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A Park Is a Park Unless It's Not: Litigating the Public Trust Doctrine

By Michael Rikon

On Oct. 14, 2014, the Appellate Division, First Department, reversed an order in *Matter of Glick v. Harvey*.[1] The order of Justice Donna M. Mills enjoined New York University from beginning any construction in connection with its expansion project that would result in any alienation of three parcels of land found by the court to be public parkland, unless and until the state Legislature authorizes the alienation of any parkland to be impacted by the project. The decision itself provided very little factual information. According to an article in the Wall Street Journal on Oct. 15, 2014, the project involved the construction of about two million square feet of new facilities in Greenwich Village. The plan calls for four high rises on two university-owned blocks.

The plaintiffs—Assembly Member Deborah Glick and more than 20 other individuals and organizations—argued that there were areas on the blocks that were used for recreational purposes. One of the parcels includes LaGuardia Park, which is on LaGuardia Place between Houston Street and Bleecker Street. It has been used as a community garden and small park. The parcels have been mapped as streets since they were acquired by the city, and the city has refused various requests to have the streets de-mapped and re-dedicated as parkland.

The First Department held that while the city has allowed for continuous use of the parts of the parcels for park-like purposes, such use was not exclusive. It stated, "where, as here, there is no formal dedication of land for public use, an implied dedication may exist when the municipality's acts and declarations manifest a present, fixed and unequivocal intent to dedicate. (Citations omitted)." The court held that the land was not implied park land because the parcels were mapped as streets, not parks, and have been used as pedestrian thoroughfares. Further, any management of the property by the Department of Parks was understood to be temporary.

There certainly will be an effort to bring the Glick case to the Court of Appeals given that parkland is of vital concern to the public.

The Court of Appeals recently decided a park case involving Union Square some 11 blocks to the north. In *Union Square Park Community Coalition v. New York City Parks & Recreation*,[2] the issue before the court was whether it is permissible to allow the operation of a restaurant in Union Square Park. In this case, the Supreme Court had granted a preliminary injunction restraining the alteration of a pavilion building to accommodate the restaurant.

> Parks are protected by the public trust doctrine, which has long been part of the fabric of American law.

The Appellate Division, First Department, reversed, and the Court of Appeals affirmed. It found itself guided by recent precedent, *795 Fifth Ave. Corp. v. City of New York*,[3] which involved a challenge to the placement of a restaurant in Central Park, New York City. The Union Square Park Community Coalition court noted, in reviewing its precedent, that "although it is for the courts to determine what is and is not a park purpose, we recognize that the Commissioner enjoys broad discretion to choose among alternative valid park purposes. Observing that restaurants have long been operated in public parks, we rejected Plaintiff's public trust claim, holding that they could show only a 'difference of opinion' as to the best way to use the park space and that this 'mere difference of opinion [was] not a demonstration of illegality'."

These decisions do not mean that public park protection is anywhere close to being in jeopardy. Parks are protected by the public trust doctrine, which has long been part of the fabric of American law.

Public Trust Doctrine

The public trust doctrine was well-established in English law and subsequently became part of the common law of the United States. *Illinois Central Railroad v. Illinois*[4] is often considered the landmark case which defined the scope of the doctrine. It appears that the Illinois Legislature granted most of the Chicago harbor to the Illinois Central Railroad. The U.S. Supreme Court held that while the state held title to the land underneath the navigable waters of Lake Michigan, it held this title in trust for the public's use and could not convey the land if the effect would be to destroy the public's right of navigation and fishing.

The doctrine has often been applied in New York. In *Marba Sea Bay Corp. v. Clinton Street Realty Corp.*,[5] the Court of Appeals invalidated the grant of 11 miles of foreshore, the entire oceanfront of Queens, to a private person, holding that "the title which the State holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit."[6]

In the leading case in *New York, Friends of Van Cortlandt Park v. City of New York*,[7] the Court of Appeals ruled that the city could not build a water treatment plant in the park without state legislative approval. In *Friends of Van Cortlandt Park*, the court held that a water treatment plant was a non-park use. The court held that a 1920 opinion in *Williams v. Gallatin*[8] was controlling precedent. In *Williams*, a taxpayer sought to enjoin the Commissioner of Parks from leasing the Arsenal building in Central Park. In prohibiting the lease, the Wil- » Page 8

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liams court explained that a park is 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.

