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' SUPPLEMENTAL BRIEF AND EVIDENCE IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Friends of Denver Parks, Inc., Zelda Hawkins and Steve Waldstein, through counsel, BENSON & CASE, LLP, file this Supplemental Brief and Evidence in support of Plaintiff's Cross-Motion for Summary Judgment.

I. The Manager of Parks and Recreation admitted in her 30(b)(6) deposition that land owned and managed by the Denver Department of Improvements and Parks in 1955 is protected from sale by Charter Section 2.4.5.

On March 18, 2014 Plaintiff took the 30 (b) (6) deposition of the Defendant City and County of Denver. The city designated its Manager of Parks and Recreation, Laura Dannemiller, as the witness to testify concerning how parks become designated. Ms. Dannemiller testified as follows:

> Q. What's your understanding of [Charter Section] 2.4.5?
>
> A. **That land that was in ownership by the Parks and Recreation Department, or some form of that prior to 1955**, or land that is designated subsequent by an ordinance as a park, **cannot be sold without a vote of the people.**

(Exhibit 1, 30(b)(6) Deposition of Laura J. Dannemiller, P. 59, L. 22 – P. 60, L.2)
(boldface added)

On May 17, 1955 Denver voters amended Charter Section A4.5 to read as follows:

> "No portion of any Park now belonging to or hereafter acquired by the City and County shall be sold or leased at any time; provided, however, that no land hereafter acquired by the City and County shall be deemed a Park unless specifically designated a park by ordinance."

(Exhibit 2, p. 1 – amended May 17, 1955, effective January 1, 1956) (underline added).

As the city's official witness on the topic of park designation, Ms. Dannemiller explained that the city intended to designate as parks all parcels of land that were owned by the Department of Improvements and Parks in 1955:

> Q. Now, what's your understanding of what you refer to as a mass designation process?
>
> A. That all the parcels that were owned by the Department of Parks and Recreation were at the time of the original Charter language going in, that was the - that was how I generically was referring to mass designation because there were a number of parcels. To my knowledge, there weren't any individual designations ordinances the way the parks are designated

now so that's why I describe it as a mass designation.

Q. When you say "mass designation," you mean when the Charter was amended on May 17 of 1955, which became effective January 1 of '56, that designated all parks that were owned by the city at that time as parks.

A. Not owned by the city, but owned by the Department of parks and recreation and managed.

Q. And are you aware that at the time the department of Parks and Recreation was named the Department of Improvements and Parks?

A. Yeah, it was combined with Public Works.
Q. So it would be your understanding that parks managed by the Department of Improvements and Parks were designated as parks by the Charter amendment in 1955?

A. Can you repeat the question?

(The pending question was read back)

MR. BROADWELL: I'm going to object again, that it calls for a legal conclusion and the ultimate conclusion of the case. Go ahead.

A. I think that the - that **the process that took place with the Charter amendment thus <u>designated</u> parks that were owned, managed by the City's Public Improvements Department at that time.**

(Exhibit 1, P. 46, L. 11 – P. 47, L. 19)(boldface and underline added)

II. In 1955 the Denver Department of Improvements and Parks owned and managed Hampden Heights North Park (also known as Parcel 31).

The Defendants can no longer deny that in 1955 the Denver Department of Improvements and Parks owned and managed the park land that is now in dispute. Ordinance 296, Series of 1955, authorizes the Manager of Improvements and Parks, with the approval of the

Mayor, to grant an easement to CDOT over Parcel 31 for the construction of S. Havana St. The title to the bill reads in pertinent part:

> FOR AN ORDINANCE AUTHORIZING THE MANAGER OF IMPROVEMENTS AND PARKS, WITH THE APPROVAL OF THE MAYOR, TO GRANT AND CONVEY TO THE DEPARTMENT OF HIGHWAYS OF THE STATE OF COLORADO CERTAIN RIGHTS OF WAY AND EASEMENTS OVER TRACTS OR PARCELS OF LAND IN ARAPAHOE COUNTY, COLORADO. . .

