DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202	
Plaintiff: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; and ZELDA HAWKINS, an individual v. **Defendant:** CITY AND COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity, and DEBRA JOHNSON, in her capacity as clerk and recorder of the City and County of Denver.	**▲COURT USE ONLY▲** Case Number: 2013CV32444 Courtroom: 376
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CLOSING STATEMENT BY DEFENDANTS CITY AND COUNTY OF DENVER AND DEBRA JOHNSON, CLERK AND RECORDER, IN REGARD TO THE HEARING ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Introduction

As anticipated in the City and County of Denver and Debra Johnson, Clerk and Recorder's opening statement, almost all of the testimony and exhibits entered in the hearing on the Plaintiffs' Motion for a Preliminary Injunction are essentially irrelevant to the legal issues to be determined by the Court. Under the *Rathke* standards, first and foremost the Plaintiffs bear the burden of demonstrating to the court that they have a reasonable probability of ultimately prevailing on the merits of the claims, that the injunction will not disserve the public interest, and that the balance of the equities weigh in their favor. This they have utterly failed to do.

The Plaintiffs and their witnesses clearly disagree with the policy choices made by democratically elected officials—the Denver School Board and the Mayor and City Council of Denver—to select the Hampden Heights site for a new elementary school and to enter into the Contract to Exchange Property. However, it is axiomatic that ". . . courts must refrain from reviewing controversies concerning policy choices and value determinations that are constitutionally committed for resolution to the legislative or executive branches . . . ." *Busse v. City of Golden,* 73 P.3d 660, 664 (Colo. 2003). In particular, all of the testimony about whether DPS could have chosen a different or better site for the elementary school is nothing but a distraction from the handful of true legal issues embodied in the Complaint.

To the extent the Complaint asserts any real, justiciable legal claims against the City, the Plaintiffs failed to produce any evidence at the hearing indicating they would have any chance of success on those claims.

Claims arising under Charter § 2.4.5

While the Plaintiffs claim that the City violated Charter § 2.4.5 by entering into the Contract without submitting the conveyance of the property to a vote of the people, they have failed to demonstrate any probability of success on the merits. Plaintiffs neither produced an ordinance officially designating the property as a park, nor did they demonstrate that the land was a "park belonging to the City as of December 31, 1955." The Plaintiffs' last minute offer of testimony indicating that equestrians in the 1950's may have ridden horses from stables in the Denver/Glendale area into the wide open spaces of rural Arapahoe County does nothing to demonstrate that the property was considered a city "park" at the time. As demonstrated on the 1957 U.S.G.S. maps (Exhibits J and K), if a city park existed at that time, it was labeled as such on the map. These maps and the contemporaneous aerial photo (Exhibit I) show nothing but the creek and open land in the vicinity of the property.

However, two particularly salient pieces of evidence emerged at the hearing, both of which militate against a finding that the subject property is a "park" triggering the voter-approval requirements of Charter § 2.4.5. Plaintiffs' witnesses, David Longbrake and Susan Baird, confirmed that the City had constructed a parking lot on a major portion of the land in the 1990's and leased it to a nearby commercial property owner. This testimony was consistent with City's

Exhibit E, which demonstrates how the Manager of Parks and Recreation in 1992 disclaimed that the property was a park, thus allowing the lease for the "Oppenheimer Remote Parking Lot" to go forward. Significantly, Charter § 2.4.5 prohibits park property from being either sold *or leased* without voter approval. Thus, proof that the property was leased historically for private parking lot weighs heavily against the Plaintiffs' unsubstantiated theory that the property is a park land today. This historical evidence also demonstrates that the City has maintained a consistent legal position over the years, and the City did not recently invent the notion that the subject property is exempt from Charter § 2.4.5 in order to rationalize its approval of the Contract for Exchange of Property. The land simply is not a park and never has been.

