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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St., Room 256
Denver, CO 80202

Plaintiffs: ARTHUR KEITH WHITELAW, III, JOHN DERUNGS, KATHERINE K. MCCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER.

Defendants: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul López, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman;
THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity);
THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittney Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz, and Chris Smith);
THE CITY AND COUNTY OF DENVER; and
CEDAR METROPOLITAN LLC, a Colorado LLC (the Property Owner/zoning Applicant).

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Case Number: _____

Division:

COMPLAINT FOR RELIEF UNDER C.R.C.P. 106(A)(4) AND FOR DECLARATORY JUDGMENT

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Plaintiffs, by and through their attorneys, complain and allege as follows:

INTRODUCTION

1. This is an action by Denver residents in the Crestmoor neighborhood whose homes and pre-school surround and are adjacent to the 2.33 acre church parcel located on the eastern edge of Crestmoor Park at 195 S. Monaco Parkway, which until recently housed the historic Mt. Gilead Church (the "Mt. Gilead Parcel"). Plaintiffs seek both relief under C.R.C.P. 106(a)(4) and also a declaratory judgment. Plaintiffs challenge the unlawful process and arbitrary and capricious administrative decisions by which the Denver Manager of Community Planning and Development ("CPD"), Denver Planning Board, and Denver City Council changed the zoning for the Mt. Gilead Parcel to S-MU-3 (a zoning category for "suburban multi-unit" three story buildings allowing apartment buildings) from E-SU-DX (a zoning category for "Urban Edge, Single Unit" that allows suburban and urban houses with a minimum zone lot area of 6,000 square feet). The Mt. Gilead parcel had been zoned for single-family homes or a religious property since the early 1960s when the Crestmoor area was developed. The E-SU-DX single-family home zone category was reaffirmed in the comprehensive community planning process leading to the new 2010 Denver Zoning Code.

2. For the reasons explained below in this Complaint, the decision to rezone the Mt. Gilead Parcel by the Denver City Council at a public hearing on June 8-9, 2015 (ending at approximately 2:30 am on June 9, 2015) (referred to below as the "195 S. Monaco Zoning Change"), and the decisions by CPD, the CPD Manager, the City of Denver and the Denver Planning Board leading up to that Council vote, are unlawful and must be vacated because:

a. Quasi-judicial procedures not followed: The Denver City Council does not understand its obligations as a quasi-judicial administrative body making non-legislative zoning decisions. The Denver City Council failed to follow proper quasi-judicial procedures and failed to base its decision to approve the proposed new zoning on the criteria listed in Section 12.4.10 of the Denver Zoning Code for approval of a new zone map amendment. Instead, the Council members who voted in favor of the rezoning treated the process as a political and legislative decision, and were influenced before the public hearing by *ex parte* contacts. The Council members explained their decisions, when they voted early on the morning of June 9, 2015, in terms of political factors and personal biases and preferences, rather than the evidence in the record of the public hearing and the specific, mandatory review criteria in the Denver Zoning Code required to approve a zoning change.

b. Zoning Code criteria not met: The 195 S. Monaco Zoning Change does not meet the criteria for a zone map amendment in the Denver Zoning Code, including Sections 12.4.10.1, 12.4.10.7, and 12.4.10.8 because:

i. It is not consistent with Adopted Plans including the Denver Comprehensive Plan and Blueprint Denver (there is no small area plan for the

Crestmoor neighborhood because CPD regards it as an "area of stability" that does not need such a plan); the most recent plan for this parcel is the 2010 Denver Zoning Code, which zoned this parcel as E-SU-DX following an intensive community process for legislative rezoning most of Denver's neighborhoods.

ii. None of the "justifying circumstances" in DZC 12.4.10.8 supports this zoning change. There was no error or mistake of fact with the existing E-SU-DX zoning adopted five years ago in the 2010 Zoning Code. The existing zoning does not overlook some natural condition affecting development. The land around Crestmoor Park has not changed in recent years in such a way that it is in the public interest to encourage redevelopment of the area. And the criteria for an overlay zone district were not met.

iii. The zoning change does not "further the public health, safety and general welfare of the City," DZC 12.4.10.7. The Planning Board and the City Council erroneously refused to consider the adverse traffic and parking effects for surrounding neighborhoods of this zoning change, mistakenly contending they "cannot" consider those factors and instead must approve zoning changes and wait for traffic and parking issues to be addressed in the administrative "site" planning process in which the public does not participate. The zoning change will allow traffic that will harm orthodox Jewish residents who walk to their services along East Cedar Avenue, will endanger children in a preschool immediately south of the site, and inadequate parking could cause harm to children who use Crestmoor Park regularly for sports games and practices.

iv. This high-density zoning category it is not compatible with the density and uses in the surrounding residential neighborhoods (see Exhibit 5: density chart), which consist primarily of single-family homes, adjacent townhomes, and a 30-acre city park, and have no apartment buildings along the west side of Monaco Parkway for several miles between I-70 on the north and Leetsdale Drive on the south.

c. Appearance of impropriety and bias resulting from campaign contributions: The quasi-judicial decisionmaking process required of the Denver City Council members who participated in the June 8-9, 2015 public hearing appeared to lack neutral decisionmakers. Council members who make quasi-judicial decisions about rezoning receive campaign contributions from lobbyists and lawyers who represent rezoning applicants. This creates the appearance of impropriety and bias where such contributions appear calculated to influence certain Council members' quasi-judicial role.

d. CPD and City blocked protest petition procedure: The Denver Manager of Community Planning and Development (and his delegated decisionmakers) and City representatives erred in implementation of the Protest Petition procedure in Denver Zoning Code 12.4.10.5 and Article 3.2.9.E of the Denver Charter by: i) including City of Denver park land in their calculation of the Protest Petition/super-majority property area

for which 20% of the signatures were required for the June 8, 2015 City Council public hearing; and/or ii) by failing to adopt a procedure to allow citizens to obtain protest petition signatures from City representatives for City-owned property including City park land. As a result CPD contended that less than the required 20% of protest petition signatures were submitted. If CPD had not included such park property, or allowed protest petitions for such City-owned park land, the 195 S. Monaco Zoning Change would not have passed because fewer than 10 Council members voted in favor of it.

e. Conflict of interest with Planning Board approval: The Denver Planning Board's January 21, 2015 decision to approve the proposed zoning application (the applicant at that time was seeking S-MU-3 zoning "with waivers") was tainted by the conflict of interest resulting from having one of the current Planning Board members (Jim Bershof) sign the rezoning application and serve as the rezoning applicant's "Property Owner Representative" and "Point of Contact for Application."

f. Unlawful spot zoning: The rezoning of the Mt. Gilead Parcel under these circumstances constituted unlawful "spot zoning."

JURISDICTION AND VENUE

3. The Mt. Gilead Parcel is located in the City and County of Denver with a property address of 195 S. Monaco Parkway. It is listed as Schedule Number 0608311005000 in the Denver Assessor's records, with a legal description of: "Eastern Capitol Hill 3rd Flg B8 L13 TO 43." Jurisdiction is proper in this Court under Colo. R. Civ. P. 106, Colo. R. Civ. P. 57, and under the Court's general jurisdiction to resolve disputes like this. This action is timely filed under C.R.C.P. 106(b) within 28 days of the Denver City Council's final decision on this rezoning, which was made at a vote taken at approximately 2:30 am on the morning of June 9, 2015.

4. Venue is proper in this Court under Colo. R. Civ. P. 98(a) because this is an action affecting real property located in the City and County of Denver.

5. Section 12.4.10.10 of the Denver Zoning Code provides that: "A decision by the City Council on a proposed official map amendment may be appealed to District Court"

PARTIES

Plaintiffs

6. Plaintiffs own homes and a business property in the City and County of Denver adjacent to the Mt. Gilead Parcel.[1] The Plaintiffs are:

[1] Colorado law does not require plaintiffs challenging a zoning decision to have a common property boundary with the property being rezoned. Colorado cases focus on the nature and scope of the injury to the plaintiffs. For example, in *Fedder v. McCurdy*, 768 P.2d 711

a. Arthur Keith Whitelaw, III, is one of the owners of the home and property located at 6300 E. Cedar Ave., Denver, CO 80224. His property faces Crestmoor Park and is located within the City's 200-foot perimeter calculation for the Protest Petition procedure; he signed the Protest Petition for the June 8, 2015 City Council meeting described below. He and his wife purchased their home in July 2013, after the 2010 Denver Zoning Code was adopted, which Code classified the Mt. Gilead Parcel as E-SU-DX. Prior to his purchase, he verified the classification of his prospective home and the surrounding neighborhood as being classified E-SU-DX (single-family residences) and relied on that zoning classification. He and his wife frequently walk in Crestmoor Park for recreation.

b. John DeRungs is one of the owners of the home and property located at 40 Kearney St., Denver, CO 80220 (near the corner of Southmoor Drive and Kearney St.). His property is a short distance from the north side of Crestmoor Park and is about 1,300 feet (about 4 blocks) from the Mt. Gilead Parcel. He frequently uses Crestmoor Park for recreation.

c. Katherine K. McCrimmon is one of the owners of the home and property located at 200 S. Kearney St., Denver, CO 80224 (at the southeast corner of Cedar Ave. and South Kearney St.). Her property faces Crestmoor Park and is approximately 900 feet (3 blocks) from the Mt. Gilead Parcel. Ms. McCrimmon is the City's official contact person for the Crestmoor Park Neighborhood Association, the Denver Registered Neighborhood Organization that encompasses the Mt. Gilead Parcel and Crestmoor Park. She helped organize the volunteer group called "Friends of Crestmoor Park," that helped survey residents, organize neighborhood response, coordinate public meetings, and attempt to negotiate with Cedar Metropolitan LLC representatives concerning the proposed 195 S. Monaco Zoning Change. She frequently uses Crestmoor Park for recreation.

d. Laura Pitmon owns the property and Crestmoor Learning Center pre-school facility located at 225 S. Monaco Parkway (at the northeast corner of Cedar Ave. and Monaco Parkway). Her property faces the Mt. Gilead Parcel, which is directly across Cedar Ave. Her property is located within the 200-foot perimeter calculation for the Protest Petition procedure; she signed the Protest Petition for the June 8, 2015 City Council meeting described below.

e. Denise Sigon, formerly known as Denise L. Sager, owns the townhome and property located at 148 S. Locust St. Her property shares a common property

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(Colo. App. 1988), *cert. denied* (1989), the Colorado Court of Appeals confirmed that property owners who lived one-half mile from a proposed new concrete plant on a 13-acre parcel in Douglas County had standing to challenge the zoning decision allowing that plant, because of the harm they alleged from severe dust problems and increased traffic on the road that served their homes.

boundary with the Mt. Gilead Parcel; the proposed new apartment building would tower to the east and south over her townhome. Her property also faces Crestmoor Park and is located within the City's 200-foot perimeter calculation for the Protest Petition procedure; she signed the Protest Petition for the June 8, 2015 City Council meeting described below. Ms. Sigon's mother lived in this townhome and died in May 2015. Ms. Sigon currently lives in Tucson, Arizona but may decide to move back to Denver and live in this townhome.

f. Alan and Rita Singer own the home and property located at 215 S. Kearney St., Denver, CO 80224 (near the southwest corner of Cedar Ave. and South Kearney St.). Their property is a short distance from the southwest corner of Crestmoor Park and is a little over 1,000 feet (3-1/4 blocks) from the Mt. Gilead Parcel. They are members of the Orthodox Jewish community in Denver. They, along with members of their community, regularly walk on E. Cedar Avenue and adjacent streets on the Sabbath.

