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

Denver District Court
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; 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.

v.

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

REPLY BRIEF OF APPELLANTS

CERTIFICATE OF COMPLIANCE

I 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 those rules.

Specifically, the undersigned certifies that this brief complies with C.A.R. 28(g) because it contains 5,293 words.

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.

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STATEMENT OF FACTS

Both the City and DPS attempt to minimize the testimony of local historian Charles Bonniwell concerning the park-status of HHNP prior to 1955. Appellees would have this court believe that Mr. Bonniwell was a rebuttal witness who testified only that Denver citizens "occasionally" rode horses across HHNP in the early 1900's. However, the trial court accepted Mr. Bonniwell's testimony as part of Appellants' case-in-chief. (6/13/2013 Transcript at 278:19 – 279:3) Mr. Bonniwell offered undisputed testimony that the City acquired HHNP for the specific purpose of providing Denver citizens with an area in which to recreate, and that citizens have accepted the City's invitation to use HHNP for park and recreational purposes including horseback riding, walking, and picnicking since the 1900. (*Id.* at 274:20 – 288:3).

Mr. Bonniwell's testimony establishes that prior to 1955 the City engaged in conduct evidencing intent to dedicate the property as a park. Per Mr. Bonniwell, the City acquired HHNP with the specific intent that citizens would continue to use the land along Cherry Creek for riding and recreation, as they had since settlers first arrived by the Cherokee Trail. Even though, in 1936, the parcel was located outside the city limits in Arapahoe County, it was part of network of trails along Cherry Creek where citizens rode their horses, walked, and found solitude. Consistent with this historical intent to use the Cherry Creek corridor for parks and

recreation, the City immediately zoned HHNP as "public - open space – park" when it annexed the parcel in 1965 (*See* Plaintiff's Exhibit 14, Denver Master Land Use Plan 1967-1985).

Appellees argue that the City's allowance of an easement for East Girard Avenue across the southern tip of the original triangular parcel is evidence that the City did not intend the remaining twenty-six acre parcel to be a park. (City Answer Brief at 24) This is not so. Every City map published since 1967 identifies HHNP as a park. (See Exhibits 14 through -25). Nor is the short term lease of the southern two acres as a parking lot determinative of City intent, where subsequent park plans called for the removal of the asphalt and re-seeding of the ground with indigenous plants.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANTS FAILED TO ESTABLISH A SUBSTANTIAL PROBABILITY THAT HHNP IS A PARK.

A. Denver City Charter § 2.4.5 is not the sole authority for determining the park status of Denver property

Appellees claim that courts must resolve disputes concerning the park status of Denver property solely by reference to the Denver City Charter. This is incorrect. The Charter did not eliminate the doctrine of common law dedication.

Article XX, Section 6 of the Colorado Constitution provides that, where a city adopts a home rule charter, the charter "shall supersede . . . any law of the state

in conflict therewith." COLO. CONST. Art. XX, § 6 (emphasis added). Accordingly, City Charter § 2.4.5 supersedes the doctrine of common law dedication only if the two laws directly conflict. *See id.* Absent such a conflict, common law dedication continues to operate. *See id.*; *See also*, *Lobato v. Industrial Claim Appeals Office,* 105 P.3d 220, 224 (Colo. 2005) (holding that, where possible, laws will be interpreted to harmonize); *Colorado Mineral Association v. Commissioners of Summit County*, 199 P.3d 718, 723 (Colo. 2009) (holding that federal law will preempt state law where compliance with both is physically impossible).

Ignoring this "conflict" requirement, Appellees assert that, because the Charter mentions Denver park property, the Charter is the sole source of authority for resolving disputes concerning such property. However, whether the Charter mentions Denver parks is not the test. *See* COLO. CONST. Art. XX § 6. The test is whether Charter § 2.4.5 and the doctrine of common law dedication conflict to such an extent that the application of both is logically impossible. *See id.* Only then will the Charter apply to the exclusion of common law. *See id.* Such is not the case here.

The last sentence of Charter § 2.4.5 states, "[n]o land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance." Under the rule of statutory construction *expressio unius exclusio alterius* (the expression of one thing excludes others not mentioned, *e.g.,*

Beeghly v. Mack, 20 P.3d 610, 613 (Colo. 2001), only park land acquired after 1955 must be designated by ordinance in order to be "deemed a park." Land acquired before 1955 can "be deemed a park" by other means.

