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| COLORADO COURT OF APPEALS<br>Court Address: 2 East Fourteenth Ave.<br>Denver, Colorado 80202 | |
| Denver District Court<br>Case No. 2013 CV 32444<br>Hon. Herbert L. Stern III, District Court Judge | |
| **Plaintiffs/Appellants:** FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; RENEE LEWIS, DAVID HILL, SHAWN SMITH, JOHN CASE and JUDY CASE, individually and as Members of the Petitioner's Committee; and STEVE WALDSTEIN and ZELDA HAWKINS, individuals.<br><br>v.<br><br>**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. | ▲ **COURT USE ONLY** ▲ |
| Attorneys for Appellants:<br>John Case, # 2431<br>Benson & Case, LLP<br>1660 So. Albion Street, Suite 1100<br>Denver, CO 80222<br>PH: (303) 758-5003 FAX: (303) 753-0444<br>Email: case@bensoncase.com | Case No.: 13CA1249 |

# OPENING BRIEF OF APPELLANTS

## CERTIFICATE OF COMPLIANCE

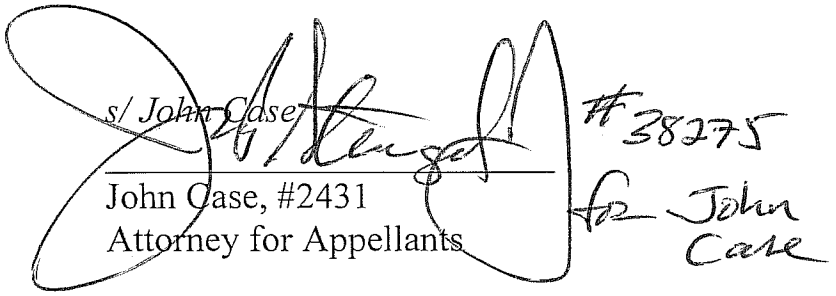
I certify that this brief complies with all requirement of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) because it contains 9,362 words.

The brief complies with C.A.R. 28(k) because, for the party raising the issue, it contains, under a separate heading, (1) a concise statement of the applicable standard of appellate review with citations to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

BENSON & CASE, LLP

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in ruling that Appellants failed to establish a reasonable probability of success on the merits where the evidence presented at the preliminary injunction hearing conclusively established that the land in question was a park and thus inalienable pursuant to both common law trust principles and the Denver City Charter absent voter approval.

2. Whether the trial court's failure to make any written findings of fact mandates a remand.

3. Whether the trial court erred in ruling that Appellants failed to establish a reasonable probability of success on the merits where the Denver Clerk and Recorder deprived Appellants of their fundamental constitutional right to a referendum on Ordinance 170, a legislative measure.

## STATEMENT OF THE CASE

### A. Nature of the Case, Course of Proceedings and Disposition Below:

Appellants bring this appeal to protect 10.77 acres of Hampden Heights North Park ("HHNP") in southeast Denver from unlawful development. On April 1, 2013, Denver City Council enacted two ordinances subdividing HHNP into a south parcel and a north parcel. Ordinance 170, Series of 2013, approved a contract to trade the south parcel, consisting of 10.77 acres, to School District No.

1 in the City and County of Denver ("DPS"), in exchange for a building at 1330 Fox Street. DPS intends to build a school on the park starting in January 2014.

Ordinance 168, Series of 2013, took the north parcel, consisting of 16 acres, and designated it part of Paul A. Hentzell Park, located immediately to the north.

Appellants opposed the adoption of Ordinance 170 at a City Council meeting on April 1, 2013 and subsequently circulated a referendum petition to repeal Ordinance 170. Defendant Debra Johnson, the Clerk and Recorder of the City and County of Denver, rejected the petition, refused to count the signatures of Denver voters, and informed Appellants that they should seek relief in the courts.

Appellants filed their complaint on May 29, 2013, along with a motion for preliminary injunction to prevent transfer of the south parcel to DPS. Relying upon *McIntyre v. Commissioners of El Paso County,* 61 P. 237 (Colo. App. 1900) and numerous authorities recognizing common law dedication, Appellants assert that HHNP is a park held by city officials as trustees for the citizens of Denver. Appellants assert that the property is protected from sale by common law trust principles and City Charter § 2.4.5, which bars the sale of any "park or portion of any park belonging to the City as of December 31, 1955" without voter approval.

On July 5, 2013 the trial court denied Plaintiffs' Motion for Preliminary Injunction, finding that Plaintiffs failed to demonstrate a probability of success on

the merits. (07/05/13 Order, Case File ["CF"] p. 548.] Appellants filed their Notice of Appeal on July 5. The trial court denied Appellants' motion for an injunction during the pendency of the appeal by oral ruling on September 19, 2013.

Appellants ask this Court to reverse the trial court's denial of a preliminary injunction. Based on the evidence presented in the trial court, this Court should hold that Plaintiffs established a reasonable probability of prevailing on the merits. The evidence and the law establish that: (1) HHNP was a park by common law dedication; (2) City officials hold the park land in trust as trustees for the benefit of Denver citizens; (3) trust principles and Section 2.4.5 of the City Charter prohibit the sale of the park without a vote of the people; and (4) City officials acted legislatively when they subdivided HHNP into two parcels and traded the south parcel to DPS. By separate motion Appellants are asking that this Court enter an injunction protecting the park from destruction during the pendency of this appeal.

**B. Statement of Facts:**

Evidence presented at the preliminary injunction hearing

The trial court conducted an evidentiary hearing June 12 and 13, 2013. The evidence established that the City purchased the land, a triangular parcel bordering Cherry Creek, in 1936. (Deed, Ex. A, CF p. 424.)

In 1936 the property was located outside the city limits in Arapahoe County. The City referred to the property as "Parcel 31." The City acquired the property as part of its effort to control flooding along the Cherry Creek corridor. (06/13/13 Transcript at 59.) After conveying the east edge of Parcel 31 to the Colorado Department of Transportation for construction of South Havana St. in 1955, the City annexed the remainder of the parcel in 1965. (*Id.* at 52.)

