DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 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, , v. **Defendant:** CITY AND COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER.	**▲COURT USE ONLY▲** Case Number: 2013CV32444 Courtroom: 376
Attorneys for the Defendant School District No. 1 Jerome Deherrera, reg. no. 35893 Molly H. Ferrer, reg. no. 37857 Michael Hickman, reg. no. 30610 Denver Public Schools 900 Grant St. Denver, Colorado 80203 Telephone: (720) 423-3393 Facsimile: (720) 423-3892 Attorneys for the Defendant City and County of Denver David W. Broadwell, Esq., Atty. No. 12177 Mitchel Behr, Esq., Atty. No. 38452 Patrick Wheeler, Esq., Atty. No. 14358 Assistant Denver City Attorneys 1437 Bannock St. R#353 Denver, CO 80202 Telephone: 720-865-8754 Facsimile: 720-865-8796	

DEFENDANTS' JOINT REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs' Additional Facts

In their Response to Defendants' Motion for Summary Judgment, Plaintiffs bring forth the following additional alleged facts:

1. In 1996, John Bennet read a statement during the City Council meeting, before the City Council voted on the language of 2.4.5, that said: "All parks used as parks prior to 1955 are designated parks."

2. Charles Bonniwell testified on June 13, 2013 that citizens used the School Site for recreational purposes.[1] Sandra Dennehy, Joan Biggs and Carolyn Gallagher rode horses on the School Site before 1955. Dave Norden rode horses on the School Site sometime between 1955-1967.

3. The School Site appears on maps and lists of city parks from 1978 through 2011.[2]

4. In 2010, City Council adopted Ordinance 333, series of 2010, which rezoned the School Site as OS-A, "Open Space Public Parks District."

For purposes of this motion, Defendants' will stipulate to the additional "facts" in Plaintiffs' Response.

Introduction

In responding to Defendants' Motion for Summary Judgment, Plaintiffs argue two main points: First, they argue that public use alone (without any pre-1955 statements or actions by the City) is enough to support their claim that the School Site was dedicated as a park prior to 1955. Second, Plaintiffs argue that the School Site was designated as a

[1] Contrary to Plaintiffs' Motion, Mr. Mr. Bonniwell did not testify that the city acquired the School Site to provide recreation for its citizens. Rather, Mr. Bonniwell testified that it was acquired for flood control. However, even if Mr. Bonniwell did so testify, there is no competent evidence to support this assertion.

[2] It is important to note that, while the School Site is included on lists that include parks, the School Site is never identified as a designated or official park on these lists, while official parks are so designated. However, even if the School Site were identified as a "park" on these lists, Plaintiffs only cite to post-1955 lists.

park by a city-wide zoning ordinance passed in 2010. Both of these claims fail as a matter of law.

It remains undisputed that the School Site was not a park as of 1955 and that the School Site was not designated as a park after 1955. Because these facts are essential to Plaintiffs' claims, there is not a genuine issue of material fact in this case and this Court should grant Defendants' Motion for Summary Judgment.

Argument

A. Plaintiffs' additional "facts" brought forth in their Response do not put the fact that the School Site was not a park *as of 1955* in dispute.

Plaintiffs argue that "legislative history" of City Charter section 2.4.5 creates an entirely new category of "parks"—property that was used for recreational purposes by the public, without any demonstration of intent by the City. Specifically, Plaintiffs argue that this category of park was created by a 1966 statement by John Bennet during the City Council meeting that said: "All parks used as parks prior to 1955 are designated parks." (Plaintiffs' additional facts #4). Plaintiffs' alleged new category of "park" is not supported by Colorado law (or any other jurisdiction, for that matter) and, importantly, is contrary to the plain language in the City Charter.

