DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Rm. 256 Denver, CO 80202	DATE FILED: June 12, 2017 8:17 PM FILING ID: 873C550C314A5 CASE NUMBER: 2016CV32126
Plaintiffs: JOHN D. MACFARLANE, DAVID TORRES, LAMONE NOLES, SARAH EDGELL, VIDA HUGHES, THERESA JOHNSON, HEATHER STRACK MCCUTHCEON, and CHRISTINE O'CONNOR **v.** **Defendants:** THE CITY AND COUNTY OF DENVER; MICHAEL B. HANCOCK, in his official capacity as Mayor of the City of Denver, JOSE M. CORNEJO, in his official capacity as Manager of Denver Department of Public Works; ALLEGRA HAYNES, in her official capacity as Executive Director of Denver Department of Parks and Recreation	▲ COURT USE ONLY ▲
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PLAINTIFFS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT	

Plaintiffs, by and through undersigned counsel, hereby respond to Defendants' Motion for Summary Judgment ("Motion"):

I. SUMMARY

In their Motion, Defendants ignore disputed and undisputed material facts that are inconvenient to them, while focusing on undisputed facts that simply do not entitle them to summary judgment. Defendants ignore the undisputed fact that tens of thousands of Denver residents—if not more, golfers and non-golfers alike—will be unable to use City Park Golf Course ("CPGC") for **any** park purpose for an extended period of time during the installation of a large stormwater management feature (the "Project") within its confines. Just as New York's highest court found that closure of a park for an extended period of time—which meant "the public will be deprived of valued park uses"—was forbidden in that case,[1] so too should the Court similarly reject Defendants' argument that the governing law in this case (the Denver Charter, the Denver Zoning Code, and common law) can be ignored simply because the end result will "look like" a park. Taken to its logical conclusion, Defendants' argument would counsel in favor of closing all Denver parks for an extended period of time—and the public's deprivation of use of those parks in the interim be disregarded—as long as the parks were someday reopened. This cannot be the law.

Defendants similarly ignore the fact that CPGC will be purposely inundated with floodwater following construction of the Project, making it more difficult to use for park purposes. Defendants ignore its own consultants' consideration of the installation of a more modest amount of stormwater detention in CPGC than the proposed Project to present real challenges to golf course playability. Likewise, Defendants' assertion that the Project will improve CPGC is genuinely contested. Defendants ignore the evidence that the Project will severely impact trees and bird habitat in CPGC, which are park purposes. Defendants admit that the presence of trash in parks is inconsistent with park purposes, but ignore that their own

[1] *See Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 623, 628-30 (N.Y. App. 2001).

consultants saw large problems with the accumulation of trash in CPGC because of the Project. Defendants admit that park purposes include historic preservation, but ignore the documented adverse effects that the Project will have on historic (and nationally-recognized) elements of CPGC. Defendants admit that highway construction support is not a park purpose, but ignore evidence that the Project is being pursued to support a proposed lowering and expansion of I-70.

In addition to Defendants' omission of these facts in the Motion, Defendants also ignore—or inadequately address—various legal theories advanced by Plaintiffs. Defendants ignore the fact that the Project presents all the hallmarks of a lease of CPGC, and merely point to their own failures to document that lease as evidence that there is none. Defendants likewise ignore the aspects of Plaintiffs' claim that turns on the common law governing parks and § 2.4.6 of the Denver Charter prohibiting the grant of any franchise for the maintenance of special privileges in parks.

In sum, Defendants have not met their burden to show that there are no material facts in dispute that would entitle them to summary judgment. Rather, Defendants simply ignore undisputed and disputed material facts that preclude the entry of summary judgment.

II. STATEMENT OF ADDITIONAL MATERIAL FACTS AND RESPONSE TO DEFENDANTS' STATEMENT OF ALLEGEDLY UNDISPUTED FACTS

A. City Park Golf Course Background

1. Over fifty thousand (50,000) rounds of golf were played at CPGC in 2015. Exh. 48 at 28. Beyond golfing activities, many Denver residents walk around and through CPGC, including substantial use multiple times per week by Plaintiffs, several of whom reside adjacent to CPGC. Defendants understand that CPGC is one of Denver's "premier resources" and is "a lot of people's favorite course." Exh. 81; Haynes Depo. at 144:18-22.

2. Defendant Haynes, Executive Director of Denver's Department of Parks and Recreation ("DPR"), testified that the "entirety" of CPGC, and if not that, the "vast majority" of CPGC is designated or dedicated as a park. Transcript of Deposition of Allegra Haynes ("Haynes Depo."), attached hereto as Exhibit 1-A, at 247:2-22.

3. CPGC is designated as a park under Denver's Charter. *See* Exh. 68 at p. 5 (bottom of page). CPGC is designated as a park under Denver Charter separately from City Park itself, which is also designated as a park. *Compare* Exh. 68 at p. 5 *with id.* at p. 6.

4. While Defendants now assert in this case—apparently for the first time—that portions of CPGC are not designated as a park under the Denver Charter, prior communications from Defendants to Denver's City Auditor concerning CPGC's designation status indicated CPGC was designated in its entirety. Exh. 68 (noting that 138.8 Acres of CPGC was designated parkland); *compare with* Exh. 40 at CCD002952 (CPGC acreage is "138 acres").

5. Defendants incorrectly assert that approximately half of CPGC is zoned as an OS-A district. Motion at 5 ¶ 12. Rather, Denver's own online zone mapping system demonstrates that the entirety of CPGC is zoned as an OS-A district. *See* Exh. 5; *compare with* Motion at Exh. H, which failed to include the other half of CPGC zoning.

6. Defendant Haynes' duties include the management and control of the operation of CPGC. Motion at 2 ¶ 3. Defendant Haynes admits that DPR cannot acquiesce to actions on property it manages that are in violation of the Denver City Charter or its Zoning Code. Haynes Depo. at 20:22-21:8.

B. Project Background

7. When Defendant Haynes first learned of the proposed Project, her reaction was "distress" as the concept was "disturbing" and she had "grave concerns…." Haynes Depo. at

41:8-17; 42:2-7. Likewise, when the Project was proposed for CPGC during the summer of 2015—far earlier than it was announced as a possibility to the public and before Defendant Haynes was appointed—it was "frowned upon by management…." Exh. 80 at CCD014333.

