

**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

No. SD28083

CITIZENS FOR THE PRESERVATION OF BUEHLER PARK, a non-profit corporation; THOMAS J. SAGER; LINDA MARIE NOVAK; EDIE GALE HAYS; NEIL ELFRINK; and EILEEN LUNSFORD,

Plaintiffs-Appellants,

v.

CITY OF ROLLA, MISSOURI, a municipal corporation; WILLIAM S. JENKS, Mayor; and MONTY JORDAN; TERRY RUCK; STANLEY G. SPADONI; DONALD Z. BARKLAGE; SUE EUDALY; GARY HICKS; JUDY JEPSEN; LOUIS MAGDITS; JIM WILLIAMS; JIM WATERMAN; RICHARD D. SIBLEY; and CHARLOTTE WIGGINS, Members of City Council,

Defendants-Respondents.

**On Appeal from the Circuit Court of Phelps County
Cause No. CV305- 0352CC
The Honorable Tracie L. Storie, presiding**

BRIEF OF PLAINTIFFS-APPELLANTS

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ORAL ARGUMENT REQUESTED

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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.

STATEMENT OF FACTS

This case concerns the dedication of a parcel of land for a park and the preservation of an important part of Rolla's heritage.

In 1958 the civic leaders of the City of Rolla intended to (and did) set aside land for a public park to be known as "Buehler Park." LF 37, 94-100. The civic leaders of the City now in office intend to set aside "Buehler Park" for use as a restaurant district consisting of a "Lions Choice," a "Rib Crib," and a "Ruby Tuesday." LF 51, 55.

Acquisition of Buehler Park by the City Of Rolla

Before the City of Rolla took title to Buehler Park, the park land was owned by the Rolla Chamber of Commerce. LF 37. The official records of the Chamber reveal that, in 1957, the Chamber was exploring whether to convey Buehler Park to the City:

The question has come up, whether or not the Chamber of Commerce should deed that part of Buehler Park which lies South of the road, to the City, so that the City, through the Park and Recreation Board could maintain and improve it. Discussion followed, and Mr. Maggi asked Mr. Christopher to meet with the Park and Recreation Board and get their opinion.

Minutes of the Rolla Chamber of Commerce, July 10, 1957, LF 96. At the next regular Chamber meeting, the Chamber discussed the conditions under which it would consider transferring the property to the City:

Mr. Christopher reviewed his meeting with the Park Board concerning the

Chamber of Commerce deeding the park section of the Buehler Park tract to the City. Mr. White mentioned that maintaining the grove was a moral obligation to the memory of Chief Buehler. When the Park Board have definite plans for improvement, and maintenance, and arrangements can be made for the transfer of the property.

Minutes of the Rolla Chamber of Commerce, August 16, 1957, LF 98. Five months later the Chamber settled upon the conditions under which it would make the transfer:

Motion was made by Aaron Baxter, and seconded by John Morris, that that part of the land south of the road at Buehler Park be deeded to the City to be used from now on as a Park in memory of Chief Buehler.

Minutes of the Rolla Chamber of Commerce, January 3, 1958, LF 100. The land was to be used as a Park “from now on.” Id. The park was to be “in memory of Chief Buehler.” Id.

The following month the Chamber and the City executed the deed for the transfer of Buehler Park. The deed conveys the property "TO HAVE AND TO HOLD. . . FOREVER." LF 37 (emphasis in original). The deed includes the following statement:

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.

LF 37.

In Memory of Chief Buehler

Buehler Park honors the life of Henry Andrew Buehler. LF 37, 100.

Henry Andrew Buehler was born at Monroe, Wisconsin on May 27, 1876. LF 104. He entered public service in Missouri in 1901 as Assistant State Geologist. Id. He was appointed Missouri’s State Geologist in 1908. LF 109. He served as State Geologist

for thirty-six years, having been appointed and reappointed by 11 governors during his term of office. LF 109.

He was instrumental in bringing Fort Leonard Wood to Missouri. LF 109. In 1935, he served as President of the American Institute of Mining and Metallurgical Engineers, following Herbert Hoover, the Country's thirty-first President. LF 103.

