COLORADO COURT OF APPEALS Court Address: 2 East Fourteenth Ave. Denver, Colorado 80202	
Denver District Court Case No. 2013 CV 32444 Hon. Herbert L. Stern III, District Court Judge	
Plaintiffs/Appellants: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation; and STEVE WALDSTEIN and ZELDA HAWKINS, individuals. v. **Defendants/Appellees:** 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** ▲
Attorneys for Appellants: John Case, # 2431 Evans Case, LLP 1660 So. Albion Street, Suite 1100 Denver, CO 80222 PH: (303) 758-5003 FAX: (303) 753-0444 Email: case@evanscase.com	Case No. 14CA1641

OPENING BRIEF OF APPELLANTS

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g) because it contains 7,883 words.

The brief complies with C.A.R. 28(k) because, for the party raising the issue, it contains, under a separate heading, (1) a concise statement of the applicable standard of appellate review with citations to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

EVANS CASE, LLP

s/ John Case

John Case, #2431
Attorney for Appellants

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by determining disputed issues of fact and weighing evidence on summary judgment.

2. Whether the trial court erred by ruling that the Denver zoning ordinance of 2010 did not designate Hampden Heights North Park as a park, when the official zoning map designated HHNP as a park owned and managed by the Denver Department of Parks and Recreation.

3. Whether the plaintiffs demonstrated triable issues of material fact that the land at issue was a park before 1955.

4. Whether plaintiffs are entitled to a jury trial on their claim for declaratory judgment, that the land in dispute is a park which cannot be sold without a vote of the people.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below:

Appellants bring this appeal to recover 10.77 acres of park land in southeast Denver that the defendant City and County of Denver ("City") traded to co-defendant School District Number 1 in the City and County of Denver ("DPS"), without allowing a vote of the people as required by Denver City Charter Section 2.4.5. DPS is constructing an elementary school on the property. The core factual

issue is whether the land in dispute was a park. Appellants assert that the trial court erroneously decided disputed issues of material fact when it entered summary judgment. (*See* Order and Judgment, R. CF p. 1488-1491.)

Appellant Friends of Denver Parks, Inc. is a non-profit corporation whose members live near the land labeled on City maps as Hampden Heights North Park ("HHNP"). Steve Waldstein owns a residence immediately adjacent to the park. Zelda Hawkins owns a home in the same neighborhood.

On April 1, 2013, Denver City Council enacted two ordinances subdividing HHNP into a south parcel and a north parcel. Ordinance 170, Series of 2013, approved a contract to trade the south parcel, consisting of 10.77 acres, to School DPS in exchange for a building at 1330 Fox Street. (R. Ex. 5)

Ordinance 168, Series of 2013, took the north parcel, consisting of 16 acres, and designated it part of Paul A. Hentzell Park, a park located immediately to the north of HHNP. (R. Ex. 48.)

Appellants and other citizens were unsuccessful in opposing the adoption of Ordinance 170 at the City Council meeting on April 1, 2013. Appellants subsequently circulated a referendum petition to repeal Ordinance 170. The Clerk and Recorder of the City and County of Denver rejected the petition, refused to

count the signatures of Denver voters, and informed Appellants that they should seek relief in the courts.

Appellants filed their complaint on May 29, 2013, and simultaneously recorded a Notice of Lis Pendens as to the parcel involved in the land swap. Appellants sought a preliminary injunction to enjoin the defendants from consummating the land swap prior to trial on the merits. After an evidentiary hearing, the trial court denied the motion for preliminary injunction. The Court of Appeals affirmed the denial of the preliminary injunction. *Friends of Denver Parks v. City & County of Denver*, 327 P.3d 311 (Colo. App. 2013).

The Court of Appeals Opinion on Preliminary Injunction

This Court construed Charter Section 2.4.5 to mean that the land could acquire park status in one of two ways: (1) the land could be designated as a park by ordinance; or (2) the land could have become a park prior to December 31, 1955. 327 P.3d at 318. The Court observed that Section 2.4.5 of the Charter does not specify how land acquired before 1955 becomes a park. Interpreting § 2.4.5, the Court held that "it does not matter how city land became a park before December 31, 1955." *Id.* at 319. The Court acknowledged that common law dedication was one acceptable means by which land could become a park before that date. *Id.* at 317. The Court held that common law dedication occurs when the

city's "unambiguous actions" demonstrate its "unequivocal intent" to set the land aside for a particular public use. *Id.* The Court noted that intent to dedicate need not actually exist, but must appear to exist. *Id.*

This Court made clear that its holding was limited to the facts presented at the injunction hearing, and was not a decision on the merits. *Id.* at 316.

Discovery

Plaintiffs conducted discovery to ascertain how city land acquired before 1955 could become a park. Lauri Dannemiller, the current Manager of the Department of Parks and Recreation ("DPR") , testified as follows:

> **That land that was in ownership by the Parks and Recreation Department, or some form of that prior to 1955,** or land that is designated subsequent by an ordinance as a park, **cannot be sold without a vote of the people.**

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

Cross Motions for Summary Judgment

The case was scheduled for trial commencing on May 19, 2014. Appellees moved for summary judgment, alleging that the land was not a "designated" park subject to the protection of Charter Section 2.4.5. Appellees also filed a motion to deny plaintiffs trial by jury, and a motion in limine to exclude evidence of the City's 40 year history of representing to the public that HHNP was a city park.

