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SUPREME COURT, STATE OF COLORADO
2 East Fourteenth Ave.
Denver, Colorado 80203

Colorado Court of Appeals No. 2016CA920 (pending)

District Court, City and County of Denver
Case No. 2015CV32427
Judge Shelley I. Gilman

Petitioners:
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:
THE DENVER CITY COUNCIL (including the individual Council members named in Plaintiffs' Complaint); THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan); THE DENVER PLANNING BOARD; THE CITY AND COUNTY OF DENVER; AND CEDER METROPOLITAN LLC

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Case Number: 2016SC603

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CITY DEFENDANTS' OPPOSITION TO PETITIONERS' PETITION UNDER C.A.R. 50 FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS BEFORE JUDGMENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 28, C.A.R. 32 and C.A.R. 53(c), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 53(c).

- ☑ It contains 3,330 words (opposition brief does not exceed 3,800 words). Counsel relied on Microsoft Word for the word count and included the headings, footnotes and any quotations

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

By: /s/ Tracy A. Davis, #35058
Attorney for City Defendants

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I. ISSUES PRESENTED

In Issue 1, Petitioners contend that the Denver City Council ("including the individual Council members named in Plaintiffs' Complaint"), the Manager of Community Planning and Development (Brad Buchanan), the Denver Planning Board, and the City and County of Denver ("City Defendants") violated Petitioners' due process rights and "mandatory procedures" in rezoning real property located at 195 S. Monaco Blvd. Pkwy. (the "Parcel") by (a) allowing allegedly undisclosed *ex parte* communications between a City Councilwoman and the developer's lobbyist; (b) allowing a Planning Board member to serve as the developer's rezoning applicant; (c) allowing City Council members to rely on "irrelevant political factors" and "ignore the specific mandatory criteria" in voting on the rezoning; (d) "blocking" application of the protest petition procedure in Denver Charter, §3.2.9(E) by including Denver-owned park land in the 200-foot perimeter calculation; and (e) allowing to vote City Council members who had alleged conflicts of interest created by campaign contributions.

In Issue 2, Petitioners contend that Denver failed to protect the rights of property owners by improperly rezoning the Parcel when it (a) was not directed by the adopted plans; (b) was the result of changed conditions allegedly caused by the Parcel's developer; and (c) does not take into account harm to surrounding residents

from traffic and parking issues because Denver contends the City Council should not consider these issues.

In Issue 3, Petitioners contend the rezoning of the Parcel was "spot zoning."

II. STATEMENT OF THE CASE AND FACTS

In 2015, the Denver City Council rezoned the Parcel from E-SU-DX, which permitted churches and single family homes, to S-MU-3, which allows uses including, but not limited to, residential apartment buildings up to three stories tall. Petition, Appx A, Trial Court's Order ("Order"), 2. Petitioners objected to the rezoning and sued to overturn it on, essentially, all of the bases now identified as Issues in their Petition. Petitioners asked the Trial Court, and now ask this Court, to change the law so that Petitioners can prevail because, as the Trial Court found, evidence in the record supported the rezoning and the City Defendants did not act contrary to law. The Petition is replete with mischaracterizations and misstatements of fact but, for the purposes of this Objection, we will focus on the Petition's legal arguments.

Respondent Cedar Metropolitan LLC ("Cedar") owns the Parcel, which, at the time of the purchase, contained a vacant church. *Id.* at 2. The Parcel is bounded by:

> East – South Monaco Parkway and multi-family apartments across the street;
> South –one single family home and a day care facility;
> North – a City-owned Parks maintenance facility and portions of Crestmoor Park; and
> West – rowhouses and portions of Crestmoor Park.

See Order at 2. The Crestmoor Park neighborhood is to the west and south of Crestmoor Park and is zoned single-family. *Id.*

Denver is a home rule municipality. Colorado Const. Art. XX. Rezoning is governed by the Denver Charter, §3.2.9, and the Denver Zoning Code ("DZC"), Art. 12. (Cited portions of the Denver Charter are attached as Appx. A; cited portions of the DZC are attached as Appx. B.) The DZC regulates what may be built on a given zone lot, including the size, location, and types of buildings and uses. It also contains general design standards. *See* DZC at Art. 10, Introduction, ¶A.

