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SUPREME COURT, STATE OF COLORADO

Court Address: 2 East 14th Ave.
Denver, Colorado 80203

Court Below:

Trial Court: Denver District Court
Case No. 2015CV32427
District Judge Shelley I. Gilman

Court of Appeals: Case No. 2016CA920 (pending)

Petitioners-Plaintiffs: Arthur Keith Whitelaw, III, John DeRungs, Katherine K. McCrimmon, Laura Pitmon, Denise Sigon f/k/a Denise L. Sager, Alan Singer, and Rita Singer.

Respondents-Defendants: The Denver City Council (including the individual Council members named in Plaintiffs' Complaint), the Manager of Community Planning and Development (Brad Buchanan), The Denver Planning Board, the City and County of Denver, and Cedar Metropolitan LLC.

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Case Number: _____

PETITION UNDER C.A.R. 50 FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS BEFORE JUDGMENT

Certificate of Compliance

I hereby certify that this petition 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 C.A.R. 53(a).
  Choose one:
  - ☒ It contains 3,684 words.
  - ☐ It does not exceed 12 pages.

- The brief complies with C.A.R. 28(k). [**NOT APPLICABLE TO PETITION FOR CERTIORARI**]
  - ☐ For the party raising the issue:

  It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. __, p. __), not to an entire document, where the issue was raised and ruled on.

  - ☐ For the party responding to the issue:

  It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Gregory J. Kerwin
Gregory J. Kerwin

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ISSUES PRESENTED FOR REVIEW

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

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

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

c. allowing City Council members deliberating and voting on the rezoning to ignore the specific mandatory criteria for a rezoning contained in the Denver Zoning Code and instead rely on irrelevant political factors as a basis for their quasi-judicial vote;

d. blocking application of the Denver Charter's requirement of a super-majority City Council vote for a rezoning when residents owning 20% of the area within a 200-foot perimeter sign a protest petition, by refusing to exclude publicly-owned City park land from the City's calculation;

e. allowing City Council members functioning as quasi-judicial decisionmakers to vote on the rezoning despite the conflict of interest

created by their receipt of large cash and in-kind campaign contributions from the developer's lobbyists?

2. Whether the City of Denver failed to protect private property owners' rights by carrying out an *ad hoc* quasi-judicial rezoning of a small parcel to allow high-density buildings in a residential area for the benefit of a private developer, when such rezoning:

a. is not specifically directed in the Denver City Council's adopted plans, and alters the zoning designation in Denver's comprehensive new 2010 Zoning Code, which rezoned the entire city through a legislative, community-driven process;

b. is justified by the City under a mandatory Denver Zoning Code criterion as necessary and in the public interest to address "changed" or "changing" conditions in a blighted neighborhood, because the owner of the parcel to be rezoned in a thriving neighborhood did not maintain its existing structure in good repair; and

c. fails to take account of the harm to surrounding residents from resulting traffic and parking problems, which factors the City contends the Council should not consider when applying the mandatory criterion of whether the rezoning advances the public health, safety, and general welfare.

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

OPINION BELOW

The district court's Order challenged here is dated May 17, 2016. (Appendix A) (the "Order"). Plaintiffs filed a timely appeal in the Colorado Court of Appeals on May 31, 2016 (Case No. 2016CA920). That appeal is pending.

In this C.A.R. 50 petition, Plaintiffs are seeking review by this Court before the Court of Appeals rules on the merits of the appeal.

GROUNDS ON WHICH SUPREME COURT'S JURISDICTION IS INVOKED

A. Date of judgment or decree sought to be reviewed:

May 17, 2016: This petition is timely filed under C.A.R. 50, which does not set a deadline for when such a petition must be filed while an appeal is pending.

The only action the Court of Appeals has taken so far in Case No. 2016CA920 has been to issue a June 8, 2016 Notice directing that the appeal record is due on August 30, 2016.

B. Orders concerning rehearing or extensions of time:

No petitions for rehearing were filed. No party has requested an extension of time relevant to this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents several precedent-setting issues of state-wide importance about the integrity of the local land use planning and quasi-judicial rezoning process, which affect all local government officials and Colorado property owners in zoned communities. This case meets each of the criteria under C.A.R. 50(a) for immediate review by this Court. First, the case involves matters of substance this Court has not addressed before. Second, in the pending appeal the court of appeals will be asked to decide important state-wide questions that this Court should determine. Third, the issues Plaintiffs present are of such imperative public importance as to justify deviation from the normal appellate process and require immediate determination by this Court.

