DISTRICT COURT, JEFFERSON COUNTY, COLORADO 1st Judicial District Court Jefferson County Court & Administrative Facility 100 Jefferson County Parkway Golden, CO 80401-6002	DATE FILED: January 16, 2014 10:31 AM CASE NUMBER: 2012CV3006 **▲COURT USE ONLY▲**
Plaintiff(s): JEFFERSON COUNTY SCHOOL DISTRICT R-1, **v.** **Defendant(s): THE CITY OF LAKEWOOD, et al.**	Case No. 12 CV 3006 Division 8, Courtroom 4D
ORDER	

BACKGROUND

The Jefferson County School District filed this Rule 105 action, seeking to quiet title to a piece of real property approximately ten acres in size, located at 2090 Wright Street. The City of Lakewood (hereinafter "City" or "Lakewood") responded by disclaiming any interest in the property.[1] The Interveners seek a determination that title to the property rests with the City (and/or that the property was dedicated to the City) and that the use of the property is limited to parks and/or open space.[2] A trial to the Court was held in this matter on November 4 - 6, 2013. This Court has considered all of the testimony and evidence provided[3], and now FINDS and ORDERS as follows:

[1] In 2011, the District attempted to sell 2090 Wright Street to the Rocky Mountain Deaf School so that the latter could utilize the site for a K-12 school.

[2] The Interveners also asserted a claim for violation of the Open Records Act (Colo.Rev.Stat. § 24-6-401, *et seq.*) and asserted that certain actions of the City were *ultra vires*. At trial, the Interveners limited their claim for violation of the Open Records Act to a City Council meeting that occurred on September 10, 2012.

[3] As the record reflects, neither party presented any expert testimony at trial; thus the trial record is devoid of any expert opinions on the issues presented. Neither party presented any deposition testimony that had been previously designated.

A history of the property at issue is necessary to a determination of this action.[4] In 1965, Green Mountain, Inc. obtained a Warranty Deed for undeveloped property in Lakewood, Colorado, including the approximately 10-acre parcel of that land at issue here ("2090 Wright Street"). **Ex. 16.**

On April 18, 1973, the City Planning Commission held a public hearing wherein Mr. Wilbur Hamilton (and Mr. Bob Morrison (chief engineer for development)), presented the development plan for Hutchinson Homes – Green Mountain Village (rezoning application E-73-19) which encompassed 1006 acres. Included in that presentation was a statement that

> The Planned Development proposes a number of school sites for elementary schools and one junior high school which will be donated to the City for schools.

The Motion for adoption of a Resolution recommending approval of Rezoning Application E-73-19 failed to carry on April 18, 1973. **Ex. I-3.**

However, on May 9, 1973, the City Planning Commission certified a Resolution recommending that the City Council approve Rezoning Application E-73-19 (from Agricultural 2 (A-2)) to Planned Development (P.D.)). That resolution provided, *inter alia*:

> The school and park sites are to be dedicated to the City of Lakewood. An agreement has been reached between the City of Lakewood's Department of Parks and Recreation and the Jefferson County R-1 School District to use that part of whole of the school site not being put to use for school purposes into public parks and recreational facilities.[5]

[4] Although there are numerous documents pertaining to the title to the property, the tracing of transactions and the history was made more difficult because the Interveners did not conduct formal discovery but rather conducted a review of City documents and issued CORA requests (they did conduct depositions), and the City and the District did not automatically provide all documents expected by the Interveners pursuant to Rule 26. Examination of the available documentary history of this property makes clear (through references thereto) that other documents existed at one time and were not produced in discovery or offered at trial. It is not clear whether or not those documents exist in City or District files today. Some documents were not timely produced by the District and the City (including the 1973 Deed that the District had insisted for months was not in its files, other documents that were not "located" until days before 30(b)(6) depositions, documents provided the Friday prior to the Monday trial (Ex. 54-62, which this Court refused), and even documents that the Court had to order produced during trial). The Interveners filed upwards of 50 Colorado Open Records Act requests with the City. Many of the documents introduced by the Interveners at trial were obtained via CORA requests. This Court will base its decision on the documents and information admitted at trial.

[5] It is not clear whether there existed any written agreement between the City and District to that effect, and none was ever produced.

Ex. I-9. The Resolution contains the notation "GMV ODP" (Green Mountain Village Official Development Plan).

On that same date, Findings of Fact were incorporated into the Resolution for Case E-73-19 stating

> WHEREAS all interested parties, groups, and organizations were afforded a full and fair opportunity to be heard and present such evidence as deemed appropriate; and WHEREAS, the Planning Commission of the City of Lakewood makes the Following Findings of Fact: . . . 3. The school and park sites are to be dedicated to the City of Lakewood. An agreement has been reached between the City of Lakewood's Department of Parks and Recreation and the Jefferson County R-1 School District to use that part or whole of the school site not being put to use for school purposes into public parks and recreational facilities.

Ex. I-2.

On June 11, 1973, the City Council considered Ordinance O-73-50, which provided for annexation of "Green Mountain Village" Case P-73-1, and Ordinance O-73-51, related to Resolution E-73-19. Included in the record for the latter Ordinance were "the land use plan in map form, applications, and . . . the Resolution of the Planning Commission . . . ." The City Council approved the annexation (Ordinance O-73-50), but tabled Ordinance O-73-51 until July 9, 1973. **Ex. I-46.**[6]

On July 9, 1973 the Lakewood City Council approved Ordinance O-73-51 relating to Case E-73-19 (without any amendments), thereby giving it the force of law. **Exh I-47.** The adoption of the ODP as part of this Ordinance was not disputed at trial; the legal effect of the ODP as a means of dedication however, was disputed.

On July 23, 1973, the City Planning Division approved the Official Development Plan (hereinafter "ODP") submitted for Hutchinsons Green Mountain Village. That ODP contained provision A-3 which provided

> A minimum of 10 acres of land will be donated to the City of Lakewood for the benefit of the Jefferson County School District R-1 by the developer, in the

[6] This document was not provided by the City, but was discovered by one of the interveners in the City's files on the Wednesday before trial. This is merely one example of the failure of discovery in this case.

> area designated as A-3 for elementary school purposes. If the site, or any portion thereof, is not utilized by the School District for such purposes within eight years of the date of approval of this plan, all rights of the School District in the land shall be null and void and said land shall revert to the City of Lakewood for municipal purposes.

The ODP further provided "All stipulations and regulations set forth for the entire Planned Development including multifamily and commercial areas shall be binding upon the applicants, their heirs and assigns." The City Council approved the ODP on August 1, 1973.[7] The ODP was recorded with the Jefferson County Clerk and Recorder on that same date. **Ex. I-1.** The land at issue is in the area designated as A-3.

On November 27, 1973, the Plat for Hutchinsons Green Mountain Village Filing No. 32 (for property adjacent to the property at issue) was filed; it was approved December 12, 1973 and accepted by the City in January 1974. The entire parcel at issue is not shown, but there is a designation next to the platted area that reads "unplatted" and is located in the southwest corner of 2090 Wright Street. The plat dedicates to the City the "streets, avenues, tracts, and all . . . easements over and across said lots and locations . . . ." **Ex. 45.** It is unclear why the property at issue (or for that matter the entire Hutchinson Park area) was not included in Plat 32.

On July 11, 1974, Green Mountain, Inc. granted a Utility Easement to Public Service Company of Colorado. **Ex. 19.**

On November 26, 1974, the Plat for Hutchinsons Green Mountain Village Filing No. 34 (for property adjacent to that part of South Hutchinson Park north of the property at issue) was filed; it was approved January 8, 1975 and accepted by the City in January 1975. It shows an area designated as Parcel A (referred to in this litigation as North Hutchinson Park). It designates an area on the north side of South Hutchinson Park as "unplatted" but does not show the entire park area or any of the land at issue. The plat dedicates to the City the "streets, avenues, tracts, and all . . . easements over and across said lots and locations . . . ." **Ex. 46.** It is

[7] The approval indicates that is is "subject to *minor* revisions that may be needed to conform to current City of Lakewood zoning and planning regulations." **Ex. I-1** (emphasis added).

unclear why the property at issue (or for that matter the entire Hutchinson Park area) was not included in Plat 34.

On March 7, 1975, Paul and Mary Campbell purchased their property located at 12521 West Asbury Place. In connection with their purchase, they were shown a copy of the ODP and directed to the provision for reversion to the City for land that was designated as a "proposed elementary school" if a school was not built by 1981. The ODP provided that the land would revert for municipal purposes, but the sales representatives repeatedly stated that the land would be a park after it could no longer be used as a school. Mr. Campbell testified that the only portion of the 37-plus acres in area A-3 that is flat enough to be suitable for use as a park is the property at issue in this case. He also testified that that property was regularly used as a park for kite flying, cross-country skiing, animal walking, snowshoeing and shooting rockets. Mrs. Campbell testified that the property was and is used for walking, jogging, baseball, flying model airplanes, and for watching fireworks on the 4th of July.

On May 22, 1975, Anthony and Beatrice Quinkerp purchased their house at 12530 West Warren Avenue. She was told by salespersons that the land at issue could be used as a school, but if a school as not built in eight years, it would become park space. Both testified that they purchased their property because of its proximity to the park. She testified that the property was historically used as a park by her family and others for biking, hiking and flying model airplanes. She testified that the City open space signs were placed on the property "years and years and years ago."

