

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 90CV2822, Courtroom 21

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

ANNA D. MCRAE; MARK E. APPEL; KATHERINE POPPE McNEIL; GREGORY M. ROSE; ELAINE F. BROST; GEORGE K. MCLEOD; BARBARA WRIGHT; MARK P. KELLY; PATRICIA L. PAUL; DAVID V.S. KNOWLES; CYNTHIA J. CRONAN; and DENIS FRANK,

Plaintiffs,

v.

CAROLYN ETTER and DON ETTER, co-managers, Department of Parks and Recreation, City and County of Denver, DOROTHY NEPA, zoning administrator, City and County of Denver; FEDERICO PENA, Mayor, City and County of Denver, and CITY AND COUNTY OF DENVER, a municipal corporation,

Defendants.

Pursuant to the findings of fact and conclusions of law announced in open court on July 25, 1990, a copy of which is attached hereto and incorporated herein by reference, at which time all parties were present in person or through counsel, the Court orders, adjudges, decrees and declares that the proposed use of the Pavilion at City Park located in the City and County of Denver, as a headquarters administrative office building for the Department of Parks and Recreation of the City and County of Denver would be an illegal use of City Park, which land was acquired by Denver in 1882 for public park purposes and dedicated to such use by the City Council at that time and by the Charter of the City and County of Denver and by the continued uninterrupted use of the land as a public park since its acquisition in 1882.

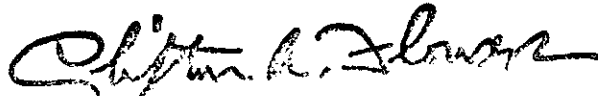
The Court further order, adjudges and decrees and declares that the proposed use of the Pavilion at City Park as a headquarters administrative office building for the Department of Parks and Recreation would not be a proper and legal use by right or a proper and legal accessory use pursuant to the Zoning Ordinances of the City and County of Denver. The Court further orders, adjudges, decrees and declares that the zoning Administrator of the City and County of Denver does have jurisdiction and the obligation to enforce the Zoning Ordinances

in the public parks in the City and County of Denver, and in particular City Park.

It is further, ordered, adjudged and decreed by the Court that a permanent injunction be and the same is hereby entered enjoining and restraining Carolyn Etter and Don Etter, Co-Managers of the Department of Parks and Recreation, City and County of Denver, Dorothy Nepa, Zoning Administrator, City and County of Denver, Federico Pena, Mayor, City and County of Denver, and the City and County of Denver, a municipal corporation, their officers, agents, servants and employees and all persons in active concert or participation with them, who receive actual notice of this order, from using or attempting to use the Pavilion at City Park or any other portion of City Park as the headquarters administrative offices for the Department of Parks and Recreation of the City and County of Denver.

DONE this 7th day of August, 1990, nunc pro tunc to the 25th day of July, 1990.

BY THE COURT:



CLIFTON A. FLOWERS
District Judge

cc: William G. Imig, Esq.
Walter W. Garnsey, Jr., Esq.
Dudley R. Griggs, Esq.
John L. Stoffel, Jr., Esq.

1 DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

2 Civil Action No. 90CV2822, Courtroom 21

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4 REPORTER'S TRANSCRIPT

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6 ANNA D. McRAE, et al.,

7 Plaintiffs,

8 v.

9 CAROLYN ETTER, et al.,

10 Defendants.

11 -----

12 The trial in this matter recommenced on Wednesday,
13 July 25, 1990, before the HONORABLE CLIFTON A. FLOWERS,
14 Judge of the District Court.

15

16 FOR THE PLAINTIFFS: William G Imig, Esq.
Walter W. Garnsey, Jr., Esq.
17 Dudley R. Griggs, Esq.

18 FOR THE DEFENDANTS: John L. Stoffel, Jr., Esq.
Assistant City Attorney

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1 THE COURT: The record should reflect that
2 the Court has examined the file in this matter and has
3 heard the evidence and the arguments of counsel and has
4 observed the demeanor and determined the credibility of
5 the witnesses and has examined the exhibits herein, and
6 based thereon, the Court finds, concludes and orders as
7 follows: The Court finds that it has jurisdiction over
8 the parties and the subject matter of this proceeding.
9 The Court further incorporates into its findings of
10 fact the stipulated facts which are in evidence as
11 Exhibit 8.