Since property acquired before 1955 can be "deemed a park" without ordinance designation, the doctrine of common law dedication operates side by side with designation by ordinance, and both doctrines are applicable in evaluating the park status of HHNP.

In sum, Article XX, Section 6 of the Colorado Constitution provides that a city-home rule charter will abrogate the common law only if the two directly conflict. Because the doctrine of common law dedication does not directly conflict with the plain meaning of Charter § 2.4.5, the Charter is not the sole source of authority concerning the park-status of Denver property. The doctrine of common law dedication is alive and well in Denver.

Appellees reject this interpretation of the Charter and maintain that, in order to constitute a park for purposes of Charter § 2.4.5, HHNP must have been named as a park on USGS topographical maps published before 1955 (City's Answer Brief at 14-15). This is false. USGS topographical maps are not published by the City, nor do they show the legal status of specific parcels of property.

Not only does Appellees' interpretation conflict with the plain meaning of the Charter, it ignores the history of the City's plan to preserve the Cherry Creek

corridor for parks and recreation, as well as flood control. The most recent evidence of this historical plan occurred in 2007, when the Manager of Parks and Recreation, after years of study by the City's own naturalists, designated HHNP as part of the Hentzell Natural Area, thereby protecting indigenous plants and wildlife, and preserving open space for the citizens of Denver.

The City's interpretation of the Charter promotes injustice by allowing city officials to deceive citizens concerning the park status of specific property. Appellees admit that numerous Denver properties which, like HHNP, are widely recognized as public parks but have never been designated parks by ordinance, are in jeopardy of being sold at the whim of city officials:

> Q. (By The Court) So [does] it bother [you], Mr. Broadwell, that the City can represent for decades that this is park land, tell homebuyers who want to make sure that it's going to be park land not to worry, only to have this changed after decades and discover that it's not park land?
>
> A. (Mr. Broadwell): If you want to have a discussion about estoppel and the degree to which that could be --
>
> Q. I want to know if, as a citizen of Denver, if you can understand how that would be kind of a troubling series of events. You can't rely on your City's --on the representations of a mayor or Parks and Rec official, you can't rely on decade's worth of maps that this is a park area. Isn't there something about that that's just very troubling? Forget about the legal issues.

(6/28/2013 Transcript at 330:6-19).

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> Q. (By The Court: Do you have any idea about the number of other properties that the public very well might consider to be a park, maybe has been a park for five, ten, 20, 30 years, and which in fact is just maintained as a nice area by the City subject to a good deal coming along? Do you have any idea?
>
> A. (Mr. Broadwell): I can't precisely quantify it, Your Honor. But the one huge irony surrounding this case is that we have an administration and a Parks manager now who systematically is updating our formal park designations to fill those gaps, to take properties that logically ought to be designated but haven't, for whatever reason through the decades, and to clean that up and to bring our parks maps up to date with more formal designations by ordinance. How many are on the protected side of the line versus the non-protected side of the line? I can't say with any precision in terms of acreage. But those who raise the specter of that problem, we urge them to be specific. Tell us a property you think might be exposed if the Court today were to deny the motion for preliminary injunction. What precedent this would set, what properties that would expose. Tell us about it.

(6/28/2013 Transcript at 332:12 – 333: 6)(emphasis added). It is noteworthy that the Denver City Attorney asserted to the trial court that citizens of Denver have the burden to identify pre-1955 parks because city officials are not aware of exactly which park land was acquired before 1955.

That the passage of Ordinance 170 places recognized park property in jeopardy is illustrated by an Englewood ballot initiative passed November 4, 2013. The initiative passed in response to the recent sale of a park by the Englewood city council, and by Appellees' actions in this case. Englewood citizens proposed and adopted by an 87%-13% margin a ballot initiative declaring that any property designated as a "park" on the Englewood Parks and Recreation Master Plan would

be formally dedicated as a park. (Englewood Certified Ballot, Appendix 3 attached)[1] The clear intent of the measure was to prevent Englewood officials from selling other properties recognized by the city and its people as parks, but which, like HHNP, city officials had neglected to designate parks by ordinance.

