

Denver County, Colorado 1437 Bannock Street Denver, CO 80202	
<b>THE CITY AND COUNTY OF DENVER, PLAINTIFF</b>	
<b>v. HOLM, TROY DANIEL DEFENDANT</b>	
Attorney or Party Without Attorney (Name and Address):	Case Number:
Phone Number:	16GS013978
FAX Number:	Division 3F Courtroom
E-mail:	
Atty. Reg. #:	
<b>ORDER re: DEFENDANT'S MOTION TO DISMISS</b>	

This matter comes before the court on the Defendant's Motion to Dismiss. Defendant Holm was charged with two counts for alleged violations of the Denver Revised Municipal Code ("D.R.M.C.") as follows: D.R.M.C 39-4 Restriction or Prohibition of Uses and Activities; and 38-115 Trespass. The statutes read as follows:

- **Sec. 39-4. - Restriction or prohibition of uses and activities.**

(a) It shall be unlawful for any person, other than authorized personnel, to engage in any use of or activities in any area or part of any park, parkway, mountain park, or other recreational facility in violation of any temporary directive issued by the manager restricting or prohibiting such use or activities.

(b) It shall be unlawful for any person, other than authorized personnel, to engage in any team sport activities, as defined in adopted rules, in violation of any rules or public notice restricting or prohibiting such team sport activities in any passive recreation use area, as defined in adopted rules.

(Ord. No. 446-12, § 1, 9-10-12; Ord. No. 728-15, § 1, 11-9-15)

- **Sec. 38-115. - Trespass.**

(a) It is unlawful for any person knowingly to enter or remain upon the premises of another when consent to enter or remain is absent, denied, or withdrawn by the owner, occupant, or person having lawful control thereof.

(b) It shall be prima facie evidence that consent is absent, denied, or withdrawn, to enter or remain upon the premises of another when:

(1) Any person fails or refuses to remove himself from said premises when requested to leave by the owner, occupant or person having lawful control thereof; or

- (2) Such premises are fenced or otherwise enclosed in a manner designed to exclude intruders; or
- (3) Private property or public property, which is not then open to the public, is posted with signs which give notice that entrance is forbidden.

\* \* \*

At the center of both charges is Temporary Directive 2016-1: "Suspension of Right to Access of Parties Engaged in Drug-Related Activity from City Parks and the Cherry Creek Greenway" , a temporary directive issued by the Director of Parks and Recreation which purportedly is effective from September 1, 2016 - February 26, 2017. This directive suspends the right of a person "engaged in Illegal Drug-Related Activity" from accessing or using the City Parks and the Cherry Creek Greenway in which the Illegal Drug-Related Activity occurred for a period of ninety (90) days. A full rendition of Temporary Directive 2016-1 is incorporated into this Order as Appendix A, for consideration upon appeal. However, discussion of several aspects of Temporary Directive 2016-1 are discussed below.

According to the directive, "Illegal Drug-Related Activity" is defined as "[t]he act of distributing, transferring, selling, sharing, buying, consuming, using, or illegally possessing Illegal Drugs." Specifically, and of most interest to this court, is the enforcement provision of the Temporary Directive which reads as follows:

Enforcement: If a Denver Police Officer should determine that a person has committed a Violation, the Denver Police Officer may issue a notice to said violator suspending the right of the violator (the "Suspension Notice") from accessing or using City Parks or the Cherry Creek Greenway, depending on the location(s) of the Violation, for a period of ninety (90) days *from the date of the Suspension Notice. The Suspension shall be immediately in effect upon the issuance of the Suspension Notice.* Failure to comply with the Suspension Notice during the 90-day Suspension shall be grounds for issuance of a ticket and assessment of a penalty as provided in section 1-13, DRMC. The person subject to the Suspension Notice need not be charged, tried or convicted of any crime, infraction, or administrative citation in order for the Suspension Notice to be issued or effective. *(emphasis added)*

The Temporary Directive then dictates a fairly elaborate administrative appeals process, whereby a person who receives a Suspension Notice has ten days to file an appeal with the Department of Parks and Recreation Director. Once the appeal is filed, a hearing "shall be scheduled for a date no later than twelve (12) calendar days following the date the Appeal is filed". After this hearing is scheduled, notice of the hearing must be sent to the party no later than four days following the date the date that the appeal is filed. The Administrative Hearing Officer (appointed by the Department of Parks and Recreation Director) may continue the hearing for up to 10 days upon request of either the suspended party or the City, in order for additional witnesses and evidence to be presented, and provides that "[t]he Suspension Notice shall remain in effect during this continuance."