12 The Court further finds as facts those
13 admissions of the Defendants as set forth in their
14 Answer herein and which the Court will highlight as
15 follows: That the Defendants have developed plans for
16 the renovation of the City Park Pavilion to be used for
17 the administrative offices for the Department of Parks
18 and Recreation. Further, that the original 1882
19 ordinance authorizing the acquisition of City Park
20 indicated that the lands were being acquired for park
21 purposes. Further, that City Park is a designated park
22 pursuant to sections A4.4 and A4.4-1 of the Denver City
23 Charter.

24 Further, that parks may only be used for park
25 purposes; that City Park is zoned R-1 under the Denver

1 Zoning Ordinances which allows a public park as a "use
2 by right"; that the applicable Zoning Ordinances of the
3 City and County of Denver only authorize "accessory
4 uses" to a "use by right" which are clearly incidental
5 and customary and commonly associated with the
6 operation of a "use by right". Further, the Defendants
7 have admitted in their Answer that the Pavilion was
8 constructed in the mid 1890's and has been used over
9 the years as an open air shelter and as an eating area.
10 Further, that the Pavilion is an integral part of City
11 Park.

12 Further, the Defendants admit in their Answer
13 that the initial development plans of the Park and
14 Recreation Department's administrative offices called
15 for at least seventy-five full-time administrative
16 employees. Further, that the administrative employees
17 of the Parks and Recreation Department intended to be
18 housed in the Pavilion are not limited to only those
19 employees whose primary responsibility is the operation
20 and maintenance of City Park. And lastly, a material
21 admission of the Defendants in their Answer is that the
22 employees proposed to be housed in the Pavilion will
23 transact departmentwide programs and parks, including
24 City Park.

25 In addition to those findings which are

1 stipulated to in Exhibit 8 and those material facts
2 which the Defendants admitted in their Answer, the
3 Court would make further findings of fact: That the
4 Plaintiffs are residents and taxpayers of the Defendant
5 City and County of Denver. That the Defendants,
6 Carolyn and Don Etter, are the duly-appointed and
7 acting Co-Managers of the Department of Parks and
8 Recreation of the City and County of Denver; that the
9 Defendant, Dorothy Nepa, is a duly-appointed and acting
10 Zoning Administrator for the City and County of Denver;
11 that the Defendant, Federico Pena, is the duly-elected
12 Mayor of the City and County of Denver.

13 The Court further finds that the Denver City
14 Park, which is the subject matter of this proceeding,
15 is located within the perimeters of the City and County
16 of Denver and is bounded generally on the east by
17 Colorado Boulevard, on the south by East 17th Avenue,
18 on the west by York Street, and on the north by East
19 23rd Avenue. The Court further finds from the evidence
20 that this property consists of approximately 320 acres,
21 more or less, exclusive of the golf course, and was
22 acquired by the City of Denver in 1882 for public park
23 purposes, and that this property has been used
24 continuously since its acquisition as a public park.
25 The Court further finds from the evidence and the

1 admission of the Defendants to that effect in their
2 trial brief that the parcel of land known as City Park
3 has been dedicated by the City for public park purposes
4 since its acquisition by the City in 1882.

5 The Court further finds that there has been
6 for many years a Pavilion in City Park located on the
7 west side of the so-called "Big Lake". And the Court
8 further finds from the testimony of the witness Don
9 Etter that the Pavilion was historically used for
10 serving of food and also as an open veranda-type
11 building. And the Court would further find, by way of
12 elaboration of the stipulated facts, that under the
13 proposed plan to relocate the administrative offices of
14 the Department of Parks and Recreation in the City Park
15 Pavilion, that all of Denver's numerous and widespread
16 park facilities and Denver's recreation system will be
17 administered out of that office in the Pavilion in City
18 Park. And this would include, as incidental thereto,
19 the housing of the facilities for the granting of
20 various permits that the Parks and Recreation
21 Department grants. Persons in general having business
22 with the Department of Parks and Recreation would use
23 the offices at the Pavilion and various vendors who do
24 business with the Department of Parks and Recreation
25 would also have to use the facilities at the Pavilion

1 at City Park.

