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
Party without attorney Eric Sutherland 3520 Golden Currant Fort Collins, CO 80521 (970) 224 4509 sutherix@yahoo.om	
MOTION FOR AMENDMENT OF FINDINGS AND JUDGMENT PURSUANT TO C.R.C.P RULE 59	

Plaintiff, Eric Sutherland files this Rule 59 Motion requesting that this court amend its findings and judgment. Sutherland will sometimes refer to himself with 1st personal pronouns. Plaintiff Brian Dwyer had confessed to having been exhausted by the nonsense of this proceeding to the point of disinterest. Mr. Dwyer's position is perhaps the most rational of all to be expressed in this proceeding.

CONFERENCE: Both City of Fort Collins and Next Chapter have stated that they oppose the relief requested here.

I. BACKGROUND

The Defendants of the City of Fort Collins have now filed a Motion under Rule 59. If not for this filing, the instant *Motion* would not also be filed and Plaintiff Eric Sutherland would proceed instead toward appeal to the district court.

This court's misapprehensions of the nature and substance of claims are so significant that it simply does not seem to make much sense to try and straighten things out with a Rule 59 Motion unless Plaintiff was going to go through the brain damage of the Rule 59 activities anyway.

II. MISAPPREHENSIONS OF NATURE OF CLAIMS.

Claim 1 alleged abuse of discretion. Claim 2 alleged abuse of discretion. Claim 3 requested declaratory judgment. Claim 4 requested declaratory judgment. Claim 5 requested declaratory judgment. As such, the amended complaint that commenced the instant action was a hybrid of Rule 106 and Rule 57 type claims.

The preceding paragraph spells out the clear and unambiguous nature of the claims that were presented to this court for review. Somehow, this court took it upon itself to read into each of the claims 1-5 a duality that did not exist. The overall action was a hybrid, but none of the individual claims was a hybrid.

By analyzing each of the claims as though both Rule 57 and Rule 106 were in play, this court completely misapprehended the nature of the lawsuit.

III. MISAPPREHENSION OF THE SUBSTANCE OF CLAIMS

To reiterate the foundation of Plaintiffs approach to this matter: we were looking for something simple and straightforward that would nudge the resultant development a couple degrees back toward the public interest outcome we believe the LUC was authored to create. It is unimaginable to me that this proceeding has taken this long and has wandered so far, far away from anything recognizable as the tug-of-war between private and public interests that one might expect in a development review squabble.

I set the whole thing up so as to minimize the need for the record to be reviewed. I am flabergasted to think that the court reviewed the entire record. It was never necessary. Had Plaintiffs' case benefited by certifying any part of the record, that would have been done. However, the purposeful, intentional decision ***not*** to certify any part of the record was, in and of itself, a showing as to the

substance of the two Rule 106 claims; both alleged the ***complete absence*** of necessary elements of the development review process. One may not show a ***complete absence*** of anything by submitting any part of the record of the court below unless the entire record is submitted with the intent of proving that no evidence exists in any part of it. I do not think that explaining this 50 more times will help this court understand what is going on. This is the 4th time such an explanation has been given.

There can be no doubt that the City of Fort Collins decision to certify the entire record, instead of simply certifying those elements of the record that would refute the allegations of the amended complaint was done intentionally for purposes of conflating this proceeding. This was subterfuge. This was one of many steps the city took on the path taken to lead this court away from the very simple, very practical foundation that had been laid out in the amended complaint. It worked. This court's findings and orders are so far off base that both the city and Plaintiffs now object.

I have no doubt that if Mr. Dwyer and I were engaged in a dispute with planners ... and not lawyers who know nothing of planning ... we would have settled this long ago. Obviously Next Chapter has no inclination whatsoever to get this project built. A motivated developer would have worked things out. A quick remand and ... boom, done. Unstained entitlements.

But things are what they are and litigation for litigation's sake has done its worst here. Consequently a brief description of how this court misapprehended the substance of each of the 5 claims is treated briefly here.

A. The court misapprehended the substance of Claim 1

Claim one simply stated that the P & Z had failed to receive enough information on which to base a decision as to the compatibility of a trash enclosure

with surrounding land uses. Plaintiffs allegation circumscribed the basic reality that if the P & Z didn't have enough information, neither did the public.

The P & Z is but an extension of the citizenry of Fort Collins. Board members are appointed to make decisions that affect the entire community for the community. The process is set up such that decisions that are made that are inconsistent with the LUC may be appealed to Council. Thus, P & Z makes decisions subject to scrutiny and review by interested parties that participate in the process.

This court failed to understand that P & Z can't make a decision about something that it has not been properly informed about because the interested parties are similarly deprived of information. I really think that this is where the court got off on a wild tangent. This may very well have happened because the court is unaware of the significance of decisions made about compatibility. Compatibility is the most subjective decision that can be made in the context of development review.

Of course, P & Z abdicated its responsibility to decide compatibility to others. This was an abuse of discretion. P & Z can't do this because when they do, the interested parties are deprived of an opportunity to challenge the decision as to compatibility. To hold otherwise would mean that P & Z could abdicate ever single decision that it is required under the LUC to make unto others. This would be absurd.

