

PUBLIC TRUST CHALLENGE TO PRIVATE PARK MUSEUM

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Public/private partnerships in parks and recreation administration are commonplace, providing a generally very beneficial and cost effective means for increasing the range of available recreational opportunities in public parks. In so doing, however, as illustrated by the case described herein, the terms of any such public/private agreement must not effectively relinquish complete control of public parkland held in public trust to a private entity.

In many locales, users of a particular public park have organized themselves into what are popularly known as “Friends of the Park” groups to bring legal challenges to proposed governmental projects that would divert parkland to other allegedly inappropriate uses. In the reported case law, these groups have played a very significant role as “citizen watchdog” organizations, ensuring local government complies with applicable law designed to preserve and protect parkland and open space held in public trust for the entire community.

Under traditional common law, the State owns submerged lands up to the mean high tide water mark. These lands, including reclaimed submerged land, are generally held in public trust for all citizens, most notably public beaches. Accordingly, without specific legislative authorization from the State which protects the public interest, a local governmental entity authorized to operate by the State, such as a park district, cannot divert or convey such public trust lands in a manner which could conceivably relinquish public control and access to a private party.

STAR WARS

In the case of *Friends of the Parks v. Chicago Park District*, 2015 U.S. Dist. LEXIS 30291 (N.D. Ill. 3/12/1915), the federal district court considered whether construction of a proposed museum on public parkland reclaimed from Lake Michigan violated the “public trust doctrine.” The federal court also considered whether the Chicago Park District (CPD) lacked the legal authority to enter into a memorandum of understanding (MOU) with a private non-profit group to authorize construction of the proposed museum.

SEE: <http://abc7chicago.com/news/lucas-lawsuit-challenges-museum-location/393248/>

Plaintiff Friends of the Parks (FOTP) is a nonprofit park advocacy organization, dedicated to preserving, protecting, and improving Chicago's parks and forest preserves. Plaintiffs Sylvia Mann and John Buenz are residents of Illinois. Defendant Chicago Park District (CPD) is "a body politic and corporate" established by state law. 70 Ill. Comp. Stat. § 1505/3. Defendant City of Chicago is a body politic and municipal corporation.

In May 2014, a task force appointed by Chicago Mayor Rahm Emanuel issued a report recommending the parking lots south of Soldier Field as the site for constructing a museum, to be known as the Lucas Museum of Narrative Art. The Museum is to be operated by a nonprofit corporation also called the Lucas Museum of Narrative Art (the LMNA) and will be dedicated to the exhibition of "narrative art" selected by the LMNA. The Mayor has publicly endorsed the proposed location.

On or about September 8, 2014, CPD entered into a memorandum of understanding (MOU) with the LMNA. The MOU formalized the terms discussed between CPD and the LMNA, including the construction, use and operation of the Museum. It provides that the Museum will be located on the plot of land recommended by the task force and endorsed by the Mayor. The Museum would be located in the Museum Campus in the area generally lying between East Waldren Drive on the north and the McCormick Place Lakeside Center (East Building) on the south (the "Project Area").

The "Project Area" is located within Burnham Park and consists entirely of land recovered from the navigable waters of Lake Michigan, most of it during the 1920s. Under the MOU the LMNA "will have the exclusive right to occupy, use, maintain, manage and control the Museum Building and the Museum Site." The MOU does not specify whether the Museum will be owned by the LMNA, the City or CPD.

In their complaint, FTOP alleged CPD had acted *ultra vires* (i.e., without legal authority) and in violation of the public trust doctrine. CPD asked the federal district court to dismiss FTOP's claims. In so doing, CPD contended FTOP lacked legal standing to bring their claims and their lawsuit was premature, i.e., lacked "ripeness," because the project was a mere proposal subject to further approvals. In addition to standing and ripeness procedural issues, the federal district court would also consider whether FTOP had alleged sufficient facts which would support their claims and avoid a pretrial dismissal for failure to state a legal basis for their lawsuit.

STANDING FOR "RIPE" LAWSUIT?