2 The Court further finds that under Denver's
3 R-1 zoning, a public park is expressly authorized as a
4 use by right, and the Court further finds that under
5 Denver's R-1 Zoning Ordinance, an office building is
6 not authorized expressly, at any rate, as a use by
7 right. The Court further finds that pursuant to
8 sections A4.4 and A4.4-1 of the City Charter mandate
9 that park facilities be used only for park and
10 recreational purposes. The Court further finds that
11 the Plaintiffs, prior to the filing of the instant
12 lawsuit, inquired of the Defendant Nepa as to whether
13 she intended to enforce the R-1 zoning with respect to
14 the intended use of the Pavilion as an office facility
15 for the Department of Parks and Recreation, but that
16 the Defendant Nepa informed the Plaintiffs through
17 their counsel that she did not feel that she had any
18 jurisdiction over the matter.

19 The Court further finds, pursuant to section
20 A4.4 and A4.4-1 of the Denver City Charter, that those
21 two sections purport to vest exclusive management,
22 operation and control of all of the city parks in the
23 Manager of the Department of Parks and Recreation. The
24 Court further finds that pursuant to the Denver Zoning
25 Ordinance, specifically section 59-132(3), that

1 accessory uses are defined as follows: "Accessory
2 Uses. Incidental only to a use by right, any use which
3 complies with all of the following conditions may be
4 operated as an accessory use and need not be enclosed."
5 Subsection a., "Is clearly incidental and customary to
6 and commonly associated with the operation of the use
7 by right."

8 Pursuant to the foregoing findings of fact,
9 the Court makes the following conclusions of law: The
10 Court concludes that when the land upon which City Park
11 is situate was acquired by the City of Denver in 1882,
12 it was thereupon dedicated by the City Council for
13 public park purposes, and I think in view of the
14 evidence in this case, that fact is really undisputed.
15 There is no question but that City Park has been not
16 only acquired originally by the City of Denver and
17 dedicated by the City Council for public park purposes,
18 but the evidence shows that that fact is not in
19 dispute. So City Park is a dedicated public park that
20 is dedicated for public park purposes.

21 The first issue really in this case, as I see
22 it, is whether or not the use of the Pavilion for
23 administrative offices for the Department of Parks and
24 Recreation is a legal use of that property in view of
25 the fact that City Park has been dedicated for public

1 park purposes. The law in Colorado on that subject is
2 not too plentiful, but there are several cases, I
3 think, that bear on that issue. Probably the principal
4 case is the McIntyre v. Board of Commissioners case,
5 which appears at 61 P. 237 (Colo. App. 1900). That was
6 the case, as you know, where there was a dedicated park
7 in Colorado Springs, and the City of Colorado Springs
8 attempted to convey the park to the county
9 commissioners of El Paso County for use as a
10 courthouse. The Supreme Court held that that could not
11 be done because the use would be inconsistent with the
12 purposes and objectives of the dedication of the
13 property as a public park.

14 The court in McIntyre, in effect, held that
15 property that's dedicated as a public park is held by
16 the governmental agency that holds it, and in that
17 instance, the City of Colorado Springs, in this
18 instance, the City and County of Denver, that the
19 property is held by the governmental authority in trust
20 for the benefit of the members of the general public,
21 and that the City cannot impose upon such dedicated
22 property any servitude or burden inconsistent with the
23 dedication of the property for public park purposes.
24 The court in the course of its opinion said that, "The
25 term 'park' in its ordinary and useful significance,

1 imports a plot of ground in a city or town set apart
2 for ornament, a place which the residents of the
3 municipality may frequent for pleasure and exercise or
4 amusement."

5 The court went on to say that, "It is,
6 besides, conducive to health; furnishing to the
7 citizens of crowded cities a place where they may
8 breathe the pure air, untainted by smoke and noxious
9 gases." You have to keep in mind, this opinion was
10 written ninety years ago, and that portion of the
11 opinion in McIntyre probably is not too significant in
12 1990, but I think the intent is the same. And the
13 court concluded, insofar as material to this case, I
14 think, that they said, "It cannot be contended that the
15 erection of a large building, namely, the courthouse,
16 in such a place, however massive, grand or beautiful
17 may be its architecture, to be used by either city or
18 county for the carrying on of its business is
19 consistent with this use," that is, as a public park.
20 The court went on to hold in that case that, "By the
21 great weight of authority is that a resident taxpayer
22 of a municipality has the right to maintain a suit to
23 prevent the unlawful disposition by the municipal
24 authorities of the money or property of the town, and
25 to restrain the diversion of property in his town from

1 any public use, in which he shares, to which it has
2 been dedicated."

