COURT OF APPEALS, STATE OF COLORADO Court Address: 2 East Fourteenth Avenue Denver, Colorado 80202	
Denver District Court Case No. 2013CV32444 District Court Judge: Herbert L. Stern III	
Plaintiffs/Appellants: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; RENEE LEWIS, DAVID HILL, SHAWN SMITH, JOHN CASE and JUDY CASE, individually and as Members of the Petitioner's Committee; and STEVE WALDSTEIN and ZELDA HAWKINS, individuals, v. **Defendants/Appellee:** CITY & COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity.	**▲COURT USE ONLY▲** Case Number: 14CA1641
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ANSWER BRIEF

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CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 5,137 words. It does not exceed 30 pages. It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

/s/ David Broadwell
Signature of attorney or party

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

In their notice of appeal, plaintiffs framed the issues to be decided on appeal as follows:

1. Whether the trial court erred in granting Defendants' motion for summary judgment when there are disputed issues of material fact whether the land in question is a city park.

2. Whether the trial court erred in denying Plaintiffs' motion for post-trial relief amending judgment and granting a new trial.

However, in their Opening Brief, the plaintiffs expand upon the issues as follows:

1. Whether the trial court erred by determining disputed issues of fact and weighing evidence on summary judgment.

2. Whether the trial court erred by ruling that the Denver zoning ordinance of 2010 did not designate Hampden Heights North Park as a park, when the official zoning map designated HHNP as a park owned and managed by the Denver Department of Parks and Recreation.

3. Whether the plaintiffs demonstrated triable issues of material fact that the land at issue was a park before 1955.

4. Whether plaintiffs are entitled to a jury trial on their claim for declaratory judgment, that the land in dispute is a park which cannot be sold without a vote of the people.

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

This appeal marks the second time the dispute between the parties has been before the Colorado Court of Appeals. The underlying dispute is explained

extensively in *Friends of Denver Parks, Inc. v. City and County of Denver,* 327 P.3d 311 (Colo. App. 2013); *cert. denied* (2014), and need not be repeated in detail here. Plaintiffs assert that the City and County of Denver violated its own home rule charter when it conveyed a 10.77 acre parcel of vacant land to Denver Public Schools ("DPS) for the construction of an elementary school without referring the conveyance to a vote of the people. Plaintiffs invoke charter section 2.4.5[1] which requires voter approval for the conveyance of any city property that was either: (A) a park belonging to the city as of 1955, or (B) was acquired by the city after 1955 and officially designated as a city park by ordinance.

Relying extensively on this court's construction and interpretation of charter section 2.4.5 in *Friends of Denver Parks*, the trial court on April 2, 2014 granted the defendants' motion for summary judgment and denied the plaintiffs' cross-motion for summary judgment upon a finding that there are no disputed issues of material fact in this case, and ruled as a matter of law that section 2.4.5 did not

[1] Charter section 2.4.5 reads in its entirety: "**§ 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. "

require the city to refer to the voters the question of whether or not the school site should be conveyed to DPS.

Prior to the order granting the defendants' motion for summary judgment, the plaintiffs had tried and failed on five (5) separate occasions[2] to enjoin the conveyance of the land and the construction of the elementary school. The plaintiffs did *not*, however, move for a stay or injunction pending the resolution of the current appeal under Rule 8, C.A.R. As it now stands, the school site has long since been conveyed by the city to DPS, the construction of the school has continued apace during the pendency of this litigation, and the project is nearing completion. The school is currently scheduled to open for enrollment in time for the 2015-16 school year.

