

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

No. SD28083

CITIZENS FOR THE PRESERVATION)
OF BUEHLER PARK, et al.)
)
) **Plaintiffs-Appellants,**)
))
) **v.**)
))
THE CITY OF ROLLA, MISSOURI,)
et al.)
) **Defendants-Respondents.**)

On appeal from the Circuit Court of Phelps County, Missouri
The Honorable Tracy L. Storie, Presiding
Cause No.: CV305-0352CC

**BRIEF OF AMICI CURIAE DIABETES EDUCATION FUND,
MISSOURI COALITION FOR THE ENVIRONMENT, AND
UNITARIAN UNIVERSALIST FELLOWSHIP OF ROLLA**

**John B. Randall (No. 58550)
7474 Teasdale Ave.
University City, MO 63130
(314) 941-6166
Attorney for amici curiae**

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JURISDICTIONAL STATEMENT

This appeal is taken from a final judgment (LF 178) of the Circuit Court of Phelps County. The case presents no question to invoke the exclusive jurisdiction of the Supreme Court. Jurisdiction is vested in this Court. Article V, Section 3, Missouri Constitution.

INTERESTS OF AMICI CURIAE

Amicus Curiae the Diabetes Education Fund (DEF) is a Rolla-based nonprofit organization incorporated under the laws of the State of Missouri and registered with the Internal Revenue Service as a 501(c)(3). The goal of the DEF is to improve the quality of diabetes management through the education of diabetics and those who care for them. The primary source of funding for the DEF is the Tour of the Ozarks, a bike-a-thon that has been based at Rolla's Buehler Park every September since 1998. The Tour of the Ozarks is likely the most intensive use of Buehler Park; the event starts before sunrise and often closes after sundown. Buehler Park provides a unique staging area for the bike-a-thon with its plentiful parking and easy access to the most desirable bicycling routes in the area. The Tour of the Ozarks is a major regional event attracting around 200 bicyclists each year to Rolla from the Midwest Region.

The contributions collected by the DEF at this event are used to support the education and outreach efforts of various organizations including the Central Missouri Diabetic Children's Camp, the Phelps County Regional Medical Center, the Pediatric Diabetes Clinic at the University of Missouri Health Center, and area public schools. The park, with its green space, trees, and pavilion provide an ideal headquarters for the Tour of the Ozarks.

The Diabetes Education Fund seeks to preserve Buehler Park because of its key role in the organization's primary fund raising activity. The DEF is also concerned that, if the City of

Rolla is permitted to divert the park property to a restaurant district, then potential contributors to organizations like DEF may be more reluctant to make charitable contributions.

Amicus Curiae the Missouri Coalition for the Environment (MCE) is a non-profit organization that has catalyzed and supported citizen action in support of Missouri's unique environment since 1969. MCE has members throughout the State of Missouri. MCE's mission includes the preservation of urban green space such as Rolla's Buehler Park. MCE believes that greenspace amidst commercially developed areas, such as Rolla's Kingshighway where Buehler Park lies, is particularly important to the health and well-being of urban residents.

As a 501(c)(3) organization, MCE relies upon the support of the public in working for Missouri's environment. MCE believes that donors need to have confidence that when they donate money or property, their gifts will be used for the purpose intended. MCE knows of instances where potential donors of land have cancelled their gifts to governmental bodies over concerns that the land would be diverted to a use different from the use intended by the donors.

Amicus Curiae The Unitarian Universalist Fellowship of Rolla (UUFR) believes in respect for the interdependent web of all existence of which we are a part. Thus, UUFR believes in the importance of parkland to urban residents, and recognizes the importance of Buehler Park in the lives of Rolla's citizens.

UUFR believes in caring for the most vulnerable among us. Thus, UUFR notes the proximity of Gingerbread House, residential home for severely mentally and developmentally handicapped children, directly across the parking lot from Buehler Park. UUFR is concerned that the quality of life of these children would be adversely impacted if they could no longer view the park.

UUFR also notes that in accepting this land from the Chamber of Commerce in 1958, the City of Rolla covenanted to maintain Buehler Park “for Park purposes only and none other, ... FOREVER.” UUFR would view the selling of Buehler Park as a breach of faith. UUFR is also concerned that if Buehler Park were to be sold, citizens who give money and property for charitable purposes may decide to cease charitable giving over concerns that their gifts may be diverted for an unapproved purpose.

STATEMENT OF FACTS

Amici Curiae adopt the statement of facts set out in the brief of the appellants, Citizens for the Preservation of Buehler Park, et al. In addition, amici curiae point to the following facts:

The public has made use of the parcel of land in Rolla known as Buehler Park. Legal File (LF) 30. The 3.2-acre Park lies one block from Interstate 44, located specifically at the intersection of Kingshighway and Fairgrounds Road. LF 48.

