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| **COURT OF APPEALS, STATE OF COLORADO**<br>Court Address:<br>2 East Fourteenth Avenue<br>Denver, Colorado 80202 | |
| Denver District Court<br>Case No. 2013CV32444<br>District Court Judge: Herbert L. Stern III | |
| **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>v.<br>**Appellee:** 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▲**<br><br>_____<br><br>Case Number: 13CA1249 |
| Attorneys for the Defendant<br>DOUGLAS J. FRIEDNASH, Atty. No. 18128<br>Denver City Attorney<br>DAVID W. BROADWELL, Atty. No. 12177<br>PATRICK A. WHEELER, Atty. No. 14358<br>MITCH T. BEHR, Atty. No. 38452<br>Assistant City Attorneys<br>Denver City Attorney's Office<br>1437 Bannock St., Room 353<br>Denver, Colorado 80202<br>Telephone: (720) 865-8600<br>Facsimile: (720) 865-8796<br>E-mail: david.broadwell@denvergov.org<br>E-mail: patrick.wheeler@denvergov.org<br>E-mail: mitch.behr@denvergov.org | |
| **ANSWER BRIEF** | |

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| **CERTIFICATE OF COMPLIANCE** | |

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

The brief complies with C.A.R. 28(g).

It contains 7,623 words.

It does not exceed 30 pages.

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

/s/ David Broadwell
Signature of attorney or party

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## I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the trial court erred in denying the Appellants' Motion for a Preliminary Injunction seeking to enjoin the execution and performance of a real estate exchange contract between the City and County of Denver and Denver Public Schools, where the Appellants failed to establish a probability of success on the merits of their claims that:

A. The land to be conveyed by the City to DPS was subject to the voter approval requirements set forth in Denver Charter § 2.4.5; or

B. The ordinance approving the real estate contract was subject to referendum under the Charter and state law.

## II. STATEMENT OF THE CASE

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

On April 1, 2013 the Denver City Council approved Ordinance No. 170, Series of 2013 (Plaintiffs' Ex. 5) authorizing the City to enter into a real estate exchange contract with Denver Public Schools. Among other things, the contract authorized the conveyance of 10.77 acres of vacant city-owned land to DPS for the construction of an elementary school. On May 20, 2013, Appellants submitted to the Clerk a proposed affidavit, petition form, and ballot title for a referendum on

Ordinance No. 170. (Plaintiffs' Ex. 6) Via a letter dated May 22, 2013, the Clerk rejected the petition form on the grounds that Ordinance No. 170 was not a legislative enactment and that, under Colorado law, the constitutional right of referendum extends only to legislative matters. (Plaintiffs Ex. 9)

On June 5, 2013, the Appellants filed their Second Amended Complaint in the instant action. The Complaint is essentially based on two distinct legal theories. On the one hand, Appellants assert that City Charter § 2.4.5 should be interpreted to *require automatically* that Ordinance No. 170 be put to a vote, on the theory that the 10.77 acres conveyed by the City to DPS is a "park" for which voter approval must necessarily be sought prior to conveyance.

On the other hand, Appellants argue that they should be entitled to force Ordinance No. 170 to a vote via a referendum petition, and they assert various allegations against the City and the Denver Clerk and Recorder in regard to the Clerk's rejection of their referendum petition forms. Initially, in lieu of suing the Clerk in mandamus under Rule 106(a)(2), C.R.C.P., or framing their claim as an appeal of a quasi-judicial decision by the Clerk under Rule 106(a)(4), C.R.C.P. and asking for an expedited hearing on those claims, the Appellants framed their Complaint as an action for declaratory and injunctive relieve.

