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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FRIENDS OF GRIFFITH PARK  
et al.,

Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B290637

(Los Angeles County  
Super. Ct. No. BS170298)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, James C. Chalfant, Judge. Affirmed.

ACTIUM, Mike Gatto; Mitchell M. Tsai for Plaintiffs and  
Appellants.

Michael N. Feuer, City Attorney, Timothy McWilliams,  
Assistant City Attorney, Robert Mahlowitz, Deputy City  
Attorney, for the Defendant and Appellant.

## INTRODUCTION

In this appeal, Friends of Griffith Park, Griffith J. Griffith Charitable Trust, and Los Feliz Oaks Homeowners Association (collectively, FOG) challenge the trial court's judgment denying their petition for writ of mandate. FOG asserts that the trial court erred in concluding that the decision by the general manager of the City of Los Angeles' (City) Department of Recreation and Parks (department) to change the way in which a gate at the area known as Beachwood Canyon access point to Griffith Park worked did not violate the Los Angeles City Charter (Charter) section 594(c)(4) or Los Angeles Municipal Code (LAMC) section 63.45A.

The trial court never rendered such a decision. FOG failed to timely assert either this Charter provision or the LAMC as grounds for a writ of mandate in the trial court. These arguments are, instead, made for the first time on appeal. FOG asserts that, as there are no controverted facts, we can reach these purely legal issues on appeal. FOG is incorrect. The nature of the access that is still afforded through this gate, whether Griffith Park has been closed in any way after the changes to the gate were made, and whether this was an operational decision within the legal purview of the department's general manager were contested facts adjudicated below. Substantial evidence in the record supports the trial court's findings that the gate at the Beachwood Canyon access point to Griffith Park remains open for public use, albeit for egress only. Substantial evidence supports the trial court's finding that this change in gate operation has not closed any part of Griffith Park to the public. And, substantial evidence supports the trial court's finding that the department's determination to reprogram the

gate to comply with an injunction entered in another lawsuit was an operational decision. The Charter authorizes the general manager to make such operational decisions without the involvement of the department's board.

## **BACKGROUND**

As supported by substantial evidence, the essential facts are as follows:

In 1940, Sunset Ranch Hollywood Stables Inc.'s (Sunset Ranch) predecessor, Eben Coe, purchased a two-acre ranch located inside of what is now Griffith Park. At the time, Coe also purchased an appurtenant easement, a 20-foot wide strip of land about one-mile long. Sunset Ranch used this easement to get in and out of the ranch from what was then the end of North Beachwood Drive. Sunset Ranch is still a horse boarding facility and stable. The access easement (access road) extends from the Sunset Ranch parcel to the public street at Beachwood Canyon Drive. Until 2001, the access road did not connect to any hiking trails or any other Griffith Park land open for public use.

Historically, a trailhead located on Hollyridge Drive was used by the public to access the Hollyridge Trail and other areas within Griffith Park. That trailhead, however, was located on private property. In 2001, the owner of that private property blocked public access.

To re-establish access to the Hollyridge Trail, the department created a dirt fire road from the access road to Hollyridge Trail. That fire road was created without consulting the department's board or the public.

The opening of the access road as a route to the Hollyridge Trail significantly increased its use by both vehicles and pedestrians. In 2014, a new pedestrian and vehicle gate

(Beachwood Gate) was proposed to be constructed between Beachwood Canyon Drive and the access road. The board approved the funding, but left the operation of the gate up to department staff.

The Beachwood Gate opened in January 2015. Staff calibrated the gate to allow public ingress during Griffith Park hours, to allow public egress at any time of the day or night, and to prohibit vehicle entry to everyone other than guests of Sunset Ranch or employees of the department.

In March 2015, Sunset Ranch filed suit against the City. Sunset Ranch alleged that increased use of the access road interfered with its easement rights.

