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	
PLAINTIFFS' MOTION FOR POST-TRIAL RELIEF AMENDING JUDGMENT AND GRANTING A NEW TRIAL	

Plaintiffs Friends of Denver Parks, Inc., Zelda Hawkins and Steve Waldstein, through counsel, BENSON & CASE, LLP, pursuant to C.R.C.P. 59, respectfully ask the Court to amend the Judgment, entered May 2, 2014, to deny Defendants' Motion for Summary Judgment and re-schedule this case for trial. In support of this motion, Plaintiffs state:

1. **A court may not decide disputed issues of fact when ruling on a motion for summary judgment.**

It is elementary that in deciding a motion for summary judgment, the trial court may not make a finding of fact if there is evidence from which a jury could reach a different conclusion.

Mile High Concrete, Inc. v. Matz, 842 P.2d 198, 203 (Colo. 1992) (summary judgment improper where "reasonable minds could differ"); *Bent v. Ferguson*, 791 P.2d 1241, 1244 (Colo. App. 1990) (in quiet title action, existence of a question of the parties' intent as to when deed delivery was to take place precluded granting defendant's motion for summary judgment). In reviewing a summary judgment motion, the opposing party is entitled to all favorable inferences that are reasonably drawn from the undisputed facts. *In re Tonko,* 154 P.3d 397, 402 (Colo. 2007). Any doubt as to inferences that may be drawn must be resolved in favor of the opposing party. *Id.*

2. Here, the Court and the Defendants agreed that there is a factual dispute about what constitutes a "park belonging to the City as of December 31, 1955.

The central factual and legal issue in this case is what the city council intended when it adopted the language of Charter Section 2.4.5 as part of Ordinance 704, Series of 1996. The language enacted by City Council on August 19, 1996, and approved by the voters the following November, reads as follows:

> **Charter § 2.4.5 - Sale and leasing of parks.**
>
> 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, provided, however, that property in parks may be leased for park purposes to concessionaires, to charitable or nonprofit organizations, or to governmental jurisdictions. All such leases shall require the approval of Council as provided for in Article III of this Charter. No land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance.

(Ordinance 704, Series of 1996, at 1-2, Exhibit 1 attached [emphasis added].)

At a hearing on June 28, 2013, the Court pondered the question of how to interpret the undefined phrase "park belonging to the City as of December 31, 1955":

> THE COURT: Okay. Well, so no one has told me or suggested to me what the definition of a park is. It seems to be an I know it when I see it kind of a thing.

(06/28/13 Transcript at 300:12-14 [emphasis added].) When the Court discussed the differences between the 1900 *McIntyre* case relied on by Plaintiffs, and the 1946 *Hall* decision relied upon by the City, the Court again brought up the unanswered question of what factual elements must be proved to constitute a "park" that was acquired before 1955:

> THE COURT: Okay. Because I recognize that there are some distinguishing features in the *Hall* case from the *McIntyre* case, but not the least of which - - well, I won't go into that. But the Court seemed to consider whether something was a Park and mentions that the area was never, quote, layout as a Park. And it was assessed like non--Park property. But then it goes on and says, "we conclude that the area in question never has been a public park," whatever that means, "in the legal acceptance of that term," whatever that means.

(*Id.* at 311:25 – 312:1-8 [emphasis added].) At the same hearing, Assistant City Attorney David Broadwell acknowledged that Charter §2.4.5 does not define what constitutes a "park belonging to the city as of December 31, 1955":

> MR. BROADWELL: That's correct. And there's some ambiguous language in Hall about there's no charter dedication, whatever they determine that mean back in 1946. They didn't define that. But I think it's possible in the pre-'55 scenario to have land that, even if it's not on the deed, that the City itself has given some sort of official recognition of it by passing an ordinance back then, or whatever the case may be, to show that it has, quote/unquote, dedicated the land as park land and is officially treating it as such. And somebody can point to a document as a smoking gun showing an official recognition and the City's accepted that responsibility. And of course back then, originally the charter said once it's recognized as a park it can't be sold at all. When in later years it said it can be sold, but only with voter approval. But there were serious legal consequences for distinguishing back then what was a park and what wasn't a park. And again, I think that's the main thing we get from the Hall decision is mere user like -- if it quacks like a duck and walks like a duck is not enough. There's got to be something else beyond that. And that something else is missing in this case.