B. *McIntyre* supports Appellants' argument that HHNP is a park

In their Answer briefs, both the City and DPS assert that *McIntyre v. Board of Commissioners of El Paso County*, 61 P. 237 (Colo. App. 1900) is factually distinguishable from the instant case and does not support Plaintiffs' argument that HHNP is a park. However, a close reading of the *McIntyre* pleadings in the trial court and Court of Appeals shows that *McIntyre* is identical to the facts of this case.[2]

In *McIntyre*, a group of citizens sued the Board of Commissioners of El Paso County to prevent the construction of a courthouse on Alamo Square—a block of city-owned property in Colorado Springs which was platted by the developer, accepted by the city, and, from 1871-1899, treated by both the city and the people

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[1] Appellants have filed a contemporaneous motion asking this Court to take judicial notice of the Englewood ballot initiative. The ballot initiative is attached as Appendix 3.

[2] Copies of relevant pleadings from the *McIntyre* trial court file are attached as Appendix 1. A copy of the Board of County Commissioners post-oral argument submission to the Court of Appeals is attached Appendix 2. Appellants retrieved and copied the documents from the original case files at the Colorado State archives. With this brief, Appellants have filed a contemporaneous motion for the Court of Appeals to take judicial notice of the files.

as a public park.

According to the citizens' Amended Complaint, the Colorado Springs Company owned a large tract of land that was to be used as the town site for the city of Colorado Springs. (Amended Complaint, Appendix 1 attached, at 1) The tract was platted into blocks, and each of blocks was further divided into lots. (*Id.* at 2) Two of the blocks—Acacia Place and Alamo Square—were not divided into lots. (*Id.* at 2-3) Instead, the city represented to the public that the blocks would be reserved from sale and dedicated to the people for use as city parks. (*Id.* at 3).

The city of Colorado Springs improved Alamo Square at public expense for park purposes, beautifying it with "lawns, shade trees, public walks, water fountains, and seats for the accommodation of the general public." (*Id.* at 3-4) Colorado Springs citizens used Alamo Square as a public park from 1871 to 1899. (*Id.* at 4)

After twenty years of continuous, uninterrupted park use, in 1891 the Board of County Commissioners "conspire[ed] with the mayor and city council," and "induced" the council to pass an ordinance to convey Alamo Square to the County Commissioners and allow a courthouse to be constructed in the park. (*Id.* at 4) The citizens objected and filed for an injunction to prevent the construction of the courthouse. The citizens maintained that, by virtue of the city's actions in treating Alamo Square as a park, the people had an "irrevocable easement" in the property

"for park purposes." (*Id.)*

In its Answer, the Board of Commissioners denied that the property was a park. The Board's denial was based primarily on a reservation in the recorded plat which provided:

> [Acacia Place and Alamo Square] are reserved for public buildings, company buildings, and parks.

(Answer, Appendix 1 attached at 1-2)The Board argued that there had been no final dedication of Alamo Square as a park, because the plat reserved to the Colorado Springs Company, as well as the government, the right to erect buildings on the ground. (*Id.*)Therefore, the Commissioners claimed the property was not a park regardless of the fact that it had long been used as one.

In addition to claiming that Alamo Square was not a park, the Board reported that the County had entered into "expensive contracts" and expended "large sums of money" on the erection of the courthouse, and thus, that construction should be permitted to proceed. (*Id.* at 7) Finally, the Board noted that, because there were other parks in Colorado Springs, the citizens would suffer no harm from the loss of Alamo Square. (*Id.*)

The trial court in El Paso County reviewed the pleadings and dismissed the citizens' Amended Complaint. (Judgment Order, Appendix 1 attached). The citizens appealed. On appeal, the Board acknowledged that for twenty years, the

city of Colorado Springs had treated Alamo Square as a park. Nonetheless, the Board argued that, because the plat reserved to the Colorado Springs Company and the City of Colorado Springs the right to erect public buildings on the property, the property was not a park. The Court of Appeals disagreed. The Court explained that, regardless of the reservation, both the city and the developer had engaged in conduct evidencing intent to dedicate the property as a park and, as a result of that conduct, the property was a park by common law dedication. *McIntyre* 61 P. at 239.

Contrary to the Appellees' assertions, *McIntyre* is identical to the case at hand. Both cases involve citizens who filed suit to protect park property. Both cases concern city-owned property which was represented to the public to be a park for decades, and which was improved and maintained at public expense for park purposes. Both cases involve agreements between government officials to take park property for a different public use; and in both cases government officials relied on legal technicalities to deny that park land was protected from development.

