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SUPREME COURT, STATE OF COLORADO
Court address: 2 East 17th Ave.
Denver, CO 80203

Denver District Court, Case No. 2015CV32427
District Judge: Shelley I. Gilman

Court of Appeals Case No. 2016CA920 (pending)

Petitioners-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.

Respondents-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).

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Case Number: 2016SC000603

CEDAR METROPOLITAN LLC'S RESPONSE TO C.A.R. 50 PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with all type, font, and margin requirements, and contains **1,391** words.

Duly signed original on file at the offices of
Foster Graham Milstein & Calisher, LLP

/s/ Chip G. Schoneberger

INTRODUCTION

Cedar Metropolitan Homes, LLC ("Cedar") responds to Petitioners' C.A.R. 50 petition for writ of certiorari primarily to advise the Court of several material misstatements and omissions in the petition. Apparently recognizing this case presents no basis for pre-emptive certiorari under C.A.R. 50(a), Petitioners attempt to increase their chance of obtaining review by omitting key facts and controlling authority.

This case presents no novel legal issue at all, much less state question of "such imperative public importance" to justify deviation from the normal appellate process. It is a garden-variety C.R.C.P. 106(a)(4) action for judicial review of the Denver City Council's decision to approve the rezoning of a parcel of land in the Crestmoor neighborhood where Petitioners live, under the criteria established in the Denver Municipal Code. Petitioners simply dislike the re-zoning decision, which came after a lengthy public hearing and is well-supported by the facts of record. Nothing about this case warrants immediate certiorari to this Court under C.A.R. 50.

ARGUMENT

I. City Council and the District Court Applied Well-Settled Legal Principles to the Facts of Record: Despite Petitioners' Disagreement with the Outcome, No Novel Legal Issue of Statewide or Public Importance Exists

Petitioners recast this case as presenting novel issues of first impression on the "integrity" of the rezoning process and thus seek certiorari to this Court for "guidance" and to "confirm" certain aspects of that process. (Pet. at 4, 6). Specifically, Petitioners ask the Court to confirm that quasi-judicial rezoning decisions must: (1) comply with due process; (2) follow the applicable zoning ordinances; and (3) honor common law principles. (*Id*. at 6). These are well-settled concepts, not novel ones. Petitioners omit the authority and facts of record establishing that Denver City Council (and the district court) indeed decided the case pursuant to those principles, notwithstanding Petitioners' disagreement with the outcome.

First, Petitioners fail to advise this Court of key facts regarding the alleged "*ex parte* communications" with Councilwoman Mary Beth Susman – the only Councilmember with whom the alleged communications took place. Namely, Petitioners omit that Councilwoman Susman voted *against* the rezoning. (*See* Pet. Appx. A at 13). Moreover, the communications contained no substantive factual

information about the rezoning and no record evidence suggests other City Council members relied on (or even saw) the alleged communications.

This Court has already clarified that *ex parte* communications cannot invalidate an administrative body's quasi-judicial decision absent both the decision-maker's actual reliance on the communication, and substantial 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"); *Mobile Pre-Mix Transit, Inc. v. Pub. Util. Com'n*, 618 P.2d 663, 667 (Colo. 1980) ("the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result"). *See also L.G. Everist, Inc. v. Water Quality Control Com'n of Colo. Dept. of Health*, 714 P.2d 1349, 1352 (Colo. App. 1986) ("[w]hile it is true that parties to an administrative hearing should have the opportunity to be confronted with all facts that influence the disposition of a case, there must be substantial prejudice shown to invalidate the agency action").

The district court correctly applied this principle in ruling that Petitioners failed to meet it:

> [Petitioners] have failed to establish that they were prejudiced by the emails and the other communications, that they were denied an opportunity to rebut information contained within them, or that any of the Council

> members relied on them. ... The emails ... are either non-substantive or contain information already available to [Petitioners]. ... Indeed, any information in those emails had been sent to the neighbors who opposed the rezoning or had otherwise appeared in the public record. Significantly, none of these alleged *ex parte* communications presented additional evidence of factual information subject to cross-examination or rebuttal.

(Pet. Appx. A at 13).

