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COURT OF APPEALS, STATE OF COLORADO

2 East 14th Avenue, Denver, Colorado 80203

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

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

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

CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant)

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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

☒ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Gregory J. Kerwin
Gregory J. Kerwin

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SUMMARY OF ARGUMENT

The Court should reject Defendants' contention that Denver's current quasi-judicial rezoning process complies with Due Process and Denver's Zoning Code. The record here, even without the benefit of affirmative disclosures from the City or discovery, reveals the contrary.

Under the current process revealed here:

a) Developers' lobbyists communicate with City decisionmakers "off the record" and behind the scenes about the merits of a proposed rezoning and effectively control the process (typically leaving no written evidence that would reveal the content of the secret communications), while buying private access to Council members with "campaign contributions" and special favors like serving as a member's campaign treasurer.

b) Current Planning Board members serve as a zoning change applicant, requesting Planning Board approval before City Council review.

c) Council members serving as quasi-judges: 1) do not proactively disclose before or at a public hearing the substance and circumstances of all *ex parte* communications about the merits of the decision, and 2) need not explain their decisions, but if they do so, base them on political factors irrelevant to the

mandatory statutory criteria, or rely on information outside the public hearing record.

d) Denver can approve high-density "upzoning" in any part of the City (a/k/a "spot zoning") based on generic "strategies" in its Comprehensive Plan and Blueprint Denver that would apply to virtually any parcel citywide, declaring "changed circumstances" that allow rezoning if a property owner fails to maintain its building.

e) The City adheres to an irrational official policy of not considering in the rezoning process adverse traffic and parking consequences to residents from a proposed zoning change.

Denver suggests these problems are built into the current system in a home-rule city, where elected officials (Council members) also serve as quasi-judges reviewing proposed zoning changes. Denver, and its City Attorney's office, would rather not have to design and manage a process that ensures fundamental fairness. Therein lie the reasons for the current appeal.

ARGUMENT

I. Standard of Review: The Court should reject the City's and Cedar's arguments for blind deference and a presumption that the City's proposed statutory interpretations are correct.

The Court should reject the City's and Cedar's attempt to limit this Court's review of the Due Process and legal errors that tainted this Rezoning. Ignoring the *de novo* standard, which applies to this Court's review of legal issues including violations of Due Process and an administrative body's proposed statutory interpretation, Opening Brief ("Op. Br.") 9-10, the City tries to redefine every issue presented here as governed by an abuse of discretion standard. City Answer Br. ("City"): 1-2. Contrary to Colorado Supreme Court precedents, the City and Cedar also advocate deference to any position any City official asserts on any issue, including in appeal briefs, without explaining in each case why deference is warranted. *E.g.,* City: 7, 17, 32, 34; Cedar Answer Br. ("Cedar"): 13-14. *Cf. Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220, 223 (Colo. 2005) (agency interpretation must be uniform and consistent to warrant deference); *Mile High Cab, Inc. v. PUC*, 302 P.3d 241, 246 (Colo. 2013) (no deference to agency interpretations that misconstrue the law or contravene legislative intent).

Cedar relies on one older case to contend this Court must "presume" the City's legal interpretations are valid. Cedar: 14, 29 (citing *Quaker Court LLC v.*

Bd. of County Comm'rs, 109 P.3d 1027, 1030 (Colo. App. 2004)). That decision actually stated the "BOA's determination is accorded a presumption of validity, and as a result, the burden is on [challenger] to overcome the presumption." *Id.* Regardless, the Colorado Supreme Court does not hold that an agency's legal interpretations are "presumed" to be valid. *See, e.g., City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008) (court "is not bound by the agency's construction because the court's review of the applicable law is *de novo*.").

Defendants also rely on a presumption of integrity and honesty, without explaining why the City's many conflicted actions documented here do not warrant an exception to that presumption. City: 6, 9-10, 12 (citing *Scott v. City of Englewood*, 672 P.2d 225 (Colo. App. 1983)); Cedar: 10, 16 (same).

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

The Court should reject the City's and Cedar's arguments for excusing as non-reversible error the Due Process and quasi-judicial procedural violations Plaintiffs identify.

