DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	DATE FILED: February 18, 2016 4:28 PM FILING ID: DC246A443C053 CASE NUMBER: 2015CV32427
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).	**▲COURT USE ONLY▲** Case Number: 2015CV032427 Division: 269
Attorneys for the City Defendants Nathan Lucero, Atty. No. 33908 Tracy Davis, Atty. No. 35058 Assistant City Attorneys Denver City Attorney's Office 201 W. Colfax Avenue, Dept. 1207 Denver, Colorado 80202 Telephone: (720) 913-3275; Fax (720) 913-3180 nathan.lucero@denvergov.org; tracy.davis@denvergov.org	

CITY DEFENDANTS' ANSWER BRIEF

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 submits this Response to Plaintiffs' Opening Brief in Support of their Claims Under Colo. R. Civ. P. 106(A)(4) and for Declaratory Judgment ("Brief").

There is competent evidence in the record to support the City Council's rezoning of the Mt. Gilead Parcel and the Council did not abuse its discretion by misinterpreting the law or violating Plaintiffs' due process rights. The rezoning should be upheld. Plaintiffs cannot appeal the Denver Planning Board's recommendation that the City Council should approve the rezoning, nor can they appeal the decision of the Community Planning and Development in its calculation of the protest petition outcome. Plaintiffs also are not entitled to the declarations they seek and those claims should be denied.

FACT BACKGROUND

I. BACKGROUND

After a public hearing that lasted past midnight on June 8, 2015, on June 9, 2015, the Denver City Council voted 8 for and 4 against to rezone a parcel located at 195 S. Monaco St. Pkwy in Denver, also called the "Mt. Gilead Parcel." The votes were:

For: Brooks, Brown, Faatz, Kniech, Lehman, Montero, Nevitt, and Shepherd
Against: Lopez, Ortega, Robb, and Susman
Absent: [Herndon]

See Disk 1, City Council Minutes, 195 S. Monaco – 001422 (for brevity, we will refer to documents by Disk, file name and page without "195 S. Monaco –").

The Mt. Gilead Parcel is a 2.33 acre lot located on S. Monaco Street Parkway, just north of Alameda Ave. City staff presented the proposed rezoning to City Council with the recommendation to approve it. The presentation included a Power Point attached for the Court's convenience as Exhibit A here and a Staff Report attached as Exhibit B. *See* Disk 1, City Council 6-8-15 (SIRE). The presentation included a series of maps to help City Council locate the Mt. Gilead Parcel in the City, the area and to identify nearby uses and zoning classifications at the edge of the Crestmoor neighborhood on Monaco St. Parkway. *See* Exhibit A at 777-786.

Plaintiffs' Brief leaves the impression that the Mt. Gilead Parcel is surrounded by single family homes in the midst of the neighborhood or at the end of 34 blocks of "thriving" single family on S. Monaco St. Pkwy. *See* Brief at 5, ¶ 5. This mischaracterizes its location. Rather, it is bounded as follows, *see* Exhibit A at p. 780-1, 784, 786 and Exhibit B at 653-5:

North – a City-owned Parks maintenance facility (the "maintenance facility");
West – a two-story townhome development and Crestmoor Park;
South – across Cedar Ave., a single family home located in an E-SU-DX (the Mt. Gilead Parcel's original zoning and a day care facility on a parcel also zoned S-MU-3;
East – across four-lane Monaco, apartment and townhome complexes zoned R-2-A, from the City's pre-2010 zoning code, a residential zone district, allowing single and multiple unit dwellings, up to 110 feet in height).[1]

[1] In 2010, the City went through a citywide rezoning and adopted a new zoning code (the Denver Zoning Code) to govern the rezoned city. "Former Chapter 59" was left in effect to administer and enforce zoning in areas of the city that retained Former Chapter 59 zoning, with the intent that eventually the Denver Zoning Code would be administered citywide with the phasing out of those areas retaining Former Chapter 59 zoning. *See* Denver City Council, Ordinance No. 333, Series of 2010.

Thus, on three sides of the Mt. Gilead Parcel, there are no single family homes and on one side, the Mt. Gilead Parcel abuts one single family home and a business owned by one of the Plaintiffs with the same S-MU-3 zoning to which the Mt. Gilead Parcel was rezoned. Exhibit A at 788-791 contains photographs of the land uses adjacent to the Mt. Gilead Parcel.

The Mt. Gilead Parcel was rezoned from E-SU-DX to S-MU-3. *E.g.*, Exhibit A at 776; Exhibit B at 653. E-SU-DX is an "Urban Edge" ("E-") neighborhood context which permits single unit (single family) suburban and urban style houses with a minimum zone lot of 6,000 square feet. *See* Denver Zoning Code ("DZC") § 4.2.2.2.D (cited excerpts of the DZC are attached as Exhibit C for the Court's convenience). S-MU-3 is a suburban neighborhood context which permits multi-unit house, duplex, townhouse, garden court, and apartment building forms up to three stories in height. *See* DZC § 3.2.2.2.I.

II. RESPONSE TO PLAINTIFFS' PROPOSED UNDISPUTED FACTS

¶ 1. The City agrees that the certified record includes the documents from SIRE, the City's system for managing City Council records. SIRE included Cedar Metropolitan's application for rezoning, the City staff's report and presentation, letters, and emails received both for and against the rezoning, and copies or photographs of materials such as visual aids.

¶ 2. The City agrees that the video of the public hearing is on Disk 5 and disagrees that the video on the Council's web site is part of the Certified Record. The City agrees that the transcript of City Council deliberations is on Disk 1 and the Planning Board public hearing is on Disk 3.

