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COURT OF APPEALS, STATE OF COLORADO

2 East 14th Avenue, Denver, Colorado 80203

Appeal from Denver District Court:
Case No. 2015-cv-032427, Courtroom 269
Trial judge: Hon. Shelley A. Gilman

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

Defendants/Appellees: THE DENVER CITY COUNCIL, et al., THE CITY AND COUNTY OF DENVER; and

CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant)

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OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Certificate of Compliance

I hereby certify that this brief complies with all 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:

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s/ Gregory J. Kerwin
Gregory J. Kerwin

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ISSUES PRESENTED FOR REVIEW

In the court below, Plaintiffs challenged the City of Denver's quasi-judicial rezoning of a 2.3 acre parcel previously zoned for single-family homes. The issues presented are:

1. Whether the City violated Due Process and mandatory procedures for a quasi-judicial rezoning by:

   a. allowing undisclosed *ex parte* communications about the merits of the rezoning between the developer's lobbyist and the City Councilwoman running the Council process;

   b. allowing a current Denver Planning Board member to serve as the developer's zoning change applicant in a process that required Planning Board approval before City Council approval;

   c. allowing City Council members who deliberated and voted on the rezoning to rely on irrelevant political factors as a basis for their quasi-judicial vote, rather than base their decisions on the specific mandatory criteria in the Denver Zoning Code;

   d. blocking application of the Denver Charter's requirement of a super-majority City Council vote for a rezoning when residents owning 20%

of the area within a 200-foot perimeter sign a protest petition, by refusing to exclude city-owned park land from the City's calculation;

e. allowing City Council members functioning as quasi-judicial decisionmakers to vote on the rezoning despite the conflict of interest created by their receipt of large cash and in-kind campaign contributions from the developer's lobbyists?

2. Whether the City failed correctly to apply the mandatory limits in the Denver Zoning Code, which require that zone amendments be consistent with the City's adopted plans, be based on statutorily defined justifying circumstances, and further the public health and welfare (which requires honest evaluation of whether the rezoning will create traffic and parking problems for surrounding neighborhoods).

3. Whether the rezoning here constituted unlawful spot zoning because it allows high-density apartment buildings in a single-family neighborhood contrary to the single-family zoning designation in the recently updated 2010 Denver Zoning Code map, and without any direction for such a specific change in the Denver Comprehensive Plan, Blueprint Denver, or a small area plan for the neighborhood?

STATEMENT OF THE CASE

1. Nature of the Case, Relevant Facts, Procedural History, and Rulings Presented For Review.

Nature of the Case: In this appeal Plaintiffs challenge Denver's developer-controlled procedures for quasi-judicial rezoning of a single parcel, which: a) encourage secret *ex parte* communications between the developer's lobbyist and Council members and their staff, and conflicted Council-member decisionmaking, and b) violate Due Process and standards for neutral fact-based decisions. Plaintiffs also challenge Denver's failure to enforce its own mandatory Zoning Code limitations on zoning changes, which bar zone map amendments like this absent proof of consistency with the City's adopted plans, justifying circumstances, and evidence the change will not harm the general health and welfare of surrounding neighborhoods. In addition, this rezoning constituted unlawful spot zoning.

Relevant Facts: Plaintiffs own homes and a preschool near the 2.3 acre former Mt. Gilead church parcel ("Parcel") in East Denver. They challenged the City's approval of Cedar Metropolitan's proposed rezoning (the "Rezoning") of

the Parcel from E-SU-DX (allowing single family homes or a church)[1] to S-MU-3 (allowing three-story apartment buildings) because of the harm the high-density rezoning would cause to Plaintiffs, and others in the surrounding residential neighborhoods and people who use the adjacent 37-acre Crestmoor Park. CF pp. 6, 8-11 (¶¶ 1, 6, 7) (Compl.); 232-34 (Order). Plaintiffs alleged harm to the enjoyment of their property and their property values from new traffic and parking problems and hazards to pedestrians. *Id.*

Relevant facts are discussed below with each argument.

Procedural History: The City Council held a hearing on the Rezoning on June 8-9, 2015, and approved the Rezoning.[2]

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[1] Under the pre-2010 Denver zoning ordinance a church was a permitted use in residential zone districts including R-0, R-1, and R-2. *See* D.R.M.C. "Former" § 59-117.

[2] The Administrative Record ("AR") consists of 9 CDs the City prepared. Relevant parts include:

Disk 1: CityCouncil 6-8-15 (SIRE).pdf (referred to below as "SIRE"): written record City made available online for the June 8-9, 2015 hearing through its "SIRE" system;

Disk 1: Final of DenverCityCouncil 6-8-15 gh.pdf: ("Transcript" or "Tr"): 41-page transcript of the City Council deliberations following public testimony;

Disk 5: Video file for June 8-9, 2015 public hearing;

Disk 6: Susman Gmail.pdf: 1,364 pages of Councilmember Susman's emails re Rezoning from her personal gmail account.

Plaintiffs filed a timely Complaint seeking: 1) judicial review under C.R.C.P. 106(a)(4) of the June 8-9, 2015 City Council decision approving the Rezoning; and 2) a declaratory judgment concerning the City's unlawful actions in approving the Rezoning. CF pp. 3-94.

The court denied Plaintiffs' motion seeking to subpoena documents from, and take depositions of, Cedar's representatives and lobbyists to gather evidence outside the administrative record on Cedar's *ex parte* communications with City Council members. CF pp. 247-70; 438-40. It also rejected Plaintiffs' Objection to the completeness of the administrative record based on the City's failure to preserve, *after* this lawsuit was filed, Outlook email files on City servers for the seven Council members whose terms ended in 2015 (the City reconstructed at least some emails from archives). CF pp. 467-73; 499-500.

After full merits briefing and oral argument, the district court dismissed all Plaintiffs' claim. CF pp. 1075-89.

Rulings Presented for Review: This Court reviews the City's approval of the Rezoning directly in a Rule 106(a)(4) appeal. Plaintiffs seek an order vacating

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Plaintiffs provided copies of key documents from the Administrative Record as Appendix 1 and 2 to their district court Opening Brief, CF pp. 534-611.

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the Rezoning and reversing all aspects of the district court's order including its refusal to grant a declaratory judgment about the City's unlawful rezoning procedures and spot zoning. Plaintiffs also challenge the court's discovery rulings that blocked important additional evidence of Cedar's *ex parte* contacts and excused the City's failure to preserve emails for seven Council members.

SUMMARY OF ARGUMENT

First, the Court should vacate this Rezoning and declare that Denver's rezoning procedures here violated Due Process and minimum standards for quasi-judicial decisionmaking. This case presents a textbook example of flawed administrative procedures. In particular:

a) the undisclosed *ex parte* communications by Cedar's lobbyist with at least CM Susman before the public hearing deprived citizens of a fair and open process and require reversal and a remand.

b) Denver's procedure allowing a current Planning Board member to serve as the zoning applicant in a rezoning process requiring Planning Board approval creates at least the appearance of an unlawful conflict of interest for the remaining Planning Board members.

c) the Council members who explained their individual quasi-judicial decisions based their votes on irrelevant political factors rather than the mandatory criteria that should have informed their analysis.

d) the City misapplied the Denver Charter's Protest Petition procedure by failing to exclude city-owned park land from the calculation of relevant acreage; if the park land had been excluded the Rezoning would have failed the necessary super-majority vote.

e) several City Council members had at least the appearance of a conflict of interest because of the substantial monetary and non-monetary contributions they received from Cedar's lobbyists, and should have recused themselves because they could not function as neutral quasi-judges.

Second, the Court should vacate the Rezoning and declare that Denver failed correctly to apply the mandatory limits in the Denver Zoning Code, which require that zone amendments be consistent with the City's adopted plans, be based on statutorily defined justifying circumstances, and further the public health and welfare (which should require evaluation of traffic and parking problems for surrounding neighborhoods).

