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COLORADO COURT OF APPEALS Court Address: 2 East Fourteenth Ave. Denver, CO 80202	
Denver District Court Case No. 2013 CV 32444 Hon. Herbert L. Stern III, District Court Judge	
Plaintiffs/Appellants: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; RENEE LEWIS, DAVID HILL, SHAWN SMITH, JOHN CASE and JUDY CASE, individually and as Members of the Petitioner's Committee; and STEVE WALDSTEIN and ZELDA HAWKINS, individuals. v. **Defendants/Appellee:** CITY & COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity; and DEBRA JOHNSON in her capacity as clerk and recorder of the City and County of Denver.	Δ COURT USE ONLY Δ
Attorney for Appellee: Molly Ferrer, #37857 Jerome DeHerrera, #35893 Deputy General Counsel 900 Grant St. Denver, CO 80203 Phone Number: 720-423-1121	Case No.: 13CA1249

APPELLEE SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER ANSWER BRIEF

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

The brief complies with C.A.R. 28(g).

It contains 4,423 words.

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

s/ Molly H. Ferrer

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Appellee School District No. 1 in the City and County of Denver, State of Colorado ("DPS"), by and through undersigned counsel, respectfully submits its Answer Brief, as follows:

Counter Statement of Issues Presented for Review

I. Did the trial court abuse its discretion or commit legal error in denying Appellants' Motion for a Preliminary Injunction?

II. Are the trial court's Order and record below legally sufficient to support the denial of Appellants' Motion for a Preliminary Injunction?

Statement of the Case

I. Facts.

Over the last six years, DPS's student population increased by more than 12,000 students. ROA Vol. 1, pg. 179:3-8. In Southeast Denver, this surge in students has caused serious overcrowding in the existing neighborhood schools and forced preschoolers in some cases to attend Early Childhood Education ("ECE") in a facility different than their neighborhood elementary school. ROA Vol. 1, pgs. 167:23-168:12; 169:7-14; 184:20-185:3; 209:3-17; ROA Vol. 2, pg. 207:21-24. DPS forecasts that this demand for additional elementary classroom seats in S.E. Denver will continue to increase. ROA Vol. 1, pg. 169:11-14; ROA Vol. 2, pg.

210:6-17. In response to this growth, DPS's strategic regional analysis demonstrated a need in Southeast Denver for a new elementary school that will satisfy the demand for classrooms, especially in the preschool and kindergarten grades. ROA Vol. 1, pgs. 168:21-169:3; ROA Vol. 2, pg. 207:5-16; Ex. G.

In November of 2012, Denver voters passed a mill levy to expand ECE programing so that an even higher percentage of DPS students can receive ECE. ROA Vol. 2, 211:6-8. High quality elementary schools with ECE programs are an important tool DPS hopes will improve the educational outcomes for students in poverty. ROA Vol. 1, pg. 169:17-23; ROA Vol. 2, pgs. 211:21-212:1. With the passage of the mill levy, DPS now has the funding to expand the ECE program, but does not have the capacity in the existing schools in certain areas while also meeting elementary student needs. ROA Vol. 2, pgs. 210:23-211:9.

Also in November 2012, Denver voters approved a bond program to fund the procurement of additional land and development of new schools to meet the growing need for elementary seats. ROA Vol. 1, pg. 185:9-14. With the funding from the bond program, as one of its top priorities, DPS is building a new

elementary school in Southeast Denver that will serve approximately 500 ECE through Fifth Grade students. ROA Vol. 2, pg. 210:6-22; Ex. G at 11.