(Exhibit 3, Certified copy of Ordinance 296, Series of 1955) (underline added)

The text of the ordinance expressly granted authority to the Manager of Improvements and Parks to convey easements to CDOT over parcels of real property that were owned and managed by the Department of Improvements and Parks.

> Section 1. 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, the Manager of Improvements and Parks, with the approval of the Mayor, shall have power and he is hereby authorized to grant and convey to the Department of Highways . . . . .

(*Id* at P. 1) (underline added).

Note that the purpose of the easement is to connect the City and County of Denver with its parks and parkways outside the city limits. Such parks included HHNP (then known as Parcel 31), and the land acquired for the Kenwood dam (which later became part of the John F. Kennedy Golf Course at S. Havana St. and East Hampden Ave). The ordinance authorized CDOT to construct S. Havana St. along the eastern edge of Parcel 31, which strip of land was approximately 10.7 acres. This strip of land is legally described by metes and bounds as parcel

B in the ordinance (*Id* at PP. 2-3).

The point is, Parcel 31 was owned and managed by the Department of Improvements and Parks in 1955. That is why Ordinance 296 had to authorize the Manager of Improvements and Parks to convey the easement to CDOT. Thus, according to the testimony of Ms. Dannemiller quoted above, the city intended Parcel 31 to be a designated park when voters amended the Charter in 1955.

III. Ms. Dannemiller's testimony is perfectly consistent with the enactment of Ordinance 704, Series of 1996.

On August 19, 1996, city council enacted Ordinance 704, Series of 1996, which submitted to Denver electors for approval the current version of Charter Section 2.4.5. The Executive Director of City Council at the time was John Bennett, whose affidavit is attached as Exhibit 4. Mr. Bennett read to council a statement of the purpose of the proposed Charter amendment. He knew what the intent of the Charter amendment was from attending city council committee meetings and speaking with assistant city attorney Don Wilson, who drafted the Charter amendment. (Exhibit 4, ¶ 2).

Mr. Bennett testifies that the intent of the Charter Amendment was to confirm the following:

"Parks used as parks prior to 1955 are <u>designated parks</u>."

(Exh't 4. A transcript of the council vote is attached to Mr. Bennett's Affidavit as Appendix 1.)[1] A copy of Ordinance 704, Series of 1996 is attached as Exhibit 5. The Defendants do not deny that the land known as HHNP (formerly Parcel 31) was used by numerous citizens of Denver as

[1] A video recording of the Council vote first produced by the city on February 6, 2014 will be hand delivered to the Court's division clerk.

a park for recreational purposes between 1936 and 1955. See affidavits of Joan Biggs, Sandra Dennehy, Carolyn Gallagher, and Dave Norden that were submitted to this Court in support of Plaintiffs' Cross-Motion for Summary Judgment.

IV. From 1955 until 1995, the Department of Parks and Recreation interpreted its Charter to mean that parks existing prior to 1955 are designated parks, and do not require designation by ordinance.

In 1995 the city was involved in litigation in Grand County over disputed status of the city's hotel property in Winter Park. The city argued that its hotel property had been acquired before 1955, and therefore was a designated park. In summary judgment proceedings, opposing counsel argued that the hotel could not be a park unless it had been designated by ordinance. To support its claim that the hotel property was a designated park, the city submitted an affidavit from Neil Sperandeo, who at the time was Director of Long Range Planning for the Denver Department of Parks and Recreation. Mr. Sperandeo testified:

> Is my interpretation and understanding of the Denver Charter that **parks existing prior to 1955 are designated parks**, and that there was no requirement that they be designated by ordinance. The department has consistently enforced misinterpretation, which is in accord with the 1955 and 1983 charter amendments to §A.4.5

(Exhibit 6, Affidavit of Neil Sperandeo ¶5) (boldface added). Ms. Dannemiller reluctantly conceded in her deposition that she agrees with Mr. Sperandeo's interpretation of the Charter (Exhibit 1, P. 48, L. 20).

