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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St., Room 256
Denver, CO 80202

Plaintiffs: ARTHUR KEITH WHITELAW, III, JOHN DERUNGS, KATHERINE K. MCCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER.

Defendants: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul López, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman;
THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity);
THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittney Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz, and Chris Smith);
THE CITY AND COUNTY OF DENVER; and
CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant).

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Case Number: 2015cv032427

Ctrm: 269

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR CLAIMS UNDER COLO. R. CIV. P. 106(A)(4) AND FOR DECLARATORY JUDGMENT

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Plaintiffs submit this Reply Brief in response to Defendants' two briefs (referred to below as "City" and "Cedar").[1] Defendants skirt many of Plaintiffs' arguments, misconstrue relevant facts and inaccurately describe the Parcel's context,[2] and ignore the protections the Denver Zoning Code and Colorado case law, including Due Process principles, affords against arbitrary rezoning. The Court must vacate the Rezoning.

I. Response to Defendants' arguments about the standard of review

Defendants cite the deferential "competent evidence" standard of review for an agency's fact determinations. But that standard does not apply to the legal challenges here. Plaintiffs are not raising arguments that turn on the sufficiency of the evidence in the administrative record.

The City and Cedar also mistakenly argue the Court must defer to the City's *ad hoc* interpretations here of the statutory language at issue, citing older Court of Appeals decisions. City at 7; Cedar at 5. Yet Defendants have not identified any longstanding, well-reasoned, principled interpretation by the City of Denver of the statutory provisions at issue, that deserves deference under the principles the Colorado Supreme Court articulates. *See* Op. Br. at 2. The fact that the City currently argues for a particular legal interpretation does not prove that position

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[1] Plaintiffs cannot respond in 15 pages to each argument or case cite in 56 pages of response briefs. Plaintiffs do not concede points that they lack space to address in this Reply Brief.

[2] The City inaccurately describes the Parcel's context as not having single family homes on three sides. City at 4. Crestmoor Park is surrounded by single-family homes including the townhomes that abut the Parcel. Cedar Ave. has single family homes and a day-care center that was allowed as a community (not commercial) use within a single-family neighborhood. The Lex complex features single-family townhomes on Monaco Pkwy. The apartment buildings are a full city block to the east, set back away from Monaco Pkwy. The park maintenance facility consists of a small parcel with a few garage-type buildings and a parking area used for Denver park department service vehicles. The traffic and parking problems from Cedar's proposed new apartments would impact all the single family homes in the blocks surrounding Crestmoor Park—an entire neighborhood.

deserves deference from the Court. Deference may be warranted when an agency takes uniform, consistent positions over many years based on careful explanation of statutory language.

II. Argument

A. The Rezoning did not meet the Denver Zoning Code's mandatory criteria.

1. The Rezoning was not consistent with Adopted Plans for the Parcel.

The requirement that zoning changes be consistent with "adopted plans" has deep roots in zoning law and is codified in the Denver Zoning Code. Yet the City proposes to construe this mandatory legal requirement as meaningless through the City's diluted definition of "consistent" and its vacuous analysis of generic "strategies" in the Comp. Plan and Blueprint Denver, which say nothing specific about the 195 S. Monaco Parcel except to classify it as an "area of stability."

First, Defendants do not even address Plaintiffs' argument that there is no small area plan for the Parcel. As Plaintiffs explain, small area plans are the tool under Chapter 8 of Blueprint Denver that the City is supposed to use to plan for zoning changes, while developing a community consensus for each neighborhood. Op. Br. at 11. CM Susman candidly admitted to residents there is no small area plan for the Crestmoor neighborhood because it is stable and not undergoing change. *Id.* While asking this Court to defer to its legal interpretation of the Zoning Code's "adopted plan" requirement, the City offers no analysis of when zoning changes should be allowed in an area of stability that lacks a small area plan.

The City appears to be arguing that the absence of any specific plan for the Parcel itself constitutes an "adopted plan" that allows any rezoning. But the City's practice, based on Chapter 8 of Blueprint Denver, is not to create small area plans for stable areas where a specific plan is not needed. *See* CPD website describing and listing existing small area plans:

www.denvergov.org/content/denvergov/en/community-planning-and-development/planning-and-design/how-we-plan/small-area-plans.html When adopted plans do not direct specific changes in an area, that is just as important as when plans do direct specific changes. Mere generic citywide "strategies" should not be treated as equal to a small area plan that calls for specific changes.

