Fort Collins Municipal Court, **Larimer County, Colorado** Court Address: 215 N. Mason St., 1st floor P.O. Box 580 Fort Collins, CO 80522 Court Phone: 970-221-6800	▲ COURT USE ONLY ▲ **Civil Case No.: 2018-CIVIL-01**
PLAINTIFFS: ERIC SUTHERLAND; and BRIAN DWYER v. **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 **Intervenor:** Next Chapter Properties, LLC, an Illinois limited liability company	

AMENDED DECISION AND ORDER

Appearances: Eric Sutherland and Brian Dwyer, Plaintiffs, pro se
City of Fort Collins, by and through Kimberly B. Schutt, Esq.
Intervenor Next Chapter Properties, by and through Jeffrey B. Cullers, Esq.

This matter is before the Court for review pursuant to C.R.C.P. 57 and C.R.C.P. 106(a)(4)[1] , to review the City's approval of a Preliminary Development Plan ("PDP") for the Johnson Drive Apartments Project, PDP#! 70034 ("the Project").

PROCEDURAL HISTORY

The City's Planning and Zoning Board ("the Board") initially approved the PDP after hearing on January 18, 2018. Plaintiff Eric Sutherland appealed the Board's approval of the PDP to the City Council, which heard the appeal on February 27, 2018. Following the hearing, the City Council denied the appeal and upheld the Board's approval of the PDP, finding that the

[1] Municipal Court has jurisdiction under these provisions of the Colorado Rules of Civil Procedure pursuant to *Town of Frisco v. Baum*, 90 P.3d 845 (Colo. 2004).

Board did not fail to properly conduct a fair hearing and that the Board did not fail to properly interpret and apply certain sections of the City's Land Use Code ("LUC") in its approval of the PDP with conditions. See, Resolution 2018-023. Record E.

Plaintiff Eric Sutherland originally filed his complaint with a business, J & M Distributing, DBA Fort Collins Muffler and Automotive, as co-plaintiff. That complaint named as an indispensable party an individual named Craig Russell, erroneously referred to in the amended complaint as the Applicant. The case was originally assigned to a different judge, but was reassigned to the undersigned after Plaintffs filed a motion to disqualify. After a series of motions and orders, Plaintiff J & M, a business which could not proceed pro se, was replaced by Plaintiff Dwyer, Mr. Russell was dismissed as not an indispensable party, and Next Chapter Properties, the Applicant for approval of the Project, was permitted to intervene.

After another series of pleadings, Plaintiffs filed their Second Amended Complaint on June 15, 2018, to which the City and the Intervenor filed answers. Despite it being their burden to do so pursuant to Rule 106(a)(4), Plaintiffs never designated any portion of the record below for review. Eventually Next Chapter Properties filed a Motion to Expedite Briefing Schedule, and the City filed the certified record on September 5, 2018. Due to the nature of the proceedings under Rule 106, no hearing was held, but briefs were filed by all parties. A Decision and Order was filed December 3, 2018. Both Plaintiffs[2] and Defendant City filed motions pursuant to C.R.C.P. 59; Defendant Next Chapter filed a response. Pursuant to C.R.C.P. 59, the December 3 Decision and Order is withdrawn, and this Amended Decision and Order is filed in its place.

STATEMENT OF FACTS

The Court hereby adopts the citation convention for the certified record set forth in footnote 1 of the City's Answer Brief, as well as the unopposed Statement of Facts set forth in the City's Answer Brief. The Certified Record was submitted to the Court in PDF format. The citations to the record will generally refer to the page number of the particular PDF document constituting that part of the record. However, to the extent possible, the references to the page numbers for the transcript of the Board hearing will also indicate the number as it is reflected on the bottom of each page of the actual transcript, which differs from the page number of the PDF document, since it is one of many items included within that part of Record A. For the City Council hearing transcript, the page numbers for the transcript correspond with the page numbers of the PDF.

The subject Project proposes a five-story mixed-use building at the southwest corner of Johnson Drive and Spring Court in the central part of Fort Collins, Colorado, near the Colorado State University ("CSU") campus. The project includes a total of 192 dwelling units and 412 bedrooms, which are expected to be occupied primarily by college students. Record A, Item 1 Part 7, at p. 40.

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[2] In their Rule 59 motion, "Plaintiffs" have allegedly become a single Plaintiff, Mr. Sutherland. However, no motion to withdraw as a party was ever filed by Mr. Dwyer, thus he is still a party to the action and the Court continues to address them as "Plaintiffs."

