COLORADO COURT OF APPEALS Court Address: 2 East 14th Avenue Denver, Colorado 80203 Telephone No.: (720) 625-5150	
El Paso County District Court Trial Court Judge: The Honorable Michael P. McHenry Case No.: 2016CV032101	
Plaintiff/Appellant: SAVE CHEYENNE, a Colorado non-profit corporation; **v.** **Defendants/Appellees:** CITY OF COLORADO SPRINGS; CITY COUNCIL OF THE CITY OF COLORADO SPRINGS; JOHN W. SUTHERS, solely in his official capacity as the Mayor of the City of Colorado Springs; and RONN CARLENTINE or his successor, solely in their official capacity as Real Estate Services Manager of the City of Colorado Springs. **and** **Intervenors/Appellees:** MANITOU AND PIKE'S PEAK RAILWAY COMPANY; COG LAND & DEVELOPMENT COMPANY PF, LLC; and BROADMOOR HOTEL, INC.	**▲Court Use Only▲** Case No.: 2017CA000043
Charles E. Norton, #10633 Kristin N. Cisowski, #45781 NORTON & SMITH, P.C. 1331 17th Street, Suite 500 Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com KCisowski@NortonSmithLaw.com	
OPENING BRIEF	

The Appellant/Plaintiff, Save Cheyenne, a Colorado non-profit corporation, through counsel, Norton & Smith, P.C., submits the following Opening Brief pursuant to C.A.R. 28(a):

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CERTIFICATE OF COMPLIANCE UNDER C.A.R. 28 and C.A.R. 32

The Appellant/Plaintiff, Save Cheyenne, a Colorado non-profit corporation, by and through their counsel, Norton & Smith, P.C., certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒ It contains **9,374** words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

Dated this 31st day of May, 2017.

NORTON & SMITH, P.C.

S/ Charles E. Norton
Charles E. Norton, #10633
Counsel for the Appellant

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I. ISSUES PRESENTED FOR REVIEW

Save Cheyenne presents the following issues for review by this Court:

(1) In granting the Defendants' motions to dismiss Save Cheyenne's first claim for relief, did the District Court err in declining to apply the common law doctrine regarding the dedication of parks, as delineated in *McIntyre v. Bd. of Comm'rs, 61 P. 237, 85 (Colo. App. 1900)*, and *Friends of Denver Parks, Inc. v. City and County of Denver*, 327 P.3d 311, 313 (Colo. App. 2013)?

(2) In dismissing Plaintiff's second claim for relief, did the District Court erroneously conclude that sections 10-10 and 10-60 of the Colorado Springs home rule charter did not apply to the land exchange?

(3) Did the District Court err in dismissing Save Cheyenne's third claim for relief and concluding that § 31-15-713(1)(a), C.R.S. did not require a vote before Strawberry Fields could be conveyed because the disposition of parks is purely a matter of local concern, and hence the statute does not apply to home rule cities?

(4) In dismissing Save Cheyenne's fourth claim for relief, did the District Court err in holding that the land exchange did not violate Article XI, section 2 of the Colorado Constitution, which prohibits a city from making any "grant to, or in aid of… any corporation or company?"

(5) Did the District Court err in dismissing Save Cheyenne's fifth claim for relief on the basis that it was not yet ripe for review?

II. STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

This case concerns the fate of a parcel of approximately 189.5 acres located within North Cheyenne Canon Park and commonly known as "Strawberry Fields." As the District Court aptly noted in its order granting Appellees' motions to dismiss, "No one disputes that this land is among the crown jewels of Colorado Springs' park system, such as the Garden of the Gods and Cheyenne Canon, which are world-renowned and vital to the quality of life in Colorado Springs. Conveyance of such parkland to a private entity is always a serious matte This case raises important issues concerning the sound stewardship of our public lands." R. CF, p. 397, para. 5.

This action was commenced on August 1, 2016 by the filing of a Complaint for Declaratory and Injunctive Relief. R. CF, p. 1. The action was originally commenced only against the City of Colorado Springs; however, three entities affiliated with the Broadmoor hotel and resort, Manitou and Pike's Peak Railway Company; COG Land & Development Company; PF, LLC; and Broadmoor Hotel,

Inc. sought leave to intervene, which was stipulated to by the parties and approved by the District Court in an order dated October 11, 2016. R. CF, pp. 163-164.

The Complaint contained five claims for relief: (1) That the City Council resolution approving the conveyance of Strawberry Fields violated the terms of a statutory and common law dedication of the parcel as a park; (2) That the resolution violated sections 10-10 and 10-60 of the Colorado Springs City Charter by conveying a perpetual right to use Strawberry Fields for a term greater than 25 years and without a vote of the people; (3) That the conveyance violated the terms of § 31-15-713, C.R.S., which requires an election before park property may be sold or disposed of; (4) That the land exchange which included the conveyance of Strawberry Fields to the Broadmoor violated Article XI, section 2 of the Colorado Constitution which prohibits any city from making a donation or grant to any corporation or company; and (5) That the proposed use of approximately 8.5 acres of Strawberry Fields as an equestrian center available only to the Broadmoor's guests violates the terms of the deed restriction required by the resolution that the property be in a PK zone for public recreation and open space.

Both Colorado Springs and the Broadmoor brought motions to dismiss the Complaint, which were granted in an order entitled "Ruling on Defendants' Motions to Dismiss," dated December 15, 2016 ("Ruling"). R. CF, pp. 396-410.

Save Cheyenne filed its Notice of Appeal on January 5, 2017 seeking reversal of the entire Ruling. R. CF, pp. 411-437.

B. Statement of the Facts Relevant to the Issues Presented for Review.

In reviewing a motion to dismiss, this Court must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff. *Ybarra v. Greenberg & Sada*, *P.C.,* 2016 COA 116, ¶6, (citing *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000)). This statement of facts is drawn from the allegations of the Complaint and exhibits attached to it, as well as documents of public record offered by both parties and examined by the District Court during consideration of the motions to dismiss.