Appellants filed a cross-motion for summary judgment, supported by affidavit, asserting that the plain language of Denver's comprehensive zoning ordinance of 2010 designated HHNP as a city park. (R. CF p. 1156-1170.)

Appellants opposed the City's motion for summary judgment with numerous affidavits and the deposition admissions of City officials. (R. CF p. 1143-1155, 1171-1242.) Appellants' evidence, set forth in detail below, showed that the public used HHNP as a park from 1938 until present, and that City officials understood that HHNP was a park protected by Charter § 2.4.5.

Appellants submitted the affidavit of James Kellner, who served DPR for thirty years and at the time of his retirement in 2009 was the Superintendent of the Southeast Parks District where HHNP is located. Mr. Kellner testified:

> **The entire time that I worked for DPR, Southeast District, I understood that HHNP was a city park.** It was on the list of parks that I was responsible for managing and preserving for future generations. **In my opinion, based on my direct personal knowledge of the park's status for thirty years, the claim that HHNP is not a park and that it can be sold without a vote of the people is incorrect.**

(Kellner Affidavit, R. CF p. 1229 [emphasis added].)

Trial Court's Order and Final Judgment

The trial court interpreted this Court's opinion to mean that HHNP "could only be a park if it were Common Law Dedicated as one before 1955, or it was

formally designated later as such by the City." (Order granting summary judgment, R. CF p. 1490). The trial court ruled that the evidence proffered by Appellants failed to demonstrate "that the City's *unambiguous* actions demonstrated that it *unequivocally* intended to dedicate the property as a park before 1955." (*Id.*)

The 2010 zoning ordinance rezoned properties according to how they were designated on the official zoning map. HHNP was designated on the map as "OS-A," meaning City owned park land used as Open Space. The trial court ruled that the ordinance "unambiguously used the word 'designate' to mean show, not to officially demarcate the Property as a park within the meaning of the Charter." *Id.*

The trial court granted summary judgment for Appellees. The trial court also ruled that Appellees' Motion to Strike Jury Demand and all other pending motions were moot. (R. CF p. 1490-1491.)

Appellants' Motion for Post-Trial Relief

Appellants filed a Motion for Post-Trial Relief, Amending Judgment, and Granting New Trial (R. CF p. 1501-1509), which the trial court denied in a written order (R.CF p. 1534-1536).

B. **Statement of Facts:**

The City acquired the land in 1936 by quitclaim deed (R. CF p. 424). The original parcel included 36.45 acres located outside the Denver city limits in what

was then Arapahoe County. The parcel was triangular, as shown by 1955 aerial photograph. (R. CF p. 824).) Cherry Creek meanders through the property in a northwesterly direction, with both banks of the creek enticing for horseback riding, bicycling, jogging, walking, birdwatching, picnicking, playing, wading in the creek, hunting tadpoles, and other recreational pursuits. From 1936 until it was conveyed to DPS, the property was under the ownership and management of the Department of Improvements and Parks (now known as the DPR).

Effective January 1, 1956, Denver voters amended the City Charter by adopting a new Article, which created the DPR. The amendment further provided:

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

(R. CF p. 1100) (emphasis added). The Charter does not define "park now belonging to . . . the City[.]" The City claimed in discovery that it had no lists of Denver's extraterritorial parks in 1955. Thus, the Charter language and the City's own lack of records provide no guidance for determining which lands that were owned by the City in 1955 were considered parks.

On September 6, 1955 Denver enacted an ordinance authorizing the Manager of Improvements and Parks to convey an easement to the Colorado

Department of Highways for the construction of S. Havana St. along the east boundary of the 36 acre parcel. (R. CF p. 1070-1073.) The stated purpose of the easement was "to improve, and aid in the construction of, public roads outside the limits of the City and County of Denver, for the purpose of establishing and improving the system of roads connecting the City and County of Denver and its parks and parkways outside such limits." (R. CF p. 1070 [emphasis added].) The easement was subject to reversion, so that if the Grantee stopped using or abandoned the right of way, title reverted to the City. (*Id.*) Furthermore, the deed reserved the right in the City to use any part of the easement for any purpose not inconsistent with use as a road. (*Id.*)

In 1965, Denver annexed the property along with the adjacent single family residential neighborhood of Hampden Heights.

In 1967 the City official master land use map identified HHNP as a park. (R. Pl Preliminary Injunction Hearing Exhibits 14-1, 14-6, and 15.)

In 1978, DPR published a list of Denver parks in a brochure with a map that that encouraged the public to use the parks. The list included HHNP as "Unnamed" park located at "Havana & Cherry Creek." (R. CF p. 1227.) The accompanying map shows the park and identifies Cherry Creek by name where the creek intersects Havana. (R. CF p. 1222.) DPR also included HHNP on its internal

list of parks printed in June 1978 as "Unnamed" park at Havana and Cornell consisting of 27 acres. (R. CF p. 1226.)

In 1979, Mayor Bill McNichols referred to HHNP as "dedicated park land" in a letter to a Hampden Heights resident. (R. Ex. 26-4.) Mayor McNichols stated that the property "is eventually going to be developed into a park but will also remain in native grass for some time" (R. Ex. 26-3).

