

“PINE TREE” CELL TOWER IN PARK

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Congress enacted the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 151 *et seq.*, "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). At the same time, Congress recognized that there are legitimate State and local concerns involved in regulating the siting of telecommunications facilities. See *Voicestream Minneapolis, Inc. v. St. Croix County*, No. 02-2889 (7th Cir. 2003).

As illustrated by the case of *AT&T Wireless Services of Fla., Inc. v. WCI Communities, Inc.*, Nos. 4D04-3285 and 4D04-3286, 2005 Fla. App. LEXIS 14108 (Fla.App. 4th Dist. 2005), one such local concern, the siting of telecommunications towers in public parks, remains subject to deed restrictions which limit the use of particular tracts of public land to specified "park purposes." In this particular case, a telecommunications tower was erected in a public park in the City of Coral Springs, Fla. In 1975, a land developer had conveyed the land for Sherwood Forest Park to the City of Coral Springs. WCI Communities, Inc. (WCI) acquired the rights of the Grantor under the terms of the deed conveying the land to the City. In pertinent part, the deed conveying the land to the City contained the following restriction:

In consideration of this conveyance, by acceptance hereof, the Grantee [City] agrees and understands and assures to Grantor that the above described property would be used and maintained solely for passive park purposes unless the express written consent of Grantor, its successors or assignees, is first obtained.

In October 1996, the City passed Ordinance 96-137 which allowed freestanding telecommunications towers to be placed in parks and recreation areas greater than five acres. The legislative intent of this Ordinance was to accomplish the following:

- (1) promote the health, safety and general welfare of the citizens by regulating the siting of telecommunications towers;
- (2) provide for the appropriate location and development of telecommunications towers and antennas within the city; and
- (3) minimize adverse visual effects of telecommunication towers and antennas through careful design, siting, landscape screening and innovative camouflaging techniques.

Sherwood Forest Park was listed on the City's list of parks as potential sites for cellular towers. On July 9, 2001, pursuant to the Ordinance, the City entered into a lease agreement with AT&T Wireless Services of Florida., Inc. (ATT) to install a telecommunications tower in Sherwood Forest Park. The City leased 1600 square feet of park land to ATT for the construction of a "Stealth Tree" type tower, equipment building, black chain-link fencing and associated equipment.

In January 2002, the City processed and approved an application for the issuance of a building permit to ATT to allow construction of an eighty-five (85) foot telecommunications tower, a maintenance building and access ways, supporting structures, and hard-surface areas. The City required ATT to construct the "stealth tree tower" in the form of a pine tree to blend in with the park's aesthetics. ATT paid the City a one-time payment of \$10,000 to be used at the park and pays annual rent in the amount of \$24,000.

In its complaint, WCI claimed the City's approval of the telecommunications tower was in violation of the deed restriction on the park's use. Specifically, WCI alleged that "the use contemplated by ATT and the structure submitted for a building permit was an active commercial use and not a passive use, and thus, the use and construction thereof are violative of the deed restriction." Moreover, according to WCI, neither the City nor ATT had requested or received WCI's "express written consent for the construction of the tower" as required by the terms of the deed.

In the opinion of the trial court, "there was no ambiguity in the deed restriction" which required that "the park was to be used for "passive park purposes only." Further, the trial court found that ATT and the City had both investigated the status of the title of the park prior to entering the lease agreement for the construction of the telecommunications tower, and that they were aware of the applicable deed restriction." In addition, the trial court noted that neither the City nor ATT had made a written request for WCI to waive the restriction in the deed or otherwise consent to the placement of a communication tower in the park.

Under the terms of the agreement between the City and ATT, the trial court found that "the public was physically excluded from the leased property and that the City was receiving a financial benefit from its commercial venture." As a result, the trial court held "the use of the park space was a direct violation of the deed restriction, and therefore, impermissible." Accordingly, the trial court granted an injunction in favor of WCI. In so doing, however, the trial court found it would be "impractical, and unwise, to order the immediate destruction of the cellular communication tower" because "[t]hat would, no doubt, affect the public negatively." The trial court, therefore, ordered that "ATT search for, and attempt to acquire or lease an alternate location for a communications tower which would provide suitable coverage to residents and the police, within a 24-month period." ATT and the City appealed.

ON APPEAL

As described by the appeals court, "[d]eed restrictions on lands are deemed contractual in nature and subject to the same rules of interpretation as are contracts." Accordingly, the appeals court would apply the following general contract principles to determine whether "the City violated the deed restriction by using the park property for a telecommunications tower."

When a contract is clear and unambiguous, the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of the language controls...

