

District Court, Broomfield County 17 DesCombes Drive Broomfield, CO 80020	DATE FILED: October 8, 2018 10:27 PM FILING ID: 450E88A0F83FD CASE NUMBER: 2018CV30316
WILDEARTH GUARDIANS, and RESIDENTS RIGHTS, Plaintiffs v. CITY AND COUNTY OF BROOMFIELD and BROOMFIELD CITY MANAGER, CHARLES OZAKI, IN HIS OFFICIAL CAPACITY Defendants, and EXTRACTION OIL AND GAS, INC.; Interested Party	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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COMPLAINT FOR DECLARATORY JUDGMENT	

Plaintiffs WildEarth Guardians, and Residents Rights on behalf of their affected members, bring this action against the Defendants, City and County of Broomfield and its City Manager, Charles Ozaki, and in support of their claims state as follows:

NATURE OF THE ACTION

This case involves the purported administrative approval of a Comprehensive Drilling Plan (“CDP”) by Charles Ozaki, the unelected City Manager for the City and County of Broomfield (“Broomfield”). The CDP is a mandatory condition of the 2017 Operator Agreement

(“OA”), approved by City Ordinance, between Broomfield and Extraction Oil & Gas, Inc. (“Extraction”) as a prerequisite to the approval of drilling permits by Broomfield and commencement of drilling operations.

Broomfield is a home rule municipality with a “Council-Manager” form of government, with all powers vested in the elective Council. The Broomfield City Manager, Mr. Ozaki, is granted his powers under § 8.3 of the home rule charter, which does not include the power to amend or enter into contracts on behalf of the city. Mr. Ozaki was authorized by Broomfield City Council under the OA to issue an administrative approval of a CDP if it met certain criteria, particularly that it complied with all of the requirements of the OA and the Broomfield Charter. Mr. Ozaki acted in excess of his jurisdiction or *ultra vires* by approving a CDP that was not in compliance with the OA or the Broomfield Charter; by previously issuing a ‘conditional approval’ that listed conditions for Extraction to meet, then reversing that decision and issuing final approval of the CDP with authorization for Extraction to begin operations before all conditions required have been met. Mr. Ozaki’s actions were also arbitrary and capricious, and contrary to law in violation of the Broomfield Charter, and the Colorado Open Meetings Law.

To the extent that Mr. Ozaki’s actions are being treated as a final approval, Broomfield is acting in violation of its own city Charter, § 2.1(b). The relevant section – which was enacted by the people through their reserved legislative powers under the Colorado constitution on the November 2017 ballot – requires Broomfield to use its authority to “require oil and gas development to only occur in a manner that does not adversely impact the health, safety, and welfare of Broomfield’s residents.” Broomfield has regulatory powers and duties under the Ordinance approving the OA, the Broomfield Charter and state statutes which it has declined to enforce, to the detriment of its residents’ health, safety, and welfare. This constitutes an action outside of its authority and an abuse of its discretion.

PARTIES

1. WildEarth Guardians is a non-profit public interest corporation organized under the laws of the State of New Mexico and is registered in good standing with the Colorado Secretary of State. The mission of WildEarth Guardians includes efforts to protect, conserve, and restore the public lands, wildlife, wild places, wild rivers, and health of communities across the American West, as well as to empower communities to choose the kind of energy, jobs, and local democratic solutions that benefit current and future generations. WildEarth Guardians is a national organization with members in Broomfield, as well as in neighboring communities, who will be adversely affected by the actions of the Defendants.

2. Residents Rights is a Colorado nonprofit corporation, based in Broomfield, with affected members in Broomfield. The mission of Residents Rights is to protect the health, safety, and welfare of the community and the environment, and to help communities protect their rights through education and by promoting accountability. Residents Rights’ members live in neighborhoods, and their children attend schools, near the proposed Extraction fracking operations. Members are registered voters of Broomfield who were involved in the amendment of the Broomfield Charter that is alleged to have been violated. They also have interests in

protecting the aesthetic, conservation, and recreation value of the public open space that is being used by Extraction for these massive fracking operations.

3. City and County of Broomfield is a home-rule municipality of Colorado.

4. Charles Ozaki is the City Manager for the City and County of Broomfield and is a Defendant in his official capacity.

5. Extraction Oil & Gas, Inc. is a Delaware corporation, registered in good standing with the Colorado Secretary of State to conduct business in the state as a foreign corporation. Extraction is engaged in oil and gas development in Colorado, and has offices at 370 17th Street, Suite 5300, Denver, CO 80202.

JURISDICTION AND VENUE

6. This court has subject matter jurisdiction to hear these claims under the Colorado Declaratory Judgments Act, C.R.S. § 13-51-105 and 106, as well as C.R.C.P. 57(a) and (b); C.R.S. § 26-6-101; and Colo. Const. art. VI, § 9.

7. This court also has jurisdiction under C.R.C.P. 106(a)(4).

8. The Court has personal jurisdiction over Broomfield pursuant to C.R.S. § 13-1-124(1), as it is a home-rule consolidated city and county of Colorado.

9. This court has personal jurisdiction over the Broomfield City Manager, Charles Ozaki, pursuant to C.R.S. §13-1-124(1) as a resident of the state and an employee of Broomfield.

10. This court has personal jurisdiction over Extraction Oil & Gas, Inc. as it is a corporation doing business in Colorado.

11. Venue is proper in this district pursuant C.R.C.P. 98(c).

FACTUAL ALLEGATIONS

A. The Operator Agreement

12. On October 24, 2017, by vote of the City Council at a public hearing, Broomfield passed Ordinance No. 2017-186, which approved the entry of an Operator Agreement (“OA”) with Extraction to govern the company’s oil and gas development activities in Broomfield. *See* Exhibit 1, the OA.¹

13. The OA calls for up to 84 hydraulic fracturing wells, on six pad sites to be placed on public open space, close to residential neighborhoods, sensitive wildlife habitat, and future

¹ All exhibits are judicially noticeable public records pursuant to C.R.E. Rule 201, and can be found at <https://www.broomfield.org/2805/Extraction-Comprehensive-Drilling-Plan>.

drinking water supplies. As proposed, it is unprecedented in scope for a residential area in Colorado.

14. The OA, ¶ 9, requires Extraction to submit a Comprehensive Drilling Plan (“CDP”) for review and approval by Broomfield, at least 30 days prior to the submission of drilling permit applications to the Colorado Oil and Gas Conservation Commission (“COGCC”). See OA, Exhibit 1 at ¶ 9.

15. The OA requires Extraction to include in the CDP twenty-one separately described elements, and to “comply with the requirements set forth in Exhibit B,” a list of Best Management Practices (“BMPs”) that were negotiated with Extraction. OA, Exhibit 1 at 23–44.

16. One of the 57 BMPs listed in Exhibit B of the OA, number 55, required Extraction to provide a “risk management plan, which will include the identification of potential risks, methods of risk avoidance and controls that implement techniques to prevent accidents and losses and reduce the impact or cost after the occurrence of identified potential events.” *Id.* at 44.

17. The OA requires Broomfield to “issue administrative approvals, by the City Manager or his designee, for the operations allowed for by this Agreement . . . if such operations comply with the requirements of this Agreement, including BMPs set forth on Exhibit B.” OA, Exhibit 1 at ¶ 12.