Third, the Court also should reverse the district court's decision finding the Rezoning did not constitute unlawful spot zoning.

ARGUMENT

I. The City violated Due Process and mandatory procedures for a quasi-judicial rezoning.

The City Council members failed correctly to function as "quasi-judges." Instead, they behaved like politicians who explained their votes based on factors irrelevant to the mandatory rezoning criteria, after having allowed undisclosed *ex parte* communications by the developer's lobbyist during the weeks and months before the public hearing. Thus, the Court also should vacate the Rezoning and declare the Council failed to adhere to Due Process and quasi-judicial requirements.

Zoning decisions affecting individual parcels of land are quasi-judicial. *See Snyder v. City of Lakewood*, 542 P.2d 371, 374-75 (Colo. 1975); *see also Margolis v. District Court*, 638 P.3d 297, 304-05 (Colo. 1981) (clarifying *Snyder*). In *Cherry Hills Resort v. Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988), the Supreme Court explained: "[E]xercise of quasi-judicial authority, unlike legislative authority, is conditioned upon the observance of traditional procedural safeguards against arbitrary governmental action. These safeguards basically consist of providing adequate notice to those individuals whose protected interests are likely to be adversely affected by the governmental action, and giving to such persons a fair opportunity to be heard prior to the governmental decision."

A. Standard of Review/Preservation of Error.

In a Rule 106(a)(4) appeal, the court of appeals reviews the lower government body's decision directly, rather than the district court's determination, to determine whether that government body exceeded its jurisdiction or abused its discretion. *Alpenhof, LLC v. City of Ouray*, 2013 COA 9 ¶ 9, 297 P.3d 1052, 1055 (Colo. App. 2013).

The government body exceeds its jurisdiction or abuses its discretion if it either misapplies the law or no competent record evidence supports its decision. *Id.* By analogy, a *trial court* abuses its discretion "if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Murray v. Just In Case Business Lighthouse, LLC*, 2016 CO 47M ¶ 16, 374 P.3d 443, 450 (Colo. 2016).

Thus, as Plaintiffs contend here, in this Rule 106(a)(4) proceeding, "the reviewing court may consider, in determining the existence of an abuse of discretion, whether the hearing officer misconstrued or misapplied the applicable law." *Id.* Interpretation of a city code is reviewed *de novo*, applying ordinary rules of statutory construction. *Alpenhof*, 297 P.3d at 1055.

When Rule 106(a)(4) claims present legal issues, the court applies a *de novo* standard of review. *See City of Commerce City v. Enclave West, Inc.*, 185 P.3d

174, 178 (Colo. 2008) (the court "is not bound by the agency's construction because the court's review of the applicable law is de novo."). When "the agency interpretation [of a statute] is not uniform or consistent, [the reviewing court does] not extend deference and will look to other statutory construction aids." *Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220, 223 (Colo. 2005). Those other aids include: seeking to effectuate the intent and purpose of the legislative body, applying the plain, ordinary meaning, and determining the proper interpretation by examining the legislative goals underlying the provision, and the consequences of alternative constructions. *Id.* at 223-24. "[C]ourts are not bound by agency interpretations misconstruing or misapplying the law"; "interpretations actually contravening legislative intent are not entitled to deference." *Mile High Cab, Inc. v. PUC*, 302 P.3d 241, 246 (Colo. 2013); *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004) (reviewing court sets aside agency legal "interpretations that are clearly erroneous, arbitrary, or otherwise not in accordance with the law.").

For factual issues, "no competent evidence" means "the governmental 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. Board of County Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006) (cite omitted).

Plaintiffs preserved their objections to the City's violations of due process and principles for quasi-judicial decisionmaking in their Rule 106 opening and reply brief. CF pp. 505-09; 520-22; 524-31; 1040-41, 1042-48. The court rejected those arguments. CF pp. 1078-80, 1084-85, 1086-89.

B. The City should not have allowed undisclosed *ex parte* communications about the merits of the rezoning between the developer's lobbyist and the City Councilmember running the Council process.

Undisclosed *ex parte* communications about the substance of a matter necessarily taint a quasi-judicial process, undermine the appearance of neutrality, and should never be allowed. The City Council failed to include in the public "SIRE" record made available before and during the June 8-9, 2015 public hearing, information documenting both the occurrence and substance of the private, *ex parte* communications that Council members had with Cedar's lobbyist, Maley. *See* AR Disk 1: CityCouncil 6-8-15 (SIRE).pdf. In addition, during the hearing Council members remained mum about such communications, rather than voluntarily disclosing them as some legal authorities recommend.

Plaintiffs explained the *ex parte* communications between Cedar's lobbyist and Councilmembers (primarily CM Susman) that were evident just from the administrative record, without depositions or document subpoenas, in a summary and excerpts. *See* Appendix 1: CF pp. 534-82. The augmented administrative

record the district court required for this case included 1,364 pages of emails from CM Susman's private "gmail" account. AR Disk 6: "Susman Gmail.pdf."

This Court should reject the district court's inaccurate "no prejudice" analysis concerning such communications, and recognize the obvious difficulty, without discovery tools, for a plaintiff to prove the actual taint such private communications, including telephone calls, caused. Both this Court and the Colorado Supreme Court have vacated administrative decisions based on the mere occurrence of undocumented *ex parte* communications, and that is the better practice to ensure such communications never occur.

In addition, if this Court does not vacate the Rezoning on this basis, it should at least reverse and remand because of the district court's erroneous discovery rulings, which: a) blocked Plaintiffs from obtaining documents and deposition testimony from Cedar and its lobbyists about their *ex parte* communications including undocumented telephone calls, CF pp. 247-70; 438-40; and b) failed to hold the City accountable in any way for its destruction of seven Councilmembers' City emails after this lawsuit had been filed, CF pp. 467-73; 499-500.

The record shows Susman privately obtained factual information about the merits of the Rezoning from lobbyist Maley at critical stages. Susman and Maley communicated through Susman's personal gmail account and through telephone

calls apparently to avoid having their private communications become public records under the Colorado Open Records Act, and be disclosed to the public in the SIRE hearing record. App'x 1: CF pp. 534-82; briefly summarized in Pltf's "Undisputed Fact #7": CF pp. 507-08.

When a Colorado agency making a quasi-judicial decision fails to disclose at the time of the hearing substantive oral or written *ex parte* communications with any of the quasi-judicial decisionmakers, Due Process requires the reviewing court to reverse and remand the decision. *See Colorado Energy Advocacy Office v. Public Service Co.*, 704 P.2d 298, 302-04 (Colo. 1985) (Colorado Public Utilities Commission remanded case to hearing examiner after learning of private communications between PUC staff and utility about the subject of quasi-judicial hearing; such private communications were "clearly improper"; "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."); *see also Zuviceh v. Industrial Comm.*, 544 P.2d 641, 642-43 (Colo. App. 1975) (Court vacated agency's administrative decision, even after a "subsequent hearing" because of *ex parte* communications between employer and administrative decisionmaker that had not been disclosed to employee seeking benefits).

In enforcing Due Process principles, the Court should not weigh the importance of the undisclosed fact information communicated *ex parte*. *See Board of County Commissioners v. PUC*, 157 P.3d 1083, 1094 (Colo. 2007) ("whether the factual information the staff obtained is of great or little importance to the Commissioners, it belongs in the record . . . ."); *see generally* G. Dahl, *Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and Ex Parte Contacts*, 33 Colorado Lawyer No. 3 (March 2004) ("Board members and constituents may be accustomed to using private conversations to communicate public policy information. This is perfectly acceptable when the matter is legislative. However, this is not permitted in quasi-judicial matters, as it violates the due process rights of the applicant and opponent.").

