Reverse and Render; Opinion Filed May 3, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00067-CV

CITY OF MCKINNEY, Appellant
V.
ELDORADO LAND COMPANY, LP, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-03745-2009

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

In this case, we interpret the meaning of a deed restriction in a special warranty deed ("the deed"). Appellee Eldorado Land Company, LP ("Eldorado") conveyed a certain piece of real estate ("the Property") to appellant City of McKinney ("the City") subject to a deed restriction that the Property "shall be used only as a Community Park" ("the deed restriction"). Approximately a decade later, Eldorado filed this lawsuit against the City, alleging the City violated the deed restriction by building a library on the Property. The trial court denied the City's traditional and no-evidence motions for summary judgment as to liability and granted Eldorado's motion for partial summary judgment imposing liability for violating the deed restriction. Further, following a jury trial on damages, the trial court awarded Eldorado more than $7 million in damages.

In two issues on appeal, the City (1) challenges the trial court's summary judgment rulings respecting liability and (2) asserts error as to the determination of the amount of damages. We decide in favor of the City on its first issue. Consequently, we do not reach the City's second issue. We reverse the trial court's judgment and render a take nothing judgment against Eldorado. Because the law to be applied in this case is well settled, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2(a), 47.4.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Property consists of a 32.652-acre tract located in McKinney, Texas. In 1998, the City passed an ordinance that, among other things, designated the Property for "park" use. In May 1999, Eldorado conveyed the Property to the City pursuant to the deed. Specifically, a portion of the Property totaling 15.318 acres was donated to the City and the remaining 17.334-acre portion was sold to the City for $243,000. The deed stated in part (1) the conveyance "is made subject to the requirement and restriction that the Property shall be used only as a Community Park" and (2) "[f]or purposes hereof, the term 'Community Park' shall mean and be defined as a park and recreational facility operated by Grantee and serving the citizens of the City of McKinney." Additionally, the deed provided that "[i]n the event Grantee violates the foregoing restriction or should Grantee desire not to develop the Property as a Community Park, Grantor and Grantor's successors and assigns shall have the option (the 'Option') to purchase the Property for a purchase price in an amount equal to the lesser of (i) the then fair market value of the Property, or (ii) the purchase price paid by Grantor to Grantee for the Property."

In approximately 2008, the City began construction of the John and Judy Gay Library ("the Library") on a two-acre portion of the Property. The Library opened in 2009. Eldorado sent the City a letter dated September 15, 2009, in which Eldorado stated in part (1) the deed restriction had been violated because "[t]he property has recently been developed as a library and

not as a 'Community Park'" and (2) it intended to exercise the Option to purchase the Property. The City did not respond to that letter.

On September 29, 2009, Eldorado filed this lawsuit against the City, asserting a claim for inverse condemnation. Specifically, Eldorado contended in its petition (1) "[s]ometime during 2009, the Property was developed as a library and not as a 'Community Park'"; (2) upon receipt of the September 15, 2009 letter, "the City was required to have either conveyed the Property back to [Eldorado] or condemn [sic] [Eldorado's] reversionary interest and option right under its power of eminent domain"; and (3) "[b]y the actions described above, the City took [Eldorado's] interest in the Property for public use without compensation, without formal condemnation proceedings or without the consent of [Eldorado]."

The City filed a general denial answer. Also, the City asserted several affirmative defenses, including, in part, that "the property at issue has at all relevant times been used only as a community park" and "the City has taken no action that violates any provision or restriction in the deed."[1]

On March 3, 2014, Eldorado filed a motion for partial summary judgment as to liability. Eldorado contended in part (1) "[t]he John and Judy Gay Library is not a 'Community Park'"; (2) "[a]s seen on the City's webpage, the John and Judy Gay Library is operated by the City's Library Department" and "[o]n the other hand, the City has a completely separate Parks & Recreation Department"; (3) "[a] library is not a park"; (4) "[o]nly by means of linguistic contortions could the John and Judy Gay Library be considered a park and recreational facility"; (5) "such a construction would be clearly contrary to the City's own internal usage of the terms

