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COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

Colorado District Court, Denver County
Hon. Shelley A. Gilman
Case No. 2015CV32427

Plaintiffs-Appellees:

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

v.

Defendants-Appellants:

THE CITY AND COUNTY OF DENVER, *et al.*, and CEDAR METROPOLITAN LLC.

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Case No.: 2016CA920

CEDAR METROPOLITAN LLC'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, 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. 28(g) or C.A.R. 28.1(g):

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The brief also complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b):

> It contains a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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/s/ Chip G. Schoneberger

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STATEMENT OF THE CASE

A. The Record Set Straight

Cedar Metropolitan LLC ("Cedar") generally agrees with plaintiffs' recitation of the nature and procedural history of the case. (Aplts' Opening Br. at 3-5). However, throughout their brief plaintiffs make factual assertions without record support, omit several material facts, and misstate others. For example, in an attempt to bolster their *ex parte* argument, plaintiffs declare councilwoman "Susman privately obtained factual information about the merits of the [r]ezoning." (Aplts' Opening Br. at 12). Yet plaintiffs never identify or discuss a single communication containing undisclosed factual information material to the rezoning; they only vaguely direct the Court to "1,364 pages of emails." (*Id*. at 11-13).

Plaintiffs also omit their own attempts to engage in private discussions with Susman and other City Council members. Indeed, plaintiff Katie McCrimmon emailed Susman stating, "a couple of us wanted to meet with you to brief you on our presentation[;] [t]his would be a private meeting with you, not one with the developers or other neighborhood leaders." (A.R. Disc 2, Susman-Kline_Redacted at 1100).[1]

[1] "A.R." refers to the administrative record before City Council.

Plaintiffs also declare that an "Area of Stability" designation under Blueprint Denver "mean[s] the neighborhood is stable and should not be changed." (Aplts' Opening Br. at 36-37). This is patently false. Blueprint Denver expressly allows development and redevelopment in an Area of Stability: "[t]he goals for Areas of Stability is to identify and maintain the character of an area while accommodating some new development and redevelopment." (R. CF. at 687).

B. Additional Material Facts

The following other facts are material to the issues raised on appeal.

The Comprehensive Plan and Blueprint Denver

Enacted in 2000, the Denver Comprehensive Plan 2000 ("Plan")[2] is Denver's master zoning plan and provides general guidance for the entire city. (R. CF. at 697 § 12-61(a)), 700). The Plan identifies numerous objectives and strategies by which those objectives may be achieved. Some of its goals include environmental sustainability, adopting effective land use policies, preserving Denver's legacies such as tree-lined streets, and improving Denver's

[2] Plaintiffs failed to submit the Plan or Blueprint Denver for inclusion in the administrative or district court records. Nor did plaintiffs include any provisions of the Denver Zoning Code ("Code") or the Denver Revised Municipal Code ("DRMC") on which they rely. Cedar and the City provided the district court with excerpts of these zoning plans and municipal code provisions, but neither record contains complete versions of the Plan or Blueprint Denver. (R. CF. 677-779, 924-967, 991-97).

neighborhoods. (R. CF. at 704-79). The Plan identifies several strategies to meet these goals, including:

- Environmental Sustainability Strategy 2-F: "[P]romoting infill development at sites where services and infrastructure are already in place" (*Id*. at 714);
- Land Use Strategy 3-B: Managing growth and change through effective land use policies, including "encourag[ing] quality infill development that is consistent with the character of the surrounding neighborhood; that offers opportunities for increased density" (*Id.* at 736);
- Neighborhood Strategy 1-E: "Modify[ing] land-use regulations to ensure flexibility to accommodate changing demographics and lifestyles[,] and [a]llow ... a diverse mix of housing types and affordable units[.]" (*Id.* at 773);
- Neighborhood Strategy 1-F: Investing in neighborhoods "to help meet citywide goals and objectives for a range of housing types and prices, community facilities, human services and mobility." (*Id.*)

City Council adopted Blueprint Denver in 2002 "to implement and achieve the vision outlined in [the] Plan[.]" (*Id.* at 684). Among other things, Blueprint Denver identifies "Areas of Change" and "Areas of Stability," and further subcategorizes Areas of Stability as either a "committed area" or a "reinvestment area." (*Id.* at 687-89). Though not identifying "committed areas" and "reinvestment areas" on the map, Blueprint Denver defines "reinvestment areas" as "neighborhoods with a character that is desirable to maintain but that would benefit from reinvestment through modest infill and redevelopment of major projects in a

small area." (*Id.* at 688). Indicators of such reinvestment areas within an Area of Stability include "deteriorated and poorly maintained housing stock," "inappropriate land uses or inadequate buffering between uses," "lack of curbs," and "maintaining affordable housing." (*Id.*).

Like the Plan, Blueprint Denver also identifies numerous strategies by which to meet its goals. These include: (1) "address[ing] incompatible zoning and land use issues," (2) "address[ing] edges between areas of stability and areas of change," and (3) "diversity of housing type, size and cost." (*Id.* at 685) (emphasis added). It also explicitly identifies a "regulatory toolbox" to help implement these strategies in an Area of Stability. One such "tool" is a zone map amendment, *i.e.*, "rezoning." (*Id.* at 689-90). Blueprint Denver contemplates use of map amendments to "create a better match between the land uses in an area and zoning." (*Id.*)

The Parcel and Rezoning Application

The at-issue parcel is bounded on the east by S. Monaco Parkway with approximately 700 multi-family apartments across the street; on the south by a daycare business and one single-family house; on the north by rowhomes and portions of Crestmoor Park; and on the west by rowhomes and other portions of Crestmoor Park. (A.R. Disc 6, City Council 3-31-15 at 531). The Crestmoor Park

neighborhood lies to the west and south of Crestmoor Park and is also zoned as single-family. (*Id.*)

Blueprint Denver places it in an Area of Stability directly adjacent to an Area of Change:

