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 Attorney: John Case, Atty reg. # 2431 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, Colorado 80222 Phone Number: (303) 757-8300 FAX Number: (303) 753-0444 E-mail: case@bensoncase.com	Case No.: 2013CV032444 Courtroom 376

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT AGAINST DEBRA JOHNSON IN HER CAPACITY AS CLERK AND RECORDER

Plaintiffs Friends of Denver Parks, Inc. ("Friends"), Steve Waldstein and Zelda Hawkins, by and through counsel, BENSON & CASE, LLP, respectfully submit this reply in support of their Motion for Leave to File Third Amended Complaint Against Debra Johnson in her Capacity as Clerk and Recorder ("Motion").

For the reasons set forth below, Plaintiffs agree with the statement in paragraph 18 of the Response filed by Defendants City and County of Denver ("City") and Debra Johnson, Clerk and Recorder, that Plaintiffs "should have reiterated their original claims in their proposed Third Amended Complaint." Accordingly, Plaintiffs hereby withdraw the proposed Third Amended Complaint attached to the Motion and substitute the Revised Third Amended Complaint attached hereto as Exhibit 1. As the Court can see, the Revised Third Amended Complaint recites all claims Plaintiffs are pursuing, including the previously pled claims. The Revised Third Amended Complaint makes clear that Plaintiffs are not abandoning any of the claims set forth in their Second Amended Complaint.

The remaining contentions advanced by the City and Ms. Johnson lack merit. Good cause exists for the proposed amendments. Defendants' contention that the proposed addition of Friends' Petitioners' Committee as plaintiffs would be futile is based upon misreading of the City's Charter and the language of C.R.C.P. 106(b). While Defendants are correct that Plaintiffs are in part seeking leave to file a supplemental pleading rather than an amended pleading as to matters occurring after this lawsuit was commenced (Response ¶¶ 16-17), the distinction is without a difference in this case since the standard for allowing a supplemental pleading is the same as that for allowing an amended pleading, and that standard is met here.

DISCUSSION

I. GOOD CAUSE EXISTS FOR ALLOWING PLAINTIFFS TO FILE THEIR PROPOSED REVISED THIRD AMENDED COMPLAINT.

1. Plaintiffs' Revised Third Amended Complaint (Ex. 1 attached) includes two amendments. First, Plaintiffs propose to add the members of their Petitioners' Committee (John Case, Judith M. Case, Renee Lewis, David Hill and Shawn Smith) as Plaintiffs. Second, Plaintiffs propose to add new claims against Ms. Johnson based in part on events occurring after the commencement of this litigation. The Revised Third Amended Complaint does not seek to add new parties or claims as to the City.

2. The law provides that in a Rule 106 action "[a] timely complaint may be amended **at any time** with leave of the court, for good cause shown, **to add, dismiss or substitute parties**, and **such amendment shall relate back** to the date of filing of the original complaint." C.R.C.P. 106(b) (emphasis added).

3. Rule 106(b) authorizes courts to allow amendments adding parties alleged to be indispensable. *E.g., Frazier v. Carter*, 166 P.3d 193, 195 (Colo. App. 2007).

4. The purpose of Rule 106(b) was "to remedy an existing trap for a plaintiff who named the governmental entity as defendant instead of its governing body from which the appeal is taken, or who failed to name another indispensable party, typically the applicant, and then was barred by C.R.C.P. 106(a)(4)." *Black Canyon Citizens Coal., Inc. v. Board of Cty. Comm'rs of Montrose Cty.*, 80 P.3d 932, 933 (Colo. App. 2003).

5. Even if the party seeking an amendment does not specifically allege "good cause," a trial court properly allows the proposed amendment where doing so facilitates resolution on the merits and avoids piecemeal litigation. *Neighbors for a Better Approach v. Nepa*, 770 P.2d 1390, 1391 (Colo. App. 1989).

6. In this case, Ms. Johnson first claimed that Friends' Petitioners' Committee is the only entity with standing to challenge her actions long after this litigation was initiated. Plaintiffs disagree with that contention for the reasons cited below. However, Ms. Johnson's contention amounts to a claim that Plaintiffs omitted indispensable parties from their complaint. That is

exactly the sort of inadvertent error Rule 106(b) was intended to address. *Black Canyon*, 80 P.3d at 933. Pursuant to the case that Defendants themselves cite as authoritative, simple "mistake" or "inadvertence" constitutes good cause to amend a complaint. *Polk v. District Court*, 849 P.2d 23, 27 (Colo. 1993), *cited in* Response ¶ 10. Plaintiffs' failure to include members of Friends' Petitioners' Committee in their prior pleadings was at worst an inadvertent error. Allowing the amendment adding new Plaintiffs would facilitate resolution of the claims against Ms. Johnson on the merits as opposed to procedural technicalities. That being true, good cause exists for permitting the proposed amendment pursuant to C.R.C.P. 106(b). Defendants do not dispute that the proposed amendment is in the interests of justice per C.R.C.P. 15(a).

II. DEFENDANTS' CONTENTION THAT THE AMENDMENT ADDING THE MEMBERS OF THE PETITIONERS' COMMITTEE IS FUTILE FAILS.

7. As Defendants correctly note, a proposed amendment may be disallowed on futility grounds, meaning *inter alia* that the amendment could not withstand a motion to dismiss. *Benton v. Adams*, 56 P.3d 81, 86 (Colo. 2002).

8. The City and Ms. Johnson contend that the proposed amendment adding Petitioners' Committee members as Plaintiffs is futile. (Response ¶ 15.) That contention is based on Defendants' claim that Section 8.3.2(C) of the Denver City Charter "is crystal clear" and "exclusively vests standing" to challenge the Clerk's rejection of a petition "in the petitioners' committee." (Response ¶¶ 5, 11.)

9. Defendants' futility contention fails for at least three reasons.

10. ***First,*** the futility argument is based on a misreading of the applicable Charter language. The provision states in relevant part:

> If the affidavit, petition sample, or ballot title is rejected, the Clerk and Recorder shall make written findings specifying the defects in the affidavit, petition sample, or ballot title. The petitioners' committee, if not satisfied with the decision of the Clerk and Recorder, **may** institute legal proceedings with the appropriate court.

