

**DISTRICT COURT
DENVER COUNTY, COLORADO**

1437 Bannock Street, Room 256
Denver, CO 80202

Plaintiff:

**FRIENDS OF DENVER PARKS, INC., a
Colorado non-profit corporation; and
STEVE WALDSTEIN, an individual; and
ZELDA HAWKINS, an individual**

v.

Defendant:

**CITY AND 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 Number:

2013-CV-032444

Courtroom 376

Volume III of III

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The matter came on for hearing on Friday, June 28, 2013, before the HONORABLE HERBERT L. STERN, III, Judge of the District Court, and the following FTR Proceedings, transcribed from an electronic recording, were had.

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1 DENVER, COLORADO; FRIDAY, JUNE 28, 2013

2 (Call to Order at 9:03 a.m.)

3 THE COURT: Calling the Friends of Denver Parks
4 matter, 13-CV-32444.

5 Counsel, please enter.

6 MR. CASE: Good morning, Your Honor. John Case,
7 Registration Number 2431, for the Plaintiffs.

8 MR. BROADWELL: Good morning, Your Honor. David
9 Broadwell for the City and County of Denver. I'm accompanied
10 by Mitch Behr, also from the City Attorney's Office.

11 MR. HICKMAN: Good morning, Your Honor, Michael
12 Hickman appearing for Denver Public Schools, attorney number
13 30610. Also my co-counsel, Jerome DeHerrera is here. I don't
14 know his bar number.

15 MR. DEHERRERA: 35893, Your Honor.

16 THE COURT: Okay. Well, this case has proven to be
17 quite difficult for me and quite bothersome in many ways.
18 There are a number of things that I want to touch on today
19 before I make a ruling. I want to explore some of the concepts
20 with counsel that we've talked about.

21 Let's start with Mr. Case, if you would just take the
22 podium for a minute, and I'm going to jump around. I don't
23 have any outline and the like. You rely on the McIntyre case,
24 it seems to me, in part for the proposition that -- and I'm
25 going to ask you to correct me if you agree or not -- in part

1 for the proposition that there can be either a park acquired by
2 prescription or a park acquired or dedicated by common law. Do
3 you agree with that?

4 MR. CASE: Not acquired by prescription.

5 THE COURT: Okay, but by common law?

6 MR. CASE: But by common law, which includes the
7 intent of the City to use it as a park.

8 THE COURT: So is your common law theory that this
9 land was used as a park, much as Mr. Charles Bonniwell
10 testified to both convincingly and interestingly in many ways
11 at the hearing, that this has been a park since the late 1860s?

12 MR. CASE: Well, I think --

13 THE COURT: Or is your position on the common law
14 issue that since 1967 or '68 or 1970, a period of 40 or 50
15 years, this area has been used as a park and that's what makes
16 it a park?

17 MR. CASE: Well, it's both.

18 THE COURT: Okay. Let's talk about the pre-'55
19 theory and facts as you see them. Tell me about that.

20 MR. CASE: All right. So our argument is, I'm sorry,
21 Your Honor, I didn't turn my cell off. It's off now.

22 So our common law argument is this: There must be
23 intent on the part of the municipality to use it and have the
24 citizens use it as a park. And there must be a representation
25 that it is park, and then used by the citizens as a park, and a

1 common understanding that it's a park. Which were the elements
2 in McIntyre. And so in that this case the strongest evidence
3 pre-1955 that the City treated this as a park was Mr.
4 Bonniwell's testimony that it acquired -- the City of Denver
5 acquired easements across the land of private owners in the
6 Cherry Creek floodplain, who wouldn't sell their land outright,
7 but who would allow the City an easement so the Denver citizens
8 could ride their horses and walk across those lands for
9 recreational purpose. And recreation is a park use. That's
10 our pre-1955 argument.

11 THE COURT: So by virtue of buying up those easements
12 along the Cherry Creek bridle paths or whatever you want to
13 call them --

14 MR. CASE: It's now called the Cherry Creek Trail,
15 and at the time called the Cherokee Trail. It was the way that
16 all the settlers came to Denver from the East.

17 THE COURT: Okay. So according to you and Mr.
18 Bonniwell's testimony, where the City couldn't buy the land
19 along Cherokee, a/k/a Cherry Creek trail, it purchased
20 easements so that its citizens could utilize the area for
21 recreational purposes?

22 MR. CASE: Yes, Your Honor

23 THE COURT: And they did so?

24 MR. CASE: Yes, sir.

25 THE COURT: So you have intent and you have use.

1 MR. CASE: Yes, Your Honor.

2 THE COURT: You don't really get to any
3 representations that this is park land until sometime in the
4 '60s, do you?

5 MR. CASE: No, because --

6 THE COURT: By the City.

7 MR. CASE: That's true.

8 THE COURT: Okay.

9 MR. CASE: Of course there's Colorado common law that
10 if you don't want people on land you have to fence them out,
11 which was never done, of course.

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

15 MR. CASE: Actually, the City does have the
16 definition.

17 THE COURT: Well, I'm talking about before '55.

18 MR. CASE: Oh. I agree with your definition.

19 THE COURT: I'll know it when I see it?

20 MR. CASE: Yes.

21 THE COURT: One of the seemingly mundane aspects of
22 something -- of land being a park, it seems to me, is that the
23 park would have boundaries. Do we have any boundaries that you
24 can direct me to before 1955? Or are we just talking about
25 this trail and five feet on either side, five yards, 50 yards,

1 a mile?

2 MR. CASE: Well, the people followed the trail and
3 actually -- although there wasn't evidence at the hearing, the
4 trail would vary according to the contours of the creek.

5 THE COURT: Okay. Well, let's assume for purposes of
6 discussion that this trail constitutes a park, and that the
7 limits of this park, pre-1955, is -- we'll just take a vague
8 term and say within a reasonable degree of either side of the
9 trail that's a park.

10 From looking at the maps, the 10.7 acres at issue
11 here are, to my mind, at least, far off of the trail. So under
12 that way of looking at things, it's not a park. But that gets
13 to another issue which I would like your thoughts on. And that
14 is: Do I focus on the 11 acres? Do I focus on the 26 acres?
15 Did I focus the 90 acres? What are your thoughts on that?

16 MR. CASE: Well, on the 26, 26 acres.

17 THE COURT: Okay.

18 MR. CASE: That was always understood by the
19 residents of Denver to be a park.

20 THE COURT: The whole 26 acres?

21 MR. CASE: Absolutely.

22 THE COURT: And that's an odd shape of land. So how
23 it is that the citizens of Denver understood this triangular
24 shape of land to be a park?

25 MR. CASE: Well --

1 THE COURT: Maybe the part of it nearest Cherry Creek
2 or --

3 MR. CASE: Are you talking pre-'55?

4 THE COURT: Yes, this is all pre-'55.

5 MR. CASE: Okay. I think they would understand that
6 because it was owned by the City and it was unfenced land and
7 they were allowed to use it for recreation. They could go
8 there and have picnics. They could ride their horses along the
9 trail. They could play games in the fields. They could sit
10 and look at the wildlife or watch the birds that nested in the
11 trees along Cherry Creek. And people did use it for that.

12 THE COURT: All right. Maybe Mr. Broadwell is going
13 to come up and say wait a minute this, back then, pre-'55, back
14 in the late 1800s, early 1900s, this was vacant land out in the
15 middle of nowhere. It was not maintained. People didn't know
16 where parcels of land started and stopped. There were cows out
17 there, yeah, there were birds, there were flowers, you know, it
18 was a natural area. It was just an open vacant land, natural
19 area back then in the middle of nowhere. And, yes, people went
20 out six, eight miles, whatever it was from the city, on
21 horseback and rode horses.

