

JUNE 2018 LAW REVIEW

PARK PURPOSE CHALLENGE TO WIRELESS COMMUNICATIONS FACILITY

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In general, state and local laws limit the power of governmental entities to divert public parkland to other public or private purposes. For example, a private gift of land for public park purposes may expressly preclude use which is inconsistent with the donor's intent to preserve in perpetuity the natural or recreational character of a donated site. Similarly, acquisition and/or development of park site through a federal grant from the Land and Water Conservation Fund will prohibit any conversion from public recreational use of the site which is inconsistent with the terms of the federal grant. Moreover, applicable state and local law may limit the authority of public entities to divert public parkland to other public or private purposes.

As illustrated by the case described herein, the City's ability to issue a permit to a private company to construct a wireless telecommunications facility (WCF) was subject to provisions in the city charter governing use of dedicated public parkland. In this particular instance, the state court had to determine whether the City's actions were consistent with the terms of the city charter. In so doing, however, courts tend to defer and not second guess the judgment of governmental officials on factual issues better left to those with expertise in a given area, like management of parks and recreation facilities.

CAN YOU HEAR ME NOW?

In the case of *Don't Cell Our Parks v. City of San Diego*, 21 Cal. App. 5th 338, 2018 Cal.App. LEXIS 209 (Cal.App. 4th Dist. 3/15/2018), the state appeals court had to determine whether construction of a wireless telecommunications facility in a public park could be considered a proper park purpose.

In 2000, a City ordinance dedicated the Ridgewood Neighborhood Park ("the Park") in perpetuity for park and recreational purposes. The Park is located in a residential zone in the community of Rancho Peñasquitos and adjacent to the Los Peñasquitos Canyon Preserve to the south. The Park is 8.53 acres in size, consisting of a large grass area bounded by a cement path, with two basketball courts surrounded by a 12-foot-high fence, circuit training equipment stations, a play structure, and picnic tables outside the cement path.

In June 2014, Verizon filed an application with the City to build a wireless communications facility (WCF) on the outskirts of the Park. At the time, the City had 37 active leases for telecommunications facilities in dedicated parks within the City.

The Project entailed placing an unmanned cell tower disguised as a 35-foot-high faux eucalyptus tree and a 250-square-foot landscaped equipment enclosure with a trellis roof and a chain link lid on the outskirts of the 8.53-acre Park. The faux tree would be installed in an existing stand of tall trees, two of which are about 55 feet high.

An 11-foot-by-20-foot concrete masonry unit (the unit) would contain equipment required for the

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Project. The unit would be located northeast of the faux tree and set back about 15 feet from the edge of the Park's sidewalk path. The unit would have a stucco finish, be painted a tan/sandstone color, and be surrounded by native shrubs.

The Project would require relocating one piece of exercise equipment about 100 feet north of its current location. The total footprint of the Project is 534 square feet or 0.14 percent of the total ground area of the Park.

According to Verizon, the Project would fill a substantial gap in Verizon's cell service so that area customers will have improved cell service capabilities and 911 service, including within the Park and the nearby Preserve area. At a Rancho Peñasquitos Community Planning Board meeting, the president of the basketball association noted that not having cellular telephone service was an issue for coaches who practice at the Park if an emergency arises.

Verizon had found the Park was the only property within the intended coverage area that was not an open space preserve or developed with single-family residences. Due to "terrain challenges" in the area, Verizon had further concluded alternative locations outside the proposed Park Project site were not feasible.

In February 2015, the Rancho Peñasquitos Community Planning Board voted 11 to seven to approve the Project. In August, a City hearing officer, after a public hearing, approved development and use permits for the Project. In October, the City Planning Commission (Commission), after public hearing, unanimously approved the permits.

PERMISSIBLE PARK USE?

In November, □ Don't Cell Our Parks (DCOP), a not-for-profit entity, filed a lawsuit challenging the City's decision to issue permits approving the Project. In so doing, DCOP argued that "placing a WCF in the Park was not a permissible park or recreational use under the plain language of Charter 55" which required "the consent of two-thirds of the voters" before "allowing the installation of WCF's in dedicated City parkland."

As cited by the court, Charter 55, entitled "Park and Recreation," provided in relevant part:

All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes *shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose* having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose. (*Emphasis of court*)

In the opinion of the trial court, "Charter 55 allowed the City to adopt regulations to manage City parks and enact ordinances not in conflict with Charter 55, such as the instant Project." In reaching this conclusion, the trial court found the Project was consistent with Charter 55 because it would "not interfere with or detract from park uses in the Park."

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Moreover, the trial court found a "significant history of legal opinions and policies" had applied "the City's interpretation of Charter 55 in allowing WCF's in dedicated parks as long as the WCF did not detract from park uses or interfere with park purposes." Further, in giving "great weight and respect to the City's interpretation of Charter 55," the trial court noted, "the City's interpretation had not been challenged for many years and many transactions occurred in reliance on the City's interpretation." DCOP appealed this decision.

On appeal, DCOP contended, "the trial court erred because Charter 55 unambiguously restricts the use of dedicated parks to only park, recreation, and cemetery uses."

CITY CHARTER POWER

As noted by the appeals court, the city charter was "the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law."

Moreover, the City "has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter." Also, the court would construe charter provisions "in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction thereon which is not expressly stated in the charter." Further, the appeals court noted, "administrative interpretations of City Charter provisions of longstanding are entitled to great weight unless they are plainly wrong."