(*Id.* at 321:3-23 [emphasis added].)

The above transcripts show that from the inception of this case, both the City and the Court recognized that there is no legal definition of what constitutes "a park belonging to the City as of December 31, 1955." Therefore, whether the land known as Hampden Heights North Park ("HHNP") was a "park belonging to the City as of December 31, 1955" is not a question of law that can be decided on summary judgment, but rather a question of fact that must be resolved by the trier of fact at a trial on the merits.

It is of no use to refer to the Court of Appeals decision in *Friends of Denver Parks v. City & County of Denver*, ___ P.3d ___, 2013 COA 177 for resolution of this factual issue, because as the Court of Appeals pointed out, its opinion was based only upon evidence adduced at the preliminary hearing, and was not a decision on the merits:

> 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.

Id. ¶ 39 (emphasis added).

3. Plaintiffs' evidence established that when City Council amended Section 2.4.5 of the Charter in 1996, it did so with the express understanding and intent that all property actually used as parks before 1955 were automatically protected, such that proof of common law park status was unnecessary.

Plaintiffs presented the following evidence, all of which was undisputed:

- Ordinance 296, Series of 1955, which proves that the Department of Improvements and Parks owned and managed HHNP in 1955 (Exhibit 3 to Plaintiffs' Supplemental Brief of 04/01/14).
- Deposition admissions of the City, through its current Manager of Parks and Recreation, 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. at 46:11 – 47:19, 59:22 – 60:2, quoted at pages 2-3 of Plaintiffs' Supplemental Brief).

- 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" (Aff't of John Bennett, Exhibit 4 to Plaintiffs' Supplemental Brief).

- The affidavit of Neil Sperandeo, Director of Long Range Planning for Denver Department of Parks and Recreation in 1994 and 1996, stating that "[i]t 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." (Sperando Aff't ¶ 5, Exhibit 6 to Plaintiffs' Supplemental Brief [emphasis added] .)

The foregoing facts established beyond any rational debate that from 1996 forward, the City considered § 2.4.5 fully applicable to land the city owned that was actually used as a park before December 31, 1955. Based on the City's own understanding of its Charter, evidence that city-owned land was in fact being used as a park as of 1955 was sufficient in itself to trigger the protections of § 2.4.5. Accordingly, it was not necessary for Plaintiffs to establish the elements of common law dedication (unequivocal intent to dedicate plus public acceptance of the dedication); it was enough to show that HHNP was used as a park before 1955.

No one, including the Defendants, disputes that HHNP was used as a park prior to 1955. Given the overwhelming evidentiary record in this case, no such dispute would pass the proverbial straight face test. Since everyone agrees that HHNP was in fact used as a park before 1955, and evidence of legislative intent establishes that after 1996 all city-owned land that was used as parks before 1955 is within Section 2.4.5's protective ambit, Plaintiffs respectfully

submit that Defendants were not entitled to judgment as a matter of law. At the very least, Plaintiffs should receive their day in Court so that they will have the chance to show the trier of fact that HHNP is in fact protected property that required voter approval for any sale.

4. The Court decided an issue of fact in Defendants' favor by holding as a matter of law that the evidence in this case failed to establish a triable issue of fact regarding whether the City manifested an unequivocal intent to dedicate HHNP as a park before 1955.

As discussed in Section 3, *supra*, proof of common law dedication is not necessary in light of the legislative intent behind the 1996 amendment. However, such proof is sufficient. *See Friends*, 2013 COA 177, ¶ 54 (noting that "it does not matter how city land became a park before December 31, 1955"). This Court ruled as a matter of law that there was no "unequivocal intent to dedicate" HHNP as a park before 1955. (05/02/15 Judgment at 3.) Plaintiffs respectfully submit that the Court was mistaken in that regard.

