DATE FILED: February 18, 2016 7:30 PM
FILING ID: EEA7521C201D0
CASE NUMBER: 2015CV32427

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: ARTHUR KEITH WHITELAW, III, JOHN DERUNGS, KATHERINE K. McCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER **v.** **Defendants**: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, 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 Pearch, 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▲**
Attorneys for Defendant, Cedar Metropolitan LLC: Chip G. Schoneberger, #41922 Katherine A. Roush, #39267 Foster Graham Milstein & Calisher LLP 360 South Garfield Street, 6th Floor Denver, Colorado 80209 Phone: (303) 333-9810 Email: cschoneberger@fostergraham.com roush@fostergraham.com	Case Number: 2015cv032427 Courtroom: 269

DEFENDANT CEDAR METROPOLITAN, LLC'S ANSWER BRIEF

Defendant, Cedar Metropolitan, LLC ("Cedar"), submits its Answer Brief, as follows:

INTRODUCTION

In this Rule 106(a)(4) action, Plaintiffs challenge the Denver City Council's decision to rezone a 2.3 acre plot of land from single-family (E-SU-DX) to multi-family (S-MU-3). After the Denver Community Planning and Development Board ("Planning Board") held a five-hour public hearing and approved the rezoning request, City Council received substantial input from the public and held another eight-hour public hearing on the rezoning request. After that hearing, City Council approved the rezoning request finding the proposed rezoning met all relevant criteria under the Denver Zoning Code ("Zoning Code" or "DZC").

Though Plaintiffs disagree with City Council's decision, City Council reasonably interpreted the Code and adopted plans (Denver Comprehensive Plan 2000 and Blueprint Denver),[1] and the record evidence supports its findings and conclusions. Further, the alleged *ex parte* communications never impacted Plaintiffs' substantial or procedural due process rights in any way and thus no basis exists to reverse City Council's decision.

STATEMENT OF FACTS

At the time of City Council's decision, the at-issue parcel ("Parcel") housed the vacant Mt. Gilead church. (R. 000587, Disc 6, City Council 3-31-15).[2] The Parcel is bounded on the

---

[1] Plaintiffs never submitted either adopted plan for inclusion in the record. Nor do Plaintiffs ask the Court to take judicial notice of these plans or provide copies with their Opening Brief. Plaintiffs also cite provisions of the Zoning Code and Denver Revised Municipal Code not in the record and equally fail to provide copies of those provisions or even an internet address for them. (*See, e.g.,* Op. Br. at 1, 9). For the Court's convenience, Cedar provides those portions of the adopted plans, DZCode, and Municipal Code cited herein in the **Appendix**.

[2] "R. ######" refers to the "195 S. Monaco" Bates Number on the bottom right of each record page. "Hr'g [time stamp]" refers to recorded portions of the June 8, 2015 Hearing. "Hr'g Tr. ####" refers to transcribed portions of the June 8 hearing. All record cites also include the Disc number and the name of the document on that Disc.

east by S. Monaco Parkway with approximately 700 multi-family apartments across the street; on the south by a daycare business and one single-family house; on the north by rowhomes and portions of Crestmoor Park; and on the west by rowhomes and other portions of Crestmoor Park. (*Id.*). The Crestmoor Park neighborhood lies to the west and south of Crestmoor Park and is also zoned as single-family. (*Id.*). The Parcel's prior zoning, E-SU-DX, provided for churches or single-family homes on a minimum of 6,000 square foot lots. (*Id.* at 000586-87).

South Monaco Parkway is a "residential arterial" street "designed to provide a high degree of mobility and generally serve longer vehicle trips to, from, and within urban areas." (R. 000591, Disc 6, City Council 3-31-15); Blueprint Denver at 51). Arterials "interconnect[] major unban elements such as ... large urban and suburban commercial centers and residential neighborhoods." (Blueprint Denver at 51). Arterials thus "serve a city-wide function and are ... designated using a broader city-wide perspective." (*Id*.) Alameda, also designated as an arterial, is a block south of the Parcel. (R. 000590, Disc 6, City Council 3-31-15).

In October 2014, Cedar applied to rezone the site, originally seeking to rezone it from E-SU-DX to S-MU-5 in order to build a four-story, 120-unit age-targeted apartment building on the Parcel. (R. 000632, Disc 1, City Council 6-8-15 (SIRE)). In December 2014, Cedar revised its application to S-MU-3, thus limiting the height to a three-story building. (*Id.*). The Zoning Code defines S-MU-3 zoning as Suburban Neighborhood Context and allows buildings up to three stories tall. (R. 000586, Disc 6, City Council 3-31-15). The Suburban Neighborhood Context is characterized by single-unit and multi-unit residential and some commercial strips and centers. (*Id.*). The multi-unit residential and commercial uses are the uses generally located along arterial streets while single family is located away from arterials and on local streets. (*Id.*).

The Planning Board recommended approving the rezoning application on January 25, 2015 by a vote of 8-1. (R. 000632, Disc 1, City Council 6-8-15 (SIRE)). In light of opposition from some of the surrounding neighborhood residents, Cedar asked City Council to delay its hearing on the rezoning application to June 8, 2015, to permit more time to interface with the neighborhood. (*Id.* at 000633). During this time, in response to the neighborhood's concerns, Cedar again revised its site plan and now plans to build only a 50-unit, age-targeted apartment building plus 25 for-sale townhomes with access limited to Monaco (rather than Cedar or Locust) and increased available parking to at least two parking spaces per unit. (*Id.*).