3 I conclude that the proposed use of the
4 Pavilion at City Park as an office building for the
5 Parks and Recreation Department is a prohibited use of
6 City Park and the Pavilion in particular. I find and
7 conclude that the proposed use of the Pavilion for such
8 purposes would be inconsistent with the historical use
9 to which City Park has been put and would be
10 inconsistent with the dedication of City Park as a
11 public park. The case of Melin v. School District, the
12 Illinois case which was cited in the briefs, and the
13 case of Kelly v. Town of Hayward, the California case
14 cited in the brief, both buttress the proposition that
15 Denver may not appropriate City Park for the
16 administrative offices of the Parks and Recreation
17 Department, for to do so would be to interfere with the
18 public's common use and enjoyment of the park. And I
19 note that the California case cites the Colorado case
20 of McIntyre v. Board of County Commissioners as
21 authority.

22 The case of Baker v. Norwalk, which is the
23 Connecticut case cited in the briefs, held -- and I'm
24 not quoting directly, but in substance, that case held
25 a park is commonly understood to mean a place of

1 ornament, recreation and amusement, but not a place for
2 a civic center or city hall. There was some dispute in
3 the evidence in this case as to whether the proposed
4 use of the Pavilion to house some seventy-five plus or
5 minus employees of the Department of Parks and
6 Recreation would really be using that Pavilion for
7 governmental office purposes, and I would find as a
8 fact and conclude as a matter of law that the use of
9 the Pavilion for that purpose would undoubtedly be
10 using the Pavilion for governmental office purposes.
11 Whether you call it an extension of City Hall or
12 whatever, any suite of offices or set of offices that
13 houses seventy-five persons, more or less, is certainly
14 the use of the premises for governmental office
15 purposes. It would, in fact, be an office building,
16 and I really think that that's virtually indisputable
17 from the evidence before the Court.

18 The McLauthlin case which has been cited by
19 the parties, another Colorado case, McLauthlin v. City
20 and County of Denver, 280 P.2d 1103 (Colo. 1955), that
21 case involved Congress Park and whether or not it was
22 within the discretion of the then Manager of Parks and
23 Recreation to use part of the park for a swimming pool
24 and the necessary bathhouse to accompany the same. And
25 the McLauthlin court identified various uses that are

1 consistent with park purposes and upheld the building
2 of a swimming pool and a bathhouse at Congress Park as
3 being consistent with proper park purposes. And it
4 goes without saying that amongst those proper park
5 purposes delineated by the McLauthlin court, a
6 governmental office building was not one of those
7 proper and legal uses.

8 Just one other comment. I'm satisfied that
9 under the Denver Charter, the management, control and
10 operation of the parks and recreational facilities
11 within the City and County of Denver are clearly vested
12 in the Manager of that Department, or in this instance,
13 the Co-Managers, but I don't believe that that grant of
14 authority vests the Manager with unfettered authority
15 or discretion to use city parks for any use that the
16 Manager determines. And that's been one of the
17 contentions in this case, that the Charter gives the
18 Manager exclusive management and control and operation
19 of the City Park and, therefore, the Manager can use
20 these parks for what the Manager sees fit. I don't
21 believe that. It has to be a legal use. If it's not a
22 legal use both under general law and under the Denver
23 Zoning Ordinances, then the Manager can't use it for
24 such a purpose. And I doubt that the Manager would
25 seriously question that.

1 For example, and probably a bad example, but
2 the Manager couldn't put a hazardous waste plant in the
3 middle of City Park just because he's the Manager and
4 those facilities are under his exclusive management and
5 control. Under general law and under the City
6 ordinances, it has to be a legal use, and if it's a
7 legal use, such as was involved in the Congress Park
8 case, the McLauthlin case, then there is a presumption
9 that the decision of the Manager is correct and that
10 decision will not be set aside except for abuse of his
11 discretion. But that's not the situation that we have
12 in the case at bar. I'm satisfied that under the law,
13 the proposed use of the Pavilion at City Park for the
14 general administrative offices of the Department of
15 Parks and Recreation is an illegal use of that property
16 under the general law of this state involving dedicated
17 public parks.