Henry Buehler selflessly devoted his life to serving the public and, in particular, the citizens of Rolla. In 1944, upon Henry Buehler's death, Rolla's Mayor called for all Rolla businesses to close for two hours. Minutes of Special Meeting of the Rolla City Council, March 15, 1944, LF 101. The Missouri House, the Missouri Senate, and the delegates to the 1943-1944 Constitutional Convention all passed resolutions the following day, honoring Chief Buehler. LF 102-107. The Missouri House called Henry Buehler "Rolla's most prominent citizen." LF 103. The Missouri Senate referred to Henry Buehler as an "institution in Missouri." LF 104. The delegates to the 1943-1944 Constitutional Convention wrote:

It is said that no man is indispensable. This may be true, but it will require many days to find a man of the stature and capacity and unselfish devotion to succeed to the work of H. A. Buehler . . .

Resolution No. 69, LF 107. Even a half century after his death Governor Mel Carnahan proclaimed that there be a "Chief Henry A. Buehler Week." LF 109.

In all likelihood Henry Buehler is Rolla's most prominent historical figure.

Maintenance of Buehler Park, 1958-2006

From the time the Chamber conveyed Buehler Park to the City, the Park has been maintained by the City of Rolla as a park, known as "Buehler Park." LF 30, ¶ 2.

Use of Buehler Park

From the time the Chamber conveyed Buehler Park to the City, the Park has been used as a public park, and still is used as a park. LF 30, ¶ 2; LF 34-36, ¶¶ C, E, F, G; LF 110-113.

Today, the Park's tall shade trees remain (referred to as "the grove" by the Chamber in 1957 (see p. 2, supra)). LF 34, 110, 127. People sit, relax, and watch the birds there. LF 34-36, 126, 127, 129. People use the pavilion there. LF 36, 126. Children play there. LF 110-112, 126.

Various events are held in Buehler Park. LF 35. The "Tour of the Ozarks" bicycle ride begins and ends in Buehler Park. LF 110, 111. The Rolla Optimist Club soccer league plays soccer there. LF 34, 112. Families hold reunions there. LF 126, 127. In May, 2005, the cast of the American Family Theater's production of "The Little Mermaid" were there. LF 35, 112.

Proposed Sale of Buehler Park

In 2004 and 2005, the City of Rolla, its mayor and city council developed plans to sell Buehler Park. LF 38-50. In December, 2004, the City mailed out requests for proposals for the sale and development of Buehler Park (LF 30-31, ¶¶ 6, 7; LF 48-50), and placed an advertisement in the Rolla Daily News, soliciting proposals. LF 31, ¶ 7; LF 47.

American Realty and Thessing Commercial Properties, among others, tendered a joint proposal to the City. LF 31, ¶ 8; LF 51-93. The developers propose to develop Buehler Park into a "Restaurant Development District." LF 51. The proposal includes three letters of intent - one on behalf of "Ruby Tuesday, " one on behalf of "Lions Choice," and a third on behalf of "Rib Crib." LF 55. While converting Buehler Park to

these three eating establishments, the proposal claims to “preserve[] a part of the Buehler Park heritage,” in that the developers “plan to preserve a landscape strip on Fairgrounds Road and Kingshighway that will include a distinctive monument as a ‘City of Rolla’ identification element.” LF 56.

In March, 2005, the City Council passed Resolution No. 1556, authorizing the Mayor to execute a contract with American Realty. LF 30, ¶ 3; LF 38. In April, 2005, the City and American Realty executed an option contract for Buehler Park. LF 39. The contract requires Buehler Park to be converted to at least one regional franchise restaurant and at least one other food service business. LF 43.

Evidence Relating to Standing

By way of a stipulation, plaintiffs testified concerning the use of Buehler Park by the public, along with their interest in Buehler Park. LF 30-36.

