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

Appeal from Denver District Court
Case No. 2015CV32427
Honorable 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

v.

Defendants - Appellees:

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

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Attorneys for THE DENVER CITY COUNCIL (including the individual Council members in their official capacity: Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul Lopez, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman); THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity); THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith); and THE CITY AND COUNTY OF DENVER (collectively, "Denver" or "City") **KRISTIN M. BRONSON, DENVER CITY ATTORNEY** Nathan J. Lucero, #33908 Tracy A. Davis, #35058 Assistant City Attorneys Municipal Operations Section 201 W. Colfax Avenue, Dept. 1207 Denver, CO 80202-5332 Telephone: 720-913-3275 Facsimile: 720-913-3180 E-mail: nathan.lucero@denvergov.org tracy.davis@denvergov.org	
DENVER'S ANSWER BRIEF	

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:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

☑ It contains 8,509 words (principal brief does not exceed 9,500 words).

The brief also contains a statement whether the appellees agree with the appellants' statements concerning the standard of review and preservation for appeal.

The brief complies with C.A.R 28(k):

☑ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: */s/ Tracy A. Davis*
Tracy A. Davis, Esq. (#35058)
Attorney for City Defendants

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I. STATEMENT OF THE ISSUES

The City does not accept the Appellants' Issues Presented for Review. Based on the issues raised in Appellants' Issues section, the City reframes the issues as follows:

1. Whether the City Council abused its discretion in allowing allegedly "undisclosed *ex parte* communications" about the rezoning to occur between a lobbyist for Cedar Metropolitan, LLC, the property owner, and a City Council member.

2. Whether the City Council abused its discretion by permitting a Denver Planning Board member to represent an applicant for a rezoning.

3. Whether the City Council abused its discretion when members allegedly relied "on irrelevant political factors" in voting on the rezoning based on their statements made during deliberations.

4. Whether the City or City Council abused its discretion in a quasi-judicial rezoning by interpreting the Protest Petition Procedure to include City-owned land.

5. Whether the City Council abused its discretion in allowing members to vote on the rezoning when City Council members accepted campaign donations from parties that later supported a rezoning.

6. Whether the City Council abused its discretion when it approved the rezoning of the Parcel because the rezoning is not consistent with the City's adopted plans as required by the Denver Zoning Code.

7. Whether the rezoning constituted spot zoning.

II. STATEMENT OF THE CASE

The City does not accept the Appellants' Statement of the Case, which contains many unsupported factual claims and conclusions. Whitelaw appeals the rezoning by the City Council of a parcel located at 195 S. Monaco St. Pkwy. in Denver (the "Parcel" or the "Mt. Gilead Parcel") pursuant to C.R.C.P. 106(a)(4). R. CF, pp. 3-42.[1] The rezoning was contentious, with both proponents and opponents advocating to City Council members in person and via e-mail or letter both before and during the public hearing. In an effort to stop the rezoning, Whitelaw now alleges error in nearly every step in the rezoning process. However, the City, the Planning Board and City Council followed the law. City Council did not abuse its discretion and evidence in the record supported the rezoning. *See* C.R.C.P.

[1] We refer the docket and filed pleadings as R. CF plus page number and to documents in the administrative record, which is on CDs, as R. CF plus disk number, file name and page number of the file. The official record from the public hearing, including e-mails and other documents received by City Council before the hearing and sent to the record, and the City's staff report and presentation are on Disk 1, City Council 6-8-15 (SIRE).pdf.

106(a)(4). This court should not adopt new law or overturn long-standing precedent simply so that Whitelaw may prevail.

A. **Relevant Facts.**

At the time of the rezoning, the Parcel was the site of the Mt. Gilead Church. R. CF, Disk 1, City Council 6-8-15 (SIRE), pp. 26, 160. The Parcel is bounded by Monaco to the east, with two-story apartments across Monaco. *Id.* at 26-28, 154, 157, 159, 161. On the south, it is bounded by Cedar St. and, across Cedar, a day care business and a single family home. *Id.* at 26-28, 162. On the west, the Parcel abuts a portion of Crestmoor Park across Locust Street and two-story townhomes. *Id.* at 26-28, 163. On the north, it abuts the townhomes and a City-owned parks maintenance facility. *Id.* at 26-28, 164.

The Parcel was zoned E-SU-DX, which allowed suburban and urban houses, and the church use. *Id.* at 26. The applicant, defendant Cedar, proposed to change the zoning to S-MU-3 in order to permit development of a multi-family residential apartment building. *Id.* S-MU-3 allows buildings up to three stories tall. *Id.*

The proposed rezoning and potential project were the subject of substantial community discussion, with members of the public both for and against it. Many people contacted City Council members, including Mary Beth Susman, the Council member in whose district the Parcel lies. The administrative record in the district

court is replete with e-mails, letters and other records of communications from both opponents and proponents. *See*, *generally*, R. CF, Disks 1, 2, 6, and 9.

The City's Planning Board recommended that the City Council approve the rezoning. Jim Bershof, Cedar's architect, is a member of the City's Planning Board. Mr. Bershof did not attend or vote on the rezoning at the Planning Board. R. CF, Disk 1, CPD_Redacted.pdf, pp. 572-73.

Opponents of the rezoning attempted to invoke the City's Protest Petition Procedure. *See* R. CF, Disk 1, CPD_Redacted.pdf, pp. 212-22. Under the Denver Charter, §3.2.9(E), if opponents gather signatures from property owners representing 20% or more of the land area within 200 feet of the perimeter of a proposed rezoning, then the rezoning must pass the City Council by a super-majority (10 members). *Id.* at 212-22, 232, 923; Op. Brief at Appx. 4, §12.4.10.5. Opponents were unable to gather the required number of signatures to trigger a super-majority. R. CF, Disk 1, CPD_Redacted.pdf, p. 220.