Charter § 8.3.2(C) (emphasis added). Defendants' claim that the Charter vests "exclusive standing" in the petitioners' committee is incorrect as a simple matter of fact. The term "may" is generally "permissive or directory" rather than mandatory, and indicates the availability of choice. *E.g., People v. District Court*, 713 P.2d 918, 922 & n.7 (Colo. 1986). Far from conferring "exclusive standing" on anyone, the Charter simply states that a petitioners' committee "may" challenge the Clerk's action in court. The provision does not purport to be an exclusively specification of permissible plaintiffs. Since the Defendants' futility argument is based on an untenable reading of the Charter provision at issue, the argument fails.

11. ***Second,*** even if Defendants' proffered reading of the Charter language were correct, their futility argument still fails because the proposed amendment adding the members of

the Petitioners' Committee relates back to the filing of the original complaint. Defendants' contention that an amendment to cure a defect in the original Rule 106 complaint can never relate back is based exclusively on case law from the 1970s. (Response ¶¶ 12-13.[1]) However, Rule 106(b) was amended in 1981 to provide expressly that amendments adding parties are allowed and relate back, thus superseding prior case law. *See Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 676 & n.6 (Colo. 1982) (1981 amendment to Rule 106(b) changed prior case law holding that failure to bring a Rule 106 action in the name of the proper party was a "jurisdiction defect" that could not be cured via subsequent amendment). Today, the rule expressly allows pleading amendments to add allegedly indispensable parties and expressly provides that such amendments relate back. *Black Canyon, supra*; *Frazier, supra*. According to Defendants themselves, the members of Friends' Petitioners' Committee are indispensable parties because they are the only proper Plaintiffs as to the claims against Ms. Johnson. Thus, the proposed amendment adding those members as Plaintiffs would relate back pursuant to the clear and unequivocal terms of C.R.C.P. 106(b).

12. ***Third***, Defendants' contentions regarding futility, if accepted, would elevate form over substance and raise grave concerns regarding deprivation of fundamental constitutional rights. For example, the Colorado Constitution expressly reserves the rights of initiative and referendum to the people. Colo. Const. art. V, § 1(2, 3). The rights of initiative and referendum are fundamental in nature. *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994). Legislation governing the exercise of those rights must be liberally construed so as to facilitate rather than hamper voter initiatives and referendums. *Id.* at 1384.

13. In this case, Defendants advance a reading of Section 8.3.2(C) of the Charter and of C.R.C.P. 106(b) that would restrict the availability of an action challenging the Clerk's action on a referendum petition to a single plaintiff (the petitioners' committee) and would categorically preclude any amendment to cure an alleged defect in the plaintiff's identity from relating back. Defendants' interpretation would bar the existing Plaintiffs in this action – an organization and two individuals who clearly have a tangible personal stake in the outcome of the referendum process – from ever challenging Ms. Johnson's actions with regard to the Petition. That narrow and hypertechnical interpretation of the Charter and civil rules would raise serious concerns about violation of Plaintiffs' fundamental right to contest local government action via referendum. Pursuant to the doctrine of constitutional avoidance, Defendants' interpretations of the Charter and Rule 106(b) should be rejected in favor of those advanced by Plaintiff, which facilitate rather than hinder the fundamental rights at issue. *See People v. Montour*, 157 P.3d 489, 502-03 (Colo. 2007) (doctrine of constitutional avoidance requires courts "to interpret a statute in a constitutional manner where the statute is susceptible to a constitutional construction.").

14. To sum up, the Defendants' claim that adding the Petitioners' Committee members as Plaintiffs would be futile is based on a misreading of the City Charter, which does

[1] The cases cited in Defendants' Response are *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1976), *Richter v. City of Greenwood Village*, 577 P.2d 776 (Colo. App. 1978) and *Frankmore v. Board of Educ.*, 589 P.2d 1375 (Colo. App. 1978).

not purport to make petitioners' committees the only viable plaintiffs in a Rule 106 action contesting the Clerk's action on a referendum petition. Moreover, the futility claim fails because Rule 106(b) expressly provides that amendments like the one at issue here relate back. Finally, the Defendants' proposed interpretations of the Charter and Rule 106(b) should be rejected pursuant to the doctrine of constitutional avoidance because those interpretations would raise grave concerns regarding the infringement of Plaintiffs' fundamental constitutional rights.

III. PLAINTIFF'S REQUEST TO ASSERT NEW CLAIMS BASED ON FACTS ARISING AFTER THE COMMENCEMENT OF THIS CASE IS ENTIRELY PROPER UNDER C.R.C.P. 15(d).

15. Defendants chide Plaintiffs for not styling their amended pleading as a supplemental pleading because the proposed Third Amended Complaint includes new claims based on post-commencement events. (Response ¶ 16-17.)

16. Defendants are correct that the proposed Third Amended Complaint "contains a combination of alleged facts and claims for relief, some of which relate to events occurring since the filing of the previous complaint, and some of which relate to events occurring afterward." (*Id.* ¶ 16.) If the point of those meanderings is the trivial observation that a pleading alleging facts and/or claims arising after commencement of a lawsuit are called supplemental pleadings, then Plaintiffs agree. *See* C.R.C.P. 15(d). However, that is meaningless for purposes of the Motion because the considerations governing whether to allow pleading amendments per Rule 15(a) and those governing whether to allow supplemental pleadings per Rule 15(d) are the same. *Lutz v. District Court*, 716 P.2d 129, 131 n.1 (Colo. 1986).

17. Here, Plaintiffs seek to add claims based on Ms. Johnson's rejection of a petition submitted to her on July 1, 2013, well after this lawsuit was commenced. Rule 15(d) specifically permits inclusion of those claims in a new pleading, and the Defendants offer no reason at all why the Plaintiffs should not be allowed to add those claims here. Defendants' contentions regarding the supplemental v. amended pleading dichotomy present distinctions without differences and should be rejected outright.

IV. THE REVISED THIRD AMENDED COMPLAINT ATTACHED HERETO ADDRESSES AND RESOLVES DEFENDANT'S CONCERNS REGARDING WHETHER PLAINTIFFS INTEND TO "PRESERVE" THE CLAIMS IN THEIR SECOND AMENDED COMPLAINT.

18. Defendants assert that if Plaintiffs want to pursue all their claims – the ones presented in prior pleadings plus the ones advanced in the proposed Third Amended Complaint – then Plaintiffs should have reiterated all their prior claims in the new pleading. (Response ¶ 18.)

