Pitfalls in the Use or Taking of Park Land

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1. Introduction

In general, Chapter 26 of the Texas Parks and Wildlife Code ("Chapter 26") limits a municipality's authority to approve programs or projects that require the use or taking of public land previously designated and used as a park or recreation area. However, a municipality may condemn or change the use of public park land or a recreation area if the municipality provides proper notice and makes specific findings. *See* Tex. Parks & Wild. Code Ann. §§ 26.001-26.002 (Vernon 2002). At first glance, this obscure chapter of the Texas Parks and Wildlife Code appears innocuous; however, its subject matter has been the basis for litigation on several occasions. Accordingly, the purpose of this paper is to inform municipal attorneys and provide practical guidance to help municipalities avoid the possible legal pitfalls that await the unwary municipality seeking to condemn or change the use of a public park land or recreation area.

2. Tex. Parks & Wild. Code § 26.001

Before taking or changing the use of park land or a recreation area, the governing body of a municipality must first determine that: "(1) there is *no feasible and prudent alternative* to the use or taking of such land; and (2) the program or project includes all reasonable planning to minimize harm to the land, as a park, recreation area …, resulting from the use or taking." *See* Tex. Parks & Wild. Code Ann. § 26.001 (Vernon 2002) (emphasis added). The second finding should be relatively simple for the governing body of a municipality to make. City staff can present evidence at a public hearing showing the level of planning involved in the project and the possible impact the new use or taking will have on the land. The language of the first finding, on the other hand, appears to be so stringent that it would preclude the governing body from satisfying the requirements

of Section 26.001. After all, one could conjure up a feasible and prudent alternative for almost every fact scenario that involves the use or taking of such land. Fortunately, several Texas cases address this issue and others relating to Chapter 26.

3. Change in Use or Taking

Public parks and recreation areas come in all shapes and sizes and are used in various ways. However, some park or recreation areas may have been designated by private individuals and abandoned, or designated for park and recreation purposes, but never used. Occasionally, a title search my reveal that certain property was deeded to a municipality for park purposes, but that the property was only temporarily used for park purposes. Along these lines, another governmental entity with eminent domain authority may seek to take a municipality's public park or recreation area, or a municipality may desire to change the use of a park or recreation area for a more suitable purpose. Whatever the case, it's important to keep Chapter 26 and the relevant case law in mind before changing the use or taking public land previously designated and used as a park or recreation area.

a. Changes in Use

In *Persons v. City of Fort Worth*, 790 S.W.2d 865 (Tex. App.—Fort Worth 1990, no writ), Persons sought to enjoin the City of Fort Worth from expanding and further developing its zoo and park. The expansion and development plans required the removal of tennis courts and other recreational areas and the addition of several new zoo exhibits, including retail concessions and other facilities. According to the plans, the fenced area of the zoo also divided the remainder of the park into two separate portions, which would make it more difficult for Persons to gain park access. *Id.* at 868. Persons alleged

that the City failed to comply with the notice and hearing provisions of Chapter 26. The City of Fort Worth denied that Chapter 26 applied to the facts in this case and it also denied that Persons had standing under Chapter 26. Along these lines, the City also contended that, even if Persons had standing, he failed to bring the suit within the prescribed thirty-day period. *Id.* at 867.

As a general rule, to establish standing, a party must demonstrate some interest peculiar to it individually and not as a member of the general public. *Scott v. Bd. of Adjustment*, 405 S.W.2d 55 (Tex. 1966). In this case, Persons contended that he used the park in numerous ways and that he would be inconvenienced by the park expansion and developments. However, Persons did not allege that his use of the park was unique or peculiar to him as compared to park uses by the public at large. Likewise, Persons failed to timely file suit within 30 days as required by Section 26.003. *See* Tex. Parks & Wild. Code Ann. § 26.003 (Vernon 2002). Accordingly, the court held that Persons lacked standing under Chapter 26, and Persons was otherwise barred for failure to timely file such action as required by Section 26.003. *Persons*, 790 S.W.2d 865 at 872.