In order to build the new school, DPS needs approximately 10 acres of land. ROA Vol. 2, pgs. 216:23-217:1. In a mature area of the city, such as the Southeast, it is difficult to find a 10-acre parcel of land suitable to develop a school. ROA Vol. 2, pg. 217:7-12. In 2012, DPS identified a 10.7-acre site, owned by the City, as being suitable for the new elementary school (the "School Site.") ROA Vol. 1, pg. 171:11-23. While the City owned the land, the School Site consisted of an unused parking lot and an area of unmaintained and undeveloped land. ROA Vol. 1, 63:8-17; Ex. F. DPS purchased the School Site because of its location near the neighborhoods where the school's future students live. ROA Vol. 1, pgs. 171:11-23; 185:19-24; 188:7-13; 189:10-16; ROA Vol. 2, pg. 216:18-23. DPS also appreciated that the School Site abutted a natural area, which could enhance the School's educational program. ROA Vol. 1, pgs. 181:1-12; 185:19-186:7; 186:11-187:8; 189:17-190:4. Because of the difficulty of finding a suitable and affordable 10-acre parcel in Southeast Denver, DPS found

no alternative locations for the new elementary school. ROA Vol. 2, pgs. 221:18-19; 222:9-19.

To secure the School Site, DPS and the City entered into an agreement ("the Contract"), whereby DPS agreed to convey to the City a building and parcel of land at 13th Avenue and Fox Street ("Fox Street") in exchange for the School Site plus $705,000. ROA Vol. 2, pgs. 215:25-216:15; Ex. 5. The City intends to use Fox Street to build a center to support victims of domestic violence. ROA Vol. 1, pg. 142:7-9. After the trial court denied Appellants' Motion for a Preliminary Injunction, the parties closed on their transaction and DPS took ownership of the School Site. Ex. 5.

The City purchased the School Site in 1936 for the purpose of flood control. ROA Vol. 2, pgs. 243:1-3; 256:7-13. Between 1936 and 1955, the School Site remained an undeveloped and unmaintained parcel of land. ROA Vol. 2, pgs. 246:9-11; 247:7-9, 19-22; Ex. I. During the preliminary injunction hearing, an historian testified that he believed people occasionally rode horses across the property prior to 1955, because the property is located near Cherry Creek. ROA Vol. 2, pgs. 283:14-285:12. Other than this opinion, there is no evidence in the

record that the School Site was used for recreation purposes as of 1955. The record is entirely devoid of any evidence that the City treated, or even considered, the School Site as a park before 1955. ROA Vol. 1, pgs. 64:23-65:1; 111:16-18.

The City Charter provides the following with regard to the sale and creation 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…

Denver City Charter § 2.4.5. It is undisputed that the City never passed an ordinance designating the School Site as a park before it was sold to DPS.

In 2007, the Manager of Parks and Recreation designated the School Site as a natural area. ROA Vol. 1, pg. 94:11-18. The Manager of Parks and Recreation has the authority to designate a parcel as a natural area without an ordinance passed by City Council. *Id*. A site does not have to be a designated, or dedicated, park in order to be designated by the Manager of Parks and Recreation as a natural area. ROA Vol. 1, pg. 112:13-15. The Manager of Parks and Recreation, without an ordinance by City Council, also has the authority to de-designate a natural area.

ROA Vol. 1, pgs. 94:9-18; 107:7-25. In 2012, the School Site was properly de-designated as a natural area by the Manager of Parks and Recreation. *Id*.

The School Site was sold to DPS by City Ordinance 170. After the sale of the School Site, Appellants filed a request for petition with the City Clerk to circulate a referendum to repeal City Ordinance 170. ROA Vol. 1, pgs. 160:10-23; Ex. 6. The City Clerk denied Appellants petition because Ordinance 170 was an administrative act and, therefore, not subject to referendum. ROA Vol. 1, pg. 161:3-10; Ex. 9.

DPS has spent more than $400,000, and has committed to design fees in excess of $1 million, for the planning and preparation of the School Site. ROA Vol. 2, pg. 221:7-17. DPS intends to open the new elementary school for the beginning of the 2015-16 school year. ROA Vol. 2, pg. 220:6-12, 18-23. To meet this goal, DPS adopted an aggressive construction schedule. ROA Vol. 2, pg. 220:6-12, 13-23.