The same day the Appellants filed their Second Amended Complaint, they filed a Motion for Preliminary Injunction against the City, the Clerk and DPS seeking to forestall the closing of the real estate transaction, and seeking to enjoin the Clerk from "interfering" with their referendum rights. The trial court conducted a two-day hearing on the Appellants' motion on June 12 and 13, 2013 and afforded the parties an opportunity to submit written briefs on their respective positions. The Court then set the matter for a ruling on the Motion for Preliminary Injunction on July 5, 2013. On July 5, the court engaged in an extended colloquy with attorneys for both sides to probe the strength of their respective factual and legal arguments before rendering a ruling. (Vol. III, pp. 297-345)

The trial Court then denied Appellants' Motion for Preliminary Injunction, finding that Appellants had failed to prove a reasonable probability of success on the merits of their claim that the property to be conveyed by the City to DPS was subject to the voter approval requirements of Charter § 2.4.5 because: (A) the Appellants had proffered no evidence that the property has been formally designated as a City park by ordinance since December 31, 1955; and (B) the Appellants had proffered insufficient evidence or legal arguments to show that the property was a "park belonging to the City as of December 31, 1955" within the meaning of the charter provision. The Court also held that Appellants had failed to

prove a reasonable probability of success on the merits of their claims that Ordinance No. 170 approving the land exchange contract was subject to referendum under applicable Colorado law, and thus the Appellants could not show that the Clerk erred in rejecting their petition forms. The court then directed counsel for the City to prepare a brief written order ("One and a half pages, short and sweet.") (Vol. III, p. 344:25-345:6) denying the Motion for Preliminary Injunction on the sole basis that the Plaintiffs had failed to establish a probability of success on the merits of their claims. The court then signed the Order effective July 5, 2013. (Case File, p. 548)

Appellants then filed another motion in the trial court for an injunction pending appeal, which was denied by the court at a status conference held on September 19, 2013. On that date, the court again conducted another extended colloquy with the attorneys about their respective legal positions, and again ruled against the Appellants.[1] Finally, the Appellants filed a motion for an injunction pending the resolution of the appeal in this Court, which was denied on October 18, 2013.

[1] On October 3, 2013 the Appellants filed a Motion in the Court of Appeals to supplement the record with a transcript of the hearing on September 19, but this court has not yet acted on the motion.

## B. Statement of Facts

At the hearing on Appellants' Motion for Preliminary Injunction held on June 12 and 13, the Appellants offered no evidence or testimony regarding their claims against the Clerk and Recorder, or their assertion that they should be allowed to circulate referendum petitions calling for a repeal of Ordinance No. 170. The parties apparently agree on certain basic facts surrounding the ordinance: Via Ordinance No. 170 the Denver City Council approved the Mayor's proposal to convey 10.77 acres of City-owned property located near Cherry Creek and Havana Street in far southeast Denver in exchange for property owned at 1330 Fox Street in central Denver. Specifically, the Ordinance approved the execution of a Contract to Exchange Property. The purpose of the exchange of real estate was to provide a location for DPS to construct a new elementary school in southeast Denver, and for the City to establish a center to provide services to domestic violence victims. When the Appellants tendered referendum forms to the Clerk, with the intent of calling for an election on the repeal of Ordinance No. 170, the Clerk rejected the forms on the grounds that Ordinance No. 170 is not legislative in nature, and thus is not subject to referendum. The parties simply disagree whether, as a matter of law, the ordinance constituted municipal legislation that would be subject to a referendum under applicable Colorado law.

The majority of the evidence and testimony at the hearing was directed to the question of whether or not the 10.77 acres being conveyed by the City to DPS was a "park," thus making the conveyance subject to voter approval under § 2.4.5 of the Denver Charter which provides in relevant part:

> **"§ 2.4.5 Sale and leasing of parks.**
>
> 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 . . ."

The Appellants produced no evidence indicating that the subject property had ever been officially designated as a park by an ordinance of the City.

The Appellants offered five witnesses (Vol. I, pp. 18-164) and numerous exhibits to describe the physical characteristics and use of the 10.77 acres (as well as surrounding city-owned property) from the mid-1960's (when the area was annexed into the City and the adjacent residential neighborhoods began to be constructed) through the present. Four of the five witnesses reside immediately adjacent to or quite near the property, and the fifth (Susan Baird) was a former long-time employee of the City's Department of Parks and Recreation. However, none of the five witnesses offered any evidence or testimony that the property was a "park belonging to the City as of December 31, 1955." Indeed, they denied any

knowledge of the status or use of the property in 1955, and confined their testimony only to events and circumstances arising long after that date.