On June 9, 2016, after a lengthy public hearing and with a substantial public record, City Council voted 8 to 4 to rezone the parcel. R. CF, Disk 1, City Council Minutes.pdf, pp. 18, 41; *see* R. CF, pp. 1096, ¶1, 1097-8, ¶10; *see, generally*, City Council 6-8-15 (SIRE).pdf.

B. Trial Court Proceedings.

Opponents continued to oppose the rezoning and filed this lawsuit seeking to overturn it on a variety of procedural and factual bases pursuant to C.R.C.P. 106(a)(4). The district court granted Whitelaw's request for an administrative record for review that included, primarily, e-mails to and from City Council members and others regardless of whether they were in the City Council's record at the time of the hearing.

The district court reviewed the record, including the additional documents, received substantial briefing, and held an oral argument. The City agrees with the district court's Order, dated May 17, 2016, upholding the rezoning of the Parcel. As that court found, evidence in the record supports the rezoning and the City Council did not abuse its discretion. Whitelaw now appeals the same issues raised below.

III. SUMMARY OF THE ARGUMENT

The City Council did not abuse its discretion or act contrary to law in approving the rezoning of the Parcel. Rather, the City and City Council followed established City ordinances and case law in conducting the public rezoning process and City Council hearing and vote. Whitelaw and other opponents had notice and an extensive opportunity to be heard, including but not limited to the eight-hour public hearing on the rezoning conducted by the City Council. Any alleged *ex parte*

communications between Cedar's representatives and City Council members, and alleged campaign contributions to some Council members, did not bias or prejudice City Council members.

Scott v. City of Englewood, 672 P.2d 225 (Colo. Ct. App. 1983) and related law regarding quasi-judicial decision-making support the conclusion that fundamental fairness prevailed. There is no basis to overcome the presumption that City Council members acted with integrity, honesty, and impartiality.

The City and City Council did not misinterpret the Protest Petition Procedure and this Court should not overturn *Burns v. Denver City Council*, 759 P.2d 748 (Colo.App. 1998). The rezoning also is not spot zoning pursuant to *Clark v. City of Boulder*, 362 P.2d 160 (Colo. 1961).

Finally, and most fundamentally, evidence in the record supports the rezoning and there is no indication that City Council members relied on evidence outside the record in casting their votes. Therefore, the Court should find that City Council did not abuse its discretion.

IV. ARGUMENT

A. Legal Standard.

The City generally agrees with Whitelaw's presentation of the standard of review. However, the City disagrees with regard to two issues. First, in the appeal of a district court's Rule 106(a)(4) decision, the Court of Appeals reviews the governmental body's decision rather than the District Court's decision. *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶9, 297 P.3d 1052, 1055 (Colo.App. 2013).

Second, the rezoning of an individual parcel is a quasi-judicial decision by the City Council. *Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 757 P.2d 622, 625-6 (Colo. 1988). Quasi-judicial decision-making requires notice and an opportunity to be heard as a matter of "fundamental fairness to those persons whose protected interests are likely to be affected by the governmental decision." *Id.* Thus, this Court must affirm unless the governmental entity exceeded its jurisdiction or abused its discretion, which occurs if the body either misapplies the law, or if no competent evidence supports its decision. *Alpenhof, LLC*, 2013 COA at ¶9, 297 P.3d at 1055. While interpretation of a city code is reviewed *de novo*, interpretations of the governmental entity charged with administering it deserve deference if they are consistent with the drafters' overall intent. *Alpenhof, LLC*, 2013 COA at ¶10, 297 P.3d at 1055. "No competent evidence" means that 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. Board of County Com'rs*, 172 P.3d 905, 907 (Colo.App. 2006).

B. <u>City Rezoning Procedure</u>.

Rezoning of any land (a "map amendment") is governed by the Denver Charter, §3.2.9, and the Denver Zoning Code ("DZC") Art. 12. *See* R. CF, pp. 912-23; Op. Brief at Appx. 4. A property owner may initiate a map amendment. Op Brief at Appx 4, DZC §12.4.10.4.2. After meetings and review by various City agencies, the Planning Board holds a public hearing on the application and recommends to City Council whether to approve, approve with conditions, or deny the proposed rezoning. *Id.* at DZC §12.4.10.4.E. The Planning Board does not make a final decision, nor is the recommendation reviewable by a Court. *Id.*, at DZC §§12.2.2.3, 12.4.10.4.E and G; *see Buck v. Park*, 839 P.2d 498 (Colo.App. 1992); *O'Connor v. Denver Planning Board*, 15CA0709 (Colo.App. Nov. 25, 2015).

City Council makes the final decision in a rezoning after holding a public hearing. Op. Brief at Appx. 4, DZC §12.4.10.4.G. In deciding whether to approve a map amendment, City Council must consider the recommendations of the Manager of the Department of Community Planning and Development ("CPD") and the Planning Board, any other comments received, and the review criteria in DZC

§12.4.10.7 and §12.4.10.8. Only those criteria raised by Whitelaw are addressed here.

C. City Council did not violate Whitelaw's due process rights.

City Council did not violate Whitelaw's due process rights, thereby abusing its discretion, when Council members and Cedar's representative communicated about the rezoning without any rezoning opponents present. Whitelaw argues these are improper "ex parte" communications that were not disclosed or included in the public record and, therefore, the City Council's decision was "tainted" and must be overturned. Op. Brief at 11. Whitelaw asks the Court to reject *Scott*, 672 P.2d 225, and create a new, strict liability standard applicable to City Council. Whitelaw does not argue that there was no notice or an opportunity to be heard, nor can he given the ample opportunity for both opponents and proponent to voice their views, in writing or orally, before and at the lengthy public hearing.

The City agrees that the Appellants preserved these issues for appeal.

1. Council members are entitled to a presumption of integrity, honesty, and impartiality and prejudice must be proven.

Whitelaw asks this Court to apply case law related to *ex parte* communications that applies to judges and state agency hearings in this City Council rezoning. Op. Brief at 13-14. However, the law is settled and should not be upended.