To change the zoning of any lot (a "map amendment"), the Planning Board must hold a public hearing and recommend to the City Council whether to approve, approve with conditions, or deny the proposed rezoning. DZC at §12.4.10.4. Then, the City Council must approve the map amendment following another public hearing. *Id.* at §12.4.10.1. Zoning may be changed because of changed conditions in an area or the City, to implement an adopted plan, or to promote the public health, safety or general welfare. *Id.* at §12.4.10.1. The City Council must consider the recommendations of the Planning Board and the Manager of Community Planning and Development, any other comments received, and the review criteria." *Id.* at §§12.4.10.4.G.2, 12.4.10.7-8. Among other things, a map amendment must be consistent with the City's adopted plans or the rezoning must provide land for a need

that was not anticipated when the plan was adopted. *Id.* at §12.4.10.7.A. The City Council adopted Comprehensive Plan 2000 ("Comp. Plan 2000") and a supplement called Blueprint Denver that apply to the Parcel. Order at 4-6. *See* Denver Revised Municipal Code ("DRMC") §12-61 (cited portions of the DRMC are attached as Appx. C). The City Council's decision is a final action reviewable under C.R.C.P. 106(a)(4). DZC at §§12.2.1.2, 12.4.10.4.G, 12.4.10.10.

In 2014, Cedar applied to rezone the Parcel to C-MX-5, proposing to construct a four-story apartment building. The proposed rezoning was very contentious in the Crestmoor Park area, with community members, Cedar, and Cedar's representatives contacting the City, the City Council member (Mary Beth Susman) in whose district the Parcel is located, and other council members to advocate both for and against the proposed rezoning. *See* Order at 3, 13-14, n.14. After negotiations with neighborhood residents, Cedar revised its application to C-MX-3, proposing a three-story apartment building. *Id.* at 2.

The Planning Board considered the proposed rezoning and recommended approval to the City Council. Order at ¶5. Mr. Bershof, one of Cedar's architects, is a member of the Planning Board. In compliance with DRMC §12-44, he did not participate in the consideration or vote on this matter. *Id.* at 12.

After a public hearing that lasted over eight hours, the City Council voted 8

to 4 to rezone the Parcel. *Id.* at ¶10. Some members, but not all, made statements during deliberations addressing the public and providing their thoughts. *See id.* at 8-9. Denver does not have a requirement that City Council members find facts and make conclusions of law before voting. Rather, during deliberations, Council members may ask questions, address each other, or address the public.

After the rezoning, Petitioners filed this action pursuant to C.R.C.P. 106(a)(4) challenging the rezoning on many of the same grounds identified in their Issues here. The Trial Court reviewed the record and the parties' briefs, and held a lengthy oral argument. The Trial Court upheld the rezoning, finding there was evidence in the record to support it and that it was not contrary to law.

III. ARGUMENT IN OPPOSITION TO THE PETITION

Petitioners summarily argue that this case presents precedent-setting issues of state-wide importance on which this Court has not ruled previously, but it involves a quintessentially local issue – zoning – in a home rule municipality and, primarily, interpretation of Denver's ordinances and procedures. *See* Petition at 4. Petitioners have not shown that this Court should grant certiorari pursuant to C.A.R. 50.[1]

[1] Petitioners do not correlate their Issues Presented for Review to the argument in the Reasons Why This Petition Should Be Granted section. *See* Petition at 1-3, 10-18. We will address the issues as raised in the argument.

A. Petitioners' arguments are conclusory.

Petitioners argue without analysis and with limited citation that the Court should take this case because the Court must "clarify the details of how quasi-judicial procedures and Due Process principles" apply in Colorado. Petition at 4-5 and generally. Petitioners do not explain how or why any of the issues raised for this appeal were incorrectly decided by the Trial Court or how the specific issues in this case meet C.A.R. 50(a). Petitioners' conclusory arguments do not show that the Court should wade into these issues before the Court of Appeals has the chance to review them, or even clarify the issues that should be addressed on appeal. *See* C.A.R. 50(a); *also Maudlin v. Lowery*, 255 P.2d 976 (Colo. 1953).

B. Petitioners failed to show that this case involves a matter of substance not previously decided by this Court.

1. Request for Detailed Procedures: While this Court and the Court of Appeals have set standards for quasi-judicial proceedings, Petitioners now ask this Court to "explain whether particular procedures" are required for a quasi-judicial rezoning. Petitioners identified two specific areas: whether City Council members must "explain their decision and base it solely on relevant statutory criteria and record evidence received at the administrative hearing" and whether a current Planning Board member also can be an applicant's representative. Petition at 11-12.

Petitioners argued in the Trial Court that Council members voted based on "irrelevant personal preferences and political factors," relying on statements made by members during deliberations. *See* Petition at 12; Order at 14. Petitioners cited no law, nor are the City Defendants aware of any, that require City Council members acting in a quasi-judicial capacity to speak at all before voting, let alone to each find facts and make conclusions of law. Petitioners apparently want this Court to require such findings by individual members and, it seems, to prohibit the Council members from asking questions or addressing issues raised at the hearing during their deliberations. This would be a substantial change for the many municipal and county bodies that make quasi-judicial decisions with no showing that this is a significant issue or generates litigation around the State. Further, this is not required for review of the decision under C.R.C.P. 106(a)(4)(I), which looks at the record before the decision-maker, though Council members' statements are part of the record.

