

## DECEMBER 2006 LAW REVIEW

### GIFT OF PARK LAND IN PERPETUITY

James C. Kozlowski, J.D., Ph.D.  
© 2006 James C. Kozlowski

In 1930, the will of Mary P.C. Cummings left a “gift of real estate” known as “Babylon Hill” to the City of Boston to hold “in trust” and keep the parcel “forever open as a public pleasure ground, and to maintain and care for the same in a suitable manner in accordance with that purpose.” The land itself is actually outside of Boston in Woburn and Burlington, Mass. Ms. Cummings’ will also stipulated that income from certain real estate and stock was to be applied “upon the trust” by the City of Boston “to the care and maintenance of said real estate in Woburn and Burlington as a public pleasure ground.”

In the event the “City of Boston shall decline or fail to accept said real estate in Woburn and Burlington for the purposes aforesaid” the will provided that the land was to be given to “the Playground and Recreation Association of America, in trust for the same purposes and upon the same terms and conditions as are herein prescribed concerning the taking of the same by the said City of Boston” (Apparently, the Playground and Recreation Association of America was one of the predecessor organizations which ultimately came together to form the National Recreation and Park Association.)

Fast forward seventy-five years; the City of Boston still holds the land and it is open to the public, but the tract remains relatively undeveloped, certainly for active recreational use. In August of 2005, the *Boston Globe* reported that “[m]oney to endow and care for the new Rose Kennedy Greenway [in downtown Boston] could come from an unlikely source: a couple hundred acres of wooded land and fields bequeathed to the city 75 years ago,” i.e., “the Cummings Trust, which holds 218 acres of idle land in Burlington and Woburn estimated to be worth \$30 million.”

The *Globe* piece referenced a letter to Mayor Thomas Menino from the Boston Finance Commission which claimed “the city could honor the intent of the trust by selling the land for some kind of development and using the proceeds to pay for upkeep of the Greenway.” In the opinion of the Commission, “there has been no use made of the land” for a number of years. A local resident, however, told the *Globe* that “the property is mostly used by kids on dirt bikes and hikers.” A number of local individuals and groups, most notably the Woburn Residents’ Environmental Network (WREN), favor continuation of existing passive recreational use of the site and oppose any attempt on the part of the City to sell the land for development.

In February 2006, a Woburn alderman reported that he had “met with the City of Boston and they agreed not to move forward with any development until both Burlington and Woburn are comfortable with the outcome.” The alderman noted further that the Finance Commission had no power to sell and develop that [Cummings Trust] land. While he favored making “a strong case for a passive use and completely fulfilling the spirit of the will of Mrs. Cummings,” the alderman thought the City of Boston would prefer “to build a golf course and derive some

## DECEMBER 2006 LAW REVIEW

income from a lease to Woburn and Burlington.”

In the 2005 article, the *Globe* reported that Boston corporation counsel recognized that “there were several big obstacles to selling the land for commercial use.” Clearly, as illustrated by the state court opinions described below, any attempt by the City to sell the land for private development would violate the public trust requiring the gift of land be maintained as a public pleasure ground in perpetuity. Further, depending on the scope and public availability of any recreational development, a golf course which effectively engulfs a public park may not be consistent with the maintenance of a “public pleasure ground” within a modern context.

### PUBLIC CHARITABLE TRUST

In the case of *Cohen v. City of Lynn*, 33 Mass. App. Ct. 271; 598 N.E.2d 682 (1992), the City conveyed land to a private developer because it claimed the parcel was “no longer usable for park purposes.” Plaintiffs claimed “the conveyance violated the city's obligations under a public charitable trust which they claimed arose in 1893 when the parcel was acquired by deeds which state the land is to be used ‘forever for park purposes’.”

A state statute authorized the state attorney general to bring an action in state court “to enforce the purpose or purposes of any gift or conveyance which has been accepted by any city for a specific purpose or purposes in trust or otherwise, or the terms of such trust.” In the event the purposes of the trust “have become impractical” or the purpose of the trust had terminated, the statute authorized the state court “to determine the purposes or uses to which the property involved shall be devoted.” G. L. c. 214, § 3(10)

In this particular instance, the trial judge had concluded that “the parcel was still impressed with the public charitable trust originally established, and it had not been demonstrated that it had become impossible or impracticable to carry out the trust purposes.” In so doing, he noted that the parcel was “suitable for park purposes,” possessing “a beautiful scenic ocean view” and was “suitable for park purposes.” Moreover, at the time of the City’s attempted conveyance to a private developer (Gilberg), the parcel “was a popular area for walkers, riders, and joggers” and “provided a scenic vista of open space suitable for park purposes and reinforced the ‘greenness’ of the area.” As a result, the trial judge concluded that “the trust obligations could not be impaired by the enactment of special legislation purporting to authorize the city to convey the parcel at a private sale and declared the conveyance to Gilberg null and void.” The City appealed.

Assuming “the parcel was still impressed with the public charitable trust originally established,” the City argued on appeal “compliance with the original terms is today impracticable” and that the doctrine of “cy pres” (from the French meaning “as close as possible”) should be applied to “bring the conveyance within the original purposes of the trust.” The appeals court rejected this argument.

