Fordham Environmental Law Review

Volume 13, *Number* 2 2001 *Article* 3

Improving Public Trust Protections of Municipal Parkland in New York

Cyane Gresham*

*Fordham University School of Law

NOTES

IMPROVING PUBLIC TRUST PROTECTIONS OF MUNICIPAL PARKLAND IN NEW YORK

Cyane Gresham[*]

---

[*] J.D. Candidate, Fordham University School of Law, 2003; M.S. The University of Wisconsin (Geology); B.A. Williams College (Geology). My thanks to the Counsel's Office at the City of New York Department of Parks and Recreation; especially Alessandro Olivieri, General Counsel, who suggested the project when the author was an intern, and Laura LaVelle, Assistant Counsel, who patiently answered questions. The support of Alan, Marjorie, and David Bayersdorfer has been constant and always appreciated. Finally, I would never have become so interested and involved in park matters without the urging of Alicia.

> [T]rust principles provide a valuable underpinning, but no more than that, for . . . planning. Successful . . . regulation will rest on coherent legislative and administrative goals and on their intelligent and understanding implementation. . . . [L]egislators and coastal administrators can and should take an active role in shaping the application of the public trust doctrine and public trust principles in their state, by developing strategies and mechanisms to incorporate the public trust doctrine into state constitutions, statutes, and regulatory programs, as well as to structure court cases creating favorable judicial precedents.[1]

INTRODUCTION

The Angel of the Waters hovers above Bethesda Fountain in Central Park. The imposing bronze statue celebrates completion of the Croton Aqueduct, which brought clean surface water into New York City for the first time in 1842.[2] Piping water in from Westchester County had been a massive engineering achievement, designed to help stop cholera epidemics, fight fires, and provide for the masses crowding the metropolitan area.[3] The gift of fresh water bubbling out of fountains and pipes seemed to New Yorkers of the mid-nineteenth century a healing gift from angels worthy of a park statue.[4] One hundred and fifty years later, by the end of the

---

1. JACK ARCHER ET AL., THE PUBLIC TRUST DOCTRINE & THE MANAGEMENT OF AMERICA'S COASTS ix & 179 (1994) (arguing for an incorporation of public trust principles from common law into state constitutions statutes, and regulations).

2. DENNIS BURTON, NATURE WALKS OF CENTRAL PARK 138–39 (1997); RICHARD J. BERENSON & RAYMOND CARROLL, ILLUSTRATED MAP AND GUIDEBOOK TO CENTRAL PARK 41 (Barnes & Noble 1999). Prior to 1842 New Yorkers had relied principally on wells in an overburdened groundwater aquifer. *See* DIANE GALUSHA, LIQUID ASSETS: A HISTORY OF NEW YORK CITY'S WATER SYSTEM (1999) at 11–17.

3. EDWIN G. BURROWS & MIKE WALLACE, GOTHAM, A HISTORY OF NEW YORK CITY TO 1898 594–95, 625–27 (1999); Galusha, *supra* note 2, at 17 (yellow fever, cholera and fire).

4. BERENSON, *supra* note 2, at 41; BURTON, *supra* note 2, at 139. For instance the name for Bethesda Fountain came from the New

twentieth century, it was clear that Croton water was no longer pristine and further treatment was necessary.[5] This Note discusses the controversy surrounding city attempts to place the water treatment plant in a municipal park. It also examines broader issues of park purposes and allowable park uses under New York common law. The Note argues that common law protections of municipal parkland under the public trust doctrine[6] are important but not sufficient and suggests ways to strengthen the concept of a common public trust resource of municipal parkland while adapting to changing technologies and cultural expectations.

Historically,[7] certain lands have been protected under common law as a public trust[8] resource held by the sovereign state[9] for the

---

Testament account of an angel bestowing health-giving properties to the pool of Bethesda near Jerusalem. *Id.*

5. *See, e.g.*, Peter H. Lehner, *Avoiding the Path of Good Intentions: Protecting the Watershed Through Better Enforcement*, 12 FORDHAM ENVTL. L.J. 523, 523–26 (2002) (listing contaminants such as road runoff, microbes, heavy metals, and synthetic organics). High levels of phosphorus and algae regularly shut down the Croton reservoirs during the summer. *See* Galusha, *supra* note 2, at 150–53 (recounting history of debate on filtering city water).