7. Plaintiffs will suffer an injury in fact and be adversely affected by the high-density S-MU-3 zoning for the Mt. Gilead Parcel for at least the following reasons, which establish both economic and non-economic injuries that are unique to Denver residents living in close proximity to the Mt. Gilead Parcel and distinct from the injury suffered by the public at large:

a. All Plaintiffs' property values will be harmed by the construction and use of a new high-density apartment building planned by the rezoning applicant that will create an eye-sore at the corner of Crestmoor Park and will create traffic and problems on E. Cedar Avenue, Monaco Parkway, S. Locust Street, and adjacent streets, and parking problems on E. Cedar Avenue and adjacent streets. Some residents of a new apartment building at the Mt. Gilead Parcel will choose to park their cars along Crestmoor Park on E. Cedar Avenue and South Locust Street because of inadequate parking for residents of the apartment building, or charges to residents to use a parking space. That will cause visitors to Crestmoor Park to park their cars on the streets in front of Plaintiffs' homes and business.

b. All Plaintiffs' views of the area around Crestmoor Park will be obstructed by a new building that can be 52 feet high including roof objects. The prevailing structures in the area by comparison are 25 to 30 feet high, and on the west side of Monaco there are no apartment buildings in the vicinity. And Plaintiffs' aesthetic enjoyment of Crestmoor Park, which is their neighborhood park for recreation and enjoyment, will be harmed by the creation of a new high-density apartment building on the southeast corner of the park.

c. All Plaintiffs' use of Crestmoor Park will be harmed by the additional vehicular traffic from new residents using Cedar Avenue as a cut-through street to avoid existing heavy traffic and congestion on Monaco Parkway and East Alameda Avenue. On weekends and some weekdays the park is filled with children and adults playing

soccer, baseball, and lacrosse. The additional traffic from the new apartment complex allowed by the 195 S. Monaco Zoning Change poses a threat to children who play at the park. It also poses a threat to Mr. and Mrs. Singer and other the members of the orthodox Jewish community who live in the Crestmoor neighborhood and walk on the Sabbath (the narrow or non-existent sidewalks in the area force them to walk on the street right-of-way).

d. All the Plaintiffs are injured by losing the protections of the Denver Zoning Code. The 195 S. Monaco Zoning Change, which altered the E-SU-DX zoning category assigned to the Mt. Gilead Parcel in the 2010 Zoning Code, demonstrates that residents can no longer rely on the existing zoning of other properties in their neighborhood, even in this Area of Stability. Now any new property owner can simply ask to rezone its property to a new high-density zone category, based on the precedent set by the 195 S. Monaco Zoning Change. The 195 S. Monaco Zoning Change has created instability for residents of the surrounding neighborhood because their property and property values are now at risk anytime another new owner/property developer seeks to do something similar to what happened with the Mt. Gilead Parcel.

e. Plaintiff Laura Pitmon, the owner of the Crestmoor Learning Center pre-school facility located at 225 S. Monaco Parkway adjacent to the Mt. Gilead Parcel (immediately to the south), will be harmed because creation of an apartment building next to a pre-school creates security risks for the children at the facility. In addition, the traffic from the new apartment complex, and the new residents who will be parking on the street on E. Cedar, South Locust, or other nearby streets, will make it difficult for parents who are dropping off or picking up their children, or attending school events, and for pre-school staff members, to get to the facility and find a parking place near it.

f. Ms. Sigon and owners of the other townhomes immediately west/northwest of the Mt. Gilead Parcel will have a new building towering over them to the east and south with noise from apartment residents, and a loss of privacy. And new residents at the Mt. Gilead Parcel will create traffic and parking problems for the townhome owners.

Defendants

8. Defendant the Denver City Council ("City Council") is an entity that exists under Article III of the Denver Charter. Article 3.2.9 of the Denver Charter describes the Council's authority for zoning decisions in Denver. The City Council members as of the June 8-9, 2015 public hearing on the 195 S. Monaco Zoning Change were: Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul López, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, and Mary Beth Susman. Councilman Herndon did not attend the June 8-9, 2015 hearing. The individual Council members are sued only in their official capacity.

9. Defendant the Denver Planning Board ("Planning Board") is an entity whose members are appointed by the Mayor of Denver that exercises the powers described in the Denver Revised Municipal Code Section 12-45 and Section 12.2.2 of the Denver Zoning Code. The Planning Board made the zoning decision for the Mt. Gilead Parcel on January 21, 2015, approving the zone map amendment that Plaintiffs challenge in this action. The Planning Board's individual members as of January 21, 2015 were: Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl (Chair), Frank Schultz, and Chris Smith. They are sued only in their official capacity.

10. Defendant the Manager of Community Planning and Development, Brad Buchanan (who also uses the title Executive Director), exercises the powers described in the Denver Revised Municipal Code § 12-17 and Section 12.2.3 of the Denver Zoning Code. Mr. Buchanan is sued only in his official capacity.

11. Defendant the City and County of Denver is a home rule municipal corporation of the State of Colorado organized under Article XX, Section 6 of the Colorado Constitution (the home rule amendment).

12. Defendant Cedar Metropolitan LLC, on information and belief, is a Colorado limited liability company owned by Metropolitan Homes, an Englewood real estate developer controlled by Peter Kudla. Cedar Metropolitan LLC was organized on October 3, 2014 and lists its office location as 10111 Inverness Main Street, Suite T, Englewood, CO 80112. Its registered agent is A. Peter Kudla. On information and belief, Cedar Metropolitan LLC was organized to purchase the Mt. Gilead Parcel. Cedar Metropolitan LLC purchased the Mt. Gilead Parcel on approximately October 15, 2014 for a purchase price of $1.6 million. Immediately, on or about October 15, 2014, Cedar Metropolitan LLC, through its Manager Peter Kudla, signed a Zone Map Amendment (Rezoning) --Application seeking to rezone the property to "S-MU-5 w/ waivers." The zoning application for the 195 S. Monaco Zoning Change lists the Property Owner as "Peter Kudla (Manager) – Cedar Metropolitan LLC. The Application lists the "Property Owner(s) Representative" and the "Contact for Application" as Jim Bershof -- OZ Architecture. As noted in Paragraph 2.e above, Mr. Bershof is also serving as a current member of the Denver Planning Board.

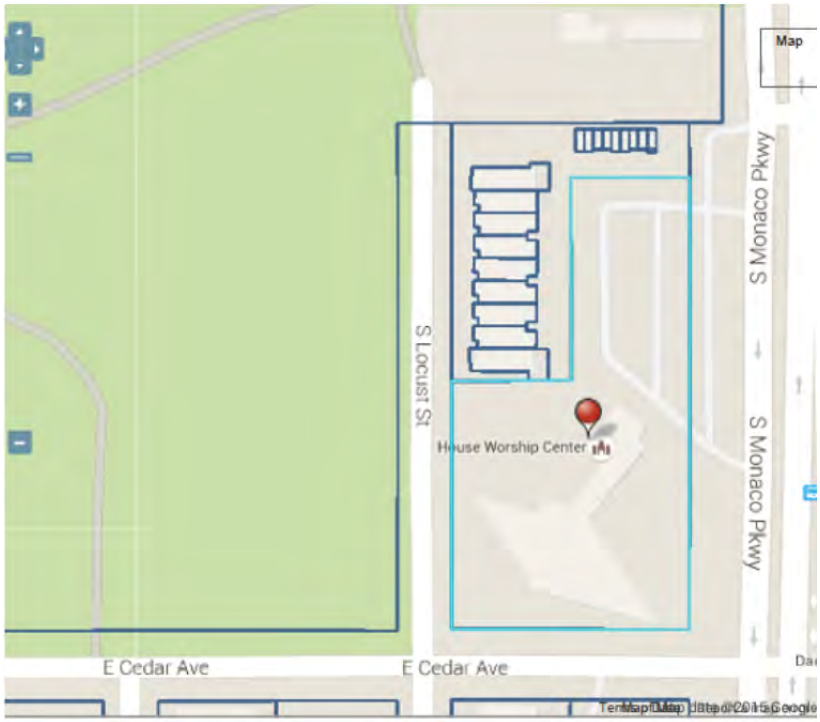
RELEVANT BACKGROUND AND EVENTS

History Of Mt. Gilead Parcel And Character Of Surrounding Residential Neighborhoods

13. The church building on the Mt. Gilead Parcel was designed in 1962 by acclaimed modernist architect Eugene Sternberg. The structure initially was a Jewish synagogue, Temple Micah. It later became the famed Mt. Gilead Baptist Church. The church building fell into disrepair because of the church congregation's limited resources.

14. The developers falsely claimed in the rezoning process that the area should qualify as a reinvestment area. The land is valuable. It simply needed to be maintained properly.