On February 3, 2017, Judge Elizabeth R. Feffer issued a posttrial ruling in favor of Sunset Ranch. The trial judge found that the City's decision in 2001 to channel pedestrian traffic to the fire road connection unreasonably interfered with Sunset Ranch's easement rights. Judge Feffer enjoined the City from allowing continuing interference with Sunset Ranch's easement rights and ordered the parties to inform the trial court regarding the logistics of the City's compliance with the injunction.

After reviewing the injunction, the department's general manager decided to reduce pedestrian interference with the access road by reprogramming the Beachwood Gate to allow pedestrian egress only. On March 13, 2017, the City submitted a proposed order to Judge Feffer to obtain the trial court's approval of this compliance plan. Judge Feffer approved the proposal, without modification.

On April 18, 2017, the department's general manager authorized the reprogramming of the gate lock so that ingress

was foreclosed, but all day and all night egress remained available and unaffected.

Although the public's ability to use the Beachwood Gate as a route into the Hollyridge Trail has been restricted, the Hollyridge Trail remains open for the public and can be reached by the public through different trailheads and other trails. Pedestrians continue to walk both north and south on the Hollyridge Trail (and the other public parts of Griffith Park to which it connects) and use the Beachwood Gate to exit Griffith Park. In fact, pedestrian traffic on the access road leaving Griffith Park through the Beachwood Gate remains so substantial that Sunset Ranch brought a motion for contempt seeking to close the Beachwood Gate to both ingress and egress.

On July 18, 2017, FOG filed a petition for writ of mandate,<sup>1</sup> challenging the City's "closure" of a major entrance into Griffith Park without requiring a public hearing and decision by the board.

In support of its writ petition, FOG argued that the decision to "close" the Beachwood Gate violated Charter section 506(b) because it was a "rule of general application to be followed by the public," and, therefore, had to be voted on and passed by the full board.

FOG also argued that the decision to "close" the gate to comply with the injunction was an impermissible "settlement"

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<sup>1</sup> The trial court held that the case was one for traditional mandamus pursuant to Code of Civil Procedure section 1085. (See *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 554 ["Failure to provide a hearing required by law or regulation is remedied by a petition for traditional mandate"].) FOG does not appear to challenge this ruling.

under Charter section 273, which requires all settlements by the city attorney to be put to a public vote. Accordingly, either the board or the city council was required to have a noticed public hearing and vote before changing how the Beachwood Gate operated.

FOG alleged violations of the section 22.171.14 of the LAMC for “substantial[ly] alter[ing]” Griffith Park by recalibrating the Beachwood Gate without the approval of the City’s Cultural Heritage Commission.

FOG alleged that the change in the operation of Beachwood Gate violated the City’s zoning provisions under the Hollywoodland Specific Plan. Specifically, “[t]he City’s actions changed the use and effectively re-zoned the land in and around the Beachwood Canyon Gate and Hollyridge trailhead from ‘parkland’ to ‘commercial.’”

FOG also argued that the change in the Beachwood Gate improperly resulted in a gift of public funds to Sunset Ranch. “Clearly[,] the City’s granting to the stable the use of the expensive gate serves no public purpose.”

FOG argued that the City’s decision to “close” the Beachwood Gate violated Charter section 594(c). That provision requires that all parkland “forever remain for the use of the public inviolate.” The department’s changes to the gate, which FOG argued had the effect of “diverting or withdrawing a stretch of land committed to park purposes,” violated that provision. FOG also asserted that under Charter section 594(d), and Los Angeles Administrative Code sections 7.21 through 7.27, there are requirements for ceding control over parkland for a nonpublic use that were not followed by the City.

In its reply brief, FOG asserted new arguments in support of the petition. FOG argued for the first time that LAMC section 63.45A allowed the general manager to “close” parkland only in emergencies, and the Beachwood Gate closure was not justified by a condition of emergency. FOG also argued, again for the first time, that the City’s actions in changing the Beachwood Gate violated the City’s conservation open space elements of the general plan. FOG also sought judicial notice of additional items, filed additional exhibits, and submitted the March 8, 2018 supplemental declaration of Mitchell M. Tsai.

