

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

**No. SD28083**

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**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.**

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

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**BRIEF OF DEFENDANTS-RESPONDENTS**

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**JURISDICTIONAL STATEMENT**

Respondent agrees jurisdiction over this appeal is vested in this Court,  
pursuant to Article V, Section 3, Missouri Constitution.

## STATEMENT OF FACTS

Prior to his death in March of 1944, Dr. Henry “Chief” Buehler had been a resident of Rolla, Missouri and Missouri’s chief geologist since 1908. At the time of his death he was suitably memorialized by resolutions in the Missouri House of Representatives and State Senate (LF 102-104) as well as by resolution of the City of Rolla requesting all businesses in the City close the afternoon of Dr. Buehler’s funeral so all could attend, and offering a plot in the City Cemetery free of charge “as a slight token of respect to Dr. Buehler”. (LF 101) The then convened constitutional convention likewise passed a resolution in respect of the recently departed Dr. Buehler (LF 106-107) and, as late as 2000, the governor of Missouri proclaimed a ““Chief” Henry A. Buehler Week” (LF 108-109)

Prior to July, 1957, the Rolla Chamber of Commerce maintained a public park, named “Buehler Park” in honor of Dr. Buehler. (LF 96, 98, 100, 133 and 134) In July, 1957, the Chamber Board of Directors began to discuss deeding the property to the City so that it “could maintain and improve it.” (LF 96). Discussions with the City were reviewed at the Chamber Board meeting of August 16, 1957, with one board member commenting “that maintaining the grove was a moral obligation to the memory of Chief Buehler.” (LF 98) Action on the discussions was deferred until the City, through its Park Board had “definite plans for improvement, and maintenance,” of the park. (*Id.*). In January, 1958, it was announced the City’s Park Board wanted to make definite plans for the coming year and inquiring “whether the Chamber will deed the Buehler Park grove to

them, so that they may spend money on improving it.” The minutes of that meeting reflect the following action:

“Motion was made..., and seconded..., 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.”

The motion, which carried, also provided for appointment of a committee “to handle the negotiations,” (LF 100, emphasis added)

Deed records for Phelps County reflect that on February 28, 1958, the “ROLLA CHAMBER OF COMMERCE, INCORPORATED” by Warranty Deed did “Grant, Bargain and Sell, Convey and Confirm” a tract of land comprised of about three and one quarter acres to the “City of Rolla, Missouri” a municipal corporation of the County of Phelps and State of Missouri”. The deed recites:

“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, emphasis added)

Since 1958, the City has maintained the tract as a park, known as Buehler Park, and the public has used the property as a park. (LF 30)

In March 1997, the City entered into a Contract for sale of the property with Cracker Barrel Old Country Store, Inc. By Quit Claim Deed dated April 14, 1997, “the Rolla Area Chamber of Commerce, formerly the Rolla Chamber of Commerce at Rolla, Missouri, a/k/a Rolla Chamber of Commerce, Incorporated,” quit claimed to the City the park property “to release the restriction that the above described real property be used for

park purposes only and be known as Buehler Park....By this Deed First Party releases any right of entry and any reversionary right it may have in and to the above described real property and releases any right it may have to enforce as a covenant the provision in said deed that said land be used for a park.” *Ours v. City of Rolla*, 965 S.W.2d 343, 344 (Mo. App. S.D. 1998) and (LF 176) Various citizens of Rolla and users of the park filed suit to enjoin the sale claiming the 1958 deed from the Rolla Chamber of Commerce to the City constituted a dedication to a public purpose and sale of the park would constitute a violation of that dedication. Id.

The first trial was held in April, 1997, resulting in a “FINAL JUDGMENT AND DECREE” dated April 18, 1997, finding that those plaintiffs lacked standing as “taxpayers, residents of the City and those who use and enjoy the park” to challenge this sale because they had no higher or better standing than the general public; that the Chamber of Commerce was in a better position to represent the interests of the general public and it had “indicated its position in support of the sale” by quit claiming the property to the City to eliminate any “alleged dedicatory language”; and that the 1958 deed was not a dedication “to public use” but, instead, a restriction on the City’s use of the property and therefore the City “held the property subject to a defeasible fee retained in the Rolla Chamber of Commerce, Inc.”, which said defeasible fee was released by the quit claim deed. (*Ours, Id.* at 344, LF 117-118).