19. Plaintiffs agree with that assertion. Accordingly, they hereby withdraw the proposed Third Amended Complaint attached to the Motion and substitute the Revised Third Amended Complaint attached hereto as Exhibit 1. The Revised Third Amended Complaint

addresses Defendants' concerns by reiterating the claims made in the Second Amended Complaint along with the new claims now being proposed. Thus, the Revised Third Amended Complaint makes clear that Plaintiffs are not abandoning their previously asserted claims.

CONCLUSION

20. For the foregoing reasons, Plaintiffs respectfully request leave to file the Revised Third Amended Complaint attached hereto as Exhibit 1.

Respectfully submitted July 17, 2013.

BENSON & CASE, LLP

Original signed by John Case

John Case, # 2431
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2013 true and correct copies of the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT AGAINST DEBRA JOHNSON IN HER CAPACITY AS CLERK AND RECORDER** were filed and served on the following:

Denver County District Court
1437 Bannock Street
Denver, CO 80202

VIA ICCES

Mr. David W. Broadwell, Esq.
Mr. Patrick Wheeler, Esq.
Assistant City Attorneys
1437 Bannock St. R#353
Denver CO 80202

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

VIA ICCES

s/Karen Corner
Karen Corner

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiffs: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; ZELDA HAWKINS, an individual; MEMBERS OF THE PETITIONERS COMMITTEE TO REPEAL DENVER ORDINANCE 170, consisting of JOHN CASE, JUDITH M. CASE, RENEE LEWIS, DAVID HILL, AND SHAWN SMITH. **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 FAX Number: (303) 753-0444 E-mail: case@bensoncase.com	Case No.: 2013CV032444 Courtroom 376
REVISED THIRD AMENDED COMPLAINT AND JURY DEMAND	

Plaintiffs, through counsel BENSON & CASE, LLP, submit this Revised Third Amended Complaint for Declaratory and Injunctive relief, and for judicial review of the acts of Defendant Debra Johnson ("Johnson") pursuant to CRCP 106(a)(4).

SUMMARY OF COMPLAINT

Plaintiffs' First Claim for Relief seeks a declaratory judgment that Hampden Heights North Park ("HHNP") is park land owned by Defendant City and County of Denver ("the City"). Plaintiffs claim that by signing a contract to trade part of the park land for an office building downtown, the City acted *ultra vires,* in violation of City Charter section 2.4.5, which prohibits the sale of any park land without a vote of the people. Plaintiffs ask the Court to enjoin the City from transferring HHNP.

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PLAINTIFF'S EXHIBIT
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Plaintiffs' Second Claim for Relief seeks a Declaratory Judgment that on April 1, 2013 city council subdivided HHNP into two separate parcels, each with different land uses, and designating 10.771 acres of open space for development by Defendant School District No. 1 in the City and County of Denver ("DPS"). Plaintiffs assert that subdividing HHNP constitutes new municipal policy and legislative action by the City.

Plaintiffs' Third Claim for Relief seeks a Declaratory Judgment that DPS does not lawfully hold title to the above-referenced 10.771 acre parcel. Plaintiffs ask the Court to enjoin DPS from developing the subject land in a manner inconsistent with its long-standing use as a public park.

Plaintiffs' Fourth Claim for Relief seeks declaratory judgment that section 8.3.2 (C) of the city Charter on its face and as applied violates fundamental rights of the plaintiffs and the people of Denver guaranteed by the First, Fifth, and Fourteenth Amendments of the U.S. Constitution, Article II Sections 10 and 25, and Article V § 1 of the Constitution of Colorado, and section 8.3.1 of the Charter of the City and County of Denver.

Plaintiffs' Fifth, Sixth, and Seventh Claims for relief seek judicial review pursuant to CRCP 106(4)(a) of the clerk and recorder's interference with Petitioners' activities and rejection of the Petitioners Committee referendum petition. The referendum petition was signed by 6,664 registered voters in the city and county of Denver. 6,129 signatures are required to place the issue on the ballot. The referendum petition included more than enough signatures to place the issue on the ballot. On July 3, 2013 Johnson rejected the referendum petition. Johnson refuses to place the referendum issue on the ballot as required by the city Charter. Plaintiffs seek injunctive relief allowing them until August 19, 2013 to gather more signatures on the referendum petition, and an order directing the city and Johnson to place the referendum issue on the ballot.

STANDING OF PLAINTIFFS

1. Plaintiff Friends of Denver Parks, Inc. ("Friends") is a private, non-profit corporation organized and existing under the laws of Colorado with its office located at 10081 E. Cornell Ave. Denver CO 80231. The corporate office is located on real property directly adjacent to Paul A. Hentzell Park and Natural Area.

2. The Members of Friends are Judith M. Case, 10081 E. Cornell Ave. Denver CO 80231; Renee Lewis, 2770 S. Elmira St. Unit 38, Denver CO 80231; David Hill, 2770 S. Elmira St. Unit 38, Denver CO 80231; and Shawn Smith, 3905 S. Monaco Parkway Denver CO 80237.

3. All Members of Friends are also members of the Petitioners Committee of the Referendum Petition to Repeal Denver Municipal Ordinance 170, series 2013.

4. The Members of Friends live in close proximity to HHNP.

5. All of Friends' Members are adult voting residents of the City and County of Denver who use and value HHNP for its aesthetic beauty and natural state.

6. Plaintiff Steve Waldstein ("Waldstein") is an individual who owns the real property and resides at 3326 S Geneva Street Denver, CO 80231 in the Hampden Heights neighborhood.

7. Waldstein's residence is directly adjacent to HHNP.

8. Waldstein purchased his residence in the Hampden Heights neighborhood in 1999 because of its proximity to the beauty and aesthetic value of HHNP.

9. When purchasing his residence adjacent to HHNP, Waldstein relied to his detriment on City representations that Hampden Heights North Park was park land and open space, and that HHNP would remain park land and open space.

10. Plaintiff Zelda Hawkins ("Hawkins") is an individual who owns real property and resides at 3319 S. Galena Street Denver, CO 80231 in the Hampden Heights neighborhood.