8. Defendants' own employees expressed fears that the Project would result in Denver parks becoming a "last priority" and being used "for 'anything' / dumping ground[.]" Exh. 62 at CCD0011520; Excerpts of Deposition of Chris Proud ("Proud Depo."), attached hereto as Exh. 1-C at 112:5-113:23, 114:15-18.

9. The Project is meant to benefit areas outside of CPGC with respect to stormwater management, and that its "only purpose" is to mitigate flooding in the Montclair drainage basin. Haynes Depo. at 55:16-24, 58:17-25. Defendants stated to Project bidders that the "drainage scope is a critical element to the overall program success as **it is the reason** for the project." Exh. 40 at CCD002952 (emphasis added).

10. The Project will require the closure of CPGC to the public from between eighteen months to two years. *See* Excerpts from Deposition of Jennifer Hillhouse ("Hillhouse Depo."), attached hereto as Exhibit 1-D at 31:3-12, 71:1-5, 112:14-16; Exh. 12 at CCD008778 (Defendants' own report, stating "The golf course would also not be playable while under construction which could be a 2-year timeframe.").

11. Although Defendants assert that many other Denver parks and golf courses detain stormwater, whether intentionally or inadvertently (Motion at 4 ¶¶ 6-7), Defendants cannot identify any other examples in the past where a designated park in Denver was closed in its entirety to install a drainage feature. Haynes Depo. at 122:16-123:18, 183:17-184:4; Excerpts from Deposition of City Engineer Lesley Thomas ("Thomas Depo."), attached hereto as Exhibit 1-E at 45:3-16. Previous drainage improvements in City Park itself did not expand the footprint

of a pre-existing lake, and did not require the closure of City Park. Thomas Depo. at 209:11-210:24. As such, the closure of CPGC for eighteen to twenty-four months for the installation of a stormwater control project appears to be without precedent.

12. Defendants have recognized many risks in connection with the Project. Exh. 58. One such risk is that "construction takes longer and the golf course can't be reopened in time." Exh. 58 at fourth page, Risk ID No. 22. Defendant Haynes agrees that it would be "very ugly" if that happened, and would present "serious challenge[s]" for her if the reopening schedule is not met, because it is not desirable to have "one of your popular golf course[s]…out of operation for very long." Haynes Depo. at 200:11-202:4.

13. During construction, no member of the public will be permitted in CPGC to enjoy it for park—or indeed any—purposes. Hillhouse Depo. at 31:3-12. Moreover, the RFP for the Project calls for a six-foot tall nontransparent fence to encircle the entire CPGC at the curb around its perimeter, obstructing even views into CPGC. Exh. 67 at Resp. to Request for Admission No. 7.

14. When informed about the possibility that the Project would be proceeding in CPGC, Scott Rethlake, Denver Director of Golf, expressed numerous concerns regarding the Project's impact to the golf program. *See* Exh. 100. Defendants admit that these concerns are not being honored in connection with the Project. Hillhouse Depo. at 69:4-7; 70:15-72:19.

15. The Project will alter CPGC such that it will intentionally detain additional stormwater as compared to its current condition. Thomas Depo. 59:6-11. As Defendants' recognize, stormwater "picks up contaminants such as oil residue from cars, litter, and debris."[2]

16. Defendants' consultants admit that the "overall size of [CPGC] is small relative to today's golf standards[,]" (Exh. 59 at CCD007482) and that there "are a lot of challenges in

[2] *See* https://www.denvergov.org/content/denvergov/en/wastewater-management.html (last accessed June 11, 2017).

getting the volume we want and a configuration that meets golf course playability." Exh. 101 at CCD014191. This latter statement was made in the context of an analysis that sought only 117 acre-feet of stormwater detention in CPGC. *Id.* at 14190. In fact, the amount of detention actually called-for in the Project—approximately 215 acre-feet (Hillhouse Depo. at 24:7-24)—is significantly higher than the 117 acre-feet figure that presented "a lot of challenges" to playability.

17. Neither Defendant Haynes nor DPR provided any input into how much stormwater detention should be provided by the Project. Haynes Depo. at 47:15-24, 204:3-15; Thomas Depo. at 102:12-103:24, 192:6-16. The amount of detention called-for in the Project was determined in conjunction with the size of other pipes in connection with other drainage components outside of CPGC. Uhernick Depo. at 130:23-131:7;[3] Thomas Depo. at 102:12-103:24, 192:6-16. Defendant Haynes agrees that it is easier to maintain golf course playability at CPGC if it did not have to detain as much stormwater. Haynes Depo. at 204:16-21.

18. The Project is being funded by Wastewater Enterprise Fund sources. Hillhouse Depo. at 76:7-14; Thomas Depo. at 94:14-95:2. Defendants admit that the creation of park and recreational amenities in CPGC above and beyond replacement and mitigation made necessary by the Project would require funding outside of these sources. *See* Exh. 16, at Response to Request for Admission No. 18; Haynes Depo. at 118:18-120:5 (noting that Wastewater Enterprise Funds cannot be used to improve a park). Additionally, Plaintiffs' expert Steven Eisenberg—a nationally-recognized expert in golf course design issues—does not agree that the Project will in fact improve CPGC, and will instead harm it. *See* Eisenberg Report, attached

[3] Bruce Uhernick was designated by Defendants pursuant to C.R.C.P. 30(b)(6) to testify concerning DPW's practices, policies, and procedures with respect to stormwater management and the facts and circumstances surrounding the creation of the 2014 Stormwater Master Plan. Exh. 71; Transcript of Deposition of Bruce Uhernick ("Uhernick Depo." attached as Exhibit 1-B) at 14:5-12.

hereto as Exhibit 6; *see also* Proud Depo. at 97:17-19 ("Q: But improving the golf course wasn't the purpose of the project, correct? A: That's correct."). As such, Defendants' repeated assertion that the Project will "improve" CPGC (*see* Motion at 2, 3, 8, 10, 12) is a disputed issue.

19. Although Defendants admit that it is important to maintain records concerning problems Denver is trying to solve, Defendants have produced no records of any alleged flooding in the CPGC clubhouse. *Compare* Haynes Depo. at 22:2-5, 188:19-23 and Exh. 67 at Resp. to Interrogatory No. 14 (failing to identify any documents) *with* Motion at 5 ¶ 10.

