COLORADO SUPREME COURT Court Address: 2 East Fourteenth Ave. Denver, Colorado 80202 Colorado Court of Appeals Case No. 13CA1249 Denver District Court Case No. 2013 CV 32444 Hon. Herbert L. Stern III, District Court Judge **Petitioners:** FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN and ZELDA HAWKINS, individuals. v. **Respondents:** CITY & COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity.	**▲COURT USE ONLY▲** Case No.:
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PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 53(a) because it contains 3,660 words.

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

BENSON & CASE, LLP

s/ John Case

_____

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ADVISORY STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that Denver Charter § 2.4.5 abolished the common law dedication of parks that belonged to the city before 1955, when the Charter includes no such express or implied abolition.
2. Whether the trial court abused its discretion in holding that Plaintiffs failed to demonstrate a reasonable probability of proving that Hampden Heights North Park ("HHNP") is a park by common law dedication.

REFERENCE TO COURT OF APPEALS OPINION

Friends of Denver Parks, Inc. v. City & County of Denver, ___ P.3d ___, 2013 COA 177 (Appendix 1).

JURISDICTION

This Court has jurisdiction pursuant to C.R.S. § 13-4-108 and C.A.R. 49. The date of the Court of Appeals' opinion was December 26, 2013. No petition for rehearing or request for extension of time to petition for certiorari was filed.

STATEMENT OF THE CASE

Petitioners Friends of Denver Parks et al seek review of the denial of their motion for preliminary injunction to prevent the Respondents, City of Denver ("city") and Denver Public School District No. 1 ("DPS"), from building a school in a common law park. After an evidentiary hearing, the trial court denied

Petitioners' motion for preliminary injunction (Order, Appendix 2). Appendix 3 is the Charter Amendment for parks adopted in 1955. The Court of Appeals held that the current version of §2.4.5 (Appendix 4, amended August 19, 1996), which requires a popular vote before parkland can be sold, abolished common law dedication of parkland owned before 1955 (Opinion at 19).

Charter §2.4.5 is silent on how parkland owned before 1955 becomes a park. From that silence, the Court of Appeals inferred that the drafters intended to abolish common law dedication of pre-1955 parks. The decision is contrary to *Vaughn v. McMinn* 945 P.2d 404, 410 (Colo. 1997), *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004), and numerous precedents holding that, when a statute is consistent with common law, intent to abrogate may not be inferred.

McIntyre v. Board of Commissioners of El Paso County, 61 P. 237 (Colo. App. 1900) established that, when a municipal government treats a parcel of land for decades as a park, and the public uses it as a park, the land becomes a park by common law dedication. Because a municipality owns parkland in trust as trustee for the benefit of its citizens, the city may not sell it. *Id.* The Court of Appeals decision is contrary to *McIntyre*, and out of step with recent well-reasoned decisions of lower courts, which follow the doctrines of common law dedication and public trust. See *Glick v. Harvey*, Supreme Court of NY #103844/12

Judgment 1/10/2014 available at http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=103844-2012&Submit2=Search (enjoining city of New York and NYU from building university dormitories on municipal land that citizens used for decades as parks). *See also Jefferson County Schools v. City of Lakewood et al,* District Court Jefferson County Colorado #2012CV3006 Judgment 1/16/2014 at 30-31 (citing *McIntyre* as authority for declaring common law dedication of park, held in trust for people, and enjoining Lakewood and Jeffco Schools from building school there without a popular vote).

This case began when the city traded 10.7 acres of HHNP in southeast Denver to DPS for a building at 1330 Fox St. By trading dedicated parkland held in trust for its citizens, the city avoided having to pay $4 Million in cash for 1330 Fox. The city then persuaded the Denver District Court and the Colorado Court of Appeals that Charter §2.4.5, which requires a vote of the people, does not protect HHNP or any of the other common law parks that the city has owned and managed for its citizens since before December 31, 1955.[1]

[1] When the trial court asked the city attorney how many undesignated pre-1955 parks are in Denver, the city attorney did not know. Although not part of the trial court record, Appendix 5 is a list of Denver parks published by the city 8/12/2013 that shows **fifty five parks** that were not designated by ordinance, and are therefore **subject to sale without a vote of the people**.

