

DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LAPORTE AVE, SUITE 100 FT. COLLINS, CO 80521 970-494-3500	DATE FILED: April 15, 2021 6:00 PM FILING ID: E831369967F5D CASE NUMBER: 2021CV30210
<p><b>Plaintiffs:</b>          RE DENVER and COLORADO FLOORING INDUSTRIES,          Inc. as tenants in common, and OSF INVESTMENTS, LLC          d/b/a Carpet Exchange, a Washington Limited Liability          Company</p> <p>v.</p> <p><b>Defendants:</b>          CITY OF FORT COLLINS, a home rule city, and CITY OF          FORT COLLINS PLANNING AND ZONING BOARD,          STAN SCOTT, and GUARDIAN STORAGE FORT          COLLINS, LLC dba GUARDIAN SELF STORAGE</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p>Attorney for Defendants CITY OF FORT COLLINS, a home          rule city, and CITY OF FORT COLLINS PLANNING AND          ZONING BOARD:</p> <p>Name: John R. Duval, Attorney Reg. No. 10185</p> <p>Address: Fort Collins City Attorney's Office          300 LaPorte Avenue          Fort Collins, Colorado 80521</p> <p>Phone Number: 970-416-2488          FAX Number: 970-221-6327          E-mail Address: jduval@fcgov.com</p>	<p>Case Number: 2021CV030210</p> <p>Div.: 5B</p>
<p><b>CITY OF FORT COLLINS MOTION TO DISMISS</b></p>	

Defendants City of Fort Collins and the City of Fort Collins Planning and Zoning Board  
 (jointly, the "City") hereby submit through their counsel, John R. Duval, Fort Collins Deputy City

Attorney, this Motion to Dismiss under C.R.C.P. 12(b)(1) and C.R.C.P. 12(b)(6) requesting the Court to dismiss the Plaintiffs' Complaint and, in support thereof, state:

### **CERTIFICATE OF COMPLIANCE**

Pursuant to C.R.C.P. 121, § 1-15(8), undersigned counsel certifies that he has conferred with counsel for Plaintiffs and has been advised by Plaintiffs' counsel that Plaintiffs oppose this motion.

### **INTRODUCTION**

Plaintiffs filed this action on March 24, 2021, seeking judicial review under C.R.C.P. 106(a)(4) and declaratory relief under C.R.C.P. 57. In both claims for relief, the Plaintiffs are challenging the March 11, 2021, decision of the Defendant City of Fort Collins Planning and Zoning Board (the "P & Z Board") which approved the application of Defendant Guardian Storage Fort Collins LLC ("Guardian") requesting approval under the City's Land Use Code (the "LUC") of a preliminary development plan to development a mini-storage facility on a parcel of land in Fort Collins at the northeast corner of South College Avenue and Fossil Creek Parkway, identified by the City as "Guardian Self Storage, PDP190020" (the "Guardian PDP").

On March 25, 2021, the Plaintiffs also filed with the Fort Collins City Clerk the "Notice of Appeal" attached as Exhibit "A" and incorporated herein by reference (the "Notice of Appeal"). LUC Section 2.2.12(A) and Division 3 of Article II in Chapter 2 of the City Code, copies of which are attached as Exhibits "B" and "C" respectively, set forth the procedures and remedies available to parties-in-interest to appeal and challenge a decision of the P & Z Board to the City Council. Code Section 2-56 in Division 3 of Article II sets forth the various actions the City Council can take on appeal and Section 2-56(c) states the following about the Council's "final action":

“No later than the date of its next regular meeting, the City Council shall adopt, by resolution, findings of fact in support of its decision. **The date of passage of such resolution shall be the date of final action of the City Council for the purpose of any subsequent judicial review of the decision of the City Council.**” (Emphasis added.)

The Plaintiffs request, by their filing of the Notice of Appeal under these provisions of the LUC and the City Code, that the Fort Collins City Council hear the Plaintiffs’ appeal of the P & Z Board’s approval of the Guardian PDP. Plaintiffs state in the Notice of Appeal, as one of their grounds for appeal, that the P & Z Board failed to properly interpret LUC Section 3.10.2(a) and the City’s South College Corridor Plan, Policy LU 1.4. These are the same provision Plaintiffs cite and seek relief concerning in their Complaint (*see* ¶¶ 10, 24 and 27).

