LEASING PUBLIC FACILITIES TO PRIVATE CONCERNS: SOME LEGAL CHECKPOINTS

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"Coping with Cutbacks" is the theme in a recent issue of Trends (Vol. 18, No. 2, 1981), published cooperatively by the NRPA and the National Park Service about topics of general interest in park and recreation management and programming. One of the articles entitled "Creative Financing for a Cutback Era" described a variety of "enterprise" activities that involve the private sector in developing new public recreational facilities. One of the suggested methods to maximize revenue return with minimum investment risk is to purchase a recreational facility with public funds and lease it back to a private operator.

General legal principles and related court decisions may help illustrate some specific limitations imposed on the leasing of public property to private operators. Once administrators are familiar with some of the legal considerations involved in this type of municipal lease agreement, they will be better able to evaluate the utility of such arrangements in their own operations.

The ultimate decision to lease or not, however, will obviously depend upon a more detailed analysis by local counsel of the municipal charter, ordinances, regulations, state enabling statutes, and court decisions in a given jurisdiction. In any event, it appears that innovative leasing arrangements between public and private sectors will continue as a trend as the increased costs of acquisition, construction, operation, and maintenance become prohibitive for the public sector to manage alone.

Absent a grant of authority from the state, municipalities and counties do not generally have the power to lease their property to private persons. As a result, any expressed or necessarily implied leasing authority must be clearly based upon a specific state statute or a provision in a municipal charter (56 Am Jur 2d§ 556, p. 609).

In the case of *Lake George Steamboat Co. v. Blais*, 30 N.Y. 2nd 48, NE 2d 147 (1972), a five-year lease of dock and related facilities by the village of Lake George to a private corporation operating sightseeing boats was nullified. The dock facilities were on three parcels of land granted to the village by the state that were restricted, in part, to public park purposes and "for the sole purpose of erecting a dock or docks and dock facilities for the benefit of the Village of Lake George."

In a four to three vote, the New York appeals court said the lease to a private operator "for that corporation's private pursuit of profit clearly diverted part of this public trust to exclusively private purposes without legislative sanction." The court reiterated the general rule of law regarding leases of public property to private operators: "A municipality, without specific legislative sanction, may not permit property acquired or held by it for public use to be wholly or partly diverted to a possession or use exclusively private." The court added, ". . . the ultimate control over the uses of public places is in the Legislature. . . legislative sanction must be clear and certain to permit a municipality to lease public property for private purposes."

When such legislative authority does exist, the courts will determine whether a particular agreement complies with the relevant state statutes regarding the leasing of public lands to private operators. In the 1981 case of *Barker v. New Orleans Park Improvement Association*, La.App., 400 So 2d 237, the city's second extension of a lease for a horse riding academy to a private operator was declared void.

The state statute clearly provided that all leases were for a period of ten years with a possible extension of ten more years if the lessee had added $2,000 or more in permanent improvements. In this case, the lessee had provided the improvements during the initial ten-year lease and had received a seven-year extension. In the opinion of the court, the "further extension of five years clearly exceeded the limits of [the state statute] by two years and was for that reason void."

Assuming that a municipality has the power to lease public property to a private operator and does so within the provisions of the state statute, the terms of the lease agreement itself must ensure availability of the facility to the public on an equal basis with other groups. In the case of *Lincoln Park Traps v. Chicago Park District*, 323 Ill App 107, 55 NE 2d 173 (1944), the park commissioners leased a portion of a public park to a private nonprofit shooting club. Although the club kept the facility open to the public on an equal basis with members, the actual terms of the written lease could possibly operate to bar the public from using that portion of the park if the club so desired. The court invalidated the lease agreement finding the club's ability to exercise control over the premises inconsistent with its use as public property.

Ordinarily, a reasonable arrangement between a city and a private agency for the management and operation of special facilities in a park will be sustained if the proposed use in the lease is consistent with and in furtherance of public use and enjoyment of the park. Leases that do not substantially interfere with use for park purposes have also been upheld. 10 *McQuillan Municipal Corporations*, § 28.53 (3 ed. 1978).