In 1980 the City dedicated the southern tip of the parcel for the construction of East Girard Ave.

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

> A4.5 Sale and Lease of Parks. No portion of any designated park belonging to the city shall be sold. No portion of any designated park or recreational facility may be leased, except for concession leases and leases to charitable or not-for-profit organizations or other governmental jurisdictions. All such leases and any sub-leases shall require the approval of Council as provided for in Chapter B of this Charter. All designated parks existing at the time this provision is enacted shall continue to be designated as parks. No land now owned or hereafter acquired by the City and County shall be deemed a park unless specifically designated a park by ordinance.

(R. CF p. 1101 [emphasis added].) The Charter again left open the question of how land acquired before 1955 became a "park."

In 1987 DPR considered a proposal from a developer to construct a 22 acre water theme amusement park in HHNP. The developer intended to lease the park land as a concession. DPR rejected the proposal based on objections from residents, and because the amusement park would have taken away valuable open space. (R. Ex. 27.)

In 1992 the city leased the southernmost two acres of HHNP to Oppenheimer Corp. as a parking lot. When the lease terminated, DPR put a gate across the parking lot and resumed management of the property.

On August 19, 1996 the Denver City Council enacted Ordinance 704, Series of 1996, which submitted to a vote of the people the following amendment to section A.4.5 of the Charter:

> **Charter § 2.4.5 - Sale and leasing of parks.**
>
> Without the approval of a majority of those registered electors voting in an election held by the City and County of Denver, **no park or portion of any park belonging to the City as of December 31, 1955, shall be sold or leased at any time**, and no land acquired by the City after December 31, 1955, that is designated a park by ordinance shall be sold or leased at any time, provided, however, that property in parks may be leased for park purposes to concessionaires, to charitable or nonprofit organizations, or to governmental jurisdictions. All such leases shall require the approval of Council as provided for in Article III of this Charter. **No land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance.**

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

Once again, the Charter language provided no guidance as to what land was "a park belonging to the City as of December 31, 1955." In response to this concern, John Bennett, who at the time served as Executive Director of City Council, told the council: **"The amendment confirms that parks used as parks before 1955 are designated parks."** (R. CF p. 1321 – 1322 [emphasis added].)

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

In 2007 the Manager of DPR designated HHNP and the adjacent Paul A. Hentzell Park as a continuous 90 acre natural area. Natural area designation requires that land remain in its native state, undeveloped. The plan was to re-seed the abandoned parking lot with native prairie grasses. Re-seeding was never accomplished due to lack of funding. (R. Tr. June 12, 2013 p. 91-92.)

In the fall of 2012, Denver citizens were notified that Mayor Hancock had agreed to trade 11 acres of park land in HHNP to DPS in exchange for an office building at 1330 Fox St. The Parks and Recreation Advisory Board ("PRAB"), which is made up of Denver citizens appointed by the Mayor and City Council

members, conducted two public hearings on the proposed land swap. PRAB voted 11-6 against the land swap. The next day Mayor Hancock replaced two appointees on PRAB who voted against the land swap.

Lauri Dannemiller, who is Mayor Hancock's appointed Manager of Parks and Recreation, then de-designated the 11 acres as natural area, allowing the land swap to proceed. (R. Tr. June 12, 2013 p. 107.)

SUMMARY OF ARGUMENT

1. In granting summary judgment, the trial court improperly determined disputed issues of fact and weighed evidence.

2. Appellants were entitled to judgment as a matter of law in their favor because the evidence demonstrated conclusively that HHNP was officially designated a city park in the zoning ordinance of 2010.

3. Appellants presented affidavits and deposition testimony establishing that HHNP was acknowledged by the City to be a park before December 31, 1955, and after that date.

4. Plaintiffs are entitled to a jury trial on the merits of their claim for declaratory judgment.

ARGUMENT

I. IN GRANTING SUMMARY JUDGMENT, THE TRIAL COURT IMPROPERLY DETERMINED DISPUTED ISSUES OF FACT AND WEIGHED EVIDENCE.

A. Standard of Review and Preservation.

This Court reviews de novo a trial court's summary judgment ruling. *Rich v. Ball Ranch Partnership*, ___ P.3d ___, 2015 COA 6, ¶ 4. The trial court's order granting summary judgment appears at R. CF p. 1488-1491. The trial court's order denying post-trial relief appears at R. CF p. 1534-1536.

B. In summary judgment proceedings, a trial court may not weigh evidence or determine disputed facts.

"Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Churchey v. Adolph Coors Co.,* 759 P.2d 1336, 1339-40 (Colo. 1988). It is elementary that in deciding a motion for summary judgment, the trial court may not make a finding of fact if there is evidence from which a jury could reach a different conclusion. *Mile High Concrete, Inc. v. Matz,* 842 P.2d 198, 203 (Colo. 1992) (summary judgment improper where "reasonable minds could differ"); *Bent v. Ferguson*, 791 P.2d 1241, 1244 (Colo. App. 1990) (in quiet title action, existence of a question of the

parties' intent as to when deed delivery was to take place precluded granting defendant's motion for summary judgment).