Like Alamo Square, HHNP is a park by common law dedication. Here, as in *McIntyre*, this Court should re-affirm the duty of public officials to protect park property that is held in trust for citizens:

> Under the facts of this case, the principles which control and determine are the same, whatever may have been the manner of

> dedication. It is not disputed, either, that the city of Colorado Springs acquired and has the right to control and regulate the use of this square, as trustee for the people of the city, and is bound to perform the duty. In such case it is well settled by the universal current of authority that the municipality holds the dedicated ground for the use and benefit of its citizens, for the purposes only of its dedication. The trustee cannot impose upon it any servitude or burden inconsistent with these purposes, or tending to impair them. Neither can it alienate the ground, nor relieve itself from the authority and duty to regulate its use.

Id. at 239. If this Court follows *McIntyre*, its decision will protect not only HHNP, but also the numerous parks in Denver and other Colorado municipalities where government officials have neglected to designate park land by ordinance. While a site for government buildings may be a laudable use of city property, parks belong to the people, and are excluded from the land available for such development. *Id.*

C. *Hall* does not require that disputes concerning Denver park property be resolved solely by reference to the Denver City Charter.

Appellees assert that, even if *McIntyre* established a doctrine of parks by common law dedication, *McIntyre* was distinguished by *Hall v. City and County of Denver*, 177 P.2d 234 (Colo. 1946), and *Hall* requires that disputes concerning the park-status of Denver property be resolved solely by reference to the Denver City Charter. Not only do Appellees provide no explanation as to why *Hall* dictates that result, the *Hall* court did not discuss whether the land in question was a park by common law dedication. Accordingly, while *Hall* cited the City charter in deciding

that certain property was not a park, *Hall* did not eliminate the doctrine of common law dedication.

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

In disputing Appellants' argument that the trial court failed to make adequate findings of fact both the City and DPS rely on the trial court's generalized assertions that Appellants failed to establish a "reasonable probability" that HHNP is a park and that Ordinance 170 is legislative. Each of those "findings" is in fact a conclusion of law. Because the trial court cited no facts in support of its conclusion that Appellants' failed to establish a reasonable probability of success on the merits, this case must be remanded for further factual findings.

III. THE TRIAL COURT ERRED IN RULING THAT APPELLANTS' FAILED TO ESTABLISH A SUBSTANTIAL PROBABILITY THAT ORDIANCE 170 IS LEGISLATIVE

A. Ordinance 170 must be evaluated, not by its narrow language, but by its practical effect on land use policy concerning Denver parks.

If the powers of initiative and referendum are to serve as a meaningful check by the people on the power of government, their applicability must be determined with regard to *substance* rather than *form.* That is, in determining whether Ordinance 170 is "administrative" or "legislative" for referendum purposes, this court must consider not only the express terms of the Ordinance, but also at its practical effect on land use policy concerning Denver parks.

Appellees have characterized Ordinance 170 as approving "a single real estate transaction." While it is true that Ordinance 170 specifically mentions only a single real estate transaction, its practical effect is much broader. Ordinance 170 approves the transfer of HHNP to DPS without a public vote and, in doing so, effectively declares that, contrary to the express language of Charter § 2.4.5, the City may transfer park property to third parties without the consent of the public. This practical effect must be considered in evaluating whether Ordinance 170 is "legislative" for referendum purposes.

The people have a fundamental right of referendum on all government actions that are "legislative" in character"— that is, all government actions that create "new public policy." *See Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974) (describing initiative and referendum as "fundamental rights"); *City of Idaho Springs v. Blackwell,* 731 P.2d 1250, 1253 (Colo. 1987) (limiting the right of referendum to acts that are "legislative in character"); *City of Idaho Springs v. Blackwell,* 731 P.2d 1250, 1253 (Colo. 1987) (same)

Because the right of referendum extends to all government actions that create new public policy, it necessarily applies to actions that create new policy expressly, as well as to actions that do so by implication or effect. Thus, any ordinance that has the practical effect of creating new public policy is subject to the same fundamental right of referendum as an ordinance that expressly

announces new public policy. If this were not so, the government could effectively annul the people's right of referendum simply by passing an ordinance which operates to change existing policy, without expressly announcing the change.

Given these facts, in determining whether Ordinance 170 is "administrative" or "legislative" for referendum purposes, it is imperative that this court look beyond the express terms of the Ordinance to its actual effect on Denver land use policy. To do otherwise would be to read a non-existent limitation into the people's right to challenge the legislative actions of their government.

B. Ordinance 170 constituted an unprecedented change to Denver's land use policy regarding parks and, thus, was "legislative" for referendum purposes.