¶ 3. The City agrees that the Mt. Gilead Parcel is in an "area of stability" as that is defined in Blueprint Denver. The City disagrees that the Court should consider Plaintiffs' allegations in the Complaint, whether admitted by the City or not, on this Rule 106(a)(4) appeal.

¶ 4. The City agrees that opponents of the rezoning testified against it and/or submitted letters and that they argued, among other things, that the "neighborhood is thriving, with strong property values, and not blighted." The City disagrees that a finding of blight was required.

¶ 5. The City agrees that Mr. DeRungs testified as described but disagrees with the substance and Plaintiffs' citation of this testimony as discussed below.

¶ 6. Ms. Susman's email to Ms. Pardo speaks for itself. The City disagrees that the email should have been included in the record since the email discusses whether a small area plan exists for Crestmoor and that is not at issue in this lawsuit.

¶ 7. The record speaks for itself and Plaintiffs' characterization is not evidence. Plaintiffs disagree that evidence from outside the record or that is not otherwise admissible should be considered by the Court. All of the emails cited speak for themselves.

¶ 8. The City Council members' deliberations speak for themselves.

¶ 9. The City does not agree that any of the information contained in Appendix 3 is properly admitted or should be considered by the Court for the reasons discussed below.

ARGUMENT

The question here is whether the City Council exceeded its jurisdiction or abused its discretion in rezoning the Mt. Gilead Parcel. Plaintiffs do not claim the City Council exceeded its jurisdiction and it did not abuse its discretion as it properly interpreted the law and the record contains substantial evidence supporting the decision. The decisions of Mr. Buchanan and the Planning Board cannot be reviewed under Rule 106(a)(4) because they are not final decisions.

I. STANDARD OF REVIEW

"Under C.R.C.P. 106(a)(4), a reviewing court can reverse an agency decision only when there is no competent evidence to support the decision, *see Ross v. Fire & Police Pension Ass'n,* 713 P.2d 1304, 1308–09 (Colo.1986), or when the agency has 'exceeded its jurisdiction,' as the rule's plain language states." *City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008); *City of Colo. Springs v. Securcare Self Storage, Inc.,* 10 P.3d 1244, 1246–47 (Colo.2000). No competent evidence means the "ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross v. Fire and Police Pension Ass'n*, 713 P.2d 1304, 1308-9 (Colo. 1986). Even if evidence is presented to the agency that is contrary to its ultimate decision, as long as the record as a whole contains competent evidence to support the decision, it should not be overturned. *Martinez v. Board of Comm'rs of the Hous. Auth.*, 992 P.2d 692, 696 (Colo.App. 1999). The reviewing court must not substitute its judgment for that of the fact finder where there is competent evidence in the record nor should it consider evidence from outside the record. *See Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203 (Colo. App. 2000); *Civil Service Commission v. Hazlett*, 201 P.2d 616, 619 (Colo. 1948).

In determining whether an abuse of discretion occurred, the court can consider whether the decision maker misconstrued or misapplied the applicable law. *Eason v. Board of County Com'rs of County of Boulder*, 70 P.3d 600, 609 (Colo.App. 2003). The Court reviews the interpretation of an ordinance *de novo*, giving effect to the legislative body's intent and beginning with the plain language. *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010); *Kisselman v. Am. Fam. Mut. Ins. Co.*, 292 P.3d 964, 969 (Colo.App. 2011). The agency's interpretation should

be accepted if it has a reasonable basis in law and is warranted by the record. *Regents of the Univ. of Colorado v. City & County of Denver By & Through Bd. Of Water Comm'rs*, 929 P.2d 58, 61 (Colo.App. 1996). A decision-maker's "denial of due process in its exercise of quasi-judicial functions may amount to an abuse of discretion." *Eason*, 70 P.3d at 609.

II. THE DENVER ZONING CODE AND REZONING PROCEDURE

The DZC regulates what can be built on a given zone lot, including the size, location and types of buildings and use(s) that are permitted. It also contains "general design standards that apply throughout the City … including general standards for parking, landscaping, site grading, outdoor lighting, and signs." DZC, Art. 10, Introduction, ¶ A. It does not regulate streets or traffic. *See*, *e.g.*, Denver Revised Municipal Code ("DRMC") Ch. 49 (regulating street, sidewalks, and other public ways) and Ch. 54 (regulating street design and traffic).

An Official Map Amendment is the method to change the zoning of any particular lot. *Id.* at § 12.4.10.1. Zoning may be changed "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." *Id.* An owner like Cedar Metropolitan LLC can initiate a rezoning. DZC § 12.4.10.4.2. After meetings and review by the Community Planning and Development and other City agencies, the Planning Board must hold a public hearing on the application and recommend to the City Council whether to approve, approve with conditions, or deny the proposed rezoning. *Id.* at § 12.4.10.4. The DZC does not give the Planning Board the authority to make a final decision, nor does it make the Planning Board's decision reviewable by a Court. *Id.* at §§ 12.2.2.3, 12.4.10.4; *see Buck v. Park*, 839 P.2d 498 (Colo.App. 1992); *O'Connor v. Denver Planning Board*,

15CA0709 (Colo.App. Nov. 25, 2015) (upholding dismissal of appeal of the Denver Planning Board's recommendation) (attached as Exhibit D).

The City Council has final decision-making authority on a rezoning and the DZC provides that the decision can be reviewed pursuant to C.R.C.P. 106(a)(4). DZC §§ 12.2.1.2, 12.4.10.4.G, 12.4.10.10. In deciding a zoning amendment, the City Council "shall consider the recommendations of the Planning Board and the Manager; and any other comments received, in addition to the review criteria below, in approving, approving with conditions, or denying an official map amendment." *Id.* at § 12.4.10.4.G.2. Various criteria must be met. *See id. at* §§ 12.4.10.7 and 12.4.10.8. This brief focus only on the sections argued by Plaintiffs.