Second, Defendants' proposed interpretation of the "adopted plan" requirement would construe it as meaningless, providing no effective limitation on zoning changes. *Cf. Young v. Brighton School Dist.*, 325 P.3d 571, 576 (Colo. 2014) ("we read the statutory design as a whole, giving consistent, harmonious, and sensible effect to all of its parts"). The City's construction of the "adopted plan" requirement would allow the City Council to rezone to allow high-density apartment buildings on any Denver residential property in any stable neighborhood if a developer requests the change. The City does not contend that its 2000 "Comp. Plan" or Blueprint Denver provide any specific guidance about this particular Parcel other than Blueprint's map classifies the Parcel as an "area of stability." Yet the City cites the following generic "strategies" that could apply city-wide to any parcel in Denver within a designated area of stability:

- "promoting infill development" "consistent with the character of the surrounding neighborhood" where infrastructure is already in place [Comp. Plan Strategy 2-F, 3-B];
- "accommodate changing demographics and lifestyles" and encourage "a diverse mix of housing types" with a "range of housing types and prices" [Comp. Plan Strategy 1-E, 1-F].
- address incompatible zoning and land use issues, promote compatibility between existing and new development; address edges between address of stability and areas of change, and provide diversity of housing type, size, and cost. [Blueprint "strategies"].

See City at 11-13; *see also* Cedar at 6-10 (comparable arguments based on generic plan "strategies"). According to the City, the Denver Zoning Code's requirement that zoning changes

be consistent with "adopted plans" provides residents with no protection anytime a city planner wants to apply these "strategies" to change their neighborhood to allow a diverse mix of housing types with a range of prices to accommodate changing "lifestyles." Defendants' arguments that evidence exists in the record to support applying these "strategies" to the Parcel, City at 13; Cedar at 7, 9-10, fail to frame the correct question. The correct issue is whether, as a matter of law, the City's interpretation of the "adopted plans" requirement is correct, when city-wide plans and generic "strategies" do not provide any specific guidance for this particular Parcel.

A sensible, plain English interpretation of the Zoning Code's "adopted plan" requirement that does not render it meaningless, is that when the City wants to change the zoning for a particular parcel in an area of stability, it must demonstrate the change is consistent with an adopted small area plan for the area. Generic "strategies" in city-wide plans like the Comp. Plan and Blueprint are not sufficient. If (as here) there is no small area plan because the area is stable, then the City must honor the existing zoning category contained in the legislatively adopted Zoning Code (which was updated only six years ago after a city-wide process for public input).

Third, the City tries to neutralize the "adopted plan" requirement with an unreasonable definition of "consistent" as merely "generally compatible." City at 11. The dictionary definition of "consistent" means "marked by harmony, regularity, or steady continuity: free from variation or contradiction."; "marked by agreement"; and "showing steady conformity to character, profession, belief, or custom." *See* Merriam Webster online dictionary. www.merriam-webster.com/dictionary/consistent The City cites an "Oxford" definition ("compatible or in agreement with something"), while ignoring that source's other definitions: "unchanging in achievement or effect over a period of time" and "not containing any logical

contradictions." www.oxforddictionaries.com/us/definition/american_english/consistent And the City relies on a secondary "Thesaurus" definition from the "Cambridge" dictionary of "having the same principles as something else," while ignoring the primary definitions of: "not varying"; "always happening or behaving in a similar way" and "agreeing with something said or done previously." http://dictionary.cambridge.org/us/dictionary/english/consistent

The Court should reject the City's weak proposed definition. The City argues that planning precedes zoning, and plans provide an outline to guide future development. City at 10. The Court should not let the City skip the small area planning process, as it did here, by failing to create "adopted plans" for each neighborhood that specifically spell out, after achieving a community consensus, any changes proposed for a stable area. Absent such an adopted plan that calls for a zoning change, the existing zoning for a parcel should remain in place. This promotes stability and honors expectations of surrounding property owners who rely on existing zoning.

