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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: 2016SC00603

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR 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 Reply 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 C.A.R. 53(d).
  Choose one:
  - ☒ It contains 3,131 words.
  - ☐ It does not exceed 10 pages.

- The brief complies with C.A.R. 28(k). [NOT APPLICABLE TO REPLY BRIEF IN SUPPORT OF 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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Petitioners submit this Reply Brief in support of their Petition under C.A.R. 50. The response briefs from the City of Denver ("City") and the developer ("Cedar") only serve to provide support for having the Court grant certiorari now to decide the important issues of statewide concern that Petitioners identify in their Petition.

Both Denver elected officials and their legal advisors, and local officials throughout Colorado, need guidance from this Court about how to comply with quasi-judicial standards for rezoning of individual parcels, how to honor the core principle of state and local law that zoning changes must comply with a comprehensive plan, and how to avoid unlawful spot zoning. There is no reason for this Court to wait for the court of appeals to analyze the issues first. Colorado citizens and local governments need clear guidance from this Court and the developer here is racing ahead with its construction project trying to moot these important issues.

Introduction

First, the City's brief makes clear that Denver believes it is proper to run a quasi-judicial rezoning process just like the political process for legislative decisions the City Council makes. The City's brief shows that Denver's legal advisers do not instruct elected officials/Council members and Planning Board

members to even explain their rezoning decisions, much less base them on relevant criteria and record evidence, or refrain from secret *ex parte* contacts with the developers and their lobbyists. Denver is content with the current developer-controlled zoning process because it serves the political interests of the Mayor and Council members, who can provide favorable rezoning decisions that benefit their friends, campaign contributors, and favored lobbyists. To facilitate this developer-controlled process, Denver sees no conflict with having its *current* Planning Board members serve as a rezoning applicant, or with the City blocking the Protest Petition procedure through its ownership of City park land. And the City's brief shows that it considers it acceptable for developers' lobbyists to seek to influence City Council members' quasi-judicial votes through significant cash and non-cash campaign contributions. This case illustrates how Colorado's capital city has made a mockery of the quasi-judicial decisionmaking process, setting a terrible example for other city and county officials statewide for how to run a rezoning process. Yet the district court declined to set aside Denver's rezoning action here. Denver cannot argue there is a lower Due Process standard for quasi-judicial decisionmaking just because it is a home-rule city.

Second, local officials need guidance from this Court about how to ensure that zoning changes of individual parcels comply with comprehensive plans. The

City's and Cedar's argument that there is no legal issue for this Court to address about the bedrock principle of state and local law that zoning changes must be consistent with adopted plans, misses the point. Denver must do more than give lip service to that core principle, which applies to both home-rule cities like Denver, and cities and counties subject to state law. Comprehensive land use plans adopted through a consensus planning process express the voice of the community about how neighborhoods should change or preserve their character. When, as here, local officials fail to honor that core principle they are still accountable even under the deferential review standard of C.R.C.P. 106(a)(4) and associated claims for declaratory judgment.

And finally, the facts of this case and the district judge's summary rejection of Petitioners' spot zoning argument, illustrate why the Court should grant certiorari to provide further clarification to lower courts in the context of the instant dispute about how and when spot zoning principles limit a local government's authority to rezone a small parcel.

The City and Cedar make various merits arguments in opposition to the Petition. Petitioners did not brief the merits of their claims in their Petition, and do not respond in detail here to Respondents' merits arguments. The Court can see the parties' merits briefs in the District Court record if it needs to understand how

the merits were argued below. Petitioners will provide full merits briefing if the Court grants certiorari.

Argument

I. The City's and Cedar's arguments only underscore why this Court's urgent guidance is needed for how cities and counties should manage a quasi-judicial rezoning process to ensure the integrity of that process and comply with Due Process.

The City's response brief is full of statements that illustrate why Denver officials, and other city and county officials, urgently need guidance from this Court on how to carry out the Court's mandate that quasi-judicial rezoning proceedings must observe traditional procedural safeguards against arbitrary governmental action including giving persons whose protected interests are likely to be adversely affected by the governmental action a fair opportunity to be heard prior to the governmental decision. *See Cherry Hills Resort v. Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988).