In fact, by the very terms of Temporary Directive 2016-1, the Suspension Notice remains in effect from the moment that a Denver Police Officer "determines that a person has committed a Violation" (by what standard the directive is silent), hands an alleged violator the Suspension Notice, continuing throughout the administrative appeal process, and further continues unless and until the Administrative Hearing Officer "reverses the Suspension Notice". In order to acquire a reversal, the Administrative Hearing Officer must find that the alleged violator has proven that either the violator did not commit the violation, that the Suspension Notice was not legally issued, or was issued "in violation of other law".

After the hearing is completed, as per the terms of the Temporary Directive, the Administrative Hearing Officer has an additional five days to issue a written decision. This means that from the time a person is immediately banned from a public park upon issuance of a Suspension Notice, and even assuming that the alleged violator does not wait the ten days to request a hearing, to the conclusion of the hearing challenging the issuance, twenty-seven days may pass before a wrongly inflicted "violator" receives reprieve. If the alleged violator takes the 10 days given to initiate the challenge, thirty-seven days may pass. All the while, the alleged violator has been deprived access to a public park or area, and is subjected to criminal charges should the subject present himself at the noted public location. This is a substantial proportion of the 90 day suspension period.

There is, by the very wording of Temporary Directive 2016-1, no pre-deprivation due process afforded to a person who is subjected to a Suspension Notice. The Temporary Directive is meticulously crafted in this way, while asserting no compelling reason to support such a pre-deprivation approach, nor does this court find that such a compelling reason to deny procedural Due Process in this way has been established by the City. The infringement upon the right to utilize a public area could easily be delayed until the administrative hearing has been held, the alleged violator has had a meaningful opportunity to be heard, and the hearing officer has made a written determination as to the basis of the deprivation. Essentially, the exact procedures mandated by Temporary Directive 2016-1 could be implemented, but the sanction of banishment from public parks could be imposed after procedural Due Process has been afforded. Instead, deprivation of the liberty to utilize a public space is immediately imposed upon the ambiguous "determination" ("ambiguous" because no standards for determination are noted - for example, requiring the sanctioning officer to witness firsthand the alleged violation, or with any indication regarding the standard of proof the officer must assert to support such determination) by an officer that a violation has occurred.

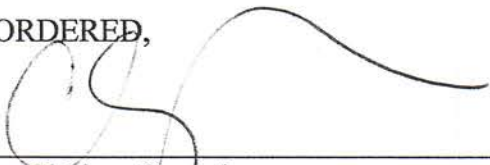
The court must weigh three factors to determine whether the action of the City in this case has deprived a person of a liberty interest without due process of law as follows: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and 3) the City's interest, including the function involved and the administrative burdens that the additional requirement would entail. Matthews v. Eldridge, 424 U.S. 319, 336 (1976); Van Sickle v. Boyes, 797 P.2d 1267 (Colo.1990).

The interest of the City in this case is recognized as the need to rid the parks of persons who utilize the area as a sanctuary for drug use. This is seen as a legitimate state/city interest. The court also recognizes a private interest of a member of the public to have access to public parklands, as recognizes the same as a liberty interest. Further, the risk of an erroneous deprivation of the liberty

interest in using public land is great under Temporary Directive 2016-1, as the “determination” is made by an officer without standards imposed, allowing for unfettered, unchecked discretion on the part of an officer. Finally, considering the City’s interest and the relative ease at which the procedures could be changed (essentially imposing very little difference in cost and time upon the City) the deprivation of the liberty interest is found to be offensive to a *Matthews* analysis. As the park suspensions under Temporary Directive 2016-1 take effect immediately, within the pure unchecked discretion of any police officer on the scene, and with a complete lack of any pre-deprivation Due Process, the suspensions violate procedural Due Process protections, and are found unconstitutional for this reason.

