| FORT COLLINS MUNICIPAL COURT<br>214 N. Mason<br>Fort Collins, CO 80521<br>Phone: (970) 221-6800<br><br>**Plaintiffs: Eric Sutherland; and J&M Distributing d/b/a Fort Collins Muffler and Automotive**<br><br>**v.**<br><br>**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.**<br><br>**Intervenor: NEXT CHAPTER PROPERTIES, LLC, an Illinois Limited Liability Company.** | COURT USE ONLY |
|---|---|
| Kimberly B. Schutt, #25947<br>WICK & TRAUTWEIN, LLC<br>323 South College Avenue, Suite 3<br>P.O. Box 2166, Fort Collins, CO 80522<br>Phone Number: (970) 482-4011<br>E-mail: kschutt@wicklaw.com<br>FAX Number: (970) 482-8929 | Case Number:<br><br>2018-CIVIL01 |

**CITY DEFENDANTS'**
**MOTION TO AMEND FINDINGS AND JUDGMENT**
**PURSUANT TO C.R.C.P. 59**

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 pursuant to C.R.C.P. 59 to amend its findings and judgment in its Decision and Order dated December 3, 2018. Said amendment is needed to correct certain errors in the Court's findings and remand order relating to the Plaintiffs' fifth claim for relief, as discussed further below. In support hereof, the City states as follows:

## I. RULE 121 CERTIFICATION

Undersigned counsel hereby advises the Court that she has attempted to confer with the plaintiffs and with Counsel for the Intervenor regarding the relief sought in this motion. Based upon the last email from Plaintiff Eric Sutherland, undersigned counsel understands that he is

objecting to the City's motion (and planning to file his own Rule 59 motion) and Mr. Dwyer is taking no position. Mr. Cullers has indicated that he has been unable to determine his client's position as of this afternoon, and thus Next Chapter is taking no position at the present time.

## II. INTRODUCTION

On December 3, 2018, the Court issued its Decision and Order in this action brought by the Plaintiffs pursuant to C.R.C.P. 106, in which they challenged various aspects of the City's approval of the Project Development Plan ("PDP") for the Johnson Drive Apartments Project, PDP# 70034 ("the Project"). The Court rejected the Plaintiffs' first four claims for relief, but granted in part the Plaintiffs' fifth claim for relief, which asserted the City Council allegedly abused its discretion in approving the PDP with reduced parking, without requiring specific provisions for auditing and enforcement of the parking mitigation strategies. The Court concluded, based upon application of a state statute to interpret Section 3.2.2(K)(1)(a)1.a of the City's Land Use Code ("LUC"), there was a deficiency in the PDP in that it failed to provide specifics about how and when the parking mitigation strategies would be implemented or about how compliance would be measured, or noncompliance sanctioned. The Court thus ordered as follows:

> "The PDP is remanded back to the Planning and Zoning Board solely for the limited purpose of including in the Development Agreement provisions consistent with this ruling that will persist for the duration of the project and that provides for the auditing and enforcement of the transit pass and car sharing mitigation strategies. These provisions shall be included in the Final Plan for the approval of the Board and Council; a second full review of the PDP is not required."

As the Court acknowledged in its order, civil litigation such as this case is not in the ordinary business of municipal courts, and determining the limits of its jurisdiction within the framework of this Rule 106 case was challenging. The City appreciates the Court's very

thorough review of the extensive record and its detailed findings and order. However, the Court's findings and orders regarding the remand on the fifth claim for relief are problematic for several reasons:

1. The Court applied a state statute regarding statutory construction to the LUC, when the City Code and LUC contain specific rules regarding interpretation and construction of the City's code provisions which must be applied here;
2. Further, the Court misinterpreted Section 3.2.2(K)(1)(a)1.a. to conclude City Council abused its discretion because the PDP allegedly did not contain specifics about when and how the parking mitigation strategies would be implemented and enforced; the Court's findings and conclusion overlook the site plan in the record, the process *yet to be carried out* pursuant to the LUC for execution of the Development Agreement and approval of the Final Development Plan, and the specific enforcement provisions contained within the LUC itself.
3. The Court's indication that the Final Plan shall later be approved by the Board and Council is contrary to the actual administrative process required by the LUC; and
4. The Court's remand to the Board with direction to take certain action based upon these findings oversteps its jurisdiction under Rule 106, as set forth in *Garland v. Board of County Comm'rs, Larimer County,* 660 P.2d 20 (Colo. App. 1982) and its progeny.