## DECEMBER 2006 LAW REVIEW

As noted by the appeals court, in 1891, the park commissioners had wanted to acquire “more open air space” for a park purposes which were defined as follows:

The term “park” usually signifies an open or inclosed [sic] tract of land set apart for the recreation and enjoyment of the public; or, in the general acceptance of the term, a public park is said to be a tract of land, *great or small*, dedicated and maintained for the purposes of pleasure, exercise, amusement, *or ornament*; a place to which the public at large may resort to for recreation, *air, and light.*”  
(*Emphasis of court*)

Applying this definition to the facts of the case, the appeals court rejected the City’s contention that “the parcel is too small to serve park purposes.” On the contrary, the appeals court agreed with the trial judge’s findings that “it was being used, at the time of the purported conveyance to Gilberg, for exercise and recreation and provided pleasant vistas including a beautiful scenic ocean view.” Moreover, “[b]y ornamenting the parkway and making the general area pleasing to the eye,” the appeals court found “the parcel serves park purposes.” As a result, the appeals court determined that the City had “not demonstrated that it had become impossible or impracticable to carry out the original park purposes of the 1893 conveyances.”

In reaching this determination, the appeals court found the City held title in the land subject to its being used “forever for park purposes.”

As noted by the appeals court, “[p]roperty conveyed to a governmental body for particular public purposes may be subject to an enforceable general public obligation or trust to use the property for those purposes.”

Whether a trust or obligation is imposed is a matter of interpretation of the particular instrument and determination of the particular donors’ intent, and is to be ascertained from a study of the instruments as a whole in the light of the circumstances attending their execution. Search should be made for a general plan designed to express a consistent and harmonious purpose.

Applying these principles to the facts of the case, the appeals court found “direct and unambiguous language, clearly declaring that the grantors divested themselves of all their interests in the land forever for park purposes.” According to the court, “conveyances of land for parks, where the grantors specified the land be used ‘forever’ or ‘in perpetuity’ without other limitation, have been found to establish a public charitable trust. Moreover, in this particular instance, the appeals court found no condition or limitation on the use for park purposes. Further, there was “no right of reversion,” i.e., the return of the land to the grantor’s heirs if the City diverted the land to some other use unrelated to park purposes. Accordingly, the appeals court found the trial judge had “correctly concluded that a public charitable trust arose from these conveyances and that the acceptance of deeds by the city” which “constituted a contract

## DECEMBER 2006 LAW REVIEW

between the donor [of the land gift] and the donee [City] which must be observed and enforced."

The appeals court went on to note that "the contract obligations arising from a charitable trust such as exists in the present case cannot be impaired legislatively."

A conveyance conditional upon perpetual use of the property... imported a contract obligation. The sanctity of such a contract is under the protection of art. 1, § 10, of the Constitution of the United States. The special legislation authorizing the city to sell and convey could therefore neither impair the trust obligation, nor ratify the purported conveyance...

The policy of the Commonwealth has been to add to the common law inviolability of parks express prohibition against encroachment. . . . The firmly settled and frequently declared policy of the Legislature heretofore has been to preserve public parks free from intrusion of every kind which would interfere in any degree with their complete use for this public end. It cannot be assumed that this policy is to be lightly thrown aside.

The appeals court, therefore, affirmed the judgment of the trial court which had held the terms of the public charitable trust prohibited the City from conveying the park parcel to a private developer.

### ICE RINK PARK

In the case of *Dunphy v. Commonwealth*, 368 Mass. 376; 331 N.E.2d 883 (1975), the town of Rockland, Mass. authorized the construction of an artificial ice skating rink on land conveyed to the town in 1917 with the stipulation in the deed that the land was "to be kept and used as a Public Park in perpetuity for the public good and to be called the Maj. Edward P. Reed Park." In 1972, legislation authorized the town to "convey the Major Edward P. Reed Park, located therein, to the Commonwealth as a site for an artificial ice skating rink to be named the Major Edward P. Reed Rink."

In their complaint, plaintiffs claimed the "cutting of the trees and erection of the proposed skating rink and related facilities and the conveyance of the land to the Commonwealth for the proposed use is unlawful." According to the trial judge, the town "has contracted and is charged with a charitable trust to carry out the terms of the deed that the land be kept and used as a public park" with the following changes effected by the proposed development project:

The Reed Park land consists of about 3.64 acres, or about 160,000 square feet, and until recently it included a stand of trees of great age. Under the Commonwealth's plan for the construction of the rink and use of the property, some trees will be left on three strips of the land of the following sizes: one about fifty feet by 160 feet, one about fifteen to thirty feet in depth by 115 feet in length,

## DECEMBER 2006 LAW REVIEW

and the other about twenty feet by sixty-three feet, the total area for all three being about 12,000 square feet. The remainder of the Reed Park land is to be devoted to the building housing the rink, driveways, and parking areas, surfaced with bituminous concrete.

In the opinion of the trial judge, these proposed changes did not “coincide with the intention of Mr. Reed when he made his gift to the Town of Rockland.”

When for all practical purposes, the entirety of the area is devoted to a permanent building, and hot-top parking spaces and driveways, the parcel is no longer a park with a skating rink. It is a skating rink -- period. The preservation of a token number of trees does not change the situation. The public at large will no longer use Maj. Edward P. Reed Park. Skaters will use it.

The appeals court agreed. In the opinion of the appeals court, “the use of the land for the erection and operation of the proposed skating rink building and related facilities would constitute a violation of the terms and conditions of the trust to which the land is subject.” As noted by the appeals court, the town had taken title to Reed Park “as trustee under a public charitable trust requiring it to use the land for a public park in perpetuity.”

The town in taking title to the Reed Park land assumed obligations and must now comply with them. It is not within the power of the Legislature to impair those obligations by legislation, and St. 1972, c. 89, does not validate the diversion of the property from public purposes to other uses and purposes.

As a result, the appeals court ordered the land “be kept and used as a Public Park in perpetuity for the public good in accordance with the terms of the deed of the grantor to the town dated April 4, 1917.”