Only belatedly on rebuttal did the Plaintiffs offer any testimony (in the person of Charles Bonniwell) on the status or use of the property *circa* 1955. Unlike the other witnesses, Mr. Bonniwell was not a neighbor to the subject property; instead he was offered as an "expert in the history of the Cherry Creek Corridor." (Vol. II, p. 278:8-18) He testified that the 10.77 acres, as part of the larger group of open public and private lands along the Cherry Creek corridor, were used by equestrians, hikers and picnickers in earlier times, including the mid-1950's. (Vol. II, pp 281:19-285:12.)

Other undisputed evidence at the hearing established the following: The 10.77 acres was a remnant of a larger property, "Parcel 31," acquired by the City in 1936. (Vol. II, pp. 243:1-255:16; Plaintiffs' Ex. 3) In turn Parcel 31 was part of an even larger assemblage of properties all along the Cherry Creek corridor that were acquired by the City in the mid-1930's for flood control and drainage improvements. (Vol. II, pp. 253:11-255:13; 279:8-17) The warranty deed conveying Parcel 31 to the City contained no language indicating that the property was being conveyed or dedicated for park purposes. (Plaintiffs' Ex. 3) Over time, other portions of Parcel 31 were carved out and dedicated for road right-of-way for

portions of Havana Street and Girard Avenue. (Vol. II, pp. 245:4-11) In 1955, Parcel 31 had not yet been annexed into the City and County of Denver; instead it lay in rural, unincorporated Arapahoe County where the property (in common with almost all of the lands around it) was vacant and unimproved. (Vol. II, pp. 245:18-253-6; Defendants' Ex. I[2] In later years, a portion of Parcel 31 was leased by the City for a commercial parking lot, which now lies abandoned and derelict on the 10.77 acres the City has conveyed to DPS. (Vol. I, pp. 63:8-18; 110:10-13; 121:17-125:25) Finally, a remaining portion of Parcel 31 (albeit not the 10.77 acres conveyed by the City to DPS) has recently been officially designated as city park land by ordinance as an addition to nearby Hentzell Park. (Plaintiffs Ex. 48).

During the course of the hearing, the trial court liberally allowed Appellants' witnesses to testify about facts and circumstances arising *after* December 31, 1955, evidence apparently intended by Appellants to indicate that the 10.77 acres took on the characteristics of a "park" after that date. However, in ultimately determining that Charter § 2.4.5 did not require Ordinance No. 170 to be put to a vote of the people, the court held that the dispositive factor was that the Appellants had failed

[2] Defendants' Exhibit I, a 1955 aerial photograph of the Cherry Creek basin depicting the location of Parcel 31 and the surrounding area, is one of the exhibits that is the subject of a Motion by DPS to supplement the record, which was granted by this court on October 25. However, as of the date of submission of this brief, the Exhibit has not yet been transmitted by the trial court.

to show as a matter of fact or as a matter of law that the property was a "park belonging to the City as of December 31, 1955." (Case File, p. 548) The nebulous assertions by Mr. Bonniwell that the property may have been used in common with other open lands in the Cherry Creek corridor for horseback riding and hiking in the 1950's were insufficient to establish that Plaintiffs had a probability of success on the merits of their claims that Charter § 2.4.5 required voter approval for conveyance of the property.

Finally, at the hearing the trial court also liberally allowed both sides to introduce evidence and testimony on the question of whether or not the 10.77 acres was a suitable site for an elementary school. But the court ultimately noted during the course of the hearing that the decision by DPS to select this particular site for a school was "political" (Vol. II, p. 234:12-14) and disagreements over the merits of the school site were beyond the scope of the legal issues to be decided by the court in this case. (Vol. II, pp. 238:22-239:8)

## III. SUMMARY OF ARGUMENT

Denver's home rule charter is the sole source of authority for determining when the sale of city-owned park land must be put to a vote of the people. In support of their Motion for a Preliminary Injunction, Appellants failed to produce any evidence or legal authority to support their claims that the conveyance of the

10.77 acres of land by the City to DPS fell within the scope of the plain language set forth in § 2.4.5 of the Charter. Thus, the trial court correctly held that the Motion for a Preliminary Injunction should be denied because Appellants did not demonstrate a reasonable probability of success on the merits of their claims that Denver officials unlawfully approved the conveyance of the land without a vote of the people.

