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
Plaintiffs' Attorneys: John Case, Atty reg. # 2431 Jessica Schultz Atty reg. #46292 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, Colorado 80222 PH: (303) 757-8300 FAX: (303) 753-0444 Email: case@bensoncase.com	
REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT	

Plaintiffs Friends of Denver Parks, Inc., Zelda Hawkins and Steve Waldstein, through counsel, BENSON & CASE, LLP, respectfully submit this Reply in support of Plaintiff's Cross-Motion for Summary Judgment. For the reasons that follow, and those set forth in the cross-motion, Plaintiffs are entitled to judgment as a matter of law as requested.

1. The Court of Appeals decision is not a final adjudication on the merits.

Defendants urge the Court to grant them summary judgment as a matter of law, repeatedly and erroneously citing the Court of Appeals decision in this case as the final word on

all issues. (Opposition Brief at 2, 7, 8, 9, 10, 16.) The decision of the Court of Appeals is not final, because a petition for certiorari is pending in the Colorado Supreme Court. Even if the Court of Appeals decision were final, it adjudicates only the issues and evidence addressed in the preliminary injunction; proceedings. It does not decide this case on the merits. As the Court of Appeals itself wrote, "The decision to grant or to deny a request for a preliminary injunction is **not an adjudication of the parties' ultimate rights** in a controversy, **and our review of such a decision does not address these ultimate issues**." (Opinion at 13 [emphasis added].)

The Court of Appeals did not have the benefit of any of the following evidence, which is now before this Court: (1) Ordinance 296, Series of 1955, which proves that the Department of Improvements and Parks owned and managed the park property in 1955 (Exhibit 3 to Plaintiffs' Supplemental Brief 4/1/2014); (2) deposition admissions of the City, through its current Manager of Parks and Recreation, Lauri Dannemiller, that if land was owned and managed by the Department of Improvements and Parks before 1955, then it was a designated park protected from sale (Dannemiller depo. P. 46, L. 11 – P. 47, L. 19, and P. 59, L. 22 – P. 60, L. 2, quoted at pages 2-3 of Plaintiffs' Supplemental Brief); (3) evidence of legislative history establishing that when Council enacted the current version of Charter § 2.4.5, council members were informed that "parks used as parks prior to 1955 are designated parks" (Affidavit of John Bennett, Exhibit 4 to Plaintiffs' Supplemental Brief); (4) affidavits of numerous eyewitnesses who used the park as park prior to 1955; (5) the affidavit of Neil Sperandeo, Director of Long Range Planning for Denver Department of Parks and Recreation in 1994 and 1996, stating that, "It is my interpretation and understanding of the Denver Charter that parks existing prior to 1955 are designated parks" (Exhibit 6 to Plaintiffs' Supplemental Brief); and (6) the full text of Ordinance

333, Series of 2010, along with the Denver Zoning Code and Official Map. Thus, new and different evidence supports the Plaintiffs' claims.

2. The Defendants have produced no evidence to contradict Plaintiffs' evidence; they simply deny the significance of City ordinances and the testimony of City officials that prove the Plaintiffs' case.

At page 9 of their Opposition Brief, Defendants contend:

> The Petitioners have not yet proffered any evidence of any official enactments, maps, park lists, or other affirmative acts or conduct of the City that would prove that the city unequivocally intended to dedicate the School Site as a park as of December 31, 1955.

In so pontificating, Defendants simply ignore Ordinance 296, Series of 1955, in which the Manager of Improvements and Parks was authorized to convey a road easement over the property, "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." (Exhibit 3 to Plaintiffs' Supplemental Brief [emphasis added].) Thus, Ordinance 296 conclusively establishes that the City considered HHNP a park prior to December 31, 1955.

Defendants do not dispute that Ordinance 296 proves that Parcel 31 was managed by the Department of Improvements and Parks in 1955. Instead, at page 11 of their Opposition Brief, Defendants argue that Plaintiffs have distorted the admissions of Laurie Dannemiller. In truth, Plaintiffs simply quoted Ms. Dannemiller's deposition testimony *verbatim*:

> **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.**

(Dannemiller depo. P. 59, L. 22 – P. 60, L.2. [emphasis added].) Where, pray tell, is the distortion? Dannemiller's admission shows that there is no disputed issue of material fact that the City interprets Charter § 2.4.5 to mean that land owned and managed by the Department of Improvements and Parks before December 31, 1955 was considered a designated park. The plain language of Ordinance 296 proves conclusively that Parcel 31 was owned and managed by the Department of Improvements and Parks in 1955. These two facts, conceded by the Defendants, show that the Plaintiffs are entitled to judgment that parcel 31 was a designated park in 1955 and thus protected by Charter § 2.4.5.