While purporting to disagree with Plaintiffs, the City concedes this Rezoning was quasi-judicial and describes certain attributes of a quasi-judicial process,

City: 7 (admits rezoning individual parcel "is a quasi-judicial decision."). Yet Defendants do not explain how Denver manages a rezoning process differently than a legislative/political decision that comes before the City Council.

A. Even the incomplete evidence about the admitted *ex parte* communications from Cedar's lobbyist with Council members concerning the merits of this Rezoning requires vacating the Rezoning.

Even without the benefit of affirmative disclosures by Council members of *ex parte* communications with them, or discovery, the record shows undisclosed *ex parte* communications about the merits of the Rezoning that cannot be dismissed as harmless. This Court should not construe Colorado cases as excusing such misconduct—doing so will reward the bad behavior here and encourage future misconduct by lobbyists and Council members.

1. The City admits there were undisclosed communications on the merits of the proposed rezoning with Council members, and cannot argue the substance of all such communications was disclosed at the public hearing.

The City admits there "were communications on the merits of the proposed rezoning," City: 13. Yet it tries to minimize the evidence of *ex parte* communications by arguing "the substantive evidence in these" was in the public record. *Id.*

The City does not explain how the Court reasonably can conclude "the substantive evidence" presented in all *ex parte* communications was disclosed at the public hearing, when City Council members did not purport to affirmatively disclose all substantive communications they had about the Rezoning before or during the public hearing. *See* AR Disk 1 Transcript.

In addition, the evidence shows some communications were in undocumented phone calls whose substance is not disclosed and cannot be ascertained without discovery. *See* CF pp. 536 & 548: Maley 3/20/15: "per our chat about the continuance"; CF pp. 537 & 558: Susman 5/27/15 request to call Maley; see also CF pp. 536 & 553: Susman 5/21/15 request for "time to chat" with planner Gaspers about project. The district court denied Plaintiffs' request to conduct discovery to ascertain the substance of all the communications that occurred. CF 438-40.

Therefore, this Court cannot reasonably hold based on the current record that all the "substantive evidence" about the facts of the Rezoning that Cedar's lobbyist communicated to any Council members, including Susman, was disclosed during the public hearing. For example, did Cedar's lobbyist (Maley) recommend in his phone calls with Susman that she move the vote on the Rezoning to the June 2015 lame-duck Council (just after May/June city elections), and that Susman tell other

Council members behind the scenes that she did not object to their supporting the Rezoning, although she would vote against it to avoid angering her constituents? *Cf.* CF pp. 537 & 580(Barnes-Gelt 6/6/15 email to Susman). There is no way for Plaintiffs or this Court to know what Susman discussed in those telephone calls, which did occur.

Cedar tries to minimize the undisputed evidence of its *ex parte* communications arguing that Plaintiffs' brief summary of those communications, Op. Br. 12-13, does not explain in chapter and verse in the Opening Brief how Cedar's lobbyist tainted the quasi-judicial process here. Cedar: 17 n. 5. Plaintiffs' brief refers to the places in the record where Plaintiffs provided a detailed explanation of Cedar's improper communications. Op. Br. 13 (citing Undisputed Fact #7 in Plaintiffs' district court brief, CF pp. 507-08 and Plaintiffs' Appendix 1 filed in the district court). As summarized in detail to the trial court, CF pp. 507-08 and in that Appendix 1, CF pp. 534-82, the emails show how Cedar's lobbyist (Maley) compromised the integrity of the quasi-judicial process, with willing assistance from Councilmember Susman. The communications reveal:

a. Cedar representatives secretly relayed factual information and opinions to Susman in emails and calls before the public hearing: CF pp. 539-44, 554, 557-58 (AR pp. 4579, 3719, 5439-42, 4708, 4436, 5386). Susman and Maley

consciously communicated through Susman's personal Gmail account, CF p. 539 (AR p. 4579).

b. Susman played conflicting roles advising Cedar on strategy and trying to mediate the dispute with neighbors, while also managing the Rezoning for the City Council: CF pp. 541, 545-47, 549-53, 555-56, 559, 579 (AR pp. 5439, 3785-87, 5485-88, 3712, 5471-72, 5773, 4432).