II. Procedural History

Appellants filed their Complaint on May 30, 2013, alleging they were entitled to declaratory relief preventing the use of the School Site from anything other than a park and for judicial review of the clerk and recorder's rejection of

their petition to circulate a referendum. That same day, Appellants filed a Motion for a Preliminary Injunction. After a two-day hearing, in which eleven witnesses testified and fifty-six exhibits were entered into the record, the trial court denied the motion because Appellants failed to show a likelihood of success on the merits of their claims. Order, 06/05/13. Because Appellants could not show a likelihood of success on the merits, the trial court did not need to rule on the other elements that Appellants would have had to demonstrate to win their motion for a preliminary injunction. Appellants filed this appeal to challenge the denial of their motion for a preliminary injunction.

Appellants then moved for an injunction pending the appeal at the trial court level. Appellants made the same arguments, relied on the same facts, and the trial denied the motion because, once again, Appellants failed to show a likelihood of success on the merits. Tr. 09/19/13, pg. 28:1-9. The trial court also found that Appellants failed to demonstrate that the public interest weighed in favor of an injunction because public interest concerns equally weighed for and against the injunction. Tr. 09/19/13, pgs. 7:20-9:5.

Next, Appellants filed a motion in this Court, again asking for an injunction pending the final outcome of this appeal. This court denied Appellants' motion on October 18, 2013.

Standard of Review

"The grant or denial of a preliminary injunction lies within the sound discretion of the trial court." *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo.1982). This Court "review[s] a ruling on a motion for preliminary injunction with deference to the conclusion reached by the trial court and will not overturn a trial court's ruling unless it is manifestly unreasonable, arbitrary, or unfair." *Home Shopping Club, Inc. v. Roberts Broadcasting Co. of Denver*, 961 P.2d 558, 561 (Colo. App. 1998). To the extent the trial court's order dated July 5, 2013 denying the preliminary injunction relied on the first *Rathke* factor—i.e. whether the Appellants demonstrated a reasonable probability of success on the merits of their claims—the appellate court's review of this finding is *de novo*. *Denver Firefighters Local No. 858*, *IAFF, AFL-CIO v. City & County of Denver*, 292 P.3d 1101, 1104 (Colo. App. 2012).

Argument

I. The Trial Court Properly Denied Plaintiffs' Motion for a Preliminary Injunction.

In moving for an injunction, Appellants were required to demonstrate: (1) that there is a reasonable probability of success on the merits of their claims; (2) that a danger of real, immediate, and irreparable injury exists which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of the preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Rathke*, 648 P.2d at 653. "If any criterion is not met, injunctive relief should not be granted." *Home Shopping Club, Inc.*, 961 P.2d at 560 (citing *Board of County Commissioners v. Fixed Base Operators, Inc.*, 939 P.2d 464 (Colo.App.1997)). "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issuance depends upon the circumstances of the particular case." *Id*.

The trial court found Appellants failed to demonstrate two of the six criteria—a reasonable probability of success on the merits of their claims and that

the balance of the equities weighs in favor of an injunction. As explained below, the trial court acted properly in denying Appellants' Motion for a Preliminary Injunction on either of these two grounds.

A. The Trial Court Correctly Interpreted the City Charter and Colorado Law When it Held that Appellants Failed to Demonstrate a Reasonable Likelihood of Success on the Merits of their Claims.

In their underlying Complaint, Appellants request a declaratory judgment that the School Site is a "park" and the City violated the City Charter by selling the parcel without voter approval. Based on the theory that the School Site is a "park," Appellants also request a declaratory judgment that the sale of the School Site was a "de-facto rezoning" of the property and, thus, a legislative act that could be reversed through a referendum by Denver voters.

The trial court concluded that Appellants failed to demonstrate a reasonable likelihood of success of proving that the City had designated the School Site as a park, either by common law or otherwise, and determined that the sale of the School Site was an administrative act. Order, 06/05/13.

