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▲**
Plaintiffs' 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 INJUNCTION DURING PENDENCY OF APPEAL

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 Injunction During Pendency of Appeal.

1. Legal Standard for Granting Injunction

Plaintiffs agree with Defendant City and County of Denver ("City") that the standard for granting the injunction is set forth in *Romero v. City of Fountain,* ___ P.3d ___, 2011 WL 1797240 (Colo. App. May 12, 2011). That standard allows an injunction to enter when there will be great irreparable harm, even if probability of success on the merits is less than "strong":

> **"[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other.** This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere

'possibility' of success on the merits."

Id. at *3 (emphasis added) (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153–54 (6th Cir. 1991) and citing *Mohammed v. Reno,* 309 F.3d 95, 101 (2d Cir. 2002)).

2. Balancing the Equities

Here, balancing the equities cries out for entry of an injunction. If the Court does not grant an injunction pending appeal, the people of Denver forever lose 11 acres of park land. That harm plainly qualifies as "irreparable" for injunction purposes. *See Romero*, 2011 WL 1797240, at *3. On the other hand, if the Court grants the injunction, there is no harm whatsoever to the City. The City has already acquired title to 1330 Fox St. from DPS. (City Response ¶ 4.) If the City is confident in prevailing, is it free to start remodeling 1330 Fox immediately to create its proposed new domestic violence center.

Further, there is little consequence to Defendant Denver Public Schools ("DPS") if the Court grants the injunction. If DPS prevails on the merits, it will experience only a temporary delay in construction of its proposed new school building. By contrast, if DPS is allowed to proceed with construction immediately and Plaintiffs prevail on the merits, it would likely be impossible to undo the physical damage that construction work would do to the land.

3. Serving the Public Interest

As the City points out, a court's ruling on a motion for injunction pending appeal must serve the public interest. *Romero*, 2011 WL 1797240, at *3-4. Here, the public interests in preserving the park and protecting the citizenry's rights to vote on proposed transfer of park land far outweigh the limited interest of DPS in starting construction on a new school.

The Court can readily determine where public interest lies by reviewing Exhibits 1-18 attached hereto. These are 18 newspaper commentaries and op-ed pieces authored by Tom Noel, Vincent Carroll, Ann Ditmer, Susan Barnes-Gelt, Paul Kashman, Alan Prendergast, and Jeremy Meyer. The authors, who have significant recognition in Denver media and government circles, unanimously recommend preserving this unique parcel of open space natural area within Denver. Only DPS and the City want to deprive Denver citizens of park land without a public vote.

4. Plaintiffs' Probability of Success on the Merits

In its Order denying a preliminary injunction, this Court found that the Plaintiffs failed to show that the land at issue was "a park belonging to the city as of December 31, 1955" for purposes of Section 2.4.5 of the City Charter. In so holding the Court relied on *Hall v. Denver,* 115 Col. 538, 177 P.2d 234 (1946). Factually, *Hall* is readily distinguishable from the present case. In fact, *Hall* actually supports issuance of an injunction here.

In *Hall,* the City proposed to sell a former county courthouse building and the land around it. The city auditor testified that no parks money was ever expended on the property. 115 Colo. at 541. The Supreme Court found the facts as follows:

> "It would appear, therefore, that during the seventy-one years from the time when the property was first bought for a courthouse site it has been uniformly treated first, as a site for the courthouse up to the year 1932, and thereafter as real estate to be disposed of as soon as a satisfactory price could be obtained. **At no time was it treated as a park.**"

Id. at 542 (emphasis added).

In this case, the disputed 11 acres of Hampden Heights North Park has been zoned and maintained as open space natural area, not a vacant building as in *Hall.* At the hearing June 12 and 13, this Court heard from numerous witnesses that the Department of Parks and Recreation had maintained Hampden Heights North Park for 45 years since 1967; that Parks Department funds were used to construct bicycle and pedestrian walkways and bridges through the park; that the City posted signs stating that the land is a park. The evidence showed that as soon as Denver annexed parcel 31 in 1965, city officials began representing to its citizens that the land was a park and would remain a park. The park was zoned "Open Space – Park." The City's comprehensive land use plan (Exhibit 14) first published in 1967, showed the parcel as "Public – Open – Parks." Plaintiffs and residents of the Hampden Heights community relied to their detriment on city representations that the land would remain a park in perpetuity. Steve Waldstein testified that the park added $20,000 of economic value to the recent appraisal of his home. Starting at least as early as 1967, the City placed HHNP under the control of Denver Department of Parks and Recreation. In 1979 Mayor McNichols wrote to a Hampden Heights resident that the property was maintained by the Parks Department and would be "developed into a park but will also remain in native grass for some time." (Exhibit 26-3, 2d paragraph.) In 2007 the City designated the land as part of a 90 acre natural area called "Paul A. Hentzell Park," which was to be restored to its natural state as a prairie remnant and habitat for indigenous wildlife including deer, fox, beaver, coyotes, prairie dogs, owls and hawks. (Exhibit 17.) A sign currently at the entrance to HHNP identifies the land as a "Park." (Exhibit 35-2.) Current City zoning maps show the parcel as "OS-A", meaning "Open Space – Park." (Exhibits 25 and 19.)

