DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN, an individual; ZELDA HAWKINS, an individual; MEMBERS OF THE PETITIONERS COMMITTEE TO REPEAL DENVER ORDINANCE 170, consisting of JOHN CASE, JUDITH M. CASE, RENEE LEWIS, DAVID HILL, AND SHAWN SMITH. **Defendants:** 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.: 2013CV032444 Courtroom 376
Plaintiff's Attorney: John Case, Atty reg. # 2431 Jessica Schultz Atty reg. #46292 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, Colorado 80222 Phone Number: (303) 757-8300 FAX Number: (303) 753-0444 E-mail: case@bensoncase.com	

PLAINTIFFS' RESPONSE AND AFFIDAVITS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Friends of Denver Parks, Inc., Zelda Hawkins and Steve Waldstein, through counsel, BENSON & CASE, LLP, file this Brief in Opposition to the Defendants' Motion for Summary Judgment. This Brief is supported by the affidavits of eight witnesses with direct personal knowledge of the facts that will determine the outcome of this case. For the reasons that follow, the Court should deny the Defendants' Motion.

STANDARD OF REVIEW

"Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact . . . ." *Churchey v. Adolph Coors Co.,* 759 P.2d 1336, 1339-40 (Colo.1988). Summary judgment is appropriate if, but only if, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *see also Casebolt v. Cowan*, 829 P.2d 352, 354 (Colo. 1992). A fact is "material" if it will affect the outcome under the applicable substantive law. *Mt. Emmons Mining Co.* v. *Town of Crested Butte,* 690 P.2d 231, 239 (Colo. 1984).

The moving party must show that no triable issues exist. *Smith v. Boyett*, 908 P.2d 508, 514 (Colo. 1995). That burden has two components. First, the movant must inform the court of the basis of his motion. *Continental Air Lines v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Second, he must "identify[] those portions of the record and of the affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact." *Id.* That cannot be done with a mere "conclusory assertion that the nonmoving party has no evidence[.]" *Quist v. Specialties Supply Co.*, 12 P.3d 863, 868 (Colo. App. 2000). Only then must the nonmoving party come forward with evidence establishing a triable issue of fact. *See* C.R.C.P. 56(e).

A court may not weigh evidence or assess credibility in summary judgment proceedings. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714, 718 (Colo. 1987). The evidence must be viewed in the light most favorable to the nonmoving party. *Natural Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist.*, 142 P.3d 1265, 1276 (Colo. 2006). The nonmoving party also gets the benefit of all favorable inferences from the evidence. *Smith*, 908 P.2d at 514. Any doubts as to the existence of triable issues must be resolved against the movant. *Id.*

DEFENDANTS' FACTUAL ERRORS

Defendants' motion is based upon two assertions of fact that are widely recognized in the Denver community as incorrect. The first assertion is that the City never designated the school site as a park by ordinance (Motion, p. 6 and 9). To the contrary, Ordinance 333, series of 2010, designated not only Hampden Heights North Park, but also all other parks owned by the city on June 25, 2010, as official city parks, which, under the express provisions of the 2010 Zoning Code, must be protected and preserved by the Department of Parks and Recreation ("DPR"). (*See* Exhibit 1, Affidavit of former city council member Susan Barnes-Gelt, with Appendices 1-5 showing that HHNP was designated by ordinance).

This response is also supported by the Affidavit of James Kellner, who was employed for thirty years by DPR, and at the time of his retirement in 2009 served as Superintendent of the Southeast Parks District. Mr. Kellner testifies that HHNP was a designated city park, it appeared on the official lists of city parks, and it was his duty to preserve and protect the park for future generations. (Exhibit 2, Aff't of James Kellner). The issue of designation by ordinance is addressed more fully in Plaintiffs' Cross-Motion for Summary Judgment, filed contemporaneously herewith.