2. There are no "justifying circumstances."

The Zoning Code also requires that "justifying circumstances" exist for any zoning change; CPD told the City Council this was met by the existence of "changed or changing conditions."[3] Op. Br. 14. The City does not address Plaintiffs' argument that a poorly maintained building just on the property to be rezoned does not establish "changed or changing conditions" that qualify as a "justifying circumstance" for the zoning change. Op. Br. 14-15. Instead, the City misconstrues this mandatory statutory condition to a zoning change as met because the Mt. Gilead Church needed repairs. City at 15; *see also* Cedar at 15-16. This ignores

[3] The "justifying circumstance" in DZC § 12.4.10.8(A)(4) is: "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."

the Code's rationale that a zoning change for "changed" or "changing" circumstances is needed to "recognize the changed **character of the area**." DZC § 12.4.10.8(A)(4) (emph. added). One decayed building does not define the "character of the area." The Court should reject Cedar's argument that the Code's reference to "the land" means changed or changing circumstances can be based on just the parcel seeking rezoning. Cedar at 16. Allowing a zoning change just because one property is in bad condition creates obvious incentives for a property owner seeking a zoning change to let the property decay even if the surrounding neighborhood is thriving.

The Court should also reject Cedar's *post hoc* rationalization that the surrounding area is changing so "it is in the public interest to encourage a redevelopment of the area." Cedar at 16. CPD did not present that rationale for "justifying circumstances" to the City Council. *See* SIRE p. 174 (#801) ("Structure on site has been deteriorating and the property is a reinvestment area within an Area of Stability." "Multi unit residential is typically located along arterial streets").

The Court must vacate the Rezoning because there was no "justifying circumstance."

3. The City also erred in refusing to consider resulting traffic and parking problems as part of whether the Rezoning meets the public health, safety and general welfare.

The Rezoning flunks both criteria of consistency with adopted plans and presence of a justifying circumstance. But to prevent the City from continuing to ignore residents' objections to rezoning based on resulting traffic and parking problems, the Court should also address the criterion that a zoning change must meet the public health, safety and general welfare.

Defendants present inconsistent arguments on adverse traffic and parking impacts. First, the City contends it is not required to consider traffic or parking impacts in a rezoning, arguing this is the job of the Department of Public Works (but not explaining why the City Council need

not consider whether rezoning will create traffic/parking problems). City at 16-17. The Court should reject this position as a classic example of arbitrary agency action because the City refused to base its decision on factors that should be relevant to the City Council's analysis of "the public health, safety and general welfare," DZC § 12.4.10.7(C).

Second, Cedar tries to argue, despite clear statements to the contrary for the Planning Board (Noble) and Council (Brooks), Op. Br. at 17, that the City Council did evaluate the adverse traffic/parking impacts as part of its analysis of the public health, safety and general welfare. Cedar at 13-14. Cedar ignores CM Brooks' statement that "this is not our scope to deal with all the transportation issues and traffic issues in your neighborhood," Transcript at 38:7-9, and contends that CM Brooks "did consider traffic issues," Cedar at 13, merely because Brooks admitted "severe traffic issues" exist and argued this "site will not dramatically increase it." The City's position, as confirmed in its brief here and by CM Brooks' statement, is that the Council should not consider adverse traffic/parking impacts when evaluating a rezoning. The mere fact that traffic and parking problems were discussed extensively during the hearing, *see* Cedar at 14, which CM Brooks admitted (calling "traffic" and "transportation issues" "the major issue I'm walking away with," Transcript at 38:4-5), does not demonstrate the Council gave any weight to adverse traffic and parking impacts when evaluating the mandatory factor of public health, safety and general welfare. Instead, both the Planning Board and Council mistakenly believe they cannot consider those impacts. That proves the Rezoning reflects arbitrary agency action.

B. The Court should reject the City Council's incorrect interpretation of the Charter's Protest Petition procedure.

The City's argument about the Protest Petition procedure, City at 18, misses Plaintiffs' point. Plaintiffs contend city-owned park land should be taken out of the calculation (both the

numerator and denominator) because the City has no procedure for the Parks Department to sign a protest petition for a rezoning that could harm a City park. If the 115,310 SF of park land had been excluded, the Protest Procedure would have applied (82,395/363,255 [478,565-115,310] = 22.7%). *Burns* did not address this scenario, and its holding should be reconsidered in any event by the Court of Appeals and reviewed by the Supreme Court.