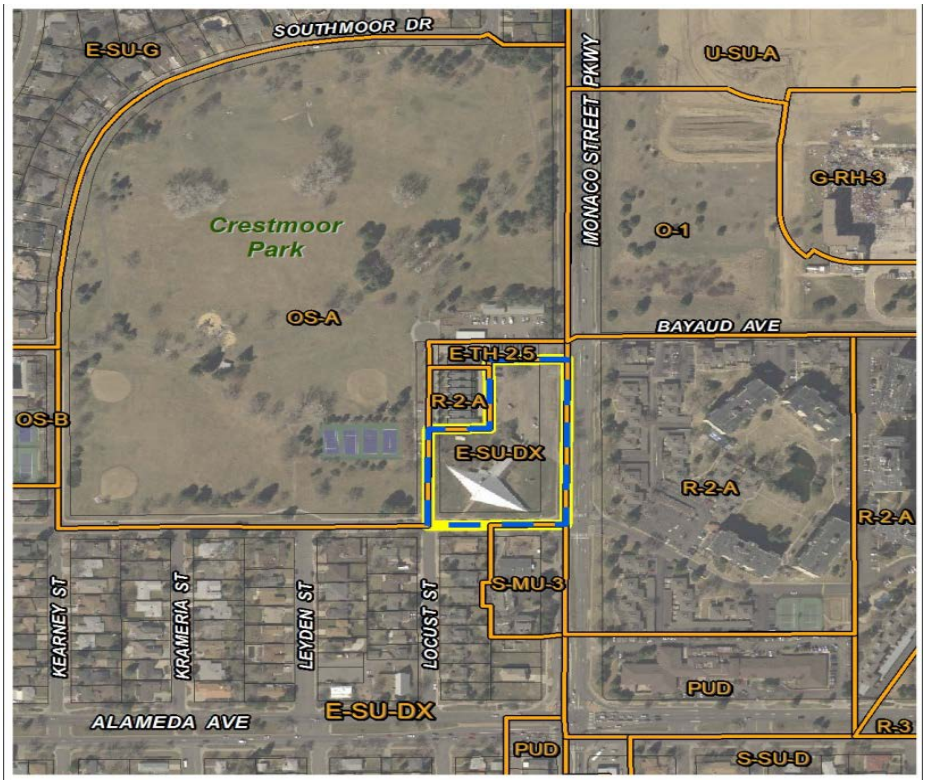
(*Id*. at 535).

South Monaco Parkway is a "residential arterial" street "designed to provide a high degree of mobility and generally serve longer vehicle trips to, from, and within urban areas." (*Id.*; R. CF. at 686). Arterials "interconnect[] major unban elements such as ... large urban and suburban commercial centers and residential

neighborhoods." (R. CF. at 686). Arterials thus "serve a city-wide function and are ... designated using a broader city-wide perspective." (*Id.*) Alameda, also designated as an arterial, is a block south of the Parcel. (A.R. Disc 6, City Council 3-31-15 at 534).

In October 2014, Cedar applied to rezone the site, originally seeking to rezone it from E-SU-DX to S-MU-5 in order to build a four-story, 120-unit age-targeted apartment building on the Parcel. (A.R. Disc 1, Council 6-8-15 (SIRE) at 5-8). In December 2014, Cedar revised its application to S-MU-3, thus limiting the height to a three-story building. (*Id.*). The Code defines S-MU-3 zoning as Suburban Neighborhood Context and allows buildings up to three stories tall. (A.R. Disc 1, Council 6-8-15 (SIRE) at 26-27; A.R. Disc 6, City Council 3-31-15 at 889-97). The Suburban Neighborhood Context is characterized by single-unit and multi-unit residential and some commercial strips and centers. (*Id.*). The multi-unit residential and commercial uses are the uses generally located along arterial streets while single family is located away from arterials and on local streets. (*Id.*).

The properties surrounding the parcel contain a variety of different zoning designations, including the same S-MU-3 zoning Cedar sought for the parcel, as follows:



(A.R. Disc 6, City Council 3-31-2015 at 532).

The Planning Board recommended approving the rezoning. (A.R. Disc 1, City Council 6-8-15 (SIRE) at 26). In light of opposition from some of the surrounding neighborhood residents, Cedar asked City Council to delay its hearing on the rezoning application to June 8, 2015, to permit more time to interface with the neighborhood. (*Id.* at 5-8). During this time, in response to the neighborhood's concerns, Cedar again revised its site plan and now plans to build only a 50-unit, age-targeted apartment building plus 25 for-sale townhomes with access limited to Monaco (rather than Cedar or Locust) and increased available parking to at least two parking spaces per unit. (*Id.*).

City Council held its public hearing on the rezoning application on June 8, 2015. (A.R. Disc 1, City Council Minutes at 18). The hearing lasted over eight hours and included dozens of public comments, a presentation from the Community Planning and Development ("CPD") staff and Cedar, and questions from various City Council members to the public, the CPD staff, and Cedar. (*Id*.) City Council ultimately approved the rezoning application 8-4. (*Id*.) Mary Beth Susman, the councilmember for District 5 where the parcel is located, voted against the rezoning. (*Id.*)

SUMMARY OF THE ARGUMENT

Plaintiffs use this C.R.C.P. 106(a)(4) ("Rule 106") appeal not to correct a legal or factual error by City Council, but, rather, to urge judicial "reformation" of an allegedly "broken" zoning process. (Supr. R. Tr. 4/22/16 at 6:19-23). Indeed, plaintiffs request this Court: (1) bar City Council from deciding rezoning applications despite the authority granted in Denver's Charter and zoning Code; (2) bar public contact with City Council members; (3) bar City Council from relying on express language in its adopted zoning plans; (4) bar planning board members from signing rezoning applications despite the express authority granted in the zoning Code; and (5) omit city-owned land from the protest petition process despite plain language in Denver's Charter and zoning Code as adjudicated by this Court.

Notwithstanding plaintiffs' legislative agenda, City Council committed no reversible abuse of discretion in rezoning the parcel and plaintiffs' contrary arguments fail for several reasons.

First, neither the emails to councilwoman Susman nor City Council's receipt of campaign contributions constitute a reversible due process violation. Plaintiffs identify no *ex parte* communication containing factual information about the rezoning not otherwise publicly available. The mere existence of undisclosed

emails cannot rise to the level of a reversible due process violation absent evidence that they contained material fact information about the rezoning and that City Council actually relied on that information to make its decision. No such evidence exists here; plaintiffs were afforded a full and fair opportunity to address the rezoning and thus fail to rebut the presumption of integrity inherent in the rezoning process.

Second, plaintiffs fail to establish that City Council misinterpreted the zoning Code's review criteria, or that its decision lacks any evidentiary support in the administrative record so as to render it arbitrary and capricious. Plaintiffs effectively concede the record evidence supports the rezoning's consistency with the Plan's and Blueprint Denver's plain language regarding zoning "strategies" and "justifying circumstances." And plaintiffs present no factual or legal basis to adopt their position that City Council must ignore this plain language and evidence.

Third, plaintiffs' attempt to obtain Rule 106 judicial review of the Planning Board's conduct or its alleged "conflict of interest" is misguided. The Planning Board is not a quasi-judicial body subject to Rule 106 review and this Court's decision in *O'Connor v. Denver Planning Board* forecloses plaintiffs' contrary argument.

Fourth, this Court's decision in *Burns v. Denver City Council* likewise forecloses plaintiffs' argument to exclude city-owned property from the City's protest petition process. *Burns* interpreted the identical City Charter language to unambiguously include all land irrespective of ownership, and plaintiffs present no factual or legal basis to overturn *Burns*.

Finally, plaintiffs' "spot-zoning" argument fails for the simple reason that the rezoning does not impermissibly create an isolated zone lot surrounded by a single uniform zone district, *i.e.*, an "island in a sea of sameness." Indeed, the surrounding properties contain a variety of different zoning designations, including the same S-MU-3 zoning at issue here.