B. Statement of Facts

Significantly, in granting the defendants' motion for summary judgment, the trial court stated in its order, "The Court accepts all of Plaintiffs' pre-1955 evidence as true." (R.CF p. 1490) Indeed, the parties have never contested any of the basic facts about how the property was used after it was acquired by the city in

[2] Original denial of preliminary in junction in the trial court (July 5, 2013); denial of injunction pending appeal by the trial court (September 19, 2013); denial of injunction pending appeal by the Colorado Court of Appeals (October 18, 2014); decision of the court of appeals upholding the trial court's original denial of preliminary injunction (December 26, 2013); denial of motion for emergency injunction by the Colorado Supreme Court while petition for *certiorari* was pending in that court (March 14, 2014).

1936, the physical characteristics of the property in 1955 as open prairie lying along the banks of Cherry Creek but well outside the municipal boundaries of Denver, and the fact that the property may have been used along with other surrounding open lands for informal and itinerant recreational activities such as horseback riding and picnicking as of 1955. The defendants do not dispute the basic recitation of pre-1955 facts in plaintiffs' Opening Brief with the following key exceptions.

The plaintiffs erroneously state at p. 7 of their Opening Brief: "From 1936 until it was conveyed to DPS, the property was under the ownership and management of the Department of Improvement and Parks (now known as DPR)." There is absolutely no evidence in the record that the property was "owned" by the city department formerly known as the Department of Improvement and Parks, or the current department known as the Department of Parks and Recreation. From its original acquisition in 1935 until its conveyance to DPS, the land was titled in the name of the City and County of Denver.

The plaintiffs say at p. 23 of their Opening Brief: "Appellants established that before 1956 the City intended its citizens to use the property as a park, and people accepted the City's invitation by using the park." On the contrary, plaintiffs produced no e evidence in this case that the city said or did anything manifesting its intention that the property be used as a park prior to 1955; nor is there any

evidence that the city ever invited anyone to use the property as a park at that time. Indeed, one of the main reasons the trial court granted the defendant's motion for summary judgment was due to the *absence* of any evidence that would tend to show that there had been a statutory or common law dedication of the property as a city park as of 1955.

III. SUMMARY OF ARGUMENT

This court previously ruled in *Friends of Denver Parks* that the meaning of charter section 2.4.5 is plain and unambiguous. Thus, there is no need to resort to extrinsic evidence, such as the legislative history of section 2.4.5, to construe the meaning of the section.

In their arguments to the trial court on the cross-motions for summary judgment, the plaintiffs failed to meet their burden of showing that there are any triable issues of fact in this case. The trial court did not inappropriately "weigh" evidence as the plaintiffs now assert. Instead, the court noted the complete *absence* of evidence to support the plaintiffs claims that the school site was a "park belonging to the city as of December 31, 1955" or that any city ordinance had "designated" the site as a park since 1955. Properly applying this court's interpretation of charter section 2.4.5, as set forth in *Friends of Denver Parks*, the trail court correctly ruled that voter approval was not required in order for the city to convey the school site to DPS.

In particular, the trial court correctly determined that the plaintiffs failed to adduce any evidence that the city through its "unambiguous actions" demonstrated its "unequivocal intent" effected a common law dedication of the school site as a city park as of 1955. Furthermore, as a matter of law, a city-wide zoning ordinance adopted in 2010 did not have the effect of "designating the school site as a park within the meaning of section 2.4.5.

Plaintiffs' assertion that they should be granted a jury trial on remand should be ignored or rejected. Plaintiffs' request for a jury trial is not properly before the court on appeal and plaintiffs' arguments are without merit because plaintiffs are seeking equitable relief in this case.

IV. ARGUMENT

A. Standard of review.

An appellate court reviews a grant of summary judgment under a de novo standard of review. "Summary judgment is only proper where there is no genuine issue of material fact in dispute, entitling the moving party to summary judgment as a matter of law.' *Shelter Mutual Insurance Co. v. Mid-Century Insurance Co.*, 246 P.3d 651, 657 (Colo. 2011). Furthermore, questions of constitutional or statutory interpretation are always subject to de novo review upon appeal. *Justus v. State of Colorado*, 336 P.3d 202 (Colo. 2014). Indeed, the Colorado Supreme Court recently held that a disputed interpretation of Denver's home rule charter is

subject to de novo review in *City and County of Denver v. Denver Firefighters Local No. 858*, 320 P.3d 354 (Colo. 2014).

