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.	**▲COURT USE ONLY▲** Case No.: 13CA1249
Attorneys for Plaintiffs/Appellants: John Case, # 2431 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, CO 80222 PH: (303) 758-5003 FAX: (303) 753-0444 Email: case@bensoncase.com	

APPELLANTS' RENEWED MOTION FOR INJUNCTION PENDING APPEAL, OR IN THE ALTERNATIVE, REQUEST FOR IMMEDIATE RULING ON THE MERITS OF THIS APPEAL

Appellants, through counsel, BENSON & CASE, LLP, pursuant to C.A.R. 8(a) and 27(a), respectfully submit this Renewed Motion for Injunction Pending Appeal, or in the Alternative, Request for Immediate Ruling on the Merits of this Appeal. In support of this motion, Appellants would show the Court as follows:

1. Appellants filed their original motion for injunction pending appeal on October 4, 2013. At that time it was Appellants' understanding, based upon representations by the City and County of Denver and Denver Public Schools, that construction would not begin at Hampden Heights North Park ("HHNP") until January 2014. This Court denied the motion for injunction pending appeal but ordered expedited briefing stated that the appeal would "be set for disposition as soon as practicable after the reply brief is filed." (10/18/13 Order.) Briefing is now complete, and no one has requested oral argument.

2. We now know that the prior statements regarding the commencement of construction were inaccurate. The City and DPS have begun construction site preparation in Hampden Heights North Park, moving dirt and installing storm drainage infrastructure for the proposed new school. The Appellees have turned the south end of HHNP into a full-blown construction zone. (*See* Affidavit of John Case, attached as Exhibit 1 and two photographs attached to affidavit.)

3. HHNP is part of a larger ecosystem formed by the nearly ninety acres of protected open space that border Cherry Creek. The area is home to numerous species of plant and animal life. (06/12/13 Hearing Transcript at 43-62.) The construction underway is damaging the land and the plant and animal species that used to live there. Appellant Steve Waldstein used to look out onto a prairie

remnant and wildlife in their natural state. Now he is looking at backhoes and earth movers digging and moving mounds of dirt within 3 feet of his back fence.

4. Absent an injunction, or alternatively a forthwith ruling on the merits of this appeal, the people's right to vote on transfers of Denver park property will be lost forever. 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. The trial court recently dismissed Plaintiffs' claims for judicial review of the Clerk and Recorder's actions in refusing to count the signatures of Denver voters on the petition to repeal Ordinance 170 by referendum. (*See* December 11, 2013 Trial Court Order, Exhibit 2 attached.) Accordingly, this appeal represents the last chance to preserve HHNP from the total destruction currently under way.

5. Appellants incorporate all arguments in their original Motion for Injunction Pending Appeal filed October 4, 2013.

WHEREFORE, Appellants respectfully request that this Court enjoin the City and DPS from developing, building upon or otherwise altering Hampden Heights North Park until this appeal is decided on the merits. Alternatively, Appellants respectfully request an immediate ruling on the merits of this appeal.

Date: December 20, 2013.

Respectfully submitted,

BENSON & CASE, LLP

/s/ John Case

John Case, #2431
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2013 I served the foregoing APPELLANTS' RENEWED MOTION FOR INJUNCTION PENDING APPEAL OR IN THE ALTERNATIVE, REQUEST FOR IMMEDIATE RULING ON THE MERITS OF THIS APPEAL as follows:

David W. Broadwell, Esq. **Via ICCES**
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/s/Karen Corner

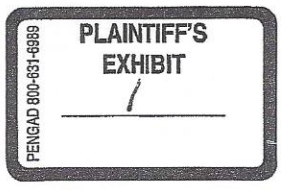
Karen Corner

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.	▲COURT USE ONLY▲
Attorneys for Plaintiffs/Appellants: John Case, # 2431 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, CO 80222 PH: (303) 758-5003 FAX: (303) 753-0444 Email: case@bensoncase.com	Case No.: 13CA1249

AFFIDAVIT OF JOHN CASE

STATE OF COLORADO)
)ss
COUNTY OF DENVER)

John Case, being first duly sworn, states upon oath as follows:



1. I am an attorney licensed to practice law in Colorado. My attorney registration number is 2431. I represent the Appellants in trial court and appellate proceedings referenced in the caption of this affidavit. I submit this affidavit in support of Appellants' Renewed Motion for Injunction Pending Appeal, or in the Alternative, for Immediate Ruling on the Merits of the Appeal.