As of January 1, 1976, the ten (10) acre parcel at issue "had been identified, reserved and approved by the school district, and the developer was then obligated to convey same." **Ex. I-19.**

On March 10, 1976, the Plat for Hutchinsons Green Mountain Village Filing No. 35 (for property adjacent to that part of South Hutchinson Park north and east of property at issue) was filed; it was approved March 22, 1976, and accepted by the City in April 1976. It designates an area on the northeast edge of South Hutchinson Park as "unplatted" but does not show the entire

park or any of the land at issue. The plat dedicates to the City the "streets, avenues, tracts, and all . . . easements over and across said lots and locations . . . ." **Ex. 47.**

On May 27, 1976, the Land Use Planner for the District sent a letter to the City Department of Community Development, in "response to [a May 24, 1976] request for update of comments on Hutchinson's Green Mountain Village Planned Development" confirming that the "developer is obligated to dedicate land for school use to the City of Lakewood at the time of final platting."[8] **Ex. I-14.** The evidence indicates that land at issue was never platted (or at least there was no evidence presented at trial regarding the platting of the parcel) and it is designated as "unplatted" on those plats that were introduced at trial.

On September 28, 1976, Green Mountain, Inc. issued a Deed of Easement to Green Mountain Park Water and Sanitation District. **Ex. 18.**

On January 24, 1977, Green Mountain, Inc. submitted a letter to the City of Lakewood, stating

> [i]n accordance with the stipulations of the Official Development Plan of Hutchinsons Green Mountain Village we are herewith enclosing a deed to the City of Lakewood for 37.76 acres of land located in Planning Areas A-3 and A-4. In reviewing our land donation requirements for Planning Area 'A' the ODP requires 10 acres in A-3 for an elementary school . . . . It is our understanding that it is your obligation to determine what portion if any of this deed should be conveyed to the School District R-1.

That letter enclosed the January 1, 1977 Quit Claim Deed from Green Mountain, Inc. to the City wherein the developer deeded the 2090 Wright Street property (the 10-plus acres of property at issue here) to the City of Lakewood (subsumed within 37.76 total acres deeded therein to the City). **Exhs. 5, I-17.**

There are various versions of this January 1, 1977 Quit Claim Deed in the City's files and the District's files. All versions have the number 8469 at the bottom right corner; no one has

[8] Nothing in the ODP requires the dedication to occur at the "time of final platting" although this letter from the District contains that language. The May 24, 1976 letter was not produced at trial, but the court will infer its contents by the reference in Ex. I-14.

been able to tell the Court who placed that number there or what it signifies.[9] One version of the Deed contains the handwritten notations "K-77-4"[10] and "W. Asbury & S. Wright"; another "K-77-4" "Not Recorded" and a recently added electronic sticky note that reads "1. this deed not accepted by the city, not a valid conveyance"; and yet another has nothing handwritten at the top. **Exhs. 6, 7, I-16, I-18, I-19.**[11]

On January 25, 1977, Dave Armagast, Right-of-Way Technician for the City of Lakewood, drafted a Memorandum to Frank Brown, Jr., Deputy City Attorney, Thru [sic] Milt Marshall, Land Agent. The subject of that Memorandum was "Deed from Green Mountain, Inc. for Parkland Pursuant to O.D.P. of Hutchinsons Green Mountain Village." The Memorandum stated that the January 1, 1977 deed was unacceptable for four enumerated reasons and provided four recommendations. One recommendation was that "conveyance of parkland to the City be made by General Warranty Deed, and conveyance to R-1 School District by the same method." **Ex. 8 (Ex. I-27).** There is no record of any action taken in connection with this correspondence.

On April 13, 1977, City Assistant Planning Director Charles H. Stromberg wrote a letter "To whom it may concern"

> to confirm that pursuant to the dedication requirements of the Hutchinson Green Mountain Village, a Planned Development, approved August 1, 1973, thirty-seven (37) acres of land, described in Exhibit 'A',[12] attached hereto, has been deeded to the City of Lakewood. Said land was designated for public use at the time the Planned Development was approved. Ten (10) acres of said land or part thereof will subsequently be deeded to the Jefferson County School District (R-1) for the use of public school purposes. The remaining twenty-seven (27) acres will be used by the City of Lakewood for parks and recreational purposes.

[9] A subsequent deed to the School District contains the number 8945 in the same location.

[10] Apparently, this is a reference number added by the City; the subsequent deed to the City contains the designation K-77-43.

[11] No one who testified was able to state when the handwritten "not recorded" was added to the version of the deed with the electronic sticky note (Ex. 6). That sticky note was added after this litigation commenced and this court will find that it is a reasonable inference that the notation "not recorded" was also added after this litigation was commenced (or at least after the dispute regarding ownership/title to the property began).

[12] The Court will find that this refers to the January 1, 1977 deed to the City of Lakewood. Although the City seemed to imply at trial that there might have been another deed attached and referred to as Exhibit A, no other deed or any reference thereto has been produced from the records of the City or the District (and the City acknowledged it was unaware of any other deed that for 37 acres given to the City). In addition, the Deed marked K-77-4 was the next item on the microfiche when the letter was discovered by one of the Interveners. The Court finds that the insinuation that there might have been another deed attached to this letter is incredible as a matter of law; it was clearly one version of the January 1, 1977 Deed introduced as Ex. I-16, I-18 or I-19.

This letter has a handwritten notation "E-73-19" in the upper right-hand corner (which was adopted by Ordinance O-73-51). **Ex. I-18.**

On that same date, an individual with the initials "R.P.E." with Jefferson County School District R-1 wrote a letter to the Jefferson County Board of County Commissioners indicating that "the property, described in Exhibit "A",[13] attached hereto, contains within its boundaries ten (10) acres of ground that has been reserved for the Jefferson County School District (R-1) for the purpose of a public school facility. . . . the property has now been conveyed to the City of Lakewood.[14] Subsequently, ten (10) acres will be conveyed to the R-1 School District. **Ex. I-19.** This letter was produced by the District on the eve of the 30(b)(6) deposition of the District; prior to that date, the District had adamantly denied that it had a copy of the January 1, 1977 deed in its files; it was found in a different file.[15]

On April 15, 1977, City Land Agent Milton D. Marshall wrote a "Memo" to City Assistant Planning Director Charles H. Stromberg asking that information be incorporated as an addendum to that letter. His Memo indicates that the deed described as Exhibit "A" was determined to be unacceptable for City acceptance by engineering review. The Memo goes on to indicate: "Additionally, legal opinion from the Office of the City Attorney found a significant problem with subsequent conveyance requirments [sic] or desires." The Memo indicates that "after considerable review and discussion involving Mr. Spore, Frank Brown, John Lambert, Dave Armagast, and [Mr. Marshall], of City Staff, with Messrs. Hamilton, Beck, and Morrison, representing the developer, the following . . . were established."[16] City Park Planner Jeff Simmons was to provide "a schematic approved by R-1, of the proposed school and parkland property, for Dave Armagast to translate into two legal descriptions, one for each use and desired ownership" and Deputy City Attorney Brown was to "prepare deed conveyance to effect the conveying of . . . recreational open space lands to the City of Lakewood, materials will be

[13] Again this Court will find that this letter refers to the January 1, 1977 deed to the City of Lakewood (the evidence indicated that this letter was actually stapled to the January 1, 1977 deed when located in the District's files).
[14] The letter states that as of January 1, 1976 the land was identified, reserved, and approved by the School District, and could not be sold by the developer.
[15] The experts based their opinions on the District's lack of receipt of the original deed given the City.
[16] No documentation or other proof of the content of such discussions was introduced as evidence in the trial.

furnished to R-1 for their deed preparations." There is a handwritten note at the top of this letter "E-73-19 Unplatted SE corner (School /Park) Site 4-19-77." **Exh I-28.**

According to a handwritten note on the second page of the Memorandum, Mr. Stromberg contacted Mr. Marshall on 4/19/77 and informed him that the April 13, 1977 letter had been sent "at Wilbur's request to use with County Tax Assessor." Mr. Marshall "agreed that it is the City's and School Board's desire to receive the land described in the PD." **Ex. I-28.** There is no evidence that the County Tax Assessor was informed that the deed designated as Exhibit A was not accepted by the City and thus the property remained on the tax rolls of Green Mountain, Inc. There is also no evidence that the January 1, 1977 deed was ever formally rejected by the City Council as required by the statute in effect at that time. See Colo.Rev.Stat. §13-25-205 (eff. 1975).

On September 2, 1977, Green Mountain, Inc. deeded approximately 26.66 acres to the City. This property is adjacent to the property at issue and it is undisputed that it is City of Lakewood parkland/open space. This property is sometimes referred to as "South Hutchinson Park" (at times South Hutchinson Park also includes the property at issue here).[17] **Ex. 11.** On December 12, 1977, the City Council accepted the September 2, 1977 Deed from Green Mountain, Inc. via Resolution 77-317. **Ex. 12.**

On September 20, 1977, the School District was sent a Commitment for a Title Insurance Policy to be issued by Transamerica Title Insurance Company dated August 29, 1977 for the property at issue. That Title Commitment was sent to Mr. Hamilton of Hutchinson Homes, Inc. in a letter from Donald R. Cross indicating "the School District attorney is quite insistent on having property conveyed to the School District by General Warranty Deed. Since the commitment indicates fee simple title to be vested in Green Mountain, Inc., it would not seem that conveying title by means of a General Warranty Deed would be a problem for you." **Exhs. 1, 3.** No title policy was produced at trial, however.

[17] South Hutchinson Park includes the property at issue in some City and public maps.