In their Opposition Brief, Defendants complain that Plaintiffs could not produce an official list of City parks for 1955. This is disingenuous. On April 4, 2014 the City admitted in response to formal discovery that no official lists of parks exists for the time period between 1936, the year the City acquired HHNP, and 1955:

> The City responds that, to the best of its knowledge, **it has no existing singular list or collection of lists of all properties it owned and the Manager of Improvements and Parks maintained** between October 9, 1936 and December 31, 1955.

(City Response to Plaintiffs' Third Set of Requests for Production, Response to Request No. 4, page 5, Exhibit 1 attached hereto [emphasis added].)

The earliest list produced by the City of all parks that were owned and managed by the Department of Parks and Recreation, including parks outside the city limits in 1955, was dated 1978. The 1978 list, as well as every subsequent list published by the Department of Parks and Recreation from 1978 through 2012, show HHNP as a city park (Exhibit 8, 30(b)(6) deposition of DPAR surveyor Greg Neitzke, pp. 31-40.)

3. City actions after 1955 are relevant to the issue of whether the City intended to designate HHNP as a park.

Citing no authority, Defendants argue that actions of the City after 1955, are irrelevant to the factual determination of whether the City intended Parcel 31 to be a designated park before December 31, 1955. (Opposition Brief at 10.) Post-1955 evidence includes DPAR using public funds to construct bridges and bicycle trails through the park; DPAR posting park signs in the park; DPAR publishing official lists of city parks that include HHNP; DPAR publishing official parks maps that show HHNP is a park; city officials specifically informing DPAR employees and members of the public that HHNP was a park; and enacting Ordinance 333, Series of 2010, and the Zoning Code that unmistakably designates HHNP as a park on the Official Map. Unfortunately for the Defendants, the law of evidence does not support their position.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. CRE 401. With certain exceptions that do not apply in this case, all relevant evidence is admissible. CRE 402.

Here, the primary factual issue is whether the city intended HHNP to be a park before December 31, 1955. Where a party disputes its intentional participation in a transaction, evidence of post-event conduct can be admissible to show the party's intent at the time of the event. This is true in a number of different contexts. In contract disputes, when the terms of the contract are subject to varying interpretation, conduct of the parties after signing an agreement is admissible to show their interpretation of the agreement. *Nahring v. City & County of Denver Bd. of Water Comm'rs,* 484 P.2d 1235, 1237-38 (Colo. 1971) (holding that conduct of Water Board after contract was signed was admissible to show the intent of the Water Board to sell

certain volume of water to its customer); *Shuck Corp. v. Sorkowitz,* 686 P.2d 1366, 1368 (Colo. App. 1984) (principal who accepts benefits from services of agent is estopped from denying implied agreement to pay, even though written agency agreement contemplated different services). Here, similar to the Water Board's conduct in *Nahring,* Denver municipal government claims that it did NOT intend HHNP to be a park in 1955, even though the City placed the land under the ownership and management of its Department of Improvements and Parks. Under those circumstances, the City's conduct after 1955 tends to make it more likely that the city always intended the land to be a park, and evidence of that conduct is admissible.

In the context of a criminal case, subsequent conduct of the accused is admissible to show guilty knowledge of the accused. *People v. Summitt,* 132 P.3d 320, 323-328 (Colo. 2006) (evidence of flight can be admitted to show consciousness of guilt); *People v. Eggert,* 923 P. 2d 230, 234-235 (Colo. App. 1995) (evidence that accused tried to intimidate prosecution witness, and then fled jurisdiction after motions hearing, was admissible to show awareness of guilt).