[1] Additionally, the City asserted a plea to the jurisdiction in which it contended Eldorado's retained right to purchase the Property on the occurrence of a future event was not a compensable property interest under the Texas Constitution. The trial court sustained the City's plea to the jurisdiction and this Court affirmed the trial court's judgment. *See El Dorado Land Co., L.P. v. City of McKinney*, 349 S.W.3d 215, 218 (Tex. App.—Dallas 2011), *rev'd*, 395 S.W.3d 798 (Tex. 2013). The supreme court reversed, concluding "the reversionary interest retained by El Dorado in its deed to the City is a property interest capable of being taken by condemnation." *See* 395 S.W.3d at 804. Further, the supreme court (1) stated "[w]e express no opinion, however, on whether a taking has occurred in this case" and (2) remanded this case to the trial court "for it to determine whether the City violated its deed restrictions by building a public library on a part of the land dedicated for use as a community park and, if so, to what extent the City has taken El Dorado's interest in the restricted property." *Id.*

'library' and 'park and recreational facility'"; and (6) "[a]ccordingly, the summary judgment evidence establishes that no genuine issue of material fact exists as to whether the City violated its deed restrictions in constructing the John and Judy Gay Library on land restricted for use as a 'Community Park.'"

The evidence attached to Eldorado's motion for partial summary judgment consisted of (1) copies of the deed and the September 15, 2009 letter described above; (2) an affidavit of Eldorado's attorney with attached printouts of pages from the City's website, including a page pertaining to the "McKinney Public Library System" and a page pertaining to the City's "Parks, Recreation and Open Space Department"; and (3) an affidavit of Michael W. Massey, a real estate appraiser, in which he testified in part that the John and Judy Gay Library is located on the Property and described attached maps and photographs of the Property.

The City filed a motion for no-evidence and traditional summary judgment on March 13, 2014. The City contended (1) there is no evidence that it "violated the restriction that the Property be used only as a community park" and (2) "the summary judgment evidence establishes as a matter of law that the Property has been and is being used only as a community park." Additionally, the City stated that "[a]fter acquiring the Property, the City designated the Property in its entirety as a part of the Gabe Nesbitt Community Park."

The evidence attached to the City's motion for summary judgment included (1) a copy of the deed; (2) City plats dated 2007 and 2008 showing the entirety of the Property as part of a City park; and (3) a March 19, 2007 "work session agenda" of a City meeting in which City personnel described the "proposed programming of library services" for the "new Community Library at Gabe Nesbitt Community Park," which proposed services were to include, *inter alia*, library materials, "comfortable lounge chairs," "quiet reading rooms," meeting room spaces, public Internet capacity, and a "dedicated children's area" with "children's story time spaces."

Additionally, the City's evidence included an affidavit of Galen Cranz, an expert on urban parks, who testified in part that (1) on a visit to the Library, she observed "young students seated and working at a number of computer stations available to the public"; several young children and adults "using a glassed-in play room"; "literature" that advertised "pre-school and elementary school programs, including story time and music classes, and evening computer program classes"; and "a large meeting room that is available for community use" and (2) "[i]t is my professional opinion . . . that the Property, including the Library, is being used as a park and recreational facility operated by the City and serving the citizens of the City of McKinney."

In a response to the City's motion for no-evidence and traditional summary judgment, Eldorado argued in part that "[n]o matter how hard the City tries to wrestle with semantics, a library is not a community park." According to Eldorado, (1) "[b]uilding a library on the Property violates the deed restriction—notwithstanding the fact that the City considers the Property part of the Gabe Nesbitt Community Park"; (2) the City's March 19, 2007 "work session agenda" described above "describes library functions, not park functions" and thus "establishes that the John and Judy Gay Library is not used as 'a park and recreational facility'"; (3) "the Deed takes a functional approach: the inquiry is on whether the city operates any part of the Property other than as a 'park and recreational facility'" (emphasis original); (4) the Library "is operated by the City as a library, not as a park and recreational facility"; (5) the Texas Tort Claims Act "recognizes that libraries and parks are two separate and distinct governmental functions"; (6) "the City itself divides these two separate government functions—parks and libraries—into two departments"; (7) Cranz's descriptions respecting what she saw at the Library "are simply those of people using a library facility"; and (8) "the John and Judy Gay Library and the Gabe Nesbitt Community Park are two separate City facilities." Eldorado's summary

judgment response was supported by the same evidence described above attached to its motion for partial summary judgment.

