

<p>COLORADO COURT OF APPEALS Court Address: 2 East Fourteenth Ave. Denver, Colorado 80202</p>	
<p>District Court, City and County of Denver, Colorado Case No. 2013 CV 32444 Hon. Herbert L. Stern III, District Court Judge</p>	
<p>Plaintiffs/Appellants FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; and ZELDA HAWKINS, an individual.</p>	
<p>Defendants/Appellees: 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.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiffs/Appellants: John Case, # 2431 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, CO 80222 PH: (303) 758-5003 FAX: (303) 753-0444 Email: case@bensoncase.com; kari@bensoncase.com</p>	<p>Case No.:</p>
<p style="text-align: center;">NOTICE OF APPEAL</p>	

Plaintiffs/ Appellants Friends of Denver Parks, Inc., Steve Waldstein and Zelda Hawkins, through counsel BENSON & CASE, LLP, respectfully submit this Notice of Appeal pursuant to C.A.R. 1 (a)(3), 3(d) and 4(a).

I. TRIAL COURT INFORMATION

A. TRIAL COURT: District Court, City and County of Denver, Colorado

- B. TRIAL COURT JUDGE: The Honorable Herbert L. Stern III
- C. PARTIES INITIATING APPEAL: Friends of Denver Parks, Inc., Steve Waldstein and Velda Hawkins
- D. TRIAL COURT CASE NUMBER: 2013 CV 32444

**II. DESCRIPTION OF NATURE OF THE CASE AND
DISPOSITION IN THE TRIAL COURT**

(A) This is an action to enjoin the City and County of Denver from trading 10.7 acres of a 26 acre park to Denver Public School District Number 1, in violation of City Charter section 2.4.5, which requires a vote of the people before any part of city park land may be sold. Plaintiffs also seek an order enjoining the city clerk and recorder, Debra Johnson, from denying plaintiffs the right to circulate a referendum petition that would allow the citizens of Denver to vote on the issue.

The land in dispute is a 26 acre triangular parcel that is identified on current city maps as Hampden Heights North Park (“HHNP”). The city purchased the parcel in 1936 as part of an assemblage of parcels along the Cherry Creek flood plain, extending from downtown Denver to the Kenwood Dam in Arapahoe County. The city intended that the land would be managed for flood control and recreational use by Denver citizens. From the 1936 to present, Denver citizens have used the subject parcel for park purposes, including horseback riding, bicycling, walking, bird watching, observing wildlife, and enjoying the beautiful natural scenery.

Denver City Charter Section 2.4.5 prohibits the city from selling any park land that was acquired by the City before December 31, 1955, without a vote of the people. The city purchased the parcel in 1936, when it was still part of Arapahoe County. At an evidentiary hearing before the trial court, the evidence showed that: from the time the land was purchased in 1936, Denver citizens used the land for recreational purposes. After annexing the land in 1966, the city took affirmative steps to designate the land as a park, including: (1) publishing zoning and land use maps that show the land as “Open Space - Park,” (2) telling property owners that it is a park and will remain a park in perpetuity, (3) posting signs stating it is a park, (4) placing it under the management of the Denver Department

of Parks and recreation, (5) using public funds to construct bicycle trails and bridges through the park for use by the public, (6) identifying the property on city maps as “Hampden Heights North Park,” and (7) including the 26 acres as part of a 90 acre natural area and wildlife habitat known as “Paul Hentzell Park Natural Area.”

On April 1, 2013 the city reversed 76 years of land use policy with respect to HHNP. City council enacted two new ordinances that subdivided HHNP into a north parcel and a south parcel. Ordinance number 168 incorporated the metes and bounds description of a new survey, and designated the north parcel as part of Paul A. Hentzell Park. Ordinance number 170, also based on a new survey, traded the south parcel to DPS in exchange for an office building at 1330 Fox St. When plaintiffs submitted a referendum petition to clerk and recorder Debra Johnson to repeal ordinance 170, she ruled that city council was not acting in a legislative capacity when it subdivided the 26 acre parcel. On this basis, the clerk and recorder denied plaintiffs the right to circulate a referendum petition to repeal the land swap.

Following an evidentiary hearing on June 12 and June 13, 2013, the trial court entered a written order on July 5, 2013 denying plaintiffs’ motion for a preliminary injunction (“the order”).

(B) Plaintiffs appeal from the trial court’s order denying their motion for a preliminary injunction. Appeals from an order granting or denying a temporary injunction are appealable pursuant to C.A.R. 1 (a)(3). This appeal is taken pursuant to C.A.R. 3 (d) and 4(a).