As recited in the Complaint, on August 21, 1885, the Colorado Springs City Council passed an ordinance appropriating $5,500 for the purpose of acquiring certain lands known as Cheyenne Canons. R. CF, p. 3, para. 6. A certified copy of that ordinance is attached to the Complaint as Exhibit 1, R. CF, p. 13. As the ordinance recited, the voters at an election held on August 18, 1885 had approved an appropriation to pay for the acquisition and that election was held pursuant to an act of the General Assembly approved on April 10, 1885. R. CF, p. 3, para. 7.

A copy of that act of the General Assembly was included in the record at R. CF, pp. 319-321. Section 19 of the statute provided that "Any incorporated city

may acquire by purchase or gift, lands to be used by such city as public parks." The purchase had to be submitted to the qualified electors of the city, through a call that described the location of the land to be acquired, describing it by legal subdivision, giving the price to be paid and the manner of payment.

After the election question passed on August 18, 1885, the City acquired the site, including Strawberry Fields, by a Deed dated August 22, 1885. R. CF, pp. 15-18. On October 5, 1885, the City Council passed "An Ordinance Relating to and for the Government of Public Parks." R. CF, pp. 19-23. The Ordinance described the area of Cheyenne canon, including Strawberry Fields, and stated that "The property above named is hereby dedicated as a public park, and shall be known as and called Cheyenne park." Section 2 of the October 5, 1885 ordinance also set forth regulations governing the use of the park. R. CF, pp. 21-23. The area of 640 acres conveyed to the City on August 22, 1885 and dedicated as a public park in the Ordinance of October 5, 1885 has been known either as "Cheyenne Park," or, more recently, as "North Cheyenne Canon Park." An area within North Cheyenne Canon Park has come to be known by the name of "Strawberry Fields" to Save Cheyenne, its Board of Directors, and the residents and taxpayers of Colorado Springs who use it. R. CF, p. 4, paras. 12, 13.

Since 1885, Strawberry Fields has been used by the public for park purposes, including hiking, watching birds and other wildlife, finding and identifying wildflowers, picnics, going out for family walks with children and pets, and watching the sun rise over the eastern plains. Strawberry Fields, particularly the meadow area, is easily accessible from surrounding neighborhoods, from local trails, and from Mesa Road; and, because of its gently rolling slopes, it can be accessed comparatively easily by people with disabilities and children. While the City has not constructed trails within the area of Strawberry Fields, many years of walking have resulted in "social trails" which are used by the public. R. CF, pp. 4-5, para. 15.

On May 24, 2016, the City Council enacted Resolution No. 55-16, "A Resolution Authorizing a Land Exchange Between the City of Colorado Springs and the Broadmoor" (the "Resolution"). R. CF, pp. 24-35. The two tax schedule parcels making up Strawberry Fields are described as City Property 1 and City Property 2. In the recitals on page 1 of the Resolution, the City Council recognizes that Strawberry Fields "has intrinsic value as a public asset beyond the estimated fair market value and, in order to retain that value," the City would only transfer Strawberry Fields to the Broadmoor subject to the Terms and Conditions in Exhibit A to the Resolution. R. CF, pp. 25-26.

During the public hearings leading up to the passage of the Resolution, the Broadmoor representatives stated that the Broadmoor intended to use Strawberry Fields to construct an equestrian center where the guests of the Broadmoor could take horseback trips. R. CF, p. 6, para. 19. The equestrian center would also include a stable where horses would be kept on a permanent basis during the season; pavilions for weddings and other activities; and a buffet for food service. Exhibit G to the Resolution, R. CF, p. 41, is a Building Envelope Concept Plan, depicting possible locations for the pavilions, stables, and an access road to be built for the Broadmoor's "Cheyenne Canon Picnic Grounds," located on Strawberry Fields and almost completely occupying the meadow area, which is depicted on the Concept Plan. The area of the Building Envelope depicted on Exhibit G is 8.5 acres. Paragraph 5, page 10 of the Terms and Conditions provides that the Broadmoor shall allow free and open public access to Strawberry Fields, "except the Building Envelope." R. CF, p. 10. (emphasis added).

Pursuant to paragraph 7 of the Terms and Conditions, after the exchange is completed, the Broadmoor shall have the right to manage all of Strawberry Fields, "including but not limited to promulgating rules and regulations and enforcing such rules and regulations for the protection of natural resources and to deter inappropriate and illegal behavior." R. CF, p. 33.

Paragraph 4 of the Terms and Conditions provides that the Broadmoor shall convey a conservation easement for Strawberry Fields to an "appropriate certified conservation easement holder." The Conservation Easement shall identify the exact location and size of the Building Envelope, which is to be no greater than 8.5 acres. Certain Prohibited and Allowable uses shall be set forth in the Conservation Easement. Because of the conveyance of Strawberry Fields under the Resolution, the administration and enforcement of these Prohibited and Allowable Uses shall be by the Broadmoor, a privately-owned entity. R. CF, p. 6, paras. 22-24. On page 7, paragraph 2, of the Terms and Conditions, it is provided that the conveyance of Strawberry Fields shall include a deed restriction that the land will be in a "PK" zone. R. CF, p. 30.

In exchange for the conveyance of Strawberry Fields to the Broadmoor, along with the conveyance by the City of a site of approximately .55 acres near the Manitou Incline, the City will receive the following:

a. Fee title to land consisting of approximately 154.6 acres including a portion of the Manitou Incline and land traversed by the Barr Trail;

b. Fee simple title to two parcels; of 3.26 acres and 5.35 acres, next to the Bear Creek Regional Park, a park owned by El Paso County;

c. A parcel of 208 acres located west of Seven Falls, and crossed by the Gold Camp Road and the Daniels Pass Trail; this site is much more remote than Strawberry Fields, and it will require much greater distances for hiking and climbing and higher levels of fitness and strength to use than does Strawberry Fields;

d. Various easements for trail access, utilities, and termination of an existing revocable license for a parking area.

R. CF, pp. 7-8, para. 28.

III. SUMMARY OF ARGUMENT

Colorado Springs holds Strawberry Fields as a trustee, solely for the benefit of all its citizens. *See McIntyre v. Bd. of Comm'rs*, 61 P. 237, 239 (Colo. App. 1900); *Friends of Denver Parks, Inc. v. City and County of Denver, 327 P.3d 311, 313, 317 (Colo. App. 2013)*. The Resolution violates the terms of this trust, because it conveys Strawberry Fields to a private party, delegates the authority to make rules and regulations for Strawberry Fields to that same private party, and allows uses inconsistent with park purposes by excluding the general public entirely from a critical portion of the site.