III. THE CITY OBJECTS TO PLAINTIFFS' REFERENCE TO DOCUMENTS AND WEBSITES NOT IN THE RECORD

In a Rule 106(a)(4) hearing, the Court cannot take additional evidence or testimony, even when faced with an inadequate record below. *Hazlewood v. Saul*, 619 P.2d 499, 501 (Colo. 1980); *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203 (Colo.App. 2000). Rather, the Court should rule on the petition based only on the record before the decision maker. *Garland v. Board of County Com'rs, Larimer County*, 660 P.2d 20, 23 (Colo.App. 1982). Plaintiffs nevertheless cite extensive outside information including printouts of web pages, an e-mail newsletter, e-mail, extensive information regarding alleged campaign contributions, counsel's affidavit, a State website and a 2006 presentation by a former Denver City Attorney that predates the adoption of the DZC. *See* Brief at 4, 5, 7, 9-11. This information is not part of the Certified Record and should not be considered.

Further, the Campaign contribution and related information contained in Appendix 3 also should not be considered because it is not subject to judicial notice and is not admissible under the

Colorado Rules of Evidence. *See* Brief at Appendix 3, Affidavit ¶ 4. "Judicial notice" is not a catch-all by which parties can shoe-horn matters not in evidence or the record into a lawsuit at will. C.R.E. 201 applies only those matters "not subject to reasonable dispute in that it is either (1) generally known with the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Judicial notice is used "cautiously in keeping with its purpose to bypass the usual fact finding process only when the facts are of such common knowledge that they cannot reasonably be disputed." *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 853 (Colo. 1983). Appendix 3 does not meet this standard, as evidenced by the complexity of the process counsel described in his affidavit.

In addition, a party seeking to introduce summary evidence pursuant to C.R.E. 1006 must, among other things, (1) identify the documents underlying the summary and show them to be voluminous and (2) establish that the underlying documents are otherwise admissible evidence. *U.S. Welding, Inc. v. B & C Steel, Inc.*, 261 P.3d 513, 517 (Colo.App. 2011). Here, Plaintiffs have not established that any of the records are voluminous, authentic or otherwise admissible. There is no evidence that CRL Associates' website is accurate. Further, it is hearsay under C.R.E. 801.

IV. EVIDENCE IN THE RECORD SUPPORTS THE CITY COUNCIL'S DECISION

A. Legal Background Regarding Adopted Plans

Plaintiffs argue that the rezoning did not meet the "mandatory requirements for a zoning change" set out in the DZC. Brief at 7-8. Specifically, they argue that the rezoning was not consistent with the adopted plans, as required by DZC § 12.4.10.7.A and refer specifically to the Comprehensive Plan 2000 and Blueprint Denver. *Id.* at 8, 11. DZC § 12.4.10.7.A requires that

"[t]he proposed official map amendment is consistent with the City's adopted plans, or the proposed rezoning is necessary to provide land for a community need that was not anticipated at the time of the adoption of the City's plan."

Pursuant to DRMC § 12-61, the City created the Comprehensive Plan 2000. Section 12-61(a) provides that "the comprehensive plan shall provide an expression of the city's vision for the future with a listing of goals and objectives. Once prepared and adopted, the plan will guide and influence decisions that affect the future of the City." The City also adopted Blueprint Denver in 2002 as a supplement to the Comprehensive Plan 2000. Plaintiffs are correct that there is no other adopted plan that applies to the Mt. Gilead Parcel.

Plans provide a general outline to guide future development while zoning ordinances regulate what can and cannot be done in a particular place to. *Compare* DRMC § 12-61 *with* Charter § 3.2.9 (granting City Council zoning power); *see Theobald v. Bd. of Cnty. Comm'rs*, 644 P.2d 942, 949 (Colo. 1982) (a "plan embodies policy determination and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles." (internal citation omitted)). The Supreme Court also cautioned that "the master plan itself is only one source of comprehensive planning and is generally held to be advisory only, and not the equivalent of zoning, nor binding upon the zoning discretion of the legislative body." *Id.*

DZC § 12.4.10.7(a) supports the notion that plans are intended to guide future decisions, but not mandate them by allowing City Council to approve a rezoning so long as it is "*consistent* with the City's adopted plans." (Emphasis added). The term "consistent" is defined as

"compatible or in agreement with something,"[2] or "having the same principles as something else."[3] A zoning decision can follow the same principles as a plan without strict adherence to each and every principle, so long as the two are generally compatible. If this were not the case, then plans would not be "plans" at all, but regulatory documents like the zoning code.

B. Evidence supports consistency with the Comprehensive Plan 2000

The Comprehensive Plan 2000 provides general guidelines for the future development of Denver. The PowerPoint and Report both identify strategies contained in the Comprehensive Plan 2000 to guide development:

- Environmental Sustainability Strategy 2-F – Conserve land by **promoting infill development** with Denver at sites where services and infrastructure are already in place; designing mixed use communities and reducing sprawl so that residents can live, work and play within their own neighborhoods.

- Land Use Strategy 3-B – Encourage quality infill development that is **consistent with the character of the surrounding neighborhood**; that offers opportunities for increased density and more amenities; and that broadens the variety of compatible uses.

- Neighborhood Strategy 1-E – Modify land-use regulations to ensure flexibility to **accommodate changing demographics and lifestyles**. Allow, and in some places encourage**, a diverse mix of housing types** and affordable units, essential services, recreation, business and employment, home-based businesses, schools, transportation and open space networks.