When the non-movant bears the burden of proof at trial, as in this case, summary judgment is "mandate[d]… , after adequate time for discovery and upon a motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to [its] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Colorado Supreme Court adopted the *Celotex* reasoning in *Continental Airlines Inc. v Keenan*, 731 P.2d 708 (Colo. 1987), stating:

> "The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied then shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party.
>
> "Whenever summary judgment is sought, the moving party bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and of the affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact. In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case.
>
> "Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law."

Id at 712-713 (Internal citations omitted.)

B. The language of charter section 2.4.5 is plain, and the trial court correctly relied upon the plain meaning of this charter section in ruling for the defendants as a matter of law

The ultimate outcome of this case was sealed by this court's original ruling in *Friends of Denver Parks v. City and County of Denver* for two main reasons. First, this court found that the meaning of charter section 2.4.5 is plain and held:

> "we conclude that 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. . . . Section 2.4.5 makes clear that it does not matter how city land became a park before December 31, 1955. But City land can only become a park after that date if the city designates it as a park by ordinance." *Friends of Denver Parks*, 327 P.3d at 318.

Second, the court reaffirmed the principal that "common law dedication" of municipal property to a particular use occurs only when "the city's 'unambiguous actions' demonstrate its 'unequivocal intent' to set the land aside for a particular public use." *Friend of Denver Parks*, 327 P.3d at 317.

It is a well-settled principle of statutory construction that, "If the statutory language unambiguously sets forth the legislative purpose, we need not apply additional rules of statutory construction to determine the statute's meaning." *People v. Cooper*, 27 P.3d 348, 354 (Colo. App. 2001). In particular, the courts

will not review the legislative history of a law when the meaning of the law is clear on its face. *In re People v. Paul Lesley Voth*, 312 P.3d 144 (Colo. 2013).

The Colorado Supreme Court recently reaffirmed these principles in relation to Denver's home rule charter. "When a charter is unambiguous, we will not alter the plain meaning." *City and County of Denver v. Denver Firefighters Local No. 858*, 320 P.3d at 357.

Notwithstanding these principles, plaintiffs urge this court to go beyond the plain meaning of charter section 2.4.5 and delve into the legislative history of the section. The trial court appropriately refused to do so, and this court should likewise decline the invitation. If, however, this court decides to review the legislative history of charter section 2.4.5, then the court should find that the "evidence" offered by the plaintiffs is incompetent to prove anything about the meaning of section 2.4.5.

Plaintiffs assert that the real intent and meaning of charter section 2.4.5 was to overturn the definition of common law dedication of park land, and establish the principle that the mere ***use*** of city-owned property for recreational purposes prior to 1955 was sufficient to transform the property into park land. In support of this proposition, the Plaintiffs cite a single contemporaneous statement made on the record by John Bennett, the staff director for the city council, the night charter section 2.4.5 was referred to Denver voters (along with Mr. Bennett's subjective

recollections eighteen years later of why he made the statement.) Opening Brief, pp. 11, 25-26. Mr. Bennett stated on the record in 1996, "The amendment confirms that ***parks*** used as ***parks*** prior to 1955 are designated ***parks***." (Emphasis added.) This statement adds nothing to the understanding of charter Section 2.4.5 for two obvious reasons: (A) the statement is inconsistent with what the plain language of Section 2.4.5 actually says. (B) the statement is a tautology in that it repeats the word "park" over and over again, begging the question of how city-owned property may have become a "park" in the first place *circa* 1955.

The plaintiffs also rely on the subjective recollections of a former city council member, Susan Barnes-Gelt, concerning her understanding of the meaning of charter section 2.4.5 when it was referred to the voters in 1996. Opening Brief, p. 11, 25-26. However, subsequent recollections by a former member of a legislative body are not considered a part of the legislative record 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).