As an example of current (well-advised) municipal practice in Colorado, the City of Lakewood directs that: "If and when a Council member does receive information about a case outside of the public hearing, the member is expected to disclose the communication, in as much detail as possible, to the entire Council at the beginning of the public hearing." Lakewood City Attorney's Office, "The Quasi-Judicial Process and Citizen Access to the City Council," http://www.lakewood.org/City_Attorney/Articles_of_Interest/Articles_Of_Interest.aspx (accessed 10/9/16); copy at CF pp. 254-56.

Here, the Court should reject the City's argument minimizing this Due Process violation, contending that because Susman voted against the Rezoning her undisclosed *ex parte* communications were harmless.

First, Colorado cases do not excuse undisclosed *ex parte* communications if they occurred with a quasi-judicial decisionmaker who voted a certain way. They require a remand. The case the district court cited, CF pp. 1086-87, involved different circumstances where the communications did not relate to the substance of the agency's decision. *See L.G. Everist, Inc. v. Water Quality Control Comm'n*, 714 P.2d 1349, 1352 (Colo. App. 1986) (board member mentioned "possible complaints by fishermen"). The district court erred here in dismissing the communications here as "either non-substantive" or "contain[ing] information already available to Plaintiffs" (which is a meaningless characterization when what matters is whether arguments or information were communicated privately to a decisionmaker so that opposing parties could fairly counter them). The neighborhood residents who participated in the hearing were entitled to know of the private Maley-Susman communications before or during the hearing to, for example:

a) move that Susman recuse herself based on her conflicted roles (as supposed mediator and non-neutral advocate) and private communications (where

Maley suggested in March 2015 the language Susman should use to delay the process to a lame-duck Council session, CF p. 536), and also disclose any of her communications with colleagues about the Rezoning to avoid prejudice from her participation in the quasi-judicial process before the hearing;

b) obtain information about Maley's apparent advice to Susman about how to get political cover by voting against the Rezoning while privately urging her lame-duck Council colleagues to vote for it –the scenario that appears to have occurred here, *see* CF p. 538 (Barnes-Gelt email to Susman).

The evidence Plaintiffs presented of Susman's actual lack of integrity in this process, even without discovery and with incomplete Council email records, was sufficient to overcome the "presumption of integrity" that might otherwise apply. *See Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. 1983) ("[A] quasi-judicial proceeding violates due process only if this 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."). Because Susman ran the Council proceedings since the Parcel was in her Council district, CF pp. 537-38, the Court cannot assume that Susman's actions did not taint the evaluation and vote of her Council colleagues.

Second, because the district court denied Plaintiffs' request for document subpoenas to, and depositions of, Cedar and its lobbyists, and failed to hold the City accountable for its destruction of seven Councilmembers' emails, this Court has no way to assess what private ideas or information from Cedar, Susman communicated to other Council members including the eight members who voted for the Rezoning (e.g., she would vote against, but they could vote in favor). Contrary to the City of Lakewood's recommended prophylactic procedure, *see supra* this Section I.B, Susman did not pro-actively disclose on the record at the public hearing *any* information about her private communications with Maley. In one private gmail communication with Susman, former Councilmember Barnes-Gelt reported to Susman hearing that she was telling colleagues "you are comfortable if it's approved[.] Say it isn't so." *See* CF pp. 538, 580-82. The City failed to preserve intact the active Outlook email files for the seven departing Council members whose terms ended July 20, 2015, and instead purported to recover some information from archives. *See* CF p. 469 (¶¶ 3-5). Thus, the augmented administrative record the district court ordered may not include all written communications those seven departing members had about the proposed Rezoning. The record shows Susman took the lead for the City Council in coordinating the timing and postponement of the public hearing and the content of

CPD's presentation supporting the Rezoning because the proposed change was in her Council District. *See, e.g.,* CF pp. 553, 559, 579; AR Disk 2 "Susman-Kline_Redacted [3785-87]).

Citizens are entitled to a quasi-judicial zoning process conducted with complete integrity, not one that is only partially tainted by secret communications with the developer's lobbyists. Due Process requires the Court to reverse and remand because the City Council did not disclose at the hearing all the substantive communications its members received about the Rezoning.

C. The City should not have allowed a current Denver Planning Board member to serve as the developer's zoning change applicant in a process that required Planning Board approval before City Council approval.

The City Council's final decision also was tainted by the Planning Board's own conflict of interest. Current Planning Board member (Jim Bershof) signed the Rezoning application and served as the Rezoning applicant's "Property Owner Representative," CF p. 848 (application); p. 12 (Pl. Complaint: ¶¶ 9, 12); p. 298 (City Answer ¶ 9). Although Bershof did not vote at the Planning Board meeting, as applicant he created an inherent conflict of interest for the rest of the Planning Board members when they were asked to vote, as quasi-judges, on their own colleague's rezoning request. *See infra* Section I.F (discussing *City of Manassa*/*Caperton*/Due Process standard for conflict of interest). Even with good

intentions, the Planning Board members could not be neutral voting in a quasi-judicial hearing on their own member's application. Although Denver Revised Municipal Code § 12-44 allows Planning Board members to have a financial interest in a measure before the Board, and allows the Board to "grant a hearing" to such member in the role of applicant, this Court should hold that the practice is improper when the Planning Board functions as a quasi-judicial body.

Plaintiffs objected at the Jan. 21, 2015 hearing to the conflict of interest created by Bershof's dual role; the City did not take any action to address the conflict. *See* AR Disk 1: SIRE at pp. 433-34 (#1060-61); Disk 3: mtg1.MP3 file 3:08:07-35 (hearing tape). The effect of the Planning Board's conflicted approval vote here was to deprive the City Council of objective, un-conflicted analysis of Cedar's Rezoning proposal even though Planning Board review is an essential step in the process for approval of a zone map amendment, *see* DZC § 12.4.10.4.D.2, E, F.1 & G.2 (CF pp. 679-80).

Because this Court has construed the Zoning Code as not allowing for judicial review of the Planning Board's decision until the City Council also votes on rezoning, *see, e.g., O'Connor v. Denver Planning Board*, No. 15CA0709 (Colo. App. Nov. 25, 2015) (unpublished), CF pp. 976-78 (Op. at 8-10), the Court should reverse the Rezoning in this case because the Planning Board has an inherent

conflict of interest when it votes on zoning applications presented by one of its current members. The Court also should grant Plaintiffs' motion for a declaratory judgment and direct the City of Denver to cease this practice of allowing current Planning Board members to serve as the applicant for a rezoning request.

D. The City Council members deliberating and voting on the rezoning ignored the specific mandatory criteria for a rezoning contained in the Denver Zoning Code and instead relied on irrelevant political factors as a basis for their quasi-judicial votes.

Unlike politicians, quasi-judicial decisionmakers are required to base their decisions on relevant review criteria and the evidence in the administrative record. *See, e.g., Snyder v. City of Lakewood*, 542 P.2d 371, 374 (Colo. 1975) (quasi-judicial decisionmaking involves having the body "make a determination by applying the facts of a specific case to certain criteria established by law."). Here, the Council Members' explanation of their votes shows they relied on irrelevant factors and information outside the hearing record. *See* CF pp. 508-09 [summary in UF#8]; *see also* Disk 1 Transcript: pp. 7:18-9:15 (Faatz); pp. 10:8-15:16 (Nevitt); pp 18:16-19:22 (Lopez); pp. 26:13-27:12; 28:15-31:5 (Kniech); pp. 35:15-37:8 (Brown); pp. 38:4-39:11; 39:19-24 (Brooks). Those explanations demonstrate on their face flawed quasi-judicial decisionmaking. It would be

comparable to this Court deciding this appeal without regard to the facts in the record and applicable law.

E. The City improperly blocked application of the Denver Charter's requirement of a super-majority City Council vote for a rezoning by refusing to exclude publicly-owned City park land from the City's protest petition calculation.

