COLORADO SUPREME COURT Court Address: 2 East Fourteenth Ave. Denver, Colorado 80202 Colorado Court of Appeals Case No. 13CA1249 Denver District Court Case No. 2013 CV 32444 Hon. Herbert L. Stern III, District Court Judge **Petitioners:** FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN and ZELDA HAWKINS, individuals. v. **Respondents:** CITY & COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity.	**▲COURT USE ONLY▲** Case No. 2014SC00118
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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I certify that this reply brief complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The reply brief complies with C.A.R. 53(d) because it contains 2,497 words.

BENSON & CASE, LLP

s/ John Case

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INTRODUCTION

Charter §2.4.5 as amended in 1996 is silent on how parkland owned before 1955 becomes a park. The legislative history of the amendment shows that city council intended all parks owned and managed by DPR in 1996 to be designated parks, if they were used as parks before 1955. Petitioners presented irrefutable evidence at the preliminary injunction hearing in the trial court that the Department of Parks and Recreation owned and managed Hampden Heights North Park ("HHNP") in 1996, and that the public used HHNP as a park before 1955. Additional legislative history shows that HHNP was a designated park in 1983. Finally, the comprehensive zoning code of 2010 and its Official Map specifically designated HHNP as a park to be protected and preserved by the city.

The trial court and the Court of Appeals lacked the legislative history presented here, because the city did not produce the legislative history until February 6, 2014 in response to formal discovery requests. Neither of the lower courts considered the fact that the 2010 zoning code designated HHNP as a park. From the facts presented in the trial court, and the legislative history discussed herein, it is clear that from 1955 forward, through and including the zoning code of 2010, the city intended to protect and preserve HHNP for future generations.

REPLY ARGUMENT

I. The legislative history of Charter Section 2.4.5 proves that the city designated HHNP as a park.

On August 19, 1996 the Denver City Council adopted the current version of Charter §2.4.5. Just before council voted on the proposed Charter amendment, the city manager explained how the Charter amendment would affect parks, such as HHNP, owned by the city before 1955:

> The amendment confirms that **parks used as parks prior to 1955 are designated as parks**.

(Partial Transcript of Denver City Council Meeting 8/19/1996 p. 1). As stated before the vote, the city council believed there were two requirements for pre-1955 land to be a designated park in 1996. First, the land had to be owned and managed by Department of Parks and Recreation ("DPR") in 1996. Second, the land had to be used as a park before 1955.

Petitioners presented overwhelming evidence in the trial court that HHNP was a park in 1996. Susan Baird, Ph.D., who worked for DPR as a parks planner from 1990 - 2010, testified that DPR owned and managed HHNP throughout the 20 years that she was employed. During those two decades, DPR constructed bicycle trails through the park that connected it with the Hampden Heights neighborhood and the Cherry Creek Recreation Area. DPR constructed bridges in

the park so that cyclists, joggers, and pedestrians could cross over Cherry Creek and its tributaries. DPR posted a sign in the park to inform the public of park rules (no motor vehicles, no alcohol, 10:00 p.m. curfew). City maps published between 1990 and 2013 identified the park as "Hampden Heights North."

Petitioners presented historical evidence that HHNP was used as a park before 1955. During the trial court hearing on June 13, 2013, Petitioners counsel, Respondents counsel, and Judge Stern all elicited expert testimony from historian Charles Bonniwell that Hampden Heights North Park, formerly known as Parcel 31, was used as a park prior to 1955:

> Q. [By Plaintiff Counsel] **After 1936 and before December 31, 1955, did citizens of Denver ride on horseback and walk along Cherry Creek through Parcel 31 for recreational purposes?**
> A. [By Mr. Bonniwell] **Yes.**
>
> Q. [Cross examination by City Attorney David Broadwell]
>
> To the best of your knowledge, is the triangular parcel located on this 1955 aerial map recorded anywhere by name as a park, acknowledged anywhere officially as park, as of December 31, 1955?
>
> A. [By Mr. Bonniwell] I know it was repeatedly referred to as a park after 1955. I know of no designations, per se, **I just know it was used as a park**.

MR. BROADWELL: Thank you.