City Council held its public hearing on the rezoning application on June 8, 2015. The hearing lasted over eight hours and included dozens of public comments, a presentation from the Community Planning and Development ("CPD") staff and Cedar, and questions from various City Council members to the public, the CPD staff, and Cedar. City Council ultimately approved the rezoning application 8-4. (R. 001422, Disc 1, City Council Minutes). Mary Beth Susman, the Councilmember for District 5 where the Parcel is located, voted against the rezoning. (*Id.*)

ARGUMENT

I. CITY COUNCIL DID NOT ABUSE ITS DISCRETION IN APPROVING THE REZONING APPLICATION

A. Standard of Judicial Review Under Rule 106(a)(4)

Rule 106(a)(4) limits judicial review of the City Council's decision to two grounds. The Court must affirm the decision unless the City Council abused its discretion or exceeded its jurisdiction. C.R.C.P. 106(a)(4). Here, Plaintiffs never allege City Council exceeded its jurisdiction, thus limiting this Court's review to whether City Council abused its discretion in approving the rezoning. A quasi-judicial body abuses its discretion if no competent evidence

reasonably supports the decision such that it is arbitrary and capricious. *Platte River Envir. Conserv. Org., Inc. v. Nat'l Hog Farms, Inc*., 804 P.2d 290, 291-92 (Colo. App. 1990). In other words, "no competent evidence" means the body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Canyon Area Residents v. Bd. of Cty. Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006).

In making that determination, this Court may consider whether City Council misconstrued or misapplied a law or ordinance. *Platte River*, 804 P.2d at 292. Courts "give great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). This includes a zoning body's interpretation of its own zoning regulations. *Fire House Car Wash, Inc. v. Bd. of Adj. for Zoning Appeals*, 30 P.3d 762, 766 (Colo. App. 2001); *Anderson v. Bd. of Adj. for Zoning Appeals*, 931 P.2d 517, 520 (Colo. App. 1996). Moreover, its interpretation is presumed valid and Plaintiffs bear the burden to overcome that presumption. *Quaker Court Ltd. Liab. Co. v. Bd. of Cnty. Comm'rs*, 109 P.3d 1027, 1030 (Colo. App. 2004). If a reasonable basis exists for the interpretation, the decision may not be set aside on those grounds. *Platte River*, 804 P.2d at 292 (Colo. App. 1990); *Save Park Cty. v. Bd. of Cty. Comm'rs*, 969 P.2d 711, 714 (Colo. App. 1998).

B. The record evidence supports City Council's determination that the rezoning meets the relevant criteria for a zone map amendment

City Council has discretion to approve an official map amendment (a rezoning request) if the proposed rezoning complies with all of the following criteria: (1) the proposed rezoning is consistent with adopted plans; (2) the proposed rezoning results in uniformity of district regulations and restrictions; (3) the proposed rezoning furthers public health, safety and welfare;

(4) a justifying circumstance, such as a change to the land or its surrounding environs, exists; and (5) the proposed rezoning is consistent with the description of the applicable neighborhood context. (R. 000973, Disc 1, City Council 6-8-15 (SIRE) (DZC §§ 12.4.10.7 & 12.4.10.8)). Plaintiffs contend the rezoning failed to meet review criteria (1), (3) and (4). However, the record evidence sufficiently supports City Council's decision that all review criteria are met here.

1. The rezoning is consistent with adopted plans

Plaintiffs challenge the rezoning's consistency with the Denver Comprehensive Plan 2000 and Blueprint Denver. (Op. Br. at 11; R. 00590, Disc 6, City Council 3-31-15). The record supports the City Council's finding that the rezoning is consistent with both adopted plans.

Denver Comprehensive Plan 2000. Enacted in 2000, the Denver Comprehensive Plan 2000 ("Plan") is Denver's master zoning plan and provides general guidance for the entire city. (DRMC § 12-61(a)); Plan at 4). The Plan identifies numerous objectives and strategies by which those objectives may be achieved. Some of its goals include environmental sustainability, adopting effective land use policies, preserving Denver's legacies such as tree-lined streets, and improving Denver's neighborhoods. (Plan at 26-61, 84-105, 138-56). The Plan identifies several strategies to meet these goals, including:

- Environmental Sustainability Strategy 2-F: "[P]romoting infill development at sites where services and infrastructure are already in place" (Plan at 39);
- Land Use Strategy 3-B: Managing growth and change through effective land use policies, including "encourag[ing] quality infill development that is consistent with the character of the surrounding neighborhood; that offers opportunities for increased density" (Plan at 60);
- Neighborhood Strategy 1-E: "Modify[ing] land-use regulations to ensure flexibility to accommodate changing demographics and lifestyles[,] and [a]llow ... a diverse mix of housing types and affordable units[.]" (Plan at 150);

- Neighborhood Strategy 1-F: Investing in neighborhoods "to help meet citywide goals and objectives for a range of housing types and prices, community facilities, human services and mobility." (*Id.*)

Here, the record evidence supports City Council's determination that the rezoning is consistent with these express objectives and strategies. The Code mandates that City Council "shall consider the recommendations of the Planning Board and Manager, and any other comments received" in considering a rezoning request. DZC § 12.4.10.4(G). In recommending approval of the rezoning, the CPD staff found the rezoning "is consistent with many ... Plan strategies." (R. 000590, Disc 6, City Council 3-31-2015). Specifically, CPD found the S-MU-3 zoning meets "Environmental Sustainability Strategy 2-F by promoting infill development within walking distance to a mixed use area [Lowry Town Center]." (*Id.*). CPD also presented evidence that a "three-story multi-unit residential development" is similar to multi-unit buildings across S. Monaco Parkway yet provides a height limit of three-stories more compatible with single-family areas to the west of the Parcel, and thus is consistent with Land use Strategy 3-B. (*Id.* at 000591). CPD further found it meets Neighborhood Strategy 1-E "by increasing flexibility to accommodate changing demographics and lifestyles" (*Id.*). Finally, CPD found it meets "Neighborhood Strategy 1-F by providing the opportunity for a range of housing types in this neighborhood." (*Id.*; R. 000073, Disc 6, City Council 3-31-2015).

The rezoning also meets several other Plan strategies. For example, Denver Legacies Strategy 4-A aims to "preserve the pattern and character of the primary street system, including ... detached sidewalks and tree lawns," and Mobility Strategy 8-B ensures "sidewalks are continuous along all major Denver streets." (R. 000620-21, Disc 6, City Council 3-31-2015). The rezoning meets these by providing a catalyst for building detached sidewalks on the Parcel

where none currently exist. (*Id.*). Moreover, Housing Strategy 6-E aims to "capitalize on opportunities to develop housing along transit lines." (*Id.*). The Parcel runs along residential arterial S. Monaco Parkway one block from Alameda, an enhanced transportation center. (*Id.*).