6. *See, e.g.*, JOHN CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS: TWO ACTIVISTS FIGHT TO RECLAIM OUR ENVIRONMENT AS A BASIC HUMAN RIGHT 141 (1999). "According to the Public Trust Doctrine, the public owns common or shared environments—air, water, dunes, tidelands, underwater lands, fisheries, shellfish beds, parks and commons, and migratory species . . .Government trustees are obligated to maintain the value of these systems for all users—including future generations. Like other rights, public trust rights are said to derive from 'natural' or God-given law. They cannot be extinguished." *Id.*

7. *See* CRONIN & KENNEDY, *supra* note 6, at 141–44. The public trust doctrine, goes back at least to the Roman civil law; it was incorporated into English common law after the Magna Carta, and was adopted by the original American colonies. *Id. Contra* Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL L.J. 1, 24–36 (1998) (contesting assertions that the public trust doctrine has

people.[10] A public trust requires that the trust land be accessible and used for public purpose; that it be put to traditional or uses appropriate to the resource; and, in some cases, that it not be sold.[11] Public trust protections have been promoted as instruments of democratization and equal access to resources.[12] Although the

---

deep historical roots and asserting that it is a relatively modern tool for advancing political agendas).

8. *See* BLACK'S LAW DICTIONARY 1513–14 (7th ed. 1999) (defining a public trust when property is held by a trustee for the benefit of the general public).

9. *See id.* at 1401–02 (defining a sovereign state as one with independent existence and central authority). The sovereignty or rule, which was exercised by the crown of England, for example, passed to the people of the thirteen colonies. *Id.*; *see also* ARCHER ET AL., *supra* note 1, at 8–9. Other states entered the Union on an equal footing, with complete power over its public trust lands. *Id.*

10. *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 387–89, 452–53 (1892) (ruling that a state may not convey public trust property if the public's interest in remaining public trust lands is impaired); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476–79 (1988) (holding each state entered the Union with sovereignty over all tidal and navigable waters and lands beneath them and could later expand its public trust authority).

11. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1971); *see also* CRONIN & KENNEDY, *supra* note 6, at 143. Reciting Supreme Court public trust cases and summarizing judicial interpretation. "The public trust resources of America are owned by the public . . . and no one has the right to use them in a way that will diminish their use and enjoyment by others. The state, as trustee, has no authority to enact policies that favor one public user over another." *Id.*

12. *See* Sax, *supra* note 11, at 560–61 (explaining that the central task for courts in public trust cases is democratization through giving voice to a diffuse majority); CRONIN & KENNEDY, *supra* note 6, at 156 (viewing the struggle over natural resources as inseparable from the struggle for democracy).

doctrine has been applied to lands covered by tidal waters[13] and navigable freshwaters,[14] states have discretion in applying public trust authority.[15]

The public trust doctrine has been an important and controversial influence on environmental law at least since the early 1970s.[16] John Cronin and Robert F. Kennedy, Jr. propose that the common law public trust doctrine (as well as nuisance laws) provided the philosophical underpinning for the major environmental statutes.[17] Whether or not they are correct that it is the source of fundamental environmental rights,[18] a public trust approach has shaped environmental statutes,[19] and even constitutions[20] of certain states.

---

13. *See, e.g.*, Town of Oyster Bay v. Commander Oil Corp., 759 N.E.2d 1233, 1236 (N.Y. 2001) (applying public trust principles to a shore owner in Oyster Bay Harbor in Nassau County).

14. *See* Robert J. Kafin, *Ancient Principles of Navigability to Have a Modern Applicability*, 19 N.Y. ENVTL. LAW 15 (1999) (reporting on a long conflict over passage by canoes and kayaks in small waterways). The extent of public trust protection in navigable waters has long been a contentious issue. *Id.* Although the New York Court of Appeals granted public trust passage to recreational boaters in one case, the question of navigability appears to be fact-specific. *See id* at 17–18 (discussing New York Court of Appeals cases).

15. *See Phillips Petroleum*, 484 U.S. at 483.