2. I make this affidavit on personal knowledge of the matters herein.

3. On December 18 and 19, 2013 I walked around Hampden Heights North Park (HHNP) and personally observed the following:

A. The southern half of HHNP is fenced off. Behind the fence, backhoes and earth moving equipment were digging, moving dirt, and installing 54 inch storm sewer pipe in trenches.

B. Workers have installed a storm sewer manhole at the northwest corner of the construction area. The storm sewer manhole appears in the foreground of the photograph attached as Exhibit 1.a.

C. Exhibit 1.b. is a photograph of dirt piles and earth moving equipment at work on the morning of December 19, 2013.

D. Exhibits 1.a and 1.b accurately depict the condition of the south half of HHNP on December 19, 2013.

4. On December 18, 2013 a worker who identified himself as an employee of Denver Public Works (DPW) told me that the purpose of the manhole and storm sewer pipe being installed along the west side of HHNP is to transport storm water away from and around the proposed school building site, and carry the storm water into Cherry Creek.

5. DPW's installation of storm sewer pipe as part of the proposed school infrastructure contradicts representations that Nancy Keen of DPW made to the Denver City Council when Ordinance 170 was being debated. Ms. Keen told the

city council that city funds would NOT be used to build drainage infrastructure for the proposed new school:

> But, the City of Denver is not responsible for taking this school out of the floodplain and **no City dollars are gonna be used** to take this site out of the floodplain. It will be a DPS responsibility. (Council Transcript, Plaintiff's Exhibit 10, p. 20 [emphasis added].)

6. At a hearing on September 19, 2013, counsel for DPS represented to the trial court that actual construction of the proposed new school would not begin until early 2014:

> So even before we, quote/unquote, break ground, there's considerable work going on even as we speak and **we do plan on breaking ground probably in early 2014**. And because of the type of schedule we have, the goal would be to have this ready and open in the fall of 2015. So we're on a very tight time limit in terms of actual construction of the building itself, once we break ground. (09/19/13 Hearing Transcript at 19:6-12 [emphasis added].)

7. A Denver jury is scheduled to decide the merits of this case at trial starting May 19, 2014.

8. The Defendants/Appellees have begun construction of the proposed school infrastructure before this Court rules on the merits of this appeal and before a jury of Denver citizens can decide the case on the merits.

9. Only an immediate ruling from this Court of Appeals on the merits of the above-captioned appeal, or in the alternative, entry of an injunction during the pendency of the appeal, will prevent further destruction of Hampden Heights North Park and further waste of public funds.

10. Further affiant sayeth naught.

John Case

Sworn and subscribed in my presence this ___ day of December, 2013 by John Case.

Witness my hand and official seal

My commission expires: 12/09/2014

Notary Public, State of Colorado

DISTRICT COURT, DENVER, COLORADO 1437 Bannock St. Denver, CO 80202	DATE FILED: December 11, 2013 CASE NUMBER: 2013CV32444
Plaintiffs: FRIENDS OF DENVER PARKS, INC., et al v. **Defendants:** CITY & COUNTY OF DENVER, et al	COURT USE ONLY Case Number: 13CV32444 Courtroom: 376

COURT'S ORDER RE: PLAINTIFFS' CLAIMS ARISING UNDER C.R.C.P. 106(a)(4).

This matter is before the Court pursuant to Plaintiffs' Claims Arising under C.R.C.P. 106(a)(4), filed October 10, 2013. The Court having reviewed the briefs, the file and being fully advised Finds and Orders as follows:

I. Background

On April 1, 2013, the Denver City Council passed Ordinance 170, which approved a contract between Defendant City and County of Denver (the "City") and Defendant School District No. 1 in the City and County of Denver ("DPS") whereby the City and DPS exchanged real estate. In essence, the City conveyed 10.77 acres of City-owned land (the "Property") to DPS in exchange for a building near downtown Denver. While the Property, for many years, was maintained and named as a park, it was never officially "designated" as "park" land pursuant to Section 2.4.5 of the City's charter. Ordinance 170 did not change the zoning classification for the Property.