22 So what? How does that make it a park? Just because
23 it was -- because you've got this open land on the -- way on
24 the outskirts? It wasn't even part of the City and County back
25 then. How does that rise to the level of a park, let alone a

1 Denver park?

2 MR. CASE: Well, we have a lower threshold for what
3 is a park.

4 THE COURT: Okay.

5 MR. CASE: But an interesting fact, I don't know how
6 much -- I think this was mentioned, but never really discussed
7 in the testimony, there was no Denver Parks Department before
8 1955. The Department of Public Works managed all land owned by
9 the City of Denver and they didn't split those. They didn't
10 add a Parks Department until '55, when this charter amendment
11 was adopted. So that left all of these pre-1955 parcels that
12 had never been designated by an ordinance, but were used by the
13 public and understood to be parks.

14 So when we get to the post-1955 issues, I would like
15 to make another comment.

16 THE COURT: We'll get there.

17 MR. CASE: All right.

18 THE COURT: So can you address what you mean by the
19 term park and can you address the issue that I raised as to
20 what are the boundaries of your park before 1955?

21 MR. CASE: All right. It's a parcel of land owned by
22 the City and County of Denver that is used by the citizens as a
23 park, and intended by the City to be used by its citizens as a
24 park. And I think this parcel fits that description.

25 THE COURT: A park is what is used as a park. A park

1 is what the city intends to be a park.

2 MR. CASE: Yes, as long as the --

3 THE COURT: But what's a park?

4 MR. CASE: -- use is recreational. It's land that's
5 used for recreational purposes.

6 THE COURT: Okay.

7 MR. CASE: For enjoying the beauty of nature or
8 exercise or whatever you do with recreation that doesn't
9 disturb the land. And Mr. Bonniwell made a very interesting
10 observation, and that is recreation prior to 1955 was horseback
11 riding, and now it's bicycling. And the City's kept up with
12 that. They took this horse trail and turned it into a bike
13 trail, but the use has never changed. It's always been
14 recreational for the citizens of Denver.

15 THE COURT: And what about the limits or the
16 boundaries?

17 MR. CASE: Well, in the 1955 photograph there are --
18 you can see there's a farmer's field to the west of the
19 triangular parcel. And that farmer's field later became the
20 Hampden Heights neighborhood. So it was bounded by the
21 farmer's boundaries and had some delineation in that respect.
22 I don't recall seeing what the boundaries were on the east
23 side, other than the greenhouse that was identified by Mr.
24 Ellis.

25 THE COURT: So another way of looking at it might be

1 that you would say the park boundaries back then were the
2 boundaries of the City-owned parcel, since the park has to be
3 City-owned.

4 MR. CASE: Yes. And the boundaries were delineated
5 by adjacent landowners who fenced their land and farmed it or
6 used it for greenhouses.

7 THE COURT: Do you think -- well, I think your answer
8 is going to be ask yes. Let me ask you this: Do you have
9 anything that you can direct me to factually that would support
10 your definition of a park such that the 1955 law, which
11 mentions parks in a vague unclear way --

12 MR. CASE: Right.

13 THE COURT: -- that would suggest that you and the
14 City Council back then were thinking of parks in the same way?

15 MR. CASE: Well, I'm not sure I completely understand
16 your question.

17 THE COURT: Well, let's see. The 1955 charter,
18 2.4.5, says without the approval of a majority of voters, blah,
19 blah, blah, no park shall be sold. But we don't know what a
20 park is. So my question is: How is the 1955 language in the
21 City charter referencing a park? How would you argue that that
22 -- the use of that term is the same as you would use it today,
23 I mean, that we discussed today?

24 MR. CASE: All right. I think the answer is in the
25 last sentence of the charter 2.4.5. "No land acquired by the

1 City after December 31, 1955, shall be deemed a park unless
2 specifically designated a park by ordinance."

3 So in other words, there were lands deemed parks,
4 known to be parks, understood to be parks by the citizens and
5 their government. And that is what is referred to here. And
6 what this charter amendment does is it says there will be no
7 more parks by common law, there's got to be an ordinance.

8 THE COURT: Okay. So a park is land owned by the
9 City. A pre-1955 park, is land owned by the City, used by the
10 citizens for recreational purposes.

11 MR. CASE: Yes. And understood by all to be a park.
12 That's what the word, I think, means when it says deemed a
13 park.

14 THE COURT: Okay.

15 MR. CASE: Are you ready for my post-1955 comment?

16 THE COURT: Something tells me I'd better be, because
17 you're about to bust a gut if I keep you off of that.

18 MR. CASE: I wanted to answer your questions.

19 THE COURT: I understand. Go ahead.

20 MR. CASE: all right.

21 THE COURT: Post-1955?

22 MR. CASE: Right. So this last sentence I think is
23 the key to the whole legal structure of this case. There's
24 this doctrine of expressio unius exclusio alterius. Meaning,
25 one thing mentioned includes others not mentioned. All right.

1 So what they're saying here is, after 1955, it's not a park
2 unless we say it's a park by ordinance. That's land acquired
3 after '55. So it's not land owned by the City before '55; it's
4 land acquired after '55 that has to be designated by ordinance.

5 So that says two things. First, for land there can
6 be parks not designated by ordinance that were acquired prior
7 to '55. That's the clear implication of that statement. Then
8 the question is: Well, how would they be designated? Or how
9 would they be deemed a park? And so I think that's where
10 common sense comes in. If a city puts a sign on it and says
11 this is a park, which they did for Hampden Heights North Park;
12 if they put it on every single City map that's released to the
13 public since 1967 that says it's a park, that's a
14 representation that it's a park.

15 If the citizens understand it's a park and you use it
16 as a park in response to these invitations by the City
17 government, they understand it to be a park. And if the City
18 continuously improves not only the trails through it and
19 changes them from dirt to asphalt and then to concrete, because
20 the bicyclists didn't like the asphalt trails. Initially
21 through this park there was a dirt trail.

22 THE COURT: That's okay. Let's not digress.

23 MR. CASE: All right. So the City constantly
24 upgrades this park area, this 26 acres. First with asphalt
25 trails, then with a concrete bike path that connects up to the

1 top of the dam. The underpass under Havana.

2 THE COURT: They also put it under Parks and Rec.

3 MR. CASE: Yes. Put it under the Division of Parks
4 and Recreation, Parks and Rec took care of the land, mowed it,
5 planted native grasses, eradicated prairie dogs in parts of it.
6 So the City --

7 THE COURT: Allowed for a parking lot to be leased.

8 Go ahead.

9 MR. CASE: Yeah. That is an inconsistent use. We
10 agree.

11 THE COURT: We'll get to that. I understand.

12 MR. CASE: So I'm saying by all of those standards
13 the City affirmatively, after 1955, said to the public this is
14 a park. This is a park. We have a sign on it. It's on the
15 maps. You come down here and we'll talk to you, we'll tell you
16 it's a park. You don't have to worry about developing -- us
17 developing it in the future. We're not going to do that
18 because it's open space. It's in a floodplain. It's a park.
19 That's what they said.

20 THE COURT: Well, they also talked out the other side
21 of their mouth too.

22 MR. CASE: Not to the public. There's that memo from
23 John Stoffel, but nobody ever published that.

24 THE COURT: Okay.

25 MR. CASE: So that's my comment on post-'55. So if

1 the City owned it before '55 and then started making
2 representations after '55 that it's a park, and it was used as
3 a park, it's a park.