Accordingly, the initial issue before the federal district court was whether FTOP had established legal standing to bring their lawsuit. As noted by the court, legal standing exists to bring a lawsuit where a plaintiff can show the following:

- (1) a concrete and particularized injury that is actual or imminent;
- (2) a causal connection between the injury and the defendant's action; and
- (3) a likelihood that the injury can be redressed if the court finds in the plaintiff's favor.

Applying these principles to this particular case, the court found legal standing existed in FTOP to pursue a lawsuit in federal court because FTOP had indeed "identified a concrete injury, i.e., the lands held in the public trust are imminently in danger of being altered by the actions" of CPD. Moreover, the court found "this injury can be redressed by a favorable court decision."

In so doing, the court cited earlier legal precedent to provide standing to local taxpayers who had “sued to prevent the implementation of plans to construct facilities on public parks” because these citizens are “beneficiaries of lands held in the public trust”:

If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.

The federal district court then considered whether the claims in the FTOP lawsuit were “ripe for adjudication.” As noted by the court, in determining whether a case is ripe, courts will consider: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. In this particular instance, the court found claims based on “transfer of control of public trust land to a private entity” were certainly fit for a judicial decision. The alleged hardship to FTOP was more than mere conjecture and speculation.

Here, the Park District has signed an agreement, the MOU, with the LMNA regarding the terms of the construction of the Museum. Although Defendants argue that the Museum will need additional approvals before it is constructed, the MOU makes clear that the Park District has already committed to transferring control of public parkland to the LMNA.

As a result, the federal district court denied CPD’s motion to dismiss the lawsuit on the basis of legal standing and ripeness.

PUBLIC TRUST CLAIM

In their complaint, the FTOP alleged CPD had “engaged in a breach of trust” against FTOP and other members of the public with respect to the subject property. As cited by the federal district court, under the public trust doctrine, “the State holds title to submerged land, as is involved here, in trust for the people, and in general the governmental powers over these lands will not be relinquished.”

Under the public trust doctrine, the State cannot abdicate its trust over property in which the whole people are interested so as to leave them entirely under *the use and control of private parties*. State control over public lands cannot be relinquished except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. (*Emphasis of court*)

As characterized by the federal district court, this case illustrated “the classic struggle between those members of the public who would preserve our parks and open lands in

their pristine purity” and the role of local government to respond to “the pressures of the changing needs of an increasingly complex society.” Specifically, the court acknowledged that local government may “find it necessary, in good faith and for the public good, to encroach to some extent upon lands heretofore considered inviolate to change.” That being said, the federal district court found “[t]he resolution of this conflict in any given case is for the legislature and not the courts.” In so doing, however, the court recognized “the purpose of the public trust doctrine is to police the legislature's disposition of public lands.”

If courts were to rubber stamp legislative decisions, the doctrine would have no teeth. The legislature would have unfettered discretion to breach the public trust as long as it was able to articulate some gain to the public.

As cited by the federal district court, the following “three basic principles” should characterize judicial review of an alleged “public trust” violation by a governmental entity:

First, courts should be critical of attempts by the state to surrender valuable public resources to a private entity. Second, the public trust is violated when the primary purpose of a legislative grant is to benefit a private interest. Finally, any attempt by the state to relinquish its power over a public resource should be invalidated under the doctrine.

Moreover, consistent with the public trust doctrine, the court acknowledged that “[t]he legislature can alienate the State's interest in public trust land if the primary purpose is not to satisfy a private interest and does not impair the interest of the public in the remaining lands and waters.”

In their complaint, FTOP had claimed “the construction of the LMNA will unduly encroach on open space.”

As noted by the court, the operating agreement in the MOU between the LMNA and CPD provided that LMNA would have “the exclusive right to occupy, use, maintain, manage, and control the Museum Building and the Museum Site,” subject to the rules and regulations of the Park District:

In furtherance of the foregoing, it is understood that notwithstanding the Park District's ownership of the Museum Site, so long as LMNA is operating the Museum for the Museum Purpose, LMNA shall have full and exclusive operational control of the Museum Building and any other improvements located on the Museum Site...