Second, Petitioners assert that Mr. Bershof, who signed the rezoning application, also "was a current member of the Denver Planning Board, whose approval was a necessary step in the rezoning process[.]" (Pet. at 9). Petitioners sought to use C.R.C.P. 106(a)(4)'s limited judicial review to ask the district court to determine whether this somehow "tainted" the rezoning process. (Compl. at 34, ¶ 90). Yet C.R.C.P. 106(a)(4) limits judicial review to two grounds: whether City Council abused its discretion or exceeded its jurisdiction in approving the rezoning. C.R.C.P. 106(a)(4). Neither Mr. Bershof's signature on the rezoning application nor his position on the Planning Board impacts that analysis.

Moreover, in their petition to this Court, Petitioners omit that Mr. Bershof *abstained* from voting as a board member on the rezoning measure. (Pet. Appx. A at 12). Petitioners further omit that the Denver Municipal Code expressly permits Planning Board members (like Mr. Bershof) to submit a rezoning application as

long as that member does not participate in the consideration or Planning Board vote on the measure:

> 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.

(Denver Municipal Code, § 12-44; Pet. Appx. A at 12).[1] Therefore, the district court correctly ruled that "Mr. Bershof complied with the obligations of this provision." (Pet. Appx. A at 12).

Third, Petitioners also claim insufficient judicial guidance exists on whether City Council must adhere to "mandatory" zoning ordinances requiring consistency with adopted plans when considering a zone map amendment. (Pet. at 14-16). Common sense and the express provisions in the Denver Zoning Code both control and answer this question. "Mandatory requirements" obviously mandate compliance. And Denver Zoning Code § 12.4.10.7 establishes the mandatory criteria for a zone map amendment:

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[1] Petitioners violate C.A.R. 53(a)(6)(C) by failing to append the text of this, and other, pertinent ordinances and statutes. (*See* Pet. at 14-15). Petitioners also violate C.A.R. 53(e) by appending a separate brief to their Petition and directing the Court to arguments therein. (Pet. at 9; Pet. Appx. B).

> **12.4.10.7 General Review Criteria Applicable to All Zone Map Amendments**
>
> The City Council may approve an official map amendment ***if the proposed rezoning complies*** with all of the following criteria:
>
> A. Consistency with Adopted Plans
> The proposed official map amendment is consistent with the City's adopted plans ...

(*See* Appx. to Cedar's Ans. Br. in the District Court; *see also* https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/Zoning/DZC/Denver_Zoning_Code_Article12_Administration.pdf) (emphasis added)).

Here, Petitioners do not really seek judicial "guidance" on a purportedly novel issue of whether City Council must follow mandatory zoning criteria; they only dispute the City Council's factual determination under it. Indeed, City Council found the rezoning meets the mandatory criteria and the district court affirmed that decision as supported by competent evidence in the record. (Pet. Appx. A at 7). *See Sellon v. City of Manitou Springs*, 745 P.2d 229, 235 (Colo. 1987) (in a C.R.C.P. 106(a)(4) action, a reviewing court must uphold the decision of the governmental body "unless there is no competent evidence in the record to support it").

II. Petitioners' Other Arguments Equally Present no Basis for Certiorari Review

Petitioners also seek certiorari for this Court to determine "when, if ever" City Council members who receive campaign contributions may serve as neutral quasi-judicial decision-makers. (Pet. at 12). Petitioners presented no evidence on this issue to City Council, and the district court rejected their attempt to submit such extrinsic evidence in the C.R.C.P. 106(a)(4) action, which is limited to the administrative record. *See IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008) ("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).

Finally, Petitioners' argument regarding construction on the rezoned lot under valid permits is not a basis for certiorari under C.A.R. 50. As the rule expressly states, the bases for such an extraordinary procedural vehicle are limited to consideration of the legal issues presented – not Petitioners' mere desire to fast track review to the State's highest court to avoid the impediments to obtaining a stay under the rules of procedure.

Respectfully submitted this 15th day of August, 2016.

FOSTER GRAHAM MILSTEIN
& CALISHER, LLP

By: */s/ Chip G. Schoneberger*
Chip G. Schoneberger
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of August, 2016, a true and correct copy of the foregoing **CEDAR METROPOLITAN LLC'S RESPONSE TO C.A.R. 50 PETITION FOR WRIT OF CERTIORARI** was served via ICCES upon the following:

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