Citizens for the Preservation of Buehler Park is a membership organization, organized and existing under Missouri’s not-for-profit corporation laws for the purpose of promoting and preserving historic Buehler Park. LF 34, ¶B. Almost all of the members of the organization are frequent users of the Park. *Id.* All of the organization’s members have an interest in promoting and preserving historic Buehler Park for park purposes. *Id.*

Thomas J. Sager resides at 8 Laird Avenue in the City of Rolla, Missouri. LF 34, ¶C. He owns the property there, and has paid real estate taxes to the City of Rolla since 1993. *Id.* Almost all of the goods purchased by him are purchased within the City of Rolla. *Id.* Since 1982, he has paid sales taxes and other taxes and fees to the City of Rolla. *Id.*

Sager has been an avid user of Buehler Park for over 10 years. LF 34, ¶C. This

summer he has been practicing baseball in Buehler Park with his 8-year-old grandson. Id. He has played soccer in Buehler Park with the Rolla Optimist Club Soccer League. Id. Sager has met many interesting people in Buehler Park. LF 35. Last year, he met the cast of a production of Hans Christian Anderson's "The Little Mermaid" in Buehler Park. LF 35, ¶C, LF 112.

He is a member of Citizens for the Preservation of Buehler Park. LF 35, ¶C.

Linda Marie Novak is a member of Citizens for the Preservation of Buehler Park. LF 35, ¶D. Ninety-five percent of the goods purchased by her are purchased within the City of Rolla. Id. She has paid sales taxes to the City of Rolla since 1994. Id.

Edie Gale Hays resides at 110 Bryant, approximately 500 feet from Buehler Park, in the City of Rolla, Missouri. LF 35, ¶E. She owns the property there, and has paid real estate taxes to the City of Rolla since 1994. Id. Ninety percent of the goods purchased by her are purchased within the City of Rolla. Id. Since 1990 she has paid sales and personal property taxes to the City. Id. She also owns a business in the City of Rolla and pays licensing fees to the City. Id. She has been using Buehler Park for more than twenty years. Id. She enjoys attending various events there, and watching sports practices there. Id.

She is a member of Citizens for the Preservation of Buehler Park. Id.

Neil Elfrink resides at 10231 County Road 8150, Rolla, Missouri 65401, near the City of Rolla. LF 35, ¶F. Eighty-five percent of the goods purchased by him are purchased within the City, and he has paid sales and real estate taxes to the City of Rolla since 1992. LF 35-36, ¶F. He has been using Buehler Park for 14 years. LF 36, ¶F. He walks through the Park almost every day. Id. He also enjoys walking his dogs in the Park. Id.

He is a member of Citizens for the Preservation of Buehler Park. Id.

Eileen J. Lunsford resides at 1001 Lynwood Drive in the City of Rolla, Missouri. LF 36, ¶G. For the past 20 years, she has paid personal property taxes, utility taxes and franchise fees to the City of Rolla. Id. All of the goods purchased by her are purchased within the City, and she pays sales taxes to the City of Rolla. Id.

She has been using Buehler Park for many years. Id. She enjoys walking to the Park with her daughter, who spends time on the playground equipment, and enjoys using the pavilion for creating works of art inspired by the wildlife she sees there. Id.

She is a member of Citizens for the Preservation of Buehler Park. Id.

The Expenditures of Public Funds

For the proposed sale of Buehler Park, \$214.72 was expended from the City's general fund to mail out requests for proposals on or about December 8, 2004, and \$68.75 was spent from the City's general fund to advertise a "Public Notice" requesting proposals on or about December 12, 2004. LF 31, ¶ 7; LF 47, 48-50. The payees were the United States Postal Service and the Rolla Daily News, respectively. LF 31, ¶ 7. The source of the funding was the City's general fund which includes monies from taxation, fees and other sources. Id. The expenditures would not have occurred but for the defendants' plan to sell Buehler Park. Id.

Proceedings below

The case was tried on stipulated facts to the Hon. Tracy L. Storie on August 4, 2006. Tr. 1, 11-14, LF 18. On September 21, 2006, Judge Storie entered judgment for defendants. LF 178-79. The Circuit Judge held: (1) that plaintiffs have standing to sue as taxpayers; and (2) that Buehler Park was not dedicated to public use. LF 178.