To help this Court understand the topography of the subject land, four Exhibits admitted at the hearing are attached to this brief in the Addendum. Exhibit 1 (admitted 06/13/13 Transcript at 10) is a 2013 city flood plain map that shows the location of HHNP. Exhibit 17 (admitted *id.*) is a Parks Department map of the 90 acre natural area that includes HHNP and Paul Hentzell Park. Exhibit I (admitted *id.* at 246) is a 1955 aerial photograph of Parcel 31 showing the area before development took place. Exhibit F (admitted *id.* at 64) is a current satellite photo that shows the new boundaries of the north and south parcels of HHNP, which boundaries were created by Ordinances 168 and 170 on April 1, 2013.

Charles Bonniwell, a local historian whom the trial court accepted as an expert in the history of the Cherry Creek corridor, testified that HHNP was part of the original pioneer trail along Cherry Creek, which westbound gold miners and settlers followed to downtown Denver. The City encouraged Denver citizens to

use Parcel 31 and other properties acquired along Cherry Creek for recreation activities. The City purchased easements across privately owned properties so that Denver citizens could enjoy riding horses and recreation along the water:

> Q. What did you find as far as Denver's ability to acquire all of the land along Cherry Creek?
>
> A. It did not. It was unable to acquire various portions because the landowner was unwilling to sell them, which is a little unusual because they were buying floodplain, other than of a school, I guess, you can't normally build. And this was the depression. So they were buying basically the floodplain, but some owners refused to sell. The Denver Country Club refused to sell its creek bed to the City and County of Denver. The owners of the property on Colorado Boulevard where — Cherry Creek South, refused to sell any property to the City and County of Denver. City and County of Denver then later went back and got rights of ways in order that its citizens could recreate and go through those parcels unimpeded.
>
> Q. And when you say rights of way, what do you mean?
>
> A. That's exactly what they were. They were easements to allow them to build a path and to allow residents to go through that path so they could reach all the way from downtown Denver to Cherry Creek dam.
>
> Q. Were those easements acquired to allow people to go through Parcel 31 for recreational purposes?
>
> A. To get to Parcel 31, yes, and the other parcels.

(06/13/13 Transcript at 279:18 – 280:15.)

The public right of way along Cherry Creek extended from the Denver Country Club stables at Speer and University, all the way to the Cherry Creek dam, one-half mile east of Parcel 31. Numerous stables were located along the bridle paths, including the Glendale Riding Club, which later became the Riviera Mexican Restaurant at Colorado Blvd. and E. Kentucky Ave. (*Id.* at 283-85.)

Mr. Bonniwell testified that from the early 1900s until present, Denver citizens have used the land in HHNP for horseback riding, hiking, bird watching, and other park and recreation purposes:

> Q. So prior to the time that Denver acquired this land in 1936, did people use it for recreational purposes?
>
> A. Absolutely. Absolutely. This is where the horse trails went through. This is one beautiful section of Cherry Creek, where it bends around. People love to go there for 150 years. They'd go there to picnic. They'd go there to recreate.
>
> . . .
>
> Q. After 1936 and before December 31, 1955, did citizens of Denver ride on horseback and walk along Cherry Creek through Parcel 31 for recreational purposes?
>
> A. Yes.
>
> . . .
>
> A. . . . Denver Country Club had stables from 1905 to 1923. From 1923 to 1942, there were stables at the polo club grounds. After that, all of the riding clubs were located in Glendale. They were less regulated and it's a place where you can go park your horse or have

your horse there and then you can ride up the trail, four miles from 4 Mile House up to what is today Cherry Creek Dam.

Q. And that activity went on from the 20s all the way up through when? Present?

A. Today. Today people tend to use bikes as preferable transportation. You don't have to feed a bike.

(*Id.* at 281:12-18, 281:25 – 282:3, 283:22 284:7.)

Bonniwell's testimony is strong historical evidence that City officials treated HHNP as public park land for the recreational use of its citizens before December 31, 1955. Direct and overwhelming evidence exists that, starting with the City's master land use plan in 1967 (Ex. 14, admitted at 06/12/13 Transcript at 10; Ex. 15, admitted at 06/12/13 Transcript at 10), the City and its elected officials published official documents that treated HHNP as a city park.

David Longbrake, a retired professor and former chairman of the geography department at the University of Denver, testified that in 1976 when he moved to Denver, he was looking for a Denver neighborhood with lots of open space for his wife and children to enjoy. When the realtor showed Mr. Longbrake 3016 S. Geneva St. in Hampden Heights, Mr. Longbrake was impressed with the open space that bordered on the north and east. To make sure the City would preserve the open space, Mr. Longbrake consulted members of the Denver City Planning Office. Those officials provided Mr. Longbrake with Exhibit 14, the City's master

land use plan published in 1967, which showed that the land was treated as "public open space – park." Planning officials assured Mr. Longbrake that HHNP would remain a park in perpetuity. (06/12/13 Transcript at 30:17-25.) Mr. Longbrake relied on this information. Had Mr. Longbrake not received such assurances, he would not have purchased his home. (*Id.* at 36:20-22.)

Mr. Longbrake identified Exhibit 35-2, a photograph of the sign announcing Park Rules of the Denver Department of Parks and Recreation. (06/12/13 Transcript at 42.) The sign is posted at the west entrance to HHNP, clearly informing the public that the land is a city park.

One of the values Appellants seek to preserve is the ability of Denver citizens to connect with nature. During the 36 years Mr. Longbrake has lived next to HHNP, he has seen deer, red fox, black fox, coyotes, raccoons, skunks, muskrats, beavers, beaver dams, ducks, prairie dogs, owls, hawks, and a rare black crowned night heron. After his wife passed away from cancer, Mr. Longbrake commemorated her love for the park by donating a park bench on the west bank of Cherry Creek in HHNP. (06/12/13 Transcript at 43-62.)

The trial court accepted Susan Baird, Ph.D., who served as senior planner for the Denver Department of Parks and Recreation from 1990 until 2010, as an expert in land use and park planning. Dr. Baird discussed the long established

policy of the Parks Department to continue acquiring land along urban waterways, particularly along the South Platte River and the banks of Cherry Creek. She described how natural areas benefit the physical and emotional health of Denver citizens. Eighty percent of Denver residents who responded in a survey said that natural areas were "moderately important" to "very important" in their lives. Natural areas like HHNP include plants and wildlife indigenous to the prairie environment. Such areas offer Denver citizens a different experience than English style parks, which construct a pleasant but artificial environment of irrigated bluegrass, sidewalks, and shade trees. (06/12/13 Transcript at 76-90.)