The proposed site includes a total of 2.5 acres within the General Commercial (C·G) Zone District and the Transit-Oriented Development (TOD) Overlay Zone, which is explained below. A total of 261 off-street parking spaces are proposed within a parking garage located within the first two levels of the building. Record A, Item J Part 7, at p. 40.

The Board reviewed the PDP for the Project at a hearing held on January 18, 2018. At the hearing, the City Planning Staff presented its report on the Project [Record A, Item 1, Attachment 8, at p.20], consisting of 18 narrative pages outlining details of the Project, the Staff conclusions that the Project met applicable provisions of the City's LUC, and its recommendation that the Board approve the Project with two specific conditions:

"1) The applicant shall provide, no later than Final Plan approval, a detailed trash and recycling enclosure design, including truck access and circulation, compactor and/or dumpster locations, in a manner substantially compliant with the Planning and Zoning Board approval and in accordance with adopted Engineering Standards and Trash and Recycling Standards in Section 3.2.5 of the Land Use Code, and

2) The applicant shall provide, no later than Final Plan approval, material samples and colors to ensure compliance with Section 3.10.S(C) of the Land Use Code."

The Staff report also included extensive attachments consisting of building plans, traffic impact studies, landscape and lighting plans, etc. Planning Staff and representatives of Next Chapter Properties addressed Board questions at the hearing, and members of the public (including Plaintiff Eric Sutherland) also spoke at the hearing, as is reflected in the transcript of that hearing found in the record. Record A, Item 1, Part 7, at p. 15.

At the conclusion of the hearing, the Board voted unanimously to approve the PDP subject to the two conditions recommended by the City Planning Staff. Record A, Item 1, Part 7, pp. 36-37 (pages 21-22 of the transcript).

On February I, 2018, Plaintiff Eric Sutherland and another individual not a party to this action, Paul Patterson, filed an appeal to the City Council seeking review of the Board's approval of the Project. Record A, Item 1, Attachment 7, p. 13.

The City Council considered the appeal in a quasi-judicial hearing held February 27, 2018, as is reflected in the transcript included in the record. Record D. At the hearing, City Council had before it all of the information considered by the Board, including a transcript of the hearing held January 18, 2018, and also took testimony from City Planning Staff, representatives of Next Chapter Properties, the two appellants, and Plaintiff Brian Dwyer.

At the conclusion of the February 27th hearing, based upon the evidence before it, the City Council voted unanimously to uphold the Board's decision approving the PDP, finding it properly interpreted and applied the relevant provisions of the LUC. Record D, at. pp. 36-37. That decision was embodied in Resolution 2018-023, adopted by City Council at its next regular meeting on March 6, 2018, and found in the record. Record E.

INTRODUCTORY NOTE

Before turning to resolution of the Plaintiffs' specific claims, a brief discussion of the unique and challenging aspects of this case is warranted. Civil litigation such as this case is not in the ordinary course of business for municipal courts; adapting the Rules of Civil Procedure to fit the circumstances of this case, and determining the limits of the Court's jurisdiction under this carve out of what is normally district court jurisdiction was a bit like untying a Gordian knot. Unfortunately, despite their protests to the contrary, Plaintiffs have failed to appreciate the limited nature of a Rule 106 proceeding, as well as the burden of proof which falls on plaintiffs in Rule 106(a)(4) proceedings. Plaintiffs failed to certify any portion of the record below for review, and failed and refused to cite to any portion of the record the City designated in support of their arguments; they have berated the Court for reviewing the record once certified on the grounds that there was a "complete absence of necessary elements of the development review process" in the record, while at the same time acknowledging that "[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." Plaintiffs' Motion for Amendment of Findings and Judgment at 2-3. Throughout the process Plaintiffs' pleadings have been laced unnecessarily with hyperbole and invective and overbroad and conclusory statements. These failures, particularly those involving the record, could have resulted in a summary decision against Plaintiffs; however, in the spirit embodied by the City's decision to certify the record so as to get to a decision on the merits, that decision on the merits follows.