- Neighborhood Strategy 1-F – **Invest in neighborhoods** to help meet citywide goas and objectives for **a range of housing types and prices**, community facilities, human services and mobility.

Exhibit A at 795 (bold in original); *see* Exhibit B at 657-8.

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[2] Consistent, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/consistent (last visited on Nov. 20, 2015).

[3] Consistent, CAMBRIDGE DICTIONARIES, http://dictionary.cambridge.org/dictionary/english/consistent (last visited on Nov. 20, 2015).

Evidence in the record supports consistency with these strategies. For example, S-MU-3 zoning allows an infill development along a residential arterial (Monaco) and near a commercial arterial (Alameda) so that transit and other services already are in place. Residents can live, work and play nearby. *See* Exhibit A; Disk 1, Transcript at 14:25-155 (Councilman Nevitt: "the site we're looking at 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. It's adjacent to an important amenity."). S-MU-3 zoning is not out of character with the neighborhood. It does not allow skyscrapers or other towering buildings because buildings are limited to three stories. *See* DZC § 3.2.4. The parcel across Cedar Street even has the same S-MU-3 zoning and the zoning is in character with the two-story townhomes to the north/west and the multi-unit/multi-story homes across Monaco. Exhibit B at 654-5. The rezoning also would create diversity in the housing stock in the area but allow multi-unit that is consistent with other residential uses. *Id.* at 659-60.

C. <u>Evidence supports consistency with Blueprint Denver</u>

Adopted in 2002 to supplement the Comprehensive Plan, Blueprint Denver also provides for guidelines for the City's development. An Area of Stability does not mean that no development or changes ever could occur, as Plaintiffs desire. *See* Blueprint Denver at 75, 124 ("In some instances it may be appropriate to change the zoning in Areas of Stability to create a better match between existing land uses and the zoning.") (excerpt attached as Exhibit E). Rather, changes will, inevitably, occur as the City changes. Blueprint Denver provides a guide for managing this change.

The City's report identified various strategies specified in Blueprint Denver for meeting Blueprint Denver's goals related to Areas of Stability:

- Address incompatible zoning and land use issues;

- Compatibility between existing and new development, design and development standards;
- Address edges between Areas of Stability and Areas of Change; and
- Diversity of housing type, size, and cost.

Exhibit B at 660; Exhibit A at 798.

Evidence in the record shows that the rezoning was consistent with Blueprint Denver. For example, as discussed in Exhibit A at 798, the DZC states: "Single-unit residential uses are primarily located away from residential and commercial arterial streets. Multi-unit residential and commercial uses are primarily located along arterial and collector streets." DZC § 3.1.1 (General Character of Suburban Neighborhood Context). Monaco is a residential arterial and, therefore, it is consistent with Blueprint Denver to address this generally incompatible zoning principal with the original single-unit use of the original zoning. This makes further sense when the zoning and land use around the Mt. Gilead Parcel is considered. The existing development and new development are more compatible than the single-unit zoning was, given the lack of single-unit residential abutting the Mt. Gilead Parcel. Further, the Suburban Neighborhood Context design standards will require the developer of the Mt. Gilead Parcel to construct a project with building placement, location, and design that meets the Suburban Neighborhood Context. (For example, the project cannot be something that would be appropriate downtown as the size and design requirements would not permit it.) *See* DZC §§ 3.3.2, *generally*. Further, the Mt. Gilead Parcel is at the edge of the Crestmoor area and will provide some diversity of housing type, size and cost in Crestmoor.

Plaintiffs argue that the Stability Strategies should not apply because the city is ignoring that "the entire length of Monaco Parkway for more than 30 blocks north of the Mt. Gilead Parcel to Martin Luther King Blvd. contains single-family, not multi-unit development." Brief at 12-13.

However, the facts do not support this assertion, which is based entirely on Plaintiff Mr. DeRungs' City Council hearing testimony in which he stated that there are no multi-unit residential buildings on the west side of Monaco between the Mt. Gilead Parcel and 34 blocks to the north, Martin Luther King Jr. Blvd. *See* Brief at 5, ¶ 5. Regardless of whether this is accurate, the Mt. Gilead Parcel abuts the maintenance facility on Monaco, not single-family residential, and the maintenance facility is separated from the closest single-family homes on Monaco by Crestmoor Park. Further, it ignores the east side of Monaco directly across the street from the Mt. Gilead Parcel, which is zoned for multi-family residential and contains multi-story apartment buildings, and the commercial building with the same zoning immediately south of the Mt. Gilead Parcel on Monaco. Therefore, this argument does not support a finding that the City Council's decision was not supported by the record or is legally incorrect.

D. The Plans are not vague

Plaintiffs argue that the Comprehensive Plan 2000 and Blueprint Denver are too vague to be enforced because the City can do whatever it wants and has no "long established agency interpretation." Brief at 13; *see id* at 12 (the Comprehensive Plan's language is so malleable that the City was able to construct an argument to "justify placing high density apartments in the middle of an established residential neighborhood" and still be consistent). This argument should not prevail since its rests on their theory that the Comprehensive Plan and Blueprint Denver are regulatory, like the zoning code, but they are not, as described above. Further, despite Plaintiffs' repeating it regularly, the new zoning would not allow "high-density" high-rise or skyscraper-type building surrounded by single-family homes, which might be incompatible with the plans.

Further, design standards will require set-backs, layouts, design, parking, and landscaping to keep development in line with the neighborhood character. *See* DZC § 3.3 (Design Standards).