Buehler Park is home and host to a wide array of public activities and endeavors. LF 34. For example, the Diabetes Education Fund “Tour of the Ozarks” event starts and finishes at Buehler Park. LF 110. The park is a suitable location for various other family and community gatherings including family reunions, drama productions, Easter egg hunts, even marriage proposals. LF 111, 112, 127, 128, & 157-58. A city-built sheltered pavilion in the park enhances its utility for this wide range of activities. LF 111 & 152.

Physically, the park is characterized by countless tall shade trees, mostly oak. LF 117 & 127. Because of its western exposure, Buehler Park can often be much cooler than the surrounding, black-topped areas. LF 34-35. It is the only park local to Rolla that has completely shaded areas. LF 128. Further, there are many evergreen trees in the park which lend it a green color that is otherwise hard to find in the area during the colder winter months. LF 117 & 137.

Those citizens who use the park remark that it is quiet, a good place to eat lunch or go for a walk or sit and have a cup of coffee. LF 35 & 126. Kids have enjoyed the park due in part to its unique dinosaur playground equipment and have been known to refer to Buehler Park as “Dinosaur Park.” LF 36, 126, & 128.

Over the years, the park has been home to various exercise and sporting endeavors including soccer games and baseball practices. LF 34-35 & 112.

Sometimes residents or folks just passing through town will grab a meal to-go from nearby restaurants such as McDonald's, Kentucky Fried Chicken, Pizza Inn, or Arby's and just sit in their cars to eat their meals and peacefully gaze at the park. LF 128 & 129. Likewise, travelers who are lodged at the nearby Days Inn or Super 8 motels can walk across the street to relax in the park before or after a long day of traveling. LF 49.

STANDARD OF REVIEW

Amici Curiae adopt the standard of review set out in the opening brief of the appellants, Citizens for the Preservation of Buehler Park, et al.

POINTS RELIED ON

(1) The trial court erred in entering judgment for defendants, ruling that the language contained in the 1958 deed of Buehler Park did not effectively 'dedicate' the park property to public use forever because the deed did effect a dedication in that (i) that the owner intended to dedicate the land to a public use; (ii) that the land dedicated was accepted by the public; and, (iii) that the land dedicated is used by the public. *Whittom v. Alexander-Richardson Partnership*, 851 S.W.2d 504, 507-08 (Mo. banc 1993).

(2) The trial court erred in entering judgment for defendants, ruling that the land known as Buehler Park could be alienated for uses other than park purposes because as dedicated land the park grounds cannot be diverted to uses foreign to those contemplated by the dedicating instrument. *City of St. Louis v. Bedal*, 394 S.W.2d 391, 396 (Mo. 1965).

ARGUMENT

I. Introduction

Under the common law, an owner of land can dedicate that land to a proper public use. *City of St. Louis v. Bedal*, 394 S.W.2d 391, 396 (Mo. 1965); Restatement (Third) of Prop.: Servitudes § 2.18(1) (2000). Missouri specifically recognizes that a private party can dedicate land for a public use, including for park purposes. *Bedal*, 394 S.W.2d at 396. The dedication will only be effective if and when the city or municipality takes action to acknowledge its ‘acceptance’ of the dedicated lands. *Whittom v. Alexander-Richardson Partnership*, 851 S.W.2d 504, 507-08 (Mo. banc 1993). Once dedicated and accepted, restrictions on the use of the dedicated land are based upon a theory of a contract between dedicator and public which is binding upon both parties. *Bedal*, 394 S.W.2d at 396. Once it has accepted the dedicated lands, a city cannot simply change its mind and devote the dedicated lands to another use not contemplated by the document effecting conveyance. *Id.* at 398.

II. Common Law Dedication

The trial court erred in entering judgment for defendants, ruling that the language contained in the 1958 deed of Buehler Park did not effectively ‘dedicate’ the park property to public use forever because the deed did effect a dedication in that (i) that the owner intended to dedicate the land to a public use; (ii) that the land dedicated was accepted by the public; and, (iii) that the land dedicated is used by the public. *Whittom*, 851 S.W.2d at 507-08.

