

DISTRICT COURT, CITY AND COUNTY OF  
DENVER, STATE OF COLORADO  
City and County Building  
1437 Bannock Street, Room 256  
Denver, Colorado 80202

**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, Brittany 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).

*Attorneys for the City Defendants*

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Case Number: 2015CV032427

Division: 269

**CITY DEFENDANTS' ANSWER**

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, and Mary Beth Susman (collectively, the “City Council”); 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, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith (collectively, the “Planning Board” or “Denver Planning Board”); and the City and County of Denver (all collectively, the “City” or “City Defendants”), through their undersigned attorneys submit this Answer to the corresponding numbered paragraphs of Plaintiffs’ Complaint.

**ANSWER**

1. The City admits that ¶ 1 generally characterizes the nature of Plaintiffs’ claims. The City denies its process and decisions were unlawful, arbitrary and/or capricious. The City admits the Mt. Gilead Parcel was zoned E-SU-DX which allowed for houses with a minimum zone lot area of 6,000 square feet and for institutional uses such as churches. The City admits that the Mt. Gilead Parcel was re-zoned to S-MU-3 by action of the City Council on June 9, 2015. The City denies the E-SU-DX zone category was “reaffirmed” in any way.

2. Denied.

3. The City admits that the Mt. Gilead Parcel is located within the City and County of Denver and that it’s address is 195 S. Monaco Blvd. The City also admits City’s Assessor Schedule number for the Mt. Gilead Parcel is 0608311005000 and that its legal description is EASTERN CAPITOL HILL 3<sup>RD</sup> FLG B8 L13 TO 43. The City admits this Court has jurisdiction. The City admits the action is timely filed to the extent it states a claim pursuant to Rule 106(a)(4) regarding the City Council’s rezoning decision dated June 9, 2015. The City denies the action is timely filed to the extent Plaintiffs state a claim against Mr. Buchanan, the Planning Board of the Planning Board members based on their “final” decisions.

4. Admitted.

5. Admitted.

6. The City admits that all of the Plaintiffs own residential or commercial real property but the City does not have sufficient information to admit or deny that all of these properties are within 1,300 feet of the Mt. Gilead Parcel and, therefore denies this portion of the allegation. The City denies that all of the Plaintiffs’ properties are “adjacent” to the Mt. Gilead Parcel pursuant to either the dictionary definition of that word or as the word is used in Colorado

caselaw.

- a. The City does not have sufficient information to admit or deny the allegations of this paragraph and, therefore, denies them except that the City admits: Mr. Whitelaw is a record owner of the real property located at 6300 E. Cedar Ave., Denver, CO; this property is within the City's 200-foot perimeter pursuant to the so-called Protest Petition procedure and he signed the "Protest Petition."
  - b. The City does not have sufficient information to admit or deny the allegations of this paragraph and, therefore, denies them except that the City admits: Mr. DeRungs is a record owner of real property located at 40 Kearney Street, Denver, CO; and this property is north of Crestmoor Park.
  - c. The City does not have sufficient information to admit or deny the allegations of this paragraph and, therefore, denies them except that the City admits: Ms. McCrimmon is a record owner of real property located at 200 S. Kearney Street, Denver, CO.
  - d. The City does not have sufficient information to admit or deny the allegations of this paragraph and, therefore, denies them except that the City admits: Ms. Pitmon is a record owner of real property located at 225 S. Monaco Pkwy, Denver, CO; Ms. Pitmon's property is located across Cedar St. from the Mt. Gilead Parcel; this property is within the City's 200-foot perimeter pursuant to the so-called Protest Petition procedure and she signed the "Protest Petition."
  - e. The City does not have sufficient information to admit or deny the allegations of this paragraph and, therefore, denies them except that the City admits: Ms. Sigon is the record owner of real property located at 148 S. Locust St., Denver, CO; this property is within the City's 200-foot perimeter pursuant to the so-called Protest Petition procedure and she signed the "Protest Petition."
  - f. The City does not have sufficient information to admit or deny the allegations of this paragraph and, therefore, denies them except that the City admits: Alan and Rita Singer are record owners of real property located at 215 S. Kearney St., Denver; CO.
7. Denied.
8. The City admits that the City Council exists pursuant to the Colorado Constitution, Article XX, § 6 and City Charter § 3.1.1, and the City Charter § 3.2.9 generally sets forth the City Council's power with regard to zoning, including to amend, supplement, change, modify or repeal zoning. *See* City Charter § 3.2.9(E). The City admits the identified individuals were members of the City Council as of June 8 and 9, 2015, that they are sued in their official capacity, and that Councilman Herndon did not attend the June 8-9, 2015 City Council meeting. The City denies any allegations not specifically admitted in this paragraph.

