DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; and ZELDA HAWKINS, an individual. **Defendants:** CITY & 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▲**
Plaintiff's Attorneys: John Case, Esq. Atty reg. # 2431 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, Colorado 80222 Phone Number: (303) 757-8300 Email *case@bensoncase.com*	Case No.: 2013CV032444 Courtroom 376
PLAINTIFFS' CLOSING ARGUMENT	

Plaintiffs' Closing Argument consisting of three pages is submitted to the Court with this title page, and with Appendix 1 that includes the full text of Charter section 2.4.5 and relevant Denver ordinances.

Respectfully submitted June 17, 2013.

Benson & Case, LLP

By */s/ John Case*
John Case #2431

I. HISTORY OF PARCEL AND CITY DESIGNATION

The 26 acre triangular parcel that is identified on City maps as Hampden Heights North Park (Exhibits 1, 18, 19, 20, and 23) was purchased by the City in 1936 (Exhibit A). The land was part of an assemblage of parcels along the Cherry Creek flood plain, extending from downtown Denver to the Kenwood Dam in Arapahoe County (Ellis & Bonniwell testimony). When some private owners refused to sell land in the flood plain, the City purchased easements across the land, so that Denver citizens would have unobstructed use of the trails along Cherry Creek for horseback riding and recreation (Bonniwell testimony). Citizens kept their horses at stables such as Denver Country Club and the Glendale Riding Club, which later became the Riviera Restaurant. From the 1860's to present, Denver citizens have used the land along Cherry Creek, including the subject parcel, for park purposes including horseback riding, walking, bird watching, observing wildlife, and enjoying the beautiful natural scenery (Bonniwell testimony).

City officials represented to its citizens that the parcel was a park and would remain a park. The park was platted as "Open Space – Park" starting in 1966. In 1976 City Planning officials told David Longbrake that the parcel would remain a park in perpetuity (Longbrake testimony). The City's comprehensive land use plan (Exhibit 14). first published in 1967, informed Mr. Longbrake that the triangular parcel is classified "Public – Open – Parks" (Exhibits 14 & 15). Mr. Longbrake relied to his detriment on these representations, and would not have purchased his home adjacent to the park if the City could use the land for other than park purposes. The same is true for Plaintiff Steve Waldstein, who relied to his detriment on City zoning maps when he purchased his home adjacent to the park in 2000 (Waldstein testimony). Starting at least as early as 1967, the City placed Hampden Heights North Park ("HHNP") under the control of Denver Department of Parks and Recreation. In 1979 Mayor McNichols wrote to a Hampden Heights resident that the property was maintained by the Parks Department and would be "developed into a park but will also remain in native grass for some time" (Exhibit 26-3, 2d paragraph). In 2007 the City designated the land as part of a 90 acre natural area called "Paul A. Hentzell Park," which was to be restored to its natural state as a prairie remnant and habitat for indigenous wildlife including deer, fox, beaver, coyotes, prairie dogs, owls and hawks (Baird testimony; Johnstone testimony; Exhibit 17). A sign currently at the entrance to HHNP identifies the land as a "Park" (Exhibits 35-1 and 35-2). Current City zoning maps show the parcel as "OS-A", meaning "Open Space – Park" (Exhibits 25 and 19). HHNP meets the definition of *City park land* under Municipal Code, Sec. 39-191 (2), and the definition of *Natural Area* under Municipal Code section 39-191 (1). See Appendix 1, which provides the full text of charter section 2.4.5 and relevant ordinances.

II. ANALYSIS

Charter Section 2.4.5 states in part, "No land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance." Under the rule of construction *expressio unius exclusio alterius* (the expression of one thing excludes others not

mentioned, *e.g., Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001)), only park land acquired after 1955 must be specifically designated by ordinance. It necessarily follows that city park land acquired before 1955 does not require ordinance designation.