Missouri common law dedication requires three showings: (1) that the owner intended to dedicate the land to a public use; (2) that the land dedicated was accepted by the public; and, (3) that the land dedicated is used by the public¹. *Id.*

Here, the ‘owner’ would have been the Rolla Chamber of Commerce. Did the Rolla Chamber of Commerce in the 1958 warranty deed intend to dedicate the land now known as Buehler Park for public use? To test for intent, one would ask: Did the conveyance demonstrate a purpose to “create or expand the public’s right to use the property”? *State ex rel. Missouri Coalition for Environment v. Conservation Com’n of State of Mo.*, 940 S.W.2d 527, 531 (Mo.App. W.D. 1996). By its words, this deed has taken lands in which the public had no right and devoted them to “park purposes...forever.” In Missouri, a park is recognized as a “place for the resort of the public for recreation, air, and light.” *Bedal*, 394 S.W.2d at 397. In *Bedal*, the Court found that a deed conveying land to the City of St. Louis for park purposes amounted to a private dedication of land for public use. *Id.* Similarly, the court should find that the 1958 warranty deed dedicated the land known as Buehler Park to a public use, namely “park purposes.”

As to the second element of dedication, public acceptance is shown on account of the City of Rolla’s decision to treat the land conveyed in the 1958 deed as park grounds. *Kleeman v. Kingsley*, 167 S.W.3d 198, 203 (Mo.App. S.D. 2005). In *Kleeman*, a roadway was subject to public acceptance where the public made use of the roadway and the roadway was publicly

¹ It is true that appellants also rely on this point in their brief; however, amici must examine this doctrine in order to make their final point, which is not made in appellants’ brief.

maintained. *Id.* Likewise, the City of Rolla has always held itself responsible for the maintenance of Buehler Park. LF 30 & 152. The City of Rolla has consistently cut grass, manicured trees, and managed fallen limbs. LF 141 & 152. In addition, the City of Rolla installed a playground, removed portions of that playground, and erected a wooden pavilion so that park-goers would have a place to seek shelter from the elements while enjoying the park. LF 111, 135, & 152. Even now, the City of Rolla has been a consummate caretaker of Buehler Park on behalf of Rolla's citizens.

Finally, the facts amici have cited above are sufficient to show the land dedicated as Buehler Park has been and is being used by the public. *Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 847 (Mo.App. S.D. 1995). Amicus Diabetes Education Fund holds an annual Tour of the Ozarks Bicycle race that begins and ends in Buehler Park. Amicus Missouri Coalition for the Environment has members that use the park for recreation and relaxation. Amicus Unitarian Fellowship attests that its members enjoy the park in various ways.

III. Erection of Restaurant District Would Be Unlawful Diversion from Park Purposes

The trial court erred in entering judgment for defendants, ruling that the land known as Buehler Park could be alienated for uses other than park purposes because as dedicated land the park grounds cannot be diverted to uses foreign to those contemplated by the dedicating instrument. *Bedal*, 394 S.W.2d at 396.

Assuming that the three-part test for dedication is met in the case at bar, amici now ask the court to consider what the Missouri Supreme Court has done in cases where a city has proposed to take a privately dedicated park and divert its utility to uses not contemplated in the document effecting dedication. It is generally held that if a dedication of property for public use is by a private party for a specific or defined purpose, neither the legislature nor a municipality

has any power to authorize the use of the property for any purpose other than the one designated. *Id.* at 398 (quoting *Kirkwood v. City of St. Louis*, 351 S.W.2d 781, 784 (Mo. 1961)).

Amici will now show that in the case of Buehler Park,

- (1) a private party has dedicated the property;
- (2) for a public use;
- (3) for a defined purpose; and,
- (4) use of park land as a restaurant district is foreign to specified use for park purposes.

In *Bedal*, the private party/dedicator was Mr. Henry Shaw, who conveyed land to the City of St. Louis. 394 S.W.2d at 397. In the case at bar, the 1958 warranty deed shows that the Rolla Chamber of Commerce, a private party, conveyed the land known as Buehler Park to the City of Rolla.

A park use is a public use. To wit, a park is defined as a “place for the resort of the public for recreation, air, and light.” *Bedal*, 394 S.W.2d at 397.

A use specified as “park” purposes qualifies as a defined purpose. *Id.*

Finally, and most importantly, the fourth requirement demands close attention. In Missouri, uses to which park grounds can be put vary depending on how the park grounds were established. *Id.* at 395-96. In cases where the park grounds come about as a the result of a private “dedication...for park purposes”—as is true in the case at bar—the potential uses of the park grounds are much more restrictive. *Id.* at 396; *Kirkwood*, 351 S.W.2d at 784. In cases of dedication, the terms of the grant control. *Id.* Restrictions on the use of park grounds dedicated to the public are based upon the theory of a contract between dedicator and public which is binding upon both parties. *Id.* The Court in *Price v. Thompson* even used the term “trustee” to

describe a city's role and duties in taking care of grounds that were dedicated to its control².