The people's right to force a referendum on a newly adopted city ordinance applies only to ordinances that are legislative in nature. This principle is well settled in Colorado, and has been elucidated in a long series of appellate court decisions, culminating most recently in the case of *Vagneur v. City of Aspen,* 295 P.3d 493 (Colo. 2013). In particular, the courts have repeatedly held that an action by a city council approving a specific transaction, such as an individual contract, does not constitute legislation, law-making, or policy-making, and thus is not subject to the power of referendum. The Denver Clerk and Recorder correctly determined that Ordinance No. 170 was not subject to referendum. Thus, the trial court correctly determined that the Motion for a Preliminary Injunction against the Clerk should be denied because the Appellants did not demonstrate a reasonable probability of success on the merits of their claims that the Clerk erred in refusing to process their referendum petition forms.

## IV. ARGUMENT

### A. Standard of Review.

"The grant or denial of a preliminary injunction lies within the sound discretion of the trial court." *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo.1982). This Court "review[s] a ruling on a motion for preliminary injunction with deference to the conclusion reached by the trial court and will not overturn a trial court's ruling unless it is manifestly unreasonable, arbitrary, or unfair." *Home Shopping Club, Inc. v. Roberts Broadcasting Co. of Denver,* 961 P.2d 558, 561 (Colo. App. 1998); *Denver Firefighters Local No. 858 v. City and County of Denver,* 292 P.3d 1101, 1104; *cert granted* (2013). However, to the extent the trial court's order dated July 5, 2013 denying the preliminary injunction relied entirely on the first *Rathke* factor—i.e. whether the Appellants demonstrated a reasonable probability of success on the merits of their claims—the appellate court's review of this finding is *de novo*. *Id.*, at 1104.

### B. No Need for Remand for Further Factual Findings by the Trial Court

In their Opening Brief, pp. 26-27, Appellants argue that the case should be remanded because the trial court failed to make sufficient findings of fact. On the contrary, in its July 5 Order, the trial court made an explicit finding on the two key

facts that are most salient to its ruling in this case: "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.'" Indeed, the entire hearing on the Motion for Preliminary Injunction was notable for the *absence* of any facts demonstrating that the voter approval requirements of Charter § 2.4.5 were triggered. In particular, the Appellants failed to come forward with any convincing factual evidence that the property was a "park" in 1955, instead focusing almost all of their testimony on matters arising after 1955. Beyond the written order, the trial court engaged in an extended colloquy with counsel for the Appellants at the July 5 hearing, in which the court expressed its skepticism that the Appellants had factually or legally established that the property was a park in 1955. (Vol. III, pp. 297:21-316:16) Even when a trial court's ruling is general in nature, the findings can be sufficient to show the basis for the trial court's order. *See Bishop & Co. v. Cuomo*, 799 P.2d 444, 445 (Colo. App. 1990) (citing *Mowry v. Jackson*, 343 P.2d 833 (1959)).

### C. The Appellants Have No Reasonable Probability of Success on the Merits of Their Claim that Voter Approval Should be Required For Conveyance of the City-owned Land to DPS

Denver is a home rule city and county, and as such exercises its municipal powers under the authority of its own charter and ordinances, as provided by

Article XX of the Colorado Constitution. Section 3.2.6 (C) of the City's home rule charter describes the following procedure for approval of real estate conveyances by the City:

> *(C)* "*Sale or conveyance of city-owned real property.* The Mayor of the City and County of Denver shall be and is hereby authorized to initiate actions to effect the sale or conveyance of real property owned by the City upon such terms as in the Mayor's judgment shall appear proper. All contracts providing for the sale or conveyance or real property owned by the city, or amendments to such contracts, before their execution by city officials, shall be authorized by the Denver City Council *acting by ordinance* or resolution." (Emphasis supplied.)

Section 2.4.5 of the City's home rule charter provides a limited exception to the powers conferred upon the Mayor and the City Council to convey City-owned real estate set forth in the foregoing section by requiring voter approval for the sale of certain parks, as follows:

> **"§ 2.4.5 Sale and leasing of parks.**
>
> 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 . . ."