Defendants' second assertion is that there is no evidence that the city intended to recognize HHNP as a park existing before 1955 (Motion p. 11). Again, the Defendants are being less than candid with the Court. Formal discovery forced the city to produce the legislative history of Charter § 2.4.5. The legislative history includes a transcript of the city council vote August 19, 1996, when council adopted the current version of Charter §2.4.5. The transcript shows that, at the time of the vote, the Denver City Council placed the following interpretation on the charter amendment: "The amendment confirms that <u>all parks used as parks prior to 1955</u>

are designated parks." (*See* Exhibit 1 and Appendix 1, the transcript of City Council meeting August 19, 1996).

The attached affidavits of senior citizens Joan Biggs (Exhibit 4), Sandy Dennehy (Exhibit 5), Carolyn Gallagher (Exhibit 6), and Dave Norden (Exhibit 7), show that the current DPS building site was part of a recognized city park that the witnesses used for horseback riding and picnicking before 1955.

Defendants are unable to locate even one employee of the Department of Parks and Recreation who is willing to sign an affidavit that HHNP is not a park. The reason is obvious: every employee of DPR knows that HHNP is and always was a park. HHNP appears on official maps and lists of city parks from 1978 through 2011 (Exhibit 3, Appendices 1-11). The Defendants attempt to support their motion with affidavits from two city surveyors, both of whom lack firsthand knowledge of whether HHNP is a designated park. Their affidavits consist of conclusions prepared by the City Attorney based on the surveyors' review of incomplete city records. Neither surveyor worked for DPR like Mr. Kellner, or has any personal knowledge of parks management. Neither gentleman discusses the legislative history of Charter §2.4.5 or Ordinance 333, Series of 2010, the comprehensive Zoning Code of 2010, or the designation of Hampden Heights North Park as an official park on the city's Official Map. Furthermore, the surveyors' affidavits do not prove what the Defendants claim.

The Affidavit of Gregory Neitzke refers to purported lists of city parks allegedly compiled in 1951 and 1955 (Attachments 1 and 2). The lists include only parcels of land that are located within the city limits. The lists do not include parks outside the city limits such as HHNP, Daniels Park, Winter Park, or other mountain parks that existed in 1951 and 1955. Since

HHNP was located outside the city limits in Arapahoe County at the time the lists were created, the absence of HHNP on the lists is to be expected. Attachments 1 and 2 are not probative of whether the city recognized HHNP as a park. Even if Attachments 1 and 2 were actually complete lists of Denver parks in 1951 and 1955 (which they are not), they are rebutted by competent evidence. Plaintiffs have produced countervailing evidence in the Affidavit of Susan Barnes- Gelt ("all parks used as parks prior to 1955 are designated parks") and the transcript of testimony of Charles Bonniwell June 13, 2013 (Exhibit 10), in which Mr. Bonniwell testified that the city acquired HHNP to provide recreation for its citizens, as well as flood control along Cherry Creek.

The Defendants erroneously claim that "in 1955 the city deeded a portion of Parcel 31 to CDOT for the creation of Havana Street, a use that would be contrary to park dedication" (Motion p. 11). An examination of the documents proffered by Defendants shows that the easement to CDOT was not contrary to park dedication. Ordinance 296, Series of 1955 states that the deed to CDOT is made "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." (Affidavit of Ron Ellis, Attachment 2, p. 1). Most of Denver's extraterritorial parks include roads so that citizens can use the parks. A conveyance made for the purpose of giving Denver citizens access to extraterritorial parks, such as HHNP, is consistent with, not contrary to, park dedication. Furthermore, the deed to CDOT did not convey a fee interest. It is a "Deed of Easement" that includes rights of reversion and use for the city (Affidavit of Ron Ellis, Attachment 3, p. 3, paragraphs 1 and 3). If CDOT abandons the road or stops using it, the easement reverts to the city. While the road is in use, the city reserves the right to use the

easement in any way that is not inconsistent with CDOT use. After the easement was conveyed in 1955, Denver citizens remained free to continue using any unpaved, unfenced portion of the easement as a park.

