DISTRICT COURT, **EL PASO COUNTY, COLORADO** 270 South Tejon Street Colorado Springs, CO 80903	~~DATE FILED: April 8, 2022 4:30 PM~~
Plaintiff: 2424 GOTG LLC, a Colorado limited liability company **v.** **Defendants:** CITY OF COLORADO SPRINGS, a home rule City and Colorado municipal corporation, acting through the CITY COUNCIL OF THE CITY OF COLORADO SPRINGS	
OFFICE OF THE CITY ATTORNEY Wynetta P. Massey, City Attorney W. Erik Lamphere, Division Chief P.O. Box 1575, Mail Code 510 30 South Nevada Avenue, Suite 501 Colorado Springs, CO 80901 Telephone: (719) 385-5909 Fax number: (719) 385-5535 erik.lamphere@coloradosprings.gov Atty. Reg. #18912, #37887 *Attorneys for City of Colorado Springs*	**▲ COURT USE ONLY ▲** Case Number: 2021CV31499 Div: 2

ANSWER BRIEF

Defendants, City of Colorado Springs ("City") and the Colorado Springs City Council ("City Council"), by and through the Office of the City Attorney, hereby submit this Answer Brief.

SUMMARY OF THE ARGUMENT

Deciding whether to allow a rezoning that will have a significant impact on the surrounding community is no easy task. It is with good reason that within the City of Colorado Springs, City Council is charged with making zoning decisions. After all, City Councilmembers are elected to act in the best interest of the City and make difficult decisions such as the one that confronted them when a request to rezone 2424 Garden of the Gods Road came before them. Five members of City

Council ultimately found that rezoning 2424 Garden of the Gods Road to allow residential density in a place where it was not otherwise permitted was not appropriate under the City's rezoning code, City Code § 7.5.603.B. Their decision finds support in a robust record containing thousands of pages of documents, and hours of testimony and evidence. The inquiry, now, is whether the record contains any competent evidence to support City Council's ultimate decision. A review of the record reveals ample support to uphold the decision. As such, the decision should be affirmed.

The record supports a finding that the project was detrimental to the public interest, health, safety, convenience, or general welfare. The property sits in a unique place at the western end of Garden of the Gods Road and backs up to undeveloped wildland. Situated at the edge of the urban-wildland interface, the risk of wildfire at the site is undoubtedly elevated. Nearby residents recognized and appreciated the safety risk, having lived through the tragic events of the Waldo Canyon fire. They testified that rezoning the property only compounded problems encountered during the fire. The residents also pointed out that the request to allow residential use came after the area has experienced a significant uptick in population growth; during a time when wildfires have become increasingly frequent; and wildfire season continues to stretch deeper into the winter.

Residents testified that allowing residential density at the intersection presented different problems than the commercial use currently permitted. They testified that the traffic studies created by City staff and the applicant were too narrow in scope to fully embrace the impact of the project. They testified to their own experiences traveling to and from their homes in the middle of rush hour on roadways already brimming with high traffic volumes. They testified that 30th Street quickly narrows to two-lanes heading southbound and the Garden of the Gods entrance, a short

distance away from the property to the south on 30th Street, regularly becomes overwhelmed with vehicular traffic.

Residents also presented evidence that the residential rezoning request was inconsistent with the hillside overlay criteria. Residents showed that the proposed apartment complex would block the view of the nearby foothills and majestic landscape. This was not only inconsistent with the hillside overlay, but also the City's comprehensive plan. Finally, the residents presented evidence that the project had a detrimental impact on a bighorn sheep population that lived nearby.

Plaintiff, in its Opening Brief, is critical of the testimony and evidence presented by opponents of the project, calling it anecdotal. Such a label does not give the evidence the credit it deserves. City Council was permitted to consider all the evidence and testimony. It was not required to consider only evidence proffered by experts and professionals. It was City Council's task to sift through the evidence and weigh it accordingly. The fact that Councilmembers credited the residents' testimony, and not Plaintiff's, does not mean that the record lacks competent evidence to support the decision. It only means City Council performed its role appropriately. Finally, no member of Council cited the lack of an evacuation plan as a basis for denying the application. City Council did not apply an unwritten criterion to Plaintiff. The concern was one over safety, not over evacuation planning.

City Council did not err by hearing additional evidence on evacuation concerns on August 24, 2021. After all, Plaintiff was first to raise the topic at the hearing. After being warned of the consequences of doing so, Plaintiff elected to proceed with discussion on the topic. City Council appropriately allowed the topic to be discussed after Plaintiff opened the door.

Finally, nothing cited in the Opening Brief overcomes the strong presumption of regularity afforded to City Council. City Council, time and again, expressed its ability, as a whole and individually, to be fair and impartial, and consider only the evidence presented and criteria at issue. The record contains disclosures of issues relevant to the inquiry. What the record does not contain is evidence relied on by Plaintiff to support its argument that the presumption has been defeated. Because the exhibits to the Opening Brief fall outside the record, the Court should not consider them. Plaintiff has also failed to show substantial prejudice. The record does not show that Councilmembers were unduly influenced. In the end, the request to rezone the property was defeated on a 5-to-4 vote. That result was based on the evidence presented to City Council. As such, this Court should uphold City Council's action.

STATEMENT OF THE CASE

Plaintiff, 2424 GOTG LLC, owns a parcel of land located at 2424 Garden of the Gods Road in Colorado Springs, Colorado. The 125.34-acre property sits directly west of the intersection of Garden of the Gods Road and 30th Street. (005756)[1]; (009383). The property is in proximity to Garden of the Gods Park, a majestic landscape according to the City's comprehensive plan, PlanCOS. (005735). The property was annexed into the City in 1965 and 1971. (010082). It was zoned in 1980 and 1981. (010082). It is currently zoned General Industrial, Agricultural, Planned Unit Development with a Hillside overlay. (005718). The property is subject to the Mountain Shadows Master Plan ("Master Plan"), which was adopted in 1978. (010082). Under the Master Plan, the property has an Office Industrial Park land use designation. An approximately 750,000-

[1] Citations to page number within parentheticals, without more, *e.g.*, (000001), refer to the record on appeal, CITY-DEFS – 000001-010214.

square-foot building that once housed MCI resides on the property and is currently approximately 40% occupied. (006100).

Plaintiff sought to amend the Master Plan, rezone the property and gain approval of a concept plan. (005719). Ultimately, as presented to City Council, Plaintiff sought to amend the Master Plan from Office Industrial Park to a mix of office, commercial, residential, public institution and open space (009388); (009395); rezone the roughly 125 acres to Planned Unit Development with a Hillside overlay allowing for residential and commercial use, forty-five foot maximum height, 15-16.99 dwelling units per acre and a 950,000 maximum non-residential square footage. (009388); (009396-009397). The desired changes were set forth in Plaintiff's proposed concept plan. (009333).

On January 21, 2021, the Planning Commission held a public meeting on a resolution to approve the master plan amendment, zoning map amendment and concept plan. (000271-000290). The master plan amendment sought to change the land designation of 125 acres from Office Industrial Park to Open Space, Office, Public Institution, Residential and Community and Neighborhood Commercial. (000267). The application also sought to change the zoning from Planned Industrial Park, Agriculture, Planned United Development with a Hillside Overlay to a Planned Unit Development with a Hillside Overlay and a maximum residential density of 16-17.99 dwelling units per acre; maximum commercial building square footage of 1,130,000 square feet and a maximum building height of 45 feet. (000268). A concept plan calling for a mix of commercial, residential and open spaces accompanied the master plan amendment and rezoning request. (000268).

Before the Planning Commission, City Planning staff made a presentation. The applicant also made a presentation, answered questions raised by various parties, and provided a rebuttal. (000271); (000282-000283). Project opponents appeared and voiced their concerns. Among those appearing were nearby landowners, residents, and representatives of the Mountain Shadows Community Association. (000274-000282). Opponents raised many concerns about the project, including a lack of detail in the application (000274); (000275); (000278); (000281); impacts to wildlife and a local bighorn sheep herd (000274); (000277); (000278); (000280); building height (000274); (000279); (000280); traffic impacts (000276); (000278); (000279); (000280); (000281), particularly during an evacuation (000274); (000276); (000280); (000281); bicycle safety (000274); (000278); increased trespassing and criminal activity (000275); (000278); proximity of buildings to streets (000277); school crowding (000278); inconsistency of project with Comprehensive Plan (000278); (000279); and increased potential for wildfires (000282). A vote on the project was delayed until March 18, 2021, to address several questions raised in the meeting and to present a more detailed concept plan. (000284).

On March 18, 2021, the application was brought back before the Planning Commission. City Planning staff provided an overview of the project. (003027). Staff addressed seven requests made by the Planning Commission at the first meeting. (003027-003028). Staff noted that the applicant and representatives of the Mountain Shadows Community Association (MSCA or Association) met twice—on February 1st and February 26th—to discuss concerns raised by the Association. City Staff also coordinated with City traffic engineering, the Fire Marshal and the Office of Emergency Management. (3027-3028). The applicant presented the project again and noted changes to the application. (10085). The applicant stated that the maximum height of any

future building would be the lesser of 45 feet or three stories, unless building height was restricted to two stories. (003028). The project was modified so any two-story building on the property would be subject to a one-hundred-and-fifty-foot setback and the maximum density was reduced to 16 dwelling units per acre. (003028). Areas A and C of the concept plan were modified so no new buildings were proposed to be added in Area A, and Area C was limited to residential use only. (003028). Finally, maximum nonresidential square footage was amended and decreased to 950,000 square feet. (003028).

At the hearing, traffic impacts and evacuation were discussed. (003028-003030). Risks posed by future wildfires were discussed as well. (003030-003031). The applicant noted that the existing building was forty percent occupied and the designated use of the building would remain unchanged. (003031). The MSCA and multiple residents appeared and spoke in opposition to the project. (003031-003035). Among the reasons cited for opposition were safety and emergency evacuation (003031); (003033); noncompliance with the Hillside Overlay criteria (003031); (003033); adverse impacts on wildlife (003031); (003032); (003033); noncompliance with the criteria for a master plan amendment and rezoning (003032); capacity impacts on local schools due to population growth (003033); and increased vehicular traffic (003034). In the end, the Planning Commission recommended approval of the application. (003040-003042).

The application was then heard before City Council on May 25, 2021. (010225-010238). City Planning staff presented the items. The senior planner with the City provided a detailed and comprehensive overview of the applications. She provided a vicinity map, context map, property analysis of the Garden of the Gods corridor, vacancy rates, data on the types of properties within the corridor, overview of the existing property, concerns raised about the applications, stakeholder

process, site details, findings from Colorado Parks and Wildlife, geologic hazards and land suitability analysis, hillside overlay, the comprehensive plan, and staff recommendations. (010227). City Council heard testimony from the applicant's representative and traffic consultant; the City Traffic Engineer; testimony on emergency management and emergency evacuations; and testimony from the President of the MSCA and several homeowners living near the project. (010228-010230) Councilmembers discussed and inquired about many of these topics, including height limitations and visual impact (010231); (010231); (010232); impacts to the local bighorn sheep herd (010231); (010233); (010235); crime (010231-010232); safety; evacuation and traffic congestion (010233); (010234); (010235); and the financial impact analysis (010233-010235). City Council ultimately approved the master plan amendment, rezoning and concept plan on a narrow five-to-four vote. (010236-010238)

The request to rezone the property came back before City Council on June 22, 2021, after the second reading was postponed at the request of the applicant. (010240-010241). At the meeting, and after discussion, the second reading was postponed once again so an updated traffic safety study could be completed. (010264-010267).

With the traffic study completed, rezoning of the property came before City Council for the last time on August 24, 2021. After considerable debate largely surrounding the impact the project had on public safety, the motion to amend the zoning map failed on a five-to-four vote. (010292-010298). This appeal followed.

STANDARD OF REVIEW

Review of a governmental body's quasi-judicial decision is "limited to a determination of whether the body . . . has exceeded its jurisdiction or abused its discretion based on the evidence

in the record before the defendant body . . . ." C.R.C.P. 106(a)(4)(I). In reviewing a decision by City Council acting in a quasi-judicial capacity, the District Court is not a "super-zoning commission[,]" *Garrett v. City of Littleton*, 493 P.2d 370, 372 (Colo. 1972), and "should not . . . sit as a zoning board of appeals." *Bd. of Cty. Comm'rs of Routt Cty. v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). Accordingly, "[i]n the case of a zoning proceeding, a court is not the fact finder and may not substitute its own judgment for that of a zoning board where competent evidence exists to support the zoning board's findings." *Id.*; *see also Dolan v. Fire & Police Pension Ass'n*, 413 P.3d 279, 285 (Colo. App. 2017) ("[E]valuating witness credibility and the probative value and weight of the evidence are solely within the fact-finding province of the agency.").

Review of a decision by City Council must be upheld unless "there is no competent evidence to support the decision." *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308-09 (Colo. 1986) (internal quotation marks omitted). "'No competent evidence' means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* at 1309. Thus, the decision "must be upheld if there is some evidence in the record to support it." *Washington v. Atherton*, 6 P.3d 346, 348 (Colo. App. 2000) (internal quotation marks omitted). Indeed, the Rule 106(a)(4) "no competent evidence" bar has been described as "low." *See Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 488 P.3d 352, 358 (Colo. App. 2018).

Finally, "[a]dministrative proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Lieb v. Trimble*, 183 P.3d 702, 704 (Colo. App. 2008). "Generally, a reviewing court should defer to the construction of a statute by the administrative

officials charged with its enforcement. If there is a reasonable basis for an administrative board's interpretation of the law, [the Court] may not set aside the board's decision." *Id.* Finally, at all times, "[t]he burden is on the party challenging an administrative agency's action to overcome the presumption that the agency's acts were proper." *Id.*

ARGUMENT

I. Denial of the Request to Rezone

Plaintiff is able to use its property any number of ways as permitted in its current zoning designation. But, as zoned, the property cannot be used for residential purposes. Surrounding property owners have a right to rely on existing zoning regulations. *See Roosevelt v. City of Englewood*, 492 P.2d 65, 68 (Colo. 1971). Under the City's zoning code, a property's zoning designation "may be approved" "only if" City Council makes three[2] specific findings:

> 1. The action will not be detrimental to the public interest, health, safety, convenience, or general welfare.
> 2. The proposal is consistent with the goals and policies of the Comprehensive Plan.
> 3. Where a master plan exists, the proposal is consistent with such plan or an approved amendment to such plan. Master plans that have been classified as implemented do not have to be amended in order to be considered consistent with a zone change request.

(010209, City Code § 7.5.603.B). As the term "may" indicates in § 7.5.603.B, a zoning change is not granted as a matter of right. The Code provision also makes clear that a request to rezone may be denied if any one of the three findings are not made in favor of the applicant. City Council correctly found that the applicant failed to carry its burden.

A. Evidence Supported Denial Based on the Project Being Detrimental to Public Interest, Health, Safety, Convenience, or General Welfare

[2] City Code 7.5.603.B also includes a fourth criterion which applies to Mixed Use ("MU") zone districts. The subject property is not situated within a MU zone district.

City Council was acting within its authority and discretion to consider evidence related to traffic and safety. There is no suggestion that City Council was not presented with evidence of traffic and safety concerns. Instead, Plaintiff advances three arguments to support its position that denial was improper. First, it argues that Council should not have considered the evidence. Second, Plaintiff claims that Council required the applicant to provide an evacuation plan. Third, Plaintiff asks this Court to place itself in the position of City Council and reweigh the evidence. Each argument fails to show reversible error.