The District Court erred in concluding that these common law rules did not apply to Strawberry Fields. First, it mistakenly concluded that Save Cheyenne's

claim was dependent upon a "public trust doctrine" not applicable in Colorado. Second, it erroneously held that a single phrase in the 1885 Ordinance read out of context completely negated all elements of the dedication that the Council had made in the same ordinance. Third, it distinguished *McIntyre* because Strawberry Fields was dedicated by the City Council and not a private party, a distinction that does not appear in the case law and which violates the trust created when the voters of Colorado Springs taxed themselves in 1885 to purchase the park.

The District Court also held that any trust created in 1885 was abrogated when Colorado Springs became a home rule city in 1906. However, the home rule provisions of the Colorado Constitution provide that while a municipality may dispose of real and personal property, if it is conveyed in trust, it may be disposed of only "in accordance with the terms of the trust." Further, any effort by Colorado Springs to abrogate the common law rules governing the dedication of parks must be manifested either expressly or by clear implication. *Friends of Denver Parks*, 327 P.3d at 317. The various sections of the City's Charter, ordinances, and Real Estate Manual cited by the District Court fall far short of this standard.

The District Court also erroneously concluded that art. 2, section 11 of the Colorado Constitution, which forbids Colorado Springs from enacting any law that is retrospective in its operation, does not preclude the City from destroying the

trust created for Strawberry Fields. All the citizens of Colorado Springs, past and future, hold a fully vested right in the entirety of Strawberry Fields being maintained as a public park.

As an alternative second claim for relief, Save Cheyenne pled that the land exchange violated sections 10-10 and 10-60 of the Colorado Springs City Charter, which mandate that no right of use of City-owned parklands may exceed 25 years and that a vote of the people must first be conducted approving any such use. The District Court held that this did not apply to the land exchange; however, this is contradicted by the plain language of the Charter and leads to the absurd result that while Colorado Springs would have to hold a vote to lease Strawberry Fields as an equestrian center, it can simply convey the property for the same purpose without voter approval.

The District Court also dismissed Save Cheyenne's third claim for relief, that if Strawberry Fields can be disposed of, it must be first approved at an election held pursuant to § 31-15-713, C.R.S. The District Court held that this statute deals with a matter of purely local concern and hence does not apply to Colorado Springs as a home rule city. However, applying the criteria set forth in *City of Longmont v. Colorado Oil and Gas Ass'n*, 369 P.3d 573, 580 (Colo. 2016), the

disposition of parklands is a matter of mixed state and local concern and hence a vote must be held.

The District Court also erred in dismissing Save Cheyenne's fourth claim for relief, and holding as a matter of law that the land exchange did not violate Article XI, section 2 of the Colorado Constitution, which prohibits a city from making any "grant to, or in aid of, …any corporation or company," if Colorado Springs received any consideration and if the transaction had any public purpose. This holding directly contradicts the precedent in *Tamblyn v. City and County of Denver*, 194 P.2d 299, 301 (Colo. 1948) , which remains good law in Colorado.

Finally, the District Court also erred in dismissing Save Cheyenne's fifth claim, that the Resolution mandates that Strawberry Fields be in a "PK" zone and that exclusively private uses violate such a zoning designation. This controversy is fully ripe for adjudication because the Broadmoor now has a contract right to exclude the public from a portion of Strawberry Fields.

IV. ARGUMENT

A. In granting the Defendants' motions to dismiss Save Cheyenne's first claim for relief, did the District Court err in declining to apply the common law doctrine regarding the dedication of parks, delineated in *McIntyre v. Bd. of Comm'rs* and *Friends of Denver Parks, Inc. v. City and County of Denver*?

1. Standard of Review pursuant to C.A.R. 28(a)(7)(A).

This Court reviews de novo a district court's order dismissing a case as a matter of law and without an evidentiary hearing. *Asphalt Specialities Co. v. City of Commerce City*, 218 P.3d 741, 744-745. (Colo. App. 2009). A complaint must state a claim for relief that is plausible on its face. *Warne v. Hall*, 2016 CO 50, ¶¶1-2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); a C.R.C.P. 12(b)(5) motion should only be granted when the plaintiff's factual allegations cannot support a claim as a matter of law. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004).

Issue A was raised in the first claim for relief in Save Cheyenne's Complaint, R. CF, pp. 8-9; in its response to Colorado Springs' Motion to Dismiss, R. CF, pp. 328-333; and in its response to the Broadmoor's Motion to Dismiss, R. CF, pp. 306-317. The District Court dealt with the issue extensively in its Ruling. R. CF, pp. 400-406.

2. Discussion.

a. Save Cheyenne has stated a claim upon which relief may be granted based upon the statutory or common law dedication of the area including Strawberry Fields as a public park.

In Colorado, a dedication may be obtained pursuant to statute or according to common law. *City and County of Denver v. Publix Cab Co*., 308 P.2d 1016, 1019 (1957); *State Department of Highways v. Town of Silverthorne*, 707 P.2d 1017, 1019 (Colo. App. 1985). Save Cheyenne has stated a claim for both types of dedication.

On August 21, 1885, the Colorado Springs City Council passed an ordinance appropriating $5,500 for the purpose of acquiring certain lands known as Cheyenne Canons. R. CF, p. 3, para. 6. A certified copy of that ordinance is attached to the Complaint. R. CF, pp. 13-14. The voters at an election held on August 18, 1885 had approved an appropriation to pay for the acquisition, R. CF, p. 3, para. 7, and that election was held pursuant to an act of the General Assembly approved on April 10, 1885.

A copy of that act of the General Assembly was submitted into the record, R. CF, pp. 319-321. Section 19 of the statute provided that "Any incorporated city may acquire by purchase or gift, lands to be used by such city as public parks." The purchase must first be submitted to the qualified electors of the city, through a call that

described the location of the land to be acquired, describing it by legal subdivision, giving the price to be paid and the manner of payment.