18 Assuming, arguendo, that the proposed use of
19 the Pavilion for the administrative offices of the
20 Parks and Recreation Department is not illegal as being
21 in violation of the dedicated purposes of City Park,
22 then the next question is whether, under the Zoning
23 Ordinances of the City and County of Denver, such a use
24 can be made of the Pavilion. I think that question
25 must be answered in the negative as well. As

1 previously noted, a City Park is zoned R-1 and a public
2 park is a designated use by right within an R-1
3 district. An office building is not a designated use
4 by right within an R-1 district.

5 And there's no doubt but that the Zoning
6 Ordinances of the City and County of Denver apply to
7 the public parks, and in particular to City Park. And
8 that property can only be used by the City in keeping
9 with the Zoning Ordinances. And within a particular
10 zoning district, only those uses which are uses by
11 right or those which are permitted as an accessory use
12 may be permitted. As I think previously noted in the
13 stipulated facts, but at any rate, the Denver Zoning
14 Code, section 59-132(1)m. defines a public park as a
15 parcel of land intended to promote recreational
16 activities by the general public. And City Park,
17 undoubtedly, falls within the definition of a public
18 park under Denver's Zoning Code.

19 The real question then, I think, insofar as
20 zoning laws are concerned, is whether the use of the
21 Pavilion as proposed would be an accessory use to City
22 Park. Under the accessory use provision of the City
23 Zoning Ordinance, an accessory use is a use that is
24 "Incidental only to a use by right," that is to say,
25 "any use which complies with all of the following

1 conditions," one of which in subsection a., "Is clearly
2 incidental and customary to and commonly associated
3 with the operation of the use by right." In the case
4 of East Side Baptist Church v. Klein, which is cited in
5 the briefs and which involved Denver property, the
6 court held that whether an accessory use is clearly
7 incidental to a use by right is a question of fact.
8 And they further held in that case that to be clearly
9 incidental, the accessory use must be clearly
10 subordinate to the primary use by right.

11 And in the case at bar, I find, as the fact
12 finder, that an administrative office building housing
13 some seventy-five plus or minus employees of the Parks
14 and Recreation Department is not a clearly subordinate
15 use to the primary use of the property in question as a
16 public park. The housing of that many people, Parks
17 and Recreation Department personnel, whose duties in
18 major part would have nothing to do with the management
19 and control and operation of City Park, I find, is not
20 a use that would be clearly subordinate to City Park as
21 such. I think what the ordinance contemplates and what
22 the court in the East Side Baptist Church case was
23 saying is that to be a subordinate use or a use that's
24 commonly associated with the use by right, it must be a
25 use that has to do with the normal day-to-day operation

1 of the primary use, in this instance, City Park.

2 Undoubtedly, the use of the Pavilion as the
3 administrative office headquarters for the Department
4 of Parks and Recreation for the conduct of that
5 Department's general day-to-day business would be
6 incidental to the operations of that Department, but I
7 don't think it can be said to be incidental to the use
8 of City Park for public park purposes. So I find and
9 conclude that the proposed use would not be clearly
10 incidental to the primary use of City Park for park
11 purposes.

12 I further find and conclude that the use of
13 City Park for the headquarters office building of the
14 Department of Parks and Recreation cannot be said to be
15 a customary park use. The fact of the matter is that
16 this is the first instance -- at least I think the
17 evidence supports that finding and conclusion, this is
18 the first instance ever that a park such as City Park
19 has been proposed to be used for governmental office
20 purposes as a headquarters office. So it can't be said
21 that this is a common use of City Park facilities owned
22 by Denver.

23 The fact that public parks in other
24 communities in Colorado and in other states throughout
25 the United States may be used to house the

1 administrative offices of the respective parks
2 departments, I think, has no real bearing on the
3 question whether City Park can be used for such
4 purposes. We don't know what the general law in those
5 other states is. We don't know whether those parks
6 were all dedicated parks. We don't know what the
7 zoning laws or ordinances in those various states and
8 communities are. So I really don't place much
9 significance on the fact that in Illinois, for example,
10 at some public park, the parks department housed its
11 administrative offices therein. That has nothing to do
12 with this case. For example, the Rocky Mountain
13 National Park, I think it's probably common knowledge
14 that there are park headquarters in Rocky Mountain
15 National Park, but I don't think we can compare Rocky
16 Mountain National Park to Denver's City Park.