This appeal followed. LF 180.

POINTS RELIED ON

I. The court below erred in entering judgment for defendants, ruling that the language in the 1958 deed from the Rolla Chamber of Commerce to the City of Rolla did not dedicate Buehler Park to public use, but rather gave the property to the City of Rolla subject to a defeasible fee retained in the Rolla Chamber of Commerce, because plaintiffs proved all three elements of a dedication, in that:

Whitton v. Alexander-Richardson Partnership,
851 S.W.2d 504 (Mo. banc 1993)

Coffey v. State ex rel. County of Stone, 893 S.W.2d 843
(Mo. App. S.D. 1995)

Connell v. Jersey Realty & Investment Co., 180 S.W.2d 49
(Mo. 1944)

Earls v. Majestic Point, Ltd, 949 S.W.2d 239
(Mo. App. S.D. 1997)

A. The Rolla Chamber of Commerce intended to dedicate the land to public use as a park;

Coffey v. State ex rel. County of Stone, 893 S.W.2d 843
(Mo. App. S.D. 1995)

Hand v. City of St. Louis, 59 S.W. 92 (Mo. 1900)

B. The land dedicated was accepted by the City of Rolla and maintained as a public park; and

Kleeman v. Kingsley, 167 S.W.3d 198
(Mo. App. S.D. 2005)

Coffey v. State ex rel. County of Stone, 893 S.W.2d 843
(Mo. App. S.D. 1995)

C. Since 1958 the land dedicated has been and is used by the public as a public park.

Coffey v. State ex rel. County of Stone, 893 S.W.2d 843

(Mo. App. S.D. 1995)

- D. The City does not hold Buehler Park subject to a right of reentry.

Hand v. City of St. Louis, 59 S.W. 92 (Mo. 1900)

Baker v. St. Louis, 7 Mo. App. 429 (1879)

II. The court below erred in failing to enter judgment for plaintiffs, because the undisputed facts show that the City holds Buehler Park in trust for the people, and cannot lawfully violate that trust by selling the Park, in that the Park was dedicated in 1958.

Board Regents Normal School District No.3 v. Painter,
14 S.W. 938 (Mo. 1890)

City of St. Louis v. Bedal, 394 S.W.2d 391 (Mo. 1965)

Cummings v. City of St. Louis, 2 S.W. 130 (Mo. 1886)

Gaskins v. Williams, 139 S.W. 117 (Mo. 1911)

ARGUMENT

STANDARD OF REVIEW

This is an appeal of a bench-trying case on stipulated facts. The question before this Court is whether the trial court drew the proper legal conclusions from the facts stipulated. *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979); *Glass v. Missouri Property Ins. Placement Facility*, 912 S.W.2d 653, 656 (Mo. App. S.D. 1995).

Introduction

This appeal marks the fourth occasion Buehler Park has come before this Court.¹ Previously, only Judge Garrison addressed the merits of petitioners' claims:

The deed restricts the City's use of the property to "park purposes," going so far as to bestow a name on the park. . . . The intent of the Chamber of Commerce to dedicate the park property to public use is clear from the language of the deed.

Ours v. City of Rolla, 965 S.W.2d 343, 347 (Mo. App. S.D. 1998) (Garrison, J., dissenting).

¹ The prior cases are *Citizens for the Preservation of Buehler Park v. City of Rolla*, 187 S.W.3d 359 (Mo. App. S.D. 2006); *Ours v. City of Rolla*, 14 S.W.3d 627 (Mo. App. S.D. 2000); and *Ours v. City of Rolla*, 965 S.W.2d 343 (Mo. App. S.D. 1998).

I.

THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR DEFENDANTS, RULING THAT THE LANGUAGE IN THE 1958 DEED FROM THE ROLLA CHAMBER OF COMMERCE TO THE CITY OF ROLLA DID NOT DEDICATE THE PROPERTY TO PUBLIC USE, BUT RATHER GAVE THE PROPERTY TO THE CITY OF ROLLA SUBJECT TO A DEFEASIBLE FEE RETAINED IN THE ROLLA CHAMBER OF COMMERCE, BECAUSE PLAINTIFFS PROVED ALL THREE ELEMENTS OF A DEDICATION

The evidence establishes all three elements of a dedication: (1) the Rolla Chamber of Commerce intended to set aside Buehler Park for public use; (2) the City of Rolla has maintained the property as a park; and (3) the public has been using Buehler Park. Accordingly, as a matter of common law, Buehler Park has been dedicated to the City of Rolla for public use:

Common law dedication. . . is proven by showing: (1) that the owner, by unequivocal action, intended to dedicate the land to public use; (2) that the land dedicated was accepted by the public; and (3) that the land dedicated is used by the public.

Whittom v. Alexander-Richardson Partnership, 851 S.W.2d 504, 507-08 (Mo. banc 1993). This is the well-established test for dedication. See, e.g., *Connell v. Jersey Realty & Investment Co.*, 180 S.W.2d 49, 52 (Mo. 1944); *Kleeman v. Kingsley*, 167 S.W.3d 198, 203 (Mo. App. S.D. 2005); *Earls v. Majestic Point, Ltd*, 949 S.W.2d 239, 246 (Mo. App. S.D. 1997); and *Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 846 (Mo. App. S.D. 1995).

A. The Rolla Chamber of Commerce intended to dedicate the land to public use as a park

The Chamber’s intent to set aside the “park” or “grove” in memory of Henry Buehler appears in the Chamber’s official records. LF 94-100. The Chamber believed that there was a “moral obligation” to maintain the grove in memory of Chief Buehler.

Minutes of the Rolla Chamber of Commerce, August 16, 1957, LF 98. The Chamber would not transfer Buehler Park to the City until the City had definite plans to maintain the park. *Id.* Once the City's plans to improve and maintain the Park were in place:

Motion was made by Aaron Baxter, and seconded by John Morris, that that part of the land south of the road at Buehler Park be deeded to the City to be used *from now on as a Park in memory of Chief Buehler.*

Minutes of the Rolla Chamber of Commerce, January 3, 1958, LF 100 (emphasis supplied).

Moreover, the Chamber's intent to dedicate or set aside Buehler Park for public use is set out on the face of the deed:

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.

LF 37. Putting aside the Chamber's official records, the wording of the warranty deed shows that the Chamber intended to set aside the Buehler Park land for public use as a park. A warranty deed which contains language showing an intent that the property be accessible to the public is sufficient to show an intention to dedicate land to public use. *Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 844 (Mo. App. S.D. 1995). The language in the Buehler Park deed is far more restrictive, for example, than the language contained in the warranty deed which was the subject of *Coffey*. In *Coffey*, a general warranty deed conveyed a private road and contained the language "Grantee agrees maintenance of road in suitable condition for school bus to travel." 893 S.W.2d at 844. The Court of Appeals held that the recitals in the deed manifest the owner's intent to dedicate the road to public use. 893 S.W.2d at 847. See also *Hand v. City of St. Louis*, 59 S.W. 92, 93 (Mo. 1900) (deed to city "for the purpose of a public market, to be called 'Shepard's Free Market'"). The language in the Buehler Park deed is far more specific and more limiting than the language in the *Coffey* and

Hand deeds. The language in the Buehler Park deed shows the intent of the Rolla Chamber of Commerce to dedicate Buehler Park to public use.

B. The land dedicated was accepted by the City of Rolla and maintained as a public park

With respect to the second element, acceptance by the public, the City of Rolla has maintained, and the public has used, Buehler Park for approximately fifty years. LF 30, ¶ 2. Maintenance of Buehler Park by the City and use of Buehler Park by the public are sufficient to establish acceptance by the public. *Kleeman v. Kingsley*, 167 S.W.3d 198, 203 (Mo. App. S.D. 2005); *Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 847 (Mo. App. S.D. 1995).