11. Hawkins residence is near HHNP.

12. Hawkins purchased her residence in the Hampden Heights neighborhood in the year 1996 because of its proximity to the beauty and aesthetic value of HHNP.

13. When purchasing her residence near HHNP, Hawkins relied to her detriment on City representations that Hampden Heights North Park was park land and open space, and that HHNP would remain park land and open space.

14. The members of the Petitioners Committee are: John Case, 10081 E. Cornell Ave. Denver Colorado, 80231, who is also counsel for plaintiffs; Judith M. Case, 10081 E. Cornell Ave. Denver Colorado, 80231; Renee Lewis, 2770 S. Elmira St. Unit 38, Denver CO 80231; David Hill, 2770 S. Elmira St. Unit 38, Denver CO 80231; and Shawn Smith, 3905 S. Monaco Parkway Denver CO 80237 (hereafter referred to collectively as "Petitioners Committee").

15. All individual plaintiffs circulated a referendum petition to repeal Denver Ordinance No. 170, Series of 2013.

16. Unless the Court grants injunctive relief, all Plaintiffs, as well as the citizens of Denver, will suffer imminent injury in fact to a legally protected interest fairly traceable to the Defendant's conduct. *Friends of Black Forest v. County Commissioners of El Paso County* 80 P.3d 871 (Colo. App. 2003).

FACTS

17. Plaintiffs incorporate all other allegations of this Complaint as if fully re-written.

18. This action concerns 26 acres of park land referred to on Denver city maps as "Hampden Heights North Park" ("HHNP").

19. HHNP is a triangular shaped parcel located immediately west of South Havana St. and immediately north of E. Girard Ave. in the city and county of Denver.

20. The City acquired title to HHNP on or about October 9, 1936 by deed recorded at Book 379, Page 65, in the records of Arapahoe County ("the 1936 Deed").

21. At all times relevant zoning authorities and the City zoned HHNP as "Public - Open Space – Park Land"

22. At all times from 1967 through and including April 1, 2013 the City identified HHNP as "Public - Open Space – Park Land" on its official zoning and planning maps that the city published and distributed to Denver citizens.

23. At all times from 1967 until 2012, city officials represented to the plaintiffs and their predecessors in interest that HHNP was park land and would remain a park in perpetuity.

24. At all times relevant from October 1936 until present, the citizens of Denver, including the Plaintiffs and their predecessors in interest, used HHNP for recreation and park purposes, including but not limited to horseback riding, hayrides, bicycling, walking, bird watching, observing native prairie grasses and fauna, wildlife watching, playing, wading and exploring in Cherry Creek, finding arrowheads and animal bones hunted by earlier civilizations, and enjoying the beautiful vistas along Cherry Creek.

25. At all times since 1936 HHNP has been owned and managed by the Denver Department of Parks and Recreation and its predecessor departments.

26. At all times since 1967 the city expended public funds to maintain HHNP, mow the grasses, control weeds, and control prairie dogs. The city expended public funds to construct physical improvements for the benefit of Denver citizens including but not limited to (1) asphalt bicycle trails, (2) concrete bicycle trails, (3) bridges over Cherry Creek and its tributaries for bicyclists and pedestrians, (4) a split rail fence to demarcate the west boundary of HHNP at the junction with the greenbelt trail to Hampden Heights Park; and (5) signs to post park rules for HHNP, signs prohibiting motor vehicles in HHNP, and signs providing directions to bicyclists and pedestrians.

27. HHNP and Paul A. Hentzell Park form a continuous, open space park and

Natural Area within Denver. The Natural Area borders the banks of Cherry Creek. It includes a Historic Trail over which pioneers and gold prospectors traveled along Cherry Creek to Denver. It was formerly used as a Native American hunting ground for bison and deer. Motor vehicles are not allowed. The natural area is home to numerous and fascinating indigenous species of plant and animal life, including deer, fox, coyote, skunk, raccoon, muskrat, prairie dogs, rabbits, beaver, hummingbirds, chickadees, robins, sparrows, magpies, crows, woodpeckers, flickers, finches, doves, blackbirds, other small birds, butterflies, caterpillars, ant colonies, roly poly bugs, insects, crawdads, minnows, bull snakes, garter snakes, ducks, geese, heron, owls, and hawks, all of which are seen, heard and enjoyed on a regular basis by citizens of Denver and their children who walk and play and bicycle in the natural area.

28. Section 2.4.5 of the Denver City Charter states:

> **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.

(Charter 1960, A4.5; amended May 17, 1955; amended May 17, 1983; amended August 19, 1996)

29. HHNP belonged to the city as of December 31, 1955.

30. HHNP was managed by the City for park and recreational purposes from October 9, 1936 through and including April 1, 2013.

31. At the invitation of City officials, HHNP was used by citizens of Denver for park and recreational purposes from October 9, 1936 through and including April 1, 2013.

32. The City Municipal Code, Sec. 39-191 (2) defines *City park land* as follows:

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.

33. At all times relevant, HHNP met the above definition of "*City park land.*"

34. The City Municipal Code 39-191 (1) defines *Natural Area* as follows:

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.

35. At all times relevant, HHNP met the above definition of *"Natural Area."*

36. At all times since 1936 HHNP is and was a park.

37. HHNP has remained in its natural state and has been open to the use and enjoyment of the public since the City acquired HHNP in 1936.

38. At all times relevant the City allowed the Plaintiffs and all citizens of Denver, and members of the public at large, to use HHNP and Paul A. Hentzell Park as a single, continuous, open space, Park and Natural Area.

39. HHNP has been designated by common law use as park land. *McIntyre v. Board of Commissioners of El Paso County,* 61 P. 237 (Colo. App. 1900)

40. The City owns all Denver park land in trust as trustee for the citizens of Denver.

41. The City owns HHNP in trust as trustee for the citizens of Denver.

42. In approximately 2011, agents of the City and DPS entered into a secret oral agreement to trade part of HHNP for an office building at 1330 Fox St., Denver CO.

43. The City and DPS entered into the secret oral agreement without notice to the public or other interested parties, including but not limited to the plaintiffs, Denver Parks and Recreation Advisory Board, Inter-Neighborhood Cooperation, Inc., and members of the Denver City Council.

44. On April 1, 2013 the Denver City Council conducted a meeting at which it adopted two ordinances, numbered 168 and 170, that subdivided HHNP into two

separate parcels, a north parcel consisting of approximately 16 acres, and a south parcel consisting of 10.771 acres.