THE COURT: **Used as a park before 1955?**

THE WITNESS: **Correct.**[1]

HHNP meets the two criteria that city council required for park designation when council adopted the amended version Charter §2.4.5 on August 19, 1996: (1) HHNP was a park in 1996; and (2) HHNP was used as a park before 1955. Thus, in the words of city council, HHNP is one of the "parks used as parks prior to 1955 [that] are designated as parks." (Transcript 8/19/1996)

In Respondents' Opposition Brief, they claim "there is absolutely no record support" that the city purchased HHNP for recreation purposes (Opposition at 6.) That is simply not correct. Mr. Bonniwell testified that he examined the deeds to Parcel 31 and other parcels in the Cherry Creek corridor that the city acquired from 1934 through 1936. In order to provide recreation for citizens who enjoyed horseback riding along Cherry Creek, the city purchased not only fee title to numerous parcels, but also easement deeds across the land of non-selling owners. Thanks to the city's foresight in 1936, Denver citizens could ride on bridle paths

[1] Since the trial court hearing, Petitioners have located numerous witnesses who rode horses, played, explored, and picnicked in HHNP before 1955. These witnesses, who will testify at trial on May 19, 2014, considered HHNP open space parkland that was used by the public. One of these witnesses, Sandy Dennehy, has had her testimony preserved by deposition.

along Cherry Creek for several miles, starting at the Denver Country Club and continuing all the way across Parcel 31 to Kenwood Dam. Mr. Bonniwell stated that the reason the city purchased land in the Cherry Creek corridor was so that its citizens could use the land for recreation:

> The City and County of Denver then later went back and got rights of way **in order that its citizens could recreate** and go through these parcels unimpeded.

Respondents further claim "there is absolutely no evidence of 'intent' by the city" to dedicate HHNP as park land before December 31, 1955. (Opposition at 7.) The city's own records contradict Respondents' position.

On September 6, 1955 the city enacted Ordinance 296, Series 1955, which authorized the Manager of Improvements and Parks, with the approval of the mayor, to convey an easement for S. Havana St. across 10.718 acres of HHNP to the Colorado Department of Transportation for the following express purposes:

> That to improve, and aid in the construction and maintenance of, public roads outside the limits of the City and County of Denver, **for the purpose of establishing and improving the system of roads connecting the City and County of Denver and its parks and parkways outside such limits**,

(Ordinance 296, Series of 1955) (emphasis added).

At the time, HHNP was located in Arapahoe County, outside the city limits. The stated purpose of Ordinance 296 was to connect the city with

HHNP and other parks outside the city limits. The phrase "connecting the City and County of Denver and its parks and parkways outside such limits" shows that the city recognized HHNP as a park, which had been dedicated by 19 years of public use from 1936 to 1955.

The conveyance of 10.7 acres to CDOT for South Havana Street was not a permanent sale or lease of park property prohibited by the Charter. Most of Denver's mountain parks and remote parks include roads. Providing a road along the east edge of HHNP to connect the park with automobile traffic to and from the city provided access to the park for Denver citizens. Title was in the form of a Deed of Easement that reverted to the city when CDOT stopped using the road. The deed reserved the right to the city to continue using the conveyed parkland for any purpose "not inconsistent" with CDOT's use of the road. (Deed of Easement Recorded Book 7747, Page 563).

II. The legislative history of §2.4.5 proves that the city designated HHNP as a park before 1983.

Two documents produced by the city on February 6, 2014 show that the city had designated HHNP as a park in 1983. The first document is the text of an amendment to Section A4.5 of the Charter that Denver voters approved on May 17, 1983. The amendment reads in pertinent part as follows:

> A4.5 Sale and Lease of Parks. No portion of any designated park belonging to the city shall be sold. No portion of any designated park or recreational facility may be leased, except for concession leases and leases to charitable or not-for-profit organizations or other governmental jurisdictions. All such leases and any sub-leases shall require the approval of Council as provided for in Chapter B of this Charter. **All designated parks existing at the time this provision is enacted shall continue to be designated as parks.** No land now owned or hereafter acquired by the City and County shall be deemed a park unless specifically designated a park by ordinance.

(Ordinance 218, Series of 1983, approved by voters 5/17/1983) (emphasis added).

The second document is a list of Denver parks published by the Department of Parks and recreation in June 1978. The list refers to HHNP as "Unnamed 27.6 acres at Havana and Cornell." The inclusion of HHNP on the city's official list of parks shows that it had been designated.