C. Since 1958 the land dedicated has been and is used by the public as a public park

For the third element, use by the public, the facts show that Buehler Park is actively used. LF 30, ¶ 2. People sit, relax, and watch the birds in the Park. LF 34-36, 126, 127, 129. People use the pavilion there. LF 36, 126. Children play there. LF 110-112, 126.

Various events are held within Buehler Park. LF 35. The “Tour of the Ozarks” bicycle ride begins and ends in Buehler Park. LF 110, 111. The Rolla Optimist Club soccer league plays soccer there. LF 34, 112. Families hold reunions there. LF 126, 127.

The evidence establishes the regular use of Buehler Park by the public. *Coffey v. State ex rel. County of Stone*, 893 S.W. 2d 843, 847 (Mo. App. 1995).

D. The City does not hold Buehler Park subject to a right of reentry

The court below ruled that the City holds the property subject to a defeasible fee retained by the Rolla Chamber of Commerce, and that any interest retained by the Rolla Chamber of Commerce before its quitclaim deed of April 14, 1997, was relinquished and transferred to the City of Rolla by that instrument. LF 178. The court’s ruling is contrary to the 1958 deed. LF 37.

The Chamber covenanted “that it will Warrant and Defend the title [not a defeasible fee] to said premises unto . . . [the City] . . . , FOREVER, and against the unlawful claims and demands of all persons whomsoever [including the Chamber].” LF 37 (emphasis in original). This warranty prevents the superimposition by the trial court of an implied “defeasible fee retained by the Rolla Chamber of Commerce” with a right to reenter. The warranty would be difficult or impossible to reconcile even with an express reservation of a right to reenter. It precludes creation of an implied right to reenter. Evidence of the Chamber’s intent to dedicate the property is even more clear here than in *Coffey*.

This is the precise holding of the Supreme Court in *Hand v. St. Louis*, 59 S.W. 92 (Mo. 1900). The *Hand* deed, like the Chamber’s deed, conveyed the fee, without any provision for reverter, specifying that the property was to be used for a public market. When the City put the property to another use, the grantor’s son sued to recover title. He lost.

. . . [T]he further proposition, that property that has been so conveyed absolutely, without provision for reversion, will revert when the trustee abandons the prescribed purpose, and attempts to divert it to another use, is one to which we can not assent. . . [W]hen the title is conveyed absolutely in trust for a given purpose, it is not subject to recall by the grantor, and the only power a court of equity has in the premises is to prevent the abuse, and compel the trustee to perform the trust . . .

59 S.W. at 93. The Supreme Court contrasted the case with *Baker v. St. Louis*, 7 Mo. App. 429 (1879), where

there was a grant by deed to the city of land for a street and market place, with express reservation that when the city should cease to use it for such purpose it should revert to the grantors. That reservation makes the essential difference between that case and the case at bar.

59 S.W. at 94. That reservation also makes the essential difference between *Baker* and the Buehler Park deed. The ruling of the court below directly conflicts not only with the plain, express language of the Chamber deed, but also with the plain, emphatic ruling of the Supreme Court in *Hand*.

Summary

For these reasons, the court below erred in entering judgment for defendants. Plaintiffs proved that Buehler Park was dedicated to public use. The court below should have entered an order enjoining the City of Rolla from selling Buehler Park.

II.

THE COURT BELOW ERRED IN FAILING TO ENTER JUDGMENT FOR PLAINTIFFS, BECAUSE THE UNDISPUTED FACTS SHOW THAT THE CITY HOLDS BUEHLER PARK IN TRUST FOR THE PEOPLE, AND CANNOT LAWFULLY VIOLATE THAT TRUST BY SELLING THE PARK, IN THAT THE PARK WAS DEDICATED IN 1958

The three elements of a dedication having been established, the City of Rolla holds the fee to Buehler Park in trust for the benefit of the public, the trust to be executed in accordance with the terms of the Deed:

There is no doubt that if land in a city has been dedicated for use as a park, the city has a duty to keep the park open and in good order for the benefit of the public for purposes of health, pleasure, and recreation.

