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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 (the Property Owner/zoning Applicant).

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Case Number: 2015cv032427

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PLAINTIFFS' BRIEF IN OPPOSITION TO CITY DEFENDANTS' MOTION TO DISMISS

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The Court should deny the City's motion to dismiss, which raises a host of superficial arguments that ignore or misconstrue Colorado law. In brief, viewing the allegations in the Complaint in the light most favorable to Plaintiffs as required under Rule 12(b)(5), these Plaintiffs clearly have standing to challenge this zoning change. And it is premature for the Court to dismiss any defendants or decide anything about the relief it may grant under Rule 106(a)(4) and Rule 57 until it receives the parties' merits briefs, the administrative record, and the City's Answer to the Complaint. (The developer, Cedar Metropolitan, has not timely responded to Plaintiffs' Complaint, so Plaintiffs will seek a default judgment against it.)

First, the Court should deny the City's motion to dismiss because the City has no reasonable basis at the pleading stage to contend that these Plaintiffs: lack standing, failed to allege sufficient injury-in-fact, or do not qualify as "adjacent" property owners under Colorado law. Colorado law—including the very cases cited by the City—clearly gives these Plaintiffs standing and a legally protected interest to protect their property from adverse effects caused by legally deficient zoning.

Second, Plaintiffs' Complaint states proper claims under Rule 106(a)(4) against both the CPD Manager (for CPD's decisions that blocked the Protest Petition/super-majority procedure) and the Planning Board (for its conflicted action as a quasi-judicial decisonmaker).

Third, it is premature for the Court to decide the scope of the precise relief it will grant under either Rule 106(a)(4) or Rule 57. Colorado appellate decisions that the City ignores or misconstrues allow this Court to decide relevant legal issues in a declaratory judgment that supplements the relief granted under Rule 106(a)(4). The Court will need the administrative record and the parties' merits briefs concerning Plaintiffs' Rule 106(a)(4) and Rule 57 claims to

rule on the City's arguments about whether certain declaratory relief is appropriate here. Nothing is gained by debating now, based solely on the Complaint, what relief can be granted under Rule 106(a)(4) vs. Rule 57.

Fourth, the City has no proper basis to dismiss Plaintiffs' contention that City Council members who received campaign contributions from the developer's lobbyists and lawyer, tainted the quasi-judicial process, created an appearance of impropriety, and did not comply with their quasi-judicial obligations.

This long response brief is necessary because the City's Motion presents a series of baseless arguments that ignore the Rule 12(b)(5) standard and misconstrue applicable law.

I. Plaintiffs' Complaint alleges sufficient facts to establish their "injury in fact," legally protected interests, and status as "adjacent" property owners to demonstrate Plaintiffs have standing to challenge the 195 S. Monaco Zoning Change.

The City's motion to dismiss challenging Plaintiffs' allegations of standing and "injury in fact" raises frivolous arguments, and ignores the Rule 12(b)(5) standard by which the Court views the facts in the Complaint in the light most favorable to Plaintiffs. Under the City's flawed arguments, no one has standing to challenge unlawful zoning changes in Denver because all injury from zoning changes is speculative and all zoning changes affect each resident the same way. Well-established Colorado zoning law disproves the City's standing arguments.

A. The 195 S. Monaco Zoning Change authorizes a new high-density three-story apartment building in Plaintiffs' single-family residential neighborhood.

It is foolish for the City to argue that Plaintiffs cannot allege injury from the new zoning the City approved for the Mt. Gilead Parcel because the developer has not constructed yet the new apartment building allowed by this zoning. Anticipating the City's recent pattern of moving to dismiss every zoning lawsuit, Plaintiffs' Complaint alleges in great detail how the City's

zoning change of the 2.33-acre parcel on the eastern side of Crestmoor Park in east Denver from E-SU-DX (a category that allows single-family homes on 6,000 square foot lots) to S-MU-3 (a category that allows "suburban multi-unit" three story apartment buildings) will cause an injury in fact to each of the Plaintiffs. *See, e.g.,* Complaint ¶¶ 1, 2, 6, 7. The Denver Zoning Code does not contain density limitations for S-MU-3 zoning. *See* Denver Zoning Code ("DZC") §§ 3.2.2 & 3.3.3.3 ("no max" per zone lot) (copy at Denver's CPD website: http://www.denvergov.org/cpd/communityplanninganddevelopment/zoning/denverzoningcode/tabid/432507/default.aspx). If the Mt. Gilead developer fills 60% of the land area with a three-story building, that would create about 183,000 square feet of apartment space (2.33 x 43,560 square feet per acre x 60% x 3 stories). If the average apartment is 1,000 square feet, that would yield up to 183 apartments (probably a few less with common areas). At various times during 2015, the developer for the Mt. Gilead Parcel proposed replacing the existing church with between 75 and 120 dwelling units. *See* Complaint Exh. 5, at 2-3 (noting density range of 32 to 52 dwelling units per acre). If the residents occupying each new apartment drive an average of two cars, that will mean between 150 and 240 new cars parking near, and driving on residential streets to and from, this 2.33 acre site. This is not speculation—these are just calculations based on the new S-MU-3 zoning the City approved over neighborhood objections. The surrounding Crestmoor neighborhood consists of single family homes with a few townhomes, and a 37.3 acre park, with far lower density. *See* Complaint ¶ 16 & Exh. 6.

B. Plaintiffs allege non-speculative injuries specific to their individual situation as owners of homes and a preschool next to, or within several blocks of, the proposed new high-density three-story apartment development.