On September 27, 1977, Green Mountain Inc. deeded, via a Statutory Deed with warranties-joint tenancy, the land at issue to Jefferson County School District No. R-1 for $10.00, "with all its appurtenances and warrant(s) the title to the same, *subject to reservations, restrictions, easements, and rights of way of record* and subject to property taxes for the year 1977."[18] **Exhs. 2, 32.** (emphasis added). The acceptance of the deed was placed on the Agenda of the School Board. **Ex. 33.**[19] The deed was recorded on December 15, 1977. **Id.** A copy of the recorded deed was sent to the Jefferson County Treasurer on December 23, 1977, instructing him to "remove this property from the tax roll . . . ." **Ex. 20.**

However, the City's October 1980 Parks, Leisure, and Open Space Master Plan does not indicate that that the property at issue is a school district-owned site; rather, it indicates that it is one of the "Land Acquisition Priorities" areas designated "5R" "Lower Ravines" "to be acquired by dedication only." It also shows that a "potential school site" labeled 5B-2 is in the center of the City's undisputed portion of South Hutchinson Park (coded as open space). It also reads "Joint development and use (or interim use until schools develop) of school sites at the following locations (refer to map): 5B-2 West of Union, south of Jewell Ave." **Ex. 63 (pages 53 - 56, 59).** The City's Director of Community Development James K. Spore, Manager of Parks Ron Williams, and Manager of Planning F.E. Ospina, among many other staff, contributed to the Master Plan. **Id. (Acknowledgements).** The Court notes that this Master Plan was issued prior to the expiration of the reverter provision in the ODP.

On or about September 9, 1982, the School District investigated a complaint of dumping on future R-1 school site (east of Wright and south of West Asbury). The report states "The area in question is owned by the City of Lakewood and R-1 Schools." According to the report, at the time there were several no-dumping signs[20] and an R-1 sign stating "No Tresspass [sic]."

[18] On that same date, Green Mountain, Inc. deeded another property, which is not relevant here. **Ex. 15.**
[19] As shown by late-disclosed documents, the District Board accepted the Deed. **Ex. 14.**
[20] Residents of the area testified that in the 1980s white signs with black lettering were placed on the property. The signs prohibited motorized vehicles and dumping and cited to a City Ordinance, and thus the residents interpreted this to indicated that the signs were on City property.

"Fawcett [the complaining party] said the City of Lakewood has a future park on this [their][21] acreage." **Ex. 21.**

Mr. Campbell testified that any signs indicating that this was school property were removed in the early 1980s and the signs referencing the City Ordinance remained. He testified that these signs went up in response to neighborhood complaints about motorcycle riding and unauthorized dumping of debris. They were later removed when the blue "City of Lakewood Open Space" signs were installed around the property. Mrs. Campbell testified that they had a neighborhood get-together in 1982 when the white signs went up because then the land could no longer be used for an elementary school and would be used as a park. She testified that City signs were up during the 1980s, 1990s and 2000s, until they were removed in 2011.

On August 8, 1983, the City Council adopted an Ordinance delegating authority to accept dedications on behalf of the City to the City Administrator or his designee. **Ex. 51.**

On November 10, 1983, City Park Planner Ross Williams wrote to Kathy Tully of the District, "In reviewing the official development plan for the Green Mountain Village area, I find that the intended use for these parcels was schools but if they were not used for schools in eight years, they were to be parks. (see attached). This stipulation has not been carried out. My department would like a letter from the School District reiterating the official adopted plan for the area." **Ex. I-11.** There was no evidence presented of any response from the District.

On July 20, 1984, the School District granted an easement to Green Mountain Water and Sanitation District and the Metropolitan Denver Sewage Disposal District No. 1. **Ex. 22.**

On January 7, 1992, City Park Planner Ross Williams sent a Memorandum to City Supervisor of Current Planning Vince Harris indicating that

> The O.D.P . . . requires a dedication for parks and drainage of 136 acres and for schools 53 acres. . . . The O.D.P. required a reverter clause on the school

[21] On the document the word "this" is crossed out and the word "their" written. It is unclear who made the notation and when. The court would note that the letter "r" in the word "their" is different than the others in the handwritten notations on the document apparently made by the investigator.

> land dedicated so that if a school was not built within 8 (10 in planning area C and D) years of the platting the school land would become parkland. This reverter clause should be placed on the school land dedicated in future filings. The land should be dedicated to the City of Lakewood for school purposes and if no school is built in 10 years of platting the land would be parkland in perpetuity.

Ex. I-10.

On September 30, 1993 City Director Richard J. Plastino sent a Policy Report to the Mayor and City Council stating, "Another site that was dedicated but is not being used for a school is a 10 acre site (1) on the east side of Wright Street where [it] dead-ends on Lakewood's southern border." It continues:

> Hutchinson Homes was willing to trade land they own at Yale and Gladiola (8) for the site at Wright Street (1) but this was not palatable from the City's standpoint. Citizens and the Community Resources Department consider the Wright Street site to be an established and desirable element in the City's park system. There are conditions on the original Official Development Plan that indicate the Wright Street site was meant to become a City park if not used for a school site within a certain number of years. Yet it is also clear that if school site issues are not resolved among the school district, the City and citizens in the area, there will be some difficult legal problems between the City and R-1 regarding the Wright Street site particularly since R-1 holds title to the site. For example, if the school district should some day [sic] unilaterally decide to use the site for a school, the City would be forced to respond with some type of court action claiming that it is now a City park under the provisions of the Official Development Plan. It is staff's conclusion that Hutchinson Homes has fulfilled their school dedication needs and that use of the Wright Street site for uses other than a park is not a desirable option. The most practical and fair alternative to provide a new elementary school site is to obtain an additional five acres at Yale and Gladiola (7) with the cost to be shared between the school district and the City. … The school district is anxious to cooperate with the City and transfer title to the 10 acre Wright Street site (1) for park purposes but they cannot absolutely guarantee such a transfer at this time … it is possible the Wright Street site might be needed for school purposes. … It needs to be understood that participation in this purchase by the City does not give an absolute 100% guarantee that the Wright Street site will be transferred to the City in the future, but it does upgrade the likelihood from "low" to "high." In other words this is an investment with a degree of risk.

Ex. I-24. This memo was reviewed by the City Manager and Assistant City Manager. There is no evidence as to what occurred after this 1993 memo was sent and received.

A February 8, 1995 Memorandum from Public Works Director Richard Plastino to File 268 [ ] indicated that the purchase discussed in Exhibit I-24 above occurred, and in return the school district agreed to deed two parcels other than the Wright Street property to the City. The Memorandum continued, "[a] marginal additional benefit to the City was to raise the probability that a site at the south end of Wright Street *would remain open space* rather than be used for a school. This was a complex issue since this site was to be under City ownership if it was not used for a school within eight years. Through a series of events the title to the school now rests in R-1 School District portfolio of properties . . . . " (emphasis added). Director Plastino indicated that converting this property to development would not be a feasible option. **Ex. I-45.**

On August 14, 1996, the District granted a Temporary Construction Easement to Public Service Company of Colorado. **Ex. 35.** On October 15, 1996, Kathy Tully, District Director of Property Management, responded to homeowner Richard Felton re: complaints about construction noise, and debris related to the project. **Ex. 36.**

On May 13, 1997 City of Lakewood Facility Planner Ross Williams sent a letter to Jefferson County Open Space Manager of Acquisitions Lynn Johnson Wodell re: City of Lakewood Acquisition Priorities. That latter indicated: "The City desires this parcel if surplus from the School District. The Official Development Plan for the parcel states that it is to be parkland if it is not used as a school within eight years. The City expects the School District to deed the parcel to the City." **Ex. I-12.** Again, there is no evidence of any response to this letter.

In the late 1990 or early 2000 timeframe, the City removed the white signs referencing the City Ordinance and put up signs surrounding the area (including the ~ 27 acres deeded to the City and the ~ 10 acres at issue here) indicating that the property was "City of Lakewood Open Space." **Exhs. I-4, I-5 and I-7.** The signs on the parcel at issue were removed after this dispute arose.

Tracy Gibbons purchased her home across the street from Hutchinson Park in September 2003. She testified that she believed the property was City of Lakewood Open Space because of the signage; she was unaware of the ODP prior to her purchase. She also testified that a City

employee warned her that she could get a citation for walking her dog on City property without a leash. Her family uses the property as a park to walk the dog and ride bikes. Her neighbors also use the property as a park.

The April 2008 Jefferson County Public Schools Summary Report section pertaining to Land Holdings – Hutchinson Site – 10 acres – Green Mountain Area – acknowledged that the property "has a title provision to revert to the City of Lakewood for park purposes" and indicates that they are "currently working on a process to transfer title of this site to the City of Lakewood." **Ex. I-15.** Apparently, that transfer never occurred, but again, there is no documentation or other evidence as to why it did not. This 2008 Summary Report was on the District's website before this litigation commenced, but was taken off the website at some point.

There is also reference to a 2008 memo from the District reporting that it was in the process of transferring title to the City because of the ODP provision reverting the site to the City for park purposes. **Ex. I-35.** However, this memo was never provided to the Interveners or introduced at trial (and there was some testimony by Mr. Reed that the 2008 memo reference was actually a reference to the 2008 Summary Report). Mr. Reed also testified that the land had to be surplussed and fair market value determined prior to any transfer to the City; however the District did not deem the land as surplus until 2011 when it was negotiating with RMDS.

In October 2008, Heather Wenger purchased her property at 11872 West Asbury Place. Her property borders the north end of the park. She paid a premium for the property because she borders the open space. She relied on the sales flier, signs and maps (including google maps and mapquest) for her belief that the property at issue was a park; she did not contact the City, District or Clerk and Recorder and was not provided a copy of the ODP. She and others use the property for nature walks, flying model airplanes, sledding and snowshoeing; the parcel at issue is the only accessible part of the 37 acres due to its topography.

