COLORADO SUPREME COURT Court Address: 2 East Fourteenth Ave. Denver, Colorado 80202 Colorado Court of Appeals Case No. 14CA1641 Denver District Court Case No. 2013 CV 32444 Hon. Herbert L. Stern III, District Court Judge **Petitioners:** FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN and ZELDA HAWKINS, individuals. v. **Respondents:** CITY & COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity. Attorneys for Petitioners: John Case, # 2431 Evans Case, LLP 1660 So. Albion Street, Suite 1100 Denver, CO 80222 PH: (303) 757-8300 FAX: (303) 753-0444 Email: case@bensoncase.com; schultz @bensoncase.com	**▲COURT USE ONLY▲** Case No.:

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirement of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 53(a) because it contains 3763 words.

This brief complies with C.A.R 53(a) because it contains (1) an advisory listing of the issues presented for review; (2) a reference to the official or unofficial reports of the opinion or judgment and decree of the court; (3) a concise statement of the grounds on which jurisdiction of the Supreme Court is invoked; (4) a concise statement of the case containing the matters material to consideration of the issues presented; (5) a direct and concise argument amplifying the reasons relied on for the allowance of the writ; and (6) an appendix containing: (a) A copy of any opinions delivered upon the rendering of the decision of the Court of Appeals; and (b) the text of any pertinent statute or ordinance.

EVANS CASE, LLP

s/ John Case

_____

John Case, #2431
Attorney for Petitioners

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ADVISORY STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals misconstrued Denver City Charter § 2.4.5, as amended in 1996, by holding that pre-1955 parks must be dedicated by ordinance or by common law when Denver city council expressly stated that all "parks used as parks prior to 1955 are designated parks."
2. Whether the Court of Appeals contravened this Court's precedents in holding that there is no factual dispute whether Hampden Heights North Park became a park before 1955.
3. Whether the Court of Appeals contravened this Court's precedents in holding that the 2010 zoning ordinance, which designated Hampden Heights North Park as city park land, did not designate the land as a park.

REFERENCE TO COURT OF APPEALS OPINION

Friends of Denver Parks, Inc. v. City & County of Denver, 2014CA1641 September 17, 2015, not published pursuant to C.A.R.35 (f) (Appendix 1).

JURISDICTION

This Court has jurisdiction pursuant to C.R.S. § 13-4-108 and C.A.R. 49. The date of the Court of Appeals' opinion was September 17, 2015, and the opinion was entered on 8:00 a.m. on that date. No petition for rehearing or request for extension of time to petition for certiorari was filed.

STATEMENT OF THE CASE

This case concerns the preservation of precious open space known as Hampden Heights North Park ("HHNP") in southeast Denver. Municipal governments own parks in trust for their citizens. *McIntyre v. Board of Comm'rs of El Paso County*, 61 P. 237, 240 (Colo. App. 1900). Denver Charter Section 2.4.5 grants citizens the right to vote on any proposed sale of park land. The right to vote is fundamental, *Meyer v. Lamm*, 846 P.2d 862, 874 (Colo. 1993), and laws dealing with the franchise must be liberally construed to protect that right, *Chesser v. Buchanan*, 568 P.2d 39, 43 (Colo. 1977). In 2013, the city carved out a 10.7 acre parcel from HHNP, and traded it to School District No. 1 ("DPS") for an office building downtown without authorization from the voters.

The Court of Appeals' September 17, 2015 opinion construed §2.4.5 differently than another division of the Court of Appeals construed the same language in *Friends of Denver Parks, Inc. v. City & County of Denver*, 327 P.3d 311 (Colo. App. 2013)[1], and differently than City Council construed the same language when it adopted the Charter amendment.

[1] This petition refers to Court of Appeals Case No. 2013CA1249 as "*Friends 1*," and Court of Appeals Case No. 14CA1641 as "*Friends 2.*" This Court denied certiorari in *Friends 1*. 2014 Colo. LEXIS 357 (May 12, 2014).

The 10.7 acres in dispute is part of a 36 acre parcel that straddles Cherry Creek, which the city acquired in 1936 for flood control and recreation. Although the parcel was not annexed until 1965, Denver citizens used the land for horseback riding, picnicking, hiking, bicycling, and other park purposes since 1938 with the city's knowledge and encouragement. From 1936 until it was conveyed to DPS, the property was under the management of the Department of Improvements and Parks, now known as the Department of Parks and Recreation ("DPR").