18. The OA also requires that the CDP comply with the requirements of the Broomfield Municipal Code chapter 17-54. *Id.*

19. As a matter of law, the OA, which was approved by City ordinance, must also comply with the requirements of the Broomfield Charter. *City of Boulder v. Public Service Company of Colorado*, 420 P.3d 289, ¶ 30 (Colo. 2018) (“A city’s charter is like its constitution, and all ordinances that a city passes must comply with the terms of its charter.”) (citations omitted).

B. Broomfield Voters Amended the City Charter, Requiring Broomfield To Use All Available Power to Protect Public Health, Safety, Welfare, and the Environment

20. On November 6, 2017, the voters of Broomfield passed ballot measure 301, with 57 percent approval, which amended Section 2.1(b) of the Broomfield Charter to provide:

(b) The City shall have all the power of local self-government and home rule and all power possible for a city to have under the Constitution of the State of Colorado. . . . All such powers shall be exercised in the manner prescribed in this Charter or, if not provided for herein, in such manner as shall be provided by ordinance of the Council of the City. . . . With regard to oil and gas development near the City’s populated areas and within the City’s boundaries, such powers shall include but not be limited to plenary authority to regulate all aspects of oil

and gas development, including land use and all necessary police powers. As such, *Broomfield shall condition oil and gas development permits to require oil and gas development to only occur in a manner that does not adversely impact the health, safety, and welfare of Broomfield's residents in their workplaces, their homes, their schools, and public parks in order to protect the public's health, safety, and welfare and to safeguard the environment and wildlife resources.* (emphasis added).

21. This Charter Amendment was enacted pursuant to the voters' fundamental rights under Art. V, § 1(9) of the Colorado Constitution to pass all local, special and municipal legislation of every character in or for their municipality.

22. Section 2.1(b) of the Broomfield Charter was enacted by its voters to “protect the public’s health, safety, and welfare and to safeguard the environment and wildlife resources.” It requires Broomfield to use the full authority provided by the Charter to protect its citizens from the public health and safety dangers posed by oil and gas development.

23. Section 2.1(b) of the Broomfield Charter is also consistent with the City’s duty to use its regulatory powers to protect the public health, safety and welfare. *People v. Blue*, 190 Colo. 95, 544 P.2d 385, 390–91 (1975) (holding that government has a duty under its inherent police power to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people).

24. Case law in Colorado recognizes that the power to ‘protect’ the public health, safety, and welfare “contemplates preventive measures undertaken before measurable pollution” occurs. *Town of Carbondale v. Gss Properties, LLC*, 140 P.3d 53, 59 (Colo. App. 2005), rev’d on other grounds, 169 P.3d 675 (Colo. 2007). See also *Dillon v. Yacht Club Condominiums Home Owners Ass’n*, 2014 CO 37, 325 P.3d 1032, 1041–42 (2014) (“a municipality certainly need not wait for more accidents to happen before addressing a perceived danger.”); 6A Eugene McQuillen, *THE LAW OF MUNICIPAL CORPORATIONS* §24.10 (3d ed. 2007) (police power includes “power to anticipate and prevent dangers”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1822 (1976) (defining ‘protect’ as “to cover or shield from that which would injure, destroy, or detrimentally affect”).

C. Extraction’s Draft CDP Submissions

25. Extraction sent a package to Broomfield on December 15, 2017, containing the first version of the CDP and a draft of the permit applications it intended to file with the COGCC. Available at Broomfield County website > City Council & Agendas > Oil and Gas Development > Extraction Oil and Gas > Extraction Oil & Gas Proposal > December 2017.

26. Extraction provided its first proposed CDP to Broomfield on December 15, 2017. The December 15, 2017 draft of the 2A permit application shown to Broomfield contained 57 BMPs. December Form 2A, Exhibit 2.

27. Extraction filed drilling permit applications to the COGCC on January 16, 2018. The BMPs contained in the 2A permit application varied significantly from those given to the city the month before. *See* January Form 2A, Exhibit 3. For example, Extraction told Broomfield it would include the following BMP:

Regulations. The Operator shall comply with all applicable state, and federal regulations in addition to the terms of this Agreement and the BMPs set forth in this Exhibit B. The City agrees that it will not impose any fine on the Operator for violation of this Agreement if the activity or condition that created the violation is also subject to regulation by the COGCC, and if the violation results in action taken by the COGCC against the Operator.

The January permit application only contained the following language:

Regulations. The Operator shall comply with all applicable state, and federal regulations and agreements in place with the local government.

28. Broomfield responded, by letter from the City Manager, with comments to Extraction's proposed CDP on January 22, 2018. In those comments, Broomfield stated that it could not approve the CDP. Broomfield's detail of the deficiencies of the proposed CDP was twenty-four pages long, with 220 separate items that did not meet the requirements of the OA. Exhibit 4. The City Manager requested that Extraction address each of its comments and questions in writing and submit a revised CDP to the City for review.

29. The following day, January 23, 2018, Extraction sent a three-page response to Broomfield's comments stating that it would work with the city to address its concerns, and "if, and only if necessary, we will revise the December CDP and supplement the Form 2s and 2As that Extraction submitted to the COGCC on January 16, 2018." Exhibit 5 at 2.

30. Three days later, on January 26, 2018, Extraction provided a second draft CDP.

31. On March 23, 2018, the Broomfield City Manager sent a letter to Extraction with five pages of detailed comments regarding the CDP, stating "[Broomfield] has submitted written comments on Extraction's draft [CDP] on January 22, 2018, March 7, 2018, and now on March 23, 2018. Per our discussion with you on Wednesday, [Broomfield] expects a revised draft [CDP] that incorporates all of [its] comments not later than March or early April, for [Broomfield's] further review." Exhibit 6 at 5.

32. Extraction sent two additional drafts of the CDP, on April 17 and May 11.

33. Extraction, in the May 11th draft of the CDP, included in its Risk Management Plan a risk matrix that had been commissioned by Broomfield through its Oil and Gas Task Force from the Charles Taylor insurance company. Exhibit 7 at 1175–79. This risk analysis was commissioned in order to evaluate 23 potential risks of oil and gas development by probability of

occurrence and significance of the potential impacts, ranging from rare to probable and from insignificant to catastrophic.

34. Charles Taylor, an independent insurer, rated 14 of the 23 risks as potentially catastrophic, meaning “fatalities, serious injury, devastating impact to environment or community (50+ homes affected).” These risks were all rated to be rare (less than 2% chance of occurring) to unlikely (3–10% chance of occurring). These included explosions and fires, well blowout, lighting strike, aquifer contamination, surface water pollution, chemical exposure drifting, corrosion or mechanical failure, human error or miscommunication, faulty design, construction, or repair, flood, storage tank collapse, and IT systems failure.

35. One risk – the risk of surface or soil pollution – was rated to be potentially major, meaning causing serious injury and/or serious damage to environment or impact to 20+ homes. This risk was also rated as moderate, meaning an 11–35% chance of occurrence.

36. This risk matrix failed to include many known risks of oil and gas development, including those disclosed by Extraction in its Securities and Exchange Commission filings.