The evidence presented at the hearing established that HHNP meets the definition of *City park land* set forth in Municipal Code, Sec. 39-191 (2). The evidence further established that the land at issue has been used for park purposes since the City took title in 1936. The evidence presented at the preliminary injunction hearing on this issue was **undisputed**.

In this case, unlike *Hall,* the City treated HHNP as a park for a continuous period of 45 years. Here, unlike *Hall,* the Parks Department spent money from its budget to improve the

park. In this case, unlike *Hall,* the City told its citizens that HHNP was open space park land, and that it would remain open space park land in perpetuity.

Per *Hall*, the test is whether at any time the City "treated [the subject land] as a park." 115 Colo. at 542. That test is well and truly met here since the evidence regarding the City's treatment of HHNP as a park is extensive and undisputed. Had the *Hall* Court been presented with the evidentiary record at issue in this case, the outcome would have been entirely different. Thus, *Hall* supports the conclusion that Plaintiffs established a strong probability of success on the merits with regard to their assertion that Section 2.4.5 of the City Charter requires a vote.

After this Court conducted an evidentiary hearing on June 12-13, Defendant Debra Johnson, in her capacity as Clerk and Recorder, rejected a referendum petition with 6,664 valid signatures of Denver voters, which is more than enough to put the issue on the November ballot. On July 11, 2013 this Court ordered Defendant Johnson to certify the record so that this Court can review her actions under CRCP 106(a)(4). On July 23, 2013 this Court entered an order directing the Plaintiffs to set the case for trial on the merits as required by *Rathke v. MacFarlane,* 648 P.2d 648 (Colo. 1982). Unless the Court enters an injunction during the pendency of the appeal, trial on the merits will be meaningless. While the case is pending, DPS will erect of $20 Million of permanent construction improvements on open space park land which rightfully belongs to the people of Denver.

5. Plaintiffs asserted their rights promptly after City Council subdivided Hampden Heights North Park on April 1, 2013

The City argues that the plaintiffs were guilty of "an undue delay in bringing suit." (Response ¶ 6.) The City's contention is laughable. For six months starting in November of 2012 the City and DPS invited the plaintiffs to attend public meetings to state their opposition to the proposed transfer of HHNP. The plaintiffs accepted these invitations, and spoke out publicly at all of the meetings in favor of preserving HHNP. While the plaintiffs spoke out at public meetings, concerned members of the media, government, and academic communities published articles urging the city to preserve the land. These publications started in December of 2012 and continued to the present. See Exhibits 1-18.

The City and DPS ignored the views of the plaintiffs, as expressed at public meetings, and on April 1, 2013 proceeded to approve a contract for sale of HHNP that arguably violates the people's right to vote on the issue under Charter section 2.4.5. Plaintiffs filed suit on May 29, less than two months after the City subdivided the park.

This is not a case in which the plaintiffs delayed. It is case in which the city willfully ignored its duty as trustee to protect park land and open space for the benefit of the people who own it, and simply sneered at citizens who stood up for the right of the public to vote before park land is sold.

CONCLUSION

The irreparable injury that will be suffered by the plaintiffs and the citizens of Denver is the permanent loss of 11 acres of unique and irreplaceable open space park land, plus the loss of $20,000 of property value for each homeowner in Hampden Heights East neighborhood adjacent to HHNP. Balancing the equities according to the standard set forth in *Romero,* "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." 2011 WL 1797240, at *3. Clearly, plaintiffs have more than a "mere possibility" of success on the merits. If a jury of Denver citizens is allowed to decide whether HHNP is a park, then the odds would certainly favor the plaintiffs at a trial on the merits.

For the foregoing reasons, Plaintiffs respectfully request that the Court grant an injunction during the pendency of the appeal to maintain the status quo of the park and prevent disturbance of this unique open space land until a final adjudication is had on the merits.

Respectfully submitted July 26, 2013.

BENSON & CASE, LLP

Original signed by John Case

John Case, # 2431
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2013 true and correct copies of the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTION DURING PENDENCY OF APPEAL** was filed and served on the following:

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