The City objected to these new arguments and new documents submitted in support of them. The trial court sustained certain of the City’s objections. Specifically, the trial court excluded certain paragraphs of Tsai’s declaration and attached exhibits A through J and exhibits M and N. The trial court also declined to take judicial notice of certain materials submitted by FOG. The trial court also refused to consider FOG’s argument, made for the first time in reply, that LAMC section 63.45A required an emergency condition before the Beachwood Gate could be “close[d].” The trial court noted that had that argument been properly asserted, the conditions it addresses were simply not presented in this case.

At oral argument, FOG introduced yet another argument for the first time. Citing Charter section 594(c)(4), FOG objected to the changes to the Beachwood Gate because only the board could decide to open and maintain streets through parklands.

The trial court refused to consider this argument as it had not been made in FOG's written submissions.<sup>2</sup>

After hearing and after ruling upon evidentiary objections, the trial court denied the first amended petition and entered judgment for the City. The trial court necessarily adjudicated several disputed facts in reaching its decision. The trial court found that the Beachwood Gate was not entirely closed to the public; rather it has been reprogrammed to allow pedestrian exit at any time, but not entry. The trial court also found that every part of Griffith Park remains available for public use. The trial court also found that Sunset Ranch has vehicular access through the Beachwood Gate, but has no ability to cause the pedestrian part of the gate to open or close. The trial court also found that the way in which the Beachwood Gate opened and closed in certain directions and at certain times has always been determined by department staff and that the programming of a gate has never been determined by the board. Finally, the trial court characterized this action as a day-to-day operational decision, not a rule of general application.

Based on these factual findings, the trial court concluded that the general manager could lawfully reprogram the Beachwood Gate to prevent pedestrian ingress without a public hearing and vote by the board. "Thus, the General Manager's decision falls within the day-to-day operation of the [Griffith] Park and is not a strategic decision that may be made only by the Board."

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<sup>2</sup> The trial court also declined to consider FOG's new argument that the changes made to the Beachwood Gate constituted a legislative act requiring a public hearing.



FOG appeals the judgment. On appeal, we granted FOG's and the City's requests for judicial notice (RJN), but for the reasons discussed below, FOG's supplemental RJN is denied.

## DISCUSSION

### I. FOG Cannot Assert New Arguments on Appeal

On appeal, FOG asserts two arguments, neither one of which was properly presented in the trial court.

FOG's first argument—that the general manager's decision to change the Beachwood Gate to allow egress only violates Charter section 594(c)(4)—was mentioned for the first time at oral argument on the writ of mandate. As there had been no mention of this Charter provision in FOG's written briefs, the trial judge declined to consider it. FOG's second argument—that the general manager violated LAMC section 63.45A because there was no emergency condition that required him to reprogram the Beachwood Gate—was made for the first time in FOG's reply brief on the writ of mandate. For that reason, the trial judge also refused to consider it.

The late presentations of these arguments justified the trial court's decision to disregard them. (*Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.* (1995) 31 Cal.App.4th 1323, 1333.) And, as the issues were not properly presented to the trial court, they are not properly before this court. (*Ibid.*) New legal arguments, such as these, normally cannot be asserted for the first time on appeal. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.) “This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal.” (*Ibid.*)

There is a singular exception to this rule. Where the facts are undisputed, a party may present a new legal theory on appeal. (*Nellie Gail Ranch Owners Assn. v. McMullin*, *supra*, 4 Cal.App.5th at p. 997.) However, if the new appellate theory “ ‘contemplates a factual situation the consequences of which are open to controversy’ ” and those issues were not put at issue in the trial court, then the opposing party should not be “ ‘required to defend against it on appeal.’ ” (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879.)

The new arguments presented by FOG in this appeal are not predicated on undisputed facts. Despite FOG’s assertion that it is undisputed that the Beachwood Gate and a portion of Griffith Park was closed by staff, those claims were controverted at the trial court level. The trial court resolved those disputes by finding that Beachwood Gate was not entirely closed; rather it was calibrated to preclude ingress, but to allow egress all day and all night. The trial court also resolved a disputed fact when it found that all of Griffith Park remained accessible to the public after the general manager altered the direction of the Beachwood Gate. Finally, the trial judge resolved the controverted factual issue as to whether the reprogramming of the gate by the general manager was an operational decision. Finding this was an operational decision, the trial court concluded that such a decision was within the purview of the general manager and did not require board approval. These factual findings are supported by substantial evidence in the record. Although FOG invites this court to relitigate these factual contentions on appeal, we decline.