In Paragraph 7, Plaintiffs allege they will suffer the following economic and non-economic injuries—facts the Court must accept as established and view in the light most favorable to Plaintiffs for a Rule 12(b)(5) motion to dismiss:

a. Harm to property values, new eye-sore along park, and traffic and parking problems: For all Plaintiffs, the new high-density apartment building will create an eye-sore at the corner of Crestmoor Park that will create traffic and parking problems on the surrounding streets where Plaintiffs own homes and a pre-school business. Para. 7(a).

b. Harm to aesthetic enjoyment and view: For all Plaintiffs, the new high-density apartment building will harm their aesthetic enjoyment of Crestmoor Park and the views from the park, which will be marred by a new apartment building on the west side of Monaco Parkway. Para. 7(b).

c. Harm to pedestrians from new vehicular traffic: For all Plaintiffs, the new high-density apartment building will create additional vehicular traffic that poses dangers to pedestrians including children who play in the park and nearby, and members of the orthodox Jewish community (including Plaintiffs Alan and Rita Singer) who walk on Cedar Avenue and adjacent streets on the Sabbath. Para. 7(c).

d. Lost protections of the Denver Zoning Code: For all Plaintiffs, the 195 S. Monaco Zoning Change represents a precedent that demonstrates any property in Denver can be rezoned to high-density without regard to the limitations in the Zoning

Code. This harms Plaintiffs' property values by depriving them of the stability that zoning restrictions normally provide. Para. 7(d).

e. Specific harm to Crestmoor Learning Center preschool: Plaintiff Laura Pitmon owns the preschool immediately south of the Mt. Gilead parcel and her preschool business will be harmed by the new security risk for children from new apartment dwellers living across the street. In addition, the new traffic and parking the apartment building generates will pose a risk to young children and interfere with access and parking for preschool parents and staff members. Para. 7(e).

f. Specific harm to townhome residents: Plaintiff Denise Sigon lives in a townhome immediately west of the new apartment building and the new building will tower over her townhome to the east and south creating noise and a loss of privacy, as well as traffic and parking problems. Para. 7(f).

In Paragraphs 52-82 of their Complaint, Plaintiffs explain in detail the Denver Zoning Code's requirements for zoning changes, and the common law rules for quasi-judicial decisionmaking, and how those standards for rezoning were violated here.

C. Plaintiffs have properly alleged the elements necessary for standing here, including injury in fact, a legally protected interest, and facts that show they qualify as "adjacent" property owners.

The City's challenge to Plaintiffs' standing ignores and misconstrues Colorado cases.

1. The harm Plaintiffs face is real, not speculative; the *Olson, Kolwicz,* and *Ainscough* cases do not support the City's standing challenge.

The City's Motion purports to summarize Plaintiffs' standing allegations, but then labels the harms as "speculative" and "based on assumptions" about how the new S-MU-3 zoning will be used. Motion at 6. The City contends it is premature to assume the developer who hired a

team of lobbyists and lawyers to change the zoning to S-MU-3 will use that new zoning to build the three-story apartment building he told the City and surrounding residents he would build. Incorrectly implying that residents cannot challenge a zoning change until the owner actually constructs a new building on the rezoned property (and citing no authority for that implied proposition), the City contends that this lawsuit is premature or speculative because the City's approval of the 195 S. Monaco Zoning Change "did not approve any particular development project," the details of which will come from the "site plan review process." Motion at 6-7.

It is the City—not Plaintiffs—raising speculative arguments, contending a property owner will not use the new high-density zoning it just obtained. The City's argument ignores the fact that the Denver Zoning Code does not provide for any public participation in the site-planning process, and does not provide for judicial review of site-planning decisions, but the Code specifically does authorize judicial review of a zoning Map Amendment like the instant zoning change. *Compare* CPD website on Site Development Plan Review: https://www.denvergov.org/developmentservices/DenverDevelopmentServices/HelpMeFind/SiteDevelopmentPlanReview/tabid/436366/Default.aspx with Complaint ¶ 5 (discussing DZC § 12.4.10.10, which authorizes judicial review of the map amendment reflected in the 195 S. Monaco Zoning Change). The City's argument is disingenuous that residents should wait and challenge some future site plan decision or building permit decision the City will make based on the approved S-MU-3 zoning. If Plaintiffs waited to do that, then the City and developer would contend Plaintiffs waited too long and should have challenged the rezoning, which was the pivotal City administrative decision that would allow the new high-density building. The Court should reject the City's specious argument.

The City cites *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002), for the proposition that Plaintiffs' claimed injuries are speculative. But the facts in the *Olson* case do not resemble the instant zoning dispute in any way. The City's reliance on *Olson* demonstrates how strained the City's standing argument is here. *Olson* was not a zoning case and was decided on summary judgment, not a motion to dismiss. *Id.* at 749-50. Ms. Olson did not make any allegations in her complaint about "injury or cognizable legal interest personal" to her. *Id.* at 750. Instead, she contended she had standing to challenge contracts entered into by the City of Golden based solely on her status as a taxpayer. *Id.* Thus, *Olson* stands for the proposition that a plaintiff needs more than status as a taxpayer to challenge a City's decision to develop a property based on its urban renewal plan. Despite the lack of allegations of specific personal harm, the court of appeals still conducted a detailed analysis to see if Ms. Olson would pay incrementally more in taxes because of the urban renewal project. *Id.* at 751-52. Based on these facts, the court of appeals stated that Ms. Olson's injury [as a taxpayer] was "presently speculative" and "not sufficiently direct and palpable to support a finding of injury in fact." *Id.* at 752.