In a similar vein, plaintiffs go beyond the plain meaning of charter section 2.4.5 and invoke the deposition testimony of the city's current Manager of Parks and Recreation, Lauri Dannemiller to construe the section via extrinsic evidence. Opening Brief, p. 22. Over the objections of counsel for the city, counsel for the

plaintiffs repeatedly asked Ms. Dannemiller to give her interpretation of the legal applicability of charter Sec. 2.4.5 to properties owned by the City *circa* 1955.[3] Ms. Dannemiller ultimately explained her understanding of the 1996 charter amendment as follows: "the process that took place with the charter amendment thus designated parks that were owned, managed by the City's public improvement department at that time." (R. CF pp. 1379, 1380.) Like Mr. Bennett's statement in 1996, Ms. Dannemiller's testimony begs the ultimate question of what factors would define any particular city-owned property to be a "park" *circa* 1955. However, as reflected in her deposition testimony, she understood as did this court in its original *Friends of Denver Parks* decision that the language in charter Section 2.4.5 protecting any "park belonging to the City as of December 31, 1955" must be tested according to whether the City had taken any overt, unambiguous action to identify or "manage" the property as a park as of that date, and thereby "dedicate" the land as a park.

In granting the defendants' motion for summary judgment, the trial court did not adjudicate disputed "facts" concerning the meaning of charter section 2.4.5. Instead the court ignored the subjective interpretations of the lay witnesses as

[3]"A lay witness can provide opinion testimony regarding an ultimate issue to be decided by the trier of fact under certain circumstances. See CRE 701, 704 . . . However, a witness may not testify that a particular legal standard has or has not been met. The question that elicits the opinion testimony must be phrased to ask for a factual rather than a legal opinion." *People v. Beilke*, 232 P.3d 146 (Colo. App. 2009).

revealed in the deposition testimony, and simply applied the plain meaning of the charter as the court properly should have done.

C. Plaintiffs failed to establish that there was a triable issue of fact on the question of whether or not the school site was a city park as of 1955.

In briefing the cross-motions for summary judgment, the defendants complied scrupulously with the burden shifting principles set forth in *Continental Airlines Inc. v Keenan.* In particular, the defendants met their initial burden of "showing the court that there is an absence of evidence in the record to support the nonmoving party's case." 731 P.2d at 713. After a reasonable period of discovery, the plaintiffs had failed to produce any evidence that the school site had been dedicated as a city park as of 1955. There was no evidence the parcel had been dedicated as a park by plat or deed; no evidence of a statutory or ordinance dedication of the site as a park prior to 1955; and no evidence of a common law dedication. Pertaining to the latter, plaintiffs had produced no evidence that the city through its "unambiguous actions" demonstrated its "unequivocal intent" to dedicate the site as a park in 1955.

In accordance with *Continental Airlines Inc. v Keenan,* "after the defendants showed there was an absence of evidence to support the plaintiffs' case, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to

summary judgment as a matter of law." *Id*., at p. 713. To repeat, in its order granting summary judgment, the trial court treated all of the plaintiffs' "pre-1995 evidence" as true, in particular testimony of those who may have used the school site and the surrounding rural area for recreational purposes *circa* 1955. Simply put, these facts were never disputed by the parties. The mere use of city-owned property for recreational purposes does not and never has sufficed to establish a common law dedication of a park. *Hall v. City and County of Denver*, 177 P.2d 234, 236 (Colo. 1946) (recognizing that mere use by the public, without acts or declarations by the city cannot be sufficient to establish common law dedication). Thus, the trial court properly granted summary judgment to the defendants due to the failure of the plaintiffs to produce any evidence that could have led to a different conclusion.