Since the charter does not require pre-1955 park land to be designated by ordinance, then it must also be true that the City can designate parks on pre-1955 land by other methods, including (1) representing to its citizens that such land is a park, (2) placing the land under the control of the Department of Parks and Recreation, and (3) posting signs indicating it is a park, (4) permitting and encouraging the public to use the land as a park. Here, it is undisputed that the City (1) represented to its citizens that HHNP is a park, (2) placed HHNP under the control of the Department of Parks and Recreation, (3) posted signs indicating HHNP is a park, (4) permitted and encouraged citizens to use HHNP as park land, and (5) encouraged citizens to invest in adjoining residential property based on the representation that HHNP would remain open space park land. Thus, the City's own actions, not prescriptive use by the public, designated Hampden Heights North Park as a park, even though there was no designation by ordinance.

On three occasions the City used peripheral acreage for purposes inconsistent with designation as park land. The first was dedication of a 10 acre strip along the east boundary to complete S. Havana St. The second was dedication of the southern tip of the triangle as part of East Girard Ave. in 1980 (Exhibit E). The third was leasing the southernmost 2 acres to Oppenheimer Corp. as a parking lot in 1992 (Exhibit E). None of these uses contradicts the Plaintiffs' position that the remaining 26 acre triangle is a park. None of these uses was inconsistent with the City's representations to its citizens that the 26 acre parcel was a park. Dedication of the eastern 10 acre strip to South Havana St. occurred before there were residents in Hampden Heights to protest the dedication (Ellis testimony). The City provided an underpass below Havana St. so that pedestrians could use the historic dirt trails along Cherry Creek both east and west of Havana (Exhibit 1). The dedication of less than an acre to E. Girard Ave. in 1980 was insignificant. Leasing the 2 acre parking lot to Oppenheimer in 1992 was a temporary discontinued use that the Parks Department planned to reverse by tearing out the asphalt and re-seeding the land after 2007 (Baird testimony). The City did not allow a vote of the people on any of the uses of peripheral acreage, as required by section 2.4.5 of the charter, so there was no waiver of charter protection by Plaintiffs or their predecessors in interest.

Section 2.4.5 of the charter reserves to the citizens of Denver the right to vote on whether park land may be sold. Voting is a fundamental right of every citizen. Statutory provisions granting the right to vote must be construed broadly, and provisions limiting the right to vote must be construed narrowly. COLO. CONST. Art. 5, § 1; *Bernzen v. Boulder*, 525 P.2d 416, 419 (1974); *Margolis v. District Court*, 638 P.2d 397, 302 (Colo. 1981). Thus, the court must give a broad construction to section 2.4.5 of the charter.

It is beyond dispute that (1) the City acquired Hampden Heights North Park before 1955, and (2) the City designated HHNP as a park by its own actions. Giving a broad construction to charter section 2.4.5, it protects HHNP from sale unless Denver voters approve the sale in an election. Ordinance 170 (Exhibit 5) and the land swap contract (Exhibit B) are void because they are in derogation of the fundamental right of Denver citizens to vote on the sale of park

land. Numerous pre-1955 parks in Denver that are not designated by ordinance will be affected by the Court's decision (Baird testimony).

Council enacted both Ordinance 168 (Exhibit 48, designating 16 acres of HHNP as part of Hentzell Park) and Ordinance 170 (Exhibit 5, transferring 10.7 acres to DPS) at the same city council public meeting April 1. Just as the decision to designate 16 acres as a park is legislative, the decision NOT to designate the remaining 10.7 acres and instead trade it is also legislative. Rezoning decisions are legislative in character, not administrative. *Margolis,* 638 P.2d at 303-04. Council recognized the City's historical treatment of HHNP by designating 16 acres as park land. The decision NOT to designate the remaining 10.7 acres and instead to dispose of it confirms that the Council was engaged in legislative line-drawing that effectively re-zoned 10.7 acres from previous Open Space designation. Acts that constitute new declarations of public policy are legislative. *Id.* The "de-designation" of natural area park land in Ordinance 170 was new public policy and unprecedented (Baird testimony). Chapter 39 of Denver Municipal Code does not provide for "de-designation" of a natural area (see Appendix 1). Constructing a school in a park is a permanent and substantial change in use. City Council's approval of the exchange was not just a "real estate transaction," it was also approval of the substantial change in land use policy that accompanied it. Viewed in this light, Ordinance 170 was not an administrative real estate transaction. Rather, it was a legislative rezoning decision that is subject to challenge and repeal by the people.