The court also addressed the issue of whether or not Chapter 26 applies to a program or project that changes the use of public land from one park use to another park use. Under Chapter 26, the change in use of a public park or recreation area requires notice, public hearing, and particular findings. In this case, the City of Fort Worth did not comply with the notice and hearing requirements of Chapter 26. However, the zoo expansion and park development plans included a park use. Thus, the court reasoned that the requirements of Chapter 26 are not triggered where the change in park use is from one park use to another park use. Similarly, Chapter 26 does not proscribe a

particular degree of change in park use; instead, the degree of change in park use is left to the discretion of the City. *Persons*, 790 S.W.2d 865 at 875.

Approximately twelve years later, the Court of Appeals in Austin found the Court's reasoning in *Persons* to be controlling. In *Walker v. City of Georgetown*, 86 S.W.3d 249 (Tex. App.—Austin 2002, pet. denied), the Walkers argued that the City of Georgetown was required to comply with Chapter 26 before leasing parkland to a competing batting cage company. The Walker's argued that the batting cage lease to a private entity embodies a change in use because the batting cage will be a commercial facility. *Id.* at 254. The Court rejected the Walker's argument by citing Persons and holding that "the construction of batting cages on parkland consisting largely of baseball fields is not a change in use that would invoke the notice and hearing requirements of Chapter 26." *Id.* at 257.

b. Condemnation

In *Block House Mun. Util. Dist. v. City of Leander*, 291 S.W.3d 537 (Tex. App.—Austin 2009, no pet.), the City of Leander passed a resolution authorizing the condemnation of a portion of public parkland for a 24–inch wastewater line. The City of Leander complied with the requirements of Chapter 26 and determined that there was no feasible and prudent alternative to the taking of such land. The parkland was owned by the Block House Municipal Utility District ("District"); which, after a public hearing, determined that a feasible and prudent alternative route did exist for the wastewater line that did not require condemnation of the District's parkland property. Accordingly, the court addressed the issue of whether or not a city's decision to condemn public park property should be overturned if it can be found that a feasible and prudent alternative

exists. In general, the condemnor's determination that the exercise of eminent domain is necessary is conclusive absent a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously. *Whittington v. City of Austin,* 174 S.W.3d 889, 898 (Tex.App.—Austin 2005, pet. denied). In this case, the court determined that the plain language of Chapter 26 does not impose an affirmative obligation on the condemnor to plead and prove necessity. *Block House,* 291 S.W.3d 537 at 542. Instead, Chapter 26 merely requires the governmental entity make a determination. In fact, the record reflected, and the District did not contend, that the City of Leander conclusively made a determination of no feasible and prudent alternative. Therefore, the District had the burden to show that the City of Leander made such determination only by establishing that the City acted fraudulently, in bad faith, or arbitrarily and capriciously. *Id.* at 543. With this burden in mind, courts have held that an arbitrary and capricious act in the condemnation context is "willful and unreasoning action, action without consideration and in disregard of the facts and circumstances." *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 269 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (quoting *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex.Civ.App.—Fort Worth 1961, writ ref'd n.r.e.)). In this case, the City of Leander considered the testimony of its engineers and an independent consulting firm, and took into account the possibility of alternative routes. Thus, the District could not meet its burden and the court held that the City of Leander did not act arbitrarily and capriciously or abuse its discretion in determining that there was no feasible and prudent alternative to the taking of the District's parkland. *Block House,* 291 S.W.3d 537 at 548.

