

PUBLIC PARK DEDICATION EVIDENT IN LWCF GRANT

James C. Kozlowski, J.D., Ph.D.

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The ability of local government to divert existing parkland to other public purposes may depend on whether a particular parcel has been dedicated as a public park under state or federal law. If so, as illustrated by the case described herein, local government may have to strictly comply with procedural restrictions imposed by state and federal law before any diversion of public parkland can occur.

In the case of *Smith v. City of Westfield*, 278 Mass. 49 (Mass. 10/2/2017), the state supreme court considered that applicability of state and federal law to a planned conversion of a public park and playground (the Cross Street Playground) to an elementary school. Cross Street Playground contained 5.3 acres of land and included two little league baseball fields and a playground.

On August 18, 2011, the Westfield city council voted to transfer the entire Cross Street Playground from the city's parks and recreation department to its school department for the purpose of constructing a new elementary school on the land. In 2012, the city began a demolition process that included taking down century-old trees and removing a portion of the playground.

A group of city residents sued the city, including the mayor and city council, claiming a provision of the state constitution (Article 97) required approval by the state legislature prior to any construction or operation of a new school on any part of the Cross Street Playground. (As was the case here, typically, it is a group of concerned citizens and/or a local "Friends of the Park" group, which challenge their own local government's attempts to divert existing parkland to other public purposes or private development.)

ARTICLE 97 & LWCF GRANT

In 1972, Article 97 was added to the Massachusetts Constitution to protect "lands and easements taken or acquired for conservation purposes." In particular, Article 97 provided these resources "shall not be used for other purposes or otherwise disposed of without the approval of a two-thirds roll call vote of each branch of the Legislature."

In 1979, working in cooperation with the State government, the City of Westfield had applied for and received a grant from the Federal government (as well as matching funds from the State) to rehabilitate several of its playgrounds, including the Cross Street Playground. The federal conservation funds that the city received were made available by the Land and Water Conservation Fund Act of 1965.

The grant agreement for rehabilitation of the Cross Street Playground indicated that the grant was expressly conditioned on compliance with the act. Therefore, by accepting the Federal monies under the act, the city forfeited the ability to convert any part of the Cross Street Playground to a use other than public outdoor recreation unilaterally; such a conversion could

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only proceed with the approval of the Secretary of Interior through the National Park Service. The LWCF mandated that “[n]o property acquired or developed with assistance under this section shall be converted to other than public outdoor recreation uses” without the approval of the United States Secretary of the Interior (Secretary). 16 U.S.C. § 4601-8(f)(3). Further, the LWCF stated that “the Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan (SCORP) and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.”

The 2006 Massachusetts SCORP stated explicitly that land acquired or developed with LWCF funds becomes protected under the Massachusetts Constitution (Article 97) and federal regulations — and cannot be converted from intended use without permission from the National Park Service and Massachusetts Executive Office of Energy and Environmental Affairs.

LOWER COURT PROCEEDINGS

The trial court had issued an injunction prohibiting construction of the new school until the city complied with applicable state and federal law. In subsequent proceedings, however, the court found Article 97 of the state constitution state law would not protect Cross Street Playground from diversion absent a "recorded instrument" in the land records indicating the land was specifically "taken or acquired for conservation purposes." Since no recorded instrument had designated use of the Cross Street Playground "as a playground or for any other recreational purpose," the trial court ultimately concluded "the parcel was not protected" by article 97 of the state constitution. The trial court, therefore, vacated the injunction against the City.

The appeals court affirmed the judgment of the trial court in favor of the City. In the opinion of the appeals court, "land is protected by art. 97 only where it was taken or acquired for conservation or another purpose set forth in art. 97, or where “the land is specifically designated for art. 97 purposes by deed or other recorded restriction.”

A dissenting judge, however, found this narrow interpretation of article 97 was inconsistent with the legislative intent to protect parks: "The overriding point of art. 97 is to insulate dedicated parkland from short-term political pressures." As a result, the dissenting judge would not have limited the application of article 97 protection to lands with a conservation purpose expressed in a recorded deed.