Denver Charter Art. 3.2.9.E creates a Protest Petition procedure ("Protest Procedure") requiring a super-majority Council vote of at least 10 affirmative votes if residents owning at least 20% of the area within a 200-foot perimeter sign a protest petition.[3] Here the Rezoning only passed by 8 votes, so it would not have passed if the Protest Procedure had applied. 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 petition signatures from the City. In doing that, the City stepped outside of its supposedly neutral, quasi-judicial role and supported the Rezoning applicant by blocking the Protest Procedure from applying.

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[3] The relevant Charter language states: "In case, however, of a protest against such change, signed by the owners of twenty per cent or more, either of the area of the lots included in such proposed change or of the area to a distance of two hundred feet from the perimeter of the area proposed for change, such amendment shall not become effective except by the favorable vote of ten of the members of the Council of the City and County of Denver."

Neighborhood residents invoked the Protest Procedure, obtained a map from CPD identifying the area within 200 feet that CPD contended was relevant, and then submitted signatures for most of the surrounding private property owners, whose land covered 82,395 square feet (17.2%) of the perimeter zone in CPD's map. *See* AR Disk 1: SIRE at pp. 221, 411 (#848, 1038). The City declined to apply the Protest Procedure. AR Disk 1: Brooks etc. pdf at #1469. CPD effectively blocked the Protest Procedure from applying by including City-owned park land within Crestmoor Park but not providing any procedure for residents to obtain a signature from the City for the city-owned land. The Parks Department acreage covered 115,310 square feet (24%: 115/310 SF/478,565 SF). AR Disk 1 "CPD_Redacted.pdf" at 243.

To require a reasonable interpretation of the Charter's Protest Procedure, this Court should hold that the City must either: a) exclude City owned park land from the Protest Procedure area; or b) create a procedure to allow citizens to obtain protest petition signatures from City representatives for city-owned park land.

The Charter provision's language shows it was intended to create a higher threshold for a zoning change when roughly 20% of the residents who live nearby oppose the proposed Rezoning. The provision uses a formula based on lot area to weigh the votes of larger property owners vs. smaller ones. It is silent about City-

owned property. The City had an opportunity to clarify how to address City-owned land when it codified the Protest Procedure in the 2010 Zoning Code, but failed to do so. *See* DZC § 12.4.10.5 (CF p. 680). Thus, the City has not offered any relevant legal interpretation of the Charter provision that requires deference.

In addressing this issue, the Court should reconsider its holding in *Burns v. Denver City Council*, 759 P.2d 748 (Colo. App. 1988). First, it is not rational to include City-owned property in the Protest Petition calculation when there is no mechanism to obtain a petition signature from the City (i.e., the City will always be deemed to support the rezoning). Second, even if *Burns* remains good law, it involved city streets, and does not address the City's separate obligation to protect park land from encroachments such as development on the perimeter of parks. Here, Plaintiffs sought to have the City parks director sign a protest petition, consistent with her obligation to protect City parks. The Parks Department acreage covered 115,310 SF. The parks director took the position that "she is unable to take sides on this matter." AR Disk 1: "CPD_Redacted.pdf" at 223, 243. By not having a procedure in place to sign a Protest Petition, the parks director effectively supported the Rezoning, rather than her stated goal of not taking sides in the matter.

Therefore, this Court should reconsider and limit *Burns* and hold that the City exclude park land from its calculation unless it has a procedure in place that allows the parks director to sign a protest petition to protect City park land. If, as here, the City fails to put such a procedure in place, then the City-owned property should be excluded from the Protest Procedure calculation.

F. City Council members functioning as quasi-judicial decisionmakers voted on the rezoning despite the conflicts of interest created by their receipt of large cash and in-kind campaign contributions from the developer's lobbyists.

Denver City Council members who receive substantial political contributions from lobbyists advocating rezoning cannot serve as neutral quasi-judicial decisionmakers. Due Process requires that quasi-judicial decisionmakers be neutral and unbiased. *See, e.g., City of Manassa v. Ruff*, 235 P.3d 1051, 1056 (Colo. 2010) ("The due process requirement of neutrality in adjudicative proceedings entitles a person to an impartial and disinterested decision-maker."). The "fundamental protections of neutrality and fairness [] apply to non-judicial decision-makers acting in a quasi-judicial capacity." *Id.* at 1057. In *City of Manassa*, the Court endorsed the U.S. Supreme Court's statement in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009), for when Due Process compels disqualification of a judicial officer: "The ultimate due process question is whether, under a realistic appraisal of psychological tendencies and human

weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 235 P.3d at 1057 (quotes omitted). Although the Colorado Standards of Conduct for local officials, C.R.S. § 24-18-104(3)(3), do not treat campaign contributions to elected officials as prohibited "gifts of substantial value," that should not insulate elected officials who serve a dual role as quasi-judges from complying with the *Caperton* Due Process standard.

The determination of what constitutes a conflict of interest depends on the context. *See City of Manassa*, 235 P.3d at 1055 ("conflict of interest" reflects policy determinations, depending on the context); *Schupper v. People*, 157 P.3d 516, 520 (Colo. 2007) (the appearance of a conflict of interest is a factual question that must be made on a case-by-case basis). The district court relied on language in *City of Manassa* stating that quasi-judicial decisionmakers are not subject to the same standards as judicial officers. CF p. 1089. Nevertheless, that should not exempt quasi-judicial decisionmakers from any conflict of interest obligations mandated by Due Process principles.

Here, in evaluating when Council members functioning as quasi-judges ruling on a proposed rezoning have a conflict of interest under the *Caperton*/Due Process standard, the Court should also be guided by the U.S. Supreme Court's

recent evaluation of judicial bias in Florida, where judges run political campaigns. In *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), the Supreme Court upheld Florida's ban on judges personally soliciting campaign donations and rejected the argument that Florida's ban violates the First Amendment. The Court stated that maintaining the perception of judicial integrity "is a state interest of the highest order," because "the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors." *Id.* at 1666. The same concerns apply here with City Council members making quasi-judicial rezoning decisions while obtaining significant contributions, or campaign assistance, from the developer's lobbying firm. Any non-trivial gift creates a conflict, or the objective appearance of a conflict, for a quasi-judicial decisionmaker. Colorado does not allow judges of any kind to accept political contributions from litigants.

In addition to actual conflicts of interest, political contributions to Council members deciding rezoning issues create the appearance of impropriety. On its face, the Colorado Code of Judicial Conduct applies to anyone who performs judicial functions including administrative law judges. *See* CJC, Application, Section "I," posted at Colorado Judicial Branch website. Rules 1.2 and 2.2, of the Code forbid judges from engaging in actions that create an appearance of

impropriety. Colorado judges are not permitted to receive payments from the parties whose dispute the judge is adjudicating. This Court is not required to overlook blatant conflicts of interest.

The Denver City Council has countenanced a system where developers seeking rezoning and their lobbyists provide substantial monetary and non-monetary contributions to Council members, who function as quasi-judicial decisionmakers, under the guise of a campaign contribution, to obtain private access and influence the rezoning decision. *See* CF pp. 507-09 [UF#7, 9]; CF pp. 534-82 & 612-36 (App'x 1, 3). Under the *City of Manassa/Caperton* standard, those payments created a conflict of interest for the Council members who approved the Rezoning. Here, four of the Council members who voted on the Rezoning had received significant monetary and nonmonetary political contributions from Cedar's lobbyists. *See* CF p. 509 [UF#9]; CF pp. 612-36 (App'x 3). In addition, Nevitt should have recused himself because lobbyist Garcia-Berry of CRL was his campaign Treasurer.

II. The Rezoning did not comply with mandatory conditions in the Denver Zoning Code for a zone map amendment.

The Court also must vacate the Rezoning because, as a matter of law, it did not meet the Denver Zoning Code's mandatory requirements for a zoning change.