In reviewing a summary judgment motion, the opposing party is entitled to all favorable inferences that are reasonably drawn from the undisputed facts. *In re Tonko,* 154 P.3d 397, 402 (Colo. 2007). Any doubt as to inferences that may be drawn must be resolved in favor of the opposing party. *Id.* Moreover, a court may not weigh evidence or assess credibility in deciding the motion. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714, 718 (Colo. 1987).

C. **The trial Court decided a disputed issue of fact.**

The central factual and legal issue in this case is what the city council intended when it adopted the language of Charter Section 2.4.5 as part of Ordinance 704, Series of 1996. The language enacted by City Council on August 19, 1996, and approved by the voters the following November, reads as follows:

> **Charter § 2.4.5 - Sale and leasing of parks.**
>
> Without the approval of a majority of those registered electors voting in an election held by the City and County of Denver, no park or portion of any park belonging to the City as of December 31, 1955, shall be sold or leased at any time, and no land acquired by the City after December 31, 1955, that is designated a park by ordinance shall be sold or leased at any time, provided, however, that property in parks may be leased for park purposes to concessionaires, to charitable or nonprofit organizations, or to governmental jurisdictions. All such leases shall require the approval of Council as provided for in Article

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

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

At a hearing on June 28, 2013, the trial court pondered how to interpret the undefined phrase "park belonging to the City as of December 31, 1955":

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

(R. 06/28/13 Tr. at 300:12-14 [emphasis added].) When the Court discussed the differences between the 1900 *McIntyre* case relied on by Plaintiffs, and the 1946 *Hall* decision relied upon by the City, the Court again brought up the unanswered question of what qualifies as a "park" that was acquired before 1955:

> THE COURT: Okay. Because I recognize that there are some distinguishing features in the *Hall* case from the *McIntyre* case, but not the least of which - - well, I won't go into that. But the Court seemed to consider whether something was a Park and mentions that the area was never, quote, layout as a Park. And it was assessed like non--Park property. But then it goes on and says, "we conclude that the area in question never has been a public park," whatever that means, "in the legal acceptance of that term," whatever that means.

(*Id.* at 311:25 – 312:1-8 [emphasis added].) At the same hearing, Assistant City Attorney David Broadwell acknowledged that Charter §2.4.5 does not define what constitutes a "park belonging to the city as of December 31, 1955":

> MR. BROADWELL: That's correct. And there's some ambiguous language in Hall about there's no charter dedication, whatever they determine that mean back in 1946. They didn't define that. But I think it's possible in the pre-'55 scenario to have land that, even if it's not on the deed, that the City itself has given some sort of official recognition of it by passing an ordinance back then, or whatever the case may be, to show that it has, quote/unquote, dedicated the land as park land and is officially treating it as such. And somebody can point to a document as a smoking gun showing an official recognition and the City's accepted that responsibility. And of course back then, originally the charter said once it's recognized as a park it can't be sold at all. When in later years it said it can be sold, but only with voter approval. But there were serious legal consequences for distinguishing back then what was a park and what wasn't a park. And again, I think that's the main thing we get from the Hall decision is mere user like -- if it quacks like a duck and walks like a duck is not enough. There's got to be something else beyond that. And that something else is missing in this case.

(*Id.* at 321:3-23 [emphasis added].)

The above transcripts show that from the inception of this case, both the City and the trial court recognized that there is no legal definition of what constitutes "a park belonging to the City as of December 31, 1955." Therefore, HHNP was a "park belonging to the City as of December 31, 1955" is not a question of law that can be decided on summary judgment, but rather a question of fact that must be resolved by the trier of fact at a trial on the merits.

Per this Court's original ruling, common law dedication is a viable means by which city-owned land could become a park prior to 1955. Common law dedication occurs where a governmental body displays through "unambiguous

actions" an "unequivocal intent" to set aside land for a particular purpose, include use as a park. *Friends,* 327 P.3d at 317.

In its order granting summary judgment the trial court recited certain undisputed evidence tending to show that the City considered and used HHNP as a park long before 1955. (R. CF p. 1490.) The court then pontificated, without analysis or argument, that the evidence "falls short" of establishing an "unequivocal intent" to dedicate HHNP as a park. (*Id.*) In doing so, the trial court assumed the role of trier of fact by weighing evidence. Indeed, it is impossible to conclude that specific evidence fails to establish "unequivocal intent" without weighing that evidence. Since the trial court weighed evidence and decided a disputed issue of material fact, its summary judgment ruling should be reversed.

II. APPELLANTS ESTABLISHED AS A MATTER OF LAW THAT HHNP WAS OFFICIALLY DESIGNATED A CITY PARK IN THE ZONING ORDINANCE OF 2010.

A. Standard of Review and Preservation:

An appellate court reviews summary judgment rulings de novo. *Rich,* 2015 COA 6, ¶ 4. The trial court's ruling that the 2010 zoning ordinance did not qualify as a dedication appears at R. CF p. 1490.

B. HHNP was designated as a park by Ordinance 333, Series of 2010, adoption of the 2010 Zoning Code, and adoption of the Official Map that shows HHNP is a designated park.

As this Court previously noted, and the City Charter expressly provides, for purposes of Charter § 2.4.5 city-owned land can become a park after December 31, 1955 only by being "designate[d] . . . as a park by ordinance." *Friends,* 327 P.3d at 318. That is exactly what we have in this case.