This Court has not previously clarified the details of how quasi-judicial procedures and Due Process principles, including the prohibition on *ex parte*

contacts, apply to a county or municipal rezoning process. Additionally, it has been 55 years since the Court analyzed in detail spot zoning principles. Nor has the Court reviewed how Denver's "protest petition" ordinance, requiring a super-majority vote when surrounding landowners sign a petition, applies when the City is one of the major landowners. Finally it is appropriate for the Court to consider whether "campaign contributions" to local elected officials functioning as quasi-judges are compatible with evolving standards governing the independence of judges and quasi-judges.

Colorado courts have long recognized that stable zoning protects the rights of property owners from arbitrary changes to the character of their neighborhood. This Court has explained: "Property owners have the right to rely on existing zoning regulations when there has been no material change in the character of the neighborhood which may require re-zoning in the public interest." *Clark v. City of Boulder*, 362 P.3d 160, 163 (Colo. 1961). Similarly the court of appeals has stated: "Colorado has long recognized the legal right of neighboring land owners to rely on the fact that the zoning of land in their neighborhood will not be changed, absent substantial reasons therefor. . . . If this legal right is invaded by a rezoning decision such that neighboring landowners are adversely affected, they have a right

to seek judicial relief." *Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988), *cert. denied* (1989).

In the instant petition, Plaintiffs ask the Court to confirm that local officials making quasi-judicial zoning decisions must:

a) comply with due process and procedures governing the integrity of the quasi-judicial process including refraining from *ex parte* contacts, avoiding both actual conflicts of interest and the appearance of a conflict, and basing any rezoning decision solely on relevant statutory criteria;

b) conform rezoning decisions to adopted local plans, consistent with both state law and city ordinances; and

c) honor common law principles forbidding "spot zoning."

This case shows how, in a period of rapid state-wide population growth and pressure from developers to allow more "density" per acre in existing residential neighborhoods, the City of Denver has been running a conflicted developer-controlled rezoning process dominated by secret, *ex parte* communications between developers' lobbyists and City Council decisonmakers, that does not comply with mandatory quasi-judicial procedures and Due Process. Denver allows zoning changes that harm stable neighborhoods and subvert the community land-use planning process by ignoring, or not requiring, adopted plans. Denver

politicians and their appointees have been approving rezoning of small parcels to benefit private developers through quasi-judicial actions involving conflicted City decisionmakers and lobbyists who have effectively purchased private access through "campaign" contributions.

Yet in response to Plaintiffs' challenge here, the district court declined to take any action to address Denver's unlawful process for rezoning. The district court allowed the Denver City Council to be the arbiter of the fairness of its own tainted quasi-judicial procedures, and to decide for itself whether it mis-applied the Denver Zoning Code's mandatory criteria for rezoning.

Plaintiffs seek expedited review directly by this Court under C.A.R. 50 because the developer is trying to moot these legal challenges by moving ahead with its high-density development under the unlawful rezoning before the Colorado appellate courts have time to rule on the merits of Plaintiffs' claims. Prompt review by this Court of these unsettled legal issues, along with an immediate stay of proceedings, will prevent Plaintiffs' important arguments from potentially being mooted by buildings constructed while appellate review is underway.

STATEMENT OF THE CASE

Plaintiffs sought a declaratory judgment and review under C.R.C.P. 106(a)(4) of the Denver City Council's June 2015 decision approving a rezoning application for a 2.3 acre parcel at the southeast corner of Crestmoor Park, in east Denver. The City's rezoning would allow three-story apartment buildings on property that has been zoned for single-family homes (a former church site).[1]

Plaintiffs asked the district court to vacate the challenged rezoning. The district court granted Plaintiffs' request to allow an augmented administrative record that included a large volume of previously undisclosed emails about the rezoning sent to and from Councilwoman Susman's private "gmail" account. The disputed parcel is located in Susman's Council district. Those emails include private communications with the developer's lobbyist and emails confirming the fact, but not the substance, of Susman's private telephone calls with that lobbyist before the public hearing.

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

After full briefing, the trial court held a hearing to receive oral argument and issued its May 17, 2016 Order, which rejected all of Plaintiffs' arguments.