37. The risk matrix also failed to account for the fact that this development is both extremely large and extremely close to heavily populated areas, as well as the fact that Extraction is not a typical oil and gas developer and in its short life has already accumulated a major explosion, several environmental violations, and numerous Notices of Alleged Violation leading to penalties imposed by the COGCC.

38. Additionally, many types of community impact are not classified as “risks” because they are intentional and allowed by the COGCC, such as the intentional emissions of gasses which are known to contain explosive methane, VOCs, and BTEX compounds and are known to be carcinogenic and otherwise unhealthful.

39. On June 1, 2018, the COGCC approved Extraction’s Form 2A Location Permit for the Livingston Pad, and 16 of the 19 Form 2 Permits to Drill at that location, while all other Form 2A and Form 2 applications by Extraction pertaining to the CDP remained pending.

40. Extraction sent Broomfield a Notice of Breach on June 15, 2018. That Notice stated that “submission of the CDP constitutes full compliance with the City’s administrative process for the oil and gas development operations that are the subject of the Operator Agreement.” *See* Exhibit 8.

41. The June 15 Notice of Breach also describes the April 16, 2018 CDP submission as “the Final CDP.” *Id.*

42. On June 29, 2018, the Broomfield City and County Attorney sent a 6-page letter to Extraction detailing Broomfield’s response to the Extraction June 15, Notice of Breach, and including Broomfield’s Notice of Breach by Extraction of the OA. Exhibit 9.

43. Broomfield's Notice of Breach to Extraction described "Extraction's attempts to bully and intimidate Broomfield's staff and its elected officials into approving an incomplete CDP. . . ." The City and County Attorney also stated that administrative approval was not required until the CDP is complete, and that a separate letter would be issued listing the remaining deficiencies that must be corrected before approval. *Id.*

44. By separate letter on June 29, 2018, Broomfield provided a gap analysis of the BMPs from the OA and Form 2A submissions, Exhibit 10, noting that of the 57 BMPs included in the OA:

- a. 21 OA BMPs are not contained in the 2A permit,
- b. Nine BMPs that are included on the 2A permit were not part of the OA BMPs,
- c. Seven BMPs of the OA were redlined by the COGCC as beyond the enforcement powers of the agency and therefore inappropriate to be included on a permit,
- d. Only six BMPs were identical in the 2A permit application to the language of the OA BMPs. The rest contained substantial deviations and rearrangements.

45. On July 10, 2018, Broomfield adopted Ordinance 2067, which replaced the entirety of the Municipal Code chapter 17-54, governing Use By Special Review standards and procedures. Exhibit 11.

46. On July 27, 2018, Extraction provided a new CDP (the "July CDP").

47. The July CDP did not contain a risk management plan as required by the OA. The Charles Taylor Risk Assessment incorporated by Extraction in earlier drafts of the CDP was omitted in the July CDP.

48. The July CDP, Section R, ¶ 2.3, is entitled "Risk Assessment," and states

Assessment of risk involves two factors. First, is the probability, which is the measure of certainty that an event, or risk, will occur. This can be measured in a number of ways using various tools and matrices to determine the category for the probability of occurrence, and the risk level as it correlates with the probability of occurrence. There are a variety of Risk Assessment and matrices that are used in the industry. For the Broomfield project, Extraction *will utilize applicable risk assessment tools at that time of the risk assessment.*

Exhibit 12 at 6 (emphasis added).

49. Not only was no risk assessment performed, but Extraction then continues on to say that while “probability” of an event is the first factor, the second factor “is an estimate of the impact *on the project*.” This estimate was to be given a rating of A–E. *Id.*

50. Risk assessment is a science with actual definitions and methods, and what Extraction states to be “risk assessment” does not actually meet the accepted standards of risk assessment, which is an analysis “of what can go wrong, how likely it is to happen, what the potential consequences are, and how tolerable the identified risk is.” Rausand, M., *Chapter 1: Introduction, RISK ASSESSMENT: THEORY, METHODS, AND APPLICATIONS*, pp. 1–28 (2013).

51. The submitted risk assessment, which requires only an estimate of the impact that a risk would pose *to the project*, rather than to Broomfield’s citizens and residents, water supply, infrastructure or property, air quality, emergency response preparedness, and other myriad risks that range from ‘possible’ to ‘likely,’ is inadequate as a matter of law under the Broomfield Charter and the OA, and the lack of an adequate risk assessment reduces Broomfield or Extraction’s ability to discover, track, monitor, measure, or mitigate risks to the public including Plaintiff’s members.

52. A risk assessment which provides a “letter grade” rather than “identification of potential risks, methods of risk avoidance and controls that implement techniques to prevent accidents and losses and reduce the impact or cost after the occurrence of identified potential events” is inadequate as a matter of law under the Broomfield Charter and under the OA.

53. On August 14, 2018, Broomfield held a public hearing at which the public was told that the July CDP had been “withdrawn” by Extraction. *See* Exhibit 13.

C. Broomfield’s “Conditional Approval” of the CDP

54. On August 20, 2018, Broomfield issued a “CDP Conditional Approval Letter and Press Release” in which the City Manager purported to approve the July CDP, conditional upon Extraction re-submitting the withdrawn July CDP to the City and County Manager, and Extraction’s agreement in writing to 15 specifically enumerated conditions. *See* Exhibit 14.

55. Among the 15 conditions in the August 20, 2018 Conditional Approval letter, Mr. Ozaki included several conditions pertaining to a risk analysis, including number 9, which required Extraction to “amend Section (R) of the CDP to include specific risks, associated mitigation efforts, & resulting mitigated risk probability,” including all safety risks from the company’s Securities and Exchange Commission (“SEC”) Form 10-K, wildfire, light pollution, sabotage and vandalism, pipeline risks, and risks associated with potential interference with existing wells, during the fracking process.

56. In Extraction’s (most recent) 2017 SEC Form 10-K statement, the company stated that: “Drilling for and producing oil and natural gas are high risk activities with many uncertainties that could adversely affect our business, financial condition or results of operations” It then identified numerous safety risks associated with its operations, including:

- delays imposed by or resulting from compliance with environmental and other regulatory requirements including limitations on or resulting from wastewater discharge and disposal, subsurface injections, GHG emissions and hydraulic fracturing;
- pressure or irregularities in geological formations;
- equipment failures or accidents, such as fires or blowouts;
- lack of available gathering facilities or delays in construction of gathering facilities; and
- environmental hazards, such as natural gas leaks, oil spills, pipeline and tank ruptures, encountering naturally occurring radioactive materials, and unauthorized discharges of brine, well stimulation and completion fluids, toxic gases or other pollutants into the surface and subsurface environment.

See Extraction Oil & Gas 2017 10-K Statement, at Item 1A “Risk Factors,” at 30–31 (33–34 of pdf).

57. The risk that Extraction might become insolvent or less solvent, or have lenders foreclose on its debts and assets, leading to increased physical risks such as deteriorated physical condition of assets, reduced maintenance or inspection staffing, delayed repairs, or even well abandonment and orphanage, is also disclosed in Extraction’s SEC filing, and must be included in the quantitative risk analysis required in the CDP.