"Quasi-judicial proceedings must be conducted in accordance with procedural due process." *Scott*, 672 P.2d at 227 (citations omitted). Acting as quasi-judicial decision-makers, city council members are entitled to a "presumption of integrity, honesty, and impartiality." *Id.* This presumption can be overcome "by a showing that there is a conflict of interest on the part of a participating decision-maker." *Id.* at 227-8. The taking of a public stance on a policy issue related to an upcoming hearing does not, in the absence of a showing of bias, disqualify the decision-maker. *Id.* In *Scott*, the court noted that, while a city council member's actions created an "appearance of impropriety," this did not amount to bias in the quasi-judicial decision-making. *Id.* Despite using language sometimes used in judicial contexts, the *Scott* court did not apply the judicial "appearance of impropriety" or other judicial standards. *See* C.C.J.C. Rule 1.2.

A party to a quasi-judicial proceeding must be afforded an opportunity to "be confronted with all facts that influence the disposition of the case, there must be substantial prejudice shown to invalidate the agency action." *L.G. Everist, Inc. v. Water Quality Control Com'n of Colo.*, 714 P.2d 1349, 1252 (Colo.App. 1986).

Whitelaw's reliance on agency cases and articles is misplaced. For example, in the agency cases cited, the courts focused on whether the alleged *ex parte* information impacted the decision or a party was prejudiced because the information

was not introduced another way for rebuttal, consideration, or review. The courts did not adopt the "strict liability" or judicial standards advocated by Whitelaw. *See Board of County Commissioners v. Public Utilities Com'n*, 157 P.3d 1083, 1086 (Colo. 2007) (staff's memorandum read at the open meeting contained new information and should have been made part of the record for the purposes of review under C.R.S. §40-6-115); *Colorado Energy Advocacy Office v. Public Service Company of Colo.*, 704 P.2d 298, 305 (Colo. 1985) (any due process issue caused by commissioners' *ex parte* communications with one party but not in the record was cured because evidence was taken about it at a hearing); *Zurevich v. Industrial Com'n*, 544 P.2d 641, 651 (Colo.App. 1975) (court remanded after allegedly *ex parte* communications because the court was "unable to determine the basis for the Commission's decision" and, without it, they "may not reject claimant's assertion that the decision was based upon an ex parte hearsay conversation which is improper.").

The Colorado Lawyer article cited by Whitelaw supports the City's interpretation. *See* Op. Brief at 14. The author concludes that "[a]n *ex parte* contact may not necessarily result in invalidation of the ultimate decision" but he cautions that it might "undermine the integrity of the governing body itself." Gerald E. Dahl, *Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and Ex Parte*

Contacts, 33 Colorado Lawyer No. 3, 71 (March 2004). Indeed, *Johnson v. City Council for City of Glendale*, 595 P.2d 701, 703-4 (Colo.App. 1979), cited by Dahl, also supports the City's position. The court concluded that, even if the city council considered evidence from a prior formal hearing and council members stated opinions on the merits after the first hearing, the plaintiff still was not denied due process, especially where there was sufficient evidence at the hearing to support the council's decision. *Id.* at 704.

2. Whitelaw has not overcome the presumption of integrity, honesty, and impartiality, and has shown no prejudice.

Whitelaw has not cited any evidence to overcome the presumption of integrity, honesty and impartiality, nor has he cited any evidence to show bias or prejudice. Indeed, despite obtaining a much larger record than the law typically permits, Whitelaw pointed to no evidence or arguments that were not available to the opponents before or during the public hearing so that it could not be rebutted. Further, City Council conducted an eight-hour hearing and opponents had an ample opportunity to testify and rebut supporters' testimony. *See* R. CF, p. 1108.

Whitelaw identified to the district court approximately 50 pages of e-mails from thousands produced by the City as his evidence of improper *ex parte* contacts. R. CF, pp. 534-582. However, as the district court found, these e-mails do not overcome the presumption or indicate prejudice. Some of the e-mails are between

Ms. Susman and City employees discussing procedure or the ongoing community dialog about the rezoning. *E.g.*, R. CF, pp. 545-47, 553, 559, 579 (Kyle Dalton is a City employee). Whitelaw does not explain how these are improper and they do not discuss the merits of the rezoning. The e-mail at R. CF, p. 539 forwarded documents circulated by opponents. Other e-mails concerned the ongoing neighborhood process and dispute. *E.g.*, R. CF, pp. 540-44, 548-552, 554-6. Some, however, were communications on the merits of the proposed rezoning but the substantive evidence in these also was in the public record and so was available to all Council members and the public. *E.g.*, R. CF, pp. 560-76; R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, pp. 5-8. The three documents sent to Ms. Susman in R. CF, pp. 557-58 were forwarded to other Council members and also were in the public record. *E.g.* R. CF, p. 560.

Whitelaw tries to craft a due process violation from City Hall gossip in the e-mail chain between former Councilwoman Susan Barnes-Gelt and Councilwoman Susman, at R. CF, pp. 580-2. Op. Brief at 17. However, Ms. Susman clearly dismissed such gossip and recognized her duty to be impartial. R. CF, p. 581. Thus, this e-mail does not evidence bias, prejudice or other due process violations.

Indeed, the only document that even suggests that any City Council member prejudged the issue is a draft statement by Councilwoman Susman showing that she

was considering voting *against* the rezoning – in Whitelaw's favor. R. CF, pp. 577-78. Councilwoman Susman ultimately did vote against it. *Id.* at 1077-78. Thus, even if, *arguendo*, she prejudged the matter before the hearing, she was not biased against the opponents and they suffered no prejudice. *See L.G. Everist, Inc.*, 714 P.2d at 1252; *Johnson*, 595 P.2d at 703-4.