Plaintiffs have a reasonable probability of success on the merits. They will suffer immediate irreparable injury in the absence of injunctive relief, and they have no other adequate remedy available. A preliminary injunction serves all Denver citizens by protecting HHNP and other pre-1955 parks from sale without a vote. An injunction will preserve park status of this unique wildlife habitat that has existed in its natural state since 1936. Balancing the equities favors entry of a Preliminary Injunction. DPS chief operating officer David Suppes testified that DPS can find alternative sites for construction of an elementary school. Common sense and planning treatises inform us that, because of potential dangers, construction of an elementary school in a flood plain next to a five lane 45 mph highway is not good practice (Longbrake testimony). Entry of the injunction will prevent city officials including clerk and recorder Debra Johnson from interfering with the fundamental right of Denver citizens' to vote on this issue (see Exhibit 9, in which Johnson denies plaintiffs' rights to circulate a referendum petition).

For the foregoing reasons, Plaintiffs respectfully request that the Court issue the Preliminary Injunction (1) enjoining the City from transferring the 10.7 acre parcel of park land; (2) enjoining DPS from taking title to or developing any part of the parcel; and (3) enjoining Debra Johnson from interfering with the Plaintiffs' rights to repeal ordinance 170 by referendum petition, and granting the Plaintiffs 90 days from the date of the injunction to obtain additional signatures. Since May 21, 2013 Plaintiffs have obtained approximately 2500 valid signatures, but their efforts were impeded by misinformation from the City Attorney and Debra Johnson (Renee Lewis testimony).

Plaintiffs request that, pursuant to CRCP 65(c), the Court allow the Plaintiffs to give security in the amount of $100. In order to minimize any potential adverse impact on DPS, plaintiffs request that the Court set a prompt date for trial of the Permanent Injunction.

APPENDIX 1
CITY CHARTER AND ORDINANCE PROVISIONS

Charter § 2.4.5 - Sale and leasing of parks.

Without the approval of a majority of those registered electors voting in an election held by the City and County of Denver, no park or portion of any park belonging to the City as of December 31, 1955, shall be sold or leased at any time, and no land acquired by the City after December 31, 1955, that is designated a park by ordinance shall be sold or leased at any time, provided, however, that property in parks may be leased for park purposes to concessionaires, to charitable or nonprofit organizations, or to governmental jurisdictions. All such leases shall require the approval of Council as provided for in Article III of this Charter. No land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance.

Denver Municipal Code Sec. 39-191. Definitions.

The following words and phrases, when used in this article, shall have the meanings respectively ascribed to them:

(1)

Natural area. A geographical area of land of either geologic or biologic significance which retains, has had reestablished, or has the potential to reestablish many aspects of its natural character. Such an area could now or in the future support native vegetation, associated biological and geological features, or provide habitat for indigenous wildlife or plant species. Such an area could host geological, scenic, or other natural features of scientific, aesthetic, or educational value.

(2)

City Park land. Any parks, parkways, mountain parks and other recreational facilities, as well as other land, waterways and water bodies, owned, operated or controlled by the department of parks and recreation.

(3)

City property. Any land, waterways and water bodies owned, operated, or controlled by any department, office, agency, board, or other subsidiary of the City and County of Denver, except the department of parks and recreation.

(4)

Other governmental property. Any land, waterways and water bodies owned, operated, or controlled by any governing body, department, agency or political subdivision of the federal government and the state or of any county, municipality, school district, special district, authority, or other public entity, except the City and County of Denver.

(5)

Conservation easement. As defined and provided for in Article 30.5 of Title 38 of the Colorado Revised Statutes.

(6)

Cooperative agreement. As provided for in section A4.4-6 of the City Charter.

(Ord. No. 764-97, § 1, 11-3-97)

Sec. 39-192. Natural area designation and preservation.

(a)

Under section A4.4-1 of the City Charter, the manager of parks and recreation has the power and authority to adopt rules and regulations for the management, operation and control of city park land, including the power to adopt rules and regulations for the designation and preservation of natural areas contained within said city park land.

(b)

Subject to any executive order or interdepartmental agreements directing or allowing the designation and preservation of city property as natural areas, the manager of parks and recreation shall have the power and authority to adopt rules and regulations for the designation and preservation of natural areas contained within said city property.