ANALYSIS AND CONCLUSIONS OF LAW

This Court has jurisdiction over local land use matters pursuant to C.R.C.P. 106(a)(4) and pursuant to the Charter of the City of Fort Collins, which vests exclusive jurisdiction to decide matters arising under the Charter in its Municipal Court. *See Town of Frisco v. Baum*, 90 P.3d 845 (Colo. 2004). C.R.S. 13-51-5-101 also arguably vests this Court as a court of record with jurisdiction over local land use matters. As part of qualifying for relief under C.R.C.P. 106(a)(4), the decision must have been issued by a government body or officer acting in quasi-judicial role. Quasi-judicial decisions are generally characterized as actions taken by a government body or officer where (1) a local or state law requires that notice be given before the action is taken; (2) a local or state law requires that a hearing be conducted before the action is taken; and (3) a local or state law directs that the action results from the application of prescribed criteria to the individual facts of the case. *See Baldauf v. Roberts*, 37 P.3d 483 (Colo. App. 2001). "'A general rule or policy which is applicable to an open class of individuals, interests, or situations'" rather than to a specific piece of property, is not subject to review under Rule 106(a)(4). *Snyder v. City of Lakewood*, 542 P.2d 371 (1975), *overruled on other grounds by Margolis v. Dist. Court*, 638 P.2d 297, 299 (Colo. 1981)

In a Rule 106(a)(4) proceeding, the court's review is limited to whether the governmental body's decision was an abuse of discretion or was made in excess of its jurisdiction, which occurs if no competent evidence in the record before that body supports its decision. C.R.C.P. 106(a)(4)(I); *Whitelaw v. Denver City Council*, 2017 WL 1279771; *see also Verrier v. Colo. Dep't of Corr.*, 77 P.3d 875, 879 (Colo. App. 2003); *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052,

1055 (Colo. App. 2013). "'No competent evidence' means that the decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.'" *Whitelaw*, 2017 WL 1279771, *quoting Canyon Area Residents v. Bd. of Cty. Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006) (*in turn quoting Bd. of Cty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996)). The person challenging the governmental action bears the burden of proving abuse of discretion, and that no competent evidence supports the decision. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008).

An agency's misinterpretation or misapplication of governing law may constitute an alternative ground for finding an abuse of discretion under C.R.C.P. 106(a)(4). *Whitelaw, supra*; *see also Roalstad v. City of Lafayette*, 2015 COA ¶ 13, 363 P.3d 790, 793. "While interpretation of a city code is reviewed de novo, interpretations of the code by the governmental entity charged with administering it deserve deference if they are consistent with the drafters' overall intent." *Whitelaw, supra*; *see also Alpenhof*, ¶ 10, 297 P.3d at 1055.

Unfortunately, Plaintiffs have conflated and confused these standards and burdens of proof as they apply to many of Plaintiffs' claims. For example, in their fifth claim for relief, Plaintiffs focus on a provision in the LUC that provides a developer with the benefit of building fewer required parking spaces if it adopts certain mitigation strategies. Plaintiffs argue that this portion of the LUC is not rational because it allows the developer to reap a significant benefit without any guarantee that the mitigation strategies will be implemented or effective; by the time the failure of the mitigation is evident, say Plaintiffs, the damage is done—the project cannot be rebuilt, the parking deficiency cannot be remediated. However valid this argument may or may not be, it is simply not something that can be fixed judicially. The enactment of that LUC provision was a legislative act, not a quasi-judicial one. It is therefore not subject to this Court's review pursuant to Rule 106(a)(4), nor will this Court engage in judicial activism pursuant to Rule 57 by substituting its judgment for the judgment of the City Council in enacting the LUC.

Problems of the same nature plague Plaintiffs' first and second claims for relief: Plaintiffs seek to have this Court change or adopt hearing procedures for the approval of PDPs by the Board and by Council, including the role staff should play in that process, and upon whom the burden of proof should fall in such proceedings. See, e.g., Opening Brief ("OB") at 4-6. Plaintiffs also seek to limit the Board and Council's authority to impose conditions on the approval of a PDP, so that those conditions cannot assist the project's compliance with any of the LUC's substantive requirements, despite the provisions of LUC 2.2.9, which allows the decision maker to "impose conditions on approval of the development application as are necessary to accomplish the purposes and intent of this Code," and of LUC 2.2.5, which permits staff to recommend conditions for approval "to eliminate any areas of noncompliance or mitigate any adverse effects of the development proposal." OB at 6-7. Again, these are provisions of the LUC, see, e.g., LUC Sections 2.2.5 and 2.2.7(A)(2), concerning hearing procedures, i.e., legislative enactments by Council; any deficiencies therein must be remedied legislatively by Council.

This Court arguably has jurisdiction to hear actions for declaratory judgment pursuant to C.R.C.P. 57 and 13-51-101 et seq, C.R.S. Rule 57 is limited to "[d]istrict and superior courts within their respective jurisdictions", but the statute has no such limitation, and case law often

discusses Rule 106(a)4) and Rule 57 as two sides of the review coin, quasi-judicial and legislative. *See, e.g., Russell v. City of Central*, 892 P.2d 432 (Colo. App. 1985). Given the *Town of Frisco v. Baum* decision regarding jurisdiction under Rule 106(a)(4), this Court concludes it does have jurisdiction under the proper circumstances to award declaratory relief. However, both the statute and Rule 57 include the following limiting language: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and is entitled to be heard." 13-51-115, C.R.S.; C.R.C.P. 57(j).