16. *See, e.g.*, JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 500 (2000). "The public trust doctrine is one of the most far-reaching and controversial rules defining the legal relationship between private owners and the environment." *Id.*

17. *See* CRONIN & KENNEDY, *supra* note 6, at 145. "[C]ourts and Congress began to breathe life into the moribund Public Trust Doctrine, raising it up in a new iteration: modern environmental law . . . the Clean Water Act, the Clean Air Act, The Endangered Species Act, and the National Environmental Policy Act are all best understood as a modern guarantee of the protection of ancient public trust rights in an industrial age." *Id.*

18. *See id.* at 9 (describing Kennedy's belief in a fundamental right of protection from pollution and environmental abuse).

19. *See* David Gionfriddo, Comment, *Sealing Pandora's Box: Judicial Doctrines Restricting Public Trust Citizens Environmental*

Professor Joseph Sax authored an influential 1971 article praising the public trust doctrine as an "instrument for democratization" and enhanced natural resource protection.[21] His scholarship provoked decades of debate about the value and role of judicial protection of common resources.[22] Pro-public trust writers applaud his efforts and tend to advocate for expansion of resources protected to include national parks,[23] groundwater,[24] and biodiversity[25] and others.[26] Anti-

---

Suits, 13 B.C. ENVTL. AFF. L. REV. 439, 443 (1986) (describing how Professor Joseph Sax relied on the public trust doctrine as a foundation when helping to draft Michigan's environmental policy statute of 1970).

20. *See* PHILIP WEINBERG & KEVIN A. REILLY, UNDERSTANDING ENVIRONMENTAL LAW 53 (1998) (describing how California's constitution guaranteed public access to the shore); *see also* Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL L. 477, 477–78 (2001). The Pennsylvania constitution contains public trust rights to natural resources. *Id.*

21. *See* Sax, *supra* note 11 at 491–92 (defining public trust approval by legislatures of administrative agency decisions about natural resources as an instrument of democratization); CRONIN & KENNEDY, *supra* note 6, at 145 (illustrating democratic action as building communities through environmental activism).

22. A symposium and volume of commentary was recently devoted to criticism of Joseph Sax's scholarship on natural resource law. *See, e.g.*, Richard J. Lazarus, *Foreword* to *Takings, Public Trust, Unhappy Truths, and Helpless Giants: A Review of Professor Joseph Sax's Defense of the Environment Through Academic Scholarship*, 25 ECOLOGY L.Q. 325–26 (1998).

23. *Cf.* Sally K. Fairfax, *The Essential Legacy of a Sustaining Civilization: Professor Sax on the National Parks*, 25 ECOLOGY L.Q. 385, 385–88 (1998) (reviewing Sax's scholarship on park protections).

24. *See, e.g.*, Erik Swenson, Comment, *Public Trust Doctrine and Groundwater Rights*, 53 U. MIAMI L. REV. 363, 363–64 (1991) (advocating public trust protections of groundwater).

25. *See, e.g.*, William C. Galloway, *Protection of Biodiversity Under the Public Trust Doctrine*, 8 TUL. ENVTL. L.J. 21, 21–22, 32 (1994) (public trust protections of biodiversity).

public trust commentators criticize the theoretical[27] and historical[28] bases of the doctrine, finding it variously weak, dangerous,[29] and unconstitutional.[30] Other legal writers have taken a more nuanced approach, analyzing the resurgence of the public trust doctrine in a context of cultural history.[31] Finally, some academics have critiqued the doctrine as being based on outdated concepts of private and public property and making analysis and action more difficult.[32] In

---

26. *See, e.g.*, Scott B. Yates, Comment, *A Case for the Extension of the Public Trust Doctrine in Oregon*, 27 ENVTL. L. 663, 663 & 695 (1997) (arguing that common law and state statutes support application of public trust protections to maintenance of adequate stream flows in non-navigable tributaries); *see also* Peter Manus, *To a Candidate In Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 315–19, 367–69 (2000) (suggesting that 2000 presidential candidate Al Gore rely on the public trust doctrine).

27. *See, e.g.*, Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 717–21 (1996) (questioning interpretations of early Supreme Court decisions by commentators like Sax who find them as supportive of public trust protections).