Dr. Baird testified that the Parks Department maintained HHNP throughout her twenty year tenure. Maintenance included constructing trails for walking and bicycling, posting signs, picking up trash, mowing, using goats to eliminate weeds, re-seeding with native grasses, and controlling the prairie dog population. Prairie dogs are the keystone species for the HHNP wildlife population of hawks, owls, foxes and coyotes that eat small rodents.[1] (06/12/13 Transcript at 91-93.)

Dr. Baird identified current maps printed from the City of Denver website. These are Exhibits 18 (floodplain), 19 (land use), 20 (planning), 21 (transportation), 22-1 (fire), 22-2 (police), 23 (Parks and Recreation), 24 (streets),

[1] As of the date this brief is filed, the City and DPS have set animal traps with the intent to eliminate every prairie dog in HHNP.

and 25 (Zoning). All these maps were published by the City for public use. The maps identify HHNP by name. All of the maps show HHNP as a park belonging to the City. Exhibits 19, 21, 22, 23, and 25 show that the City zoned the land in HHNP "OS-A," meaning "Open Space – Park." (06/12/13 Transcript at 96-99, 105:15.) The trial court admitted all of the maps into evidence. (*Id.* at 10.)

Exhibit 25 is a printout of the pertinent section of the official City zoning map published electronically on March 4, 2013 by the City and County of Denver Department of Community Planning and Development. The zoning map is attached to this brief in the Addendum. It shows that at the time Ordinance 170 was enacted, HHNP was zoned OS-A, meaning "Open Space – Park."

In addition to maintaining HHNP's zoning as Open Space Park from 1967 to present, the Department of Parks and Recreation in 2007 designated HHNP as part of a 90 acre natural area that also included the adjacent Hentzell Park and Babi Yar Park. The Parks and Recreation Advisory Board ("PRAB") conducted two public hearings to determine whether HHNP and Hentzell Park should be treated as a single ecosystem. After the hearings, PRAB recommended to the Manager of Parks and Recreation that HHNP be included in the natural area and restored to its original prairie state. This resulted in a published proclamation by the Manager of

Parks and Recreation designating HHNP as part of the 90 acre natural area that is shown in Exhibit 17. (06/12/13 Transcript at 76-85, 105-106.)

In November 2012, after the City and DPS negotiated their land swap, the Mayor instructed Laurie Danemiller, his appointee as Manager of Parks and Recreation, to de-designate the south parcel of HHNP from the natural area. After two public hearings at which citizens expressed their outrage, PRAB voted against the mayor's proposal 11-6. In January 2013, Ms. Danemiller ignored her citizen advisory board and obeyed the Mayor. Ms. Danemiller referred to the south parcel as "a stand alone parcel" that was "blighted" by prairie dogs. She de-designated the south parcel as a natural area, the first time in Denver history that a natural area had been de-designated. (06/12/13 Transcript at 106-108, 131.)

Dr. Baird testified that HHNP is not a "stand alone parcel," but is part of the larger ecosystem formed by Cherry Creek and the surrounding 90 acre natural area. Dr. Baird testified that if the Parks Department restored HHNP to its original prairie environment, the area would be just as beautiful as Hentzell Park and Babi Yar Park to the north. (06/12/13 Transcript at 91-93.)

Dr. Baird testified that the City's new plan to construct a school in HHNP "goes against every adopted plan that I can think of":

> Not only for this area, but for the City, because if you look at the Cherry Creek corridor or master plan, you look at the Cherry Creek

> water basin plan, you look at the game plan, which again was the master plan for the entire Department, and you look at Hentzell Park, what is the pattern in terms of what **the goals are for all of these areas is to acquire more land. It's to actually, where possible, remove buildings from these areas and to acquire more land.**

(*Id.* at 94-95 [emphasis added].)

Appellant Steve Waldstein testified that the largest factor in purchasing his home at 3326 S. Geneva St. was HHNP. Before buying his home, Mr. Waldstein relied on city maps showing HHNP as a city park. HHNP gave Mr. Waldstein and his family immediate access to trails leading east to Cherry Creek dam, and west to the confluence of Cherry Creek and the Highline Canal. He would not have purchased his home without the open space. In a recent appraisal, HHNP open space increased his property value by $20,000. As a result of Ordinance 170, Mr. Waldstein faces a school being constructed next to his boundary fence, bringing commotion where before there was tranquility. (06/12/13 Transcript at 146-152.)

After describing his efforts to gather signatures on the Appellants' referendum petition, Mr. Waldstein discussed his frustration with city officials:

> Q. As a citizen, was it your understanding that the city officials owned the parks in trust for the benefit of the people?
>
> A. Absolutely.
>
> Q. Do you feel they've betrayed that trust?

A. Absolutely. For one thing, I mean, **like everyone else I assumed that a park is a park, that a park stays a park forever. You know, I had no idea of different classifications of parks and some are, you know, protected and some aren't. But I mean to me, you know, if the city is advertising it as a park, it's a park and it should stay a park.**

Q: Do you feel, as a citizen, that if this ordinance was passed over your objection by the city Council, that you have a right, as it citizen, to petition for its repeal?

A. Absolutely.

(06/12/13 Transcript at 152-153 [emphasis added].)

Proceedings before the Clerk and Recorder

On May 20, 2013, Appellants submitted a petition to Debra Johnson, the Clerk and Recorder, for approval as to form. The Petition sought to repeal Ordinance 170 by referendum. (Exhibit 6, admitted at 06/12/13 Transcript at 10.) Johnson rejected the Petition on the ground that "[b]ecause Ordinance No. 170 concerns an administrative matter of approving or disapproving a real estate transaction, it is not subject to referendum under Section 8.3.1 of the Denver Charter." (Exhibit 9, page 9-1, admitted at 06/12/13 Transcript at 10.) Johnson further advised that Appellants "may institute proceedings with the appropriate court" if they were dissatisfied with her actions. (*Id.* at 9-2.)

On July 1, 2013 Plaintiffs submitted the completed petition with 6,664 signatures of Denver registered voters, more than the 6,129 required for a

referendum. Ms. Johnson refused to count the signatures and accused Appellants of violating Denver Charter § 8.3.2(C) by "circulating the petition and gathering signatures without the clerk's approval." (07/03/13 Letter, CF p. 555.)