The City respectfully submits that the Court's findings are not a proper interpretation of Section 3.2.2(K)(1)(a)1.a under the applicable rules of construction, and impose requirements greater than those found in the LUC for this Project and potentially others. The City thus brings this motion pursuant to C.R.C.P. 59, the purpose of which is to give a trial court the opportunity to correct certain errors prior to the filing of an appeal. *Harriman v. Cabela's, Inc.,* 371 P.3d 758, 761-62 (Colo. App. 2016) [2016 COA 43]. The City respectfully requests the Court to amend its

findings and orders to correct those errors, as discussed in more detail below, in keeping with the purpose of Rule 59.

## III. ARGUMENT

### A. The Court erred in using a state rule of statutory construction to interpret a provision of the City's LUC, instead of the required rules of construction contained in the City Code and LUC.

On page 9 of the Decision and Order, the Court turned to C.R.S. §2-4-201, a state statute providing rules of statutory construction, as the guiding framework for the Court's interpretation of Section 3.2.2(K)(1)(a)1.a of the LUC. By its own terms, C.R.S. §2-4-201 is only applicable to "statutes." The City's land use and zoning ordinances, as found in the LUC, are not statutes subject to §2-4-201. Instead, the City, as home rule city, has the authority under Article XX, Section 6 of the Colorado Constitution to adopt, as a matter of purely local concern, its own land use and zoning ordinances that preempt and control over any conflicting state statutes that may apply. *City of Colorado Springs v. Secure Self Storage, Inc.*, 10 P.3d 1244, 1247 (Colo. 2000) (a home rule city may adopt and draft its zoning code provisions as it chooses so long as it conforms with constitutional limitations and its own charter). Therefore, as specifically set forth in LUC Section 1.4.9 (attached as part of ***Exhibit 3***), it is this LUC Section and Section 1-2 of the City Code (attached as part of ***Exhibit 3***) which provide the mandatory framework for interpreting the provisions of the LUC:

> "**1.4.9. Rules for Construction of Text**
>
> In construing the language of this Land Use Code, the rules set forth in Section 1-2 of the City Code and this Section shall be observed unless such construction would be inconsistent with the manifest intent of the Council as expressed in this Land Use Code or in City Plan Principles and Policies. The rules of construction and definitions set forth herein shall not be applied to any express provisions excluding such construction, or where the subject matter or context of such section is repugnant thereto. In the event

of a conflict between these rules of construction and the rules of construction established in Section 1-2 of the City Code, these rules shall control.

***(A) Generally.*** All provisions, terms, phrases and expressions contained in the Land Use Code shall be so construed in order that the intent and meaning of the Council may be fully carried out. Terms used in the Land Use Code, unless otherwise specifically provided, shall have the meanings prescribed by the statutes of this state for the same terms.

> In the interpretation and application of any provision of the Land Use Code, such provision shall be held to be the minimum requirement adopted for the promotion of the public health, safety, comfort, convenience and general welfare. Where any provision of the Land Use Code imposes greater restrictions upon the subject matter than another provision of the Land Use Code, the provision imposing the greater restriction or regulation shall be deemed to be controlling. In other words, the more stringent controls over the less stringent.
>
> The definitions are intended to be generally construed within the context of the Land Use Code, except as shall be specified by the term itself within a given context for a select section of the Land Use Code." [underlined emphasis added].