The City also relies on *Kolwicz v. City of Boulder*, 538 P.2d 482 (Colo. App. 1975). But that too was not a zoning case and also involved a plaintiff who did not allege any special interest in the subject matter of the lawsuit. *Id.* at 483. The City has no reasonable basis here to contend, as a supposedly undisputed proposition, that these Plaintiffs, whose properties are next to or within a few blocks of, the Mt. Gilead Parcel will not experience different problems from increased traffic, parking difficulties, noise, and damage to views, than the general public. Motion at 7. This argument of no injury is baseless and ignores the Rule 12(b)(5) standard.

The other case the City cites for its standing objection, *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004), also undermines the City's objection here. The City cites *Ainscough* as support that Plaintiffs have not alleged injuries caused by the rezoning. Motion at 7. That conclusion plainly raises a dispute of fact about the cause of the injuries Plaintiffs allege, which cannot be decided on a Rule 12(b)(5) motion, and it ignores *Ainscough*'s holding on standing.

In *Ainscough*, the Colorado Supreme Court held that proving injury in fact to a legally protected interest to establish standing should be "relatively easy to satisfy." 90 P.3d at 856. Courts are not supposed to dismiss cases based on standing except in extreme circumstances. In *Ainscough*, the Court explained:

> Colorado has a tradition of conferring standing to a wide class of plaintiffs. In addition to the traditional legal controversies, our trial courts frequently decide general complaints challenging the legality of government activities and other cases involving intangible harm. Moreover, we have long recognized that state officials can be sued in their official capacities to challenge the validity of constitutional provisions, statutes, and administrative policies."

90 P.3d at 853. These holdings do not support the City's standing argument here.

2. Adjacent property owners have a legally protected interest to sue for legally deficient zoning; these Plaintiffs have alleged valid economic and non-economic injuries.

In *Wells v. Lodge Properties, Inc.*, 976 P.2d 321, 324 (Colo. App. 1998), the court of appeals explained that: "A property owner has a legally protected interest in protecting its property from adverse effects by legally deficient zoning of adjacent property, and has standing to challenge such rezoning." The *Wells* court also explained that "if an adjoining landowner's interest in its property is adversely affected by a rezoning decision, the landowner has a right to seek judicial relief." *Id.* This is precisely the basis for Plaintiffs' standing here, and each of these Plaintiffs qualifies as an "adjacent" property owner under existing Colorado precedents

(which the City ignores and fails to address, *see infra* Section I.D). Strangely, the City's Motion cites, but then ignores and misconstrues the *Wells* case. Motion at 8-9.

Wells undercuts the City's argument of no valid injury-in-fact here. In *Wells*, the court of appeals explained that a plaintiff "satisfies the injury in fact requirement by demonstrating that the challenged activity has caused or has threatened to cause injury to the plaintiff such that a court can say with fair assurance that there is an actual controversy proper for judicial resolution." *Id.* Apart from its speculation that the developer may decide not to build the new 3-story apartment building on the Mt. Gilead Parcel and its belittling of the direct personal harm Plaintiffs alleged in Paragraphs 6-7 of the Complaint, the City does not contend the Complaint fails to frame an actual controversy here that is proper for judicial resolution.

The City's Motion contends that Plaintiffs cannot challenge harm to the quality of life in their neighborhoods including new traffic and parking problems and damage to their neighborhood park. Motion at 7. The City appears to believe it is unaccountable for zoning changes that alter the character of Denver neighborhoods. And the City appears blind to the security concerns for the existing preschool (an institution devoted to protecting young children) from having more than 200 adults move into a new 3-story apartment building across the street where they can observe the preschool entrances and play areas, and drive their cars daily on the residential streets (Cedar and South Locust) where children and parents enter and exit the school. Motion at 7-8.

Yet it is basic standing law in Colorado that "harm to intangible values can satisfy the injury-in-fact requirement." *City of Greenwood Village v. Petitioners*, 3 P.3d 427, 437 (Colo. 2000) ("Injuries need not be economic in character"); *see also Rocky Mountain Animal Defense*

v. Colo. Div. of Wildlife, 100 P.3d 508, 513 (Colo. App. 2004) (recognizing standing for environmental group seeking declaratory judgment and injunction concerning poisoning of wildlife, because its members enjoy and appreciate wildlife in Colorado).

The Colorado Supreme Court has explained that "injury in fact may be found in the absence of direct economic injury." *Dodge v. Dep't of Social Services*, 600 P.2d, 70, 71-72 (Colo. 1979) (listing examples of standing of plaintiffs seeking to ensure organization of government conforms to the state constitution, and taxpayer standing).