In the case of *Casambas v. Newport*, 45 R.I. 343, 121 A 534 (1923), the city entered into a 20-year lease with a private operator for a portion of public beach. Terms within the lease required the private operator to comply with the city's plan to "enhance the beauty of the beach and add to its availability as a place of public resort and recreation." The plaintiff in this case alleged the city did not have the power to enter into such an agreement. Unlike *Lincoln Park Traps*, the explicit purpose of this lease was to increase, rather than circumscribe, public access. The court, therefore, upheld the agreement as a reasonable extension of the city's power to control its public land.

> Without question the city would have authority to establish reasonable regulations concerning the public use and enjoyment of the beach, and the city might make a lease of a portion of the beach if the public were not excluded therefrom, and the purpose and effect of such lease was the furtherance of the public use for which the beach is held.

Leasing land or facilities to private operators must also be permissible within the terms of the grant or dedication that originally conveyed a parcel of land to the municipality for public park purposes. In the case of *City of Bangor v. Merrill Trust Co*., 99 A 2d 298 (1953), the court

upheld the leasing of public park land for fairs and night racing under the terms of the will that conveyed the property. The 1919 will of Joseph Bass conveyed Maplewood Park to the city with the restriction that the tract would "be forever known as Bass Park . . . and devoted to Public Park purposes including if the City shall see fit, semi-public purposes such as circuses, fairs, the City charging for such uses at its option."

Ruling on the validity of a 1951 lease of the park fairgrounds, the state supreme court determined that horse racing came "within the meaning and intent of the testator's gift." The court found "no essential difference which would permit the circus and fair and deny racing." According to the court, they were all "semi-public" purposes within the intent and meaning of the donor's will.

Similarly, in the case of *Angel v. City of Newport*, 288 A 2d 498 (1972), the issue was whether the city, in leasing a small portion of the park to a private nonprofit corporation, had violated the condition in the donor's 1921 deed that required that the land "be forever used and maintained as and for a public park for the free use of the public." In 1969, the city entered into a lease agreement with the Newport Chapter for Retarded Children, Inc. to build an indoor recreation facility on the leased land. The lease provided that the facility would be open to the public free of charge.

The court's opinion in this case cited the strict conformity rule of law that governs land dedicated to public use. "[A] municipality to which land has been granted for dedication to a public use, and this is particularly true of public parks, [must] strictly conform to the terms of the grant as it stated the uses to which the grantor intended that it be dedicated."

In reaching its decision, however, the court applied some reasonable qualifications to the strict conformity rule. "In appropriate circumstances," the court found that the strict conformity rule was not breached where "the new or substituted use did not patently distort, negate, or violate the intention of the grantor." According to the court, "dedication is not confined to the usages known at the time; it includes the right of the public to use the property in such a way as is convenient and comfortable according to changed conditions

As a result, the court determined that the lease did not change the use of the land parcel as a park and a place of recreation. Rather than violating the terms of the dedication, the court said the lease intensified the use intended by the donor.

> It makes the recreational potential of the land available to retarded children who are part of the public but who can be provided with suitable recreational opportunities contemplated by the grantor more effectively by the provision of such facilities. . .

Unlike leases, a mere license to operate a facility can be revoked at any time by the municipality. The only legal remedy for a wrongfully revoked license is money damages. A lease, however, provides the private operator with much greater legal protection if the municipality wishes to terminate the lease. A lease cannot be terminated unless the operator provides the municipality with adequate cause for eviction under the expressed or implied terms of the lease. In addition, the operator may have the municipality enjoined from wrongfully interfering with his or her possession of the premises. In the event of wrongful eviction, the operator has a right to regain

possession of the premises. As a result, any agreement with a private operator should be carefully considered, keeping in mind the different legal consequences which attach to a lease agreement versus a license, 14 *Am Jur Legal Forms Parks, Squares, Playgrounds*, § 192:33.