Plaintiffs' Third Claim for relief seeks a declaration that "[t]he mitigation strategy for 'car share' [in the TOD set forth in LUC section 3.2.2(K)] is unconstitutionally vague." Second Amended Complaint at ¶41. Plaintiffs' Fourth Claim for relief requests "that this court issue a declaration that the mitigation strategy for 'transit passes' [in the TOD set forth in section 3.2.2(K) of the LUC] is unconstitutionally vague." Second Amended Complaint at ¶47. At the City Council hearing, Plaintiff Eric Sutherland also asserted that the LUC provisions concerning the TOD parking mitigation strategies (the subject of Plaintiffs' Fifth Claim for Relief) "are the equivalent of an unconstitutional law and must be deemed a nullity when considering the sufficiency of the PDP." Record A, Item 1, Part 8, p.22. "A municipal court can only exercise jurisdiction over matters that are of local or municipal concern." Town of Frisco v. Baum, 90 P.3d 845 (Colo. 2004). The requirement of Rule 57(j) and of 13-51-115 that actions seeking to declare ordinances unconstitutional must be served on the state attorney general clearly indicates that such a declaration is of statewide, rather than strictly local or municipal, concern. This Court therefore does not have jurisdiction to grant the relief requested in Plaintiffs' Third and Fourth Claims and Fifth Claims for relief, and those claims or parts thereof are hereby DENIED. (The Court would also note that there was no compliance in this case with the requirement that the attorney general be served with the complaint.)

As to the declaratory judgment components of Claims 1, 2, and 5 discussed above that do not involve claims of unconstitutionality, the Court has two concerns that preclude it from providing the requested relief. The first concern is again from the language of Rule 57(j) and 13-51-115, this being the first clause of the paragraph: "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." If this Court were, for example, to declare invalid that portion of the LUC that permits a reduction in the number of parking spaces to be built in return for certain mitigation strategies, the rights of not only this Applicant, Next Chapter Properties, but every potential developer applicant, every Fort Collins property owner contemplating selling their property for development, would be affected by that declaration. That concern applies to the other portions of the LUC objected to by Plaintiffs, as well—the elimination of the ability of the Board and Council to approve an application with conditions could potentially affect every current and future applicant for development in the City. This dovetails with the other concern this Court has with providing the relief requested by Plaintiffs, the scope of relief requested. Rule 57(b)

provides in relevant part "[a]ny person . . . whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . .ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder." Plaintiffs in this case don't just seek a declaration of rights or pose a question of construction as to how these Code provisions are being applied to this specific project in a way that affects their specific rights in this instance, they are seeking declarations that would potentially nullify the application of these Code provisions throughout the City based on their alleged effect on one specific project. In some instances they are not just seeking a declaration of rights, but a rewriting of the disputed provisions. These are legislative roles, not judicial ones, and this Court will simply not cross that line. Plaintiffs' claims for declaratory relief are therefore DENIED.

Having sorted out those claims made by Plaintiffs that it cannot decide, this Court now turns to those portions of the claims that it does have jurisdiction to decide. Those questions are: 1) Did Council abuse its discretion in approving the PDP with the condition that "[t]he applicant shall provide, no later than Final Plan approval, a detailed trash and recycling enclosure design, including truck access and circulation, compactor and/or dumpster locations, in a manner substantially compliant with the Planning and Zoning Board approval and in accordance with adopted Engineering Standards and Trash and Recycling Standards in Section 3.2.5 of the Land Use Code," rather than remanding the application to the Board for the Applicant to provide specific materials and design proposals for the trash/recycling enclosure? and 2) Did Council abuse its discretion in approving the PDP without requiring the Applicant to dedicate "a right-of-way across the subject property in a manner consistent with a plan for eventually constructing a bicycle/pedestrian path?" (Reply at 6)

1) Did Council abuse its discretion in approving the PDP with the condition that "[t]he applicant shall provide, no later than Final Plan approval, a detailed trash and recycling enclosure design, including truck access and circulation, compactor and/or dumpster locations, in a manner substantially compliant with the Planning and Zoning Board approval and in accordance with adopted Engineering Standards and Trash and Recycling Standards in Section 3.2.5 of the Land Use Code," rather than remanding the application to the Board for the Applicant to provide specific materials and design proposals for the trash/recycling enclosure?