In *Friends of the Black Forest v. Board*, 80 P.3d 871, 874-75 (Colo. App. 2003), *cert. denied*, 2003, the court of appeals confirmed that a nonprofit corporation and individual owners of property "adjoining the park" had interests sufficient to establish an injury in fact to have standing to challenge a developer's construction of roads through the Black Forest Regional Park and a County's "determination of the permitted uses" of the park. The individual plaintiffs owned property "near the park," *id.* at 875. They brought a declaratory judgment action because they were concerned "that the new road would create heavy traffic through the subject property." *Id.* They sought a stay of the county's zoning process. On appeal, the court held it was proper for the trial court to grant a declaratory judgment (separate from a Rule 106(a)(4) process) to determine the validity of the road easement. *Id.* at 876. In addition, the court rejected the developer's standing objection, noting that "harm to intangible values is sufficient." *Id.* at 876-77. The court explained that "construction of the road through the subject property would harm plaintiffs' aesthetic, ecological, and property interests." Id. at 877. It stated: "This direct injury satisfies the standing requirement." *Id.*

In *Grand Valley Citizens' Alliance v. Colorado Oil and Gas Conservation Comm'n*, 298 P.3d 961, 965 (Colo. App. 2010), the court of appeals rejected the argument that plaintiffs lacked standing to challenge the environmental risks of an oil drilling program as "too remote and uncertain" to constitute injury. The court explained: "plaintiffs need not allege that environmental harms inevitably will occur; instead, it suffices that a regulatory scheme threatens to cause injury to the plaintiff's present or imminent activities." *Id.* (quotations omitted). It cited *Friends of Earth, Inc. v. Laidlaw Env'tl Services*, 528 U.S. 167, 183-85 (2000), noting that that case stands for the proposition that: "standing [is] established where current users of [the] area expressed 'reasonable concerns' about [the] effect of challenged action on their ability to continu[e] using and enjoying the area." 298 P.3d at 965.

Thus, Plaintiffs' allegations in their Complaint here are not speculative and, when viewed in the light most favorable to Plaintiffs as required by Rule 12(b)(5), are sufficient to allege injury-in-fact from the City's S-MU-3 rezoning of the Mt. Gilead Parcel. 0

D. Plaintiffs qualify as "adjacent" property owners with standing under existing Colorado law to challenge unlawful zoning actions.

The City also has no reasonable basis under existing Colorado law to contend that each Plaintiff's property is not close enough to the Mt. Gilead parcel for them to challenge the rezoning of it. *See* Motion at 8-9. Plaintiffs explain in Paragraph 6 of their Complaint that they own property: a) right next to the Mt. Gilead Parcel: for Ms. Pitmon and Sigon; b) within a 200-foot perimeter: for Mr. Whitelaw; or c) within 1,300 feet: for Mr. DeRungs [1,300 feet/4 blocks], Ms. McCrimmon [900 feet/3 blocks], and Mr. and Mrs. Singer [1,000 feet/3-1/4 blocks]. The City has no reasonable basis under Colorado law to contend any of these Plaintiffs lives too far away to be personally and directly affected by the new S-MU-3 zoning, which the City

Council approved over neighborhood objections, and the now-authorized three-story/high-density apartment building. The City cites an irrelevant case involving a plaintiff who lived three miles from the rezoned land. *See* Motion at 9 (discussing *Bedford* case).

The definition of "adjacent" does not require a shared or common property boundary. For example, Black's Law Dictionary defines "adjacent" as: "Lying near or close to, but not necessarily touching." *Black's Law Dictionary* (9th ed. 2009).

The *Rathkopf* zoning treatise (which the City cites, Motion at 5) explains the requirement that an adjacent or nearby property owner bring a zoning challenge: the "adjoining or nearby owner must show that the zoning action complained of affects his property in a manner different from that in which the community at large is affected." A. Rathkopf et al., *Rathkopf's The Law of Zoning and Planning*, § 63:16 (Dec. 2014). The *Rathkopf* treatise explains: the "distinction has been drawn between the 'community at large' and an interest shared by a complainant in common with a number of other members of the community, for instance, where an entire neighborhood is affected." *Id. See also* 4 *American Law of Zoning* § 42.17 (5th ed. 2015) ("Although proximity is thus not decisive, the distance between the land subject to the decision and the land of the petitioner is relevant in determining whether an owner has been specially affected by a land use decision. Landowners have been granted standing where their land was in close proximity, within 200 feet, within 500 feet, within 500 yards and within two miles of the property subject to the decision for which review is sought.") (footnotes omitted).

At zero to 1,300 feet from the Mt. Gilead Parcel, Plaintiffs' properties all are close enough to the Mt. Gilead Parcel for Plaintiffs to challenge the rezoning as adjacent property owners. Colorado appellate decisions do not apply an arbitrary distance test in deciding whether

a plaintiff challenging a zoning decision has standing to sue; instead they look to qualitative factors concerning the nature of the alleged injury to the plaintiff.

Landowners who are one-half mile from a new development may suffer injury in fact from a large project. Thus, in *Fedder v. McCurdy*, 768 P.2d 711 (Colo. App. 1988), *cert. denied* (1989), the 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. In *Fedder*, the court of appeals explained:

> Colorado has long recognized the legal right of neighboring land owners to rely on the fact that the zoning of land in their neighborhood will not be changed, absent substantial reasons therefor. [citation omitted]. If this legal right is invaded by a rezoning decision such that neighboring landowners are adversely affected, they have a right to seek judicial relief. [citations omitted].
>
> The record here contains sufficient evidence to establish actual injury. Plaintiffs are the members of the community who will be affected adversely by the construction of the batch plant. The plant will be located only one-half mile from the residential area where plaintiffs live, and it will cause severe dust problems and increased traffic on the road which serves plaintiffs' homes. Moreover, this same road passes directly in front of the school attended by their children.
>
> Thus, the plaintiffs have satisfied the test in *Wimberly v. Ettenberg, supra*, and the trial court did not err in concluding that they have standing to challenge these decisions.