The plain language of sections 2.4.5 and 3.2.6 of the City Charter, read together, demonstrate that the pertinent question is whether the School Site was a "park belonging to the City as of December 31, 1955." Section 2.4.5 of the City Charter provides as follows:

> 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…

As the Court of Appeals recognized, "the explicit language of the pertinent sections of the City's Charter make clear that, as of December 31, 1955, the city intended (1) to eliminate the concept of common law dedication of parks; (2) for land that the city owned as of that date; (3) that had not already been dedicated as a park by such means." Friends of Denver Parks, at *7. When the language of a law is clear, the court need not look to legislative history or resort to other rules of statutory construction at all. *In re People v. Paul Lesley Voth*, 312 P.3d 144 (Colo. 2013).

The language of the City Charter does not support a claim that public use of a parcel for recreational purposes prior to 1955 means that it was thereafter protected. Rather, pursuant to the plain language of the City Charter, only "parks belonging to the City as of 1955" and property designated by ordinance after 1955 are protected. It is undisputed that the School Site was not designated a park by ordinance, deed or plat prior to 1955. Therefore, Plaintiffs' claim that the School Site was a park as of 1955 is based entirely on a theory of common law dedication. As explained in Defendants' Motion, common law dedication occurs when the city's "unambiguous actions" demonstrate its "unequivocal intent" to set the land aside for a particular public use. *Friends of Denver Parks v. City and County of Denver, et. al.*, -- P.3d --, (Colo. App. 2013), *available at* WL6814985 at *6, citing *State Dep't of Highways v. Town of Silverthorne*, 707 P.2d 1017, 1020 (Colo. App. 1985). As the Court of Appeals recognized, the use of the property by the public does not support a claim that the City dedicated the School Site as a park. *Friends of Denver Parks* at *6.

Rather than bring forth evidence demonstrating that the City's "unambiguous actions" demonstrated its "unequivocal intent" to set the School Site aside as park prior to 1955, Plaintiffs continue to rely on public use of the parcel (Plaintiffs additional facts # 2) and post-1955 actions by the city (Plaintiffs' additional facts # 3). None of these additional "facts," however, put the fact that the City did not demonstrate intent to dedicate the School Site as a "park" prior to 1955 in dispute.

Plaintiffs are unable to bring a single fact to this Court's attention regarding the actions of the City prior to 1955 because the City did not intend to dedicate the School Site as a park—no improvements were made on the parcel, the School Site was never identified as a park on a plat, and the parcel was not included on lists of parks that were published in 1951 and 1955.

Because it is undisputed that the School Site was not a park as of 1955, Plaintiffs remaining claims in this matter fail.

B. Plaintiffs claim that the 2010 city-wide zoning ordinance and map was effectively a designation of the School Site as a park fails as a matter of law.

The 2010 city-wide zoning ordinance and map did not designate the school site as a park.

As explained in greater detail in Defendants' Response to Plaintiffs' cross-motion for summary judgment, Plaintiffs' theory that the School Site was designated a park by virtue of the City's zoning ordinance fails as a matter of law for at least seven reasons.

First, the Plaintiffs attempt to support this portion of their argument with an affidavit filed by a single former city council member, Susan Barnes-Gelt, expressing her personal recollections about the intent of the adoption of the 2010 Zoning Code in general, and the assignment of the OS-A zone district to the schools site and other city-

owned properties. Plaintiffs' Exhibit 1. Subsequent recollections by a former member of a legislative body are not considered a part of the legislative records and are generally inadmissible to prove legislative intent. *Colorado Department of Social Services v. Board of County Commissioners of the County of Pueblo*, 697 P.2d 1, 21 (Colo. 1985).

Second, as the Court of Appeals noted, on the same night the City approved the ordinance conveying the school site to DPS, the Council adopted a second ordinance officially designating the adjacent remaining city-owned property (also zoned "OS-A") as an addition to nearby Hentzell Park. *Friends of Denver Parks* at *4 (*See* Exhibit 1, Appendix 4, attached to Plaintiffs' Response, illustrating the way all city-owned property in the vicinity of the School Site is depicted in the OS-A zone district). Thus, the Council evinced by its own actions that it did not consider the remainder parcel, by virtue of the fact that it was already zoned OS-A, to be officially designated as a park. Instead, a distinct and separate legislative enactment would be necessary to effect such a designation. The City's interpretation of its own Charter, treating zoning as being ineffectual as a park designation within the meaning of section 2.4.5, should be given great deference by this Court. *Mile High Enterprises v. Dee*, 558 P.2d 568, 571 (Colo. 1977).