4 THE COURT: Do you have any idea -- one of the most
5 disturbing and disconcerting aspects of this case was the
6 testimony that there are potentially numerous other parcels
7 that fall within this debatable area of park land or not park
8 land. Do you know if it's scores of properties, hundreds of
9 properties, five or ten properties?

10 MR. CASE: No, Your Honor. I don't know the answer
11 to that. Susan Baird -- she was the one who referred to this
12 and also Ms. Johnstone, but apparently at Stapleton now, where
13 there's issues about land use, there are parcels that are
14 partly designated by ordinance and the other part of the parcel
15 is pre-'55 and wasn't designated. So that's my understanding.
16 But I'm not knowledgeable enough to state what the exact facts
17 are. But I think the Parks Department concedes there are a
18 number of these parcels.

19 THE COURT: So there can be -- there could be a
20 square block or part of a square block somewhere in Denver over
21 in the Highlands area, let's say, that people have been using,
22 in the neighborhood has been using for decades as a park, it's
23 been maintained as a park, et cetera, et cetera, its existence
24 effects the value of properties in the area, and we might --
25 "we" meaning citizens of Denver might find out that that lo and

1 behold this is not a park, and the City can put an apartment
2 building up there or whatever.

3 MR. CASE: Well, they can claim that. I think what
4 they're claiming in this case, which is misleading, is it can't
5 be a park unless there's an ordinance that says it's a park.
6 And that plainly contradicts 2.4.5, because clearly there can
7 be pre-1955 land that is and was deemed a park, and that the
8 City represents to be a park. And if that's the case, it is a
9 park.

10 THE COURT: How would you respond to the testimony
11 that this area was -- it was bought for the purposes of flood
12 control and that any recreational use is ancillary to the
13 higher government purpose of the City protecting its citizens
14 from a disastrous flood?

15 MR. CASE: Well, there isn't a hierarchy of use where
16 the highest use is to protect the citizenry from floods and
17 then way down here is this recreational use that the City can
18 take away at their whim. The two uses were always understood
19 to be part of, you know, they were complementary. They're one
20 and the same. Because you don't want to build in a floodplain.
21 It's dangerous. So where do you want to put parks? You put
22 them where you can't build, because if the park gets wet people
23 can leave the area while it's raining or flooding and they can
24 come back when it's dry.

25 So historically, and Susan Baird testified to this,

1 historically parks are -- most of them are located in
2 floodplains, and that's the way the Denver park system grew,
3 was around the rivers and streams.

4 THE COURT: Let's talk about the Hall case from 1946.
5 What's your take on that?

6 MR. CASE: Factually distinguishable from McIntyre.

7 THE COURT: Because of what?

8 MR. CASE: Because the City never represented to the
9 public that was a park. And the City always maintained --
10 there was evidence in that case that even though it was an
11 historic building, City administration had consistently taken
12 steps to try to sell the property.

13 THE COURT: I'm sorry, what did you just say?

14 MR. CASE: My recollection of Hall is that City had
15 taken steps to sell the property even while it existed as kind
16 of a historic site. They never represented to the public that
17 it was a park.

18 THE COURT: Well, the representation to the public
19 that this area at this case was a park seems to me does not
20 begin until the late '60s.

21 MR. CASE: That's when it appeared on maps.

22 THE COURT: When was there a representation by the
23 City before 1955 that this area was a park?

24 MR. CASE: Well, it was implied by use.

25 THE COURT: Okay. Because I recognize that there are

1 some distinguishing features in the Hall case from the McIntyre
2 case, but not the least of which -- well, I won't go into that.
3 But the Court seemed to consider whether something was a park
4 and mentions that the area was never, quote, laid out as a
5 park. And it was assessed like non-park property. But then it
6 goes on and says, "We conclude that the area in question never
7 has been a public park," whatever that means, "in the legal
8 acceptance of that term," whatever that means.

9 Can you give me any guidance on that?

10 MR. CASE: Not other than what I've already said.

11 THE COURT: Okay.

12 MR. CASE: I would add there though, Judge, that
13 Susan Baird's testimony is helpful on that. The City's actual
14 treatment of the floodplain areas has changed over time, and
15 even though they were used as parks, the City didn't really try
16 to preserve the natural areas until the late '90s and on into
17 the first ten years of this century. So people thought of a
18 park as something like City Park, where there's irrigated grass
19 and trees. And everybody thinks, well, that's a park because
20 it looks like a park. But the City began treating these
21 streams and river areas as parks and natural areas and trying
22 to preserve the natural wildlife and fauna that grow there.

23 So what the Court would have said in that case you
24 just cited is a, you know, legal understanding of a park has
25 changed over time. The understanding has changed in City

1 government and in the Parks Department.

2 THE COURT: Well, let's move on to the initiative
3 referendum part of this. How do you get around the Vagneur
4 case from this last February?

5 MR. CASE: Oh, it's totally different.

6 THE COURT: Okay. Fill me in.

7 MR. CASE: All right. So the citizens wanted -- they
8 wanted to design the highway that the Federal Highway
9 Administration and CDOT had approved after years of
10 administrative hearings that went over a city open space
11 easement to get into Aspen. So the citizens said, well, we've
12 got a better design. And they put it on a ballot initiative.
13 And it would have repealed -- basically repealed the
14 administrative law for the design of this highway. And the
15 Supreme Court said you can't do that, that's -- you know, the
16 City has the right to administrate the open space easements in
17 accordance with State and Federal law, you know.

18 So one of the things they pointed out is the
19 initiative's fundamentally seek to change the design that was
20 previously approved by State and Federal agencies in a lengthy
21 administrative process required by Federal law. And the Court
22 found that the initiatives impermissibly intruded on the
23 administrative power of the City to manage the City-owned open
24 space. This case is nothing like Vagneur.

25 In this case we have a charter that says you can't

1 sell a park without a vote of the people. And there's no issue
2 about design; it's just about whether the people get to vote on
3 whether their park, not the Mayor's land, but the citizens'
4 park can be sold without a vote of the people. That's the
5 issue. And that issue was not present in Vagneur.

6 THE COURT: So you would not address the issue of
7 legislative versus administrative act?

8 MR. CASE: Absolutely, sure.

9 THE COURT: You would or you would not?

10 MR. CASE: We did. We do address that. So here's
11 what happens. City Council has a meeting on April 1st, and
12 they take this 26-acre triangle, and in Ordinance 168 they say
13 these north 16 acres, we're designating that as a park by
14 ordinance. That is a legislative act. Now we'll take the
15 south 10.7 acres and we'll trade it to DPS. But you have no
16 say in that because that's an administrative act. Same parcel;
17 same City Council meeting; same land, subdivided. And they
18 claim that half of the subdivision is legislative and the other
19 half is administrative, so the citizens have no say. That's a
20 ridiculous argument.

21 THE COURT: What about the policy aspect of
22 evaluating whether something is administrative or legislative?

23 MR. CASE: I'm sorry, I don't understand your
24 question, Your Honor.

25 THE COURT: Well, it seems to me that something is

1 more likely to be deemed legislative if it is a decision that
2 can be attributed to a policy.

3 MR. CASE: Oh, yes, I'm sorry.

4 THE COURT: As opposed to a single transaction.

5 MR. CASE: Right. So this transaction that's in
6 dispute in this lawsuit is a total change in policy by the
7 City. They have reversed over -- it's over 45 years of land
8 use with respect to this parcel. Zoning decisions are
9 legislative. The Margolis case is clear. And that is exactly
10 what they did. They said we're going to change this from a
11 park and we're going to let DPS build a school on it and
12 there's nothing you can do about it because DPS is exempt from
13 State zoning.