After the election was held, the City acquired the site, including Strawberry Fields, by a Deed dated August 22, 1885. R. CF, pp. 3-4, para. 8. On October 5, 1885 the City Council passed "An Ordinance Relating to and for the Government of Public Parks." R. CF, p. 4, para. 9. The Ordinance described the area of Cheyenne canon, including Strawberry Fields, and stated that "The property above named is hereby dedicated as a public park, and shall be known as and called Cheyenne park." Section 2 of the October 5, 1885 ordinance also set forth regulations governing use of the park.

In Colorado, different statutory provisions govern specific forms of dedication. *State Dept. of Highways v. Town of Silverthorne*, 707 P.2d 1017, 1019 (Colo. App. 1985)(citing *Fortner v. Eldorado Springs Resort Co.*, 230 P. 386 (1924)). The Act of April 1885, R. CF, pp. 319-321, Section 19, provided a method for purchasing and dedicating parks. Colorado Springs meticulously followed that procedure, and a statutory dedication was effected.

The District Court erroneously concluded that Save Cheyenne had not stated a claim for statutory dedication, because Plaintiff had not alleged that the Park had been designated as a public park on a city map or plat and that there was no evidence of compliance with the "Colorado dedication statute," citing *City of Leadville v. Coronado Mining Co*., 86 P. 1034, 1036 (Colo. 1906). R. CF, p. 401, para. 27. However, *Coronado Mining* does not support the District Court's holding. The case dealt with an 1877 statute which required that the dedication of streets and alleys to a city or town be in a plat. The case did not deal with park dedications, at all.

In addition to statutory dedication, one of the public uses for which a city may dedicate land under the common law is as a park. *Friends of Denver Parks,* 327 P.3d at 317; (citing *McIntyre* 61 P. at 239, and *Hall v. City & Cty. of Denver*, 177 P.2d 234, 236 (1946). Common law dedication occurs when the city's unambiguous actions demonstrate its unequivocal intent to set the land aside for a particular public use. *Friends of Denver Parks*, supra. at 317. The approval of the ballot question in August of 1885; the appropriation of money by the City Council; the ordinance of October 5, 1885 dedicating the area

as a "public park;" and the passage of regulations regarding the park in that same ordinance all demonstrate an unequivocal intent to set Strawberry Fields aside as a dedicated public park.

Ultimately, whether the dedication of Cheyenne Canon and Strawberry Fields was statutory or at common law, "the principles which control and determine are the same, whatever may have been the manner of dedication." *McIntyre* 61 P. at 239. Colorado Springs acquired the property as trustee for the use and benefit of the people of the City, and it cannot alienate the ground, nor relieve itself from the authority and duty to regulate its use. *Id*.

McIntyre involved an action brought by residents, property owners, and taxpayers of the City of Colorado Springs to enjoin the El Paso County commissioners from acquiring and using a public park within the city as the site of a new courthouse, pursuant to a Colorado Springs ordinance relinquishing the City's rights to the property, which had been dedicated as a park.

The Court of Appeals held that this ordinance violated the terms of the dedication in several respects. First, it improperly conveyed the park to El Paso County. *Id.*, at 239. Second, the

arrangement consisted of "an entire alienation and abdication by the city—the trustee of the people—of its right to control the possession and regulate the use of the square." *Id.*, at 241. Third, if the ground is dedicated for a park, the Court of Appeals held that the citizens, as beneficiaries of the trust, are entitled to the use of the whole; the City as trustee had no power to say that a particular part was not needed for the purposes of the dedication. *Id.*, at 240. Finally, the Court held that the "it cannot be contended that the erection of a large building in such a place, however massive, grand, or beautiful may be its architecture, to be used by either city or county for the carrying on of its business, is consistent" with the use of the land as a park. *Id.*, at 240.

It is almost uncanny the extent to which the Resolution violates the trust requirements detailed in *McIntyre*. The Resolution provides that "the City shall convey" Strawberry Fields to the Broadmoor Entities. R. CF, p. 5, para. 17. As did the County in *McIntyre*, the Broadmoor agrees that it "shall allow free and open public access to Strawberry Fields," except for a Building Envelope of 8.5 acres, which it may restrict to its guests. R. CF, pp. 5-6, para. 18, 19.

Section II.7 of the Terms and Conditions of sale delegate to the Broadmoor the power of "promulgating rules and regulations and enforcing such rules and regulations for the protection of natural resources and to deter illegal and inappropriate behavior." R. CF, p. 6, para. 21. Additional regulatory authority will be held by a "certified conservation easement holder" in the future. *Id.*, p. 6 para. 22. The property may be conveyed by the Broadmoor to a third party, subject only to a right of first refusal by the City. R. CF, p. 7, para. 27. In short, the Resolution amounts to "an attempted appropriation" of Strawberry Fields for a use inconsistent with the purpose of the dedication, and "of an entire alienation and abdication by the city—the trustee of the people—of its right to control the possession and regulate the use" of Strawberry Fields. *McIntyre*, supra, at 239. The Resolution is null and void.

b. The District Court erroneously held that Save Cheyenne's position is dependent upon the public trust doctrine which has been rejected in Colorado.

The District Court reasoned that Save Cheyenne's first claim for relief is dependent upon the common law public trust doctrine

which does not exist in Colorado. However, Save Cheyenne's argument is not dependent upon the public trust doctrine in any respect.

The duty to "preserve and protect the public lands for the public's common heritage" is part of the common law in some states, and a constitutional requirement in others such as Pennsylvania. *See Aspen Wilderness Workshop, Inc. v. Colorado Water Conserv. Bd.,* 901 P.2d 1251, 1263 (Colo. 1995) (Mullarkey, J. dissenting); *City of Longmont v. Colorado Oil & Gas Ass'n*, 369 P.3d 573, 586 (Colo. 2016) (discussing the Pennsylvania constitutional provision). The Environmental Rights Amendment to the Pennsylvania Constitution provides that Pennsylvania's public natural resources are the common property of all the people, including generations yet to come, and as trustee the Commonwealth shall conserve and maintain them for the benefit of all the people. *City of Longmont,* 369 P.3d at 586.