Section 1-2 of the City Code (attached as part of ***Exhibit 3***) contains the following pertinent provisions governing interpretation of the LUC, including Section 3.2.2(K)(1)(a)1.a:

In the construction of this Code and of all ordinances, the following definitions and rules of construction shall apply unless such construction would be inconsistent with the manifest intent of the City Council:

...

*Interpretation.* In the interpretation and application of any provisions of this Code, it shall be held to be at least the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare. Where any other provision of this Code imposes greater restrictions upon the subject matter than the general provision imposed by the Code, the provision imposing the greater restriction or regulation shall be deemed to be controlling.

...

*Nontechnical and technical words.* Words and phrases shall be construed according to the common and approved usage of the language, but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be

construed and understood according to such meaning..."

Thus, in the first instance, the Court committed error in using the state statute as the guiding framework for its interpretation of Section 3.2.2(K)(1)(a)1.a., rather than applying the mandatory rules of construction contained in the City Code and LUC and outlined above.

**B. The Court misinterpreted Section 3.2.2(K)(1)(a)1.a. to conclude City Council abused its discretion because the PDP allegedly did not contain specifics about when and how the parking mitigation strategies would be implemented and enforced; the Court's findings and conclusion overlook the site plan in the record, the process *yet to be carried out* pursuant to the LUC for execution of the Development Agreement and approval of the Final Development Plan, and the specific enforcement provisions contained within the LUC itself.**

As noted by the Court, Section 3.2.2(K)(1)(a)1.a contains a chart which sets forth the various parking mitigation strategies for reducing the number of required parking spaces for developments within the Transit Overlay Development (TOD) zone in the City. The section also contains a statement that "[a]ll demand mitigation strategies shall be shown on the site plan and in the Development Agreement and shall be subject to audit for the duration of the project." As discussed above, the applicable rules of construction in the LUC require the Court to construe this provision according to the common and approved usage of its terms, within the context of the LUC, with the provision held to at least the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare.

Instead, as noted above, the Court interpreted the provision pursuant to C.R.S. § 2-4-201(d) and its requirement that a statutory provision must be read so that a "result feasible of execution is intended." Based on this state rule of statutory construction, the Court then concluded that, in order to comply with Section 3.2.2(K)(1)(a)1.a, the PDP itself (not just the Development Agreement) must "provide specifics about when and how the mitigation strategies would be implemented, or about how compliance would be measured, or noncompliance would

be implemented, or about how compliance would be measured, or noncompliance sanctioned." However, with all due respect to the Court, this is an erroneous interpretation of Section 3.2.2(K)(1)(a)1.a under the governing rules of Code construction set forth above, and it overlooks the site plan in the record, the process *yet to be carried out* pursuant to the LUC for drafting and execution of the Development Agreement and approval of the Final Development Plan, and the specific enforcement provisions contained within the LUC itself.

Nowhere in Section 3.2.2(K)(1)(a)1.a does it state that the details of the parking demand mitigation strategies, and the plan for their enforcement, must be included in the PDP. Rather, it simply states all demand mitigation strategies shall be

a. "shown on the site plan": The site plan for this project was contained in the record as an attachment to the Staff Report presented at the hearing. Record A, Item 1, Part 2, p. 3. A highlighted version is attached to this motion as ***Exhibit 1*** for the Court's convenience, and clearly reflects that it did show the specific demand mitigation strategies planned for the Project (transit passes for each tenant and car shares, with specific car share spaces);

b. "and on the Development Agreement:" As the record should reflect, there is no Development Agreement in place yet. The Development Agreement comes later in the development review process, in conjunction with the Final Development Plan. *See, Sections 2.1.3(D)(1) and 3.3.2 of the LUC* (attached as part of ***Exhibit 3***). It would be expected that additional details relating to operation and management of the Project, including details relating to the transit passes and car shares, will be adopted at that time. The Court's order thus "jumps the gun," so to speak, and just presumes that will not occur.