45. Ordinance No. 168 designated the north 16 acres of HHNP as part of Paul A. Hentzell Park. The City mayor and Defendant Johnson signed Ordinance 168 on April 2, 2013. Notice of Ordinance 168 was published in the Daily Journal March 29 and April 5, 2013.

46. Ordinance No. 170 approved transfer of the southern 10.771 acres HHNP to DPS pursuant to a written contract ("the Contract"). The City mayor and Defendant Johnson signed Ordinance 170 on April 2, 2013. Notice of Ordinance 170 was published in the Daily Journal March 29 and April 5, 2013.

47. The Contract trades 10.771 acres of HHNP for an office building at 1330 Fox St.

48. On information and belief, the Contract was scheduled to close on or about July 10, 2013.

49. The right of Denver citizens to vote is a fundamental right guaranteed by the U.S. Constitution and the Constitution of Colorado.

50. The right of Denver citizens to vote prior to the sale of any city park land is a fundamental right guaranteed by Charter section 2.4.5.

FIRST CLAIM FOR RELIEF

By all Plaintiffs against all Defendants for Declaratory Judgment that (1) Hampden Heights North Park is park land owned by the City; (2) that the City violated City Charter Section 2.4.5 and acted *ultra vires* in contracting to transfer the park land without a vote of the people; and (3) for Injunctive Relief enjoining the City from transferring HHNP.

51. Plaintiffs incorporate all other allegations of this Complaint as if fully re-written.

52. Transfer of HHNP without a vote of the people violates Charter section 2.4.5.

53. The City acted *ultra vires*, in excess of its lawful authority, by entering into a contract to sell park land without a vote of the people.

54. The Contract benefits the mayor and city officials, who avoid the obligation to pay full cash value for an office building at 1330 Fox St., by trading away park land that belongs to the people and cannot be replaced.

55. The Contract benefits DPS by providing DPS with open space park land that has commercial value and development potential, in exchange for property at 1330 Fox St. that DPS bondholders must value at more than $7 Million, but which has actual market value of less than $4 Million.

56. The Contract also benefits DPS by requiring the City to pay $705,000 cash.

57. Plaintiffs have a reasonable probability of success on the merits of proving that HHNP at issue is a dedicated Park, and that sale or transfer of HHNP without a vote of the People violates Denver City Charter Section 2.4.

58. The danger of real, immediate, and irreparable injury will be prevented by injunctive relief.

59. Plaintiffs have no plain, speedy, or adequate remedy available at law.

60. A preliminary injunction and permanent injunction will not disserve any public interest since Plaintiffs are protecting and preserving the public's interest in dedicated and designated City park land, Natural Area, and open space.

61. A balance of the equities favors granting preliminary and permanent injunctive relief. Transfer of HHNP without a vote of the people violates City Charter Section 2.4.5. Further, construction of a school in a floodplain will unnecessarily endanger students. Construction of an elementary school next to a 45 mph four lane highway (S. Havana St.) will unnecessarily endanger students attempting to cross the highway on foot, it will unnecessarily endanger motorists traveling 45 mph on the highway, and it will create serious traffic problems on S. Havana St. and East Girard Ave.

62. Entry of a preliminary injunction will preserve the status quo pending a trial on the merits of the Complaint.

63. The City is estopped from denying the dedication and designation of HHNP as a Park and Natural Area.

64. Allowing the City or DPS to develop HHNP would be utterly inconsistent with the purpose for which HHNP was dedicated.

65. If HHNP is developed, its intended and dedicated use as a Park and Natural Area will be destroyed forever, not only for Plaintiffs, but also for all future generations of Denver citizens.

66. Unless the Court grants the relief requested by Plaintiffs, all Plaintiffs, and the citizens of Denver, will suffer imminent injury in fact to a legally protected interest fairly traceable to the Defendants' conduct.

WHEREFORE, on their First Claim for Relief, Plaintiffs pray that this Honorable Court enter Declaratory Judgment that HHNP is and at all times was a dedicated park, owned by the City as trustee in trust for the benefit of Denver citizens; that HHNP is and at all times was a designated Park and Natural Area under the ownership and management of the Department of Denver Parks and Recreation; that transfer of HHNP without a vote of the people violates Charter section 2.4.5; that the City acted *ultra vires*, in excess of its lawful authority, by entering into a contract to transfer HHNP without a vote of the people; and that Ordinance 170, series 2013 and the Contract are null and void because they are *ultra vires* acts and violate Section 2.4.5 of the Denver Charter. Plaintiffs pray further that the Court grant preliminary and permanent injunctive relief enjoining the City from selling, transferring, leasing, developing, or alienating HHNP. Plaintiffs pray further that the Court grant preliminary and permanent injunctive relief enjoining the City from using, zoning, or listing HHNP in any way that is inconsistent with its intended and dedicated use as a Park, Natural Area, and Open Space; and commanding the City to restore HHNP to its intended state as a Park, Natural Area, and Open Space. Plaintiffs pray further for costs including expert witness fees, for reasonable attorney fees, and for all other appropriate relief.

SECOND CLAIM FOR RELIEF

By all Plaintiffs against all Defendants for Declaratory Judgment that on April 1, 2013 city council's subdivision of HHNP's into two separate parcels, each with different land uses, and designating 10.771 acres of open space for commercial development, constitutes new municipal policy, rezoning of open space land, and legislative action by the City.

67. Plaintiffs incorporate all other allegations of this Complaint as if fully re-written.

68. The subdivision of HHNP into two parcels on April 1, 2013 constituted legislative action in that (1) it reversed the City's land use policy in effect for 45 years, and established new land use policy; (2) it created two parcels with different land uses; (3) it effectively re-zoned 10.771 acres from "Public – Open Space – Park Land" to a commercial building site for a school or other commercial development.

69. The subdivision of HHNP into two parcels on April 1, 2013 established new precedent and new policy that the Manager of the Department of Parks and Recreation City could "de-designate" land from previously designated Natural Areas

70. The subdivision of HHNP into two parcels on April 1, 2013 established new precedent and new policy that the City, without a vote of the people, could sell or trade land that was used as a park and owned and managed by the Department of Parks and Recreation for 45 years.