The trial court accepted as true all testimony and affidavits from park users, two former DPR employees, a historian, the former staff director of Denver City Council, and a former councilwoman who voted for amended § 2.4.5 on August 19, 1996. DPR used public funds to maintain and improve HHNP by building paths and bridges. DPR placed official park signs along bike paths, and for four decades included HHNP on published lists of city parks.

A 1955 deed showed that HHNP was managed by the Department of Improvements and Parks. On September 6, 1955 Denver enacted an ordinance to convey an easement to the Colorado Department of Highways for the construction of S. Havana St. The stated purpose was "to improve, and aid in the construction of, public roads outside the limits of the City . . . for the purpose of establishing and improving . . . roads <u>connecting the City and County of Denver and its parks</u>

and parkways outside such limits." Significantly, because the 36 acre parcel was managed by the Department of Improvements and Parks, the ordinance authorized the Manager of Improvements and Parks to sign the easement deed.[2]

Effective January 1, 1956, Denver voters amended the City Charter by adopting a new Article providing in part:

> **A.4.5 No park to Be Sold or Leased.** No portion of any park now belonging to or hereafter acquired by the City and County of Denver shall be sold or leased at any time; provided however, that no land hereafter acquired by the City and County of Denver shall be deemed to be a park unless specifically designated a park by ordinance.

(R. CF p. 1100) (emphasis added). The Charter does not define "park now belonging to . . . the City[.]"

Lauri Dannemiller, who was the Manager of DPR from 2012-2015, admitted in her 30(b)(6) deposition that the 1955 Charter Amendment

[2] In *Friends 2*, the Court of Appeals failed to mention that from 1936 through 1955, HHNP was managed by the Department of Improvements and Parks. The Court did not mention that city council delegated authority to the Manager of Parks and Improvements to grant the easement across parks department property. The Court held that held the easement transaction "cannot be said to constitute an unambiguous designation of the southern parcel as a park." (Appendix 1, at 6.) A jury might reasonably disagree, especially if the jury were allowed to consider the testimony of historian Charles Bonniwell that the parcel was not only managed by the parks department, but was used by the public as a park with the knowledge and consent of the department. (R. CF pp. 1192-1198 [Bonniwell testimony].)

"designated" all parks that were owned and managed the Department of Parks and Improvements at the time:

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

(R. CF p. 1312 [emphasis added].)

After January 1, 1956 DPR employees understood that HHNP was a city park and managed it as such. In 1965, Denver annexed HHNP along with the adjacent residential neighborhood of Hampden Heights. In 1967 the City official master land use map identified HHNP as a park. (R. Pl Preliminary Injunction Hearing, Exhibits 14-1, 14-6, 15.). HHNP appears as a city park on DPR published lists of parks and park maps from 1978 through 2011 (R. CF p. 1225).

On May 17, 1983 the voters adopted an amendment to Section A.4.5 of the Charter which read in pertinent part as follows:

> A4.5 Sale and Lease of Parks. No portion of any designated park belonging to the city shall be sold. . . . All designated parks existing at the time this provision is enacted shall continue to be designated as parks. No land now owned or hereafter acquired by the City and County shall be deemed a park unless specifically designated a park by ordinance.

(R. CF p. 1101 [emphasis added].) The Charter was silent on how land acquired before 1955 became a "park," and did not define "designated park."

In 1995 Neil Sperandeo, the city's Director of Planning for DPR, signed an affidavit stating that there was no requirement that pre-1955 parks be designated by ordinance:

> 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 this interpretation, which is in accord with the 1955 and 1983 charter amendments to §A.4.5

(R. CF p. 1343 [emphasis added].) DPR Manager Lauri Dannemiller testified that she agreed with Mr. Sperandeo's testimony. (R. CF p. 1312).

On August 19, 1996 the Denver City Council enacted Ordinance 704, which submitted to a vote of the people the following amendment to the Charter:

> **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 . . . . **No land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance.**

(R. CF p. 1325-1326 [emphasis added].)