Cedar further adopts the arguments in the City's answer brief. This Court should affirm City Council's decision in its entirety.

ARGUMENT

I. Standard of Review and Preservation of Issues

A. Standard of review

Plaintiffs propose a single standard of review for all issues on appeal – the standard for reviewing a governmental body's quasi-judicial decision under Rule 106. (Aplts' Opening Br. at 9-11, 28). Cedar partially agrees with plaintiffs' recitation of that standard; however, plaintiffs omit additional key parameters. (*Id*.)

Rule 106 limits judicial review to two grounds based solely on the administrative record before City Council – whether City Council abused its discretion or exceeded its jurisdiction. C.R.C.P. 106(a)(4). *See also Verrier v. Colo. Dept. of Corr.*, 77 P.3d 875, 879 (Colo. App. 2003) ("C.R.C.P. 106(a)(4) proceedings are limited to review of ... [the quasi-judicial body's decision] based on the evidence in the record before that body"). Plaintiffs allege no jurisdictional error and thus limit judicial review to abuse of discretion based on the administrative record.[3]

[3] Plaintiffs improperly cite materials outside the administrative record. (Aplts' Opening Br. at 14 [City of Lakewood materials]; Br. at 27 [campaign contribution materials]; 30-31 [Colorado Dep't of Local Affairs, Cmty. Dev. Office materials]; 31 [Rocky Mt. Land Tr. Inst./DU symposium materials]). Therefore, this Court should disregard those materials.

As plaintiffs correctly state, a quasi-judicial body abuses its discretion if no competent evidence reasonably supports its decision, meaning the decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Canyon Area Residents v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006); *Platte River Envir. Conserv. Org., Inc. v. Nat'l Hog Farms, Inc.*, 804 P.2d 290, 291-92 (Colo. App. 1990).

In making that determination, this Court may consider whether City Council misconstrued or misapplied a local code or ordinance. *Platte River*, 804 P.2d at 292. Courts interpret city codes *de novo*, applying the ordinary rules of statutory construction. *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2013).[4] Courts also "give great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). *See also Alpenhof*, 297 P.3d at 1055

[4] "However, appellate review extends only to those code provisions included in the record." *Alpenhof, LLC v. City of Ouray*, 297 P.3d at 1055. As established *supra*, plaintiffs failed to include any provisions of the Code, DRMC, Plan, or Blueprint Denver in the administrative or district court records. Although Cedar and the City provided some excerpts to the district court, plaintiffs bore the burden of ensuring a complete record for review; failing that, this Court presumes the record supports the lower tribunal's decision. *See generally*, *Colorado Dep't of Pub. Health and Env't v. Bethell*, 60 P.3d 779, 787 (Colo. App. 2002).

("interpretations by the governmental entity charged with administering a code deserve deference, provided they are consistent with the drafters' overall intent"). This includes a zoning body's interpretation of its own zoning regulations. *Fire House Car Wash, Inc. v. Bd. of Adj. for Zoning Appeals*, 30 P.3d 762, 766 (Colo. App. 2001); *Anderson v. Bd. of Adj. for Zoning Appeals*, 931 P.2d 517, 520 (Colo. App. 1996). Moreover, courts presume such interpretation is valid and plaintiffs bear the burden to overcome that presumption. *Quaker Court Ltd. Liab. Co. v. Bd. of Cnty. Comm'rs*, 109 P.3d 1027, 1030 (Colo. App. 2004). If a reasonable basis exists for the interpretation, the court may not set aside the decision on those grounds. *Platte River*, 804 P.2d at 292; *Save Park Cnty. v. Bd. of Cnty. Comm'rs*, 969 P.2d 711, 714 (Colo. App. 1998).

B. Preservation of issues

Cedar agrees that plaintiffs preserved some issues raised on appeal. But plaintiffs' passing comments about the district court's denial of their duplicative claim for declaratory judgment and request for discovery, or the City's failure to preserve email accounts, fail to sufficiently raise and present these issues for appellate review. (Aplts' Opening Br. at 5-6, 12, 17, 20, 47). Plaintiffs never identify these as issues for review and never make a legal argument or cite legal authority related to them. Plaintiffs thus waived appellate review of these issues.

C.A.R. 28(a)(7). *See also Comm. for Better Health Care v. Meyer,* 830 P.2d 884, 890 (Colo. 1992) (argument waived where "stated in conclusionary form ... not accompanied by citations to any authority, and [presented] solely in the context of [other] arguments"). For similar reasons, plaintiffs failed to sufficiently present several other issues for appellate review, as discussed *supra* in Sections III and IV.

II. City Council Committed No Reversible Due Process Violation in Approving the Rezoning

In Section I of their brief, plaintiffs vaguely reference both "[d]ue [p]rocess and mandatory procedures for a quasi-judicial rezoning." (Aplts' Opening Br. at 8). Cedar agrees that procedural due process generally applies to quasi-judicial proceedings, and the denial of that process may constitute an abuse of discretion under Rule 106. *Tepley v. Pub. Emp. Retirement Ass'n*, 955 P.2d 573, 578 (Colo. App. 1997). But due process affords no constitutionally protected interest in a particular statutory or administrative procedure – even a "mandatory" one. *Hillside Cmty. Church, S.B.C. v. Olson*, 58 P.3d 1021, 1027 (Colo. 2002). Because only two of the five issues contained in plaintiffs' Section I actually mentions due process (Aplts' Opening Br. at 11-18, 24-27), Cedar addresses those issues here and addresses the other three issues *infra* at Section IV.

A. Due process in quasi-judicial proceedings

"A presumption of validity and regularity attaches to a governmental proceeding, and the burden is on the party challenging that body's action to demonstrate an abuse of discretion." *Colorado Airport Parking, LLC v. Dep't of Aviation of City and Cnty. of Denver*, 320 P.3d 1217, 1219 (Colo. App. 2014). "[A] quasijudicial 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." *Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. 1983).

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Van Sickle v. Boyes*, 797 P.2d 1267, 1273 (Colo. 1990). "The essence of procedural due process is fundamental fairness." *Id*. In other words, "[a]n administrative body has the duty ... to be fundamentally fair in the resolution of a legal dispute between an individual and a governmental entity where the individual is threatened with deprivation of a significant property interest." *Id*. "Due process requires, at a minimum, notice and the opportunity for a meaningful hearing before an impartial tribunal." *Id*. at 1273-74.

In evaluating the inherent fairness of a hearing, courts consider the total effect of the entire procedure on the rights of the individual. *Nichols ex rel.*

Nichols v. DeStefano, 70 P.3d 505, 507 (Colo. App. 2002) (citations omitted). Rather than a narrow focus on particular factors, the court must examine the totality of the procedures afforded and their effect on the fundamental fairness of the hearing. *Id*.