E. Evidence supports the existence of justifying circumstances

In addition to being consistent with the City's adopted plans, a rezoning must also comply with the DZC. Plaintiffs argue there are no "justifying circumstances" as required by DZC § 12.4.10.8.A and the City staff's reasoning failed to provide them. Brief at 14-15. Evidence in the record supports finding justifying circumstances, including based on (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." Exhibit A at 800; Exhibit B at 660-661. At the time Blueprint Denver was adopted in 2002 and the Mt. Gilead Parcel designated as part of an Area of Stability, the "church was in a better state of repair" and now that has changed. Exhibit B at 661. Plaintiffs argue that this is the fault of the developer and the developer should not be able to benefit from its own neglect, but there is no evidence in the record showing that the deterioration commenced after Cedar Metropolitan bought the property in 2014. Brief at 15. *See* Disk 1, City Council 6/8/15 (SIRE), 1045 (opponent e-mail discussing timeline of communications with developer in 2014), 705 (letter noting "It is indisputable that the property has been a blight on the neighborhood since before we moved here five years ago."). Further, the area around the Mt. Gilead Parcel, particularly Lowry, has made a rapid transformation and growth. Disk 1, City Council 6-8-15 (SIRE), 690.

Plaintiffs also argue that Councilwoman Kniech's deliberation statement that changed circumstances is, "to me the weakest part of this application" is evidence that there were no justifying circumstances. Brief at 15; Disk 1, Transcript, 25:9-12. Plaintiffs do not explain how

this statement is evidence that there were no justifying circumstances. Indeed, the Councilwoman recognized that it was "part of her job" to consider whether there were changed circumstances and to "analyze the criteria" using the testimony she heard and the record. Transcript at 25:25-26:12. In the end, the Councilwoman voted for the rezoning. Disk 1, City Council Minutes at 1422.

V. THE CITY COUNCIL DID NOT ABUSE ITS DISCRETION

A. The City correctly determined that traffic and street parking issues are not proper considerations for a rezoning

Plaintiffs argue that the City Council erred in failing to consider traffic and parking consequences in its review of the rezoning criterion and cite evidence showing that it did not. Brief at 15-18. The City Council did not abuse its discretion in failing to consider allegedly adverse traffic and parking impacts. Even if the Planning Board's decision can be reviewed pursuant to C.R.C.P. 106(a)(4), it did not abuse its discretion for this same reason.

Plaintiffs cited no law and no provision in the DZC that requires the City to consider traffic or parking impacts in a rezoning decision or that it is outside the ability of the City to regulate or mitigate traffic and parking issues through other means. *See* DRMC §§ 52-42 (assigning street planning and traffic operations regulation to the City's Traffic Engineer in the Department of Public Works); 52-43(b) (examples of areas in which the City Traffic Engineer may regulate, including street design, parking, and other matters). Rather, Plaintiffs relied on C.R.S. § 31-23-303(1) without any discussion of its application. Section 303(1) "grants municipalities broad discretion with respect to promulgation of, and the matters to be governed by, zoning regulations." *Town of Grand Lake v. Lanzi*, 937 P.2d 785, 789 (Colo.App. 1996) (town may regulate parking

through its zoning ordinances). However, it does not require the City to consider specific traffic impacts when considering a particular rezoning.

As discussed above, the DZC does not regulate traffic; it regulates what can and cannot be built on zone lots. Councilman Brooks noted during the hearing that it was not the City Council's role in a *rezoning* to consider traffic impacts and that other parts of the process will consider traffic. Disk 1, Transcript, 38:4-40:3. Further, pursuant to the DZC, the new S-MU-3 zoning is appropriate next to a residential arterial like Monaco.

B. <u>The City properly applied the protest petition procedure</u>

Plaintiffs ask this Court to overrule *Burns v. Denver City Council*, 759 P.2d 748 (Colo.App. 1988), *cert den.* (1988) and find that the City's inclusion of City-owned property in its calculation of the land for the purposes of the protest procedure in the City's Charter at § 3.2.9(E) and/or the City's refusal to take a position on the protest petition was improper. Subsection E provides that:

> In case, however, of a protest against such change, 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, such amendment shall not become effective except by the favorable vote of ten of the members of the Council of the City and County of Denver.

As affirmed in *Burns*, the City includes in the calculation of the "area to a distance of two hundred feet from the perimeter of the area proposed for change" any land owned by the City. In the case of the Mt. Gilead Parcel, that included various City-owned property. *See* Disk 1, Adriana, 008-16, with map at 16 (Exhibit F hereto).

Plaintiffs assert "the City stepped outside of its supposedly neutral, quasi-judicial role and supported the Rezoning applicant by blocking the Protest Petition Procedure from applying." Brief

at 18. Plaintiffs do not assert that the City somehow contacted owners within the perimeter or otherwise lobbied or required that owners not sign the petition. Indeed, the record indicates the City was helpful and responsive in aiding those who sought to gather signatures. *E.g.*, Disk 1, CPD_Redacted, 006402-36. Since the City followed its established procedure and did not change its procedure for this rezoning, the City is entitled to deference in its interpretation of its ordinance. *See Eason*, 70 P.3d at 609. Plaintiffs cite no reason for this Court to reconsider *Burns* other than their unhappiness with the outcome.

Plaintiffs also argue that the law is unclear and the City failed to clarify it when it codified the protest petition procedure. Brief at 19. However, the Charter provision is clear on its face and has not changed since *Burns* was decided. DZC § 12.4.10.5 does not – and cannot – contradict the City's Charter. The City's interpretation and application is consistent and so is entitled to deference. *See Eason*, 70 P.3d at 609.