4. Legal Challenges

a. Judicial Review

Chapter 26 authorizes judicial review of a program or project that involves the taking or use of park land or a recreation area if a petition is filed within 30 days after the approval or disapproval of the project is announced. *See* Tex. Parks & Wild. Code Ann. § 26.003 (Vernon 2002). The language in Section 26.003 and the holding in *Persons* (790 S.W.2d 865 at 872) is clear, if a petition is not timely filed, then judicial review is barred; however, Section 26.003 does not identify the standard for review if a petition is timely filed. Fortunately, the court in *Block House* addressed this issue in the condemnation context. The *Block House* court reasoned that the scope of judicial review of a determination under Chapter 26 that no feasible and prudent alternative exists "mirrors the scope of review of a determination under local government code section 251.001(a) that the taking is necessary." *Block House*, 291 S.W.3d 537 at 542. Neither statute requires pleading or proof of the applicable determination. Instead, deference is given to the municipality's determination based on the longstanding precedent that the necessity or expediency of appropriating any particular property for public use is not a judicial question. *See Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 89 (1940). Therefore, a municipality's determination under Chapter 26 that there is no feasible and prudent alternative to the use or taking of parkland is subject to judicial review only where there is a showing that the municipality made the determination fraudulently, in bad faith, or arbitrarily and capriciously. *See Whittington v. City of Austin*, 174 S.W.3d 889, 898 (Tex. App.—Austin 2005, pet. denied) (citing *Higginbotham*, 143 S.W.2d at

88). The requirement under Section 26.001(a)(2) to determine that a project includes all reasonable planning to minimize harm to the park or recreation area was not addressed in *Block House*; however, the same reasoning applied by the court in *Block House* should be extended by future courts to cover determinations made under Section 26.001(a)(2).

b. Standing

In *Walker v. City of Georgetown*, 86 S.W.3d 249 (Tex. App.—Austin 2002, pet. denied), the Walkers sought to enjoin the City of Georgetown from entering into a lease agreement for batting cages on a public park owned by the City. The Walkers owned and operated a private golf center that also included plans for constructing and operating a batting cage. Shortly after beginning construction on the batting cage, the Walkers discovered that the City of Georgetown entered into a lease agreement for batting cages at San Gabriel Park, which is primarily a baseball park, consisting of several baseball and softball fields. *Id.* at 252. The lease covered less than one percent of the park, required the lessee to pay $400 a month, and gave the option to renew the lease after ten years. Among other things, the lease also provided that the batting cage facility would become the property of the City upon termination of the lease, if the parties exercised the option to renew the lease, and gave the City of Georgetown the authority to approve advertising and terminate facility staff. *Id.* As a general rule, to establish standing, a party must demonstrate some interest peculiar to it individually and not as a member of the general public. *Walker*, 86 S.W.3d 249 at 253 (citing *El Paso Cmty. Partners v. B & G/Sunrise Joint Venture*, 24 S.W.3d 620, 624 (Tex. App.—Austin 2000, no pet.). Specifically, the Walkers have standing to sue if: (1) they have sustained, or are immediately in danger of sustaining, some direct injury as a result of the wrongful act of which they complain; (2)

there is a direct relationship between the alleged injury and the claim to be adjudicated; (3) the Walkers have a personal stake in the controversy; (4) the challenged action has caused the Walkers some injury in fact, either economic, recreational, environmental, or otherwise; or (5) the Walkers are an appropriate party to assert the public interest in the matter as well as his own interest. *Id.* In this case, the Walkers alleged that they incurred $2,355.84 in start-up and construction expenses for the batting cages. *Id.* at 253. The Walkers also argued that, as competitors, they are suffering an injury peculiar to themselves. *Id.* More particularly, the Walkers asserted that their project was no longer economically viable because they could not compete with a company that enjoyed the benefit of a lease of city property at below market rates. *Id.* Therefore, the court concluded that the Walkers pled a sufficiently particularized injury to confer standing to sue. *Id.*

The *City of Heath v. Duncan*, 152 S.W.3d 147 (Tex. App.—Dallas 2004, pet. denied), is another case that addresses the issue of standing as it relates to Chapter 26. In *Heath*, owners of property in a subdivision challenged the City's expenditure of public funds to construct a water tower on property previously dedicated as a municipal park. The park property was developed in conjunction with the Texas Parks and Wildlife Department and use of the land was limited by deed restrictions that prohibited a change in use to something other than parkland. *Id.* at 150. Among other things, the subdivision property owners alleged that the expenditure of funds for the water tower is illegal due to the City's failure to comply with the requirements of Chapter 26. *Id.* The City of Heath contended that the property owners lacked standing to seek injunctive and declaratory relief as taxpayers. In the case of taxpayers, unless standing is conferred by statute,