B. The undisclosed Susman emails do not warrant reversal: Susman voted against the rezoning, no evidence suggests other City Council members relied on them, and plaintiffs were afforded an opportunity to address all material facts

1. *Ex parte* communications do not violate due process absent actual reliance and manifest prejudice

Plaintiffs seek reversal of City Council's rezoning decision based upon certain alleged "*ex parte*" emails sent to councilmember Susman, which City Council failed to include in the SIRE record prepared for the public hearing.[5]

Colorado law makes clear that undisclosed *ex parte* communications cannot invalidate quasi-judicial action absent the decision-maker's actual reliance on the communication and substantial manifest prejudice. *See L.G. Everist, Inc. v. Water*

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[5] Plaintiffs label the emails "*ex parte* communications." However, that term has a specific meaning in a due process context. *See, e.g., Asmussen v. Comm'r, New Hampshire Dep't of Safety*, 766 A.2d 678, 694 (N.H. 2000) ("the Due Process Clause does not prohibit communications that do not concern adjudicatory facts or the outcome of an adjudicatory proceeding"). The district court found "[t]he emails ... are either non-substantive or contain information already available to Plaintiffs." (R. CF. at 1087). Plaintiffs never identify which email they believe contains improper *ex parte* communications and only vaguely direct the Court to "1,364 pages of emails." (Aplts' Opening Br. at 11-13).

Quality Control Com'n of Colo. Dep't of Health, 714 P.2d 1349, 1352 (Colo. App. 1986); *see also Colorado Energy Advocacy Office v. Pub. Serv. Co.*, 704 P.2d 298, 303 (Colo. 1985) ("an agency may not base its decision on *ex parte* information").

L.G. Everist illustrates the point. *L.G. Everist* involved the imposition of civil penalties for discharging pollutants into the Blue River. 714 P.2d at 1350. Although one Water Control Commission board member received complaints not reflected in the administrative record, the Court of Appeals held this fell "far short of constituting the degree of prejudice necessary to invalidate the action of the Commission." *Id*. at 1352. The Court reasoned, "[w]hile it is true that parties to an administrative hearing should have the opportunity to be confronted with all facts that influence the disposition of a case, there must be substantial prejudice shown to invalidate the agency action." *Id*. The Court further noted, "the record as a whole shows the commissioners discounted this isolated statement and based their decision solely on the record." *Id*.

In short, the key is not whether an *ex parte* communication occurred in the first instance, but, rather, whether it substantially influenced the outcome. *L.G.*

Everist, 714 P.2d at 1352.[6] The circumstances here fail to reach even the level of the *ex parte* complaints received and disregarded in *L.G. Everist*. Here, plaintiffs cite nothing in the administrative record establishing City Council ever saw the emails to Susman in the first instance, much less its reliance on them or any resulting prejudice. Nor could they, as Susman voted against the rezoning and nothing in the record suggests she disclosed the emails to other Council members who voted for it.

2. No authority supports a *per se* rule based on the mere occurrence of *ex parte* communications

Absent any evidence that the emails impacted City Council's decision in any way, plaintiffs simply declare that "[b]oth this Court and the Colorado Supreme Court have vacated administrative decisions based on the mere occurrence of undocumented *ex parte* communications," and that "Colorado cases do not excuse undisclosed *ex parte* communications if they occurred with a quasi-judicial decisionmaker who voted a certain way[;] [t]hey require a remand." (Aplts'

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[6] Other jurisdictions are in accord. *See, e.g., Sills v. Walworth Cnty. Land Mgmt. Comm'n.*, 648 N.W.2d 878, 892 (Wisc. Ct. App. 2002) ("[e]ven if the neighbors had actual evidence of ex parte communications, they would still fail to make a prima facie showing of a procedural due process violation in the absence of bias or an impermissibly high risk of bias"); *Union State Bank v. Galecki*, 417 N.W.2d 60, 64 (Wisc. Ct. App. 1987) ("[e]ven if there was evidence of an *ex parte* communication, it would constitute material error only if ... improper influence on the decision maker appears with reasonable certainty to have resulted").

Opening Br. at 12, 15). Plaintiffs cite no cases or other authority with these declarations. (*Id*.) Instead, they urge this Court to create a *per se* rule to discourage constituents from ever contacting their elected City Council members at all. (Aplts' Opening Br. at 11-12) (arguing *per se* rule "is the better practice to ensure such communications never occur").

Plaintiffs' *per se* rule is untenable and unsupported.

Zoning proceedings present unique considerations regarding *ex parte* communications. As one reviewing court reasoned, "[g]iven the localized and political nature of zoning decisions, and the status of [Council] members as representatives of the community, it may be natural that such contacts occur." *Sills*, 648 N.W.2d at n.9. But "ex parte communications are not a per se violation of due process in the context of zoning permit proceedings." *Id*.

And none of plaintiffs' cited cases support adopting such a *per se* rule here. In fact, *Colorado Energy* confirms the reliance-prejudice requirements and implicitly rejects a *per se* rule. That case involved a gas tariff to offset the utility company's costs. 704 P.2d at 302. The appointed hearing examiner recommended modifying the tariff to require *ex post facto* refunds when the utility overcharges any individual user. The Public Utilities Commission ("PUC") approved the tariff but denied the proposed revision as too burdensome based on cost-effectiveness

data received from a staff member *ex parte*. *Id*. When the plaintiffs complained about the undisclosed data, the PUC remanded for the examiner to reopen the record and allow all parties to address it. *Id*. After those proceedings, the PUC again approved the tariff without the refund piece. *Id*. at 303.

On appeal, the plaintiffs argued for a *per se* rule similar to plaintiffs' rule here – that the mere occurrence of *ex parte* communications in the first place tainted the proceedings. In rejecting this, the Colorado Supreme Court confirmed the reliance-prejudice requirement: "An agency may not *base* its decision on ex parte information of which the parties are not given notice[.]" 704 P.2d at 303 (emphasis added).[7]

No meaningful distinction exists between the *per se* rule rejected in *Colorado Energy* and the one plaintiffs propose here. *Colorado Energy* rejected it because supplemental proceedings cured any inability to address the substantive *ex parte* information on which the PUC actually relied to make its initial decision. 704 P.2d at 304. Here, no evidence suggests City Council relied on the Susman emails at all. Neither scenario compels a *per se* rule.

[7] The Colorado Court of Appeals applied a similar analysis in *Zuviceh v. Indus. Comm'n*, 544 P.2d 641, 642-43 (Colo. App. 1975) (Industrial Commission improperly relied on *ex parte* communication from employer to re-open case).