15. Below are the property diagram and aerial photo shown in the Denver Assessor's records (the Mt. Gilead Parcel is outlined in a turquoise line with "House Worship Center" as the building label for the existing church):



16. As shown in the Denver Assessor's Parcel map attached as Exhibit 1, the Mt. Gilead Parcel is surrounded to the north and west by the Crestmoor residential neighborhood with single family homes, and by Crestmoor Park, a public city park with 37.3 acres of open space including picnic areas and athletic fields, and somewhat removed, to the east by the Lowry neighborhood. There is no evidence in the administrative record for the 195 S. Monaco Rezoning of any blight or urban decay for the Crestmoor and Lowry neighborhoods. They are thriving. And although there are some apartment buildings on the east side of Monaco including the "Lex" townhome and apartment complex, as shown in the density analysis on Exhibit 5, the density of the buildings nearby east of Monaco, is nowhere near the density for the S-MU-3 zoning for the 195 S. Monaco Zoning Change (proposed density of as high as 50 units/acre—very substantially above surrounding areas).

Process Leading To Adoption Of 2010 Denver Zoning Code

17. The 2010 Denver Zoning Code represented a wholesale overhaul and revision of Denver's zoning preceded by years of public hearings and dialogue. CPD created a website called "NewCodeDenver.org" to help citizens track changes and published a newsletter called "In the Zone." *See* Exh. 6.A. For several years before 2010, the City of Denver encouraged Denver residents to check how their neighborhood was classified in the proposed new Code and provide comments if they disagreed with such zoning. CPD held a public meeting on the proposed comprehensive new Zoning Code in Council District 5 in East Denver (the area encompassing the Mt. Gilead Parcel) on August 18, 2009. *See id.* CPD urged residents: "Your help is needed in reviewing the draft maps! Please attend your district meeting or review and comment on the maps online!" *Id.* In announcing its "Final Review Draft" of the new Zoning Code, CPD told citizens on January 18, 2010 that through its "New Code Denver effort" it had "engaged more than 35,000 people through public meetings and association gatherings, e-mails, phone calls, letters and Website interactions." Exh. 6.B. It told citizens the New Code would give them "a clear, predictable zoning code that creates value and economic opportunity for homeowners and other property owners and preserves Denver's economic vitality and outstanding quality of life." *Id.* The City Council declared when it adopted the 2010 Zoning Code that it was avoiding "piecemeal amendment" in order to respond to changing conditions. *See* Exh. 6.C (Ordinance No. 333, Series 2010, Council Bill No. 10-431).

18. The Mt. Gilead Parcel was zoned as E-SU-DX in the 2010 Denver Zoning Code. This was a reaffirmation of comparable zoning under the previous code that classified this land as appropriate for single-family homes, a church or a school. The zoning has been consistent for 53 years. The reaffirmation process involved both community input on the designations chosen for the new Zoning Code, as well as community input on the legislative remapping of most areas of the City. Many Crestmoor residents participated in the public meetings that remapped Crestmoor, including this parcel as E-SU-DX. Existing residents in the surrounding Crestmoor, Lowry, Hilltop, South Hilltop, and Mayfair neighborhoods, and people who purchased homes near Crestmoor Park in and after 2010, relied on the E-SU-DX zoning classification, along with the treatment of the Crestmoor neighborhood as an "area of stability" in the "Blueprint Denver" planning document.

19. In the absence of a "small area plan" for the Crestmoor neighborhood (something the City deems unnecessary or a very low priority, *see infra* Paragraph 35), the Denver City Council's legislative decision to zone the Mt. Gilead Parcel as E-SU-DX in the 2010 Denver Zoning Code represents a type of "adopted plan" by the Denver City Council for that parcel—an adopted plan on which citizens can rely and that restricts future zoning changes. Indeed, under the definition of an "adopted plan" espoused by the Denver City Attorney representative (Karen Aviles) at the June 29, 2015 City Council public hearing, any land-use plan adopted by any City agency constitutes an "adopted plan."

20. Under established administrative law concepts, the City of Denver cannot suddenly revise the zoning for that parcel within a short period of time (i.e., five years) without very strong justifications for doing so. *See, e.g., Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (courts must take a "hard look" at agencies' informal rescission of administrative rules).

Applicant's Purchase Of Property Subject To Existing Zoning

21. Cedar Metropolitan LLC and Mr. Kudla were aware when Cedar Metropolitan LLC purchased the Mt. Gilead Parcel in October 2014 of the existing E-SU-DX zoning for the Parcel, and that such zoning had been approved by the Denver City Council in 2010 as part of its adoption of the new 2010 Denver Zoning Code.

Applicant's October/November 2014 Zoning Application

22. In a rezoning application signed by Peter Kudla on October 15, 2014, with Jim Bershof, at the time a member of the Denver Planning Board, listed as the "Property Owner(s) Representative" and "Point of Contact for Application," Cedar Metropolitan LLC asked the City of Denver to rezone the Mt. Gilead Parcel to S-MU-5 "w/ waivers." In that application, the applicant requested zoning allowing for a structure of "Four (4) stories up [to] 65 feet in height." Application at 4 (dated as of November 3, 2014).

23. That application contended that the rezoning was needed because more people want to live in the area: "The surrounding neighborhood is rapidly growing with the redevelopment of the Lowry Neighborhood. The activity in the area has created an increased desire to live in this urban setting as well as a desire to take advantage of the existing and proposed office, retail, and educational establishments." Id. at 27.

24. As alleged "justifying circumstances" for the zoning change, the application contended: "Denver's Hilltop neighborhood and adjacent Lowy Park neighborhood are in the midst of rapid transformation and steady growth. The area is becoming more popular and more diverse because of direct investment and redevelopment in the area. . . . [describing new development in Lowry] This type of development encourages the creation of livable, vibrant neighborhoods that are defined by choices in housing type, different lifestyles and quality public improvements and amenities." The application asserted: "The proposed map amendment is considered to fall within a 'reinvestment area' as classified by Blueprint Denver. Reinvestment

areas are 'neighborhoods with a character that is desirable to maintain but that would benefit from reinvestment through modest infill and redevelopment or major projects in a small area.'" *Id.* at 29. The application falsely stated: "The conditions and character of this area has changed significantly which provides the legal basis for this map amendment." *Id.* at 29.

25. The justifications in this zoning application represent the type of standard-less "consultant-speak" that permeates many applications for rezoning in Denver. The rationale for the zoning change is: Denver needs more density to accommodate people who want to live in the City. Therefore, the zoning change should be approved.

26. Peter Kudla and his retained architect and Planning Board member, Jim Bershof, met with representatives of the Crestmoor Park RNO on September 22, 2014 at the Schlessman Family Library building. Mr. Bershof served as the developer's representative at that meeting, seeking to persuade neighborhood representatives to support his client's planned zoning change application. The neighborhood representatives expressed opposition to Mr. Kudla's proposed rezoning and the density.

27. In December 2014, Cedar Metropolitan LLC, through Peter Kudla and Jim Bershof, presented an amended rezoning application (dated as of December 8, 2014) seeking S-MU-3 zoning "w/ waivers". Their justifications for the zoning change remained the same as in their October/November 2014 rezoning application. See above. They also sought to justify the S-MU-3 zoning by comparison to the preschool/day-care facility on the south side of Cedar Avenue, ignoring that the building and use on that site did not resemble the high-density use they were proposing. See Application at 29 (Dec. 8, 2014).

28. The Crestmoor Park RNO arranged and held a community meeting on the evening of January 6, 2015 at the Eisenhower Chapel in Lowry to hear presentations from Cedar Metropolitan about its proposed rezoning, and to allow for comments on the rezoning from neighborhood residents. The meeting participants asked the developer to propose a lower density development for the property including townhomes if it wanted to get community support. The meeting attracted a standing-room-only crowd. Through a show of hands, the members of the public who attended the meeting expressed overwhelming opposition to the proposed S-MU-3 rezoning for the Mt. Gilead Parcel.

The January 21, 2015 Planning Board Hearing

29. Mr. Kudla's proposed rezoning application seeking S-MU-3 zoning "w/ waivers" was presented to the Denver Planning Board at a public hearing on January 21, 2015. The hearing lasted until approximately 9:00 pm, with many residents and representatives of the Crestmoor and Lowry RNOs expressing opposition to the 195 S. Monaco Zoning Change. The Registered Neighborhood Organization closest to the Mt. Gilead Parcel (Crestmoor Park RNO) polled nearly one thousand residents and reported that nearly all respondents oppose this project.

30. Community resident Greg Kerwin objected to the Planning Board's ability to vote in a neutral way on the application when the principal contact person for the developer was

current Planning Board member Jim Bershof. The Planning Board and City Attorney's office representative ignored that concern and disclaimed any conflict of interest. Although Mr. Bershof did not attend the January 21, 2015 Planning Board meeting, he had previously voted in favor of the Buckley Annex Text Amendment at the October 1, 2014 Planning Board meeting, despite a request by Mr. Kerwin to recuse himself because of his role as the representative of the private developer seeking to change the zoning for the Mt. Gilead Parcel. The application that Mr. Bershof helped write for Cedar Metropolitan LLC for the 195 S. Monaco Zoning Change specifically relied on the proposed zoning changes for the Lowry/Buckley Annex parcel as part of the justification for rezoning of the Mt. Gilead Parcel. Thus, Mr. Bershof appears to have used his official position as a Planning Board member (voting in favor of the Lowry Text Amendment on October 1, 2014) to try to aid the position of his private client (Cedar Metropolitan LLC) with its rezoning of the Mt. Gilead Parcel.

31. The Planning Board members voted 9 to 1 in favor of the 195 S. Monaco Zoning Change, with only Member Chris Smith voting against. See Exhibit 3 (Planning Board Meeting Record). The Planning Board members refused to consider adverse traffic and parking impacts from the zoning change, contending they are not allowed to do so as part of their evaluation of the general health, safety, and public welfare under the Denver Zoning Code. The rationale of the Planning Board members who explained their decision at the public hearing included the following explanations, based primarily on personal observations and public policy, rather than the Denver Zoning Code criteria for approving a map amendment:

- Change is difficult.
- Denver needs to make room for more density. Our job is not to protect neighborhoods. Every neighborhood must pitch in.
- The Planning Board is not allowed to consider traffic impacts as part of "public health, safety and general welfare" when approving new zoning.
- [After disclaiming the relevance of traffic impacts] Monaco Parkway is an arterial street so it is appropriate to locate a new high-density development along it.
- The Planning Board is not bound by, and does not need to defer to, the zoning classifications in the new 2010 zoning code.

32. The Planning Board did not make any specific findings on the record to explain why it believed the 195 S. Monaco Zoning Change meets each of the Zoning Code's required criteria, and to explain why objections presented by residents and representatives of surrounding RNOs were unwarranted.