17 Incidentally, Denver's City Park was referred
18 to by Mr. Lewis, the witness Harry Lewis, as a crown
19 jewel of Denver's park system, and I think he's right.
20 And I think even Mr. Etter, I forgot his exact
21 terminology, but Mr. Etter's testimony was to the same
22 effect, that this is a real jewel of a park, and I
23 think it should be kept as such. So I would conclude
24 that the proposed use would not be a customary use of
25 City Park property. And the other prong of the

1 accessory use ordinance requires that it be commonly
2 associated with the operation of the use by right, and
3 I don't think that the proposed administrative offices
4 would be or could be said to be commonly associated
5 with a public park use.

6 As the court stated in the City of Sheridan
7 v. Keen case, which is reported at 524 P.2d 1390 (Colo.
8 App. 1974), an accessory or incidental use has been
9 defined as a use customarily incident to the principal
10 use and so necessary or commonly to be expected in
11 conjunction therewith that it cannot be supposed the
12 ordinance was intended to prevent it. I think, as has
13 previously been noted, the proposed use of the Pavilion
14 for administrative office purposes is not a use that is
15 customarily incident to the principal use of City Park
16 for public park purposes, and I don't think it can be
17 said to be a commonly expected use in conjunction with
18 City Park's use as a public park.

19 The proposed use of the Pavilion for the
20 administrative offices of the Parks and Recreation
21 Department is not a use that is either necessary to the
22 operation of City Park or one that is commonly expected
23 to be found in conjunction with a public park such as
24 City Park. So the Court concludes, insofar as the
25 Zoning Ordinance and accessory use provision, that the

1 proposed use of the Pavilion at City Park for the
2 administrative offices and headquarters for the Parks
3 and Recreation Department would not be a permissible
4 accessory use to the park itself pursuant to the
5 applicable Zoning Ordinances of the City and County of
6 Denver.

7 The Court would further conclude that, as
8 stated in the McLauthlin case, the Charter does vest
9 the Manager of the Parks and Recreation Department with
10 sole management and control over the city parks, and so
11 long as the Manager exercises that discretion fairly,
12 reasonably and legally, the Court will not substitute
13 its opinion for that of the Manager in deciding the
14 various uses to which a park may be put. But where, as
15 here, the Manager seeks to use a public park for a
16 purpose in violation of the dedication of that park,
17 then the Manager has abused his or her discretion and
18 the Court will intervene. And the Court concludes that
19 the use of the Pavilion for administrative office
20 purposes is not a park purpose for which City Park was
21 dedicated and is therefore illegal. And as I've
22 previously indicated, I also conclude that the Pavilion
23 cannot legally be used for administrative office
24 purposes as an accessory to City Park for the reasons
25 heretofore stated.

1 The Court further concludes that the Defendant
2 Dorothy Nepa, in her capacity as Zoning Administrator,
3 does have jurisdiction to enforce the Zoning Ordinances
4 with regard to the public parks owned by the City and
5 County of Denver, and particularly with respect to the
6 enforcement of Denver's R-1 Zoning Ordinance with
7 regard to the uses to which the Pavilion in City Park
8 may be put. I would further find and conclude that the
9 bond issue of last fall has no real bearing on the
10 issues before the Court. The electorate can't change
11 the Zoning Ordinances by voting on a bond issue, and it
12 can't undo the dedication of City Park as a public park
13 by virtue of a city bond election. So I really don't
14 believe that the bond issue has any bearing on this
15 case at all.

16 So in conclusion, I would simply state that
17 the issue here is not the propriety or the desirability
18 of using the Pavilion for the purposes sought to be
19 used by the Co-Managers of the Department of Parks and
20 Recreation. Let me say that the Co-Managers, Don and
21 Carolyn Etter, are to be commended for their efforts
22 with respect to the parks of the City and County of
23 Denver and their management thereof. And I would also
24 commend Mr. Harry Lewis, who testified in this case.
25 Their efforts to do something constructive with the

1 Pavilion of City Park is to be commended, and it's a
2 laudable effort, but I find and conclude that what they
3 want to do with it is simply illegal not only under the
4 general law, but contrary to the City's Zoning
5 Ordinances.

6 There must be many uses that the Pavilion
7 could legally be used for that should be considered and
8 explored. The Congress Park case lists many uses that
9 are clearly legal, swimming pools -- I don't think the
10 Congress Park case mentions a skating rink -- but the
11 Court can think of various uses that would comport with
12 the dedicated use of the crown jewel City Park as a
13 public park, and I'm satisfied to use it for office
14 purposes is not.