Before council voted, John Bennett, the Executive Director of City Council, explained to council that pre-1955 parks were "designated" by the amendment:

> **The amendment confirms that parks used as parks prior to 1955 are designated parks.** [3]

(R. CF p. 1321-1322 [emphasis added].)

Former council member Susan Barnes-Gelt voted for the amendment with the understanding that HHNP and other lands acquired before 1955 would be protected from sale if those lands were used as parks before 1955. (R. CF p. 1237.)

In 2007 the Manager of DPR designated HHNP and the adjacent Paul A. Hentzell Park as a continuous natural area. Natural area designation requires that land remain in its native state, undeveloped. The plan was to re-seed the abandoned parking lot with native prairie grasses. (R. Tr. June 12, 2013 p. 91-92.)

In fall 2012, voters were told that Mayor Hancock had agreed to trade 11 acres of HHNP to DPS for an office building at 1330 Fox St. The Parks and Recreation Advisory Board ("PRAB"), which is made up of Denver citizens appointed by the Mayor and City Council, conducted two public hearings. PRAB voted 11-6 against the land swap. The next day the mayor replaced two PRAB of

[3] The city did not provide the videotape of these proceedings to petitioners until after the Court of Appeals decided *Friends 1*. Thus, the Court of Appeals decided *Friends 1* without knowing that city council construed §2.4.5 to mean "parks used as parks prior to 1955 are designated parks."

his appointees who voted against the swap. Lauri Dannemiller, the mayor's appointed Manager of DPR, then de-designated the 11 acres as natural area, allowing the land swap to proceed. (R. Tr. June 12, 2013 p. l07.)

In her 30(b)(6) deposition, Ms. Dannemiller was asked what property was protected by § 2.4.5:

> Q. And 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.**

(R. CF p. 1401-1402 [emphasis added]. [4]

ARGUMENT

This Court grants certiorari "when there are special and important reasons therefor," including without limitation where the Court of Appeals decided a case in a manner probably not in accord with Supreme Court decisions, or where different divisions of the Court of Appeals conflict. C.A.R. 49(a)(2), (3). For both reasons, this case is appropriate for Supreme Court review.

[4] The Court of Appeals in *Friends 2* did not mention Ms. Dannemiller's testimony, although petitioners cited it to the Court as an admission of a party in the briefs and oral argument.

I. THE COURT OF APPEALS MISCONSTRUED SECTION 2.4.5 AND CONTRADICTED THE DIVISION THAT DECIDED *FRIENDS 1* WHEN IT HELD THAT PRE-1955 PARKS MUST BE DEDICATED.

At a hearing on June 28, 2013, the trial court pondered 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.

(R. 06/28/13 Tr. at 300:12-14 [emphasis added].) At that hearing, the city's attorney acknowledged that § 2.4.5 does not define what constitutes a "park belonging to the city as of December 31, 1955." (*Id.* at 321:3-23 [emphasis added].) Thus, both the City and the trial court recognized that there is no legal definition of "a park belonging to the City as of December 31, 1955."

Regarding how city land owned before 1955 became a park, the Court of Appeals in *Friends 1* construed § 2.4.5 as follows:

> Section 2.4.5 makes clear that it does not matter how city land became a park before December 31, 1955.

327 P.3d at 318, ¶ 54 (emphasis added). And,

> It did not matter to the drafters how land became a park before December 31, 1955.

Id. at 319, ¶ 57 (emphasis added).

In *Friends 2*, a different division construed § 2.4.5 to require dedication:

> [T]he city did not by ordinance designate the parcel as a park prior to December 31, 1955. Therefore, the parcel could have become a park only by common law dedication.

Appendix 1, at 4 (emphasis added).

The interpretation in *Friends 2* conflicts with *Friends 1*, and conflicts with the drafters' own understanding, as expressed to city council when it adopted the amendment to §2.4.5 on August 19, 1996, that "parks used as parks prior to 1955 are designated parks." (R. CF p. 1321 – 1322) (emphasis added).

II. THE COURT OF APPEALS DECIDED THIS CASE IN A WAY THAT DOES NOT ACCORD WITH DECISIONS OF THIS COURT BU HOLDING THAT THERE IS NO FACTUAL DISPUTE ABOUT WHETHER HHNP WAS A PARK BEFORE 1955.

