

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.

Attorney for Plaintiffs:

John Case, Atty reg. # 2431  
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▲ COURT USE ONLY ▲

Case No.:  
2013CV032444

Courtroom 376

**PLAINTIFF'S UNOPPOSED MOTION TO ALLOW TRIAL SETTING**

Plaintiffs, by and through counsel, BENSON & CASE, LLP, respectfully request that this Court authorize setting the above-captioned case for trial in accordance with C.R.C.P. 121 § 1-6. In support of this motion, Plaintiffs would show the Court as follows:

1. **Certification:** Pursuant to C.R.C.P. 121 § 1-15(8), the undersigned conferred with counsel for Defendants City and County of Denver ("City"), Debra Johnson, in her capacity as Clerk and Recorder, and School District No. 1 in the City and County of Denver ("DPS") before filing this motion. Defendants DO NOT OPPOSE the relief sought herein.

2. In this action Plaintiffs seek declaratory and injunctive relief regarding two City ordinances that split Hampden Heights North Park into two parcels and authorized the sale of the southerly parcel to DPS. Plaintiffs assert, *inter alia*, that the ordinances in question were *ultra vires* because Section 2.4.5 of the City Charter bars the City from selling park land absent the approval of Denver voters.

3. Plaintiffs filed with their complaint a motion for preliminary injunction seeking to preclude implementation of the ordinances at issue pending final disposition of this case.

4. The Court conducted a hearing on the motion for preliminary injunction on June 12-13, 2013. The Court denied the motion by order issued July 5, 2013. The order does not finally adjudicate any of Plaintiffs' claims. Instead, the Court merely denied preliminary injunctive relief based on its determination that Plaintiffs failed to demonstrate a probability of success on the merits. (07/05/14 Order ¶¶ 1, 2.)

5. Pursuant to C.A.R. 1(a)(3), Plaintiffs appealed the denial of their motion for preliminary injunction to the Colorado Court of Appeals on July 5, 2013.

6. Per C.R.C.P. 121 § 1-6, Plaintiffs filed a Notice to Set on July 8, 2013. When the paralegal for Plaintiffs' counsel called the Court on July 17, 2013 to obtain trial dates, she was advised of the Court's position that the commencement of the appeal deprives this Court of jurisdiction to proceed until the appeal is resolved. The Court advised that it may reconsider its position on trial setting if Plaintiffs could provide authority for the proposition that this Court retains jurisdiction to adjudicate this case while the appeal is pending.

7. The purpose of this motion is to provide this Court with the requested authority regarding a trial court's jurisdiction continuing despite a pending appeal of the denial of a motion for preliminary injunction.

8. The circumstances of this case are indistinguishable from those of the key Colorado preliminary injunction case *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982). There, the plaintiff filed a declaratory judgment action contesting the constitutionality of a statute. Plaintiff also filed a motion for preliminary injunction, which the trial court denied on the ground that the plaintiff failed to establish probable success on the merits of his claim. *Id.* at 650-51. Plaintiff appealed the denial of his motion for preliminary injunction and later filed a notice in the trial court to set his claim for trial. The trial court refused to allow a trial setting while the order denying the plaintiff's motion for preliminary injunction was on appeal. *Id.* at 651.

9. The principal issue before the Supreme Court was whether the trial court erred in denying the motion for preliminary injunction. However, the Supreme Court also held that the trial court should have allowed the case to proceed to trial despite the pending appeal:

The merits of the particular constitutional challenges to the statute should be heard in the first instance at the trial court level and should not be prejudged upon review of a preliminary injunction application. We take this opportunity, however, to disapprove the trial court's denial of Rathke's motion to set the matter for trial pending the appeal of the denial of his motion for a preliminary injunction. **We can perceive no good reason to deprive Rathke or persons similarly situated from their rights to a trial on the merits** based on their applications for a declaratory judgment and a permanent injunction. Accordingly, **we hold that the pending appeal in this case did not deprive the trial court of**

**jurisdiction to proceed in a timely and orderly fashion with the declaratory judgment and permanent injunction proceedings.**

*Id.* at 651 n.3 (emphasis added, citations omitted).

10. *Rathke* is in full accord with federal authorities decided under substantially similar rules of procedure. *See, e.g., State of Colo. v. Idarado Min. Co.*, 916 F.2d 1486, 1490 n. 2 (10th Cir. 1990) (when the appeal is from an injunction, “the district court retains power to act on the case pending appeal”); *Moltan Co. v. Eagle–Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995) (“The District Court thus had jurisdiction to continue with the merits of the litigation while the appeal from the preliminary injunction was pending.”); 11A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2962, at 438–39 (2d ed. 1995) (“An appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is pending.”).

11. Here, as in *Rathke*, the order on appeal denied a motion for preliminary injunction on the ground that the moving party failed to show a probability of success on the merits. As in *Rathke*, Plaintiffs in this case want to set their claims for declaratory judgment and permanent injunctive relief for trial. Pursuant to the *Rathke* Court’s clear holding, this Court has jurisdiction to proceed and should allow Plaintiffs to set their claims for trial.

**WHEREFORE**, Plaintiffs respectfully request that this Court issue an order authorizing the above-captioned case to be set for trial in accordance with C.R.C.P. 121 § 1-6.

Respectfully submitted July 19, 2013.

BENSON & GASE, LLP

  
/s/ John Case

John Case, # 2431

Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2013 true and correct copies of the foregoing **PLAINTIFF'S MOTION TO ALLOW TRIAL SETTING** were filed and served as follows:

Denver County District Court  
1437 Bannock Street  
Denver, CO 80202

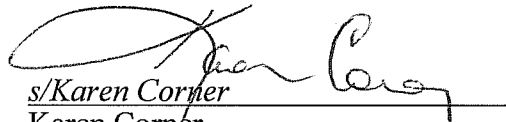
**VIA ICCES**

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

**VIA ICCES**

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 Cornér  
Karen Cornér

<p>DISTRICT COURT, DENVER COUNTY, COLORADO  Court Address: 1437 Bannock Street  Denver, CO 80202</p> <hr/> <p><b>Plaintiff:</b> FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; and ZELDA HAWKINS, an individual.</p> <p><b>Defendants:</b> CITY &amp; 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;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> <p style="text-align: center;">Case No.:  2013CV032444</p> <p style="text-align: center;">Courtroom 376</p>
<p style="text-align: center;"><b>[Proposed] ORDER GRANTING PLAINTIFF'S MOTION TO ALLOW TRIAL SETTING</b></p>	

This matter is before the Court on Plaintiffs' Motion to Allow Trial Setting. Upon due consideration, and being fully advised, the Court finds the motion well taken.

**IT IS THEREFORE ORDERED** that Plaintiffs' Motion to Allow Trial Setting is GRANTED. Plaintiffs shall file a notice to set this matter for trial in accordance with C.R.C.P. 121 § 1-6 within seven (7) days of the entry of this order.

Date: \_\_\_\_\_

BY THE COURT:

\_\_\_\_\_  
Hon. Herbert L. Stern III  
District Court Judge

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:** 11C9756ED681B  
**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:** 07/19/2013 4:23 PM

**Filing Party(ies):**

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

**Documents :**

Document ID	Event	Title	Statutory Fee
B47B17883B3F9	<u>Motion</u>	Plaintiff's Unopposed Motion to Allow Trial Setting	\$0.00
95CDC9855BD0F	<u>Proposed Order</u>	Proposed Order	\$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
School Dist No 1 In The C&c Of Denver	Defendant	Michael J Hickman	Denver Public Schools	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