768 P.2d at 713.

In *Dillon Companies, Inc. v. City of Boulder*, 183 Colo. 117, 515 P.2d 627 (1973), the Colorado Supreme Court held the district court erred in denying a motion to intervene in a rezoning dispute. In describing who qualifies as an adjacent landowner with standing to challenge a zoning decision, the Court explained that property owners who live between 1-1/2

and 3-1/2 blocks from the subject property qualified as adjacent landowners who were entitled to intervene in the rezoning dispute:

> First, C.R.C.P. 24(a)(2) requires 'an interest relating to the property or transaction which is the subject of the action.' The owner of the land which is within an area sought to be zoned or rezoned clearly meets this requirement. Here, however, the land which was to be 'rezoned' was relatively small and vacant. There are no homeowners on it. The rule, however, does not require 'an interest in the property' but an 'interest relating to the property.' The record reveals that the proposed intervenors live between one and one-half and three and one-half blocks from the subject property. Thus, they meet the first requirement of the rule under the facts of this case.

515 P.2d at 628-29.

In describing the valid interest that the adjacent landowners sought to protect in *Dillon Companies* from the proposed new supermarket, the Supreme Court explained that concerns with increased traffic and parking lot drainage were sufficient: "The intervenors allege that a supermarket will affect their interest in several ways. The increased traffic will make it more hazardous for their children. The asphalt parking lot will affect drainage in the area, etc." *Id.* at 629. Those interests and harms are similar to the future harms Plaintiffs allege here.

In *Wells*, cited above, the court of appeals held a property owner who owned a condominium "in close proximity to [the defendant's] hotel" had standing to challenge the Vail town council's approval of a building addition to that hotel. The court's focus there was qualitative, not quantitative: whether the plaintiff can demonstrate that the challenged activity has caused or has threatened to cause injury to the plaintiff such that a court can say with fair assurance that there is an actual controversy proper for judicial resolution. *Id.* at 324; *see also Condiotti v. Board*, 983 P.2d 184, 187 (Colo. App. 1999) ("Condiotti has sufficiently demonstrated that the challenged activity has caused, or has threatened to cause, injury to him such that a court can say with fair assurance there is an actual controversy proper for judicial

resolution."). In *Wells*, the court did not base its decision on the precise distance in feet from the Wells condo to the defendant's hotel property boundary. The adjacent landowner in *Wells* owned a condominium "in close proximity to" the proposed new hotel development; that landowner contended the expanded use "could have a detrimental effect on Wells' use of her property by obstructing views and limiting access to open space." 976 P.2d at 323, 324.

Thus, for the City's Rule 12(b)(5) motion, this Court must accept Plaintiffs' allegations of the personal harm each will suffer. And the Court must treat each Plaintiff as an "adjacent" property owner entitled to protect his/her property from harm from legally deficient rezoning.

E. Plaintiffs have a legally protected interest to protect their property from adverse effects from legally deficient zoning—there is no separate constitutional "standing" test they need to meet beyond that.

To challenge standing here, the City presents internally inconsistent, and inaccurate, arguments within the same page of its motion to dismiss. On the top and middle of page 8 of the City's motion, the City contends "[n]one of the Plaintiffs have a legally protected right" to challenge the 195 S. Monaco Zoning Change. Motion at 8. Then at the bottom of page 8 and the top of page 9, the City's own Motion quotes from the *Wells* case (noted above) to admit that: "Colorado common law recognizes that a property owner has a 'legally protected interest in protecting its property from adverse effects cause by legally deficient zoning of *adjacent property*.'" (Emphasis in original). Motion at 8-9 (emphasis added). *See also Fedder*, 768 P.2d at 713 (quoted in Section I.D, above) ("Colorado has long recognized the legal right of neighboring land owners to rely on the fact that the zoning of land in their neighborhood will not be changed, absent substantial reasons therefor. . . . If this legal right is invaded by a rezoning

decision such that neighboring landowners are adversely affected, they have a right to seek judicial relief.").

As noted in section (I.D), all these Plaintiffs qualify as owners of property "adjacent" to the Mt. Gilead Parcel under Colorado law. Thus, the City cannot contend that any of the Plaintiffs—much less all of them—lacks a legally protected interest here.

It is not clear what the City is trying to argue on pages 8-9 of its Motion. It seems to be saying, without citing any Colorado authority, that Plaintiffs who have a "legally protected interest" to protect their property from adverse effects and are entitled to bring a zoning challenge under Colorado "common law" are nevertheless barred from doing so for zoning changes in the City and County of Denver because they lack standing under what the City calls the "constitutional test" for standing. Motion at 8-9. Under the City's strained interpretation of the Denver Zoning Code, no Denver property owner or anyone else has standing to challenge unlawful zoning action by the City because the Denver Zoning Code does not specifically confer standing on anyone in particular. This argument inaccurately describes Colorado standing law, discussed at length above in Section I.A to I.D. In *Ainscough*, discussed above, the Colorado Supreme Court presented a very different view of standing requirements under Colorado law that does not resemble the insurmountable threshold the City of Denver seeks to create. Standing should be "relatively easy to satisfy," *Ainscough*, 90 P.3d at 856, and just ensures the presence of an actual controversy, *Wells*, 976 P.2d at 324.

The City relies on the *Reeves* case for the City's flawed theory that the Denver Zoning Code must confer standing on property owners for them to challenge unlawful zoning by the City. *See* Motion at 9 (discussing *Reeves v. City of Fort Collins*, 170 P.3d 850 (Colo. App.