For example:

- *Denver admits*: "Denver does not have a requirement that City Council members find facts and make conclusions of law before voting." City at 5. Denver's substitute for reasoned explanations of decisions is that: "Council members may ask questions, address each other, or address the public." *Id.*
    - *Petitioners ask*: Are local officials allowed to exempt themselves from making reasoned quasi-judicial decisions that are subject to judicial review under C.R.C.P. 106(a)(4)(IX) ("In the event the

court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.")?

- *Denver admits*: Requiring Denver officials to explain their quasi-judicial rezoning decisions and refrain from secret *ex parte* communications outside the context of the public hearing "would be a substantial change for the many municipal and county bodies that make quasi-judicial decisions . . . ." City at 7.

  - *Petitioners respond*: It is not that difficult for local officials to design a quasi-judicial rezoning process with the integrity Due Process requires.

- *Denver professes* to find it difficult to understand how to apply a prohibition against *ex parte* contacts in a quasi-judicial rezoning process: "Petitioners have not defined "*ex parte*" . . . . This is a judicial concept that does not neatly fit the quasi-judicial decision-making process, particularly when the decision-makers are elected officials and the process is a public one." City at 9.

  - *Petitioners note*: This Court's decision in *Colorado Energy Advocacy Office v. Public Service Co*., 704 P.2d 298, 302-05 (Colo. 1985), does not make it optional for local officials to prevent or disclose *ex parte* contacts in quasi-judicial proceedings. Other Colorado cities like Lakewood have figured out how to manage a quasi-judicial zoning process without allowing *ex parte* contacts. *See* Lakewood website cited *infra* in fn. 1: www.lakewood.org/City_Attorney/Articles_of_Interest/Articles_Of_Interest.aspx

- *Denver admits*: One of Cedar's architects and a *current* Planning Board member also served as the rezoning applicant here, and argues there cannot be a conflict with this role because Denver has a Code provision purporting to authorize such a conflicted role for Planning Board members. City at 4, 7-8 (citing DRMC § 12-44).

- *Petitioners ask*: Can Denver override by municipal ordinance the Due Process requirements for unconflicted, neutral decisionmakers? Having a current Planning Board member ask his colleagues to approve a rezoning application plainly creates a compromised situation for the other Planning Board members.

- *Denver argues* that no "wholesale change in the law" is necessary to ensure that elected officials who receive contributions from developers and their lobbyists serve as the neutral quasi-judicial decisionmakers Due Process requires, with neither an actual conflict or the appearance of one: "the State legislature and home rule municipalities have made policy decisions that campaign contributions are treated differently." City at 8.

    - *Petitioners ask*: Could the General Assembly or local officials adopt lawful ordinances that legalize bribes to quasi-judicial decisionmakers?

These arguments from the City demonstrate that Denver's legal advisors have not given City officials appropriate, if any, guidance on how to ensure Council Members and Planning Board members make decisions as quasi-judges, not politicians.

Respondents also contend the evidence of secret *ex parte* communications by the developer's lobbyist, which the City did not disclose to the public before or during the June 2015 public hearing—and only revealed in response to Plaintiffs' demand in this lawsuit—shows only harmless communications. City at 9-10 (arguing no communication "were improper or contained information not known to 'opponents' of the rezoning such that they could not be subject to 'cross examination or rebuttal' at the hearing"); Cedar at 2-3 (arguing communications

"contained no substantive factual information about the rezoning"). The district court dismissed the *ex parte* communications by Cedar's lobbyist as "either non-substantive or contain[ing] information already available to Plaintiffs." Yet the district court lacked sufficient information in the administrative record to make such sweeping conclusions excusing the *ex parte* communications that occurred.[1]

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[1] Attached hereto as Appendix C is the "Appendix 1" table Petitioners presented to the district court to summarize the evidence in the administrative record they were able to obtain. These communications suggest Cedar's lobbyist was working with Susman behind the scenes to direct the Council's consideration of Cedar's rezoning application, including Susman's decision to vote against the rezoning but signal to her Council colleagues that they should vote for it. Although the district court did require the City to disclose Councilmembers' communications about the rezoning using personal email accounts (including CM Susman's gmail account), the administrative record evidence about *ex parte* communications still was necessarily incomplete because:

a. Undocumented telephone calls: Some of Cedar's lobbyist's communications were through telephone calls, and there is no evidence in the record of what was discussed on those calls. Thus, neither the City nor the district court could make non-speculative arguments about what was communicated in those calls.