The City filed a response to Eldorado's motion for partial summary judgment in which it argued, in part, (1) the issue before the trial court is not "whether the Library, or any building, constitutes a park," but rather "whether the construction and placement of the John and Judy Gay Library, on a part of the Property, violated the Deed Restriction, which requires that the Property be used as a Community Park," (2) "the City's Official Website does not have 'a separate Library department and a separate Parks & Recreation department'"; (3) on the City's website, the "McKinney Public Library System" and the "Parks, Recreation & Open Space Department" are both grouped under the heading "Culture & Recreation," along with six other City entities: "Arts Commission," "Convention & Visitors Bureau," "Main Street–Historic Downtown," "Oak Hollow Golf," "Performing Arts Center," and "Tennis Center"; (4) "there is notable overlap" between the McKinney Public Library System and the Parks, Recreation & Open Space Department as to "their respective functions and activities"; and (5) "[h]ow the City is set up administratively or displays its organizational structure online is irrelevant" to the issue before the trial court described above. In addition to the evidence described above, the City relied upon two exhibits attached to its response: (1) affidavit testimony of a City employee respecting "overlap between the functions and activities of the library and parks and recreation" and (2) additional pages printed from the City's website, including a page showing the entities listed under the website's "Culture & Recreation" heading.

At the hearing on the parties' summary judgment motions, counsel for Eldorado argued in part, (1) "the real issue comes down to before [sic] this Court today is whether or not the City violated the deed restriction by building the John and Judy Gay Library on the land"; (2) "[w]hether a park is a library, really, I think, is a matter of you can look at the dictionary,"

which defines "park" as "a piece of ground in or near a city or town kept for ornament or recreation" that is "maintained in its natural state as a public property" and defines "library" as "a place in which literary, musical, artistic, or reference materials, as books, manuscripts, recordings, or films are kept for use, but not for sale"; (3) the City's argument that "the library has a recreational aspect to it" ignores the deed language, which "says shall only be used as a community park" and "defines community park as a park and recreational facility"; (4) "[a] library is not a recreational facility, it's a place where books are stored and research materials are stored and people check it out"; (5) as to the City's March 19, 2007 "work session agenda" described above, "nothing in there is recreational based"; (6) "really what you look at is from an operational standpoint," i.e., "Is the City operating this as a park, or is the City operating it as a library?"; and (7) "the City's web page indicates a separate park section and the department is [sic] separate library section" and "even though [the City] responded saying they're all part of some sort of cultural affairs section, those are very different functions and treated by the City different with different staff."

Counsel for the City responded in part (1) the Library is situated on a "small amount of property within that overall large community park" and (2) "[t]he definition in the deed of community park includes recreational facilities, and that's why we've talked about recreational facilities and how the library, in fact, can be considered a recreational facility in and of itself."

At the end of the hearing, the trial court stated in part,

> If the deed restriction said the property was to be used as a community park, if the restriction said property was to be used primarily as a community park, I think that Plaintiff's motion fails, but the restriction does not say that. It says that it is to be used only as a community park, and I fail to see that there's any genuine issue of disputed fact that the property is not being used only as a community park if there is a library situated on the property.

Following a jury trial as to damages, the trial court signed the judgment described above. The City filed a motion for new trial, which was overruled by the trial court. This appeal timely followed.

II. CITY'S LIABILITY FOR INVERSE CONDEMNATION

A. Standard of Review

We review a trial court's decision to grant summary judgment de novo. *See, e.g.*, *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 607 (Tex. 2013); *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When, as in this case, both parties move for summary judgment and the trial court grants one motion and denies the other, the appellate court will review both parties' summary judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. *See, e.g.*, *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007).