Plaintiffs erroneously argue "the City cannot reasonably rely on language [in the Plan] to justify any specific zoning change as 'consistent with' the plan." (Op. Br. at 12). Yet plaintiffs cite no authority whatsoever for this assertion and present no alternative interpretation. To mandate "consisten[cy] with the City's adopted plans" (DZC § 12.4.10.7(A)) necessarily allows – indeed *requires* – review and reliance on the express language of those plans.

Blueprint Denver. City Council adopted Blueprint Denver in 2002 "to implement and achieve the vision outlined in Plan 2000" (Blueprint Denver at 3). Blueprint Denver identifies "Areas of Change" and "Areas of Stability," placing the Parcel in an Area of Stability directly adjacent to an Area of Change:

(R. 000591, Disc 6, City Council 3-31-2015).

An Area of Stability aims to "maintain the character of these areas ***yet accommodate some new development and redevelopment to prevent stagnation***." (Blueprint Denver at 120) (emphasis added). Like the Plan, Blueprint Denver identifies numerous strategies by which to meet this goal. These include: (1) "address[ing] incompatible zoning and land use issues," (2) "address[ing] ***edges between areas of stability and areas of change***," and (3) "diversity of housing type, size and cost." (*Id.* at 25) (emphasis added). And Blueprint Denver explicitly identifies a "regulatory toolbox" to help implement these strategies in an Area of Stability. One such "tool" is a zone map amendment exactly like the one at issue here. (*Id.* at 123-24). Blueprint Denver contemplates use of map amendments to "create a better match between the land uses in an area and zoning." (*Id.*)

Blueprint Denver further subcategorizes Areas of Stability as either a "committed area" or a "reinvestment area," though not identifying these areas on the map. (*Id.* at 122-23). However, it defines reinvestment areas as "neighborhoods with a character that is desirable to maintain but that would benefit from reinvestment through modest infill and redevelopment of major projects in a small area." (*Id.*). Indicators of reinvestment areas within an Area of Stability include "deteriorated and poorly maintained housing stock," "inappropriate land uses or inadequate buffering between uses," "lack of curbs," and "maintaining affordable housing." (*Id.*).

Here, the record supports City Council's determination that the rezoning is consistent with Blueprint Denver. In recommending approval of the rezoning, CPD found the Parcel was a "reinvestment area within an area of stability" because it currently houses a "deteriorating and poorly maintained church," (R. 000592, Disc 6, City Council 3-31-2015; *see* Blueprint Denver at

122-23. (reinvestment area often contains "deteriorating and poorly maintained housing stock")), and also because the Parcel is on a residential arterial road better suited for multi-family than the currently zoned single-use residential (R. 000592 Disc 6, City Council 3-31-2015; *see* Blueprint Denver at 122-23 (reinvestment area contains inappropriate land uses); and is on the edge of an Area of Stability and directly adjacent to an Area of Change and multi-family buildings (R. 000592; *see* Blueprint Denver at 122-23 (reinvestment area contains inadequate buffering between uses")).

Rezoning the parcel to allow a three-story multi-family addresses these issues and thus aligns with Blueprint Denver's strategies for Areas of Stability and reinvestment areas. The record specifically includes the following evidence:

- The rezoning would "address incompatible zoning and land use issues" by allowing multi-family housing, rather than single-family, to be built on a residential arterial street. (R. 000592, Disc 6, City Council 3-31-2015 (DZC explains that single family residential uses are primarily located away from such arterials while multi-family residential is primarily along such arterial roads));

- Because the Parcel is on the edge of an Area of Stability, with multi-family buildings across Monaco in an Area of Change, the rezoning will "address the edge" of the Area of Stability to the west and create a "buffer" between the arterial street and the Crestmoor neighborhood. (*Id.*);

- The rezoning will increase "diversity of housing" choices in the Area of Stability. (*Id.*);

- S-MU-3 zoning has "siting and design element standards" to establish compatibility between existing and new development. (*Id.* at 000079, Disc 6, City Council 3-31-2015);

- The Parcel differs from the single-family homes on the west side of Monaco Parkway from 6th Avenue to Martin Luther King Boulevard. This is because those homes are matched with single family homes on the east side of Monaco, while the Parcel has over 700 apartments directly across Monaco. There is also a median parkway running the length on Monaco between 6th Avenue and Martin Luther King Blvd that does not exist on the stretch of S. Monaco adjacent to the Parcel. (R. 000633, Disc 1, City Council 6-8-2015 (SIRE)).