The February 1, 2009 Jefferson County Assessor's Map labels the parcel at issue "Jefferson County School District R-1" but has a disclaimer that "[t]his map is for assessment

purposes only. It is not necessarily accurate for surveying standards. DO NOT USE FOR LEGAL CONVEYANCE." **Ex. 48.**

The District's October 14, 2009 Facilities Usage Committee Vacant Land Inventory lists this property as Vacant Land (with restrictions), described as Hutchinson Site – 10 acres – Green Mountain and indicates "this property has a title provision to revert to the City of Lakewood." **Ex. I-33.** The District's property director testified that he had never seen this document before trial, but there was testimony that the document was still available on the District's website. Interestingly, the Inventory lists another site, Tamarisk (another 10 acres in Green Mountain) as "[h]eld in trust by City of Lakewood with reverter clause."

In December 2009, William Marcoux purchased his home at 2053 South Robb Way. He testified that he paid a significant premium for his lot because of the unobstructed view he is afforded by the property at issue, and thus has paid higher property taxes. He also testified that the view and proximity to open space was a major factor in his purchase. He inquired of his realtor and was told that the property was open space; he did not contact the City or the District. City of Lakewood Open Space signs were on the property at issue at the time of his purchase, but were removed in the Spring of 2012.

Brett Johnson purchased his home at 12332 West Asbury place, in 2010. That home sits on the edge of the property at issue. He testified that he paid a significant premium for a lot that adjoins open space. His realtor took a picture of one of the City of Lakewood Open Space signs at the property at the time of his purchase (**Ex. I-7).** In addition, he researched Jefferson County open space and Google websites which showed that the property was a park (although he recalled that it had been designated as something else, the amount of time that had lapsed plus the signage gave him the impression that it was a park).[22] He did not contact the District, the City or the Clerk and Recorder before his purchase. He testified that he uses the property as a park 1 - 3 times per week for walking the dog and others regularly use it for things such as sledding and playing in the creek.

[22] He also testified that the websites had been changed between the time of his purchase and the time of trial and thus the property was no longer designated as park land on those sites.

Ross Williams with the City sent an email to the District on October 19, 2010 indicating it had been several weeks since "Anne Heine provided you with the City's view of the Hutchinson School Site on South Wright Street. In her email she indicated that there was a letter from the City regarding the site from 2001.[23] This was not the latest discussion of the site and the needed transfer to the City of the site." Mr. Williams stated that Kathy Tully and John Young "both assured [him] that all that was needed was a Board resolution to transfer the property to the City." **Ex. I-38.** Again, apparently there was no board resolution to transfer the property and no evidence or documentation as to what occurred.

The City held a neighborhood meeting concerning the rezoning of the property on January 12, 2011. Notice was posted on the parcel at issue and sent to residents, owners, and associations within a certain distance from the site. **Ex. I-41.**

On June 1, 2011, Michael Bugarin purchased his home at 12185 West Asbury Place, approximately three houses west of the property. He assumed the property was open space because of the open space signs, and a park because the maps indicated it was. The City of Lakewood website indicated that this property was part of Hutchinson Park; he did not contact anyone from the City prior to his purchase or review the real estate records for the property. He acknowledged that a sidewalk along the east side of Wright Street did not extend all the way along the property at issue. He was given a copy of the OPD with his closing papers, but did not research the ownership. He paid a premium for his property because it was close to the park. His family uses the park to walk (with or without their dog). Because this property is the only flat area (the remaining area consists of gullies and canyons as noted in the June 11, 1973 Minutes of the City council Meeting (**Ex. I-46**)), it is the only area in the 37-plus acre parcel that his disabled son is able to utilize.

[23] This letter was apparently produced by the City in discovery in September 2013 and was included in the City's exhibit book as Ex. 42, but it was not offered or admitted at trial.

At a District Board Meeting on October 6, 2011, the School Board declared the "10 acres of property near Hutchinson Park in the Green Mountain area as surplus to district needs . . . . " **Ex. I-43.**

On October 11, 2011 Fidelity National Title Ins. Co. issued a Commitment in the amount of $13,418,446 (referencing Plat 32) which provided that "Title to the estate or interest in the land is at the Effective Date vested in: Jefferson County School District R-1 . . ., subject to fulfillment of Requirement 'd' and 'e.'" Requirement "d" consisted of a "Quit Claim Deed from City of Lakewood, to extinguish their potential interest by reverter, as disclosed by the Regulation and Stipulations contained in the Planned Development Map recorded August 3, 1973 at Reception No. 584887." **Ex. I-21.** The District's representative testified at trial that the District thereafter requested a Quit Claim deed from the City.[24] But there is again no documentation of that request, nor any indication that the City issued any such deed.

That same date, October 11, 2011, Assistant Attorney General Heidi Dineen forwarded the Fidelity Title Commitment to the Colorado Department of Education and the District (among others), set out "Form of Deed and Title Problems" and indicated that the State required "additional evidence that Jeffco School District has clear fee title to this site." Because the reverter clause and conditions in the ODP had not been amended, Fidelity required a quit claim deed from the City indicating that the "condition for 'Jeffco' building an 'elementary school' has been satisfied or amended." **Ex. I-36.**[25] Again, no evidence of any such quit claim deed was presented at trial.

On October 17, 2011 Ted Hughes with the Department of Education wrote to Robert Hammond and Leann Emm instructing that there is an Intergovernmental Agreement [IGA] between the District and the City that would need to be voided (in connection with the rezoning).[26] Mr. Hughes states that the City Public Works Director [Mr. Hutchison] was drafting

[24] Mr. Reed initially testified that he requested a quit claim deed in late 2010 or early 2011, but also testified that he asked for this deed in response to the title company's concerns which were not raised until late in 2011.

[25] The legal conclusions set forth in Exhibits I-36 and I-37 were objected to and not adopted by this Court, however the Exhibits themselves were admitted into evidence.

[26] It is not clear to what IGA this comment refers. The Interveners attempted to introduce a copy of a 2008 IGA between the City and the District that was not executed. That IGA provided for transfer of the property at issue to

a "Letter of Agreement" to amend that IGA, but this Court has not been provided with such draft or agreement, if it exists. **Ex. I-39.** The Court acknowledges that this exhibit was not admitted at trial, however, the Court is including the reference based upon Messrs. Reed and Hutchison's testimony (as introduced by both the Interveners and the City).

Apparently, on October 20, 2011, Land Title issued a Title Commitment to the District, which did not contain the additional requirements contained in the Fidelity Commitment.[27]

AAG Dineen informed the District via email on October 27, 2011, that the state needed written confirmation from Land Title that they were aware of the ODP and the "reservations contained in the 1977 vesting deed." She stated that "[t]he ODP was a restriction and reservation of record when the property was conveyed in 1977" and expressed concern that coverage under the title policy would be void if the State was in receipt of information and documents concerning title but failed to notify Land Title. **Ex. I-37.** The District's property manager testified that he then sent a copy of the ODP to Land Title which thereafter revised its title commitment as noted below.

On that same date, AAG Dineen wrote to City Public Works Director Jay N. Hutchinson: "The property is subject to the attached [ODP] recorded August 3, 1973 . . . ." She quoted the reverter provision from the ODP. Her letter notes that the 1977 deed specifically provides that it is "subject to reservations, restrictions, easements, and rights of way of record and subject to property taxes …." She indicated that because the ODP was a reservation and restriction of record as of the date of the conveyance, the State believed the conveyance to the District was subject to the ODP. Since the condition to construct an elementary school on the site pursuant to

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the City as part of an exchange of properties. Exh I-44. It was received subject to further foundation, but no such foundation was laid and it was ultimately refused. Mr. Hutchison testified that there is a long-standing IGA between the District and the City that governs school properties, but he further testified he did not know why it would need to be voided in 2011 for purposes of rezoning the property at issue. The long-standing IGA to which the City and District's witness referred was never introduced at trial (and apparently it was never produced in discovery because the City didn't deem it relevant to the issues). Mr. Hutchison further testified that he had drafted the "Letter of Agreement" referred to (but it was not produced in discovery by the City). Clearly, both of these documents are relevant to this litigation and should have been automatically produced by the City pursuant to Rule 26, but were not available for trial.

[27] This Title Commitment was precluded at trial because it was not timely produced, but the letter enclosing it was admitted. However, as noted, the Policy that was eventually issued contained the exceptions deriving from the ODP related to the City's potential claim to the property.

the ODP was not satisfied by the required date, she asked the City to explain its basis for concluding that the District had title to the site. She noted that the State had been unable to locate any conveyance from Lakewood to the District or from Lakewood back to the developer consistent with the language in the ODP, or to find any official modification of the ODP whereby Lakewood agreed to relinquish its interest in the Property. Ms. Dineen indicates that she attached a *written communication dated September 29, 2011 whereby the Lakewood Planning Department indicated the property was subject to the ODP and the Intergovernmental Agreement between Lakewood and Jeffco***. (**emphasis added)[28] AAG Dineen's letter goes on to discuss procedures for modification to the ODP and asks for written assurances that the City will defend its interpretation of the ODP. **Ex. I-23.**

On November 23, 2011 City Facilities Planner Ross Williams sent an email to Evelyn Baker (City) re: ZP-11-091 2090 S Wright Rezoning. That email provided: "In past years this parcel had been promised to the City for Park use by the District . . . . I do not believe that past plans and community expectations would see this property as anything but a school or park. Rezoning the parcel to straight 2R would allow the District to sell the site for housing in the future. The intent of the original ODP was to preserve this land for public use." **Exh I-13.** There is no documentation of any response.