In states that recognize common law dedication, the issue of whether a landowner manifested unequivocal intent to dedicate is a question of fact. *E.g., A&H Corp. v. City of Bridgeport*, 430 A.2d 25, 29 (Conn. 1980) (unequivocal intent to dedicate is a question of fact); *Finger v. Doane*, 121 A. 155 (N.J. 1923) (noting that common law dedication is a matter of intent, which is a question of fact); *Reed v. Harlan*, 2 Ohio. Dec. Reprint 553, 1861 WL 2602 (Ohio C.P. 1861) ("If the act of dedication be unequivocal, it may take place immediately. Whether it exists or not, is a question of fact, for the jury").

Here, Plaintiffs presented extensive evidence of the City's intent to designate HHNP as a park prior to 1955. To cite but one example, Ordinance 296, Series of 1955 authorized 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].) Ordinance 296 demonstrates that the City considered HHNP a park prior to December 31, 1955. The Court did not discuss the effects of Ordinance 296 in its recent order granting Defendants' motion for summary judgment.

Defendants submitted evidence they considered contrary to an unambiguous intent to dedicate HHNP as a park. Plaintiffs countered with explanations showing that Defendants' evidence is not inconsistent with an intent to dedicate HHNP as a park. On the record herein, Plaintiffs respectfully submit that this case is not one in which the issue of unequivocal intent to dedicate can be decided as a matter of law. The favored approach is to let the trier of fact decide such issues, and there is nothing in the record that warrants departure from that approach here.

5. There is a "smoking gun" document in which both defendants admitted that Hampden Heights North Park is a park.

Recall that in his dialogue with the Court on June 28, 2013 (quoted above), Assistant City Attorney David Broadwell suggested that the Court should require the Plaintiffs to produce from the City records **"a document as a smoking gun showing an official recognition"** that HHNP was a park. During discovery, DPS produced the smoking gun document. It is a "Memorandum of Understanding" dated December 31, 2011, in which the defendants acknowledged that HHNP is "City of Denver-owned Parks land." (See Exhibit 2, Affidavit of John Case authenticating the smoking gun document, and Exhibit 3, the actual Memorandum of Understanding). The context of the document is that the City and DPS had been negotiating the land swap in 2011, and they reduced their understanding to written form. (See Exhibit 4, Excerpt from deposition of DPS 30(b)(6) witness Andrew Robinson.) Exhibit 3 states in pertinent part:

> This Memorandum of Understanding ("MOU") dated December 31, 2011 is between Denver Public Schools and the City & County of Denver ("City"), collectively known as the “Parties."
>
> The parties understand the following:
>
> 1) **DPS preference is to acquire between 8.00 and 11.00 acres of <u>City of Denver owned Parks land</u>** located at the northwest corner of Havana Street and Girard Avenue.
>
> 3 DPS understands that the City would like, and some point, to also locate a recreation center on this site. DPS will create a site design that allows for shared access to and use of common recreational facilities (including the school gymnasium), and future development of a recreation center when the City has determined they are ready to move forward with such a project.
>
> Access to selected shared facilities could be made available as soon as construction is completed.

(Exhibit 3, at 1 [emphasis added].)

A trier of fact could easily conclude from this document that both the city and DPS recognized in 2011 that HHNP had legal status as a Park. Later, in 2012 and 2013, when the Defendants realized that building a school in a park would be controversial, the defendants scrubbed the word "Park" from their contractual documents and denied publicly that the land had ever been a Park. This is a classic issue of fact which must be determined at a trial.

<u>CONCLUSION</u>

For the foregoing reasons, Plaintiffs respectfully request that this Court amend its May 2, 2014 judgment to deny Defendants’ motion for summary judgment, and reschedule this matter for trial.

Date: May 23, 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 May 23, 2014 true and correct copies of the foregoing **PLAINTIFFS' MOTION FOR POST-TRIAL RELIEF AMENDING JUDGMENT AND GRANTING A NEW TRIAL** were filed and served as follows:

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s/*Russell W. Jones*
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