However, during the pendency of that appeal Cracker Barrel withdrew from its contract with the City. (*Ours v. City of Rolla*, 14 S.W.3d at 628 (Mo. App. S.D. 2006). In its *Ours* decision, in 1998, the majority of a divided panel affirmed plaintiffs’ lack of

standing and so never reached the question of whether the 1958 deed constituted a dedication to public use.<sup>1</sup>

The City continued to maintain the property for public use as a park (LF 30) but in December, 2004, published and mailed out “REQUEST FOR PROPOSALS-PROPOSED SALE OF THE BUEHLER PARK TRACT” (LF 47-50) culminating in Resolution 1556 of the City of Rolla of March, 2005, directing the mayor to enter into a contract with American Realty, LLC, for development of, and option to purchase, the property. (LF 38) The contract between the City and the developer was amended in May, 2006, to provide, *inter alia*, that the developer “optionee” would reimburse the City for costs associated with the sale of the property. (LF 113) Those costs include the amounts expended for publication and postage for distributing the request for proposals. (*Id.*)

Plaintiffs, many of whom were included in those objecting to the sale in 1997, have banded together as “CITIZENS FOR THE PRESERVATION OF BUEHLER PARK” a not-for-profit corporation. (LF 114)

Plaintiffs’ efforts to get the Attorney General of Missouri to contest the sale of the park having failed (LF 115-116), Plaintiffs have proceeded with suit for declaratory

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<sup>1</sup> Following this affirmation on appeal, additional litigation between the parties resulted concerning defendants’ damages. From a partial judgment in favor of defendants, both sides appealed and the Southern District reversed that judgment in *Ours v City of Rolla*, 14 S.W.3d 627 (Mo. App. S.D. 2000). The issues in that litigation and appeal are not relevant to the issues now before this Court.

judgment and injunction to stop the sale. (LF 21-24) Initially this Court, in relying upon the previous finding that Plaintiffs did not have standing to contest the 1997 attempt at sale of the park, granted defendants' Motion to Dismiss but, on appeal, this court ruled that a finding of lack of standing was premature and could not be based on the court's prior rulings in "Buehler Park I"; that a hearing must be held for the Trial Court to "decide whether the attempted alienation of the park from the City is a legal or illegal expenditure and whether the Citizens have evidence to support a claim of illegal expenditures of public funds or the prospect of such illegal expenditures based upon evidence." (*Citizens for the Preservation of Buehler Park v. City of Rolla*, 187 S.W.3d 359, 362-363 (Mo. App. S.D. 2006). The facts not being in dispute, the parties submitted the issues to the trial court upon their STIPULATION OF FACTS and EXHIBITS 1-19 (LF 30-33, 34-36 and 37-177).

The trial court ruled plaintiffs had standing as taxpayers but that the language in the 1958 deed from the Rolla Chamber of Commerce to the City did not dedicate the property to public use forever but conveyed the property subject "to a defeasible fee retained by the Rolla Chamber of Commerce"; that the property was not subject to dedication to public use and that any interest retained by the Chamber of Commerce was conveyed to the City by its corporate quit claim deed of April 14, 1997. (LF 178-179). From this judgment plaintiffs have appealed. (LF 180-182).

### **STANDARD OF REVIEW**

Respondents agree that on appeal of a bench tried 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 Insurance Placement Facility*, 912 S.W.2d 653, 656 (Mo. App. S.D. 1995).

### **INTRODUCTORY NOTE**

For the fourth time litigation concerning Buehler Park in Rolla, Missouri comes before this Court. The prior cases are *Ours v. City of Rolla*, 965 S.W.2d 343 (Mo. App. S.D. 1998), hereinafter “Buehler Park I”. *Ours v. City of Rolla*, 14 S.W.3d 627 (Mo. App. S.D. 2000) hereinafter “Buehler Park II” and *Citizens for the Preservation of Buehler Park v. City of Rolla*, 187 S.W.3d 359 (Mo. App. S.D. 2007) hereinafter “Buehler Park III.”