Because the Deed of Easement to CDOT was for the purpose of providing access for Denver citizens to extraterritorial parks, and reserved rights of reversion and use for the city, a jury and this Court can find that the easement is consistent with park dedication.

As set forth in the argument below, the 1996 Charter Amendment confirmed that HHNP was intended to be a designated park because, in the words of council, it was one of the "parks used as parks prior to 1955 are designated parks." (Exhibit 1, Appendix 1). If the Court does not grant Plaintiffs' Cross Motion for Summary Judgment, there are at least disputed questions of material fact that preclude entry of Summary Judgment for defendants.

ARGUMENT

I. History of HHNP as a Park before the 2010 Zoning Code

A. The City acquired HHNP in 1936 for park and recreation purposes as well as flood control.

Use of HHNP as a park is what the City intended for its citizens when it acquired the property in 1936. On August 3, 1933 the Castlewood Dam in Douglas County collapsed. A wall of water rushed along Cherry Creek all the way to downtown Denver, destroying everything in its path. (Exhibit 4, Aff't of Joan Biggs ¶ 2.) In the three years after the flood, city officials allocated money to purchase land bordering Cherry Creek. The parcels were acquired both for flood control purposes, and to provide Denver citizens with places for recreation in the parks and parkways along Cherry Creek. Since the late 1860's, Denver citizens rode horses and recreated along the popular

bridle paths that flanked Cherry Creek. The bridle paths went from the Denver Country Club stables at University and Speer Blvd. all the way to Twenty Mile House in Parker. (Exhibit 10, Testimony of historian Charles Bonniwell June 13, 2013, pp. 279-282.)

B. The 1996 Charter Amendment

Charter §2.4.5 was amended most recently on August 19, 1996. Before council voted on the amendment, there was discussion about how parks like HHNP, which were owned before by the City before 1955, became designated parks under the amendment. Susan Barnes-Gelt, a member of the city council who voted at that meeting, has personal knowledge of what council intended:

> On August 19, 1996 I was present and voted at the city council meeting in which council passed a bill to amend Section 2.4.5 of the Denver City Charter. A transcript of that portion of the council meeting is attached to this affidavit as Appendix 1. Before the vote was taken, John Bennett, Staff Director of City Council, read a statement that described the intent of the bill. He said:
>
> **The amendment confirms that parks used as parks prior to 1955 are designated parks.**
>
> Council members including me were aware at the time of the vote that the city owned numerous parks that had been acquired before 1955 that had never been designated parks by ordinance. When I voted for the amendment, I understood that **any park owned by the City and County of Denver, that was under the management of the Department of Parks and Recreation in 1996, and that had been used as a park before 1955, was confirmed by the amendment as a designated park.** This would include the park known as Hampden Heights North Park ("HHNP") in southeast Denver.

(Exhibit 1, Aff't of Susan Barnes-Gelt, ¶ 2 [emphasis added]; *see also* Appendix 1 to affidavit, which is a transcript of the city council vote August 19, 1996.)

C. Denver citizens Used HHNP as a park from 1938 until 2013

Attached are affidavits from senior citizens of Denver who used HHNP as a park before

1955. These witnesses with firsthand knowledge testify that the park was always open to public use, and was used continuously without objection from 1938 until 1955. Joan Biggs, born in 1926, rode in HHNP as a member of the Hottentot riding club in the 1930's and 1940's. Ms. Biggs identifies the DPS construction site as part of the park where she rode. (Exhibit 4, Aff't of Joan Biggs [emphasis added].) Sandy Dennehy, born in 1939, is the oldest daughter of the late Gerald Phipps, former owner of Phipps Construction and the Denver Broncos. Mrs. Dennehy remembers riding, playing, and picnicking in HHNP between 1946 and 1955 (Exhibit 5, Aff't of Sandra Dennehy.) Carolyn Gallagher's family moved to Denver in 1953, when she was eleven years old. Her mother, father, and sister owned horses and competed in equestrian events. Ms. Gallagher rented horses at a stable near the family home at S. Dahlia St. and E. Florida Ave. She liked to ride in the parkland along Cherry Creek. She identifies the DPS construction zone as part of the park where she rode before 1955 (Exhibit 6, Aff't of Carolyn Gallagher). Dave Norden started riding horses in HHNP in 1954, when he was seven years old. (Exhibit 7, Aff't of Dave Norden). It is clear from the foregoing affidavits, which are wholly undisputed, that Denver citizens used HHNP as a park before 1955.