The Code protects property owners from politicians who would approve zoning changes that impose inappropriate development on a neighborhood. It requires, among other mandatory "review criteria" for a zone map amendment, that:

1. a change must be consistent with Adopted Plans, DZC § 12.4.10.7(A), and
2. there must be one of the specific "justifying circumstances" in DZC § 12.4.10.8, and.
3. the zoning change must "further the public health, safety and general welfare of the City," DZC § 12.4.10.7(C).

A. Standard of Review/Preservation of Error.

The same principles discussed in § I.A concerning review under Rule 106(a)(4), including *de novo* review on questions of law, and when deference may be appropriate, apply here.

Plaintiffs preserved their objections concerning Denver Zoning Code requirements in their Rule 106 opening and reply brief. CF pp. 505-20; 1035-40. The district court rejected Plaintiffs' arguments. CF pp. 1078-84.

B. The Rezoning was not consistent with the City's adopted plans and deviated from the zoning designation for the Parcel in Denver's comprehensive new 2010 Zoning Code.

1. The Zoning Code requires that a proposed new map amendment must be consistent with the City's adopted plans.

Denver Zoning Code ("DZC") §§ 12.4.10.1 and 12.4.10.7(A) (CF p. 681, 918-19) contemplate that zoning changes will follow, and be consistent with, an intense community consensus planning process. This avoids arbitrary changes like the Rezoning here. § 12.4.10.7(A) allows the City Council to approve a "proposed official map amendment [if] is consistent with the City's adopted plans, or the proposed rezoning is necessary to provide for land for a community need that was not anticipated at the time of the adoption of the City's plan."[4] § 12.4.10.1 refers to rezoning an area "to implement adopted plans, . . . "

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[4] DZC § 12.4.10.7 states, in part:

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, or the proposed rezoning is necessary to provide for land for a community need that was not anticipated at the time of the adoption of the City's plan.

* * *

There is no "Adopted Plan" that calls for a high-density apartment building on the east side of Crestmoor Park. The City did not contend at the public hearing that the change was necessary to meet some "community need" not anticipated in previous adopted plans.

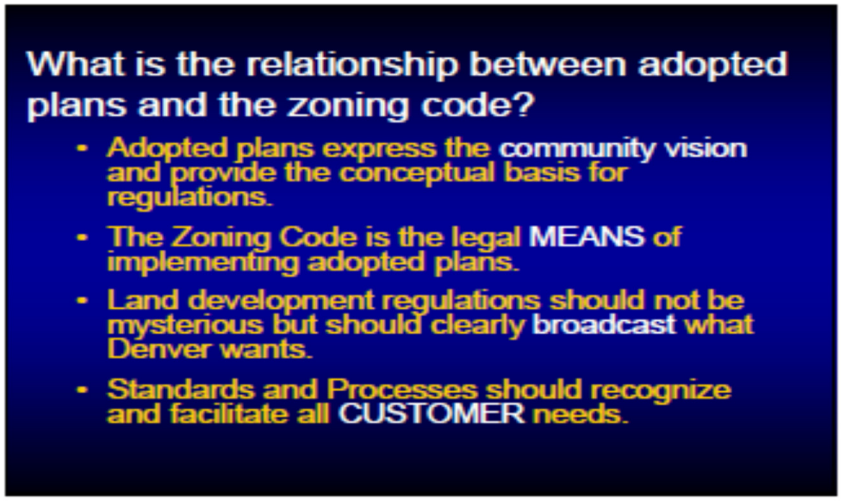
The concept of consistency with adopted plans is central to zoning law and mandated by state statute. *See, e.g.,* A. Rathkopf, et al., *1 Rathkopf's The Law of Zoning and Planning* § 14:1 (4th ed. Sept. 2016) (footnotes omitted) ("The requirement that zoning be 'in accordance with a comprehensive plan' is one of the most fundamental concepts in land use regulation. Actions challenging zoning nearly always include an allegation that the zoning is not in accordance with a comprehensive plan."). In Colorado: "Municipalities and counties are authorized to prepare comprehensive plans as a long-range guiding document for a community to achieve its vision and goals. The comprehensive plan (or master plan) provides the policy framework for regulatory tools like zoning, subdivision regulations, annexations, and other policies. A comprehensive plan promotes the community's vision, goals, objectives, and policies; establishes a process for orderly growth and development; addresses both current and long-term needs; and provides for a balance between the natural and built environment. (*see* C.R.S. 30-28-106 and 31-23-206)." Colorado Department of Local Affairs, Community

Development Office, website at:

https://www.colorado.gov/pacific/dola/comprehensive-plans (accessed 10/9/16).

Colo. Rev. Stat. §§ 31-23-301 and 303 authorize municipalities to enact zoning regulations; § 303(1) says "[s]uch regulations shall be made in accordance with a comprehensive plan . . . ."

The "adopted plan" requirement ensures that zoning changes will comply with the "community vision." A senior Denver City Attorney explained at a 2006 symposium that: "adopted plans" under the Zoning Code "express the community vision and provide the conceptual basis for [zoning] regulations," and the Zoning Code is the legal means of implementing adopted plans:



See Rocky Mtn Land Inst., "Constitutional and Statutory Limits on Local Zoning Authority" at 7 (DU Law School March 10, 2006 symposium with Denver Asst. City Attorney, Karen Aviles):

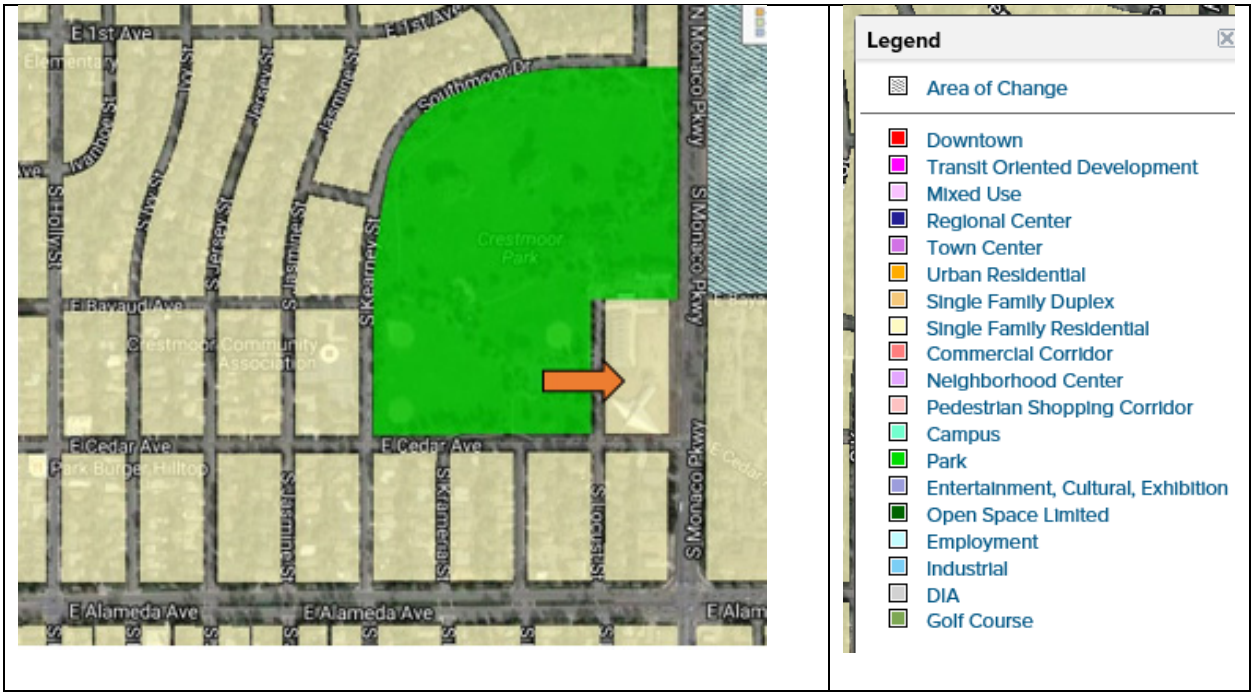
http://www.law.du.edu/index.php/rmlui/publications/by-subject/land-use-law/zoning (accessed 10/9/16).