33. The Planning Board failed to function properly as a quasi-judicial decisionmaker, that must make its decision based on the evidence presented at the public hearing and on the specific criteria of the Denver Zoning Code. And it functioned under an inherent bias and conflict of interest because it was called upon to consider a zoning application presented to it by one of its current Planning Board members, Jim Bershof. The Planning Board's tainted and improper approval of the 195 S. Monaco Zoning Change on January 21, 2015 contributed to the

City Council's improper approval of that Zoning Change on June 8, 2015. If the Planning Board had not approved the Zoning Change, the applicant may have withdrawn its rezoning application and, if not, the City Council likely would have declined to hold a public hearing on it.

Postponement of Original March 31, 2015 Denver City Council Hearing and events occurring during the period from January 21, 2015 to June 8, 2015

34. The 195 S. Monaco Zoning Change was originally scheduled to go before the City Council for a public hearing on March 31, 2015. But at the request of the developer, barely seven days before the scheduled public hearing the Council agreed to postpone the application for the convenience of the developer, without consulting neighborhood leaders. At this time, District 5 Councilperson Mary Beth Susman contended that she was granting the delay so the developer could work with neighbors on an appropriate project for the site. The developers failed to come to terms with neighbors.

35. During this time, representatives of the Crestmoor Park RNO contacted District 5 Councilperson Mary Beth Susman and asked her to arrange to have CPD prepare a small area plan for the Crestmoor neighborhood. Susman checked with CPD and reported back in an email to the Pardo family dated February 20, 2015 (see Exhibit 2) that: "Crestmoor doesn't actually meet the criteria for beginning a small area plan," noting the following criteria and her comments about why they do not apply:

> From: **Susman, Mary Beth - City Council** <MaryBeth.Susman@denvergov.org>
> Date: Fri, Feb 20, 2015 at 7:54 AM
> Subject: RE: Crestmoor Park
> To: The Pardos <99pardo@gmail.com>
>
> I have left a message with the planning office about small area plans. Below are the criteria which engender a small area plan. Crestmoor doesn't actually meet the criteria for beginning a small area plan. See the criteria and my notes below.
>
> ## Small Area Plans
>
> A small area plan is any plan that addresses the issues of a portion of the city. Small area plans can cover three different geographic scales -- neighborhood, corridor, and district regardless of the size of the area. Small area plans cover a specific geography that often has a cohesive set of characteristics.
>
> **Types of Small Area Plan:**
>
> - Station area plans. Visit the Transit Oriented Development (TOD) website to learn more.
> - Neighborhood plans
> - Corridor plans
>
> **Criteria for selecting areas for small area planning:**

- Evidence of disinvestment and deteriorating housing - high vacancy, unemployment and poverty rates- **Not at all true of Crestmoor**
- Significant change is occurring or anticipated - **Crestmoor is not itself changing**.
- Public facilities and/or physical improvements need to be addressed- **Not present in Crestmoor**
- Opportunities for substantial infill or redevelopment are present - **There are no substantial infill situations nor redevelopment in Crestmoor.**
- Opportunities arise to influence site selection, development or major expansion of a single large activity generator - **Not present in Crestmoor**
- Transit station development opportunities - **No transit station development in Crestmoor.**

Criteria that more specifically address the goals of Blueprint Denver:

- Creating opportunity for appropriate development in areas of change - **I don't believe your neighborhood wants development and your neighborhood isn't an "area of change" in Blueprint Denver.**
- Stabilizing conditions that threaten areas of stability- **don't really know what this means.**
- Promoting public investment that increase transportation choice - **this one would be nice.**

Mary Beth Susman
Denver City Council | District 5
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marybeth.susman@denvergov.org | Dial 3-1-1 for City Services

Susman wrote to the Pardos on February 25, 2015 with a slightly revised analysis of the issue, which showed that she could not arrange for the City to get a small area plan created for the Crestmoor neighborhood within any meaningful time frame. *See* Exhibit 2.

36. On information and belief, hired representatives of Cedar Metropolitan LLC and Peter Kudla had extensive *ex parte* contacts with District 5 Councilperson Mary Beth Susman and her staff members, and with other City Council members during the period between January 21, 2015 (after Planning Board approval) and June 8, 2015. In those *ex parte* contacts, the developer's representatives arranged to have the City Council postpone its public hearing on the

195 S. Monaco Zoning Change. Those developer representatives arranged to have the City Council hearing on the Zoning Change scheduled for June 8, 2015—after the Denver municipal elections of members of City Council. This had the effect that Council members' votes would not become an issue in the Council elections, and would be made before the new City Council members would be sworn in on July 20, 2015. Thus the voting would be made, in part, by a "lame duck" body. Councilmember Susman warned community members at her regularly scheduled neighborhood discussion meeting approximately one week before the June 8, 2015 hearing not to expect other Council members to vote with her. It will be necessary for Plaintiffs to obtain discovery to ascertain the full extent of those *ex parte* contacts, which may have affected the outcome quasi-judicial process of the City Council on June 8-9, 2015.

Protest Petitions Submitted For June 8, 2015 Denver City Council Hearing

37. Article 3.2.9.E of the Denver Charter creates a procedure for a protest petition "signed by the owners of twenty per cent or more, either of the area of the lots included in such proposed change or of the area to a distance of two hundred feet from the perimeter of the area proposed for change" by which a super-majority of 10 Council members is necessary to approve the zoning change.

38. Crestmoor Park RNO representative, Katie McCrimmon, contacted CPD representatives in March 2015 seeking information needed to gather protest petitions for invoking the Protest Petition/super-majority procedure for the proposed 195 S. Monaco Zoning Change. CPD employee and Senior City Planner, Deidre Oss, responded on March 10, 2015, forwarding several materials including the "Protest Petition Map" showing the land area the City contended was relevant to the Protest Petition calculation, which include City-owned park land in Crestmoor Park and the park maintenance facility area north of the Mt. Gilead Parcel. *See* Exhibit 4.C. According to CPD's calculation in that map and the accompanying spreadsheet, signatures representing 95,713 square feet of surrounding property were necessary to meet the 20% threshold for the Protest Petition/super-majority procedure.

39. McCrimmon then contacted Arthur Gilkison of Denver Parks and Recreation by email on March 12, 2015, to request that it sign a Protest Petition to facilitate neighbors' request to have the super-majority procedure apply at the then-planned March 31, 2015 Council hearing. Mr. Gilkison responded by email on March 16, 2015 declining the request and stating: "Unfortunately, the Department of Parks and Recreation is not able to take a side in particular situation and is unable to sign on to your petition of protest." McCrimmon then asked David Gaspers of CPD, by email dated March 16, 2015 to exclude the City-owned land from the area covered by the Protest Petition calculation. She stated:

> Arthur Gilkison discussed this matter with Lauri Dannemiller. As you'll see below, she has decided that she is unable to take sides on this matter. That certainly makes sense.

Therefore, since the City can't sign for their very large portion of the land surrounding 195 S. Monaco Parkway, it seems logical that we would remove that land from consideration and the total on which we'd base the 20% would be somewhat lower.

If I am doing my math correctly, the City Parks portion represents 115,310 of the total (478,565). If we subtract the Parks Department portion from the total, we get to 363,255. Then 20% of that would be 72,651, compared to 20% of 478,565, which is 95,713. It seems appropriate to switch to the 72,651 requirement.

Could you please let me know how we can handle this issue of the City being a very large landowner in this area and being unable to sign our petition?

40. CPD declined to remove the City-owned park land and park maintenance facility area, and City rights-of-way from its land-area calculation for the Protest Petition process.

41. As noted above, the City Council's March 31, 2015 public hearing was rescheduled to June 8, 2015. Crestmoor Park RNO representative, Katie McCrimmon, sent to CPD representatives, David Gaspers and City Council representative Kelly Velez on June 1, 2015 the protest petition signatures attached as Exhibit 4.A. These signatures were from individual property owners surrounding the Mt. Gilead Parcel whose properties accounted for 82,395 square feet of the protest area as shown in the City's map and spreadsheet. In submitting these signatures she sought to invoke the super-majority/protest petition procedure in article 3.2.9.E of the Denver Charter, and Section 12.4.10.5 of the Denver Zoning Code, by which the votes of 10 Council members would be necessary to approve the 195 S. Monaco Zoning Change.

42. CPD "Senior GIS Analyst" Eric McClelland responded on June 1, 2015 explaining that CPD takes into account the City park land and City-owned rights of way in calculating the 20% area needed for the super-majority/protest petition procedure to apply. He stated:

The area calculation within the 200' buffer is 307,449 Sq Ft of parcel area + 171,116 Sq Ft Right of Way = 478,565 Sq Ft Total.

One source of confusion may be that the Map Amendment Area includes the adjoining Right of Way (to the centerline). This is displayed on the attached map.

See Exhibit 4.B (June 1, 2015 email).

43. McCrimmon and Crestmoor resident, Dr. Michal Ruder, contacted Gaspers and McClelland to seek clarification on their calculation. Gaspers then responded to McCrimmon in a June 2, 2015 email, declining to remove the City park land, park maintenance facility, and right-of-way property from the protest petition calculation. Gaspers stated:

Katie: In light of the GIS computations matching, it's CPD's understanding that the 478,564 sq ft is the accurate total land area within 200 ft of the perimeter of the map

amendment area. With that said, your total of 82,395 square feet of land area with signatures does not reach the 20 percent requirement.

Unless you think this is in error, I will inform the City Council office of the outcome of the protest petition filing. I know you worked very hard on this effort and appreciate all of the time put into it. Sorry it didn't work in your favor.

Please let me know if you'd like to discuss further.

See Exhibit 4.B (June 2, 2015 email).

44. Although CPD interprets the Protest Petition procedure in Article 3.2.9.E of the Denver Charter and Denver Zoning Code § 12.4.10.5 as encompassing City-owned park land and City-owned streets and rights-of-way, CPD and the City of Denver have no procedure for allowing citizens to obtain protest petition signatures from City representatives for such City-owned land. The effect of Defendants' policy and practice is to make it extremely difficult, if not impossible, for citizens to invoke the super-majority procedures to protect a parcel like the Mt. Gilead Parcel that is adjacent to a city park.

45. If CPD had not included the City-owned park land and park maintenance facility area in its Protest Petition calculation, the Protest Petition/super-majority requirement would have applied at the June 8-9, 2015 City Council public hearing, and the 195 S. Monaco Zoning Change would not have passed because it lacked 10 Council votes.