58. Any of the risks of the Extraction residential fracking project identified by the Charles Taylor risk matrix, most of Extraction’s SEC-disclosed risk, and other risks which are not enumerated in either analysis, have the potential of gravely affecting Plaintiff’s members.

59. Any CDP approval must also include approval of an adequate “Emergency Response Preparedness Plan” as required by paragraph 9(J) of the OA, as well as the Broomfield Municipal Code §17-54-010. There has been no finding on the record that an adequate Emergency Response Preparedness Plan has been approved by the City Manager or the City Council. To do so would first require an analysis of the risks to prepare an adequate response.

60. Condition number 10 in the August 20, 2018 letter stated:

Prior to the beginning of the Drilling Phase at any well site and subject to the approval of the City and County Manager, Extraction will provide the Risk Analysis, as referenced in the CDP in Section (W) Alternative Site Analysis, in sub-Section 7.5, and such Risk Analysis should support all of those critical risks identified in the Risk Management Plan.

61. Contrary to the August 20, 2018 Conditional Approval Letter, the OA does not authorize Extraction to conduct operations at any phase on any of the proposed sites before submitting an approved Risk Management Plan.

62. On August 23, 2018, the COGCC approved the Form 2A locations and 39 Form 2 drilling permits for the Interchange A and B, and Northwest A and B pad locations. The United pad and drilling permit applications remain pending.

63. Following public outcry over the August 20, 2018 Conditional Approval letter, there were reports of City officials conducting private meetings with Extraction representatives. If true, this represents a substantial violation of the rule against ex-parte contacts in quasi-judicial proceedings, or the Open Meetings Law.

D. Broomfield’s Approval of the CDP Without Satisfaction of All Conditions

64. On September 10, 2018, the Broomfield City Manager announced a reversal of the Conditional Approval of the CDP issued on August 20, 2018. Mr. Ozaki’s September 10, 2018 letter to Extraction stated that “The City and County of Broomfield has received Extraction Oil & Gas, Inc.’s Comprehensive Drilling Plan dated July 27, 2018 that Extraction resubmitted by letter dated September 10, 2018.”

65. After Mr. Ozaki issued warnings to Extraction that the City expects Extraction to “comply with all the safety measures incorporated into the Operator Agreement and the CDP”, and that the City will “enforce compliance with the CDP,” he then states in paragraph 4: “In follow up to my previous letter dated August 20, 2018, the CDP and other information submitted by Extraction satisfy my conditions of approval.” Mr. Ozaki then described how the language “included in the CDP, or the letter that resubmitted the CDP, which are hereby incorporated in the CDP”, satisfies all 15 conditions of his August 20, 2018 letter, except for conditions 9 and 10 (which are described above).

66. In paragraph 6 of Mr. Ozaki’s September 10, 2018 letter, he states:

To resolve conditions 9 and 10, Broomfield will be retaining DNV-GL USA Inc., as an expert consultant to conduct an independent risk assessment process. I request Extraction to cooperate with Broomfield’s consultant in the process. Extraction has agreed to provide a risk analysis on pipelines before drilling begins, as requested by Broomfield pursuant to the Operator Agreement, BMP #3.

67. Thus, without any public discussion or vote, Mr. Ozaki removed conditions 9 and 10 from his August 20, 2018 Conditional Approval letter and committed the City’s taxpayers to the funding of another “independent risk assessment process” (*see supra* ¶¶33–38, description of the Charles Taylor Risk Matrix above) while authorizing Extraction to go forward with work on the project while the DNV-GL USA, Inc. risk assessment proceeds on an undetermined schedule.

68. By the fact that the City Manager’s September 10, 2018 letter purporting to approve the CDP was resubmitted at the same time as Extraction’s letter dated September 10, 2018, it is apparent that the final approval was negotiated in secret executive sessions, possibly with the City Council issuing the equivalent of secret votes to provide direction and authorization for the City Manager to issue his approval, without notice to the public or any public comment.

69. In fact, Extraction’s September 10, 2018 letter to Mr. Ozaki states: “[I]t is Extraction’s understanding that, with the agreements from Extraction set forth below to certain

contract administration items, the City will be approving the July 27 CDP without imposing any conditions of approval.”

E. Threats to Public Health, Safety, Property and the Environment Require a Thorough Quantitative Risk Assessment Before Oil and Gas Development Can Be Permitted in Broomfield

70. Consistent with, and in addition to, the safety risks identified in Extraction’s SEC filing, an array of other high severity threats to health, safety, property, and the environment have been associated with oil and gas operations, including all phases of production.

71. Such health and safety threats include leaks of methane and volatile organic compounds (“VOCs”) exacerbating ozone pollution and climate change; exposure to benzene, ethyl-benzene, toluene, and other cancer causing chemicals in emissions; exposure to radioactive materials produced from underground during the hydraulic fracturing process; risk of explosions and water pollution caused by methane migration from improperly abandoned wells and flow lines; risk of catastrophic well and pipeline explosions, fires, and the associated pollution from smoke and the toxic substances used by first responders to combat such catastrophic events; permanently scarred landscapes; earthquakes; soil contamination; destruction of wildlife habitat; road and other infrastructure destruction and other threats to public health, safety, property, and the environment from enormous amounts of truck traffic.

72. Hundreds of peer reviewed studies have been presented in the last few years describing public health and safety hazards associated with oil and gas development. The Concerned Health Professionals of New York (CHPNY), an initiative by health professionals, scientists, and medical organizations for raising science-based concerns about the impacts of oil and gas development on public health and safety, has published five annual editions of a fully referenced compilation of the evidence outlining its risks and harms (the “Compendium”). The Compendium is a public, open-access document that is housed on the websites of Concerned Health Professionals of New York (www.concernedhealthny.org) and Physicians for Social Responsibility (www.psr.org).

73. In the Fifth Edition of the Compendium, released in March 2018, the CHPNY and PSR summarized the findings at 266:

All together, findings to date from scientific, medical, and journalistic investigations combine to demonstrate that fracking poses significant threats to air, water, health, public safety, climate stability, seismic stability, community cohesion, and long-term economic vitality. Emerging data from a rapidly expanding body of evidence continue to reveal a plethora of recurring problems and harms that cannot be sufficiently averted through regulatory frameworks. There is no evidence that fracking can operate without threatening public health directly or without imperiling climate stability upon which public health depends.

74. The TEDX FrackHealth Database is another widely cited source of open-access

peer-reviewed literature on health effects associated with unconventional oil and gas drilling. Carol Kwiatkowski, Ph.D, Executive Director of TEDX, has done an overview for TEDX of the studies evaluating health risks from air pollution associated with unconventional oil and gas operations (“UOG”),² and made the following findings:

- A review of 48 peer-reviewed studies analyzing air samples near UOG found benzene, ethylbenzene, toluene and xylenes (BTEX) were among the top most frequently found chemicals. These hazardous air pollutants have known respiratory, cardiovascular, neurological and carcinogenic effects, as well as having endocrine disrupting effects.
- Ten of the studies sampled the air in Colorado, with eight being in the Denver Julesburg Basin (within which Broomfield is located). Multiple studies from NOAA researchers collecting top-down emission concentrations found high levels of non-methane volatile organic compounds and traced it to UOG extraction.