A plaintiff moving for summary judgment must conclusively establish the elements of its claim. *See, e.g.*, *Masterson*, 422 S.W.3d at 607; *see also* TEX. R. CIV. P. 166a. A defendant moving for no-evidence and traditional summary judgment must show (1) the nonmovant produced no more than a scintilla of probative evidence to raise a fact issue on the material questions presented or (2) its own evidence disproves at least one element of the plaintiff's claim as a matter of law. *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Bever Props., L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878, 885 (Tex. App.—Dallas 2011, no pet.). More than a scintilla of evidence exists if the evidence "would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). "Evidence that is so slight as to make any inference a guess is in legal effect no evidence." *Id.* A matter is conclusively proved if "ordinary minds could not

differ as to the conclusion to be drawn from the evidence." *In re Estate of Hendler*, 316 S.W.3d 703, 707 (Tex. App.—Dallas 2010, no pet.).

In reviewing the parties' summary judgment motions, we consider the evidence in the light most favorable to the nonmovant, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See, e.g.*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

B. Applicable Law

A plaintiff seeking to prevail on an inverse condemnation claim must establish an intentional government act that resulted in the uncompensated taking of private property for public use. *See City of Houston v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2015); *Sw. Bell Tel., L.P. v. Harris Cty. Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009). A taking is the acquisition, damage, or destruction of property via physical or regulatory means. *Carlson*, 451 S.W.3d at 831.

The construction of an unambiguous deed and its reverter clause presents a question of law that we review de novo. *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991). The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the "four corners" rule. *Id*. We "should consider that the intent of the parties must be taken from the agreement itself, not from the parties' present interpretation, and the agreement must be enforced as it is written." *Calpine Producer Servs., LP v. Wiser Oil Co.*, 169 S.W.3d 783, 787 (Tex. App.—Dallas 2005, no pet.). We discern the parties' intent from the entirety of the deed's language without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules. *Stribling v. Milligan DPC Partners, L.P.*, 458 S.W.3d 17, 20 (Tex. 2015). "When a term

in a conveyance is not specifically defined, that term should be given its plain, ordinary, and generally accepted meaning." *DeWitt Cty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999); *see Graham v. Prochaska*, 429 S.W.3d 650, 655 (Tex. App.—San Antonio 2013, pet. denied) ("The deed's terms are given their plain, ordinary, and generally accepted meanings unless the deed itself shows them to be used in a technical or different sense.") (citing *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)). Also, dedications made by individuals to the public are construed strictly according to the terms of the grant. *City of Fort Worth v. Burnett*, 114 S.W.2d 220, 223 (Tex. 1938).

C. Application of Law to Facts

In its first issue, the City contends the trial court erred by denying the City's traditional and no-evidence motion for summary judgment as to liability and granting Eldorado's motion for partial summary judgment.[2] According to the City, "[b]ased on the language of the deed, there is no evidence that the building of the Library on the Property violated the restriction that 'the Property shall be used only as a Community Park,' (which is defined as a 'park and recreational facility' operated by the City for its citizens)." Further, the City asserts it "conclusively established that it did not violate the deed restriction when it built a public library on a portion of the Property included within the Gabe Nesbitt Community Park" and Eldorado "did not conclusively establish that the building of the Library violated the deed restriction."

[2] The City's first issue states as follows:

> The determination of liability in this case turns on whether the City violated the deed restriction requiring "that the Property shall be used only as a Community Park"—i.e., a "park and recreational facility operated by [the City] for the citizens of the City of McKinney"—when it built a public library on a portion of the Property. This determination presents three issues:
>
> (a) Did the trial court err in denying the City's no-evidence and traditional motion for summary judgment on liability, when the motion conclusively established that the library is a "park and recreational facility" operated by the City for its citizens, and that the building of the library does not affect, alter, or destroy the Property's use as only a Community Park?
>
> (b) Did the trial court err in granting ELC's motion for partial summary judgment, when ELC's evidence did not conclusively establish a violation of the deed restriction and, in any event, was controverted by the City's evidence?
>
> (c) At the very least, are there genuine issues of material fact that necessitate a trial on the question whether the building of the library on the Property violated the deed restriction?