Evidence of prior and/or subsequent acts of a party is admissible to show intent, plan, scheme, absence of mistake, etc. This is true in civil, as well as criminal trials. CRE 404(b); *Boetcher & Co. v. Munson,* 854 P.2d 199, 210-212 (Colo. 1993) (evidence of prior similar acts of stockbroker that were probative of intent to violate civil securities laws); *Sieber v. Wigdahl,* 704 F. Supp. 1519, 1527 (N.D. Ill. 1989) (evidence of similar transactions in civil tort case is subject to the same test for admissibility as in criminal trial); *Young v. Ribideau,* 821 F. 2d 373, 377 (7th Cir. 1987) (Rule 404(b) governs admissibility of other acts evidence in civil case).

Here, the conduct of the City in listing HHNP as a park, showing it on park maps, and using public funds to improve the park after 1955 shows that the city always intended HHNP to

be a park. This evidence is consistent with, and independently corroborates, the pre-1955 ownership and management of HHNP by the Department of Improvements and Parks, as reflected in Ordinance 296, Series of 1955. The City's conduct is also consistent with and corroborates the undisputed testimony of historian Charles Bonniwell that the City purchased the property as a recreation area for Denver citizens, as well as for flood control. The post-1955 conduct shows the City's intent to preserve HHNP as a park for Denver citizens. The City's conduct shows the absence of mistake. Thus, evidence of City conduct after 1955 is relevant to the issue of intent, and meets the criteria of CRE 404(b) for admissibility of other acts.

Finally, in light of the City's recently fabricated denial that HHNP is a park, which began only in the fall of 2012, evidence of the City's conduct from 1967 to 2012 is admissible for impeachment purposes. CRE 407 (allowing evidence of subsequent measures for impeachment purposes); *White v. Caterpillar, Inc.,* 867 P. 2d 100, 106 (Colo. App. 1993) (evidence of defendant's subsequent acts admissible for impeachment); *Martinez v. W.R. Grace Co.,* 782 P.2d 827 (Colo. App. 1989) (same); *Vallejo v. Eldridge,* 764 P.2d 417, 418 (Colo. App. 1988) (same).

4. As a matter of law, HHNP was a "park designated by ordinance" for purposes of Charter § 2.4.5 by virtue of Ordinance 333, Series of 2010.

Everyone agrees that Ordinance 333, Series of 2010 formally adopted Denver's 2010 Zoning Code and Official Map. It is also undisputed that HHNP's official classification on the zoning map is OS-A, meaning that HHNP is an "Open Space Public Park" district. Pursuant to Charter § 2.4.5, no land "designated a park by ordinance" may be sold without the electorate's permission. Ordinance 333 designated HHNP a park, such that the City could not sell any part of it without a vote of the people.

Using a "kitchen sink" approach, Defendants contend that Ordinance 333 did not designate HHNP a park for a plethora of reasons. First, they claim that "an ordinance imposing land use regulations on the city in general is entirely different from an ordinance limiting the sale or leasing of a particular parcel of city-owned property." (Opposition Brief at 13.) That may well be true, but so what? Defendants' contention has no bearing whatsoever on the outcome of this issue.

First of all, § 2.4.5 is most definitely not just "an ordinance limiting the sale or leasing of a particular parcel of city-owned property." To the contrary, § 2.4.5 protects all parcels "designated a park by ordinance" from sale absent voter approval. It is beyond dispute that Ordinance 333 was an ordinance. The only remaining question is whether Ordinance 333 "designated" HHNP a park. The answer is an unequivocal yes.

City charters are construed in accordance with the same rules as statutes. *Leggett & Platt, Inc. v. Ostrom,* 251 P.3d 1135, 1141 (Colo. App. 2010). If statutory language is unambiguous, then the plain meaning of that language governs and resort to other tools of statutory construction is unnecessary. *People v. Voth*, 312 P.3d 144, 149 (Colo. 2013).

Here, the Charter does not define "designated," so the term's plain meaning controls. The common meaning of "designate" is "to mark or point out; indicate; show; specify . . . to denote; indicate; signify . . . to name; entitle; style . . . ." http://dictionary.reference.com/browse/designate?s=t (last checked Apr. 15, 2014).

Did Ordinance 333 "designate" HHNP a park per the commonly understood meaning of that term? Absolutely. The official zoning map the ordinance adopted expressly provides that HHNP is an "open space public park." Accordingly, the

ordinance "denotes," "signifies," "names," "entitles" and "styles" HHNP a park. Reasonable minds could not conclude otherwise on the undisputed facts of this case. That being true, HHNP was at all relevant times "designated a park by ordinance" and was subject to the strictures of § 2.4.5. Therefore, the City violated the Charter when it subdivided HHNP and sold the southerly parcel to DPS without voter approval.