Bogert, *The Law of Trusts and Trustees* § 34 (West Pub. Co. 1984). When the fee was conveyed to the City by the Deed, the real estate "was not owned by the [City] in fee absolute, but was held in trust for a specific use." *Gaskins v. Williams*, 139 S.W. 117, 120 (Mo. 1911). The Deed conveys a "dedicatory trust committed to the hands of the city." *Goode v. City of St. Louis*, 20 S.W. 1048, 1053 (Mo. 1892). The City "took the premises as a trustee with the obligations attached." *City of St. Louis v. Bedal*, 394 S.W.2d 391, 396 (Mo. 1965), quoting *Price v. Thompson*, 48 Mo. 361,

366 (1871).

Because the City holds Buehler Park in trust for the public, to be used for the purpose for which it was dedicated, the City has no power to sell any part of Buehler Park for use as a restaurant district. See, e.g., *Cummings v. City of St. Louis*, 2 S.W. 130, 131 (Mo. 1886) ("The [public entity] may control and regulate [the use of the dedicated property], but it has no right to sell the property. . . . It must follow that the proposed out and out sale is a flagrant abuse of the trust reposed in the [public entity], and without any warrant or authority of law"). See also *Board Regents Normal School District No.3 v. Painter*, 14 S.W. 938, 940 (Mo. 1890):

[T]he [public entity] is but a trustee to manage the property for the uses and purposes to which it was devoted by the donors. It may control and regulate the use of the property, but it has no right to devote the same to private uses, or even to public uses, different from those specified in the deed. . . . This being so, the [public entity] had no right or power to convey the [dedicated property].

14 S.W. at 940.

The Missouri rule is also the generally accepted rule:

Where the property involved is dedicated property, it is well settled that, unless the municipality is authorized by statute, the property cannot be sold even if the proceeds are to be used for the purpose for which the dedication was made.

11A McQuillin, *The Law of Municipal Corporations* § 33.75 (3rd ed. revised, West Group 2000).

Whether the ownership or merely a right of user is vested in the public, the land cannot be alienated by the public authorities to individuals or corporations...

4 Tiffany, *The Law of Real Property* § 1113 (3rd ed., Callaghan & Co. 1975) (citing

Cummings v. City of St. Louis, 2 S.W. 130).

When a public body proposes to alienate or alter the use of property dedicated for use as a park, the remedy is to enjoin the alienation or misuse. *Price v. Thompson*, 48 Mo. 361 (Mo. 1871); *Cummings v. City of St. Louis*, 2 S.W. 130 (Mo. 1886).

[O]ne to whom property has been conveyed in trust for a particular use cannot lawfully divert it to a different purpose, and, if he attempts to do so, a court of equity... will interpose and prevent the misuse and abuse of the trust.

Hand v. City of St. Louis, 59 S.W. 92, 93 (Mo. 1900).

The purpose of a dedication is to establish a trust. The grantor gives up its ownership, in exchange for assurance that successors to the grantor and grantee will not have the authority to alter the terms of the trust. Experience has shown that people with little appreciation for the value of public land can easily be swayed by cash (or BBQ).

CONCLUSION

Buehler Park was dedicated to the City of Rolla for use by the public as a park. For the reasons set forth above, this Court should reverse the judgment of the court below and remand this case with instructions that the circuit court enter judgment for plaintiffs declaring that the City of Rolla has no lawful authority at this time to sell Buehler Park for use as a restaurant district and enjoining the City of Rolla from alienating Buehler Park.

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Certifications

The undersigned certifies that on the 19th day of March, 2007, two copies of the brief of plaintiffs-appellants, together with an electronic copy, were sent to counsel for respondents via next day delivery to the following address:

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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 5,748 words (all inclusive) in the brief.

Appendix

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 Warranty deed dated February 28, 1958, between the Rolla
 Chamber of Commerce, Incorporated, and the City of Rolla,
 Missouri A3