b. No deposition allowed: The district court denied Petitioners' motion to take a deposition of Cedar's lobbyist to find out through sworn testimony the timing and substance of all his communications.

c. No affirmative disclosure by Council members at hearing: There was no affirmative disclosure by Denver City Council members at the public hearing of all their private communications before the public hearing relating to the rezoning, including oral communications. Denver does not consider proactive affirmative disclosure of *ex parte* communications necessary or appropriate. *Cf.*

[Footnote continued on next page]

This Court should not sanction any *ex parte* communications with quasi-judicial decisionmakers just because they can be justified as containing information already available to other parties (which is a meaningless characterization). The Court should clarify how rules against *ex parte* communications in administrative proceeding apply to this context.

[Footnote continued from previous page]

Lakewood City Attorney's Office, Articles of Interest ("If, and when, a Council member receives information about a case outside the public hearing, the member is expected to disclose the communication, in as much detail as possible, to the entire Council at the beginning of the public hearing"), available at: www.lakewood.org/City_Attorney/Articles_of_Interest/Articles_Of_Interest.aspx; *see generally* G. Dahl, *Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and Ex Parte Contacts*, 33 Colorado Lawyer No. 3 (March 2004).

d. Council emails for the lame duck members may not have been preserved: The City did not preserve, despite this lawsuit, individual emails of the six lame-duck Council members who voted for the rezoning after the May 2015 election to replace them, and before their Council terms expired (Brown, Faatz, Lehmann, Montero, Nevitt, Shepherd). It claimed to restore all that were available in archives.

Denver residents who attended the June 2015 public hearing had no inkling of the scope and content of Cedar's secret communications about the rezoning using unofficial channels (including Councilmember Susman's personal gmail account), and no opportunity to cross-examine Council members about such unknown communications. (Denver City Council hearing procedures do not allow for cross-examination of any kind, including questions by members of the public to Council members or the zoning applicant. Each member of the public is limited to 3 minutes to speak at public hearings.)

The court of appeals has not already provided meaningful guidance to local officials, and the district court here concluded either there is no problem with Denver's procedures, or that courts lack authority to review Denver's alleged Due Process violations. The City argues local officials are entitled to a presumption of integrity, City at 7. But that argument does not obviate the question of how local officials should comply with quasi-judicial rezoning requirements, and is irrelevant in the face of abundant evidence that Denver lacks safeguards to ensure integrity in the rezoning process.

Cedar and the City suggest this Court cannot review whether a rezoning process complies with the requirements for quasi-judicial decisonmaking because of the limited scope of review under C.R.C.P. 106(a)(4). Cedar at 4; City at 7. But that argument would neutralize this Court's ability to police the integrity of state and local administrative processes, and also ignores Petitioners' companion claim for a declaratory judgment. Colorado appellate courts have long recognized courts and litigants can raise related legal issues in a declaratory judgment claim accompanying review under C.R.C.P. 106(a)(4). *See, e.g., Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004) (constitutional questions and challenges to the overall validity of a statute or ordinance are more properly reviewed under Colo. R. Civ. P. 57), *cert. denied,* 2004.

Thus, the Court should grant the Petition to provide urgent guidance about how cities and counties should conduct a lawful quasi-judicial rezoning process.

II. Respondents' briefs also demonstrate that Colorado local officials and lower courts need this Court's guidance on how to ensure local rezoning decisions for individual parcels actually do conform with the city or county's comprehensive plan and any small area plan.

The City and Cedar contend this Court cannot provide relevant guidance about the core statewide and local requirement that zoning changes be consistent with adopted plans because all the Court can do is confirm the requirement exists. City at 11; Cedar at 6. Indeed, Denver thinks it is sufficient for the City Council to just reject or ignore citizen arguments that the City is not following adopted plans, even when it is plain Denver planning officials are ignoring or contradicting adopted plans. *Cf.* Cedar at 6 (arguing it is sufficient that the "City Council found the rezoning meets the mandatory criteria"). But judicial review of agency action in Colorado is not that toothless. Limiting zoning changes to those consistent with the community's adopted plans assures that zoning changes do not undermine residents' expectations and plans for their own neighborhoods.