Since the Charter is silent on how city land became a park before 1955, Petitioners respectfully submit that the determination of whether HHNP was a "park belonging to the City as of December 31, 1955" is not a question of law but rather a question of fact that must be resolved at a trial on the merits. That is consistent with the Court of Appeals' holding in *Friends 1* that its decision was not a final adjudication of the merits. 327 P.3d at 316, ¶ 39.

A central issue is how city land became a park before 1955. The most crucial piece of evidence was the videotape of council proceedings on August 19, 1996 at which council adopted the amendment to Charter § 2.4.5. The city did not produce the videotape until after the Court of Appeals decided *Friends 1*.

In *Friends 2*, the Court of Appeals refused to consider evidence that "parks used as parks prior to 1955 are designated parks." Although the Charter is silent on what is a "park belonging to the city" before 1955, the court held that *Friends 1* prohibited any factual inquiry:

> [T]he interpretation of Denver Charter section 2.4.5 . . . in *Friends of Denver Parks* . . . became the law of the case when the division of this court interpreted the relevant portion of the city charter . . . [and] there was no factual dispute as to the meaning of a "park belonging to the City" in section 2.4.5.

Appendix 1, at 10-11.[5]

The trial court recognized that there was a factual dispute, reciting Petitioners' undisputed evidence tending to show that the City considered and used HHNP as a park long before 1955. (R. CF p. 1490.) The court then ruled that the evidence "falls short" of establishing "unequivocal intent" to dedicate HHNP a park. (*Id.*) The court thus weighed evidence. The Court of Appeals placed its imprimatur on that conduct, and in doing so contravened this Court's rule that in summary judgment proceedings all doubts regarding the existence of genuine

[5] *Friends 2* cited *Hall v. City & County of Denver*, 115 Colo. 538, 177 P.2d 234 (1946) for the proposition that public use of city owned land is insufficient to convert that parcel into a park. *Friends 2,* Appendix 1, at 4. *Hall* is distinguishable. It was decided 50 years before the 1996 amendment to § 2.4.5. The *Hall* Court relied heavily on the fact that no funds of DPR were spent improving the alleged park, whereas in this case, DPR used public money to build bike paths and bridges, and post park department signs. Furthermore, there was no evidence in *Hall,* as there is here, that "parks used as parks prior to 1955 are designated parks."

issues of material fact must be resolved against the moving party. *E.g., Vigoda v. Denver Urban Renewal Auth.*, 646 P.2d 900, 904 (Colo. 1982).

III. THE COURT OF APPEALS RULED IN A WAY THAT DOES NOT ACCORD WITH DECISIONS OF THIS COURT WHEN IT DETERMINED THAT THE 2010 ZONING ORDINANCE DID NOT "DESIGNATE" HHNP A PARK.

City-owned land can become a park after December 31, 1955 for § 2.4.5 purposes only "if the city designates it as a park by ordinance." 327 P.3d at 318, ¶ 54. That is what happened here.

On June 25, 2010 the City enacted Ordinance 333 stating that "[a]ll 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 <u>designated</u> on the Official Map**." (R. CF p. 1232 [emphasis added].)

HHNP is shown on the Official Map as "OS-A." The purpose of OS-A designation is:

> <u>to protect and preserve public parks owned, operated or leased by the City</u> and managed by the City's Department of Parks and Recreation ("DPR") for park purposes.

(R. CR p. 1351 [emphasis added].) The city's 30(b)(6) witness, Tina Axelrad, agreed that HHNP is a park under the zoning code. (R. CF p. 1337 [depo p. 18, l. 14 – p. 19, l. 11].)

Section 2.4.5 protects all parcels "designated a park by ordinance" from sale absent voter approval. Ordinance 333 was an ordinance, and also "designated" HHNP a park.

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 the language is unambiguous, then plain meaning governs and resort to other tools of construction is improper. *People v. Voth*, 312 P.3d 144, 149 (Colo. 2013).

The Charter did not define "designated," so 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 Feb. 4, 2015).

Ordinance 333 plainly "designated" HHNP a park per the commonly understood meaning. The zoning map the ordinance adopted provides that HHNP is an "open space public park." Accordingly, the ordinance "denotes," "signifies," "names," "entitles" and "styles" HHNP a park. Thus, HHNP was "designated a park by ordinance" and was subject to § 2.4.5.