Whitelaw infers that discovery would have revealed further misbehavior by Council members because the "augmented" record included "1,364 pages of e-mails from CM Susman's private 'gmail' account." Op. Br. at 12, citing R CF, Disk 6, Susman Gmail.pdf. However, even a cursory review of that file shows that many, if not the majority, of the 1,364 pages are e-mails to or from Councilwoman Susman's City e-mail (MaryBeth.Susman@denvergov.org or "Susman, Mary Beth – City Council"). Thus, this file is not evidence that Ms. Susman carried out 1,364 pages worth of "*ex parte*" communications with Cedar on her personal e-mail account or that Ms. Susman failed to include substantive communications received in the City Council record.

Finally, Whitelaw's argument ignores the substantial public process that occurred regarding this rezoning, including that opponents also communicated with Councilwoman Susman and tried to meet with her on an *ex parte* basis. *E.g.*, R. CF, Disk 2, Susman-Kline_Redacted.pdf, p. 1100 (Appellant McCrimmon requesting a

meeting with Ms. Susman but "not one with the developers or other neighborhood leaders."); R. CF, Disk 6, Susman Gmail.pdf, pp. 310-31. This belies any argument that the Appellants are seeking to vindicate fair quasi-judicial procedures because they believe the developer had an advantage that they did not.

Therefore, Whitelaw's argument that the City Council violated opponents' due process rights by relying on undisclosed *ex parte* communications finds no support in the record and there is no basis for the Court to conclude that City Council abused its discretion.

D. <u>The Planning Board's procedure was proper</u>.

As discussed above, the Planning Board's recommendation is not a final, appealable decision and should not be at issue here. Even assuming Planning Board procedure is a proper basis to appeal the City Council's decision, the City Council's decision was not "tainted" by the Planning Board's recommendation that Council approve the rezoning because a Planning Board member, Jim Bershof, signed Cedar's rezoning application. *See* Op. Brief at 18. Whitelaw cites no legal basis for this theory and, without argument, asserts that *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), *City of Manassa v. Ruff*, 235 P.3d 1051 (Colo. 2010), and "due process" apply. *Id.*

Denver Revised Municipal Code ("D.R.M.C."), §12-44 specifically provides:

> Any planning board member having a financial interest in any measure before the board shall not participate in the consideration of such measure as a board member nor vote on such measure, but the board shall have authority to grant a hearing to such member in the capacity of or as an applicant, subject to the board's bylaws and rules and regulations governing such hearings.

R. CF, p. 1086. Mr. Bershof complied with this requirement by not attending the Planning Board meeting or otherwise participating in the decision. R. CF, Disk 1, CPD_Redacted.pdf, pp. 572-73.

Whitelaw cited no basis for imputing to the entire Planning Board any conflict Mr. Bershof had. Whitelaw has not identified any personal, financial, or other stakes in the recommendation held by the Planning Board members who attended and voted at the meeting. *See Scott*, 672 P.2d at 228 (in the absence of any evidence that other decision-makers had a conflict, the recusal of one board member with a conflict meant the decision was rendered by presumptively impartial members).

Therefore, like the District Court, this Court should conclude that the Planning Board's recommendation was not improperly obtained and did not somehow "taint" the City Council's decision.

E. The City did not misapply the Protest Petition Procedure.

The City did not misapply (or manipulate) the Protest Petition Procedure, nor did it take one side or the other in opponents' efforts to obtain signatures. *See* Op. Brief at 21. Rather, the City followed its law and *Burns v. Denver City Council*, 759 P.2d 748 (Colo.App. 1998), *cert den.* (1988), in which a division of this Court held that the City could include City-owned land in the area from which signatures must be obtained. Op. Brief at 23-24. In *Burns*, 759 P.2d 748, the Court of Appeals upheld the City's inclusion of City-owned streets in the calculation of the 200-foot protest petition area. Current Charter §3.2.9(E) is the same as the Charter §B1.17 applied in *Burns.* Further, Parks' refusal to sign the Petition did not violate the law. The City agrees that Whitelaw preserved this issue.

In calculating the land area here, the City included all City-owned land, including the portion of Crestmoor Park within the 200-foot protest petition area. *See* R. CF, Disk 1, CPD_Redacted.pdf, pp. 218-220, 225. This long-standing interpretation is entitled to deference. *See Alpenhof, LLC,* 2013 COA at ¶10, 297 P.3d at 1055; *Burns*, 759 P.2d 748.

Whitelaw argues that the Court should overturn *Burns* but provided no basis for this other than that they, simply, do not like the outcome. Op. Brief at 23-24. *Burns* provides clear and long-standing guidance to the City that the City and protest

signature gatherers have followed for many years. *See Ingold v. AIMCO/Buffs, L.L.C. Apartments*, 159 P.3d 116, 125 (Colo. 2007) (discussing reasons to overrule prior decisions). In the absence of a better reason to revisit *Burns*, the Court should not.

Whitelaw also asserts that the City "stepped outside of its supposedly neutral, quasi-judicial role and supported the Rezoning applicant by blocking the Protest Procedure from applying." Op. Brief at 21. CPD administered the Protest Petition Procedure and the record shows it was helpful and responsive in aiding opponents who sought to gather signatures. R. CF, Disk 1, CPD_Redacted.pdf, pp. 212-57, 262-67, 301-212.

Further, the City did not "block" the Protest Petition Procedure from applying when the Parks Manager declined to sign the petition. *See* Op. Brief at 21-23. Opponents of the rezoning needed to obtain signatures representing 20% of the total protest petition area. The City owned approximately 24% of the land in the protest petition area, and opponents had approximately 76% of the area from which to get the required 20%. Thus, the City did not "block" opponents from gaining the required percentage. Moreover, had the City signed, it would have single-handedly caused the petition to succeed, thereby taking a side in favor of the opponents.

Therefore, City Council did not abuse its discretion by not applying the Protest Petition Procedure standard to the vote.