1. Appellants failed to demonstrate the School Site was a City-owned "park" *as of* 1955.

Because the City never designated the School Site as a park by ordinance, Appellants argue that the City dedicated the School Site as a park by common law as of 1955. Appellants failed to carry their burden:

> Plaintiffs did not demonstrate that the property was a "park belonging to the city *as of* December 31, 1955" to the extent voter approval would be required prior to the conveyance of the property.

Order, 06/05/13. The trial court correctly applied the facts in the record to Colorado law regarding how, as of 1955, a property could become a protected park.

Appellants did not contend that as of 1955 the School Site became a protected park by statute or prescription; rather, Appellants argue that the School Site became a park as of 1955 by common law. Contrary to Appellants' argument, there is no common law dedication of property as a protected park. Appellants argue that in *McIntyre v. Bd. of Commissioners of El Paso Cty*, 61 P. 237 (Colo. App. 1900), the court held that property could become a protected park by common law dedication. However, the court in McIntyre did not find that there was common law dedication of a park. The parties in McIntyre conceded

that there was a dedication of the property as a park; therefore, the court was "relieved … from the necessity of considering whether the dedication was a statutory one or one at common law, or whether the right which the city authorities possessed to control the square, and the people of the city to use it, is acquired by prescription." *Id*. at 239. Appellants cite to no other case law that would support the proposition that the City could dedicate a parcel as a protected park (with restrictions on a future sale) by common law.

There is Colorado case law discussing when there is a common law dedication of property *generally* to public use. *See e.g. City of Northglenn v. City of Thornton*, 569 P.2d 319, 321 (Colo. 1977). However, as stated above, there is no authority for the proposition that there can be common law dedication of a protected park, which would restrict the later sale of the property. Even where there is a dedication of property to the public for use generally, "[a] dedication of property to the public use is never presumed without evidence of unequivocal intent to make such a dedication." *City of Northglenn*, 569 P.2d 319, 321 (Colo. 1977). "[F]or a common law dedication to be found there must be certain elements present including an intent on the part of the owner to dedicate and an acceptance

of the dedication by the governmental authority." *Id*. "To show a dedication, it should clearly appear that the owner intended to give the land to the public … no presumption that the owner intended to deprive himself of his land can be relied upon to explain any ambiguities or uncertainties. The particular use for which the land was intended must plainly appear." *Chicago, R.I. & P. Ry. Co. v. Hayes*, 113 P. 315, 318 (Colo. 1910).

There is no common law dedication of a property to public use (for any reason) if the owner of the property does not intend to offer land to the public. This is true even if the parcel is used for recreational purposes. *See Hall v. City and County of Denver*, 177 P.2d 234 (Colo. 1946); *see also Starr v. People*, 30 P. 64 (Colo. 1892) (mere use by the public, without acts or declarations indicating an offer to dedicate, was not sufficient to vest a roadway to the public). In *Hall*, the Supreme Court rejected the plaintiffs' argument that the City dedicated a parcel of land as a park that could not later be sold because the City improved the parcel and the public used the parcel for recreational purposes. *Id*. at 236.

In this case, it is undisputed that the City purchased the School Site for flood control purposes. ROA Vol. 2, pg. 256:7-13. There is no evidence the City intended to dedicate the School Site to the public prior to 1955, for any use. The only evidence in the record regarding the City's actions towards the School Site as of 1955 is that the City did not improve the area and left it as a vacant parcel. ROA Vol. 2, pg. 253:11-24, 255:7-10. As for the use of the School Site for recreational purposes a local historian, Charles Bonniwell, testified that people may have ridden their horses across the property and may have had picnics in the area. ROA Vol. 2, pgs. 281:25-282:3. Even if Appellants could verify Mr. Bonniwell's opinion, occasional use of a parcel by the public for recreation does not support a theory of common law dedication to the public, much less common law dedication as a park. Nor would it establish that the School Site is any different than other, vacant, city-owned lands over which people rode their horses and stopped for picnics, but which did not become parks. Occasional, historic recreational use by the public does not demonstrate the necessary intent by the City to dedicate land to the public, let alone to dedicate it as a protected park.