"[T]he consideration of the public health, safety, and welfare criterion may, in certain instances, include a review of issues relating to traffic and parking." *Whitelaw v. Denver City Council*, 405 P.3d 433, 444 (Colo. App. 2017); *see also W. Paving Const. Co. v. Jefferson Cty. Bd. of Cty. Comm'rs*, 689 P.2d 703, 707 (Colo. App. 1984). City Council was presented with a tremendous amount of testimony and evidence on the traffic impacts the project would bring. While City Council was presented testimony from staff and the applicant—both supporters of the project—that the rezone would bring less traffic and the roads were well-equipped to handle traffic from the site, testimony supporting the opposite conclusion was also presented. Multiple residents living nearby testified that rezoning the property to allow for high-density residential use would create a life-threatening "chokepoint" at a critical junction point at Garden of the Gods Road and 30th Street. (005832, lns. 3-11); (005836, lns. 13-16); (005860, lns. 16-22). The views were informed by the personal perspectives of those living in the Mountain Shadows neighborhood—some for multiple decades—and personal experiences living through the traumatic events of the Waldo Canyon fire. The question for this Court, now, is not which evidence was more persuasive.

Apportioning appropriate weight and persuasive value of the evidence was solely within the province of City Council.[3] The task, instead, is to ask whether the decision to deny rezoning is supported by competent evidence. In light of the record developed at the hearings, the answer is resoundingly in the affirmative.

City Council heard extensively that the project posed a safety risk. (005847, lns. 22-25); (005862, lns. 23-25). Opponents testified that the project would only increase traffic congestion. (005807); (005832, lns. 3-11); (005837, lns. 12-15); (005859, lns. 2-15); (005863, lns. 11-18); (005885, lns. 20-25-005886, ln. 1). Residents were concerned that increasing density at the site would exacerbate traffic back-ups, cause delays, and strain first responder resources. (005847, lns. 16-18); (005858, lns. 18-25-5859, lns. 1-20).

Opponents also identified an elevated risk of a wildfire near the site. As noted by City staff, and later by Councilmember Donelson, the property is uniquely situated immediately next to a natural, undeveloped slope to the west. (005715, lns. 16-25); (006014, lns. 5-10). In this unique location, the risk of a wildfire is elevated both day and night. (005864, lns. 8-13) (Resident Dorian Lee testifying that "[i]t seems inconceivable that with the seriousness of the yearly Colorado fire season we fail to consider that another explosive fire will occur somewhere on the west side of our City possibly at night and that more causalities will happen due to the limited egress many of these neighborhoods have."). The threat of wildfire near the site is not hypothetical. The site sits near the Mountain Shadows neighborhood. The neighborhood, as widely known, experienced

[3] Councilmember Helms recognized this point at the end of the May 25th hearing when he said City Council had heard "all the information, and no one is giving us false information. Everyone is giving an opinion based upon an analysis of different material. And so it is left to us then to analyze that information and decide which way we fall . . . ." (006000-006001).

unimaginable tragedy during the Waldo Canyon fire. Lives were lost and 347 homes were burned to the ground. (005866, lns. 12-13) (Resident Polly Dunn testifying that "[o]ur home did not survive that fire."); (005876, lns. 6-10) (Resident Kim Fleck testifying "I'd just like to say that it was a traumatic experience for our family getting out, just as it was for half of Mountain Shadows. And please consider that. We're all still at some level traumatized."); (005896, lns. 21-22) (Resident Caitlin Henderson testifying that over 300 homes burned in the fire); (005889, lns. 7-9); 9521; (005840, lns. 7-8); (005860, lns. 3-15). Residents waited for hours in gridlock to escape the raging fire. (005840, lns. 7-8); (005860, lns. 1-5) (Resident Maribeth Netherton testifying that "[w]e were in bumper-to-bumper traffic from the moment we left our home. It took us two hours to travel from our home to Garden of the Gods Road, a distance of approximately just one mile."); (005863, lns. 8-10) (Dorian Lee testifying that "we[, the Mountain Shadows residents,] were the ones who feared being burned alive while trapped in our cars during the Waldo Canyon evacuation traffic jam."); (005874, lns. 19-24). To add to this painful history, residents testified to two points that have become increasingly obvious—first, wildfire season continues to creep deeper and deeper into winter with each passing year, (005890, lns. 8-10) (Resident Kathy Rios testifying to a 5-acre brushfire near her backyard in January 2021), and, second, population in the area has boomed. (005828, lns. 12-13); (005840, lns. 10-11); (005858, lns. 23-25-005859, ln. 1).

The residents also testified that the traffic studies prepared by the applicant and the City did not fully capture the true scope of the impact of the project. While Garden of the Gods Road is a multi-lane corridor, 30th Street, going south from the intersection of Garden of the Gods Road, funnels down to one lane in each direction. (005890, lns. 12-15) (Resident Kathy Rios testifying "I have heard about the traffic on Garden of the Gods Road, but not a lot about the traffic on the

30th Street. . . . It is so congested."); (005860, lns. 23-25); (005832, lns. 3-11); (005848, lns. 18-23); (005889, lns. 3-6); (005896, lns. 7-12). Residents noted the heavy traffic on Garden of the Gods Road, (005859, lns. 2-15); (005863, lns. 11-18); (005886, ln. 25-005887, ln. 1), and traffic traveling northbound on Flying W Ranch Road. (006167).

The Opening Brief contends that City Council denied the application because it lacked an evacuation plan.[4] But, as multiple Councilmembers noted, the project was not denied due to a lack of an evacuation plan. Instead, the impact the project would have on traffic volumes at critical times, such as in the case of a wildfire, was the source of concern. (010009, lns. 1-4) (President Pro Tem Skorman stating at the end of the August 24th hearing "I can't support this kind of a dense project right now in our WUI for health and safety reasons, not because we don't have an evacuation plan in place."); (006014, lns. 21-24) (Councilmember Donelson commenting during the May 25th hearing that his concern was "an issue of safety and how many people do we put into a limited egress route and what effect does that have on the residents that live there."); (010015, lns. 16-18) (Councilmember Donelson during the August 24th hearing "My concern is that we make [the task for police and fire] harder and harder when we keep putting more development into the area that has already proven to be our most dangerous site."); (006023, lns. 4-6) (President Strand commenting during the May 25th hearing, "I think there is a safety issue that is kind of a mix between fire threat and evacuation and egress and the traffic situation . . . .").

[4] Plaintiff relies on evidence outside the record to argue that City Council required Plaintiff to address evacuation planning. Opening Brief, Exhibits 2 and 3. These exhibits must be disregarded. *See Whitelaw*, 405 P.3d at 441.

To City Council, the concerns raised over adding population density at an important intersection presented a significant enough health, safety, and welfare concern to deny rezoning.

Many of the Councilmembers expressed the view that testimony of Mountain Shadows residents on the safety risk created by the project persuaded them to vote against rezoning. (010009, lns. 2-6); (010017, lns. 4-11). Councilmembers within their discretion by relying on evidence presented by opponents of the project. City Council's consideration was not limited to evidence presented by project proponents such as City staff, the applicant, or retained experts. *See Stor-N-Lock Partners # 15, LLC*, 488 P.3d at 358 (rejecting the argument that the "quality of evidence was insufficient to outweigh its own competing evidence" and finding "it was the City Council's job to evaluate the probative value and weight of all of the evidence and to decide the best use of the property using its own judgment."). Instead, City Council could consider and weigh *any* competent testimony and evidence germane to whether rezoning "will not be detrimental to the public interest, health, safety, convenience or general welfare." Certainly, the competency of testimony before a quasi-judicial body is not reserved for, as Plaintiff describes it, professional testimony. Nor is evidence incompetent because it lacks the qualification of being presented by an expert.

The decision to approve—or deny—rezoning was a difficult task. The hearings presented high stakes for Plaintiff, having purchased the property with hopes of rezoning it and garnering greater profits. The hearings were also highly contested with the presentation of conflicting evidence. Under City Code, City Council is charged with deciding the issue. City Council was also in the best position to decide whether rezoning was detrimental to the public interest, health, safety, and welfare. After all, each member of City Council is an elected official called on to apply criteria

and exercise judgment in the best interest of the City. It was an important task which was not lost on Councilmembers. (005710, lns. 8-10) (Councilmember Henjum remarking at the beginning of the May 25th hearing, "I . . . having campaigned and won [the right] to sit in this role, I take very seriously what we're about to do. And this is why we were elected."); (006005, lns. 6-9); (005999, lns.22-25-006000, lns. 1-2). Because the record is replete with competent evidence to support the decision, City Council's denial of the request to rezone must be affirmed.

B. Noncompliance with Hillside Overlay

The record supported denial of rezoning based on non-compliance with the Hillside Overlay ordinance. The purpose of the hillside overlay is "to ensure that these areas retain their unique characteristics, to safeguard the natural heritage of the City, and to protect the public health, welfare and safety." (010183, City Code § 7.3.504.A.2). The hillside overlay is applied when the City needs, among other things, to "conserve the unique natural features and aesthetic qualities of the hillside areas;" "assure type, distribution and densities of development which are compatible with the natural systems, the terrain, and the geologic character of hillside areas;" and "preserve wildlife habitat . . . which provide wildlife migration corridors." (010183, City Code § 7.3.504.A.3.a; -d; -g).

The ordinance limits the height of a building. (010191, City Code § 7.3.504.F). For multi-family and nonresidential uses, "[h]eight will be based upon consideration of site factors including, but not limited to, visual analysis, topography, and proposed height relative to existing vegetation." (010191, City Code § 7.3.504.F.2); *see also* (010192, City Code § 7.3.504.F.3). The visual impact of the project was disputed. While the applicant and staff found the visual analysis of the project complied with the hillside overlay, opponents did not. The position was based on evidence in the

record. (009365-009366 (MSCA Visual Analysis)); (006176-006189); (005815, lns. 1-25-005818, lns. 1-15); (005837, lns. 3-11, 16-24); (005886, lns. 2-6); (009931, lns. 19-25-009933, lns. 1-24). The opponents' visual analysis showed a view from 30th Street where the foothills and mountains are obstructed by the proposed height of the apartments. (009365). Opponents also presented evidence that the height of the buildings was inconsistent with the comprehensive plan. (005815); (005818); (009934, lns. 1-17); (009358); (009366-009367). Two Councilmembers noted the proposed height in their comments prior to voting. (006011, lns. 13-16); (006023, lns. 8-9). Accordingly, competent evidence was present on the record to deny rezoning based on nonconformity with the hillside overlay ordinance.

C. Detrimental Impact on the Bighorn Sheep Herd

The impact the project would have on a local bighorn sheep herd was also the subject of significant debate at the hearings. Evidence on this topic was relevant to the rezoning ordinance and the requirement that rezoning not be "detrimental to the public interest, health, safety, convenience or general welfare." (010209, City Code § 7.5.603.B). It was also relevant to the consideration of the hillside overlay and the objective that wildlife habitat and migration corridors are preserved. (010183, City Code § 7.3.504.A.3.g)

Like other aspects of the hearing, there was conflicting evidence on this issue. There was evidence that the project would not impact the herd. (005728, lns. 20-25-5729, lns. 1-12). Evidence was also presented that the herd would be disturbed by the project. Residents testified to seeing bighorn sheep on the property and in the area. (005886, lns. 17-20) (Leo Finkelstein testifying during the May 25th hearing "With respect to the bighorn sheep, they definitely use and transverse the property. I've personally seen them move across the property from Mountain Shadows to Glen

Eyrie.")); (005819, lns. 15-25-005821, lns. 1-24); (005854, lns. 10-25-005855, lns. 1-15); (009908, lns. 17-25-009910, ln. 1); (009359, 009369-009371). Two Councilmembers noted the negative impact the project had on the herd during the hearing. (005965, lns. 15-23) (Murray); (006014, lns. 1-2) (Donelson). Accordingly, the detrimental impact to the local bighorn sheep herd acts as an additional basis supporting denial of the application to rezone the property.

II. City Council was Fair and Impartial

"Acting as quasi-judicial decision-makers, city council members are entitled to a 'presumption of integrity, honesty, and impartiality.'" *Whitelaw*, 405 P.3d at 438 (quoting in part *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983)). "[T]he challenger of a quasi-judicial decision has the burden of rebutting this presumption of impartiality." *Id.* The burden to rebut the presumption is quite significant—Plaintiff must show a "personal, financial, or official stake in the decision evidencing a conflict of interest on the part of a decision-maker." *Id.* at 228; *see also Meyerstein v. City of Aspen*, 282 P.3d 456, 468 (Colo. App. 2011) ("[T]he . . . presumption of integrity and honesty is overcome by a showing that the decision-maker has a conflict of interest."). Substantial prejudice must be shown as well. *See Whitelaw*, 405 P.3d at 438.

The opening brief challenges the presumption by advancing three arguments—(1) *ex parte* communications by councilmembers; (2) President Pro Tem Skorman's disclosure that he had visited the area near the property; and (3) a meeting between three Councilmembers while the application was pending before City Council. None of the grounds—individually or collectively—are sufficient to overcome the presumption.

First, in support of its argument, the Opening Brief reaches outside the record on appeal and relies on purported email correspondence. Opening Brief p. 13-14 (citing Exhibits 6-8).

Evidence outside of the record may not be considered as part of a Rule 106 proceeding.[5] C.R.C.P. 106(a)(4)(I) ("Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, *based on the evidence in the record . . . .*" (emphasis added)). The emails must be disregarded. *See Whitelaw*, 405 P.3d at 441 ("Because evidence of [political] contributions was not in the record before the Council and the neighbors first raised this issue in the district court, we may not review it."). Within the record, nothing reflects that Council, as a whole or individually, was biased.

Looking beyond the outside evidence relied on by the Opening Brief, any communications were insufficient to rebut the presumption of impartiality. "A decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to the dispute, if there is no showing that the decision maker is incapable of judging the particular controversy fairly on the basis of its own circumstances." *Mountain States Tel. & Tel. Co. v. Pub. Utilities Comm'n of State of Colo.*, 763 P.2d 1020, 1028 (Colo. 1988); *see also City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010) (describing the circumstance as "rare" when fundamental due process compels disqualification in the circumstance of "an appearance of or actual conflict of interest" and holding "the ultimate due process question is whether under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."). Each Councilmember expressed the ability to judge the application fairly and impartially from the outset. (005702, ln. 25-005711, lns. 1-10).

---

[5] In fact, all of the exhibits attached to the Opening Brief are documents outside of the record. Accordingly, they should be disregarded.

On June 21st, after City Council convened for its regular work session meeting, Councilmembers Strand, Donelson and Henjum had a brief, five-to-ten-minute, conversation regarding a proposed motion to delay the second vote in order to obtain a second traffic safety study. (009754, lns.10-25-009755, lns. 1-13). The following day, the Councilmembers disclosed in detail the nature and contents of the communication in public. (*Id.*). The Councilmembers, individually, noted that the conversation did not change their position or impact their ability to be fair and impartial decisionmakers. (009756, lns. 22-23); (009757, lns. 6-9, 21-23). President Strand also disclosed, in public, having contact with community members. (009756, lns. 17-20). He made this disclosure after his contacts with constituents. *Compare* Opening Brief, Exhibits 6 and 7 *with* (009755-009756). He reiterated his ability to be fair and impartial. (*Id.*).

The public statements also prompted President Pro Tem Skorman to note that he had driven past the location. (009759, lns. 22-25-009760, ln. 1). Neither the brief conversation nor the fact that President Pro Tem Skorman drove by the site shows a personal, financial, or official stake in the decision, or substantial prejudice. In fact, the short conversation was described as merely a possible "technical" violation of the Open Meetings Law that only required disclosure. (009759, ln. 15). The site visits by President Pro Tem Skorman were not prohibited and only necessitated disclosure under City Council rules. (009762, lns. 15-17). Thus, the presumption of impartiality has not been rebutted and Plaintiff has not shown substantial prejudice as a result. Consequently, the decision of City Council should be affirmed.