The Court should also reject the City's argument that Plaintiffs had to file a separate BOA appeal to challenge CPD's calculation. City at 19. Plaintiffs are challenging the Council's application of the Protest Petition procedure, which was based on CPD's calculation.

Cedar's arguments do not warrant a response separate from Plaintiffs' Opening Brief.

C. The Rezoning constituted unlawful spot zoning.

Defendants contend this Rezoning does not constitute spot zoning by relying on the same flawed arguments founded on the Comp. Plan and Blueprint. City at 19-20; Cedar at 11. There is nothing in those general planning documents that calls for placing a high-density apartment building on the east side of Crestmoor Park. *See supra* Section II.A.1; Op. Br. at 11-14.

The City cannot show this particular zoning change was made with the purpose of furthering a comprehensive zoning plan by relying on generic "strategies" for diverse development that could apply city-wide. The City never adopted any small area plan to guide new development in this area, because none is needed. Instead, allowing this high-density apartment zoning category of S-MU-3, despite the City's reaffirmation of E-SU-DX (single family homes on 6,000 SF lots) just six years ago in the 2010 Zoning Code, reflects an "arbitrary act" that "fails to take into account the need for reasonable stability in zoning regulations." *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961). Here, as in *Clark*, there has not been a

"material change in the character of the neighborhood" that requires rezoning; therefore "[p]roperty owners have the right to rely on existing zoning regulations," i.e., the E-SU-DX designation the City Council confirmed in 2010 after a city-wide legislative rezoning process. There is no evidence in the administrative record of adverse changes to the character of the neighborhood between 2010 and June 8, 2015 (the Rezoning hearing). This new development will be just as detrimental to the edge of Crestmoor Park, or more so, as a placing a new filling station there would be, and will generate as much or more new vehicle traffic.

Cedar's argument that spot zoning is an "antiquated notion," Cedar at 11 n.3, is baseless and unsupported. It shows Cedar sees Plaintiffs have proved the elements of spot zoning.

D. The Court should grant a declaratory judgment that the Planning Board's decision here was tainted by an unlawful conflict of interest.

Defendants have no explanation for how Planning Board members could vote in a neutral way on the zoning application of their own colleague (Bershof). City at 27-28; Cedar at 27. The conflict exists, and undermines the neutrality of the quasi-judicial Board, even though Bershof did not attend the meeting. The City cites *Scott* for a presumption of impartiality, but it did not involve the conflict that exists because of the inherent bias of all Board members to favor approving their own colleague's zoning application, in which the colleague has a personal financial interest. D.R.M.C. § 12-44 cannot validate a corrupt structure that undermines Due Process for quasi-judicial decisionmakers.

E. The City Council violated Due Process including quasi-judicial procedures.

Defendants misrepresent the record and applicable law to defend Denver's current tainted system where City Council members, acting in a quasi-judicial role, engage in undocumented *ex parte* communications with a developer's lobbyists about the merits of rezoning, and collect

campaign contributions and favors (services) from lobbyists that are calculated to influence their votes. No ethical administrative judge would function in this corrupt way. The current broken system only serves the interest of entrenched lobbyists and Council members who treat rezoning as a political process. It flunks Due Process. The Court needs to issue a declaratory judgment directing the City and its attorneys to reform its flawed process for rezoning; otherwise they will continue to defend and rationalize it.

1. Cedar's undisclosed *ex parte* communications require the Court to vacate the City Council's rezoning decision.

Defendants mischaracterize Colorado case law about the effect of undisclosed *ex parte* communications on an administrative decision. The City purports to distinguish detailed summaries of applicable law in the *Colorado Lawyer* article and Lakewood memo as not "binding" on the Denver City Council. City at 21. The City also questions whether Colorado precedents concerning PUC and state quasi-judicial procedures apply to it, and then proposes a narrow interpretation of those cases. City at 22-23.