Park use of HHNP continued after 1955. *See* Exhibit 4 Aff't of Joan Biggs [stating that she led trail rides in HHNP starting in 1958 and continuing in the 1960's]; Exhibit 7, Aff't of Dave Norden [stating that in the 1960's and 1970's he took riders through HHNP]; and Exhibit 8, Aff't of Amy Laugesen [stating that she used HHNP as a park from 1975 to 1984, and that at all times the park was "open, unfenced, and used by the public as a park without objection"].

D. Intent to Dedicate by the City

Jim Kellner, the former superintendent of the Southeast Denver Parks District, managed

HHNP throughout his career. Mr. Kellner testifies:

> **The entire time that I worked for DPR, Southeast District, I understood that HHNP was a city park.** It was on the list of parks that I was responsible for managing and preserving for future generations. In my opinion, **based on my direct personal knowledge of the park's status for thirty years, the claim that HHNP is not a park and that it can be sold without a vote of the people is incorrect.**

(Exhibit 2, Aff't of Jim Kellner, ¶ 6 [emphasis added]). Official maps and lists of parks published by DPR show that DPR listed HHNP as a park from 1978 through 2011. *See* Exhibit 3, Appendices 1-11.

The City's 1967 Master Land Use Plan showed HHNP as a park. In 1976 employees of the Planning Department told University of Denver professor David Longbrake, Ph.D. that HHNP was a park and would remain a park in perpetuity. Relying on this statement, Dr. Longbrake purchased his home adjacent to HHNP. For the next 36 years, Dr. Longbrake witnessed city employees maintaining and improving HHNP. They picked up trash, mowed the grass, reseeded native grasses, and built bridges and bicycle trails. In 1979, Mayor McNichols sent a letter to a homeowner stating that HHNP was "dedicated park land." The city posted a sign announcing park rules in HHNP (no motor vehicles, no alcohol, park hours 5 a.m. to 11 p.m.) *See* Exhibit 11, Excerpts of testimony of David Longbrake June 12, 2013).

II. HHNP was used as a park before 1955. Thus, it is a designated park subject to the protection of Charter § 2.4.5 as amended August 19, 1996.

Municipal charter provisions are interpreted pursuant to the same rules of construction applicable to statutes. *E.g., Leggett & Platt, Inc. v. Ostrom*, 251 P.3d 1135, 1141 (Colo. App. 2010). Statutes are generally construed solely in accordance with the plain and ordinary meaning of their terms. *Board of Comm'rs of County of Boulder v. Hygiene Fire Protection Dist.*, 221

P.3d 1063, 1066 (Colo. 2009). However, "[i]n the face of statutory silence, questions of interpretation are governed by legislative intent." *Williams v. White Mountain Constr. Co.*, 749 P.2d 423, 429 (Colo. 1988). Determining legislative intent in the face of statutory silence necessarily involves consideration of legislative history. *See, e.g., Robbins v. People*, 107 P.3d 384, 389 (Colo. 2005) (considering testimony presented to the House and Senate Judiciary Committees in deciding legislative intent on an issue as to which the statute under consideration was silent).

Charter § 2.4.5 is silent on how parks managed by the Department of Parks and Recreation ("DPR") in 1996, which were owned by the city before 1955, became designated or considered parks. That being true, legislative history becomes relevant to the point of being outcome determinative. The legislative history of the 1996 amendment to § 2.4.5 establishes conclusively that city council members who voted for the amendment construed its language as follows:

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

(Exhibit 1, Aff't of Susan Barnes-Gelt ¶ 2, and Appendix 1 thereto.)