Finally, Plaintiff has not shown that any of the evidence—either within the record or outside of it—resulted in substantial prejudice. Significantly, Plaintiff never raised any of the issues during any of the hearings. Plaintiff never requested recusal of any Councilmember. Further,

rezoning was denied on a 5-to-4 vote on second reading. (010019, lns. 11-12). President Strand, along with Councilmembers Donelson, Henjum and Murray voted against rezoning each time. *Compare* (006029, lns. 2-19) *with* (010018, lns. 16-25-010019, lns. 1-8). Only President Pro Tem Skorman changed his vote between the first and second reading. No record evidence shows that President Pro Tem Skorman was improperly influenced to change his vote. Moreover, removing President Pro Tem Skorman's vote results in the same conclusion. A tie vote defeats a proposed ordinance. *See* Exhibit A. Accordingly, substantial prejudice has not been shown.

III. City Council Did Not Abuse Its Discretion by Hearing Additional Testimony at The August 24th Hearing.

Plaintiff was first to discuss evacuation planning at the August 24th hearing. Once Plaintiff went beyond discussing the updated traffic study and discussed evacuation concerns, testimony on the topic was fair game.

The topic was first raised by Plaintiff's counsel. (009883, lns. 5-6). President Strand interrupted and cautioned counsel by stating:

> [T]hat's an area that I think is beyond kind of the scope of what we want to do here today. I think we want to concentrate on this traffic study/analysis. If you insist on going into that area, it's going to open it up, I think, for opposition to talk about this to some extent too. And I want you to be aware of that.

(009883, lns. 11-16). Plaintiff's counsel, after being warned, continued to discuss the topic. (009883, lns. 21-25-009884, lns. 1-19). Prior to that point in the hearing, no one had mentioned evacuation planning. (009855-009883). Because Plaintiff broached the topic, City Council was within its right to allow testimony on the topic.

In a judicial setting, when a party successfully prohibits mention of a subject matter *in limine* but later proceeds to present evidence on the topic at trial, the opposing party is permitted

to introduce evidence on the once-prohibited topic. *See, e.g., Itin v. Ungar*, 17 P.3d 129, 132 n. 4 (Colo. 2000). If such action is consonant with due process in a courtroom, it is unquestionably appropriate in Council chambers as well. As such, City Council did not abuse its discretion in allowing evidence on evacuation concerns after Plaintiff opened the door.

CONCLUSION

This Court should affirm City Council's decision denying the appeal.

Dated this 8th day of April, 2022.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY,
CITY OF COLORADO SPRINGS, COLORADO
Wynetta P. Massey, City Attorney
Reg. No. 18912

/s/ W. Erik Lamphere
W. Erik Lamphere
Reg. No. 37887

Attorneys for City of Colorado Springs

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2022, I served a true and correct copy of the foregoing **ANSWER BRIEF** with the Clerk of the Court through *Colorado Courts E-Filing* system which will send notification of this filing to the following:

Steven K. Mulliken (smulliken@mullikenlaw.com)
Murray I. Weiner (mweiner@mullikenlaw.com)
Attorneys for Plaintiff

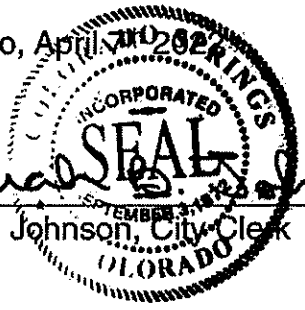
/s/ Donnielle Davis
Donnielle Davis
Legal Secretary

Certification of Document

DATE FILED: April 8, 2022 4:30 PM

I, Sarah B. Johnson, City Clerk of the City of Colorado Springs, Colorado, do hereby certify that the attached is a true and complete copy of Part 3-9 of the City of Colorado Springs Rules and Procedures of City Council as adopted by Resolution 36-21, effective March 9, 2021, the original of which is held on record in the Office of the City Clerk of Colorado Springs, Colorado.

Dated in Colorado Springs, Colorado, April 7th, 2022.



Sarah B. Johnson, City Clerk

3-9. TIE VOTES

A. In case of a tie vote on any proposal, the proposal shall be considered lost/failed. (2000)

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: Post Office Box 2980 Colorado Springs, CO 80901	DATE FILED: May 20, 2022 10:28 AM CASE NUMBER: 2021CV31499
Plaintiff(s): 2424GOTG LLC, v. **Defendant(s):** CITY OF COLORADO SPRINGS, et al.	▲ COURT USE ONLY ▲ Case Number: 21CV31499 Div.: 2

ORDER FOLLOWING RULE 106 REVIEW

THIS MATTER comes before the Court on review on Plaintiff's Complaint for Judicial Review. In this matter, Plaintiff seeks review of a decision by the City of Colorado Springs on a land use question under C.R.C.P. 106(a)(4)(VII). The parties have submitted the record for review and fully briefed the issues presented. The Court found the briefs to be complete and does not find grounds to set a hearing for oral argument. The matters are ripe for analysis and determination.

Factual and Procedural Background

Plaintiff, 2424 GOTG LLC, owns a 125.34-acre parcel of land located directly west of the intersection of Garden of the Gods Road and 30th Street in Colorado Springs. The property is currently zoned General Industrial, Agricultural, Planned Unit Development with a Hillside overlay. The property is subject to the Mountain Shadows Master Plan, which gives the property an Office Industrial Park land use designation.

Plaintiff sought to amend the Master Plan, rezone the property and gain approval of a concept plan, amending the land use designation from Office Industrial part to a mix of office, commercial, residential, public institution, and open space. Plaintiffs sought to rezone the parcel to Planned Unit Development with a Hillside overlay allowing for residential and commercial use. These changes were set forth and provided to the City Council in Plaintiff's proposed concept plan.

On January 21, 2021, the City Planning Commission held a public hearing on a resolution to approve the changes and concept plan Plaintiffs sought. During the hearing City Planning staff and representatives of Plaintiff made presentations and answered questions raised by various interested parties. The Commission also heard from other interested parties, including nearby property owners, residents, and members of the Mountain Shadows Community Association ("MSCA"). At the conclusion of the hearing, the Commissioners moved to postpone a decision on Plaintiff's requested changes and concept plans to March 18, 2021.

On March 18, 2021, the City Planning Commission met again and heard from representatives of the Plaintiff. Plaintiff reported that it had met with members of MSCA to address concerns with the proposed changes and had made certain modifications to their proposal in response to MSCA's concerns. The Planning Commission staff had also coordinated with traffic engineering, the Fire Marshall, and the Office of Emergency Management prior to Plaintiff's presentation of the modified proposal. Despite the changes to the proposal, MSCA and multiple other area residents still spoke out in opposition to the proposal at the March 18th hearing. Ultimately, the Planning Commission recommended approval of the application.

On May 25, 2021, Plaintiff's application came before City Council. The Council heard presentations from the City's senior planner, Plaintiff's representatives, as well as MSCA and local property owners and residents. The materials presented to the City Council by these parties are contained in the record at Bates 009355—009542. In addition to the formal presentations, as well as the testimony, there were over 1,000 pages of emails provided as public comment related to the proposed rezoning. Bates 006087—008160. The presentations, as well as the testimony before the Council related primarily to traffic concerns, emergency management and evacuations, height limitations and visual impacts, impacts to the local bighorn sheep herd, potential impacts of crime, and the financial impact analysis. The City Council initially approved the master plan amendment, rezoning, and concept plan by a 5-4 vote.

Plaintiff's application was set for a second reading at the Council's June 8, 2021, meeting. However, Plaintiff requested a postponement to the June 22, 2021, meeting, and Council agreed to the postponement. At the hearing on June 22, 2021, members of the Council raised concerns about wildfire evacuation planning and the impact the project might have on the City's ability to conduct efficient evacuations. Questions were also raised about the accuracy of Plaintiff's traffic study, which had been conducted during the COVID-19 pandemic, when traffic volumes were reduced. The Council moved to continue the hearing so the City could engage an independent engineering company to review and verify Plaintiff's traffic analysis. Plaintiff's representative expressed concern with Council's postponement for the purpose of reviewing an additional traffic study, noting that public comment had been closed after the first read on May 25 and stating, "I think what we're talking about through the motion is really reopening more evidence and saying we need more evidence to consider." However, Plaintiff's representative

ultimately agreed to the continuance for the purpose of verifying the traffic study they had provided, stating, "our client is extremely concerned about safety as well. We believe that a second traffic study will show that this is actually an improvement." Bates 009796. Council President Strand, who made the motion for the independent traffic study, stated that he would "stand down" if a second independent study confirmed the evidence that was presented in Plaintiff's traffic study. Bates 009801.

On August 24, 2021 City Council met for the final time concerning Plaintiff's proposed amendments. At that hearing Council heard the results of the independent traffic study they had commissioned at the previous meeting. In the materials presented to the Council, the independent study "concur[red] with the methodology and findings outlined in the project development study." The independent study found that "the traffic projections developed, and conclusions stated in the development traffic study are believed to be valid." Bates 010092.

After hearing the results of the study, community members including representatives of MSCA asked to be heard. These community members specifically noted that the postponement "was for consideration of a traffic analysis and a safety analysis" and asked to "be allowed to speak to the safety analysis piece." Bates 009893. They argued that this testimony was specifically germane to whether this change in zoning and usage was in the best interest of the community. Bates 009894. After a brief recess to address this request, Council President Strand stated, "Evacuation is not part of the criteria for this zoning request. It is simply not part of the criteria. It's important. It's all about health and safety, and welfare, and we understand that, and we are going to get to that. But what we're going to do today is we're going to focus on the traffic study and the traffic analysis." Bates 009896. Ultimately, President Strand stated, "I said

if they want to talk about safety issues, which may include evacuation, that the participants that are here and the opponents can do that." Bates 009899. The Council then heard further citizen comments, allowed Plaintiff's representative to respond, and ultimately debated the final outcome of the proposed changes. The proposal was denied on a 5-4 vote.

Plaintiff subsequently filed this Motion pursuant to C.R.C.P. 106 seeking judicial review and reversal of the City Council's denial of its zone change application.

ISSUES PRESENTED

Plaintiff asserts that the record establishes that the City Council exceeded its authority, abused its discretion, and acted arbitrarily in denying Plaintiff's requested zoning and use changes. Specifically, Plaintiff asserts that the City Council applied a review criterion, namely evacuation planning, which is not set forth in the City Code. Plaintiff also asserts that City Council violated procedural rules by engaging in evidence gathering outside of public hearings and prohibited *ex parte* communications while the matter was pending before the Council. Plaintiff additionally argues that the Council abused its discretion by discussing evacuation planning concerns at the August 24, 2021 hearing, rather than only addressing the specifics of the independent traffic study. Finally, Plaintiff asserts that City Council's denial of the zoning and use change was arbitrary and unsupported by competent evidence.

Defendants contend that the record supports a finding that the project was detrimental to the public interest, health, safety, convenience, or general welfare, and that it was not an abuse of discretion for the Council to hear evidence regarding evacuation concerns during the August 24, 2021, hearing because Plaintiff opened the door to such testimony.

STANDARD OF REVIEW

> Where, in any civil matter, any governmental body or officer . . . exercising judicial or quasi-judicial function has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:
>
> (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

C.R.C.P. 106(a)(4)(I).

> Review of a governmental body's decision pursuant to C.R.C.P. 106(a)(4) calls into question the decision of the body itself . . . *See City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244 (Colo. 2000). Our review is based solely on the record that was before the board, and the decision must be affirmed unless there is no competent evidence in the record to support it such that it was arbitrary or capricious. *See Krupp v. Breckenridge Sanitation District*, 1 P.3d 178 (Colo. App. 1999), *aff'd*, 19 P.3d 687 (Colo. 2001).
>
> We consider whether the board abused its discretion or exceeded its jurisdiction, as well as whether it applied an erroneous legal standard. *See Puckett v. City & County of Denver*, 12 P.3d 313 (Colo. App. 2000). Generally, a reviewing court should defer to the construction of a statute by the administrative officials charged with its enforcement. *See Platte River Environmental Conservation Organization, Inc. v. National Hog Farms, Inc.*, 804 P.2d 290 (Colo. App. 1990). If there is a reasonable basis for an administrative board's interpretation of the

law, we may not set aside the decision on that ground. *See Wilkinson v. Board of County Commissioners*, 872 P.2d 1269 (Colo. App. 1993).

Administrative proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency. The burden is on the party challenging an administrative agency's action to overcome the presumption that the agency's acts were proper. *See van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990); *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P.2d 654 (Colo. App. 1999).

City & County of Denver v. Board of Adjustment for City & County of Denver, 55 P.3d 252, 254 (Colo. App. 2002).

The Colorado Supreme Court has

long held that in a Rule 106(a)(4) action, a reviewing court must uphold the decision of the governmental body "unless there is no competent evidence in the record to support it." *Sellon v. City of Manitou Springs*, 745 P.2d 229, 235 (Colo. 1987); *Board of County Comm'rs v. Simmons*, 177 Colo. 347, 350, 494 P.2d 85, 87 (1972); *Marker v. Colorado Springs*, 138 Colo. 485, 488, 336 P.2d 305, 307 (1959). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross* [*v. Fire and Police Pension Ass'n*, 713 P.2d 1304] at 1039 [(Colo. 1986)].

> In the case of a zoning proceeding, a court is not the fact finder and may not substitute its own judgment for that of a zoning board where competent evidence exists to support the zoning board's findings. *Sundance Hills Homeowners Ass'n v. Board of County Comm'rs*, 188 Colo. 321, 327-28, 534 P.2d 1212, 1215-16 (1975). The role of a reviewing court in a challenge to a zoning board's decision "is not and should not be to sit as a zoning board of appeals." *Id.* at 328, 534 P.2d at 1216 (citing *Garrett v. City of Littleton*, 177 Colo. 167, 493 P.2d 370 (1972)); *see also Bentley v. Valco, Inc.*, 741 P.2d 1266, 1267-68 (Colo. App. 1987) (holding that, in a zoning case, a reviewing court is not permitted to weigh the evidence). Thus, court should not interfere with the decision of zoning authorities absent a clear abuse of discretion. *Simmons*, 177 Colo. at 350, 494 P.2d at 87.

Board of County Com'rs of Routt County v. O'Dell, 920 P.2d 48, 50 (Colo. 1996).

ANALYSIS AND CONCLUSIONS OF LAW

Each of Plaintiff's claims regarding the City Council's alleged abuse of discretion or arbitrary action will be addressed individually.

Application of Inapplicable Review Criterion

Plaintiff cites *Bauer v. City of Wheat Ridge*, 513 P.2d 203 (Colo. 1973), for the proposition that once an applicant applies for an exception or change under an already-existing ordinance, only those factors which apply generally to all applicants may be considered. Plaintiff argues that the City Council violated this principle by "applying a criterion (evacuation planning) that is neither specifically set forth in the Code nor generally applicable to all applicants." Plaintiff's Brief p. 8.

The parties agree that the criteria which the City Council may use in evaluating zone changes are set forth in Section 7.5.603(B) of the Code. Plaintiff's Brief p. 8; Response Brief p. 10. That code states, in relevant part:

> A proposal for the establishment or change of zone district boundaries may be approved by the City Council only if the following findings are made:
>
> 1. The action will not be detrimental to the public interest, health, safety, convenience or general welfare.
> 2. The proposal is consistent with the goals and policies of the Comprehensive Plan.
> 3. Where a master plan exists, the proposal is consistent with such plan or an approved amendment to such plan.