Denver has three levels of City Council-approved "adopted plans," that guide zoning:

1. First, "Denver Comprehensive Plan 2000," ("Comp. Plan") provides general guidance for the entire city. *See* CF pp. 699-779. The City Council enacted Comp. Plan 2000 with a City ordinance. Series 2000-0028, Council Bill 0028, Ord. 2000-0052 (Jan. 23, 2000). D.R.M.C. § 12-61(a) directs: "The comprehensive plan shall provide an expression of the city's vision for the future with a listing of goals and objectives. Once prepared and adopted, **the plan will guide and influence decisions** that affect the future of the city." (Emph. added). The "Comp" Plan says nothing specific about the Parcel.

2. Second, "Blueprint Denver" constitutes a 2002 "supplement" to the Comp. Plan. *See* https://www.denvergov.org/content/denvergov/en/community-planning-and-development/planning-and-design/blueprint-denver.html (accessed 10/10/16); excerpts at CF pp. 683-90, 991-97. The City Council enacted Blueprint Denver to "become a part of the comprehensive plan for the City and County of Denver" under D.R.M.C. § 12-61. *See* Series 2002-0138, Council Bill 0138, Ordinance 2002-0170 (March 3, 2002). Blueprint Denver maps "areas of change"

and “areas of stability” within Denver and states certain general principles. Blueprint maps the Parcel (on the SE corner of Crestmoor Park—see red arrow—as an “area of stability”/”Single Family Residential” property—not an “Area of Change”:



Map excerpt from: https://www.denvergov.org/maps/map/blueprintdenver (arrow added). Under Blueprint (p. 5): “Areas of Stability include the vast majority of Denver and are primarily the fairly stable residential neighborhoods where minimal change is expected during the next 20 years. The goal is to maintain the character of these areas yet accommodate some new development and

redevelopment to prevent stagnation." Thus, the City is supposed to respect existing zoning in areas of stability.

In addition, the zoning for the Parcel was specifically reaffirmed with community input when the City approved the 2010 Denver Zoning Code updates and retained the single-family residential designation that had governed the Parcel since 1962, when the synagogue/church was built (E-SU-DX in the 2010 Code). *See* CF p. 506: UF#3: citing CF pp. 586, 596-97, 608; CF pp. 9, 44-56 (Compl. ¶¶ 17-18 & Exh. 6.A, 6.B, 6.C); CF p. 299 (City Answer ¶¶ 17-18). The City had no justification to change that designation in 2015, in an admitted "area of stability."

3. Third, Denver uses "small area plans" to supplement the Comp. Plan and guide zoning. Chapter 8 of Blueprint Denver describes how "small area plans" are adopted through a community consensus process. Blueprint Denver explains (at p. 144): "The advantage of a small area plan is its ability to engage issues and people on a close-up, personal scale. The result can be a richly detailed plan that addresses the area's unique issues with tailored solutions." *Id.* It explains (at p. 145) that: "Plan 2000 is the guiding document for land-use policy. The policy is primarily implemented through plans adopted as supplements to the comprehensive plan, the zoning ordinance, and the zoning map."

Denver has no small area plan for the Crestmoor neighborhood where the Parcel is located because it is stable. CF pp. 594, 597. CM Susman confirmed the Crestmoor neighborhood "doesn't actually meet the criteria for beginning a small area plan" because it is a stable neighborhood not undergoing change. *See* CF pp. 18-19, 82-92 (Complaint ¶ 35 & Exh. 2); pp. 609-10 [AR SIRE pp. 615-16 (#1242-43)]; AR Disk 9 at 364, 370-71.

2. The Rezoning was not consistent with the Comp Plan and Blueprint Denver plans.

Lacking a community-consensus small area plan to support the Rezoning here, the City relied instead on generic city-wide "strategies" in the Comp. Plan and Blueprint Denver. This Court should reject the district court's reliance on such "strategies," which render meaningless the Zoning Code's "adopted plan" requirement. The absence of a specific "plan" does not constitute an "adopted plan" that guides development. When the language of a city-wide adopted plan is so malleable it could support any land-use decision, the City cannot reasonably rely on such language to justify a specific zoning change as "consistent with" the plan.

First, in slides for the City Council public hearing, CPD relied on general language in the Comp Plan about: a) promoting infill development consistent with the character of the surrounding neighborhood; and b) land-use regulations should

"accommodate changing demographics and lifestyles" with diverse housing types. CF p. 828.

Such generic city-wide language in the Comp. Plan does not justify the Rezoning. This Court would be construing, the "adopted plan" requirement as meaningless if, like the district court, it accepts CPD's argument of consistency with the Comp. Plan. The City could justify placing high density apartments in the middle of any established residential neighborhood under CPD's and the district court's interpretation of plan consistency.

Second, CPD argued that Blueprint Denver allows for a "Reinvestment Area" within an Area of Stability. CF pp. 829, 830, 834, 839. CPD also relied on vague "Area of Stability Strategies," contending the Rezoning would allow multi-unit development along Monaco Parkway, "a residential arterial." CF p. 831. This argument ignored that the entire length of the west side of Monaco Parkway for more than 30 blocks north of the Parcel to Martin Luther King Blvd. contains single-family homes, not multi-unit development. *See* AR Disk 5 video: 6:23:18 to 6:24:27 (DeRungs testimony). CPD also argued the Rezoning would "improve the edge" of the single-family neighborhood to the west. CF p. 831.

Blueprint Denver does not provide any specific guidance about development of the Parcel other than classify it as an "Area of Stability"—meaning the

neighborhood is stable and should not be changed. Contrary to CPD's analysis, Blueprint's map of Denver does not identify specific "reinvestment areas" within designated areas of stability. CPD's vacuous analysis seeking to justify the zoning change as consistent with Blueprint Denver, which the district court accepted, could be used to justify a high-density apartment building in any Denver residential neighborhood.

CPD's proposed interpretation of the two relevant "adopted plans" is not entitled to deference by this Court under the legal standard discussed above in § I.A. CPD's commentary is not based on a long-established agency interpretation; it is an *ad hoc* justification for a developer's proposed new development.

In addition, the explanations at the hearing from the three City Council members who addressed the "adopted plan" requirement either:

a) conclude there is not such consistency, AR Disk 1: Tr. at 22:1-13; 23:23-24 (Robb: "there is not a plan for this neighborhood"; "this is an area of stability"; "this zoning does not meet our criteria"); *id*. at 34:25-35:3 (Ortega: we want tools to protect the residential character of our neighborhoods identified in Blueprint as an area of stability); or

b) offer an unexplained conclusion the requirement is met, without the kind of explanation that would be necessary for the Court to defer to an agency's legal conclusion, *id*. at 39:9-16; 40:7-9 (Brooks: for me the plans are consistent; the "existing site" "reflects the context to me"; "it is in line with our plans").

To give a reasonable meaning to the Zoning Code's "adopted plan" requirement, this Court should vacate the Rezoning because as a matter of law it is not consistent with the City's "adopted plans."