20. Plaintiffs, who regularly frequent CPGC, testified in their depositions that they have not observed any significant flooding problems or standing water issues in CPGC. Indeed, Denver's Department of Public Works ("DPW") has not identified any "significant flooding locations" within CPGC. Exh. 24 at p. 115 (lack of red stars within CPGC); Uhernick Depo. at 48:21-49:14.

21. But for the Project, Defendants had no plan to close CPGC for at least eighteen months or redesign it. Exh. 67 at Resp. to Request for Admission No. 9; Haynes Depo. at 262:3-8. As of August 3, 2015, Defendants' plans for capital improvements at CPGC did not include any broad redesign of CPGC, or any indication that there was a flooding problem at the CPGC clubhouse that needed to be fixed. Exh. 69; Haynes Depo. at 152:8-15. There is no indication that DPR ever requested that flooding at CPGC be addressed by DPW in stormwater management planning, or that DPR has studied any issues with muddy conditions at CPGC or any alleged flooding at the CPGC clubhouse. Haynes Depo. at 189:15-24.

22. Nowhere do Defendants support the proposition with documentary evidence that the Project "will also improve the course by…reducing the length of time it presently takes for stormwater to drain from the course after a major storm event." Motion at 3. Indeed, the entire

purpose of the Project is to detain or store additional stormwater in CPGC that would otherwise not be detained within its boundaries to slow the stormwater's flow to the northwest. Exh. 12 at CCD008779.

23. Defendants' limited plans for improvements at CPGC would not have required closure of CPGC, would have required less construction time than the Project, and likely would not have impacted the core golf season. Haynes Depo. at 151:21-152:3, 257:25-261:21.

24. Defendants' own consultants analyzed alternative locations for the Project, and rejected several other park locations because they were "not capable of storing the required volume of water while continuing to function as a public park." Exh. 93 at CCD011391 (with reference to Russell Square Park, Morrison Park, and Fuller Park). Defendant Haynes agrees that in some circumstances, storing stormwater is incompatible with a public park functioning. Haynes Depo. at 219:3-6. If CPGC was selected as the location for the Project, "impacts to the golf course would need to be mitigated." Exh. 93 at CCD011391.

25. The scoring criteria for evaluating the Project proposals devotes only 12% of its weight (60% of 20 possible points, out of a total of 100 points) towards the technical design for golf course layout, which includes, *inter alia*, hole routing, the driving range, view sheds within CPGC, and tree preservation. Exh. 70 at CCD000147-48.

26. Moreover, Defendant Haynes does not have sole control over which proposal in response to Defendants' RFP is ultimately selected for construction, which may ultimately proceed based on a plan she does not prefer. Exh. 70; 268:11-15; 275:4-18; 277:14-18.

27. Chris Proud was a lead staff member at DPR in connection with the Project, represented DPR in larger discussions with other City employees, is one of the people with the most knowledge at DPR regarding the Project, and Defendant Haynes considers him reliable,

trustworthy, thorough, not known to say anything incorrect or false related to project, and not to omit any important details with respect to the Project. Haynes Depo. at 95:22-97:10. Mr. Proud is a "project manager" with respect to the parks department. Proud Depo. at 18:5-19:5.

28. In connection with a presentation concerning the Project, Christopher Proud noted that the presentation was "primarily missing some of the **negative aspects**." Exh. 87 at CCD009862 (emphasis added). Mr. Proud also:

- Listed a number of "opportunities" and "challenges" with respect to the Project, none of which included improving CPGC. *Id.* at CCD009862-63.[4]

- Noted that "piping the five year storms around the golf course is most desirable to mitigate impact to play most of the time." *Id.* at CCD009863. However, this "piping around" or "bypass" of five-year storms is not called-for by the RFP for the Project. Proud Depo. at 93:8-94:10; Thomas Depo. at 101:10-18.

- Noted that at least one of Defendants' contemplated design alternatives for CPGC "appears to result in many golf impacts, with limited to no golf benefits." Exh. 85 at CCD009804. With apparent reference to this alternative, Mr. Proud asserted that "it leaves the golf course worse than it is today." Exh. 87 at CCD009863.

- Insisted that, to avoid excessive impact on golf operations by the Project, "the golf course must remain playable and maneuverable on foot or by golf cart [following a 20-50 year storm event]." Exh. 85 at CCD009803. Mr. Proud's insistence on this point was informed by his conversations with Scott Rethlake, the Director of Denver's Golf Program, and Greg Cieciek, Senior Landscape Architect and Program Manager for Denver Golf. Proud Depo. at 83:19-84:7. However, the Request for Proposals only mandates that the Project avoid ten-year storm impacts to playability. Exh. 7 at § 12.2.4.11.

- Noted that proposed infrastructure related to the Project could "change the look and feel of the course." Exh. 85 at CCD009803.

29. On or around August of 2016, Mr. Proud began transitioning out of his role, and in October of 2016 he left his position. Proud Depo. at 81:15-20. His position remained vacant until recently, leaving DPR without a dedicated advocate-liaison to the rest of the City employees concerning the Project during the finalization of the RFP (issued in January 2017) and

[4] Mr. Proud testified that this "opportunities" and "challenges" framework was as thorough as possible and included everything that he thought was important. Proud Depo. at 32:18-33:23.

beyond. Proud Depo. at 83:4-11; Motion at Exh. J. As such, a key position—previously filled by someone who was not shy to express concerns with the Project—went unfilled during a crucial time for the Project.

C. Park Purpose

30. Defendant Haynes asserts that many park purposes are served in CPGC, including adult golf, youth golf instruction, jogging and walking, and community gatherings. Haynes Depo. at 138:3-139:22. She has to balance various competing issues to make the determination of whether a proposal comports with a park purpose. Haynes Depo. at 137:19-148:2.