Defendants' contention that Ordinance 170 did not constitute a change to Denver's land use policy concerning parks is based on an unreasonably narrow interpretation of the Ordinance. While Defendants appear to concede that Ordinance 170 permanently and drastically changed the land use policy governing HHNP, they continue to rely on *Vagneur v. City of Aspen* to suggest that because the Ordinance did not specifically mention all Denver parks, it constitutes a "change in use of a particular parcel of city-owned property" and, thus, is not subject to repeal via referendum. (City's Answer at 9-10) (quoting *Vagneur v. City of Aspen*, 295 P.23d 493, 510 (Colo. 2013).

However, as explained previously, though Ordinance 170 specifically

mentions only HHNP, its practical effect extends to all Denver parks. In passing Ordinance 170 and authorizing the transfer of HHNP to DPS without a vote of the people, the Council bypassed Charter § 2.4.5 and, in doing so, reversed City land use policy concerning the transfer/sale of all Denver park property. Prior to the passage of Ordinance 170, Charter § 2.4.5 required the City to obtain a vote of the people prior to selling Denver parkland. By violating Charter § 2.4.5 to transfer HHNP to DPS, Council effectively declared that Charter § 2.4.5 no longer applies to parks acquired before 1955, and the City is no longer required to obtain the consent of the people prior to transferring such parks. That shift constitutes a substantial change Denver's land use policy concerning sale/transfer of public parks and qualifies Ordinance 170 as "legislative" for referendum purposes.

That the City will not actually be forced to change the zoning classification of HHNP in order for construction of the school to proceed does nothing to refute Appellants' argument that Ordinance 170 constitutes a substantial change in Denver's land use policy concerning parks. The fact that the park-zoned property will now be home to an elementary school building is more than sufficient to support Plaintiff's contention. Prior to the passage of Ordinance 170, property zoned "Public-Open Space-Park" was presumed to be park property, reserved for park uses, and subject to sale only upon a vote of the people. Now, such properties are potential public school sites, subject sale at the whim of the City. That shift

constitutes a substantial change in Denver's land use policy and qualifies Ordinance 170 as "legislative."

C. Ordinance 170 announced new public policy and, thus, was "legislative" for referendum purposes.

Like its "land-use" argument, Defendants' argument that Ordinance 170 did not announce new public policy is grounded in the notion that, because the Ordinance specifically mentioned only HHNP as opposed to all Denver parks, it "neither expressly or implied established any policy or legal precedent in regard to future real estate transactions of the City." (City's Answer at 12). As explained above, this argument overlooks the practical implications of the Ordinance and, thus, should be disregarded. In violating Charter § 2.4.5 to authorize the transfer of HHNP to DPS, Council effectively instituted a new city-wide policy under which Denver park property can be sold without a vote of the people. Because, prior to the passage of Ordinance 170, such a vote was required, Ordinance 170 constitutes new public policy concerning the sale of Denver parks and, thus, is "legislative," for referendum purposes.

D. The City Charter itself recognizes that ordinances such as Ordinance 170 are "legislative" for referendum purposes.

Defendants misunderstand Appellants' argument concerning the effect of the Charter voter approval requirement on the administrative/legislative distinction. Appellants' do not assert that, because the Charter requires voter approval prior to the

sale of City-owned parklands, such sales are "legislative" as a matter of law. Rather, Appellants' assert that the fact that Charter contains a voter approval requirement is strong evidence that the authors of the Charter considered sales of park property to be "legislative," and respectfully suggest that this Court give due consideration to the authors determination in ruling on the character of Ordinance 170.

E. *Vagneur* is factually distinguishable and, thus, does not support the conclusion that Ordinance 170 is administrative.

Finally, in asserting that Ordinance 170 is "administrative" for referendum purposes, Appellees' rely heavily on the Colorado Supreme Court's holdings in *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013). Such reliance is misplaced. As explained in Appellants' Opening Brief, *Vagneur* is factually distinguishable and does not support the conclusion that Ordinance 170 was "administrative".

Vagneur was a case in which the people attempted to circumvent the City's decision concerning the design of a state highway by proposing petitions that set forth substitute designs. (*Id.* at 500) The effect of Ordinance 170 and Appellants' petition are much broader. Ordinance 170 side-steps the vote requirement of Charter § 2.4.5 and, in doing so, establishes a city-wide policy under which any parcel of Denver park property can be traded without consent of the people. Appellants' petition serves to reverse that policy and to safeguard the people's right to vote on sales of Denver park property. These broad policy objectives distinguish Ordinance 170 and Plaintiff petition from the petitions at issue in *Vagneur*.