Plaintiff claims that, because evacuation planning is not a specific criterion set forth in the City Code, and because it was thoroughly and repeatedly addressed throughout the City Council's consideration of the proposed zoning changes, the Council impermissibly added evacuation planning and held Plaintiff's proposed change to a different standard than the one generally applicable under the Code. This argument, however, fails to recognize that the ability to evacuate safely in the event of an emergency falls within the criterion that a zoning change not be determinantal to the public interest, health, safety, convenience or general welfare. Plaintiff's citation to the opinion expressed by counsel at the time of the hearing to the contrary is not persuasive.

Plaintiff references comments made during the proceedings whereby Council members were informed that evacuation planning was not among the specific criteria they were permitted to consider in determining whether to approve the proposed change. See Plaintiff's Brief p. 10,

Reply Brief pp. 2-3. These comments, however, do not address whether the City Council could consider evidence regarding evacuation planning as that evidence informs the generally applicable criterion that a change in zoning not be detrimental to public health and safety. This Court is not persuaded by Plaintiff's argument that use of the term "safety" to define a factor to be considered necessarily excludes consideration of emergency evacuation issues by the term's failure to refer to traffic or evacuation specifically. This Court finds inclusion of emergency evacuation within the rubric of a "public health and safety" factor to be a reasonable interpretation.

When representatives of the MSCA asked to speak to the Council regarding their concerns about the potential dangers related to evacuation, they specifically cited the applicability of these concerns to City Code 603(B)(1) and (B)(2). Bates 009894. When announcing their votes, some of the members of the Council who voted against the proposed change addressed the distinction between using evacuation planning as a criterion or using it to consider the potential impact on health and safety. Councilmember Skorman stated, "I know it's not the criteria we are talking about today in terms of the evacuation planning. That's not a criteria we have in our tool chest. But safety is, the health and safety." Bates 010008. Councilmember Donelson, when discussing the community members' concerns regarding a potential evacuation, stated, "One of the criteria we must base our decisions on is that it is not detrimental to public health and safety." Bates 010014. Council President Strand similarly stated, "[O]ne of the criteria is health and safety. And, you know, for better or worse, the property owner bought property in an area that has subsequently been involved in a tragedy, you

know, in 2012 and people have come here and poured out their hearts to us about that. And for me, that's been very compelling." Bates 010017.

These comments, rather than demonstrating that the Council applied a criterion that is not specifically set forth in the Code nor generally applicable to all applicants, demonstrate that the Council took the information they were provided throughout the course of the public hearings and applied it to the generally applicable criterion that a proposed change not be detrimental to public interest, health, safety, convenience or general welfare.

Plaintiffs have failed to meet their burden of demonstrating that the Council exceeded its authority by applying a criterion that was not set forth in the City Code. Here, the Council's interpretation that the criterion that a zoning change not be detrimental to public interest, health, safety, convenience or general welfare encompasses consideration of the need to consider a community's potential evacuation is a reasonable interpretation of City Code section 7.5.603(B), and therefore the denial of the proposed zoning change cannot be set aside on that basis.

Violation of Procedural Rules Through Outside Evidence Gathering

Plaintiff's next contention is that members of the City Council violated their own procedural rules in this matter, which "indicates that the governing body acted in an arbitrary and capricious nature." Plaintiff's Brief p. 12. In support of this argument Plaintiff cites *Corper v. Denver*, 552 P.2d 13, 15 (Colo. 1976) for the proposition that a "court may reverse the quasi-judicial decision of a local governing body if the record shows that the governing body failed to comply with its own procedural requirements." Plaintiff's Brief p. 12. *Corper*, however, does not make this specific finding. The case states the inverse, that "[i]f the trial court finds that the record shows compliance by council with the procedural requirements and there is competent

evidence of a factual basis for the rezoning decision, it must affirm the action of the zoning authority." *Corper*, 552 P.2d at 15. In that case, the trial court "found that all procedural requirements had been fulfilled by both the city and the applicant" so the *Corper* court did not substantively address the issue of procedural deficiencies at all. *Id.* Plaintiff has cited no case where a governing body's quasi-judicial decision has been reversed based only on the body's failure to follow its own procedural rules. However, because Council's failure to follow its own procedural guidelines could inform a finding regarding an abuse of discretion, Plaintiff's substantive claims are worth addressing.

Plaintiff's claims center on two procedural rules which guide Council's decision-making process: City Code Section 7.1.105(5)(B) ("The decision is based completely on facts, evidence and testimony presented at the hearing and evaluated using this Zoning Code requirements and criteria. . . . Decision makers may not be contacted or lobbied.") and City Council Rule 10-2(A) ("The Council shall refrain from receiving information and evidence on any quasijudicial matter while such matter is pending before the City Council or any agency, board or commission thereof, except at the public hearing.").

Plaintiff contends Council members violated these rules in three ways: 1) Council Member Skorman's acknowledgement at the June 22, 2021 hearing that he had visited the property at issue multiple times and observed the traffic patterns; 2) an *ex parte* conversation between Council Members Strand, Henjum, and Donelson which was also acknowledged at the June 22, 2021 hearing; and 3) electronic communications between Council Members Strand and Donelson with members of the public.

Plaintiff, in alleging that Member Skorman's site visit was a violation of City Council Rule 10-2(A), that Council Members must refrain from receiving information or evidence related to quasi-judicial matters that are pending before the Council except at the public hearing, fails to acknowledge the language of that rule that states that "if any member is exposed to information about a pending matter outside of the public hearing, through . . . site visits, the member shall disclose all such information and/or evidence acquired . . . during the public hearing and before the public comments period is open." That is what Member Skorman did. *See* Bates 009761. Plaintiff's assertion that this was a violation of procedure is unpersuasive.

Regarding the second incident involving an *ex parte* conversation between Members Strand, Henjum, and Donelson, the contents of the conversation appear to have been limited. Nonetheless, the contents were disclosed to the Council and the public at the June 22, 2021, hearing. Bates 009754—009756. The members involved stated on the record that the conversation would have no impact on their final decision. (President Strand: "[M]y decision will be only made, you know, as I go forward today, on the review criteria." Bates 009756; Member Donelson: "I'll decide my vote today based on the review criteria just like I did the first time." Bates 009757; Member Henjum: "This conversation did not in any way bias my position or my vote." Bates 009757.). Given these statements by the Council Members involved in the conversation, Plaintiff has not overcome the presumption of validity and regularity afforded to Council's decisions.

Finally, Plaintiff's concerns related to the electronic communications between Council Members and members of the public are not properly before this Court pursuant to C.R.C.P. 106. *See* C.R.C.P. 106(a)(4)(I) ("Review shall be limited to a determination of whether the body or

officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record . . . ." *See Also Whitelaw*, 405 P.3d 433, 441 (Colo. App. 2017) ("Because evidence of [political] contributions was not in the record before the Council and the neighbors first raised this issue in the district court, we may not review it.").

None of the allegations levelled by Plaintiff establish that a Council Member involved in this decision had any personal, financial, or official state in the decision evidencing a conflict of interest on the part of a decision-maker. *See Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983) (noting standard). Plaintiff has failed to meet his burden to overcome the presumption that the individual members were acting with integrity, honesty, and impartiality or that the agency's acts were proper, therefore the denial of the proposed zoning change cannot be set aside on that basis.

Addressing Evacuation Concerns at August 24, 2021 Hearing

Plaintiff's next claim is that the City Council exceeded its authority, both substantively and procedurally, and abused its discretion by entertaining public comments about evacuation planning at the August 24, 2021 hearing. Plaintiff asserts that the "stated and sole reason given for the continued hearing was to receive/review the results of an independent traffic study commissioned by the City." Plaintiff's Brief p. 15. Because public commentary regarding evacuation safety is unrelated to that traffic study, Plaintiff argues, it was improper for the Council to hear any additional comments regarding evacuation safety.

On June 22, 2021, President Strand made the following motion:

So I would like to move that our City Council delay this second vote on Item 10.A., Ordinance No. 21-48, amending the zoning map of the City of Colorado

> Springs for 63 days or until 24 August in order to obtain a second and independent traffic study and safety analysis – and we can use those words traffic study and safety analysis in a Statements of Work and figure out what they would be -- of the property known as 2424 Garden of the Gods Road.

Bates 009793 -- 009794.

During the August 24, 2021, hearing, opponents of the zoning change brought up what was variously described as a 'point of order' or 'point of process' seeking to determine whether they would be able to address matters outside the specifics of the traffic study. Bates 009889. The opponents argued that "the postponement was for consideration of a traffic analysis and a safety analysis, and we've been told that there would be no safety analysis discussed, and that that's an event specific item. And so at minimum, I think we ought to be allowed to speak to the safety analysis piece." Bates 009893. After hearing these arguments, President Strand recessed the proceedings to determine how the remainder of the hearing would be conducted. After the recess, President Strand announced:

> Evacuation is not part of the criteria for this zoning request. It is simply not part of the criteria. It's important. It's all about health and safety and welfare, and we understand that, and we are going to get to that. But what we're going to do today is we're going to focus on the traffic study and the traffic analysis.
>
> At the end of that discussion concerning traffic evaluation – or traffic study and analysis, I am going to give your group, the opposition, 30 minutes to talk about *any of the issues you feel this Council needs to know about*. I also have to be fair

to both sides, the petitioner, the Applicant as well as the opposition, and they will have 30 minutes to respond to what you're going to say at the end of this meeting. Bates 009896 (emphasis added).

After this announcement, Member Murray requested clarification as to whether President Strand had found that there was a legal restriction prohibiting talking about evacuation, or whether this decision was being made by President Strand as the Chair of the proceeding. President Strand stated that it was "a decision made by me" and that "if they want to talk about safety issues, which may include evacuation, that the participants that are here and the opponents can do that." Bates 009899.

Plaintiff has not provided the Court with any case or evidence suggesting that President Strand's decision to allow final summary statements by the opponents and Applicant for a zoning change is inherently invalid or irregular, even in a setting where the general scope of the hearing has been limited to a specific purpose. Plaintiff has not met its burden of demonstrating that the Council exceeded its authority or abused its discretion by allowing final statements from both parties at the June 24, 2021 hearing, and as such the zoning determination cannot be overturned on this basis.

Ultimate Determination Was Arbitrary and Unsupported

Plaintiff's final claim is that the City Council acted arbitrarily in denying the proposed zoning change. In support of this claim, Plaintiff argues that evacuation planning is not a criterion for zone changes that the city generally applies to all applicants and that there was no competent evidence supporting the Council's conclusion that the zone change would detrimentally affect public health and safety.

Plaintiff's argument that evacuation planning is not a generally applicable criterion applied to all applicants for zoning change is similar to its argument that the City Council improperly applied an inapplicable review criterion, and it fails on the same basis. Plaintiff argues that the Council's concern with evacuation constituted an independent criterion which is not applied to other applicants for zoning changes. This argument does not acknowledge that the criterion that was being considered, as addressed above, was that the zoning change not be detrimental to public interest, health, safety, convenience or general welfare. Plaintiff asserts that by focusing on evacuation safety in this case, the City Council treated this proposal differently from all other projects, but this complaint fails to acknowledge that evacuation planning may have a significant impact on the generally applicable public interest, heath, safety, convenience or general welfare criterion in some cases, and play a less significant role in evaluating that same generally applicable criterion in others. Because there was a reasonable basis for City Council's interpretation of the review criterion in this instance, the decision cannot be set aside on that ground. *See Wilkinson v. Board of County Commissioners*, 872 P.2d 1269 (Colo. App. 1993).

The final aspect of Plaintiff's claim is that there was no competent evidence supporting the City Council's conclusion that the proposed change would detrimentally affect public health and safety. "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *O'Dell*, 920 P.2d at 50 citing *Ross*, 713 P.2d at 1039.

Plaintiff accurately notes that the traffic impact study it commissioned and presented to Council, as well as the Council's own traffic study, and all of the City's experts indicated to

Council that the proposed change would not hinder safe and efficient evacuations. Plaintiff's Brief pp. 19-21. In contrast, Plaintiff argues that the only evidence presented to Council that was contrary to its position was anecdotal testimony from community members, and "[w]hile these fears are understandable given the City's past experiences with wildfire, they were fully refuted by the traffic data and expert testimony presented by the Applicant and the City's own emergency management professionals." Plaintiff's Brief p. 21. This analysis, however, asks the Court to undertake an analysis which is not permitted by C.R.C.P. 106(a)(4). Under these proceedings, a reviewing court commits error "by impermissibly reweighing the evidence in [the] case instead of simply determining whether the Board's decision was supported by competent evidence." *O'Dell*, 920 P.2d at 51.

In this case, in addition to the public testimony from opponents of the project at the City Council's May 25, 2021 (Bates 006048 – 006068) and August 24, 2021 (Bates 009853 – 010052) hearings, the City also received over 1000 pages of public comments (Bates 006369 – 008160) prior to the May 25, 2021 hearing. Council additionally received a presentation from MSCA addressing the community's concerns regarding safety, noncompliance with Hillside Overlay Ordinance, detrimental impact on local bighorn sheep, and failure to meet parkland dedication ordinances. Bates 009354 – 009380.

In light of all of this evidence, the City Council's determination not to approve the requested zoning change was not so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. As such, their determination cannot be overturned on that basis.

CONCLUSION

For the reasons stated above, Plaintiff has failed to meet its burden of demonstrating that the City Council exceeded its jurisdiction or abused its discretion in denying Plaintiff's requested zoning changes. Plaintiff's request to set aside the City Council's decision under C.R.C.P. 106 is denied.

DONE and ORDERED May 20, 2022.

BY THE COURT

David S. Prince
DISTRICT COURT JUDGE

DATE FILED: November 18, 2022 5:00 PM
FILING ID: D9901C644B3DA
CASE NUMBER: 2022CA1145

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

Appeal from the DISTRICT COURT,
El Paso County, Colorado
The Honorable David S. Prince
Case No. 2021CV31499

Plaintiff/Appellant: 2424 GOTG, LLC,

v.

Defendants/Appellees: CITY OF COLORADO SPRINGS, a home rule City and Colorado municipal corporation

Attorneys for Defendants City of Colorado Springs
OFFICE OF THE CITY ATTORNEY
Wynetta P. Massey, City Attorney
Brian Stewart, Senior Attorney
P.O. Box 1575, Mail Code 510
30 South Nevada Avenue, Suite 501
Colorado Springs, CO 80901
Telephone: (719) 385-5909
Fax number: (719) 385-5535
Brian.stewart@coloradosprings.gov
Atty. Reg. #18912, #37887

□ COURT USE ONLY □

Case No.: 2022CA1145

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

It contains 7,306 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(b).

The answer brief contains, under a separate heading, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation of issues 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 and C.A.R. 32.