Notwithstanding the plain language of this Charter provision, the Appellants continue to argue that "Denver land can qualify as a park in multiple ways" under a *de facto* or "common law dedication" theory.

In particular, Appellants continue to argue that, due to events occurring *since* 1955, the subject property may have taken on the characteristics of a park. Throughout this case, the Appellants have relied almost entirely on one court of appeals decision, *McIntyre v. Board of Commissioners of El Paso County*, 15 Colo. App. 78 (Colo. App. Ct., 1900), supporting the notion that municipal property may be deemed a park under a theory of "common law dedication." However, *McIntyre* is inapposite to the facts of this case. The two parcels of park land that were the subject of that decision were platted out and reserved for public parks by the original developers of Colorado Springs, and these parcels were accepted, developed and maintained by the City government of Colorado Springs solely as public parks before the City government decided to sell one of these parcels to El Paso County for the construction of a courthouse. The City government of Colorado Springs did not argue that the parcel being sold to El Paso County was not a park, but rather took the view that a courthouse was a use consistent with a park.

In contrast, the 10.77 acres being conveyed to DPS in this case were a part of a larger assemblage of parcels, including Parcel 31, acquired for flood control and drainage management purposes and continued to be maintained for this purpose over the years. There is no plat, no deed, nor any other legal instrument in

existence from 1955 or before indicating that Parcel 31 was intended to be a dedicated park. Parcel 31 has been used for a variety of purposes before and since 1955, not any of which would have the legal effect of making Parcel 31 into a dedicated park. Indeed, the parking lot constructed on the southerly end of Parcel 31, which is part of the 10.77 acres conveyed to DPS, was clearly not intended for a park use. The only nearby uses that are arguably park uses – the Cherry Creek Trail and the Kennedy Golf Course – are located on portions of Parcel 31 which were not conveyed to DPS. (Vol. I, p. 117:5-12)

Significantly, the court of appeals decision in *McIntyre* was later distinguished by the Colorado Supreme Court in a case directly arising under the Denver Charter, *Hall v. City and County of Denver,* 115 Colo. 538, 177 P.2d 234 (Colo. 1946). The court in *Hall* rejected a claim that a proposal to sell certain City-owned property should be enjoined under the charter, even though the property had the appearance and characteristics of a traditional city park. According to *Hall*, one relevant inquiry in Denver is whether there has been a "charter dedication of the land as a park." There was no such formal dedication in the *Hall* case, and likewise there has been no such formal dedication or designation of the property that is at issue in this case.

In the *Hall* case, the property in dispute was a downtown city block where the old Arapahoe County Court house had been razed, and the property had actually been beautified and used like a city park. However, the Supreme Court refused to enjoin the sale of the property even under these circumstances. In sharp contrast, the 10.77 acres at issue in the instant case has (except for the abandoned parking lot) primarily existed in an open and natural state since it was acquired by the City in the 1930's for flood control. A particularly compelling piece of evidence at the hearing on the Motion for Preliminary Injunction was a 1955 aerial photo of the subject property and its environs. (Defendants' Ex. I) The photo conclusively proves that the property was wild, open and unimproved, with no hint whatsoever that it had been defined, improved, or used as a park as of 1955.

The completely rural unimproved condition of the property stands in sharp contrast to the way the Colorado Supreme Court understood the meaning of "parks" in 1955:

> "In this jurisdiction we have adopted the modern concept for a dedicated public park. That while an entire area of a park may not be converted to playground or recreational uses; nevertheless, when, considering the size and location of the park, its environments, density of adjacent population and their public needs, it is proper and legitimate that a reasonable portion of a park area be set aside and used for playground and recreational purposes. These uses would include tennis courts, playground and dancing facilities, skating, a swimming pool and bathhouse, horseshoe pitching, walking, horseback riding, athletic sports and other outdoor exercises, as may

> be needed, and if conditions are conducive therefor, golfing and baseball with the necessary equipment therefor, and with car parking facilities for the use and convenience of patrons and the public; provided always that a substantial portion of the park area remains in grass, trees, shrubs and flowers, with seats and tables for picnicking, for the use by, and enjoyment of, the public." *McLathlin v. City and County of Denver,* 280 P.2d 1103, 1106 (Colo. 1955).