Courts have unfailingly guarded against encroachments on public park land where such park land is under the protection of a deed restriction or restrictive covenant... Although restrictive covenants should be narrowly construed, they should not be construed in a manner that would defeat the plain and obvious purpose and intent of the restriction. Restrictive covenants will be enforced where their intent is clear and their restrictions are reasonable.

Applying these principles to the facts of the case, the appeals court found the trial court had “properly concluded that there was no ambiguity in the deed restriction requiring that the property be ‘used and maintained solely for passive park purposes’ and that the ‘property herein conveyed is dedicated to the public for use as passive parks’.”

In reaching this determination, the appeals court rejected ATT and the City’s contention that “the telecommunications tower's use was passive.” As characterized by the appeals court, it was not a question as to whether the tower itself and its use in the park was passive. Rather, the specific issue to be resolved by the court was “whether the use was consistent with the deed restriction that limits use ‘solely’ to ‘passive park purposes’.” In this particular instance, the appeals court found “quite simply, the use of the park for the telecommunications tower is not related to or in furtherance of ‘solely for passive park purposes’.”

A telecommunications tower does not support a park use. While appellants [ATT and the City] argue that the tower supports a park use, like utilities or restrooms, because someone at the park could make a cell call from the park, the tower has no park use...

The City devoted a portion of deed-restricted park lands to a private commercial enterprise and as a result restricted access of park lands from the public's use. While courts have consistently ruled that commercial benefit does not defeat a park purpose, the telecommunications tower has no park purpose. ATT's use of the park property is neither passive, nor is it used to support the park. The lands are being used to fill in ATT's telecommunications grid for monetary gain.

In determining whether the park was being “used for passive park purposes only,” the appeals court noted further that “[f]ractional use was not specified” in the deed restriction. Moreover, the appeals court acknowledged that “a fraction of the park is not being used for passive purposes.” Accordingly, ATT and the City had contended on appeal that the alleged violation of the deed restriction was “de minimis,” i.e., the impact of the “tree tower” on the passive recreational use of the park was minimal and that WCI was unaffected by the use.

While acknowledging that “the impact of the tower to the neighborhood is minimal,” the appeals court noted that “[a] minor violation of the deed restriction is still a violation of the deed restriction.” Moreover, in this particular instance, the appeals court had determined that “the telecommunications tower is not reasonably incidental to ‘passive park purposes’.”

As characterized by ATT and the City, the trial court had “found that the public interest would not be served by granting the relief sought,” i.e., demolition and removal of the

telecommunications tower from the park. The appeals court acknowledged that the trial court had held that “the immediate destruction of the cellular telecommunications tower “would, no doubt, affect the public negatively.” However, in the opinion of the appeals court, such recognition of a negative impact on the public did not alter the trial court’s conclusion that the construction of the telecommunications tower in the park was “inconsistent with the deed restriction.”

The order granting the injunction clearly stated that the public was physically excluded from the leased property. This exclusion cut off access to park property to the very members of the public for whose benefit the park was given... While appellants characterize the telecommunications tower as a de minimis violation, it was nevertheless a violation of which they were aware and which they ignored.

As a result, the appeals court held “[t]he public interest is best served by the maintenance of the parks, as dedicated and restricted, particularly where there is a common plan served by the parks.” In this particular instance, the appeals court found “the public interest was served by the maintenance of WCI’s common plan for development.”

On appeal, ATT and the City had argued further that “the public interest would be harmed if the injunction were entered where the telecommunications tower served the public interest by providing safety to its citizens through the reception of 911 calls made from the area.” The appeals court rejected this argument. According to the appeals court, ATT and the City “cannot negate the property and legal rights of others based on a decision regarding public safety.”

Here, the City circumscribed the location of telecommunications towers to City park lands and presented ATT with Sherwood Forest Park as the only candidate site. Clearly, public safety was not the City’s most paramount concern as evidenced by its removal of phone service previously available to park users due to the low revenue it generated...

[I]n an effort to balance the competing interests and ensure fairness to all involved, the court properly ordered the removal to take place over time, allowing ATT and the City to relocate the necessary cellular telecommunications tower. The two-year transition period was intended to allow for the removal of the tower in a manner that minimizes potential harm to the parties and the public.

As a result, the appeals court concluded that “the trial court did not err in granting permanent injunctive relief” to WCI. The appeals court, therefore, affirmed “the final judgment [of the trial court] ordering the demolition and removal of a telecommunications tower from Sherwood Forest Park and permanently enjoining appellants from maintaining a tower on that property.”