/s/ Brian Stewart
Brian Stewart, Colo. Reg. # 39050
Senior Attorney
Office of the City Attorney
30 S. Nevada Avenue
Colorado Springs, CO 80903
tel: 719-385-5909 / fax: 719-385-5535
e-mail: Brian.stewart@coloradosprings.gov
Attorney for Appellees

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 6

ISSUE PRESENTED 11

SUMMARY OF THE ARGUMENT 12

ARGUMENT 16

1. STANDARD OF REVIEW 16

2. 2424GOTG Does Not Have A Right To A Zoning Change 17

3. 2424GOTG Is Impermissibly Asking This Court To Reweigh The Evidence 18

4. City Council's Interpretation Of § 7.5.603.B Was Reasonable And Its Decision Was Based On The Criteria In The Ordinance. 20

4.1. City Council did not add criteria to § 7.5.603.B. 23

4.2. 2424GOTG failed to raise Beaver Meadows below. Further, Beaver Meadows is factually distinct from this case. 25

5. City Council's Decision Was Supported By Substantial Evidence In The Record. 27

5.1. The record contains competent evidence that adding close to 1,000 people to a key intersection would increase health and safety risks, especially in the event of a future wildfire. 27

5.2. Residents' evidence shows the Rezone Request was detrimental to the convenience, health, safety, and general welfare of the community in several

ways. 29

5.2.1. Residents presented competent evidence about the area's traffic problems.....29

5.2.2. Competent evidence was presented to show that the Project would be detrimental to the area's bighorn sheep.....30

5.2.3. Competent evidence was presented to show that the Project violated the Hillside Overlay.....31

5.2.4. Competent evidence related to bicycle safety and the proximity of the Garden of the Gods was presented to show that the Project was detrimental to the public interest, convenience, and general welfare of the area.....31

6. City Council Did Not Abuse Its Discretion.....32

6.1.City Councilmembers are entitled to the presumption of Impartiality 33

6.1.1 2424GOTG cannot rely on evidence or allegations that were not presented to City Council5.2.4 31

6.2. City Council did not act improperly by hearing evidence related to safety at the August 24th hearing.....33

CONCLUSION.....37

TABLE OF AUTHORITIES

CASES Page

Abromeit v. Denver Career Serv. Bd.,
140 P.3d 44 (Colo. App. 2005).....25, 32, 34

Alpenhof, LLC v. City of Ouray,
297 P.3d 1052 (Colo. App. 2013).....19, 22

Bauer v. City of Wheat Ridge,
513 P.2d 203 (Colo. 1973).....22

Bd. of Cty. Comm'rs of Routt Cty. v. O'Dell,
920 P.2d 48 (Colo. 1996).....16, 18

Beaver Meadows v. Board of County Comm'rs,
709 P.2d 928 (Colo. 1985).....21, 25, 26

City of Colorado Springs v. Securcare Self Storage, Inc.,
10 P.3d 1244 (Colo. 2000).....21

Coleman v. Gormley,
748 P.2d 361 (Colo. App. 1987).....17

Debalco Enters., Inc. v. Indus. Claim Appeals Office,
32 P.3d 621 (Colo. App. 2001).....25

Gold Hill Dev. Co. v. TSG Ski & Golf, LLC,
378 P.3d 816 (Colo. App. 2015).....21, 25

Johnson v. Dep't of Safety,
503 P.3d 918 (Colo. App 2021).....19, 20, 33

Khelik v. City & Cnty. of Denver,
411 P.3d 1020 (Colo. App. 2016).....19

Kruse v. Town of Castle Rock,
192 P.3d 591 (Colo. App. 2008).....20, 22

Mangels v. Pena,
789 F.2d 836 (10th Cir. 1986). 33

Ross v. Fire & Police Pension Ass'n,
713 P.2d 1304 (Colo. 1986).....16

Soon Yee Scott v. City of Englewood,
672 P.2d 225 (Colo.App.1983).....32, 33, 35

State v. Nieto,
993 P.2d 493 (Colo. 2000).....21

Stor-N-Lock Partners # 15, LLC v. City of Thornton,
488 P.3d 352 (Colo. App. 2018).....17

Sundance Hills Homeowners Ass'n v. Bd. of County Commis.,
534 P.2d 1212 (Colo. 1975).....19

Van Sickle v. Boyes,
797 P.2d 1267 (Colo. 1990).....16, 17, 25, 33

Whitelaw v. Denver City Council,
405 P.3d 433 (Colo. App. 2017)..... 24, 28, 32, 35, 36

Yakutat Land Corp. v. Langer,
462 P.3d 65 (Colo. 2020).....16

OTHER AUTHORITIES

City Code § 7.3.504. 31

City Code § 7.5.603. ..... 11, 12, 17, 22, 23, 24, 31, 37

C.R.C.P. 106(a)(4). 10, 16, 18

The City of Colorado Springs ("City"), and the City Council of Colorado Springs ("City Council") (collectively "City Defendants"), by and through the Office of the City Attorney, hereby submits the following Answer Brief.

STATEMENT OF THE CASE

The Applications

Plaintiff, 2424 GOTG LLC, ("2424GOTG") owns a parcel of land located at 2424 Garden of the Gods Road in Colorado Springs, Colorado ("Property"). The 125.34-acre property sits at the end of Garden of the Gods Road adjoining the intersection of Garden of the Gods Road and 30th Street ("Intersection"). CF, pp. 9136:7-10; 8754. The Property, like the homes in the Mountain Shadows neighborhood around it, is located in one of the largest Wildland Urban Interfaces ("WUI") in the country. *Id*. at 2962:13-17; 8734; 9378:21-23. The Property is also close to the Garden of the Gods Park, a majestic landscape considered by many to be the crown jewel of the area and the City. *Id*. at 9982:10-11. The Property was annexed into the City in 1965 and 1971 and zoned in 1980 and 1981. *Id*. at 8676-8677. It is currently zoned General Industrial, Agricultural, Planned Unit Development with a Hillside Overlay and is subject to the Mountain Shadows Master Plan ("MSMP"). *Id*. at 346; 8669-8670.

In August 2020, 2424GOTG submitted the applications necessary to rezone the Property for residential and business use (the "Project"). *Id*. at 3275-3288. The Project was amended several times before it was considered by City Council on May 25, 2021. *Id*. at 9136-9142. Ultimately, 2424GOTG presented City Council with three applications related to the Project. First, was a request to amend the MSMP from Office Industrial Park to a mix of office, commercial, residential, public institution, and open space. *Id*. at 10273. Second, was a request to amend the zoning map of the Property from Planned Industrial Park, Agriculture and Planned Unit Development with Hillside Overlay ("PUD"), to Planned Unit Development: Residential and Commercial uses, with a maximum 420 units for residential units, and up to 950,000 square feet for non-residential use. ("Rezone Request") *Id*. at 10284. Third, was a PUD Concept Plan to establish a mixed use development pattern for the Property. *Id*. at 10285.

The Planning Commission's hearings

Before reaching City Council, the Project was evaluated by the City's Planning Commission over the course of two public hearings conducted on January 21, 2021, and March 18, 2021. *Id* at 48-266; 2847-3028. At both hearings, the Mountain Shadows Community Association ("MSCA") opposed the Project, and when the hearings were opened to the public, hundreds of residents phoned in. *Id*. at

130:10-11; 2922:18-22. Every caller who spoke, expressed opposition to the Project. *Id*. at 129:3-21; 2916-2959; 2969-3006. The residents also sent emails and submitted a petition in opposition to the project. *Id*. at 377-2168; 2395-2773. The residents took issue with several aspects of the Project. They raised concerns with the Project's impact on the area's bighorn sheep herd and other wildlife; the building height; the Project's traffic impacts on the Intersection and the Mountain Shadows Community, particularly during an evacuation; bicycle safety; and increased potential for wildfires. *Id*. at 319-326; 3072-3078. In the end, the Planning Commission voted four-to-three to approve the Project. *Id*. at 3084-3086.

The City Council's hearings

The application was then heard before City Council on May 25, 2021. *Id*. at 9078-9412; 10273-10286. In support of the Project, City Council heard from City Planning and 2424GOTG. *Id* at 10274-10277. City Council also heard from the City's Traffic Engineer; the City's Fire Marshall, and the City's Deputy Chief of Staff. *Id*. at 10276-10278. The MSCA made a presentation, and several residents testified in opposition to the Project. *Id*. at 10278. Only one person spoke in favor of the Project. *Id*. Councilmembers discussed and inquired about many of the topics raised by the MSCA and the residents, including the Hillside Overlay and the visual impact of the Project (*Id*. at 10279-10280); the impacts to the local bighorn sheep

herd (*Id*. at 10279; 10281; 10283); fire safety; emergency evacuation; and traffic concerns. (*Id*. at 10281-10283). City Council ultimately approved the master plan amendment and concept plan on a five-to-four vote. *Id*. at 10284-10286. The Rezone Request also passed the first reading. *Id*. Because the Colorado Springs City Code ("City Code") requires two readings and two votes to rezone a property, a second reading was scheduled for June 8, 2021. *Id*. at 10288-10289. The reading was then postponed until June 22, 2021, at 2424GOTG's request. *Id*. at 10289.

On June 22, 2021, the second reading of the Rezone Request came before City Council. *Id*. at 9792:13-19. However, President Tom Strand moved to continue the hearing "in order to obtain a second and independent traffic study and safety analysis…" until August 24th. *Id*. at 9835:1-8. 2424GOTG did not object to the postponement. *Id*. at 9838:4-9. After some discussion, the hearing was continued. *Id*. at 9842:9.

On August 24, 2021, City Council reconvened for the second reading of the Rezone Request. At the onset of the hearing, President Strand noted that he wanted to focus on traffic concerns. *Id*. at 9896:20-23. 2424GOTG began its presentation by addressing traffic, noting that once the Project was complete the area would see an additional 2,208 trips per day. *Id*. at 9919:22. 2424GOTG's counsel then shifted the conversation to evacuations. *Id*. at 9923:5-9 ("I want to talk for just a minute about

evacuation concerns because that seems to be the main concern. And we've had, you know, two really awful fires in the relatively recent history that we've all lived through. It's a serious issue."). Even after President Strand warned counsel that further comments on evacuations would reopen discussion on evacuations, counsel persisted. *Id*. at 9923-9924. After 2424GOTG's comments, President Strand allowed the public to make comments. *Id*. at 9940-10010. After the public comments, 2424GOTG addressed the residents' testimony. *Id*. at 10013-10033. After considerable debate, the Rezone Request failed on a five-to-four vote. *Id*. at 10340-10346.

The District Court rejected all of 2424GOTG's arguments

On September 17, 2021, 2424GOTG filed its complaint in the District Court for El Paso County, ("District Court") alleging that under C.R.C.P. 106(a)(4) the City Council exceeded its jurisdiction by not approving the Rezone Request. *Id*. at 3-7. On December 29, 2021, the City submitted the Certified Record of City Council's proceedings to the District Court. *Id*. at 36-47. On February 9, 2022, the City filed a motion to add the certified minutes of the meetings held by City Council. *Id*. at 10347. On February 18, 2022, 2424GOTG submitted its Opening Brief to the District Court. *Id*. at 10354-10377. Attached to the brief were nine exhibits that were

not included in the Certified Record.[1] *Id*. at 10378-10705. On May 20, 2022, the District Court issued an order upholding City Council's decision. *Id*. at 10759-10777. Specifically, the District Court found that it was reasonable to interpret the health and safety criteria in § 7.5.603.B to include emergencies and emergency evacuations. *Id*. at 10768; 10775. The District Court also found that 2424GOTG's claims of impropriety were insufficient to overcome the presumption that City Council made its decision with honesty, impartiality and integrity. *Id*. at 10772. Finally, the District Court found that 2424GOTG's claims that City Council exceeded its authority, by allowing additional public comments on evacuation safety, to be unsupported by law or evidence. *Id.* at 10774. This appeal followed.

ISSUES PRESENTED

A. Was the Colorado Springs City Council's denial of the Rezone Request an abuse of discretion when evidence was presented which showed rezoning the

---

[1] Portions of the COS Comprehensive Plan were discussed during the meetings, CF pp 10378-10677. However, the entire plan is not part of the Certified Record. *Id*. at 1-10377. Exhibits 2 and 3 are agendas from City Council work sessions which occurred after City Council denied Plaintiff's Rezone Request. *Id*. at 10678-10689. Exhibit 4 is a portion of a manual that was not presented to City Council and is not part of the Certified Record. *Id*. at 10690-10697. Exhibits 5, 6, 7, 8, and 9 are emails and a Facebook post that were not presented to or considered by City Council. *Id*. at 10698;10703-10705.

property would be detrimental to the health, safety, and general welfare and contrary to City Code § 7.5.603.B?

B. Has 2424GOTG overcome the presumption that the Colorado Springs City Council acted with honesty, impartiality, and integrity when it failed to seek councilmember recusal after three councilmembers briefly discussed this case after a work session, and then immediately disclosed the conversation the following day and when another City Councilmember drove by the property between two hearings and then disclosed his travels as required by the Council Rules?

SUMMARY OF THE ARGUMENT

City Council was well within its rights to deny the Rezone Request. When considering a request to rezone a property, City Council looks to the criteria stated in City Code § 7.5.603.B.[2] *Id*. at 10248-10249. While the ordinance contains four

---

[2] The ordinance in its entirety reads:
Establishment Or Change Of Zone District Boundaries: A proposal for the establishment or change of zone district boundaries may be approved by the City Council only if the following findings are made:
1. The action will not be detrimental to the public interest, health, safety, convenience or general welfare.
2. The proposal is consistent with the goals and policies of the Comprehensive Plan.
3. Where a master plan exists, the proposal is consistent with such plan or an approved amendment to such plan. Master plans that have been classified as implemented do not have to be amended in order to be considered consistent with a zone change request.

criteria, only one is pertinent here. The first criterium requires a finding that the Rezone Request is not "detrimental to the public interest, health, safety, convenience or general welfare." *Id*. Because an abundance of evidence was presented showing that the Rezone Request was detrimental to the health and safety, convenience, public interest, and general welfare of the Mountain Shadows neighborhood, its residents, and the entire area, City Council's decision must be upheld.

Wildfires and traffic congestion pose serious risks to the health and safety of the area

In 2012, the Waldo Canyon Fire consumed 346 homes in the area and took two lives. With the fire raging down the nearby mountainside, residents sat in their cars for hours, inching their way through gridlocked streets to safety. From the first hearing in January 2021 to the last hearing in August 2021, residents testified about escaping the fire and expressed their concerns that the size and location of the Project would jeopardize their safety in the event of another fire. Indeed, the unique location of the Project presents a problem. The Property sits in an intersection which is considered by many to be a chokepoint under normal conditions. The Project

4. For MU zone districts the proposal is consistent with any locational criteria for the establishment of the zone district, as stated in article 3, "Land Use Zoning Districts", of this chapter. CF, pp. 10248-10249.

exacerbates the chokepoint by adding around 1,000 cars to the existing bottleneck, which could result in a trap for others should another wildfire breakout.

Beyond the dangers posed by wildfires, residents also presented other evidence of how the Project is detrimental to the health, safety, public interest, convenience, and general welfare of the area. While expressing skepticism at the results of 2424GOTG's traffic study and the City's review of the study, they presented evidence of their personal day-to-day experiences driving in the area. Residents presented evidence that the Project would have a detrimental effect on the local herd of bighorn sheep, and they raised concerns about the Project's compliance with the Hillside Overlay Code. Specifically, they questioned whether the height of the Project's buildings complied with the code or whether it would impair the incredible views in the area. The residents expressed their concerns through emails, a petition with over 6,500 signatures, and lengthy testimony in opposition to the Rezone Request. Because the evidence they presented was more than sufficient to show that the Project was detrimental to the area's health, safety, public interest, convenience, and general welfare, City Council's decision should be upheld.

2424GOTG is impermissibly asking the Court to reweigh the evidence

It is clear from the record that City Council listened to the residents and took their testimony seriously. 2424GOTG, however, disregards their accounts and paints

them as "emotional," "boisterous," and "loud," and insists that they should be disregarded in favor of the opinions expressed by "experts" who also testified. In making this argument, 2424GOTG asks the Court to ignore the well-established principal that as the factfinder, City Council is entitled to weigh the evidence as it sees fit. Because City Council's decision is well supported by competent evidence, it must be upheld.

City Council is entitled to the presumption of honesty, integrity, and impartiality

Every City Councilmember is entitled to the presumption that he or she acted with honesty, impartiality, and integrity. Here, 2424GOTG attacks Councilmembers Strand, Donelson, and Henjum and accuses them of having an improper conversation about the Rezone Request after a public meeting. 2424GOTG overlooks the fact that at the beginning of the next day's meeting, all three councilmembers acknowledged the conversation, provided details about it, and gave 2424GOTG the opportunity to address what was said. Finally, 2424GOTG claims that Councilmember Skorman improperly visited the Property after the May 25th hearing. 2424GOTG ignores the fact that site-visits are not improper. Councilmembers are simply required to disclose the visit and their impressions. Which, as the District Court noted, is exactly what Councilmember Skorman did.