Evidence in the trial court established that historically, since the city acquired HHNP in 1936, city officials and the public recognized HHNP as parkland open for recreational use. HHNP was one of numerous parcels that the city purchased in the Cherry Creek corridor after the creek overflowed its banks in downtown Denver in 1933. The city had two purposes: flood control and recreation. Since 1887, Denver citizens rode their horses southeast out of the city and picnicked along the shady banks of Cherry Creek. Numerous riding stables were located along the creek, including the Denver Country Club at University and Speer Boulevard, and the Glendale Riding Club at Kentucky and Colorado Blvd. Denver citizens rode their horses southeast along Cherry Creek to the Kenwood Dam, a remnant of which remains today on the Kennedy Golf Course. HHNP was a triangular parcel that straddled Cherry Creek ½ mile northwest of Kenwood Dam, with curving stretches of creek shaded by cottonwood trees and bushes. HHNP was owned by Denver, situated in Arapahoe County, and used for recreation by everyone who took time to enjoy its beauty and tranquility.

In 1965 Denver annexed Section 34 from Arapahoe County. Annexation included HHNP and the adjacent Hampden Heights subdivision. After annexation, citizen use of HHNP as parkland continued unabated. On every city map published since 1967, HHNP is depicted as public open space parkland.

In 1976 city officials told University of Denver professor David Longbrake, Ph.D. that HHNP was a park and would remain a park in perpetuity. Relying on this statement, Dr. Longbrake purchased his home adjacent to HHNP. For the next 36 years, Dr. Longbrake witnessed city employees maintaining and improving HHNP. They picked up trash, mowed the grass, reseeded native grasses, and built bridges and bicycle trails. In 1979, Mayor McNichols sent a letter to a homeowner stating that HHNP was "dedicated park land." The city posted a sign announcing park rules in HHNP. The name Hampden Heights North Park appears on city maps. Currently, approximately 2,000 cyclists per week ride the bike trail and bridges through HHNP that the Parks Department built with taxpayer funds.

In 2007, the Parks Department designated HHNP part of a 90 acre Natural Area that includes HHNP and Paul A. Hentzell Park. The purpose of natural area designation was to protect prairie grasses and provide a habitat for wildlife, including deer, coyotes, foxes, prairie dogs, raccoons, skunks, owls, hawks, ducks, geese, herons, hummingbirds, beaver, muskrats, and numerous other species that live and migrate through HHNP.

In 2010 the city enacted a comprehensive zoning ordinance that zoned HHNP as "OS-A," meaning "open space park."

The city and DPS agreed to the land swap in 2011, but concealed it from the public until October 2012. In December 2012, the Board of Parks and Recreation ("BPAR") voted 11-6 against the land swap. BPAR is a body created by Charter §2.4.3 made up of citizen appointees. The sale of HHNP was a display of raw political power by the mayor and DPS. First, the mayor replaced two appointees on BPAR who opposed his wishes. On January 2, 2013 Lauri Dannemiller, the mayor's appointed Manager of Parks and Recreation, overruled BPAR and "de-designated" 10.7 acres of HHNP as natural area so that it could be traded. The school board was divided 3-3 on whether to approve the land swap. DPS's superintendent then appointed a friend of the mayor to fill a vacancy on the board, who cast the deciding vote to approve the land swap 4-3.

Notwithstanding intense citizen opposition, the land-swap sailed through city council April 1, 2013. Petitioners obtained sufficient voter signatures on a referendum petition to place the issue on the November 2013 ballot. The city clerk and recorder refused to count the signatures or place the issue on the ballot. Deprived of their right to vote on the issue, by the very officials they elected, and denied a preliminary injunction by two lower courts, Petitioners now turn to the Colorado Supreme Court.

