DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202	
Plaintiff: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; and ZELDA HAWKINS, an individual v. **Defendant:** CITY AND COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity, and DEBRA JOHNSON, in her capacity as clerk and recorder of the City and County of Denver.	**▲COURT USE ONLY▲** Case Number: 2013CV32444 Courtroom: 376
Attorneys for the Defendant DOUGLAS J. FRIEDNASH, Atty. No. 18128 Denver City Attorney DAVID W. BROADWELL, Atty. No. 12177 PATRICK A. WHEELER, Atty. No. 14538 MITCH T. BEHR, Atty. No. 38452 Assistant City Attorneys Denver City Attorney's Office 1437 Bannock St., Room 353 Denver, Colorado 80202 Telephone: (720) 865-8600 Facsimile: (720) 865-8796 E-mail: david.broadwell@denvergov.org E-mail: patrick.wheeler@denvergov.org E-mail: mitch.behr@denvergov.org	

RESPONSE OF DEFENDANTS CITY AND COUNTY OF DENVER AND DEBRA JOHNSON CLERK AND RECORDER TO MOTION FOR INJUNCTION DURING PENDENCY OF APPEAL

Defendants City and County of Denver ("City") and Debra Johnson, Clerk and Recorder ("Clerk"), hereby submit this response to Plaintiffs' Motion for Injunction During Pendency of Appeal ("Motion") submitted to the Court on July 5, 2013.

1. In order to obtain the injunction pending appeal requested in their Motion, Plaintiffs have the burden of proof to demonstrate (1) a strong showing of likelihood of success on the merits of their underlying complaint; (2) that the issuance of the injunction requested will not substantially injure the Defendants, and; (3) that the public interest lies in support of the injunction. Plaintiffs must satisfy these standards in *addition* to a demonstration of the "irreparable injury" alleged in their Motion. *Romero v. Fountain*, 2011 WL 1797240 at *3 (Colo.App.).

2. Plaintiffs' Motion should be denied because they have not met their burden of proof on any of these issues in their Motion or in nearly two and one-half (2½) days of evidence and argument presented to the trial court.

3. Plaintiffs have not demonstrated any likelihood of success on the merits of their underlying complaint. Regarding Plaintiffs' request in their complaint to enjoin the transfer and development of the DPS site as a school, Plaintiffs neither produced an ordinance officially designating the property as a park, nor did they demonstrate that the land was a "park belonging to the City as of December 31, 1955." Accordingly, the Court previously denied the 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 based on the following finding in its order entered July 5, 2013:
    a. "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)."

4. Defendants would be substantially injured by the issuance of the injunction requested in Plaintiffs' Motion. The City and DPS executed the Contract to Exchange Property prior to the filing of Plaintiffs' Complaint and began to mobilize for closing on the transaction, construction of the school, and conversion of the Fox Street property into a domestic violence center before the Plaintiffs filed their complaint and motion for a preliminary injunction. Since the entry of the Court's order on July 5, 2013, denying Plaintiffs motion for a preliminary injunction, the City and DPS have proceeded under the terms of their contract, and title to the DPS site has been conveyed to DPS. Thus, the *status quo* has changed and there is nothing for the court to enjoin at this

time with respect to the transfer of the DPS site to DPS. DPS currently owns the site and the parties continue to proceed under the terms of their contract. An injunction against development of the DPS site would substantially injure the City and DPS by preventing the development of the site for a school and potentially wasting significant resources invested in doing so thus far.

5. Issuance of the injunction requested by Plaintiffs' in their Motion would disserve the public interest. The contract between the City and DPS serves many important public interests. The court received evidence of the dire and immediate need for the additional elementary school in southeast Denver due to severe overcrowding at existing facilities. An injunction pending appeal would impede progress toward an additional elementary school. The overwhelming public good that would accrue to the larger neighborhood and the public from the construction of a school on the DPS site should be deemed by the court to outweigh the interest articulated by the Plaintiffs in this case.

6. Last of all, in balancing of the equities between the parties in this case, the court should consider that Plaintiffs could have sought declaratory or injunctive relief to forestall the transaction, but they waited to file suit until after the Denver City Council and the DPS Board approved the transaction; after both parties had executed the Contract to Exchange Property; and after both parties had begun to mobilize for closing on the property, construction of the school, and conversion of the Fox Street property into a domestic violence center. An undue delay in bringing suit by the plaintiffs can and should weigh against them in any balancing of the equities for the purposes of a request for injunctive relief, as held in *Combined Communications Corp. v. City and County of* Denver, 528 P.2d 249 (Colo. 1974), in which the supreme court vacated a preliminary injunction having found that the plaintiffs waited too long to file suit.

7. City requests that, in the event the court grants Plaintiffs' Motion in whole or in part, the Plaintiffs be required to post adequate security in accordance with C.R.C.P. 62(c).

WHEREFORE, Defendants City and County of Denver and Debra Johnson respectfully request that the Plaintiffs' Motion for Injunction During Pendency of Appeal be denied.

Respectfully submitted this 23rd day of July 2013.

By: /s/ David W. Broadwell

DAVID W. BROADWELL
PATRICK A. WHEELER
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Attorneys for the Defendants City and County of Denver and Debra Johnson, Clerk and Recorder of the City and County of Denver

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

CERTIFICATE OF SERVICE

I hereby certify that today, July 23, 2013, the foregoing **RESPONSE OF DEFENDANTS CITY AND COUNTY OF DENVER AND DEBRA JOHNSON CLERK AND RECORDER TO MOTION FOR INJUNCTION DURING PENDENCY OF APPEAL** was filed and served via ICCES on:

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