F. City Council members' campaign contributions did not create a due process violation.

Whitelaw argues that some Council members received "substantial political contributions from lobbyists" and, therefore, were biased in the rezoning vote, a due process violation and abuse of discretion. Op. Brief at 24-25. However, the evidence shows that, even if campaign contributions could lead to a due process violation in a City Council rezoning, the contributions at issue here do not rise to that level. The City Defendants agree this issue was preserved.

First, Whitelaw's evidence regarding the contributions was not part of the record and the district court properly disregarded it, as this Court should. R. CF, pp. 1088-89; *see* C.R.C.P. 106(a)(4); *Hazlewood v. Saul*, 619 P.2d 499, 501 (Colo. 1980); *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203 (Colo.App. 2000). The Court also should not take judicial notice of it or consider it as proper summary evidence. *See* C.R.E. 201, 1006; *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 853 (Colo. 1983); *U.S. Welding, Inc. v. B & C Steel, Inc.*, 261 P.3d 513, 517 (Colo.App. 2011).

Even assuming Whitelaw's evidence was admissible, the City Council members who allegedly received contributions from Cedar's representatives did not

violate opponents' due process rights by voting. Whitelaw bases this argument on the faulty proposition that judicial campaign contribution laws apply to quasi-judicial decision makers, like the City Council, and that any contribution whatsoever creates a conflict. *See* Op. Brief at 24-27. This Court should reject extending judicial standards to elected City Council members. Indeed, as Whitelaw recognizes, "[t]he determination of what constitutes a conflict of interest depends on the context." *Id.* at 25.

Due process in the context of a quasi-judicial rezoning does not require application of judicial disqualification, ethics codes and local rules of procedure. Rather, "the ultimate due process question is whether under a realistic appraisal of psychological tendencies and human weaknesses, 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." *City of Manassa*, 235 P.3d at 1057 (internal quotations and citations omitted). Even in the case of judges, the court must look at each case of alleged judicial conflict individually to determine whether recusal was required. *Schupper v. People*, 157 P.3d 516, 517 (Colo. 2007).

Scott, 672 P.2d 225, provides an adequate standard to address City Council decision-making in this context. The Court does not need to adopt the Colorado Code of Judicial Conduct, or *Caperton* and *Williams-Yulee*, two cases about judicial

election campaign finance, to City Council quasi-judicial decision-making to set the contours of due process here. *See* Op. Brief at 25-26, relying on *Caperton*, 556 U.S. 868 and *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015).

Moreover, even if *Caperton* applied, it would not change the result. First, the City's ethics law excludes legal campaign contributions to Council members from the definition of impermissible gifts. *See* D.R.M.C. §2-60(b)(2). Whitelaw did not allege, nor did he provide any evidence, that the contributions at issue were illegal. While State law does not apply because the City is a home rule municipality, though the district court discussed it, the contributions would not be illegal under Colorado law either. *See* C.R.S. §24-18-104(3)(a); R. CF, p. 1109.

Second, the alleged contributions do not rise to the level found in *Caperton* or to one where a risk of bias must be found. *See City of Manassa*, 235 P.3d at 1057. Whitelaw claimed in the district court that Councilmembers Kniech, Nevitt, Shepherd, and Susman ***collectively*** received $15,010 ***total*** from people allegedly related to Cedar in 2013 and 2014, the year before this rezoning. R. CF, pp. 615-636. As a percent of their total campaign contributions, this ranged from 1.88% of total contributions (Councilman Nevitt) to 5.51% of Councilwoman Susman's. R. CF, p. 636. This is not remotely close to *Caperton*, where one person funded a state supreme court justice's campaign for the specific purpose of removing his

competitor from office, and spent far more than everyone else. The largest percentage was to Councilwoman Susman – who voted against the rezoning. *See* R. CF, Disk 1, City Council Minutes.pdf, p. 18.

Further, even if all four of these Council members recused themselves, the final vote would have been five in favor and three against, and the rezoning would have passed. Op. Brief at 27; R. CF, p. 509 ¶ 9; R. CF, Disk 1, City Council Minutes.pdf, p. 18. Likewise, Whitelaw cited no e-mails showing that any of these Council members favored or were biased towards Cedar for any reason, let alone because of these alleged contributions.

As a result, the Court should not import judicial standards but, if it does, the Court should find that the alleged campaign contributions do not rise to a level that create an abuse of discretion.

G. Evidence supported the rezoning and City Council did not ignore the criteria.

Whitelaw argues the rezoning did not meet the criteria for a rezoning under the DZC and that City Council voted based on political considerations rather than the criteria. Op. Brief at 20-21, 26-43. Issues 3 and 7 are addressed here, together, because they are related. The City agrees that Whitelaw preserved these issues on appeal.

Pursuant to the DZC, a rezoning must comply with the following criteria: (1) the rezoning is consistent with the City's adopted plans; (2) the rezoning results in uniformity of district regulations and restrictions; (3) the rezoning furthers the public health, safety and general welfare; (4) there is a justifying circumstance for the rezoning; and (5) the rezoning is consistent with the description of the applicable neighborhood context and with the stated purpose and intent of the proposed zone district. R. CF, pp. 182, 842 (DZC §§12.4.10.7-8). A justifying circumstance includes "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." R. CF, p. 1081 (*citing* DZC §12.4.10.8.A.4. Whitelaw asserts that the rezoning is not consistent with the City's adopted plans (Op. Brief at 35-38); that the rezoning was not necessary to addressed changed or changing conditions (Op. Brief at 38-39); and the rezoning did not advance the public health, safety and general welfare because the City Council did not consider alleged traffic and parking problems opponents speculated would arise (Op. Brief at 40-44).