Respondents do not cite any Colorado appellate cases that guide local officials how to enforce this requirement. Petitioners seek this Court's guidance here because they have not located appellate cases guiding local officials on how to

ensure zoning changes are consistent with adopted plans and other limitations (other than "spot zoning" cases, discussed below), and the district court effectively concluded Denver has absolute discretion to construe its plans and decide whether zoning changes conform to those plans.

Petitioners argue that Denver only gives lip service to the principle of limiting zoning changes to those consistent with the community's adopted land use plans and other mandatory criteria. And Petitioners contend both the district court and this Court can examine the City's explanations of its decision and the administrative record here to consider whether the City ignored such requirements, rather than merely rubber-stamp the City's statement that its decision complied with the mandatory criteria.

Thus, this case also presents important issues of statewide concern about how local officials can be held accountable for ensuring zoning changes for individual parcels conform to adopted plans. Allowing zoning changes detached from the community planning process undermines that process. Here, the record evidence shows Denver never bothered even to create a small area plan for the affected Crestmoor neighborhood because it is thriving and stable. Yet Denver also approved Cedar's de-stabilizing zoning change here based on strained arguments about the need to address neighborhood blight caused by one poorly

maintained church building, and bureaucratic double-talk about the need to implement generic city-wide planning "strategies" to encourage a broad range of housing options.

Thus, this case presents an excellent vehicle for this Court to provide urgent guidance to local officials on how to ensure that zoning changes for individual parcels actually conform to a community's comprehensive plans.

III. The City's response and the district court court's decision below also show that lower courts need this Court's guidance on how to enforce spot zoning principles that limit when rezoning is lawful.

Finally, it is also urgent that this Court provide further guidance to lower courts about when they should apply spot zoning principles to a proposed rezoning of a small parcel. The City contends this Court need not provide further guidance on spot zoning principles because the Court stated the test for spot zoning 55 years ago in *Clark v. City of Boulder*, 361 P.2d 160 (Colo. 1961). City at 12. Spot zoning principles represent common law limitations on zoning changes for individual parcels, and as with all common law concepts it is helpful for lower courts to understand the various fact patterns in which the principles apply. The district court's opinion below illustrates how lower courts are currently unwilling to apply spot zoning principles beyond the specific fact scenario presented in *Clark*. *See* Petitioners' App'x A (Opinion at 11) (unwilling to apply concept to

placement of apartment building in single family zone; also citing *Rathkopf* treatise).

IV. The response briefs do not explain why this Court would benefit from having the court of appeals address these important issues first, and cannot explain why it is better for Denver residents or the developer for it to construct new buildings during this appeal that may need to be removed if the rezoning is ultimately reversed.

The issues Petitioners present meet the high standard for C.A.R. 50 review, and delaying final resolution of this appeal could lead to wasteful results including demolition of the new apartment building Cedar wants to build along the east side of Crestmoor Park. In a transparent effort to delay Petitioners' appeal here, the City argues without explanation that that this "Court should [not] wade into these issues before the Court of Appeals has the chance to review them, or even clarify the issues that should be addressed on appeal." City at 6. The court of appeals would just be guessing how this Court would resolve the important legal issues presented here. This Court would not benefit from such advance analysis by the court of appeals—a process that would likely add at least 6-12 months delay to final resolution of this appeal. The City is mistaken in contending that the urgent need for a definitive ruling is not a proper consideration for granting C.A.R. 50 review. City at 14.

V. Conclusion.

The Court should grant the petition.

Dated: August 22, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, a true and correct copy of the foregoing PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION UNDER C.A.R. 50 FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS BEFORE JUDGMENT was sent to the following persons through the ICCES system:

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APPENDIX to REPLY BRIEF

Appendix C:

"Appendix 1" filed in the district court on January 14, 2016 with Plaintiffs' Opening Brief:

"Chronology of certain emails concerning Rezoning that were not included in the City's SIRE public hearing record for June 8-9, 2015 public hearing."