In the case of *Gage v. City of Topeka*, 205 Kan. 143, 468 P2 d 232 (1970), a written agreement between the city and a private concessionaire to construct and operate a miniature train upon park premises was challenged. Heirs of the donor alleged that the agreement constituted a conveyance that violated the restrictions contained in the 1899 deed to the city. Non-compliance by the city with the terms of the grant would have caused the park to revert to the heirs.

In determining whether the agreement constituted a lease in violation of the deed restrictions or a mere license, the court looked to the terms of the concessionaire contract. According to the court, a right of exclusive possession of the premises would indicate a lease, while a mere privilege to occupy the premises under the control of the owner would suggest a license. Under the facts of this case, the court found a limited right to "make available to the public a certain type of entertainment" rather than an exclusive right to possess the premises.

> The rights granted are subject to a high degree of control by the city, and subject as well to the normal use and enjoyment of the park by the public ... everything permitted to be done under the agreement must conform to the will of the city about all the concessionaire has is the exclusive right to operate as the city may dictate. . . [which] strongly suggests a license rather than a lease.

Municipalities may lease their property where the land and facilities are owned in a proprietary capacity, but municipalities are ordinarily denied the right to lease for private purposes property needed to serve governmental functions, 63 *C.J.S. Municipal Corporations*, §964 (1950). Governmental functions are legal duties imposed by the state on municipalities to preserve and promote the general public health, safety, and welfare. The municipality receives no particular benefit or compensation for fulfilling such obligations.

On the other hand, proprietary functions are granted by the state for the specific benefit and advantage of the inhabitants embraced within the corporate boundaries of the municipality. When a municipality exercises such discretionary powers of local self-government or home rule for its own benefit or the private advantage of its inhabitants, it is engaging in a proprietary function. In practice, the facts of the individual case will determine whether a particular municipal activity is a governmental or a proprietary function, 62 *C.J.S. Municipal Corporations*, § 110 (1955).

In the case of *Jonesboro Area Athletic Association v. Dickson*, 227 Ga. 513, 181 S.E. 2nd 852 (1971), the city entered into a five-year lease with a private nonprofit corporation to maintain and operate a public athletic field. In attempting to cancel the lease, the city alleged that it had had no power to enter into this agreement because the field had been dedicated by the municipality for public use. Such an exercise of governmental power, therefore, precluded any grant of property rights for private purposes.

According to the court, the city had the power at its discretion to dispose or lease property

purchased or held for use in its proprietary capacity. In the absence of expressed legislative authority, however, other circumstances must be shown before the city could lease or otherwise dispose of property acquired in a governmental capacity for the use and benefit of the general public.

> The trial court must determine.. . whether or not the property had been previously dedicated to a public we and, if so, there being no express legislative authority to lease it to a private corporation, whether the public use had in fact been abandoned or the property had become unsuitable or inadequate for the purposes to which it was dedicated prior to the lease.

"In the absence of charter authority to the contrary," the court said, "the maintenance of a park by a municipality is a governmental function." Since the facts in this case did not indicate abandonment or unsuitability of the public property for athletic field purposes, the court found the city had no power to lease property performing a governmental function to a private operator. Acts taken by a municipality without the required legislative authority are termed *ultra vires* and hence void.

The private operator in this case was a nonprofit corporation providing services to the general public. This fact, however, had no bearing on the validity of the lease.

> [T]he operation of the facility by the plaintiff… [cannot] be construed as a public use by a showing that the plaintiff is a nonprofit corporation which may devote any profits from its operation to charitable purposes, or that benefits may flow to the city in carrying out an *ultra vires* contract made in its behalf. . . . [T]he general public . . . [must be] subject to the uses and rules prescribed by the plaintiff private corporation or else be denied its use.

As seen earlier in *Lincoln Park Traps*, the court in this case refused to uphold a lease that, on paper if not in practice, relinquished administrative control of a public facility performing a governmental function to a private operation. On the other hand, the courts appear to be more willing to uphold agreements with private operators when the city maintains the power to prescribe rules and regulate uses in a public facility.