A second important bit of evidence emerged at the hearing, again provided by the Plaintiffs' own witness, Cynthia Johnstone. Ms. Johnstone testified that she is a former member of the City's Parks and Recreation Advisory Board, and is currently active with the organization known as Inter-Neighborhood Cooperation (INC), which also opposes the conveyance of the City-owned land to DPS. She authenticated Plaintiffs' Exhibit 49, a letter from INC delivered to the City in January of 2013 expressing that organization's position on the matter. Ironically, however, the INC letter agrees thoroughly with the City's legal position in this case, concluding that 'undesignated" city properties which citizens may perceive or assume to be parks should be officially designated as parks *by ordinance*, so that the property will be truly locked-in and protected from future conveyance absent a vote of the people.

Instead of filing a brief at the time they filed their Motion for Preliminary Injunction, the Plaintiffs submitted a brief on the eve of the hearing. Their brief does nothing to improve their prospects of prevailing on the merits. The Plaintiffs continue to rely almost entirely on the 1900 Court of Appeals decision in *McIntyre v. Board of County Commissioners*, while ignoring the more pertinent 1946 Supreme Court precedent of *Hall v. City and County of Denver*, a decision which clearly demonstrates that disputes of this nature arising in Denver must be decided through an interpretation of the City's home rule charter, not by resort to some sort of "common law dedication" theory.

While the Plaintiffs lack of any probability of success on the merits should, on its own, justify a denial of the Motion for Preliminary Injunction, the attorneys for DPS will argue that the Plaintiffs have also failed to meet the *Rathke* standards because an injunction would disserve the public interest, and that the equities of the case weigh in favor of the defendants.

Claims against the Clerk and Recorder

Remarkably, in their brief the Plaintiffs fail to address, let alone distinguish, all of the case law in Colorado which stands for the principle that site-specific decisions concerning the management or disposition of municipal property are not subject to initiative and referendum, as detailed in the City's original Response in Opposition to the Motion for Preliminary Injunction. Again, the great weight of decisional law in Colorado demonstrates that the Clerk was correct in

rejecting the forms proposing a referendum on Ordinance No. 170 because the ordinance is not legislative in nature.

The Plaintiffs attempt to argue in their Brief that the decision by the City to convey the property to DPS is in fact "legislation" because it is tantamount to a rezoning of the property. However, an identical argument was specifically addressed and rejected by the Colorado Supreme Court in the recent case of *Vagneur v. City of Aspen*, 295 P.3d at 510. The City concurs with the testimony of Mr. Suppes at the hearing on the irrelevance of the zoning classification ascribed to the property. Under Colorado law, a school district is ultimately empowered to construct a school on any property it may own regardless of the zoning. See: § 22-32-124(1)(d), C.R.S.

Paradoxically, even while the Plaintiffs are seeking a Preliminary Injunction against the Clerk for "interfering" with their referendum rights, two of the Plaintiffs' witnesses (Steve Waldstein and Renee Lewis) testified at the hearing that they had begun gathering signatures on the referendum petition anyway notwithstanding the Clerk's disapproval of the petition forms. The City's efforts to clearly and promptly communicate its legal position that Ordinance No. 170 is not subject to referendum was intended to save the petitioners' committee the time, money and effort that would be wasted in a vain attempt to gather signatures. Notably, in all of the appellate decisions cited in the City's Response to the Motion for Preliminary Injunction, petitioners had already circulated an initiative or referendum petition and obtained sufficient signatures, only to find in the end that the municipality would not place the matter on the ballot, and that the courts would agree the municipality had no duty to do so. The Clerk and the City cannot be faulted for staking out a position on this issue early, rather than "ambushing" the petitioners at the end of the process with a refusal to place the matter on the ballot.

The Motion for Preliminary Injunction as it pertains to the Clerk should be denied because the Plaintiffs have no probability of success on the merits of their claim that the Clerk erred in rejecting their petition forms.

Posting of Security

In conclusion, the City renews its request that, in the event the court grants the motion in whole or in part, the Plaintiffs be required to post adequate security in accordance with Rule 65 (c) in an amount sufficient to cover the damages DPS and the City will suffer if there is an undue delay in the school project as well as the conversion of the Fox Street property for the City's new domestic violence service center.

Respectfully submitted this 17th day of June, 2013.

By: /s/ David W. Broadwell

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In accordance with C.R.C.P. 121§1-29(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that today, June 17, 2013, the foregoing was served via ICCES on:

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