Trial court's ruling

An evidentiary hearing was held on Appellants' motion for preliminary injunction on June 12-13, 2013. The trial court denied the motion by order issued July 5, 2013. The court ruled that Appellants failed to show a probability of success on the merits. As to Appellants' assertion that voter approval of the land transfer was necessary per common law trust principles and Section 2.4.5 of the Denver City Charter, the court found that Appellants did not show that the land was a park. As to Appellants' assertion that the Clerk and Recorder denied them their constitutional right to referendum, the court found that Appellants did not show that Ordinance 170 was "legislative" in nature. (07/05/13 Order, CF p. 548.)

## SUMMARY OF ARGUMENT

1. The evidence in the trial court established that the land in question was both a park by common law dedication and a "park belonging to the City as of December 31, 1955" for purposes of Charter § 2.4.5. In both cases, voter approval is required before selling the property and the trial court erred in ruling otherwise.

2. The trial court made no findings of fact in support of its ruling. Since findings of fact are required in connection with denial of a motion for preliminary injunction, the order denying Appellants' motion should be vacated.

3. Ordinance 170 was a *de facto* zoning change. Further, the ordinance and Appellants' petition to undo the ordinance are declarations of public policy. Accordingly, Ordinance 170 is legislative in nature and the right of referendum set forth in Art. V, § 1(9) of the Colorado Constitution applies.

## ARGUMENT

### III. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFFS FAILED TO SHOW A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS AS TO WHETHER THE LAND IS A PARK.

#### A. Standard of Review and Preservation:

To obtain a preliminary injunction the moving party must show (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury; (3) absence of a plain, speedy, and adequate remedy at law; (4) an injunction would not disserve the public interest; (5) the balance of equities favors an injunction; and (6) the injunction will preserve the status quo pending a trial. *Rathke v. MacFarlane,* 648 P.2d 648, 653–54 (Colo. 1982).

Denial of a motion for preliminary injunction is generally reviewed for abuse of discretion. *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 716

(Colo. 2010). However, whether the moving party established a reasonable probability of success on the merits for purposes of the first *Rathke* factor is reviewed de novo. *Denver Firefighters Local No. 858, IAFF, AFL-CIO v. City & County of Denver*, 292 P.3d 1101, 1104 (Colo. App. 2012), *cert. granted*, 2013 WL 2246789 (Colo. May 20, 2013). Interpretation of city charter language is a question of law that appellate courts review de novo. *North Ave. Ctr., L.L.C. v. City of Grand Junction*, 140 P.3d 308, 310 (Colo. App. 2006).

The trial court's ruling that Appellants failed to establish a probability of success on the merits as to whether the land at issue is a park the sale of which must be approved by the voters appears in its July 5, 2013 Order, CF p. 548.

B. **Denver land can qualify as a park in multiple ways.**

The threshold issue is whether, as Appellants assert, HHNP is a park. If so, HHNP cannot be sold without a vote of the people, and Ordinance 170 – by which City Council purported to exchange the south 10.77 acres of HHNP for an office building without a vote of the citizenry – was ultra vires and void.

There are three categories of Denver parks: parks designated by ordinance, parks belonging to the City as of December 31, 1955, and parks by common law dedication. The first category includes properties formally designated parks by ordinance. The second category includes properties which, though not formally

designated, were acquired before December 31, 1955 and have been recognized as parks. The third category includes properties which the City, by its actions, has dedicated as parks and which the people, by their actions, have accepted as parks. While there is some overlap, the difference lies in law that governs each.

Parks by formal dedication and parks belonging to City as of 1955 are expressly referenced in and subject to Section 2.4.5 of the City Charter:

> 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. (Emphasis added.)

Thus, parks falling into those two categories cannot be sold without voter consent.

Parks by common law dedication arise under and are governed by Colorado common law. Such parks cannot be sold without consent of the people. That result is dictated by common law precepts declaring that common law parks are held in trust for the benefit of the people to whom they were dedicated. *McIntyre v. Board of Commissioners of El Paso County*, 61 P. 237, 240 (Colo. App. 1990).

HHNP was never designated a park by ordinance. However, applying the law to the evidence before the trial court, Appellants established a reasonable probability of success on the merits as to HHNP's status as a park by common law dedication and as a park belonging to the City as of December 31, 1955.

### C. HHNP is, and long has been, a park by common law dedication.

#### 1. The City Charter does not abrogate common law dedication as to land the City owned as of December 31, 1955.

The City contended in the trial court, and will likely contend here, that disputes over the park status of Denver land must be decided solely under the City Charter. That is incorrect. The Charter did not eliminate common law dedication.

Nothing in the Charter purports to abrogate the common law as to all park land. Section 2.4.5 of the Charter suggests that designation by ordinance is the exclusive means of creating a park as to land acquired after December 31, 1955. However, as to land acquired before that date – such as HHNP – the Charter imposes no restrictions on how the property can become a park. Absent such restrictions, common law dedication is alive and well. *See Brook v. Restaurant Servs., Inc.*, 906 P.2d 66, 68 (Colo. 1995) ("[L]aws in derogation of the common law must be strictly constructed so that if the [government] wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication.").

Recognizing that nothing in the Charter eliminates common law dedication, the City relied upon *Hall v. City & County of Denver*, 177 P.2d 234 (Colo. 1946), claiming that the Charter governs all disputes concerning Denver park property. That reliance is misplaced. The plaintiffs in *Hall* did not assert, and the *Hall* Court did not consider, whether the land at issue was a park by common law dedication. Thus, although the *Hall* Court cited the Charter in deciding that certain property was not a park, *Hall* does not by any stretch of the imagination hold that the Charter abrogated common law dedication; the Court did not address that doctrine.

Finally, the Charter itself impliedly recognizes common law dedication as to land acquired before December 31, 1955. The final sentence of Section 2.4.5 provides that "[n]o land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance." By providing that only property acquired after December 31, 1955 must be designated a park by ordinance, the Charter impliedly recognizes that property acquired prior to December 31, 1955 may be deemed a park by other means. *See, e.g., Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) (setting forth the rule of construction *expressio unius exclusio alterius*—the expression of one thing excludes others not mentioned). Because the only means of establishing a park other than those set forth in the Charter is common law dedication, the Charter impliedly recognizes

that property acquired by the City before December 31, 1955 may become a park by common law dedication so long as the elements are satisfied.

2. HHNP is a park by common law dedication because the evidence established the City's unequivocal intent to dedicate the land and the citizenry's acceptance of the dedication.