As demonstrated in *Hall*, the Denver Charter and the Charter alone is the key to resolving the legal question of whether the property is a type of "park" for which voter approval is required prior to conveyance. Even to the extent Appellants continue to rely on *McIntyre*, neither that case nor any other case cited by the Plaintiffs stands for the proposition that voter approval is required to sell park land. The requirement for voter approval derives entirely from the Denver Charter, and it is triggered in only two discrete circumstances, neither of which exist in this case.

Section 2.4.5 of the Charter contemplates only two scenarios under which voter approval is required to sell or convey park land. "Common law dedication" or any other theory under which city-owned land somehow takes on a status as *de facto* parkland after 1955 is simply not one of the scenarios under which the charter requires voter approval prior to a sale. Because the Appellants cannot show either that the property could be considered a "park belonging to the City" as of December 31, 1955 or that it has been officially designated as a park since that

date by ordinance, they have no reasonable probability of success on the merits of their claim that voter approval is required under § 2.4.5.

### D. The Appellants Have No Reasonable Probability of Success on the Merits of Their Claim that Ordinance No. 170 Approving the Conveyance of the City-owned Land to DPS is Subject to Referendum

1. Only "legislative" ordinances are subject to referendum under Colorado law.

The right of the citizens of municipalities to force a referendum election is secured by section 1(9) of Article V of the Colorado Constitution, which provides in relevant part:

> "The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal *legislation* of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal *legislation*." (Emphasis supplied.)

The Colorado Supreme Court long ago interpreted this constitutional provision to apply, not to every action taken by a city council, but only to acts which are legislative in character. *City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977). (Rejecting referendum petitions seeking to force a vote on a city water rate increase.) In *Zwerdlinger* and subsequent decisions, the court recognized that a municipal city council (unlike a purely legislative body such as Congress or the

Colorado General Assembly) wears many different hats and makes decisions in different capacities, sometimes acting legislatively but other times acting in an executive, administrative or quasi-judicial capacity. In Denver, for example, the City Council acts hundreds of times each year on individual contracts, leases, concessions and land transactions submitted by the Mayor for Council ratification under Charter § 3.2.6.

The *Vagneur* decision, which also addressed a dispute over conveyance and use of city-owned open space, is particularly instructive because it contains a thorough review of prior case law in Colorado on the subject of initiative and referendum rights. Perhaps more clearly than ever, the court in *Vagneur* articulates the various tests for distinguishing legislative and administrative matters. Among other things the court held:

> "Legislative power is defined by the work product it generates, namely, the promulgation of laws of general applicability; when the government legislates, it establishes a generally applicable rule that sets the governing standard for all cases coming within its terms. . . When a government legislates, it weighs broad, competing policy considerations, not the specific facts of individual cases." *Id. at 506-507.*
>
> ". . . decisions that require specialized training and experience or intimate knowledge of the fiscal or other affairs of government to make a rational choice may be properly characterized as administrative." *Id. at 507.*

> ". . . government decisions to enter into a contract with a specific entity are not legislative decisions because they do not involve the adoption of generally applicable rules in the implementation of public policy." *Id. at 507.*
>
> ". . . in a close case, a court's decision may be informed by historical examples . . . an initiative that finds longstanding parallels in statutes enacted by legislative bodies, for example, may be deemed legislative on that basis, while initiatives that seem more like traditional executive acts may be deemed to fall on that side of the line." *Id at 507.*

Of greatest relevance to the instant case is the holding in *Vagneur* that the action of a city council approving an individual contract cannot be considered "legislative" in nature. The concept that an ordinance approving a contract cannot be subject to referendum is buttressed by an entirely different principle—a public entity generally cannot impair the obligations of its own contracts. *United States Trust Company of New York v. New Jersey,* 97 S.Ct. 1505 (1977); *Colowyo Coal Co. v. City of Colorado Springs,* 879 P.2d 438 (Colo. App. 1994); *Raptor Educ. Foundation, Inc. v. State, Dept. of Revenue,* 296 P.3d 352 (Colo. App. 2012). When citizens legislate through the power of initiative or referendum, they are essentially standing in the shoes of the city council. No more than the city council itself could repeal an ordinance that formerly approved a contract, thereby purporting to unilaterally abrogate the contract, so too do the voters lack the authority to impair or abrogate a binding municipal contract through a referendum.