The City also relies on two other cases: *L.G. Everist, Inc. v. Water Quality Control Comm'n*, 714 P.2d 1349 (Colo. App. 1986) and *Johnson v. City Council*, 595 P.2d 701 (Colo. App. 1979). City at 21-22. *Everist* involved a board member who mentioned "possible complaints by fishermen on the Blue River who were not witnesses" at the administrative hearing. The court recognized that "parties to an administrative hearing should have the opportunity to be confronted with all facts that influence the disposition of a case," but did not find "substantial prejudice" on those facts. 714 P.2d at 1352. Those harmless contacts do not resemble the pattern of undocumented contacts by Cedar's lobbyist that occurred here. *Johnson* involved a hearing on termination of the Glendale police chief that the Court of Appeals held

"need not comport with all aspects of due process." *Id.* at 703. In the context of those "relaxed standards" the court excused the fact that city council members had learned some information about the chief's misconduct at an "informal hearing" the terminated employee had "insisted on" before the "formal hearing." *Id.* at 703-04. Those circumstances in *Johnson* do not resemble what happened here, and Denver's quasi-judicial rezoning is subject to all aspects of due process.

Cedar exaggerates the Colorado Supreme Court's decision in *Colorado Energy Advocacy Office v. Public Service Co*., 704 P.2d 298, 302-04 (Colo. 1985), as holding that *ex parte* communications "cannot undermine a quasi-judicial decision" unless there is proof the decisionmaker actually relied on the communication. Cedar at 22. That decision does not state that principle. In that case, the *ex parte* communications came to light because the PUC quoted potential costs and amounts "that could not have been derived from the pleadings or hearing record." *Id.* at 302. On those facts, the Court agreed that the PUC correctly remanded for a new hearing based solely on evidence in the record. The Court's statement that that "an agency may not base its decision on *ex parte* information of which the parties are not given notice and an opportunity to cross-examine or rebut," *id.* at 303, represented an explanation why *ex parte* communications are improper. The Court was not validating *ex parte* communications as long as the decisionmakers do not cite them in their decision.

Cedar inaccurately contends that two other cases involved decisionmakers who "relied" on the *ex parte* communications. Cedar at 24. First, Cedar cites *Zuviceh v. Industrial Comm.*, 544 P.2d 641, 642-43 (Colo. App. 1975), which required vacating an administrative decision because of an undocumented phone call with the decisionmaker. In *Zuviceh*, the court was "unable to determine" the basis for the Commission's decision, and left to speculate whether the

phone call "may have had some effect." *Id.* at 642-43 & n. 2. Cedar also cites *Board of County Comm'rs v. PUC*, 157 P.3d 1083, 1094 (Colo. 2007), which stated: "whether the factual information the staff obtained is of great or little importance to the Commissioners, it belongs in the record . . . ."). The improper action in that case happened "when the staff inject[ed] new factual information into the proceedings" through a memo read at the Commissioners' deliberations. *Id.* at 1086, 1094. The PUC contended it "did not consider" the New Zealand information contained in the memo. *Id.* at 1094. Contrary to Cedar's summary, the Court's ruling did not depend on proof the decisionmakers relied on the evidence outside the record.

Courts should not require proof that a quasi-judicial decisionmaker actually relied on *ex parte* communications before vacating the tainted decision. Due Process is violated when undisclosed communications occur. And when, as here, some communications occur by phone it is not possible to show the substance of what information was communicated or possible reliance. Yet the harm to the fairness of the quasi-judicial proceeding is just as great.

Defendants also inaccurately describe the *ex parte* communications that occurred here. The City dismisses the evidence of extensive substantive *ex parte* communications between Cedar's lobbyist Maley and CM Susman as "innuendo," and presents an inaccurate summary of those communications. City at 20, 24. The City's summary ignores the evidence showing Susman ran this rezoning process for the Council because it involved a property in her Council district, and engaged in undisclosed telephone calls and private Gmail communications where Maley fed factual information to her, and she played multiple conflicting roles that undermined her ability to serve as a neutral quasi-judge. *See* UF#7. The City cannot avoid this evidence by

ignoring it. And the City's argument that the evidence must show she "prejudged" the decision or actually relied on information from Maley reflects an inaccurate view of Due Process rules.