46. CPD relied on the court decision in *Burns v. City Council of City of Denver*, 759 P.2d 748 (Colo. App. 1988). In this action, Plaintiffs seek to have the Colorado courts reconsider that precedent in the context of the unique facts presented in this case.

The June 8-9, 2015 Denver City Council Hearing

47. At the Denver City Council public hearing on the 195 S. Monaco Zoning Change, there was extensive evidence presented about why the Zoning Change did not meet the Denver Zoning Code's criteria. The volume of evidence presented was substantial, and most of the City Council members did not have time even to read all the submissions that were received, despite their obligations as quasi-judicial decisionmakers.

48. The public hearing, Council deliberations, and voting lasted until 2:30 am on June 9, 2015. Representatives of the three Crestmoor-area RNOs and the Lowry United Neighborhoods RNO presented information about the strong opposition of the residents of their neighborhoods to the Zoning Change. In response to questions from Councilmembers (and with no correction from the Denver City Attorney's representative), CPD planner Gaspers told the Council that it should not consider traffic impacts in deciding whether to approve the zoning application. Instead, Gaspers explained, CPD contends that adverse traffic impacts should only be considered in the site plan review process run by the "Development Services" office, which is an "internal" CPD process in which no public meetings or input are received.

49. In their deliberations following the presentation of testimony and evidence (which begin at 7 hour 45minutes (07:45:50) on the television record of the public hearing), the Council members demonstrated their lack of understanding of their quasi-judicial role. They explained their votes like politicians, not judges, relying on personal preferences and extraneous evidence like whose arguments annoyed them more. Here is a brief synopsis of their explanations and comments. Plaintiffs will present a full transcript of their comments with their Rule 106(a)(4) opening brief:

a. Susman (whose District 5 encompasses the Mt. Gilead Parcel) stated she would vote against because it is a small site that would not make much impact on the City's need for density, saying: "This isn't a big project."

b. Faatz stated that she is familiar with a residential building for the elderly in her district that seems similar to the apartment building the developer is proposing for the Mt. Gilead Parcel, and that Sunrise assisted-living facility for seniors near Sheridan and Quincy in Pinehurst Estates has worked well for the community. Therefore she was voting in favor of the Zoning Change to promote housing for seniors on this Mt. Gilead site. Faatz made this vote, conceding at 7 hours 28 minutes) that she understood the developer was proposing "age-target" housing for the Mt. Gilead Parcel. The term "age-targeted" is a marketing term developers use to describe residents ages 45 and older.

c. Nevitt stated that he does not like urban sprawl like Los Angeles, Phoenix, or northern Virginia, and Denver needs density. He said there is "cognitive dissonance" between urban sprawl and opposition to density. He said we will add one million more people to Denver in the next 20 years. "Where are they going to live?" He said each neighborhood needs to help contribute to Denver's density to avoid having those additional people live in the suburbs instead of the City of Denver. His so-called "third path" is the path he contends Denver is on already: preserving the homes in Denver's old neighborhoods but at the same time taking advantage of "every single opportunity that we have to maximize density with redevelopment." "We need to maximize density." "And everyone needs to contribute." "There is no neighborhood so precious and so perfect that it should not be asked to contribute to this enterprise to solving this problem that we need to solve." This site is "not in the interior of the neighborhood." It's on the edge of the neighborhood. "It lies on a significant transit route. It's a block from another significant transit route." "We need to site the density we need at sites like this." "I cannot stand idly by and indulge the cognitive dissonance of abhorring sprawl but refusing to do anything about it." Therefore he said he would vote in favor of the Zoning Change.

d. Lopez commented briefly on density and the "soul of Denver." He mentioned the Denver Zoning Code and the "stream of code" and specialized terms, and said they tend to "geek out" on those terms. But rather than address Zoning Code requirements, he talked about trying to "feel the energy in the room." He said the last time he could remember not supporting a zoning was in 2007 because it involved traffic

and safety. He agreed with Susman and said he respected the community voice tonight. He said he detests when someone belittles our community and people who come to testify. He said he detests being threatened. He disagreed with the comments belittling the community for using legos to show alternative designs. "That is what cost you the vote tonight for me." He said he would vote against the Zoning Change.

e. Robb said that "this has been an evening of extremes." She commented on arguments that we need this density, that units won't be affordable enough. She heard comments this "conforms to Blueprint" and it "defies Blueprint." "I have heard things I agree with and things that I disagree with from both sides." She commented on "right-zoning" in the 2010 Zoning Code. She referred to discussions among Council members in the context of another zoning, where they said: "We had a compact." She said: "There is not a plan for this neighborhood." So it is different than a situation on South University that had a University Hills Plan. "We don't have a plan like that." She said it is different than Cherry Creek where we worked two years on a plan that had widespread support. She noted "This is an area of stability." "It is not an area of change, like Cherry Creek." "I see this as a rezoning where the neighbors have made a case for their opposition and that it conforms to criteria that I have seen." She cautioned: "Be careful what you ask for," noting a time she turned down a rezoning at 55 S. Garfield, where it took a long time to get another project there—12 years later and four different projects. "So you better decide what you want there." "I think this is an attractive project. I admire the developer for compromising." "It is hard to decide on this. But I think the case is there that this zoning does not meet our criteria."

f. Kniech stated she is undecided, saying "I am not going to break the tie here." She questioned whether the community is united against this project. "You have a divided community." "That to me is important to note." "You have people with differing opinion in your neighborhood." "To me the weakest part of this application is the changed circumstance." Saying she drives by the site 4 or 5 times per week, she said: "It is clear to me that the site is struggling." "It is not an attractive site. It is in decline." But she said "that is not the same as describing an entire change in the area." So she said she is struggling with whether there is enough changed circumstance to justify the legal criteria, which is really my job. She acknowledged her job is weighing the Zoning Code criteria. She noted "Politics you know is another piece of this." She also said "on the other side of it," "I always look to see whether and how a community has impacted a development project, but it is never my belief that a community gets to decide what a landowner does on their property." "There has to be evidence of impact." "In this case I see a lot of evidence of impact" "I see a significant reduction in the number of units. I see significant access concessions." For her the threshold is whether the community had impact on the developer. She said: "This development doesn't actually touch the park." She said "Nothing on this development actually touches the park." She described that as a point in favor of the zoning. There are actually homes closer to the park. She said the "deciding factor" for her likely would be: "it concerns me the anti-rental sentiment that I hear," not in testimony at the hearing, but in early communications she believes occurred

from the neighborhood. She cited the need for rentals in Denver. "If the deal breaker for this community that has been opposed, is they just don't like rental and they don't think rental belongs in Crestmoor, that does not sit well." She said every community has an obligation to provide a mix of housing and that mix needs to include rental. She also commented on her view of traffic created by "for sale units" for families vs. rentals to seniors. She noted: "I have some concerns about the criteria being met." She concluded: "I see a lot of places where I believe this is an arterial. I believe that the context closest to it matters most. I see a buffer for the park. And I also believe that rental is a part of every strong community, that a mix of individuals is a fair representation of our City and a fair representation for each community." She said she remains "torn."

g. Ortega said the decision is "a little bit challenging." She noted that in the 2010 rewrite of the Zoning Code it drastically changed how this body looks at zoning. She noted the planning office looks at details after the zoning is passed. She expressed concern that churches in Denver like this one on large lots in stable neighborhoods for single-family homes were at risk because of zoning changes. She noted hearing from voters about density and development pressures as she campaigned across the City. She said she is "struggling" that churches are threatened in stable neighborhoods. She said she appreciated the developer going the "extra mile" to try to work through finding something doable for the developer and the neighborhood. She said she is "struggling" with how to vote. She said she is: "looking at what is in the best interest of the city, the neighborhood, that particular location. But then I look at what we're dealing with across the city in other neighborhoods where the pressures are so great." She noted concerns of neighborhoods that have been identified in Blueprint Denver as areas of stability.

h. Brown stated: "I know where I stand on this issue and I am for it." "After fourteen years on this Council, I have heard much of the same comments that I heard from the folks who are against it on other projects." "Someone said tonight: 'Our way of life is at risk.' Really? You don't believe that." He said he had projects in his district that were highly controversial. People thought the world was coming to an end if approved. You look at how those projects matured and say how can people be so upset at this project. He noted Garth Brooks' song about: Back when the old stuff was new. Five years from now this project will blend right in. Crestmoor Park is not a country club, it is a public park. So we need to start with that as a premise. He said the developer had made considerable compromises. Thanks to that this is a better project. He said to Mr. Kudla: "I would not have liked the first proposal, Peter."

i. Brooks said: "What you see up here is a lot of turmoil, a lot of weighing about where our City is, and which direction do you go." He said the "major issue" is traffic and transportation issues. The "bad news is this is not our scope to deal with" all the transportation and traffic issues in your neighborhood. He said the "good news" is we can deal with it through Public Works through funding it has received for infrastructure improvements. "You are facing some severe traffic issues and we need to address it." Brooks believed he could not consider traffic impacts on the zoning decision. He noted

the legal obligation to consider "are the plans consistent, are they in context." He said: some of his colleagues believe they are; others do not. To him this site reflects the context. 120 units was way too much. The developer came down. The developer has made more concessions to work with the neighborhood and will have to live up to that. In site plan review the developer should work with neighborhoods. So he said he is voting in favor, but is "torn" because the neighborhoods made an incredible case. He said he believes this is "in line with our plans" in Denver.

j. Other Council members did not explain their votes.

50. Here is the summary from the City's "SIRE" website of the final Council 8 to 4 vote in favor of the 195 S. Monaco Zoning Change:

(Council Member) Brooks	Yes
(Council Member) Brown	Yes
(Council Member) Faatz	Yes
(Council Member) Herndon	Off the Dais
(Council Member) Kniech	Yes
(Council Member) Lehmann	Yes
(Council Member) Lopez	No
(Council Member) Montero	Yes
(Council Member) Nevitt	Yes
(Council Member) Ortega	No
(Council Member) Robb	No
(Council Member) Shepherd	Yes
(Council Member) Susman	No

51. For the reasons explained below, the Court must set aside the City Council's approval of the 195 S. Monaco Zoning Change under C.R.C.P. 106(a)(4) and applicable law.

