

COLORADO COURT OF APPEALS
Court Address: 2 East Fourteenth Ave.
Denver, Colorado 80202

District Court, City and County of Denver, Colorado
Case No. 2013 CV 32444
Hon. Herbert L. Stern III, District Court Judge

Plaintiffs/Appellants FRIENDS OF DENVER
PARKS, INC., a Colorado non-profit corporation; and
STEVE WALDSTEIN, an individual; and ZELDA
HAWKINS, an individual.

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.

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Case No.: 13CA1249

APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

Appellants, through counsel, BENSON & CASE, LLP, pursuant to C.A.R. 8(a) and 27(a), submit this Motion for Injunction Pending Appeal. For the reasons that follow, Appellants respectfully request that this Court enjoin Appellees City and County of Denver ("City") and School District No. 1 in the City and County of Denver ("DPS") from developing, building upon or otherwise altering property

known as Hampden Heights North Park (“HHNP”) in southeast Denver until the above-captioned appeal is decided on the merits.

STATEMENT OF THE CASE

This case arises out of Appellants’ appeal of the Denver District Court’s denial of their Motion for Preliminary Injunction to prevent the unlawful sale and development of Hampden Heights North Park in southeast Denver (“HHNP”). Appellants submitted a Motion for Injunction During the Pendency of Appeal in the trial court on July 5, 2013. That motion was denied on September 19, 2013. (09/19/2013 Transcript of Trial Court Status Conference, P. 28, L. 3-4.) Appellants now seek an injunction pending appeal from this Court, to enjoin DPS from developing HHNP until a final adjudication on the merits can be had.

STATEMENT OF FACTS

The relevant facts are set forth in Appellants’ Opening Brief which is incorporated herein by reference as if completely rewritten.

STANDARD FOR GRANTING INJUNCTION

To obtain an injunction pending appeal, Appellants must demonstrate that: (1) they are likely to succeed on the merits of their underlying complaint; (2) they will be irreparably injured absent a stay; (3) a stay will not substantially injure the other parties to this proceeding; and (4) the public interest favors the injunction.

Romero v. City of Fountain, 307 P.3d 120, 122 (Colo. App. 2011).

While each factor must be shown, each need not be equally compelling. The standard allows for an injunction to issue where there will be great irreparable harm, even if the probability of success on the merits is less than “strong.” *Id.*

“[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, move of one excuses less of the other. This relationship, however, is not without limits; the movant is always required to demonstrate more than a mere ‘probability’ of success on the merits.”

Id. at 123 (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)).

ARGUMENT

Because Appellants’ have established each of the four *Romero* factors, their Motion for Injunction Pending Appeal should be granted.

a. Success on the Merits

Appellants have shown a strong probability of success on the merits as to: (1) the status of HHNP as a park by common law dedication; (2) the status of HHNP as a “park belonging to the City as of December 31, 1955” for purposes of Section 2.4.5 of the Denver City Charter; and (3) the status of the City Council’s actions as “legislative” for purposes of initiative and referendum. The arguments supporting Appellants’ positions are fully set forth in Appellants’ Opening Brief.

Appellants established that HHNP is a park by common law dedication. Appellants demonstrated that, after acquiring title to the property in 1936, the City consistently engaged in conduct which evidenced intent to dedicate HHNP for use as a public park, and that the citizens of Denver accepted that dedication by using HHNP as a park for a period of more than seventy years. (*See* Appellants’ Opening Brief at 18-23 and accompanying citations.)

Appellants established that HHNP is a park belonging to the City as of December 31, 1955. Appellants showed that the City acquired title to the property prior to 1955 and recognized the property as a park. (*See* Appellants’ Opening Brief at pages 23-26 and accompanying citations.) Since HHNP was a park acquired by the City before December 31, 1955, Section 2.4.5 of the City Charter mandates that the park cannot be sold absent voter approval.

Finally, Appellants demonstrated that the City’s actions in trading HHNP to DPS were “legislative” for purpose of initiative and referendum. The City’s actions constituted a new declaration of public policy and a *defacto* city-wide amendment to Denver land use policy—quintessentially legislative activities. (*See* Appellants’ Opening Brief at 27-39 and accompanying citations.)

b. Irreparable Harm

That Appellants will suffer irreparable harm absent an injunction is indisputable. HHNP is a unique space within the city and county of Denver.