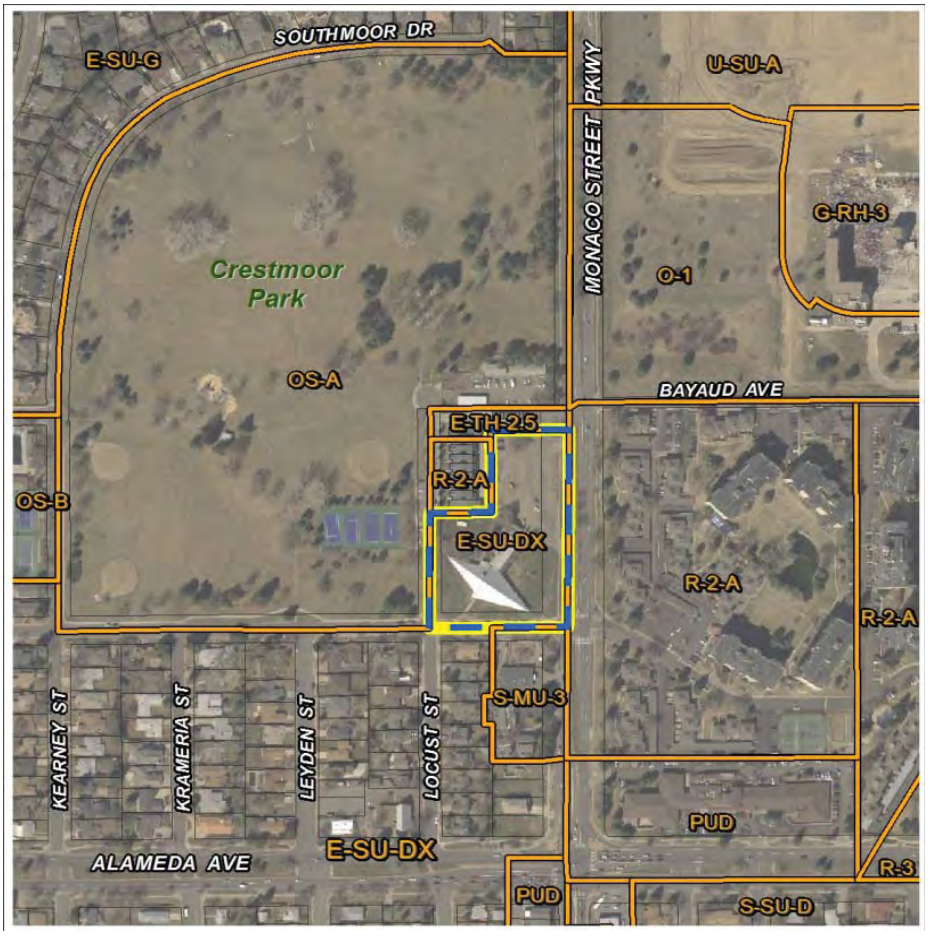
Plaintiffs ignore this record evidence and simply ask this Court to reweigh the evidence and reach a different outcome. For example, although Blueprint Denver expressly contemplates multi-family residences along arterial roads such as S. Monaco Parkway, Plaintiffs complain the CPD staff recommendation gave insufficient weight to the fact that one section of one side of S. Monaco Parkway contains only single-family homes. (Op. Br. at 12). But Plaintiffs' disagreement with how City Council weighed the evidence in its analysis cannot establish an abuse of direction. Rule 106(a)(4) limits the Court's inquiry to whether the record contains any competent evidence supporting the decision. *Platte River*, 804 P.2d at 291-92; *Canyon Area Residents*, 172 P.3d at 907.

Plaintiffs' "spot zoning" argument is misplaced for essentially the same reason. (Op. Br. at 20). Spot zoning examines "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 code." *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1962)).[3] In other words, spot zoning "creates a small island of property with restrictions on its use different from those imposed on the surrounding property." *Little v. Winborn*, 518 N.W.2d 384, 387 (Iowa 1994).

Here, as established above, the rezoning furthers multiple goals of both the Plan and Blueprint Denver. Notably, Blueprint Denver expressly authorizes the regulatory mechanism Cedar chose to utilize—a zone map amendment—as one "tool" for use in Areas of Stability such as the Crestmoor neighborhood. In other words, rezoning is both consistent with, and authorized

[3] Given the complex and evolving nature of today's zoning regulations, "spot zoning" has become an antiquated notion. This is illustrated by the fact that Plaintiffs' "spot zoning" cases pre-date the Plan and Blueprint Denver by 40+ years.

by, the adopted plans. Additionally, the Parcel is not an "island" in a sea of sameness, *i.e.*, a different zoning than its surrounding property. The surrounding properties contain a variety of different zoning designations, including the same S-MU-3 zoning as the Parcel. In fact, the property directly to the Parcel's south has the same S-MU-3 zoning. (R. 000587, Disc 6, City Council 3-31-2015). The property directly to the east, across S. Monaco Pkwy, is zoned R-2-A, which also permits multi-unit homes (and on which sits 700 apartments). (*Id.*). As the existing zoning map demonstrates, rezoning the Parcel to S-MU-3 actually brings it more in line with zoning restrictions of the surrounding property.



(R. 000588, Disc 6, City Council 3-31-2015).

2. The rezoning furthers public health, safety and welfare

Next, Plaintiffs argue City Council erred as a matter of law by purportedly "refus[ing] to consider the adverse traffic and parking consequences of the proposed rezoning" in its analysis of whether the rezoning furthers the public health, safety, and general welfare. (Op. Br. at 15-18). This argument fails for several reasons.

First, the Zoning Code's plain language says nothing about traffic. It merely generally requires that "[t]he proposed official map amendment furthers the public health, safety and general welfare of the City." (DZC § 12.4.10.7(C)).

Second, Plaintiffs misleadingly attempt to pass-off a single Councilmember's comments as "[t]he City's official position ... [that traffic] cannot be considered in a rezoning decision." (Op. Br. at 16-17). However, Plaintiffs also omit the same Councilmember's statements that he did consider traffic issues and does not believe this rezoning will significantly impact it:

> That's one of the real issues that's going on in this city. You're articulating it. I'm hearing articulating in every neighborhood. I'm downtown, so I use multi modal. But when I drive my car to DU, I realize how much traffic is going on in the city.
>
> * * *
>
> ***My belief is this site will not dramatically increase it***, but you are facing some severe traffic issues and we need to address it. Our call, our legal obligation before you today is, are the plans consistent? Are they in context for approval?

(Hr'g Tr. at 38:20-39:11).

Third, Plaintiffs' contention that City Council "refused to consider the adverse traffic and parking consequences for the surrounding neighborhood" is patently false. (Op. Br. at 16). City Council heard substantial evidence and discussion of traffic and parking issues at the June 8

hearing. The following represents just a sample of the 30+ instances where parking and traffic were discussed:

Time	Summary of Discussion
24:10-20, Disc 4, VTS_01-1 (3:40:43)[4]	Cedar representative, Mr. Warren, explains that Cedar's decision to limit access to the Parcel to Monaco, and not Cedar or Locust, was a deliberate effort to mitigate cut-through traffic in the neighborhood.
1:30:25-1:31:29, Disc 5, VTS_01-1 (7:21:36)	Answering Councilwoman Ortega's question about whether there was a traffic study, Mr. Warren says a traffic study was completed and showed that the proposed development would contribute "slightly over" 1% of the total traffic on Monaco Boulevard.
1:34:25-1:25:05, Disc 5, VTS_01-1 (7:25:20)	Answering Councilwoman Kneich's question about the available parking, Mr. Warren confirms that there will be 152 parking spaces for 75 total units, including 58 underground parking places.
1:42:55-1:45:10, Disc 5, VTS_01-1 (7:34:15)	Councilman Brooks asked if CPD considers impacts of traffic. CPD confirms it evaluates transportation impacts and work to further improve public safety and welfare. CPD confirms that from a traffic impact standpoint, it cannot determine the impact because it only evaluates zoning, not the site plan, and does not review a specific project but, rather, the zone district.
Hr'g Tr. 27:1-12	Councilwoman Kneich discusses the access points and potential concerns but notes that the developer has worked with neighbors to reduce cut through traffic by restricting access to Monaco only.