75. Peer-reviewed studies of the health and safety impacts from oil and gas development in Colorado have shown serious adverse health impacts and high risks from living near oil and gas operations. Dr. Kwiatkowski summarized those studies from the University of Colorado School of Public Health thusly:

- In 2018, McKenzie *et al.* conducted a risk assessment demonstrating that air pollutants, and associated acute and chronic health risks, increased with increasing proximity to UOG. Earlier work from the same group also concluded that residents living less than a half mile from wells are at greater risk of experiencing health effects such as neurological and developmental effects and cancer than those living further away.
- Other research has investigated the health impacts of prenatal exposure to UOG. In 2014 McKenzie and others published a study using a retrospective cohort of 125K birth records in 57 rural-Colorado counties. Results showed a linear relationship between well density/proximity and the likelihood of a baby having a congenital heart defect. Neural tube defects were also associated with a higher density/proximity score.
- In a recent case-control study of childhood risk, experts concluded that children with acute lymphocytic leukemia were more likely to live near oil and gas wells.

Id. n.2 *supra*, at 24–25.

76. These and other peer-reviewed studies provide sufficient information regarding the threats to public health, safety, property and the environment from air pollution to warrant a thorough quantitative risk assessment from Extraction so the Broomfield City Manager, the City Council, and the citizens of Broomfield, can determine whether the CDP (and resulting permits for oil and gas development in the City) comply with the OA and the Broomfield Charter, before the CDP is approved.

² Letter of Carol Kwiatkowski, Executive Director, TEDX, *Re: Scientific literature addressing the health effects of unconventional oil and gas development*, available at <https://drive.google.com/file/d/1bZYYtzF5hRKdK0543fAt64125rZKkwU9/view> pp. 21–31 (June 29, 2018).

F. Reported Adverse Effects from Oil and Gas Operations in Surrounding Areas Provide Further Evidence of Risk from the Extraction CDP

77. Front Range residents living near gas and oil developments, including families in nearby Erie, Colorado, have filed hundreds of complaints with the COGCC and the CDPHE describing personal experiences of sudden nosebleeds, headaches, nausea, dizziness, rashes, chronic pain and fatigue, and also sleep disturbances due to the oil and gas drilling and production approved by the state and local governmental agencies.

78. As a result of the unrelenting health impacts complained about to the COGCC, CDPHE, and local governments, parents have resorted to testing their young children for levels of VOCs in their children's blood. Test results in Erie and other communities near the proposed Extraction CDP Project have shown alarming levels of cancer-causing VOCs, including benzene and ethyl-benzene, that have been associated with living in proximity to the hundreds of oil and gas wells that have already been permitted in those areas.

79. The COGCC is aware of these complaints and health studies, but granted the Livingston, Interchange, and Northwest permits and others related to the Extraction CDP Project without any demonstrable concern for the health, safety, and welfare of Colorado residents.

G. Catastrophic Risks Must be Thoroughly Evaluated to Determine if the Public Health and Safety are Protected Before Approval, Not After

1. "Residential Fracking" Raises Uncharted Explosion Risks

80. Extraction has touted itself as "Residential Fracking Experts" but the company has not accounted for the catastrophic risks associated with putting these multi-well megapads in close proximity to neighborhoods, schools, and hundreds of abandoned wells.

81. In Colorado, there have been more than a dozen explosions due to oil and gas operations in just the past two years. Nationally, there have been massive explosions that show clearly how reckless "residential fracking" could be.

82. In January 2018, a drilling rig exploded in Oklahoma, killing 5 workers, in the deadliest U.S. drilling accident since the 2010 Deep-Water Horizon rig explosion in the Gulf of Mexico. Federal investigators recently found that an uncontrolled influx of gas in the well ignited during the routine activity of drill pipe being removed, and the blowout preventer failed. According to reports at the scene, emergency workers were kept 3/4 mile away for hours due to the heat of the fire (which melted the rig), toxicity concerns, and secondary explosions that occurred.

83. In February 2018, an uncontrolled gas leak at a fracking well site in Ohio caused a fire that required a one-mile evacuation for firefighters and well control experts from Texas and Oklahoma could extinguish the fire and 20 days to stop the gas flow from the well.

84. While most explosions and well fires have occurred in rural areas where deaths and injuries have been limited, Extraction fails to account for the increased risk to public health and safety of moving these operations into residential areas. Recent peer-reviewed studies on the adequacy of setbacks must be included in the risk analysis.

85. On April 17, 2017, less than a month after the *Martinez* decision was issued by the Court of Appeals, Front Range communities experienced the trauma of seeing the explosion in Firestone that killed two people, severely burned another, and terrorized the entire neighborhood.

86. Preliminary reports stated that a 1-inch severed flow line thought to be abandoned, but still connected to a well less than 200 feet from the leveled house, seeped gas into the soil and into the house's basement, where it ignited during repairs on a water heater.

87. COGCC Director at the time, Matt Lepore, assured residents in Firestone in the days following the disaster that the agency had identified the isolated methane leak that had caused the explosion and it was perfectly safe for them to return to their homes. Those assurances were false. On May 25, 2017, two other high concentration pockets of flammable methane gas had been found underneath a street in the same Firestone neighborhood, where the house exploded more than a month earlier, according to the state's vapor test findings. Again, the COGCC "did a significant amount of public outreach in the Firestone community to let them know that it is safe and there are no ongoing concerns." *Id.*

88. These assurances of public safety were made despite only having preliminary findings about the cause of the disaster. To date, nearly 18 months later, the National Transportation Safety Board, which assumed control over the investigation, still has not issued a final report identifying the cause. Yet the COGCC continues to approve permits like those sought by Extraction, for new wells to be drilled near and under neighborhoods where there are hundreds of abandoned wells, old flowlines, and sources of methane leaks.

89. Since the explosion, new COGCC rules addressing risks from flowlines were adopted, however they only apply to new flowlines, and not to the old or abandoned flowlines that caused the disaster in Firestone.

90. These catastrophic risks must be identified, evaluated, and shown to be meet the protections set out in the Broomfield Charter, before the CDP is approved.

H. Extraction's Safety Record Must Be Considered in Any Risk Assessment

91. Extraction has accumulated numerous Notices of Alleged Violation (NOAV) on its wells between 2015 and 2018, and has been penalized by the COGCC for many violations, without any suspension in its activities. For example:

- a. Oct. 27, 2015 – \$17,080 penalty for fracking at least two wells without required prior notification;

- b. April 18, 2016 – Penalty for failing to use required sound mitigation techniques resulting in at least eleven separate complaints to the Commission;
- c. June 6, 2016 – Penalty for unauthorized flaring at 3 wells in September of 2015;
- d. August 29, 2016 – \$62,000 penalty for violations of Rule 303 from January through April of 2016;
- e. September 29, 2016 – \$27,000 penalty for drilling eleven wells less than the approved setback distance from a nearby utility line;
- f. July 24, 2017 – \$10,500 penalty for “emissions violations”;
- g. May 24, 2018 – COGCC issued NOAVs to Extraction for failure to conduct Bradenhead Tests on wells at 6 pad locations; and
- h. Extraction was under investigation by the CDPHE for ongoing air quality violations in Windsor and Greeley since August 2015.