2007). But the City is misconstruing *Reeves*. The plaintiff landowner in *Reeves* lived eight blocks from the proposed development and participated in the administrative hearing challenging the proposed development. 170 P.3d at 853. In *Reeves*, the court of appeals did not need to decide whether the plaintiff there qualified as an "adjacent" landowner because it separately concluded that the Fort Collins ordinance was intended to protect (and thereby afford standing to) "parties in interest" including persons who submit comments for, or attend, the administrative hearing. *Id.* at 852-54. Therefore the court did not decide whether Mr. Reeves also had standing "to protect from injury his aesthetic and recreational interests," *id.* at 854, which would have been based on his status as an adjacent landowner.

The Court should reject the City's baseless arguments about Plaintiffs' supposed lack of a legally protected interest.

F. The City's reliance on Rule 12(b)(1) does not provide a separate basis for dismissal here and the City is not requesting an evidentiary hearing for Plaintiffs to prove their allegations of injury in fact.

The City's motion cites and discusses the separate standard for dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction. Motion at 3. For certain types of Rule 12(b)(1) motions, the trial court is required to hold an evidentiary hearing to decide threshold facts based on evidence. *See, e.g., Finnie v. Jefferson County School District*, 79 P.3d 1253, 1259 (Colo. 2003) (for Rule 12(b)(1) motion raising sovereign immunity issues, trial court can hold hearing, weigh evidence, and making findings of fact).

Nevertheless, Plaintiffs' counsel understands the City is not requesting an evidentiary hearing under Rule 12(b)(1) for Plaintiffs to present evidence to support their allegations in the Complaint about standing and injury in fact. (Aug. 14, 2014 phone call between Greg Kerwin

for Plaintiffs and Nate Lucero and Tracy Davis for City.) Therefore, under Rule 12(b)(5) the Court must accept the allegations in the Complaint as true, and view them in the light most favorable to Plaintiffs. *See, e.g., Asphalt Specialty v. City of Commerce City*, 218 P. 3d 741, 744 (Colo. App. 2009) ("A C.R.C.P. 12(b)(5) motion should only be granted when the plaintiff's factual allegations cannot support a claim as a matter of law.") (quotations omitted).

To the extent the Court has any concerns about the sufficiency of Plaintiffs' allegations supporting their standing and injury in fact, Plaintiffs request that the Court hold an evidentiary hearing so Plaintiffs can testify to explain their injury and respond to the City's baseless arguments that Plaintiffs will not suffer any specific harm from the rezoning challenged here.

II. Plaintiffs pled valid claims against the CPD Manager and the Planning Board.

The City also objects to Plaintiffs' naming the CPD Manager and the Planning Board as defendants. Motion at 9-10. The City is mistaken about both.

CPD Manager

C.R.C.P. 106(a)(4) provides for review of actions by "any governmental body or officer" exercising quasi-judicial functions who has exceeded its jurisdiction or abused its discretion and there is no plain, speedy or adequate remedy otherwise provided by law. Under C.R.C.P. 106(a)(4) a plaintiff challenging actions by City officials must name the officials as defendants, not just the City itself. *See, e.g., Tri-State Generation v. City of Thornton*, 647 P.2d 670, 673-76 (Colo. 1982) (city council was an indispensable defendant that was not timely sued; therefore Rule 106(a)(4) claim against just the city was dismissed).

Plaintiffs sued the CPD Manager, Brad Buchanan, to challenge CPD's decision refusing to apply the Protest Petition procedure in Article 3.2.9.E of the City Charter by which a super-

majority of 10 Council members would have been necessary to approve the 195 S. Monaco Zoning Change. CPD made an administrative decision, as part of the rezoning process, to include City park land in its calculation of the landowner signatures needed for protest petitions. *See* Complaint ¶¶ 2(d), 37-46, 82(d), 92, 95(b) and prayer for relief Para. 1(d) & 2(b) on page 36 of Complaint. Because the final Council vote was 8-4, if CPD had applied the Protest Petition procedure to this zoning change, the rezoning would have failed. Id. ¶¶ 50, 92.

The City contends in its Motion that the City Council made the final zoning decision and that the CPD Manager "did not make the decisions being complained of." Motion at 9. This argument ignores Plaintiffs' specific challenge articulated in their Complaint to CPD's decision not to apply the Protest Petition procedure. The Court must accept under Rule 12(b)(5) Plaintiffs' allegations in ¶¶ 2(d), 37-46, 82(d), 92, 95(b) and the prayer for relief of their Complaint, rather than the City's argument in its Motion about who made the challenged decisions. If Plaintiffs had not sued the CPD Manager, the City would have argued that Plaintiffs cannot challenge CPD's decision on the Protest Petition.

Therefore, it was proper for Plaintiff to sue the CPD Manager here and the claims against him should not be dismissed. Plaintiffs have stated a proper claim against him.

Planning Board

Here, the fact that the Planning Board made a recommendation to the City in favor of the 195 S. Monaco Zoning Change, rather than the final decision, does not insulate the Planning Board's administrative decision from review. If the Planning Board had rejected this zoning change, it likely would never have reached the City Council.

Plaintiffs allege in detail in their Complaint facts that show the Planning Board's recommendation, and functioning as a quasi-judicial decisionmaker, was tainted by a conflict of interest because the Board was voting on a zoning application sponsored by one of its own members, Jim Bershof. *See* Complaint ¶¶2(e), 9, 29-33, 75-81, 82(e), 86, 90, 91(b), 95(a) & (d), and the prayer for relief Para. 1(a) & (c) & 2(a) & (d) on pages 36-37 of Complaint. This Court must accept those allegations as true under Rule 12(b)(5). Those facts state a valid claim for review under both Rule 106(a)(4) and 57 of the Planning Board's decision.