9. The City admits that the Planning Board members are appointed by the Mayor pursuant to D.R.M.C. § 12-41 and that it exercises the powers assigned to it in the D.R.M.C. and the Denver Zoning Code (“DZC”). The City denies that the Planning Board “made the zoning decision” for the parcel as described or that it “approved” of the zone map amendment being challenged. The City admits that the Planning Board members as of January 21, 2015 are as named in the Complaint and ¶ 9 and that Plaintiffs are suing them in their official capacity.

10. Admitted.

11. Admitted.

12. The City does not have sufficient information to admit or deny the allegations of ¶ 12 and, therefore, deny them.

13. The City does not have sufficient information to admit or deny the allegations of ¶ 13 and, therefore, deny them.

14. Denied.

15. The City does not have sufficient information to admit or deny the allegations of ¶ 15 and, therefore, denies them.

16. Denied.

17. The City admits it adopted the present Denver Zoning Code in 2010. The City does not have sufficient information to admit or deny the remaining allegation of ¶ 17. To the extent a response is necessary, the City states the language of the documents provided as Plaintiffs’ exhibits and Ordinance No. 333, Series 2010, Council Bill No. 10-431 speak for themselves and the City denies all allegations inconsistent with the plain language thereof.

18. The City admits that, prior to the 2015 rezoning, the Mt. Gilead Parcel was zoned E-SU-DX. The City admits that, pursuant to the E-SU-DX zoning, single family residences and certain institutional uses such as churches were permitted uses of the property. The City denies the remaining allegations of this paragraph.

19. The City admits there is no so-called “small area plan” for an area including the Mt. Gilead Parcel. The City does not have sufficient information to know what Plaintiffs mean by the “Crestmoor neighborhood” and therefore deny any allegations regarding such neighborhood. The City denies any remaining allegations in this paragraph.

20. Denied.

21. The City does not have sufficient information to admit or deny the allegations of ¶ 21 and, therefore, denies them.

22. The City admits that the application speaks for itself and denies any allegations or

characterizations that are inconsistent with the application. The City admits that Mr. Bershof was a member of the Planning Board at the time the application was filed.

23. The City admits that the application speaks for itself and denies any allegations or characterizations that are inconsistent with the application.

24. The City admits that the application speaks for itself and denies any allegations that are inconsistent with the application, including Plaintiffs characterization of it (such as that it “falsely stated” something).

25. Denied.

26. The City does not have sufficient information to admit or deny the allegations of ¶ 26 and, therefore, denies them.

27. The City admits that the application speaks for itself and denies any allegations or characterizations that are inconsistent with the application.

28. The City does not have sufficient information to admit or deny the allegations of ¶ 28 and, therefore, denies them.

29. The City admits that the Planning Board considered the amended application filed by Cedar Metropolitan, LLC at its public meeting held on January 21, 2015. The City admits that some individuals spoke in favor of the rezoning of the Mt. Gilead Parcel and some spoke against it. The City does not have sufficient information to admit or deny any efforts undertaken by the “Crestmoor Park RNO” to “poll” individuals or the results of that poll and, therefore, denies any allegations on this subject. The City denies any allegations not specifically admitted or discussed above.

30. The City denies the allegations of ¶ 30 except that it admits Mr. Bershof did not attend or vote at the Planning Board meeting at which Cedar Metropolitan, LLC’s application was considered, that Mr. Bershof voted in favor of the rezoning of a parcel sometimes referred to as Buckley Annex at a prior meeting and that, at the meeting during which the Buckley Annex text amendment was considered, Plaintiffs’ counsel, Mr. Kerwin, requested that Mr. Bershof recuse himself.