71. The subdivision of HHNP into two parcels on April 1, 2013 established new precedent and new policy that, without a vote of the people, the City could sell or

trade land that belonged to the city prior to December 31, 1955 after: (a) the City represented to the citizens of Denver that the land was public open space park land for 45 years, (b) the Department of Parks and Recreation used public funds from the Parks Department budget to manage and maintain the park for 45 years, (c) the Department of Parks and Recreation used public funds from the Parks Department budget to construct improvements consisting of modern bicycle and pedestrian trails and bridges; (d) at the invitation of the city, citizens of Denver used and enjoyed HHNP for park and recreation purposes for 45 years.

WHEREFORE, on their Second Claim for Relief, Plaintiffs pray that this Honorable Court enter Declaratory Judgment that on April 1, 2013 city council's subdivision of HHNP's into two separate parcels, each with different land uses, and designating 10.771 acres of open space for commercial development, constitutes new municipal policy and legislative action by the City. Plaintiffs pray further for costs including expert witness fees, for reasonable attorney fees, and for all other appropriate relief.

THIRD CLAIM FOR RELIEF

By Plaintiffs Friends of Denver Parks, Inc. Steve Waldstein, and Zelda Hawkins for Declaratory and Injunctive Relief against DPS.

72. Plaintiffs Friends of Denver Parks, Inc. Steve Waldstein, and Zelda Hawkins incorporate all other allegations of this Complaint as if fully re-written.

73. DPS intends to take title to 10.771 acres of HHNP and develop it commercially, including construction of a two story elementary school for 500 students K-5, and an early learning center for 250 students pre-K.

74. DPS lacks good title to the 10.771 acres, because the proposed conveyance to DPS is an *ultra vires* act by the City in violation of Charter Section 2.4.5.

75. At all times relevant, HHNP has been zoned Public Open Space Park land.

76. Development of HHNP violates its zoning classification as Public Open Space Park land.

77. The 10.771 acres lies in a flood plain.

78. The 10.771 acres is bordered on the east by South Havana Street.

79. South Havana St. is a five lane highway with a 45 mph speed limit.

80. The location is unsafe and inappropriate for an elementary school.

81. DPS has other suitable locations to construct an elementary school, if

there is an actual need for a new elementary school.

82. Development of HHNP by DPS will impair use of the historic Cherry Creek Trail by cyclists.

83. Approximately 2000 cyclists per week currently use the Cherry Creek Trail on HHNP and will be adversely affected by DPS's planned development.

84. Plaintiffs have a reasonable probability of success on the merits of proving that HHNP at issue is a dedicated Park, and that sale or transfer of HHNP without a vote of the People violates Denver City Charter Section 2.4.

85. The danger of real, immediate, and irreparable injury will be prevented by injunctive relief.

86. Plaintiffs have no plain, speedy, or adequate remedy available at law.

87. A preliminary injunction and permanent injunction will not disserve any public interest since Plaintiffs are protecting and preserving the public's interest in dedicated and designated City park land, Natural Area, and open space.

88. A balance of the equities favors granting preliminary and permanent injunctive relief. Transfer of HHNP without a vote of the people violates City Charter Section 2.4.5. Further, construction of a school in a floodplain will unnecessarily endanger students. Construction of an elementary school next to a 45 mph four lane highway (S. Havana St.) will unnecessarily endanger students attempting to cross the highway on foot, it will unnecessarily endanger motorists traveling 45 mph on the highway, and it will create serious traffic problems on S. Havana St. and East Girard Ave.

89. Entry of a preliminary injunction will preserve the status quo pending a trial on the merits of the Complaint.

90. The City is estopped from denying the dedication and designation of HHNP as a Park and Natural Area.

91. Allowing the City or DPS to develop HHNP would be utterly inconsistent with the purpose for which HHNP was dedicated.

92. If HHNP is developed, its intended and dedicated use as a Park and Natural Area will be destroyed forever, not only for Plaintiffs, but also for all future generations of Denver citizens.

93. Unless the Court grants the relief requested by Plaintiffs, all Plaintiffs, and the citizens of Denver, will suffer imminent injury in fact to a legally protected interest fairly traceable to the Defendants' conduct.

WHEREFORE, on their Third Claim for Relief, Plaintiffs pray that this Honorable Court find that HHNP is and at all times was a dedicated park, owned by the City as trustee in trust for the benefit of Denver citizens; that HHNP is and at all times was a designated Park and Natural Area under the jurisdiction of the Department of Denver Parks and Recreation; that transfer of HHNP without a vote of the people violates Charter section 2.4.5; that the City acted *ultra vires*, in excess of its lawful authority, by entering into a contract to transfer park land without a vote of the people; and that Ordinance 170, series 2013 and the Contract are null and void because they violate Section 2.4.5 of the Denver Charter. Plaintiffs pray further that the Court grant preliminary and permanent injunctive relief enjoining DPS from acquiring or developing HHNP. Plaintiffs pray further that the Court grant preliminary and permanent injunctive enjoining DPS from using HHNP in any way that is inconsistent with its intended and dedicated use as a Park, Natural Area, and Open Space; and that the Court command DPS to restore HHNP to its intended state as a Park, Natural Area, and Open Space. Plaintiffs pray further for costs including expert witness fees, for reasonable attorney fees, and for all other appropriate relief.

FOURTH CLAIM FOR RELIEF

By all plaintiffs for Declaratory Judgment against the City and Johnson that Charter section 8.3.2 on its face and as applied violates fundamental rights of the plaintiffs and the citizens of Denver guaranteed by the First, Fifth, and Fourteenth Amendments of the U.S. Constitution, Article II Sections 10 and 25, and Article V § 1 of the Constitution of Colorado, and section 8.3.1 of the Charter of the City and County of Denver; and for injunctive relief directing Johnson to place the referendum ballot issue on the ballot at the next election.

94. Plaintiffs incorporate all other allegations of this Complaint as if fully re-written.

95. Defendant Debra Johnson ("Johnson") holds the Office of Clerk and Recorder of the City and County of Denver, to which she was elected by vote of the people of Denver.

96. The clerk and recorder is not required to have legal training and does not perform judicial functions.

97. On July 1, 2013 Petitioners Committee delivered to Defendant Johnson the signed referendum petition with 6,664 valid signatures of registered Denver voters ("the referendum petition").