A dedication of property to public use may be made pursuant to statute or according to the common law. *City of Denver v. Clements*, 3 Colo. 472, 497 (Colo. 1877). To establish a common law dedication, Appellants must show both an unequivocal intent on the part of the City to make a dedication, and acceptance of the dedication by the people. *City of Northglenn v. City of Thornton*, 569 P.2d 319, 321 (Colo. 1977); *State Dep't of Highways, Div. of Highways v. Town of Silverthorne*, 707 P.2d 1017, 1020 (Colo. App. 1985).

While it seems clear from the Charter that common law dedication applies only to land acquired on or before December 31, 1955, the Charter imposes no time restriction on when the property must have been dedicated. In other words, in determining whether HHNP is a park by common law dedication, it is necessary that the City acquired the property prior to 1955; however, it does not matter when the City evidenced its intent to dedicate the property. If at any point before or after the acquisition there was a dedication of the property to public use and an acceptance of that dedication, HHNP is a park by common law dedication.

Here, it is undisputed that the City acquired HHNP in 1936. (Ex. A, CF p. 424.) From that time forward the City evidenced intent to dedicate HHNP as a public park. The citizenry accepted the dedication by using HHNP as a park. Thus, HHNP is a park by common law dedication, is held in trust by the City for the benefit of the people, and may not be sold without the people's permission.

*Intent to Dedicate:* Evidence of intent to dedicate need not be express; it may be implied by conduct from which the intent can be rightly presumed, and from which any other presumption would be inconsistent. *McIntyre*, 61 P. 237 at 240. Evidence of intent to dedicate may generally be implied from acts or declarations on the part of a landowner that clearly demonstrate his intent to make a dedication, or from conduct on the part of a landowner that would estop him from denying such intent. *Starr v. People*, 30 P. 64, 65 (Colo. 1892).

Mere use by the public is insufficient, in and of itself, to prove a common law dedication. *Id.* But public use increases the weight of other evidence tending to establish intent to dedicate. *Id.* Where a landowner engages in acts evidencing intent to dedicate, and those acts are accompanied by public use of the property without objection, the public's use is additional evidence intent to dedicate. *Id.*

The undisputed testimony of historian Charles Bonniwell established that Denver citizens regularly used HHNP for park and recreational purposes from the

early 1900s forward. After the City acquired the land in 1936 those public uses continued with the knowledge and encouragement of Denver officials, who treated the land as a park even though no ordinance designated it as such. Thus, the City manifested its intent to dedicate HHNP as a park from the time of acquisition.

From 1967 forward the evidence of intent to make a common law dedication is overwhelming. The City identified HHNP as "Public—Open Space—Park" on its 1967 master land use plan (Exs. 14 & 15), and on subsequent zoning, land use and park maps (Exs. 18-25) published by the City and distributed to Denver citizens. The City represented to the public that HHNP was a park and would remain a park in perpetuity. (06/12/13 Transcript at 30:17-25.) A city-funded sign at the entrance of the property identifies the land as a "Park" (Ex. 35-2; 06/12/13 Transcript at 52:2-14), and the City's Parks Department has expended substantial funds not only maintaining property, but also constructing improvements like bridges, bicycle trails, and pedestrian walkways that are suitable only if the HHNP is to be used as a park. (06/12/13 Transcript at 91-93.) These actions clearly evidence the City's intent to dedicate the property as a public park because, absent such intent, the City's actions would be logically inconsistent.

The public's use of HHNP as a park from 1936 forward increases the weight of the aforementioned facts because the City did not object to such use. Citizens

have used HHNP for park purposes since the City acquired the land. This use has been open, uninterrupted, and without objection by the City. The public was making the exact use of the property that the City intended—that of a park. Hence, the public's use of HHNP is evidence of the City's intent to dedicate.

In sum, by zoning the property as a park, representing to the public that the property was a park, expending Parks Department funds to improve and maintain the property as a park, place park signs on the property, and allowing the public to use the property as a park without objection, the City evidenced its intent to dedicate HHNP to the people for use as a public park.

*Acceptance of the dedication*: In determining whether there has been an acceptance of a common law dedication, no particular form is required. *Thornton v. City of Colorado Springs*, 478 P.2d 665, 667 (Colo. 1970). Any unambiguous act or acts will generally suffice. *Id.* Here, the citizens of Denver have used HHNP as a park for over seventy years. Such use is sufficient to constitute an acceptance.

In *McLathlin v. City & County of Denver*, the Colorado Supreme Court established that a park is a plot of ground "used for public recreation." 280 P.2d 1103, 1106 (Colo. 1955). The Court acknowledged that, "[because] the public has various recreational preferences," the uses of public parks may vary as well. *Id.* Among the uses that courts have identified as public park uses are: space for grass,

trees, shrubs, and flowers; space for seats and tables for picnicking; space for playgrounds, tennis courts, and swimming pools; and space for activities such as skating, swimming, biking, horseshoe pitching, horseback riding, and sports. *Id.*

Since 1936 the citizens of Denver have used HHNP for recreational activities including walking, hiking, biking, picnicking, and horseback riding. By using the property in these ways, the citizens unambiguously accepted the City's dedication of the property as a park. Because there was both intent to dedicate and an acceptance of the dedication, HHNP is a park by common law dedication.

Because HHNP is a park by common law dedication, the property is held by the City in trust for the benefit of the people. *See McIntyre*, 61 P. at 240. Hence, the City cannot use HHNP in a manner inconsistent with the park-purpose to which it was dedicated. *See id.* Additionally, because HHNP is held in trust for the benefit of the people, it naturally follows that the property may not be sold by the City without the express permission of the people. *See id.*

### D. Apart from the doctrine of common law dedication, HHNP is a "park belonging to the City as of December 31, 1955" for purposes of City Charter § 2.4.5 and therefore cannot be sold without voter approval.

The Charter expressly provides that "any park belonging to the City as of December 31, 1955" cannot be sold or leased "[w]ithout the approval of a majority of those registered electors voting in an election held by the City and County of

Denver[.]" Charter § 2.4.5. By the Charter's plain and unambiguous terms, the voter approval requirement applies to any sale or lease of land that is: (1) a park; and (2) was City-owned as of December 31, 1955. HHNP clearly qualifies.

Ordinance 170 authorized transferring the south 10.77 acres of HHNP to DPS in exchange for other real estate. That transaction plainly qualifies as a sale. *See, e.g.,* C.R.S. § 4-2-106(1) (defining "sale" as transfer of title for a price). It is undisputed that the City owned HHNP as of December 31, 1955.