ARGUMENT

I. THE COURT OF APPEALS DECIDED A SUBSTANTIVE ISSUE IN A MANNER CONTRARY TO THE DECISIONS OF THIS COURT BY HOLDING THAT DENVER CHARTER § 2.4.5 ABOLISHED COMMON LAW DEDICATION OF PRE-1955 PARKS, WHEN THE CHARTER INCLUDES NO SUCH EXPRESS OR IMPLIED ABOLITION.

A. Laws in derogation of common law must be strictly construed.

While the legislature may abrogate or modify the common law, a court "will not infer such intent unless it is clearly expressed." *Giampapa v. American Family Mut. Ins. Co.* 64 P.3d 230, 237 (Colo. 2003). Statutes in derogation of common law must be "strictly construed so that if the legislature wishes to eliminate [common law rights] it must manifest its intent either expressly or by clear implication." *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004). When a statute does not explicitly bar common law claims, and the statute is not inconsistent with common law rights, the Court will not conclude that the legislature intended to abrogate the common law. *Vaughn* 945 P.2d at 410.

The principles governing interpretation of a city charter are the same as those governing the interpretation of a statute. *Leggett & Platt, Inc. v. Ostrom*, 251 P.3d 1135, 1141 (Colo. App. 2010). When interpreting a statute, a court must discern and give effect to the intent of the legislature. *Board of Comm'rs of County of Boulder v. Hygiene Fire Protection Dist.*, 221 P.3d 1063, 1066 (Colo. 2009).

The statutory language must be construed in context, and the words and phrases therein must be given their plain and ordinary meanings. *Id.*

B. Charter § 2.4.5 does not expressly or by clear implication abrogate the doctrine of common law dedication as to property owned by the city before December 31, 1955.

The Court of Appeals held that Charter § 2.4.5 abolished common law dedication of parks that the city owned before 1955. As adopted in 1955, the Charter amendment stated:

> **A4.5 No park to be sold or leased.** No portion of any park now belonging to or hereafter acquired the City and County shall be sold or leased at any time; provided, however, that no land hereafter acquired by the City and County shall be deemed a park unless specifically designated a park by ordinance.

(Appendix 3, Charter Amendment May 17, 1955)

The plain language divides city property into two categories: property belonging to the city before the amendment, and property acquired after the amendment. Land acquired after the amendment must be designated a park by ordinance. As to property like HHNP, owned before 1955, the Charter prohibits sale of such parkland, but does not say how or when it becomes a park.

When adopting the 1955 Charter amendments, the drafters were presumed to have in mind *McIntyre* and the doctrine of common law park dedication. *See Vaughn* at 409 ("The legislature is presumed to be aware of the judicial precedent

in an area of law when it legislates in that area"). Since the Charter does not expressly alter the doctrine of common law dedication of pre-1955 land, such land may be dedicated by common law usage before or after the date of the amendment. This must be true because, in 1955, parks like HHNP were already in use as public parks, but had not been recognized by formal designation.

Subsequent amendments to the Charter allow the city to sell parkland, but only after a popular vote. The Court of Appeals interpreted the 1996 amendment to mean that land "belonging the city as of December 31, 1955" could be sold unless: (1) the city owned the property before 1955 and (2) the property was a park by December 31, 1955. However, the charter is equally susceptible of another interpretation: that the Charter protects land owned by the city before 1955, if it is designated as a park after 1955.

Petitioners assert that the phrase "park now belonging to or hereafter acquired by the city" includes any property that was: (1) city-owned in 1955, and (2) became a park at some point. Because both interpretations are plausible, the provision is ambiguous and rules of construction apply.

The first such rule mandates strict construction of statutes in derogation of common law. Because the Charter language is ambiguous, it cannot be said that the drafters either "expressly" or "clearly intended" to abrogate common law rights.

Accordingly, this Court should construe the Charter in a manner that preserves common law dedication. *See Vigil* 103 P.3d at 327.

Additionally, where language is ambiguous, "courts should construe the language in light of the objective sought to be achieved." *Farmers Ins. Exch. v. Bill. Bloom, Inc.*, 921 P.2d 465, 470 (Colo. 1998). The objective of Charter § 2.4.5 is to protect Denver parks from sale. Hence, the Charter should be interpreted to protect parks by requiring voter approval before parkland is sold. The Court of Appeals' interpretation disregards that canon of statutory construction.