### **POINTS RELIED ON**

**I. THE TRIAL COURT WAS CORRECT IN RENDERING JUDGMENT FOR DEFENDANTS, ALBEIT NOT NECESSARILY FOR THE REASON STATED, IN THAT PLAINTIFFS LACKED STANDING TO OBJECT TO THE SALE OF BUEHLER PARK BECAUSE**

- (a) As inhabitants and property owners in the City their interest in the park does not differ from that of the public generally;**
- (b) As users of the park they lack standing because they have not shown a sufficient interest in the maintenance of the land as a park; and**
- (c) As taxpayers they have failed to show an illegal expenditure of public funds or the prospect of such so as to obtain standing.**

*Eastern Missouri Labor's District Council v. St. Louis County*, 781 S.W. 2d 43, 46 (Mo. banc 1989)

*Mid-American Georgian Gardens, Inc. v. Missouri Health Facilities Review Committee*, 908 S.W.2d 715, 718 (Mo. App. 1995)

*Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. banc 1997)

*O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 98 (Mo. banc 1993)

*Ours v. City of Rolla*, 965 S.W.2d 343, 344 (Mo. App. S.D. 1998)

*Phillips v. Hoke Constr., Inc.*, 834 S.W. 2d 785, 789 (Mo. App. S.D. 1992)

*Tichenor v. Missouri State Lottery Commission*, 742 S.W. 2d 170, 172 (Mo. banc 1988)

*Walker v. City of Springfield*, 172 S.W.3d 857 (Mo. App. S.D. 2005)

Section 77.140 RSMo.

Section 89.050, RSMo.

**II. (IN RESPONSE TO APPELLANTS' POINT RELIED ON I)**

**THE TRIAL COURT RULED CORRECTLY FOR DEFENDANTS THAT THE 1958 DEED FROM THE ROLLA CHAMBER OF COMMERCE TO THE CITY OF ROLLA DID NOT DEDICATE THE PROPERTY TO PUBLIC USE BECAUSE NEITHER THE LANGUAGE OF THE DEED NOR THE CIRCUMSTANCES SURROUNDING THE TRANSFER EVIDENCED AN UNEQUIVOCAL INTENT BY THE GRANTOR TO DEDICATE THE LAND TO PUBLIC USE.**

*Board Regents Normal School District v. Painter*, 14 S.W. 938 (Mo. 1890)

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

*Connell v. Jersey Realty and Investment Company*, 180 S.W.2d 49, 52 (1944)

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

*Haertlein v. Rubin*, 195 S.W.2d 480 (Mo. 1946)

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

*State Ex Inf. Danforth v. Banks*, 454 S.W.2d 498 (Mo. 1970)

*State ex rel., Missouri Coalition for the Environment v. Conservation Commission of the  
State of Missouri*, 940 S.W.2d 527 (Mo. App.W.D. 1997)

*Weakley v. State Highway Commission*, 364 S.W.2d 608 (Mo. 1963)

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

Section 77.140 RSMo.

**III. (IN RESPONSE TO APPELLANTS' POINT RELIED ON II)**

**THE TRIAL COURT RULED CORRECTLY IN DENYING PLAINTIFFS' RELIEF AND THEREBY PERMITTING THE CITY TO SELL THE PROPERTY BECAUSE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROOF IN THAT THEIR EVIDENCE WAS NOT SO CONVINCING, FULL, PERSUASIVE AND COGENT AS TO LEAVE NO REASONABLE DOUBT OF THE EXISTENCE OF THE CHAMBER'S INTENT THAT THE 1958 DEED WAS NOT A DEDICATION TO PUBLIC USE AND THE CHAMBER'S ACTS WERE CONSISTENT WITH THE COURT'S FINDING THAT THE DEED WAS A**

**CONVEYANCE SUBJECT TO A DEFEASIBLE FEE RETAINED BY THE  
GRANTOR.**

*Ankrom v. Roberts*, 126 S.W.3d 798 (Mo. App. S.D. 2004)

*Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506

(Mo. banc 1999)

*Catron v. Scarritt Collegiate Institute*, 175 S.W. 571 (Mo. 1915)

*Duncan v. Academy of Sisters of the Sacred Heart at St. Joseph, Mo.*,

50 S.W.2d 814, 817-8 (Mo. 1961)

*Haertlein v. Rubin*, 195 S.W.2d 480 (Mo. 1946)

*McIntosh v. City of Joplin*, 486 S.W.2d 287, 290 (Mo. App. 1972)

*State ex rel., Missouri Coalition for the Environment v. Conservation*

*Commission of the State of Missouri*, 940 S.W.2d 527 (Mo. App.W.D. 1997)