### **ARGUMENT<sup>1</sup>**

#### **C.R.C.P. 106(a) (4)**

Subsection (b) of C.R.C.P. 106 provides that an action filed under subsection (a)(4), as here, “... shall be filed in the district court not later than 28 days after the **final decision** of the body or officer.” (Emphasis added). In applying this provision in an action under Rule 106(a)(4), the Colorado Court of Appeal in *Carney v. Civil Service Commission*, 30 P.3d 861 (Colo. App. 2001) states:

“Under C.R.C.P. 106(b), a complaint seeking judicial review pursuant to C.R.C.P. 106(a)(4) must be filed in the district court no later than thirty days after the final decision of the tribunal being challenged is rendered. **This thirty-day limitations period is jurisdictional and begins to run at the point of administrative finality, which occurs when the action complained of is complete, leaving nothing further for the agency to decide.**[Internal quotes and cites omitted.] Therefore, the issue here is when the ‘point of administrative finality’ occurred for purposes of C.R.C.P. 106(a)(4).” (Emphasis added.) 30 P.3d at 863.

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<sup>1</sup> The City adopts and incorporates herein by reference the arguments the Defendant Guardian has made in its motion to dismiss recently filed with the Court.

Here the P & Z Board's approval of the Guardian PDP has clearly not reached "the point of administrative finality" under the City's LUC and Code. There is something left for the City Council to decide and that is the appeal the Plaintiffs have asked the City Council to consider by filing their Notice of Appeal.

It is also noteworthy that the Plaintiffs make no allegation in their Complaint that the P & Z Board's approval of the Guardian PDP was a final decision.

Moreover, there is nothing to stop the Plaintiffs from filing a second lawsuit with this Court after the City Council renders its final decision so they will not be prejudiced by the Court granting this Motion. In addition, if the City Council grants the Plaintiffs' appeal, the Plaintiffs will presumably have no reason to file a second lawsuit.

Therefore, since the P & Z Board's approval of the Guardian PDP is not a final decision and remains appealable to the City Council, this Court is without jurisdiction to consider this action and the Plaintiffs have failed to state a claim for relief under Rule 106(a)(4). The Plaintiffs must exhaust their administrative remedies through the City's appeal process and the City Council must first be given a chance to issue its final decision in the Plaintiffs request appeal.

### **C.R.C.P. 57**

An action for declaratory relief under C.R.C.P. 57 must address a presently existing controversy and the fact that the controversy may arise in the future is not sufficient to invoke a court's jurisdiction under Rule 57. *Villa Sierra Condominium Association v. Field Corporation*, 878 P.2d 161, 164 (Colo. App. 1994). In deciding whether there is a presently existing controversy, the Court of Appeals in *Villa Sierra Condominium Association* observed "the

essential requirement is that all relevant events have occurred, so that the court is addressing a present dispute. Hence, if the parties' legal rights are dependent upon the happening of a contingency that may never occur, the issuance of a declaratory judgment would be premature." *Id.* at 165.

What is left to happen here is for the City Council to hear and decide the Plaintiffs' appeal and, until it does, all events relevant to the Plaintiffs' claims in this action have not yet occurred. There is, therefore, no presently existing controversy for which this Court should exercise its jurisdiction under Rule 57.

WHEREFORE, the City respectfully requests the Court to dismiss Plaintiffs' Complaint in its entirety as not ripe for adjudication and for failing to state a claim for relief because there is no final decision from the City Council and Plaintiffs have failed to exhaust their administrative under the City's appeal process.

Dated: April 15, 2021

By: /s/ John R. Duval

John R. Duval, Registration No. 10185  
Fort Collins Deputy City Attorney  
[jduval@fcgov.com](mailto:jduval@fcgov.com)  
300 LaPorte Avenue  
Fort Collins, CO 80521  
Telephone: 970-416-2488  
Facsimile: 970-221-6327

Attorney for Defendants CITY OF FORT  
COLLINS, a home rule city, and CITY OF  
FORT COLLINS PLANNING AND ZONING  
BOARD

**CERTIFICATE OF SERVICE**

I hereby certify that this 15th day of April, 2021, a true and correct copy of the foregoing CITY OF FORT COLLINS MOTION TO DISMISS was filed via the Colorado Courts E-Filing System and served upon Plaintiffs' counsel of record as follows:

Jon T. Bradley, Esq.  
Kelci L. Sundahl, Esq.  
BRADLEY DEVITT HAAS & WATKINS, P.C.  
South Mesa Professional Building  
2201 Ford Street  
Golden, CO 80401

/s/ Cary Carricato  
Cary Carricato, Paralegal