Affidavits established that the 2010 ordinance confirmed HHNP's historical status as a park. Susan Barnes-Gelt, a member of the city council that voted unanimously for the amendment of §2.4.5 on August 19, 1996, was told at the time

that "all parks used as parks prior to 1955 are designated parks." James Kellner, former Superintendent of Southeast Denver Parks District, testified that during his thirty year career as an employee of DPR, HHNP was always included on DPR's official lists of city parks. DPR's maps and lists of parks corroborate Mr. Kellner's testimony. Six eyewitnesses with firsthand knowledge provided affidavits testifying to their personal use of HHNP, and the public's use of HHNP as a park, starting in 1938 and continuing into the 1980s. (R. CF p. 1174-1184.)

In *Friends 2*, the Court of Appeals ruled that "Ordinance 333 specifically designates zoning districts – not a park." Appendix 1, at 8. This is a distinction without a difference. If HHNP is city land, and is designated by the zoning ordinance as park land, and the land is under the management of DPR, which is expending public funds to maintain and improve the land for public use, then it must be protected by § 2.4.5. If the ordinance designates zoning districts – and it does – and HHNP was designated the zoning district for parks/open space – and it was – then the ordinance designated HHNP a park as a simple matter of fact. Any other conclusion would render the term "designate" in the Charter meaningless.

The Court of Appeals cited Ordinance No. 168, Series of 2013 as an "instructive" example of an ordinance that "designates" a park. Appendix 1, at 9. In truth, Ordinance 168 was a formal dedication with a metes and bounds

description and a name for the park. That is much greater formality than the term "designate" in the Charter requires. Formality in Ordinance 168 was necessary because the city had already carved out a 10.7 acre parcel from HHNP and traded it to DPS without voter approval. Clarifying the boundaries of the remaining 16 acres required a new survey. Ordinance 168 also gave cover to the city's story that HHNP was never a park, despite 40 years of city representations that it was.

This Court's precedents provide that the right to vote is fundamental and that legislation touching upon the franchise be liberally construed to protect that right. *Meyer*, 846 P.2d at 874; *Chesser*, 568 P.2d at 43. Those precepts require construing Ordinance 333, Series of 2010 as "designating" HHNP a park and therefore triggering the right of voter approval set forth in § 2.4.5. Thus, the Court of Appeals decided this case in a manner contrary to this Court's precedent.

CONCLUSION

The city breached the trust that citizens place in their government by using public funds to manage and improve HHNP as a city park, representing to the public that it was a park, designating it as city park land in the 2010 zoning ordinance, and then trading the park land without allowing the people of Denver to vote, which is their right under the Charter. The government's plan is to make sure that ordinary citizens never get to decide this issue, either at the polls or in a

courtroom. It is unfortunate that the lower courts chose to stand by city officials, instead of acting as an independent third branch of government to protect voting rights spelled out in the Charter of our state's largest city. It is unfair to require citizens to prove that a park was formally dedicated in order to protect it from sale, when the Charter does not require formal dedication, and city council proceedings prove that "parks used as parks prior to 1955 are designated parks."

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Date: October 28, 2015.

Respectfully submitted,

EVANS CASE, LLP

s/ John Case
John Case, #2431
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2015 true and correct copies of the foregoing **PETITION FOR WRIT OF CERTIORARI** were filed and served as follows:

Clerk of the Colorado Supreme Court **Via ICCES**
2 East 14th Ave.
Denver, CO 80203

Mr. David W. Broadwell, Esq. **Via ICCES**
Mr. Mitch Baer, Esq.
Mr. Patrick Wheeler, Esq.
Assistant Denver City Attorneys
1437 Bannock St., Room 353
Denver, CO 80202
Attorneys for City and County of Denver

Molly H. Ferrer, Esq. **Via ICCES**
Mr. Michael Hickman, Esq.
Mr. Jerome De Herrera, Esq.
Denver Public Schools
900 Grant St. #401
Denver, CO 80203-2996
Attorneys for Denver Public School District No. 1

/s/Russell W. Jones
Russell W. Jones