*Weakley v. State Highway Commission*, 364 S.W.2d 608 (Mo. 1963)

## ARGUMENT

### I.

**THE TRIAL COURT WAS CORRECT IN RENDERING JUDGMENT FOR DEFENDANTS, ALBEIT NOT NECESSARILY FOR THE REASON STATED, IN THAT PLAINTIFFS LACKED STANDING TO OBJECT TO THE SALE OF BUEHLER PARK BECAUSE**

- (a) As inhabitants and property owners in the City their interest in the park does not differ from that of the public generally;**
- (c) As users of the park they lack standing because they have not shown a sufficient interest in the maintenance of the land as a park; and**
- (c) As taxpayers they have failed to show an illegal expenditure of public funds or the prospect of such so as to obtain standing.**

In a court tried case the Court of Appeals' "concern is whether the trial court reached the proper result, not the route taken to reach that result." *Phillips v. Hoke Constr., Inc.*, 834 S.W. 2d 785, 789 (Mo. App. S.D. 1992)

The Circuit Court of Phelps County previously held, and this Court affirmed, that similarly situated Plaintiffs do not have standing as inhabitants and property owners of the City, nor as users of Buehler Park. *Ours v. City of Rolla*, 965 S.W. 343, 344-345 (Mo. App. S.D. 1998). The nature and character of the evidence presented by Plaintiffs here does not differ, except in degree, from that presented to the Circuit Court of Phelps County in 1997 so that this Court should follow its prior ruling in that regards.

The only difference in this case, from that in 1997, is the parties have agreed the City spent \$214.72 from its general fund to mail out requests for proposals and \$68.75 to publish a notice requesting proposals for development of the park. The expenditures by the City to distribute request for proposals are not illegal. They are, instead, the types of expenditures routinely made by cities to conduct business.

Although, taxpayers may have standing to challenge the legality of expenditures even where the expenditures create economic gain, rather than loss, (*Tichenor v. Missouri State Lottery Commission*, 742 S.W. 2d 170, 172 (Mo. banc 1988)), “absent fraud or other compelling circumstances, to have standing a taxpayer must be able to demonstrate a direct expenditure of funds generated through taxation, or an increased levy in taxes, or a pecuniary loss attributable to the challenged transaction of a municipality.” *Eastern Missouri Labor’s District Council v. St. Louis County*, 781 S.W. 2d 43, 46 (Mo. banc. 1989). The seminal test is whether the expenditure of public funds is illegal. *Eastern Missouri Labor’s District Council, Id.* at 46. In this case there will be no actual expenditure by the City since it is to be reimbursed for its expenses. (LF 113; see also, *Ours, Id.* at 346, payment of real estate commission from sale proceeds, so that no commission is paid unless the sale occurs, does not constitute an expenditure of funds.)

Staff expenses, including salaries, correspondence and telephone calls “are not the type of expenditure of public funds which would give standing, as they are general operating expenses which would be incurred whether or not the challenged transaction took place.” *Buehler Park I* at 346, citing *Mid-American Georgian Gardens, Inc. v. Missouri Health Facilities Review Committee*, 908 S.W.2d 715, 718 (Mo. App. 1995).

“Cases which have held that staff expenses were an unlawful expenditure of funds were cases in which the underlying law was being challenged and ultimately found to be unconstitutional or otherwise void. See *O’Reilly v. City of Hazelwood*, 850 S.W.2d 96, 98 (Mo. banc 1993) and *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. banc 1997).” Buehler Park I, Id. Plaintiffs in this case challenge no underlying law, ordinance or statute. Therefore, the only expenditure which could or might permit them standing is the expenditure for publication of the notice seeking requests for bids or proposals for the development of the park. However, as has been pointed out §77.140 provides that third-class cities can sell public park ground, there are myriad statutes requiring cities to publish notices, (e.g., §89.050, RSMo. regarding hearings on zoning) and cities routinely publish requests for bids concerning purchases.

The closing language of the decision in Buehler Park III would seem to indicate the question of standing is determined by resolution of the underlying legal issue.<sup>2</sup> That surely seems inconsistent with this Court’s decision in *Walker v. City of Springfield*, 172 S.W.3d 857 (Mo. App. S.D. 2005) that, “standing is a jurisdictional matter antecedent to the right of relief...”