As the two counts charged against the Defendant in this case are wholly reliant upon the validity of Temporary Directive 2016-1, the Defendant’s motion is GRANTED.

SO ORDERED,

  
\_\_\_\_\_  
Judge Clarisse Gonzales  
Denver County Court

Date 2/22/17

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Order re: \_\_\_\_\_ was delivered to the following parties, U.S. postage prepaid, on the 22 of February, 2017.

Hand Delivered in Open Court.

\_\_\_\_\_  
Linda Baltazar, Clerk to Judge C. Gonzales

**APPENDIX A**  
Denver Parks and Recreation Temporary Directive 2016-1



## Denver Parks and Recreation

**Temporary Directive: Suspension of Right of Access of Parties Engaged in Drug-Related Activity from City Parks and the Cherry Creek Greenway**

**Effective: September 1, 2016**  
**Expires: February 26, 2017**

**Number: 2016-1**

Approved by Division Head: Bob Finch  
Approved by Executive Director: Allegra "Happy" Haynes  
Approved by Deputy Executive Director of Parks: Scott Gilmore

### Background:

#### **A. Executive Director's Directive Powers:**

- The Executive Director of Parks and Recreation (also referred to as the "Manager") has the authority under the Denver City Charter to restrict or prohibit certain uses or activities within parks and other recreational facilities under the jurisdiction of the Denver Department of Parks and Recreation.
- Under section 39-2(g) of the Denver Revised Municipal Code ("DRMC"), such restrictions and prohibitions can be implemented through a written temporary directive signed by the Executive Director.
- Once executed, a temporary directive can be enforced through section 39-4(a), DRMC, which makes it "unlawful for any person, other than authorized personnel to engage in any use of activities in any area or part of any park . . . or other recreational facility in violation of any temporary directive issued by the manager restricting or prohibiting such use or activities."
- Under section 39-2(g), DRMC, a temporary directive shall endure for no more than 180 days. If the Executive Director desires to make the restrictions and prohibitions permanent, then the rulemaking process set forth in section 39-2, DRMC, will be followed, and a rule or rules adopting the restrictions or prohibitions put into place. The new rule or rules could be enforced under sections 39-1 or 39-4(a), DRMC, or such other ordinance adopted in Article I of Chapter 39 to enforce the new rule or rules.
- Additional specifics of these directive powers can be found in Rule 2.0 of the Denver Department of Parks and Regulations Rules & Regulations, as amended and restated May 27, 2015 (the "Park Use Rules & Regulations").

**B. Application of the Park Use Rules & Regulations within the Cherry Creek Greenway:** Under Article VII of Chapter 39, DRMC, the Executive Director has the authority to extend the application of, and to enforce, the Park Use Rules & Regulations and the provisions of Article I of Chapter 39, DRMC, within the Cherry Creek Greenway upon the occurrence of certain actions.

- The Cherry Creek Greenway includes "real property, such as city park land, city property . . . and the Cherry Creek Trail, located adjacent to, or in the immediate vicinity of, the channel of Cherry Creek." Section 39-171(2), DRMC.
- "City property" includes "any real property, including land, waterways and water bodies, owned, operated or controlled by any department . . . of the City and County of Denver, except the department of parks and recreation." Section 39-171(6), DRMC.
- Such "City Property" may be included within the Cherry Creek Greenway by means of an interdepartmental agreement. Section 39-171(4) and section 39-172(b), DRMC.
- The property subject to this Directive 2016-1 is located in and along Cherry Creek and is under the jurisdiction of the Denver Department of Public Works. On September 6, 2000, the Department of Parks

and Recreation and the Department of Public Works entered into an "Inter-Departmental Memorandum of Understanding for Application and Enforcement of Park Rules and Regulations in the Cherry Creek Greenway from Confluence Park to Downing Street" ("Parks-Public Works MOU").