Petitioners also ask the Court to "address" whether a Planning Board member can serve as a rezoning applicant. Petition at 12. Colorado courts already determined that "a quasi-judicial proceeding violates due process only if th[e] presumption of integrity and honesty is overcome by a showing that there is a conflict of interest on the part of a participating decision-maker." *Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo.App. 1983); *see Mountain States Tel. and Tel. Co. v. Public Utilities*

Com'n of State of Colo., 763 P.2d 1010, 1028 (Colo. 1988). In conformance with this law, DRMC §12-44 requires a Planning Board member who has a financial interest in a measure to not participate in its consideration or to vote on it. The Trial Court found Mr. Bershof complied with *Scott* and DRMC § 12-44.[2] Order at 12. The law is settled. Petitioners have not shown that further explication is necessary.

2. Campaign donations to Council members: Petitioners ask the Court to import judicial conflict standards from *City of Manassa v. Ruff*, 235 P.3d 1051 (Colo.2010) and *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) to quasi-judicial decision-makers. Petition at 12-13. Petitioners do not explain why such a wholesale change in the law is necessary, particularly given state and local campaign finance laws and the impact on counties and municipalities that assign final rezoning decisions to elected officials. *Scott*, 672 P.2d 225, and similar case law limits when a quasi-judicial decision-maker can participate based on financial conflicts and the State legislature and home rule municipalities have made policy decisions that campaign contributions are treated differently. In the absence of any showing that requires overruling this regime, the Court should decline to accept certiorari.

3. Ex parte communications. Petitioners next ask this Court to opine

[2] The Trial Court did not state in the Order but the record showed that Mr. Bershof did not even attend the Planning Board's hearing on Cedar's application.

"when, if at all," City Council members may have any *ex parte* communications with proponents of a rezoning. Petition at 13. Petitioners have not defined "*ex parte*" since there is no formal opposing party to a rezoning applicant but in the trial court they argued that Cedar should not have been allowed to contact City Council members, even when opponents were permitted to do so. This is a judicial concept that does not neatly fit the quasi-judicial decision-making process, particularly when the decision-makers are elected officials and the process is a public one.

The Trial Court correctly found that not all *ex parte* communications in a quasi-judicial proceeding categorically violate due process, citing long-settled law that a party "should have the opportunity to be confronted with all facts that influence the disposition of a case[.]" Order at 12-13, *quoting L.G. Everist, Inc. v. Water Quality Control Com'n of Colorado*, 714 P.2d 1349, 1352 (Colo.App. 1986). The Court of Appeals previously held that the "mere fact that a Councilmember has learned facts or expressed an opinion [outside the hearing] is not sufficient in itself to demonstrate that a hearing is unfair." *Johnson v. City Council for City of Glendale*, 595 P.2d 701, 703-4 (Colo.App. 1979).

The facts of this case do not support revisiting this law nor do Petitioners provide any legal argument to support it. Indeed, the Trial Court found that none of the alleged "*ex parte* communications" were improper or contained information not

known to "opponents" of the rezoning such that they could not be subject to "cross-examination or rebuttal" at the hearing. Order at 12-13. Further, as the Trial Court demonstrated here, the case law is sufficient to set a standard that can be applied to the facts of the case by trial courts. Thus, certiorari is not warranted here.

4. Protest Petition Procedure and *Burns*. Petitioners argue that this Court should revisit the Court of Appeals' decision in *Burns v. Denver City Council*, 759 P.2d 748 (Colo.App. 1988), *cert. den.* (1988), which construed Denver's protest petition procedure because it is "nearly 30 years" old. Petition at 14. Under Denver's Charter at §3.2.9(E), opponents of a proposed rezoning can obtain the signatures of 20% or more of the land area within 200 feet of the perimeter of the area proposed for rezoning and thereby require a vote of ten members of the City Council in favor of the change rather than the usually-required majority vote. In *Burns*, the Court of Appeals upheld Denver's inclusion of City-owned streets in the calculation of 200-foot perimeter area. Charter §3.2.9(E) is the same as the Charter §B1.17 applied in *Burns*. In calculating the land area here, Denver included all City-owned land, including the portion of Crestmoor Park within the 200-foot perimeter. The Trial Court followed *Burns* and concluded that the City Defendants did not err. Order at 10.

Petitioners provided no basis for this Court to overrule *Burns*; it provides clear and long-standing precedent that the City and protest signature gatherers have followed for many years. *See Ingold v. AIMCO/Buffs, L.L.C. Apartments*, 159 P.3d 116, 125 (Colo. 2007) (discussing reasons to overrule prior decisions). In the absence of a reason to revisit *Burns* that is more than, simply, because Petitioners do not like the outcome, this Court should not revisit it.