Legal Principles Governing Denver Decisions On Zoning Changes Including Zone Map Amendments

A. Role of zoning protections in protecting neighborhoods and their residents and preserving property values

52. Zoning laws protect residents and neighborhoods from new developments that are incompatible with existing uses. Zoning preserves property values for residents who have invested much of their life savings in a home.

53. Zoning changes can undermine the vitality of an entire neighborhood. They should be based on necessity, justifying circumstances, and strong public support, not merely the whims of developers who stand to make money on a new development and have hired lobbyists and made political contributions to city officials.

54. Zoning ordinances must impose reasonable conditions to ensure that the zoned property will be compatible with the surrounding neighborhood. *See, e.g., Moore v. City of Boulder*, 484 P.2d 134, 136 (Colo. App. 1971). While it is permissible to permit diversification of uses, these uses must be in harmony with the surrounding neighborhood. *Id.* at 135.

B. The Denver Zoning Code's requirements governing the Planning Board's consideration of a zone map amendment

55. CPD, the Denver Planning Board, and Denver City Council do not have absolute discretion to adopt zoning changes including map amendments to the Zoning Code. Instead, Section 12.4.10 of the Denver Zoning Code protects Denver residents and their property values by placing specific limitations on map amendments. (Section 12.4.11 places comparable limits on text amendments for rezoning.)

56. First, Section 12.4.10.1 of the Zoning Code limits the circumstances when a map amendment may be adopted. It allows map amendments in only four circumstances:

1. to correct an error in the zone map;

2. because of changed or changing conditions in a particular area or in the city generally;

3. to rezone an area to implement adopted plans; or

4. to change the regulations and restrictions of an area as reasonably necessary to promote the public health, safety or general welfare.

The full text of Section 12.4.10.1 states:

> An official map amendment may be required to correct an error in the map or, because of changed or changing conditions in a particular area or in the city generally, to rezone an area to implement adopted plans, or to change the regulations and restrictions of an area as reasonably necessary to promote the public health, safety or general welfare.

57. The Zoning Code includes procedural protections, reflecting quasi-judicial decision-making requirements for administrative action. Section 12.4.10.4 sets forth a Review Process that includes the requirement for a public hearing by the Planning Board after public notice, where the Planning Board's recommendation is forwarded to the City Council for consideration. (Section 12.4.10.4.E). The Planning Board is required in such a public hearing to consider "any comments, in addition to the review criteria below [in Section 12.4.10.4.E]. The

City Council is required "to hold a public hearing on the proposed official map amendment." (Section 12.4.10.4.G). Consistent with common law quasi-judicial requirements: "The City Council shall consider the recommendation of the Planning Board and Manager, and any other comments received, in addition to the review criteria below, in approving, approving with conditions, or denying an official map amendment." (Section 12.4.10.4.G). Thus a flawed recommendation by the Denver Planning Board (here tainted by the conflict of interest from Jim Bershof's dual role as representative for the developer and current Planning Board member) taints the City Council vote because the City Council is required to "consider" the Planning Board's recommendation.

58. Section 12.4.10.5.A describes the procedure for obtaining property owner signatures for Protest Petitions:

1. If a protest to an official map amendment signed by the owners of 20 percent or more either of (1) the total gross land area included in such proposed change; or (2) the total land area from the perimeter of the area proposed for change to a distance of 200 feet outside of the perimeter of the area proposed for change, is filed with the City Council per subsection B. below, then the amendment shall not become effective except by the favorable vote of 10 members of the City Council.

2. For the purpose of defining owners and the area of land represented by the owner land owned by more than one owner shall be divided to the extent of each owner's percentage of ownership interest in determining whether a protest has the required percentage of signatures.

3. The Manager shall determine the adequacy of all protest petition signatures.

59. The Zoning Code also spells out in Section 12.4.10.7 three specific "Review Criteria" for approval of a map amendment:

A. Consistency with adopted plans: The Code explains: "The proposed official map amendment is consistent with the City's adopted plans, or the proposed rezoning is necessary to provide for land for a community need that was not anticipated at the time of the adoption of the City's plan."

B. Uniformity of District regulations and restrictions; and

C. Public health, safety and general welfare: The Code states: "The proposed official map amendment furthers the public, health, safety and general welfare of the City.

The Code requires consistency with adopted plans that have the force of a City ordinance to emphasize the importance of the formal planning process and protect residents from harmful, arbitrary zoning changes that ignore or undermine the community vision expressed in an adopted plan.

The Code does not purport to define what can be considered for the City's "public health, safety and general welfare" and does not state that traffic and parking concerns cannot be considered when evaluating a zone map amendment.

60. The City Council did not make any specific findings about the applicability of the mandatory Review Criteria in Section 12.4.10.7. The evidence presented at the public hearing did not demonstrate that the proposed S-MU-3 zoning was consistent with Adopted Plans in this "area of stability." The Council ignored relevant information about traffic and safety impacts (an error of law based on mistaken direction from CPD and presumably the Denver City Attorney's office) that it should not consider those impacts as part of the public health, safety and general welfare review criteria.

61. The Zoning Code contains additional "Review Criteria for Non-Legislative Rezonings" in Section 12.4.10.8, requiring that: "the City Council may approve an official map amendment that is not a legislative rezoning only if the City Council finds the application meets the following criteria:

A. Justifying Circumstances: The Zoning Code lists five "justifying circumstances" one of which the Council must find to exist:

1. The existing zoning of the land was the result of an error;

2. The existing zoning of the land was based on a mistake of fact;

3. The existing zoning of the land failed to take into account the constraints on development created by the natural characteristics of the land, including, but not limited to, steep slopes, floodplain, unstable soils, and inadequate drainage.

4. The land or its surrounding environs has changed or is changing to such a degree that it is in the public interest to encourage a redevelopment of the area or to recognize the changed character of the area; or

5. It is in the public interest to encourage a departure from the existing zoning through application of supplemental zoning regulations that are consistent with the intent and purpose of, and meet the specific criteria stated in, Article 9, Division 9.4 (Overlay Zone Districts), of this Code.

B. Consistency with Neighborhood Context Description, Zone District Purpose and Intent Statements: The Code requires: "The proposed official map amendment is consistent with the description of the applicable neighborhood context, and with the stated purpose and intent of the proposed Zone District."

62. The City Council did not make any specific findings about the applicability of these additional mandatory Review Criteria. The evidence presented at the public hearing did

not support any of these "justifying circumstances" and did not show that the proposed S-MU-3 zone category was consistent with the Crestmoor neighborhood's context and the stated purpose of that zone category [zone district].

C. Quasi--judicial requirements for Planning Board and City Council decisions on a zone map amendment

63. In *Margolis v. District Court*, 638 P.2d 297, 305 (Colo. 1981), the Colorado Supreme Court confirmed that "rezoning is quasi-judicial for the purposes of judicial review." The Court described some of the attributes of quasi-judicial proceedings: notice to individual landowners, hearings, and decision-making by the application of facts to specified criteria established by law. *Id.* at 303. Judicial review of such quasi-judicial proceedings is under Colo. R. Civ. P. 106(a)(4). *Id.* Article 3.2.9.D of the Denver Charter protects the citizens of Denver from arbitrary zoning changes by requiring quasi-judicial procedures for zoning changes including notice and a public hearing "at which parties in interest and citizens shall have an opportunity to be heard."

64. The "action of an agency will be deemed quasi-judicial for C.R.C.P. 106(a)(4) purposes if: (1) a state or local law requires that the body give adequate notice to the community before acting; (2) a state or local law requires that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requires the body to make a determination by applying the facts of a specific case to certain criteria established by law." *Widder v. Durango School District No. 9-R*, 85 P.3d 518, 527 (Colo. 2004).

65. Under common law principles for quasi-judicial decision-making, which apply to the Planning Board's and City Council's public hearings, a government entity must provide adequate notice and an opportunity for a meaningful hearing. *See Canyon Area Residents v. Board of County Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006); *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 288 (Colo. App. 2004), *cert. denied*, Aug. 16, 2004. A city also must follow its own procedures and standards in its municipal code as part of the quasi-judicial process. *Id.*

66. Colorado cases have not yet fully defined the common law requirements for quasi-judicial hearings. Nevertheless, the principle of fundamental fairness must be observed in zoning proceedings. *See Canyon Area Residents*, 172 P.3d at 908. The hearing process must be conducted in an atmosphere evidencing fairness in the adjudication of matters before a board. *Id.* A showing that the decision-maker in a quasi-judicial, adjudicative hearing has a conflict of interest will overcome the presumption of integrity and honesty that normally applies to such a hearing. *Meyerstein v. City of Aspen*, 282 P.3d 456, 468 (Colo. App. 2011); *see also Applebaugh v. Board. of County Commissioners*, 837 P.2d 304, 309 (Colo. App. 1992) ("There is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities, which must be rebutted in order to establish a due process violation.").

67. The Colorado Judicial Code of Conduct applies to: "anyone who is authorized to perform judicial functions, including an officer such as a magistrate, referee, or member of the administrative law judiciary. *See* Colorado Code of Judicial Conduct, Application, Section "I. Applicability of This Code" (July 1, 2010) (copy posted at Colorado Judicial Branch website at: https://www.courts.state.co.us/Courts/Education/Conduct.cfm Comment 3 to this Section I states: "[R]eference to the code by all judicial officers, including municipal judges, is recommended to provide guidance concerning the proper conduct for judges." Although Plaintiffs have not located Colorado cases applying this Code to quasi-judicial decisionmakers, they contend the Code provides relevant background for the standards of integrity that should govern such decisonmakers in quasi-judicial zoning decisions. The Judicial Code of Conduct's requirements include:

> "Rule 1.2. Promoting Confidence in the Judiciary--A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety[.]" CO ST CJC Rule 1.2.

> "Rule 2.2. Impartiality and Fairness—A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially[.]" CO ST CJC Rule 2.2.

> "Rule 2.4. External Influences on Judicial Conduct—(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment. (C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge[.]" CO ST CJC Rule 2.4.

> "Rule 2.9. Ex Parte Communications—(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed[.]" CO ST CJC Rule 2.9.

> "Rule 2.11. Disqualification—(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances . . . (3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, child, or other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding. (4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy[.]" CO ST CJC Rule 2.11.

> "Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General—(A) Except as permitted by law, or by this Canon, a judge or a judicial

candidate shall not . . . (7) seek, accept, or use endorsements from a political organization; (8) personally solicit or accept campaign contributions; [or] (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court[.]" CO ST CJC Rule 4.1.