- In paragraph 1 of that Parks-Public Works MOU, it is provided that "[a]ll property and improvements owned, operated or controlled by Public Works in the Cherry Creek corridor that are situated between the floodwalls running from Confluence Park through Downing Street, as well as in the landscaped and sidewalk areas lying between the road curb of Speer Boulevard Parkway and the floodwalls shall be included in to the Cherry Creek Greenway."
- Paragraph 2 declares: "Those Parks rules and regulations that are currently in effect and applicable in common to City parks shall be extended to include, and made applicable to, the Greenway property. . . . Upon adoption of [any] revisions or additions [to these rules and regulations], the amended rules and regulations shall be applicable to Greenway property."
- Finally, paragraph 3 observes: "In accordance with Article VII of Chapter 39 of the Denver Revised Municipal Code, this Memorandum of Understanding ('MOU') establishes the authority for those provisions of Article I of Chapter 39 of the Denver Revised Municipal Code, as they may be amended from time to time, to be enforced on the Greenway property by the Denver Police Department, the Denver County Court, and other City enforcement authorities."
- The portion of the Cherry Creek Greenway identified in the Parks-Public Works MOU (Confluence Park through Downing Street) shall be subject to this Directive 2016-1.

### **Temporary Directive:**

**1. Purpose:** The purpose of this Directive 2016-1 is to address serious and chronic public health and safety problems caused by illegal drug-related activity in City Parks and the Cherry Creek Greenway. There have been persistent and increasing complaints from park patrons, trail users, law enforcement, Parks and Public Works staff, and other members of the public about misconduct and threatening conduct associated with drug selling, drug buying and drug use in City Parks and in and along the Cherry Creek Greenway. These problems include assaults, shootings, and other acts of violence or threats of violence, used needles and other drug paraphernalia, people passed out or incapacitated due to drug use, vandalism, activities of drug sellers, drug buyers and drug users in and about the Cherry Creek Greenway that obstruct passage or make for unsafe passage of pedestrians, joggers, skaters and bicyclists on the Cherry Creek Trail, and other misbehavior that intimidates and frightens members of the public and has resulted in making the City Parks and the Cherry Creek Greenway a much less attractive place for the public to recreate and enjoy nature and the outdoors. This Directive 2016-1 is necessary to reduce or eliminate the problems and hazards of illegal drug-related activity in City Parks and the Cherry Creek Greenway.

**2. Directive:** *The following Directive, as issued by the Executive Director of the Department of Parks and Recreation ("DPR Director"), shall be applicable at all times in the City Parks and in the Cherry Creek Greenway, as said Greenway is defined in the Parks-Public Works MOU, i.e., from Confluence Park to Downing Street and including the entire area within the floodwalls as well as the sidewalks, landscaped areas and other infrastructure outside of the floodwalls from interior curb to interior curb along Speer Boulevard (the "Cherry Creek Greenway").*

**Duration:** *Directive 2016-1 shall be in effect from September 1, 2016, through February 26, 2017 ("Duration"), subject to any time extension specified below in this Directive.*

**Suspension:** *Illegal Drug-Related Activity, as defined below, is prohibited in City Parks and in the Cherry Creek Greenway. The prohibition of Illegal Drug-Related Activity shall be enforced, among other legal means and for the Duration of this Directive 2016-1, by suspending the right of a person engaged in Illegal Drug-Related Activity from accessing or using the City Parks and the Cherry Creek Greenway in which the Illegal Drug-Related Activity occurred for a period of ninety (90) days ("Suspension").*

**Definitions:** *As utilized in this Directive 2016-1, the following terms and phrases shall have the following meanings:*

- **Illegal Drugs:** Controlled substances, as defined and regulated under the Uniform Controlled Substances Act of 2013, as codified and amended in Article 18 of Title 18 of the Colorado Revised Statutes. This includes (1) Schedule I controlled substances, and (2) Schedule II, III, IV and V controlled substances not legally in a person's possession.
- **Illegal Drug-Related Activity:** The act of distributing, transferring, selling, sharing, buying, consuming, using, or illegally possessing Illegal Drugs.

**Violation:** It shall be unlawful for any person to violate this Directive 2016-1 ("Violation").

**Enforcement:** If a Denver Police Officer should determine that a person has committed a Violation, the Denver Police Officer may issue a notice to said violator suspending the right of the violator (the "Suspension Notice") from accessing or using City Parks or the Cherry Creek Greenway, depending on the location(s) of the Violation, for a period of ninety (90) days from the date of the Suspension Notice. The Suspension shall be immediately in effect upon issuance of the Suspension Notice. Failure to comply with the Suspension Notice during the 90-day Suspension shall be grounds for issuance of a ticket and assessment of a penalty as provided in section 1-13, DRMC. The person subject to the Suspension Notice need not be charged, tried or convicted of any crime, infraction, or administrative citation in order for the Suspension Notice to be issued or effective.