31. With respect to the park purposes served by CPGC, Defendant Haynes sees no negatives to those purposes in connection with the Project, including the closure of CPGC for the Project. Haynes Depo. at 139:23-140:2, 140:24-141:9. Nevertheless, she admits that if the Project took five years to complete, she would not have determined it would advance a park purpose, but cannot say what the threshold for length of closure would be that would be consistent with a park purpose. *Id.* at 142:3-18.

i. DPR's Park Designation Policy

32. Defendant Haynes testified that she determines if proposal advances a park purpose by consulting guidelines in DPR's park designation policy. Haynes Depo. at 135:25-136:4. However, the very policy that Defendant Haynes consulted to determine whether the Project comports with a park purpose suggests the Project does not.

33. DPR's policy plainly states, under its narrative question of "What is not a Park?" that "Man-made open drainageways, detention or water quality ponds" are "not a Park," with some limited exceptions. *See* Motion at Exh. C § 2.3.

34. Likewise, "Negative Factors for Classification" of an area as a designated park under DPR's policy include "[a]rea infrastructure…is or will be in a state of flux so that…drainage/flood control/water quality systems…may result in impacts on or potential changes in the Park." Motion at Exh. C § 5.3.3. Additional factors weighing negatively against park designation include the location within the Park of "large or potentially dangerous storm water or flood control facilities…." Motion at Exh. C § 5.3.4.

ii. The Parks and Recreation Advisory Board

35. DPR's same policy indicates that the recommendation of the Parks and Recreation Advisory Board ("PRAB") is important in connection with park actions. *See* Motion at Exh. C § 5.4.4. PRAB is created by the Denver Charter, and "shall advise" Defendant Haynes with respect to "the policy and operation" of DPR. Charter at § 2.4.3. Defendant Haynes acknowledges that it is important to solicit PRAB's input with respect to decisions facing Denver's parks. Haynes Depo. at 92:21-93:15; *see also* Proud Depo. at 110:22-111:1 (stating that it is important for PRAB to have a say in decisions made in connection with Denver parks).

36. At the January 2016 meeting of PRAB, the Board asked for a vote concerning the Project at February meeting, and minutes reflect that Defendant Haynes would develop a proper motion. *See* Exh. 44. Defendant Haynes does not recall a vote being taken, despite evidence that a resolution was proposed. Haynes Depo. at 103:18-22, 106:16; Exh. 45. Defendant Haynes never came to an understanding of what PRAB's position was on the Project, despite being advised of "potential impacts" that could hurt CPGC or be deleterious to park purposes. Haynes Depo. at 108:2-5, 109:2-110:4. PRAB's minutes, memoranda related to PRAB, and presentations to PRAB do not reflect that Project would provide any improvement to CPGC. Exhs. 44-47. As PRAB did not a vote on whether the Project should be located in CPGC, which

Defendants acknowledge created an issue with some PRAB members. Haynes Depo. at 111:24-112:5; Exh. 47.

iii. Trees

37. Defendant Haynes has made various public comments concerning the value of trees in urban settings, stands by those comments, and admits that one park purpose is providing a space for trees. Haynes Depo. at 22:23-25:4, 134:20-135:9.

38. Defendant Haynes and the City Forrester are aware that a number of trees will be lost or removed from CPGC during the Project. Haynes Depo. at 148:4-9.

39. The Project threatens a significant loss to the trees in CPGC, as noted in Plaintiffs' expert report from a consulting arborist. *See* Exh. 8.

40. Mr. Proud (whose role is described below) considers the Project's impact to the tree canopy in CPGC a negative impact to CPGC. Proud Depo. at 56:7-16.

iv. Bird habitat

41. CPGC is certified with the Audubon Cooperative Sanctuary Program, and Defendant Haynes admits that habitat for birds serves as a park purpose. Haynes Depo. at 180:22-181:9. Defendant Haynes admits that some of that habitat will be disturbed by the Project, and CPGC may lose its Audubon certification. Haynes Depo. at 181:10-182:4.

v. Historic Preservation / Preservation of Cultural Landscapes

42. CPGC, originally built in 1913, was nominated to be placed on the National Register of Historic Places ("NRHP") in 1986, that nomination was accepted, and CPGC's placement on the NRHP automatically places it on the Colorado State Register of Historic Places ("SRHP"). *See* Exh. 9 at ¶ 15; C.R.S. § 24-80.1-105(3). The defining features of CPGC that made it eligible for placement on the NRHP and SRHP include its topography, historic layout

and design, its view sheds, and historic planting materials as illustrative of early municipal golf. Exh. 91 at CCD24147; Exh. 92. Although several Denver parks are on the NRHP and SRHP, CPGC appears to be the only golf course in the nation on the NRHP. Exh. 9 at ¶ 15. Defendant Haynes admits that park purposes include historic preservation and the preservation of cultural landscapes. Haynes Depo. at 134:17-135:16.

43. CDOT has determined that the Project will present "an *adverse effect*" to the qualities that led to CPGC's placement on the NRHP. Exh. 51 at CCD001286 (emphasis in original). Likewise, Historic Denver, Inc., is "deeply concerned" about the Project's affect on CPGC, and is "unable to endorse the project." Exh. 53.

44. Defendants admit that it is important to follow public planning documents as they provide guidance. Haynes Depo. at 22:10-22. The City's 2001 Master Plan for City Park and CPGC recommended preservation of CPGC's historical aspects, including preservation of its "basic form and configuration…as it has changed little since its creation in 1913." Exh. 10 at 62.

45. CPGC is one of Denver's "premier" resources in part because of its historical significance, and that history presents a significant attraction as a golf course. Proud Depo. at 59:25-61:7; Exh. 6. Plaintiffs' own expert with respect to historic preservation and the preservation of cultural landscapes is of the opinion that the Project will "destroy the historic and natural resources which contributed to [CPGC's] designation and contribute to its park purposes." *See* Exh. 11 at p. 4 ¶ 2 (with expert's qualifications appended). Likewise, Responses to Defendants' written discovery requests detail the rich history of CPGC and how that is connected to its park purposes. Exh. 2 at Resp. to Interrogatory No. 4.

46. Positive factors in DPR's designation policy—upon which Defendant Haynes relied in this case—include the "historical [and] cultural…significance of the Park, including sites designated by…the National Historic Registry…." Motion at Exh. C § 5.2.4.