As the Colorado Supreme Court held in *City of Longmont*, this public trust doctrine applying to all public resources is not in the Colorado Constitution or common law. But the doctrine of statutory

and common law dedication of park lands is part of Colorado law, as held in *McIntyre*, recently reaffirmed in *Friends of Denver Parks, Inc.*; and discussed by the Colorado Supreme Court in *Hall*. The Resolution violates the terms of the dedication, and it is null and void.

c. The 1885 Ordinance does not abrogate the trust assumed by Colorado Springs over Strawberry Fields.

The District Court concluded that the 1885 Ordinance itself abrogated the terms of dedication under *McIntyre*, because it "*provided always*, that the City Council may direct any act or thing to be done concerning said parks, which they may deem best for the improvement of said parks." R. CF, p. 401, para. 24 (emphasis in original). Because the land exchange was consistent with the best interests of the City's park system, in the City Council's and District Court's judgment, it was also consistent with the terms of the dedication. This same analysis also in part caused the Court to hold that there is no vested right in keeping North Cheyenne Canon Park as a park. R. CF, p. 406, para. 50.

However, this construction by the District Court violates basic principles governing how to read municipal ordinances. "The rules of statutory construction apply in the interpretation of statutes and local government resolutions and ordinances." *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010) (internal citations omitted). If possible, ordinances must be read as a whole, giving consistent, harmonious, and sensible effect to all parts. *Id.* Municipal codes must be read to construe them according to their plain wording and meaning. *Id.* at 720. The reviewing court must avoid interpretations which render any part of the ordinance superfluous. *Roalstad v. City of Lafayette*, 363 P.3d 790, 797 (Colo. App. 2015).

The ordinance of October 5, 1885, R. CF, pp. 22-23, begins with a recitation of Colorado Springs' purchase of North Cheyenne Canon. Section 1 mandates that the property "is hereby dedicated as a public park." Section 4 contains the language relied upon by the District Court:

> The defacing or injuring of any of the buildings, bridges or other property of said city of whatsoever name or description within any of the said parks, is hereby prohibited; *provided always*, that the City Council may direct any act or thing to be done

> concerning said parks, which they may deem best for the improvement of said parks.

R. CF, p. 23.

The plain and sensible meaning of the language after the phrase "provided always" is quite clear. While it was a prohibited offense to damage a fixture within a park, the City Council retained the authority to demolish or construct such improvements. It is not consistent, harmonious, or even sensible to read those words as abrogating the restrictions in *McIntyre* against the alienation of a public park, or against delegating the Council's authority to regulate the park—in fact, the cited language mandates Council's retention of regulatory authority over the park. If Strawberry Fields is finally conveyed away through the Resolution, the City Council will have no authority whatsoever to do any act concerning the park that it may deem best for its improvement.

The District Court's interpretation also renders the language of dedication completely superfluous. As the Broadmoor advocated, the Court's conclusion removes any legal consequence from the fact that Council dedicated the area including Strawberry Fields as a park. Such a construction must be avoided.

d. *McIntyre* cannot be distinguished on the basis that the City Council, as opposed to a private party, dedicated Strawberry Fields as a park.

In paragraphs 38-41 of its Ruling, the District Court held that *McIntyre* did not support Save Cheyenne's position, because *McIntyre* involved a private company that dedicated land to the city to be used as a public park. R. CF, pp. 403-404 The Court reasoned that the rule in *McIntyre* is quite narrow: when a (private) landowner donates land to be used as a public park, the city cannot then convey the land to a third party, which, the Court concluded, would be unfair to the donating landowner. *Id.*

With all due respect to the District Court and the Broadmoor, this is indeed a narrow interpretation of *McIntyre*, which can be achieved only by ignoring the bulk of the opinion. The Court of Appeals held that the property at issue was held for the use and benefit of its citizens, for the purpose only of its dedication; and that it could not alienate the property, or relieve itself of the duty to regulate its use. *McIntyre*, 61 P. at 239. In *McIntyre*, Colorado Springs did not contemplate deeding the property to a private party, but instead to

a public entity, El Paso County, for use as a courthouse, which the Court of Appeals held was a valid public purpose, but one that was inconsistent with the dedication as a park in part because the public would now be excluded from a portion of the property, and because the City would no longer have the power to control the possession and use of the courthouse square. *Id.*

McIntyre does not set forth the distinction advocated for by the Appellees, and the District Court did not cite a single case from any jurisdiction which stands for the proposition that if a city council dedicates public property as a park, the city is not bound by the terms of the dedication, while it would be if a private party had dedicated the property. Instead, the District Court simply noted that the "typical fact pattern" in the cases was for a private party to dedicate the land, which was sufficient in the Court's view to create a distinction. R. CF, p. 404, para. 38. However, the distinction violates fundamental principles for interpreting trust documents and similar instruments. As the United States Supreme Court held in the classic case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 644 (1819), "But although a particular and rare case may not, in itself, be

sufficient to induce a rule, yet it must be governed by the rule, when established unless some plain and strong reason for excluding it may be given."

No such "plain and strong" reason exists here. The District Court's new rule denies any equitable interest on behalf of the public if previously acquired public property has been dedicated in trust for their benefit. The voters of Colorado Springs, acting pursuant to statute authorizing the purchase of land for parks and at an election held on August 21, 1885, voted to appropriate $5,000 to buy North Cheyenne Canon, and to levy a tax upon themselves to pay for it. R. CF, p. 13. That interest is deemed by the Broadmoor and the City to be unworthy of protection in equity, while the expectancy, for example, of General William Jackson Palmer if he donated land for parks would be entitled to some, albeit largely unspecified, protection. There is no basis at law for this distinction.

This Court must reject the new rule of construction for park dedications endorsed by the District Court.

e. The assumption by Colorado Springs of home rule powers in 1909 and the City's subsequent exercise of those powers

did not abrogate the trust created by the dedication of Strawberry Fields as a public park in 1885.

As additional support for its dismissal of Save Cheyenne's first claim for relief, the District Court also held that Colorado Springs has abrogated the common law rule regarding the dedication of parks and that it was entitled to do so after it assumed home rule powers in 1909. However, neither conclusion is accurate.