(c)

Subject to any cooperative agreements of an intergovernmental nature entered regarding the designation and preservation of other governmental property as natural areas, the manager of parks and recreation shall have the power and authority to adopt rules and regulations for the designation and preservation of natural areas contained within said other governmental property.

(d)

Subject to any private easements or agreements, conservation easements, or cooperative agreements entered regarding the designation and preservation of private property as natural areas, the manager of parks and recreation shall have the power and authority to adopt rules and regulations for the designation and preservation of natural areas contained within said private property.

(e)

All rules and regulations authorized by the City Charter or under this section shall be adopted in accordance with section 39-2 of the Revised Municipal Code and shall be enforced in accordance with sections 39-1 and 39-3 through 39-22, inclusive, of the Revised Municipal Code. Notwithstanding any provision of Article I of this chapter to the contrary, sections 39-1 through 39-22, inclusive, shall be applicable to, and enforceable upon, all property designated as natural areas, subject to any limitations set forth in this article. The rules and regulations may set forth classifications, criteria, procedures, and public process for designating and preserving natural areas as well as regulatory requirements controlling public access to and use of the natural areas.

(f)

Any rule or regulation adopted by the manager of parks and recreation and applicable to properties other than city park land may not supersede existing contract rights or property interests, including easements and leases, and may not be enforced in any manner that interferes with existing uses or purposes of the properties except as expressly provided in any applicable executive order, interdepartmental agreement, cooperative agreement, conservation easement, or private easement or agreement.

(Ord. No. 764-97, § 1, 11-3-97)

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2013 a true and correct copy of the foregoing **PLAINTIFFS' CLOSING ARGUMENT** was served on the following:

Denver County District Court
1437 Bannock Street
Denver, CO 80202

VIA ICCES FILE & SERVE

Douglas J. Friednash, Esq.
Denver City Attorney
David W. Broadwell, Esq.
Patrick A. Wheeler, Esq.
Mitch T. Behr, Esq.
Assistant City Attorney
1437 Bannock St. R#353
Denver CO 80202

VIA ICCES FILE & SERVE

John H. Kechriotis, Esq.
General Counsel
Michael Hickman, Esq.
Jerome A. DeHerrera
Denver Public Schools
900 Grant St. #401
Denver CO 80203-2996

VIA ICCES FILE & SERVE

s/Karen Corner

Karen Corner

Your filing is successfully submitted to the court. This filing is not considered final until it is accepted by the court.

Filing Information:

Filing ID: 6DFEFB436B66A
Court Location: Denver County - District
Case Number: 2013CV032444
Case Caption: Friends Of Denver Parks Inc et al v. C And C Of Denver et al
Authorized Date: 06/17/2013 4:02 PM

Filing Party(ies):

Party	Type	Status	Attorney	Organization
Friends Of Denver Parks Inc	Plaintiff		John M Case (Benson and Case, LLP)	Benson and Case, LLP
Steve Waldstein	Plaintiff		John M Case (Benson and Case, LLP)	Benson and Case, LLP
Zelda Hawkins	Plaintiff		John M Case (Benson and Case, LLP)	Benson and Case, LLP

Documents :

Document ID	Event	Title	Statutory Fee
5EC001119132E	Filing Other	Plaintiff's Closing Argument	$0.00

Service:

Party	Type	Attorney	Organization	Method
C And C Of Denver	Defendant	Patrick Wheeler	Denver City Attorneys Office	E-Service
C And C Of Denver	Defendant	Mitchel Todd Behr	Denver City Attorneys Office	E-Service
C And C Of Denver	Defendant	David W Broadwell	Denver City Attorneys Office	E-Service
Debra Johnson	Defendant	Patrick Wheeler	Denver City Attorneys Office	E-Service
Debra Johnson	Defendant	Mitchel Todd Behr	Denver City Attorneys Office	E-Service
Debra Johnson	Defendant	David W Broadwell	Denver City Attorneys Office	E-Service

Submission Options:

Note To Clerk: N/A
Primary Attorney: John M Case
Authorizer: John M Case
Submit Options: Submit to the court and serve selected parties.

Billing Information:

Statutory Filing Fees: $0.00
Filing Fee: $6.00
Service Fees: $7.50
Total Fees: $13.50
Billing Reference: Friends at Denver Parks