**Suspension Notice:** The Suspension Notice shall be issued in writing on a form approved by the DPR Director and signed, with identifying information, by a Denver Police Officer. The Suspension Notice shall include: (1) a brief description of the conduct which is in Violation; (2) the date of issuance; (3) the City Parks or the Cherry Creek Greenway for which the Suspension Notice is applicable; and (4) notice of the right and process to appeal the Suspension Notice. If a Suspension Notice is issued less than ninety (90) days prior to the end of the Duration of this Directive 2016-1, the Suspension Notice shall remain in effect for a ninety (90) day period subject to the right of Appeal set forth below.

**Right of Appeal:** The party receiving a Suspension Notice (the "Appellant") shall be entitled to file an appeal with the DPR Director within ten (10) calendar days of the date of the Suspension Notice (the "Appeal"). A legible copy of the Suspension Notice shall be provided along with the written appeal. The Suspension Notice shall remain in effect during the pendency of the Appeal.

**Appeal Process:**

- The written notice of Appeal, along with a legible copy of the Suspension Notice, may be (1) mailed by first class mail to the DPR Director at the Department of Parks and Recreation, 201 West Colfax Avenue, Dept. 601, Denver, Colorado 80202; ATTN: Suspension Appeal; (2) emailed to [ParksRec-Manager@denvergov.org](mailto:ParksRec-Manager@denvergov.org); or (3) delivered in person between 8:00 am and 4:30 pm weekdays (except holidays) to the Civil Division of the Denver Sheriff's Office at the Wellington E. Webb Municipal Building, 201 West Colfax, 1<sup>st</sup> Floor, Denver, Colorado. A mailing address or an email address at which the Appellant can be reached must be provided by the Appellant. The Appeal shall be deemed filed as of the date the written notice of Appeal is received by the DPR Director.
- Upon the timely filing of an Appeal of the Suspension Notice, a hearing shall be scheduled for a date no later than twelve (12) calendar days following the date the Appeal is filed, and notice of the scheduled hearing shall be sent to the Appellant no later than four (4) calendar days following the date the Appeal is filed.
- The Appellant must attend the scheduled hearing. Failure of Appellant to attend the scheduled hearing shall result in the dismissal of the Appeal and the Suspension Notice remaining in effect.
- An administrative hearing officer ("AHO") shall be appointed by the DPR Director to preside over the scheduled hearing and to reach a decision sustaining, modifying, or reversing the Suspension Notice.
- The AHO shall perform those duties and functions necessary and incidental to determining the case at hand, including calling and questioning of witnesses, hearing all evidence, examining all documents, ruling on evidentiary questions and witness qualifications, and generally establishing protocol and conducting the hearing as a tribunal and quasi-judicial proceeding in conformance with Article XII of Chapter 2, DRMC,



and this Directive 2016-1. While judicial rules of evidence are not applicable, the AHO shall have the authority to determine admissibility of evidence and testimony based on relevance and probative value in light of the issues at hand. The AHO may utilize any experience, technical skills, or specialized knowledge the AHO may have in the evaluation of evidence and testimony presented.

- All testimony presented to the AHO is to be given under oath or solemn statement administered by the AHO. The Appellant and the City and County of Denver (the "City") may be represented by legal counsel. The Appellant and the City may present evidence and call and question witnesses and cross examine witnesses called by the other.
- If the Appellant appears at the scheduled hearing, the Denver Police Officer who issued the Suspension Notice to the Appellant or any other Denver Police Officer present when the Suspension Notice was issued shall be called to recount at the hearing the conduct of the Appellant that constituted a Violation and the basis for issuance of a Suspension Notice.
- The City shall bear the initial burden of proof to show that the Appellant committed a Violation and that the Suspension Notice was lawfully issued. The burden is satisfied through a preponderance of the evidence or testimony presented by the City at the hearing.
- Upon the AHO's determination that the City has satisfied this burden, the burden shifts to the Appellant to establish by countervailing testimony or evidence that there is factual or legal grounds for showing that the Appellant has not committed a Violation or that the Suspension Notice was not legally issued or was issued in violation of other law.
- The AHO shall have the right to continue the hearing for up to ten (10) calendar days from the date of the hearing, if requested by the Appellant or the City, in order for additional evidence or witnesses to be brought to the continued hearing. The Suspension Notice shall remain in effect during this continuance.
- The hearing shall be recorded by electronic means, and transcripts shall be made at the expense of the party requesting the transcript. All evidence presented at the hearing shall be kept and preserved until the applicable judicial appeal periods have lapsed or a judicial appeal has been completed.