On June 25, 2010 the City enacted Ordinance 333 that created the comprehensive new Zoning Code. The ordinance states in pertinent part: "All land located within the City and County of Denver shown on the Official Map as being zoned to a zone district in the Denver Zoning Code is hereby **rezoned as designated on the Official Map**." (R. CF p. 1232 [emphasis added].)

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

> The OS-A district is intended to protect and preserve public parks owned, operated or leased by the City and managed by the City's Department of Parks and Recreation ("DPR") for park purposes.

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

Charter § 2.4.5 protects all parcels "designated a park by ordinance" from sale absent voter approval. It is beyond dispute that Ordinance 333 was an

ordinance. The only remaining question is whether Ordinance 333 "designated" HHNP a park. The answer is an unequivocal yes.

City charters are construed in accordance with the same rules as statutes. *Leggett & Platt, Inc. v. Ostrom,* 251 P.3d 1135, 1141 (Colo. App. 2010). If statutory language is unambiguous, then the plain meaning of that language governs and resort to other tools of statutory construction is unnecessary and improper. *People v. Voth*, 312 P.3d 144, 149 (Colo. 2013).

Here, the Charter does not define "designated," so the term's plain meaning controls. The common meaning of "designate" is "to mark or point out; indicate; show; specify . . . to denote; indicate; signify . . . to name; entitle; style . . . ." http://dictionary. reference.com/browse/designate?s=t (last checked Feb. 4, 2015). The City's 30(b)(6) witness admitted that the term "designate" in the zoning ordinance is used in its ordinary meaning. (R. CF p. 1333 [depo p. 14, l. 4-11.)

Did Ordinance 333 "designate" HHNP a park per the commonly understood meaning of that term? Absolutely. The official zoning map the ordinance adopted expressly provides that HHNP is an "open space public park." Accordingly, the ordinance "denotes," "signifies," "names," "entitles" and "styles" HHNP a park. Reasonable minds could not conclude otherwise on the undisputed facts. That

being true, HHNP was at all relevant times "designated a park by ordinance" and was subject to the strictures of § 2.4.5.

Affidavits established that the 2010 ordinance designation confirmed HHNP's historical status as a park. Susan Barnes-Gelt, a member of the city council who voted unanimously for the amendment of Charter §2.4.5 on August 19, 1996, was informed at the time of the vote that "all parks used as parks prior to 1955 are designated parks." James Kellner, former Superintendent of Southeast Denver Parks District, testified that during his thirty year career as an employee of DPR from 1979-2009, HHNP was always included on DPR's official lists of city parks. DPR's own maps and lists of city parks corroborate Mr. Kellner's testimony. Six eyewitnesses with firsthand knowledge provided affidavits testifying to their personal use of HHNP, and the public's use of HHNP as a park, starting in 1938 and continuing into the 1980s. (R. CF p. 1174-1184.)

To sum up, Ordinance 333 designated HHNP as "open space public park" land. Per the "plain meaning" rule, HHNP was at all relevant times "designated a park by ordinance" for purposes of Charter § 2.4.5. Accordingly, the City violated the Charter when it sold the subject parcel without voter approval.

The trial court's reasoning is murky. The court held that the word "designate" in the zoning ordinance "unambiguously" means "show." (R. CF p.

1490.) That accords with the plain meaning of the term "designate," as discussed above. Since the 2010 zoning ordinance clearly "shows" HHNP as a park, the ordinance "designated" HHNP a park as a matter of law. That should have been the end of the issue, but the trial court went on to hold – again without argument or analysis – that an ordinance must not only "designate" land as a park, as § 2.4.5 expressly requires, but also "officially demarcate" land as a park within the meaning of the Charter. (*Id.*) Of course, no such language appears in the Charter itself, and the plain meaning of "designate" does not include any "official demarcation" requirement. Thus, the trial court's ruling is based on its own redefinition of the word "designate," a redefinition that has no support of any kind. The court erred as a matter of law. Its ruling should be reversed, and this case should be remanded with instructions to enter judgment in Appellants' favor holding that HHNP was a designated park to which Charter § 2.4.5 applied.

III. APPELLANTS PRESENTED AFFIDAVITS AND DEPOSITION TESTIMONY ESTABLISHING A TRIABLE ISSUE OF FACT THAT HHNP WAS A CITY PARK BEFORE DECEMBER 31, 1955.

A. **Standard of Review and Preservation.**

An appellate court reviews summary judgment rulings de novo. *Rich*, 2015 COA 6, ¶ 4. The trial court's ruling that Appellants did not raise "genuine issues of material fact" appears at R. CF 1490.

B. Appellants provided ample evidence that HHNP was "a park belonging to the City as of December 31, 1955."

Bear in mind that the main factual issue in this case is how City owned land could became a park before 1955. As we have seen, the current and former versions of Charter Section 2.4.5 provide no guidance.

The City designated Laurie Dannemiller, Manager of Parks and Recreation, as the City's 30 (b)(6) witness on the topic of park status. Counsel asked Ms. Dannemiller what was her understanding of Charter Section 2.4.5:

> Q. And what's your understanding of 2.4.5?
>
> A. **That land that was in ownership by the Parks and Recreation Department, or some form of that prior to 1955,** or land that is designated subsequent by an ordinance as a park, **cannot be sold without a vote of the people.**

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

Prior to 1955, HHNP was under the control of the Department of Improvements and Parks. Thus, according to Ms. Dannemiller's admission, HHNP was a park in 1955, and it could not be sold without a vote of the people.