CPD maintained that the MOU was not intended to “create any binding contractual obligations on any party.” On the contrary, CPD claimed the MOU was merely intended to “provide a general framework for the subsequent negotiation of definitive agreements regarding the development and operation of the Museum.” In so doing, CPD referred to

the provision the MOU would terminate if the CPD and LMNA did not execute a development agreement and an operating agreement within twelve months of entering into the MOU. As a result, CPD argued that the MOU "does not grant or convey anything it merely provides the general framework for subsequent negotiations."

The federal district court disagreed. While CPD would maintain ownership of the land, the court noted that "ownership does not necessarily equal control." On the contrary, the court found the MOU would provide LMNA with *the exclusive right to occupy, use, maintain, manage, and control the Museum Building and the Museum Site.*" (*Emphasis of the court.*) In particular, the court found the language in the MOU "could be reasonably construed that the parties intend any future operating agreement will give LMNA exclusive control over public land."

As a result, the federal district court agreed with FTOP that the MOU "could cause an abdication of control of the property to the LMNA." Further, the court found no indication in the MOU that "the Park District will remain the owner of the property or would remain as a landlord under a lease agreement." (Under a lease, the landowner maintains ownership and only relinquishes limited control for a period of time and to the degree specified in the terms of the lease agreement.)

Accordingly, the court found FTOP had alleged sufficient facts to establish that CPD intended to "transfer the exclusive right to use and control the Museum Site to a private entity." Under the public trust doctrine, the federal district court held "the Park District cannot abdicate its trust over public land so as to leave it entirely under the use and control of private parties." As a result, the federal district court found the Friends complaint "plausibly states a claim that the agreement violates the public trust doctrine."

"ULTRA VIRES" LACK OF AUTHORITY?

FTOP had also alleged the CPD was acting *ultra vires* (i.e., without legal authority) because the MOU between CPD and LMNA lacked "a specific authorization from the General Assembly."

CPD, however, claimed the state legislature had indeed enacted sufficient general authorizing legislation which gave "the Park District control over public parks within Chicago." Moreover, CPD claimed the Park District Aquarium and Museum Act provided the Park District with the legal power to "convey park lands for the proposed museum." Specifically, the Park District Aquarium and Museum Act empowered park districts in Illinois to erect and maintain a museum in a public park and enter into contracts for the erection and maintenance of the museum with the directors and trustees of the museum. In response, FTOP contended this statutory authorization did not give "the Park District such broad authority" to effectively ignore the public trust doctrine.

The federal district court acknowledged that "Park Districts act as delegates of the legislature in holding the parks in trust for the public." Moreover, absent a specific legislative enactment from the Illinois General Assembly authorizing a particular transfer

of public trust land to a private party, the federal district court found a local governmental entity, like a park district, could not do so on its own under its general legal authority to control and maintain public parks.

Further, the federal district court noted that [t]he state cannot abdicate its trust over property in which the whole people are interested.” In so doing, the court acknowledged a significant legal “difference between public lands owned by the state and public lands subject to the public trust doctrine.” Specifically, in the case of public parkland reclaimed from Lake Michigan, the court found “the State holds title to *submerged land*, as is involved here, in trust for the people, and that in general the *governmental powers over these lands will not be relinquished.*” (*Emphasis of court.*)

The State has the authority to relinquish control over public trust lands, but it is a limited ability compared to public lands not held within the public trust... Whether the use of land protected by the public trust doctrine is permissible has been determined in light of authorizing legislation of the Illinois General Assembly. Land in the public trust is held by the *whole people* for purposes in which the *whole people* are interested. The case law suggests action by the Illinois General Assembly is required to initiate the transfer of public land held in trust for all the citizens of Illinois.

As a result, absent such specific state authorizing legislation, the federal district court found FTOP had “plausibly stated a claim that conveyance of park lands by the Park District is *ultra vires* for the purposes of a motion to dismiss.” Accordingly, the FTOP lawsuit would be allowed to proceed to trial for further proceedings to consider the issues discussed herein. In the alternative, the Illinois General Assembly could conceivably enact specific legislation authorizing the proposed museum project between CPD and LMNA.

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