As such, none of 2424GOTG's arguments are sufficient to overcome the presumption afforded to City Council.

ARGUMENT

1. Standard of Review

"The standard for review in a Rule 106(a)(4) proceeding is 'limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.'" *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990) (quoting C.R.C.P. 106(a)(4)(I)). A governmental body exceeds its jurisdiction or abuses its discretion only when it misapplies or misconstrues the applicable law, or its decision is not "reasonably supported by any competent evidence in the record." *Yakutat Land Corp. v. Langer*, 462 P.3d 65, 70 (Colo. 2020); *see also Bd. of Cnty. Comm'rs of Routt Cnty. v. O'Dell,* 920 P.2d 48, 50 (Colo. 1996) ("[A] reviewing court must uphold the decision of the governmental body unless there is no competent evidence in the record to support it.") (internal quotations omitted). "'No competent evidence' means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986). Indeed, the Rule 106(a)(4) "no competent evidence" bar has been

described as "low." *See Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 488 P.3d 352, 358 (Colo. App. 2018). "[Finally], administrative proceedings are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Van Sickle,* 797 P.2d at 1272 (Colo. 1990).

2. 2424GOTG Does Not Have A Right To A Zoning Change

Standard of Review and Preservation

City Defendants agree that de novo review applies to City Council's decision to deny 2424GOTG's Rezone Request and that this issue was preserved by 2424GOTG's arguments in the District Court.

Argument

City Code § 7.5.603.B makes clear that City Council is not obligated to approve a request for a zoning change. CF, pp. 10248-10249. Indeed, the ordinance says that a rezoning request "may be approved by the City Council only if the following findings are made . . . ." *Id*. The ordinance's use of the word "may" indicates that changing a property's zoning is not done as a matter of right. If anything, the right lies with nearby property owners and ensuring the stability of the area by maintaining zoning regulations. *See Coleman v. Gormley*, 748 P.2d 361, 363

(Colo. App. 1987) ("Property owners in areas with existing zoning regulations have a right to rely on them when there has been no material change in the character of the neighborhood that may require rezoning in the public interest."). As President Strand noted on May 25th, 2424GOTG bought the Property subject to its current zoning. CF, p. 9402:20-22. Janna Weidler made the same point when she signed the petition opposed to rezoning the Property writing, "[w]e worked hard to purchase this house in THIS neighborhood and now you want to rezone a piece of land that will change EVERYTHING about my way of life?" *Id*. at 2424. (emphasis in original). Ms. Weidler's outrage was echoed by other residents who signed the same petition, sent emails, and testified before City Council. *Id*. at 5740-7531; 8158-8629; 8911-9075; 9657-9716.[3] City Council's decision should be upheld.

3. 2424GOTG Is Impermissibly Asking This Court To Reweigh The Evidence

Standard of Review and Preservation

City Defendants agree that de novo review applies to City Council's decision and that this issue was preserved by 2424GOTG's arguments in the District Court.

---

[3] The petition and emails in the Certified Record constitute competent evidence because, like letters, they are substitutes for live testimony. *See O'Dell*, 920 P.2d at 51 (noting that documents such as letters are "in the nature of, or a substitute for, 'live' testimony[,]" and therefore must be considered under "the deferential 'competent evidence' standard of review applicable to Rule106(a)(4) actions.").

Argument

"In the case of a zoning proceeding, a court is not the fact finder and may not substitute its own judgment for that of a zoning board where competent evidence exists to support the zoning board's findings." *O'Dell*, 920 P.2d at 50. "[A]n appellate court's role 'is not and should not be to sit as a zoning board of appeals.'" *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1057 (Colo. App. 2013) (quoting *Sundance Hills Homeowners Ass'n v. Bd. of County Commis*., 534 P.2d 1212, 1216 (Colo. 1975)). "An action by an administrative agency is not arbitrary or an abuse of discretion when the reasonableness of the agency's action is open to a fair difference of opinion, or when there is room for more than one opinion." *Khelik v. City & Cnty. of Denver*, 411 P.3d 1020, 1023 (Colo. App. 2016). "When conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency." *Johnson v. Dep't of Safety*, 503 P.3d 918, 923 (Colo. App. 2021) (internal quotations omitted).

As discussed in Section 5, competent evidence on the record exists to support City Council's decision. 2424GOTG, however, asks the Court to ignore evidence from those opposing the Project in favor of the opinions of those supporting the Project. Op. Br. 35. In doing so, 2424GOTG seeks to discount the testimony of some

witnesses and favor the testimony of others. In short, 2424GOTG is asking the Court to reweigh the evidence. However, a reviewing court should "not weigh the evidence or substitute [its] judgment for that of the administrative body." *Johnson,* 503 P.3d at 922 (citing *Kruse v. Town of Castle Rock,* 192 P.3d 591, 601 (Colo. App. 2008)).

2424GOTG's characterization of the residents' testimony is also troubling. The residents provided personal, detailed accounts of their experiences evacuating from the Mountain Shadows neighborhood during a truly catastrophic event. 2424GOTG, however, dismisses their testimony as "loud, emotional, and boisterous[.]" Op. Br. at 37. In so doing, 2424GOTG overlooks the value of the residents' testimony. After all, many have lived near the Property for decades. Each possesses a detailed and intimate understanding of the area at issue. They know the area's roads, businesses, traffic chokepoints, wildlife, and past disasters. Indeed, City Council was correct in considering their testimony along with the other evidence presented. Because City Council's decision is supported by competent evidence, it should be upheld.

4. City Council's Interpretation Of § 7.5.603.B Was Reasonable And Its Decision Was Based On The Criteria In The Ordinance

Standard of Review and Preservation

City Defendants agree that de novo review applies to City Council's decision to deny 2424GOTG's Rezone Request. Because 2424GOTG's argument made

pursuant to *Beaver Meadows v. Board of County Comm'rs,* was not raised before either the City Council, or the District Court, it has not been preserved and should not be considered. *Gold Hill Dev. Co. v. TSG Ski & Golf*, *LLC*, 378 P.3d 816, 825 (Colo. App. 2015) ("Arguments not raised before the trial court may not be raised for the first time on appeal.").

Argument

"Courts interpret the ordinances of local governments, including zoning ordinances, as they would any other form of legislation. . . When construing a statute or ordinance, courts must ascertain and give effect to the intent of the legislative body." *City of Colorado Springs v. Securcare Self Storage, Inc*., 10 P.3d 1244, 1248 (Colo. 2000) (internal citations and quotations omitted). "If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said." *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000). As such, "interpretations by the governmental entity charged with administering a code deserve deference, provided they are consistent with the drafters' overall intent." *Alpenhof,* 297 P.3d at 1055.

2424GOTG's main argument, before the District Court and now on appeal, is that § 7.5.603.B does not contain an express criterium related to evacuations. Op. Br. At 13.[4] Because of this, according to 2424GOTG, City Council must ignore the threats that wildfires present to a community's health and safety. 2424GOTG's argument overlooks the clear intent of § 7.5.603.B. By its clear language, § 7.5.603.B applies broadly to anything that could reasonably be construed as detrimental to health, safety and welfare, including wildfires. *See Kruse*, 192 P.3d at 597 ("Municipal ordinances, like statutes, often contain broad terms to allow their applicability to varied circumstances.").[5] Indeed, there can hardly be a more obvious

---

[4] 2424GOTG seeks to support its argument by pointing to agendas of City Council work sessions which occurred after the Rezone Request was denied. Op. Br. at 15, n.2. 2424GOTG also attempts to rely on a Traffic Criteria Manual and an email from Travis Easton. *Id*. at 16-17, n.3. None of this evidence was part of the Certified Record. Instead, these additions were attached as exhibits to 2424GOTG's District Court briefs. CF, pp. 10690-10698;10751-10758. Because this Court's review must be "based on the evidence in the record before the defendant body or officer[,]" these items cannot be considered. C.R.C.P. 106(a)(4)(I).

[5] 2424GOTG's reliance on *Bauer v. City of Wheat Ridge* is misplaced. Unlike this case, *Bauer* did not involve a request to rezone property. *Bauer v. City of Wheat Ridge,* 513 P.2d 203, 204 (Colo. 1973). Instead, *Bauer* involved a plaintiff who sought to build apartments in an area zoned for that very use. *Id*. Because the area was also a floodplain, the plaintiff was required to comply with the city's "flood plain ordinance." *Id*. Furthermore, the holding in *Bauer* was influenced by the Wheat Ridge City Council's "very brief, and extremely vague" findings. In contrast, the Certified Record, here, is detailed and extensive, and provides more than sufficient evidence to support City Council's decision.

safety concern, especially for the Mountain Shadows community, than being trapped in a wildfire. As noted by the District Court, "the ability to evacuate safely in the event of an emergency falls within the criterion that a zoning change not be determinantal to the public interest, health, safety, convenience, or general welfare." CF, p. 10767.

The threat of additional wildfires is also very real. Since the Waldo Canyon Fire, the City has suffered from the Black Forest Fire, the Bear Creek Fire, and other smaller fires. During a five-week period in 2020, five wildfires broke out within City limits. *Id*. at 2904:4-5. As Councilmember Avila noted on May 25th, fire season is now year-round. *Id*. at 9387:11-12. And, according to Fire Chief Royal, there was an active wildfire burning while he was testifying at the August 24th hearing. *Id*. at 9954:15-16. Because the health and safety criteria in § 7.5.603.B clearly include obvious catastrophic events like wildfires, City Council's denial of the Rezone Request was both reasonable and consistent with the intent and clear language of § 7.5.603.B. As such, its decision should be upheld.

4.1. City Council did not add criteria to § 7.5.603.B

In arguing that the Project was evaluated using uncodified criteria, 2424GOTG overlooks City Council's explanations for denying the Rezone Request. On August 24th, President Strand and Councilmembers Skorman and Donelson each

stated, on the record, that he was basing his vote on the health and safety criteria stated in § 7.5.603.B. *Id*. at 10048:12-16; 10054:17-19; and 10057:5-11. Councilmember Skorman even explicitly stated:

> I know it's not the criteria that we're talking about today, In terms of the evacuation planning. That's not a criteria we have in our tool chest. But safety is, the health and safety. . . .And I just can't – I can't support this kind of dense project right now in our WUI for health and safety reasons, not because we don't have an evacuation plan in place.

Id. at 10048-10049. Councilmember Henjum, on May 25th, explained her "no" vote, by discussing City Council's responsibility to the community. *Id*. at 9383-9386. She eloquently touched on landowner rights, biker and pedestrian safety, the Hillside Overlay and the unique flora and fauna, like the unique bighorn sheep, that call the WUI home. She concluded her remarks by stating "I feel obliged to make my decision with the guidance of the ordinances and codes…with the respect of the land and all the relationships that I just named, the entirety of the City and the people." *Id*. at 9386:10-14. All five Councilmembers who voted against the Project relied on the criteria stated in § 7.5.603.B. And all five are entitled to the presumption that they made their statements and their decisions with honesty and integrity. *Whitelaw v. Denver City Council*, 405 P.3d 433, 438 (Colo. App. 2017); *see also Van Sickle,* 797 P.2d at 1272 ("administrative proceedings are accorded a presumption of

validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency.").

4.2. 2424GOTG failed to raise *Beaver Meadows* below. Further, *Beaver Meadows* is factually distinct from this case

Significantly, in its Opening Brief, 2424GOTG raises for the first time the argument that the City Code must provide guidance on how to develop an evacuation plan. At its core, 2424GOTG's argument is that without such criteria, the City Code is too vague for a "meaningful review[.]" Op. Br. at 21. Because 2424GOTG failed to raise this argument with City Council, or the District Court, it should not be considered now. "[A]rguments not raised in administrative proceedings are not preserved for appellate review[.]" *Abromeit v. Denver Career Serv. Bd*., 140 P.3d 44, 53 (Colo. App. 2005) (citing *Debalco Enters., Inc. v. Indus. Claim Appeals Office*, 32 P.3d 621 (Colo.App.2001)); *see also Gold Hill,* 378 P.3d at 825.

Even if 2424GOTG had raised the argument below, it would still fail. *Beaver Meadows v. Board of County Comm'rs,*709 P.2d 928 (Colo. 1985) is factually different from this case. Underlying the Supreme Court's decision in *Beaver Meadows* was the approval of a master plan and a planned unit development ("PUD"). *Id.* at 929. In *Beaver Meadows*, the Board of Commissioners approved the master plan, but required the developer to improve the road to the PUD and provide it with emergency services as conditions of approval. *Id*. at 930-931. The Colorado

Supreme Court held that the County's written regulations lacked sufficient criteria to objectively determine what improvements satisfied the conditions. *Id*. at 937-38. That is not the case here. First, unlike *Beaver Meadows*, City Council did not approve 2424GOTG's Rezone Request. As the *Beaver Meadows* Court noted "we express no opinion as to whether the county's present regulations, when applied to the findings and evidence now in the record, permit the county to deny Beaver Meadows' application for PUD master plan approval." *Id.* at 939. Second and more importantly, at no time here, did City Council require an evacuation plan or deny the application for lack of a plan. Indeed, as 2424GOTG acknowledges, the City, not 2424GOTG, is tasked with managing evacuations. CF, p. 8750; Op. Br. at 16. ("Under the City's current administrative structure, evacuation planning is a function performed by the City's trained emergency management professionals…."). Because evacuation planning is the City's responsibility and because City Council did not require 2424GOTG to develop a plan, 2424GOTG's argument is without merit.

5. City Council's Decision Was Supported By Substantial Evidence In The Certified Record

Standard of Review and Preservation

City Defendants agree that de novo review applies to City Council's decision and that this issue was preserved by 2424GOTG.

Argument

5.1. The Certified Record contains competent evidence that adding close to 1,000 people to a key intersection would increase health and safety risks, especially in the event of a future wildfire

In 2012, the Waldo Canyon Fire wreaked havoc on the Mountain Shadows neighborhood. It consumed homes, took lives, and caused 32,000 people to flee for their safety. CF, pp. 8732; 8747; 8878-8910 (images of the Waldo Canyon Fire). Throughout the application process, residents testified about their experiences navigating gridlocked roads to escape the fire, often sitting for hours just to travel a mile or two. *Id*. at 9220:7-8; 9240:3-5; 9216:9-12; 9942:3-12. Some residents, such as Carrie Wait, spoke about watching the fire burn alongside her car as she sat in traffic. *Id*. at 10000:12-17. An individual only identified by his first name, Paul, told the Planning Commission, "I can honestly state that was the most terrifying moment of my life. I thought we were going to burn." *Id*. at 2975:22-24.