14 THE COURT: The Clerk and Recorder took the position
15 that your initiative was trying to set aside an administrative
16 act. Your initiative is very focused on this particular
17 transaction. I'm just curious. Do you think that an
18 initiative that was much broader, rather than laser focused
19 like yours was or is, do you think that a broader ballot title
20 would put something in the legislative arena?

21 MR. CASE: Well, first of all --

22 THE COURT: Like all land that's been used as a park
23 in the last five years in the City and County of Denver, the
24 last ten years or the last 50 years is hereby declared by the
25 people to be a park.

1 MR. CASE: Actually, we started there. We started
2 with five natural areas and we went in and had a meeting with
3 Mr. Broadwell. And he said, well, really you don't need to do
4 this because City Council is going to designate, by ordinance,
5 all of these natural areas as parks. So the only one that's
6 really in dispute here is Hampden Heights North Park.

7 THE COURT: So has City Council followed through on
8 Mr. Broadwell's representation?

9 THE COURT: They did. That's what they did at the
10 meeting April 1 of this year. They took those other natural
11 areas and made them parks, and then they took this park and cut
12 out 11 acres and said we're going to give that away. But
13 that's not legislative, that's administrative.

14 THE COURT: Anything else?

15 MR. CASE: No, Your Honor. Thank you.

16 THE COURT: Thank you.

17 Mr. Broadwell, your turn. You've been sitting there
18 biting your tongue. Why don't you address in any way that
19 seems comfortable to you some of the issues and arguments. Not
20 really -- well, arguments that we've discussed.

21 MR. BROADWELL: Thank you, Your Honor. I was
22 prepared for specific questions, but I'll be happy to talk a
23 bit about what I just heard.

24 THE COURT: Well, a lot my questions would be sort of
25 the flip side.

1 MR. BROADWELL: Yes.

2 THE COURT: Go ahead.

3 MR. BROADWELL: If I could go in reverse order, let's
4 talk about Vagneur and all the other cases because --

5 THE COURT: Okay.

6 MR. BROADWELL: Not to get redundant, but we think
7 Vagneur, with what we said in our written arguments, we think
8 Vagneur is very much on point. But it's not the only one. You
9 have the Blackwell case and the Witcher case and so forth all
10 involving site-specific real estate transactions and always
11 calling them administrative and not legislative in nature.

12 I think the Court just rhetorically made a very good
13 point, which is that there's a way of framing an initiative or
14 referendum about City real estate that would be policy making.
15 And an example is the one you just gave. If people were to
16 either by ordinance or charter amendment propose a much broader
17 restriction on the alienation of City park property that would
18 say voter approval is required, not just for pre-'55 park land
19 or park land after '55 designated by ordinance, but for
20 anything merely used as park land; that would be an example of
21 policy making that would certainly be subject to an initiative.

22 THE COURT: If it walks like a park, talks like a
23 park, it is a park, and we the people are going to make a
24 ruling as such.

25 MR. BROADWELL: It's like a de facto rule that a mere

1 user can make something a park, and if that's happened then the
2 property can't be alienated without voter approval. But that's
3 not what the law says. And one of things, kind of a general
4 comment I'll make --

5 THE COURT: The law meaning?

6 MR. BROADWELL: The charter.

7 THE COURT: That's applicable to this case?

8 MR. BROADWELL: Yes.

9 THE COURT: Got you.

10 MR. BROADWELL: The current law that's applicable to
11 this case.

12 THE COURT: Right.

13 MR. BROADWELL: And again, Your Honor, I don't want
14 to get redundant, but some of the basic arguments we made at
15 the beginning are pretty much what we have to say again today.
16 You know, it's not -- this case is not about -- about what
17 makes something a park, and I understand there's an underlying
18 issue of what makes something a park to begin with. But it's
19 about when is voter approval required, when is voter approval
20 required to get rid of City property? And I started -- my
21 response to the original motion for the preliminary injunction
22 started with you have to respect the fact that in the charter
23 there's a default rule that describes how we get rid of
24 municipally owned property in this City, by charter. It's by
25 an ordinance approved by City Council, signed by the mayor.

1 So that's the rule.

2 And these triggers for voter approval are exceptions
3 to the rule, and we're just merely arguing and encouraging the
4 Court to apply the charter as written. The charter does not
5 say, as the Plaintiffs wish it would say, that park land
6 requires voter approval before it can be sold. It doesn't say
7 that. It has these two specific categories. And I appreciate
8 from the questions of the Court that you're focusing in on it
9 analytically from that perspective, that it has a category for
10 parks belonging to the City as of '55.

11 And on that I'll just simply say again that while
12 there may have been some user that somebody could argue in
13 terms of horseback riding, we said this in our closing
14 statement, that that falls far short of anything that we would
15 say would make something a park under the Hall decision, which
16 we do -- different facts in Hall, but we do think Hall is far
17 more relevant to this case than the McIntyre case.

18 There has to be some sort of official acknowledgement
19 or dedication or recognition by the City of those 1955 parks.
20 We know what those are. Those are Washington Park and City
21 Park, Cheeseman Park and so forth. When Mr. Bonniwell was on
22 the stand I said -- even I acknowledged there were
23 extraterritorial parks in 1955. They were called the mountain
24 parks. And there are archives and records and official
25 designations of those mountain parks going all the way back to

1 the 19-teens. Right? But there's nothing that was produced in
2 this hearing showing that there was any official recognition of
3 that property out there as of 1955 as a city park, and a mere
4 user, for whatever arguments they want to make, doesn't do it.
5 We also rhetorically --

6 THE COURT: Let me slow you down. What would do it?
7 Give me an idea -- I asked Mr. Case to tell me about how it was
8 a park and we had a discussion on that. So tell me what it
9 would take from your perspective for this area that's in
10 dispute in this case to be a park.

11 MR. BROADWELL: Well --

12 THE COURT: Does it have to be a lawn that's cut?
13 Does it have to be actively maintained? Does there need to be
14 a sign? Property assessment as a park?

15 MR. BROADWELL: Well, I draw upon the Hall case to
16 say, first of all, what's not enough. In the Hall case you had
17 the courthouse square over here developed as a park. They had
18 park benches, they had landscaping, they had it in the budget
19 of the Parks Department, but all that wasn't enough. That's
20 what you draw from the Hall case, is that isn't enough. There
21 has to be something extra. And I think you get there maybe by
22 a couple of different routes. One would be that a lot of older
23 land is park because it was dedicated as such by plat or by
24 deed. It was given to the City as a park. So you can point to
25 the real estate record and determine it's a park that way.

1 THE COURT: Right. Well, we know we don't have that
2 here.

3 MR. BROADWELL: That's correct. And there's some
4 ambiguous language in Hall about there's no charter dedication,
5 whatever they determine that mean back in 1946. They didn't
6 define that. But I think it's possible in the pre-'55 scenario
7 to have land that, even if it's not on the deed, that the City
8 itself has given some sort of official recognition of it by
9 passing an ordinance back then, or whatever the case may be, to
10 show that it has, quote/unquote, dedicated the land as park
11 land and is officially treating it as such. And somebody can
12 point to a document as a smoking gun showing an official
13 recognition and the City's accepted that responsibility. And
14 of course back then, originally the charter said once it's
15 recognized as a park it can't be sold at all. When in later
16 years it said it can be sold, but only with voter approval.

