

<p>Fort Collins Municipal Court 215 N. Mason Fort Collins, CO 80521 (970) 221-6800</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiffs: Erik Sutherland and Brian Dwyer</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>Jeffrey B. Cullers, No. 41969 Herms & Herrera, LLC Attorneys for Next Chapter Properties, LLC 3600 S. College Ave., Suite 204 Fort Collins, CO 80525 Phone Number: 970-498-9999 Fax Number: 970-472-5365 E-Mail: jeff@hhlawoffice.com</p>	<p>Case Number: 2018civil01</p>
<p>NEXT CHAPTER PROPERTIES, LLC’s RESPONSE TO THE RULE 59 MOTIONS</p>	

Comes now Next Chapter Properties, LLC, (“Next Chapter”), by and through its attorney Jeffrey Cullers of the law firm Herms & Herrera, LLC, and submits this Response to the Rule 59 Motions filed by Eric Sutherland (“Sutherland Motion”) and the City of Fort Collins (“Fort Collins Motion”), as follows:

I. SUTHERLAND MOTION

A. Next Chapter’s Motivations.

Next Chapter will address only certain portions of the Sutherland Motion. First, Next Chapter addresses the portion of Page 3 suggesting that Next Chapter has abandoned the Project and is not a “motivated developer.” The Court should be aware that at this point, Next Chapter still desires to build the Project. Next Chapter considers it impractical and unnecessary to return to the Planning and Zoning process and address Mr. Sutherland’s concerns. Next Chapter views this litigation as an effort by Mr. Sutherland to force changes in the City of Fort Collins’ policies, practices, and land use code. Unfortunately, Next Chapter finds itself drawn into the middle of this dispute. Next Chapter’s primary interest lies in seeing the instant litigation resolved.

B. Claim 5.

Next Chapter agrees with Sutherland that it was improper for the Court to order a remand of this matter to the Planning and Zoning Board so that specific provisions could be added concerning the auditing and enforcement of the parking mitigation strategies. However, the Court should simply deny relief on Claim 5 rather than amend its Order to provide the declaratory judgment sought by Plaintiffs.

Plaintiffs’ primary complaint in Claim 5 is that the Fort Collins Land Use Code is itself deficient regarding enforcement of parking mitigation strategies; Mr. Sutherland would like to see the City legislate a fix to this perceived issue but admits that such is not a possible outcome of this litigation. *See* Sutherland Amended Opening Brief, at 12; *see also* Sutherland Brief, at 7. Sutherland also admits that this alleged issue cannot be solved by a remand. *See* Sutherland Amended Opening Brief, at 11. As a next-best outcome, Sutherland asks the Court to declare that the unenforceability of “car share” and “Transit Pass” strategies precludes any reduction in the number of parking spaces. *See* Plaintiffs’ Amended Complaint (filed April 3, 2018), at ¶ 57;

Plaintiffs's Second Amended Complaint (Filed June 15, 2018), at ¶ 57. Essentially, Mr. Sutherland wishes the Court to throw out the baby with the bathwater, that is, find that no project (including the one at issue) may implement parking mitigation strategies in the LUC because they are fatally flawed. *See id.* Sutherland again urges such outcome in his Rule 59 Motion, with full recognition that such ruling would threaten the Project. *See* Sutherland Motion, at 7, in the second and third full paragraphs and Conclusion.

The City of Fort Collins, in its own Rule 59 Motion, deftly explains how future development processes address parking mitigation enforcement. However, the Court can and should deny Claim 5 and the Sutherland Motion as to Claim 5 on another, more straightforward basis by construing Claim 5 entirely as a declaratory judgment claim. Although Mr. Sutherland has articulated Claim 5 as a declaratory judgment from the beginning, Next Chapter perceives that the Court recast such claim to be, at least in part, a Rule 106 matter over which it has jurisdiction. (*See* Decision and Order, at 7 first paragraph). This decision resulted in the Court's remand of Claim 5 to address Plaintiffs' concerns about enforcement in the context of the specific Project at issue. However, such relief was not even requested by Mr. Sutherland, and Next Chapter opposes it because of the delay it would cause to the Project.

In sum, Claim 5 was and has always been presented by Mr. Sutherland as a declaratory judgment claim. Respectfully, Next Chapter posits that the Court erred in recasting Claim 5 in terms of whether the City of Fort Collins abused its discretion by approving the Project with reduced parking spaces. *See* Decision and Order, at 8. Accordingly, Next Chapter requests that the Court deny the Sutherland Motion and amend its Decision and Order to find that Claim 5 is

wholly barred for the reasons that Claims 3 and 4 were barred, namely, that the Court lacks jurisdiction over such declaratory judgment claims.

II. FORT COLLINS MOTION

Next Chapter generally agrees with the arguments in the Fort Collins Motion and concurs with the prayer for relief. However, as explained above, Next Chapter believes that the Court should address as solely a declaratory judgment matter Mr. Sutherland's Claim 5, and dispose of it on that basis.

WHEREFORE, Intervenor Next Chapter Properties, LLC prays that the Court deny the Sutherland Motion in its entirety and amend its Decision and Order by denying Claim 5, whether on the basis articulated by the City of Fort Collins or the basis described herein.

Respectfully submitted this 2nd day of January, 2019

HERMS & HERRERA, LLC

/s/ Jeffrey B. Cullers [Signature on File]

Jeffrey B. Cullers, #41969

Attorney for Intervenor

E-Filed copy of document with original signature
maintained by the filing party

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of December, 2019 a true and correct copy of the above and foregoing was filed via email and served on all parties via email as follows:

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