Outside of approving the operation of a restaurant in a park as long as the agreement executed by the commissioner is a license, the use of parkland for non-parkland purposes would still be barred as a violation of the public trust doctrine.

The Court of Appeals recently confirmed the viability of the public trust doctrine in *Capruso v. Village of Kings Point*.[9] In *Capruso* the village proposed to construct a Department of Public Works facility on the land that was dedicated parkland. It appears that the village had been occupying part of the land in question for non-park purposes, particularly storage of highway materials and supplies for some time. The village claimed that the action was barred by the statute of limitations.

The Court of Appeals held that the action was not barred, and the doctrine of continuous wrong applied to the ongoing use of parkland alleged to violate the public trust doctrine. Since the defendants in *Capruso* conceded the land in question was dedicated parkland, wasn't there another theory to oust them from possession and enjoin improper intrusion on the parkland? Why did it matter how long the defendants occupied for improper purposes? Parklands are held by government in trust for the public; as such, lands held by a municipality in its governmental capacity may not be lost by adverse possession. *City of New York v. Sarnelli Bros.*[10]

The continuous wrong doctrine, an equitable doctrine, is usually applied to preserve a cause of action where the wrong was not easily discoverable within the statute of limitations period applicable. An example is *Bloomingdale's v. New York City Tr. Auth.*,[11] a case involving an underground trespass which was not discovered until the statute of limitations expired.

Development

Another case involving parkland is the proposed development of the Willets Point area of Queens, captioned, *Avella v. City of New York*.[12] This case involves the proposed development of parkland into the construction of a retail mall and movie theater. The plaintiffs, who included Senator Tony Avella, City Club of New York and Queens Civic Congress, challenged the plan on the basis that it violated the public trust doctrine.

The city's defense was predicated on a provision of New York City Administrative Code §18-118 which allowed Shea Stadium to be built. New York County Supreme Court Justice Manuel J. Mendez held that the public trust doctrine does not apply and that the Administrative Code provision applies to the use of the property for a shopping mall because it will serve the public purpose of improving trade or commerce.

> In 'Avella,' Justice Mendez held that the public trust doctrine does not apply and that the Administrative Code provision applies to the use of the property for a shopping mall because it will serve the public purpose of improving trade or commerce.

Not only did the judge hold that the public trust doctrine does not apply, but, he also held that there was no violation of the zoning resolution and no need to proceed under the Uniform Land Use Review Procedure (ULURP). ULURP is a standardized procedure required by the New York City Charter whereby applications affecting land use are publicly reviewed.

Justice Mendez wrote:

> New York City zoning regulations and ULURP do not apply if there is legislation governing a specific land use created by the state. Statutory language to the effect of "notwithstanding any other law" can be deemed to take a land use matter outside of ULURP and the New York Charter. The application of statutory procedures avoiding the duplicative use of ULURP, are appropriate to cut through "impenetrable layers of red tape" for purposes of urban redevelopment (*Matter of Waybro Corp. v. Board of Estimate of City of N.Y.*, 67 N.Y. 2d 349, at pgs. 353-355, 493 N.E. 2d 931, 502 N.Y.S. 2d 707 [1986]).

The statutory language in Administrative Code §18-118[a] establishes that the Legislature took into consideration alternate uses of the property, and permitted the Parks Commissioner with the approval of the Board of Estimate to enter into long-term leases for other uses to benefit the public, "Notwithstanding any other provision of law, general, special or local,..." Administrative Code §18-118 applies, and there is no need to address petitioners' arguments concerning the requirements of ULURP and New York City Zoning Resolution §11-13.

The decision has been appealed to the Appellate Division, Second Department. It remains to be seen if big-box retail development on city parkland constitutes substantial intrusion on parkland for non-park purposes requiring legislative approval.

1. 2014 NY Slip Op 06914.
2. 2014 N.Y. LEXIS 205 (2014).
3. 15 NY2d 221 (1965).
4. 146 U.S. 387 (1892).
5. 272 NY 292 (1936).
6. Id., at 296.
7. 95 NY2d 623 (2001).
8. 229 NY 248 (1920).
9. 23 NY3d 631 (2014).
10. 280 AD2d 573 (2d Dept. 2001).
11. 52 AD3d 120, aff'd 13 NY3d 61 (2009).
12. NY Co. Sup. Ct. Index No 100161/14, filed Aug. 15, 2014.