DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202	DATE FILED: September 18, 2015 1:50 PM
Plaintiffs: ARTHUR KEITH WHITELAW, III; JOHN DERUNGS; KATHERINE K. MCCRIMMON; LAURA PITMON; DENISE SIGON f/k/a DENISE L. SAGER; ALAN SINGER; and RITA SINGER v. **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 Lopez, 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)	**▲COURT USE ONLY▲** Case Number: 15CV32427 Courtroom: 269

ORDER
(City Defendants' Motion to Dismiss)

This matter is before the Court on the City Defendants' Motion to Dismiss. The Court, having reviewed the motion, the responsive briefs, and the applicable legal authority, finds, concludes and orders as follows:

INTRODUCTION

On June 9, 2015, the Denver City Council voted to rezone a parcel located at 195 South Monaco Parkway, on the eastern edge of Crestmoor Park, to allow "suburban multi-unit" three story buildings. Until recently, this parcel housed the Mt. Gilead Church ("the Mt. Gilead parcel"). The Mt. Gilead parcel had been zoned for single-family homes or a religious property. In this action, Denver residents in the Crestmoor neighborhood whose homes and preschool surround or are near the Mt. Gilead parcel challenge the processes of and administrative decisions by the Defendants, the Denver City Council, the Manager of Community Planning and Development, and the Denver Planning Board, and the City and County of Denver (collectively the "City Defendants").

Plaintiffs allege that they will suffer economic and noneconomic injuries by the rezoning of the Mt. Gilead parcel. These injuries include harm to their property values, obstruction of their views of the area around Crestmoor Park, increased vehicular traffic affecting their use of Crestmoor Park, and lost protections of the Denver Zoning Code. Plaintiff Denise Sigon, an owner of a townhome immediately west/northwest of the Mt. Gilead parcel, also asserts that the rezoning will create traffic and parking problems for her and other townhome owners. Plaintiff Laura Pitmon, the owner of a preschool, further alleges that the creation of an apartment building will create security risks for the children at her facility.

STANDARD OF REVIEW

A motion to dismiss under C.R.C.P. 12(b)(1) concerns "the court's authority to deal with the class of cases in which it renders judgment." *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 513 (Colo. 1986) (quoting *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981)). "Whether a court possesses such jurisdiction is generally only dependent on the nature of the claim and the relief sought." *Trans Shuttle, Inc. v. Public Utilities Comm.*, 58 P.3d 47, 50 (Colo. 2002). A plaintiff must have standing to assert a claim in order for the court to have jurisdiction over the dispute. Thus, "[s]tanding is a threshold issue that must be satisfied in order to decide a case on the merits." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). "A plaintiff has standing if he or she has an injury in fact and that injury is to a legally protected interest." *First Horizon Merchant Servs., Inc. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 179-80 (Colo. App. 2007) (quoting *Durdin v. Cheyenne Mountain Bank*, 98 P.3d 899, 902 (Colo. App. 2004)). "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." *Wells v. Lodge Properties, Inc.*, 976 P.2d 321, 324 (Colo. App. 1998).

In addressing a motion to dismiss under C.R.C.P. 12(b)(5), a court must view the allegations in the complaint in the light most favorable to the plaintiff, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992), and "accept all averments of material fact contained in the complaint as true." *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) (quoting *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23 (Colo. 1992)). A court cannot grant a motion to dismiss for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

entitle him to relief." *Dunlap*, 829 P.2d at 1291 (citation and internal quotation marks omitted). A motion to dismiss is properly granted when the plaintiff's factual allegations cannot support a claim as a matter of law. *Rosenthal*, 908 P.2d at 1099.

PLAINTIFFS' STANDING TO CHALLENGE THE REZONING DECISION

The City Defendants assert that Plaintiffs lack standing to challenge the rezoning decision. First, the City Defendants argue that Plaintiffs have failed to demonstrate an injury in fact to a legally protected interest. More specifically, the City Defendants maintain that the harms alleged by Plaintiffs are speculative since the City's approval of the zoning change did not approve any particular development project. Second, the City Defendants suggest that Plaintiffs, except for Plaintiffs Sigon and Pitmon, are nonadjacent landowners and thus do not have a legally protected interest. The Court rejects these arguments.

In considering a motion to dismiss the Court must accept all averments of material fact as true. *Board of County Commr's v. City of Thornton*, 629 P.2d 605, 609 (Colo. 1981). This Court thus accepts as factual Plaintiffs' pleaded statements that the rezoning will cause economic and noneconomic damages to them. Indeed, a loss of property values, increased traffic and parking problems, and security issues to children constitute injury in fact. *Id.* Moreover, "[i]njuries need not be economic in character; harm to intangible values can satisfy the injury-in-fact requirement." *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000); *see also Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) ("[injury] may also be intangible, such as aesthetic issues or the deprivation of civil liberties"); *Friends of the Black Forest Reg'l Park, Inc. v. Board of County Comm'rs of the Cnty. of El Paso*, 80 P.3d 871, 877 (Colo. App. 2003) (nonprofit organization to preserve and enhance park and protect interests of its neighbors, as well as property owners adjoining park, established injury in fact where they alleged that a road through the subject property would adversely affect aesthetics of park and erode property values).

