront the allegation of *complete absence* with citation of a portion of the record that defeated the allegation. No citation was provided.

has mischaracterized an argument in order to shoot something down even if it bears no relation to the actual dispute presented.

Plaintiffs in this case have sought only the dedication of a right-of-way across the subject property in a manner consistent with a plan for eventually constructing a bicycle/pedestrian path. In other places, people call this planning. In Fort Collins, it is a bridge to far.

The desirability of such a path may not be disputed. Indeed, four of the seven city council members who heard the appeal expressed some form of affinity for the prospect of a trail in this location, although most of these comments came immediately after the hearing was concluded and are not part of the transcript. The desirability of a trails segment in this location is known to have been expressed as a community concern to Plaintiff Eric Sutherland for over 15 years. Discussions about this trail segment occurred several times during the planning stages of the Bus Rapid Transit route that runs immediately to the West of the subject property. The desirability of this trail segment is made even more significant at this time owing to the recent opening of a Charter school for 6-12th graders immediately to the South of the subject property.

Yet, no matter how desirable, the only way such a trail segment will come into being is if the appropriate steps are taken when the opportunity is presented. In this case, an opportunity for the City to take ownership of a right-of-way across the subject property…and only the subject property…by virtue of a dedication of a right-of-way as a condition of approval would be missed if it is not required as a consequence of approval.

Connection to adjacent parcels is a requirement of the LUC. The LUC sections cited by the Plaintiffs are dispositive to this situation. See *Amended Opening Brief* at p. 9 citing LUC section 3.2.2(B) and 3.6.2(O).

This connectivity requirement has no relationship whatsoever with levels of service and the citations of the LUC that the City relies on its treatment of the 2nd claim. Level of service requirements gauge access of a proposed development to the public rights of way such as streets and trails that allow access to and from subject parcel. These are two distinctly different sets of requirements pertaining to access. Plaintiffs have not disputed that access to streets and trails was wanting. Rather, Plaintiffs have disputed that connections to adjacent parcels was *completely absent.*[4]

As the above treatment of just the City's argument of the 2nd claim shows, it can take more verbage in a brief to defeat a mischaracterization of a claim and proposed misapplication of law than it takes to make said mischaracterization and misapplication. The Plaintiffs will have no more of this.

IV. PLAINTIFFS NEED NOT AND WILL NOT EXHAUST THEMSELVES TO ADDRESS FURTHER ARGUMENT MADE IN BAD FAITH

The treatment of the just the three topics covered in the three preceding sections of this Reply provide far more refutation of the City's position than is necessary or deserved. To the extent that Defendant Next Chapter's arguments also bubble with bad faith, they may also be construed to be equally without merit.

A request for judicial review of a justiciable matter is not request for an opportunity to spend one's time responding to nonsense forwarded for the purposes of obfuscation and confusion. The Plaintiffs will not spend any more time doing this.

The preceding treatment of the law pertaining to failure of the City organization to abide by the plain and simple requirements of the Land Use Code and the City Code, made manifest by an abuse of discretion by Defendant City

[4] Please reference the prior argument holding that a quasi-judicial decision in which any substance for a requirement of law was *completely absent* is unquestionably an abuse of discretion.

Council, is sufficient to require this Court to order remand. Additionally, the position of the Plaintiffs on the other 4 claims speaks for itself on the basis of the pleadings presented.

Plaintiffs will be making motion to this Court for a Hearing. There does not appear to be any issues of fact to resolve by trial. However, to the extent that this Court finds matters of law may not be adequately resolved on the basis of the pleadings, oral argument would be welcomed by the Plaintiffs.

V. CONCLUSION

Great import will attend the decision this Court may now make. Development review in the City of Fort Collins has, to date, been a series of kangaroo courts. As a result, the little "c" city of Fort Collins, i.e. the community that calls Fort Collins home, is failing to achieve its potential in many ways.

This should not be happening here. We should not be failing in this area. Fort Collins should be an exemplary model of a community growing while improving quality of life for its residents and visitors. Things like unsightly trash enclosures and lost opportunity to create connections throughout the city are noticeable attributes of recent development. The legislative intent of the Land Use Code breaths of the intent to make the citizens of the community the ultimate enforcers of its provisions. However, kangaroo courts have evolved to effectively deny the citizens their right to participation and enforcement.

This Court is not the last buttress against a total washout of rule of law. Plaintiffs have rights of appeal to the District and beyond … if only for the purposes of the trash enclosure and right-of-way issue that have been further explained in this brief. That would be so unnecessary considering that this whole matter really would not have been open in this Court for longer than a month if not for the practitioners of bad faith named as Defendants in this matter.

This Court does have the power to establish rule of law in this matter. This Court also has the opportunity to restore integrity to the development review process and respect for the role of our Court in municipal matters. The role that an independent judiciary plays in our society is precious. Our nation would not be the prosperous and nurturing place that it is now without justice. It is now time for a Home Rule municipality of the State of Colorado to enjoy justice from this Municipal Court under its authorizations found in the City Charter of the City of Fort Collins in accordance with the Colorado constitution, Article XX section 6.

Respectfully submitted this 4th day of October, 2018

Eric Sutherland Brian Dwyer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing REPLY IN SUPPORT OF AMENDED OPENING BRIEF was served by electronic mail on this court and the following.

Jeffrey Cullers
Kim Schutt

Eric Sutherland