C.R.C.P. 106(b) provides for review "after the final decision of the body or officer." Courts construe administrative finality as occurring when the action complained of is complete, leaving nothing further for the agency to decide. *See, e.g., 3 Bar J Homeowners Ass'n, Inc. v. McMurry*, 967 P.2d 633, 634 (Colo. App. 1998). Thus, if Plaintiffs had sued the Planning Board immediately after it made its January 21, 2015 decision, the City would have contended the lawsuit was premature. This Court can take judicial notice that the City of Denver made this argument when East Denver residents sued in October 2014 to challenge a Planning Board decision approving the Lowry Text Amendment for rezoning the nearby Lowry/Buckley Annex parcel. *See O'Connor v. Denver Planning Board*, Case No. 2014-CV-034068 (Denver District Court): City's Motion to Dismiss at 9 (filed November 13, 2014) (City argued claim against the Planning Board was not ripe because there has been no final agency action until the City Council made its final decision on the proposed zoning).

The Court's review of the Planning Board's decision is analogous to review by the Colorado Court of Appeals of a district court's interlocutory decisions leading up to a final, appealable order. If this Court dismisses Plaintiffs' claim for review of the Planning Board's

conflicted decision, then unlawful actions by that quasi-judicial entity would never be subject to judicial review.

Therefore the Court should reject the City's requests to dismiss Plaintiffs' claims challenging decision by the CPD Manager and the Planning Board.

III. Plaintiffs are entitled to relief under Rule 57 in addition to Rule 106(a)(4); it is premature for this Court to decide the scope of any declaratory judgment it may enter until it reviews the parties' merits briefs.

The Court should reject the City's premature and inaccurate challenge to the certain aspects of the declaratory judgment Plaintiffs seek under Rule 57.

This Court clearly has authority to grant declaratory relief under Rule 57 in addition to determining whether the Defendants' administrative actions violated Rule 106(a)(4) because the Defendants abused their discretion or exceeded their jurisdiction. Plaintiffs anticipated the City would object to their Rule 57 claim (because the City has been making that argument in other zoning cases). So Plaintiffs included in Paragraph 94 of their Complaint a citation to a case that authorizes this Court to grant a declaratory judgment when Rule 106(a)(4) does not provide an adequate remedy. The court of appeals explained in that case: ""[E]ven in the context of a quasi-judicial proceeding, review under C.R.C.P. 57 may be proper where a declaratory judgment is requested and C.R.C.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 C.R.C.P. 57." *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004), *cert denied* (2004). In that case, the court of appeals concluded it was proper for it to review the overall validity of the challenged ordinances under Rule 57. *Id.*

The City's Motion does not even discuss the *Native American Rights Fund* case, instead relying on earlier cases from 1975 to 2003 that describe Rule 106(a)(4) as an "exclusive" remedy. Yet even the City's description of the *Friends of the Black Forest* case concedes that a claim for declaratory judgment "may proceed contemporaneously for matters not considered under Rule 106(a)(4)." As noted in Section I.C.2 above, in *Friends of the Black Forest*, the court of appeals held it was proper for the trial court to grant a declaratory judgment (separate from Rule 106(a)(4)) to address the plaintiffs' concerns that "the new road would create heavy traffic through the subject property" and their challenge to the validity of the road easement. 80 P.3d at 875-76. The court explained: "a declaratory judgment is allowed to resolve a dispute as to the applicability of a statute" as part of a Rule 106(a)(4) case. *Id.* at 876.

Here, the City argues, Motion at 11-12, that three of Plaintiffs' requests must be addressed as part of this Court's Rule 106(a)(4) review rather than under Rule 57:

1. The request in Para. 95(a) that the City (including the Planning Board) is required to consider adverse traffic and parking impacts from a proposed zoning change, and that it is a "mistake of law" for the City to refuse to do so.

2. The request in Para. 95(b) to declare that CPD and the City erred in implementing the Protest Petition procedure by including Denver park land in the calculation of the relevant property area and then failing to adopt a procedure for City representatives to authorize a protest petition for that City park land.

3. The request in Para. 95(d) to declare that the City Council's and Planning Board's approval of 195 S. Monaco Zoning Change constituted unlawful "spot zoning." [Plaintiffs explain "spot zoning" in Paragraph 82(f) of their Complaint: a zoning change

made just to relieve one property from zoning restrictions, rather than a change furthering a comprehensive zoning plan.]

Yet the City fails to explain why the Court should decide now important issues about the scope of its final remedy, before the Court has the benefit of the administrative record and full merits briefing from the parties. Under *Native American Rights Fund*, this Court clearly has authority to grant a Rule 57 declaratory judgment in this case to the extent it deems appropriate. So the City's Motion does not articulate a basis for dismissal, based on undisputed facts, of Plaintiffs' Rule 57 claim/Second Claim for Relief.

The Court needs to understand the facts of this dispute to make a well-informed decision about the scope of relief it grants. Each of these categories of relief raises specific legal issues that the Court can decide as a matter of law (i.e., the relevance of traffic and parking impacts, the City's inclusion of park land in calculations, and whether actions constituted spot zoning). Those categories fit the examples in *Native American Rights Fund* and *Friends of the Black Forest* of legal challenges based on constitutional or statutory questions.