Plaintiffs assert that the City "effectively blocked" the protest because the Parks Department controls 24% of the land in the protest petition area and the Parks Department refused to sign the petition. Brief at 19. Plaintiffs only needed to obtain signatures representing 20% of the total perimeter area and, even if the City owned 24%, Plaintiffs had 76% of the area from which to get 20%. However, not all of the non-City owners signed and the petitioners could have obtained the remaining 2.8% from them. *See* Disk 1, CPD_Redacted, 006441; Exhibit F. Further, had the Department signed, it would have single-handedly generated the required 20%, which would be unfair and contrary to the purpose of the petition procedure, as the other property owners would have had no ability to affect the outcome of the petition by signing – or not signing – it. Thus, this should not be a basis for overturning the City's decision.

Finally, Plaintiffs should not able to challenge the protest petition decision now, as they failed to exhaust their administrative remedies after they disagreed with the calculations made by Community Planning and Development. The appropriate mechanism for challenging an administrative decision is via an appeal to the Denver Board of Adjustments for Zoning Appeals ("BOA"). *See* DZC §12.4.8 *et seq.* All appeals must be filed with the BOA within fifteen (15) days of the date of the action being reviewed. *See* BOA Rules of Procedure, Article III (Exhibit G). Community Planning and Development's administrative decision was made on June 3, 2015, and Plaintiffs' time to challenge it expired fifteen days later. *See* Exhibit F at 0009. Therefore, Plaintiffs' time to appeal the decision expired long ago.

C. The rezoning is not spot zoning

Plaintiffs argue that the rezoning was "spot zoning" because the Mt. Gilead Parcel is small, "in the middle of a single-family residential neighborhood," and originally was zoned for single-family residences. Brief at 21. To determine whether a particular action is spot zoning, the "test 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." *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961). If the rezoning is for the purpose of furthering a comprehensive zoning plan or because there are changed conditions in the area, the rezoning is not spot zoning. *See King's Mill Homeowners Ass'n, Inc. v. City of Westminster*, 557 P.2d 1186, 1191 (Colo. 1976). As discussed above and in accordance with the criteria of the Denver Zoning Code, the rezoning of the Mt. Gilead Parcel was done in furtherance of – and consistent with – the Comprehensive Plan 2000 and Blueprint Denver.

Plaintiffs argue that the 2.33 acre Mt. Gilead Parcel is "small" and so, categorically, spot zoning occurred. Brief at 20-21. Neither Plaintiffs nor *Rathkopf*, on which they rely, explain how a parcel should be determined to be "small." Indeed, when viewed on the various maps in Exhibits A and B, it is not a "small" parcel in comparison to its neighbors at all. Further, *Rathkopf* ultimately does not support Plaintiffs, noting at § 41:8 that "rezoning to allow multifamily residences within a single family zone or industrial uses within a commercial zone may be upheld, since the incompatibility is not as severe. Such rezonings – particularly to allow apartments – may also be supported by a public welfare rationale."

Clark, 362 P.2d 160, also does not support Plaintiffs' argument. *See* Brief at 21. In *Clark*, the Court found that the rezoning of part of a planned residential area to allow a gasoline filling station (in 1961) was arbitrary. *Id.* at 162. Here, this rezoning is not out of character with the Mt. Gilead Parcel's neighbors like the *Clark* rezoning and it does not rezone an island in the middle of property burdened with greater restrictions.

Thus, this was not spot zoning and the Court should reject this argument.

VI. THE CITY COUNCIL DID NOT VIOLATE PLAINTIFFS' DUE PROCESS RIGHTS

The City Council did not violate Plaintiffs' due process rights. First, the City Council members did not improperly fail to include "*ex parte* communications" with Cedar Metropolitan's lobbyist in the record. Plaintiffs' innuendo and unsupported assertions cannot create a violation. Second, City Council members' discussion regarding their votes, which includes comments directed at the proponents and opponents of the rezoning, does not show that the members

improperly "relied on irrelevant factors and information outside the hearing." Brief at 27. Finally, any monetary or non-monetary campaign contributions also do not create a due process violation.

A. City Council members did not improperly fail to include communications in the record

Plaintiffs first argue that various "*ex parte*" communications from Cedar Metropolitan's "lobbyist," Sean Maley, to Councilwoman Susman and other Council members violated their due process rights because these communications were not disclosed at the June 8 to 9 public hearing. The question is whether a due process violation occurred because Council members had contact with Mr. Maley which were not included in the written record available to Council members or were not disclosed by Council members at the hearing. It did not.

Quasi-judicial decision-makers like the City Council are entitled to a "presumption of integrity, honesty, and impartiality." *See Scott v. City of Englewood*, 672 P.2d 225 (Colo.App. 1983). Plaintiffs should need to provide specific evidence rather than innuendo to overcome this presumption, including that the opponents of the rezoning were prejudiced by it and did not have an opportunity to rebut information that influenced the outcome of the rezoning. *See L.G. Everist, Inc. v. Water Quality Control Com'n of Colorado Dept. of Health*, 714 P.2d 1349, 1352 (Colo.App. 1986) (absent showing of substantial prejudice, statement made by one of the board members regarding complaints by parties not witnesses which also were not evidenced in the record was not enough to show commission improperly considered facts outside the record given the *Scott* presumption and no showing of substantial prejudice).