31. The City affirmatively states that the Planning Board is not the final decision maker for purposes of Plaintiffs’ C.R.C.P. 106 Complaint. To the extent that the January 21, 2015 Planning Board meeting record and transcript are relevant and a response is necessary, the City states the meeting record and transcript of said meeting speak for themselves and denies any allegations or characterizations that are inconsistent with the Planning Board meeting record and transcript.

32. The City affirmatively states that the Planning Board is not the final decision maker for purposes of Plaintiffs’ C.R.C.P. 106 Complaint. To the extent that the January 21,

2015, Planning Board meeting record and transcript are relevant and a response is necessary, the City states the meeting record and transcript of said meeting speak for themselves and denies any allegations or characterizations that are inconsistent with the Planning Board meeting record and transcript.

33. Denied.

34. The City admits that the rezoning of the Mt. Gilead Parcel was originally scheduled to be heard by the City Council on March 31, 2015 but that the hearing was postponed. The City further admits that, on information and belief, one of the reasons the hearing was postponed was so that Cedar Metropolitan could negotiate with certain individuals who were upset at the proposed rezoning. The City admits that at least some individuals did not come to an agreement or otherwise become supportive of the proposed rezoning. The City denies the remaining allegations of ¶ 34.

35. The City admits that certain members of the Crestmoor Park RNO communicated with City Councilwoman Mary Beth Susman regarding the preparation of a “small area plan” for some or all of the area included in the Crestmoor Park RNO. The City does not have sufficient information to admit or deny the authenticity of the email apparently copied or transcribed in ¶ 35 and, therefore, denies that it is authentic. The City denies any remaining allegations in this paragraph.

36. The City does not have sufficient information to admit or deny the allegations of ¶ 36, and therefore denies them. The City admits that the City Council hearing on the rezoning of the Mt. Gilead Parcel was set for and did take place commencing on June 8, 2015 and finishing in the early morning of June 9, 2015. The City denies any remaining allegations contained in this paragraph.

37. The City Charter speaks for itself and the City denies any allegations inconsistent with it.

38. The City admits that it communicated with Ms. McCrimmon regarding the Protest Petition procedure and admits that Exhibit 4.C appears to be an email on this subject. To the extent that Exhibit 4.C may be certified or authenticated, Exhibit 4.C speaks for itself and the City denies any allegations that are inconsistent with Exhibit 4.C.

39. The City admits that Ms. McCrimmon attempted to obtain a signature on the Protest Petition circulated by Ms. McCrimmon from Mr. Gilkison of Denver Parks and Recreation and Mr. Gilkison declined to do so. The City does not have sufficient information to admit or deny the substance of any communications between Ms. McCrimmon and Mr. Gilkison or between Ms. McCrimmon and Mr. Gaspers and, therefore, denies the allegations.

40. The City admits that City-owned park land, park maintenance facility areas, and City rights of way are included in calculations for the Protest Petition process. The City denies any remaining allegations contained in this paragraph.

41. The City admits that the City Council’s March 31, 2015 public hearing was rescheduled to June 8, 2015. The City states that Exhibit 4.A, 3.2.9.E of the Denver Charter and Section 12.4.10.5 of the Denver Zoning Code speak for themselves and denies any allegations that are inconsistent with them. Further, the City does not have sufficient information to admit or deny the remaining allegations in ¶ 41 and, therefore, denies them.

42. The City states that Exhibit 4.B speaks for itself and denies any allegations that are inconsistent with the document. As there are no allegations in this paragraph other than related to the text and meaning of Exhibit 4.B, no further response is required.

43. The City states that Exhibit 4.B speaks for itself and denies any allegations that are inconsistent with the document. As there are no allegations in this paragraph other than related to the text and meaning of Exhibit 4.B, no further response is required.

44. Denied.

45. Denied.

46. The City affirmatively states that *Burns v. City Council of City of Denver*, 759 P.2d 748 (Colo.App. 1988) has been settled law for over 25 years and it should not be reconsidered. The City denies any factual allegations stated in ¶ 46.

47. The City affirmatively states that members of the public spoke for and against the proposed rezoning of the Mt. Gilead Parcel. The City denies the remaining allegations of this paragraph.