Land Title (Old Republic National Title Insurance Company) issued a Title Policy LTAQ70314724*1[29] on or about February 20, 2012 which read, "title to the estate or interest covered by this policy at the date hereof is vested in: JEFFERSON COUNTY SCHOOL DISTRICT R-1 [ ] AND THE CITY OF LAKEWOOD, AS THEIR INTERESTS MAY APPEAR." It further listed in documents that affect the land: "TERMS, CONDITIONS, PROVISIONS, BURDENS AND OBLIGATIONS AS SET FORTH IN THE DEVELOPMENT PLAN OF HUTCHINSONS GREEN MOUNTAIN VILLAGE RECORDED AUGUST 01, 1973 UNDER RECEPTION NO. 564887. NOTE: SAID PLAN CONTAINS A TITLE REVERTER

[28] This Court has not seen a September 29, 2011 letter and none is attached to Ex. I-23. Apparently, it was not produced in response to the CORA request that resulted in the Interveners obtaining Ex. I-23 or provided in discovery by the City. City Public Works Director Hutchinson testified that he may or may not have been in charge of the planning department on September 29, 2011 and that he wasn't familiar with the September 29, 2011 letter.

[29] This policy indicates that it is in lieu of Policy No. LTAQ73014724 which "is hereby cancelled." The Court was not provided a copy of this prior policy, but testimony indicated that the new policy was issued when the title company was provided a copy of the ODP.

TO THE CITY OF LAKEWOOD IF THE LAND IS NOT USED FOR AN ELEMENTARY SCHOOL."[30] **Ex. I-22** (emphasis in original)**.**

On April 2, 2012, AAG Dineen sent an email to the Department of Education (among others) indicating that the title issues continued to be a concern with the property (and referencing the April 2008 Memo wherein the District indicated that it was in the process of transferring title to the City because of the "ODP provision reverting the site to the City" "for park purposes"). This email was forwarded to the District. **Ex. I-35.** There is no documentation of any response.

On July 31, 2012 City Community Resources Director Kit Botkins confirmed by email to resident Adam Paul that the City had a "mow crew" at the property on July 30, 2012 and that the crew had mowed a small portion of 2090 Wright Street (the property at issue), which they have mowed "for many years" due to a rattlesnake concern. Adam Paul forwarded the email to the City Mayor. **Ex. I-8.**

On September 10, 2012, the City entered into an Agreement for Legal Services of City Attorney with Widner Michow & Cox LLP. **Ex. 53.**

The April 17, 2013 Neighborhood Website for the City of Lakewood showed that the property at issue is included in that park designated as "Hutchinson Park." **Ex. I-6.** Testimony indicated that that map was subsequently changed (in August 2013) and the Park no longer encompasses the property at issue here.

The Interveners are residents and taxpayers of the City and own property contiguous to the property at issue and/or have a view of the parcel at issue. **Ex. I-42.**

[30] There is also reference to a Release and Quit Claim deed recorded November 23, 1998, which this Court has not been provided, and thus the Court will deem is not relevant to this litigation.

A party lacks standing to challenge the title of another. *School District No. Six v. Russell*, 396 P.2d 929, 932 (Colo. 1964). However, a resident taxpayer of a municipality has the right to maintain a suit to prevent the unlawful disposition by the municipal authorities of the property of the town, and to restrain the diversion of property in his town from any public use, which he shares, to which it has been dedicated. *McIntyre v. Bd. of Commr's of El Paso County*, 61 P. 237, 241 (Colo. 1946). The Court previously found that the Interveners, as residents and taxpayers of the City, and whose property would be impacted by any decision rendered herein, have made a sufficient showing under *McIntyre* to be permitted to assert claims in this action. *See also*, *Denver Chapter of Colo. Motel Ass'n v. City and County of Denver*, 374 P.2d 494 (Colo. 1962).

Interveners bring their declaratory judgment claim under Colorado's Uniform Declaratory Judgments Law. Colo. Rev. Stat. § 13-51-101 *et. seq.* (2012). Because no statute of limitations is specifically applicable to declaratory judgment actions, courts apply the two-year catch-all statute of limitations found in C.R.S. § 13-80-102 (2012). *Harrison v. Pinnacol Assur.*, 107 P.3d 969, 972 (Colo. App. 2004). Under Section 13-80-108(8), the cause of action begins to accrue "when the injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of reasonable diligence." The District and City argue that this and other statutes of limitations[31] operate to bar Interveners' claims.

The entities also argue that because the City would be time-barred in asserting claims, so too are the Interveners. More specifically, the District and City contend that the alleged breaches of the ODP occurred either in 1977, when the Developer deeded the Property directly to the District, or in 1981, when eight years had elapsed since the ODP's approval, the District had failed to build a school on the property, and the City did not seek title to the Property. Because the City knew or should have known of these alleged breaches of the ODP, the entities assert, any cause of action began to accrue on Interveners' claims. These arguments assume that Interveners are bringing this action on behalf of the City; as discussed above, this is simply not

[31] E.g., Colo.Rev.Stat. § 13-80-101(1)(a), Colo.Rev.Stat. § 38-41-111, and Colo.Rev.Stat. § 38-41-101.

the case. Interveners bring these claims on their own behalf, as taxpayers and residents of Lakewood, whose property is impacted by this ownership dispute. Interveners could not have known of the City's intent to disclaim any interest in the property (related to title, dedication, or otherwise) until late 2011, when notices were mailed to homeowners in the area. As such, no statute of limitations bars Interveners' claims.

As an initial matter, this Court finds that City Ordinance O-73-51 and the ODP for Hutchinson Green Mountain Village recorded in 1973 continue to have legal import regarding the title to and use of the property at issue. There was no evidence presented that either the Ordinance or the ODP was amended as it pertains to this property.[32] It is clear that the ODP explicitly provided that the land at issue land would be dedicated to the City for the benefit of the District for use as an elementary school. In addition, the ODP provided that all rights of the District in the land would be null and void and the land would revert to the City if the land or any portion thereof was not used for elementary school purposes within eight years of August 1, 1973. It is undisputed that this land remains undeveloped and has never been utilized for an elementary school.

The January 1, 1977 Deed given the City for 37-plus acres was in accord with the ODP and Ordinance O-73-51, however it was apparently never accepted or rejected by the City Council.[33] In 1977, the City was governed by Colorado statute because the Lakewood City Charter had not been adopted.[34] Thus, C.R.S. § 31-25-205 required that interests in land given to a City for park or pleasure ground purposes be accepted or refused by the City by ordinance. There was no ordinance rejecting the January 1, 1977 deed. Thus, the rejection of that deed, which contained what the City acknowledges was dedicated as park land (plus land that could

[32] To the contrary, when the District was intending to sell the property to the Rocky Mountain Deaf School, the land at issue was rezoned via ordinance to allow use by a K-12 school because it was governed by the zoning limitation contained in ODP (it was zoned for use as an elementary school). The rezoning ordinance was later rescinded by the City Council upon the District's request of September 5, 2012.

[33] The Court acknowledges that there is some evidence that the January 1, 1977 deed was accepted by the City as stated four months later in April 1977. However, because the same land was deeded a second time, this Court will find that the City implicitly did not accept the first deed. Although that correspondence is contradictory to the positions now taken by the City and the District, this Court does not determine whether the April 13, 1977 letter and memo were misrepresentations or simple misstatements by their authors.

[34] It was not adopted until 1983 according to the statements at trial, when Lakewood became a home-rule city.

revert to the City for municipal purposes), was in violation of Colorado statute.[35] However, C.R.S. § 31-15-713, also precluded the City from disposing of property held for any governmental purpose without a vote of the electorate and so the City could not receive and then transfer the property at issue to the District without such vote.[36] The evidence presented at trial indicates that individuals with the City apparently chose to reject the deed without presenting the issue to the City Council. Nonetheless, it is undisputed that the City later did receive and accept a deed for the park land required to be dedicated to the City under the Ordinance and ODP and thus any harm caused by violation of law and the ODP as it related to the park land to be given directly to the City was cured by that subsequent acceptance. The issues surrounding the current title to the 2090 Wright Street property are not as easily resolved, however.

It is undisputed that the District has held recorded title to the property since it received its Deed from the Developer in 1977.[37] This Court acknowledges that there is an "essential state interest" in the "security and marketability of real estate titles." *Strekal v. Espe*, 114 P.3d 67, 73 (Colo.App. 2004) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). "This interest is best served by a bright line rule that enables potential buyers to determine the validity of a title and its potential encumbrances." *Id. (citing Lobato v. Taylor*, 71 P.3d 938, 964 (Colo. 2002) (internal citation omitted)). The recording act protects good faith purchasers of property from a later challenge to their title. *Id.* "To be a good faith purchaser of real property, one must give value for the property, act in good faith, and lack notice of any defect in the title to the property." Id. at 74 (citation omitted).

However, the District cannot claim that it was an innocent and good faith purchaser, unaware of its obligations under the ODP and Ordinances to build a school within eight years or

[35] This Court does not find that the apparent agreement between the District and City wherein the City agreed to use that portion of the land not being used for school purposes for public parks and recreation facilities as having the legal effect of converting the school land to park land and thereby extending the application of C.R.S.. § 31-25-205 to that piece of the parcel as well.

[36] It is not clear why the legal issues were not raised at the time the Ordinance was adopted and the ODP approved, but there was no documented discussion of this problem until after the January 1, 1977 deed was given the City.

