JESSE N. LIPSCHUETZ
728 Clarkson St., #1
Denver CO 80218
Phone: (303) 837-1203
Fax: (303) 265-9629
E-Mail: jnlpc@yahoo.com

January 9, 2012

To: Members of the Denver City Council Land Use, Transportation and Infrastructure Committee (via email)

Re: Opposition to Proposed Amendment to Ordinance 333, Series of 2010 adopting the new Denver Zoning Code

I and my wife, Nancy Chapin, have owned and lived at 728 Clarkson St. for more than 20 years. We, as well as most of the other residents on our block and a substantial number of residents in our neighborhood, oppose the proposed Amendment to Ordinance 333. We oppose it on the following grounds:

1. It is not necessary.
2. It is unconstitutional.
3. It unfairly rewards the operator of a purported rooming and boarding house on our block.

BACKROUND

On December 30, 2010 at 3:40pm, a change of use permit was issued to Open Door Ministries (ODM) that purports to allow the house next to us at 740 Clarkson to be operated as a rooming and boarding (R&B) house. This permit was issued contrary to the clear language of Section 2(a) of Ordinance 333 and Section 59-26(d) of the old zoning law. Under the new zoning code our block was downzoned from R3 to U-RH-2.5, and after June 25, 2010 the issuance of a change of use permit for R&B was prohibited.

I have challenged the issuance of this permit on these grounds, and have appealed the decision of the Board of Adjustment that upheld the permit to the Denver District Court in Lipschuetz v Board of Adjustment, 2011cv7577.

If the proposed amendment is constitutional, which I do not believe it is, it would not only be adverse to our interests and those of our neighbors, but would also unfairly reward Open Door Ministries, which has acted with flagrant disregard for the zoning laws and the residents of the neighborhood. Open Door Ministries does not deserve the benefits of the proposed Amendment. (See ODM below.)

THE AMENDMENT IS NOT NECESSARY

Article III of the BOA Rules of Procedure requires that a decision of the Zoning Administrator (ZA) be appealed to the BOA within 15 days after the ZA issues a zoning permit. The ZA in his discretion can extend the date and the BOA can waive the filing deadline. Where no notice is given, Colorado Case law has upheld the right to file after the 15 days and requires that such filing must be made within a reasonable time after notice.

Under Section 12.4.1.10 of the new zoning code, an approved zoning permit for an allowed use requires that the use be established within 180 days. Therefore, such use must have been established no later than June 28, 2011 (180 days after December 30, 2010). Most of the illegal permits were probably issued before December 30, 2010 and therefore most permitted uses would have been established before June 28. As of June 28, any such use would have been obvious to anyone with a right to challenge it. June 28 was more than 6 months ago, and more than 6 months after notice is an unreasonable time in which to challenge any issuance of a permit. **So long as any wrongly issued permit has not yet been challenged, the right to challenge it has been waived.**

UNCONSTITUTIONAL AMENDMENT

We are members of a class of individuals in downzoned zoning districts that by this Amendment will have been denied the right to obtain a change of use after June 25, 2010 based on the plain language of the ordinance, **while others who were granted permits after this date contrary to the ordinance will be able to obtain vested rights**.

Since the proposed Amendment is substantive and not remedial, as well as being retroactive, it is **unconstitutionally retrospective under Article II, Section 11 of the Colorado Constitution**. By favoring a special group of property owners who obtained their permits contrary to the clear language of the ordinance over those who did not**, it is also unconstitutional as special legislation under Article V, Section 25 of the Colorado Constitution**.

The Amendment further fails by denying equal protection of the law for those who might have applied if the ordinance had permitted it and those, if any, who may have applied and were denied because of the limited scope of Section 2(a) of Ordinance 333.

ALTERNATIVES

I request that the Committee consider one of the following:

1. Do nothing. So long as the permits have not yet been challenged, the right to challenge has been waived.
2. Find another way to approve the unlawful permits that have not been challenged.

In the unlikely event an owner who obtained a use permit or other prohibited permit after June 25, 2010 is challenged to stop operating under the permit, that owner would still have an adequate legal remedy or defense in a court of law under the doctrine of equitable estoppel. If they can show that they reasonably and detrimentally relied on the issued permit, they should prevail.

OUR NEIGHBORHOOD

Ours is a diverse neighborhood at the southern end of the Capitol Hill statistical neighborhood, bounded by 7th and Colfax, and Broadway and Downing. In the last 20 years, this magnificent, historic, mostly residential block of 700 Clarkson, **has become a much more livable and stable neighborhood**, most recently attracting young couples who want to raise children in an historic inner city setting - 4 babies have been born over the last 4 years to the resident owners of the two single family houses on the block closest to us.

During these 20 years on our block, a halfway house at 755 Clarkson has closed; our two-lane one-way street has become a one-lane one-way street; a high-rise apartment has been converted to condominiums with more than 70% owner-occupancy; a new condominium project has been built with 12 units; and resident owners of houses have significantly improved their properties which show a high level of pride of ownership. Similar improvements have been made to the houses on the west side of the 700 block of Emerson, across from our alley.