1. <u>The rezoning is consistent with the City's adopted plans</u>.

    a. *The adopted plans are not impermissibly vague*

Whitelaw does not argue that there was no evidence in the record to support the rezoning. Rather, Whitelaw argues that the plans contain such vague or general language that the City could manipulate them to serve any purpose or, here, find consistency. *E.g.*, Op. Brief at 35-38. This demonstrates a fundamental misunderstanding of the planning role of comprehensive plans compared to the regulatory role of zoning because it assumes that plans should be as specific or detailed as zoning. It is well-settled in Colorado that plans like the City's Comprehensive Plan 2000 ("Comp Plan 2000") and its supplements, including Blueprint Denver, set forth guiding policies and principles which zoning will then translate into specific, enforceable regulations. *Theobald v. Bd. of Cnty. Comm'rs*, 644 P.2d 942, 949 (Colo. 1982) (a "plan embodies policy determination and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles." (internal citation omitted)). In *Theobald*, the Supreme Court cautioned that "the master plan itself is only one source of comprehensive planning and is generally held to be advisory only, and not the equivalent of zoning, nor binding upon the zoning discretion of the legislative body." *Id.* at 949.

D.R.M.C. §12-61 directs the City to create a comprehensive plan, providing that 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." R. CF, p. 687. The City's comprehensive plans, including supplements, do not set out block-by-block regulations regarding what must be placed in specific locations. Instead, their language is in policies and goals that guide the City, including City Council, in determining whether a particular zoning is appropriate given the vision expressed in the plans.

Indeed, the Denver Charter, §3.2.9(C), directs that zoning regulations be made in accordance with that plan. R. CF, p. 692. The DZC regulates what may be built on a given zone lot, including the size, location, and types of buildings and uses. It also contains general design standards. *Id.* at 909 (DZC, Art. 10, Introduction). DZC §12.4.10.7.A supports the notion that plans are intended to guide future decisions but not mandate them by allowing City Council to approve a rezoning so long as it is "consistent with the City's adopted plans." *Id.* at 923.

Comp Plan 2000 was adopted by the City in 2000 and Blueprint Denver in 2002 as a supplement to the Comp Plan 2000. Op. Brief at 32; *see, e.g.*, R. CF pp. 699-779 (Comp Plan 2000 excerpts). Whitelaw correctly states that these are the only two adopted plans to apply to the Parcel, as there is no small area plan, general development plan or another adopted plan covering it. Op. Brief at 32-33. However, despite Whitelaw's insinuation to the contrary, small area plans are not required

here, or anywhere else, though they are permitted in order to address specific areas. Whitelaw cited no law requiring one or prohibiting a rezoning in the absence of one.

The term "consistent" is defined as "compatible or in agreement with something,"[2] or "having the same principles as something else."[3] A zoning decision can follow the principles of a plan without strict adherence to each and every goal and objective stated in the plan, so long as the two are generally compatible. If this were not the case, then plans would not be "plans" at all, but regulatory documents like the zoning code.

b. *The rezoning is consistent with Comp Plan 2000*

Comp Plan 2000, p. 4, explains that it is the result of "the effort of hundreds of [Denver] residents, looking through their different lenses, to agree on the City's long-term purposes, to think through Denver's special inheritance and its effect on those purposes, and then to suggest strategies that will buy that inheritance as much long-term insurance as possible to sustain it for the future." R. CF, p. 700.

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[2] Consistent, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/consistent (last visited on Nov. 20, 2015).

[3] Consistent, CAMBRIDGE DICTIONARIES, http://dictionary.cambridge.org/dictionary/english/consistent (last visited on Nov. 20, 2015).

Comp Plan 2000 then identifies issues facing the City and strategies to address them. It identifies three policies underlying Denver's land use development: retaining and attracting residents of all economic means; enhancing the quality, diversity and stability of neighborhoods, business districts and other areas of Denver; and supporting strategies that provide multiple transportation modes, giving travelers more choices than simply using their cars. R. CF, p. 723 (Comp Plan 2000, p. 47). Comp Plan 2000 identifies inconsistent zoning with development patterns, neighborhood resistance to zoning changes particularly as the City grows in population; and individual structures that create a negative or blighting influence as challenges to the City's development. *Id.* at 727 (Comp Plan 2000, p. 51).

Both the City's presentation at the City Council hearing and the staff report in the record discussed the following strategies from Comp Plan 2000 that were relevant and supported by the rezoning:

- Environmental Sustainability Strategy 2-F – Conserve land by **promoting infill development** within Denver at sites where services and infrastructure are already in place; designing mixed use communities and reducing sprawl so that residents can live, work and play within their own neighborhoods.

- Land Use Strategy 3-B – Encourage quality infill development that is **consistent with the character of the surrounding neighborhood**; that offers opportunities for increased density and more amenities; and that broadens the variety of compatible uses.

- Neighborhood Strategy 1-E – Modify land-use regulations to ensure flexibility to **accommodate changing demographics and lifestyles**. Allow, and in some places encourage**, a diverse mix of housing types** and affordable units, essential services, recreation, business and employment, home-based businesses, schools, transportation and open space networks.

- Neighborhood Strategy 1-F – **Invest in neighborhoods** to help meet citywide goas and objectives for **a range of housing types and prices**, community facilities, human services and mobility.

R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, p. 168 (bold in Power Point); *id.* at 370-71 (staff report).

The rezoning is consistent with these strategies, and with Comp Plan 2000. *See id.* at p. 370-71. Indeed, as Councilman Nevitt said during deliberations: "the site we're looking at is not in the interior of the neighborhood. It's on the edge of the neighborhood. It lies on a significant transit route. It's a block from another significant transit route. It's adjacent to an important amenity." R. CF, Disk 1, Final of Denver City Council 6-8-15 gh.pdf, pp.14:25-15:5. The proposed rezoning would allow for diversity in housing stock, providing a range of housing options while being consistent with other residential uses west of Monaco and with the multi-family across Monaco. R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, p. 371. It also accommodates changing demographics and lifestyles, in a location with access to services, employment, and recreation. *Id.*

c. *The rezoning is consistent with Blueprint Denver*

Blueprint Denver is "the primary step to implement and achieve the vision outlined in [Comp] Plan 2000." R. CF, p. 684. It was designed to move forward a "comprehensive examination of Denver's land use ordinances and procedures and its investment strategies." *Id.* Blueprint Denver noted that it "takes a different approach to density,"

> Adding density to areas that are single use, far from transit and with a low-density street pattern simply adds an equal number of auto trips. In many parts of the Areas of Stability, there would be little benefit derived from additional growth. Limiting overall development in the Areas of Stability helps to achieve many growth management goals, while preserving the valued quality of life that is characteristic to Denver's neighborhoods.