Plaintiffs fare no better under *Board of County Commissioners of San Miguel v. Colorado Public Utilities Commission*, 157 P.3d 1083 (Colo. 2007). They cite *San Miguel* for the proposition that "the Court should not weigh the importance of the undisclosed fact information communicated *ex parte*." (Aplts' Opening Br. at 14). Yet *San Miguel* involved no *ex parte* communications at all; that case only interpreted the Administrative Procedure Act's ("APA") statutory requirement regarding what materials the PUC must include when certifying its administrative record to the district court for review. 157 P.3d at 1085. More specifically, *San Miguel* held the APA requires the PUC to include staff advisory memoranda in the certified administrative record when the memoranda contains new factual information not appearing elsewhere in the record. *Id*. at 1093-94. Nothing in *San Miguel* supports a *per se* rule requiring reversal of a quasi-judicial body's decision upon the mere occurrence of *ex parte* communications irrespective of its content or effect on the decision.

C. Ordinary campaign contributions do not create the substantial risk of bias necessary to constitute a due process violation

Plaintiffs also take issue with City Council's receipt of campaign contributions as potentially creating an impermissible conflict of interest that violates due process principles. (Aplts' Opening Br. at 24-27). Denver's Charter and zoning Code provide for an elected City Council and vests all quasi-judicial

rezoning decisions exclusively in that body. Code § 12.4.10.4(G) ("[t]he City Council shall consider the recommendations of the Planning Board and Manager, and any other comments received, in addition to the review criteria below, in approving, approving with conditions, or denying an official map amendment"). State law requires such local public officials to report all election campaign contributions (C.R.S. § 1-45-108) and nothing in the Denver Charter or zoning Code requires recusal of City Council members from their quasi-judicial role in zoning proceedings based on receipt of such campaign contributions. Nor does the Colorado statute prescribing the ethical rules for local officials. C.R.S. § 24-18-104. That statute expressly excludes campaign contributions from the category of prohibited "gifts of substantial value." *Id*. at § 104(3)(a).

Plaintiffs never directly challenge this statutory scheme as unconstitutional, and Rule 106 affords no jurisdiction to review such a challenge. (R. CF. at 40). *Price Haskel, Inc. v. Denver Dep't of Excise and Licenses*, 694 P.2d 364, 366 (Colo. App. 1984) (constitutional challenge to statute governing administrative body's quasi-judicial decision not within the scope of review under Rule 106(a)(4)). So instead, plaintiffs make a narrow *ad hoc* argument – that due process requires disqualification of individual City Council members from

participating in a rezoning decision if they received campaign contributions from advocates of the specific rezoning at issue. (Aplts' Opening Br. at 24-27).

Plaintiffs rely heavily on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009), which does not aid their cause. (Aplts' Opening Br. at 24-25). That case involved the "extraordinary situation" of a corporate litigant's post-trial effort to have a new justice elected to the appellate court reviewing its appeal by contributing $3 million to the candidate's election campaign – more than all other contributions combined and triple the amount spent by his own election committee – resulting in a narrow victory. *Id*. at 872-74. A 5-4 majority of the United States Supreme Court "conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id*. at 884.

The Colorado Supreme Court not only recognizes *Caperton* as a "rare situation," but also that small and attenuated pecuniary interests do not violate due process or otherwise require recusal of quasi-judicial decisionmakers. *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010). And that is the case here. Even considering the materials plaintiffs improperly cite (*see*, *infra*, at n.3), they

fail to establish any significant or disproportionate campaign contributions to any City Council member who voted for the rezoning. The highest percentage any such Council member received from alleged "rezoning advocates" amounted to just 5% of all contributions received. (R. CF. at 636). This differs markedly from the extreme situation in *Caperton* that compelled the High Court's narrow majority to find a "serious risk of actual bias" in that case.[8]

Finally, plaintiffs equate City Council members with judges and urge this Court to impose upon them the Code of Judicial Conduct and related jurisprudence. (Aplts' Opening Br. at 25-27). "Quasi" judicial decisions necessarily involve non-judicial officers. *City of Manassa*, 235 P.3d at 1056. The Colorado Supreme Court already made clear that "due process does not ... impose upon quasi-judicial decision-makers the more rigorous standards for disqualification, much less other reporting or disclosure requirements, applicable specifically to judicial officers through ethical codes or local rules of procedure." *Id*. at 1057. Plaintiffs' "conflict of interest" argument predicated on the receipt of campaign contributions fails.

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[8] The seminal case on the issue – *Woodlawn Hills Residents Association, Inc. v. City Council*, 609 P.2d 1029, 1033 (Cal. 1980) – also recognizes that "public policy strongly encourages the giving and receiving of campaign contributions" and thus that mere fact that city council members required to vote on a developer's application received a total of roughly $9,000 from the developer and its representatives did not create an appearance of unfairness.

III. City Council Properly Applied the Code's Review Criteria and the Administrative Record Supports its Decision

Next, plaintiffs argue City Council failed to comply with the Code's review criteria for a rezoning; namely, consistency with adopted plans and the Code's "justifying circumstances" criteria. This, too, is misplaced.

A. Consistency with adopted plan requires City Council to rely on the express language of those plans, including expressly stated "strategies"

The Code authorizes City Council to approve rezoning that "is consistent with the City's adopted plans[.]" (R. CF. at 681 [Code § 12.4.10.7(A)]). The Plan and Blueprint Denver are the only two "adopted plans" at issue here.[9] Consistency with those plans presents a fact issue within City Council's discretion. *See Friends of the Black Forest Preservation Plan, Inc. v. Bd. of Cnty. Com'rs*, 381 P.3d 396, 409 (Colo. App. 2016) (competent evidence supported "Board's finding that BFM's special use application was 'consistent with the applicable Master Plan'").

Plaintiffs implicitly concede the rezoning's consistency with multiple zoning "strategies" expressly outlined in the Plan and Blueprint Denver. (Aplts' Opening Br. at 35). Notwithstanding this, they make three sweeping assertions: (1) City Council cannot "reasonably rely" on these strategies because they are too "generic"

[9] Blueprint Denver also allows for "small area plans" at the neighborhood level but no such plan exists for the Crestmoor neighborhood. (R. CF. at 689).

(*Id*. at 35-38); (2) "generic" language in the Plan and Blueprint Denver "does not justify the [r]ezoning" (*Id*. at 36); and (3) Community Planning and Development ("CPD") misinterpreted provisions in Blueprint Denver. (*Id*. at 36-37).

Plaintiffs cite no authority for these arguments and never even discuss the allegedly "too generic" language at issue; therefore, plaintiffs fail to sufficiently present these issues for appellate review. C.A.R. 28(a)(7)(B) (argument must contain "contentions and reasoning, with citations to authority"); *Sinclair Transp. Co. v. Sandberg*, 350 P.3d 915, n.1 (Colo. App. 2014) (issue waived where "it is presented without any developed argument and it is supported by only the most generic citation of authority"); *Barnett v. Elite Prop. of Am., Inc*., 252 P.3d 14, 19 (Colo. App. 2010) ("[w]e will not consider a bald legal proposition presented without argument or development[;] ... [c]ounsel must inform the court both as to the specific errors asserted and the grounds, supporting facts, and authorities to support their contentions").

Moreover, each of plaintiffs' unsupported assertions fails.