c. Cedar's lobbyist (Maley) prepared the text of Susman's request to Council to postpone the Rezoning hearing to the June 2015 lame-duck Council session: CF p. 548 (AR p. 5445).

d. Susman wrote her speech explaining her supposedly quasi-judicial decision in a June 6, 2015 email to herself, before the June 8-9, 2015 public hearing: CF pp. 577-78 (AR pp. 5749-50).

e. Appendix 1 includes personal/familiar communications around June 3, 2015 between Maley and other council members (Faatz, Nevitt, Brown, Montero) about the Rezoning that are not in the SIRE record. CF pp. 560, 563, 567, 570 (AR: 6782-Faatz, 7100-Nevitt, 7104-Brown; 7107-Montero).

If Denver Council members had affirmatively disclosed all *ex parte* communications with them, *cf.* Op. Br. 14 (Lakewood's current practice), or if the

district court had allowed the depositions Plaintiffs requested, Op. Br. 12,[1] Plaintiffs could have filled in the gaps about the Cedar/City Council discussions not documented in the emails.

2. The Court should reject Defendants' proposed construction of Colorado appellate cases forbidding *ex parte* communications with administrative decisionmakers; neither Plaintiffs nor this Court have complete information about the communications to evaluate what actual reliance and prejudice occurred here.

The Court should reject Defendants' proposed construction of Colorado appellate decisions that discuss *ex parte* communications with administrative decisionmakers. The City argues a party challenging a quasi-judicial decision in which *ex parte* communications about the merits occurred must show "substantial prejudice." City: 11. Cedar calls for this Court to adopt a "reliance-prejudice requirement," Cedar: 21, where *ex parte* communications are excused unless one

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[1] Cedar's argument that Plaintiffs did not preserve the right to challenge the district court's denial of their request for discovery, Cedar: 14, is baseless. The court's ruling denying Plaintiffs' motion seeking discovery (Op. Br. 5) was not a final judgment that Plaintiffs could immediately appeal. The court's error in denying discovery prevented Plaintiffs from obtaining additional evidence to document the Due Process violation Plaintiffs raise about the unlawful *ex parte* communications the City allowed here, Op. Br. 1 (Issue # 1.a).

can prove the quasi-judge actually relied on the information communicated and that reliance prejudiced the challenging party.

Defendants cannot deny the Colorado Supreme Court declared in *Colorado Energy Advocacy Office* that it is improper in an adjudicatory proceeding for an administrative body to base its decision on *ex parte* information of which the parties are not given notice and an opportunity to cross-examine or rebut. *Colorado Energy Advocacy Office v. Public Service Co.*, 704 P.2d 298, 303 (Colo. 1985). Thus, undisclosed *ex parte* communications about the merits of a dispute are improper, and administrative decisionmakers cannot base their decisions on information received through such communications. The issue for courts is what to do if *ex parte* communications about the merits of a disputed issue occur, and administrative decisionmakers do not timely disclose the substance and circumstances.

The City correctly admits that some form of remand to allow further administrative hearings and ensure a fair procedure with neutral decisionmakers and the right to confront information that was secretly conveyed has been an appropriate remedy. City: 11 (discussing *Colorado Energy Advocacy Office* and *Zuviceh*). In discussing *Colorado Energy Advocacy Office*, Cedar also concedes

further administrative proceedings were necessary to cure the improper communications. Cedar: 20-21.

Both the City and Cedar rely heavily on *L.G. Everist, Inc. v. Water Quality Control Comm'n*, 714 P.2d 1349, 1352 (Colo. App. 1986), to argue that *ex parte* communications can be non-substantive and harmless. City: 10; Cedar: 17-19. Predictably Cedar argues its secret communications with Susman should be treated as non-substantive and not communications that affected the outcome of the Rezoning. Cedar: 19. Cedar argues that Plaintiffs must prove the City Council relied on the information from Cedar's improper communications.