(06/12/13 Transcript at 91-93.) It is not a stand-alone property, but rather one part of a larger ecosystem formed by the nearly ninety acres of protected open-space that border Cherry Creek. *Id.* The area is home numerous species of plant and animal life, including deer, fox, coyote, raccoons, prairie dogs, rabbits, beavers, birds, butterflies, snakes, ducks, geese, heron, owls, and hawks, all of which are seen, heard, and enjoyed by Denver citizens who walk, play, and bicycle in the park on a daily basis. (06/12/13 Transcript at 43-62.)

Absent an injunction, DPS will begin construction of a new elementary school building right in the middle of this natural area in January 2014. The construction will cause irreparable damage not only to the land itself, but to the plant and animal species that live there. HHNP is home to a prairie dog colony that is a food source for the coyotes, foxes, hawks, and owls that live and hunt in the park. (Testimony of Dr. Baird, 06/12/2013 Transcript. P. 92, L. 12-19.)

Additionally, seed stocks for native grasses reside in the soil of HHNP which are not available in local nurseries. (*Id.* at P. 89, L. 12-17.) If DPS proceeds with construction as planned, these seed stocks will be destroyed along with habitat for numerous species of Denver wildlife.

During the week of October 3, 2013, DPS and the City began removing all of the prairie dogs from HHNP. Destroying the prairie dog colony deprives coyotes, foxes, hawks, and owls of their food source. It also robs Denver citizens,

especially curious children, of the opportunity to study up close and in person one of the most interesting and charming species of prairie wildlife. Even if Appellants prevail on the merits and DPS is forced to undo the construction, it likely will be impossible to reverse the damage that has been done.

In addition to the damage that the DPS construction will cause to the land itself, Appellants Steve Waldstein and Zelda Hawkins, who bought homes in Hampden Heights East neighborhood in reliance on express representations in official City maps that HHNP was a park, will suffer additional irreparable damage in the form of decreased property values. HHNP adds approximately \$20,000 to the value of adjacent homes. (06/12/13 Transcript at 146-152.) Once the park is replaced by an elementary school building, Appellants will experience a \$20,000 decrease in the value of their properties.

Finally, given the precedent this case will set, absent an injunction, the people's right to vote on transfers of Denver park property will be threatened. In trading HHNP to DPS without a popular vote, the City acted in direct violation of both common law trust principals and Denver City Charter § 2.4.5. Absent an injunction, from this point forward, the Denver City Council will be free to sell Denver parks without a vote of the people and to redesignate the land as it sees fit.

These harms are immediate, irreversible, not compensable by money damages and, thus, "irreparable" for injunction purposes. *Romero*, 307 P.3d at 123.

c. Lack of Injury to the Defendants

The injunction will have virtually no effect on the City and DPS. If DPS prevails on the merits it will experience only a temporary delay in the construction of its proposed elementary school building. The City will be free to remodel its building at 1330 Fox St.

d. Serving the Public Interest

Given the facts set forth above, the public interest cries out for an injunction. As explained previously, absent an injunction, eleven acres of protected park and natural area will be permanently destroyed and the people's right to vote on future transfers of Denver park land will be threatened. The public has a substantial interest in preventing this result.

Public interest is reflected in the eighteen articles published by respected and well known media commentators such as Vincent Carroll, Joanne Ditmer, Susan Barnes-Gelt, Paul Kashman, Alan Prendergast, and Tom Noel (*see* articles attached as Appendices 1-18), which criticize City officials for trading park land that is held in trust for the people, without allowing citizens to exercise their right to vote.

Put simply, the public interest in preserving Denver park land and protecting the citizenry's right to vote far outweighs the limited interest of DPS in the immediate construction of a new elementary school building.

CONCLUSION

Having established the four *Romero* factors, Appellants respectfully request that this Court enjoin the City and DPS from developing, building upon or otherwise altering Denver until this appeal is decided on the merits.

Respectfully submitted October 4, 2013.

BENSON & CASE, LLP

/s/ John Case
Lawrence # 43288 On Behalf of
John Case, #2431
Attorney for Appellants *John Case*

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2013 I served and filed the foregoing **APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL** as follows:

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