The Court of Appeals held:

> First, the city has not passed an ordinance dedicating the southern parcel as a park, and therefore the second part of section 2.4.5 does not apply.

Opinion at 18. In fact, the city passed the 2010 master zoning ordinance (Appendix 6) which designates HHNP as "Open Space Park." However, the city refuses to recognize the zoning ordinance as park "designation." Thus the city can represent to its citizens for decades that HHNP is dedicated parkland, show it as a park on city maps, use taxpayer funds to build a bicycle trail and bridges for public use in the park, but for the right price, city officials can deny that HHNP is a park, and deny citizens their right to vote on the sale.

The Court of Appeals' interpretation leads to an absurd result. It allows the city to sell, without a vote of the people, all parks which were acquired before December 31, 1955, and which the city has represented for decades to be parks. As of August 2013, there were 55 such parks.

Petitioners' interpretation honors the Charter's intent by ensuring that the proposed sale of city parkland owned before 1955 be put to a vote. Because Charter § 2.4.5 neither expressly nor by clear implication abolished common law dedication of parkland belonging to the city before 1955, the Court of Appeals acted inconsistently with this Court's precedent. This Court should grant certiorari.

II. THE COURT OF APPEALS PLACED ITS IMPRIMATUR ON THE TRIAL COURT'S ABUSE OF DISCRETION IN HOLDING THAT PETITIONERS FAILED TO DEMONSTRATE A REASONABLE PROBABILITY THAT HHNP IS A PARK.

A. HHNP is a park by common law dedication because the city intended to dedicate the property and the citizenry accepted that dedication.

A dedication of property to public use may be made by statute or by common law. *City of Denver v. Clements*, 3 Colo. 472, 497 (Colo. 1877). A common law dedication occurs where: (1) a city manifests "unequivocal intent" to dedicate property to public use, and (2) the public accepts that dedication. *City of Northglenn v. City of Thornton*, 569 P.2d 319, 321 (Colo. 1977). Intent need not

actually exist, but must appear to exist. McQuillin, *Municipal Corporations* §33:32 n 6 (3d ed. rev. vol. 2009).

"[O]ne of the public uses to which a city may dedicate land under the common law is a park." (Appendix 2, ¶ 47 [citing *McIntyre*].) Common law parks are owned by the city in trust as trustee for the benefit of its citizens. Once dedicated, common law parks cannot be sold. *See McIntyre*, 61 P. at 240.

Charter § 2.4.5 neither abrogated common law dedication as to property the city owned before December 31, 1955, nor imposed a deadline by which the dedication must occur. Accordingly, HHNP is a common law park if it was: (1) city-owned before December 31, 1955; and (2) dedicated as a park.

The city acquired HHNP in 1936. (Appendix 2, ¶ 20.) From that time forward the city evidenced intent to dedicate HHNP as a park, and the people of Denver accepted that dedication. Accordingly, HHNP is a common law park, and may not be sold without a vote.

1. Intent to Dedicate:

Evidence of intent to dedicate need not be express; it may be implied from acts or declarations on the landowner's part clearly demonstrating intent to make a dedication, or from landowner conduct that would estop him from denying such intent. *Starr v. People*, 30 P. 64, 65 (Colo. 1892).

Mere public use is insufficient to prove a common law dedication. *Starr*, 30 P. at 65. However, public use increases the weight of other evidence showing intent to dedicate. *Id.* Where a landowner shows intent to dedicate, and the public uses the property without objection, that use is further evidence of intent. *Id.*

Unrebutted testimony of historian Charles Bonniwell established that Denver citizens regularly used HHNP for park purposes from the early 1900s forward. After the city acquired HHNP in 1936, park usage continued with the encouragement of Denver officials, who treated HHNP as parkland even though there was no formal ordinance designation. [2]

Starting with the 1967 master plan, the city constantly re-affirmed its intent that HHNP was a park.