In this regard, the decision of the municipal court establishes a dangerous precedent. As explained Plaintiffs' Reply Brief, any determination that a decision regarding compatibility can be abdicated to others .... especially in the absence of sufficient information to make such a decision ....is anathma to the development review process. This result will not be allowed to stand.

B. The court misapprehended the substance of Claim 2

A dedication of a right of way is not only legally possible, it is a requirement of the LUC and is done all the time. Yes, it is true that a 'plan' for how a pedestrian/bicycle connection between two places may be effectuated is a prerequisite for the accurate location and dedication of such a right of way. However, guess what, the LUC requires such planning to take place.

In the present instance, such planning is not difficult. There appears to be only one way that Creekside Park can be connected to the Max station with an ADA compliant trail. A dedication of a right of way consistent with a very crude design of this infrastructure is well within the realm of available possibilities and, to repeat myself, is a requirement of the LUC.

It was an abuse of discretion for P & Z and Council to approve the development without this dedication of a right of way.

Perhaps if this Court had not fixated on the creative writing employed by Sutherland as he exhausted himself with the inanity of kangaroo courts and debunking the obfuscation of Defendant's desperate rush to vacate the foundation that had been laid and instead read Plaintiffs filings for the practical and legal points being made, the court would not have immediately understood that the dedication of a right of way was the only component of the development proposal that Plaintiffs had deemed to be absent.

C. The court misapprehended the substance of Claim 3 (combined with)
D. The court misapprehended the substance of Claim 4

Claims 3, 4 alleged that language in the LUC was unconstitutionally vague and subject to more than one interpretation. The remedy was declaration to this effect and remand to better define, through the imposition of conditions, what "car share" and "transit passes" meant so that no one could ever, ever be confused going forward.

A finding that a statute is unconstitutionally vague is not the same as finding that a statute is unconstitutional. The court sort of got off on a tangent in this regard. This was truly astonishing. Nothing, it would seem, could be simpler than better defining what was meant by these terms and ensuring that grant of entitlements included the improved meaning.

E. The court misapprehended the substance of Claim 5

In response to Claim 5, this Court has ordered a remand so that requirements that could not possibly be more ambiguous are more clearly delineated for enforcement under a legal paradigm that provides no means for enforcement.

I am in agreement with the City that the court exceeded its authority in ordering "relief" on claim 5. Claim 5 was a request for declaratory judgment. Such claims usually present binary choices for a court to decide. Either the plaintiff is granted declaratory judgement or he or she is not. On the basis of a grant for declaratory judgment, a Plaintiff may or may not request additional relief and the court is authorized to apply such equitable relief that is necessary to effectuate the ends of justice.

The court clearly misapprehended the substance of the claim for declaratory judgment in Claim 5. Very simply the City of Fort Collins will have next to zero opportunity to ensure that 'car share' and 'transit passes' , whatever those terms mean, are enforced going forward. If the City should, at some point in time in the future, find itself or its citizens aggrieved as a result of the owner/operator of the Johnson Drive Apartments, its chances for successful enforcement is next to nothing. A request for equitable relief in the form of an order for specific performance in the district court is an unrealistic possibility because; 1) the city could never show injury in fact and 2) there is no department in the city that is currently tasked with monitoring for compliance and taking judicial action in the

absence of compliance. Outside of filing an action for specific performance, there are no other remedies.

It does not matter what lanaguage appears in the Final Develoment Plan approval or development agreement. Enforcement of these insufficiently understood "forward looking conditions" is not possible under the current state of law.

Thus, Plaintiffs' 5th claim for relief should have been granted, save for legislation by Council that bestows jurisdiction on the municipal court to impose fines or other penalties for non-compliance. Such legislation is clearly within city council's authority under Article XX section 6 of the Colorado constitution. Such legislation is an absolute necessity if the City of Fort Collins is going to continue applying 'mitigation strategies' and forward looking conditions that are expected to be enforced beyond the award of a certificate of occupancy for new projects.

Thus, it is my position here that the relief ordered by the court in response to the 5th claim was improperly granted; however, the correct result would be granting declaratory judgment in favor of the Plaintiffs. Whether or not the court went on to spell out additional relief such as declaring the entitlements null and void is immaterial at this point as that could always be the subject of further action in the municipal court. Also, as a practical matter, such a judgment would likely be fatal to the project because of the cloud it would place over the entitlements.

IV. CONCLUSION

The only real question to answer here is whether or not the situation now represents the expenditure of 2,3 or 4 times the amount of effort that would have been necessary to resolve all concerns upon 1) simple remand for consideration of alleged deficiencies in the development application and 2) legislation to secure jurisdiction for enforcement of forward looking conditions of approval within the municipal court.

Lawyers that love to litigate (for $) have conflated and obfuscated this case to kingdom come and that has resulted in an absurd finding and order of this court that needs to be corrected.

This court should immediately schedule a hearing for presentation of oral arguments if it remains confused about the simple foundation and requests for relief requested by Plaintiffs. Defendants have opposed such a hearing, but it is very likely to be worth the effort. In the alternative, this court should simply grant the relief requested and order remand to deal with the very simple issues that have been raised.

Respectfully submitted this 17th day of December, 2018

Eric Sutherland

Eric Sutherland

Address of Lead Plaintiff
3520 Golden Currant
Fort Collins, CO 80521

The above motion was served to City of Fort Collins and Next Chapter via email at the same time it was submitted by email to the municipal court.