The Property is in a unique location at the western end of the Garden of the Gods Road Corridor and up against the undeveloped foothills of the Pikes Peak region. *Id*. at 8786; 8787; 9394:7-9. Indeed, the Intersection provides one of only a few egress routes for the Mountain Shadows neighborhood. *Id*. at 8732; 8786. The City's Traffic Engineer made this same observation before the Planning Commission. *Id*. at 2881:1-3 ("I would agree with you there's potentially three

access points out – out of – out of the area."). The fact that 2424GOTG sought to add close to 1,000 people to this key intersection raised obvious health and safety concerns for the entire community. *Id*. at 9304-9305; 9532; 9552; 9694-9705. As Maribeth Netherton, a Mountain Shadows Resident since 1989, testified, "2424 Garden of the Gods Road definitely is a chokepoint for evacuating for Mountain Shadows. If the 420 high density units are approved and constructed and there's another fire, there will be no escaping." *Id*. at 9238:22-23; 9240:16-19. The Property's unique location was clearly a concern for City Council. After hearing the residents' testimony on May 25th, Councilmember Donelson noted that the area had seen an increase in population and vehicular traffic since the Waldo Canyon Fire. *Id*. at 9395:1-6. He voiced his concerns about the residents' safety when he asked "how many people do we put into a limited egress route and what effect does that have on the residents that live there." *Id*. at 9394:22-24. Indeed, as RC Smith, a 38 ½ year fire department veteran, succinctly noted "[w]hen you inject more people into any situation, it makes it more difficult." *Id*. at 9945:8-11. Because competent evidence was presented that adding significant population density to a key intersection would be detrimental to the health and safety for the entire community, City Council's decision should be upheld. *See Whitelaw,* 405 P.3d at 444 (finding in part that traffic impacts can be a health, safety, and general welfare concern).

5.2. Residents' evidence shows the Rezone Request was detrimental to the convenience, health, safety, and general welfare of the community in several ways

Wildfires were not the only reasons residents gave for opposing the Rezone Request. Rather, they presented a wealth of evidence on several topics. Reliance on any one of which would be sufficient to uphold City Council's decision.

5.2.1. Residents presented competent evidence about the area's traffic problems

The Certified Record shows that City Council was presented with competent evidence that demonstrated the ordinary traffic levels around the Property were already problematic and adding population density and corresponding vehicular traffic would only exacerbate the problem. At both the May 25th and August 24th hearings, residents refuted the traffic studies presented by Project proponents by testifying about their own day-to-day experiences with traffic in the area. CF, pp. 9228:18-23; 9269:3-6; 9993:4-15. As Maribeth Netherton stated, "I disagree with Mr. Frisbie, Mr. Rocha, and Andrea in their assessment of traffic on Garden of the Gods Road. Traffic on Garden of the Gods Road is already extremely heavy, especially during rush hours." *Id*. at 9239:2-7. Because there is ample evidence in the record to support a finding that the Rezone Request will add to the already congested roads and thus negatively affect the health, safety, and general welfare of the community. City Council's decision should be upheld.

5.2.2. Competent evidence was presented to show that the Project would be detrimental to the area's bighorn sheep

Residents presented competent evidence to show that the Project would be detrimental to the bighorn sheep herd in the area. *Id*. at 9198-9201; 9643-9649. Indeed, Leo Finkelstein testified during the May 25th hearing that he had personally witnessed sheep on the property and that there were multiple photographs on Facebook from other users capturing sheep on the property. *Id*. at 9266:17-21. The residents also showed that the bighorn sheep used an area about 1,400 feet away from the Property as a lambing ground and that the Project's residents would cause the sheep to abandon the area. *Id.* at 9201; 9633; 9643-9649; 9666; 9947-9953. The record demonstrates that this evidence may have resonated with City Council. Councilmember Murray noted on May 25th, "To suggest that this population of a thousand people will not impact the sheep herd in the back of it[,] I think[,] is not going to fly . . . . Clearly this development should not be put at this location[.]" *Id*. at 9377:2-13. Councilmembers Donelson, Skorman, and Henjum also referenced concerns over the impact on the bighorn sheep herd in their comments during the May 25th hearing. *Id*. at 9392:20-24, 9378:7-10, 9385:1-5. Finally, preserving the bighorn sheep's habitat is consistent with the Hillside Overlay and § 7.5.603.B. *See City Code § 7.3.504.A.3.g*; *Id*. at 10223 (stating as an objective "[t]o preserve wildlife habitat and wetland areas which provide wildlife migration corridors.");

Section 7.5.603.B (damaging bighorn sheep habitat is contrary to the public interest and general welfare).

5.2.3. Competent evidence was presented to show that the Project violated the Hillside Overlay

The purpose of the Hillside Overlay is to protect the unique natural features of an area and to ensure that development "is compatible with, and complements the natural environment[.]" *City Code §7.3.504A.1-2*; *Id*. at 10223. The MSCA's presentation to City Council contained a visual analysis which indicated that the Project was noncompliant with the Hillside Overlay. *Id*. at 8736-8737; 9195-9198. The findings of the presentation were echoed by residents testifying to City Council. *Id*. at 9217:3-11; 9266:2-6; 9972-9974. Again, it is clear City Council considered this evidence. *Id*. at 9392:20-21; 9403:8-10.

5.2.4. Competent evidence related to bicycle safety and the proximity of the Garden of the Gods was presented to show that the Project was detrimental to the public interest, convenience, and general welfare of the area

In addition to the evidence related to wildfires, traffic, bighorn sheep, and the Hillside Overlay, residents also presented evidence that the Project would negatively affect bicycle safety and detract from the majesty of the nearby Garden of the Gods Park. *Id*. at 9195:15-18; 9217:3-8; 9229:14-21; 9272-9273; 9591-9619. Indeed, a substantial amount of evidence was presented to show that the Project was

detrimental to the health and safety, convenience, and general welfare of the area. City Council's decision should be upheld.

6. City Council Did Not Abuse Its Discretion

Standard of Review and Preservation

City Defendants agree that de novo review applies to City Council's decision. City Defendants agree that 2424GOTG made these arguments to the District Court. However, because 2424GOTG did not raise this issue or the evidence it relied upon with City Council, it is not properly preserved for appellate review. *See Abromeit,*140 P.3d at 53 ("[A]rguments not raised in administrative proceedings are not preserved for appellate review").

Argument

"Acting as quasi-judicial decision-makers, city council members are entitled to a 'presumption of integrity, honesty, and impartiality.'" *Whitelaw*, 405 P.3d at 438 (quoting *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo.App.1983)). To rebut this presumption the moving party must show a councilmember's conduct created "substantial prejudice." *Id.; see also Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986) (noting that tribunals are presumed to act with honesty and integrity and requiring a "substantial countervailing reason to conclude that a decisionmaker is actually biased with respect to factual issues being

adjudicated."). "An adjudicatory hearing will be held to have been conducted impartially in the absence of a personal, financial, or official stake in the decision evidencing a conflict of interest on the part of a decision-maker." *Soon Yee Scott,* 672 P.2d at 227. "[A]dministrative proceedings are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Johnson*, 503 p.3d at 922. (quoting *Van Sickle,* 797 P.2d at 1272.)

6.1. City Councilmembers are entitled to the presumption of impartiality

2424GOTG's allegations of impropriety revolve around the June 22nd hearing where President Strand, at the beginning of the hearing, disclosed a brief, impromptu, conversation he had with Councilmembers Donelson and Henjum the day before. CF, pp. 9795-9797. President Strand described the conversation and expressed his ability to be fair and impartial. *Id*. at 9797:20-23. Councilmembers Donelson and Henjum also confirmed the conversation and stated that they could be fair and impartial as well. *Id*. at 9798:7-9; 22-23. Councilmember Skorman then explained that he had driven by the Property several times to assess the traffic situation since the May 25th hearing. *Id*. at 9800-9801. Addressing both issues, the City Attorney noted that President Strand had addressed any transparency concerns by disclosing the conversation. *Id*. at 9800:16-18. With respect to Councilmember

Skorman's site-visits, the City Attorney noted that Council Rule 6.2b instructs Councilmembers to disclose the visit and share their impressions, which, as the District Court noted, is exactly what Councilmember Skorman did. *Id*. at 9803:11-17; 10771. When 2424GOTG had the opportunity to address the disclosures, it did not accuse any Councilmember of bias or impropriety nor seek recusal from any Councilmember. Instead, its counsel thanked City Council stating, "following the rules and trying to really honor them is difficult. And I know that's what you're trying to do . . . [A]s an Applicant, it's important to you that you know what information is being said to the decision-makers, to you, so you can adequately address it if it's an issue. So we appreciate that." *Id*. at 9836-9837. Because 2424GOTG chose not to raise its concerns of bias with City Council, it cannot do so here. *Abromeit*, 140 P.3d at 53.

Far from showing bias, City Councilmember Strand's, Skorman's, Donelson's, and Henjum's willingness to disclose their discussions and travels supports the presumption that they acted with honesty, integrity, and impartiality. *See Whitelaw*, 405 P.3d at 438. Furthermore, none of these disclosures show that any Councilmember had a personal, financial, or official stake in the Rezone Request. *Soon Yee Scott,* 672 P.2d at 227. As such, the record does not suggest that 2424GOTG was substantially prejudiced by either the brief conversation, which was

disclosed the next day, or by Councilmember Skorman's site-visits, which were not violations of any rule.

6.1.1. 2424GOTG cannot rely on evidence or allegations that were not presented to City Council

Maybe because there is neither a shred of evidence nor a single allegation in the Certified Record of bias, 2424GOTG impermissibly attempts to rely on evidence outside of the Certified Record to support its allegations. Op. Br. 24-26; *See* Exhibits 5-9; CF, pp. 10698-10705. Specifically, 2424GOTG points to two alleged emails between President Strand and constituents, and to an alleged post from Councilmember Donelson's Facebook page. Op. Br. 24-26; *See* Exhibits 6-8; CF, pp. 10699-10704. Though 2424GOTG could have presented these exhibits to City Council at either the June 22nd hearing or the August 24th hearing, it chose not to do so. Because this Court's review of City Council's decision shall be, "based on the evidence in the record before the defendant body or officer[,]" these items cannot be considered. C.R.C.P. 106(a)(4)(I).[6]

6.2. City Council did not act improperly by hearing evidence related to safety at the August 24th hearing

[6] Even if these exhibits were considered, they would be insufficient to show substantial prejudice and overcome the presumption that both President Strand and Councilmember Donelson acted with honesty, integrity, and impartiality. *Whitelaw,* 405 P.3d at 438.

2424GOTG has no basis to claim that the City Council abused its discretion by allowing the public to comment on issues related to safety prior to voting on August 24th.[7] Op Br. 26-27. To the contrary, President Strand was well within his authority to allow public comments. CF, p. 9931:18-21. The record also demonstrates that President Strand carefully considered this decision and allowed equal time to 2424GOTG to rebut the residents' arguments. *Id*. at 9936:14-20; 9938-9939. 2424GOTG certainly did not object to the decision during the hearing. In fact, it raised the issue of evacuations first. *See Id*. at 9923:5-9 ("I want to talk for just a minute about evacuation concerns because that seems to be the main concern.").[8] 2424GOTG was also the last party to address the issue. In its rebuttal, and contrary to its argument here, 2424GOTG applauded President Strand's decision to allow the residents to comment. "I think it is good to have the neighbors have the opportunity to speak their mind. I mean, we have been through two horrendous fires in the

---

[7] Plaintiff also accuses President Strand of refusing to "stand down" after having received the results of the second traffic study. Op. Br. 26-27. However, the study that was conducted was a review of 2424GOTG's study, not the independent study and safety analysis that President Strand requested. CF, pp. 9835:1-8; 9899-9900; 9901:24-25. Furthermore, President Strand said that he would "stand down," he did not say that he would change his vote.

[8] 2424GOTG persisted in discussing evacuations even after being warned by President Strand, "if you insist in going into that area, it's going to open it up, I think, for opposition to talk about this to some extent too." *Id*. at 9923-9924.

relative recent history." *Id*. at 10020:20-24. Finally, as the District Court noted, 2424GOTG has failed to point to any case law or evidence that would suggest President Strand exceeded his authority or abused his discretion by allowing all sides an equal opportunity to make additional comments. *Id*. at 10774. Accordingly, City Council's decision should be upheld.

CONCLUSION

Because the Certified Record clearly demonstrates that City Council denied the Rezone Request based on the criteria stated in §7.5.603.B and the evidence presented, and because there is no evidence in the Certified Record that shows that 2424GOTG was substantially prejudiced by any act of any Councilmember, 2424GOTG has not met its burden to show that City Council acted arbitrarily or capriciously. As such, City Council's decision should be upheld.

Dated this 18th day of November, 2022.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY,
CITY OF COLORADO SPRINGS,
COLORADO
Wynetta P. Massey, City Attorney
Reg. No. 18912

/s/ Brian Stewart
Brian Stewart, Attorney
Registration No. 39050
Attorneys for City of Colorado Springs

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2022, I electronically filed a true and correct copy of the foregoing **ANSWER BRIEF** with the Clerk of the Court through *Colorado Courts E-Filing* system which will send notification of this filing to the following:

Steven K. Mulliken
Murray I. Weiner
102 S. Tejon St., Suite 900
Colorado Springs, CO 80903

/s/ Amy McKimmey
Amy McKimmey,
Legal Secretary

COLORADO COURT OF APPEALS

DATE FILED: July 13, 2023
CASE NUMBER: 2022CA1145

Court of Appeals No. 22CA1145
El Paso County District Court No. 21CV31499
Honorable David Prince, Judge

2424GOTG, LLC, a Colorado limited liability company,

Plaintiff-Appellant,

v.

City of Colorado Springs, a home rule city and Colorado municipal corporation, acting through the city council of the City of Colorado Springs,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE SCHOCK
Freyre and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 13, 2023

Mulliken Weiner Berg & Jolivet P.C., Steven K. Mulliken, Murray I. Weiner, Colorado Springs, Colorado, for Plaintiff-Appellant

Wynetta P. Massey, City Attorney, Brian Stewart, Senior City Attorney, Colorado Springs, Colorado, for Defendant-Appellee

Eric Maxfield Law, LLC, Eric Maxfield, Boulder, Colorado, for Amicus Curiae Dorothy Macnak

¶ 1 Plaintiff, 2424GOTG, LLC, appeals the district court's denial of its claim under C.R.C.P. 106(a)(4) to set aside the decision of the Colorado Springs City Council (the City Council) denying its application for a zoning change. We affirm.

I. Background

¶ 2 2424GOTG is the owner of a 125-acre piece of property located at the end of Garden of the Gods Road in Colorado Springs. The property, which contains a large office building, is zoned as a Planned Industrial Park. It is located in a Wildland Urban Interface (WUI) area that carries a substantial risk of wildfire. In 2012, a wildfire swept through the area, destroying more than 300 homes.

¶ 3 In August 2020, 2424GOTG submitted an application to change the zoning of the property to allow for a mixed-use development consisting of residential, office, and other commercial uses. After multiple revisions, 2424GOTG submitted its final application to the Colorado Springs Planning Commission several months later. That application sought to amend the property's zoning designation to Planned Unit Development: Residential and Commercial Uses, allowing for up to 420 residential units.

¶ 4 Section 7.5.603.B of the Code of the City of Colorado Springs provides, in pertinent part:

> A proposal for the establishment or change of zone district boundaries may be approved by the City Council only if the following findings are made:
>
> 1. The action will not be detrimental to the public interest, health, safety, convenience or general welfare.

¶ 5 2424GOTG's application was met with considerable public opposition. Members of the surrounding community raised a litany of objections, including the impact on wildlife and the environment, the effect on the local population of bighorn sheep, obstruction of views, increased traffic, and concerns about emergency evacuation of the area in the case of a wildfire. Despite those concerns, the Planning Commission voted narrowly to approve the application.

¶ 6 The application then proceeded to a hearing before the City Council in May 2021. Again, several members of the community opposed the application. A representative of the nearby Mountain Shadows Community Association expressed concern regarding "the safety and emergency evacuation in regard to increased traffic congestion" and "wildfire evacuation planning." He also identified

several other concerns of the community, including wildfire mitigation, the proposed building height, noncompliance with the city's development plan, detrimental impact on the bighorn sheep habitat, and improper infill development. Other members of the public expressed similar concerns. After the hearing, the City Council voted five to four to approve the zoning change.