Despite these advances, the residential fabric of the neighborhood is under siege and we are concerned we are reaching a tipping point. Long before we moved to this block, the Zang Mansion on 7th and Clarkson had been operating as offices, and we accept that use. However, in the last 2 1/2 years, 750 Clarkson has become a community center anticipating 10,000 visitors a year, and 740 Clarkson has **purportedly** become a R&B house.

OPEN DOOR MINISTRIES

I say **"purportedly"** because when ODM obtained the permit they had no intention of operating a R&B house. Rather they intended to move their LightHouse Program (for 15-20 "recovering" drug addicts and alcoholics transitioning from homelessness including incarceration to permanent housing) from the 1100 block of Ogden St. to 740 Clarkson. Pursuant to the group-living ordinance adopted in 1993, they were required to obtain the proper zoning permit for a "residential care use" (RCU) facility that would have required public notice with the opportunity for public input.

ODM had several months earlier worked with our Councilperson, Jeanne Robb, and with CHUN when they tried to buy the Croke-Patterson Mansion to house their LightHouse Program. When the ZA denied their application to operate a large RCU facility because of the 2000-4000 ft. spacing restriction under the group living ordinance, ODM applied for a variance. After

considerable public opposition, they withdrew their variance application and started looking for another property.

When they found 740 Clarkson, ODM decided to call their Lighthouse Program a R&B house and pulled the R&B permit before buying the property. I contend they did this solely to avoid giving the public notice required for a RCU. Afraid that the public reaction would be the same as they encountered with the Croke-Patterson Mansion and rapidly running out of time before they had to vacate Ogden St. and raise funds to buy a new property, they did an end-run around Councilperson Robb and CHUN with no public notice and with zero neighborhood outreach.

Long before 1993, Capitol Hill and other close-in neighborhoods were being saturated with group homes, and new ones were popping up at an alarming rate. It took a concerted effort over many years by involved neighbors from Capitol Hill, Congress Park and Northwest Denver to persuade City Council to adopt the group living ordinance. Under this ordinance, group living facilities were divided into "Large" and "Small" RCUs depending on the level of supervision. Small RCUs require less supervision than large RCUs. Generally small RCUs have 8 or fewer residents and large RCUs have more. Transitional housing, however, is always a small RCU regardless of the number of residents. This ordinance also provided a mechanism for public notice and public comment.

I am also the plaintiff in Lipschuetz v. Open Door Ministries, 2011cv3175, Denver District Court. After a one day preliminary hearing in this case, the court ruled that the LightHouse Program was a RCU and granted me a preliminary injunction prohibiting the operation of a RCU facility at 740 Clarkson without a proper permit. I also filed a motion to preliminarily enjoin operation of a R&B house on the grounds that David Warren, executive director of ODM, had misrepresented the proposed use. Although the court did not grant my motion, it did find that Mr. Warren was **"willingly blind"** in performing his due diligence. A full trial on the merits is now set for April, 2012.

Immediately after the injunction was issued, ODM occupied the property allegedly as a R&B house and moved in around 16 "boarders." These boarders just happened to be the same individuals that were previous participants in the LightHouse Program, but with substantially less supervision that ODM claimed they provided under their Program.

In the meantime, ODM has on two separate applications been denied a small RCU permit for transitional housing. On the first occasion they were denied because the ZA found the Program to be a large RCU and therefore prohibited under the 2000-4000 ft. spacing requirements. On the second occasion they were denied because the affected Capitol Hill neighborhoods already had some of the most significant over-concentrations of RCUs in the City. The second denial resulted in an appeal that was denied by the BOA on December 13 by a 5-0 vote.

In trying to qualify to occupy this property, first for R&B and then for transitional housing, ODM has sacrificed any integrity their Program might have had. They have so whittled down

the supervision of and restrictions on their residents from the LightHouse Program they claim they and their predecessor in interest operated successfully for 20 years, that we and our neighbors have absolutely no trust in them whatsoever.

This situation also illustrates the glaring paradox of the group living ordinance. It is far easier to obtain a permit for a small RCU such as transitional housing as it is a large RCU. **Thus operators are encouraged to drop safeguards and ease restrictions so that they can do what they want to do with little regard for the neighborhood – it's like ODM keeps trying to fit a square peg into a round hole until they can shave enough off so that it fits.**

ODM HAS A LEGAL REMEDY.

ODM has an adequate legal remedy under the doctrine of equitable estoppel. If they insist on pursuing this sham, and if the District Court in Lipschuetz v Board of Adjustment, 2011cv7577 agrees with me that the permit is not valid, the burden will be on ODM to initiate a legal action to prove that their reliance was reasonable and detrimental. If they can do that, they will prevail.

Sincerely yours,

Jesse N. Lipschuetz