98. 6,129 valid signatures are required to place the issue on the ballot.

99. 6,664 valid signatures of registered Denver voters is a sufficient number to place the referendum issue on the ballot at the next election.

100. On July 3, 2013 Johnson delivered a letter to Petitioners Committee that rejected the referendum petition.

101. Johnson refuses to place the referendum issue on the ballot.

102. Johnson refuses to let the citizens of Denver exercise their fundamental right to vote on the sale of park land pursuant to Charter section 2.4.5.

103. Johnson refuses to let the citizens of Denver exercise their fundamental right to vote on the repeal of ordinance 170.

104. In ruling upon plaintiffs' referendum petition, Johnson did not exercise independent legal judgment, but instead, relied upon the Denver City Attorney, who wrote the rulings for her.

105. The City Attorney is appointed by, and serves at the pleasure of, the mayor.

106. The City Attorney is the agent of the mayor.

107. In rejecting plaintiffs referendum petition, Johnson cited section 8.3.2 (C) of the city Charter, which states in pertinent part:

> No petition shall be circulated nor shall any signatures be procured until such affidavit, petition sample, and ballot title are approved by the Clerk and Recorder.

108. Section 8.3.2 of the Charter on its face and as applied allows the clerk and recorder and City Attorney to interfere with and thwart voter petition initiatives, for the improper purpose of accomplishing political objectives of the mayor and the clerk and recorder that are in opposition to the will of the people.

109. Section 8.3.2 of the Charter on its face and as applied violates the plaintiffs' fundamental right to petition their government, and the fundamental right of the people to govern themselves by referendum, which rights are guaranteed by the First Amendment of the U.S. Constitution, Art. V, Section 1 of the Constitution of Colorado, and Section 8.3.1 of the Denver City Charter.

110. Section 8.3.2 of the Charter on its face and as applied violates plaintiffs' fundamental right to due process of law, which right is guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article II, Section 25 of the Constitution of Colorado.

111. Section 8.3.2 of the Charter on its face and as applied violates plaintiffs' fundamental right to equal protection of the law and equality of justice, which rights are guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article II,

Section 6 of the Constitution of Colorado.

WHEREFORE, on their Fourth Claim for Relief, Plaintiffs pray that this Honorable Court enter Declaratory Judgment that Charter section 8.3.2 on its face and as applied violates fundamental rights of the plaintiffs and the people of Denver guaranteed by the First, Fifth, and Fourteenth Amendments of the U.S. Constitution, Article II Sections 10 and 25, and Article V § 1 of the Constitution of Colorado, and section 8.3.1 of the Charter of the City and County of Denver. Plaintiffs pray further that the court order the clerk and recorder to place the referendum ballot issue on the ballot at the next election. Plaintiffs pray further for costs including expert witness fees, for reasonable attorney fees, and for all other appropriate relief

FIFTH CLAIM FOR RELIEF

By all plaintiffs for review of the acts of the clerk and recorder pursuant to CRCP 106(a)(4); and for Declaratory and Injunctive Relief against Johnson.

112. Plaintiffs incorporate all other allegations of this Complaint as if fully re-written.

113. The City Attorney is appointed by, and serves at the pleasure of, the mayor.

114. At all times relevant since April 1, 2013, assistant city attorney David Broadwell acted as counsel for Johnson and the mayor, and acted as defendants' agent in communicating with the Petitioners Committee concerning the ballot issue.

115. At a public meeting on April 10, 2013 Mr. Broadwell advised the Petitioners Committee that Ordinance 170 was an administrative action that could not be repealed by voter referendum.

116. Defendant Johnson and the mayor intended that Petitioners Committee would rely upon the advice of Mr. Broadwell and give up their rights to file a referendum petition.

117. Petitioners Committee did in fact rely on Mr. Broadwell's advice to the extent that Petitioners Committee delayed filing a referendum petition until its counsel could determine, by independent legal research, whether the action of city council in subdividing HHNP on April 1, 2013 constituted legislative action subject to repeal by referendum, or whether the subdivision of HHNP was administrative action not subject to repeal by referendum, as the city defendants were claiming.

118. On May 20, 2013 counsel for Petitioners Committee determined that the subdivision of HHNP by city council in ordinances 168 and 170 on April 1, 2013 constituted de-facto re-zoning of HHNP and was legislative action subject to repeal by referendum. Counsel so advised Johnson by letter dated May 20, 2013.

119. The intentional acts of defendants and their agent interfered with Plaintiffs' fundamental rights to petition their government.

120. Charter sections 8.3.1 and 8.3.4 require citizens to submit a referendum petition within 90 days after final passage and publication of an ordinance.

121. The intentional acts of defendants and their agent caused the plaintiffs to delay 50 days before beginning to circulate their referendum petition.

122. The intentional acts of defendants and their agent caused the Petitioners Committee to lose 50 days of the 90 days allowed by Charter sections 8.3.1 and 8.3.4 to submit a referendum petition.

123. Plaintiffs ask the Court exercise its equitable power to allow the Petitioners Committee 90 days from May 20, 2013 in which to circulate and obtain signatures on the referendum petition, and to include all signatures on the 120 petition sections filed with the clerk and recorder on July 1, 2013.

WHEREFORE, on their Fifth Claim for Relief, Plaintiffs pray that this Honorable Court enter Declaratory Judgment that the Defendant Johnson both individually and through her agents interfered with Plaintiffs' fundamental rights to petition their government. Plaintiffs pray that the Court determine that the intentional acts of defendants and their agents caused the plaintiffs to delay 50 days before beginning to circulate their referendum petition, and to lose 50 days of the 90 days allowed by Charter sections 8.3.1 and 8.3.4 to submit a referendum petition. Plaintiffs pray that the Court determine that the applicable 90 day period for plaintiffs to obtain signatures on the referendum petition began on May 20, 2013 and will end on August 19, 2013. Plaintiffs invoke the equitable power of the court to allow them 90 days from May 20, 2013 in which to circulate and obtain signatures on the referendum petition, and to include all signatures on the 120 petition sections filed with the clerk and recorder on July 1, 2013. Plaintiffs pray further for costs including expert witness fees, for reasonable attorney fees, and for all other appropriate relief

SIXTH CLAIM FOR RELIEF

By all plaintiffs for review of the acts of the clerk and recorder pursuant to CRCP 106(a)(4); and for Declaratory and Injunctive Relief to allow Plaintiffs 90 days to cure any insufficiencies in the number of signatures

124. Plaintiffs incorporate all other allegations of this Complaint as if fully re-written.

125. In order to place the referendum issue on the ballot, Plaintiffs are required to collect valid signatures from registered Denver voters equaling five percent of the

total votes cast in the previous mayoral election. Currently this equals 6,129 valid signatures.