Fourth, the record supports City Council's decision that the rezoning furthers the public health because "redevelopment of the site removes a poorly maintained structure, improves character along Monaco, and residents have access to recreation, jobs and commercial activities." (R. 000799; Disc 1, City Council 6-8-2015 (SIRE); 000593 Disc 6, City Council 3-31-2015). Evidence also establishes the rezoning will increase public safety because the

[4] The recording of the hearing is located on Discs 4 and 5. The hearing is broken up into approximately 2-hour segments. This cite refers to first the time stamp in the segment, then the disc on which the segment is located, and finally the name of the segment. The time stamp in parentheses is the actual time in the hearing where the cited comment was made (for example, "7:34:15" indicates that the question occurred at 7 hours and 34 minutes into the hearing).

developer is adding a sidewalk where none currently exists; detaching another currently-connected sidewalk; and improving overall pedestrian connectivity. (Hr'g Tr. at 8:10:07 (Councilman Nevitt question to neighborhood resident)).

3. Deterioration of the Parcel justifies the rezoning

Plaintiffs also challenge compliance with the Code's "justifying circumstance" requirement. (Op. Br. at 14). Zoning Code § 12.4.10.8(4) authorizes rezoning if "[t]he 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[.]" This plain, disjunctive language makes clear that justifying circumstances exist when ***either*** "the land ***or*** its surrounding environs" has changed or is changing. (DZC § 12.4.10.8(4) (emphasis added)); *see also Armintrout v. People*, 864 P.2d 576, 581-82 (Colo. 1993) (use of disjunctive word "or" connotes alternative categories).

Here, the record evidence supports the conclusion that the Parcel had become blighted. CPD staff found the Mt. Gilead church had "been deteriorating for several years" since the implementation of Blueprint Denver due to "lack of activity and deferred maintenance." (R. 000593-94, Disc 6, City Council 3-31-2015). Numerous neighbors echoed this finding in letters supporting the rezoning; many supportive letters highlighted the property's deterioration and a need for its redevelopment. (*See* R. 000123, Disc 6, City Council 3-31-2015 ("the property at 195 S. Monaco has deteriorated to the point it is a real eyesore now"); *id.* at 000126 ("As a close neighbor to this site, I feel the property is in need of improvement and an ongoing attention." (*sic*)); *id.* at 000130 (church is "unkempt eyesore"); *id.* at 000132 (property "has been an eyesore

for years"); *id.* at 000133 ("the current building clearly has not been maintained, and the parking lot is choked with weeds and mysterious cars.")).

Plaintiffs incorrectly argue the Zoning Code requires "an entire area in a neighborhood (not just one parcel) has become blighted." (Op. Br. at 14). But the Zoning Code's plain language belies this assertion. Justifying circumstances exist when either "the land," *i.e.*, the Parcel itself, "***or*** its surrounding environs" has changed or is changing. (DZC § 12.4.10.8(4) (emphasis added)).

Even under Plaintiffs' mistaken interpretation of the Zoning Code, the record supports a conclusion that the "surrounding environs" have changed since Blueprint Denver was enacted in 2002. Though the Crestmoor Park neighborhood lying west of the Parcel on the other side of Crestmoor Park "is thriving with high, and increasing property values" (Op. Br. at 15), City Council properly considered the entire "environs" and vicinity surrounding the Parcel – not just the Crestmoor Neighborhood. (*See* Hr'g at 1:37:32, Disc 5, VTS_01-1 (7:27:01)). The Parcel is directly across the street from hundreds of apartment units and also from an Area of Change where additional apartment units are being built. (R. 000591, Disc 6, City Council 3-31-2015; *id.* at 000594).

C. City Council did not misapply or misconstrue the Protest Petition procedure

Plaintiffs next argue City Council applied an "incorrect interpretation" of the Protest Petition procedure. (Op. Br. at 18-20). Under Denver's Charter, filing a sufficient Protest Petition means City Council requires a supermajority of 10 votes to approve the rezoning. As is relevant here, a sufficient Protest Petition must be "signed by the owners of twenty per cent or more ... of the area to a distance of two hundred feet from the perimeter of the area proposed for

change." (Denver Charter, Art. 3.2.9; *see also* DZC § 12.4.10.5.A.1 (reiterated as "the total land area from the perimeter of the area proposed for change to a distance of 200 feet outside the of the perimeter of the area proposed for change")).

Plaintiffs gathered signatures from only 17% of the perimeter land owners. (R. 006432-6434, Disc 1, CPD_Redacted). The 200-foot perimeter includes a portion of Crestmoor Park and the City Parks Department declined to sign the petition. Plaintiffs contend the City "manipulated the Protest Procedure by including City-owned park land within the surrounding property area, but not allowing any procedure for residents to obtain a petition signature from the City." (Op. Br. at 18). Plaintiffs thus argue this Court should interpret the Charter and Zoning Code to either: (1) preclude city-owned property from the Protest Petition calculus; or (2) require the City to sign any protest petition presented to it. (*Id*. at 19). This makes no sense.