17 But there were serious legal consequences for
18 distinguishing back then what was a park and what wasn't a
19 park. And again, I think that's the main thing we get from the
20 Hall decision is mere user like -- if it quacks like a duck and
21 walks like a duck is not enough. There's got to be something
22 else beyond that. And that something else is missing in this
23 case.

24 THE COURT: Pre-1955.

25 MR. CASE: Pre-1955.

1 THE COURT: Post-1955, we do have some City -- some
2 affirmative City action.

3 MR. BROADWELL: In the form of an ordinance.

4 THE COURT: Well, we have --

5 MR. BROADWELL: You mean on this property?

6 THE COURT: On this property.

7 MR. BROADWELL: Right.

8 THE COURT: The asphalt, the cement, the signs.

9 Maybe, you know, different restoration going on, a ballpark or
10 whatever might be out there. I can't remember exactly right
11 now. You do have the City's open and notorious actions
12 relating to the land being a park at some point after 1955,
13 maybe it's after 1967 that things picked up. We've got the
14 maps. We know of all of that stuff. So those are public
15 indications that it's -- that the City views it as a park.

16 How would you respond to Mr. Case's argument about
17 the fact that it hasn't been acquired since 1955, so that
18 there's still voter approval -- it falls under -- it falls --
19 the falls -- the issue of whether. Let me try to figure out
20 how to say this right. The bottom line is he would say that
21 voter approval is required because it falls outside the purview
22 of the 1955 charter.

23 MR. BROADWELL: That's what I call making up a third
24 trigger for voter approval that the charter doesn't provide
25 for, right? I understand the Plaintiffs wish that were so, but

1 that's not what the charter says. But let me go back to the
2 first part of your question, Your Honor, and then elaborate a
3 little bit more on the last part.

4 The first part is that -- that kind of goes to my
5 point again about no matter how much post-'55 evidence can be
6 marshaled that it may or may not have been treated as if it
7 were a park, as I said at the beginning of the hearing, in our
8 view, in our position, it's irrelevant because that's not one
9 of the charter triggers. But we'd add, as we did in our
10 closing, that there's a lot of post-'55 activities that point
11 in exactly the opposite direction. The biggest example being
12 the humongous parking lot out of there that the City, by its
13 behavior, has demonstrated just the opposite. Not to mention
14 the fact that major portions of what we used to call originally
15 Parcel 31 were carved out from major streets. Is that any way
16 to treat a park? The City, by its behavior of allowing a big
17 part of it to be carved out for non-park uses, points in
18 exactly opposite direction.

19 But now I'm obfuscating a little bit because I'm
20 saying all that doesn't matter, because neither fall in the
21 express charter triggers that are provided. But let me mention
22 -- let me mention a nuance to this, which I think is implicit
23 in your question, is that read literally the charter does seem
24 to leave a gap for the situation you've got here where you've
25 got property where the City owned the fee title to the land

1 before '55, but decides later to make it an official City park.

2 And as you heard evidence in this case, Your Honor,
3 what's going on all over the city right now, as a matter of
4 fact, is that we take the position that we, the City, can
5 create a third protected category by applying ordinance
6 dedication of park land, designation of park land to any land,
7 whether it was acquired originally before '55, or acquired
8 after 1955. And that, in fact, happened in this case.

9 Outside the 11 acres that we're conveying to DPS, we
10 went ahead and took now at last the rest of Parcel 31, and gave
11 it formal designation by ordinance. And our interpretation --
12 let me say this is an example of where, you know, we old
13 municipal geeks, you know, municipal lawyer geeks view the
14 charter as a document of limitation. Okay. It establishes
15 kind of a baseline of lines we cannot cross, we have to comply
16 with these requirements. But we self-impose by ordinance an
17 additional category. A property that we maybe owned before '55
18 that we're now going to recognize as park, by ordinance.
19 Meaning, that that will require voter approval to ever convey
20 that land in the future.

21 We've created this third category of protected park
22 land and indeed applied it in the nearby property that wasn't
23 being sold to DPS in this case. As the Court indicated, you
24 know, to the extent they make the argument that there's a
25 historical trail, well, the trail has been preserved. The

1 whole use of this is a greenway for bikes and pedestrians and
2 horses, and has been preserved and is now locked down and fully
3 protected as park land. But not the 11 acres that we're
4 selling to DPS, which has been used for all kinds of things
5 through the years.

6 THE COURT: Which means brings me to a question that
7 came up earlier is: Where do you draw the boundaries? How far
8 do you go? Do I focus on the 11 acres? Do I focus on the 26
9 acres? Do I focus on even a broader area in trying to evaluate
10 the proper characterization of this land? What are your
11 thoughts about that?

12 MR. BROADWELL: Well, to us, the way we tried to
13 frame it for the Court, we believe the whole case is about the
14 status of what we call Parcel 31, one of the parcels that was
15 among the series that we purchased back in the 1930s for flood
16 control. And that entire parcel has never been a park, is our
17 position, never been recognized as a such pre-'55. Or until
18 recently, none of it had been designated as such by ordinance
19 post-'55.

20 THE COURT: Let me just stop you there to make sure
21 I'm clear on this. My recollection of Parcel 31 is that it
22 includes now includes the Hentzel Park, whatever the -- let me
23 backtrack. Parcel 31 included what is now part of the
24 subdivision; does it not?

25 MR. BROADWELL: No.

1 THE COURT: Okay.

2 MR. BROADWELL: No, the subdivision was all created
3 on private land outside of Parcel 31.

4 THE COURT: Okay. So fill me in a little bit more on
5 Parcel 31.

6 MR. BROADWELL: You know, I may have some factual
7 gaps in what I'm saying. I don't know if -- there was an
8 entity, Hentzel Park, officially designated by ordinance in the
9 1970s, early '80s.

10 THE COURT: '83, I think.

11 MR. BROADWELL: I have the Parks guy, the Parks
12 surveyor here. Whether any part of Hentzel Park was ever a
13 part of Parcel 31; can I look for a head nod?

14 THE COURT: Sure.

15 MR. BROADWELL: So he's indicating that Hentzel lays
16 north, I believe, north of what we're calling Parcel 31.

17 THE COURT: Okay.

18 MR. BROADWELL: Parcel 31, for all these years, has
19 kind of been an orphaned parcel coming on down to Havana,
20 right? And above which Havana was carved out of it, a part of
21 the adjacent neighborhood street was carved out of it, and the
22 parking lot was carved out about 30 years.

23 THE COURT: How about part of the golf course?

24 MR. BROADWELL: I believe part of the golf course and
25 the bike path go through Parcel 31. Is that correct? Yes.

1 THE COURT: Okay.

2 MR. BROADWELL: But it never had official park status
3 until now, until April of this year, by ordinance.

4 THE COURT: Okay. So from your standpoint is Mr.
5 Case asking me to find that the 26 acres is a park or the 11
6 acres or the 10.7 acres is a park?

7 MR. BROADWELL: Well, if you --

8 THE COURT: Or does it make a different?

9 MR. BROADWELL: I don't know that it makes a
10 difference. I think the case in controversy is only about the
11 11 acres. What's being challenged here is a contract to convey
12 the property to DPS. So to a certain extent everything on the
13 periphery becomes irrelevant. That's why you heard me
14 objecting during their hearing every time something came up
15 about anything outside those 11 acres; that's my position.