## II. FOG Cannot Introduce Disputed Facts on Appeal Through a Request for Judicial Notice

To support its claim that there are no controverted facts underlying their appellate arguments, FOG seeks to introduce several items by way of its supplemental RJN.

In all but one instance, FOG's supplemental RJN seeks appellate judicial notice of materials that were excluded by the trial court.

FOG did not discuss the trial court's evidentiary rulings regarding these items in its opening brief. Rather, it simply cited to the excluded evidence. After the City objected to this practice, FOG instead requested supplemental judicial notice of those excluded documents. Such a practice is impermissible.

Withholding a challenge to the admissibility of evidence until a reply brief is filed waives the right to challenge the rulings. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1216–1217.) “ ‘Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.’ ” (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 693.)

Further, had FOG timely challenged the trial court's exclusion of this evidence, such an argument would have been unavailing. The trial court's evidentiary rulings were proper. The maps that FOG seeks to introduce are irrelevant. Even if a proper foundation could be established as to their authenticity, these maps were not issued by the City Council or any legally authorized entity and cannot, therefore, be used to support FOG's

contention on appeal that the Beachwood Gate appeared on city-issued maps “depicting Griffith Park access points.”<sup>3</sup>

The historic designation document contains excludable hearsay. The trial court excluded the single page of that exhibit cited by FOG in its opening brief. City records such as this are not judicially noticeable under Evidence Code section 452, subdivisions (b) or (c). In addition, even if this document fell within a category appropriate for judicial notice, such notice is only proper for relevant evidence. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063–1064.) FOG does not cite the remaining materials in their appeal; its contents, therefore, serve no relevant purpose.

The August 2002 report prepared by a management analyst was excluded by the trial court. The report was excluded, *inter alia*, on relevance grounds. That ruling was not an abuse of discretion. That report does not establish the “type of act” that the Charter and Municipal Code prevent a staff member from performing. Rather, it concerns the operating hours of an entire park. Here, the trial judge found that the reprogramming of the

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<sup>3</sup> The maps sought to be judicially noticed are different from the maps filed at trial. The maps FOG filed at trial are black and white, blurry and are eight and a half by eleven, not the full color PDF maps FOG substituted in their place in the appellant’s appendix. Given this alteration of the record, these maps are not reasonably disputable—as required for judicial notice under Evidence Code section 452, subdivision (h). Although FOG submitted a declaration in support of their supplemental RJN stating the substitute maps were downloaded from the Internet, no evidence shows that those substitute maps are versions of the same blurry maps FOG filed with the trial court.

Beachwood Gate did not alter the hours that Griffith Park was accessible to the public. This report, therefore, is irrelevant.

The November 6, 2002 council directive was excluded by the trial court on the grounds of relevance, failure to authenticate, undue waste of time, and because FOG sought to admit the evidence in support of new arguments in reply. Those rulings were proper and are not an abuse of discretion. The directive was not specifically addressed to either the board or the general manager. Thus, it is not relevant to the question of what powers are ascribed to either the board or the general manager, which is the issue on appeal.

The Los Angeles Times article was also properly excluded by the trial court. Such an article is not a legislative enactment or a city regulation. As such, it is not the subject of judicial notice under Evidence Code section 452, subdivisions (b) or (c). Nor can the statements contained therein be quoted for their truth. (*Mangini v. R. J. Reynolds Tobacco Co.*, *supra*, 7 Cal. 4th at p. 1063.)

## **DISPOSITION**

The judgment is affirmed. City of Los Angeles is awarded its costs on appeal.

NOT TO BE PUBLISHED.

JONES, J.\*

We concur:

EDMON, P. J.

DHANIDINA, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.