Plaintiffs cite a Colorado Lawyer article and a City of Lakewood City Attorney opinion without any explanation of how they are binding on the City Council. The Colorado Lawyer article contains one lawyer's advice for attorneys representing public officials. It also contains the

statement that "An *ex parte* contact may not necessarily result in invalidation of the ultimate decision" and instead the author cautions that it might "undermine the integrity of the governing body itself." Gerald E. Dahl, *Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and Ex Parte Contacts*, 33 COLORADO LAWYER No. 3, 71 (March 2004). Mr. Dahl cited *Johnson v. City Council for City of Glendale*, 595 P.2d 701, 703-4 (Colo.App. 1979), which supports his point and the City. There, the Court of Appeal stated: "The mere fact that a Councilmember has learned facts or expressed an opinion [outside the hearing] is not sufficient in itself to demonstrate that a hearing is unfair." *Id.* at 704. The plaintiff had been fired and requested an informal hearing at which two Council members stated that they wanted the plaintiff fired. *Id.* at 703-4. The Court concluded that, even if the Council considered evidence from a prior formal hearing regarding the plaintiff's dismissal and Council members stated after the prior informal hearing that they wanted him fired, the plaintiff was not denied a fair hearing, especially where there was sufficient evidence at the hearing to support the Council's decision. *Id.* at 704.

Plaintiffs' case law also does not support their argument, even assuming statutes and rules applicable to the Public Utilities Commission ("PUC") and the State Administrative Procedures Act ("APA") apply to the City Council. *See Board of County Commissioners v. Public Utilities Commission*, 157 P.3d 1083, 1086 (Colo. 2007) (interpreting the PUC statute and rules and holding that when the staff "injects new factual information into the proceedings though an advisory memorandum read at the open meeting…and this factual information has not otherwise been made part of the record" the PUC must include the factual information in the record for the purposes of review under C.R.S. § 40-6-115); *Colorado Energy Advocacy Office v. Public Service Company of Colorado*, 704 P.2d 298, 305 (Colo. 1985) (construing APA and PUC statutes, any due process

issues caused by commissioners permissible *ex parte* communications with Public Service Company ("PSCo") in which the PSCo provided evidence to the commissioner but the commissioner did not include it in the record, was cured because evidence was taken regarding those matters originally omitted at a hearing); *Zurevich v. Industrial Commission*, 544 P.2d 641, 651 (Colo.App. 1975) (court remanded after allegedly *ex parte* communications occurred because the court was "unable to determine the basis for the Commission's decision" to know whether the order "was based solely on the [*ex parte*] employer's letter" and without this evidence they "may not reject claimant's assertion that the decision was based upon an ex parte hearsay conversation which is improper.").

Plaintiffs also have not shown that any information provided by Mr. Maley to Councilwoman Susman or any other Council member was not included in the extensive testimony at the public hearing, that the members relied on any of the information contained in his emails in arriving at their decisions or that there was any actual prejudice to the opponents of the rezoning. Rather, Council's deliberations show that they properly considered the evidence. *See* Disk 1, Transcript at 14:25-15:5 (Councilman Nevitt referencing the geography of the Mt. Gilead Parcel); *id.* at 22:1-23:24 (Councilwoman Robb discussing specific elements of the rezoning criterial); *id.* at 26:3-6 (Councilwoman Kniech: "My job is not to count residents for and residents against. It's to hear that input and use it to analyze the criteria. That's what the code tells me to do."); *id.* at 39:9-16 (Councilman Brooks: "Our call, our legal obligation before you today is, are the plans consistent? Are they in context for approval? And for me, as I look at that, and I think you've heard some of my colleagues say, they believe they are. They believe they're not. As I look at this whole context, as I look at this existing site, it reflects the context to me.").

Plaintiffs' cite various emails in Appendix 1 but appear to want the Court and the parties to wade through them to determine what might constitute a due process violation. They do not. Some are between Ms. Susman and City employees regarding procedural matters. *E.g.*, Appendix 1 at 3712, 3785-87, 4432, and 5773. The same email at Disk 1, City Council 6-8-15 (SIRE), 632-5 from Mr. Maley to Councilwoman Ortega was sent to various other Council members and identified by Plaintiffs, at 1470, 6782, 7100, 7104, 7107. Plaintiffs cannot have been prejudiced if one copy of the email was in the record so the information was before the City Council and available to Plaintiffs to rebut. Plaintiffs also assert that the email at 4436 was improper but the same documents attached to that email were attached to Mr. Maley's lengthy emails.

Plaintiffs also try to create a due process violation from City Hall gossip in the email chain between former Councilwoman Susan Barnes-Gelt and Councilwoman Susman, at 4719 and 5585-86. Further, Ms. Susman clearly dismissed it at p. 5585 ("Well, since we are not allowed to opine on zonings before the hearings, people assume lots of things.").

Finally, the only email that appears to indicate that Ms. Susman might have prejudged the decision shows that, if she followed the thoughts laid out, she might vote *against* the rezoning – or in Plaintiffs' favor. *See* pp. 5749-50. Thus, this decision could not have prejudiced Plaintiffs at all; in fact, it helped them. Ms. Susman ultimately did vote against the rezoning. Further, pursuant to *Johnson*, 595 P.2d 703-4, this also should not rise to the level of a due process violation.

Plaintiffs also ignore the ample evidence of their efforts to communicate with Council members and their aides to argue in opposition to the rezoning. *E.g.*, Disk 1, CM Albus Brooks, Brade Micheau & Chy Montoya_Redacted, 1510-11; Disk 1, CWKniech_Redacted, 1589-1601; Disk 2, Ortega-Susan, 2878-90). Opponents encouraged members of the public to contact

Councilwoman Susman in person at her office hours, by phone, or by email and requested they ask her for help with the protest petition procedure. *E.g.*, Disk 1, NAP 2-18-15, 2440-2443; Disk 6, Susman Gmail, 5498-5500. Other Councilmembers also received direct emails. *E.g.*, Disk 1, CWKniech_Redacted, 1527.