47. Defendant Haynes admits that the Project will have "substantial adverse changes" to the historic elements of CPGC. Haynes Depo. at 158:24-159:21; *see also* Proud Depo. at 143:4-20, 144:10-21 (admitting that the historic elements at CPGC that led to its placement on the NRHP will be changed by the Project).

vi. Trash

48. Defendant Haynes admits that the presence of trash in Denver parks detracts from their usage for park purposes. Haynes Depo. at 25:5-26:7.

49. Defendants have encountered "a lot of trash" at other locations that have much smaller tributary areas than CPGC's tributary area, and expect "a lot more trash" being directed to CPGC in light of this fact. Exh. 54.

vii. Highway Construction Support is not a Park Purpose

50. Defendant Haynes admits that highway construction support is not a park purpose, that helping CDOT move its proposed I-70 project timeline forward is not a park purpose, and that helping CDOT get around its National Environmental Protection Act ("NEPA") obligations is not a park purpose. Haynes Depo. at 57:13-16, 58:8-11, 59:6-10.

51. Stormwater master planning is done pursuant to the Denver Revised Municpal Code, is a planning tool for various public entities and private parties, and—as such—it is important that stormwater master plans be reliable. Uhernick Depo. at 45:13-47:9. Mr. Uhernick testified that it is important to follow public planning documents. Uhernick Depo. at 13:25-14:2. The public has a right to depend on master plans. Thomas Depo. 63:25-64:1.

52. A 100-year storm is a storm of the size that has a one percent chance every year, independent of previous years, of occurring, and 100-year flood protection is a storm drainage system that will convey that storm to open waterways with less than twelve inches of water depth in the streets. Uhernick Depo. at 27:6-28:5. Interstate highways require 100-year stormwater protection. Hillhouse Depo. at 50:12-16.

53. Denver's 2014 Stormwater Master Plan ("2014 SWMP") notes that Denver has nearly $1.5 billion in backlogged drainage projects needed to meet minimum drainage criteria. Exh. 24 at CCD009415. The 2014 SWMP defined minimum levels of drainage service to handle 2-year storms for residential properties and 5-year storms[5] for commercial properties. *Id.* at CCD009416. The 2014 SWMP recognized the following:

> **Cost effective implementation of a City-wide 100-year drainage system is not practical** because of the significant capital cost of retrofit construction and limited annualized flood hazard reduction. Consequently, a phased program is recommended that prioritizes improvements to address current hazards **while improving the minor storm system**.

Id. (emphasis added).

54. The Project is part of Denver's larger stormwater management endeavor called "Platte to Park Hill." (henceforth "P2PH") Haynes Depo. at 35:20-24; Proud Depo. at 9:10-18. Plans for P2PH and its components initially only contemplated five-year storm protection. Thomas Depo. at 69:20-22, 72:11-17, 180:13-21. Denver's 2009 Stormwater Master Plan likewise called for five-year storm protection. Thomas Depo. at 154:12-14.

55. Neither the Project nor P2PH is called-for in Denver's 2014 SWMP. Uhernick Depo. at 50:11-15; Hillhouse Depo. 59:10-13; Thomas Depo. 64:3-6.

[5] A 2-year storm is one of the size that has a 50% chance of occurring in any given year, and a 5-year storm is one of the size that has a 20% chance of occurring in any given year.

56. While Defendants contemplated various locations for stormwater projects in connection with P2PH, they admit that CPGC location "has the greatest impact to Parks and Recreation…." Exh. 81; Haynes Depo. at 207:16-208:13.

57. In 2015, the City of Denver and CDOT entered into an Intergovernmental Agreement ("IGA"). *See* Exh. 3. The IGA explicitly and repeatedly references CDOT's plan to reconstruct and lower below-grade portions of I-70 (a "Partially Lowered Covered" approach, or "PCL"), and notes that CDOT "must provide 100-year storm protection for the entire I-70 East Project…." *Id.* at CCD000007. There was a lack of any public input process concerning the IGA. Thomas Depo. at 178:11-18.

58. The IGA also asserts that Defendants "separately and independently created a drainage plan to provide 100-year storm protection for areas that could be inundated by water from the Montclair and Park Hill drainage basins, including the I-70 East Project alignment (the 'Two Basin Drainage Project' or 'TBDP')." Exh. 3 at CCD000007. The "Two Basin Drainage Project" or "TBDP" was simply a predecessor name for P2PH. Uhernick Depo. at 62:12-16; Thomas Depo. at 8:9-17.

59. CDOT had a budget shortfall for its I-70 PCL project, and the IGA serves to lower CDOT's potential procurement costs for that project. Thomas Depo. at 137:21-138:17, 141:2-142:2, 147:19-148:6, 179:5-18. Denver's ordinance request for the IGA notes that the IGA pertained to a drainage plan that "accomplished the need to provide 100 yr protection for the 'PCL'…." Exh. 110 at CCD0010699.

60. Defendants' own documents refer to the TBDP (P2PH's predecessor name) as an "I-70 drainage project." Exh. 103 at CCD009847.

61. P2PH provides 100-year storm protection for I-70. Proud Depo. at 37:11-25.

62. The document illustrating the supposedly "separately and independently" developed plan for 100-year storm protection from the I-70 protect (as asserted in the IGA) was the 2014 Montclair Creek Drainage Feasibility Evaluation ("Evaluation"). Uhernick Depo. at 67:11-23; *see also* Thomas Depo. at 130:1-131:10.

63. However, the Evaluation is not separate and independent from the I-70 project. For example, the Evaluation states the following:

- "[CDOT] is proposing to lower a portion of I-70 near Brighton Boulevard to Colorado Boulevard; known as the I-70 Partially Covered Lowering (PCL) project." Exh. 73 at CCD007342.

- "Our cross-departmental teams identified the following goals and risks to evaluate our options to protect the I-70 PCL project…." *Id.* at CCD007343 (emphasis added).