First, it is axiomatic that mandating "consisten[cy] with the City's adopted plans" necessarily allows – indeed *requires* – reliance on the express language of those plans. Plaintiffs cite no authority to the contrary and present no alternative interpretation.

Second, "justification" is not the test under this review criteria; the Code speaks in terms of "consistency" with the Plan and Blueprint Denver. (Code § 12.4.10.7(A)).[10] Plaintiffs offer no real argument that City Council's consistency finding lacks any evidentiary support so as to render it arbitrary and capricious. *Board of Cnty. Com'rs of Routt Cnty. v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) (courts affirm quasi-judicial decisions "unless there is no competent evidence in the record to support it[,]" meaning "the decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority").

Third, what CPD "argued" or how it "interpreted" Blueprint Denver is immaterial under Rule 106 judicial review. (Aplts' Opening Br. at 36). CPD, or, more precisely, the Manager of CPD, only makes recommendations to City Council. (R. CF. at 915, 922-23 [Code §§ 12.2.3.4; 12.4.10.4(E)-(G)]). City Council then makes the final quasi-judicial decision on rezoning (*Id.* at 914 [Code § 12.2.1.2]) and thus it is City Council's decision under judicial review here. C.R.C.P. 106(a)(4). Courts presume City Council correctly interpreted Blueprint Denver and plaintiffs bear the burden to overcome that presumption. *Quaker*

[10] *Available at* https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/Zoning/DZC/Denver_Zoning_Code_Article12_Administration.pdf at 12.4-33 (last accessed December 16, 2016).

Court Ltd. Liab. Co. v. Bd. of Cnty. Comm'rs, 109 P.3d 1027, 1030 (Colo. App. 2004).

Plaintiffs fail to overcome that presumption here. Though their argument is unclear, plaintiffs appear to complain about CPD and/or City Council's reliance on three concepts in Blueprint Denver: (1) "reinvestment areas"; (2) "areas of stability"; and (3) "residential arterials." (Aplts' Opening Br. at 36-37).

Merely because Blueprint Denver does not expressly identify "reinvestment areas" on a map is immaterial. (Aplts' Opening Br. at 36-37). Blueprint Denver expressly allows change in areas of stability: "The goals for Areas of Stability is to identify and maintain the character of an area while accommodating some new development and redevelopment." (R. CF. at 687). Blueprint Denver further identifies numerous strategies by which to meet this goal, including "address[ing] edges between areas of stability and areas of change[.]" (*Id.* at 685). And Blueprint Denver expressly identifies Crestmoor as an "area of stability" next to an "area of change." (A.R. Disc 6, City Council 3-31-15 at 535).

Plaintiffs ignore this and simply ask this Court to reweigh the evidence and reach a different outcome. Though Blueprint Denver expressly contemplates multi-family residences along arterial roads such as S. Monaco Parkway, plaintiffs accuse CPD and/or City Council of giving insufficient weight to the fact that one

section of one side of S. Monaco Parkway contains only single-family homes. (Aplts' Opening Br. at 36). But plaintiffs' disagreement with how City Council weighed the evidence in its analysis cannot establish an abuse of direction. Rule 106 limits the Court's inquiry to whether the record contains any competent evidence supporting the decision. *O'Dell*, 920 P.2d at 50.

B. Plaintiffs misread the "justifying circumstances" criteria: A single deteriorating parcel is sufficient

Plaintiffs also challenge compliance with the Code's "justifying circumstance" requirement. (Aplts' Opening Br. at 38-40). Among other scenarios, justifying circumstances exist when "[t]he land or its surrounding environs has changed or is changing[.]" (R. CF. at 681-82 [Code § 12.4.10.8(4)]). Plaintiffs do not dispute that the parcel at issue here had become deteriorated. Instead, they simply declare the phrase "land or its surrounding environs" only applies to "an entire area in a neighborhood [and] not just one parcel." (Aplts' Opening Br. at 39). Yet plaintiffs (again) cite no authority for their assertion and provide no explanation for their interpretation; thus, plaintiffs waived this argument as well. C.A.R. 28(a)(7)(B); *Sinclair Transportation*, 350 P.3d at 3; *Barnett*, 252 P.3d at 19. And plaintiffs' unsupported assertion certainly cannot overcome the presumption favoring City Council's interpretation of its own Code. *Quaker Court*, 109 P.3d at 1030.

Moreover, even under plaintiffs' theory, the record supports a conclusion of changed "surrounding environs" since the City enacted Blueprint Denver in 2002. Indeed, the parcel lies adjacent to an Area of Change where apartment units are being built. (A.R. Disc 6, City Council 3-31-2015 at 535).

IV. Plaintiffs' Remaining Arguments Lack Merit

The remainder of plaintiffs' arguments present a mixed bag of alleged errors. Cedar addresses these arguments *seriatim*.

A. Planning Board: Rule 106(a)(4) affords no right to judicial review of Planning Board recommendations or "conflicts of interest" allegedly created by DRMC § 12-44

Plaintiffs argue that, due to an "inherent conflict of interest," this Court should bar Denver Planning Board members from serving as rezoning applicants under DRMC § 12-44 "when the Planning Board functions as a quasi-judicial body." (Aplts' Opening Br. at 18-19). Whether DRMC § 12-44 creates or allows an impermissible conflict of interest among the Planning Board is not subject to judicial review under Rule 106 and not properly before this Court. As established *supra*, Rule 106 is not a vehicle for facial challenges to statutes. *Price Haskel,* 694 P.2d at 366.

Moreover, Rule 106 limits this Court's judicial review to decisions of governmental bodies or officers "exercising judicial or quasi-judicial functions[.]"

C.R.C.P. 106(a)(4). Contrary to plaintiffs' assertion, Planning Board members do not sit as "quasi-judges" and the Planning Board does not "function[] as a quasi-judicial body" or "vot[e] in a quasi-judicial hearing." (Aplts' Opening Br. at 18-19).

The zoning Code expressly states the Planning Board only makes "recommendations" to City Council on rezoning applications. (R. CF. at 678-82 [Code § 12.4.10.4(E)]). City Council then independently decides whether to approve the rezoning after a public hearing based on the evidence and statutory review criteria. *Id.* at §§ 12.4.10.4(G), 12.4.10.10. Only City Council makes the "final decision" on rezoning – not the Planning Board. (R. CF. at 914 [Code at § 12.2.1.2]). Therefore, Rule 106(a)(4) affords no jurisdictional basis to review Planning Board recommendations.

On this point plaintiffs misrepresent the only case they cite – this Court's unpublished decision in *O'Connor v. Denver Planning Board*, No. 15CA709 (Colo. App. Nov. 25, 2015).[11] Plaintiffs declare *O'Connor* held the Code does "not allow[] for judicial review of the Planning Board's *decision until* the City Council also *votes* on rezoning[.]" (Aplts' Opening Br. at 19) (italics supplied).