[37] The Interveners assert that the District's deed violated the anti-subdivision provisions of C.R.S.. § 30-28-101, however that section only applies to unincorporated territory within the county (see Colo.Rev.Stat. § 30-28-102) and is thus not applicable to this property located within the City of Lakewood.

its interest in the land would be null and void and "revert" to the City.[38] It is well documented that not only was the District on notice of the dedication and reversionary/executory limitation language in the ODP,[39] but also that the District had been provided a copy of the January 1, 1977 deed from the Developer to the City pertaining to the 2090 Wright Street property to the City prior to the District's receipt of the latter deed.[40] The District's denial of knowledge of the original deed and the dedication provisions of the ODP until the eve of trial likely had a substantial impact on the course of this litigation. All parties (their experts and the Court) were operating under the impression that the District did not have knowledge of the dedication provision in the ODP prior to the receipt of their deed and thus could not have been bound by that provision. Earlier disclosure of this knowledge may well have impacted the opinions of the legal experts and the City Attorney's decision to file a Disclaimer; all parties were operating under this misimpression through and after summary judgment briefing.

The record is now clear, however, that the District received actual notice of the executory limitation prior to its receipt of the deed for the property and they so acknowledged in their letter of April 13, 1977. The ODP was of record and the District was on (at least) inquiry notice of the limitation on their title. Although the District insisted on receiving a warranty deed, this Court finds that the Deed for the land at issue from the Developer to the District (for which they paid $10 at most) did not transfer fee simple absolute title, but rather it was by its very terms explicitly and specifically "subject to any reservations, restrictions and rights of way" of record in 1973 including the provision in the ODP that the land was to be used for elementary school purposes by 1981 or the District's rights in the land "shall be null and void" and said land would "revert" to the City. The Court finds that the District has held recorded title to this property for over 35 years; however, the District's rights were and are subject to automatic termination

[38] As discussed at the public hearings regarding approval of the ODP and Ordinance, and acknowledged by the District, the development was expected to take 7 - 10 years to complete and there were already concerns about the loads on current schools in the area. See e.g. Ex. I-3, I-14, I-46 & I-47. This 8-year limitation was rationally related to the need to address the additional burden that this development would have on the existing schools and to encourage timely development of additional schools by the District.

[39] See e.g., Ex. I-14 (developer obligated to dedicate land to City), I-19 (acknowledging that the property was reserved for the District "for the purpose of a public school facility" and that it had been identified, reserved and approved by the District as of January 1, 1976, and now conveyed to the City to be re-conveyed to the District."

[40] Late in this litigation (just prior to the 30(b)(6) deposition of the District), the District located a copy of the January 1, 1977 deed to the City attached to a letter dated April 13, 1977, stating that the District acknowledged that the land had been deeded to the City. Ex. I-19.

pursuant to the terms of the Deed and ODP, and thus the District obtained title in fee simple subject to an executory limitation.[41]

"A conveyance of a fee simple estate may employ language of either 'executory limitation' or 'special limitation' to cause the created interest to automatically expire upon the occurrence of a stated event." Restatement of Property §§ 23, 25 (1936). "Language creating a fee simple subject to executory limitation must 'express[ ] an intent of the conveyor that, on the occurrence of a stated event, an estate in fee simple contemporaneously conveyed or retained by the conveyor is to terminate in favor of an estate created in a person other than the conveyor.'" Restatement of Property § 46, cmt. j; *Kennewick Public Hosp. Dist. v. Hawe*, 214 P.3d 163, 165-66 (Wash. App. 2009). Here, the unambiguous intent of the Developer was to dedicate the property subject to the limitation contained in the ODP which created a future potential interest in the City to divest the District of the District's rights to the property if the District failed to use the property for elementary school purposes within eight years of the ODP's approval.[42] The City Council approved and adopted (and recorded) the ODP providing for the City's potential ownership interest in the property.[43] The City thereafter regularly expressed the continuing enforceability of the executory limitation and requested compliance therewith.

When the City deemed it was necessary to have a separate deed to the District, the City could have ensured that that District's deed explicitly contained the executory limitation requirement (build within eight years from ODP approval or the land would revert to the City for municipal purposes); however that absence does not defeat the City and District's knowledge of

[41] This Court acknowledges that an executory limitation has not been expressly adopted by Colorado appellate courts, but neither has it been rejected. However, Colorado courts have recognized that a city may transfer property with a possibility of reverter (*City of Idaho Springs v. Golden Savings & Loan*, 480 P.2d 847 (Colo. App. 1970)) and that the title of a school district may cease where land deeded for a school is no longer used as a school (*School District No. Six v. Russell*, 396 P.2d 929 (Colo. 1964)). An executory limitation has been approved by other state courts, *see. e.g. McKinley v. Waterloo Railroad Co.*, 368 N.W.2d 131, 138 (Iowa 1985); *Neeley v. Neeley*, 2009 WL 1076740 (Tenn. App.); *Rodriguez v. Garza*, 2007 WL 2116411 (Tex. App.); *Jensen v. City of New Albany*, 868 N.E.2d 525 (Ind. App. 2007); *Lowers v. U.S.*, 663 N.W.2d 408 (Iowa 2003); *Piche v. Independent School Dist. No. 621*, 634 N.W.2d 193 (Minn. App. 2001).

[42] Although the City may have been prohibited by statute from transferring title to the District that contained a provision for reversion on a date certain (*Centennial Properties, Inc. v. City of Littleton*, 390 P.2d 471 (Colo. 1964); it was authorized to transfer such property with the possibility of reverter (*City of Idaho Springs v. Golden Savings & Loan*, 480 P.2d 847 (Colo. App. 1970). In any event, it was the Developer and not the City who transferred title to the District.

[43] The City did not accept a statutory or common law dedication of the school property by approving the ODP, as asserted by the Interveners, but rather accepted the intent to dedicate the property with the executory limitation.

the recorded limitation on their title and the effect of that limitation on the District's title. Again, the District cannot claim that it took the subsequent (September 27, 1977) Deed as an "innocent purchaser, unaware of any dedication or use obligation of this property."[44] Clearly, no one in 1973 (including the City, District, and Developer) intended the outcome asserted by the District at trial (namely, that this property could be used for other than a school or municipal purposes, including commercial development).

All parks and other places designated or described as for public use on the map or plat of any city are public property and the fee title thereto is vested in such city (by way of a statutory dedication). Colo.Rev.Stat. § 31-23-107; *City of Greenwood Village v. Boyd*, 624 P.2d 362 (Colo. App. 1981). Statutory dedication pursuant to § 31-23-107 conveys full fee title; common law dedication ordinarily conveys only an easement. *City of Greenwood Village*, 624 P.2d at 364. Under common law, dedication of a public way by a private property owner is established by demonstrating that the property owner unequivocally intended to make the dedication, and the dedication was accepted by the governmental authority. *Bd. of County Comm'rs v. Sherrill*, 757 P.2d 1085, 1087 (Colo. App. 1987).[45] Here, the Developer's intent to dedicate the property for a school with the possibility of reverter/executory limitation to the City if not so used is explicit in the ODP.

A governmental authority's acceptance of a dedication may be evidenced by legislative act, or by the public entity's possession, improvement, or use of the land. *Id.* The City Council approved the ODP in 1973, thereby accepting a statutory dedication of the executory limitation – formerly the possibility of reverter - contained in the ODP.[46] It has been of record since August

[44] There was some evidence that the District "maintained" the property; however that maintenance consisted of "flailing" the natural growth (there was no evidence of the cost of such maintenance or testimony of any improvements made to the natural state of the property). There was also evidence that the City regularly mowed a section of this property near the playground area.

[45] The City filed a Notice of Supplemental Authority with this Court, citing *Friends of Denver Parks, Inc. v. City and County of Denver*, 2013 WL 6814985 (Colo. App.), however, that case is not a final opinion, and is clearly distinguishable. There, the Denver Charter prohibited the dedication asserted; there is no analogous provision in the Lakewood Charter. Thus, that Court's analysis is simply not applicable to the circumstances presented here.

[46] While the City implicitly rejected the dedication of the original title to the District property when it rejected the original deed for the entire parcel (even though it had approved that provision in the ODP) it accepted the dedication of the executory limitation when it approved the ODP (and passed Ordinance O-73-51); the record is replete with documentation of the City's repeated affirmation and acceptance of the dedication of the reversionary/executory limitation provision (see fn 47) while there is absolutely no evidence that the City rejected that provision. In

1, 1973. There is no evidence of any City resolution or ordinance later rejecting the reversionary provision/executory limitation contained in the ODP. As evidence of their acceptance, the City and the District have historically acknowledged that the land was subject to a title provision that transferred title to the City if a school was not built within eight years of August 1, 1973.[47] Even if the approval alone was not sufficient, the City indicated to the public by signage that this land is City open space from the 1980s until recently (and land has been used by the public as open space since the Hutchinson development began). **Ex. 4, 5 & 7.**[48] A few purchasers of property near the property at issue testified that they *inter alia,* reviewed and relied upon the ODP, relied upon the representations of the Developer's agents that the property at issue would revert to the City (as open space or a park) if not used by the District for a school by 1982,[49] and relied upon the signs indicating the property was City open space. They also testified (without impeachment) that they paid a premium for their properties based upon the proximity to the property at issue.[50] The District and the City have both historically acknowledged that the land was bound by the conditions of the ODP, and the City has repeatedly requested that the District

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rejecting the original deed and having the property conveyed directly to the District, the City, District and Developer defeated the City's ability to accept the original dedication of the property as stated in the ODP, and thereby converted the dedicated possibility of reverter into a dedicated executory limitation. This executory limitation remained of record, and limited the District's title. This court will refer to the remaining dedication of the executory limitation as "possibility of reverter/executory limitation," "executory limitation – formerly possibility of reverter," or "executory limitation." All such references are intended to refer to an executory limitation, as that is legally defined. References to "possibility of reverter" mean just that.