16 THE COURT: Well, there was -- I overruled almost a
17 number of your objections, and I recognize and freely
18 acknowledge that a lot of information came in that was
19 extraneous and ultimately irrelevant. For example, it strikes
20 me as -- it's hard for me to understand how an elementary
21 school needs 10.7 acres, but big deal, it doesn't have anything
22 to do with what we're talking about today. It's not my --
23 that's not my issue.

24 MR. BROADWELL: And that's why I led with that in my
25 closing, but DPS may wish to comment on that as well.

1 THE COURT: Talk about the policy discussion I had
2 with Mr. Case; if you would. Do you think there was a policy
3 decision here?

4 MR. BROADWELL: Absolutely not, not as defined by all
5 the case law in distinguishing policy versus administrative in
6 the cases, no. I mean, it's not as if the transactional
7 decision to sell this property to DPS affects any other
8 property in the City. Doesn't set any sort of binding
9 precedent or doesn't determine how any other property would be
10 treated. You know, certainly all the cases that talk about
11 initiative and referendum, they all have slightly different
12 facts; no doubt about that.

13 But I'm encouraging the Court, of course, to focus on
14 the broad principles of how they define these things. And the
15 Vagneur case flat-out says contracts -- approval of contracts
16 are typically deemed not to be legislative. But, if I may, if
17 I can go on a little bit, it's remarkable in the Vagneur case
18 that they tried to bootstrap exactly the same argument being
19 made again today that, well, it's like a rezoning. When you
20 agree to sell municipal property and in effect convert it to a
21 different use, that's tantamount or equal to rezoning the
22 property. And I can understand why the parties in Vagneur made
23 that argument and I can understand why Mr. Case made it,
24 because somehow or other if we can make it seem like zoning,
25 then you go back to the Margolis case.

1 And Margolis stood for the principle that a site-
2 specific rezoning, even though it only affected one property,
3 well, since zoning as legislative, then the amendment to zoning
4 is legislative, and therefore, you know, in that case some
5 site-specific rezonings were deemed to be subject to initiative
6 and referendum.

7 But Jeff Marquez and the Vagneur case have
8 specifically knocked down that argument. It said, nope, a real
9 estate transaction is different from a legislative rezoning.
10 Never the twain shall meet. And the rest of the court did not
11 accept that attempt to bootstrap Margolis under a real estate
12 deal. Real estate deals consistently have been found to be
13 administrative, not legislative, not policy making.

14 THE COURT: Which means brings me to page 3 of the
15 School District's brief, which says a court-issued injunction
16 will impeded the policy-making process. It's really not a
17 policy-making process that's being interfered with; it's a
18 simple real estate transaction, you would argue.

19 MR. BROADWELL: You may wish to ask them about their
20 choice of words, but I think policy in that case means it's
21 what I started with my closing, Your Honor, which is the whole
22 political question issue. And the fact that elected officials
23 are guided by all kinds of subjective consideration when
24 they're making a decision to do this or do that on a
25 transactional basis, and courts typically don't substitute

1 their judgment. We up here to talk about the law. Right? So
2 I think the reference to policy in their closing may have been
3 meant in that sense.

4 THE COURT: Just a second. I wanted to ask you
5 something about Vagneur that I thought I had it highlighted. I
6 can't find it now. So it bother, Mr. Broadwell, that the City
7 can represent for decades that this is park land, tell
8 homebuyers who want to make sure that it's going to be park
9 land not to worry, only to have this changed after decades and
10 discover that it's not park land?

11 MR. BROADWELL: If you want to have a discussion
12 about estoppel and the degree to which that could be --

13 THE COURT: I want to know if, as a citizen of
14 Denver, if you can understand how that would be kind of a
15 troubling series of events. You can't rely on your City's --
16 on the representations of a mayor or Parks and Rec official,
17 you can't rely on decade's worth of maps that this is a park
18 area. Isn't there something about that that's just very
19 troubling? Forget about the legal issues.

20 MR. BROADWELL: Okay. Yes. And let me respond in a
21 human way, kind of on a couple different levels. But let me
22 start by saying I think in the hearing you heard a variety of
23 things said, including representations in an historic record
24 that it might become a park someday. It's not a park now, but
25 it's planned to be a park in the future. Right? So it's not

1 as if we have in this case an unbroken chain of definitive
2 promises and representations being made by City officials
3 through the years.

4 And, you know, in our opening we said the fact that
5 it's called Hampden Heights North Park came as news to us until
6 we started studying the maps ourselves and we believe that's on
7 a Google map that's been overlaid with some City information.
8 We don't think there are -- that the moral question you're
9 raising was raised I think more dramatically than the facts of
10 this case. It's not as if we have official city maps or an
11 unbroken chain of assurances that nail it quite as much as
12 you're describing in this particular case.

13 But you said you didn't want me to give the legal
14 answer, but unfortunately kind of have to lapse into that a
15 little bit. As a municipal attorney for 33 years, I can't tell
16 you how many times I've had to answer for something somebody
17 said 15 years ago. Right? And this happens a lot in local
18 government. So and so told me 15, 20 years ago.

19 THE COURT: And the law says basically we're sorry
20 that that person made that representation, and we're sorry that
21 you relied on it.

22 MR. BROADWELL: And I lapse into Civics 101, which is
23 where government of law is not man; that you have to look to
24 the official record, you have to look to the laws of the city
25 in terms of the representations made by any individual

1 officials, even if they're in elected official, that we just
2 can't operate that way where conversations over the back fence
3 or letters or memos somebody might have written that used words
4 a little too loosely, if that were to bind municipal
5 governments in some sort of formal, legal way it would be very,
6 very difficult for us to do business.

7 Life becomes a big game of he said/she said when you
8 get into these factual disputes about the status of property or
9 how we enforce our dog laws, or whatever the case maybe. I was
10 promised such and such. We have to rely on the law as being
11 the ultimate authority to answer these questions.

12 THE COURT: Do you have any idea about the number of
13 other properties that the public very well might consider to be
14 a park, maybe has been a park for five, ten, 20, 30 years, and
15 which in fact is just maintained as a nice area by the City
16 subject to a good deal coming along? Do you have any idea?

17 MR. BROADWELL: I can't precisely quantify it, Your
18 Honor. But the one huge irony surrounding this case is that we
19 have an administration and a Parks manager now who
20 systematically is updating our formal park designations to fill
21 those gaps, to take properties that logically ought to be
22 designated but haven't, for whatever reason through the
23 decades, and to clean that up and to bring our parks maps up to
24 date with more formal designations by ordinance. How many are
25 on the protected side of the line versus the non-protected side

1 of the line? Those who raise -- I can't say with any precision
2 in terms of acreage. But those who raise the specter of that
3 problem, we urge them to be specific. Tell us a property you
4 think might be exposed if the Court today were to deny the
5 motion for preliminary injunction. What precedent this would
6 set, what properties that would expose. Tell us about it.

7 Because we have a Parks administration now that's
8 committed to doing appropriate designations and we have done
9 not just the remainder of Parcel 31, but there are other places
10 around town just in the last few months where we have made
11 additional designations. It's part of the political process of
12 making the pitch and getting property protected.

13 THE COURT: I think I'm done. Let me just look at my
14 notes. Your position with respect to -- just to clarify, your
15 position with respect to the testimony of Charles Bonniwell,
16 which I think I may have earlier referring to as very
17 interesting and enlightening, the sum total of your response is
18 that's all well and good, Mr. Bonniwell, but from the City's
19 standpoint that's not enough to create a park.