c. "and subject to audit for the duration of the project" – the City's authority to 'audit' and enforce the requirements of the Development Agreement and the final development plan is part of the LUC. Specifically, Section 2.14 (attached as part of ***Exhibit 3***). Those enforcement mechanisms include the conditioning of the issuance of permits, inspections, civil and criminal penalties, etc.. The demand mitigation strategies, like all aspects of the PDP, are automatically subject to those enforcement provisions. A plain reading of this clause does not require those "audit" mechanisms to be spelled out in the PDP; such a reading imposes a greater requirement on the City and the developer, contrary to the rules of Code construction set forth above.

A large part of the problem/confusion here is that the Plaintiffs have filed this action relatively early in the development review process for this Project. The City would direct the Court's attention to Section 2 of the LUC, which describes the process for development review and approval in the City. For example, LUC Section 2.1.2(C) states:

> Overall development plans, PUD Overlays, project development plans and final plans are the four (4) types of development applications for permitted uses. ***Each successive development application for a development proposal must build upon the previously approved development application by providing additional details (through the development application submittal requirements) and by meeting additional restrictions and standards (contained in the General Development Standards of Article 3 and the District Standards of Article 4).***

This process is further illustrated in the flowchart attached to this motion as ***Exhibit 2***, simply as a demonstrative aid.

As reflected repeatedly throughout Section 2, and as specifically stated in Section 2.2.11, the PDP is only conceptual in nature. The Board's task at the hearing is to determine whether the particular development application "has satisfied and followed the applicable requirements of [Article 2 of the LUC] and complies with all of the standards required for the applicable development application (see Step 8: "Standards" referenced in Divisions 2.3 through 2.11), as

modified by any modification of standards approved under Section 8." As argued at length in the City's Answer Brief, the record provided ample support for the City Council's conclusion that the parking mitigation strategies contained on the site plan and discussed at the hearing met those standards, and thus the City Council did not abuse its discretion in approving the PDP without imposing additional conditions. This issue was thus different than the issue of the trash enclosure, for which the conditions imposed were necessary to ensure that the trash enclosure met applicable standards.

For this Project to receive final approval, it must to continue through the development review process spelled out in Article 2 of the LUC. This means completing this final step in the process by obtaining approval of the Project's Final Development Plan and entering into the Development Agreement with the City as described in LUC Section 2.1.3(D)(1):

> The final plan is the site specific development plan which describes and establishes the type and intensity of use for a specific parcel or parcels of property. The final plan shall include the final subdivision plat (when such plat is required pursuant to Section 3.3.1 of this Code), and if required by this Code or otherwise determined by the Director to be relevant or necessary, the plan shall also include the ***development agreement*** and utility plan and ***shall require detailed engineering and design review and approval***. Building permits may be issued by the Building and Zoning Director only pursuant to an approved final plan or other site specific development plan, subject to the provisions of Division 2.8.

Again, the Court's order erroneously presumes that the Development Agreement and Final Development Plan will not contain additional details relating to the parking mitigation strategies. Also, if the Plaintiffs or anyone else believe the Development Agreement and/or Final Development Plan do not comply with Section 3.2.2(K)(1)(a)1.a, there is a further opportunity for judicial review under Section 2.2.11(E) of the LUC.

Accordingly, based upon the Code provisions and reasoning set forth above, the Court erred in interpreting Section 3.2.2(K)(1)(a)1.a to require specifics regarding the parking

mitigation strategies in the PDP, and in finding an abuse of discretion on the part of City Council. The City respectfully requests the Court to amend and reverse its findings in this regard, to instead conclude that the City Council did not abuse its discretion in approving the PDP with the parking mitigation strategies shown on the site plan. Again, the record amply supported the City Council's conclusion that those parking mitigation strategies complied with the applicable LUC provisions and standards.

