

<p>FORT COLLINS MUNICIPAL COURT 214 N. Mason Fort Collins, CO 80521 Phone: (970) 221-6800</p>	<p>COURT USE ONLY</p>
<p>Plaintiffs: Eric Sutherland; and J&M Distributing d/b/a Fort Collins Muffler and Automotive</p> <p>v.</p> <p>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.</p> <p>Intervenor: NEXT CHAPTER PROPERTIES, LLC, an Illinois Limited Liability Company.</p>	
<p>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</p>	<p>Case Number: 2018-CIVIL01</p>
<p style="text-align: center;">CITY DEFENDANTS' RESPONSE TO PLAINTIFF SUTHERLAND'S MOTION FOR AMENDMENT OF FINDINGS AND JUDGMENT PURSUANT TO C.R.C.P. 59</p>	

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 responds to Plaintiff Sutherland’s motion to amend the Court’s findings and judgment pursuant to C.R.C.P. 59, as follows:

1. Plaintiff Sutherland has submitted a motion pursuant to C.R.C.P. 59, arguing that the Court allegedly misapprehended the nature and substance of the Plaintiffs’ claims and that it should either set the matter for a hearing, or simply grant the relief originally requested in the Plaintiffs’ Second Amended Complaint. Simply put, Plaintiff Sutherland’s motion fails to articulate any rational basis for amending the Court’s findings and judgment under the standards of C.R.C.P. 59.

2. First, Plaintiff Sutherland argues that the Plaintiffs' claims were allegedly a "hybrid of Rule 106 and Rule 57 type claims," and argues the Court erroneously "took it upon itself to read into each of the claims 1-5 a duality that did not exist." However, Sutherland's assertions belie the express allegations of his own Second Amended Complaint. More specifically, paragraphs 40, 46 and 56 of the Second Amended Complaint specifically assert that the City Council allegedly abused its discretion with regard to the issues raised in the third, fourth and fifth claims for relief. Accordingly, notwithstanding the assertions now made by Sutherland in his Rule 59 motion, his third, fourth and fifth claims did indeed invoke review under C.R.C.P. 106 and the Court correctly determined those claims under the proper standard of review.

3. Further, to the extent the Plaintiffs attempted to couch some of their allegations as requests for "declaratory relief" in their third, fourth and fifth claims for relief, by arguing the terms "car share" and "transit passes" were unconstitutionally vague and not subject to enforcement by the City, legally these arguments did not create a separate cause of action for declaratory relief under C.R.C.P. 57. Rather, because City Council considered and rejected those same vagueness arguments as part of its decision below, that legal conclusion was not subject to de novo review on appeal in this Rule 106 action, but rather had to 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). As argued in the City Defendants' Answer Brief, this Court could 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. Therefore, there is no error requiring amendment of the Court's findings and judgment for the reasons asserted by Sutherland.

4. Plaintiff Sutherland's motion also, once again, argues the Court somehow erred by taking into consideration the record that was certified by the City in this case, when the Plaintiffs failed to carry out their obligation to designate one. Such assertions continue to be wholly without merit, as this Court could not logically or legally review the Rule 106 claims raised by the Plaintiffs' own complaint, and their allegations of abuse of discretion on the part of City Council, without reviewing the record that was before City Council below. Contrary to Sutherland's assertions, there was no "subterfuge" on the part of the City in certifying the record; quite to the contrary, it was providing the Court with the very information needed to reach a decision on the merits since the Plaintiffs themselves failed to do so. The Court did exactly what it was supposed to do under the express provisions of C.R.C.P. 106 by reviewing that record as part of its determination here.

5. The balance of the Plaintiff Sutherland's Rule 59 motion is generally a stream-of-consciousness series of accusations against the Court and regurgitation of the arguments previously made in the Plaintiffs' Opening Brief. Those arguments articulate no specific error or rational basis for altering or amending the Court's judgment. However, in Section E on page 6 of Sutherland's motion, he appears to agree that the Court exceeded its authority or jurisdiction under Rule 106 by ordering a remand with further instructions on what should be done with the parking mitigation strategies, as asserted in the City's own Rule 59 motion. For the reasons stated above, however, the City disagrees with his remaining statements that the fifth claim for relief presented a claim for declaratory judgment which should have been

granted by the Court, and with his assertions that there allegedly are no means of enforcing the car share and transit pass requirements reflected on the Site Plan as part of the parking mitigation strategies. As discussed in the City's Rule 59 motion, the City's Land Use Code contains specific enforcement mechanisms for those requirements, just like any other elements of the Project Development Plan. Therefore, though Sutherland appears to concede that the relief granted by the Court on the fifth claim for relief was improperly granted, the City disagrees with his statement as to what the "correct result" should be.

6. Finally, the City disagrees with Sutherland's assertion that an "immediately scheduled hearing" for presentation of oral arguments is needed here. For the reasons set forth above, Sutherland has raised no legal error that requires altering or amending the judgment, let alone great debate or further argument. Moreover, the City's Rule 59 motion addressing the legal error in the remand on the fifth claim for relief is very narrow and should not require a hearing, to the extent that one is allowed under Rule 106 or Rule 59 in the first instance.

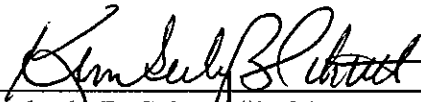
WHEREFORE, the City Defendants respectfully request the Court deny Plaintiff Sutherland's Rule 59 motion.

DATED this 2nd day of January, 2019.

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 RESPONSE TO PLAINTIFF SUTHERLAND'S MOTION TO AMEND THE FINDINGS AND JUDGMENT PURSUANT TO C.R.C.P. 59 was served this 2ND day of January, 2019, via email transmission on the following:

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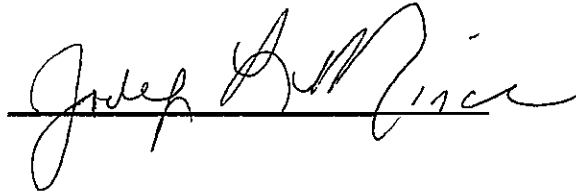
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A handwritten signature in cursive script, appearing to read "Jeffrey Cullers", is written over a solid horizontal line.