The dissenting judges in the *Lake George Steamboat* case cited earlier subscribed to a less restrictive view of public use than the majority opinion. In their opinion, public use was not necessarily synonymous with public operation. In the minority view, "the lease was valid so long as a public purpose was present, that is, if the purpose of the lease was to provide a public benefit even if by private enterprise."

This minority view of the 1972 New York court that looked to the public interest being served rather than the governmental/proprietary nature of the function, reappeared as the majority opinion in a 1978 Tennessee case, *State Association for the Preservation of Tennessee Antiquities v. City of Jackson*, 573 SW. 2d 750. In this case, plaintiff challenged the validity of a lease between the city and a private for-profit enterprise to move a municipally owned facility, the "Home of Casey Jones" museum, to a commercial area and operate it as a tourist attraction.

The ten-year lease required the facility to be kept in good repair, insured, and open to the public at reasonable hours throughout the year.

Prior to the lease, the city had operated the museum at a deficit except for one year. Under the lease the city was to receive an annual $1,500 base rental, plus 10 percent of the gross annual admission receipts. Industrialization in the area and an interstate highway overpass had made the museum's original location less accessible to the general public.

Since the museum was publicly owned and operated, plaintiff argued that the city had no legal authority to lease or dispose of a property acquired and operated in a governmental capacity. The court refused to apply plaintiff's traditional definition of governmental actions, choosing instead to examine each case "in the light of its own facts and circumstances." Noting that the city's charter expressly conferred unlimited leasing authority "so as to permit the city to exercise freely" its powers, the court chose to liberally interpret the legislative grant of power. "Obviously, cities must be and legally are free, within their charter provisions to dispose of outmoded, surplus or unprofitable properties where these are not held under a grant imposing a specific . . . limitation upon ownership or use."

In effect, the court found that the museum had become unsuitable in its original location for the purpose to which it was dedicated. As discussed in the *Jonesboro* case, unsuitability or abandonment would allow a city to dispose of a property no longer providing the intended governmental function. Instead of applying the rules cited in *Jonesboro*, the court in this case seemed more willing to defer to the city's judgment in managing property for the public benefit.

> [We] are of the opinion that . . . [plaintiff has] failed to demonstrate that the subject lease is contrary to the public interest, that it represents a misuse or abuse of the discretion and authority of the Board of Commissioners, or that it is in any other way *ultra vires* or beyond the legitimate charter power of the city.

The preceding discussion provides a quick overview of what factors the courts are most likely to examine in determining the legality of leasing public recreational facilities to private operators. Working with the advice of counsel, a municipality should be able to develop a defensible leasing arrangement of public recreational facilities to a private operator.

Knowledgeable and detailed response to the questions in the checklist that follows will not preclude court challenges to public leasing arrangements, but it should increase the likelihood of developing a valid agreement between public and private sectors.

1. Is there a specific grant of authority, state statute, or charter provision that expressly permits leasing public recreation facilities to private operators?

2. Does the lease conform in writing to the provisions of the state statute or municipal charter, particularly as it relates to lease extensions and public advertising/bidding requirements?

3. Do the written lease provisions ensure the availability of the facility to the

public on an equal basis with other groups?

4. Is the lease consistent with and in furtherance of public we and enjoyment of the recreational facility?

5. Does the lease conform to the meaning and intent of any restrictions imposed on the grant of the property to the public?

6. Would a concessionaire's license to operate a facility be preferable to a lease?

7. Does the lease permit the city a high degree of control regarding rules and regulations for public or private use of the recreational facility?

8. Given charter provisions and court interpretations in a particular jurisdiction, does the city operate the facility in a proprietary or a governmental capacity?

9. Is the facility being leased because it has become inadequate or unsuitable for its intended public we; has the intended public use been abandoned?

10. To what extent have the court in a given jurisdiction demonstrated their willingness to defer to the city's judgment to involve the private sector in managing public property for public purposes and benefits?