- "Critical Issues" in connection with any proposal under the Evaluation related to CDOT's federally-required Environmental Impact Study, conformity with the National Environmental Protection Act ("NEPA"), and providing storm protection to accommodate CDOT's scheduling issues related to same. *Id.* at CCD007354.[6]

- Additional "critical issues" touched upon obtaining an intergovernmental agreement with CDOT and the scheduling needs of the National Western Complex. *Id.*

64. Mr. Uhernick also identified the work of the Multi-Agency Technical Team ("MATT") as a reason why P2PH, despite not being called-for in the 2014 SWMP, was being pursued. Uhernick Depo. at 17:20-18:3, 63:1-64:21. MATT consisted of the City and County of Denver, the Urban Drainage Flood Control District ("UDFCD"), RTD, and CDOT. Uhernick

[6] These issues were described as follows: "**1. CDOT's I-70 [PCL] Project Manager, Keith Stefanik has confirmed from his management team that CDOT cannot include any of the Montclair Creek open channel projects in their design/build contract for the I-70 PCL Project.** To amend their Environmental Impact Study (EIS) to include an open channel option is such a large change in scope that they would have to start their NEPA EIS process essentially all over again. It has taken them two years to get to the point of where they are ready to submit their supplemental package, and they are unwilling to jeopardize their progress on the EIS for the I-70 PCL. **2. NEPA requirements will activate if we use federal funding.** If any of the Montclair Creek projects have to undergo a NEPA process, we understand from CDOT's NEPA Project Manager, Kirk Webb, that this process would take a minimum of 2 to 3 years. Based on the I-70 PCL schedule, these projects are not a viable option for the City and County of Denver to pursue. It is understood if we are able to secure non-Federal funding for these project [sic], then we would not have to undergo this NEPA process." *Id.* (bold emphasis in original). Ms. Thomas confirmed that these issues were consistent with her understanding based on conversations with Messers. Stefanik and Webb. Thomas Depo. at 138:18-139:17.

Depo. at 18:13-16. MATT was convened for "the development of a coordinated set of infrastructure improvements that…integrates the drainage needs" of various projects, including the I-70 project. Exh. 72. MATT's meeting minutes reflect extensive conversations under the heading of "I-70 PCL Drainage." Exh. 108.

65. Minutes for an August 2015 meeting with Denver employees that discussed the Project reflect that the meeting was held under the auspices of an "I-70 Drainage" discussion. Exh. 39; Hillhouse Depo. at 78:19-80:4.

66. With respect to the Montclair drainage basin, Denver is working in collaboration with UDFCD. Uhernick Depo. at 119:1-4. In 2013, Defendants requested that UDFCD study the Montclair drainage basin, and deprioritize studies of other basins, "in light of the proposed CDOT I-70 Lowering project…." Exh. 13.

67. Moreover, from a municipal planning perspective, Plaintiffs' expert Dennis Royer is of the opinion that, in light of previous City policy, the Project and P2PH's absence from historical stormwater master plans, and based on his review of related documents, the purported need for the Project and P2PH can only be explained by the need to protect CDOT's I-70 project. Exh. 14 (with Ms. Royer's qualifications appended).

68. Additionally, from a stormwater engineering perspective, Plaintiffs' expert Adrian Brown is of the opinion that the Project does not serve any stormwater-related park improvement purpose for CPGC and is not needed absent CDOT's I-70 project. Exh. 15.

III. LEGAL AUTHORITY

"Summary judgment is a drastic remedy, to be granted only when there is a clear showing that the controlling standards have been met." *Westin Operator, LLC v. Groh*, 347 P.3d 606, 611 (Colo. 2015). It is appropriate only if the evidence shows "that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). *See also Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984); *Town of Grand Lake v. Lanzi*, 937 P.2d 785, 787 (Colo. App. 1996).

The party seeking summary judgment bears the burden of establishing the lack of any genuine issue of material fact. *CenCor, Inc. v. Tolman*, 868 P.2d 396, 400 (Colo. 1994). Conversely, the non-moving party is entitled to the benefit of all favorable inferences that may be drawn from disputed facts, and "[a]ll doubts must be resolved against the moving party; at the same time, the nonmoving party must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts." *Westin*, 347 P.3d at 611; *Churchey v. Adolph Coors Company*, 759 P.2d 1136, 1140 (Colo. 1988); *Cencor, Inc.*, 868 P.2d at 400. Summary judgment must be denied if there is the "slightest doubt" as to the facts and whether the moving party can prevail as a matter of law. *Campbell v. Gilliam*, 457 P.2d 965, 968 (Colo. 1953); *Stotler v. Geibank Industrial Bank*, 827 P.2d 608, 610 (Colo. App. 1992). Even where "it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate." *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993).

IV. ARGUMENT

A. The undisputed fact that the Project will require prolonged closure of CPGC demands denial of the Motion.

Although Defendants admit that CPGC is a "beloved golf course[,]" Motion at 14, the Project will deprive the public of its use for eighteen to twenty-four months. Plainly, CPGC cannot be used for any park purposes by the public during this time. This fact alone compels denial of the Motion. Defendants cannot simply ignore the fact of CPGC's closure. While Defendants point to CPGC's purported use for park purposes following completion of construction, they simply gloss over the deprivation to the public of CPGC's use during

construction. Taken to its logical conclusion, Defendants' argument would condone the prolonged closure of all designated parks for so as long as Defendants desire (regardless of the public's deprivation of use), as long as the purported use upon reopening is park-like. This cannot be the law.

Friends of Van Cortlandt Park v. City of N.Y., 95 N.Y.2d 623 (N.Y. App. 2001), is instructive on this point,[7] as its reasoning is applicable here. The public will be deprived of CPGC's park purposes for eighteen months to two years during construction. This is hardly a *de minimus* deprivation. The Court should deny the Motion because the undisputed fact of CPGC's closure for the Project presents a situation that supports Plaintiffs' cognizable claim for declaratory relief in light of the disputed facts surrounding the Defendants' violation of the Denver Charter and Denver Zoning Code.