Because, as a matter of law, there is no common law dedication of property to the public as a protected park (which would restrict its later sale), the determination that Appellants failed to demonstrate a reasonable success on the merits was well within the trial court's discretion and not legal error. Even if there were such a thing as common dedication of park property as of 1955, Appellants failed to bring forth evidence that would support an unequivocal intent by the City to dedicate the school site to the public as a park prior to 1955, and the trial court correctly and within its discretion found that the School Site "was not a park as of 1955."

2. The trial court correctly held that the City's Charter requires an at-large vote only if the parcel was a park *as of* 1955 or if it was designated as a park by ordinance after 1955.

Interpretation of the City Charter is a question of law subject to *de novo* review. *North Ave. Ctr., LLC v. City of Grand Junction*, 140 P.3d 308, 310 (Colo. App. 2006).

In general, the City can sell real property after receiving approval from the City Council through an ordinance or a resolution. City Charter Section § 3.2.6 (C). The general rule was limited in 1955 when the City Charter was amended to

require voter approval for the sale 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…

City Charter § 2.4.5. As discussed above, the trial court correctly found that neither of these exceptions applied to the School Site.

Appellants ask this court to read into section 2.4.5 that the City also cannot sell parcels it has left undeveloped and which the public uses for recreation, unless the voters authorize the sale. This argument is contrary to the plain language of the Charter and to the dearth of case law to support this proposition. Based on the plain reading of the City Charter, the trial court correctly held that the sale of the School Site did not require voter approval.

Citing to no authority, Appellants also argue that common law dedication occurred after 1955, which conflicts with the Charter's plain language and Colorado law. As a matter of law, there was no common law dedication of property as a protected park prior to or after 1955. *Supra section* I.A.1. Even if

common law dedication were possible before 1955, the plain language of the Charter specifically states that a vote is only required for park belonging to the city as of 1955, or property that was designated as a park after 1955. There is no, silent, third category of property that would require an at-large vote.

Even if there was common law dedication of park after 1955, Appellants failed to carry their burden because the record does not support that the City intended to dedicate the School Site to the public for any use, let alone a protected park, after 1955. After 1955, the City did not maintain the School Site or develop it as a park. Further, the City's use of the School Site was inconsistent with that of a park. For example, the City permitted an easement through the area for Girard Avenue and built a parking lot on the parcel for non-public use. (ROA Vol. 1, pgs. 125:8-23, Ex. E); built a parking lot on the parcel for non-public use (ROA Vol. 1, pgs. 72:9-73:6); and, at some point, used the site as a landfill (ROA Vol. 1, pgs. 120:4-6; Ex. D).

It is undisputed that the City never designated the School Site as a park by ordinance and Appellants failed to establish that the School Site was a "park as of 1955." Therefore, the trial court properly held that the City was not required to

obtain voter approval before selling the School Site to DPS.

3. The trial court correctly held the City was acting within its administrative powers when it sold the School Site.

The City acted within its "administrative" powers when it agreed to convey the School Site to DPS. Specifically, the trial court found:

> Plaintiffs did not establish that the City ordinance approving the real estate contract with DPS (Ordinance No. 170, series of 2013) was legislative in nature and thus subject to referendum within the meaning of Article V, sec. 1(9) of the Colorado Constitution and the City Charter.

Order, 06/05/13. Because the sale was an administrative act, the ordinance approving the sale was not subject to a referendum.