Additionally, in rezoning cases, "[a] property owner has a legally protected interest in protecting its property from adverse effects caused by legally deficient rezoning of adjacent property[.]" *Wells v. Lodge Properties, Inc.*, 976 P.2d at 324. In such cases, "the protected interest at stake is a property owner's interest in *avoiding* an adjacent rezoning that *would* detrimentally affect the property owner's property." *Id.* (emphasis added). The Court finds that because it is the rezoning decision that would affect their property, Plaintiffs did not have to wait for the approval of a particular development before challenging the rezoning decision and thus could institute this action to avoid detrimental rezoning of the Mt. Gilead parcel.

The Court further finds that Plaintiffs have established that these injuries are to a legally protected right. As the Court of Appeals recognized in *Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988), "Colorado has long recognized the legal right of neighboring land owners to rely on the fact that zoning of land in their neighborhood will not be changed, absent substantial reasons therefor." *See also Norris v. Grimsley*, 585 P.2d 925, 927 (Colo. App. 1978) ("nearby landowners have standing to seek judicial review of the actions of zoning authorities"); *Snyder v. City Council of City and Cnty. of Denver*, 531 P.2d 643, 644 (Colo. App. 1974) ("landowners

within municipality who are aggrieved by the zoning of property adjacent to or near their own property have standing to seek judicial review of the actions of zoning authorities"); *Dillon Companies, Inc. v. City of Boulder*, 515 P.2d 627 (Colo. 1973) (homeowners who live between one and one-half and three and one-half blocks from subject property met requirements of intervention rule in a rezoning dispute). In these cases, the Colorado Supreme Court and Court of Appeals have interpreted the term "adjacent" to include landowners in close proximity.[1] Thus, if such neighboring landowners are adversely affected by a rezoning decision, these landowners have a legal right to seek judicial relief. *Id.*

Here, Plaintiffs' claims satisfy the two requirements of Colorado's test for standing. Accordingly, the Court denies the City Defendants' motion to dismiss the claims for lack of standing.

CLAIMS AGAINST THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT AND THE DENVER PLANNING BOARD

The Manager of Community Planning and Development and the Denver Planning Board further argue that Plaintiffs have failed to state claims for relief against them. The Court finds that the claims against these parties are sufficient to survive a motion to dismiss. Accordingly, the Court denies the City Defendants' motion to dismiss the claims against the Manager of Community Planning and Development and the Denver Planning Board.

PLAINTIFFS' CLAIM FOR RELIEF PURSUANT TO RULE 57

In its Second Claim for Relief, Plaintiffs seek a declaratory judgment, pursuant to C.R.C.P. 57, construing certain provisions of the Denver Revised Municipal Code and the Denver Zoning Code. The City Defendants move to dismiss this claim, arguing that Rule 106(a)(4) is the exclusive means of reviewing the rezoning decision. The Court finds that this claim is sufficient to survive a motion to dismiss. *See Friends of the Black Forest Reg'l Park, Inc. v. Board of County Comm'rs of the Cnty. of El Paso,* 80 P.3d at 876 (although, as a general rule, "the exclusive remedy for one challenging a rezoning is judicial review pursuant to C.R.C.P. 106(a)(4)[,] . . . in certain circumstances, an action for declaratory judgment may proceed contemporaneously with a C.R.C.P. 106(a)(4) action"). Accordingly, the Court denies the City Defendants' motion to dismiss this claim.

CLAIM OF BIAS AND THE APPEARANCE OF IMPROPRIETY AGAINST CITY COUNCIL AND ITS MEMBERS

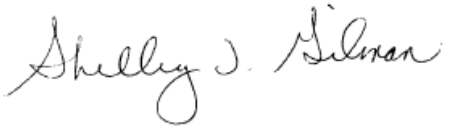
In its Second Claim for Relief, Plaintiffs seek a declaration that "receipt by City Council members of campaign contributions from developers or their lobbyists, lawyers, or other agents advocating for a zoning change tainted the quasi-judicial process and created the appearance of impropriety." Complaint for Relief under C.R.C.P. 106(a)(4) and for Declaratory Judgment, ¶ 95(c); *see also* ¶ 2(c). The City Defendants maintain that Plaintiffs have failed to set forth

[1] Notably, the term "adjacent" is defined as "[l]ying near or close to, but not necessarily touching." Black's Law Dictionary (10th ed. 2014).

sufficient allegations to state a claim and that Rule 57 is not a proper vehicle for addressing those allegations. The Court finds that this claim is sufficient to survive a motion to dismiss, and thus denies the City Defendants' motion to dismiss this claim.

DATED: September 18, 2015

BY THE COURT:



SHELLEY I. GILMAN
District Court Judge