The City appears to be positioning in advance for a deferential standard of review on these legal issues by contending the City Council can decide such legal issues. Motion at 11-12. That argument ignores that the reviewing court, not the City Council, ultimately decides disputed legal issues in a Rule 106(a)(4) proceeding. *See, e.g., City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008) (In a Rule 106(a)(4) proceeding: "The court may defer to the agency's construction of a code, ordinance, or statutory provisions that govern its actions, but is not bound by the agency's construction because the court's review of the applicable law is de novo.")

Deciding the City's argument now, about the scope of relief under Rule 106(a)(4) vs. Rule 57, will not save time when this Court addresses the merits. Yet if the Court grants the City's request now, it may foreclose an important remedy for Plaintiffs when it rules on the merits. Therefore, the Court should also reject this part of the City's motion to dismiss.

IV. Plaintiffs have stated a valid claim for a declaratory judgment that campaign contributions from the lobbyists and lawyers for the developer here to City Council members tainted the quasi-judicial process and created the appearance of impropriety.

The Court should also reject the City's challenge to part of the declaratory relief Plaintiffs seek: a declaration that 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. *See* Motion at 13-14, (challenging Complaint Paras. 2(c) and 95(c), which seek a declaratory judgment, not an injunction). The City has no legal authority for dismissing this claim under Rule 12(b)(5). The Court must take as true the facts Plaintiffs alleged in the Complaint about campaign contributions to Council members. Paragraph 2(c) alleges: "Council members who make quasi-judicial decisions about rezoning receive campaign contributions from lobbyists and lawyers who represent rezoning applicants." These are fact allegations, not legal conclusions.

The City complains that Plaintiffs "do not identify any donations from" any individuals or entities. Motion at 13. This is not a proper basis for dismissal under Rule 12(b)(5). The Court can download and take judicial notice of the "csv" spreadsheet constituting the City's cumulative campaign contribution database. *See* http://data.denvergov.org/dataset/city-and-county-of-denver-campaign-finance-reports Those records show extensive contributions to City Council members who voted for the rezoning from: CRL Associates lobbyists including Sean

Maley, lobbyist Marcus Pachner, and lawyer David Foster, all of whom represented Cedar Metropolitan LLC in the challenged rezoning. So the issue is not a lack of facts to back up the allegations in Paragraph 2(c).

The City contends the Council is entitled to a presumption of integrity, honest, and impartiality, but admits that presumption can be rebutted. Motion at 13. The mere existence of such a presumption does not mean Plaintiffs cannot challenge the presumption in their claims here. Plaintiffs allege in detail: a) how the City Council members were influenced by *ex parte* contacts with the developer's lobbyists and lawyer, and failed to comport with the standards under Colorado law for quasi-judicial decisionmakers, and b) how the Council members explanation of their own votes demonstrated nearly all of them were not applying the criteria for zoning changes they were supposed to apply as quasi-judges. *See* Complaint ¶¶ 2(a), 36, 49, 63-69, 82(a). Plaintiffs also note the need for discovery to establish the full extent of the *ex parte* contacts. *Id.* ¶ 36.

The City prefers to avoid the problem it created by putting politicians in charge of quasi-judicial zoning decisions, where developers believe they can purchase access to, and favorable rezoning votes from, Council members through campaign "contributions." The City complains that allowing this aspect of Plaintiffs' claim to go forward "would encourage the idea that every quasi-judicial rezoning [] decision made by the City Council is subject to challenge" because a Council member "may have" received a contribution from the developer's lobbyists or lawyers. Motion at 14. The City is not entitled to dismissal of this part of Plaintiffs' claim just because the City finds the argument uncomfortable, or is concerned how it would apply to other Council quasi-judicial decisions. If Plaintiffs prove their claim about the Council's tainted actions on

quasi-judicial zoning decisions, the citizens of Denver are entitled to question many aspects of how the Council has been handling rezoning decisions.

Plaintiffs are entitled to prove the merits of their claim in Para. 95(c) for declaratory judgment that this City practice of allowing contributions from developers' lobbyists and lawyers, "tainted the quasi-judicial process and created the appearance of impropriety." Plaintiffs cite the standards for judicial decisionmaking in the Colorado Judicial Code of Conduct, which clearly prohibit payments to, and *ex parte* contacts with, people functioning as judges. Complaint ¶ 67. It will be up to this Court to decide the legal issue of what ethical standards govern City Council members when they function as quasi-judicial decisionmakers. The Court cannot decide that issue in a vacuum of relevant facts based on the City's Rule 12(b)(5) motion to dismiss.

Finally, the City's alternative argument that the Court must evaluate the Council members' biased actions under Rule 106(a)(4) rather than in the context of a declaratory judgment, is flawed for the same reasons explained above in the Section III. A declaratory judgment about a legal issue like the scope of the ethical obligations of Council members functioning as quasi-judicial decisionmakers, is proper and appropriate.

Therefore the Court should also reject this part of the City's motion to dismiss. It is premature for the Court to decide whether City Council members properly carried out their quasi-judicial responsibilities while receiving payments from the lobbyists and lawyers representing the developer seeking the zoning change.

WHEREFORE, the Court should deny the City's motion to dismiss in its entirety.

Dated: August 17, 2015

/s/ Gregory J. Kerwin

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' BRIEF IN OPPOSITION TO CITY DEFENDANTS' MOTION TO DISMISS was served on the parties listed below on August 17, 2015 through the ICCES system:

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