*Parker v. City of Golden,* 138 P.3d 285 (Colo. 2006). (Initiated city charter amendment could not impair the obligations of pre-existing developer reimbursement agreements.)

The principles set forth above are embodied in a state statute which empowers municipal clerks throughout Colorado to reject proposed initiate and referendum petition forms at the very outset of the petitioning process on the following basis:

> "The clerk may reject a petition or a section of a petition on the grounds that the petition or a section of a petition does not propose municipal legislation pursuant to section 1 (9) of article V of the state constitution." § 31-11-106 (1), C.R.S.

Thus, the Clerk was operating fully within her jurisdictional authority when, on the grounds that Ordinance No. 170 is not legislative in nature, she rejected petition forms seeking to force a referendum election on the ordinance.

Since Ordinance No. 170 did not adopt any legislation or policy of general applicability, and instead merely approved an individual real estate transaction, the Clerk did not exceed her jurisdiction or abuse her discretion in rejecting the referendum petition forms tendered to her by the Plaintiffs, and the trial court correctly ruled that the Appellants had failed to prove a reasonable probability of success on the merits of their claims against the Clerk.

2. The adoption of Ordinance No. 170 did not manifest some sort of *de facto* policy change by the City.

The Appellants continue to argue on appeal at pp. 29-37 of their Opening Brief that Ordinance No. 170 which, on its face, merely authorizes a single real estate transaction nevertheless constitutes a "policy change" by the City. For example, Appellants argue that the Ordinance constitutes a change in city zoning or land use policy.

A similar argument was made and rejected in the *Vagneur* case, where the appellants claimed in that case that a decision to convey municipally-owned open space and convert it to another use was tantamount to a "*de facto* rezoning" of the property. In other words, the appellants attempted to extend the reasoning of *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981) (finding site-specific zoning decisions to be legislative and thus subject to referendum) to transactions involving the conveyance of city-owned real estate. In rejecting this argument, the Supreme Court stated:

> "We reject Proponents' suggestion that proposing a permanent change in use of a specific parcel of City-owned open space is equivalent to modifying a zoning plan and that such a proposed change in use is therefore legislative. *See: Margolis, 638 P.2d at 304-305. . . . (T)*he sale, exchange, conveyance, disposition, or change in use of a particular parcel of city-owned property cannot be analogized to the development of a city-wide zoning plan of general applicability. Such case-specific actions generally do not reflect the exercise of legislative power because they do not necessarily entail the enactment of 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.

In their Opening Brief the Appellants correctly note that the 10.77 acres conveyed by the City to DPS is currently zoned OS-A, a zoning classification typically applied by Denver to city-owned parks and spaces. However, Ordinance No. 170 did not expressly change this zoning classification, nor does the City intend to do so in the future. Under Colorado law, school districts are entitled to construct their schools on their property regardless of the underlying zoning classification ascribed to that property by a county or municipality. See: § 22-32-124(1)(d), C.R.S. Thus, Plaintiffs are incorrect in their Opening Brief when they assert at p. 30 that "the parcel will have to be re-designated to a classification other than OS-A."

Plaintiffs also err when they go on to argue at pp. 30-31 of their Opening Brief that Ordinance No. 170 effectively reversed City land use policy regarding the sale/transfer of all Denver parks. Ordinance No. 170 speaks for itself. It merely authorizes the conveyance of a single 10.77 acre parcel of vacant city-owned land. The ordinance did not, indeed it *could not*, alter the City's "land use policy" policy in regard to the conveyance of park land, because that policy is reflected in § 2.4.5 of Denver's home rule charter, which governs the sale and

leasing of City parks and defines when voter approval is or is not required to convey park land.

3. The adoption of Ordinance No. 170 did not embody a declaration of municipal policy that was permanent in nature.

From pp. 31-37 of their Opening Brief, Appellants interpose several different arguments for how and why Ordinance No. 170 should be considered "legislative," all of which have previously been rejected by the Colorado Supreme Court.