AHO Decision: Within five (5) calendar days following the conclusion of the hearing or the continued hearing, the AHO shall issue a written decision either sustaining the Suspension Notice or reversing the Suspension Notice and stating the grounds upon which the AHO reached this decision ("AHO Decision"). If the AHO should determine that there were mitigating circumstances, the AHO may shorten the duration of the Suspension under the Suspension Notice. If the AHO determines that the Violation did not occur in all of the City Parks and/or Cherry Creek Greenway identified on the Suspension Notice, the AHO may remove from Suspension those City Parks and/or the Cherry Creek Greenway where there was no Violation. If the AHO reverses the Suspension Notice, the Suspension shall immediately be revoked. The AHO Decision shall be effective immediately upon issuance. A copy of the AHO Decision shall be promptly sent to the Appellant and the DPR Director. It shall be unlawful for any person to fail or refuse to comply with the AHO Decision.

Appeal of the AHO Decision: The AHO Decision shall be considered a final decision subject to judicial appeal. In the alternative, the AHO Decision may be appealed, in writing, to the DPR Director within fifteen (15) days of the date of the AHO Decision, in which case the decision of the DPR Director in response to this appeal shall be considered a final decision. In the event of an appeal to the DPR Director, the final decision shall be effective as of the date the Executive Director's written decision is issued. The DPR Director's decision shall be promptly sent to the Appellant. Judicial review shall be under Rule 106(a)(4) of the Colorado Rules of Civil Procedure upon the timely filing of an appeal to the Denver District Court. The Suspension Notice shall remain in effect during the duration of any appeal.

### **3. Exercise of Authority under Section 39-2 (g), DRMC:**

The Executive Director of Parks and Recreation may adopt temporary directives without following the notice and hearing requirements of section 39-2, DRMC, if such action is necessary to comply with state, local or federal law or if it is deemed necessary by the adopting authority to protect immediately the public health, safety or welfare or to protect and preserve a park or other recreational facility. By the execution of this Directive 2016-1, the Executive Director finds and determines that the health and safety of the public and the preservation of the Parks facilities identified above require the adoption of this Directive. The complete text of this Directive will be filed with the Denver city clerk and a notice of adoption will be published.

**4. Enforcement under DRMC Section 39-4:**

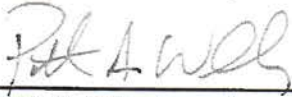
It shall be unlawful for any person, other than authorized personnel, to engage in any use of or activities in any area or part of any park, parkway, mountain park or other recreational facility in violation of any directive issued by the manager restricting or prohibiting such use or activities.

This Directive 2016-1 can be enforced by the Denver Police Department. Nothing in this Directive is intended to restrict or override the application or enforcement of the Park Use Rules and Regulations or Article I of Chapter 39, DRMC, or other applicable law.

It is so determined and directed by the Executive Director of Parks and Recreation that the Directive set forth above shall be effective this 24<sup>th</sup> day of August, 2016, for the Duration of the Directive unless otherwise withdrawn by written order of the Executive Director of Parks and Recreation.

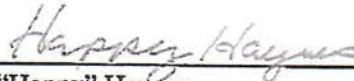
APPROVED AS TO FORM:

City Attorney  
For the City and County of Denver



Patrick A. Wheeler  
Assistant City Attorney

DEPARTMENT OF PARKS AND RECREATION  
CITY AND COUNTY OF DENVER



Allegra "Happy" Haynes  
Executive Director for Parks