The district court's Order and Plaintiffs' opening brief briefly describe Plaintiffs' evidence of the main procedural flaws with the rezoning Plaintiffs challenge here, including:

- the zoning applicant for the developer (Mr. Bershof) was a current member of the Denver Planning Board, whose approval was a necessary step in the rezoning process;
- record evidence shows undisclosed *ex parte* contacts with the lead City Councilmember managing the Council's public hearing on the proposed rezoning;
- Council members who voted in favor explained their votes based on irrelevant factors rather than mandatory statutory criteria;
- evidence from public records shows substantial contributions by the developer's lobbyists to four of the Council members who participated in the public hearing;
- Denver's official policy, admitted at public hearings by a Planning Board member and City Council member, and at oral argument by the City Attorney's office, is that the City Council should not consider adverse traffic and parking effects as part of the rezoning process;
- there is no City Council-adopted plan in Denver that called for this zoning change; the City and the developer just relied on generic "strategies" for adding density that could justify a rezoning in any Denver residential neighborhood.

Order at 2-6, 8, 12-15 (App'x A); *see also* Pl. Opening Rule 106 Brief at 10-14, 15-18, 22-29 (Jan. 14, 2016) (App'x B).

Plaintiffs filed a timely notice of appeal with the court of appeals on May 31, 2016. That appeal is pending, with the appeal record currently due on August 30, 2016.

REASONS WHY THIS PETITION SHOULD BE GRANTED

I. This Court's previous decisions do not provide detailed guidance for how cities and counties should manage a quasi-judicial rezoning process to ensure the integrity of that process and comply with Due Process.

This Court held long ago that zoning decisions affecting individual parcels of land are quasi-judicial. *See Snyder v. City of Lakewood*, 542 P.2d 371, 374-75 (Colo. 1975) (listing four factors for when municipal action is quasi-judicial and holding that a rezoning ordinance adopted pursuant to statutory criteria after notice and a public hearing constituted a quasi-judicial function); *see also Margolis v. District Court*, 638 P.3d 297, 304-05 (Colo. 1981) (clarifying *Snyder* and confirming that rezoning is quasi-judicial for the purpose of judicial review, although rezoning decisions also are subject to referendum and initiative). And in *Cherry Hills Resort v. Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988), the Court reviewed the essential characteristics of quasi-judicial action, explaining that: "[E]xercise of quasi-judicial authority, unlike legislative authority, is conditioned upon the observance of traditional procedural safeguards against arbitrary governmental action. These safeguards basically consist of providing

adequate notice to those individuals whose protected interests are likely to be adversely affected by the governmental action, and giving to such persons a fair opportunity to be heard prior to the governmental decision."

But since *Snyder* and *Cherry Hills Resort*, although the Court has regularly considered whether certain administrative actions constitute quasi-judicial conduct,[2] neither it nor the court of appeals has had the opportunity to evaluate and explain whether particular procedures in an admittedly quasi-judicial rezoning process comply with quasi-judicial requirements for procedural fairness and non-arbitrary governmental action, including how decisionmakers on a rezoning request must explain their decision and base it solely on relevant statutory criteria and record evidence received at the administrative hearing.[3] The Court has not

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[2] *See, e.g., In re Application for Water Rights of the Colorado Water Conservation Board*, 346 P.3d 52, 54 (Colo. 2015) (deciding whether CWCB decision to appropriate an instream flow right was quasi-judicial or quasi-legislative); *Widder v. Durango School District*, 85 P.3d 518, 527-28 (Colo. 2004) (whether School Board decision was quasi-judicial); *Jafay v. Board of Comm'rs*, 848 P. 2d 892, 895-98 (Colo. 1993) (whether county commissioners' actions to change county zoning regulations were quasi-judicial).

[3] In a dissenting opinion in *South Creek Assoc. v. Bixby & Assoc.*, 781 P.2d 1027, 1037 (Colo. 1989), Justice Vollack commented on when actions qualify as quasi-judicial vs. legislative, and expressed the view that certain

[Footnote continued on next page]

addressed what safeguards are necessary to ensure the integrity of the quasi-judicial process when a county like Denver empowers elected officials (the City Council) to make the final rezoning decision. For example, the Court has not addressed whether it is proper in a rezoning process for (as here) a current Planning Board member to serve as the rezoning applicant when Planning Board approval is a necessary precursor to City Council approval. And it has not addressed whether it is proper (as here) for quasi-judicial decisionmakers to explain their vote in favor of a rezoning decision based on irrelevant personal preferences and political factors (e.g., density is necessary to prevent sprawl, the applicant compromised from its original request, a similar development is attractive), rather than explaining how specific evidence received at the hearing satisfied the mandatory statutory criteria for rezoning.