In any event, all of these people, including Mr. Maley and other representatives of Cedar Metropolitan and opponents including Plaintiffs, had an opportunity to speak at the public hearing, present the same arguments to all of the Council members and not just those they communicated with directly, and to address comments by those on the other "side" of the rezoning. Plaintiffs have cited no prejudice and, therefore, the Court should not find a due process violation.

B. There is no evidence Councilmembers based their votes on political factors

Plaintiffs' efforts to pick and choose tiny parts of Council members' discussion and their reference to their own "Undisputed Fact" #8 is not enough to show that Councilmembers did not rely on the relevant criteria and voted, instead, on political factors. *See* Brief at 27. Indeed, there is no evidence that they did so and this argument should be rejected.

C. Council members did not have a conflict of interest

Finally, Plaintiffs argue that some Council members received "substantial political contributions from lobbyists" and so should not have participated in the voting. Brief at 27-29. Even assuming Plaintiffs' evidence on this issue is admissible and should be considered, Plaintiffs identified four Councilmembers who received such contributions and allegedly should not have voted. Brief at 7, ¶ 9. If the four Councilmembers had not voted, the final vote would have been five for and three against and the rezoning would have passed. *See* Charter at § 3.3.4 (requiring seven members for a quorum).

In any event, the law does not support Plaintiffs efforts to apply judicial recusal standards and case law to the City Council. Due process does not also impose upon quasi-judicial decision-makers the more rigorous standards for disqualification, much less other reporting or disclosure requirements, applicable specifically to judicial officers through ethics codes or local rules of procedure. *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010). Rather, "the ultimate due process question is whether under a realistic appraisal of psychological tendencies and human weaknesses, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidding if the guarantee of due process is to be adequately implemented." *Id.* at 1057 (internal quotations omitted). Campaign contributions and serving on campaign committees are legal in Colorado. Here, there is evidence supporting the City Council's decision and Plaintiffs have not pointed to any evidence instead of innuendo and assumptions of actual bias or prejudgment.

Caperton and *Williams-Yulee* also do not support Plaintiffs. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (state supreme court justice should recuse himself when corporate appellant's owner donated over $3 million to his campaign, created a political action committee, and far outspent all other candidates and donors with specific purpose to place the candidate on the bench to decide the donor's case); *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015) (state can regulate judicial candidates free speech only if the restriction is narrowly tailored to serve a compelling state interest). Plaintiffs claim that four Council members received $15,010 ***total*** from people allegedly related to CRL and in no case did Plaintiffs' counsel calculate this as more than 5% of the total contributions, except for Councilwoman Susman (who voted against the rezoning), who was at 5.51%. This is not remotely close to *Caperton*, where one person clearly funded Justice Benjamin's campaign for the specific purpose of removing his competitor from

office, and spent far more than everyone else. Finally, in *Schupper v. People*, 157 P.3d 516, 517 (Colo. 2007), the Court said that it must look at each case of alleged judicial conflict individually to determine whether recusal was required further undermining Plaintiffs efforts to make a categorical rule that any contributions should require recusal. 157 P.3d at 517.

VII. PLAINTIFFS ARE NOT ENTITLED TO THE DECLARATIONS SOUGHT

Plaintiffs request three declarations, which the City will discuss individually.

As discussed above, the Planning Board and City did not improperly refuse to consider the allegedly adverse traffic and parking impacts raised by the opponents and, therefore, Plaintiffs are not entitled to a declaration requiring the City to consider them on a rezoning. *See* Brief at 1, 16, and 18.

Plaintiffs also are not entitled to a declaratory judgment that the Planning Board's decision was "tainted by an unlawful conflict of interest." Brief at 22-23. The DRMC, § 12-44 specifically provides that:

> 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.

The evidence shows that Mr. Bershof did not even attend the Planning Board meeting where the rezoning was considered and, therefore, also did not vote on it. Disk 1, CPD_Redacted at 6751 (identifying Board members in attendance under § 1). Thus, he more than complied with his obligations under DRMC § 12-44 and it was not improper for the Planning Board to consider the rezoning. Plaintiffs cited no legal or factual basis for imputing to the entire Planning Board any conflict Mr. Bershof had, nor have they identified any personal, financial, or official stakes in the

recommendation held by the Planning Board members who attended and voted at the meeting. *See Scott v. City of Englewood*, 672 P.2d 225 (Colo.App. 1983). 228 (in the absence of any evidence that other decision-makers had a conflict, the recusal of one board member with a conflict meant the decision was rendered by presumptively impartial members).

Finally, Plaintiffs are not entitled to a declaration ordering the City to have a procedure so that the Parks director can sign a protest petition "when doing so will protect City park land." Brief at 20. The Court should not wade into this legislative and executive matter by effectively amending Charter § 3.2.9(E) and DZC § 12.4.10.5. Such a declaration would open the law to confusion where none exists right now. Indeed, who would decide when signing is appropriate and what is required to "protect City park land"? Would this be subject to appeal? And to whom would it be appealed? If the Plaintiffs believe this is important, they should pursue the matter legislatively.

CONCLUSION

For the reasons discussed above, the Court should uphold rezoning of the Mt. Gilead Parcel and should deny Plaintiffs' requests for a declaratory judgment.

Respectfully submitted this 18th day of February, 2016.

/s/Tracy A. Davis
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ATTORNEYS FOR THE CITY DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on this 18th day of February, 2016, a true and correct copy of the foregoing was filed with the Court and served electronically by ICCES to:

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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.