- The city identified HHNP as "Public—Open Space—Park" on its 1967 master land use plan and on every subsequent map.
- The city passed zoning Ordinances approving the park zoning of HHNP, thus designating HHNP a park by ordinance.
- The city represented to the public that HHNP was a park.

[2] Although Mr. Bonniwell's testimony was unrebutted, the Court of Appeals trivialized it. Opinion at 19. At the trial scheduled in Denver District Court for May 19, 2014, Petitioners will present eyewitness testimony that the public used HHNP continuously for park and recreation purposes, with the encouragement of city officials, before and after 1955, and such use continued unabated after the city annexed HHNP in 1965.

- A city-funded sign at the entrance of the property identifies the land as a "Park." *See G & A LLC v. City of Brighton*, 233 P.3d 701, 711 (Colo. App. 2010) (city signage is evidence of intended city use).
- The Parks Department spent taxpayer funds to maintain and improve the park, including bridges, bicycle trails, and pedestrian walkways that are suitable only if HHNP is to be used as a park.

Those actions, all conclusively established in at the evidentiary hearing in the trial court, prove the city's intent to dedicate HHNP as a park.

After annexing HHNP in 1965, the city's representations to the public that HHNP was a park increase the likelihood that the city always intended to dedicate HHNP as parkland, even dating back to 1936 when the city acquired the land. For decades the city told citizens that the land was a park, and built improvements, such as the bicycle trails and bridges, that could only be used for park purposes. Citizens used HHNP for park purposes openly, uninterruptedly and without objection. The lack of city objection to decades of park use, shows that the public was making the exact use of the property that the city intended—a park. Hence, the public's use of HHNP is evidence of intent to dedicate.

In sum, by zoning the property as a park, representing to the public that the property is a park, expending Parks Department funds to improve and maintain the

property, placing "park" signs, and allowing the public to use the property as a park without objection, the city dedicated HHNP for use as a public park.

2. Acceptance of the Dedication:

Any unambiguous act will suffice as an acceptance of a common law dedication. *Thornton v. City of Colorado Springs*, 478 P.2d 665, 667 (Colo. 1970). Here, citizens have used HHNP for park purposes including walking, hiking, biking, picnicking, and horseback riding for over seventy years. Such use constitutes acceptance. *See Thornton*, 478 P.2d at 667.

3. Absence of Contrary Intent:

As the Court of Appeals noted, on three occasions the city used peripheral acreage of HHNP for non-park purposes. The first was dedication of ten acres along the east boundary to complete South Havana Street. The second was dedication of less than an acre to complete East Girard Avenue. The third was temporarily leasing the southernmost two acres for use as a parking lot. None of these peripheral uses affected the character of the interior 24 acres as parkland.

Evidence at the hearing established that the South Havana Street dedication occurred before there were residents in adjacent neighborhoods to protest. Additionally, the city provided an underpass below Havana Street so citizens could access the park. The dedication of less than an acre to East Girard Avenue was

insignificant. The parking lot lease was a temporary use that the Parks Department planned to reverse by removing asphalt and reseeding the land after the lease expired. None of the peripheral non-park uses affected the interior parkland that DPS chose for its school site. HHNP remains a common law park.

B. **HHNP was a common law park before 1955.**

Even if the Court of Appeals correctly interpreted § 2.4.5 to require that property owned before December 31, 1955 must have been a park by that date in order to qualify for Charter protection, Petitioners satisfied that requirement.

Mr. Bonniwell's testimony established that Denver offered HHNP as a park to citizens, who used it as a park with the city's knowledge and encouragement from 1936 forward. The improvements to HHNP – including signage, bicycle trails, and park benches – were wholly consistent with, and a continuation of, the city's recognition of HHNP as a park from 1936 forward. Accordingly, HHNP was a common law park before 1955 for purposes of § 2.4.5. Petitioners established a reasonable likelihood of success on the merits on their claim that §2.4.5 required voter approval, and the Court of Appeals erred in holding otherwise.

CONCLUSION

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

Respectfully Submitted, February 4, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2014 true and correct copies of the foregoing **PETITION FOR WRIT OF CERTIORARI** were filed and served as follows:

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