28. *See, e.g.*, Scott, *supra* note 7, at 24–36 (questioning the historical basis of the public trust doctrine and finding it to be a dangerous tool of political intent which undercuts judicial precedent and property interests).

29. *See id.* at 68–70 (public trust undermines property rights and expectations).

30. *See, e.g.*, James Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. COLO. L. REV. 1135, 1335–36 (1998).

31. *See, e.g.*, Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711–23 (1986) (analyzing the common law basis of the public trust doctrine through a law and economics model); Carol Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351–52, 361–62 (1998) (suggesting that the success and impact of the public trust resurgence was due in part to its catchy name).

32. *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633. "By continuing to

that vein, Richard Delgado argues that public trust theory has already been successfully incorporated into legislative and judicial approaches and now acts as a constraint on innovative new approaches to environmental protection.[33]

One thing that all commentators might agree on is the importance of context in any analysis of this topic. The states have formulated public trust protections in differing ways.[34] Critics seize on the variability as proof that the public trust doctrine means everything and nothing and is an attempt to advance an environmental agenda by manipulation.[35] Proponents of public trust protections examine the details of evolution and application in different states.[36] Not surprisingly, each observer tends to find support in detailed study for their particular views on private property rights or environmental protection.[37] In the context of New York State, it is not clear why

---

resist a legal system that is otherwise being abandoned, the public trust doctrine obscures analysis and renders more difficult the important process of reworking natural resources law." *Id.*

33. Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1209–12 (1991).

34. *See* Scott, *supra* note 7, at 16–23 (listing differences between and within states in what lands are covered, the time over which measurements is made, what resources are protected, underlying purposes, how government has acquired the land in question and whether the government may transfer land).

35. *See, e.g., id* at 15–16, 23, 70 (contending that the public trust doctrine is used in its inconsistent manifestations to promote a philosophical/social agenda undercutting property interests).

36. *See, e.g.*, BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW AND ECOLOGY IN NEW JERSEY HISTORY xv–xxxi & 189–203 (attempting through an examination of the New Jersey "Oyster Wars" to prove that a public trust approach is viable).

37. *Compare id.* (criticizing a "tragedy of the commons" argument for privatization with support from evidence of the "Oyster Wars"), *with* James Rasband, *The Public Trust Doctrine: A Tragedy of the Common Law*, 77 TEX. L. REV. 1335, 1336 (1999) (reviewing MCCAY, *supra* note 36, and using the same Oyster Wars to argue for

and how the courts initially applied public trust protections to municipal parks, as well as tidal lands and navigable waters.

New York courts have a long tradition of extending public trust protections to municipal parks by requiring specific state legislative authorization for sale, alienations,[38] or non-park uses[39] of the land.[40] New York protections of parkland[41] differ from application of the public trust to tidal or shore areas, which can be sold but still retain public trust protections.[42] In New York, municipal parkland may not

---

stronger enforcement of constitutional protections against taking of private property).

38. *See* BLACK'S LAW DICTIONARY, *supra* note 8, at 73 (defining alienation as the "conveyance or transfer of property to another"). Modern courts tend to use the term "alienation" to encompass any impermissible use of public parkland from sale to unauthorized use of parkland. *See, e.g.*, United States v. New York, 96 F. Supp. 2d 195, 202 (E.D.N.Y. 2000) (discussing how courts have extended the meaning of alienation from, conveyances of parkland, to any non-recreational use of parkland).

39. Williams v. Gallatin 128 N.E. 121 (N.Y. 1920). Non-park uses are uses of a park that are inconsistent with park purposes. *Id.*; *see infra* Part II.B.

40. *See, e.g.*, N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., GUIDE TO THE ALIENATION OR CONVERSION OF MUNICIPAL PARKLANDS i–ii (1990). "[A]lienation . . . applies to every municipal park in the state . . . In order to convey parklands to another entity, or use them for another purpose, the municipality must receive the authorization of the State Legislature. The bill by which the Legislature grants its authorization is a 'parkland alienation bill.'" *Id.* at i.

41. In this Note, use of the word "parkland" connotes New York municipal parkland. Conveyances of state parkland can often be governed by state statutes or the terms of dedication and may not require legislative authorization. *See id.* at 6. Conveyances of federal parkland are termed "conversions" and are governed by federal statutes and guidelines. *See id.* at i–ii.