As explained in *Vagneur,* "when a government legislates, it weighs broad, competing policy considerations, not the specific facts of individual cases." *Id. at 506-507.* Here the mayor, his Manager of Parks and Recreation, and the City Council weighed the policy considerations of preserving existing park property against the need of a new public elementary school.

The *Vagneur* Court also held that "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.* Here, Section 2.4.5 of the Charter provides the historical example of whether the sale of park land constitutes legislative action. By requiring a vote of the people, the Charter acknowledges such transactions are legislative.

Appellees also note that, under *Vagneur*, decisions which require "specialized training and experience or intimate knowledge of fiscal or other affairs of government . . .[are] administrative." (City's Answer at 19) (citing *Vagneur*, 295 P. 3d at 507). Plaintiff's respectfully submit that, while the selection of a site for a public school may require specialized knowledge of government affairs and, thus, be considered "administrative," this case is not about the selection of a site for a public school. This case is about the passage of an Ordinance which contravenes existing

land use policy and to allow for sales of Denver park property without a vote of the people—an ordinance which is quintessentially legislative.

Finally, Appellees note that, under *Vagneur,* "government decisions to enter into a contract with a specific entity are not legislative" (City's Answer at 20) (citing *Vagneur*, 295 P. 3d at 507). However, as above, this case is not about the City's decision to enter into a contract with DPS. This case is about the City's decision to take park property park property and sell it without a vote of the public. For these reasons, *Vagneur* is distinguishable from the instant case, and does not support the proposition that Ordinance 170 is administrative.

IV. THE EQUITIES WEIGH IN FAVOR OF AN INJUCNTION

Throughout its Answer brief DPS sets forth numerous arguments concerning the equities of granting an injunction. To begin, DPS's brief is replete with reference to the substantial need for a new public elementary school in Southeast Denver. Appellants do not dispute the need for a school, or the importance of providing quality educational opportunities to all children who attend Denver public schools. Appellants assert only that the school may not be built on park land. If the need for a school is so great that park land must be sacrificed, the City and DPS must take their case to the people in an election as the Charter requires.

DPS also contends that the people of Denver effectively approved the land sway by voting in favor of the bond to fund the acquisition of proper and the

construction of a new Denver school. This contention is laughable. The voter-approved bond was in no way an informed decision to trade HHNP to DPS. At the time the citizens voted in favor of the bond, the City's plan to trade HHNP to DPS remained concealed. That citizens of Denver would have voted against the exchange is evidenced by the fact that, since the City announced its plan, the public has opposed the trade at every available opportunity. At no time have Denver voters approved the construction of a new elementary school at the cost of destroying HHNP. This lawsuit was filed for the specific purpose of preventing that result.

DPS asserts that Appellants' have exaggerated the harm from the destruction of HHNP because, even if HHNP is destroyed, other park property exists nearby for Appellants to enjoy. That other park property exists nearby is irrelevant. Allowing DPS to construct a school in the middle on HHNP will forever destroy the park quality of the property. Even if Appellant prevail on the merits and DPS is later forced to undo the construction, it will be impossible to reverse the damage. This is true despite the fact that other park property exists in the City of Denver.

DPS argues that the public interest in favor of preserving HHNP is minimal because, even if the property is saved, it may not remain a "natural open space." Appellant's purpose is not to ensure that HHNP remains a natural open space, but to ensure that HHNP remains a park. While the City may lawfully develop HHNP for other park purposes such as swimming or playing sports, the City may not allow the

property to be developed for non-park purposes—such as for use as an elementary school site.

DPS' contention that construction should be permitted to continue because Appellees have already spent substantial sums on the planning and preparation for the school should also be disregarded. Any financial harm to Appellees will result, not from the injunction, but from Appellees' conscious choice to spend and continue spending substantial sums of taxpayer dollars despite knowledge that their intended use of HHNP may be illegal.

Finally, DPS asserts that the injunction should not be granted because there is a "strong interest in recognizing and preserving the binding nature of contracts." While there may be a strong interest in upholding valid contract, there is no public interest in upholding illegal contracts. Because, here, the City and DPS contracted to perform an illegal act—to exchange public park land without a vote of the people, there is not public interest in preserving the contract.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the trial courts' July 5 order denying Appellants' motion for preliminary injunction and remand with instructions to grant the injunction.

Respectfully submitted, November 21, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2013 true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were filed and served as follows:

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