[11] Plaintiffs also violate this Court's policy against citing unpublished opinions. *See* https://www.courts.state.co.us/Courts/Court_of_Appeals/Forms_Policies.cfm (last visited Dec. 15, 2016) ("[c]itation of unpublished opinions is forbidden").

Plaintiffs thus represent *O'Connor* to have held that: (1) the Planning Board makes appealable decisions; and (2) the right to judicial review of such decisions ripens once City Council "also votes" on the rezoning.

O'Connor expressly held the opposite and thus forecloses plaintiffs' argument:

> We conclude that the plain language of section 12.4.11.5 does not permit an appeal of the Planning Board's recommendation in district court. Nowhere does the Denver Zoning Code refer to the Planning Board's action on a text amendment as a "decision." Rather, the Code refers to a "recommendation" by the Planning Board and a "[f]inal [d]ecision" by the City Council. § 12.4.11.3. The Planning Board's recommendation is only an intermediate step in the review process, which concludes with the City Council's decision to approve or deny the proposed text amendment. The Code explicitly states that only the City Council is responsible for "final action" on a proposed text amendment. § 12.2.1.2. Thus, reading section 12.4.11.5 in the context of these other provisions, we conclude that the word "decision" refers to a final decision by the City Council.
>
> * * *
>
> [W]e conclude that the Planning Board's recommendation on a text amendment is not appealable under section 12.4.11.5 and is not a "final decision" reviewable under C.R.C.P. 106(a)(4).

(R. CF. at 976-77).

No meaningful distinction exists between the provisions addressed in *O'Connor* and those at issue here. Both limit the Planning Board to making

recommendations and vest City Council with sole authority to make the final quasi-judicial decision.

What is more, plaintiffs' assertions that "Planning Board members could not be neutral ... [regarding] their own member's application" and that the Planning Board's alleged "conflict of interest" somehow "taints" City Council's decision is equally unsupported. (Aplts' Opening Br. at 18-19). Plaintiffs make these bald assertions with no record support at all – much less evidence of Planning Board bias or any alleged "taint" on City Council.

B. Consideration of "political factors": Notwithstanding the dialog between individual council members at the hearing, plaintiffs fail to establish an absence of competent evidence supporting City Council's ultimate decision, or that any council member relied on material facts outside the record

Plaintiffs next argue certain council member comments at the public hearing reflect "flawed quasi-judicial decision making" and somehow warrant reversal of City Council's decision. (Aplts' Opening Br. at 20). This argument totals four sentences and one generic citation to authority; therefore, plaintiffs (again) fail to sufficiently raise it for appellate review. C.A.R. 28(a)(7)(B); *Sinclair Transportation*, 350 P.3d at 3; *Barnett*, 252 P.3d at 19.

Moreover, mere dialog between individual council members at the hearing does not establish the City Council's decision constitutes a reversible abuse of

discretion. Rule 106 review does not parse out and examine the passing comments of every individual council member during a hearing. It examines whether competent record evidence supports City Council's ultimate quasi-judicial decision as a whole. *City and Cnty. of Denver v. Bd. of Adj. for City and Cnty. of Denver*, 55 P.3d 252, 254 (Colo. App. 2002) (board's "decision must be affirmed unless there is no competent evidence in the record to support it such that it was arbitrary or capricious").

Nothing in plaintiffs' argument establishes a lack of competent evidence supporting City Council's ultimate decision as a quasi-judicial body. Nor do plaintiffs establish that any individual council member relied on specific factual information outside the hearing record or ignored the record evidence in casting their vote.

C. "Manipulation" of protest petition: *Burns* controls and plaintiffs present no basis to overturn it

Plaintiffs' argument regarding the "protest petition procedure" is unclear. They claim City Council "manipulated" the procedure by "including City-owned park land ... but not allowing any procedure for residents to obtain petition signature from the City." (Aplts' Opening Br. at 21). Plaintiffs assert the City "stepped outside its ... quasi-judicial rule ... by blocking the [p]rotest [p]rocedure from applying." (*Id*.) Finally, plaintiffs ask this Court to hold the City must either

exclude City-owned land from the protest procedure or create a procedure to allow citizens to obtain signatures from the City. (*Id.* at 22). Therefore, it appears plaintiffs make the following alternative arguments: (1) City Council misinterpreted Denver Charter, Article 3.2.9(E) to include city-owned land; or (2) that provision requires the City to sign any such protest petition.

Whatever the precise nature of plaintiffs' argument, the plain language of Article 3.2.9(E) and this Court's decision in *Burns v. Denver City Council*, 759 P.2d 748 (Colo. App. 1988) foreclose their challenge.

Article 3.2.9(E) provides, in relevant part:

> In case ... 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.

(R. CF. at 692) (emphasis added); *see also* R. CF. at 680 [Code § 12.4.10.5.A.1] (reiterated as "the total land area from the perimeter of the area proposed for change to a distance of 200 feet outside of the perimeter of the area proposed for change")).

Burns interpreted this precise language to include all land in the 200-foot area irrespective of ownership. Indeed, *Burns* held "[t]he charter and ordinance

provisions that the protest area be defined as 'the area to a distance of 200 feet from the perimeter of the area proposed for change' are clear, plain, and unambiguous; accordingly, they must be applied as written." 759 P.2d at 750. Accordingly, the Court held City Council properly included any city-owned streets located within that area. *Id*. at 749-50 (*cert. denied* Aug. 8, 1988).

Here, merely because the 200-foot perimeter around the at-issue parcel includes city-owned park land rather than city-owned streets does not change the analysis or compel a different result. As plaintiffs concede, in 2010 City Council re-codified these provisions verbatim and thus presumptively agrees with *Burns*'s interpretation and holding. *See Tompkins v. DeLeon*, 595 P.2d 242, 243–44 (Colo. 1979) ("[w]hen the legislature reenacts or amends a statute and does not change a section previously interpreted by settled judicial construction, it is presumed that it agrees with judicial construction of the statute"). Consequently, City Council did not "manipulate" the protest petition procedure – it applied the plain language of Article 3.2.9(E) as further confirmed by *Burns*.

Plaintiffs argument that *Burns*'s interpretation is "not rational" is equally misplaced. Plaintiffs predicate this on their assumption that the City will "always" support a rezoning. (Aplts' Opening Br. at 23). Yet they cite no evidence supporting such a blanket assumption. The Department of Parks and Recreation

limited its decision not to sign plaintiffs' protest petition to this particular case and expressed no general policy of support for all rezoning: "[T]he Department of Parks and Recreation is not able to take a side in [this] particular situation and is unable to sign on to your petition of protest." (A.R. Disc 1, CPD Redacted at 244).