Id. at 685. Blueprint Denver's strategies included addressing the compatibility between zoning and land uses, the compatibility between existing and new development, the edges between Areas of Stability and Areas of Change, and creating diversity in housing type, size and cost. *Id.*

Whitelaw argues that the Parcel is in an Area of Stability and so, essentially, its zoning never can change. Op. Brief at 36. This is not the case. Rather, as Blueprint Denver says, "[t]he goal for the Areas of Stability is to identify and maintain the character of an area while accommodating some new development and redevelopment." R. CF, p. 687. The Parcel is in a Reinvestment Area, a "neighborhood with a character that is desirable to maintain but that would benefit

from reinvestment through modest infill and redevelopment or major projects in a small area." R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, p. 170, 372; R. CF, pp. 688-9 (Blueprint, pp. 122-23). Challenges to be remedied include "inappropriate land uses or inadequate buffering between uses…lack of curbs and gutters and other infrastructure, and maintain affordable housing." R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, p. 170; R. CF, pp. 688-89 (Blueprint, pp. 122-23).

Evidence in the record shows that the rezoning was consistent with Blueprint Denver. *See, e.g.*, R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, pp. 169-71. Monaco is a residential arterial and, therefore, it is consistent with Blueprint Denver to locate multi-unit residential on this road rather than in the interior of a neighborhood of single family residences with smaller streets. R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, p. 371-73. Whitelaw's assertion that the rezoning would allow "a high-density apartment building on the east side of Crestmoor Park" overstates both the Parcel's location and size of the building that can be constructed in the S-MU-3 zoning. Op. Brief at 30.

It also is consistent when the zoning and land use around the Parcel is considered, since there is limited single-unit residential abutting it and the adjacent parcel to the south also has S-MU-3 zoning. R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, pp. 171, 373. The Parcel is at the edge of the Crestmoor neighborhood

area, thereby addressing the edge of the area and providing a buffer between the single-unit residential to the west and additional development across Monaco. R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, p. 372. The S-MU-3 also allows a variety of housing choices along an arterial where single-family is not preferred. *Id.* at 372-73. The rezoning also promotes redevelopment on the site, which has a deteriorating church. *Id.* at 372. The district court also found that the redevelopment would include curbs and gutters, and other infrastructure, which was missing. R. CF, p. 1102.

Whitelaw argues that the City ignored the fact 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, not multi-unit development." Op. Brief at 36. This assertion is based entirely on Mr. DeRungs' City Council hearing testimony. *See* Op. Brief at 36. However, Whitelaw strategically omits that the actual land surrounding the Parcel primarily – including across Monaco – is not single family residential and that the Parcel is not going to be a high rise building incongruously located in the middle of a residential neighborhood. *E.g.*, R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, pp. 153, 157, 159, 160-4, 176, 368.

2. Evidence supports the existence of justifying circumstances, changed or changing conditions.

In addition to being consistent with the City's adopted plans, evidence in the record supports finding justifying circumstances pursuant to DZC §12.4.10.8, including (4), "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." R. CF, p. 682; *see* R. CF, Disk 1, City Council 6-8-15 (SIRE).pdf, p. 174, 374-75. Whitelaw argues that the City misinterpreted "the land or its surrounding environs" and that "the land" does not mean the Parcel itself but the entire Crestmoor neighborhood. Op. Brief at 39, *see* R. CF, p. 682. The district court correctly found that the word "land" applies to the Parcel and not the entire area in a neighborhood reasoning, in part, that the "land" at issue was the property to be rezoned and not the "neighborhood." R. CF, pp. 1083-84; *see City of Commerce City v. Enclave West, Inc*., 185 P.3d 147, 178 (Colo. 2008) (court may defer to the agency's construction of the code, ordinance or statutory provision but is not bound by it because the court's review of the law is *de novo*; in reviewing the agency's construction, the court applies the basic rules of statutory construction). Indeed, if the "land" was the entire Crestmoor neighborhood, then "surrounding environs" would be meaningless. *See McCarville v. City of Colorado Springs*, 2013 COA 169, ¶15, 338 P.3d 1033, 1037 (Colo.App. 2013) (applying rules for statutory construction to construction of an ordinance).

Here, both the Parcel and its surrounding environs have changed. At the time Blueprint Denver was adopted in 2002 and the Parcel was identified as part of an Area of Stability, the "church was in a better state of repair" but now that has changed. R. CF, City Council 6-8-15 (SIRE).pdf, pp. 174, 374. Indeed, neighbors expressed concern about the blighted condition of the Parcel. *E.g.*, *id.* at 78-79 (letter noting "It is indisputable that the property has been a blight on the neighborhood since before we moved here five years ago."). In addition to that change, the environs surrounding the Parcel, particularly in the newly-constructed Lowry neighborhood across Monaco has been completely transformed. *Id.* at 63.

Whitelaw also argues that Councilwoman Kniech's deliberation statement that changed circumstances is, "to me the weakest part of this application" is evidence that there were no justifying circumstances. Op. Brief at 39; R. CF, Disk 1, Final of Denver City Council 6-8-15 gh.pdf, 25:9-12. Whitelaw does not explain how this statement is evidence that there were no justifying circumstances. On the contrary, although the evidence was weak in Councilwoman Kniech's opinion, it was nevertheless present, because the Councilwoman was aware of the requirement and voted for the rezoning. *Id.* at 25:25-26:12; R. CF Disk 1, City Council Minutes.pdf, p. 18.