First, the home rule provisions of the Colorado Constitution do not grant a completely unrestricted right to dispose of municipal property. Article XX, section 1 provides that the municipal corporation "may purchase, receive, hold, and enjoy or dispose of, real and personal property; may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable, or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests, and donations, with power to manage, sell, lease or otherwise dispose of same in accordance with the terms of the gift, bequest, or trust." (emphasis added). These provisions controlled the scope of the home rule power that Colorado

Springs assumed in 1909; the City cannot dispose of Strawberry Fields contrary to the terms of the pre-existing trust.

Further, the materials relied upon by the District Court don't say that Colorado Springs has retroactively abrogated the dedication of Strawberry Fields. The standard here has been set by the Colorado Court of Appeals in *Friends of Denver Parks, Inc.* 327 P.3d at 317. If a legislative body wants to abrogate its right to accept the common law dedication of parks, it "must manifest its intent either expressly or by clear implication." *Id.* Colorado Springs has done neither.

In *Friends of Denver Parks*, the Court interpreted a provision of the Denver home rule charter which provided, in pertinent part, that "No land acquired by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance." *Id.* at 319. The Court of Appeals concluded that "the explicit language of the pertinent sections of the city's charter make clear that, as of December 31, 1955, the city intended to (1) eliminate the concept of common law dedication of parks; (2) for land that the city owned as of that date; (3) that had not already been dedicated as a park by such means." *Friends of Denver Parks*, at 318 (emphasis added). The

holding is clearly based on the assumption that the Charter Amendment of December 31, 1955, abrogating Denver's right to accept parks by common law dedication, did not operate retroactively.

No provisions comparable to those analyzed in *Friends of Denver Parks* exist in the Colorado Springs charter, municipal code, or the Real Estate Manual. The District Court pointed to a general provision in the charter allowing Colorado Springs to dispose of property (which Denver had as well); this flies in the face of the analysis in *Friends of Denver Parks*. The Court also determined that the Real Estate Manual says that it applies to all real estate transactions; it is difficult to conclude that this means "including transactions that we are otherwise prohibited from entering into." *See* R. CF, p. 403, para 36. There is simply nothing in the materials cited which expressly or by clear implication abrogates the common law dedication of parks.

Further, art. II, section 11 of the Colorado Constitution provides that "no law…retrospective in its operation… shall be passed by the general assembly." This prohibition against retrospective laws at the state level applies equally to local government, including home rule

cities. *City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006). Article II, section 11 prohibits any law which takes away or impairs a vested right acquired under existing laws. *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 977-978 (Colo. App. 2004). That is precisely what Colorado Springs is trying to do here—take away the public's right to own and use Strawberry Fields which vested in 1885. The City's action is *ultra vires*.

The General Assembly addressed this issue of vested rights and home rule cities in 1971 when it enacted the "Municipal Home Rule Act of 1971." The statute was intended to implement section 9 of Article XX of the Colorado Constitution, adopted at the 1970 general election. The statute, § 31-2-217, C.R.S. (2016) reads as follows:

> The adoption of any charter, charter amendment, or repeal thereof shall not be construed to destroy any property right, contract right, or right of action of any nature or kind, civil or criminal, vested in or against the municipality under and by virtue of any provision of law theretofore existing or otherwise accruing to the municipality; but all such rights shall vest in and inure to the municipality or to any persons asserting any such claims against the municipality as fully and as completely as though the charter, amendment, or repeal thereof had not been adopted. Such adoption shall never

> be construed to affect any such right existing between the municipality and any person.

The legal effect of § 31-2-217, art. II, section 11, and section 1 of article XX is quite clear. The enactment of a municipal charter by the electors of Colorado Springs in 1909 did not give the City the power to dispose of a dedicated park, heedless of the terms of the dedication. Instead, the taxpayers and residents of Colorado Springs may assert their property rights under the trust created by the dedication "against the municipality as fully and as completely as though the charter, amendment, or repeal thereof had not been adopted."

The Resolution violates that trust.

B. In dismissing Plaintiff's second claim for relief, did the District Court erroneously conclude that sections 10-10 and 10-60 of the Colorado Springs home rule charter did not apply to the land exchange?

1. Standard of Review pursuant to C.A.R. 28(a)(7)(A) .

Save Cheyenne incorporates its statement regarding the standard of review set forth in section IV. A. 1 of this brief by reference. Issue B was raised in the second claim for relief in Save Cheyenne's Complaint, R. CF, p. 10; and in its response to Colorado Springs' Motion to Dismiss, R. CF,

pp. 333-336. The District Court dealt with the issue in its Ruling. R. CF, p. 406.

2. Discussion.

The City Charter of Colorado Springs provides in Article X, section 10-10 that a "franchise" is a "special right or privilege granted by vote of the electorate of the City of Colorado Springs to any person, firm, or corporation to erect, construct, operate, carry on, or maintain …any other business activity affective of the public interest which permanently occupies and obstructs the public streets, rights-of-way, alleys, or properties…." R. CF, p. 10, para. 40.

That same article, section 10-60, goes on to provide that "For the purpose of economic development, the City may grant a lease or right to use the property of the City for up to ninety-nine (99) years. This shall not apply to City owned parklands for which the term of a franchise, lease, or right to use shall never exceed twenty-five (25) years." *Id.,* at para. 42.

Even though the land exchange contemplates granting the Broadmoor a right to use Strawberry Fields in perpetuity, the District Court held that because this is a conveyance of fee title it is not a franchise and hence not subject to the duration or voting restrictions in the Charter However, a

municipal charter is the equivalent of a statute or other legislation, and the same rules must be used to interpret it as are used when interpreting a statute. *Londoner v. City & County of Denver*, 119 P. 156, 162 (1911); *Friends of Denver Parks Inc.,* 327 P.3d at *317*. The Court's primary task is to give effect to the intent of the drafters of the charter by looking at the plain language. *Friends*, supra.; *Legett & Platt, Inc. v. Ostrom*, 251 P.3d 1135, 1141 (Colo. App. 2010). The court must give effect to the ordinary meaning of language and read the provision as a whole; it must avoid interpretations that produce illogical or absurd results. *Id.*; *see also People v. Cross*, 127 P.3d 71, 71 (Colo. 2006).