Specifically, the City argues in part (1) Eldorado "does not contest the City's plain-language definition of 'recreation'—i.e., something one does for 'refreshment of one's mind or body after work through activity that amuses or stimulates'"; (2) "[u]nlike a research library, *this* library truly offers recreation, including story time and music classes for preschoolers, evening computer classes for adults, a glassed-in play area for children, and a large community meeting room for adults" (emphasis original); (3) the Library is a "recreational facility" because "it relates to and fosters 'recreation'"; and (4) "under the deed restriction, it does not matter *which* particular department of the City operates the park and recreational facility" (emphasis original).

Eldorado responds on appeal that the trial court properly concluded the City violated the deed restriction as a matter of law. Specifically, Eldorado argues in its appellate brief (1) "[t]he City's summary judgment evidence did not establish that the Library is a park"; (2) the Library "was *operated* by the City's Library Department as a library facility—not by its Park & Recreation Department as a park and recreational facility" (emphasis original); (3) at least two Texas statutes "acknowledge[] that a library is separate from a recreational facility"; (4) the dictionary definition of "library" is "[a] place in which reading materials, such as books, periodicals, and newspapers, and often other materials such as musical and video recordings, are kept for use or lending"; (5) "[a] library's primary use is for research and study, not 'refreshment of one's mind or body after work,'" and "[w]hile there may be some who visit a library after work to read engaging fiction, that is not the purpose of a library"; and (6) "the Library is in fact a 'non-recreational facility'" because "[t]he Library is 'a place in which reading materials, such as books, periodicals, and newspapers, and often other materials such as musical and video recordings, are kept for use or lending'" and "[t]he Library is not a place for 'refreshment of one's mind or body after work through activity that amuses or stimulates.'" Further, during oral submission before this Court, Eldorado asserted two arguments for the first time: (1) pursuant to

the doctrine of ejusdem generis, any "recreational facility" on the Property must be a "akin to a park" or the deed restriction is violated, and (2) the supreme courts of Texas and Kentucky have specifically concluded a library is not a park or recreational facility.

The parties agree the deed is unambiguous. Additionally, during oral submission before this Court, counsel for Eldorado stated the deed restriction does not require that every portion of the Property must be both a "park" and a "recreational facility," but rather, "part of it can be park and part can be recreational facility." As described above, (1) the record shows that in 1998, the City passed an ordinance designating the Property for "park" use; (2) the City's summary judgment evidence included City plats dated 2007 and 2008 showing the entirety of the Property as part of a City park; and (3) the City acknowledges in its brief in this Court that "a library obviously is not a park." Further, Eldorado (1) does not complain of a violation of the deed restriction respecting the use of any portion of the Property other than the portion on which the Library was built and (2) does not cite, and the record does not show, any evidence that any portion of the Property other than the portion on which the Library is built is being used for anything other than a City park. Accordingly, to decide the issue before us, we need not address whether the Library itself is a "park" or a "park and recreational facility," but rather we must determine only whether the Library is a "recreational facility operated by [the City] and serving the citizens of the City" pursuant to the deed restriction.

We begin with Eldorado's argument respecting the doctrine of ejusdem generis. The supreme court has stated, "Where the more specific items, [a] and [b], are followed by a catchall 'other,' [c], the doctrine of ejusdem generis teaches that the latter must be limited to things like the former." *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 504 & n.1 (Tex. 2015) (citing Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012) ("Where general words follow an enumeration of two or more things, they apply only to

persons or things of the same general kind or class specifically mentioned.")). According to Eldorado, the doctrine of ejusdem generis is applicable to the phrase in the deed restriction, "a park and recreational facility." Therefore, Eldorado argues, any "recreational facility" built on the Property must be "in the same category as a park." However, the record does not show that the deed in question contains an enumeration of two or more specific items followed by general words or "a catchall 'other.'" *See id*. Consequently, we disagree with Eldorado's position that the doctrine of ejusdem generis is applicable to interpretation of the phrase "a park and recreational facility" in the deed restriction.

Second, we address Eldorado's arguments respecting the information posted on the City's website. Specifically, Eldorado contends the City's website shows "the Library was *operated* by the City's Library Department as a library facility—not by its Parks & Recreation Department as a park and recreational facility." However, the language of the deed does not require that the facility provided for therein must be operated "as" a certain type of facility or by a certain City department, but rather requires merely that such facility be "operated by [the City]." Eldorado does not assert, and the record does not show, that the Library is not "operated by [the City]."