On September 6, 1955 Denver authorized its Manager of Improvements and Parks to convey an easement along the east boundary of the 36 acre parcel to the Colorado Department of Highways for the construction of S. Havana St. (R. CF p. 1070-1073). The easement was "to improve, and aid in the construction of, public

roads outside the limits of the City and County of Denver, for the purpose of establishing and improving the system of roads connecting the City and County of Denver and its parks and parkways outside such limits." (R. CF p. 1070, underline added). The underlined language creates an inference that the 36 acre parcel was an extra-territorial park owned by Denver in Arapahoe County, and the City wanted to provide access for its citizens to the park, by granting an easement for the construction of S. Havana St.

Appellants submitted affidavits of five eyewitnesses who used the land for park purposes, including horseback riding, recreation, and picnicking, prior to 1955. The trial court accepted these affidavits as true. (R. CF p. 1490.) Thus, Appellants established that before 1955 the City intended its citizens to use the property as a park, and people accepted the City's invitation by using the land as a park. This meets the test for common law dedication as a park – the City engaged in "unambiguous actions" that appeared to demonstrate the City's "unequivocal intent" to set the land aside for a particular use as a park. *Friends,* 327 P.3d at 317

After Denver annexed the park and the adjacent Hampden Heights neighborhood in 1965, the City continued to advertise to the public that HHNP was a dedicated park. Appellants presented the trial court with eleven official lists of Denver parks and published by DPR from 1978 until 2011, all of which included

HHNP as either designated park or open space. (R. CF p. 1225.) In addition, at the evidentiary hearing on the preliminary injunction, the trial court received into evidence eight maps published by the City that identified HHNP by name and showed it as open space park land. (R. Ex. 18, 19, 20, 21, 22, 23, 24, and 25.) The trial court also received into evidence photographs of signs posted by the Parks Department in HHNP (R. Ex. 35-1, 35-2, 41, and 47). One of the signs lists rules that must be followed in the park (R. Ex 35-2).

In 1979 Mayor Bill McNichols referred to HHNP as "dedicated park land" in a letter to a Hampden Heights resident. (R. Ex. 26-4.) Mayor McNichols stated that the property "is eventually going to be developed into a park but will also remain in native grass for some time." (R. Ex. 26-3.)

Appellants also provided the trial court with the affidavit of James Kellner, who served in the parks Department for thirty years. At the time of his retirement in 2009, Mr. Kellner was the Superintendent of the Southeast Parks District where HHNP is located. Mr. Kellner's testimony is unambiguous and unequivocal: the City always treated HHNP as a park:

> **The entire time that I worked for DPR, Southeast District, I understood that HHNP was a city park.** It was on the list of parks that I was responsible for managing and preserving for future generations. **In my opinion, based on my direct personal knowledge of the park's status for thirty years, the**

> **claim that HHNP is not a park and that it can be sold without a vote of the people is incorrect.**

(Kellner Affidavit, R. CF p. 1229 [emphasis added].)

As mentioned above, Charter Section 2.4.5 provides no criteria to determine if City land was a "park belonging to the City as of December 31, 1955." Through written discovery, appellants obtained the legislative history of the adoption of Charter Section 2.4.5 by City Council on August 19, 1996. John Bennett, Staff Director of City Council told council members voting for the amendment, that **"parks used as parks prior to 1955 are designated parks."**

Appellants presented an affidavit from former city council member Susan Barnes-Gelt. Her testimony is unambiguous and unequivocal:

> On August 19, 1996 I was present and voted at the city council meeting in which council passed a bill to amend Section 2.4.5 of the Denver City Charter. A transcript of that portion of the council meeting is attached to this affidavit as Appendix 1. Before the vote was taken, John Bennett, Staff Director of City Council, read a statement that described the intent of the bill. He said:
>
> The amendment confirms that parks used as parks prior to 1955 are designated parks.
>
> Council members including me were aware at the time of the vote that the city owned numerous parks that had been acquired before 1955 that had never been designated parks by ordinance. When I voted for the amendment, **I understood that any park owned by the City and County of Denver, that was under the management of the Department of Parks and**

> **Recreation in 1996, and that had been used as a park before 1955, was confirmed by the amendment as a designated park. This would include the park known as Hampden Heights North Park** ("HHNP") in southeast Denver.

(Affidavit of Barnes-Gelt, R. CF p. 1237 [emphasis added].)

Appellants also submitted the affidavit of John Bennett, who served as Executive Director of Denver City Council at the time of the vote on § 2.4.5. Mr. Bennett testified unambiguously as to the intent of the Charter:

> 1. At the Denver City Council meeting August 19, 1996 I read the introduction to Council Bill 677. This was an ordinance that referred to Denver voters a proposed amendment to section A4.5 of the Denver City Charter. My job was to explain to council members what the intent of the Charter amendment was. **I knew what the intent of the Charter amendment was from attending city council committee meetings and speaking with assistant city attorney Don Wilson, who drafted the Charter amendment.**
>
> 2. The intent of the Charter Amendment was exactly what I told city council in the transcript attached as Appendix 1. **First, the amendment confirmed that parks used as parks prior to 1955 are designated parks.** The amendment was necessary to clear up confusion that resulted from a decision of the District Court of Grand County, which is attached as Appendix 2. The amendment also provided for designation of parks after 1955 by ordinance. Finally, the amendment provided that once a park is designated, it cannot be sold without a vote of the electors.