On May 20, 2013, Plaintiffs submitted a proposed petition to the Clerk and Recorder of the City and County of Denver (the "Clerk") which sought to repeal Ordinance 170 by referendum. On May 22, 2013, the Clerk rejected Plaintiffs' proposed petition on the basis that Ordinance 170 was an "administrative" enactment and the constitutional right of referendum extended only to "legislative" matters.

Despite the Clerk's decision, Plaintiffs went ahead and submitted their completed petition for a referendum to the Clerk on July 1, 2013. Two days later, the Clerk rejected the petition on the ground that it was circulated without the Clerk's prior approval.

Pursuant to C.R.C.P. 106(a)(4), Plaintiffs now appeal the Clerk's May 22, 2013 rejection of Plaintiffs' proposed petition on the basis that Ordinance 170 was "administrative" and not "legislative" in nature.

II. Issues

1. Whether the Clerk abused her discretion in rejecting Plaintiff's proposed petition on the basis that Ordinance 170 was "administrative" rather than "legislative."

III. Standard of Review

The district court's review under C.R.C.P. 106(a)(4) is limited to a determination of whether the governmental officer exceeded her jurisdiction or abused her discretion. *Covered Bridge, Inc. v. Town of Vail*, 197 P.3d 281, 283 (Colo. App. 2008). Such review permits a district court to reverse a decision only if there is "no competent evidence" to support the decision. *Ross v. Fire and Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986). "No competent evidence" means so devoid of evidentiary support that the decision could only be explained as an arbitrary and capricious exercise of authority. *Id.*

The right of referendum applies only to "legislative" actions of a governing body. *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987). An ordinance's classification as "legislative" or "administrative" is largely an *ad hoc* determination. *See Witcher v. Canon City*, 716 P.2d 445, 459 (Colo. 1986). The central inquiry is whether the proposed legislation announces new public policy or is simply the implementation of a previously declared policy. *City of Idaho Springs* at 1254.

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. *Vagneur v. City of Aspen*, 295 P.3d 493, 507 (Colo. 2013). Instead, such decisions are "executive" acts involving specific individual parties and, accordingly, lie beyond the bounds of legislative power. *Id.*

The 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. *Vagneur* at 510. Such case-specific actions generally do not reflect the exercise of "legislative" power. *Id.*

Section 2.4.5 of the City's home rule charter provides citizens with a right to referendum for any sale or lease of designated "park" land:

> 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 ...

IV. Conclusions of Law

The Court finds the Clerk did not abuse her discretion in rejecting Plaintiffs' proposed petition because Ordinance 170 was "administrative" in nature.

The Court is unpersuaded that the enactment of Ordinance 170 constituted a change in public policy. Plaintiffs' arguments depend on the determination that the Property somehow became designated as "park" land (by historical use, etc.) and any transfer or exchange is therefore subject to referendum. Ordinance 170 did not change the Property's zoning classification. The Property has never been designated as "park" land.

The Colorado Supreme Court's decision in *Vagneur* indicates contracts for the exchange of land, such as Ordinance 170, are not "legislative" in character. Pursuant to C.R.C.P. 106(a)(4) review, sufficient evidence exists to support the Clerk's determination that Ordinance 170 was an "administrative" act. As the right of referendum applies only to "legislative" actions of a governing body, the Clerk did not abuse her discretion in rejecting Plaintiffs' petition.

Accordingly, the Clerk's May 22, 2013 rejection of Plaintiffs' petition is AFFIRMED. The Court hereby ORDERS the following:

1. Plaintiffs' Second, Fourth, Fifth, Sixth and Seventh Claims for Relief are DISMISSED with prejudice as they rest on the determination that the Clerk's May 22, 2013 rejection was improper.

2. Plaintiffs' First and Third Claims for Relief remain in the case.

3. Each party to pay their own costs and fees.

DATED this 11th day of December 2013

BY THE COURT:

Herbert L. Stern III

Herbert L. Stern, III
District Court Judge

CC: Counsel of Record by e-filing