20 MR. BROADWELL: If the park benches and the
21 landscaping and the parks management over here at the old
22 courthouse square wasn't enough, then riding horses
23 occasionally shouldn't be enough as well, in terms of how parks
24 are understood back in the 1940s and '50s. That's part of our
25 answer, but that gave me an opportunity to mention one other

1 point, which is that I know that the Plaintiffs tried to link
2 the original frontier trails coming down Cherry Creek with the
3 later equestrian activity that might have occurred 100 years
4 later.

5 We rhetorically asked one of the witnesses this
6 question, which is we don't deny we were buying up the Cherry
7 Creek bottom, and there were some easements and deeds
8 associated with that. But you go out there now, yeah, it's a
9 bike trail, but a lot of that's in streets, a lot of it's in a
10 utility corridor. There are all kinds of things going on
11 there. And at the end of the day the fact that one of the uses
12 that has historically been made of that corridor may have been
13 a trail use, it's just -- the rhetorical question we asked was,
14 well, if people ride bikes and jog on the streets, that doesn't
15 make them a park. This is part of the mix, in terms of how
16 the property is used.

17 But if mere use for recreational purposes of a City-
18 owned parcel made it a park, it would throw everything kind of
19 into an uproar. And so that is our position.

20 THE COURT: Okay. Thank you.

21 MR. BROADWELL: Thank you.

22 THE COURT: Well, I recognize that there's an
23 emotional aspect to this case and I recognize that there may
24 be a political aspect to this case, but I have to focus on the
25 legal aspect of this case. And in my view, I'm sorry to say,

1 Mr. Case, that I am going to deny your request for a
2 preliminary injunction on the grounds that I cannot, in good
3 conscience, make a finding that there's a likelihood of success
4 on the merits.

5 I think your argument has been very well presented,
6 it has been creative, it has been thoughtful, it has been
7 detailed. And I commend you, lawyer to lawyer, for putting the
8 argument together. It's just -- from my standpoint, I think
9 the case law cannot get me where you would like me to be.

10 On the issue of the ballot matter and the like, I
11 have to say it is extremely bothersome that land represented to
12 be park land and used by and large as park land for decades,
13 can be pulled out from under the public and turned into another
14 use. But I think the case law indicates pretty clearly that
15 this is not a legislative matter that took place here. It was
16 an administrative matter.

17 And absolutely something needs to be done with
18 respect to properties in the City and County of Denver that
19 fall in this same category, but that's not my job. As a
20 citizen and as a human being, it's very bothersome. But from
21 the standpoint of my role as a judge, I agree with Mr.
22 Broadwell, who also presented a very well thought out and
23 articulate argument.

24 Any questions?

25 MR. CASE: So are we going to have a trial?

1 THE COURT: Well, you can make that decision later.
2 This is a preliminary injunction. It's not up to me to say
3 that I'm not going to give you a trial. Maybe you'll come up
4 with something else. I don't know. Maybe the two sides can
5 agree on swapping an acre out here or there, you know. I don't
6 know, but --

7 MR. CASE: Your Honor, here's --

8 THE COURT: You and your clients are going to have to
9 make that call.

10 MR. CASE: I would like to set a trial date. I think
11 we are entitled to a jury decision on whether this is a park.

12 THE COURT: That's fine. You need to set it. I
13 don't know about a jury or not; I haven't even given that any
14 thought. But in terms of setting a trial, just file a notice
15 to set and the like. I have short staff today and it's going
16 to be difficult.

17 MR. CASE: All right.

18 THE COURT: You need to just set it through the
19 regular process on notice.

20 MR. CASE: So just to --

21 THE COURT: If there's an issue, Mr. Broadwell, on
22 jury trial or court trial, we'll have to take that up. We can
23 still set it. And I would still set it for a jury trial, just
24 to make sure we've got the number of days. But if I have to
25 make a determination on court trial or jury trial, I'll cross

1 that bridge when I get to it and I'll try to give you as quick
2 a trial as I reasonably can understanding the stakes involved.

3 MR. CASE: Thank you, Your Honor. Are you then
4 denying the petitioners' committee the right to circulate a
5 referendum petition and submit it to the Clerk and Recorder?

6 THE COURT: I'm telling you that -- consider it as --
7 I don't know if it's properly in front of me in a technical
8 sense, but I wanted you to know where I'm coming from.

9 MR. CASE: I'm understanding from that comment that
10 you think we need to submit the petition to the Court, and have
11 it denied, and then bring it back.

12 THE COURT: I think that that is probably
13 procedurally the better way to do it.

14 Do you have any thoughts, Mr. Broadwell?

15 It's kind of what -- what I've said basically is I
16 consider it somewhat an advisory nature, and this is what my
17 current thinking is. But it's not -- I'm not sure it's really
18 properly before me for an official legal determination.

19 MR. BROADWELL: Your Honor, I think that's right,
20 that it was framed as a preliminary injunction trying to get
21 you to keep the Clerk from interfering with their right to
22 petition.

23 THE COURT: Right.

24 MR. BROADWELL: But it's going to remain our
25 consistent position that they're circulating petitions in

1 violation of the charter, because they didn't get them approved
2 by the Clerk and Recorder. If they return them, our position
3 will be that they're unlawful and that the Clerk will not be
4 putting it on the ballot. That may lead to an appeal of that
5 decision by the Clerk, which may more properly frame the issue
6 at that time, which would be sometime between now and August, I
7 imagine.

8 MR. CASE: So, Your Honor, part of our request in the
9 -- against the Clerk and Recorder was that the Court extend the
10 timeframe from the 90 days that's allowed under the City's
11 rules, because we were off putted on this until May the 21st.

12 THE COURT: I don't even remember that. Is that
13 something that you would oppose, Mr. Broadwell?

14 MR. BROADWELL: Absolutely, Your Honor. Yes.

15 THE COURT: Well, let me hear your argument. I'll
16 see if I can make a ruling.

17 MR. CASE: Thank you, Your Honor. So on April 1, the
18 City Council passed the ordinance.

19 THE COURT: Passed the ordinance.

20 MR. CASE: And we met with Mr. Broadwell right around
21 that time, and he pointed out to us that there's really no --
22 initially we went with a petition initiative, which is
23 different than the referendum that's before this Court now, and
24 the initiative would have designated five natural areas as
25 parks. And Mr. Broadwell said, well, really you're wasting

1 your time there because the City is going to take care of this,
2 and besides if we pass this ordinance if -- if on April 1, the
3 ordinance is passed trading away this -- approving the sales
4 contract with DPS, you won't be able to get that ground back,
5 you know, the horse will be out of the bare and gone.

6 So your initiative as to Hampden Heights North Park
7 just would be -- it would be too late, you know, DPS would
8 already own the ground. So then he pointed out and, by the
9 way, this is administrative action not legislative, so you
10 would have no remedy with a referendum petition.

11 So we undertook, after that conversation, to do the
12 legal research to determine whether or not Mr. Broadwell was
13 correct or not, and we determined that he was not, respectfully
14 disagreeing with your decision well. We think that this was a
15 legislative act changing 45 years of land use policy.

16 So once we had that research done, then we
17 resubmitted our petition to the Clerk. That was on May 13.
18 She wrote back on the 17th, which was four days later, not
19 three as the rules require, and said, you know, it's
20 administrative, not legislative, so you can't circulate the
21 petition. And we then on May 20 --

22 THE COURT: So you can't circulate them or you can
23 circulate them but I'm not going to --

24 MR. CASE: No, she said you can't circulate them.
25 She said your only remedy is to sue us. So we thought that she

1 was wrong on the law, so we started circulating petitions on
2 May 22nd, and that's -- we feel like we're rightfully entitled
3 to 90 days from May 22nd. So that would give us until August
4 22nd, to get the signatures that we need.