Moreover, Plaintiffs allege that the Project violates the common law. *See* Amended Complaint at ¶¶ 92, 103, 106. The closure of CPGC, a designated park, for installation of a stormwater management feature—which is apparently without any precedent in Denver—is contrary to common law. Likewise, Plaintiffs allege that the Project violates the prohibition in Denver's Charter § 2.4.6 against the granting of franchises for special privileges in parks. Amended Complaint at ¶¶ 96, 106. Storing water on CPGC that the Wastewater Enterprise Fund

[7] There, concerned citizens sought to enjoin the City of New York's development and construction of a water treatment plant under land—a golf course—that had been designated as public parkland. *Id.* at 628. The proposed project would have required closure of a golf course and driving range for five years during construction, with the range to be rebuilt on the roof of the plant, above a layer of dirt. *Id.* at 627-28. New York's highest state court determined that the construction of the proposed water treatment plant required state legislative approval because there was "a substantial intrusion on parkland for non-park purposes…." *Id.* at 629-30. In so doing, the court rejected the City of New York's arguments that legislative approval was not required because (1) the proposed project presented "no alienation of parkland" and (2) the water treatment plant would "be substantially underground, with park surfaces fully restored, and therefore the proposed use is not inconsistent with park purposes." *Id.* at 630. The court determined that "**the public will be deprived of valued park uses** for at least five years, as plant construction proceeds." *Id.* at 631 (emphasis added). While the court noted that there "may be '*de minimis*' exceptions" from the requirement that parkland remain available for park uses, "the magnitude of the proposed project does not call upon us to draw such lines in this case." *Id.*

extracts fees to manage is akin to a franchise for a special privilege. Defendants fail to address these aspects of Plaintiffs' claims in the Motion, and it should be denied on that basis alone.

Moreover, Colorado case law does not condone stormwater management as a "park purpose." Defendants admit that CPGC would not be closed but for the Project, and ample evidence supports the conclusion that the Project is being advanced for stormwater management purposes. *McLauthlin v. City and County of Denver* emphasized that parks are "'a plot of ground in a city or town set apart for ornament, a place which the residents of the municipality may frequent for pleasure and exercise or amusement.'" 280 P.2d 1103, 1106 (Colo. 1955) (*quoting McIntyre v. El Paso County*, 61 P. 237 (Colo. App. 1900)). *McLauthlin* quoted additional authority stating that a "'public park is ground used for public recreation.'" *Id.* (citation omitted). *McLauthlin* enumerated "proper and legitimate" uses for public parks, which focused solely on activities for the enjoyment of park patrons. Nowhere in *McLauthlin* was stormwater management described as a proper park purpose. Moreover, *McLauthlin* was applied to City Park itself, and given renewed vitality, in the *McRae v. Etter* case (attached as Exhibit 1 to the original Complaint); nowhere in the *McRae* case did the court describe the intentional detention of stormwater as an appropriate use of a designated park.

Even assuming, *arguendo*, that stormwater management is an appropriate "dual" use of CPGC—which Plaintiffs do not admit—that would not counsel in favor of granting the Motion. Defendant Haynes testified that she has to balance various competing issues to make the determination of whether a proposal is consistent with park purposes. Haynes Depo. at 137:15-138:2. Here, the public's right to use CPGC will be eliminated during construction. Defendant Haynes testified that she did not consider that deprivation as a negative factor to be weighed (see § II.C., *supra*), despite Mr. Proud's opinion that the closure does negatively impact CPGC

(Proud Depo. at 56:7-16). The Court should assess whether that deprivation is appropriately balanced against any alleged ancillary park purpose that is provided by the Project to assess whether the Project as a whole advances a park purpose or detracts from CPGC's park purposes.

B. Additional facts—whether ignored by Defendants or disputed—demand denial of the Motion.

Additional disputed material facts likewise demand denial of the Motion. It is disputed that the Project will "improve" CPGC as Defendants allege. Indeed, Plaintiffs contend that the Project will detract from CPGC's quality and playability as a golf course (expert report at Exh. 6), will detract from the public's ability to use CPGC following construction as CPGC will intentionally be filled with stormwater and be rendered unusable,[8] will detract from its park purposes as providing a place for trees and habitat for birds (*see* §§ II.C.iii-iv. *supra*), will bring additional trash into CPGC in a manner inconsistent with its park purpose (*see* § II.C.vi., *supra*), and constitutes highway construction support which is inconsistent with park purposes (*see* § II.C.vii., *supra*).[9] Moreover, the Project is inconsistent with DPR's Park Designation Policy (*see* § II.C.i., *supra*) and is being pursued without PRAB's approval (*see* § II.C.ii., *supra*).

Significantly, the Project will detract from CPGC's park purposes of historical preservation and the preservation of cultural landscapes. *See* § II.C.v., *supra*. The General Assembly has declared that the preservation of sites possessing historical significance is in the interests of the citizens of Colorado, and they should "be preserved to the extent possible for the education and enjoyment of the residents of this state, present and future." C.R.S. § 24-80.1-101. Defendants have not shown that <u>any</u> other instances of stormwater detention in parks adversely

[8] Moreover, DPW considers the P2PH system a new "backbone" for the Montclair drainage basin, to which it anticipates directing even more stormwater in the future (Uhernick Depo. at 23:24-24:1, 24:23-25:2, 37:25-38:19), which will result in even more stormwater inundation in CPGC—and its more frequent unavailability for use by the public—than currently anticipated.

[9] Although Defendants assert that "Plaintiffs' case is based on speculation and opposition to other projects, specifically, the I-70 reconstruction planned by [CDOT,]" (Motion at 2) they provide no evidence in support of this contention.

affected historic or cultural landscapes. That CPGC appears to be the only golf course in the nation on the NRHP, the Project's destruction of its historic features is highly unprecedented and represents a significant loss to CPGC's unique park purpose.

C. Defendant Haynes' determination that the Project is a Park Purpose should not be given deference.

Defendants suggest in the Motion that the Court should ignore the numerous factual issues that prevent this Court from determining on summary judgment that the Project constitutes a park purpose and simply defer to Defendant Haynes' determination that the Project is consistent with park purposes. However, that determination is not entitled substantial deference. Indeed, the very authority Defendants cite for the proposition that DPR "is entitled to deference" with respect to its interpretation of the Charter and Zoning Code (Motion at 11) in actuality states that the Court "is not bound by the agency's construction [of a code, ordinance, or statutory provisions that govern its actions] because the court's review of the applicable law is de novo." *City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008) (emphasis added, citations omitted); *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2013) (also cited by Motion, stating that interpretation of "city code is reviewed de novo") (emphasis added).

