

HEIRS CLAIM UNDEVELOPED PARK PARCEL UNDER “USE IT OR LOSE IT” CLAUSE

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In the case of *City of Houston v. Van De Mark*, No. 06-01-00125-CV (Tex.App. Dist.6 07/17/2002), John Van De Mark and several other heirs of Henry F. MacGregor claimed title to a portion of undeveloped park land on the basis that the City of Houston had violated the conditions of a deed conveying land to the City for use as a public park. On April 30, 1930, the heirs of Henry F. MacGregor had conveyed 110 acres to the City “for the purposes of a public park” as long as the land was “*used and maintained for use* as a public park under the name of MacGregor Park.” (Emphasis added)

The deed further provided the City with the full right and authority to regulate and control the use of the park “for such park purposes as the City may see proper.” However, in the event the City ever “abandoned or ceased to use and maintain the acreage for public park purposes under the name of MacGregor Park,” a “reverter” clause in the deed provided that the heirs could regain title and ownership to the land. For more than two decades, the City made some effort to devote all of the 110 acres to park purposes.

The City developed the western portion of the property by constructing a swimming center, a baseball park, tennis courts, a community center, paved roads, parking areas, playgrounds, hiking and biking trails, toilets, trash receptacles, and a statue of Henry F. MacGregor, the donor. Initially, the eastern 47.54 acres was open to the public, but remained essentially undeveloped.

In the 1950's, the City constructed a four-lane boulevard through the center of the 110 acre park area, dividing the original park into an eastern and a western portion. After construction of the boulevard, the City completely ceased to make any effort to include the 47.54 acres east of the boulevard as a part of the park.

This area was allowed to become heavily wooded and overgrown with brush. The boulevard constituted a barrier which denied easy public access to the 47.54 acres. There was no parking area on this portion of land. On the contrary, there was “one unused dirt road into the property that has not been used in years” with a locked gate and “No Trespassing” sign. Accordingly, there was “no development whatsoever of the eastern 47.54 acres for recreational purposes.” Moreover, there was “no hiking or biking trails, no signage for directions or for inviting the public to use that area, and no nature trails.” The City admitted that “the 47.54 acres are left entirely undeveloped in their natural state, even to the point that, when dead trees fall, they are left untended where they fall.”

Sometime prior to December 1996, the State of Texas condemned 6.729 acres of the original land granted by the MacGregor heirs to the City to construct a state highway. The amount of compensation for the condemned acreage was \$425,000. Subsequently, the heirs claimed “the

47.54 acres constituting the eastern portion of the original park land had reverted to the MacGregor heirs because the City had abandoned or ceased to use that portion of the land as a public park.” This 47.54 acre parcel included the 6.729 acres which had generated the \$425,000 of compensation from the State. The City claimed title to both the undeveloped park land and the condemnation award.

At trial, the jury found the City had “ceased to use and maintain the 47.54 acres for public park purposes” prior to December 1996. On the other hand, the jury found the City had not “abandoned the 47.54 acres for public park purposes.” Accordingly, the trial court entered a judgment in favor of the heirs which awarded title to 40.81 acres of land (47.54 less 6.729 taken by the State), as well as the \$425,000 from the condemnation proceedings. The City appealed this decision.

INTENT OF THE DEED?

In order to interpret the terms and discern meaning of the reverter clause, the appeals court had “to review of all the words used in the deed” to discern “the intention of the parties to the deed.” In this particular instance, the reverter clause in the deed required title in the property to revert to the heirs “if the City shall abandon said park and/or cease to use and maintain the same for public park purposes under the name of MacGregor Park or shall change or permit the name of said park to be changed from that of MacGregor Park.” Moreover, the appeals court noted, and the City conceded, that “abandonment is different and distinct from nonuse.”

Abandonment is a technical legal concept requiring evidence of a specific intent to relinquish a known right. Nonuse, however, is simply a fact that may be proven by objective evidence without evidence of an intent to relinquish.

Based upon the references to abandonment and non-use in the reverter clause of the deed, the appeals court concluded that the parties to the deed intended for the reverter provision to apply if any of the three named conditions occurred: (1) abandonment, or (2) failure to use and maintain the land for public park purposes, or (3) a change in the park's name. Accordingly, in the absence of abandonment, the appeals court found that the land would still revert to the heirs if “the City ceased to use and maintain the 47.54 acres for public park purposes”

On appeal, the City argued that park purposes included holding undeveloped park land in its natural state. Specifically, the City contended that a park is “a place where the public may go for various kinds of recreation and amusement, including undeveloped land in its natural, primitive state.” As a result, by not developing the 47.54 acres and leaving it alone in its natural state without any active maintenance, the City maintained that it had “used” those acres and maintained them “for public park purposes,” as required by the deed.

However, in interpreting the intent of the deed, the appeals court pointed out that it was not concerned with “the legal, or even the commonly accepted, definition of a park.” On the contrary, the court simply had to “determine what the parties to the deed meant when they said the land would revert to the grantors if the City ceased to use and maintain the land or any portion of it for public park purposes.” In so doing, the appeals court focused on the words “use” and “public” in the reverter clause.

NOVEMBER 2002 NRP A LAW REVIEW

From a review of the language contained in the deed as a whole, as well as a consideration of the grantors' purposes in making the grant, as stated in the deed, we believe the parties did not intend the word "use" to mean "set aside for non use." We believe the parties meant that the City would conduct some activity on the land to make it usable and accessible by the public for a public park. Likewise, we believe by their use of the word "public" in the reverter provisions, they meant that the City would perform some maintenance activity on the land that would make it accessible, attractive, and usable to the public.

Applying this reason to the facts of the case, the appeals court found sufficient evidence to support the jury's finding that "the City failed to meet the requirements of use and maintenance for public park purposes."

The City's own park consultant, Sheila Condon, testified that, in her opinion, there is nothing on the 47.54 acres that would constitute an invitation to the public to use that acreage as a park, even a natural, passive use park. In fact, she opined that the 47.54 acres were not being used and maintained as a public park. In later testimony, Condon clarified her testimony by saying that, other than the City's claimed "passive use," the City had not used the eastern portion of the land for public park purposes.

The City's deputy director of parks and recreation, Beto Bautisto, testified there is no existing public demand to use the 47.54 acres for a public park. He said the City's only use of the land as a passive park was to allow the "trees to grow and the birds to fly."

On appeal, the City argue that, under the MacGregor deed, it had "the absolute discretion to police and regulate the use of the land donated" under the MacGregor deed. As a result, the City contended that "the MacGregor heirs cannot impose their notions of proper park uses in order to defeat the City's title."

While acknowledging that "the deed gives the City the discretion how to police and regulate the use of the land for park purposes," the appeals court held that the deed "does not grant the City the discretion to decide not to use the property at all for public park purposes." As a result, the appeals court concluded that the City was "bound by the MacGregor deed to use and maintain the property for public park purposes, or allow the property to revert."

Having found that the City had not used the property for public park purposes, the appeals court found that the trial court had properly ordered the reverter of the 47.54 acres to the heirs. Moreover, the appeals court found the heirs were "entitled to both the 40.811 acres left after the condemnation and to the \$425,000.00 paid by the State for the 6.729 acres condemned."