5 THE COURT: May 27 or 22?

6 MR. CASE: 22.

7 THE COURT: 22.

8 MR. CASE: Right, which actually would be August
9 19th, I think would be the 90 days.

10 THE COURT: And so you say the 90 days began at a
11 different time, Mr. Broadwell?

12 MR. BROADWELL: It's not me; it's the charter. The
13 charter starts counting the 90 days from the adoption of the
14 ordinance itself. That's the referendum rule by charter in
15 Denver. Your Honor, if I may?

16 THE COURT: Yes.

17 MR. BROADWELL: We talked about this a little bit in
18 our written submissions to the Court. We think the whole
19 appeal of the Clerk's decision was botched from the get-go. It
20 should have been brought -- an appeal should have been brought
21 by the petitioners committee under 106 immediately after the
22 Clerk made her decision. And in lieu of doing that, they filed
23 this action, which includes the request for injunctive relief,
24 but the parties -- they could have been in court the next day
25 with a 106 claim and could have brought to the attention of the

1 Court the fact that time was of the essence because of the 90
2 days imposed by charter. But that's not what happened.

3 And so at this point our position is clear that it is
4 what it -- particularly in light of what's happened here today,
5 that the Plaintiffs -- petitioners committee, I should say,
6 distinct from the Plaintiffs, the petitioners committee made
7 their own choice to defy the Clerk's decision and begin to
8 circulate. But that's not what should have had happened at
9 that point. What should have happened should have been the
10 appropriate appeal by the petitioners committee from the
11 adverse decision, and that didn't occur. That's our position.

12 THE COURT: I certainly understand what you are
13 referring to about the 104 proceeding. Do I even have, Mr.
14 Broadwell, in your view, the authority to extend the 90-day
15 period?

16 MR. BROADWELL: In our view, no. I think you had it
17 right a few minutes ago when you said it's not properly
18 postured for that. But particularly in light of the fact that
19 the underlying premise of the Court's ruling here on the
20 injunction request is that the Clerk probably did not err in
21 her determination.

22 So there's a huge upside down irony here; the thought
23 that the Court would be going beyond what the charter allows
24 for 90-day circulation, giving them extra time on a petition
25 which you've made something of a determination probably isn't

1 valid to begin with. So that seems surreal to me.

2 MR. CASE: Your Honor, our request -- our complaint
3 was filed under 106. The claim against the Clerk was filed
4 under 106. So I think we did what the Clerk told us to do.
5 She said if you don't like my ruling, you may institute legal
6 proceedings with the appropriate court, so we did.

7 THE COURT: So do I have -- I've already told you
8 that my strong inclination is that the Clerk didn't act in
9 excess of her authority or abuse her discretion, in essence, to
10 use some 106 language. I don't even know if I have the
11 authority to extend the 90 days. Can you tell me that?

12 MR. CASE: I think you do if --

13 THE COURT: Inherent authority?

14 MR. CASE: Pardon?

15 THE COURT: I have inherent authority?

16 MR. CASE: Well, you have the power to review the
17 Clerk's decision and if --

18 THE COURT: Which I've done to a large extent. I
19 mean I really feel like -- unless there's something that
20 additionally can be brought to bear, I'm sorry to say I think
21 the Clerk's decision, as unfair and heavy handed from a
22 standpoint of the government hitting the citizens on the head,
23 legally I think she's correct. I just -- based on the Vagneur
24 case. That was a pretty -- I felt that was a strong case in
25 favor of the City and I've got to follow that. That's the

1 Colorado Supreme Court. It's, you know, a three- or four-month
2 old case. Hot off the presses in our world.

3 MR. CASE: Well, I think there is a factual --

4 THE COURT: I'm perfectly fine, based on the record
5 before me, to issue an order saying -- denying your request for
6 106 relief. It just sort of fell by the wayside, but I wanted
7 to let you know where what my thoughts were on it. That's how
8 the whole thing came up.

9 MR. CASE: Right.

10 THE COURT: I don't -- any other facts that would be
11 brought to my attention?

12 MR. CASE: Well, sure. The City kept us -- both the
13 Clerk and Recorder and Mr. Broadwell kept us in this
14 conversation from April 1st up until May 22nd about what our
15 rights were. And we finally decided on May 22nd, well, we're
16 going to go ahead anyway. So we'd like the 90 days to start
17 there, instead of April 2nd, when Ordinance 170 was signed into
18 law by the mayor.

19 THE COURT: I understand that and I'm sympathetic to
20 it. And I'm inclined, even though it may put Mr. Broadwell in
21 a never-never land, he'll handle it. If you want more time,
22 I'm inclined to grant it. I just don't know if I have the
23 authority to grant it. The City charter says what the City
24 charter says. If this is a delay caused by oversight or
25 whatever, it is what it is.

1 If you want -- why don't you do this: File a motion
2 asking me to grant the Plaintiffs an extension of time to
3 circulate their petitions, give me some authority, get it
4 before your 90 days is up. Which is?

5 MR. CASE: Monday.

6 THE COURT: Monday. Better get something to me on
7 Monday.

8 MR. CASE: We will, Your Honor, thank you.

9 THE COURT: And we can take it -- I'll rule on it,
10 and then I don't think -- my best guess is that if I see -- if
11 I can grant you an extension within the law, I'll give you some
12 more time to do it. Do I think the Clerk and Recorder's
13 decision designating this as administrative is going to change?
14 I think it's unlikely. But hopes springs eternal and maybe
15 something -- you'll come up with something.

16 MR. CASE: Thank you, Your Honor.

17 THE COURT: Okay. Mr. Broadwell, any questions?

18 MR. BROADWELL: No, thank you.

19 THE COURT: I'm just trying to keep you busy. That's
20 all.

21 MR. BROADWELL: I have to ask because you're ruling
22 today what it is, is there going to be a written order
23 memorializing it or do you want us to prepare anything or
24 what's your normal practice in a situation like this?

25 THE COURT: I would ask you to prepare a very short

1 order denying the request for a preliminary injunction on the
2 basis that I'm unable to make a finding of likelihood of
3 success on the merits. Therefore, I don't need to address the
4 other Rathke factors, and the details of my decision are
5 contained hearing record or something like that. One and a
6 half pages, short and sweet.

7 MR. BROADWELL: Thank you, Your Honor. We'll do
8 that.

9 THE COURT: Is there a record that I need to look at
10 regarding the Clerk and Recorder initiative issue? Because
11 usually in a 106 I'll get something.

12 MR. CASE: Well, they're in the Plaintiffs' exhibits.

13 THE COURT: But that's the whole record?

14 MR. CASE: Well, there's the City Council, which is
15 Exhibit 10, which I know you've read. And then there's the
16 correspondence between us and the Clerk and the petition.

17 THE COURT: Okay. Well, let's see if you can find a
18 way to get more time.

19 MR. CASE: Thank you, Your Honor.

20 THE COURT: Okay. Thank you. Appreciate it. We'll
21 be in recess.

22 (Proceedings concluded at 10:37 a.m.)

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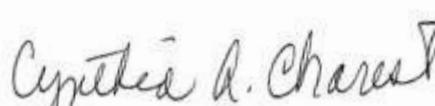
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1 CERTIFICATE2 I hereby certify that the foregoing is a true and correct
3 transcript from the electronic sound recording of the
4 proceedings in the above-entitled matter.

5

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8 _____
9 CYNTHIA A. CHAREST
 Digital Court Transcriber

10 DATED and SIGNED this 1st day of August 2013.

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