68. Although express factual findings are not a prerequisite to a valid decision by an administrative board, the necessary findings must be evident from the action taken. When a board fails to make express factual findings on the core issue it is considering, the reviewing court may remand the matter to the board for it to expressly determine that issue. *Canyon Area Residents*, 172 P.3d at 909-10.

69. An ordinance is invalid under constitutional due process requirements that allows a city to bypass quasi-judicial requirements for zoning changes. *See, e.g., Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 288 (Colo. App. 2004), *cert. denied*, Aug. 16, 2004.

D. Important role for neighborhood organizations to provide comments before major decisions by the City Council and City agencies affecting their neighborhoods

70. The Denver Revised Municipal Code specifically recognizes the importance of access to City agencies and departments for neighborhood organizations including: "to improve the flow of information between these groups and agencies of the city; and **to enable such organizations to present their positions before certain decisions affecting their neighborhoods are made by agencies and departments of the city**." D.R.M.C. § 12-91 (emphasis added).

71. The Municipal Code requires advance notice to registered neighborhood organizations "to notify such organizations in advance of occasions when decisions are to be reached on certain matters affecting their neighborhoods; and **to afford representatives of such organizations the opportunity to present the positions of the organizations at such times.**" D.R.M.C. § 12-91 (emphasis added). The Municipal Code also contemplates that registered neighborhood organizations "work cooperatively with any adjacent or overlapping neighborhood organizations to determine positions on issues affecting the neighborhood and to conduct business in an organized, representative and fair manner, which is designed to obtain informed participation from as many neighborhood citizens as possible." *Id.*

E. Role of Denver's Comprehensive Plan and Small Area Plans in community planning and zoning decisions

72. Denver as a whole is guided by its "Comprehensive Plan," which the City Council adopted in 2000. Article 1 of the Denver Zoning Code states that it "is enacted to implement Denver's Comprehensive Plan and guide orderly development of the City that preserves and promotes the public health, safety, prosperity, and welfare of its inhabitants." In addition, there is an adopted plan called "Blueprint Denver" that was adopted in 2002 as a supplement to the

Comprehensive Plan. Some neighborhoods have Small Area Plans in place, which were the result of an intense community planning effort that sought to develop a consensus vision for the small area. Those plans are incorporated into the Comprehensive Plan by ordinance.

73. The Denver Zoning Code refers in several sections to "adopted plans." *See* Sections 9.6.1.1.B.3 (PUD); 12.4.10.1 & 12.4.10.7.A (map amendments); 12.4.11.1 & 12.4.11.4.A (text amendments); 12.4.12.2.A.1 (mandatory GDP). The Code does not specifically define this term, but the reference to an "adopted plan" is to a specific plan that has been approved by the Denver City Council and incorporated by ordinance into the Comprehensive Plan after a comprehensive planning process to incorporate the community's vision for the city and for particular neighborhoods. The concept of "adopted plans" is at the center of the Denver Zoning Code because the Code seeks to ensure that zoning changes are consistent with adopted plans that were formed after a comprehensive community planning process. Denver as a whole has its "Comprehensive Plan," which the City Council adopted in 2000. In addition, there is an adopted plan called "Blueprint Denver" that was adopted in 2002 as a supplement to the Comprehensive Plan. Some neighborhoods have Small Area Plans in place, that were the result of an intense community planning effort that sought to develop a consensus vision for the small area. Examples of the Small Area Plans currently listed on CPD's website are: Central Park Station Area Plan, Baker Neighborhood Plan, Northeast Downtown Neighborhoods Plan, and the Lowry Reuse Plan. See https://www.denvergov.org/cpd/CommunityPlanningandDevelopment/PlanningandDesign/CompletedPlans/tabid/431913/Default.aspx (link under "Search Small Area Plans"). Unfortunately, many parts of Denver, including the Crestmoor neighborhood, do not have any small area plan, and therefore lack an important tool for zoning because those neighborhoods do not have any consensus document expressing the community's vision for the area.

74. As noted in Paragraph 35 above, Crestmoor residents asked District 5 Councilperson Mary Beth Susman in February 2015 to have CPD prepare a small area plan for Crestmoor. Susman responded by email that Crestmoor did not meet the criteria for having a small area plan. *See* Exhibit 2.

F. Conflict of interest rules for Planning Board members

Denver Ordinance

75. Under Section 12-44 of the Denver Revised Municipal Code, a member of the Planning Board may not participate in the consideration of a measure or vote on the measure when he/she has a financial interest in the measure. The Code provides: "Any planning board member having a financial interest in any measure before the board shall not participate in the consideration of such measure as a board member nor vote on such measure, but the board shall have authority to grant a hearing to such member in the capacity of or as an applicant, subject to the board's bylaws and rules and regulations governing such hearings."

Colorado Constitution and Statutes

76. Article XXIX of the Colorado Constitution addresses "Ethics in Government." Article XXIX, Section 1(1)(c) direct that public employees should "avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated."

77. The Colorado Ethics Handbook for 2013-15 (published by the Colorado Independent Ethics Commission) directs (on page 9) that "public employees and officials should conduct themselves for the benefit of the state or local government in which they work, and should avoid making decisions which benefit themselves or members of their family either personally or financially."

78. Colo. Rev. Stat. § 24-18-105(2) (part of the state Code of Ethics) provides:

> "A public officer, a local government official, or an employee should not acquire or hold an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by an agency over which he has substantive authority."

79. Colo. Rev. Stat. § 24-18-109(4)(b) provides that a local government official or local government employee shall not: "[a]ccept or receive a benefit as an indirect consequence of transacting local government business."

80. Colo. Rev. Stat. § 24-18-201(1) provides that public officers, local government officials, or employees, "shall not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees."

Denver Ethics Code

81. The Denver Ethics Code, Denver Revised Municipal Code § 2-61(a) forbids "an officer, official, or employee" from taking "direct official action on a matter before the city if he or she . . . . has any substantial employment, contractual, or financial interest in that matter." An employee who is conflicted is forbidden from "attempting to influence the decisions of others in acting or voting on the matter." Id. § 2-61(f).

Bases for Challenge Here to 195 S. Monaco Zoning Change

82. The Court should vacate the City Council's and Planning Board's approval of the 195 S. Monaco Zoning Change and CPD's erroneous interpretation of the Protest Provision section of the Denver Zoning Code, for each of the following reasons:

a. Quasi-judicial procedures not followed: The Denver City Council actions at and before the June 8-9, 2015 public hearing concerning the 195 S. Monaco Zoning Change demonstrate that the City Council does not understand its obligations as a quasi-

judicial administrative body making non-legislative zoning decisions. The Denver City Council failed to follow proper quasi-judicial procedures and failed to base its decision to approve the proposed new zoning on the criteria listed in Section 12.4.10 of the Denver Zoning Code for approval of a new zone map amendment. Instead, the Council members who voted in favor of the rezoning treated the process as a political and legislative decision, and were influenced before the public hearing by *ex parte* contacts. As explained in Paragraphs 49.a to 49.i above, the Council members explained their decisions, when they voted early on the morning of June 9, 2015, in terms of political factors and personal biases and preferences, rather than the evidence in the record of the public hearing and the specific, mandatory review criteria in the Denver Zoning Code required to approve a zoning change.

b. Zoning Code criteria not met: The 195 S. Monaco Zoning Change does not meet the review criteria for a zone map amendment in the Denver Zoning Code, including Sections 12.4.10.1, 12.4.10.7, and 12.4.10.8 because:

i. It is not consistent with Adopted Plans including the Denver Comprehensive Plan and Blueprint Denver (there is no small area plan for the Crestmoor neighborhood because CPD regards it as an "area of stability" that does not need such a plan); the most recent plan for this parcel is the 2010 Denver Zoning Code, which zoned this parcel as E-SU-DX following an intensive community process for legislative rezoning most of Denver's neighborhoods.

ii. None of the "justifying circumstances" in DZC 12.4.10.8 supports this zoning change. There was no error or mistake of fact with the existing E-SU-DX zoning adopted five years ago in the 2010 Zoning Code. The existing zoning does not overlook some natural condition affecting development. The land around Crestmoor Park has not changed in recent years in such a way that it is in the public interest to encourage redevelopment of the area.

iii. The zoning change does not "further the public health, safety and general welfare of the City," DZC 12.4.10.7. The Planning Board and the City Council erroneously refused to consider the adverse traffic and parking effects for surrounding neighborhoods of this zoning change, mistakenly contending they "cannot" consider those factors and instead must approve zoning changes and wait for traffic and parking issues to be addressed in the administrative "site" planning process in which the public does not participate.

iv. This high-density zoning category it is not compatible with the density and uses in the surrounding residential neighborhoods (see Exhibit 5: density chart), which consist primarily of single-family homes, adjacent townhomes, and a 37-acre city park, and have no apartment building along the west side of Monaco Parkway between I-70 and Leetsdale.

c. Appearance of impropriety and bias resulting from campaign contributions: The quasi-judicial decisionmaking process required of the Denver City Council members who participated in the June 8-9, 2015 public hearing appeared to lack neutral decisionmakers. Council members who make quasi-judicial decisions about rezoning receive campaign contributions from lobbyists and lawyers who represent rezoning applicants. This creates the appearance of impropriety and bias where such contributions appear calculated to influence certain Council members' quasi-judicial role.

d. CPD blocked protest petition procedure: The Denver Manager of Community Planning and Development (and his delegated decisionmakers) misconstrued Denver Zoning Code Section 12.4.10.5 (by which 10 affirmative Councilmember votes would be necessary): i) by including City of Denver park land in their calculation of the property area for which 20% of the signatures were required; and/or ii) by failing to adopt a procedure to allow citizens to obtain protest petition signatures from City representatives for City-owned property including City park land. As a result CPD contended that less than the required 20% of protest petition signatures were submitted. Because the Council vote on June 9, 2015 was 8 to 4, the 195 S. Monaco Zoning Change would not have been approved if the super-majority/protest petition procedure had been follows.

e. Conflict of interest with Planning Board approval: The Denver Planning Board's January 21, 2015 decision to approve the proposed zoning application (the applicant at that time was seeking S-MU-3 zoning "with waivers") was tainted by the conflict of interest resulting from having one of the current Planning Board members (Jim Bershof) sign the rezoning application and serve as the rezoning applicant's "Property Owner Representative."

f. Unlawful spot zoning: The rezoning of the Mt. Gilead Parcel under these circumstances constituted unlawful "spot zoning." The test under Colorado law for whether unlawful "spot zoning" is involved is "whether the change in question was made with the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations." *See Clark v. City of Boulder*, 362 P.2d 160 (Colo. 1961). As the Colorado Supreme Court explained in that case: "Property owners have the right to rely on existing zoning regulations when there has been no material change in the character of the neighborhood which may require re-zoning in the public interest." Unlawful spot zoning occurs when, as occurred here, the zoning change was solely for the benefit of a particular tract and not for the broader benefit of the surrounding neighborhoods. The 195 S. Monaco Zoning Change did not further any comprehensive plan for the surrounding Crestmoor and Lowry neighborhoods, and instead would merely allowed an island of high-density apartments next to a park and single-family homes and townhomes for the personal financial benefit of a private developer (Cedar Metropolitan LLC/Peter Kudla).