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<sup>2</sup> “[T]he Court must decide whether the attempted alienation of the park from the city is a legal or illegal expenditure and whether the citizens have evidence to support a claim of illegal expenditures of public funds or the prospect of such illegal expenditures based upon evidence.” Buehler Park III at 362-363.

Furthermore, if \$68.75 of publication costs confers standing, that invites the City to entertain future gratuitous proposals to purchase the park that do not involve such an expenditure, as in Buehler Park I.

Therefore, it would seem Appellants' standing depends on the legality or illegality of the city's action. However, if that is true the concept of standing is essentially eviscerated. Virtually every action taken by a city involves some "expenditure of funds generated through taxation" no matter, as here, how trivial. Therefore, any citizen or citizens who disagreed with an action by a city or "other political subdivision" could bring suit to challenge the legality thereof. That invites "government-by-lawsuit" instead of by elected representatives. Respondents urge this Court to find Appellants lack standing to bring this suit.<sup>3</sup>

Regardless, for the reasons hereinafter set out, the City of Rolla is acting legally in setting about to sell the park for development.

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<sup>3</sup> Respondents would note the interest of Amici Curiae in the property is even more tenuous than that of Appellants.

## II.

(IN RESPONSE TO APPELLANTS' POINT RELIED ON I)

**THE TRIAL COURT RULED CORRECTLY FOR DEFENDANTS THAT THE 1958 DEED FROM THE ROLLA CHAMBER OF COMMERCE TO THE CITY OF ROLLA DID NOT DEDICATE THE PROPERTY TO PUBLIC USE BECAUSE NEITHER THE LANGUAGE OF THE DEED NOR THE CIRCUMSTANCES SURROUNDING THE TRANSFER EVIDENCED AN UNEQUIVOCAL INTENT BY THE GRANTOR TO DEDICATE THE LAND TO PUBLIC USE.**

At the outset Appellants would note the legislature has seen fit to endow cities with the power to sell “public parks”. Section 77.140 RSMo. Whether the City of Rolla **should** sell the park is a political question reserved, by the *political question doctrine*, to the City Council of Rolla. *State Ex Inf. Danforth v. Banks*, 454 S.W.2d 498 (Mo. 1970). Whether the City **can** sell the park is the question before this Court.

“A dedication is the setting apart of lands for public use.” *Connell v. Jersey Realty and Investment Company*, 180 S.W.2d 49, 52 (1944)

“Common law dedication awards the public the use of the land in dispute and is proven by showing: (1) that the owner, by unequivocal action, intended to dedicate the land to the 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 (Mo. banc 1993)

That the City accepted the property and maintained and used it as a park is not subject to dispute and therefore will not be discussed here. Respondents need only prevail on the first element, whether there was unequivocal action by the owner intending to dedicate the land to public use, to prevail herein.

“The acts establishing a dedication must be unequivocal, indicating expressly or by plain implication, *a purpose to create a right in the public to use the land.*” *State ex rel., Missouri Coalition for the Environment v. Conservation Commission of the State of Missouri*, 940 S.W.2d 527 (Mo. App.W.D. 1997) (emphasis contained in original,) citing *Whittom, Id.* at 508. As will be discussed in Part III, the burden is on Plaintiffs to prove the park was dedicated, and that burden is incredibly high.

The Circuit Court of Phelps County, Hon. Jack O. Edwards presiding, previously heard this same evidence and ruled the 1958 deed “did not dedicate the property to public use because it does not require the property to be used as a park ‘forever’ or words to that effect.” Judge Edwards found the language in the deed merely restricted the City to using the property “for park purposes only and none other” with the implication that if the City used the property for something else the Chamber would retain the right to reenter and claim its interest in the land. He determined this constituted holding the property “subject to a defeasible fee retained in the Rolla Chamber of Commerce, Inc. and not in trust subject to a dedication to public use.” (L.F. 118)

Likewise, after considering the evidence Judge Tracy L. Storie determined the 1958 deed “did not dedicate the property to public use forever but, instead, conveyed the property to the City of Rolla subject to a defeasible fee retained by the Rolla Chamber of

Commerce and not in trust subject to a dedication to public use; and any interests retained by the Rolla Chamber of Commerce prior to its corporate quit claim deed of April 14, 1997, was relinquished and transferred to the City of Rolla by that instrument.” (L.F. 178)