Binding case law forecloses the first argument. In *Burns v. City Council of City & County of Denver*, the Colorado Court of Appeals held the phrase "the area to a distance of 200 feet from the perimeter of the area proposed for change" unambiguously requires including any city-owned property falling within that 200 foot zone. 759 P.2d 748, 749 (Colo. App. 1988) *cert. denied* (Aug. 8, 1988). Therefore, the CPD and City Council correctly included the park area in the calculation of the "total land area" required to constitute a sufficient protest petition.[5]

Moreover, CPD did not "effectively block" the petition by not providing a procedure to request the City sign it as owner of Crestmoor Park. (Op. Br. at 19). Indeed, CPD *encouraged* plaintiffs to seek a signature from the City Parks Department. (*See* R. 006443. Disc 1,

[5] Notably, the Charter and Zoning Code each say "signed by ***the owners***" of nearby land; they do not say "the residents" or the "the residents who live nearby," as plaintiffs suggest. (Op. Br. at 18-19).

CPD_Redacted (email from plaintiff Katie McCrimmon to CPD stating "as you suggested, I reached out to the City Park Department to get a signature for our Petition of Protest")). Merely because the City Parks Director chose not to sign it does not establish that no procedure exists to request a petition signature. A procedure exists and Plaintiffs utilized it at CPD's urging.

And nothing in the Charter or Zoning Code supports Plaintiffs' suggestion that the Court should interpret them to *require* the City to sign a protest petition. (Op. Br. at 19-20). Doing so would render meaningless the Charter's and Zoning Code's unambiguous language and the Court of Appeals' holding in *Burns*. If the City were automatically deemed to oppose rezoning within 200-feet of any city-owned property, no point would exist for using the phrase "signed by the owners of ... the area." The Charter and Zoning Code would simply provide for the pro rata portion of city-owned property to be included in the required percentage of signatures.

II. NO *EX PARTE* COMMUNICATIONS OR CAMPAIGN CONTRIBUTIONS VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS

Plaintiffs seek reversal based on alleged *ex parte* communications between Councilwoman Susman and Cedar representative Sean Maley, which Plaintiffs argue "tainted" the City Council proceedings. (Op. Br. at 24-27). More specifically, Plaintiffs argue City Council violated their due process rights by not "disclos[ing] to the public before or during the June 8-9, 2015 hearing" the communications Susman received. (*Id*. at 24). Plaintiffs' argument is misplaced.

A. The majority of communications Plaintiffs identify are not improper *ex parte* communications

Generally, an improper *ex parte* communication must be substantive, *i.e.*, a "communication ***about a case*** which an adversary makes to the decision maker without notice to

an affected party." *D'Aquisto v. Washington*, 640 F. Supp. 594, 621 (N.D. Ill. 1986) (emphasis added). This necessarily excludes non-substantive *ex parte* communications for scheduling, administrative, or emergency purposes. *See* Colo. C. Judicial Conduct Rule 2.9. Moreover, communications containing information already "in the public record" are not improper *ex pate* communications. *See Booth v. Newton Planning and Zoning Comm'n.*, No. CV000340609S, 2001 WL 1429186, *6 (Conn. Super. Ct. Oct. 30, 2001). And zoning proceedings present additional considerations regarding alleged *ex parte* communication. As one Court noted, "[g]iven the localized and political nature of zoning decisions, and the status of Committee members as representatives of the community, it may be natural that such contacts occur," but such "ex parte communications are not a per se violation of due process in the context of zoning permit proceedings." *Sills v. Walworth Cty. Land Mgmt. Comm'n.*, 648 N.W.2d 878, 891 & n.9 (Wisc. Ct. App. 2002).

Here, the emails Plaintiffs identify in their Appendix 1 are either non-substantive or contain information already available to Plaintiffs. Two of them only involve commentary about the ongoing neighborhood outreach, tension, and internet discussions about the rezoning. (*See* R. 005471-72, Disc 6, Susman Gmail (Susman voicing concern over "rhetoric" in online discussions about rezoning and that such rhetoric was silence "varying opinions"); *id.* 005485-88 (Susman to Maley wondering why Cedar is not directly engaging with neighbors: "It's interesting to me that developers don't respond [to] neighbors about emails and information put out by neighbors")). These emails are not "about the case" but, rather, are about the ongoing public discussion regarding the rezoning.

Another five emails are ministerial or administrative emails regarding scheduling and presentations at the hearing with both Cedar and CPD (*See* R. 003795-87, Disc 2, Susman-Kline_Redacted) (Susman communicating with CPD's David Gaspers about how to postpone the Council hearing); *id.* 003712 (Susman's Aide to Gaspers, seeking a time for Susman to "touch base" about the rezoning); R. 004432, Disc 6, Susman Gmail (Susman's Aide to Susman telling her that CPD planner Kyle Dalton called and said he was available if Susman had questions about the upcoming hearing); *id.* 005445 (Maley to Susman suggesting language to use for her request for a continuance on behalf of Cedar); *id.* 005773 (Gaspers asking Susman whether City Council would prefer more or less detail in his presentation at the hearing)). These emails all deal with "ministerial scheduling or administrative" issues, including the postponement of the City Council hearing at Cedar's request and discussions between Susman and CPD regarding non-substantive issues with CPD's presentation to City Council. Plaintiffs cannot seriously argue that conversations between a Councilmember and a CPD planner are improper when the Municipal Code expressly requires CPD to "advise" City Council on zone map amendments. *See* DRMC at § 12-17(8) (CPD shall "advise the mayor and city council on proposed amendments to the zoning ordinance, zoning map amendments, development plans and subdivisions[.]").

Nearly all the remaining emails conveyed information Cedar already previously sent to the neighbors or that otherwise already appears in the public record. (*See* R. 004579, Disc 6, Susman Gmail (Maley to Susman forwarding opponents' Facebook posts and saying "I just wanted to make sure you've seen some of these materials Katie McCrimmon and some of the Crestmoor neighbors have put together and have been disseminating widely . . ."); R. 003719,

Disc 2, Susman-Kline_Redacted (Susman acknowledging to Cedar representative Phil Workman that she saw "some but probably not all" of the letters being sent to Planning Board before the January 21 hearing); R. 005439-42, Disc 6, Susman Gmail (Maley sending Susman more information about neighbors' Facebook posts and Susman responding that the tactics were "disheartening" especially as she was trying to "negotiate" something); *id.* at 005485 (Maley to Susman reiterating the points he made in an email he sent to neighborhood representatives at *id.* at 004708-4718); R. 006782, Disc 9 (email from Maley to various City Council members that was already in the SIRE record at 000632-635, Disc 1, City Council 6-8-2015 (SIRE)); R. 007100, Disc 9 (same); *id.* at 007104 (same); *id.* at 007104 (same); R. 001470-72, Disc 1, Brooks, Micheau Montoya (same); R. at 004436, Disc 6, Susman Gmail (Maley attaching the "site plan and age-targeted renderings" which are in the SIRE record at 968-970, Disc 1, City Council 6-8-2015(SIRE)); R. 005386, Disc 6, Susman Gmail (Susman asking Maley if he could answer "a couple questions" regarding the site plan)).