Next, we consider the cases cited by Eldorado in support of its assertion that the supreme courts of Texas and Kentucky have specifically concluded a library is not a park or other recreational facility. *See Burnett*, 114 S.W.2d at 220; *City of Hopkinsville v. Jarrett*, 162 S.W. 85 (Ky. 1914). In *Burnett*, a citizen, S.B. Burnett, donated a parcel of land to the City of Fort Worth "for the purpose of creating a park and place of recreation in the very heart of the city." *See* 114 S.W.2d at 221. The deed contained "conditions and stipulations" that the property was to be "set apart, dedicated, treated and maintained" by the city as "a public park and breathing place for the use of the people . . . where the poor, alike with the rich, may assemble as a place of recreation and particularly for relief against the heat of our summers, and as a resting spot for

tired mothers with their children." *Id*. Further, the deed stated in part (1) the city "shall never use said property and premises for any other purpose than as a public park and meeting place"; (2) the city was to maintain the property "in a trim and tidy condition with such ornament of tree, shrub and flower, as will make it attractive to the eye"; and (3) the grantor reserved the right during his lifetime to make "improvements" and "build such structures, houses, monuments and memorials therein" as he saw fit to "enhance" the property's "beauty and usefulness to the city and the general public." *Id*. at 221–22. Subsequent to the grantor's death, the city announced plans to build a public library on a portion of the donated land. *Id*. at 222. The grantor's heirs sued to enjoin the building of library, arguing such action would violate the deed restriction. *Id*. at 222–23. The trial court granted the injunction requested by the heirs. *Id*. at 223. The Second Court of Civil Appeals in Fort Worth affirmed and, on motion for rehearing, certified several questions to the supreme court, including whether the deed's terms "forbid, by express words or by clear implication, the erection and maintenance by the city of Fort Worth of a public library on the land." *Id*.

The supreme court stated in part (1) "[i]f the land is dedicated generally for use as a park, square, or common, it is considered by most courts that the erection of buildings thereon is inconsistent with the purpose of the dedication" and (2) "[n]o servitude inconsistent with the purpose which may reasonably be presumed to have been intended by the dedication may be imposed on such property." *Id*. Then, that court reasoned as follows:

> [Burnett] set aside a spot in the heart of a throbbing, noisy city "as a resting spot for tired mothers with their children," where "tree and shrub and flower" were to make it "attractive to the eye." In the presence of this language, how can we say that this old plainsman intended that lifeless walls of brick and mortar, and the stern silence of a library room, was one of the things he had in mind, as a resting spot for tired mothers with children, "a breathing place," or "place of recreation"? Such an artificial work of man is the antithesis of "tree and shrub and flower," pointedly provided for in the quoted instrument. That he was thinking mainly of nature's creations, not man's is, we think, too plain for argument.

Id. at 224. The supreme court concluded "the instrument before us excludes by the necessary implication of its language the use of a substantial portion of the land conveyed in trust, as a site for a library building." *Id*.

Unlike the deed before us, the deed in *Burnett* "pointedly provided" for a nature environment. *See id*. Therefore, we do not find *Burnett* instructive. *See Luckel*, 819 S.W.2d at 461 (primary duty of court when construing deed is "to ascertain the intent of the parties from all of the language in the deed").

As to *Jarrett*, that case involved a devise of property by John C. Latham to the City of Hopkinsville, Kentucky, "upon condition that said lot be used forever as a public park." *See* 162 S.W. at 86. Shortly after Latham's will was probated, the city announced plans to build a public library on a portion of the property. *Id*. A group of citizens sued to enjoin the building of the library, arguing such use was inconsistent with the use of the land for park purposes. *Id*. The trial court granted the injunction and the city appealed. *Id*. The Kentucky Court of Appeals (Kentucky's then highest court) reasoned that "[w]hile in a sense [the property] was devised for the enjoyment of the public in general, it is equally manifest that it was to be enjoyed only as a public park and not in some other way equally enjoyable." *Id*. at 87. Therefore, that court stated, the use of the land as a site for a public library would defeat Latham's purpose. *Id*. That court concluded "the use of the land in question for a public library is inconsistent with the purposes and terms of the devise and amounts to a diversion." *Id*.