(Affidavit of John Bennett, R. CF p. 1321 [emphasis added].)

B. **The evidence before the trial court demonstrated that there were disputed issues of material fact regarding whether HHNP was a park before 1955.**

Simply stated, Appellants presented overwhelming evidence to the trial court showing that the City intended HHNP to be a park in 1955, the public used HHNP as a park before 1955, and Denver City Council intended that HHNP and other pre-1955 parks would be protected by Charter Section 2.4.5 as amended in 1996. In light of this competent evidence, the trial court erred in deciding that there were "no genuine issues of material fact." (R. CF p. 1490.)

IV. PLAINTIFFS ARE ENTITLED TO A JURY TRIAL ON THE MERITS OF THEIR CLAIM FOR DECLARATORY JUDGMENT.

A. **Standard of Review and Preservation.**

A civil litigant's right to a jury trial is reviewed de novo. *Stuart v. North Shore Water & Sanitation Dist.,* 211 P.3d 59, 61 (Colo. App. 2009). In the trial court the City and DPS moved to strike Appellants' jury demand. (R. CF p. 1395.) The trial court deemed that motion moot. (R. CF p. 1491.)

B. **The jury trial issue is reviewable.**

This Court ordinarily does not address issues that the trial court did not decide. However, this Court has discretion to address matters that are likely to arise on remand as a matter or judicial economy, regardless of whether the issue was preserved. *People v. Beauvais,* ____ P.3d ____, 2014 COA 143, ¶ 22.

Here, the issue of whether Appellants are entitled to a jury trial will inevitably arise if this Court reverses the summary judgment ruling and remands this case for trial. Accordingly, Appellants respectfully request that this Court exercise its discretion to decide that issue now.

C. Appellants are entitled to a trial by jury on all questions of fact relevant to the issue of whether HHNP was a park as of December 31, 1955 because this case is, in substance, an action for recovery of specific real property.

Although there is no constitutional right to a jury trial in Colorado civil cases, trial by jury remains "a cherished appurtenance to our judicial process" such that "[p]rejudicial error cannot arise out of permitting a jury to pass upon questions of fact." *Jaynes v. Morrow,* 355 P.2d 529, 531 (Colo. 1960) (Hall, J., concurring).

The declaratory judgment statute provides that where a declaratory judgment action "involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of facts are tried and determined in other civil actions in the court in which the proceeding is pending." C.R.S. § 13-51-113; *see also* C.R.C.P. 57(i) (using language is identical to the statute). Thus, a jury trial is available in a declaratory judgment action if "the right to a jury trial existed prior to the passage of the Declaratory Judgments Act in the type of action involved." *Baumgartner v. Schey*, 353 P.2d 375, 377 (Colo. 1960).

The civil rules provide that "[u]pon the filing of a demand and the simultaneous payment of the requisite jury fee by any party in actions wherein a trial by jury is provided by constitution or by statute, including actions for the **recovery of specific real** or personal **property, with or without damages**, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, **all issues of fact shall be tried by a jury**." C.R.C.P. 38(a) (emphasis added). This is just such a case.

Under Colorado law, an "action for declaratory judgment is a statutory rather than an equitable action." *Rhodes v. COPIC Ins. Co.*, 819 P.2d 1060, 1062 (Colo. App. 1991). Moreover, the type of relief Plaintiffs seek simply does not matter given the plain language of the applicable rule, which provides that a jury trial is available in all "actions for the recovery of specific real or personal property, **with or without damages**[.]" C.R.C.P. 38(a) (emphasis added). Thus, pursuit of a remedy "at law" in the form of money damages is not a necessary condition for the availability of a trial by jury.

To determine whether an independent right to jury trial exists, courts must look beyond the mere form of the action and the relief sought and examine the substance of the action. The Supreme Court's decision in *Baumgartner* is instructive. There, the plaintiff owned farm land that she leased to the defendants

for a one-year term. After the lease term expired, the plaintiff sold the land to a third party. When the time came to transfer possession to the buyer, the defendants claimed that they had a verbal lease with the plaintiff to continue farming the land for an additional year. Plaintiff filed a "Complaint for Declaratory Judgment" seeking a determination that the defendants had no valid lease. 353 P.2d at 376.

The trial court ruled that there was no right to a trial by jury in a declaratory judgment action. The Supreme Court reversed, adopting the majority rule that "whether a party is entitled to have disputed issues of fact decided by a jury, is not determined by the fact that a declaratory judgment is sought, but whether the right to a jury trial existed prior to the passage of the Declaratory Judgments Act in the type of action involved." *Id.* at 377. The Court looked past the form of the action to its substance. Despite the declaratory relief requested in the complaint, the "essence" of the plaintiff's claim was that the defendants had no valid lease and that the plaintiff was entitled to immediate possession of the land. In substance, then, the action sounded in ejectment or forcible entry and detainer. Since the law recognized a right to trial by jury in such actions, the right applied in this case even though the claim was brought as a declaratory judgment action. *Id.* at 378.