D. Spot zoning: The properties surrounding the parcel contain widely varied zone districts, including S-MU-3, and thus rezoning the parcel to the same S-MU-3 zone district does not constitute unlawful spot zoning

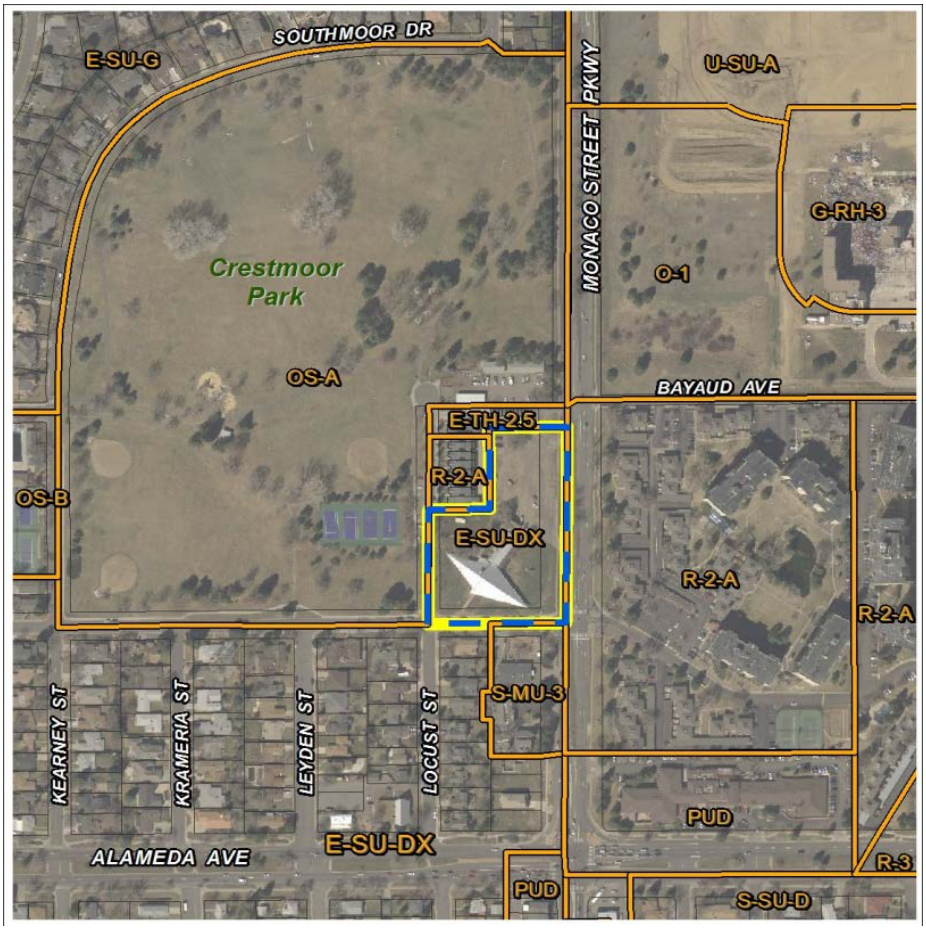
Plaintiffs erroneously argue the rezoning constitutes an "unlawful 'spot zoning.'" (Aplts' Opening Br. at 44). Plaintiffs' argument is misplaced. Spot zoning examines "whether the change in question was made with the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning code." *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1962). In other words, spot zoning "creates a small island of property with restrictions on its use different from those imposed on the surrounding property." *Little v. Winborn*, 518 N.W.2d 384, 387 (Iowa 1994). But when a parcel "lies on the fringe" of a residential zone or "serves as a buffer between sharply contrasting uses," the reclassification generally is permissible. *See* A. Rathkopf et al, 3 *Rathkopf's The Law of Zoning and Planning* § 41:8 (4th ed. 2016). Likewise, reclassifications when the "new use is consistent with others

in the surrounding area" or where a rezoning will "allow multifamily residences within a single family zone" are also generally permissible. *Id.*

Here, as established above, the rezoning furthers multiple goals of both the Plan and Blueprint Denver. The rezone "address[es] the edge" of an area of stability where hundreds of multifamily units are directly across the street in an area of change and creates a "buffer" between an arterial street (Monaco) and the Crestmoor neighborhood. (A.R. Disc 6, City Council 3-31-2015 at 536). The rezoning will also increase the "diversity of housing" choices in an area of stability. (*Id.*) Further, Blueprint Denver expressly authorizes the regulatory mechanism Cedar chose to utilize – a zone map amendment – as one "tool" for use in Areas of Stability such as the Crestmoor neighborhood. In other words, rezoning is both consistent with, and authorized by, the adopted plans.

Additionally, despite plaintiffs' incorrect statement that the parcel is "in the middle of a single family neighborhood" (Aplts' Opening Br. at 45), the parcel's surrounding properties, including immediately adjacent properties, contain a variety of different zoning designations, including the same S-MU-3 zoning. In fact, the property directly to the parcel's south has the same S-MU-3 zoning. (A.R. Disc 6, City Council 3-31-2015 at 532). The properties directly to the northwest and east, across S. Monaco Pkwy, are zoned R-2-A, which also permits multi-unit

homes. The property directly east of the parcel is home to approximately 700 apartments. (*Id.*) Only the adjacent property immediately to the southwest is zoned for single-family houses. As the existing zoning map demonstrates, rezoning the parcel to S-MU-3 actually brings it more in line with zoning restrictions of the surrounding property.



(A.R. Disc 6, City Council 3-31-2015 at 532).

Since the parcel lies on the fringe of a residential area and surrounding areas are zoned for higher residential use, the new use is consistent with the surrounding areas. *See Rathkopf* at § 41:8. The rezone does not constitute spot zoning.

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, Cedar requests this Court hold City Council did not abuse its discretion and thus affirm City Council's decision in its entirety.

REQUEST FOR ATTORNEY FEES AND COSTS

Cedar also requests its attorney fees and litigation expenses incurred in this appeal pursuant to C.A.R. 38(b) because several portions of plaintiffs' appeal are frivolous as argued. An appeal is frivolous as argued where the appellant fails to set forth a coherent and valid assertion of error supported by relevant legal authority. *Castillo v. Koppes-Conway*, 148 P.3d 289, 292-93 (Colo. App. 2006) (appeal frivolous where appellant cited only two irrelevant cases in support of its position).

Here, plaintiffs failed to present valid assertions of error supported by specific facts or relevant legal authority regarding at least four of the issues raised on appeal, as outlined *supra* in Sections III and IV. Moreover, plaintiffs brazenly misrepresent *O'Connor* and present no rational argument or authority for

distinguishing or reversing *Burns*. This warrants an award of attorney fees and litigation expenses incurred in defending these portions of plaintiffs' appeal.

DATED this 19th day of December, 2016.

FOSTER GRAHAM MILSTEIN
& CALISHER, LLP

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of December, 2016, a true and correct copy of the foregoing **CEDAR METROPOLITAN LLC'S ANSWER BRIEF** was served via ICCES upon the following:

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Original signatures on file at the offices of Foster Graham Milstein & Calisher, LLP pursuant to C.A.R. 30(f).