I. Unexplained Berthoud Abandoned Well Interference Involving Extraction Raises Risks That Must Be Addressed in the CDP

92. On October 29, 2017 an eruption of hydrocarbons and drilling mud occurred from an improperly abandoned oil and gas well near Berthoud, Colorado (the “Berthoud Incident”). Initial estimates were that 300 barrels (or 12,600 gallons) of drilling mud, containing some oil, gushed from the well (identified in COGCC records as the Saulcy #4-1 well). When COGCC inspectors excavated and exposed the well casing, the well was discharging gas and liquid under pressure through holes in the welded cap. Personal gas meters showed gas present in excess of the Lower Explosive Limit, meaning it was an explosion risk.

93. According to the reporting on the Berthoud Incident the COGCC indicated that inadequate well plugging and abandonment techniques prior to the 1990s contributed to the Berthoud Incident, but Extraction’s active drilling operations in the general area were cited as a contributing cause.

94. After the Berthoud Incident, COGCC was unable to explain why several wells in closer proximity (approximately 100 feet away) from the abandoned well did not cause the eruption, but a new horizontal well being drilled by Extraction more than 3,200 feet away did. Upon information and belief, no action was taken by the COGCC to avoid similar interference with abandoned wells by newly drilled horizontal wells like those proposed by Extraction here.

95. The Berthoud Incident is likely an example of what the industry calls “frac hits.” See e.g. Aug. 10, 2018 DeSmog Blog: *The Fracking Industry Is Cannibalizing Its Own Production, Increasing Spill Risks*, (“The oil producers are drilling too many wells in close proximity to one another, and when they frack the newer wells — known as child wells — those ‘bash’ or ‘hit’ the older wells and cause problems.”).

96. Many of the abandoned or producing wells (“offset wells”) in proximity to the wells proposed in Extraction’s Broomfield CDP were drilled in the early 1990s, and are located in the surrounding neighborhoods. As an example, the Offset Well Evaluation submitted to the COGCC by Extraction for the 19 wells on the Livingston pad showed 39 offset wells within 1500 feet of the proposed horizontal wellbores to be fracked.

97. All 39 of the offset wells are listed by Extraction as not meeting the COGCC standard for approval, and as needing “evaluation.” Some of the offset wells are less than 35 feet from the planned wellbores. Similar results are found in the Offset Well Evaluation reports for the Interchange, Northwest, and United well pads planned for Broomfield.

98. The “evaluation” needed on all these offset wells must follow the procedures declared in the COGCC’s “DJ Basin Horizontal Offset Policy, June 20, 2013.” As an expert put it in connection with his recent evaluation of Crestone’s CDP in Boulder County:

Failure to follow these mandatory procedures creates the risk of a frac hit that could result in a blowout through an existing well, and consequent impacts on the environment and human health from blowout materials which would include methane, VOC’s, BTEX materials, and frac fluid chemical additives³ See Anthony Ingraffea report n. 2 *supra*.

99. Despite the state policy, the COGCC and the City have apparently not required Extraction to prove the integrity of the cement and casings for those offset wells to identify any leaks or other safety risks. And, the citizens have no assurance that any future Quantitative Risk Assessment will be enforced to require adequate mitigation of these risks.

J. Explosion and Fire at the Windsor Stromberger Pad Complex Involving Extraction Raises Risks That Must Be Addressed in the CDP

100. On Dec. 22, 2017, a leaking valve at Extraction’s Stromberger 22-E multi-well pad complex outside of Windsor led to a fire and several explosions that threatened health and safety for the entire town and its surrounding region. According to reports, one worker was hospitalized with third degree burns.

101. The initial explosion at the Extraction site reportedly caused homes to shake more than a mile away. Secondary explosions were reported by firefighters and residents in the area. First responders had to stand off from the fire, setting up a one-mile evacuation zone, for hours because of the concern that oil and flowback storage tanks could explode “like bombs.” It took at least eight firefighting crews from throughout northeast Colorado approximately six hours, using massive amounts of fire-suppression foam and water to get the fires on the pad controlled.

102. According to public reports, researchers from INSTAAR [the Institute of Arctic and Alpine Research at the University of Colorado] were making their routine examination of

³ See June 23, 2018 Expert Report of Anthony R. Ingraffea, Ph.D., P.E., on Crestone’s Final Comprehensive Development Plan, available at <https://drive.google.com/file/d/1bZYYtzF5hRKdK0543fAt64125rZKkwU9/view>.

measurements registered at the Boulder Reservoir in the days following the explosion at the Stromberger site, and found readings of exceptionally high levels of the atmospheric pollutants ethane, propane, benzene, and toluene, higher than any ever recorded at the station, representing exposures 10–100 times background levels. The INSTAAR researchers were able to use forward and backward wind trajectories to trace the extreme levels of pollutants to the Stromberger explosion, nearly 40 miles away.

103. The COGCC conducted an on-site field inspection the night of the explosion and fire, but was unable to observe any obvious causes. The 60-day accident report, filed on Feb. 23 by Extraction said only that the investigation was still “ongoing” and that “gas and ignition source are still being investigated” by “third party fire investigators.” However, the report did mention several possibilities, including an “(o)pen line or valve, or leak on flash gas management system,” along with several other possible natural gas venting sources.

104. Despite not knowing (or reporting) the cause of the explosions and fires, Extraction listed in its report to the COGCC a number of “corrective actions.” The COGCC required nothing further, did not insist on any further information from “third party fire investigators,” and has continued to issue permits to Extraction for these massive multi-well drilling operations without identifying the risks associated with these projects.

105. Public comments from Broomfield’s Mayor and City Manager personnel point to the reasons why the Extraction CDP should *not* be approved without quantifying the risks and requiring protection of public health and safety before authorizing Extraction to move forward. According to a report of those comments made at the Feb. 27, 2018 Council meeting:

‘They [Extraction] have no idea what happened,’ said Broomfield Mayor Randy Ahrens after having read the accident report on the Stromberger Well Pad in the Weld County Windsor area. Assistant City Manager Kevin Standbridge said he was ‘personally surprised at the brevity of the document’ of 4 pages. He added that he didn’t anticipate that the COGCC would follow up with Extraction on the report. . . . Left unanswered, according to Council Member Shelton, was the question ‘What are they going to do different?’

106. The comments made by the Mayor, Council members, and Assistant City Manager about the lack of information on the cause of the Stromberger explosions and fires belie the purported basis for approval of the Extraction CDP by Broomfield – they have not quantified the risks but claim that “BMPs” are enough to approve the project going forward while a risk assessment is being done.

107. On August 17, 2018, nearly nine months after the Stromberger explosion and fire, the COGCC finally issued an NOAV to Extraction for the violation at the Stromberger 22-E pad, alleging that Extraction allowed an ignition source in the form of a mobile heater within unsafe proximity to flammable liquid storage, violating Rule 606A.h.

108. The COGCC required Extraction to implement the “corrective actions” that had been proposed by Extraction in its February 23, 2018 Accident Report by September 17, 2018 to avoid penalties. Thus, the COGCC allowed Extraction to continue for more than 6 months without ordering such “corrective actions” and risk a repeat of one of the most dangerous oil and gas well pad explosions in recent Colorado history.