In addition, while this Court has endorsed the U.S. Supreme Court's "*Caperton*" standard for when the due process requirement of neutrality in adjudicative proceedings entitles a person to an impartial and disinterested decision-maker, *see City of Manassa v. Ruff*, 235 P.3d 1051, 1056 (Colo. 2010),

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[Footnote continued from previous page]

Boulder procedures for quasi-judicial proceeding did not provide adequate notice to subsequent purchasers of interests in land.

this Court has not addressed when, if ever, elected officials who also serve as quasi-judges deciding a rezoning can be deemed impartial and disinterested and free from the appearance of a conflict of interest, when they have received substantial monetary or non-monetary contributions from the lobbyists who represent the developer seeking the rezoning.

Moreover, this Court has explained that undisclosed *ex parte* contacts with administrative decisionmakers are not proper in a quasi-judicial proceeding and provided some guidance on how quasi-judicial administrative bodies like the Public Utilities Commission should remedy *ex parte* communications that have occurred. *See Colorado Energy Advocacy Office v. Public Service Co*, 704 P.2d 298, 302-05 (Colo. 1985) (private communications were "clearly improper" and agency could not base its decision on *ex parte* information that the parties were not given notice and an opportunity to rebut). But the Court has not addressed when, if at all, *ex parte* communications are proper with local officials making a quasi-judicial rezoning decision.

Lacking such guidance, the district court here found no violation of quasi-judicial procedures or Due Process and found no problem with the developer's undisclosed *ex parte* contacts with the lead City Council member, and with the

substantial contributions from the developer's lobbyists to several of the Council members who participated in the rezoning hearing. *See* Order at 12-15.

Denver also has a Charter provision requiring a super-majority vote for a rezoning when residents owning 20% of the area within a 200-foot perimeter sign a protest petition. *See* Denver Charter Art. 3.2.9.E. In this case, if City-owned park land had been excluded from the calculation, residents would have met the 20% threshold. This Court has not reviewed how City-owned property, including public park land, should be considered when calculating whether enough surrounding residents signed a petition. The court of appeals addressed a related issue nearly 30 years ago, in 1988, and allowed Denver to include city streets in its protest petition area calculation. *See Burns v. Denver City Council*, 759 P.2d 748 (Colo. App. 1988), *cert. denied* (1988). The district court rejected Plaintiffs' argument to exclude City-owned park land, which is different from city streets, from the calculation. Order at 10.

II. Although Colorado law contemplates that a comprehensive community planning process must guide zoning decisions, this Court has not addressed whether it is proper for local officials to allow rezoning that deviates from or ignores adopted plans.

The requirement that zoning changes be consistent with adopted plans is central to zoning law and mandated by both Colorado statutes and the Denver

Zoning Code. *See, e.g.,* A. Rathkopf, et al., 1 *Rathkopf's The Law of Zoning and Planning* § 14:1 (4th ed. June 2015) (footnotes omitted) ("The requirement that zoning be 'in accordance with a comprehensive plan' is one of the most fundamental concepts in land use regulation."). In Colorado, under C.R.S. §§ 30-28-106 and 31-23-206, cities and counties must prepare comprehensive plans to provide the framework for regulatory tools like zoning; such plans are supposed to promote the community's vision, goals, objectives, and policies, establish a process for orderly growth and development, and address current and long-term needs. *See, e.g.,* Colo. Dep't of Local Affairs website at: https://www.colorado.gov/pacific/dola/comprehensive-plans *See also* C.R.S. §§ 31-23-301 and 303(1) (cites to enact zoning regulations; § 303(1)directs: "[s]uch regulations shall be made in accordance with a comprehensive plan . . . ."). The Denver Zoning Code requires that zoning changes be consistent with Adopted Plans, and states other mandatory criteria for zoning changes including that the change meet a specific "justifying circumstance" and further the public health, safety and general welfare. See §§ 12.4.10.7(A), (C), 12.4.10.8.