Cedar's inaccurate description of Maley's communications as non-substantive or containing "information already available to Plaintiffs" is equally disingenuous. Cedar at 18-20. Cedar's secret communications with Susman over the five months preceding the Council hearing represent a mockery of quasi-judicial standards. In addition, Plaintiffs have no way to know what Maley and Susman discussed in their private phone calls, and no way to discover what Susman discussed with her Council colleagues as a result. The Court cannot conclude on this record that the City Council's rezoning decision here was unaffected by Cedar's *ex parte* communications. The remedy for this Due Process violation is to vacate the Council decision.

The City and Cedar also try to save the Rezoning by arguing that there were other *ex parte* communications and everyone had an opportunity to speak at the public hearing. City at 24-25; Cedar at 23-24. The fact that the City ran a free-for-all process, where quasi-judicial decisionmakers functioned like politicians not judges, does not excuse the Due Process violation.

2. The Transcript shows the City Council members based their quasi-judicial votes on irrelevant political factors.

The City cannot dispute the evidence in UF#8 showing the Council members who explained their decisions relied on political factors irrelevant to whether the zoning change was permissible under DZC §§ 12.4.10.7 & 8. So instead the City summarily dismisses those Council explanations as "tiny parts" of the discussion. City at 25. The hearing transcript disproves the City's unsupported conclusion. The City cannot show all the Council members correctly analyzed relevant factors. Quasi-judicial decisionmakers need to base their decisions on relevant factors and the Council members did not do so here.

3. Cedar's lobbyists' monetary and non-monetary contributions tainted the quasi-judicial process here.

The City and Cedar try to block this Court from evaluating the taint created by having Cedar's lobbyists make contributions of money and services to some of the Council members, by arguing the evidence of the contributions is not part of the administrative record and the Court cannot take judicial notice of it. City at 8-9; Cedar at 25. Evidence of such contributions is not normally part of the record of a hearing on a zoning decision, but clearly can be relevant to whether the quasi-judicial decisonmakers were neutral and unbiased under the standard in *City of Manassa*. The evidence Plaintiffs ask the Court to take judicial notice of represents a summary of data contained in the City's own online official records of campaign contributions published by the Denver Elections Division. *See* UF#9; Appendix 3 ¶ 3. The Denver Election Division's data and reports about Council campaign contributions are admissible public records under C.R.E. 803(8). The City does not contend its own official records are inaccurate. Appendix 3 lists the source on the City's website for each of those records. C.R.E. 1006 allows the Court to consider a summary of admissible evidence. And C.R.E. 201(b) & (d) allow the Court, upon request, to take judicial notice of such facts that are "not subject to reasonable dispute." *See Doyle v. People*, 343 P.3d 961, 964-66 (Colo. 2015) (discussing proper scope of judicial notice of public records such as court records).

Based on this admissible evidence, the Court can conclude under the *City of Manassa* standard that Denver City Council members have a conflict of interest acting as quasi-judges on a rezoning when they receive substantial contributions from the developers' lobbyists. The solution to this conflict is not, as the City suggests, to retroactively disallow the votes of the

conflicted members. The Court has no way to measure how statements from those conflicted members affected other members' votes in the Council's deliberations at the public hearing.

The Court also should reject the City's argument that "judicial recusal standards" do not apply to Council members, City at 26, and Cedar's reliance on a California case from 36 years ago, which does not reflect current standards for quasi-judicial conflicts, Cedar at 25-26. The Colorado Supreme Court's decision in *City of Manassa* involved potential conflicts for neutral officers involved in an administrative hearing and endorsed the *Caperton* standard for when conflicts exist. Denver cannot justify its current system where Council members receive substantial contributions from the lobbyists who seek to persuade those members, in secret communications outside public hearings, to approve rezoning decisions. These conflicts undermine public confidence in the quasi-judicial rezoning process. This case, with its evidence of the numerous secret communications between Maley and Susman, illustrates how the quasi-judicial process can be undermined when Council members provide private access to lobbyists.

III. Conclusion.

The Court should vacate the Rezoning and also grant the requested declaratory judgment.

Dated: March 3, 2016.

Respectfully submitted,

/s/ Gregory J. Kerwin

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I caused a copy of the foregoing PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR CLAIMS UNDER COLO. R. CIV. P. 106(A)(4) AND FOR DECLARATORY JUDGMENT was served on the parties listed below through the ICCES system:

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