The right of citizens to reverse a municipal ordinance by referendum is limited to ordinances that are legislative in nature. The Supreme Court recently confirmed this well-established legal principal in *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013). In *Vagneur*, the Supreme Court reviewed whether a municipal decision regarding a specific parcel of city-owned land was an "administrative" or a "legislative" action. Like Appellants do here, the Petitioners in *Vagneur* argued that a municipal ordinance regarding a specific parcel of city-owned property was legislative in nature because the ordinance was akin to a

zoning decision. In response, among other things, the Supreme Court explained:

> Legislative power is defined by the work product it generates, namely, the promulgation of laws of general applicability; when the government legislates, it establishes a generally applicable rule that sets the governing standard for all cases coming within its terms.

Id. at 506-507. By way of contrast:

> [G]overnment decisions to enter into a contract with a specific entity are not legislative decisions because they do not involve the adoption of generally applicable rules in the implementation of public policy. Instead, such decisions are executive acts involving specific individual parties, and, accordingly, lie beyond the bounds of legislative power.

Id. at 507 (citing *Carter v. Lehi City*, 269 P.3d 141, 158 (Utah 2012)).

Accordingly, the Supreme Court rejected Petitioners' argument and held:

> The sale, exchange, conveyance, disposition, or change in use of a particular parcel of city-owned property cannot be analogized to the development of a city- wide zoning plan of general applicability. Such case-specific actions generally do not reflect the exercise of legislative power because they do not necessarily entail the enactment of a zoning ordinance that sets a governing standard for all properties coming within its terms, nor do they necessarily amend any existing zoning ordinance of general applicability.

Id. at 510. Because the subject matter of the ordinance at issue fell within the municipality's administrative powers, the Petitioners in *Vagneur* had no right to reverse the ordinance through a referendum. *Id*. at 511.

For the same reasons the Supreme Court articulated in *Vagneur*, the trial court below correctly found that Ordinance No. 170 approving the sale of the School Site was an administrative act and not subject to a referendum. The trial court's conclusion was not an abuse of discretion.

B. The trial court acted within its discretion in finding that the balance of public interest did not weigh in favor an injunction in this case.

The trial court, from the bench, recognized that the public interest did not weigh in favor an injunction. Tr. 09/19/13, pgs. 7:20-9:5. Rather, at best, the competing public interests are neutral and do not weigh in favor of an injunction. *Id*.

Appellants' base their alleged public interest—preservation of natural open space—on the false assumption that if Appellants succeed on the merits and the School Site is deemed a "park," the site will remain an undeveloped/natural open space. During the hearing, Susan Baird (Appellants' witness) testified that the School Site was de-designated as a natural area according to the lawful process. ROA Vol. 1, pgs. 94:9-18; 107:22-25. Appellants presented no contrary evidence. Therefore, at the time the School Site was conveyed to DPS, it was no longer a

natural area. Even if Appellants establish the School Site is a park, the City could lawfully develop the land. For example, the City could build a recreation center, a swimming pool, or any number of improvements that would alter the land. Appellants simply have no right (regardless of the outcome of this case) to preserve the School Site as open space with a prairie dog colony.

Further, Appellants exaggerate the potential harm from building a school on the School Site. To the North of the School Site is approximately 80 acres of natural area that the City designated, by ordinance, as parks (Hentzell Park and Babi Yar Park). Ex. 48. The School Site consists of 10.7 acres; however, the Southern portion the School Site is an unused parking lot. ROA Vol. 1, pg. 63:8-15; Ex. 2. There is no evidence that anyone ever objected to the construction of the parking lot. In fact, none of the residents who testified could even remember when the parking lot was built or last used. ROA Vol. 1, pg. 72:9-24. As a result of the land sale, DPS is developing only portion of the previously undeveloped 10.7 acres, which is less than 10 percent of the overall 90-acre undeveloped area and sits at the very corner of the area and is bounded by South Havana Road.