109. This example of the COGCC’s (and the City Council’s) lax, virtually non-existent enforcement of rules to protect public health and safety, makes enforcement of the Broomfield citizens’ Charter § 2.1(b) all the more important.

K. Approval of the CDP Without First Quantifying the Risks and Requiring Evidence That Corrective Measures Will Protect Public Health, Safety and The Environment, Violates the Broomfield Charter

110. According to Section 4.9 of the Broomfield Charter: Powers of Council,

The Council shall constitute the legislative and governing body of the City and shall have all legislative powers and functions of municipal government, except as otherwise provided in the Constitution of the State of Colorado, this Charter or by Statutes applicable to Home Rule Cities, and shall have the power and authority to adopt such laws, ordinances, resolutions and rules as it shall deem proper.

111. According to Section 8.1 of the Broomfield Charter the City and County Manager is appointed by the City Council and serves as Broomfield’s chief administrative officer.

112. Under relevant provisions of Section 8.3 of the Broomfield Charter the City Manager is responsible for the proper administration of all affairs of the City placed in his charge, and to that end he shall have the power and duty and be required to:

(a) be responsible for the enforcement of the laws and ordinances of the City;

...

(h) be responsible for the enforcement of all terms and conditions imposed in favor of the city in any contract or public utility franchise, and upon knowledge of any violation thereof, report the same to the Council for such action and proceedings as may be necessary to enforce the same;

(i) attend Council meetings and participate in discussions with the Council in an advisory capacity without right to vote; [and]

...

(l) perform such other duties as may be prescribed by this Charter, or by ordinance, or required of him by Council which are not inconsistent with this Charter.

113. The Broomfield Charter does not authorize the City Manager to enter into, amend, or forego enforcement of, an ordinance, contract, or agreement on behalf of the City Council.

114. Broomfield City Council did not conduct any public vote to authorize Mr. Ozaki to accept a CDP that does not comply with the requirements of the OA.

115. Broomfield City Council did not conduct any public vote to authorize Mr. Ozaki to accept a CDP that does not comply with the requirements of the Charter, § 2.1(b).

L. The COGCC's Failure to Protect Public Health and Safety Heightens the Importance of Broomfield's Actions

116. For at least the last decade, the COGCC interpreted its mandate under the Oil and Gas Conservation Act, C.R.S. 34-60-101 *et seq.*, as requiring the Commission to “balance” the desire of the state to maximize production, oil and gas operators’ economic interests, mineral rights owners’ interests, and other oil and gas industry interests, against the public health, safety and the environment in its permitting and enforcement decisions (“COGCC’s Balancing Test”).

117. In March 2017, the Colorado Court of Appeals rejected the COGCC’s Balancing Test and ruled that protection of public health, safety, and the environment is a *mandatory condition* that must be met for oil and gas operations to be authorized under the OGCA. *Martinez v. Colorado Oil and Gas Conservation Comm’n*, 2017 COA 37 (Colo. App. 2017).

118. The Colorado Attorney General is currently appealing this ruling to the Colorado Supreme Court, however the COGCC is currently stating publicly that it does not consider the *Martinez* ruling to be binding precedent, regardless of Colorado Appellate Rule 35(e).

119. While these claims are not against the COGCC, the Oil and Gas Conservation Act as interpreted by the Court of Appeals is binding on Broomfield as an entity regulating oil and gas in Colorado.

120. The impact of this disregard for precedent is serious for communities in proximity to oil and gas development. Drilling applications in the state have risen 70 percent, and the COGCC has granted more than 4400 drilling permits since the *Martinez* opinion was handed down by the Court of Appeals. Upon information and belief, none include a finding based on objective information that the mandatory standards for protection of the public health, safety and the environment have been met.

121. The Livingston, Interchange, and Northwest location assessment permits, along with 84 drilling permits close to neighborhoods in Broomfield, were approved by the COGCC without evaluating the risks of those operations, and without a demonstration on the record that mandatory standards for protection of public health, safety and the environment have been met.

Because the COGCC has explicitly declined to ensure the protection of public health, safety, and welfare, or the environment and instead chooses to utilize the “balancing test” that

places extraction of mineral resources at the same level of importance, or above, public health and safety, local governments must follow their own laws and utilize all available authority to protect citizens. Broomfield must comply with its Municipal Code and its Charter to protect its citizens from the risks presented by the Extraction CDP, first by fully understanding those risks *before* authorizing the project to go forward.

FIRST CLAIM FOR RELIEF

Declaratory Judgment: Violations of the Broomfield Charter and City Ordinance

122. Plaintiff incorporates each allegation of the foregoing paragraphs as if fully set forth herein.

123. Plaintiff's rights, status, or other legal relations are affected by the actions of the Defendants' conditional approval of the CDP, as alleged herein.

124. A real and substantial controversy exists between the parties regarding whether the approval of the CDP is invalid, void, and of no effect. A declaratory judgment will terminate the uncertainty and controversy giving rise to this proceeding.

125. A litigant may properly bring a declaratory judgment action challenging a municipal ordinance as violative of a city's charter. A city's charter is like its constitution, and all ordinances that a city passes, and all actions that it takes, must comply with the terms of its charter. *City of Boulder v. Public Service Company of Colorado*, 420 P.3d 289, ¶ 30 (2018).

126. § 4.9 of the Broomfield Charter sets out the powers of the City Council.

127. § 8.3 of the Broomfield Charter sets out the powers of the City Manager.

128. The Broomfield Charter and principles governing the separation of powers, do not authorize the City Council to delegate its powers to the City Manager.

129. The Broomfield Charter does not authorize the City Manager to enter into, amend, or forego enforcement of, an ordinance or an agreement on behalf of the City Council.

130. The City Council's and the City Manager's actions approving a CDP that threatens to adversely impact the health, safety, and welfare of Broomfield's residents in their workplaces, their homes, their schools, and public parks, and that does not protect the public's health, safety, and welfare and safeguard the environment and wildlife resources, are in violation of § 2.1(b) of the Broomfield Charter.

131. The CDP approval also violates the terms of the Operator Agreement, which is authorized by Ordinance No. 2017-186.

132. The City’s actions in authorizing the City Manager to approve a CDP that does not comply with the Operator Agreement or § 2.1(b) of the Charter is an invalid delegation of authority that violates §§ 4.9 and 8.3 of the Broomfield Charter.

133. The City Manager’s actions in approving a CDP that does not comply with the Operator Agreement authorized by Ordinance No. 2017-186 or § 2.1(b) of the Charter is *ultra vires* as it violates § 8.3 of the Charter.

SECOND CLAIM FOR RELIEF

Violations of the Open Meetings Laws C.R.S. § 24-6-402 (“OML”)

134. Plaintiff incorporates each allegation of the foregoing paragraphs as if fully set forth herein.

135. Under C.R.S. § 24-6-401, “It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret.”

136. The OML requires public meetings to be open to the public at all times. C.R.S. § 24-6-402(2)(a).

137. The Colorado Supreme Court has recognized that the OML is “clearly intended to afford the public access to a broad range of meetings at which public business is considered.” *Benson v. McCormick*, 195 Colo. 381, 383, 578 P.2d 651, 652 (1978).