In this instance, the Charter forbids a "right to use" "city-owned parkland" for more than twenty-five years. The conveyance of fee simple title in real property creates a perpetual and exclusive right of use, and the Resolution therefore violates the Charter. The Charter also requires a vote of the people before creating a franchise, which is a "special right or privilege…granted to any person, firm, or corporation to…operate a business activity affective of the public interest and which permanently occupies and obstructs the public…properties…" Authorizing the Broadmoor to operate an equestrian center and 100 seat barbeque/buffet

event center for 40 plus events a season in the Building Envelope of 8.5 acres on Strawberry Fields does precisely that, without a vote.

The interpretation advocated by Save Cheyenne avoids an absurd result. If Colorado Springs had leased Strawberry Fields to the Broadmoor, it would have to have a vote of the people and the term could be no longer than twenty-five years. However, this problem can be avoided in the City's view just by trading the City's interest away entirely! This absurd result should not be accepted by the Court.

The District Court judgment dismissing Save Cheyenne's second claim for relief must be reversed.

C. Did the District Court err in dismissing Save Cheyenne's third claim for relief and concluding that § 31-15-713(1)(a), C.R.S. did not require a vote before Strawberry Fields could be conveyed, based upon its analysis that the land exchange was purely a matter of local concern, and hence the statute does not apply to home rule cities?

1. Standard of Review pursuant to C.A.R. 28(a)(7).

Save Cheyenne incorporates its statement regarding the standard of review set forth in section IV. A. 1 of this brief by reference. Issue C was raised in the third claim for relief in Save Cheyenne's Complaint, R. CF, pp.

10-11; and in its response to Colorado Springs' Motion to Dismiss, R. CF, pp. 336-340. The District Court dealt extensively with the issue in its Ruling. R. CF, pp. 406-408.

2. Discussion.

The Third Claim for Relief is based upon § 31-15-713 (1) (a), C.R.S. , which provides that the governing body of each municipality has the power:

> To sell and dispose of…real property used or held for park purposes…. Before any such sale is made, the question of said sale and the terms and consideration thereof shall be submitted at a regular or special election and approved in the manner provided for authorization of bonded indebtedness by section 31-15-302 (1) (d).

The District Court held that the statute did not apply "because it conflicts with the City Code on a matter of purely local concern." R. CF, p. 408, para. 60. However, this conclusion conflicts with applicable precedent of the Colorado Supreme Court.

In making the decision whether a state statute that applies to home rule municipalities is superseded by the local law, the Court must weigh "the relative interests of the state and the municipality in regulating the particular issue in the case," making the determination on a case-by-case basis considering the totality of the circumstances. *City of Longmont v. Colorado*

Oil and Gas Ass'n, 369 P.3d 573, 580 (Colo. 2016) . In *City of Longmont*, the Court set out several factors that guide the inquiry. *City of Longmont*, supra. at 580. Their application leads to the conclusion that § 31-15-713 supersedes any authority in the Colorado Springs Charter to dispose of dedicated park land without a vote.

a. The need for statewide uniformity of regulation.

While the Colorado Supreme Court has stated that uniformity of regulation in itself is no virtue, it is necessary "when it achieves and maintains specific state goals." *City of Longmont*, supra. at 580. The general assembly has declared that "The protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of public interest." § 24-65.1-101, C.R.S. To further this process, local governments may designate the site selection and development of new communities as an activity of state interest, and shall administer these activities so as to "facilitate the adequate provision of …parks and other public requirements." *Id.*, sections 203 (1) (g), 204 (4) (a). Article XXVII of the Colorado Constitution, section 1, dedicates the net proceeds of the state lottery to the "preservation, protection, enhancement and

management of the state's wildlife, park, river, trail and open space heritage," including a program to "identify, acquire and manage unique open space and natural areas of statewide significance" through grants to "municipalities, counties, or other political subdivisions of the State."

§ 31-15-713 gives the residents of every city and town in Colorado the right to a vote before iconic parks may be disposed of by their municipality. This statute prevents the summary disposition by Denver of City Park, which includes regional and national attractions such as the Zoo and Museum of Nature and Science;[1] it also prevents Colorado Springs from disposing of similarly iconic parks such as Cheyenne Canon, Garden of the Gods, Monument Valley Park, Ute Valley Park and many others.

The need for uniformity is compelling, and almost by itself makes the disposition of park lands a matter of statewide or mixed state and local concern.

b. The extra-territorial effect of local regulation.

[1] As previously discussed, Denver protects this right by charter as well.

To find this factor, the Court must determine that there is a "ripple effect" that has "serious consequences" for residents outside the city and be more than incidental. *Id.* at 581. The decision of Colorado Springs to dispose of parkland without a vote as part of the "management of its real estate portfolio," R. CF, p. 101, may have a ripple effect on residents of other jurisdictions who visit the parks, or on the economy of Colorado if those attractions owned by the City are transferred into private ownership. A vote by the citizens of Colorado Springs who have a vested stake in the parks helps to protect this broad public interest.

c. Whether the state or local governments have traditionally regulated the matter.

Historically, both the state and local governments have regulated the acquisition and disposition of parklands. The general assembly enacted legislation enabling the acquisition of parks pursuant to certain specific requirements in 1885, nine years after Colorado became a state. § 31-15-713 has been in its current form since 1975, when the entire statutory section was repealed and reenacted. The requirement that there be a vote before parks can be

disposed of existed long before that, but also after the ratification of Article XX granting home rule powers in 1901. This factor argues strongly that the disposition of parks is a matter of mixed state and local concern.

d. Whether the Colorado Constitution specifically commits the matter to either state or local regulation.

While Article XX does grant home rule cities the power to "sell and dispose of, real…property," that may only be done in accordance with the terms of the gift, bequest, or trust, which would be interpreted under state law. Further, contrary to the District Court's holding, while land use may be traditionally regulated by local government, the Colorado Constitution does not relegate land use control exclusively to local governments. *City of Longmont*, supra. at 581. The statutory and constitutional scheme suggests that the disposition of parklands is a matter of mixed state and local concern.

The judgment dismissing the third claim for relief must be reversed.