C. The Rezoning was not necessary to address "changed" or "changing" conditions in a blighted neighborhood.

CPD also failed to demonstrate the existence of any of the "justifying circumstances" listed in DZC § 12.4.10.8. The City relied on only one purported circumstance, labeling the site as having "changed or changing conditions." CF pp. 833-34; *see* DZC § 12.4.10.8.A.4. Under CPD's analysis, the mere existence of the deteriorated church building on the Parcel proved changed conditions. CF p. 834. CPD also repeated its flawed "adopted plan" analysis, labeling the site as a "reinvestment area" and contending multi-unit buildings are appropriate along an arterial like Monaco Parkway. *Id.* These rationales have nothing to do with the DZC's specific "justifying circumstance" at issue, and ignore that Monaco Parkway is populated with single family homes, not multi-unit buildings.

The plain language of the "justifying circumstance" ordinance concerns circumstances where an entire area in a neighborhood (not just one parcel) has become blighted. DZC § 12.4.10.8.A.4 requires that 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 Crestmoor neighborhood is thriving with high, and increasing property values. *See* CF pp. 596-98, 599-611. There was no evidence of neighborhood decay.

Only one Council member addressed this criterion. CM Kniech openly doubted whether this justifying circumstance was satisfied when an individual property needs maintenance. AR Disk 1: Tr. at 25:9-26:2 (Kniech: "to me the weakest part of this application is the changed circumstance"; saying it is "not an attractive site" is "not really the same as describing an entire change in the area"; "I am struggling with whether there's enough changed circumstances to justify the legal criteria"); *see also id.* at 30:22-25 (discussing context).

It was unreasonable for the district court defer to the City's construction of the term "land," or to construe this justifying circumstance as allowing new high-density apartment development just because an owner allowed its own building in a single-family residence zone district to decay. CF pp. 1083-84. Deference to the

City's *ad hoc* legal interpretation of the Zoning Code advanced only in the context of the current lawsuit was not appropriate under the principles discussed in § 1.A. There was no proof of this being a consistent agency interpretation, rooted in sound logic. Instead, this was just CPD's interpretation convenient for justifying this Rezoning. Only one Council member even discussed it, and she questioned whether it was satisfied.

D. The City unlawfully applied the mandatory criterion of whether the Rezoning advances the public health, safety, and general welfare by declaring as not relevant to rezoning harm to surrounding residents from resulting traffic and parking problems.

The Zoning Code also requires that a zone map amendment "furthers the public health, safety and general welfare of the City." DZC § 12.4.10.7(C). The City does not follow a uniform practice about what is considered under this criterion, allowing almost any rationale to suffice to say this is satisfied. Here CPD contended: "redevelopment of the site, removes a poorly maintained structure, improves character along Monaco, and residents have access to recreation, jobs, and commercial activities." CF p. 832. This kind of vacuous analysis would support any zoning change. The district court avoided the issue by equating any mention of citizen concern about traffic and parking with the Council

giving weight to traffic and parking problems. CF p. 1082.[5] This Court should not repeat that error.

As part of their official policy and practice, the City Council and Planning Board specifically refuse to consider the adverse traffic and parking consequences that the proposed Rezoning would cause. Instead, the City contends the Public Works Department can solve any resulting traffic or parking issues. As a matter of law, the City's policy to refuse to consider adverse traffic and parking problems in a rezoning under the public health/safety/welfare criterion reflects an abuse of discretion.

In comparison, the Colorado statute that authorizes municipalities to enact zoning regulations specifically directs that planning and zoning address traffic issues. *See* C.R.S. 31-23-303(1) (zoning regulations shall be made in accordance with a comprehensive plan and "designed to lessen congestion in the streets," "prevent the overcrowding of land," "avoid undue concentration of population," and "facilitate the adequate provision of transportation").

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[5] The district court questioned the City's counsel suggesting he argue the City must consider traffic and parking in the rezoning process. Yet the City's counsel honestly admitted the City's policy, despite further questions inviting him to state a different position. Court Record: April 22, 2016 Hearing Transcript at 32:16-35:15 (admitting p. 33 lines 8-10: "That they don't consider traffic and parking? Yeah. That – that is correct, . . . ").

In response to extensive public concern about adverse traffic and parking consequences, the Planning Board and City Council members explained the City's policy and practice that they are not allowed to consider adverse traffic and parking consequences as part of a rezoning decision:

a. At the Jan. 21, 2015 Planning Board hearing, Board Member Joel Noble stated: "The number one, almost everybody in opposition cited, was traffic. And that's an important issue. And that isn't one of the issues Planning Board is charged with looking at. We have a very limited remit in terms of what we are supposed to consider." "So traffic, number one, I get it, I have my own thoughts about that, about what could be better, and how we can get a better transit system, for instance. But it is outside the scope of what we're allowed and charged to consider." AR Disk 3: mp3 tape part 2, at 46:42-47:00, 47:24-47:45).

b. Then at the City Council hearing, CM Brooks stated: "Here's the major issue I'm walking away with, and it's traffic. It's transportation issues. Here's the good news/bad news scenario. The bad news is, this is not our scope to deal with all the transportation issues and traffic issues in your neighborhood. The good news is, we can deal with it." *See* AR Disk 1: Tr. at 38:4-10. Brooks went on to argue that he understands the major traffic concerns, and to admit "you are facing some severe traffic issues and we need to address it." *Id.* at 38:11-39:8. He

then reiterated the official excuse that the Council is not allowed to consider traffic in rezoning: "Our call, our legal obligation before you today is, are the plans consistent? Are they in context for approval? *Id.* at 39:9-11.

Here, the Court should vacate the Rezoning and grant a declaratory judgment that the City's interpretation of the public health/safety/general welfare review criterion in DZC 12.4.10.7(C) is unreasonable, when as here, the City refuses to consider adverse traffic and parking consequences. The Court should construe the plain language of this statutory provision *de novo* applying a common sense interpretation as directed by Colorado law. There is no basis for deference to the City's interpretation. The City has not articulated that interpretation in any published document and has not provided a reasoned analysis for it. *See* § I.A.

III. The Rezoning constituted unlawful spot zoning that relieved a particular property from the restrictions of the zoning regulations.

Common law "spot zoning" principles also require reversing the district court's decision and vacating the Rezoning.

A. Standard of Review/Preservation of Error.

This Court reviews legal issues *de novo*. *See supra* § I.A. Here the district court evaluated undisputed facts in the administrative record to reject Plaintiffs' spot zoning claim, so no deference is required to that court's analysis.

Plaintiffs presented their spot zoning arguments in their Rule 106 opening and reply brief, CF pp. 522-24; 1041-42, and the court rejected them, CF p. 1085.

B. The Rezoning constituted unlawful spot zoning because it allows high-density apartment buildings in a single-family neighborhood contrary to the recently updated 2010 Denver Zoning Code map, and without specific support in the City's adopted plans.

Finally, the Rezoning also constituted unlawful "spot zoning." The test for spot zoning is: "whether the change in question was made with the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations." *See Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961); *see also King's Mill Homeowners Ass'n Inc. v. City of Westminster*, 557 P.2d 1186, 1191 (Colo. 1976). The *Rathkopf* zoning treatise notes the size of the rezoned parcel is important in spot zoning cases, with rezoning of small parcels not likely to be part of a furthering a comprehensive zoning plan. *See* A. Rathkopf et al, 3 *Rathkopf's The Law of Zoning and Planning* § 41:6 (4th ed. Sept. 2016) ("reclassification of a small area of land bounded by property burdened with greater restrictions is not likely to advance the purposes of a comprehensive plan."). This Court should reject the district court's analysis that adding apartment buildings to a neighborhood of

single-family residences is proper based on the "deterioration of the church" on the Parcel. CF p. 1085.

In *Clark*, the Colorado Supreme Court vacated Boulder County's rezoning because: "it cannot be said that re-zoning part of a planned residential area to permit a filling station is other than an arbitrary act and a proper exercise of the police power. It clearly fails to take into account the need for reasonable stability in zoning regulations." *Id.* at 162. The Court held there was "no indication that the zoning change was intended to further the comprehensive general plan. Rather, it has all the earmarks of a special act enabling the intervenors to build a filling station on property previously zoned as residential." 362 P.2d at 161. The Court explained: "Property owners have the right to rely on existing zoning regulations when there has been no material change in the character of the neighborhood which may require re-zoning in the public interest." *Id.* at 163.