**C. The Court erred to the extent its order requires the Final Development Plan to be approved by the Board and Council.**

The Court's Order remands the PDP back to the Planning and Zoning Board solely for the limited purpose of including in the Development Agreement provisions consistent with its ruling. The Order then goes on to state, "[t]hese provisions shall be included in the Final Plan for the approval of the Board and Council."

The City reads this part of the Order as requiring the Final Development Plan to go back to the Board and Council for further review and approval. However, this order is directly contrary to the Final Plan Review procedures set forth in Section 2 of the LUC, particularly Section 2.5.2. The process provides for final review by the Director, who *may* refer the Final Development Plan to the Planning and Zoning Board "when the Director is in doubt as to the compliance and consistency of the final plan with the approved project development plan." However, the Director is not required to do so.

Accordingly, to the extent the Court has ordered the Final Plan to go back for review by the Board and Council, the Court has erred requiring amendment under C.R.C.P. 59.

**D. The Court's remand in itself is beyond its jurisdiction under C.R.C.P. 106.**

This case is before the Court for judicial review under C.R.C.P. 106. The rule itself provides in C.R.C.P. 106(a)(4)(I) that "[r]eview shall be limited to a determination of whether

the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer."

The Colorado appellate courts have, on more than one occasion, held that a reviewing court under Rule 106(a)(4) is limited to the role set forth above, namely to ascertain from the record before it whether the inferior tribunal "regularly pursued its authority." *Garland v. Board of County Comm'rs, Larimer County,* 660 P.2d 20, 23 (Colo. App. 1982). It is not allowed pursuant to Rule 106(a)(4) to remand the matter back to the inferior decision-making body with further directions. *Id.* (reviewing court erred in remanding matter back with instructions to supplement the record); *City of Colo. Springs v. Board of County Comm'rs of Eagle County,* 895 P.2d 1105, 1111 (Colo. App. 1994) (where all the findings necessary for resolution of the issue at hand were made by the Board and supported by the record, the reviewing court was required to uphold the Board's denial of permits; it was error for the reviewing court to remand the matter back to the Board for further consideration); *Prairie Dog Advocates v. City of Lakewood,* 20 P.3d 1203, 1206 (Colo. App. 2000) (citing *Garland* and other cases for the proposition that a reviewing court's role under Rule 106(a)(4) is limited to determining based upon the record before it whether a lower body abused its discretion or exceeded its jurisdiction, and may not remand the matter back to the lower body).

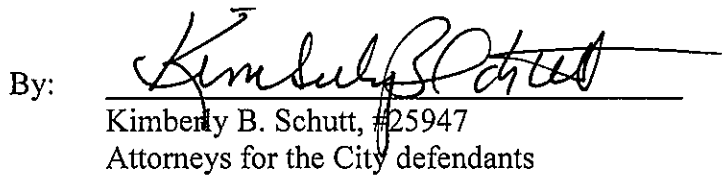
Accordingly, the Court here erred in remanding the matter back to the Planning and Zoning Board with further directions. For the reasons set forth above, the Court must amend its findings and judgment under C.R.C.P. 59 to find, based upon the ample record before it and the relevant LUC provisions, that the City Council did not abuse its discretion in approving the PDP and deny the Plaintiffs' fifth claim for relief as well.

## IV. CONCLUSION

WHEREFORE, based upon the legal authority and reasoning set forth above, the City respectfully requests pursuant to C.R.C.P. 59 the Court amend its Decisions and Order to correct the legal errors. The Court should instead find, with regard to the Plaintiff's fifth claim for relief, that the City Council did not abuse its discretion in approving the PDP with the parking mitigation strategies shown on the site plan, and enter judgment denying all of the Plaintiffs' claims for relief.

Respectfully submitted,

WICK & TRAUTWEIN, LLC

By: 

Kimberly B. Schutt, #25947
Attorneys for the City defendants

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing CITY DEFENDANTS' MOTION TO AMEND FINDINGS AND JUDGMENT PURSUANT TO C.R.C.P. 59 was served this 17^H day of December, 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*