Jarrett is distinguishable from the case before us because the instrument in *Jarrett* specifically dedicated land to be used as "a public park," rather than as "a park and recreational facility." *See id*. at 86–87. Thus, the language of the instrument in *Jarrett* was more limiting than the language of the deed in question. *See Luckel*, 819 S.W.2d at 461. We do not find *Jarrett* persuasive.

As described above, "[w]hen a term in a conveyance is not specifically defined, that term should be given its plain, ordinary, and generally accepted meaning." *DeWitt Cty. Elec. Coop.*, 1 S.W.3d at 101. The Texas Supreme Court has cited the dictionary definition of "recreation" as an example of that word's "ordinary meaning." *See Univ. of Tex. at Arlington v. Williams*, 459 S.W.3d 48, 52 (Tex. 2015) (observing that WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 985 (1984) defines "recreation" generally as "refreshment from work or a diversion; in other words, something done to relax or have fun"). Additionally, the City's brief on appeal cites the following dictionary definition of "recreation": something one does for "[r]efreshment of one's mind or body after work through activity that amuses or stimulates." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1462 (4th ed. 2006); *see also* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1198 (4th ed. 2001) (defining "recreation" as "refreshment in body or mind, as after work, by some form of play, amusement, or relaxation" and "any form of play, amusement, or relaxation used for this purpose, as games, sports, or hobbies"); DICTIONARY.COM, http://www.dictionary.com (last visited May 3, 2016) (defining "recreation" as "refreshment by means of some pastime, agreeable exercise, or the like" and "a pastime, diversion, exercise, or other resource affording relaxation and enjoyment"). "Recreational" is defined as "of or relating to recreation." *See* DICTIONARY.COM, http://www.dictionary.com.

Eldorado further contends that because certain Texas statutes "acknowledge[] that a library is separate from a recreational facility," the Library cannot be a "recreational facility" for purposes of the deed restriction. In support of that position, Eldorado cites a portion of the Texas Tort Claims Act, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (West Supp. 2015), and section 251.001 of the Texas Local Government Code, *see* TEX. LOCAL GOV'T CODE ANN. § 251.001 (West Supp. 2015). Specifically, Eldorado asserts (1) under the Texas Tort Claims Act, a municipality is liable for damages arising from "parks and zoos; . . . libraries and library

maintenance; . . . [and] recreational facilities, including but not limited to swimming pools, beaches, and marinas"; and (2) section 251.001 of the local government code allows eminent domain for certain uses and, among those uses, lists "library" separately from "park, playground, and other recreational facility." According to Eldorado, "[i]f a library is a recreational facility or even a park, then listing library as a separate category in [those statutes] would be redundant and pointless." Further, Eldorado contends (1) the "Texas Recreational Use Statute" defines "recreation" as an activity such as hunting, fishing, picnicking, hiking, and numerous other activities "associated with enjoying nature or the outdoors," *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.001–.007 (West Supp. 2015) (titled "Limitation of Landowners' Liability"), and (2) although the list of activities in that statute is not exclusive, "based on the common meaning of the listed activities, it is evident that a library would not be listed in the same category of activities."

The record shows the deed does not mention or refer to any of the three statutes cited by Eldorado or indicate that those statutes are to be used in the deed's interpretation. *See Graham*, 429 S.W.3d at 655 ("The deed's terms are given their plain, ordinary, and generally accepted meanings unless the deed itself shows them to be used in a technical or different sense."). Further, nothing in the statutes themselves shows they are intended to establish the "plain, ordinary, and generally accepted meaning" of "recreation." *Cf. Williams*, 459 S.W.3d at 52–54 (stating that although the "ordinary meaning" of the word "recreation" is sufficiently broad to include competitive sports and their spectators, the meaning of "recreation" under the Texas recreational use statute "has remained more specific than the word's ordinary meaning" and does not encompass the activity of attending a soccer game as a spectator). On this record, we cannot agree with Eldorado's position that the statutes it cites are determinative as to whether the Library is a "recreational facility" for purposes of the deed restriction.