Plaintiffs do not need to repeat their analysis here of those cases. Op. Br. 13-15. In *L.G. Everist*, the Court regarded the "possible complaints by fishermen" referenced by one board member as an "isolated statement" not affecting the substance of the agency's decision. *L.G. Everist, Inc. v. Water Quality Control Comm'n*, 714 P.2d 1349, 1352 (Colo. App. 1986).

Defendants' argument fails to explain how this Court can evaluate actual reliance and substantial prejudice when it lacks complete information about the circumstances and substance of all *ex parte* communications that occurred here. The Council members failed proactively to disclose before or at the public hearing the details of all *ex parte* communications, and Plaintiffs were not able to question

either Cedar's lobbyist or Council members under oath about Cedar's secret communications.

In the previous Colorado appellate decisions, the information about the *ex parte* communications was disclosed in some fashion by representatives of the administrative bodies, rather than (as here) ferreted out by an adverse party in a later judicial proceeding. *See Colorado Energy Advocacy Office v. Public Service Co.*, 704 P.2d 298, 302 (Colo. 1985) (PSC decision quoted potential cost information "that could not have been derived from the pleadings or hearing record"; plaintiff asserted the information "must have been obtained from *ex parte* contacts" and asked PUC to reconsider, and it granted reconsideration to reopen the record); *Zuviceh v. Industrial Commission*, 544 P.2d 641, 642-43 (Colo. App. 1975) (employer's April 25, 1975 letter referred to "phone conversation" with commissioner Russell; court of appeals remanded case to agency for new hearing, noting "if claimant had had notice of the contents of this *ex parte* communication, he might have been in a position to challenge the Commissioner's 'personal bias' for the purpose of disqualifying him."); *L.G. Everist, Inc.*, 714 P.2d at 1352 (board member made "statement" "regarding "possible complaints by fishermen).

Thus, for this Court to apply the City's proposed "substantial prejudice" standard, it first needs complete information about the circumstances and substance

of all *ex parte* communications that occurred so it can evaluate whether such prejudice occurred. Yet neither Plaintiffs nor this Court have complete information about Cedar's *ex parte* communications because Denver does not require Council members to make such affirmative disclosures, and the district court denied Plaintiffs' request for discovery.

Denver's practice, followed here, of not requiring proactive disclosure, is out of step with the Colorado Code of Judicial Conduct. *See* Colorado Code of Judicial Conduct Rule 2.9(A) & (B) (forbidding *ex parte* communications and requiring prompt disclosure of any that "inadvertently" occur); *id.* "Application" § I (standards apply to anyone authorized to perform judicial functions including administrative judges; Cmt. 3 states this does not apply to municipal judges but "is recommended to provide guidance concerning the proper conduct for judges");[2] *see also* C.R.S. § 24-4-105(14)(a) (prohibiting "*ex parte* material or representation of any kind offered without notice."). Federal and state governmental bodies also

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2 The district court rejected Plaintiffs' argument for application of that Code, relying on *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010) (Due Process does not impose on quasi-judicial decisionmakers the more rigorous standards for disqualification, reporting and disclosure). *See* CF 1089.

recognize such a disclosure obligation.[3] Timely disclosure allows parties to respond to secret communications and promptly request disqualification.

3. The Court should reject Cedar's argument for a "zoning" exception to Due Process requirements for a neutral decisionmaker.

Cedar cites a Wisconsin case to argue that zoning proceedings present "unique considerations" that warrant allowing *ex parte* communications because of the localized and political nature of zoning decisions. Cedar: 20 (citing *Sills v. Walworth County Land Mgmt. Committee*, 648 N.W.2d 878, 891 n. 9 (Wisc. Ct. App. 2002)). The Wisconsin court's decision does not mention the term "quasi-judicial" and its description of informal zoning permit proceedings in footnote 9 of that decision does not match the Colorado Supreme Court's holding that rezoning of individual parcels is a quasi-judicial, not legislative, process. *See* Op. Br. 8 (discussing *Snyder* and *Margolis* cases). Allowing undisclosed *ex parte* communications is not consistent with the Due Process requirement that quasi-

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3 *See, e.g.,* 5 U.S.C. § 557(d)(1)(A)-(C) (federal APA forbids *ex parte* communications and requires timely and complete disclosure of them); Revised Model State Administrative Procedure Act, Section 408(b),(f),(g) (July 2010) (forbids *ex parte* communications and requires timely disclosure of them), available at www.uniformlaws.org visited 1/9/17.

judicial decisionmakers make a decision based on evidence presented at a public hearing.