III. The comprehensive city zoning code enacted by ordinance June 25, 2010 recognized the official status of HHNP as a designated city park.

The Court of Appeals overlooked the fact that the city's 2010 zoning code, which was enacted by ordinance, designated HHNP as a park. On June 25, 2010 the city enacted the ordinance that created its new zoning code. Section 9.3.2 of the new zoning code states in pertinent part:

> To carry out the provisions of this code, the following Zone Districts have been established in the Open Space Context and are applied to property as set forth on the Official Map.
>
> **Open Space Context**
> OS-A Open Space Public Parks District
>
> **9.3.2.1 Purpose**
> The following paragraphs explain the general purpose and intent of the individual Zone Districts.
>
> **A. Open Space Public Parks District (OS-A)**
> The OS-A district is intended to protect and preserve public parks owned, operated or leased by the City and managed by the City's Department of Parks and Recreation ("DPR") for park purposes.

(Underline added.) The Official Map shows HHNP colored in green, and labels it "OS-A - 333-2010." Thus, the zoning ordinance of 2010 officially identified HHNP as park property owned by the city, managed by the Department of Parks and Recreation, with the express intent "to protect and preserve" the park. That is a designation of HHNP as a park by ordinance.

Respondents and the Court of Appeals made much of the fact that in 1992 the city temporarily leased 2 acres of HHNP to Oppenheimer Corp. for a parking lot. The Oppenheimer lease was terminated before 2007, when DPR designated the parking lot as part of the 90 acre Hentzell Natural Area and scheduled it for re-planting of native grasses. In 2010 the city changed the zoning of the parking lot from P-1 (parking) to OS-A (public park to be

protected and preserved by the city). When the city included HHNP as a park on the Official Map of the city's 2010 zoning code, it designated HHNP as a park by ordinance. Having been designated a park by ordinance, HHNP is subject to the protection of Charter §2.4.5. It may not be sold without a vote of the people.

IV. The Court of Appeals erroneously determined that the City impliedly abrogated common law dedication.

Respondents failed to address Petitioners' primary argument that the Court of Appeals decision is contrary to *Vaughn v. McMinn*, 945 P.2d 404, 410 (Colo. 1997), *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004), and numerous precedents holding that, when a statute is consistent with common law, intent to abrogate the common law may not be inferred. The Court of Appeals, unaware of the legislative history of Charter §2.4.5 in 1996 and 1983, erroneously inferred that the drafters of the Charter intended to abrogate the doctrine of common law dedication. As the above discussion shows, that is incorrect.

V. Special and important reasons exist for granting certiorari.

In 2011, the current mayor and DPS agreed to take 11 acres of out of HHNP and trade it for a building downtown. Only when it benefitted public officials to obtain $4 Million of free real estate did they claim that HHNP was not a park.

The Respondents' contention that there are no "special and important reasons" for the Supreme Court to review this case (Opposition at 2) is incorrect. Parks are vitally important to citizens. The right to vote is a fundamental right. Charter §2.4.5 prohibits the city from selling a park or any part of a park without a vote of the people. The Democratic Party of Denver, the Republican Party of Denver, and the Green Party of Denver all have adopted formal resolutions publicly condemning the actions of the mayor, clerk and recorder, city council, and DPS. No fewer than 35 articles published in Denver media have suggested that city officials should comply with Charter §2.4.5 and allow Denver citizens to vote before taking park land for a government building.

The issues raised here extend far beyond HHNP. Under the Court of Appeals' interpretation of the Charter, numerous parcels of parkland that city council and Denver citizens thought were protected under the Charter are fair game for sale without voter approval. Inter Neighborhood Cooperation, a non-profit made up of 100 Registered Neighborhood Organizations, attempted to intervene in the trial court for the purpose of protecting other parks throughout Denver, but the trial court denied the motion to intervene. These are special and important reasons for the Supreme Court to grant certiorari.

CONCLUSION

Petitioners are reasonably likely to succeed on the merits of their claim that Charter §2.4.5 required voter approval for a transfer of HHNP. The Court of Appeal and trial court erred in holding otherwise. The issues raised herein are of considerable public importance and cry out for resolution by this state's highest court. Petitioners respectfully ask that this Court grant their petition for certiorari.

Date: February 25, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2014 true and correct copies of the foregoing **REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** were filed and served as follows:

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