Here, the district court failed correctly to apply the legal guidance in *Clark*. The Parcel is small (2.33 acres), housed a church next to a park and in the middle of a single-family residential neighborhood, and was zoned for single-family residential use (E-SU-DX). *See* CF p. 848, 878 (application); p. 297 (City Answer ¶ 1). As explained in Sections II.B.1 and II.B.2 above, the Denver Comprehensive Plan and Blueprint Denver provide no specific direction about the zoning of this

parcel other than to designate it an "Area of Stability," that should not be disturbed. The City has not created a small-area plan for the Crestmoor neighborhood because it is stable. *See supra* Section II.B.1.

Clark emphasized the importance of reasonable stability and that property owners should be able to rely on existing zoning—a fact the district court ignored. In the City-wide legislative rezoning completed with the 2010 Zoning Code, the single-family residential (E-SU-DX) zoning for the Parcel was reconfirmed. *See* supra Section II.B.1. Thus, only five years before the Rezoning, after a City-wide community review process, the appropriate zoning for the Parcel was set, and declared to current and future residents, as single-family residential. The City has no evidence of a material adverse change in the character of the surrounding Crestmoor neighborhood. It is stable and thriving. The fact that Cedar allowed the church building to continue to decay did not change the neighborhood's character. Allowing a zoning change based on the run-down condition of an individual building incentivizes a developer to neglect a building to justify a zoning change.

Thus, this Court should hold the Rezoning represented unlawful "spot zoning" that did not further the City's comprehensive plan, and only served to relieve the developer from the constraints of the existing single-family residential

zoning to further its parochial interest in maximizing the value of the property through a high-density development.

IV. Conclusion.

The Court should reverse the district court's decision, vacate the Rezoning, and remand for the district court to grant the declaratory judgment Plaintiffs requested.

Dated: October 13, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2016 a true and correct copy of the foregoing OPENING BRIEF OF PLAINTIFFS-APPELLANTS was served in the manner indicated below on opposing counsel and on the Denver District Court:

Nathan Lucero Tracy Davis Assistant City Attorneys Denver City Attorney's Office 201 W. Colfax Avenue, Dept. 1207 Denver, Colorado 80202 (counsel for City Defendants/Appellees) (served by ICCES)	Clerk's Office Denver District Court 1437 Bannock Street, Room 256 Denver CO 80202 (served by ICCES)
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By: *s/ Gregory J. Kerwin*
Gregory J. Kerwin

Index to documents in Appeal Record cited in Opening Brief:

Court File (CF):

a. July 6, 2015 Pl. Complaint and exhibits: CF pp. 3-94

b. September 18, 2015 Order denying City Defendants motion to dismiss: CF pp. 231-35

c. September 28, 2015 Pl. Motion for Leave to Serve Document Subpoenas and Take Brief Depositions to Obtain Evidence Concerning Ex Parte Communications with City Council Members That Should Be Memorialized in the Administrative Record, with Exhibits A and B: CF pp. 247-70.

d. October 2, 2015 City Defendants' Answer: CF pp. 296-308

e. October 7, 2015 Pl. Reply Brief In Support of Their Motion for Leave to Serve Document Subpoenas and Take Brief Depositions . . .": CF pp. 332-48

f. October 21, 2015 Cedar Metropolitan Answer: CF pp. 378-86

g. November 3, 2015 Order on Plaintiffs' Motion for Leave to Serve Document Subpoenas and Take Brief Depositions . . .": CF pp. 438-40.

h. November 23, 2015 Plaintiffs' Formal Objection to Completeness of Administrative Record Tendered by City of Denver as of November 19, 2015; CF pp. 467-73

i. December 3, 2015 Order Re: Administrative Record and Briefing Schedule: CF pp. 499-500

j. January 14, 2016 Pl. Opening Brief in Support of Their Claims Under Colo. R. Civ. P. 106(a)(4) and for Declaratory Judgment, and appendices: CF pp. 501-33 and 534-636

   Appendix 1: Chronology of emails and copies of emails from administrative record: CF pp. 534-82

   Appendix 2: Excerpts from SIRE Record: cited in UF#3, 4, 6 and body of Opening Brief: pages 11, 12, 14, 16, 19, 21, 22: CF pp. 583-611

   Appendix 3: Summary of public data of campaign contribution information: Affidavit of Gregory J. Kerwin and Exhibits A, B, C, D: CF pp. 612-636

k. February 18, 2016 Cedar Metropolitan Answer Brief and Appendices: CF pp. 636-76; 677-779.

Appendix: Excerpts from Denver Zoning Code: CF pp. 677-82

Appendix: Excerpts from Blueprint Denver: CF pp. 683-90

Appendix: Excerpts from Denver Revised Municipal Code: CF pp. 691-98

Appendix: Denver Comprehensive Plan 2000: CF pp. 699-779

l. February 18, 2016 City Defendants' Answer Brief and Exhibits: CF pp. 780-808; 809-1009:

Exhibit A: CPD Powerpoint Slides from June 2015 City Council hearing: CF pp. 809-837

Exhibit B: CPD February 12, 2015 Staff Report and Recommendation to approve Rezoning, including Rezoning Application: CF pp. 838-79

Exhibit C: Excerpts from Denver Zoning Code: CF pp. 880-967

Exhibit D: Colorado Court of Appeals' Unpublished Decision in: O'Connor v. Denver Planning Board, No. 15CA0709 (November 25, 2015): CF pp. 968-90

Exhibit E: Blueprint Denver excerpts: CF pp. 991-97

Exhibit F: City Council June 4, 2015 Memo finding petitioners did not meet Protest Petition requirements, with City's calculations: CF pp. 998-1006

Exhibit G: Board of Adjustment Revised Rules of Procedure: CF pp. 1007-09

m. March 3, 2016 Pl. Reply Brief in Support of their Claims under Colo. R. Civ. P. 106(a)(4) and for Declaratory Judgment: CF pp. 1032-49

n. May 17, 2016 Order dismissing all claims: CF pp. 1075-89

Transcript (in folder called: "Transcripts Suppressed") of April 22, 2016 hearing before district court.

Administrative Record (AR): (pages other than audio and video files have document ID/"bates" number)

Disk 1: City Council's official "SIRE" record for June 8-9, 2015 public hearing, and minutes, agendas, and communications for Council and Council staff members

Disk 2: Additional Council and Council staff member communications, and slides for Council NAP meeting (Neighborhood and Planning)

Disk 3: Audio MP3 files of January 2015 Planning Board meeting

Disks 4, 5: Video file of City Council meeting

Disk 6: Susman Gmail files and Outlook filed, and additional Council meeting information

Disks 7 and 8: mp4 video files for two City Council NAP committee meetings.

Disk 9: Miscellaneous additional communications presented by City in Supplement

ADDENDUM TO OPENING BRIEF

1. May 17, 2016 Order dismissing Plaintiffs' claims, CF pp. 1075-89.

2. December 3, 2015 Order Re: Administrative Record and Briefing Schedule: CF pp. 499-500.

3. November 3, 2015 Order on Plaintiffs' Motion for Leave to Serve Document Subpoenas and Take Brief Depositions . . .": CF pp. 438-40.

4. Denver Zoning Code Sections 12.4.10.1 to 12.4.10.12: Official Map Amendment (Rezoning).

5. Denver Revised Municipal Code § 12-44.

6. Blueprint Denver Excerpts: Cover and Chapters 1, 7 and 8, including pp. 5, 144-45

7. Chronology re *ex parte* communications from Plaintiffs' Appendix 1 to their district court opening brief (filed January 14, 2016): CF pp. 535-38.