4. The "presumption of integrity and honesty" should not apply because of the conflicted actions here.

The presumption of integrity and honesty does not apply when there is a showing of a conflict of interest by a participating decisonmaker. Op. Br. 16. Defendants fail to address why that presumption is not overcome here by the evidence of a conflict of interest on the part of at least one participating decisionmaker, Susman, which affected the entire proceeding because she managed the Rezoning for the Council, and the lobbyists' campaign contributions, which affected several Council members. The fact that Susman ultimately voted for the Rezoning does not prove she lacked a conflict of interest given her multiple conflicting roles. *See supra* Section II.A.1. Susman never disclosed the circumstances and substance of her *ex parte* communications, so this Court lacks complete information on her conflicted conduct.

5. The fact that residents also tried to communicate with Susman in the conflicted process the City ran here is irrelevant.

Defendants justify the flawed quasi-judicial process here by arguing some homeowners also tried to communicate their opposition to the Rezoning to Susman before the public hearing. City: 14-15; Cedar: 1. Unlike Cedar's lobbyist Maley,

those residents were not using an unofficial back-channel like Susman's "Gmail" account to communicate with her (the cited McCrimmon communication went to Susman's official email address). Those residents had no reason to believe Susman would not timely disclose such communications.

B. It was improper for a current Denver Planning Board member to serve as the developer's zoning change applicant here.

The fact that the Planning Board's decision was not final does not prevent this Court from reviewing the conflict from Bershof's dual role as Cedar's zoning applicant and current Planning Board member. Planning Board review was an essential step in the quasi-judicial process that culminated in the City Council's approval. Op. Br. 19. If the Planning Board had voted to reject the Rezoning, that would have changed the trajectory of this zoning change.

The Tenth Circuit recently set aside an SEC final decision because the ALJ who issued the initial recommendation to the SEC was not properly appointed under the Constitution's Appointments Clause. *Bandimere v. United States Securities and Exchange Commission*, No. 15-9586, ___F.3d __ (10th Cir. Dec. 27, 2016). The Tenth Circuit rejected the SEC's arguments that the ALJ's lack of authority to make final decisions made the ALJ's recommendation and lack of constitutional appointment irrelevant.

The fact that Den. Rev. Mun. Code § 12-44 allows Planning Board members to have a financial interest in a measure before the Board does not mean the arrangement here satisfies the Due Process requirement for an unbiased decisionmaker. The U.S. Supreme Court struck down many years ago on Due Process grounds a statutory arrangement that allowed an Ohio mayor to decide cases in which he had a financial interest. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (Due Process violation when mayor decided criminal case in which he had a direct pecuniary interest). In *Tumey*, the mayor's "direct, personal, pecuniary interest" in the judicial decisions he made was "the result of the normal operation of the law and the ordinance." *Id.* at 523. But the Court rejected the argument that the legislature could decide how to set up the state's courts because the state cannot vest judicial power "in one who by reason of his interest . . . is disqualified to exercise it . . . ." *Id.* at 535. Here, applying the *City of Manassa/Caperton*/Due Process standard for conflicts of interests, using both a "realistic appraisal of psychological tendencies and human weakness and common sense, the Court should hold that the Planning Board members could not function as neutral decisionmakers for their own colleague's rezoning application. *See* Op. Br. 18-19, 24-25. Their conflicted approval of the Rezoning application tainted the City Council's later review.

Plaintiffs agree this Court's unpublished decision in *O'Connor v. Denver Planning Board*, No. 15CA0709 (Colo. App. Nov. 25, 2015), should not serve as a precedent here. While itself relying on the *O'Connor* unpublished ruling, Cedar: 33-34, Cedar contends it was improper for Plaintiffs to refer to that decision in their Opening Brief, Cedar: 32 n. 11 & 41 (fee request). Cedar overlooks that the City relied on that unpublished decision in the district court to contend the Planning Board's decision cannot be reviewed. *See* CF pp. 786-87; 968-990 (decision: Exh. D to City's Answer Brief). Plaintiffs properly anticipated in their Opening Brief that the City would advance the same argument. And the City did so. City: 8.