While "giving deference to the determination of the agency appropriate to the circumstances of the agency action," the appeals court, however, acknowledged a city "may not act in conflict with its charter" and "any act that is violative of or not in compliance with the charter is void."

CHARTER INTERPRETATION

Consistent with Charter 55, the trial court concluded the City had the discretion to determine whether a particular addition or alteration "would change the use or purpose of a park."

Whether an addition to a dedicated park constitutes a "changed use" necessarily falls within the City's control and management authority... Dedicated parks may often start as bare pieces of land. The City is then charged with exercising its management and control authority to determine whether a proposed addition to a dedicated park would change its use or purpose and thus requires voter approval.

In the opinion of the appeals court, the evidence supported "the City's determination that the Project will not change the use or purpose of the Park." Moreover, the court found the Project was "consistent with park or recreation purposes, as it will clearly benefit park visitors by providing enhanced wireless communication coverage." Further, the appeals court found improved wireless coverage would constitute "more than an incidental benefit to Park users."

As characterized by the appeals court, improved wireless coverage "undoubtedly enhances the enjoyment of the Park for those Park visitors who use their wireless communication devices

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to read books, watch movies, listen to music or play games."

PARK PURPOSE DISRUPTION?

On appeal, DCOP had argued Charter 55 prohibited "nonpark or nonrecreation uses." The appeals court rejected this argument. According to the court, "nonpark uses in dedicated parks will be upheld, despite restrictive charter language, provided that the nonpark uses do not interfere with, change, or impair park purposes. "

Accordingly, in determining whether a proposed use is permissible, the appeals court would first examine "the specific city charter or any language dedicating the park" to determine whether a proposed use is permissible. If a proposed use was permissible, the court would then determine "whether the proposed use would disrupt or interfere with park purposes."

In this particular instance, the appeals court had found the proposed use was permissible because "the Project does not change the Park's use or purpose." Having found the proposed use was permissible, the appeals court would have to determine "whether the Project would disrupt or interfere with park or recreation uses or purposes."

As noted by the appeals court, the City had the following policy for evaluating applications for WCFs in City parks:

The City may grant authorization for WCF's on dedicated or designated parkland and open space if it is first determined by the Park and Recreation Department that the requested action would not only meet the criteria of this Policy, but would also be consistent with City Charter Section 55.

In addition, the appeals court noted this policy required proposed WCFs in City parks to be "disguised such that they do not detract from the recreational or natural character of the parkland or open space." Further, the court found the policy required proposed WCFs to be "integrated with existing park facilities and must not disturb the environmental integrity of the parkland or open space."

In the opinion of the appeals court, the City's Park Director had complied with these policies by determining "the design and location of the facilities proposed for the Park by Verizon" to ensure "those facilities will not detract from or interfere with the park or its uses":

The features of the proposed mono-eucalyptus tree allow it to integrate with the other trees in the immediate vicinity. Also, the minimal footprint, height, location, and design features of the equipment housing allow the facility to integrate aesthetically. Because both facilities will be set back from the field, they will not interfere with park uses."

DEFERENCE TO AGENCY EXPERTISE

In reaching this determination, the appeals court recognized "the City's determination is entitled

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to some deference." According to the appeals court: "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts."

In this case, the court noted: "Charter 55 gives the City 'control and management of parks' with the caveat that any changed use or purpose of a dedicated park must be authorized or ratified by the voters." Further, the appeals court acknowledged the courts are "ultimately responsible for interpreting Charter 55," but the courts would give "great weight and respect to the City's construction:

Here, the Park Director has a comparative interpretative advantage over the courts in evaluating how the Project will impact the Park because this issue is entwined with issues of fact, policy, and discretion...

It is undeniable that the placement of items within dedicated parks is entwined with issues of fact, policy and discretion. The City's conclusion that the Project does not interfere with the use or purpose of the Park touches upon policy issues within the purview of the Park Director and is not clearly erroneous.

Further, the appeals court determined the City had "complied with its policies regarding encroachments on dedicated parkland and the processing of applications for WCF's in City parks."

FCC STANDARDS

Based on public comments, the appeals court noted "local residents opposed the Project based on primarily aesthetic reasons, with health issues being a secondary concern." Regarding "health concerns," the appeals court cited federal law which "prevents local governments from impeding the siting and construction of cell towers that conform to the Federal Communication Commission's (FCC) radio frequency emissions standards":

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service² facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions 47 U.S.C. § 332(c)(7)(B)(iv).

In this particular instance, the appeals court found "a registered professional electrical engineer concluded in a radio frequency site compliance report that the Project would comply with FCC rules and regulations." Moreover, "while many local residents oppose the Project as an unwelcome addition to the Park's landscape based on aesthetic reasons," the appeals court found "the Project satisfies the objective prerequisites established in advance by the City for the placement of a WCF within a dedicated park."

CONCLUSION

As a result, the appeals court concluded "the Project does not constitute a changed use or purpose

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that required voter approval under Charter 55 and that DCOP has not presented evidence showing that the City failed to follow the law in permitting the Project":

While many local residents oppose the Project as an unwelcome addition to the Park's landscape based on aesthetic reasons, the Project satisfies the objective prerequisites established in advance by the City for the placement of a WCF within a dedicated park. On this record, the subjective preferences of local residents do not constitute substantial evidence upon which the City can properly deny Verizon's application.

The appeals court, therefore, affirmed the judgment of the trial court in favor of the City.

In contrast, see "Pine Tree Cell Tower in Park" where the court found a cell tower violated a deed restriction which had created a public park:

<http://cehdclass.gmu.edu/jkozlows/lawarts/06JUN06.pdf>.

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