Applying the *Baumgartner* Court's analysis to this case dictates the same result. Colorado law affords a right to trial by jury on all issues of fact in "actions

for the recovery of specific real . . . property[.]" C.R.C.P. 38(a). Thus, if Plaintiffs' claim is in substance an action for the recovery of real property, then a right to trial by jury exists even though the relief sought includes a declaratory judgment.

This case is, in substance, a lawsuit for recovery of specific real property. This Court previously ruled that Section 2.4.5 of the Denver City Charter preserved the doctrine of common law dedication as to property acquired by the City before December 31, 1955. *Friends*, 327 P.3d at 317. Thus, if City property had become a park before that date, then § 2.4.5 prohibits the City from selling it without voter approval.

A park by common law dedication is titled in the name of a government entity, which holds the land **in trust for the benefit of its citizens**. *E.g., McIntyre v. Board of Comm'rs of El Paso County,* 61 P. 237, 240 (Colo. App. 1900). The factual issues that determine common law park status are: (1) whether the city's conduct evidenced intent to set aside the land as a park; and (2) whether the public accepted the dedication. *Friends*, 327 P.3d at 317.

Here, Appellants sought a declaration that HHNP was a designated park, that § 2.4.5 required the City to obtain voter approval for any sale, and that the City's actions in selling the southerly portion to DPS were *ultra vires* and void. In their proposed Fourth Amended Complaint, which the trial court deemed moot in view

of its summary judgment ruling, Appellants sought a declaration that the quit claim deed transferring the southerly 10.77 acres of HHNP to DPS was void.

Under the circumstances set forth above, the "essence" of this action is recovery of specific real property. The "specific real property" is the 10.77 acres of HHNP unlawfully transferred to DPS without voter approval. Appellants asserted that HHNP was a park. If Plaintiffs prevail on their assertion that HHNP was a park, then the land transfer was void. In that event, legal title to the parcel in question would revert to the City. However, the City would hold legal title as a trustee for its citizens, the beneficial owners of the park.

In substance, then, this case is an action by the Appellants – in their capacity as beneficial owners of the property in question – to oust DPS, the functional equivalent of a trespasser claiming title under a void deed, and recover possession of the property for themselves. Therefore, this is an "action for the recovery of specific real . . . property" to which a right to trial by jury attaches per C.R.C.P. 38(a). Further, this case is closely analogous to the sort of "ejectment" claim as to which the *Baumgartner* Court found a right to trial by jury despite the plaintiff's request for declaratory relief. Accordingly, this Court should exercise its discretion to hold that Appellants are entitled to a trial by jury on remand.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court reverse the judgment of the trial court's order granting Appellees' motion for summary judgment and remand with instructions to enter judgment in Appellants' favor holding that HHNP was a park to which Section 2.4.5 of the Denver City Charter applied. Alternatively, Appellants respectfully request that this Court reverse the judgment of the trial court's order granting Appellees' motion for summary judgment and remand for a jury trial on the disputed issues of fact.

Date: February 4, 2015.

Respectfully submitted,

EVANS CASE, LLP

s/John Case

John Case, #2431
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015 I served and filed the foregoing **OPENING BRIEF OF APPELLANTS** as follows:

Clerk of the Colorado Court of Appeals — **Via ICCES**
2 East 14th Ave., Third Floor
Denver, CO 80203

Mr. David W. Broadwell, Esq. — **Via ICCES**
Mr. Mitchel T. Behr, Esq.
Mr. Patrick Wheeler, Esq.
Assistant Denver City Attorneys
1437 Bannock St. R#353
Denver, CO 80202
Attorneys for City and County of Denver

Mr. Michael J. Hickman, Esq. — **Via ICCES**
Mr. Jerome A. DeHerrera, Esq.
Ms. Molly H. Ferrer, Esq.
Denver Public Schools
900 Grant St. #401
Denver, CO 80203-2996
Attorneys for Denver Public School District Number 1

/s/Russell W. Jones
Russell W. Jones

Your filing is successfully submitted to the court. This filing is not considered final until it is accepted by the court.

Filing Information:

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Submitted By: Russell Jones

Filing Party(ies):

Party	Type	Status	Attorney
Friends of Denver Parks Inc, A Colorado Non-profit Corporation	Plaintiff-Appellant	Active	John M Case (Evans Case LLP)
Zelda Hawkins	Plaintiff-Appellant	Active	John M Case (Evans Case LLP)
Steve Waldstein	Plaintiff-Appellant	Active	John M Case (Evans Case LLP)

Documents:

Document ID	Event	Title	Statutory Fee	Security
BFD218B99032F	Opening Brief	Opening Brief of Appellants	$0.00	Public

Service:

Party	Type	Attorney	Organization	Method
City & County of Denver, A Municipal Corporation	Defendant-Appellee	Mitchel Todd Behr	Denver City Attorneys Office	E-Service
City & County of Denver, A Municipal Corporation	Defendant-Appellee	David W Broadwell	Denver City Attorneys Office	E-Service
School District No 1 In the City & County of Denver, A Public Entity	Defendant-Appellee	Jerome Andronico Jose Deherrera	Denver Public Schools	E-Service
School District No 1 In the City & County of Denver, A Public Entity	Defendant-Appellee	Michael J Hickman	Denver Public Schools	E-Service

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