42. *See* Town of Oyster Bay v. Commander Oil Corp., 759 N.E.2d 1233, 1236 (N.Y. 2001) (balancing property rights of riparian owner and the town which held tidal lands and oyster beds "in trust for the public good").

be sold without legislative authorization.[43] However, common law offers little guidance on what are purposes and proper uses of land that remains a park.[44] Conflict arises over the uses of parkland as allowed by the municipal agencies that administer them.[45] Suits to enjoin an activity or proposed action as an impermissible alienation of parkland are often brought against park agencies, park commissioners, or the municipality itself.[46] Statutory controls and regulations have not been as important as the common law in New York park protection cases.[47]

---

43. *See* Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 243 (1871); *see also* discussion *infra* Part I.A.

44. *See* discussion *infra* Part II.B.1–2.

45. *See* David Gionfriddo, *supra* note 19, at 443–44 (pointing out that traditional protections are often lowered for public works projects). *See, e.g.*, NATURAL RES. GROUP, CITY OF N.Y./PARKS & RECREATION, FOREVER WILD (2000), *at* http://nycparks.completeinet.net/sub_about/parks_divisions/nrg/forever_wild/nrg_forever_wild.html (last visited Apr. 14, 2002).

46. *See* discussion *infra* Part II.B.1.

47. *See* N.Y. GEN. CITY LAW § 20.2 (McKinney 2002). "[T]he rights of a city in and to its waterfront, ferries, bridges, wharves, property, land under water, public landings, wharves, docks, streets, avenues, parks and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section." *Id.* Generally, subdivision seven is not viewed as reducing the inalienability of parklands. *See In re* Central Parkway, 251 N.Y.S. 577, 580–81 (Sup. Ct. Schenectady County 1931) (holding that subdivision seven does not give a city power to discontinue or sell a park); Gewirtz v. City of Long Beach, 330 N.Y.S.2d 495, 510 (Sup. Ct. Nassau County 1972) (affirming *In re Central Parkway*, 251 N.Y.S. at 577 and additionally finding no authority in the city charter to restrict the use of the park). Language in the New York City Charter generally follows that of General City Law and has been interpreted similarly. *See* Aldrich v. City of New York, 145 N.Y.S.2d 732, 743–44 (Sup. Ct. Queens County 1955) (finding in New York City Charter § 383 no express power to discontinue or close a park); *see also* New York City Charter ch. 9, § 383 (2001).

This Note argues that common law public trust protections are important but not sufficient without support from other branches of government and acknowledged citizen involvement to provide meaningful protections for public parks. This note assumes, without trying to prove, that parks are important for all citizens, but especially for densely crowded urban populations.[48] The note relies largely on examples, cases and information from New York City, based on an assumption that issues faced by the Department of Parks and Recreation ("DPR") highlight or foreshadow conflicts and questions that may arise elsewhere in large urban areas.[49] Part I presents the three most important New York cases involving public trust protections of parkland. Part II contends that although public trust protections are essential, they are limited by lack of clear definitions and scope. Common law protections have also sometimes been ignored, resulting in a confusing mix of pre-existing alienating uses and customs that may undercut present guidelines. Protections are limited in situations where it is not clear where park jurisdiction lies, or even whether a municipal park exists. Part III suggests that common law public trust protections can be improved by legislative and regulatory support, additional common law doctrines, and inter-governmental cooperation with citizen involvement. The note concludes that public trust protections are an interesting and useful judicial concept, but one that will become less relevant in a rapidly changing world without clearer guidelines from

---

48. *See* PETER HARNIK, INSIDE CITY PARKS 1–4 (1985) (pointing out that city parks often define urban layout, property value, traffic flow, and even whether a city is a desirable place to live that will attract new inhabitants, businesses, and jobs).