(C) The order resolved all issues related to the motion for preliminary injunction.

(D) The order was not made final pursuant to CRCP 54(b).

(E) The order was signed July 5, 2013.

(F) The trial court did not grant an extension to move for post-hearing relief.

(G) No post hearing motions were filed.

(H) N/A

(I) No extension was granted to file notice(s) of appeal.

III. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

The following list is advisory only. Issues on appeal may include, but are not necessarily limited to, the following:

1. Whether the trial court erred in failing to make adequate findings.
2. Whether the trial court erred in construing section 2.4.5 of the Denver city charter to require that parks acquired prior to December 31, 1955 must be either designated by ordinance, or used as a park at time of acquisition.
3. Whether the trial court erred in ruling that plaintiffs failed to establish that the city acted in a legislative capacity when it subdivided HHNP into two separate parcels, changed the land use on one of the parcels from “Public – Open Space – Park” to a development site for an elementary school, and then traded the parcel to DPS for an office building.

IV. TRANSCRIPT INFORMATION

Transcripts of proceedings June 12, 2013, June 13 2013, and June 28, 2013 are necessary. The proceedings were audio-recorded. Plaintiffs/Appellants filed a written request for the transcripts.

V. PREARGUMENT CONFERENCE

Plaintiffs/Appellants do not request preargument conference.

VI. COUNSEL

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VII. APPENDICES

1. A copy of the trial court's order denying Plaintiff's Motion for Preliminary Injunction is attached as Appendix 1.
2. A copy of Denver City Charter section 2.4.5 and relevant ordinances related to parks and natural areas are attached as Appendix 2.

Respectfully submitted July 5, 2013.

BENSON & CASE, LLP

A handwritten signature in cursive script, appearing to read "John Case", is written over a horizontal line. The signature is written in black ink.

John Case #2431

Attorneys for Appellants

APPENDIX 1

July 3, 2013 Trial Court Order Denying Motion for Preliminary Injunction

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202	DATE FILED: July 2, 2013 3:00 PM
<p>Plaintiff: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; and ZELDA HAWKINS, an individual</p> <p>v.</p> <p>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.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2013CV32444</p> <p>Courtroom: 376</p>
ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION: C.R.C.P. 65	

A hearing was held on June 12, 2013, and June 13, 2013, on Plaintiffs' Motion For Preliminary Injunction: C.R.C.P. 65, as amended by Plaintiffs' First Amended Motion For Preliminary And Permanent Injunction Pursuant to C.R.C.P. Rule 65 ("Plaintiffs' Motion"). The Court, having reviewed Plaintiffs' Motion and all filings of the parties related thereto, having received evidence in the form of testimony and exhibits and having heard arguments of counsel, hereby FINDS as follows:

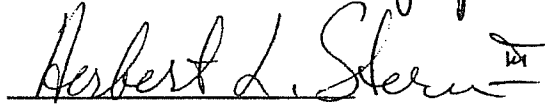
1. To the extent the Plaintiffs sought to enjoin the City from conveying the subject property to DPS on the theory that the conveyance requires voter approval under Denver Charter section 2.4.5, the Plaintiffs have not demonstrated a probability of success on the merits. The Plaintiffs did not establish that the property has ever been designated as a park by ordinance. Furthermore, the Plaintiffs did not demonstrate that the property was a "park belonging to the city as of December 31, 1955" to the extent voter approval would be required prior to conveyance of the property. See: *Hall v. Denver*, 115 Colo. 538, 177 P.2d 234 (Colo. 1946).

2. To the extent the Plaintiffs sought to enjoin the Clerk and Recorder from 'interfering' with their right to circulate referendum petitions, the Plaintiffs have not demonstrated a probability of the success on their claim that the Clerk erred in rejecting their petition forms. In particular, the Plaintiffs did not establish that the City ordinance approving the real estate contract with DPS (Ordinance No. 170, series of 2013) was legislative in nature and thus subject to referendum within the meaning of Art. V, Sec. 1(9) of the Colorado Constitution and the Denver Charter. See: *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013).

3. Because the Plaintiffs have not demonstrated a probability of success on the merits of their claim as required by *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), it is unnecessary to address the other standards governing preliminary injunctions.

Therefore, the Plaintiffs' Motion is hereby DENIED.

SO ORDERED this 5th day of July 2013.

Handwritten signature of Herbert L. Stern III in cursive script, with a horizontal line underneath.

Herbert L. Stern III

District Court Judge

APPENDIX 2
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)