The facts of this case illustrate how Denver ignores mandatory requirements such as allowing only zoning changes that are consistent with adopted plans. In addition, another pending appeal involving a Denver rezoning decision affecting

the former St. Anthony's Hospital property adjacent to Sloan's Lake Park in west Denver raises nearly the same issue about a zoning change that was not consistent with the City's adopted plan (there, the West Colfax Plan).[4] This Court's decisions have not addressed how local officials considering zoning changes must comply with statutes and ordinances that require zoning changes be consistent with adopted plans and meet other statutory criteria, which limit when changes are allowed.

III. This Court has not recently clarified the principles that govern a spot zoning claim.

In 1961, this Court recognized limitations barring "spot zoning," based on "whether the [zoning] 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 v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961); *see also King's Mill Homeowners Ass'n Inc. v. City of Westminster*, 557 P.2d 1186, 1191 (Colo. 1976) (Court rejected spot zoning argument with little explanation).

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[4] *See Torres v. City Council*, No. 2016CA712. If this Court grants Plaintiffs' C.A.R. 50 petition, it may want to also grant review in that pending Sloan's Lake appeal.

The Court has not explained spot zoning concepts since *Clark*. Plaintiffs contend the facts here illustrate unlawful spot zoning of a small parcel that ignored comprehensive plans and merely relieved the property owner of zoning restrictions. The district court concluded that apartments are similar to single-family homes and rejected Plaintiffs' spot zoning argument. Order at 11.

Because of the frequency of rezoning applications all over Colorado with the state's population growth, this Court should revisit the concept of spot zoning in the context of this case.

IV. Having the Court address these issues now under C.A.R. 50, rather than after a decision from the court of appeals, will avoid the prospect of requiring the developer to remove new buildings it constructs during the appeal if the rezoning is ultimately reversed.

With the district court's Order rejecting Plaintiffs' arguments, the developer here already has bulldozers reshaping the parcel's ground, rushing to construct high-density buildings while Plaintiffs' appeal is pending. In opposing a stay in the district court, the developer argued that if the zoning is reversed, Plaintiffs would have legal recourse to invalidate the building permit predicated on the rezoning. *See* Cedar Metropolitan Response at 7 (Feb. 29, 2016) (citing *Hargreaves v. Skrbina*, 662 P.2d 1078 (Colo. 1983) and arguing Plaintiffs "could file an equitable action to seek compliance with the existing zoning.")

Plaintiffs recognize that it would be a wasteful process for new buildings to be built and then demolished. They are willing to brief and argue the legal issues presented in this Petition as quickly as the Court will allow, to avoid the need for such wasteful demolition if the Court vacates the Denver rezoning decision challenged here. Upon filing this Petition, Plaintiffs will ask the district court under C.R.C.P. 62(b) and C.A.R. 8(a)(1) to grant a stay pending appeal. If the district court denies that stay, Plaintiffs will seek a stay from the court of appeals and this Court under C.A.R. 8(a)(2).

Plaintiffs submit that the normal multi-year timetable for obtaining a decision on the merits of a complex appeal, first from the court of appeals, and then possibly from this Court, presents practical problems given that the developer has begun construction in light of the rezoning and issuance of a new building permit based on that rezoning. The important legal issues Plaintiffs present warrant this Court's immediate review under C.A.R. 50 under the most expedited timetable for briefing and oral argument this Court will allow. Such an expedited appellate process minimizes the burden to the defendant/developer in a case where citizen-individual plaintiffs cannot post a large supersedeas bond, while allowing this Court to clarify Colorado law on important and recurring issues in Colorado rezoning proceedings.

V. Conclusion.

The petition for a writ of certiorari should be granted.

Dated: August 1, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, a true and correct copy of the foregoing PETITION UNDER C.A.R. 50 FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS BEFORE JUDGMENT PETITION FOR A WRIT OF CERTIORARI was sent to the following persons through the ICCES system:

Nathan Lucero Tracy Davis Assistant City Attorneys Denver City Attorney's Office Municipal Operations Section 201 W. Colfax Ave., Dept. 1207 Denver, CO 80202 (counsel for City Defendants) (served by ICCES)	Clerk's Office District Court, City and County of Denver, Colorado 1437 Bannock Street Denver, CO 80202 (served through ICCES)
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By: s/ Gregory J. Kerwin
Gregory J. Kerwin

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APPENDIX to PETITION UNDER C.A.R. 50

A. District Court's May 17, 2016 Order

B. Plaintiffs' Opening Brief In Support Of Their Claims Under Colo. R. Civ. P. 106(A)(4) And For Declaratory Relief (without exhibits) (Jan. 14, 2016).