As to the only remaining criterion, Section 2.4.5 of the Charter only requires consideration of whether the property was a "park"; it does not expressly or implicitly require that the property qualify as a park on December 31, 1955. However, even if there were such a requirement, it is satisfied here. The undisputed testimony of Charles Bonniwell established that Denver offered HHNP as a park to its citizens, who used HHNP as a park with the City's encouragement from 1936 forward. Thus, HHNP was a park prior to 1955 for purposes of § 2.4.5.

But since the Charter language does not compel the conclusion that the land had to be a park as of December 31, 1955, events after that date are relevant as well. The municipal code defines "city park land" to include any "land . . . owned, operated or controlled by the department of parks and recreation." Denver Muni. Code § 39-191(2). Dr. Susan Baird's testimony established that the Department of

Parks and Recreation operated and controlled HHNP. For the reasons discussed in Section I.C, *supra*, the overwhelming weight of the evidence of events occurring from 1967 forward established that the City considered HHNP a park at all times.

In conclusion, HHNP was both a park by common law dedication and a "park belonging to the City as of December 31, 1955" for purposes of Charter § 2.4.5. In either case, the City cannot sell any part of the park without voter consent. Since Ordinance 170 purports to do just that, it was ultra vires and void.

Appellants do not contend that the south 10.77 acres of HHNP can never be sold. They simply want the City to place the issue before the voters, just as the Charter dictates. If the electorate approves the transfer, then so be it. But as matters now stand the City Council is attempting an end run around the Charter's express requirements. The trial court erred refusing to enjoin the City's lawless conduct.

## II. THE TRIAL COURT FAILED TO MAKE SUFFICIENT FINDINGS OF FACT TO SUPPORT ITS ORDER DENYING APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION.

### A. **Standard of Review and Preservation:**

An appellate court reviews de novo whether the trial court's findings of fact are sufficient to facilitate appellate review. *See Gitiltz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007). The absence of factual findings is reflected in the trial court's July 5, 2013 Order, CF pp. 548-49.

### B. The trial court made no findings of fact in connection with its order denying Appellants' motion for preliminary injunction.

In granting or refusing a preliminary injunction, a trial court must set forth the findings of fact and conclusions of law that constitute the basis for its action. C.R.C.P. 52; *Gitiltz*, 171 P.3d at 1278. The purpose of this rule to provide appellate courts with a clear understanding of the basis of the trial court's decision and facilitate appellate review. *Murray v. Rock*, 364 P.2d 393, 395 (Colo. 1961).

Here, the trial court denied Appellant's motion on the ground that Appellants failed to show a reasonable probability of success. The court made no findings of fact to support its conclusion. The trial court's failure to discharge its obligations requires that this case be remanded for complete factual findings.

## IV. THE TRIAL COURT ERRED IN RULING THAT THE CITY ACTED IN AN ADMINISTRATIVE CAPACITY WHEN IT SUBDIVIDED HHNP INTO TWO SEPARATE PARCELS, CHANGED THE LAND USE ON THE SOUTH PARCEL FROM "PUBLIC - OPEN SPACE – PARK" TO THE DEVELOPMENT SITE FOR AN ELEMENTARY SCHOOL, AND THEN TRADED THE SOUTH PARCEL TO DPS.

### A. Standard of Review and Preservation:

Appellants incorporate by reference the standard of review set forth in Section I.A, *supra*. The trial court's ruling that Appellants failed to demonstrate a reasonable probability of success on the merits as to whether Ordinance 170 was

"legislative" for purposes of the constitutional right of referendum is set forth in its July 5, 2013 order denying the motion for preliminary injunction, CF p. 548.

### B. The trial court erred in denying Appellants their fundamental constitutional right of referendum on the ground that Ordinance 170 was "administrative" rather than legislative.

The Colorado Constitution vests legislative power in the general assembly, but reserves to the people the twin powers of initiative and referendum. COLO. CONST. Art. V § 1(9). The right of people to propose initiatives and referendums is fundamental. *Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974) (describing initiative and referendum as "fundamental rights"). Any "limitations on the power of referendum must be strictly construed, and should not be extended by either implication or inference." *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969).

Here, the Clerk and Recorder contended that City Council "was acting in an administrative capacity, not a legislative capacity" when it enacted Ordinance 170. (05/22/13 Letter, CF p. 4.) The trial court likewise ruled that "the Plaintiff's did not establish that the City ordinance approving the real estate contract with DPS (Ordinance 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." (07/05/13 Order, CF p. 548.)

The trial court's holding that the City acted in an "administrative" capacity in approving Ordinance 170 is incorrect for three reasons. Those reasons are discussed separately in the material that follows.

1. Ordinances 168 and 170 constituted an unprecedented change to Denver's land use policy regarding parks and were therefore legislative.

While the referendum power is broad, it is not unlimited. *City of Idaho Springs v. Blackwell,* 731 P.2d 1250, 1253 (Colo. 1987). Article V of the Colorado Constitution has long been construed to vest only legislative power in the people. *Id.* As a result, the referendum power applies to only those acts that are legislative in character. *Id.* The people may not use referendums to exercise administrative or judicial powers. *Id.*; *Vagneur v. City of Aspen,* 295 P.3d 493, 504 (Colo. 2013).

In *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981), the Colorado Supreme Court declared that zoning decisions are legislative for purposes of referendum because such decisions are permanent in nature and signify general declarations of public policy concerning land use. *Id.* at 303-04. Thus, if the ordinance to which Appellants' petition was directed qualifies as zoning decision, the ordinance was legislative and subject to repeal via referendum.

For forty-six years before Council adopted Ordinances 168 and 170, all of HHNP was zoned "Public – Open Space – Park." As a result of the two

ordinances, the park was split in two and the southerly 10.77 acres were designated for transfer to DPS for use as a public school site. In essence, Council rezoned the southerly parcel to abrogate its previous designation as park land. Given these facts, Ordinance 170 was a zoning/land use measure and therefore legislative.