[47] As recently as 2009 in the case of the District, the District acknowledged that it was limited by the provision reverting title to the City; the District and City have historically done so as well. *See, e.g.* Ex. I-10, I-11, I-12, I-15, I-24, I-33, I-34, I-38, and I-45.

[48] A park or square is different from a street, in that the municipality is bound to repair the latter but not the former; hence public use may show acceptance of the dedication of a park, i.e., acceptance of beneficial gift is presumed, and use is evidence of benefit. *Abbott v. Inhabitants of Cottage City,* 10 N.E. 325 (Mass. 1887); *Attorney General v. Abbott*, 28 N.E. 346 (Mass. 1891); *Leach v. Manhart, supra,* 102 Colo. at 133, 77 P.2d at 653 (for a roadway to exist, "[u]ser is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices). This Court acknowledges that no Colorado case has adopted the position that use by the public can work as acceptance of a dedication (other than for a street or roadway contained on a plat e.g. *City of Leadville v. Coronado Mining Co.*, 86 P. 1034 (Colo. 1906)) (and this Court is not so finding here); the Court is simply noting that after this dedication and both before and after the reversionary/executory limitation language was triggered, the public has used this property as open space / park land.

[49] "Where the owner of land in laying out a town site exhibits upon his plat a certain square or plat of ground not subdivided into lots, and states to intending purchasers of lots that this square is reserved for a public park and upon these representations sells lots, he thereby dedicates the ground to such public use as fully and effectually as if he had expressly done so by deed . . . ." *McIntyre v. Bd of Commrs of El Paso County*, 61 P. 237, 241 (Colo. 1946). The evidence indicated that this land was excluded from the platting of this subdivision (although it was surrounded by other plats), and the ODP expressly stated the Developer's intent to dedicate this property for school use and potential reversion to the City. Again, such does not amount to acceptance by the City, but there is sufficient evidence to establish the City's acceptance of the executory limitation.

[50] As a result, they paid higher property taxes (which in turn benefited the District for the past 30-plus years).

honor its obligations under the ODP and Ordinance, to no avail. *See, e.g.* Ex. I-11, I-12, I-14, I-15, I-33, and I-38. This Court finds that pursuant to *McIntyre* and *Sherill*, once the City Council accepted the ODP (which was given force of law by Ordinance O-73-51), it was recorded, and the land was treated by the City (and District as well as the public) as open space (from 1977 to present), the City accepted a common law dedication of the executory limitation for the 10-plus acres.

Although the City has never held title to the property, this would not have precluded the District from transferring title to the property to the City in accord with the express provisions of the ODP's executory limitation, as the City repeatedly requested (and at times the District even indicated that it was acceding). Such transfer never occurred, however. As AAG Dineen noted in April 2012, the City needed to quit claim its interest to the district or include some provision therefor with the rezoning in order for the District to have clear title to the property. Testimony indicated that, in fact, the District asked the City for a quit claim deed while it was attempting to sell the property at issue. One was not forthcoming, but this is yet another example of the District's acknowledgement of the City's continuing interest (under the executory limitation) in the property.

The argument that the specific ten-plus acres of land were not sufficiently identified by legal description in the ODP does not defeat the dedication of the executory limitation – the City was informed that they could determine which acreage contained in the 37 acres of section A-3 would be designed for school use, and thus could have accepted or rejected that dedication if that provision was not acceptable; the City chose to accept it in its adoption of the ODP. According to the District, this land was identified, approved and reserved as early as January 1, 1976 (before the original deed was given to the City).[51] And, once the City received the deed for the remaining acreage in areas A-3 & A-4, it certainly permitted precise identification of the remaining 10-plus acres and the opportunity for rejection of the dedication of the executory limitation of potential reversion for municipal purposes – no such rejection occurred.

[51] Ex. I-19.

Based on a totality of the evidence presented and consideration of the applicable law, this Court finds that on August 1, 1981, the District's rights to use of the property were rendered null and void and the City's future interest in the property automatically came into effect without any action required on behalf of the City. *City of Idaho Springs v. Golden Savings & Loan Assn*, 480 P.2d 847 (Colo. App. 1971). This Court finds that the City was given and accepted a common law dedication of an easement to use this property for municipal purposes pursuant to the plain language of ODP (which was given force of law) and that the easement automatically became effective on or about August 1, 1981.

Although the City filed a disclaimer in this action, that disclaimer is not effective to eliminate the City's title to the property. In *Martini v. Smith* the Colorado Supreme Court held that if a road is a public road that has been used as such, then a disclaimer by a county under the procedural provisions of C.R.C.P. 105(c) cannot operate to vacate the road because a procedural rule cannot abridge, enlarge, or modify the substantive rights of any litigants. 42 P.3d 629 (Colo. 2002). The *Martini* court reasoned that if the county were allowed to disclaim its interest in a road under C.R.P.C. 105, it would affect a vacation of the public road without complying with the mandates of C.R.S.. § 43-2-303(2)(b). *Id.* Here, the City is governed by its Charter and its Disclaimer does not comport with the provisions of Article XIV of the Lakewood City Charter which requires the passage of an ordinance to lease, sell or otherwise dispose of real property held or used for any municipal purpose.[52] The Charter also prohibits any lease or sale of "any real property used or held for open space or park purposes without the question of such lease or sale, and the terms and consideration therefor being submitted to a vote of the register electors of the City at a special or regular municipal election and a favorable vote by a majority of those registered electors voting thereon." Section 14.3(b).

The Interveners assert that this property must be used by the City as open space or park land (absent a vote from the electorate); the City asserts that any reversionary interest (executory limitation) would, by its express terms, be for "municipal purposes" (subject to action by the

[52] There was no evidence presented at trial that the filing of the Disclaimer was not authorized by the City and that issue is not relevant to this analysis (as noted, the Interveners abandoned their *ultra vires* claim at trial). However, the testimony of Councilman Wiechman that he made a motion to the City Council withdraw the disclaimer is evidence that the disclaimer was thereby approved by the City Council.

City Council). Because this issue impacts the disposition of this land, pursuant to C.R.C.P. 105, this Court must also determine whether the land is held for "municipal purposes" or for "open space or park purposes." It is well settled by authority that a "municipality holds . . . dedicated ground for the use and benefit of its citizens, for the purposes only of its dedication" *McIntyre,* 61 P. at 239. The trustee cannot impose upon dedicated land any servitude or burden inconsistent with those purposes, or tending to impair them. *Id.* Neither can it alienate the ground, nor relieve itself from the authority and duty to regulate its use. *Id.* It does not have the authority to later subvert the purposes of that dedication. *See also Turnbaugh v. Chapman,* 68 P.3d 570 (Colo. App. 2003). It is undisputed that the dedication here was for "municipal purposes" and that the property has remained undeveloped and in its natural state.

This Court finds that the City's agreement at the time of zoning to use any portion of the property not being used for schools as park land or open space until a school was built did not equate to a binding promise to do so in perpetuity. In addition, the City did not accept a dedication of an executory limitation in park land or open space; it accepted one for property to be used for municipal purposes. The ODP on which at least one purchaser relied expressly indicated that the land would revert for municipal purposes. Although sales agents represented to potential purchasers of the property that it would become park land or open space, such representations do not carry the legal weight of converting a dedication for municipal purposes into one for open space or park land. However, the City represented on both signage and maps (dating back to 1980s) that the land at issue was park land or open space, and it is undisputed that the land has been used as open space and park land since the lots around it were developed in the 1970s and 1980s. Thus, resolution of this issue comes down to one of interpretation and application of the City's Charter to the facts presented here.

Statutes must be construed as whole, and, thus, a court interpreting a statute must strive to give consistent, harmonious, and sensible effect to all of its parts. *City of Grand Junction v. Sisneros,* 957 P.2d 1026, 1028 (Colo.1998). The plain language of Provision 14.3(b) applies to "any real property used or held for open space or park purposes." Provision 14.3(a) applies to "real property held or used for any municipal purposes." The land subject to Provision 14.3(b) is obviously encompassed within 14.3(a). It is not logical to assume that any property given the

City for municipal purposes (other than park land or open space) is immediately developed. But that raises the question of when such land becomes open space or park land and whether lack of development and use by the public automatically converts open land to that "used for open space purposes." Here, the property has been used for open space purposes by the public for over 30 years, but it is not clear that it was used for open space purposes by the City. The City did install signs in the 1980s indicating that the land was City open space and the City has never indicated otherwise. Although this Court does so with significant hesitation, based on the totality of the circumstances presented, and applying a plain reading of the City Charter as required, this Court has no option but to find that this property has been used for open space and thus falls within the purview of City Charter Provision 14.3(b). As such, the property may not be leased or sold without a favorable vote on the question of such lease or sale by a majority of the registered electors of the City voting thereon.

Interveners also claim that the City violated the Open Meetings Act, C.R.S.. §§ 24-6-401, *et seq.* The declaration states that, as a matter of statewide concern and policy, "the formation of public policy is public business and may not be conducted in secret." *Id.* at § 401. Towards this end, the Open Meetings Law requires that meetings of local public bodies at which a quorum or three or more members of the body are present and at which public business is discussed or any formal action may be taken are to be "public meetings open to the public at all times." Colo.Rev.Stat. § 24-6-402(2)(b). "[A] meeting must be part of the policy-making process to be subject to the requirements of the Open Meetings Law. A meeting is part of the policy-making process if it concerns a matter related to the policy-making function of the local public body holding or attending the meeting." *Bd. of Cnty Commr's v. Costilla Cnty Conservancy Dist.*, 88 P.3d 1188, 1194 (Colo. 2004). A meeting is also part of the policy-making process "when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance, or formal action." *Id.* at 1190. The Open Meetings Law requires, *inter alia*, that notice of the meeting be provided to the public. Colo. Rev. Stat. § 24-6-402(2)(c). If no notice is provided to the public, "any resolution, rule, regulation, ordinance, or formal action" taken or made at that meeting is invalid. *Id.* at § 402(8). The Open Meetings Law prohibits a local public body "from fully discussing and debating a measure in a closed meeting and then 'rubber stamping' the same measure in an open session." *Bd. of Cnty Commr's*, 88 P.3d at 1194; *Bagby v. Sch. Dist. No. 1*,

528 P.2d 1299 (Colo. 1974).[53] The Court is to read the Open Meetings Law broadly in order to further the legislative intent "to give citizens a greater opportunity to meaningfully participate in the decision-making process by becoming fully informed on issues of public importance." *Intermountain Rural Elec. Ass'n v. Colorado Public Utilities Com'n*, 298 P.2d 1027, 1029-30 (Colo. App. 2012).