D. The adoption of the city's 2010 Zoning Code did not "designate" the school site as a park, within the meaning of charter section 2.4.5

The trial court also rejected the plaintiffs' novel argument that a city zoning ordinance can have the effect of formally "designating" city park land within the meaning of charter section 2.4.5.

In 2010 Denver adopted an entirely new zoning code and map for the entire city via Ordinance No. 333, Series of 2010. As the plaintiffs correctly note at p. 18 of their Opening Brief, the adopting ordinance linked the new zoning code to the new zoning map with the following language: "All land 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."

Even though the 2010 zoning code and map had been in existence for several years prior to the initiation of this case, the plaintiff did not assert at the outset of the litigation that the Denver Zoning Code somehow "designated" the school site as park land within the meaning of charter section 2.4.5, thus precluding the conveyance of the land to DPS without a vote of the people. This court found in *Friends of Denver Park* that, according to the evidence presented by the plaintiffs at the preliminary injunction hearing, "The city has not passed any ordinance that designates the southern parcel as a park." 327 P.3d at 315.

Until the summary judgment stage of the proceedings, the plaintiffs' claim that the voter-approval requirements in charter Section 2.4.5 applied to the school site relied almost exclusively on a theory of common law dedication. Neither the Revised Third Amended Complaint nor any prior version of the complaint in this case specifically pled the theory that the zone district classification (OS-A) assigned to the property in the 2010 Denver Zoning Code constituted a park "designation" by ordinance.

In granting summary judgment to the defendants, the trial court rejected plaintiffs' revisionist theory that the school site was designated a park by virtue of the city's 2010 Zoning Code. The court simply held that the use of the word

"designated" in Ordinance No. 333, as quoted above, means "shown" on the zoning map, nothing more and nothing less. (R. CF p. 1490.) The use of the word "designate" in this context falls far short of proving that the city intended to protect all city-owned land zoned OS-A from conveyance without approval, within the meaning of charter section 2.4.5.

Fundamentally, municipal authority to adopt zoning laws serves an entirely different purpose than the authority to limit the disposition of municipally-owned property. The Denver City Council's power to enact zoning ordinances derives from a completely different section of the charter, a section which expressly describes the zoning power as being "regulatory" in nature.[4] Denver and other 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 limiting the sale or leasing of a particular parcel of city-owned property.

[4] Denver charter Section 3.2.9 (A) states: "*Grant of power.* For the purpose of promoting health, safety, morals or the general welfare of the community, the Council of the City and County of Denver is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

The conclusion that the assignment of the OS-A zone district category to the school site is not tantamount to a park "designation" within the meaning of charter Sec. 2.4.5 is supported by several additional arguments.

As this court noted in *Friends of Denver Parks*, on the same night the City approved the ordinance conveying the school site to DPS, the city council adopted a second ordinance officially designating adjacent city-owned property (also zoned OS-A) as an addition to nearby Hentzell Park, 327 P.3d at 314. 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 was 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 deference by this Court. *Mile High Enterprises v. Dee*, 558 P.2d 568, 571 (Colo. 1977).

It is true that the language in the 2010 Denver 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." However, the city's Department of Parks and recreation manages a wide variety of properties, including both undesignated and designated 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 and

elsewhere in the city, the 2010 zoning map assigns the OS-A classification to lands that have been officially designated as parks as well as lands which have never received such a designation. (Affidavit of Lauri Dannemiller, referenced at R. CF, pp. 138-1382.)

The Zoning Code itself defines the term "city park" to include, not just properties that have been formally designated as such within the meaning of charter section 2.4.5, but also any "area of land owned or leased by the City and operated or managed by the Denver Department of Parks and Recreation." Sec. 11.12.3.3 (B)(2), Denver Zoning Code (2010). Thus, by the express language of the Zoning 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.