Finally, one email from former Councilwoman Barnes-Gelt to Susman merely said she heard Susman was "not necessarily supporting the Kudla thing ... but letting others know you are comfortable if its approved." (R. 005595-5586, Disc 6, Susman Gmail). However, Susman declined to comment, responding that "since we are not allowed to opine on zonings before the hearings, people assume lots of things." (*Id.*).

Plaintiffs' central objection to the alleged *ex parte* communications from Cedar to Councilwoman Susman is that City Council "failed to disclose to the public" the fact and substance of the communications. But the foregoing demonstrates that the substance of all the contested emails was either: (1) non-substantive; (2) from the zoning opponents themselves; (3)

duplicative information that Maley already sent to the zoning opponents; or (4) already elsewhere in the SIRE record. All the allegedly "private" information was actually very public. *See Booth*, 2001 WL 1429186 at *6 (information in public record is not improper *ex parte* communication).

Moreover, none of the emails contained new information relevant to City Council's rezoning decision. Nothing in the emails presented "additional evidence" or somehow constitutes factual information subject to rebuttal, counter-evidence, or cross-examination. Effectively, Plaintiffs only complain about Susman receiving public outreach regarding the rezoning in her representative capacity. But nothing about this changed the presentation of *evidence* at the hearing or otherwise deprived Plaintiffs' of notice and an opportunity to be heard.

B. Plaintiffs do not – and cannot – establish City Council's reliance on the alleged *ex parte* communications or any resulting prejudice

Colorado and other jurisdictions agree that *ex parte* communications cannot undermine a quasi-judicial decision absent the decision-maker's actual reliance on the communication and manifest prejudice. *See Colo. Energy Advocacy Office v. Pub. Serv. Co.*, 704 P.2d 298, 303 (Colo. 1985) ("an agency may not base its decision on *ex parte* information"); *Information Please, Inc. v. Bd. of Cty. Comm'rs*, 600 P.2d 86, 89 (Colo. App. 1979) (plaintiffs failed to establish documents allegedly submitted to the board after the hearing prejudiced their case); *Sills*, 648 N.W.2d at 892 ("Even if the neighbors had actual evidence of ex parte communications, they would still fail to make a prima facie showing of a procedural due process violation in the absence of bias or an impermissibly high risk of bias."); *Union State Bank v. Galecki*, 417 N.W.2d 60, 64 (Wisc. Ct. App. 1987) ("Even if there was evidence of an *ex parte* communication, it would constitute material error only if Union was "prejudiced by an inability

to rebut the facts communicated *and* if improper influence on the decision maker appears with reasonable certainty to have resulted.") (emphasis in original).

Here, Plaintiffs cite nothing in the record establishing the requisite reliance or prejudice. Councilwoman Susman voted against the rezoning and thus did not rely on Maley's communications – much less to Plaintiffs' detriment. Nothing in the record suggests Susman disclosed Maley's emails to other Councilmembers. And Plaintiffs' reliance on the email from Barnes-Gelt to Susman is equally illogical, as Susman declined to comment on Barnes-Gelt's statements. This neither demonstrates Susman had improper substantive *ex parte* communications with Barnes-Gelt or disclosed Maley's communications to her to fellow Councilmembers.

In fact, the record is replete with evidence that opponents to the rezoning, including some named Plaintiffs, also sought to meet with Councilwoman Susman privately and "off the record" in Susman's negotiation with the neighborhood. For example, on April 15, 2015, plaintiff Katie McCrimmon emailed Susman, stating "a couple of us wanted to meet with you to brief you on our presentation[;] [t]his would be a private meeting with you, not one with the developers or other neighborhood leaders." (R. 003996, Disc 2, Susman-Kline_Redacted). On Friday, May 29, 2015, Amy Hook, a neighborhood representative opposing the rezoning, emailed Councilwoman Susman to thank her "for taking the time to meet with us" and attaching a document entitled "talking points for city council members zone it right for crestmoor park" that maps out numerous arguments in opposition to the rezoning. The email also notes other neighbors and opponents of the rezoning who met with Councilmembers Robb and Lehman. (R. 004720-31, Disc 6, Susman Gmail). On March 2, 2015, John Sadwith, president of one of the Crestmoor

neighborhood filings and an opponent of the rezoning, emailed Councilwoman Susman's Gmail account, saying "To be serious MB—I have become convinced that this project is terrible and needs to be stopped." (*Id.* at 005395).

Evidence of such "private" communications with Plaintiffs, as well as Defendants, only highlights the need for evidence of bias before such communication will undermine City Council's decision. *See Sills*, 644 N.W.2d at 891 (evidence of ex parte communications alone is not evidence of resulting bias). Plaintiffs cannot make that showing here. Indeed, City Council conducted an eight-hour hearing and Plaintiffs had every opportunity to testify, ask questions, give presentations, and speak with various members of the City Council and CPD prior to the hearing. *See Booth*, 2001 WL 1429186 at *6 ("The conduct of the hearings was fair, and interested persons were not denied the right to be heard or the right to submit evidence to the Commission."). The record simply does not indicate Plaintiffs suffered any prejudice or that City Council was biased.

Plaintiffs' cited cases are inapposite. Unlike here, Plaintiffs' cites cases each involved decision-makers that relied on the *ex parte* communication. *See e.g. Colorado Energy Advocacy Office v. Public Serv. Co.*, 704 P.2d 298, 303 (Colo. 1985) (ex parte communications improper because PUC relied on those communications in decision); *Zuviceh v. Indus. Comm'n*, 544 P.2d 641, 642-43 (Colo. App. 1975) (commission relied on ex parte communication from employer in making decision to re-open case); *Board of Cty. Comm'rs v. Colorado Pub. Util. Comm'n*, 157 P.3d 1083, 194 (Colo. 2007) (holding all evidence considered must be included in record of PUC proceedings).