126. Between May 20, 2013 and June 30, 2013 Plaintiffs were able to collect 6,664 valid signatures from registered Denver voters, which equals more than the required five percent of the total votes cast in the previous mayoral election.

127. On July 1, 2013 Petitioners Committee delivered to Defendant Johnson the signed referendum petition with 6,664 valid signatures of registered Denver voters ("the referendum petition").

128. The referendum petition complied in all respects with the form required by Charter section 8.3.2.

129. On information and belief, Johnson may use her power as clerk and recorder to invalidate as many signatures as possible.

130. Section 8.3.2 (H) of the Charter states in pertinent part:

> *Filing of petitions; determination of sufficiency; protest and hearings.* After signatures have been obtained, the petitioners' committee shall file the completed petition with the Clerk and Recorder no later than close of business on a normal business day. All related petition sections shall be filed at the same time. The Clerk and Recorder shall record the same and shall hold the petition for a period of twenty-five days, during which time the Clerk and Recorder shall determine whether the petition is signed by the requisite number of registered electors. In the event the Clerk and Recorder determines that the petition contains an insufficient number of signatures, the Clerk and Recorder shall notify the petitioners' committee of the insufficiency, and the petitioners' committee may cure the insufficiency by filing an addendum to the original petition for the purpose of offering such number of additional signatures as will cure the insufficiency. *Any addendum shall be filed within the time period allowed for the original petition as provided in this Charter.* (italics added)

131. Read in context, the italicized sentence allows plaintiffs an additional 90 days from the date of notice of insufficiency to cure the insufficiency by gathering additional signatures.

132. On information and belief, Johnson intends to rule that the above italicized sentence requires the plaintiffs to submit any addendum petition sections no later than July 5, 2013.

133. Such an interpretation by the clerk and recorder will make it impossible for the plaintiffs to cure any insufficiencies in the number of signatures.

134. Such an interpretation by the clerk and recorder will not be the independent legal judgment of the clerk and recorder, but will be in fact the opinion of the City Attorney, who will draft the expected ruling for the clerk and recorder for the improper purpose of preventing the citizens of Denver from voting on the valid referendum petition.

135. The acts and threatened acts of the clerk and recorder actually interfere with and actually will abridge the fundamental rights of plaintiffs and the citizens of Denver to govern themselves and vote to repeal legislation by referendum.

WHEREFORE, on their Sixth Claim for Relief, Plaintiffs pray that this Honorable Court enter Declaratory Judgment that the Petitioners Committee shall be allowed 90 days from the date of notice of insufficiencies to cure any insufficiencies in the number of signatures. Plaintiffs pray further for costs including expert witness fees, for reasonable attorney fees, and for all other appropriate relief.

SEVENTH CLAIM FOR RELIEF

By all plaintiffs for review of the acts of the clerk and recorder pursuant to CRCP 106(a)(4).

136. Plaintiffs incorporate all other allegations of this Complaint as if fully re-written.

137. At 2:58 p.m. on May 13, 2013 Petitioners Committee submitted a proposed form of affidavit, referendum petition sample, and ballot title to Defendant Johnson.

138. On May 17, 2013 Johnson sent to Petitioners Committee a letter rejecting the proposed form of referendum petition.

139. Denver Charter section 8.3.2 (C) states in pertinent part:

> The Clerk and Recorder shall have three (3) full working days from the ***time*** of the filing of the affidavit to review the affidavit, petition sample, and ballot title. At the end of the three (3) working days, the Clerk and Recorder ***must*** either accept or reject the affidavit, petition sample, or ballot title. (Emphasis added)

140. On May 17, 2013 at 9:01 a.m. Johnson issued a letter which purported to reject the affidavit, petition sample, and ballot title.

141. The duration of time from 2:58 p.m. on May 13, 2013 until 9:01 a.m. on

May 17, 2013 is more than three full working days.

142. Johnson failed to accept or reject the affidavit, petition sample, and ballot title within three full working days from the time of filing.

143. By failing to comply with the Charter, the clerk and recorder lost jurisdiction to make any further rulings upon the referendum petition.

144. Johnson exceeded her jurisdiction because she failed to act within three full working days of the time the original affidavit, petition sample, and ballot title were submitted.

145. On July 1, 2013 Petitioners Committee delivered to Defendant Johnson the signed referendum petition with 6,664 valid signatures of registered Denver voters ("the referendum petition").

146. The referendum petition complied in all respects with the form required by Charter section 8.3.2.

147. On July 3, 2013 Johnson rejected the referendum petition.

148. In rejecting the referendum petition filed by the Petitioners Committee July 1, 2013, Johnson exceeded her jurisdiction and abused her discretion.

149. In accordance with CRCP 106(a)(4)(III), this complaint is accompanied by a motion and proposed order requiring Defendant Johnson to certify the record.

WHEREFORE, on their Seventh Claim for Relief, Plaintiffs pray that this Honorable Court enter Declaratory Judgment that the clerk and recorder exceeded her jurisdiction and abused her discretion by rejecting the referendum petition on May 17, 2013, May 22, 2013, and July 3, 2013. Plaintiffs pray further that the court order the clerk and recorder to place the referendum issue on the ballot at the next election. Plaintiffs pray further for costs including expert witness fees, for reasonable attorney fees, and for all other appropriate relief.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES PROPERLY TRIABLE THERETO.

Respectfully submitted July 17, 2013.

BENSON & CASE, LLP

s/John Case

John Case #2431
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2013 true and correct copies of the foregoing **PLAINTIFFS' REVISED THIRD AMENDED COMPLAINT AND JURY DEMAND** were served on the following:

Denver County District Court
1437 Bannock Street
Denver, CO 80202

VIA ICCES

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Mr. Mitchel Behr, Esq.
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VIA ICCES

s/Karen Corner
Karen Corner