Once again, there is no disputed issue of material fact. Defendants do not dispute that the school site was assigned to the OS-A zone district classification in the 2010 Zoning Code and Official Map. The trial court simply found, as a matter of law, that the zoning of the property could not reasonably be understood as a "designation" of park land within the meaning of charter section 2.4.5.

E. Plaintiffs' argument that they are entitled to a jury trial on remand should be either ignored or rejected.

Although the issue was neither decided by the trial court nor mentioned in the plaintiffs' notice of appeal, the plaintiffs devote the last portion of their

Opening Brief to the argument that they are entitled to jury trial if they are successful in this appeal and the case is remanded for further proceedings. While it is true that the defendants moved to strike the jury in the trial court (on the grounds that plaintiffs' claims were equitable in nature), the trial court never ruled on that motion.

"It is axiomatic that issues not raised in *or decided by a lower court* will not be addressed for the first time on appeal. Our judicial system depends upon the orderly presentation and preservation of issues." *Melat, Pressman & Higbee, L.L.P. v. Hannon Law Firm, L.C.C.*, 287 P.3d 842, 847 (Colo. 2012). (Emphasis supplied; internal citations omitted.) The problem is compounded when, not only does an appellant present an issue on appeal that was not decided below, but also fails to frame the issue in his notice or appeal, per Rule 3(d)(3), C.A.R. *Vikman v. International Brotherhood of Electrical Workers*, 889 P.2d 646, 658-659 (Colo. 1996). This court should simply ignore plaintiffs' arguments regarding whether or not they may be entitled to a jury trial on remand.

However, in the event the court determines to address the question of whether or not plaintiffs are entitled to a jury trial on their claims for declaratory and injunctive relief, the argument should be rejected.

In Colorado there is no constitutional right to a trial by jury in a civil action, *Federal Lumber Co. v. Wheeler*, 643 P.2d 31 (Colo. 1981). Rather, the right to a

jury trial in a civil case is derived from Rule 38, C.R.C.P., and a jury trial is available on in the actions at law enumerated in subsection (a) of the rule. There is no right to a jury trial in actions that historically were brought before courts of equity. *Worchester v. State Farm Mutual Automobile Insurance Co.,* 473 P.2d 711 (Colo. 1970).

Although the plaintiffs originally sued seeking declaratory and injunctive relief, for purposes of supporting their jury trial demand they now characterize their claims as one for "recovery of specific real property" within the meaning of Rule 38(a). The plaintiffs cite no precedent or authority for the proposition that individual citizens have any cognizable claim to "recover" property formerly owned by a municipality. In any event, arguments similar to the ones the plaintiffs are making now were rejected in *Setchell v. Dellacroce,* 454 P.2d 804 (Colo. 1969), in which the court recognized that declaratory relief regarding the conveyance of land is equitable relief and does not create an entitlement to a jury trial.

The plaintiff's reliance on *Baumgartner v. Schey,* 353 P.2d 375 (Colo. 1960) is misplaced. *Baumgartner* was an ejectment case involving a dispute between a landlord and a tenant. The present case involves the interpretation of the home rule charter. Historically, declaratory judgment actions asking for the court to interpret and enforce a home rule charter are brought before and decided by courts of equity.

Ward v. Colorado E.R. Co., 125 P. 567, 574 (Colo. 1912). Accordingly, plaintiffs are not entitled to a jury trial on their claims for declaratory and injunctive relief if this case is remanded for further proceedings in the trial court.

CONCLUSION

For the foregoing reasons, the defendants respectfully request that this court affirm the grant of summary judgment in favor of the defendants, and the denial of plaintiffs' cross-motion for summary judgment, on the basis that: (A) the plaintiffs have failed to carry their burden of proving any disputed issues of fact that would have precluded the granting of summary judgment in favor of the defendants; and (B) the trial court correctly interpreted Denver's home rule charter as a matter of law.

Respectfully submitted this 11th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that today, March 11, 2015, the foregoing **ANSWER BRIEF** was served via ICCES on:

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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.