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ZONING AND LAND USE PLANNING

The Public Trust Doctrine Is Brought Into Focus

By **Anthony S. Guardino**

Near the end of its past term, the New York Court of Appeals issued a decision in *Matter of Glick v. Harvey*.[1] The case involved the common law "public trust" doctrine, a subject often of importance for local governments, developers, and property owners—and one that seems to result in litigation more often than one might expect. Indeed, this is the second consecutive year in which the court explored the parameters of the public trust doctrine; it also did so in February 2014, in *Union Square Park Community Coalition v. N.Y. City Dept. of Parks and Recreation*.[2]

Background

Under the public trust doctrine, state legislative approval is required before parkland can be alienated or used for an extended period for non-park purposes.[3] A parcel of land may constitute a park either expressly, such as by deed or legislative enactment, or by implication, such as by a continuous use of the property as a public park.[4]

A party seeking to establish an implied dedication must show that (1) the acts and declarations of the land owner indicating the intent to dedicate the land to the public use were "unmistakable in their purpose and decisive in their character to have the effect of a dedication," and (2) the public has accepted the land as dedicated to a public use.[5] An implied dedication may exist when a municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate.[6] Once land is dedicated to parkland use, the dedication is "irrevocable" absent specific state legislative approval.[7]

The doctrine is well-established. Nearly a century ago, in the 1920 case of *Williams v. Gallatin*,[8] a taxpayer sought to enjoin the New York City Commissioner of Parks from leasing the Central Park Arsenal Building to the Safety Institute of America, arguing that the transaction was "foreign to park purposes." The lease was for a 10-year term, cancellable if the city needed the property for park use.

'Glick v. Harvey' marks the the second consecutive year in which the Court of Appeals explored the parameters of the public trust doctrine.

In prohibiting the lease, the Court of Appeals found that a park was a recreational pleasure area set aside to promote public health and welfare and, as such, "no objects, however worthy,…which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred." The court stated that the legislative will was that Central Park "should be kept open as a public park ought to be and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end."[9]

'Glick'

The Glick case arose in July 2012, when the New York City Council approved the plan by New York University (NYU) to expand its campus. The project involved demapping certain areas designated as streets on city maps and using them, either permanently or for some part of 20 years, in connection with the construction of new buildings.

After the council's approval of NYU's plan, various individual and institutional opponents of the plan commenced a CPLR Article 78 proceeding/declaratory judgment action against the city as well as some of its agencies and officials. The petitioners sought an injunction of the city's planned transfer of the parcels and a declaration that the city had unlawfully alienated impliedly dedicated public parkland in violation of the public trust doctrine. The city and NYU cross-moved to dismiss.

The Supreme Court, New York County, enjoined NYU from starting construction on three parcels without legislative authorization. The Appellate Division, First Department, disagreed and ruled that the petitioners had failed to meet their burden of showing that the city's acts and declarations manifested a "present, fixed, and unequivocal intent to dedicate any of the parcels at issue as public parkland." The Court of Appeals affirmed.

In its decision, the court found that several documents created prior to the initiation of the litigation demonstrated that the city had not manifested an "unequivocal intent to dedicate the contested parcels for use as public

ANTHONY S. GUARDINO *is a partner with the law firm of Farrell Fritzin the firm's Hauppauge office.*

parks." It observed that a permit, memorandum of understanding, and lease/license relating to the parcels showed that "any management of the parcels by the [New York City Department of Parks and Recreation (DPR)] was understood to be temporary and provisional."

Thus, the court ruled, those documents' restrictive terms showed that, although the city permitted and encouraged some use of these parcels for recreational and park-like purposes, it had "no intention of permanently giving up control of the property." The court concluded by noting that the city's "refus[al] [of] various requests to have the streets demapped and re-dedicated as parkland" further indicated that the city had not unequivocally manifested an intent to dedicate the parcels as parkland.

'Union Square'

The issue in the court's 2014 ruling in the Union Square case was not whether there was express or implied dedicated parkland—the case involved Union Square Park in lower Manhattan—but whether a proposed action by the DPR required state legislative approval.

In 2008, as part of a citywide restoration initiative, the DPR renovated portions of Union Square Park, including the pavilion area. The project included the future use of the pavilion as a restaurant to replace a café that had operated in a space adjacent to the pavilion from 1994 until 2007.

In 2012, the DPR executed a written "license agreement" with Chef Driven Market, (CDM), that permitted CDM to operate a seasonal restaurant in the pavilion for a term of 15 years. Thereafter, the Union Square Park Community Coalition, and several individuals sued the DPR, its commissioner, New York City, and CDM, seeking a declaratory judgment and injunctive relief restraining the DPR from altering the park pavilion to accommodate the restaurant under the public trust doctrine.

The Supreme Court, New York County, granted the plaintiffs' request for a preliminary injunction and denied the city's cross motion to dismiss. The Appellate Division, First Department, reversed, denied the motion for a preliminary injunction, and granted dismissal of the complaint, concluding that the restaurant did not violate the public trust doctrine and that the concession agreement was a revocable license terminable at will, not a lease.