If the Court examines its unpublished decision in *O'Connor*, the ripeness issue in that case was whether the Planning Board's decision approving a zoning text amendment constituted a final decision for purposes of an appeal to the district court under C.R.C.P. 106(a)(4) & (b) (complaint due within 28 days of "final decision"). Opinion at 8-10, CF pp. 976-78 (holding claim was "unripe.").

Here, the Council's June 2015 Rezoning was a final decision the district court had jurisdiction to review under Rule 106, and this Court has appellate jurisdiction. This Court's review of the fairness of the administrative proceedings leading up to the City Council's final, appealable decision, including the Planning

Board's threshold approval of the Rezoning, is comparable to review of a district court's non-final pretrial and trial decisions. Cedar is confusing the need for a final judgment to commence an appeal, with the scope of an appeal once commenced. *See, e.g.,* 19 *Moore's Federal Practice*, "Reviewability of Issues," at 205-1 (3d ed. 2016) ("An appeal from a final judgment of a district court potentially brings the entire case to the circuit court."); *id.* § 205.05[1] at 205-56 ("in order to be reviewable on appeal, a claim, issue, or argument must have been pressed or passed upon below.") (quotes omitted); *see also* J. Davidson & A. Loeb, *Colorado Appellate Handbook*, § 5.1 (2014 ed.) ("Ordinarily, a judgment must be final before an appeal may be taken.")

C. The Council members who voted for the Rezoning relied on irrelevant factors.

Defendants challenge Plaintiffs' abbreviated reference to the Council Members' failure to explain their votes based on relevant statutory factors. City: 35; Cedar: 34. Plaintiffs summarized the Council Members' flawed reasoning, unrelated to the mandatory Zoning Code review criteria, in Undisputed Fact #8 of their district court brief, CF pp. 508-09:

- Faatz: similar to Pinehurst building in her district, Transcript at 7:18-9:15;

- Nevitt: dislikes urban sprawl, favors density, opponents show "cognitive dissonance," *id.* 10:8-15:16;
- Lopez: developer made belittling comments about residents, *id.* 18:16-19:22;
- Kniech: saw evidence that community had "impact" on developer's proposal; "deciding factor" was early communications with the developer reflected anti-rental sentiment and she believes Denver needs more rentals, *id.* 26:13-27:12; 28:15-31:5;
- Brown: developer made "considerable compromises," *id.* 35:15-37:8;
- Brooks: developer came down and made concessions; Council cannot consider traffic and transportation issues, *id.* 38:4-39:11; 39:19-24.

The City's response citing Council members' general comments does not demonstrate members who voted in favor evaluated the statutory factors and based their decision on those factors. *See* City: 36 (Nevitt: comments on location along transit route, Tr. at 14:25-15:5); Kniech: stating her job is to analyze the Code criteria, does not equal doing so, *id.* 26:3-6; Brooks: his explanation reflects a conclusion that focuses on an irrelevant issue: whether the "existing site" reflects "the context." Robb's analysis of the lack of a small area plan in an area of

stability, *id.* at 22:1-23:24 did address relevant factors, but she voted against the Rezoning.

The comments from members who voted in favor do not reflect reasoned decisionmaking.

D. The City should have excluded City park land from the its protest petition calculation.

The City's response shows why the Court should reconsider *Burns* and direct the City to exclude City-owned park land from a protest petition calculation so the City can abstain and remain neutral. The City says it did not sign the petition because doing so would involve "taking a side in favor of the opposition." City: 18. Yet by including park land in the Protest Procedure calculation and refusing to sign a petition, the City effectively did take a side in favor of the rezoning. (With the City park land excluded, Plaintiffs' signatures constituted more than the required 20% for a supermajority).

The more reasonable interpretation of the Protest Procedure Charter provision is to exclude City park land from the calculation so the City can abstain. This Court construes statutes in light of their manifest intent and has authority to overrule or limit a past precedent like *Burns* when there is good reason to do so.