Third, it is axiomatic that municipalities enact zoning as "a valid exercise of the police power," primarily to regulate the development and use of private property. *Wright v. City of Littleton*, 483 P.2d 953, 955 (Colo. 1971). Simply put, an ordinance imposing land use regulations on the city in general is entirely different from an ordinance conferring a special status upon a particular parcel of city-owned property.

Fourth, even to the extent the language in the zoning code indicates that the purpose of the OS-A district is to "protect and preserve public parks owned, operated or leased by the City," there was nothing unusual about the City applying the OS-A classification to the School Site (in common with other city-owned property near the School Site) when the new code and map were adopted in 2010. Under her Charter authority, Denver's Manager of Parks manages a wide variety of properties, including both designated and undesignated parks within the meaning of Charter section 2.4.5, as well as other open space lands and recreational facilities. In the vicinity of the School Site, as well as elsewhere in the City, the 2010 zoning map assigns the OS-A classification to lands that have been officially designated as parks within the meaning of the Charter as well as lands which have never received such a designation. See Affidavit of Lauri Dannemiller, Manager of Parks and Recreation, attached hereto as Exhibit A.

Fifth, the foregoing point is borne out by reading in context all of the provisions the 2010 Zoning Code establishing the OS-A zone district, and the specific definition of "city park" as used in the Code. Plaintiffs attached only a small portion of the relevant code provisions to their Response at Exhibit 1, Appendix 5, focusing only on the "purpose" section of the OS-A zone district. The complete provisions of the 2010 Zoning Code establishing the OS-A zone district are attached hereto as Exhibit B. Significantly, the Zoning Code defines the term "city park" to include, not just properties that have been formally dedicated as such within the meaning of Charter section 2.4.5, but instead any "area of land owned or leased by the City and operated or managed by the Denver Department of Parks and Recreation." (Emphasis supplied.) Sec. 11.12.3.3 (B)(2), Denver Zoning Code (2010). Thus, by the express language of the Code, the OS-

A zoning classification applies not only to legally dedicated and designated parks but also to any other lands that are simply "managed" by the parks department.

Sixth, even if the School Site had not been conveyed to DPS, the OS-A zone district regulations did not expressly prohibit the construction of an elementary school in this location. Instead, the zoning ordinance states: "Permitted uses in the OS-A Zone District shall be determined by the Manager of Parks and Recreation." Sec. 9.3.4.1 (A), Denver Zoning Code (2010).

Seventh, further proof that the assignment of the OS-A classification to city-owned property was not tantamount to the formal designation of park property within the meaning of Charter Section 2.4.5 is provided by the fact that, since 2010, the City has re-zoned land from the OS-A classification to other zoning classifications. For example, a parcel that had never been formally designated as park land was removed from the OS-A classification and sold to the Denver Children's Museum without a vote of the people. See: Affidavit of Lauri Dannemiller, Exhibit A.

In sum, the Plaintiffs cannot prevail, as a matter of law, on their new theory that the 2010 Zoning Code designated the school site as a park within the meaning of Charter section 2.4.5.

Conclusion

Defendants, in their Motion, demonstrate that as a matter of law there are no genuine issues of material fact. In Response, Plaintiffs failed to bring forth specific facts demonstrating the existence of genuine issues for trial. Accordingly, Defendants respectfully request this Court enter summary judgment on Plaintiffs' remaining two claims for relief and dismiss the case in its entirety.

By: */s/ Molly H. Ferrer*

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David W. Broadwell, 12177

Attorney for the Defendant City and County of Denver

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, March 25, 2014, the foregoing was served via ICCES on:

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*/s/ Tracy Romero*_____
Denver Public Schools