“[I]t is the deed, which must unequivocally demonstrate a purpose to create a right in the public to use the land.” *State ex rel. Missouri Coalition for the Environment, Id.* at 531 In that case, as here, a group objecting to the sale of public property, banded together in a not-for-profit corporation and sued to enjoin the Missouri Conservation Commission from selling property deeded to it by Ford Motor Credit Company. The deed from Ford Motor Credit to the Conservation Commission was titled “Deed of Dedication” and stated it did “grant, bargain and sell, convey and confirm, and **dedicate the property to the commission**” (emphasis added) subject to taxes, right of access to the Missouri river over the property and the terms and conditions of preexisting easements, licenses, codes and restrictions and reserved to Ford a right of ingress and egress. The deed also recited it was accepted by the commission “for the benefit and use of the State of Missouri.” The commission went on to state that it “would not improve or develop the property, that it would remain in an unimproved natural state and that neither hunting nor the discharge of firearms or weapons of any kind [would be] permitted.” *Id.* at 529.

In determining there was no dedication to public use the Western District Court of Appeals first discounted the title of the document as not being determinative of its character and stated, “even though the deed used the language ‘dedicate’ and

‘dedication,’ there was no language purporting to create a **right in the public to use the land.**” (*Id.* at 530, emphasis added) In so holding the court found the language “grant, bargain and sell, and convey and confirm” inconsistent with intent to dedicate real property to public use.

Similarly, here the deed recites:

“In consideration of the sum of \$10.00, to it paid by the [City of Rolla], the receipt of which is hereby acknowledged, does by these presents, **grant, bargain and sell, convey and confirm, unto the [City of Rolla]...**”

Furthermore, although Respondents objected to the relevance of the Chamber of Commerce minutes which preceded the deed in question, and despite the gratuitous comment of “Mr. White” that there was a “moral obligation to the memory of Chief Buehler.”, the motion made, seconded and passed by the board of the Chamber on January 3, 1958, is that “the land...be deeded **to the City...**” (L.F. 98, emphasis added) not to the people or for their use. Furthermore, if the land is to be dedicated to public use, it seems unnecessary to “appoint a committee to handle the negotiations”. *Id.*

Appellants read the minutes of August 16, 1957 (L.F. 98) to indicate “[t]he Chamber would not transfer Buehler Park to the City until the City had definite plans to maintain the park.” Those minutes can just as easily be read to indicate the City would not accept the property until it was on the City’s terms, the City was able to improve and maintain the property to its satisfaction and not under a dedication. Moreover, the minutes of January 3, 1958 (L.F. 100) show a motion made, seconded and passed, “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,” after which a committee is appointed “to handle the negotiations”. Thereafter, the deed in question conveyed the property to the City “for park purposes only and none other, and to be known as Buehler Park.” (L.F. 37) The clear inference is that the City would not accept the park property by a deed of dedication but, instead, wanted a less restrictive use of the property. Under this language the City would be in compliance if it cleared the property, paved it over and used it for storage of park equipment, as long as it maintained the name “Buehler Park”.

As noted, the deed in question conveys the park property “to the City”, not by such language traditionally used in dedicating property to public use such as, “for the convenience and encouragement of the inhabitants...unto the inhabitants of the town aforesaid.” *Board Regents Normal School District v. Painter*, 14 S.W. 938 (Mo. 1890); or, “shall remain forever affected and appropriated to the public use to which they are respectively intended and that they, nor any part of them, shall never become private property.” *Id.* Or for instance, “is to be and remain a common forever.” *Cummings v. City of St. Louis*, 2 S.W. 130 (Mo. 1886). There is no language in the subject deed equivalent to that of the plat in question in *Haertlein v. Rubin*, 195 S.W.2d 480 (Mo. 1946) in which a strip of land was “reserved for park” and subdivision restrictions provided that all parks shown on the plat “are to be and shall be dedicated to public use forever.” (at 481). Nor does the language in the deed here rise to that of the plan in *Weakley v. State Highway Commission*, 364 S.W.2d 608 (Mo. 1963) in which the plat in question dedicated strips of land “to public use forever” (at 612).

Appellants ignore the seemingly more direct language of dedication, and facts more analogous to this case, set forth in the deed in question in *State ex. rel., Missouri Coalition for the Environment, id.*, in which their counsel participated, in favor of placing their reliance on this Court's decision in *Coffey v. State, ex. rel. County of Stone*, 893 S.W.2d 843 (Mo. App. S.D. 1995) and the Supreme Court's decision in *Hand v. City of St. Louis*, 59 S.W. 92 (Mo. 1900). Their reliance is misplaced.