The Court again notes that Plaintiffs' penchant for using hyperbole, overbreadth, and conclusory statements in their arguments has made it difficult to sort out legitimate arguments from rhetoric. For example, Plaintiffs repeatedly argue that there was a "complete absence" (their emphasis) of information concerning the trash enclosure from which to discern its compatibility with surrounding land uses as required by the LUC. Plaintiffs conceded in these arguments, however, that the plan did include "a basic outline of the footprint of the proposed trash enclosure," OB at 6; a review of the site plans presented to Council, shows drawings that include dimensions and location relative to the rest of the structure and to the site. See Record A, Item 1, part 7, p.19:32-38. The condition imposed on the PDP concerning the trash enclosure was not just that it would comply with the LUC, but that the design would be "substantially compliant with the Planning and Zoning Board approval." At the Board hearing, Staffmember Holland stated that "we would be looking at a brick enclosure with some articulation and coursing to provide more detail" Record A, Item 1, part 7, p.33:1-10; and Boardmember Hansen

made the following remarks concerning the trash enclosure: "I think the...the trash enclosure...there's a design standard in the Land Use Code for those. It needs to match the building. It's...functionally, I think it kind of needs to go where it's at. That's in a lot more visible location than we usually see a trash enclosure, so, if we get a motion that...I think there's a proposed condition associated with that. I think it should address a height and design standard, just because it's in a really highly visible location on a highly trafficked trail. People passing it at a pedestrian speed instead of a vehicle speed; you have a lot more time to experience that...that structure." Record A, Item 1, part 7, p.34:20-25. These comments clearly indicate that the Board (and through the Board, the Council) was cognizant of the need to provide a trash enclosure "compatible with surrounding land uses." Indeed, it appears that it was staff's concerns about that compatibility that had sent the question of the trash enclosure back to the Applicant to upgrade the design, accessibility, and materials of the enclosure to be comparable with the rest of the project. See, e.g., Record A, Item 1, part 7, p.19:32-38. In addition, as both the City and the Intervenor/Applicant noted, the plan in dispute here is not the final plan; conditions are imposed precisely so that the final plan can take into account concerns and suggestions developed from the Board, the Council, and the public during hearing, and the final plan will once again be before the Council before it is finally approved. Under these circumstances the Court concludes that Plaintiffs have failed to meet their burden of proof to show that Council abused its discretion by approving the PDP with condition number 1 included.

2) Did Council abuse its discretion in approving the PDP without requiring the Applicant to dedicate "a right-of-way across the subject property in a manner consistent with a plan for eventually constructing a bicycle/pedestrian path?" (Reply at 6)

It was not clear to the Court until after rereading the pleadings and the record that Plaintiffs are not asking for the present construction of this pathway, but the dedication of a right-of-way for future construction of a pathway (although at the Council hearing Plaintiff Eric Sutherland was still appealing based on his assertion that "the PDP failed to provide a pedestrian/bicycle pathway to the commercial areas to the south, even though such a pathway is completely within the realm of possibility." Record A, Item 1, Part 7 at p.53 and Part 8 at p.3.) One major problem with this requested relief is its speculative nature. While it may have been wise in Plaintiffs' opinion for the City planners to have designed a network of pathways awaiting the dedication of rights-of-way and the funds for construction to effectuate it, that planning has not been done. The property to the south of the subject property across which the pathway envisioned by Plaintiffs would go is not owned by the owner of the subject property, and no right-of-way designation across that property yet exists. Thus the extent of any right-of-way across the subject property, and its location, are completely unknown. Crafting a legal document involving these kinds of unknown variables to dedicate such a right-of-way could be legally problematic; at a minimum that the Board and Council did not do so as a condition of approving this PDP was not an abuse of discretion.

The Court's original decision in this matter reviewed Plaintiffs' Fifth Claim for Relief as having both declaratory judgment and Rule 106(a)(4) components. However, Plaintiffs' Rule 59 motion asserted that they intended no Rule 106(a)(4) argument as part of their Fifth Claim for Relief. That portion of the original decision is therefore omitted from this Amended Decision.

ORDER

For the reasons stated herein, Plaintiffs' Claims for Relief are DENIED.

Plaintiffs' Motion for Clarification filed November 21, 2018 is DENIED AS MOOT.

IT IS SO ORDERED, this 19th day of February, 2019.

Lisa D. Hamilton-Fieldman
Municipal Judge (Temporary)