15 A pavilion, incidentally, has been defined --
16 I'll just mention this in closing, this is by
17 definition in the World Book Encyclopedia Dictionary, a
18 pavilion is defined as follows: "A light building,
19 usually one somewhat open used for shelter, pleasure,
20 et cetera, in other words, a dance pavilion." If the
21 Pavilion were converted to general offices for the
22 Parks and Recreation Department, it would clearly not
23 any longer be a pavilion, at least by definition.

24 Pursuant to the foregoing findings of fact
25 and conclusions of law, the Court orders, adjudges,

1 decrees and declares that the appropriate use of the
2 Pavilion at City Park as a headquarters administrative
3 office building for the Defendant Parks and Recreation
4 Department of the City and County of Denver would be an
5 illegal use of the City Park land, which land was
6 acquired by Denver in 1882 for public park purposes and
7 so dedicated to such use by the City Council at that
8 time and by the continued uninterrupted use of the land
9 as a public park since its acquisition in 1882.

10 The Court further orders, adjudges, decrees
11 and declares that the proposed use of the Pavilion at
12 City Park as a headquarters administrative office
13 building for the Parks and Recreation Department would
14 not be a proper and legal accessory use pursuant to the
15 Zoning Ordinances of the City and County of Denver.
16 The Court further orders, adjudges, decrees and
17 declares that the Zoning Administrator of the City and
18 County of Denver does have jurisdiction to enforce the
19 Zoning Ordinances in the public parks in the City and
20 County of Denver, and in particular City Park.

21 It's further ordered, adjudged and decreed by
22 the Court that a permanent injunction be and the same
23 is hereby entered enjoining and restraining the
24 Defendants, their officers, agents, servants and
25 employees and all persons in active concert or

1 participation with them, who receive actual notice of
2 this order, from using or attempting to use the
3 Pavilion at City Park or any other portion of City Park
4 as the headquarters administration offices for the
5 Parks and Recreation Department of the City and County
6 of Denver.

7 Anything else, Mr. Garnsey?

8 MR. GARNSEY: Nothing else, Your Honor.

9 Thank you.

10 THE COURT: Anything else, Mr. Stoffel?

11 MR. STOFFEL: Nothing else, Your Honor.

12 THE COURT: Either of you want to prepare a
13 written order? Would you like a written order, Mr.
14 Stoffel -- I mean, Mr. Garnsey?

15 MR. GARNSEY: I'd be happy to prepare a
16 written order to submit to the Court.

17 THE COURT: I think at least under Rule 65,
18 injunctions have to be, I believe, in writing. If you
19 want me to check that, I will.

20 MR. GARNSEY: We're happy to do that. We'll
21 do so as soon as possible and submit a copy to Mr.
22 Stoffel for his review before we submit it to the
23 Court.

24 THE COURT: I think it would be fair to say
25 that Rule 65 doesn't expressly require injunctions to

1 be in writing. I think by implication, it does. So
2 will you prepare an order in conformance with the
3 Court's bench ruling and tender to Mr. Stoffel for his
4 approval as to form and tender to me for my signature?

5 MR. GARNSEY: Yes, Your Honor.

6 THE COURT: How much time do you want?

7 MR. GARNSEY: We can have that to you
8 tomorrow morning.

9 THE COURT: How about ten days then?

10 MR. GARNSEY: Ten days would be fine.

11 THE COURT: And the order will, of course, be
12 effective upon signature by the Court. Let me commend
13 counsel for a case well presented. It's been an
14 interesting case. And Mr. Etter and Mrs. Etter, I want
15 you to not take my ruling personally. This is the way
16 I think the law is. And as I've said, I commend both
17 of you. You're doing an excellent job as Co-Managers
18 of the Department, and maybe some other use can be
19 found for the Pavilion.

20 MR. ETTER: Thank you, Your Honor.

21 THE COURT: If there's nothing else, the
22 Court will be in recess.

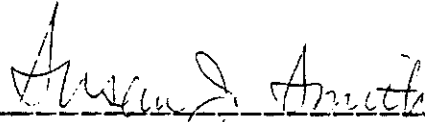
23 (Whereupon, at 10:20 a.m., the trial was
24 concluded.)

25

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter of Courtroom 21, district Court, City and County of Denver, Colorado, at the time and place above set forth.

Dated at Denver, Colorado, July 26, 1990.



Susan J. Smith, CSR, RPR