For Cedar's fee request: Plaintiffs' good faith argument for a change to existing law is not frivolous. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*,

229 P.3d 282, 299 (Colo. App. 2009). If the Court does not reconsider *Burns*, the Colorado Supreme Court may take a different view.

E. City Council members had conflicts of interest because of campaign contributions from Cedar's lobbyists.

The Court should reject the City's argument, City: 19, that it cannot consider undisputed evidence of Council members' campaign contributions. Evidence of decisionmakers' bias would not normally be included in the administrative record the City assembles for Rule 106(a)(4) review. The Court can take judicial notice of such evidence drawn from publicly filed reports. C.R.E. 201(b) & (d). Without such evidence, the Court could not evaluate if a quasi-judge received improper gifts.

Defendants rely on Denver's ethics ordinance and Colorado statutes allowing campaign contributions to elected officials to justify such lobbyist payments and favors. City: 21; Cedar: 23. But statutory authorization cannot validate a Due Process violation created by a non-neutral decisionmaker exercising judicial functions. *See supra* Section II.B (discussion of *Tumey*).

Plaintiffs' Opening Brief addresses the significance of the contributions here under the *City of Manassa/Caperton* factors. Op. Br. 25-26. If any Council members were compromised as neutral decisionmakers, the entire Rezoning should

be set aside because biased members' statements and actions (including Susman, who served multiple conflicting roles) may have influenced others' votes.

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

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

In addressing the mandatory criterion that a zoning change be consistent with adopted plans, the City correctly notes Plaintiffs' concern that "the City could manipulate [the Comp Plan and Blueprint Denver] to serve any purpose or, here, find consistency." City: 24. Defendants justify the Rezoning relying on "strategies" from two general planning documents (promoting infill development, and allow a range of housing types), City: 27-29; Cedar: 26, that would justify high-density apartment buildings on any Denver residential property in any stable neighborhood if a developer requests the change.

The City does not contend the "Comp. Plan" or Blueprint provides specific guidance about this Parcel other than Blueprint's map classifies the Parcel as an "area of stability." Defendants' interpretation of the "adopted plan" requirement would render it a meaningless limitation on zoning changes. *Cf. Young v. Brighton School Dist.*, 325 P.3d 571, 576 (Colo. 2014) (read statute as a whole; give effect

to all parts).

A more reasonable interpretation of the "adopted plan" requirement is that if the City wants to change the zoning for a parcel in an area of stability, it must demonstrate the change is consistent with an adopted small area plan for the area. Generic "strategies" in city-wide plans are not sufficient. If (as here) there is no small area plan because the area is stable, then the City must honor the Parcel's zoning category contained in the legislatively adopted Zoning Code (which was updated in 2010 after a city-wide process for public input).

The City proposes to define "consistent" as merely "compatible." City: 26. The dictionary definition of "consistent" means "marked by harmony, regularity, or steady continuity: free from variation or contradiction."; "marked by agreement"; and "showing steady conformity to character, profession, belief, or custom." See Merriam Webster online dictionary. www.merriam-webster.com/dictionary/consistent (accessed 1/9/17). The City cites an "Oxford" definition ("compatible or in agreement with something"), while ignoring that source's other definitions: "unchanging in nature, standard, or effect over time" and "not containing any logical contradictions." https://en.oxforddictionaries.com/ open Dictionary (US) and search "consistent" (accessed 1/9/17). And the City relies on a definition from the "Cambridge" dictionary but ignores the primary

definitions of: "not varying"; "always happening or behaving in a similar way" and "agreeing with something said or done previously." http://dictionary.cambridge.org/us/dictionary/english/consistent (accessed 1/9/17).

Denver contends, without support, that the Parcel is in a "Reinvestment Area" that "would benefit from reinvestment," but cannot cite any published map to establish that classification. City: 29-30. Cedar advances a similar argument that residents could not rely on Blueprint's "Area of Stability" designation, but at least concedes that Blueprint Denver does not actually identify specific "reinvestment areas" on a map or elsewhere. Cedar: 29.