Defendants next note that on the same day City Council approved sale of the southerly portion of HHNP, it passed another ordinance making adjacent land with the same zoning classification part of nearby Hentzell Park. From that Defendants conclude that Council did not consider the parcel it voted to sell DPS a "park" even though it bore the OS-A zoning designation. Defendants insist that Council's "interpretation" is entitled to outcome-determinative "deference." (Opposition Brief at 13.)

The argument is specious. There is not a single, solitary shred of evidence to support Defendants' contention that Council considered "zoning as being ineffectual as a park designation within the meaning of Section 2.4.5[.]" (*Id.*) Indeed, there is no indication that Council gave any thought whatsoever to whether HHNP's zoning status qualified as a park designation for § 2.4.5 purposes. No such argument was ever presented at any public hearing on this matter or discussed by any member of Council during meetings. The "interpretation" to which Defendants demand that this Court "defer" is a figment of Defendants' imagination, concocted in an attempt to escape the inescapable, namely the conclusion that Ordinance 333 designated HHNP a park.

Citing an affidavit from Ms. Dannemiller, Defendants next contend that the OS-A zoning classification has been assigned to property "officially designated as parks within

the meaning of the Charter" as well as to "undesignated parks." (Opposition Brief at 13-14.) That is a textbook example of the informal fallacy known as begging the question. The issue raised in Plaintiffs' cross-motion is whether the OS-A zoning classification "designates" a property a park for purposes of § 2.4.5. By claiming that the OS-A classifications applies to both "officially designated parks . . . within the meaning of the Charter" and "undesignated parks," Defendants are presuming the truth of their position to prove the truth of their position. The argument is completely circular.

It is also worth noting that earlier in their brief Defendants characterized Ms. Dannemiller as a "lay witness" who may not testify to legal standards or whether those standards were met. (Opposition Brief at 11 n.4.) Now they are citing Ms. Dannemiller's affidavit as authority for the proposition that land may be classified as OS-A yet still be "undesignated" for purposes of § 2.4.5. Defendants need to make up their minds. Can Ms. Dannemiller provide legal opinion testimony or not?

Defendants then claim that "the OS-A zoning classification applies not only to legally dedicated and designated parks but also to other kinds of land that are simply 'managed' by the Parks Department." (Opposition Brief at 14.) First of all, nothing in § 2.4.5 requires that land be formally "dedicated" a park before the Charter's protections apply; it is enough that the land be "designated" a park. Further, Defendants' claim is just more question-begging. The question is whether Ordinance 333 and the map it adopted "designated" HHNP a park. For the reasons previously discussed, the answer is yes.

Finally, and amazingly, Defendants claim that the City has sold other property zoned OS-A without voter approval. (Opposition at 14.) Defendants are essentially

saying, "What's the big deal? The City violates its Charter all the time without repercussions. Why should this time be any different?" Plaintiff need only note that lawless conduct does not and cannot become lawful through mere repetition.

To sum up, Ordinance 333 designated HHNP as "open space public park" land. Per the "plain meaning" rule, HHNP was at all relevant times "designated a park by ordinance" for purposes of Charter § 2.4.5. Accordingly, as a matter of law, the City violated the Charter when it sold the subject parcel without voter approval.

5. A mandatory injunction requiring removal of the unlawful structures from HHNP is perfectly appropriate.

Defendants aver that there is "no factual or legal basis" for requiring DPS to remove the structures it built on HHNP after the unlawful transfer. (Opposition Brief at 15.) That is incorrect, as a simple perusal of pages 13-14 of the cross-motion reveals. To reiterate briefly, the City owns HHNP as a trustee for the citizens of Denver. The structures DPS is building on the property constitute trespasses as to Denver residents, the beneficial owners of the property. The "preferred remedy" in such situations is a mandatory injunction requiring removal of the trespassing structures. *Hunter v. Mansell*, 240 P.3d 469, 479 (Colo. App. 2010).

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.

Date: April 15, 2014.

Respectfully submitted,

BENSON & CASE, LLP

Original signed by John Case

John Case, # 2431
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2014 true and correct copies of the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** were filed and served as follows:

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/*Russell W. Jones*
Russell W. Jones