On the other hand, the public has a strong interest in providing quality

schools and educational opportunities for all children who attend Denver Public Schools, regardless of the region they live in. Recognizing that there is an existing need for new schools to serve the growing student population, the residents of Denver voted in favor of a bond in order to fund the acquisition of property and construction of schools. ROA Vol. 2, pg. 211:1-9. DPS took the funds generated from the bond program and used them for the very purpose that the taxpayers intended—to purchase a suitable school site and develop it into a new elementary school for the students of Southeast Denver. *Id*. Further, the public has a strong interest in expanding ECE opportunities for preschool age children throughout the district, including in Southeast Denver. *See* C.R.S. § 22-28-102 (legislative declaration recognizing the need for preschool programming and "encourag[ing] school districts and parents to work together to ensure that the children benefit from the programs.")

DPS has a strong interest in building its new elementary school on the School Site. As School Board Members Allegra Happy Haynes and Anne Rowe testified, locating a school next to approximately 80 acres of designated park and open space could provide a valuable benefit to the educational program. ROA Vol.

1, pgs. 181:1-12; 185:19-186:7; 186:23-187:8; 189:17-190:4. For example, the students' curriculum could be enriched with an outdoor learning lab located at the steps of their school (if you don't need this sentence, please remove… I prefer not to promote construction of additional features on the site at this time. If you feel important to leave in, this is not a big deal). *Id*.

Finally, the public has strong interest in recognizing and preserving the binding nature of contracts. *See e.g.*, *Aetna Health Management, Inc. v. Mid-America Health Network, Inc.*, 975 F.Supp. 1382 (D.Kan. 1997) (recognizing the public interest in enforcing valid covenant not to compete). As explained above, the City and DPS entered into a binding contract for the transfer of the School Site and it would be contrary to the public interest for the Court to impair the contract here.

Granting an injunction in this case would be contrary to the strong public interest in ensuring: educational opportunities are being provided to Denver's public school students (including an expansion of ECE opportunities for DPS children), taxpayer dollars are preserved, and a binding contract between two public entities is recognized and free from impairment. Therefore, the trial court

did not abuse its discretion in finding that the competing public interests did not weigh in favor of an injunction.

II. The Trial Court Order and Record Below are Sufficient to Support the Denial of Appellants' Motion for Summary Judgment

Appellants argue that the trial court erred by failing to make written findings of fact. Even when a trial court's ruling is general in nature, the findings can be sufficient to show the basis for the trial court's order. *See Bishop & Co. v. Cuomo*, 799 P.2d 444, 445 (Colo. App. 1990) (citing *Mowry v. Jackson*, 343 P.2d 833 (1959)).

Here, the trial court entered a written order denying Appellants' motion for a preliminary injunction. Order, 06/05/13. In addition, the trial court made an oral recitation from the bench denying Appellants' motion for a preliminary injunction pending appeal. Tr. 09/19/13, pg. 28:1-9. The trial court expressly stated (in both the written and oral recitation) that its denial of Appellants injunction was because Appellants failed to demonstrate a probability of success on the merits and because the public interest did not weigh in favor of granting an injunction. The trial court made specific findings supporting that conclusion. Thus, the Order and record below are sufficient and the trial court did not abuse its discretion in denying

Appellants' motion.

Conclusion

The trial court was required to deny Appellants' motion for an injunction if Appellant failed to satisfy any of the *Rathke* criteria. The trial court provided Appellants with a full opportunity to make their arguments and present law and evidence in support of those arguments at the hearing. After providing Appellants with every opportunity to make their case, the trial court concluded that Appellants failed to demonstrate a reasonable likelihood of success on the merits of their claims and denied the motion. Further, the trial court found that Appellants failed to show that the public interest favored an injunction. The trial court's determination was consistent with controlling law and was based on an extensive factual record. As such, the trial court's decision was well within its discretion.

Respectfully submitted this 7th day of November, 2013.

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CERTIFICATE OF SERVICE

I certify that on this 7th day of November, 2013 a true and correct copy of the foregoing was filed and served via ICCESS upon the following:

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