5. Deviation from adopted plans. Petitioners' next argument answers its own question, and no action is required by this Court. Petitioners argue that this Court must decide whether "it is proper for local officials to allow rezoning that deviates from or ignores adopted plans." Petition at 14, 16. Pursuant to Denver's home rule authority, the DZC governs and C.R.S. § 31-23-303(1) does not apply. DZC §12.4.10.7.A requires that rezonings be "consistent with the City's adopted plans." *See* Petition at 15. Thus, this Court does not need to hold that a rezoning must be consistent with the Denver Zoning Code (or any other municipality's code) because that is already what the law says.

6. Spot Zoning. Petitioners argue that the Court should clarify spot zoning as explained in *Clark v. City of Boulder*, 362 P.2d 160 (Colo. 1961), because "it has not explained spot zoning concepts since" that case was decided. Petition at 16-17. Petitioners cite no basis for revisiting *Clark*. *See Ingold*, 159 P.3d at 125. In 1976,

this Court reaffirmed that *Clark* "states the appropriate standard for determining whether a particular action constitutes spot zoning." *King's Mill Homeowners Ass'n, Inc. v. City of Westminster*, 557 P.2d 1186 (Colo. 1976). Further the Trial Court concluded that the rezoning was consistent with the City's Adopted Plans and was based on evidence of changed conditions, such that "revisiting" or reaffirming *Clark* would not change the outcome unless this Court formulated a new test for spot zoning. *See* Petition at 17; Order at 11. Thus, Petitioners have not shown a basis for this Court to grant certiorari on this issue.

C. Petitioners failed to show that they are asking this Court to overrule one of its previous opinions.

Petitioners do not ask this Court to overrule any of its previous decisions, though effectively they ask the Court to overrule the Court of Appeals' decision in *Burns*. *See* C.A.R. 50(a)(1). As discussed above, Petitioners have not shown that C.A.R. 50(a)(1) requires certiorari on this basis either, nor is there a reason for this Court to overrule it. *See Ingold*, 159 P.3d at 125.

With regard to *Clark v City of Boulder*, 361 P.2d 160 (Colo. 1961), Petitioners assert that the Court should somehow "explain[] spot zoning" as described in *Clark*. Petition at 17. However, as discussed above, it appears they really want the Court to overrule the Trial Court's application of *Clark* to the facts of this case. *Id.* As a result,

Petitioners also have not shown that there is a basis for this Court to consider overruling *Clark*. *See Ingold*, 159 P.3d at 125.

D. Petitioners failed to show that the Court of Appeals is being asked to decide an important Colorado question that this Court should instead decide.

Petitioners attempt to frame the issues here as ones of state-wide importance by asking the Court to make or clarify law related to quasi-judicial decision-making that would apply throughout Colorado. In general, zoning is a matter of local and municipal concern. *See City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1247 (Colo. 2000). Denver adopted its own zoning code, which is subject to constitutional limitations and Denver's charter and ordinances. *Id., citing Zavala v. City and County of Denver*, 759 P.2d 664, 665-66 (Colo. 1988). *Burns*, 759 P.2d 748, applies only to Denver's protest petition procedure. Petitioners cite State law requiring that cities and counties prepare comprehensive plans, but this law does not apply to Denver, which has separate requirements. *See* DRMC at §12-61(a); DZC at §§12.4.10.4.G.2 (City Council must consider recommendations, comments and review criteria in deciding rezoning), 12.4.10.7 (among others, rezoning must be consistent with adopted plans), 12.4.10.8 (additional review criteria). *See* Petition at 15. Petitioners do not identify any state-wide issues or confusion in the law related to quasi-judicial rezonings. Thus, Petitioners have not raised any important state

questions, which would allow them to show that this Court should exercise jurisdiction pursuant to C.A.R. 50(a)(2).

E. Petitioners have not shown that this case is of such imperative public importance that deviating from the normal procedure is justified.

The only imperative here appears to be a private one – that Cedar commenced construction and Petitioners want it stopped. *See* Petition at 17-18. However, Petitioners can seek a stay from the Trial Court pursuant to C.R.C.P. 62 or from the Court of Appeals under C.A.R. 8. Petitioners have cited no law allowing Petitioners to obtain review pursuant to C.A.R. 50 instead of following the normal procedures for requesting a stay. The Court should not confuse this private imperative with one of such public importance meriting a writ of certiorari pursuant to C.A.R. 50(a).

IV. CONCLUSION

For the foregoing reasons, the City Defendants respectfully request that the Court deny the Petition Under C.A.R. 50 for a Writ of Certiorari to the Court of Appeals Before Judgment.

Respectfully submitted this 15th day of August 2016.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 15, 2016, a true and correct copy of this CITY DEFENDANTS' OPPOSITION TO petitioners' petition under C.A.R. 50 for a writ of certiorari to the court of appeals before judgment was filed with the Clerk of Court via ICCES, which will serve a true and correct copy to the following:

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