Here, Interveners allege that the City violated the Open Meetings Law on September 10, 2012 at the 4:00 p.m. meeting prior ("pre-meeting") to that date's 7:00 p.m. City Council meeting and in the form of two emails between the Mayor and various Councilmembers.[54] Intervener's allegations of the former violation are two-fold. First, Interveners assert that the City did not provide adequate notice of the pre-meeting and second, that the Councilmembers present on that September 10, 2012 took formal action or made a formal decision at the pre-meeting and then "rubber stamped" that decision at the formal City Council meeting. As to the notice issue, the City Clerk testified that regular notice of the pre-meetings was posted on the board where the notice of the City Council meetings (with agenda) was posted. That notice was captioned "Public Notice" and contained the date (2nd and 4th Tuesdays of the Month), time (4:00 p.m.), place (City Manager's Office) and topic for the meetings (Council Officer's Meeting – Open Discussion). **Exh I-52 & I-53.** The Notice did not vary from month to month and informed the public of the meeting "at which a quorum or the City Council may be in attendance or is expected to be in attendance." **Id.** While it may have been a better practice to note that the agenda and procedures for the Council meeting would be discussed, this Court find that the notice of the pre-meeting on September 10, 2012 was sufficient as long as the conduct at the 4 p.m. meeting did not run afoul of the Open Meetings Law.

[53] In *Bagby,* the Colorado Supreme Court analyzed a precursor to the current Open Meetings Act. There, it held that "superintendent conferences" were meetings that must be open to the public. In that case, the school board was invited to attend regular meetings, which were held for the purpose of discussing board business. The record showed that "the agenda [of the meetings] was quite extensive and many of the same matters were acted upon later in . . . properly called regular or special meetings." *Id.* at 1300. Of concern was the fact that the matters discussed at the closed meetings were "usually . . . given only cursory treatment and put to a vote [at open meetings], thereby indicating that the underlying pros and cons for the final decisions had been previously dispensed with." *Id.* Therefore, the court held, "[r]egardless of whether formal action is taken, when a 'conference' . . . is preceded by notice, and held with regularity at specific times and places for the purpose of discussing Board business," it must be open to the public. *Id.* at 1302.

[54] This claim was limited by the Court to violations asserted in relation to the property at issue.

Councilman Wiechman testified that he has attended approximately 10 pre-meetings over a period of four years, and that conclusions were reached before the pre-meetings, but he also indicated that he was not involved in that decision-making process. He testified that he did not know if others decided individually or together (he wasn't aware of any meetings or emails where decisions were communicated). He indicated that the pre-meeting was more of a script-writing session for how the Council meeting would be run, but that people would take positions as to what should be decided on the issues. As to the September 10, 2012 meeting, he testified that the Council had previously decided to reaffirm the zoning decision, but then received a letter from the District asking the Council to rescind that decision and so they were scrambling to write a new script.[55] He stated that the Council did not take formal action at the pre-meeting, because they knew that they could not, but that they had a vigorous discussion about the issue and reached consensus on what would occur at the formal meeting – they would reverse their position and invalidate the rezoning ordinance. He also testified that the Councilmembers who were present didn't reach a decision on the issue, although they discussed it and took positions on the issue.

Adam Paul testified that he currently attends the pre-meetings occasionally (he attended regularly when he was an officer two – three years earlier). He testified that at the pre-meetings they discussed the 7 p.m. meeting agenda to prepare procedurally for that meeting. He did not recall any substantive discussions on matters pending before counsel, or any decisions on rules, policies or positions; no votes or any formal actions were taken. He testified that he was not aware of any instances where a decision at the 7 p.m. meeting was substantively influenced by discussions at the 4 p.m. meeting. He was not aware of any formal action or policy decision made by email. He did not recall whether he attended the September 10, 2012 meeting.

The City Clerk, Margy Greer, testified that she attends the pre-meetings to determine protocol for the formal meeting (the Mayor sometimes allows extended public comment and has done so for the 2090 Coalition). She has never seen the Council take formal action at a pre-meeting, nor adopt any policy or position. She didn't remember the September 10, 2012 meeting. She testified that the 2090 Coalition attended one or more of the pre-meetings.

[55] He didn't recall if he was at the meeting where they rezoned the property.

Mayor Murphy testified that he runs the 4 p.m. meetings. Their purpose is to organize the procedures for the agenda for the 7 p.m. meetings. The September 10, 2012, agenda indicated that the Council was going to be reconsidering the rezoning of the property. He did not have a preconceived notion as to what the Council would decide, but he was aware of the District's letter by the time of the pre-meeting. The receipt of the letter was discussed at the pre-meeting and all members knew that they had two options; he didn't recall if the members discussed the District's decision or the cost of a single-issue election. He testified that they would try to get an idea as to what issues might be raised by citizens during the public comment. He asserted that they did not discuss policy, just the contents of the agenda.

Ramey Johnson testified that the pre-meetings were mostly for Council leadership. She did not recall any discussions except as to the way the Council meeting would be conducted such as who would make a motion and the sequence of the discussion items.

Cynthia Barroway testified that she attended the meetings unless she was out of town. She did not know if she was present at the September 10, 2012 meeting. She testified that there were no substantive discussions or decisions on matters pending before counsel, whether concerning motions, ordinances, policies, rules, or positions the City might adopt at the 4 p.m. meetings she attended. As to the 2090 property, there were decisions made at pre-meeting to give the citizens' representative extended time for public comment at the Council meetings wherein that property was discussed. She testified that there was no formal action or decision made by email, nor any policy, position or rule adopted by email discussion only.

Considering all the testimony and evidence presented, this Court finds that the Interveners have failed meet their burden that a violation of the Open Meetings Law occurred at the 4 p.m. meeting. Although there was conflicting testimony as to whether any substantive discussion was had at that meeting, only one Councilmember testified that consensus to withdraw the rezoning ordinance was reached at that meeting (but it is not clear how many members were present), and even he acknowledged that they did not "take formal action." Notably, these meetings were open to the public and no member of the public testified that any

violation of the Law occurred at any of the pre-meetings related to this property. The Interveners have not established that a violation of the Open Meetings Law occurred at the pre-meeting on September 10, 2012.

The Interveners also contend that the Mayor violated the Open Meetings Law by making policy decisions via two emails sent to City Councilmembers. The first email was sent Friday, June 22, 2012 and informs the Councilmembers that the City Attorney's office had sought an opinion regarding ownership of the 2090 Wright Street Property from outside counsel and that such opinion would be provided to Council prior to the next meeting. The Mayor indicates that it is standard practice under the City Attorney's hybrid model. The Interveners failed to present any evidence or legal authority that this decision to consult outside counsel should have been presented to the City Council. Thus, this claim must fail. The second email was dated September 6, 2012 and informed Council that there would be no public comment at the upcoming meeting concerning the reconsideration of the rezoning of the Wright Street property. The Interveners did not establish that this was a policy decision; there was no evidence that the Charter or the Municipal Code provided for a public hearing in connection with reconsideration of an ordinance. As stated by the Mayor, there was no new evidence that could be considered except the City Clerk's determination of the sufficiency of the Petition seeking a public vote on rescission of the rezoning ordinance. This claim too, must fail.

The Interveners further contend that City Attorney Cox was not authorized to file the Disclaimer in this case because the decision to file was a policy decision that should have been made by the City Council and not the City Attorney. However, Councilmember Barroway and Mayor Murphy testified that the City Attorney was authorized to file without City Council approval because he made a legal decision and not a policy decision (and the ownership issues had already been substantively resolved by the Council at the rezoning ordinance meeting). There was no testimony to the contrary.[56] The Interveners have not met their burden of

[56] Exhibit I-56 contains an email from Councilmember Pete Roybal questioning the City Attorney's authority to file the disclaimer; it also contained a response from the Mayor addressing Mr. Roybal's concerns. There was no testimony that Councilmember Roybal (or any other Councilmember) continued to question the City Attorney's authority on this issue; this Court finds that a reasonable inference is that the City Council implicitly acknowledged the authority (and endorsed the prior decision) to file the Disclaimer.

establishing that the City Attorney made a policy decision (as opposed to a legal decision) when he filed the Disclaimer in this action.[57]

WHEREFORE, judgment enters as stated in this ORDER.

DONE AND SIGNED THIS 16th day of January 2014.

BY THE COURT:

MARGIE ENQUIST
DISTRICT COURT JUDGE

[57]Although this Court has ultimately found that that Disclaimer is not effective under the applicable law, as noted previously, the decision to file the Disclaimer was made prior to the discovery (on the eve of trial) of the documentary proof that the District had full knowledge of the original deed to the City and the dedication and possibility of reverter/executory limitation provision in the ODP prior to the receipt of their deed.