48. The City admits that the hearing and City Council deliberations and voting on the rezoning of the Mt. Gilead Parcel lasted until 2:30 a.m. on June 9, 2015. The City admits that members of the public spoke against the proposed rezoning and affirmatively states that other members of the public spoke for it. The transcript of the City Council public hearing concerning the Mt. Gilead parcel speaks for itself and the City denies any allegations that are inconsistent with the transcript.

49. The transcript of the City Council public hearing concerning the Mt. Gilead parcel speaks for itself and the City denies any allegations that are inconsistent with the transcript and specifically denies the Plaintiffs’ characterizations contained in ¶ 49.

50. The documents and records contained in the City’s “SIRE” website speak for themselves and the City denies any allegations that are inconsistent with those documents and records.

51. Denied.

52. Denied.

53. Denied.

54. *Moore v. City of Boulder*, 484 P.2d 134 (Colo.App. 1971), speaks for itself and the City denies any allegation that is inconsistent with *Moore* or subsequent case law.

55. The DZC speaks for itself and the City denies any allegations that are inconsistent with the DZC and specifically denies Plaintiffs' characterizations in ¶ 55.

56. DZC § 12.4.10.1 speaks for itself and the City denies any allegations or characterizations that are inconsistent with that section. The City denies any other allegations contained in this paragraph.

57. DZC § 12.4.10.4 speaks for itself and the City denies any allegations or characterizations that are inconsistent with that section. The City denies any other allegations contained in this paragraph.

58. DZC § 12.4.10.5.A speaks for itself and the City denies any allegations or characterizations that are inconsistent with that section. The City denies any other allegations contained in this paragraph.

59. DZC § 12.4.10.7 speaks for itself and the City denies any allegations or characterizations that are inconsistent with that section. The City denies any other allegations contained in this paragraph.

60. Denied.

61. DZC § 12.4.10.8 speaks for itself and the City denies any allegations or characterizations that are inconsistent with that section. The City denies any other allegations contained in this paragraph.

62. Denied.

63. *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981), speaks for itself and the City denies any allegations inconsistent with it or subsequent case law. City Charter § 3.2.9.D also speaks for itself and the City denies any allegations inconsistent with it. The City denies any allegations not otherwise addressed in this paragraph.

64. *Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518 (Colo. 2004), speaks for itself and the City denies any allegations inconsistent with it or subsequent case law.

65. The cited cases each speak for themselves and the City denies any allegations that are inconsistent with one or more of them or any subsequent case law.

66. The cited cases each speak for themselves and the City denies any allegations that are inconsistent with one or more of them or any subsequent case law.



67. The Colorado Judicial Code of Conduct speaks for itself and the City denies any allegations that are inconsistent with it or any related law. The City denies that the Colorado Judicial Code of Conduct applies to members of the City Council, Planning Board or any other individual or entity acting in a quasi-judicial capacity.

68. *Canyon Area Residents v. Board of County Comm'rs*, 172 P.3d 905 (Colo.App. 2006), speaks for itself and the City denies any allegations that are inconsistent with it or any subsequent case law.

69. *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283 (Colo.App. 2004), speaks for itself and the City denies any allegations that are inconsistent with it or any subsequent case law.

70. D.R.M.C. § 12-91 speaks for itself and the City denies any allegations that are inconsistent with it or any related law.

71. D.R.M.C. § 12-91 speaks for itself and the City denies any allegations that are inconsistent with it or any related law.

72. DZC Article I, the City's Comprehensive Plan, Blueprint Denver and other City documents speak for themselves and the City denies any allegations that are inconsistent with them.

73. The DZC, including but not limited to the referenced sections, speaks for itself and the City denies any allegations that are inconsistent with the DZC. The City's Comprehensive Plan, Blueprint Denver and other City documents speak for themselves and the City denies any allegations that are inconsistent with them. The City denies that all parts of Denver need a Small Area Plan or that these areas "lack an important tool for zoning" as alleged. The City denies any allegations not specifically addressed in this paragraph.

74. Plaintiffs' Exhibit 2 speaks for itself and the City denies any allegations that are inconsistent with it.

75. The City states that D.R.M.C. § 12-44 speaks for itself and the City denies any allegations that are inconsistent with it. The City denies that any of the City Defendants violated D.R.M.C. § 12-44.