D. In dismissing Save Cheyenne's fourth claim for relief, did the District Court err in holding that the land exchange did not violate Article XI, section

2 of the Colorado Constitution, which prohibits any "grant to, or in aid of, …any corporation or company?"

1. Standard of Review pursuant to C.A.R. 28(a)(7).

Save Cheyenne incorporates its statement regarding the standard of review set forth in section IV. A. 1 of this brief by reference. Issue D was raised in the fourth claim for relief in Save Cheyenne's Complaint, R. CF, p. 11; and in its response to Colorado Springs' Motion to Dismiss, R. CF, pp. 341-343. The District Court dealt with the issue in its Ruling. R. CF, p. 408.

2. Discussion.

The fourth claim for relief is based upon Article XI, section 2 of the Colorado Constitution, which provides that "Neither the state, nor any county, city, town, township, or school district shall make any donation or grant to, or in aid of…any corporation or company." The District Court held that because Colorado Springs had received consideration through the land exchange, which served a public purpose, Save Cheyenne's complaint failed to state a claim as a matter of law. Both supporting propositions lack substantial merit.

First, *Tamblyn v. City & County of Denver*, 194 P.2d 299 (1948) is on point and has never been overruled. The *Tamblyn* Court held that "if the public property conveyed "greatly exceeds in value the contract price…it follows that the officials of the City will not only have abused their discretion, but also, if the sale is consummated, will have made a gift to (the private corporation) contrary to, and in violation of, section 2, art. XI of the state constitution." *Id.* at 301. Contrary to the District Court's holding, *Tamblyn* is not impliedly overruled by *City of Aurora v. Public Utilities Comm'n*, 785 P. 2d 1280, 1288 (Colo. 1990), which held that the term "donation" means "a voluntary transfer of property to another without consideration." As the *Tamblyn* Court emphasized, a transfer of property for a "grossly inadequate" price is precisely such a gift.

Save Cheyenne alleges facts that make a plausible claim that the gap between the value of Strawberry Fields and the other properties involved in the land exchange is considerable. For example, the Complaint alleges that the estimated value of $3,609,800 for the exchange properties as opposed to the $2,161,000 value for Strawberry Fields appears to "greatly overstate" the value of property received by the City and to understate the value of Strawberry Fields. R. CF, p. 8, para. 29. It is further pled that the 208-acre

parcel to be received by the City for Strawberry Fields is much more remote than Strawberry Fields, which has easy access from Mesa Avenue and local trails. *Id.*, at paras. 15, 28. Several exchange "parcels" are trail easements, of questionable market value. *Id.* Save Cheyenne further pleads that a review of the appraisals obtained by the City convinces the Plaintiff that the fair market value of the exchange parcels is less than Strawberry Fields. R. CF, p. 11, para. 52. These facts state a plausible claim for relief under Article XI, section 2 of the Colorado Constitution.

The District Court also held that *Tamblyn* has lost its value as precedent because if there is a "public purpose" for the transfer of property, it will not be reviewed by the courts under Article XI, section 2. However, as Colorado Springs well knows, this issue has not been addressed. As a panel of this Court noted in *Fischer v. City of Colorado Springs*, 260 P.3d 331, 338-339 (Colo. App. 2010), "Colorado appellate courts have not yet addressed whether the public purpose exception applies where, as here, the facility on which public funds are to be expended will ultimately be conveyed to a private entity for negligible consideration." This Court must not adopt the new rule endorsed by the District Court that a conveyance of

public property for any consideration which serves any conceivable public purpose is valid under Article XI, section 2.

The judgment of the District Court dismissing Save Cheyenne's fourth claim for relief must be reversed.

E. Did the District Court err in dismissing Save Cheyenne's fifth claim for relief on the basis that it constituted a zoning challenge that was not yet ripe for review?

1. Standard of Review pursuant to C.A.R. 28(a)(7).

Save Cheyenne incorporates its statement regarding the standard of review set forth in section IV. A. 1 of this brief by reference. Issue E was raised in the fifth claim for relief in Save Cheyenne's Complaint, R. CF, p. 11; and in its response to Colorado Springs' Motion to Dismiss, R. CF, pp. 343-344. The District Court dealt with the issue in its Ruling. R. CF, pp. 409-410.

2. Discussion.

The District Court held that the fifth claim for relief is not ripe for adjudication, because it raises "contingent or future matters that suppose speculative injury that may never occur." R. CF, p. 409, para. 66. However, the Terms and Conditions in the Resolution provide that the conveyance of

Strawberry Fields shall include a deed restriction that the land will be in a PK zone, and "any and all" uses shall be consistent with the City's PK zone. R. CF, p. 11, para. 54. Those same Terms and Conditions provide that the conservation easement to be imposed on the property shall include an 8.5 acre building envelope limited to park uses. R. CF, p. 33. The Broadmoor shall allow free and open public access to the site "except the building envelope." *Id.* These are not remote or speculative provisions; they are part of the contract between the City and the Broadmoor.

It is this exclusion of the public that Save Cheyenne maintains is incompatible with the PK Zone. R. CF, p. 11, para. 55. As the Court held in *McIntyre* 61 P. at 240, "if the ground is dedicated for a park, the citizens—the beneficiaries of the trust, are entitled to the use of the whole."

This right to exclude is not contingent upon a particular use being undertaken by the Broadmoor, or the review and approval of that use by the Colorado Springs planning commission or the advice of the Parks and Recreation Advisory Board. That right to exclude the public vests upon conveyance; it violates the concept of the PK zone; and Save Cheyenne is entitled now to an adjudication vindicating the rights of the public. The

judgment of the District Court dismissing Save Cheyenne's fifth claim for relief must be reversed.

II. CONCLUSION

For all of the foregoing reasons, the judgment of the El Paso County District Court dismissing Save Cheyenne's Complaint should be reversed in full, and the case remanded to the District Court for further proceedings consistent with this Court's decision.

Dated this 31st day of May, 2017.

NORTON & SMITH, P.C.

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CERTIFICATE OF SERVICE

I certify that on the 31st day of May, 2017, a true and correct copy of the foregoing **OPENING BRIEF** was sent electronically and/or mailed, postage prepaid, return receipt requested, to the following:

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