On December 6, 1995 the District Court of Grand County ruled that the city's hotel property in Winter Park was not a park because it had never been designated by ordinance (*See* Appendix 2 to Exhibit 4). This adverse decision prompted the Denver City Council to amend the

Charter in 1996 to confirm that "parks used as parks prior to 1955 are designated parks." (*See* Exhibit 4 and Appendix 1 thereto).

Assistant City Attorney Patrick Wheeler, who is one of three assistant city attorneys representing the city in this litigation, was present when Mr. Bennett addressed the City Council on August 19, 1996. (*See* Exhibit 7, email of Patrick Wheeler to John Case March 19, 2014). Mr. Wheeler did not object to or correct Mr. Bennett's statement to council that "parks used as parks prior to 1955 are designated parks." Mr. Wheeler's silence at the time constitutes adoption of Mr. Bennett's statements. *See Ovation Plumbing, Inc. v. Furton,* 33 P. 3d 1221 (Colo. App. 2001) and *People v. Sweeney* 78 P.3d 1133 (Colo. App. 2003) (nonverbal conduct showing adoption of a statement is an admission by a party and therefore admissible evidence under CRE 801 (d)(2)(B).

V. The city's public actions since 1955 demonstrate its intent that HHNP is a designated park.

The Court is already familiar with the city's public representations from 1967 until 2012 that Hampden Heights North Park is a park. At the evidentiary hearing June 12-13, 2013, the Court saw photographs of the park bicycle trails and bridges constructed by Denver Department of Parks and Recreation, and DPR signs in the park announcing Park Rules. The Court also saw official city maps identifying the park by name as "Hampden Heights North Park."

The surveyor for DPR, Greg Neitzke, testified in his 30(b)(6) deposition that Hampden Heights North Park is identified as a park on eleven official lists of city parks published by the city between 1978 and 2012 (*Id* PP. 31-38).

VI. Hampden Heights North Park was designated by ordinance, namely Ordinance

333, Series of 2010, adoption of the 2010 Zoning Code, and adoption of the Official Map that shows HHNP is a designated park.

If, as the Defendants claim, Hampden Heights North Park cannot be a park unless it was designated by ordinance, the designation of HHNP in the 2010 zoning code meets that requirement. The city designated Tina Axelrad to testify concerning the 2010 zoning code. Ms. Axelrad admitted that on June 25, 2010 the City enacted Ordinance 333 that created the comprehensive new Zoning Code, and that it states in pertinent part: "All land located within the City and County of Denver shown on the Official Map as being zoned to a zone district in the Denver Zoning Code is hereby **rezoned as designated on the Official Map**." (Exhibit 9, Axelrad depo, P.13, L. 13-16)(emphasis added). Ms. Axelrad acknowledged that the term "designated" was used in its ordinary meaning (*Id.* P. 14, L. 4-11). She acknowledged that HHNP shows on the official map as rezoned "OS-A", and that the purpose of OS-A designation is:

> 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.

(*Id.*, P. 16, L. 1-12 [underlining added].) She agreed that Hampden Heights North Park is a city park under the zoning code. (*Id.* P. 18, L. 14 – P. 19, L. 11).

As Ms. Axzelrad admitted, the city enacted Ordinance 333, Series 2010, the zoning code, and the official map that together show irrefutably that HHNP is a park. This constitutes park designation by ordinance.

CONCLUSION

There are no disputed issues of material fact concerning the designation of HHNP as a

park. Plaintiffs are entitled to judgment on this issue as a matter of law.

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

April 1, 2014.

BENSON & CASE, LLP

Original signed by John Case

John Case, # 2431

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2014 true and correct copies of the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF AND EVIDENCE IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** were served on the following:

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s/*Karen Corner*
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