Defendants avoid discussing the significance of the lack of a small area plan for this admittedly stable neighborhood, even though the City concedes that plans should guide zoning and Blueprint Denver calls for such plans when change is contemplated. City: 25; Cedar: 26 n. 9. The City appears to be arguing that the absence of any specific plan for the Parcel itself constitutes an "adopted plan" that allows any rezoning. But the City's practice, based on Chapter 8 of Blueprint Denver, is not to create small area plans for stable areas where a specific plan is not needed. *See* CPD website describing and listing existing small area plans: www.denvergov.org/content/denvergov/en/community-planning-and-development/planning-and-design/how-we-plan/small-area-plans.html (accessed

1/9/16). When adopted plans do not direct specific changes in an area, that is just as important as when plans do direct specific changes. Mere generic citywide "strategies" should not be treated as equal to a small area plan that calls for specific changes.

The Court should reject Cedar's contention that compliance with the statutory requirement of consistency with adopted plans represents a fact question. Cedar: 26, 28. Here Plaintiffs are presenting an issue of statutory interpretation that this Court reviews *de novo*.

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

The Court should reject Defendants' arguments for deference to the City's supposed interpretation of the Zoning Code's statutory criterion requiring changed or changing conditions. City: 32; Cedar: 30. The City cannot identify any published reasoned interpretation of this criterion. The City cannot designate every *ad hoc* legal position it takes in a brief as an agency interpretation entitled to deference. *See* Op. Br. 10. Plaintiffs' Opening Brief explains why the City's justification to rezone one parcel based on a decaying building on that parcel is unreasonable. Op. Br. 38-40.

C. The City concedes its policy of refusing to consider adverse traffic and parking problems as part of mandatory criterion for the public health, safety, and general welfare.

The City candidly admits its policy of not considering adverse traffic and parking consequences from a proposed rezoning: "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 . . . ." City: 34. Such a policy represents an unreasonable interpretation of the Zoning Code's mandatory criterion that a zoning change "furthers the public health, safety and general welfare of the City." *See* Op. Br. 40-43. There is no published, reasoned explanation for the City's admitted policy, and therefore no deference is warranted. *See id.* at 10. The City's justification that "the zoning code does not regulate traffic," City: 34, ignores that the City's high-density zoning changes including the one challenged here plainly create traffic congestion and parking problems in affected neighborhoods.

IV. The Rezoning constituted unlawful spot zoning.

Finally, the facts of this case also present a quintessential example of spot zoning where Denver allowed a zoning change in a stable area, without support in any adopted plan and contrary to the single-family homes zoning classification legislatively reaffirmed in the 2010 Zoning Code, which subverts residents'

reasonable expectations. Cedar relies on S-MU-3 zoning for the parcel to the south across E. Cedar Ave., Cedar: 39, failing to note that building is a low-density one-story day-care facility owned by Plaintiff Pitmon. The Court should reject Defendants' arguments that "strategies" in general city-wide plans justify this kind of change. The lame-duck City Council allowed this Rezoning as a pay-back to a developer whose lobbyists made large campaign contributions and secretly manipulated the quasi-judicial process. If these facts do not constitute "spot zoning," then the concept now is dead-letter in Colorado.

V. Cedar's claim for attorney's fees is frivolous.

The Court should deny Cedar's frivolous claim for attorney's fees. Cedar: 41. This is a baseless request from a developer who seeks to silence the voices of the people whose neighborhood he would harm. Cedar's request itself violates Plaintiffs' immunity under "*POME"* principles. *See Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1364-69 (Colo. 1984) (explaining First Amendment immunity to petition courts without harassment through "SLAPP" claim).

Plaintiffs' Opening Brief provided proper support (within the court's 9,500 word limit) for the many reasons why the Rezoning must be vacated. Plaintiffs' arguments are well-founded, not frivolous.

VI. Conclusion.

The Court should vacate the Rezoning.

Dated: January 9, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2017 a true and correct copy of the foregoing REPLY BRIEF OF PLAINTIFFS-APPELLANTS was served in the manner indicated below on opposing counsel and on the Denver District Court:

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