In *Coffey*, this Court relied upon common law dedication to keep a road open for the benefit of adjoining landowners when the trial court had errantly found the road was public pursuant to statute. This Court utilized a reference in the deed that the road was to be maintained suitable for a school bus stop, noted a member of the county commission which had tried to deed the road back to the original grantor testified the commission's deed had been a mistake and also that one of the grantees of the quit claim deed which plaintiffs sought to set aside had previously testified the road was public. Essentially this Court's ruling estopped appellants from denying the public character of the road. In that context, the decision provides Appellants here with little, if any, support.

It should be noted there is no evidence the City of Rolla ever acknowledged by deed or act that Buehler Park was dedicated ground. Further, the Chamber's quit claim deed of April 14, 1997, constitutes an acknowledgement by that organization that its deed of thirty-nine (39) years earlier did not, and was not intended to, dedicate the ground to public use forever.

Similarly, the *Hand* decision provides little support for Appellants' position. In that case a descendant of the original grantor sought to divest the City of St. Louis of

property deeded to it “for the purpose of a public market, to be called ‘Shepherd’s Free Market,’ in which all persons having wholesale provisions for sale should be licensed to use and occupy stands free or at nominal rent”. The defendant, City of St. Louis, demurred to the allegations of plaintiffs’ petition, including that the City had abandoned the use of the property as a market and constructed a firehouse there instead. By its demurrer, the City acknowledged plaintiffs’ allegation of a dedication to public use but ultimately the court ruled against plaintiffs, holding that violation of such a dedication does not result in reverter to the grantor or his descendants and, in any case, too much time had passed (twenty-five years) to interfere with the City’s violative use of the property. In the end, the interpretation of the language in the deed in hand was not at issue.

Appellants’ argument fails in the end because they have not met their burden of proof on the first element of common law dedication, unequivocal action by the grantor evidencing an intent to dedicate the land to public use. *Whittom v Alexander-Richardson Partnership, id.*, at 507-08.

### III.

(IN RESPONSE TO APPELLANTS' POINT RELIED ON II)

**THE TRIAL COURT RULED CORRECTLY IN DENYING PLAINTIFFS' RELIEF AND THEREBY PERMITTING THE CITY TO SELL THE PROPERTY BECAUSE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROOF IN THAT THEIR EVIDENCE WAS NOT SO CONVINCING, FULL, PERSUASIVE AND COGENT AS TO LEAVE NO REASONABLE DOUBT OF THE EXISTENCE OF THE CHAMBER'S INTENT THAT THE 1958 DEED WAS NOT A DEDICATION TO PUBLIC USE AND THE CHAMBER'S ACTS WERE CONSISTENT WITH THE COURT'S FINDING THAT THE DEED WAS A CONVEYANCE SUBJECT TO A DEFEASIBLE FEE RETAINED BY THE GRANTOR.**

The second part of Appellants' brief gives extensive references and citations showing that if the park property was a dedication to public use the City is without authority to sell the property.<sup>4</sup> All of which supports the proposition, not really disputed,

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<sup>4</sup> Bogert, *The Law of Trusts and Trustees* § 34 (West Pub. Co. 1984); *Gaskins v. Williams*, 139 S.W.117, 120 (Mo. 1911); *Goode v. City of St. Louis*, 20 S.W.1048, 1053 (Mo. 1892); *City of St. Louis v. Bedal*, 394 S.W.2d 391, 396 (Mo. 1965); *Price v. Thompson*, 48 Mo. 361, 366 (1871); *Cummings v. City of St. Louis*, 2 S.W. 130, 131 (Mo. 1886); *Board Regents Normal School District No. 3 v. Painter*, 14 S.W. 938, 940 (Mo. 1890); 11A McQuilllin, *The Law of Municipal Corporations* § 33.75 (3<sup>rd</sup> ed. Revised,

that if the 1958 conveyance from the Chamber of Commerce to the City of Rolla was a dedication to public trust, the City is obligated to maintain the property as a public trust in perpetuity, with all the obligations and liabilities that entails. It is for that reason no court should impose a dedication on real property unless the evidence of intent meets the highest standard of proof.