The state supreme court granted the plaintiffs' request to review these decisions by the lower courts. Accordingly, the state supreme court would determine whether article 97 would apply to a proposed change in the use of municipal parkland "where there is no restriction recorded in the registry of deeds that limits its use to conservation or recreational purposes."

PERMANENT PARK DEDICATION

In the opinion of the state supreme court, municipal parkland could be protected by article 97 without a recorded deed restriction "provided the land has been dedicated as a public park." According to the state supreme court, land would be dedicated as a public park "where there is a

clear and unequivocal intent to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park."

As described by the state supreme court, there were "various ways to manifest a clear and unequivocal intent" to dedicate land as a public park. While the recording of a deed or a conservation restriction was one way of manifesting the required intent, the court acknowledged "it is not the only way" to dedicate land to the public as a public park. That being said, the supreme court noted: "The clear and unequivocal intent to dedicate public land as a public park must be more than simply an intent to use public land as a park temporarily or until a better use has emerged or ripened." Rather, the state supreme court found "the intent must be to use the land permanently as a public park." According to the state supreme court, once land is permanently dedicated for such use to the benefit of the general public, the public obtains an interest in the land, which is "irrevocable."

COMMON GOOD PARK DEDICATION

Within the context of dedicating parkland to the general public, the state supreme court noted the public dedication is "not simply the residents of the particular city or town that owns the parkland." On the contrary, the state supreme court found "[t]he dominant aim in the establishment of public parks appears to be the common good of mankind rather than the special gain or private benefit of a particular city or town."

The healthful and civilizing influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the State under modern conditions. It relates not only to public health in its narrow sense, but to broader considerations of exercise, refreshment and enjoyment.

Moreover, "since the general public has an interest in parkland owned by a city or town," the state supreme court found the "ultimate authority over a public park rests with the Legislature, not with the municipality."

Because the Legislature has "paramount authority" over public parks, dedicated parkland cannot be sold or devoted to another public use without the approval of the Legislature. The rule that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law.

PRIOR PUBLIC USE RULE

While this "rule," known as the doctrine of "prior public use," was not limited to parkland, the state supreme court noted the rule was to be "applied more stringently where a public agency or municipality seeks to encroach upon a park." According to the state supreme court, the meaning of article 97 for an existing public park "must be understood in this common-law context," i.e., the prior public use rule.

There is no reason to believe that art. 97 was intended by the Legislature or the

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voters to diminish the scope of parkland that had been protected under the common law by the prior public use doctrine or the doctrine of public dedication.

As a result, the state supreme court concluded "parkland protected by art. 97 includes land dedicated by municipalities as public parks that, under the prior public use doctrine, cannot be sold or devoted to another public use without plain and explicit legislative authority." Accordingly, "the explicit legislation authorizing the diversion of public parkland pursuant to article 97 would require a two thirds vote by the state legislature."

PLAYGROUND PRIOR PUBLIC USE

Having found "the spirit of art. 97 is derived from the related doctrine of prior public use," the state supreme court then considered "whether the Cross Street Playground was dedicated by the city as a public park." If so, the supreme court noted the proposed transfer of Cross Street Playground from use as a public park to a school "would require legislative approval under the prior public use doctrine and, thus, under art. 97."

As described by the state supreme court, within the context of prior public use, Cross Street Playground had served as a public playground for more than sixty years. The city obtained title to the parcel in 1939 through an action to foreclose a tax lien for nonpayment of taxes. In 1946, the city planning board recommended that the land be used for a "new playground," and referred the matter to the mayor. The city council voted in 1948 to turn over "full charge and control" of the property to the playground commission, and in 1949 to transfer funds to the commission to cover costs of work to be done on Cross Street Playground.