FIRST CLAIM FOR RELIEF

(Review Under Colo. R. Civ. P. 106(a)(4) of quasi-judicial decisions concerning 195 S. Monaco Zoning Change by Denver City Council and Denver Planning Board, and administrative decisions by CPD concerning Protest Petitions.)

83. Plaintiffs hereby incorporate by reference and re-allege the allegations of Paragraphs 1 through 82 of this Complaint.

84. Under Colo. R. Civ. P. 106(a)(4):

> Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:
>
> > (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.
> >
> > (II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.
> >
> > (III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.
> >
> > (IV) Within 21 days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the court. The cost of preparing the record shall be advanced by the plaintiff, except that the court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.
> >
> > (V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within 42 days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within 42 days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within 35 days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within 14 days after service of the answer brief.

(VIII) The court may accelerate or continue any action which, in the discretion of the court, requires acceleration or continuance.

(IX) In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

85. An agency abuses its discretion under Colo. R. Civ. P. 106(a)(4) if its decision is not reasonably supported by any competent evidence in the record or if the agency has misconstrued or misapplied applicable law. Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899-900 (Colo.2008).

86. Section 12.4.10.10 of the Denver Zoning Code provides that: "A decision by the City Council on a proposed official map amendment may be appealed to District Court." Because the Zoning Code directs the City Council in Section 12.4.10.4.G to "consider the recommendations of the Planning Board and Manager," it is essential to the City Council's role as a quasi-judicial decisionmaker that it receive a recommendation from the Planning Board that is not tainted by procedural or substantive unfairness. Therefore the Court should also review the Planning Board's decision before the City Council made its decision on the map amendment at issue.

87. Section 12.4.10.10 of the Denver Zoning Code does not include a time limitation for seeking District Court review. Therefore, the 28-day time period in Colo. R. Civ. P. 106(b) governs review of the Planning Board's approval of the 195 S. Monaco Zoning Change. This action is filed within 28 days of the City Council's June 8-9, 2015 decision approving the 195 S. Monaco Zoning Change.

88. The City Council's approval of the 195 S. Monaco Zoning Change constitutes the final decision of the City of Denver concerning that map amendment.

89. Plaintiffs have no plain, speedy and adequate remedy otherwise provided by law.

90. For the reasons explained in detail above in this Complaint, which will be elaborated on in Plaintiffs' Rule 106(a)(4) opening brief, Plaintiffs request that this Court conduct judicial review under Colo. R. Civ. P. 106(a)(4) of the quasi-judicial decisions of the Denver City Council and Denver Planning Board to approve the 195 S. Monaco Zoning Change. Those decisions were arbitrary and capricious and not supported by competent evidence in the record. The Planning Board decision was tainted by Mr. Bershof's conflict of interest. In addition, a remand is necessary because those entities failed to make findings of fact or conclusions of law necessary for judicial review of their actions.

91. In addition, to the extent the Court can consider these issues in its review under C.R.C.P. 106(a)(4):

a. the receipt by City Council members of campaign contributions from developers or their lobbyists, lawyers, or other agents advocating for a zoning change tainted the quasi-judicial process and created the appearance of impropriety; and

b. the Denver Planning Board's and City Council's approval of the 195 S. Monaco Zoning Change constituted unlawful "spot zoning."

92. In addition, the Court should also review and set aside as arbitrary, capricious, and contrary to law the actions of CPD and City representatives: i) to include City of Denver park land in their calculation of the Protest Petition/super-majority property area for which 20% of the signatures were required, including their calculation for the June 8, 2015 City Council hearing on the 195 S. Monaco Zoning Change; and/or ii) failing to adopt a procedure to allow citizens to obtain protest petition signatures from City representatives for City-owned property including City park land. If CPD had not included such property, or allowed protest petitions for City-owned land, the 195 S. Monaco Zoning Change would not have passed because fewer than 10 Council members voted in favor of it.

SECOND CLAIM FOR RELIEF

(Request for Declaratory Judgment)

93. Plaintiffs hereby incorporate by reference and re-allege the allegations of Paragraphs 1 through 92 of this Complaint.

94. Even in the context of a quasi-judicial proceeding, review under Colo. R. Civ. P. 57 (the rule authorizing courts to issue declaratory judgments) may be proper where a declaratory judgment is requested and Colo. R. Civ. P. 106(a)(4) does not provide an adequate remedy. For instance, constitutional questions and challenges to the overall validity of a statute

or ordinance are more properly reviewed under Colo. R. Civ. P. 57. *See Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004), *cert. denied*, Aug. 16, 2004. Review under C.R.C.P. 106(a)(4) is limited to review of the record to determine whether the governmental tribunal has abused its discretion or exceeded its jurisdiction. *Id.*

95. In addition to seeking relief under Rule 106(a)(4), Plaintiffs request a declaratory judgment under Colo. R. Civ. P. 57 construing the provisions of the Denver Revised Municipal Code and Denver Zoning Code governing the Planning Board's and City Council's consideration of the 195 S. Monaco Zoning Change, and of a proposed zone map amendment, generally. Plaintiffs seek a declaratory judgment, among other things, that:

a. CPD, the Denver Planning Board, and the Denver City Council, may and are required to, consider adverse traffic and parking impacts from a proposed zoning change, including the 195 S. Monaco Zoning Change; the City and its agencies and departments have been operating under a mistake of law in contending that traffic and parking impacts cannot be considered as reasons to deny a zoning change, and instead can only be considered during the "site planning" process after a zoning change is approved.

b. CPD and the City erred as a matter of law in implementing the Protest Petition procedure in Denver Zoning Code 12.4.10.5 and Article 3.2.9.E of the Denver Charter by: i) including City of Denver park land in their calculation of the Protest Petition/super-majority property area for which 20% of the signatures were required for the June 8, 2015 City Council public hearing; and/or ii) by failing to adopt a procedure to allow citizens to obtain protest petition signatures from City representatives for City-owned property including City park land.

c. the receipt by City Council members of campaign contributions from developers or their lobbyists, lawyers, or other agents advocating for a zoning change tainted the quasi-judicial process and created the appearance of impropriety.

d. The Denver Planning Board's and City Council's approval of the 195 S. Monaco Zoning Change constituted unlawful "spot zoning."

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Conduct judicial review under Colo. R. Civ. P. 106(a)(4) and grant all of the relief that Plaintiffs seek under their First Cause of Action, including without limitation, holding that,

a. in approving the 195 S. Monaco Zoning Change, the Denver Planning Board and Denver City Council exceeded their jurisdiction, abused their discretion, and lack competent evidence for their decisions based on the evidence in the record of the January 21, 2015 quasi-judicial Planning Board public hearing and the June 8-9, 2015 City Council quasi-judicial public hearing;

b. the receipt by City Council members of campaign contributions from developers or their lobbyists, lawyers, or other agents advocating for a zoning change tainted the quasi-judicial process and created the appearance of impropriety for the 195 S. Monaco Zoning Change.

c. the Denver Planning Board's and City Council's approval of the 195 S. Monaco Zoning Change constituted unlawful "spot zoning"; and

d. CPD's determination to include city-owned property including park property in the calculation of land area for the Protest Petition procedure for the June 8-9, 2015 City Council hearing was arbitrary, capricious, and contrary to applicable law.

2. Grant a declaratory judgment that:

a. CPD, the Denver Planning Board, and the Denver City Council, may and are required to, consider adverse traffic and parking impacts from a proposed zoning change, including the 195 S. Monaco Zoning Change; the City and its agencies and departments have been operating under a mistake of law in contending that traffic and parking impacts cannot be considered as reasons to deny a zoning change, and instead can only be considered during the "site planning" process after a zoning change is approved.

b. CPD and the City erred as a matter of law in implementing the Protest Petition procedure in Denver Zoning Code 12.4.10.5 and Article 3.2.9.E of the Denver Charter by: i) including City of Denver park land in their calculation of the Protest Petition/super-majority property area for which 20% of the signatures were required for the June 8, 2015 City Council public hearing; and/or ii) by failing to adopt a procedure to allow citizens to obtain protest petition signatures from City representatives for City-owned property including City park land.

c. The receipt by City Council members of campaign contributions from developers or their lobbyists, lawyers, or other agents advocating for a zoning change tainted the quasi-judicial process and created the appearance of impropriety for the 195 S. Monaco Zoning Change.

d. The Denver Planning Board's and City Council's approval of the 195 S. Monaco Zoning Change constituted unlawful "spot zoning."

3. award Plaintiffs their costs and attorneys' fees as provided by law; and

4. grant such other and further relief as the Court deems just and proper.

Dated: July 6, 2015

/s/ Gregory J. Kerwin

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Exhibits:

1. Denver Assessor's Parcel Map for 195 S. Monaco Parkway
2. Emails between Council Member Susman and Pardos about small area plans: February 20 and 25, 2015
3. Denver Planning Board: Record of Hearing January 21, 2015
4. Protest Petition information
   - A. Protest Petition signatures submitted to CPD
   - B. Emails with CPD representatives about Protest Petition land area calculations
   - C. Map from CPD showing land area it included in Protest Petition calculation
5. Chart showing density of proposed building for 195 S. Monaco compared to others in area
6. Information about adoption of 2010 Zoning Code
   - A. "In the Zone" CPD newsletter dated August 2009.
   - B. January 18, 2010 CPD email announcing "Final Review Draft" of New Zoning Code.
   - C. Ordinance No. 333, Series of 2010, Council Bill No. 10-431 (concerning adoption of 2010 Zoning Code).

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