By law, the official zoning map maintained by the Department of Community Planning and Development controls zoning classifications in Denver. Denver Mun. Code § 59-4(a). The official zoning map designates HHNP as "OS-A," meaning "Open Space – Public Parks." (Zoning Map, Ex. 25 [Addendum 6]; Denver Zoning Code Summary of Districts [Addendum 7].) The land transferred to DPS is slated to be used as a public school site. If the school is built, the parcel will have to be redesignated to a classification other than OS-A, such as "CMP-EI" (Campus – Educational Institution). (Denver Zoning Code Summary of Districts [Addendum 7].) Thus, Ordinance 170 effects a zoning change.

Appellants recognize that, as a general rule, "the sale, exchange, conveyance, disposition, or change in use of a particular parcel of city-owned property" does not amount to "a zoning ordinance that sets a governing standard for all properties coming within its terms, nor do they necessarily amend any existing zoning ordinance of general applicability." *Vagneur,* 295 P.3d at 510. However, the general rule does not apply here. Council's actions bypassed Charter

Section 2.4.5, which expressly provides that park land may not be sold without authorization of the voters. Ordinance 170 was unprecedented. Moreover, those actions most assuredly are not limited to the transfer "of a particular parcel of city-owned property." Conversion of HHNP from a park to a school will have wide-ranging consequences for everyone living near the affected area.

In addition, Ordinances 168 and 170 constitute a *de facto* city-wide amendment to Denver land use policy. From now on, Council is free to sell Denver park land acquired before 1955 without a vote of the people, and redesignate the land as it sees fit. As set forth above, the parcel was a park acquired before December 31, 1955. Thus, Charter § 2.4.5 mandated voter approval of the transfer. That is a City land use policy in itself dating back to 1955. By authorizing a transfer without a popular vote, Council effectively changed land use policy as to every park acquired before December 31, 1955. Actions like Ordinance 170 that have wide-ranging effects on a city's extant land use policy are the very essence of legislative action. The trial court erred in finding Ordinance 170 "administrative."

2. Ordinance 170 was legislative for referendum purposes because the ordinance embodied a declaration of municipal policy that was permanent in character.

Whether an action is legislative or administrative is "largely an *ad hoc* determination" based upon applying general considerations to a particular action.

*Vagneur,* 295 P.3d at 506. In assessing whether an ordinance is legislative, one factor is "whether the legislation announces new public policy or is simply the implementation of a previously declared policy." *Blackwell,* 731 P.2d at 1254. Two guidelines assist in making this determination. First, "acts that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are [administrative]." *Id.* Second, acts "necessary to carry out existing legislative policies or purposes" are administrative, while those that constitute "declaration[s] of public policy" are legislative. *Id.*

The fact that the City mandates voter approval for the sale of parks strongly indicates that the City considers measures like Ordinance 170 "legislative." Where a charter imposes a voter approval requirement as a "check" on council's authority, the requirement is "an implicit recognition that changes in [land status] are, at least under the City Charter, legislative in character." *Vagneur*, 295 P.3d at 514 (Eid, J., dissenting). Since referendum does not apply to "administrative" matters, it is "highly unlikely" that any city would limit council's authority by imposing a voter approval requirement "for a purely administrative matter when such a 'check' is not required (or even contemplated) by separation of powers principles." *Id.*

Here, the Charter imposes a voter approval requirement upon the sale of park land. *See* Charter § 2.4.5. The City treated HHNP as a park from the time it

acquired the property until Council passed Ordinances 168 and 170. At that point Council arbitrarily and without following § 2.4.5 subdivided the park and sold the south 10.77 acres to DPS for purposes wholly unrelated to any park use.

The fact that the Charter includes a "check" in the form of a voter approval requirement on Council's ability to transfer park land is a powerful indicator that the City considers the transfer of park land legislative. It would be wholly illogical for the City to hamstring itself by imposing a voter approval requirement upon an act it considered "administrative." Charter § 2.4.5 declares the City's implicit recognition that actions such as Ordinance 170 are legislative. Appellants respectfully ask that this Court take the City at its word and find that Council's actions in passing Ordinance 170 were not merely "administrative."

Further indicia of the legislative nature of Ordinance 170 lies in the fact that the ordinance and the action proposed in the petition Appellants submitted to Ms. Johnson are permanent in character. When assessing whether a proposed ordinance is legislative for purposes of initiative and referendum, the use of the term "permanent" signifies "a public policy of general applicability because permanent enactments are more likely to involve policy considerations." *Blackwell,* 731 P.2d at 1254. Here, Ordinance 170 and the action proposed by the Appellants' petition constitute public policy of general applicability.

Ordinance 170 purported to authorize the sale of City park land to DPS. The action proposed by Appellants' petition is to reverse that sale. Both the Ordinance and the Petition are declarations of public policy. Through Ordinance 170, Council attempted to institute a City-wide policy under which it could bypass Charter § 2.4.5 as to park land acquired before December 31, 1955. The desired effect of Appellants' petition was to preserve the park status of HHNP and to promote the protection of Denver's natural and ecological resources through the preservation of parks and natural areas. These wide-ranging policy objectives distinguish Ordinance 170 and Appellants' petition from other actions that Colorado courts have declined to recognize as "legislative" in the past.

Take for example the initiatives proposed in *Vagneur, supra*. There, the Aspen City Council decided to expand entrance to the city via the western highway. Council considered several different designs before selecting its preferred alternative. Displeased with the counsel's choice, citizens of Aspen filed two petitions setting forth substitute designs for the expansion. Council opposed both petitions on the ground that the actions proposed were administrative.

The Colorado Supreme Court ruled that, because the desired effect of the petitions was to supplant the counsel's selected design with a different design, the petitions were administrative and thus not proper for initiative. 295 P.3d at 507-09.

The *Vagneur* Court held that, while the initial decision to construct a new entrance was a policy decision of general applicability and thus legislative, the proposed initiative merely sought to overrule council's subsequent choices regarding implementation. Such decisions are administrative in character. *Id.* at 509-10.

This case is distinguishable from *Vagneur*. Here, unlike in *Vagneur* where the purpose of the initiative was simply to replace city council's selected design, Ordinance 170 and Appellants' petition are addressed to broad issues of land use policy as to Denver parks. Ordinance 170 was not a mere administrative action affecting a single parcel but rather a *de facto* declaration that Charter § 2.4.5 no longer applies to park land acquired before December 31, 1955. Appellants' petition was addressed not merely to the 10.77 acres referenced in Ordinance 170 but rather to preservation of all Denver parks. Through their petition Appellants sought to send a clear message to Council that the citizenry value park lands, and will not allow those lands to be dealt away through back-room machinations.