C. Campaign contributions to City Council members does not justify reversal

As an initial matter, the Court has stated multiple times that its review of City Council's decision is limited to the record. (*See* 12/3/2015 Order at ¶ 4 ("the Court's review is limited to the record that was before the governmental body."); 11/3/2015 Order Denying Discovery ("introduction of new testimony is not appropriate in a C.R.C.P. 106(a)(4) proceeding")). In the "Appendix 3" to their Opening Brief, Plaintiffs submit documents summarizing campaign contributions from Cedar's lobbying firm, CRL associates, to four City Council members (Kneich, Nevitt, Shepard and Susman) totaling over $15,000. This information is not in the record before the court and the Court may not consider this information in its review of the Council's decision. *See IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008) ("Accordingly, our review is based solely on the record that was before the [governmental body], and the decision must be affirmed unless there is no competent evidence in the record to support it") (internal quotation omitted).

Regardless, this "new" information fails to raise even the specter of a conflict of interest. As recognized in Rathkopf's Zoning Treatise, "Courts have found the receipt of campaign contributions to fall outside the scope of conflict of interests statutes or have adopted the approach that public contribution disclosure requirements, along with the voters' judgment of whether their elected officials are performing their duties impartially, constitute a sufficient bulwark against conflicts arising from receipt of campaign contributions." 2 Rathkopf's The Law of Zoning and Planning § 32:27 (4th ed.) Per *Rathkopf*, the "leading case dealing with campaign contributions in the context of land use decisionmaking" is *Woodlawn Hills Residents Association, Inc. v. City Council*, 609 P.2d 1029, 1033 (Cal. 1980). There, plaintiffs argued that

because 13 of 15 city council members required to vote on a developer's subdivision application had received, between them, around $9000 from the developer and its representatives, created an appearance of bias. The California Supreme Court disagreed, holding the campaign contributions did not create even the appearance of unfairness and that "public policy strongly encourages the giving and receiving of campaign contributions." *Id.* The *Woodlawn Hills* Court also relied on California's Political Reform Act that expressly excluded from the definition of "financial interest" the receipt of campaign contributions. *Id.* ("Adequate protection against corruption and bias is afforded through the Political Reform Act and criminal sanctions.").

Plaintiffs' cited authority does not require a different result. Plaintiffs cite *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (U.S. 2009) for the proposition that "any trivial gift creates a conflict, or the objective appearance of a conflict, for a quasi-judicial decisionmaker." (Op. Br. at 29). *Caperton* dealt with a factually inapposite situation than a legally-permissible campaign contribution to a city councilmember. In *Caperton*, a CEO involved in a dispute before the West Virginia Supreme Court "contributed some $3 million to unseat the incumbent and replace him with [the judge who received the contributions]. 556 U.S. at 884. The Court recognized that it was "not every campaign contribution by a litigant or attorney creates the probability of bias that requires a judge's recusal, but this is an exceptional case."

Although Plaintiffs would prefer to hold City Council members to the same standard as members of the appointed judiciary (Op. Br. at 29 ("any nontrivial gift creates a conflict, or the objective appearance of a conflict, for the quasi-judicial decisionmaker.")), unlike the appointed judiciary, Colorado, like California, expressly excludes campaign contributions from the definition of "gifts of substantial value, which are prohibited by the Colorado Standards of

Conduct for local officials." *See* C.R.S. § 24-18-104(3)(3). In other words, campaign contributions to City Council members, especially gifts that are not even from Cedar but instead Cedar's hired lobbyists, are expressly permissible and legal. Thus, like the Court in *Woodlawn Hills*, this Court should find that campaign contributions to City Council members does not create the appearance of unfairness.

III. Plaintiffs' Planning Board "conflict of interest" argument is equally misplaced

In their brief in this Rule 106(a)(4) action, Plaintiffs also ask the Court to enter "declaratory judgment." (Op. Br. at 22-23). More specifically, Plaintiffs argue Planning Board member Jim Bershof signed the rezoning application and served as its "property owner representative," and request this Court "grant [p]laintiffs' motion for a declaratory judgment directing the City ... to cease this practice[.]" (*Id*. at 23).

Rule 57 controls declaratory judgments – not Rule 106(a)(4). Rule 57 authorizes the Court to construe a municipal ordinance and declare rights, status, or relations under it. C.R.C.P. 57(a). The Municipal Code unambiguously allows Planning Board members to submit rezoning applications so long as that member does not participate in the consideration or vote:

> 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.

D.R.M.C. § 12-44.

Plaintiffs admit – as they must – that Bershof did not vote on the measure. (Op. Br. at 22-23). The Municipal Code thus permits his and the Planning Board's actions. This Court must

deny Plaintiffs' request to construe the Municipal Code differently, or declare it to preclude such conduct.

CONCLUSION

For the foregoing reasons, Cedar requests the Court uphold City Council's decision and deny Plaintiffs' request for declaratory judgment. Cedar requests any additional relief this Court deems just and proper.

FOSTER GRAHAM MILSTEIN
& CALISHER, LLP

By: */s/ Chip G. Schoneberger*
Chip G. Schoneberger
Attorneys for Cedar Metropolitan LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of February 2015 a true and correct copy of the foregoing **DEFENDANT CEDAR METROPOLITAN, LLC'S ANSWER BRIEF** was served via ICCES upon the following:

Gregory J. Kerwin
Gibson Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, Colorado 80202
Attorneys for Plaintiffs

Nathan Lucero
Tracy Davis
Denver City Attorney's office
Municipal Operations Section
201 W. Colfax Avenue, Dept. 1207
Denver, Colorado 80202
Attorneys for The City Defendants

/s/ Ann Rutledge
Paralegal

Original signatures on file at the offices of Foster Graham Milstein & Calisher, LLP pursuant to C.R.C.P. 121 §1-26(7).