Likewise, *McLauthlin*, also cited by Defendants in the Motion, is distinguishable. The *McLauthlin* court noted that public parks are "ground used for public recreation." *Id.* at 1106 (citation omitted). The court noted the public's "various recreational preferences," and took great pains to enumerate the variety of permitted "recreational purposes" that could be included in a park. *Id.* (citation omitted). Only in that recreational context did the *McLauthlin* court find that the "Manager of Improvements and Parks" (as then-existed) had discretion to authorize the "the installation of a swimming pool and bathhouse in a public park…." *Id.* Notably absent

from *McLauthlin*'s analysis was any discussion of using parks to benefit the stormwater needs of other off-site locations as being consistent with a park purpose.

Similarly, *Burns v. City Council of Denver*, 759 P.2d 748 (Colo. App. 1988), is inapposite. There, the question was whether a city street was or was not correctly included in calculating distance from a rezoning protest area. *Id.* at 749. The court rejected appellant's reading of the relevant statute because it required reading into the statute that which was not present (the exclusion of streets when calculating distance). *Id.* Here, Plaintiffs are urging no such tortured reading of the Charter, any statute, or the zoning code. As such, the Court should not give any deference to Defendants' determination, but rather apply the *de novo* review set forth in *Enclave W., Inc., supra*, a more recent opinion from the Colorado Supreme Court.

The Court should not defer to DPR and/or Defendant Haynes' determination for several other reasons. First, with respect to the detention of stormwater in CPGC in specific, in August of 2014 DPR entered into a Memorandum of Understanding ("MOU") with DPW. *See* Exh. 4. In order to preserve certain pre-existing stormwater aspects of CPGC, the MOU explicitly restricted DPR's ability to manage or alter CPGC. *Id.* In so doing, DPR acknowledged that DPW's goals "may not be compatible with respect to the Charter purposes and missions of [DPR]." *Id.* Having already acknowledged, in writing, that it was entering into an agreement directly related to the Project that was not entirely "compatible" with its charge under the City Charter, DPR should not be entitled to any deference with respect to its determinations related to the Project. *See also* Haynes Depo. at 229:12-230:1 (admitting that there is a "natural point of tension" between DPW's drainage goals and DPR's goals and that DPR might find itself in a tough spot with respect to its Charter obligations).

Moreover, while Defendant Haynes extensively refers to the RFP for the Project as support for her determination that the Project is consistent with park purposes (Motion at Exh. B ¶¶ 13, 15-16), she actually made that determination prior to the RFP's issuance. Haynes Depo. at 74:16-75:12. As such, the RFP cannot lend support to the Court's review of Ms. Haynes' decision. Additionally, Defendant Haynes rejects any distinction between the appropriateness of first installing stormwater management features in an area that is then subsequently designated as a park, versus constructing stormwater management features in an already designated park. Haynes Depo. at 121:13-122:15. The designation of a park brings with it certain protections under the Denver Charter. Defendant Haynes' disregard of any protection that comes from designation with respect to subsequent stormwater projects suggests her determination with respect to the Project is not entitled to deference. Additionally, Defendant Haynes has never ran any Parks and Recreation organization before being appointed to her current position in September of 2015 (Haynes Depo. at 12:6-8, 84:21-23) and qualifications for her position have been questioned in the press (*see* Exh. 43). Plaintiff Christine O'Connor disputes many of the factual assertions and conclusions in Defendant Haynes' Affidavit attached to the Motion. *See* Exh. 9. In sum, the Court should not provide any deference to Ms. Haynes' determination, but should instead review the issues in this case *de novo*.

D. Plaintiffs' *de facto* lease argument is not subject to summary judgment.

Defendants assert that Plaintiffs' *de facto* lease argument "is a lease from [DPR] to [DPW]." Motion at 2. Because DPR and DPW are both agencies of Denver, "and the City cannot lease CPGC to itself[,]" Defendants assert they are entitled to summary judgment with respect to this portion of Plaintiffs' claim. *Id.*

However, Plaintiffs allege that the Project constitutes a lease of designated parkland to DPW and/or the Wastewater Enterprise Fund. Amended Complaint at ¶ 102; *see also* Exh. 2 at Resp. to Interrogatory No. 1. DPW has shown itself able to execute agreements on its own with DPR, as evidenced by the MOU (Exh. 4). The Wastewater Enterprise Fund is a "separate organization" (Proud Depo. at 106:21-24) or a city-owned "business unit" that charges fees to provide a service (Thomas Depo. at 93:23-94:13), and can undertake contracts on its own (Uhernick Depo. at 15:11-16:13). As such, both DPW and the Wastewater Enterprise Fund appear to have the ability to enter into agreements separate and apart from the City itself.

A lease "gives the right of possession of the property leased, and exclusive use or occupation of it for all purposes not prohibited by its terms." *Am. Coin-Meter, Inc. v. Poole*, 503 P.2d 626, 627 (Colo. App. 1972). Here, although there is no formal lease document, the Project presents a situation whereby the public will be shut out of CPGC during construction. As such, the public will lose its ability to use or occupy CPGC, in favor of the construction team's possession and exclusive use of CPGC.

Following construction, the Wastewater Enterprise Fund and/or DPW will be storing water on CPGC. Haynes Depo. at 129:9-22. Just as any other business would have to obtain an agreement from DPR to store items on CPGC (Haynes Depo. at 127:14-128:7), so too should the Wastewater Enterprise Fund. This storage is akin to a lease. As such, despite the lack of any formal leasing document, the Court may find that the Project presents a *de facto* lease of CPGC that must be approved by City Council pursuant to § 2.4.5 of the Denver Charter.

E. The Court should again reject Defendants' renewed unripeness argument.

Defendants halfheartedly raise, again, their unripeness argument. Motion at 13-14. The Court previously rejected this argument in denying the Defendants' Motion to Dismiss.

Defendants offer no sworn statement or evidence in connection with their argument. The legal authority cited in Plaintiff MacFarlane's Response to the Motion to Dismiss remains applicable to defeat Defendants' unripeness argument, and is hereby incorporated by reference. Defendants simply have not carried their burden with respect to this argument in the Motion, and the Court should again reject the argument. Defendants' plans are sufficiently developed, the potential harm to Plaintiffs is sufficiently threatened, and this case can be decided.

V. CONCLUSION

For the foregoing reasons, the Court should deny the Motion.

Dated: June 12, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2017, a true and correct copy of the foregoing was filed and served through CO-COURTS E-FILING and served electronically on the following:

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