Similar distinctions can be drawn between Appellants' Petition and *Blackwell*. In *Blackwell*, the Idaho Springs City Council enacted an ordinance providing for a new city hall. 731 P.2d at 1251. Council then approved a motion authorizing the purchase of a particular piece of property to serve as the site of the new city hall, and the moving and renovation of a building to house the new hall.

*Id.* Dissatisfied with Council's selections, citizens of Idaho Springs filed two initiatives seeking to repeal the city council's actions authorizing the purchase of the property and the moving of the building. *Id.* at 1251-52. Council opposed both initiatives on the grounds that the actions proposed were administrative. *Id.*

The Court determined that the initiatives "proposed by the appellants only exclude one parcel of real estate . . . and one type of structure . . . from the range of choices available to the Council" and thus did not relate to permanent, generally applicable policy declarations. *Blackwell*, 731 P.2d at 1254-55.

Unlike in *Blackwell,* where the purpose of the petition was to exclude only a single site from use as a city hall, the purpose and effect of Ordinance 170 and Appellants' petition was much broader. Through Ordinance 170, City Council attempted to alter long-standing City land use policy as to parks acquired before 1955. Appellants' petition seeks to undo that policy change and give City-wide effect to Charter § 2.4.5. The policy implications of the ordinance and petition extend far beyond the southerly 10.77 acres of HHNP.

Because Ordinance 170 and Appellants' petition directly impact the underlying public policy goals of protecting parklands, preserving open space, and conserving ecological resources, the ordinance and petition are declarations of public policy and, thus, are "permanent" for purposes of initiative and referendum.

Finally, Ordinance 170 and Appellants' petition are legislative because they are declarations of public policy rather than mere acts deemed necessary to carry out existing policy. The issue is whether the ordinance was necessary to carry out existing legislative policies or purposes or was a declaration of public policy in and of itself. *Vagneur,* 295 P.3d at 505. Both Ordinance 170 and Appellants' petition are declarations of public policy in and of themselves and thus are legislative.

Ordinance 170 was Council's attempt to abrogate existing land use policy as to park land acquired before December 31, 1955. Appellants' petition is a grassroots effort to restore and enforce existing land use policy regarding parks, particularly as embodied in Section 2.4.5 of the Charter. Accordingly, both the ordinance and the petition concern the establishment of generally applicable policy, and are not limited to "implementation" of extant policy.

3. The right of referendum applies because the Charter renders the right applicable to any ordinance.

The City Charter sets forth the right of referendum as follows:

> The people of the City and County of Denver reserve the right to propose and enact ordinances—by initiative; **to require that existing ordinances be referred to a vote** of the electorate—**by referendum**; and to recall elected officials.

Charter § 8.3.1 (emphasis added). Further:

> **An enacted ordinance** may be referred by petition of registered electors numbering at a minimum five (5) per cent of the total vote for the office of Mayor in the last election at which a Mayor was elected.

*Id.* § 8.3.4 (emphasis added).

A city may confer in its municipal charter a broader right of referendum than that set forth in the Colorado Constitution. *Burks v. City of Lafayette*, 349 P.2d 692 (Colo. 1960); *Leach & Arnold Homes, Inc. v. City of Boulder*, 507 P.2d 476 (Colo. App. 1973). That is what Denver did here. The Charter expressly provides that any "existing ordinances" may be challenged via referendum. The only qualification on the right is that the petitioners challenge "[a]n enacted ordinance."

Here, Ordinance 170 is very much an enacted ordinance. Council expressly designated it as such. That being true, it can be challenged via referendum. The legislative-administrative distinction simply does not exist in Denver. The Charter authorizes referendum challenges as to all "existing ordinances."

Appellants are aware of *City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977). There, the Supreme Court interpreted an Aurora City Charter provision under which "all ordinances" could be challenged by referendum to mean that only "legislative" ordinances could be challenged by referendum. *Id.* at 1076-77. *Zwerdlinger* is distinguishable because the charter provision in that case excepted four types of ordinances from the general rule that "all ordinances" were subject to

referendum. *Id.* at 1076. Here, Denver's City Charter contains no such exceptions. Thus, in this case, the charter actually does provide for referendum on all ordinances, whereas the provision at issue in *Zwerdlinger* did not.

If this Court determines that *Zwerdlinger* is indistinguishable, then Appellants respectfully submit that *Zwerdlinger* was wrongly decided. The *Zwerdlinger* Court acknowledged the precept that a city may confer a broader right of referendum than the state constitution provides, but then turned around and violated every cannon of statutory interpretation to find that the drafters of the Aurora City Charter did not mean what they wrote, but instead merely intended to confer a right of referendum coextensive with that in the state constitution.[2]

In conclusion, the Charter provides that every "enacted ordinance" may be challenged by referendum, without consideration of whether the ordinance is "legislative" or "administrative." Ordinance 170 is an "enacted ordinance." Therefore, Appellants are entitled to challenge the ordinance via referendum and the trial court erred in finding that Ordinance 170 was "administrative."

[2] Appellants understand that this Court may not disregard Colorado Supreme Court precedent. Appellants make the argument to preserve the issue for further appeal.

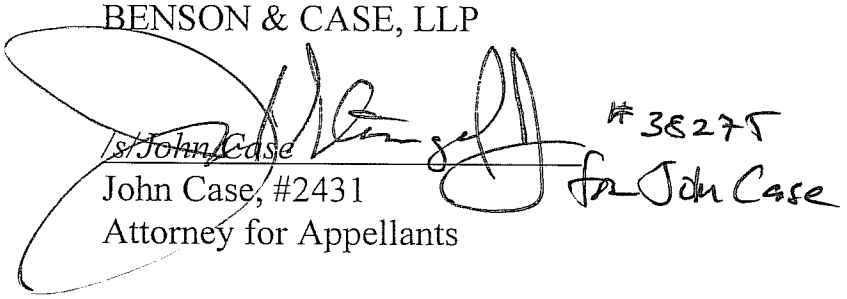
## CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the trial court's July 5, 2013 order denying Appellants' motion for preliminary injunction and remand for further proceedings on that motion.

Date: October 3, 2013

Respectfully submitted,

BENSON & CASE, LLP



/s/John Case
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## CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2013 true and correct copies of the foregoing **OPENING BRIEF OF APPELLANTS** were filed and served as follows:

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