In November, 1957, the city council passed an ordinance formally naming the playground the "John A. Sullivan Memorial Playground." The mayor approved the ordinance early in 1958. Despite the name formally given, the parcel eventually came to be commonly known as the "Cross Street Playground."

In 2009, a report on a survey of the city's parks and open space conducted by the Department of Conservation and Recreation, the Pioneer Valley planning commission, and the Franklin Regional council of governments included a map that identifies the Cross Street Playground as "permanently protected open space." A year later, the city's mayor endorsed an open space plan which noted that, although not all public land is "permanently committed for conservation purposes," Cross Street Playground was public land with a "full" degree of protection and "active" recreation potential.

LWCF GRANT "DETERMINATIVE"

In considering the "totality of circumstances," the state supreme court acknowledged the significant history of more than sixty years of public park use at Cross Street Playground. That being said, the court found the 1979 LWCF grant to rehabilitate Cross Street Playground was more determinative of the city's clear and unequivocal intent to dedicate this land as a public park. Moreover, the state supreme court found: "The restrictions imposed by the act on the management of land acquired or developed with LWCF funding remain in full effect over the

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Cross Street Playground." See 54 U.S.C. § 200305(f)(3) (2012 & Supp. II).

As a result, in light of LWCF grant funding for the site, the state supreme court held the City of Westfield had "surrendered all ability to convert the playground to a use other than public outdoor recreation without the approval of the Secretary." 16 U.S.C. § 4601-8(f)(3).

Regardless of whether the parcel had been dedicated earlier as a public park, it became so dedicated once the city accepted Federal funds pursuant to this condition. It is significant that this understanding was shared by the Executive Office of Energy and Environmental Affairs, whose 2006 SCORP stated that land developed with LWCF funds became protected under art. 97.

CONCLUSION

Having found the Cross Street Playground was dedicated as a public park by the city under the LWCF law, as well as, the prior public use doctrine and art. 97, the state supreme court vacated the judgment of the lower courts in favor of the City of Westfield and ordered the trial court to issue a judgment in favor of the plaintiffs. In so doing, absent compliance with both Article 97 and the LWCF law, the trial court would impose a permanent injunction against diversion of the Cross Street Playground to an elementary school.

The City of Westfield's had argued that "the failure to build a new public school would have an adverse impact on the residents of the city, specifically the children, who are currently learning in outdated and decaying schools." The state supreme court, however, was not prohibiting the construction of a new school. On the contrary, the supreme court was merely ordering the city to comply with the law before it proceeds, i.e., Article 97 and the LWCF law.

Compliance with Article 97 would require a two-thirds vote by the state legislature to allow diversion of the Cross Street Playground to an elementary school. Moreover, compliance with the LWCF law would require the Secretary of the Interior, through the National Park Service, to approve conversion of the Cross Street Playground to an elementary school. Approval of any such conversion request, however, would require the City of Westfield to satisfy any necessary conditions imposed by the Secretary to assure "the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location" to Cross Street Playground.

SEE ALSO:

Park Conversion Protection in LWCF Project Map
James C. Kozlowski, *Parks & Recreation*, Nov. 2011 Vol. 46, Iss. 11
<http://cehdclass.gmu.edu/jkozlows/lawarts/11NOV11.pdf>

New Yankee Stadium Replaces Parkland
James C. Kozlowski, *Parks & Recreation*, Apr., 2007, Vol. 42, Iss.4.
<http://cehdclass.gmu.edu/jkozlows/lawarts/04APR07.pdf>

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Gift of Park Land in Perpetuity

James C. Kozlowski. *Parks & Recreation*. Dec. 2006. Vol. 41, Iss.12.

<http://cehdclass.gmu.edu/jkozlows/lawarts/12DEC06.pdf>

Land & Water Conservation Fund Act Blocks Conversion of Scenic Easement to Golf Course

James C. Kozlowski *Parks & Recreation* . Aug 1994. Vol. 29, Iss . 8

<http://cehdclass.gmu.edu/jkozlows/lawarts/08AUG94.pdf>

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>