For example, Appellants make what is essentially a circular argument—Since the Denver Charter itself requires voter approval for the sale of certain park land, then Ordinance No. 170 must be legislative because (in Appellants' view) it involves the conveyance of park property. Of course, the City Defendants strenuously disagree with Appellants' theory that the subject parcel is park property (otherwise the Defendants would have referred the conveyance to the ballot in the first place).

Again, a similar argument was made and rejected in *Vagneur*. In that case, Section 13.4 of the Aspen Charter required that changes by the city council in the use of city-owned open space must be referred for voter approval. The plaintiffs in *Vagneur* argued in vain that this charter-based voter approval requirement rendered *all* decisions related to future changes of open space "legislative" and thus subject

to a citizens' initiative petition. In rejecting this argument, the Supreme Court said:

> "Section 13.4 of the Charter serves as a check on City Council's actions by granting voters the power to reject a decision by City Council regarding its management of this type of property. However, the power to reject City Council's decisions in such matters does not compel the conclusion that decisions regarding the sale, exchange, conveyance, disposition, or change in use of City-owned open space are necessarily legislative, or that the voters themselves may propose or demand specific land management decisions with respect to City-owned property." *Vagneur*, 295 P.3d at 511

In this portion of their Opening Brief, the Appellants also attempt to argue that a real estate transaction is, in a sense, "permanent" and thus should be considered "legislative" and subject to referendum. However, in the case o**f** *Idaho Springs v. Blackwell,* 731 P.2d 1250 (Colo. 1987), the Colorado Supreme Court already dispensed with this argument, not just under the facts of that case but as a general matter. In *Blackwell*, the municipality was acquiring property for a public improvement (*i.e.* a city hall) as opposed to selling property for a public improvement (*i.e*. an elementary school). But the logic of the opinion applies equally to both:

> "In our view, the selection of the site and structure for the city hall is not a permanent or general act within the meaning of *Witcher* or *Zwerdlinger*. The structure is of course permanent in the sense that it will serve as the city hall for an indefinite period of time. However, the duration of legislation or the anticipated useful life of a municipal improvement does not completely determine the meaning of

> permanence when determining whether an ordinance is legislative or administrative. . . . The term "permanent" is used to signify a declaration of public policy of general applicability because a permanent enactment is more likely to involve policy considerations." *Id.* at 1254.

Finally, in this and other parts of their Opening Brief, the Appellants argue that the court should go beyond the four corners of the ordinance and infer that some sort of larger, unstated policy implications will flow from a single real estate transaction. However, Appellants can cite no Colorado precedent supporting this novel theory.

4. The Denver Charter does not render the referendum right applicable to all city ordinances.

In the final portion of their Opening Brief the Appellants note that the referendum provisions in the Denver Charter appear to apply to *any* "enacted ordinance," but go on to acknowledge that the Supreme Court in *Zwerdlinger* has already held that such language in a home rule charter is deemed to apply only to "legislative" ordinances. *Id.* 571 P.2d at 1076-1077. This Court must reject the Plaintiffs' contention that the lack of "exceptions" in Denver Charter §§ 8.3.1 and 8.3.4 permits a referendum on all ordinances enacted by the City Council. *Zwerdlinger* makes clear that referendum provisions in a home rule charter, with or without stated exceptions, reserve legislative power only. To hold otherwise ". . .

could result in chaos and bring the machinery of government to a halt." *Id.* 571 P.2d at 1076.

The Plaintiffs also fail to mention that the Colorado Supreme Court reached essentially the same conclusion a decade later in the case of *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986), a case involving even broader charter language implying that any "measure" adopted by the city council was subject to referendum. In any event, the Plaintiffs appear to concede that this court has no choice but to follow Supreme Court precedent and read the referendum provisions of the Denver Charter to apply only to ordinances that actually adopt true "legislation."

## V. CONCLUSION

For the foregoing reasons, the Appellees respectfully request that this court affirm the denial by the Denver District Court of Appellants' Motion for a Preliminary Injunction, on the grounds that the Appellants have established no reasonable probability of success on the merits of their claims against the City, the Clerk and Recorder, or DPS.

Respectfully submitted this 7th day of November, 2013.

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*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, November 7, 2013, the foregoing **ANSWER BRIEF** was served via ICCES on:

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