Finally, Eldorado argues in its brief on appeal that "[t]he Library is not a place for 'refreshment of one's mind or body after work through activity that amuses or stimulates'" and "is in fact a 'non-recreational facility.'" Specifically, according to Eldorado,

> While there may be some who visit a library after work to read engaging fiction, that is not the purpose of a library. The same American Heritage Dictionary the City relies on also defines a "library" as "[a] place in which reading materials, such as books, periodicals, and newspapers, and often other materials such as musical and video recordings, are kept for use or lending." A library's primary use is for research and study, not "refreshment of one's mind or body after work." A student checking out books to complete a research paper is not doing so out of "refreshment of [his or her] mind or body."

Eldorado cites no evidence in support of that argument and no authority other than a dictionary definition of "library."

The City responds in part,

> Eldorado's reliance on the dictionary definition of "library" . . . actually supports the City's position. . . . Although Eldorado draws the unsubstantiated conclusion that such a place is primarily for "research and study" rather than "recreation," the opposite is true—a place where one can borrow books for reading, music recordings for listening, and videos for watching is unequivocally providing "recreation." And importantly, the public library in this case is very different from what Eldorado apparently envisions—namely, a type of research library typically associated with an educational institution. Unlike a research library, *this* library truly offers recreation, including story time and music classes for preschoolers, evening computer classes for adults, a glassed-in play area for children, and a large community meeting room for adults.

(emphasis original).

As described above, the City's summary judgment evidence included Cranz's affidavit, in which she testified in part (1) on a visit to the Library, she observed "computer stations available to the public"; several young children and adults "using a glassed-in play room"; "literature" that advertised "pre-school and elementary school programs, including story time and music classes, and evening computer program classes"; and "a large meeting room that is available for community use," and (2) "[i]t is my professional opinion . . . that the Property, including the Library, is being used as a park and recreational facility operated by the City and

serving the citizens of the City of McKinney." Also, in the City's March 19, 2007 "work session agenda," City personnel described the "proposed programming of library services" for the "new Community Library at Gabe Nesbitt Community Park," which proposed services were to include, *inter alia*, library materials, "comfortable lounge chairs," "quiet reading rooms," meeting room spaces, public Internet capacity, and a "dedicated children's area" with "children's story time spaces."

The above-described evidence shows the Library is a facility "relating" to "refreshment from work or a diversion; in other words, something done to relax or have fun," i.e., recreation. *See Williams*, 459 S.W.3d at 52 (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 985); *see also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1462 (defining "recreation" as "[r]efreshment of one's mind or body after work through activity that amuses or stimulates"); DICTIONARY.COM (defining "recreational" as "of or relating to recreation."). Further, Eldorado does not explain or describe how any evidence in the record supports its position that the Library's "primary use" is "for research and study" and the Library is therefore a "non-recreational facility." Regardless of whether the general "purpose of a library" is as described by Eldorado, the issue before us is whether the specific facility in question is a "recreational facility" pursuant to the definition of "Community Park" in the deed. On this record, we conclude the evidence conclusively shows the Library is a "recreational facility" pursuant to that definition. Accordingly, because the record shows part of the Property is being used as a "recreational facility" operated by the City and the remainder is part of a City park, we conclude the record conclusively shows the Property is being "used only as a Community Park," i.e., "a park and recreational facility operated by [the City] and serving the citizens of the City of McKinney."

We decide in favor of the City on its first issue.

III. CONCLUSION

We decide the City's first issue in its favor. Consequently, we do not reach the City's second issue. We reverse the trial court's judgment and render a take nothing judgment against Eldorado.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF MCKINNEY, Appellant

No. 05-15-00067-CV V.

ELDORADO LAND COMPANY, LP, Appellee

On Appeal from the 380th Judicial District Court, Collin County, Texas
Trial Court Cause No. 380-03745-2009.
Opinion delivered by Justice Lang, Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's judgment and **RENDER** a take-nothing judgment against appellee Eldorado Land Company, LP.

It is **ORDERED** that appellant City of McKinney recover its costs of this appeal from appellee Eldorado Land Company, LP.

Judgment entered this 3rd day of April, 2016.