Therefore, evidence supports this rezoning criterion also.

3. The rezoning furthers public health, safety and welfare.

Finally, there is evidence in the record to support the City Council's determination that the rezoning furthers public health, safety and welfare. As discussed above and at the hearing, the rezoning and development of the site will remove a poorly maintained and unused church, improve the character on Monaco, and will give its residents access to recreation, jobs and commercial activities. *See* R. CF, Disk 1, City Council 6-8-2015 (SIRE).pdf, p. 172.

Whitelaw argues that the City Council should have considered testimony from opponents of the rezoning about traffic and parking issues that they believed would arise from the proposed rezoning and development. Op. Brief at 40-41. As Whitelaw correctly noted, the City's position is that the City Council and Planning Board do not need to consider potential traffic and street parking issues as part of this element of the rezoning criteria because the zoning code does not regulate traffic. In the absence of any law to the contrary, the Court should give deference to this long-standing interpretation of the DZC. *See City of Commerce City*, 185 P.3d at 178.

However, the DZC §12.4.10.4.G (2), also requires City Council to consider "any other comments received" at the public hearing, and it is clear from the deliberations that the testimony regarding opponents' concerns about traffic and parking was heard and considered. R. CF, Disk 1, Final of Denver City Council 6-

8-15 gh.pdf, pp. 4:7-10 (Councilwoman Susman), 30:1-10 (Councilwoman Kniech), 38:4-10, 39:6-8 (both Councilman Brooks). Indeed, given that it was heard and considered, even if the Court concludes that the health, safety and welfare criterion mandates consideration of traffic and parking issues, the City Council did not abuse its discretion.

4. City Council did not ignore the criteria and rely on irrelevant political factors.

Whitelaw argues that the City Council members' deliberations show that they "relied on irrelevant factors and information outside of the hearing record" in arriving at their decisions. Op. Brief at 20-21. However, Whitelaw does not explain this argument other than to string cite to pages at a time of the City Council deliberations transcript. *Id.* at 20. Further, there is no explanation how the cited portions of the deliberations demonstrate improper reliance on information received by the Council members outside of the record or the hearing. This Court is not obligated to figure out or to make Whitelaw's arguments and, on this basis, the Court should reject them. *See Maudlin v. Lowery*, 255 P.2d 976, 977 (1953).

Moreover, the deliberations show that Council members discussed the criteria and evidence in the record, including testimony presented by both opponents and proponents at the hearing. *E.g.*, R. CF, Disk 1, Final of Denver City Council 6-8-15 gh.pdf, 14:25-15:5 (Councilman Nevitt referencing the geography of the Parcel),

22:1-23:24 (Councilwoman Robb discussing specific elements of the rezoning criteria), 26:3-6 (Councilwoman Kniech: "My job is not to count residents for and residents against. It's to hear that input and use it to analyze the criteria. That's what the code tells me to do."); 39:9-16 (Councilman Brooks: "Our call, our legal obligation before you today is, are the plans consistent? Are they in context for approval? And for me, as I look at that, and I think you've heard some of my colleagues say, they believe they are. They believe they're not. As I look at this whole context, as I look at this existing site, it reflects the context to me.").

Thus, there is no evidence that the City Council "ignored" the criteria or decided on a "political" basis, particularly when, as discussed above, evidence in the record supports the City Council's decision. *See*, *also*, C.R.C.P. 106(a)(4).

H. <u>This rezoning was not spot zoning</u>.

Whitelaw argues that the rezoning was spot zoning because it did not further Denver's comprehensive plans and thus was an abuse of discretion. Op. Brief at 45-47. The City agrees that Whitelaw preserved this issue for appeal. However, the rezoning is not spot zoning, pursuant to *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961).

To determine whether a particular action is spot zoning, the "test 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." *Clark*, 362 P.2d at 162. If the rezoning is for the purpose of furthering a comprehensive zoning plan or because there are changed conditions in the area, the rezoning is not spot zoning. *See King's Mill Homeowners Ass'n, Inc. v. City of Westminster*, 557 P.2d 1186, 1191 (Colo. 1976). As discussed above, the rezoning is consistent with the City's adopted plans and there are changed conditions.

Clark, 362 P.2d 160, also does not support Plaintiffs' argument. In *Clark*, the Court found that the rezoning of part of a planned residential area to allow a gasoline filling station (in 1961) was arbitrary. *Id.* at 162. Here, as discussed above and shown on the various maps of the Parcel, this rezoning is not out of character with the Parcel's neighbors and it does not rezone an island in the middle of property burdened with greater restrictions.

Whitelaw's citation to *Rathkopf's* does not help. *See* Op. Brief at 44, *citing* A. Rathkopf, *et al.*, 3 *Rathkopf's The Law of Zoning and Planning*, §41:6 (4th Ed. 2016). Neither Whitelaw nor *Rathkopf's* explain how a parcel should be determined to be "small." Indeed, this is not a "small" parcel in comparison to its neighbors at all. Further, *Rathkopf's* ultimately does not support Whitelaw, noting at §41:8 that "rezoning to allow multifamily residences within a single family zone or industrial

uses within a commercial zone may be upheld, since the incompatibility is not as severe. Such rezonings – particularly to allow apartments – may also be supported by a public welfare rationale." 3 *Rathkopf's The Law of Zoning and Planning* at §41:8.

Thus, the rezoning was not improper spot zoning and the Court should reject this argument.

V. CONCLUSION

For the foregoing reasons, The City respectfully requests that the Court find in its favor and uphold the rezoning.

Respectfully submitted this 19th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DENVER'S ANSWER BRIEF** this 19th day of December, 2016, was sent and served via Colorado Courts E-Filing to the following:

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