The dispute reached the Court of Appeals, which affirmed. The court ruled that the restaurant did "not run afoul of the public trust doctrine for lack of a park purpose." The court explained that restaurants have "long been operated in public parks" and that the DPR commissioner enjoyed "broad discretion to choose among alternative valid park purposes." In the court's view, this case amounted to a "difference of opinion" as to the best way to use the park space, which was "not a demonstration of illegality."[10]

Conclusion

In most instances, of course, express dedications of property for park purposes, sufficient to trigger the public trust doctrine, are not in dispute.[11] Local governments and other property owners should keep the doctrine in mind, however, to avoid implied dedications. For instance, courts may find an implied dedication for property that is designated on a survey or tax assessment map as parkland, even if the property had not been formally designated as such.[12]

The Union Square case also is a reminder that, even in dedicated parkland, not every proposed use will necessarily require state legislative approval. In recent years, courts have permitted bike-share stations in a park[13] as well as a concession to construct and operate a golf-driving range, a miniature golf course, a domed in-line skating rink, and batting cages without the need for state legislative approval under the public trust doctrine.[14] However, because each of these cases turned on specific facts, a proposal for the private use of parkland should be carefully evaluated under the growing body of case law interpreting and applying the public trust doctrine in order to minimize litigation risks.

1. *Matter of Glick v. Harvey*, 2015 N.Y. Slip Op. 05593 (June 30, 2015).

2. *Union Square Park Community Coalition v. N.Y. City Dept. of Parks and Recreation*, 22 N.Y.3d 648 (2014).

3. See, e.g., *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623 (2001).

4. See, e.g., *Matter of Angiolillo v. Town of Greenburgh*, 290 A.D.2d 1 (2d Dept. 2001); *Matter of Lazore v. Board of Trustees of Village of Massena*, 191 A.D.2d 764 (3d Dept. 1993).

5. *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N.Y. 261 (1876); see, also, *Holdane v. Trustees of Village of Cold Spring*, 21 N.Y. 474 (1860) ("The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use"); *Flack v. Village of Green Is.*, 122 N.Y. 107 (1890); *Powell v. City of New York*, 85 A.D.3d 429 (1st Dept. 2011).

As of now, even after the court's decision in *Glick*, it remains an open question whether the second prong of the implied dedication doctrine applies to a municipal land owner.

6. See, e.g., *Riverview Partners v. City of Peekskill*, 273 A.D.2d 455 (2d Dept. 2000).

7. Id.; see, also, *Chateau Rive Corp. v. Enclave Development Associates*, 22 A.D.3d 447 (2d Dept. 2005) ("Public parkland is impressed with a public trust and may not be alienated or diverted to private ownership or non-park use without a special act of the New York State Legislature").

8. *Williams v. Gallatin*, 229 N.Y. 248 (1920).

9. See, also, *Miller v. City of New York*, 15 N.Y.2d 34 (1964) (involving a 20-year lease); *Matter of Ackerman v. Steisel*, 104 A.D.2d 940 (2d Dept. 1984) (storage of sanitation vehicles and equipment), aff'd 66 N.Y.2d 833 (1985); *Stephenson v. County of Monroe*, 43 A.D.2d 897 (4th Dept. 1974); *Aldrich v. City of New York*, 208 Misc. 930 (Sup. Ct. Queens Co. 1955).

10. It is worth noting that, under the public trust doctrine, parkland may not be leased, even for a park purpose, absent legislative approval. The court found that the agreement in this case was a revocable license and not a lease, given that the DPR retained significant control over the daily operations of the restaurant, including the months and hours of operation, staffing plan, work schedules and menu prices; CDM's use of the premises was only seasonal and was not exclusive even in the summer, as outdoor seating was required to be available to the general public (with the exception of an area reserved for the service of alcoholic beverages); CDM was obligated to open the pavilion to the public for community events on a weekly basis; and the agreement "broadly" allowed the DPR to terminate it at will so long as the termination was not arbitrary and capricious.

11. However, even property referred to as a park may not be necessarily be a dedicated park for purposes of the public trust doctrine. See, e.g., *Roosevelt Island Residents Ass'n v. Smith*, 7 Misc. 3d 1029(A) (Sup. Ct. N.Y. Co. 2005) ("Octagon Park" on Roosevelt Island in New York City).

12. See, e.g., *Powell v. City of New York*, 85 A.D.3d 429 (1st Dept. 2011); *Christensen v. O'Brien*, 2012 N.Y. Slip Op. 31479(U) (Sup. Ct. Columbia Co. April 11, 2012).

13. See, *Matter of Application of Friends of Petrosino Square v. Sadik-Khan*, 42 Misc. 3d 226 (Sup. Ct. N.Y. Co. 2013).

14. See, *Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Comm'n*, 259 A.D.2d 26 (1st Dept. 1999).