138. A public meeting is defined in the context of a municipality as “[All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.” C.R.S. 24-6-402(2)(b).

139. Additionally, “‘meeting’ means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.” C.R.S. § 24-6-402(1)(b) (emphasis added).

140. Pursuant to C.R.S. § 24-6-402(9)(a), “Any person denied or threatened with denial of any of the rights that are conferred on the public by this part 4 has suffered an injury in fact and, therefore, has standing to challenge the violation of this part 4.”

141. To determine standing to bring suit under open meetings law. Colorado courts apply the two-prong test articulated in *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977). To satisfy that test, a plaintiff must establish that (1) he or she suffered an injury in fact and (2) the injury was to a legally protected interest. *Weisfield v. City of Arvada*, 2015 COA 43, 361 P.3d 1069.

142. The OML itself creates a "legally protected interest on behalf of Colorado citizens in having public bodies conduct public business openly in conformity with its provisions." *Doe v. Colorado Department of Public Health and Environment*, 2018 COA 106, ¶ 23 (citing, *Weisfield v. City of Arvada, supra*).

143. Plaintiffs, as members of the public residing in the City and County of Broomfield, possess standing to challenge the denial of their rights under the OML.

144. Actions which are improperly taken without full and timely notice are invalid. *Hyde v. Banking Bd.*, 38 Colo. App. 41, 552 P.2d 32 (1976).

145. Upon information and belief, the Broomfield City Council improperly held secret, unnoticed meetings and made private decisions on public business via various forms of electronic communications regarding matters described in this Complaint which were neither noticed nor disclosed to the public, so its actions violated C.R.S. § 24-6-402.

THIRD CLAIM FOR RELIEF

Declaratory Judgment: Arbitrary and Capricious Action, Not in Accordance with Law, an Abuse of Discretion, Contrary to the Record, or In Excess of Statutory Authority

146. Plaintiff incorporates each allegation of the foregoing paragraphs as if fully set forth herein.

147. An action for declaratory judgment, pursuant to C.R.C.P. 57 is the appropriate method for challenging governmental action by municipal officials which is not quasi-judicial and therefore not subject to C.R.C.P. 106(a)(4) review. *Russell v. City of Central*, 892 P.2d 432, 437 (Colo. App. 1995) (citing, *Denver Center for the Performing Arts v. Briggs*, 696 P.2d 299 (Colo.1985)).

148. Approval of the Extraction CDP by the City Manager was arbitrary, capricious, not in accordance with law, an abuse of discretion, contrary to the record, and in excess of the relevant statutory authority and jurisdiction.

149. The City Manager's approval of the CDP is arbitrary and capricious action (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as the City is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; and (c) by exercising discretion in such manner after a consideration of evidence before him as clearly to indicate that the City's action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

150. The City Manager's approval of the CDP was issued solely as a matter of administrative convenience, to avoid further discussion of the matter, and in the absence of sufficient investigation into pertinent considerations, and as such, the approval is arbitrary,

capricious, and invalid. *Colorado-Ute Elec. Ass'n, Inc. v. Public Utilities Com'n of State of Colo.*, 760 P.2d 627, 648-49 (1988).

151. The City Manager's approval of the CDP without a demonstration on the record that it is consistent with the protection of public health, safety, and welfare, including the environment and wildlife resources, is contrary to law as set out by the Court of Appeals in *Martinez v. Colorado Oil and Gas Conservation Commission*, 2017 COA 37 (Colo. App. 2017).

152. The Defendants failed to support their actions with adequate findings on the record. *Chase v. Colorado Oil and Gas Conservation Com'n* 284 P.3d 161, 171-72 (Colo. App. 2012).

153. To the extent the approval of the CDP was at the direction of, or authorized by, the City Council, it is invalid as arbitrary, capricious, not in accordance with law, an abuse of discretion, contrary to the record, and in excess of the relevant statutory authority and jurisdiction of the City for the same reasons as stated in regards to the City Manager.

FOURTH CLAIM FOR RELIEF

C.R.C.P. 106(a)(4): Arbitrary and Capricious Action, Not in Accordance with Law, an Abuse of Discretion, Contrary to the Record, or In Excess of Statutory Authority

154. Plaintiff incorporates each allegation of the foregoing paragraphs as if fully set forth herein.

155. This claim is brought in the alternative, pursuant to C.R.C.P. 106(a)(4), to address the actions of the City Manager and the City, to the extent such actions are considered quasi-judicial.

156. Approval of the Extraction CDP by the City Manager was arbitrary, capricious, not in accordance with law, an abuse of discretion, contrary to the record, and in excess of the relevant statutory authority and jurisdiction.

157. The City Manager's approval of the CDP arbitrary and capricious action (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as the City is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; and (c) by exercising discretion in such manner after a consideration of evidence before him as clearly to indicate that the City's action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

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159. The City Manager's approval of the CDP without a demonstration on the record that it is consistent with the protection of public health, safety, and welfare, including the environment and wildlife resources, is contrary to law as set out by the Court of Appeals in *Martinez v. Colorado Oil and Gas Conservation Commission*, 2017 COA 37 (Colo. App. 2017).

160. The Defendants failed to support their actions with adequate findings on the record. *Chase v. Colorado Oil and Gas Conservation Com'n*, 284 P.3d 161, 171-72 (Colo. App. 2012).

161. To the extent the approval of the CDP was at the direction of, or authorized by, the City Council, it is invalid as arbitrary, capricious, not in accordance with law, an abuse of discretion, contrary to the record, and in excess of the relevant statutory authority and jurisdiction of the City for the same reasons as stated in regards to the City Manager.

PRAYER FOR RELIEF

WHEREFOR, Plaintiffs respectfully request that the Court:

1. Enter a judgment pursuant to C.R.C.P. 57 declaring that the Defendants' approval of the Extraction CDP violates the Broomfield Charter and is null and void;
2. Enter a judgment against Defendants for violations of the Open Meetings Law, C.R.S. § 24-6-402;
3. Enter a judgment pursuant to C.R.C.P. 57 declaring that the Defendants' approval of the Extraction CDP is invalid as administrative actions that are arbitrary, capricious, not in accordance with law, an abuse of discretion, contrary to the record, and in excess of the relevant statutory authority and jurisdiction;
4. Enter a judgment pursuant to C.R.C.P. 106(a)(4) declaring that the Defendants' approval of the Extraction CDP is invalid as quasi-judicial actions that are arbitrary, capricious, not in accordance with law, an abuse of discretion, contrary to the record, and in excess of the relevant statutory authority and jurisdiction;
5. Enter a permanent injunction, precluding further development under the Operating Agreement unless and until approval of such development is lawful;
6. Award Plaintiffs costs and attorneys' fees incurred in prosecuting Open Meetings Law claims in Count II, pursuant to C.R.S. § 24-6-402(9)(b);
7. Award Plaintiffs their costs pursuant to C.R.C.P. 54(d); and

8. Award Plaintiffs such further relief as the Court finds proper.

Date: October 8, 2018

Respectfully submitted,

By:

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