taxpayers must establish a particularized injury distinct from that suffered by the general public in order to challenge a government action. *Heath,* 152 S.W.3d 147 at 153 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555–56 (Tex. 2000)). However, a taxpayer may sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury. *Id.* at 153. Chapter 26 requires notice and a public hearing before any land dedicated and used as a park can be converted to another type of use. *See* Tex. Parks & Wild. Code Ann. § 26.002 (Vernon 2002). In the instant case, the City did not provide notice or hold a public hearing addressing the change in the use of the parkland as required by Section 26.002. Therefore, the court held that standing was conferred under the taxpayer exception, without a showing of particularized injury, due to the City's failure to comply with Chapter 26. *Heath,* 152 S.W.3d 147 at 153.

5. Other Issues to Consider

a. Zachry v. City of San Antonio, 305 S.W.2d 558 (1957)

In *Zachry v. City of San Antonio,* 305 S.W.2d 558 (1957), the City of San Antonio signed a forty-year lease with a private developer to build an underground parking garage on city parkland and later successfully sought to void the lease. The proposed project included, among other things, the installation of tire shops, repair shops, ramps, and the placement of escalators in the center of the park. *Id.* at 559. The proposed plans required the developer to remove all of the surface area of the park until construction was completed and to replant and refit for park purposes only that portion of the surface area unused by the garage. *Id.* at 562. The Texas Supreme Court held that the lease was null and void and concluded that land dedicated as a public park could not be put to an inconsistent use. *Id.* at 563. One could view Chapter 26 (adopted in 1969) as the Texas

Legislature's response to the Supreme Court's holding in Zachry (decided in 1957); however, the holding in Zachary has not been expressly overruled by Texas courts. The court in *Walker* found that Zachary was inapplicable were there facts do not represent a change in use. *Walker,* 86 S.W.3d at 258. Accordingly, the issue of whether or not a court would give effect to *Zachry* where a city has complied with the requirements of Chapter 26 remains unresolved.

b. Sale or Lease?

Two attorney general opinions also address issues related to Chapter 26, in particular they address the applicability of Chapter 26 to the lease or sale public land dedicated as a park or recreation area. *See* Op. Tex. Att'y Gen. No. MW–471 (1982); Op. Tex. Att'y Gen. No. GA-0558 (2007). In MW–471, the City of Rusk requested an opinion regarding its authority to sell the timber rights to a public park. The attorney general concluded that the sale of perpetual rights to timber located on public parkland was a permanent conveyance of an interest in land; thus, the sale would be subject to the election requirements of Texas Local Government Code Section 253.001. Along those lines, the attorney general also stated that the City of Rusk would be required to comply with Chapter 26 and concluded that, "The city is precluded from effectuating a sale of timber if said sale constitutes using the land for something other than park or recreational purposes." *See* Op. Tex. Att'y Gen. No. MW–471 (1982) (citing *Zachry v. City of San Antonio,* 305 S.W.2d 558 (1957)).

In GA-0558, the attorney general addressed the issue of whether a home-rule municipality may lease or sell a portion of an existing city park to a school district. First, the attorney general concluded, "That Texas Local Government Code Section 253.001

does not apply to a lease of land, nor does it apply to a municipality's conveyance of parkland to an entity that has the power of eminent domain, such as a school district." *See* Op. Tex. Att'y Gen. No. GA-0558 (2007). However, Chapter 26 compliance is still required if the lease or sale involves the use or taking of parkland. Likewise, compliance with Local Government Code Section 272.005 is required if the lease to another political subdivision serves a public purpose of the municipality. *See* Tex. Loc. Gov't Code Ann. § 272.005 (Vernon 2005). Along these lines, the attorney general addresses the interplay between Chapter 26 and Local Government Code Section 272.005. Specifically, in the context of a *lease*, Section 272.005(b)(3) abrogates the requirement in Chapter 26 to publish notice in a qualifying newspaper of general circulation. On the other hand, in the context of a *sale* of parkland or recreation area by a home-rule municipality to another political subdivision, the notice and publication requirements of Chapter 26 must be followed. *See* Tex. Loc. Gov't Code Ann. § 272.001(l) (Vernon 2005).