Price v. Thompson, 48 Mo. 361, 365, 1871 WL 7747 (Mo. 1871).

So that there is no mistake, amici wish to show that the deeds in *Bedal* and the case at bar are virtually the same in substance. Recall that in *Bedal*, the Missouri Supreme Court examined a grant of land to the City of St. Louis that effected the dedication of Tower Grove Park. 394 S.W.2d at 397. The Court then had to examine whether there would be such diversion from “park purposes” by the proposed construction by plaintiff City of a four-lane through-way through the Park. *Id.* at 392. There the grant language was quite similar to the language used in the 1958 warranty deed at bar:

“[T]hat all of said tract of land hereby annexed except the aforesaid strip, two hundred feet in width shall be and remain and be used and managed as a public park for the health, well-being and enjoyment of the citizens of said city and county of St. Louis, forever. That no portion of said park shall ever be used for any other purposes than those appertaining properly to such public park.’ *Id.* at 393.

² Quoting *Price v. Thompson*:

“Nothing, I think, can be clearer than that if a grant is made for a specific, limited and definite purpose, the subject of the grant cannot be used for another and a different purpose. The town took the premises as a trustee with the obligations attached, as well as the privileges conferred, and it was not competent for it to divert them to a use or purpose foreign to the expressed intention of the grantor.”
48 Mo. at 365; 1871 WL 7747.

Note that the deed at bar includes the following language:

“It is understood that the above described real estate is conveyed to the City of Rolla, Missouri for Park purposes only and none other, and to be known as Buehler Park.”

The language in the two deeds is quite similar. In *Bedal*, the Court held that the owner of the land, Mr. Henry Shaw, had effectively dedicated it to the City. 394 S.W.2d at 396. In ruling that the City of St. Louis could not go forward with construction of the through-way, the Court found that construction of the proposed highway across the park would indeed violate the condition in the deed. *Id.* at 395. This finding is helpful in addressing our analogous situation where the City of Rolla proposes not just to run a road through Buehler Park but to sell the entire park so that it may be paved and converted into a restaurant collective. As the Court in *Bedal* put it, “The park was not created for surface traffic. It was created for use by the public as a park.” *Id.* at 396. Once a city has accepted dedicated lands, it cannot simply change its mind and devote the dedicated lands to another use not contemplated by the document effecting conveyance. *Id.* at 398. The 1958 deed restricted use of Buehler Park to use for which park purposes; alienation of the land for the construction of three restaurants is a foreign purpose not contemplated in the deed. As such, the land cannot be put to such use.

IV. Summary

Buehler Park was not conveyed to the City of Rolla so that the City could do what it wished with the land. Once the City of Rolla accepted the land as being privately dedicated, its ability to divert the park land for purposes not contemplated by the deed was severely diminished. If a dedication of property for public use is by a private party for a specific or defined purpose, neither the legislature nor a municipality has any power to authorize the use of

the property for any purpose other than the one designated. *Bedal*, 394 SW2d at 398 (quoting *Kirkwood*, 351 S.W.2d at 784). We ask that the Court follow *Bedal* and *Thompson* and hold that diverting the grounds of Buehler Park for use as a restaurant district are foreign to the purposes for which the City of Rolla agreed to accept the land.

CONCLUSION

For the reasons set forth above, and in appellants' opening brief, in 1958 Buehler Park became by deed a dedication of land for public use and remains subject to the purpose of that dedication today henceforth. Accordingly, this Court should reverse the judgment of the Court below.

Respectfully submitted,

John B. Randall (Mo. Bar No. 58550)
7474 Teasdale Ave.
University City, MO 63130
Phone: (314) 941-6166
johnbrandall@gmail.com
Attorney for amici curiae Diabetes Education Fund,
Missouri Coalition for the Environment, and The
Unitarian Universalist Fellowship of Rolla

* A copy of this brief is submitted on CD-ROM in lieu of floppy disk.

Certifications

The undersigned certifies that on the 19th day of March, 2007, two copies of the brief of amici curiae Diabetes Education Fund, Missouri Coalition for the Environment, and Unitarian Universalist Fellowship of Rolla, together with an electronic copy, were sent to counsel of record via next-day delivery at the following addresses:

Mr. John D. Beger
Beger & Bushie, LLC
103 West Tenth St.
P.O. Box 805
Rolla, MO 65402-0805

Bruce A. Morrison
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101

The undersigned further certifies that the brief contains the information required by Rule 55.03, the brief complies with the limitations contained in Rule 84.06 (b), and that there are 3,658 words in the brief.