Susan Barnes-Gelt and the other council members understood that any park owned by the City, which was under the management of the Department of Parks and Recreation in 1996, and that had been used as a park before 1955, was <u>confirmed by the amendment as a designated park</u>. That included HHNP. *Id.*

Respondents' pretense that HHNP is not a park is a modern re-enactment of Hans Christian Anderson's fable "The Emperor's New Clothes." In that story, a delusional king parades naked in front of his subjects after his advisors convince him that he is wearing a beautiful suit. Here, public officials have publicly paraded for 18 months the misrepresentation that HHNP is not a park, while

every citizen in southeast Denver sees through the falsehood.

Defendants did not fool Mr. Kellner, the people of Denver, or the press. 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 parkland for a government building. While the City and DPS have powerful control over their own employees, and apparently had come credibility with this Court in the hearings during 2013, documents produced by the City on February 6, 2014 show that the City has known throughout the litigation that HHNP was a park. The City produced the documents because it was required to comply with Petitioners' formal discovery requests. The City's nondisclosure of obviously relevant information is troubling because, throughout this litigation and appellate process, the City and DPS have argued that the courts must give deference to the city's interpretation of §2.4.5. The City never informed the courts that the 1996 legislative history contradicts the City's interpretation.

The Court of Appeals ruled that it must "defer to the city's interpretation" of §2.4.5 (Opinion at 21).[1] If it is the law of this case that courts must "defer to the city's interpretation" of §2.4.5, then this Court should use the interpretation placed on the amendment by the framers who drafted it, namely "The amendment confirms that parks used as parks prior to 1955 are designated parks." (Transcript of city council meeting August 19, 1996, Appendix 1 to Exhibit 1). Susan Barnes-Gelt and the city council believed that by enacting the Charter amendment in 1996, they were protecting from sale not only HHNP, but also all of the other pre-1955 parks that were

[1] Plaintiffs have sought review of the Court of Appeals decision by Petition for Writ of Certiorari in the Colorado Supreme Court. The Petition is fully briefed, no ruling has issued.

managed by DPR. (Exhibit 1, ¶ 2 and 12.)

In summary, it is clear from all of the evidence that HHNP is a designated park. The City acquired the parkland in 1936 to provide recreation along Cherry Creek for Denver citizens. People used the park openly and without objection before and after 1955. The Charter amendment August 19, 1996 confirmed that HHNP and the other parks used as parks before 1955 were designated parks. Ordinance 333, Series of 2010, the Zoning Code, and the Official Map, state that HHNP is a designated park. Only when the mayor realized he could save $4 Million if the traded part of HHNP for a building did the City begin denying that HHNP was a park.

CONCLUSION

The Court should deny the Defendants Motion for Summary Judgment, because: (1) HHNP is a designated park, and (2) Defendants have failed to meet their burden of showing that there are no disputed issues of material fact.

WHEREFORE, the Plaintiffs pray that the Court deny Defendants' Motion for Summary Judgment.

March 11, 2014.

BENSON & CASE, LLP

Original signed by John Case

John Case, # 2431
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2014 true and correct copies of the foregoing **PLAINTIFFS' BRIEF AND AFFIDAVITS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** were served on the following:

Denver County District Court
1437 Bannock Street
Denver, CO 80202

VIA ICCES

Mr. David W. Broadwell, Esq.
Mr. Patrick Wheeler, Esq.
Mr. Mitch Behr, Esq.
Assistant City Attorneys
1437 Bannock St. R#353
Denver CO 80202

VIA ICCES

Mr. Jerome A. Deherrera, Esq.
Ms. Molly Ferrer, Esq.
Mr. Michael J. Hickman, Esq.
Denver Public Schools
900 Grant St. #401
Denver CO 80203-2996

VIA ICCES

s/ Karen Corner
Karen Corner