¶ 7 But the Colorado Springs City Code requires two votes to approve a zoning change. So 2424GOTG's application was set for a second hearing in June 2021. At that hearing, the president of the City Council, Tom Strand, moved to continue the hearing for two months "to obtain a second and independent traffic study and safety analysis." One councilmember raised a concern about how the addition of 420 units would impact evacuation in the case of a wildfire, and the city's Director of Public Works explained that a traffic study would not model an emergency evacuation. The motion passed and the hearing was continued until August.

¶ 8 The August hearing followed the same pattern as prior hearings with significant public opposition and a divided City Council. There was substantial discussion of traffic concerns, and again, several councilmembers expressed concerns about the

impact the development could have on an emergency evacuation. Members of the public also raised those concerns, as well as others. At the end of the hearing, one councilmember, Richard Skorman, changed his vote on the rezoning from a yes to a no, and the City Council voted to deny the application by a vote of five to four.

¶ 9 2424GOTG then filed a complaint for judicial review of the City Council's decision under C.R.C.P. 106(a)(4), asserting that the City Council had exceeded its jurisdiction and abused its discretion by considering evacuation concerns. The district court denied 2424GOTG's claim, concluding that "the ability to evacuate safely in the event of an emergency falls within the criterion that a zoning change not be [detrimental] to the public health safety, convenience, or general welfare." The court also rejected 2424GOTG's other challenges to the City Council's decision.

II. Analysis

¶ 10 2424GOTG contends that the City Council exceeded its jurisdiction and abused its discretion in denying its application for rezoning by (1) improperly considering evacuation concerns; (2) violating its own procedural rules, and (3) concluding that the zoning change would detrimentally affect public health and safety.

A. Standard of Review

¶ 11 In an appeal of an action under C.R.C.P. 106(a)(4), we review "the decision of the governmental body itself rather than the district court's determination regarding the governmental body's decision." *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). Our review is limited to determining whether the governmental body exceeded its jurisdiction or abused its discretion, based on the evidence before it. C.R.C.P. 106(a)(4)(I).

¶ 12 Under this deferential standard, we "must uphold the decision of the governmental body unless there is no competent evidence in the record to support it." *Yakutat Land Corp. v. Langer*, 2020 CO 30, ¶ 20 (citation omitted). "No competent evidence" means that "the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* at ¶ 21 (citation omitted). We may also consider whether the governmental body misconstrued or misapplied the applicable law. *Id.* But in doing so, we defer to the body's reasonable interpretation of a code that it is charged with administering. *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 8.

¶ 13 In reviewing a zoning decision, our role is not to "sit as a zoning board of appeals" and substitute our judgment for that of the zoning authority. *O'Dell*, 920 P.2d at 50 (citation omitted). Nor may we reweigh the evidence. *Stor-N-Lock Partners #15, LLC v. City of Thornton*, 2018 COA 65, ¶ 33. Rather, when the issues are "fairly debatable," we must "accept the relative weight given to conflicting evidence by the governmental entity." *Id.* (citation omitted). "[C]ourts should not interfere with the decision of zoning authorities absent a clear abuse of discretion." *O'Dell*, 920 P.2d at 50.

¶ 14 Administrative proceedings carry "a presumption of validity and regularity, and all reasonable doubts as to the correctness" of a decision must be resolved in favor of the governmental body. *Lieb v. Trimble*, 183 P.3d 702, 704 (Colo. App. 2008). The party challenging a zoning decision must overcome the presumption that the governmental body's acts were proper. *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008).

B. Evacuation Concerns

¶ 15 2424GOTG's primary argument is that the City Council exceeded its jurisdiction by denying its application for rezoning based on a factor not set forth in the city code — namely,

evacuation concerns. It approaches this argument from three different angles, arguing that the City Council erred by (1) considering evacuation concerns; (2) imposing an evacuation planning requirement; and (3) allowing public comment regarding evacuation concerns. Because we conclude that the City Council could properly consider evacuation concerns as one component of public interest, health, safety, and general welfare, we disagree.

¶ 16 As an initial matter, to the extent 2424GOTG suggests that the City Council was *required* to approve the zoning change if it met the specified criteria, we reject that premise. The plain language of section 7.5.603.B provides that a proposal for a zoning change *may* be approved only if the City Council makes the necessary findings. It does not say that the City Council *must* approve a qualifying application. *See City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1249-50 (Colo. 2000) (holding that city had discretion to deny permitted use where plain language of code did not establish an absolute right to such development); *cf. Richter v. City of Greenwood Village*, 513 P.2d 241, 242 (Colo. App. 1973) (holding there was no constitutional right to zoning change).

¶ 17 But in any event, the record supports the City Council's conclusion that the proposal did not satisfy the express requirement that the zoning change "not be detrimental to the public interest, health, safety, convenience or general welfare." Quasi-judicial decisionmakers like the City Council here must base their decisions on relevant review criteria and the evidence in the administrative record. *Whitelaw*, ¶ 21. A denial of a rezoning application made "in furtherance of a legitimate zoning objective is not an abuse of discretion." *W. Paving Constr. Co. v. Jefferson Cnty. Bd. of Cnty. Comm'rs*, 689 P.2d 703, 707 (Colo. App. 1984).

¶ 18 That is what happened here. The City Council repeatedly tied its assessment of 2424GOTG's application to a "legitimate zoning objective" set forth in the applicable ordinance: preservation of public health, safety, and general welfare. Three of the five councilmembers who voted to deny the application explicitly cited public health and safety as the basis for their decisions:

- Councilmember Skorman: "I can't support this kind of a dense project right now in our WUI for health and safety reasons."

- Councilmember Dave Donelson: "One of the criteria we must base our decisions on is that it is not detrimental to public health and safety . . . . [T]his isn't just another infill site . . . it's one with a real history . . . [a]nd the real history is we had a big fire here not long ago right next to it."
- President Strand: "[O]ne of the criteria is health and safety. . . . I'm going to keep my foot on the pedal as best as I can to make sure that we keep our promises to our City to keep everybody safe."

¶ 19 Another councilmember who voted against the application, Bill Murray, cited the interface between the city and the environment and the "degradation of [his] responsibilities as a steward for the community." And the fifth no vote, Nancy Henjum, though not speaking at the time of the final vote, previously explained her decision as taking into account the city's relationship with the land, together with "the guidance of the ordinances and codes." One councilmember who voted to approve the application, Randy Helms, similarly tied his vote to health and safety, expressing his view that the City Council had "done an incredible job of looking at the safety and the health of our constituents." All of these considerations are

"legitimate zoning objective[s]" under the city code. *W. Paving Constr.*, 689 P.2d at 707.

¶ 20 Because of the proximity of the proposed development to a recent major wildfire, consideration of the public health and safety unsurprisingly evoked concerns about the feasibility of evacuation in the event of a repeat of that tragedy. But those concerns did not become an independent review criterion. Instead, they fell within the broad authority of the City Council to determine whether the zoning change would be detrimental to public health and safety. *See Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 14 (holding that developer's narrow interpretation of city ordinance violated broad authority of local governments to plan for and regulate use of land). Such a broad standard necessarily allows for consideration of a range of subsidiary issues that are not separately enumerated. *Cf. Whitelaw*, ¶ 54 (noting that "consideration of the public health, safety, and welfare criterion may, in certain instances, include a review of issues relating to traffic and parking").

¶ 21 Indeed, that is exactly how the City Council framed its discussion of the evacuation concerns. Councilmembers repeatedly acknowledged that evacuation feasibility was not an independent

criterion for approving a zoning change. And they tied their concerns about evacuation risks back to public health and safety. For example, Councilmember Skorman, the only councilmember to change his vote after the first one, explained his decision by saying:

> I know it's not the criteria that we're talking about today in terms of the evacuation planning. That's not a criteria we have in our tool chest. *But safety is, the health and safety*.
>
> . . . .
>
> I can't support this kind of a defense project right now in our WUI for health and safety reasons, *not because we don't have an evacuation plan in place*.

(Emphasis added.)

¶ 22 President Strand similarly clarified that evacuation was relevant only to the extent it related to health, safety, and welfare:

> Evacuation is not part of the criteria for this zoning request. It is simply not part of the criteria. It's important. It's all about health and safety and welfare, and we understand that.

¶ 23 Thus, the record does not show that the City Council imposed a new evacuation criterion. At most, it construed its express criteria to include consideration of evacuation challenges, as one of

many issues affecting the public health, safety, and general welfare. We defer to that reasonable interpretation. *See Whitelaw*, ¶ 57.

¶ 24 2424GOTG relies heavily on two cases to contend that the City Council exceeded its jurisdiction by considering evacuation concerns. First, it cites *Bauer v. City of Wheat Ridge*, 182 Colo. 324, 513 P.2d 203 (1973), for the proposition that the City Council could not deny an application based on a factor not in the city code. Second, it cites *Beaver Meadows v. Board of County Commissioners*, 709 P.2d 928 (Colo. 1985), for the proposition that the City Council could not impose a condition of approval not required by an existing regulation. But the City Council did neither of those things.

¶ 25 In *Bauer*, the proposed development indisputably satisfied the requirements for approval under the applicable ordinances, but the city council nevertheless denied the application without giving any substantial reason for the denial. 182 Colo. at 327, 513 P.2d at 204-05. Here, in contrast, the City Council determined that 2424GOTG's application did *not* satisfy the express requirements for a zoning change. *See IBC Denver II*, 183 P.3d at 719 (distinguishing *Bauer* and other cases in which development plan "meets all of the zoning requirements" from situation where

developer "did not meet all of the zoning requirements" and "could not proceed with its development plan unless the property was rezoned"). Moreover, unlike the "brief" and "extremely vague" findings in *Bauer*, 182 Colo. at 327, 513 P.2d at 205, several councilmembers detailed their reasons for finding that the application did not meet those express requirements.

¶ 26 In *Beaver Meadows*, the county *approved* the proposed development, but in so doing, imposed two conditions — the improvement of an access road and the provision of emergency medical services — that it did not have authority to impose. 709 P.2d at 929, 938-39. The City Council here did not impose any requirements on 2424GOTG. To the contrary, it expressly disclaimed any evacuation plan requirement. It simply denied the application because it found it did not meet the standard for approval. *Id.* at 939 (expressing no opinion as to whether county could have denied the application); *see also W. Paving Constr.*, 689 P.2d at 707 (holding that the denial of a zoning application is "quasi-judicial" activity that does not require legislative action).

¶ 27 For similar reasons, we reject 2424GOTG's assertion that the City Council exceeded its authority or abused its discretion in

allowing public comment about evacuation concerns at the August hearing. Although evacuation feasibility was not an independent criterion, public safety was. And as President Strand explained, "safety issues . . . may include evacuation." In fact, several community members who raised evacuation concerns explicitly tied those concerns to section 7.5.603.B and the requirement that the zoning change not be detrimental to public health and safety.

¶ 28 2424GOTG points out that the initial hearing was continued to obtain an independent traffic study. But that does not mean the hearing was necessarily limited to that issue. To the contrary, the City Council's consideration of the proposal remained subject to all of the criteria in section 7.5.603.B, including public health and safety. Although President Strand initially stated that he wanted to focus the meeting on the traffic study, he later clarified that, after discussion of that study, he would allow public comment on additional issues, including safety concerns. Given the broad criteria for approval in section 7.5.603.B, the City Council did not exceed its jurisdiction or abuse its discretion in doing so.

C. Procedural Violations

¶ 29 2424GOTG next contends that the City Council violated its procedural rules when (1) three councilmembers engaged in a brief off-the-record discussion about the application and an anticipated motion to continue the June hearing, and (2) President Strand drove by the property several times to observe the traffic situation.

¶ 30 President Strand disclosed both issues at the beginning of the June hearing — two months *before* the final vote — and invited questions and comments. 2424GOTG's counsel, who was present, did not object, much less suggest that the purported violations undermined the validity of the entire proceedings. To the contrary, he thanked the councilmembers for their candor and acknowledged their efforts to comply with the rules. Because 2424GOTG did not raise a claim of procedural violations before the City Council, it is precluded from raising that claim in a Rule 106 action. *Abromeit v. Denver Career Serv. Bd.*, 140 P.3d 44, 53 (Colo. App. 2005).

¶ 31 Moreover, although 2424GOTG cites a city code section and a city council rule, it does not point to where those rules appear in the record on appeal. *See Alpenhof*, ¶ 10 ("[A]ppellate review extends only to those code provisions included in the record.").

That omission is significant because the record indicates that President Strand's site visits did *not* violate the city council rule.

¶ 32 In any event, councilmembers are entitled to a "presumption of integrity, honesty, and impartiality" that can be rebutted only by a showing of "substantial prejudice." *Whitelaw*, ¶ 11 (citation omitted). 2424GOTG has failed to show that it suffered any prejudice from what were, at most, technical procedural violations. The involved councilmembers disclosed their actions and confirmed they would base their decision exclusively on the review criteria.

¶ 33 To the extent 2424GOTG relies upon email communications and a Facebook post that were not part of the record before the City Council, those documents are not before us. Our review is limited to the record that was before the City Council. *Whitelaw*, ¶ 35.

D. Competent Evidence to Support Decision

¶ 34 2424GOTG also challenges the City Council's denial of the proposed zoning change on substantive grounds, arguing that there was no competent evidence that the change would be detrimental to the public health, safety, or general welfare. To support this argument, 2424GOTG cites (1) evidence that the zoning change would result in less traffic than if the property was fully developed

as currently zoned; (2) the traffic impact study; and (3) testimony that the area could be safely evacuated in the case of an emergency.

¶ 35 But while 2424GOTG cites evidence that might support its view that the zoning change was not detrimental, there was also evidence to the contrary. In particular, community members described evacuation challenges during the last major fire and explained that the proposed development was at a chokepoint for one of the few routes of egress from the area. They further expressed their view that adding up to 420 residential units would exacerbate those problems. Other community members testified based on their firsthand experience that traffic in the area — without the addition of 420 new homes — was already significant.[1]

¶ 36 2424GOTG attempts to discount all of this testimony because it was not from experts. But the testimony of "concerned citizens" constitutes competent evidence too. *W. Paving Constr.*, 689 P.2d at 706. And the City Council may choose to credit such testimony

---

[1] 2424GOTG asserts that the zoning change would result in decreased traffic, as compared to the maximum development of the property under its existing zoning. But it was undisputed that the project would increase traffic from its current state of development.

even where it conflicts with that of professional planners and engineers. *Id.* The extensive hearings over two separate days encompassed substantial evidence on both sides of the issues. It is not our role to reweigh the evidence and substitute our judgment for that of the City Council. *See O'Dell*, 920 P.2d at 51-52.

¶ 37 Moreover, in determining whether there is competent evidence to support the City Council's decision, we are not limited to the specific findings of the City Council. *Stor-N-Lock Partners #15*, ¶ 27. Rather, "our task is to examine the record to ensure that some evidence exists to support the City Council's ultimate decision." *Id.*

¶ 38 In addition to public testimony about traffic and evacuation concerns, there is evidence in the record of other detrimental impacts on the "public interest, health, safety, convenience or general welfare" as well. Among other things, residents testified about the impact of the development on the local bighorn sheep population, views in the area, and the natural landscape. And multiple councilmembers cited the environmental impact of the project as one reason to deny the rezoning. Again, 2424GOTG disputes some of this evidence as incredible. But that was an

argument for the City Council. We must uphold the decision if there is *any* competent evidence to support it. *Yakutat*, ¶ 20.

¶ 39 Thus, because we conclude there is competent evidence in the record to support the City Council's decision that the proposed zoning change would be "detrimental to the public interest, health, safety, convenience or general welfare," we uphold that decision.

III. Disposition

¶ 40 The judgment is affirmed.

JUDGE FREYRE and JUDGE PAWAR concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.

GARDEN
OF THE
GODS