“To establish the intention to dedicate necessary to support a common law dedication, ‘the proof should be so convincing, full, persuasive and cogent as to leave no reasonable doubt of the existence of the owner’s consent or intent, and the acts relied upon must not be consistent with any construction other than that of a dedication.’ *McIntosh v. City of Joplin*, 486 S.W.2d 287, 290 (Mo. App. 1972).” As cited in *State, ex. rel. Missouri Highway & Transportation Comm. v. London*, 824 S.W.2d 55, 62 (Mo. App. E.D. 1991)

In *London* the Court of Appeals, Eastern District, rejected a claim by the State Highway & Transportation Commission that strips of land parallel to a state highway were dedicated to public use. In so doing the court distinguished the plat purporting to contain the dedication from similar documents discussed in *Haertlein v. Rubin*, 195 S.W.2d 480 (Mo. 1946) and *Weakley v. State Highway Commission*, 364 S.W.2d 608 (Mo. 1963)

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West Group 2000); 4 Tiffany, *The Law of Real Property* § 1113 (3<sup>rd</sup> ed., Callaghan & Co. 1975) (citing *Cummings v. City of St. Louis*, 2 S.W. 130); *Hand v. City of St. Louis*, 59 S.W. 92, 93 (Mo. 1900)

where the Supreme Court had determined there were dedications contained in plats because the “*London*” plat failed to have such language as “[parks] are to be and shall be dedicated to public use forever.” (*Haertlein, Id.* at 481) and “to public use forever.” (*Weakley, Id.* at 612).

Furthermore, although Appellants correctly note a dedication to public use, which does not contain a reversionary clause, does not revert to the dedicator upon abandonment or misuse of the property, that is not applicable here because:

“While a condition subsequent may be inserted in a conveyance of lands in fee without using express terms of reverter upon the breach of such condition, if the deed in its entirety and the circumstances attending its execution demonstrate that the object of the grantors was to cause a reversion of the estate upon the subsequent happening of a lawful condition, yet no such conclusion will be drawn, if it may be avoided by any other reasonable construction of the language of the deed. This is the settled policy of the law, the reason of which is that estates once vested in fee ought not be uprooted, except upon proof of the happening of a lawful condition attached to the continuance of the estate by the terms of the deed, and further proof that it was the intention of the grantor in making the conveyance that it should revert when this condition ceased to exist.”

*Duncan v. Academy of Sisters of the Sacred Heart at St. Joseph, Mo.*, 350 S.W.2d 814, 817-8 (Mo. 1961), citing *Catron v. Scarritt Collegiate Institute*, 175 S.W. 571 (Mo. 1915).

Respondents do not contest that the City of Rolla will be obligated to use and maintain the property as a park, in perpetuity, if the property was, in fact, dedicated. Appellants spend an inordinate portion of their brief reiterating matters which are not in dispute but fail to address the seminal question, whether the 1958 deed constitutes a dedication to public use. It does not.

Since the conveyance in question here was made “in consideration of the sum of ten dollars” and in exchange for which the Chamber did “grant, bargain and sell, convey and confirm” to the City of Rolla, and not to the public or to the public use forever, it is entirely consistent to construe the warranty deed as being the conveyance of a defeasible fee, not a dedication. Accordingly, Appellants have failed in their burden of proof and the judgment of the trial court should be affirmed, whether or not the correct route was taken to reach that result. *Business Men’s Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999); *Ankrom v. Roberts*, 126 S.W.3d 798 (Mo. App. S.D. 2004).

### **CONCLUSION**

Appellants herein lack standing to challenge the sale of the Buehler Park property by the City of Rolla, Missouri. Failing that determination, since the deed by the Rolla Chamber of Commerce, Inc., to the City of Rolla in 1958 is not so convincing, full, persuasive and cogent as to leave no reasonable doubt that the Chamber intended to dedicate the property to public use forever, and instead is consistent with the conveyance of the property subject to a defeasible fee, the judgment of the trial court should be affirmed.

Respectfully submitted,

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**CERTIFICATION**

The undersigned certifies that on the \_\_\_\_\_ day of April, 2007, two copies of the brief of Defendants-Respondents, together with an electronic copy, were sent to counsel for Plaintiffs-Appellants 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 6,013 (all inclusive) words in the brief.

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John D. Beger



## **APPENDIX**