76. The Colorado Constitution, Art. XXIX speaks for itself and the City denies any allegations that are inconsistent with it. The City denies that this Article applies because the City is a home rule municipality but, even if it does, the City Defendants deny that any of them violated the Colorado Constitution, including Art. XXIX.

77. The Colorado Ethics Handbook speaks for itself and the City denies any allegations that are inconsistent with it. The City denies that any of the City Defendants violated any applicable provisions in the Colorado Ethics Handbook.

78. C.R.S. § 24-18-105(2) speaks for itself and the City denies any allegations that are inconsistent with it. The City denies that this Article applies because the City is a home rule municipality but, even if it does, the City Defendants deny that any of them violated this statute.

79. C.R.S. § 24-18-109(4)(b) speaks for itself and the City denies any allegations that are inconsistent with it. The City denies that this Article applies because the City is a home rule municipality but, even if it does, the City Defendants deny that any of them violated this statute

80. C.R.S. § 24-18-201(1) speaks for itself and the City denies any allegations that are inconsistent with it. The City denies that this Article applies because the City is a home rule municipality but, even if it does, the City Defendants deny that any of them violated it.

81. D.R.M.C. § 2-61(a) speaks for itself and the City denies any allegations that are inconsistent with it. The City Defendants deny that any of them violated it, to the extent it applies to their actions.

82. Denied.

83. The City incorporates its responses to ¶¶ 1 through 82 as if fully restated herein.

84. C.R.C.P. 106(a)(4) speaks for itself and the City denies any allegations that are inconsistent with it.

85. *Freedom Colo. Info., Inc. v. El Paso County Sheriff's Dep't*, 196 P.3d 892 (Colo. 2008), speaks for itself and the City denies any allegations that are inconsistent with it or any subsequent case law.

86. DZC § 12.4.10.10 speaks for itself and the City denies any allegations that are inconsistent with it. The City denies that the Planning Board's recommendation is reviewable, including under Rule 106(a)(4). The City denies the remaining allegations of this paragraph.

87. The City admits that the 28-day time limitation contained in C.R.C.P. 106(b) applies to the Plaintiffs' claims seeking review of the City Council's rezoning decision, but denies that the Planning Board approved the 195 S. Monaco Zoning Change. The City denies that C.R.C.P 106 applies to any action taken by the Planning Board and affirmatively states that, if C.R.C.P. 106 is applicable to the actions of the Planning Board, then the claims against it are untimely.

88. Admitted.

89. Admitted.

90. Denied.

91. Denied.

92. Denied.

93. The City incorporates its responses to ¶¶ 1 through 92 as if fully restated herein.

94. The City admits that a plaintiff (but not necessarily these Plaintiffs) can bring a claim pursuant to Rule 57 even where the plaintiff also brings a claim pursuant to Rule 106(a)(4). The City affirmatively states that, in this case, Plaintiffs' Rule 57 claim is duplicative in whole or in part of their Rule 106(a)(4) claim and, therefore, the Rule 57 claim should be dismissed.

95. Denied.

### **GENERAL DENIAL**

96. All allegations not expressly admitted or otherwise discussed are denied.

### **AFFIRMATIVE DEFENSES**

1. Plaintiffs' Complaint fails to state a claim for which relief can be granted.

2. Plaintiffs' claims, to the extent they could be interpreted to contain any allegations of negligence or other covered wrongdoing by the City, are barred by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*

3. The City reserves its right to supplement its defenses if investigation and/or discovery reveal facts that would support additional defenses.

WHEREFORE, 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, and 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, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith; and the City and County of Denver respectfully request that the Court find in their favor and against Plaintiffs, dismiss Plaintiffs' claims and award them any further and other relief the Court deems just and proper.

Respectfully submitted this 2<sup>nd</sup> day of October, 2015.

/s/ Tracy A. Davis, Esq.

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ATTORNEYS FOR THE CITY DEFENDANTS

*In accordance with C.R.C.P. 121 §1-26, a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*

**CERTIFICATE OF SERVICE**

I certify that on this 2<sup>nd</sup> day of October, 2015, a true and correct copy of the foregoing was served electronically by ICCES to the following:

Gregory J. Kerwin  
Gibson, Dunn & Crutcher LLP  
GKerwin@gibsondunn.com  
*Attorney for Plaintiffs*

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/s/Kimberly D. Molenhouse