49. The New York City Department of Parks and Recreation has well over 28,000 acres under its jurisdiction. *See* CITY OF N.Y./PARKS & RECREATION, FREQUENTLY ASKED QUESTIONS (2000), *at* http://nycparks.completeinet.net/sub_faqs/park_faqs.html (last visited Apr. 14, 2002). If state and federal parkland is added in, as well as cemeteries and open space, the total is about 53,000 acres. *See* HARNIK, *supra* note 48, at 121. In fact the total park and open space acreage in New York City, at almost 27%, is the largest of any major city in the country. *See id.* at 126. Central Park is thought by many to be the most successful city park in the world, the "standard against which all other parks are measured." *Id.* at 9.

legislators, strong executive leadership and funding to protect parks and make them accessible to involved citizens who care about them.

I. NEW YORK PROVIDES PUBLIC TRUST PROTECTIONS FOR MUNICIPAL PARKLAND

Under New York common law, a municipality holds parkland in trust for the people of the state, and the people's trust may not be diminished or infringed upon without specific authorization by statute from the state legislature.[50] Three landmark cases are useful introductions to how public trust protections of municipal parkland have been applied by New York's highest court. The Court of Appeals in 1871 stated that municipal parkland could not be sold without legislative authorization,[51] in 1920 held that a non-park use would require similar authorization,[52] and in 2001 extended the requirement to a disruption of public access to a park by a non-park use.[53]

A. *Sale Of Municipal Parkland*

Brooklyn Park Commissioner v. Armstrong[54] clearly articulates public trust protections of municipal parkland by describing the City as a trustee holding lands for the purpose of public park use.[55] The

50. *See* Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 631–32 (2001).

51. *See* Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 243 (1871).

52. *See* Williams v. Gallatin, 128 N.E.2d 121, 123 (N.Y. 1920).

53. *See* Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1055 (N.Y. 2001).

54. *Brooklyn Park Comm'rs*, 45 N.Y. at 243.

55. *Id.* at 243. "It is to be observed that the act of 1861 vested the lands in the city of Brooklyn forever, but for the uses and purposes in that act mentioned. Though the city took the title to the lands by this provision, it took it for the public use as a park, and held it in trust for that purpose." *Id.*

court noted that the City could not sell or convey land held in trust for public use without legislative sanction.[56]

The facts of *Brooklyn Park Commissioner* are complex. The case involved a property owner, Armstrong, whose land had increased in value because it abutted an area planned as Prospect Park.[57] The City of Brooklyn[58], however, realizing that it had condemned too much land, tried to sell the small portion near Armstrong's property.[59] Armstrong, wanting to protect the appreciation of his land and prevent the sale, bought a lot when the City sold and refused to take title.[60] The City brought suit as a test case, with defendant Armstrong protesting that the City did not have the power to sell and convey the title of municipal parkland or to release lien obligations from bond issues.[61] The court relied on precise statutory interpretation.[62] Initially, the state legislature had authorized Brooklyn to condemn land for Prospect Park[63] and specified that the City would have fee simple absolute.[64] In 1870 the legislature had authorized the sale of the small amount of land left over and not needed for parkland.[65] Although the City had clear legislative

---

56. *Id.* (finding that it was within the power of the legislature to relieve the city of the trust to sell the land).

57. *Id.* at 244–45.

58 At the time of the lawsuit Brooklyn was still an independent city.

59. *Id.* at 234–36.

60. *Id.* at 246.

61. *Id.*

62. *Id.* at 239. "From the interpretation of the statute itself, then, must be found the extent of the right of the city in lands taken." *Id.*

63. *Id.* at 240–41 (citing 1860 N.Y. Laws 488). The court went section by section through the statute, finding that it authorized taking by eminent domain, assessment, and compensation for lands taken for the public park. *Id.*

64. *Id.* at 241–42 (finding that the statutory intent was for the City to receive full title of fee simple absolute and not an easement).

65. *Id.* at 243–44 (1870 N.Y. Laws 373). The court found that the legislature had made a good faith error in overestimating lands condemned and had no intent to transfer property for profit. *Id. See generally* M.M. GRAFF, CENTRAL PARK, PROSPECT PARK, A NEW

authorization to sell land bought for parkland, ultimately the court would not allow the sale because of the bond obligations.[66]

The court in *Brooklyn Park Commissioner* suggested a rationale for public trust protections of municipal parkland,[67] giving a fascinating insight into the unprecedented investment in Prospect Park.[68] The process of setting up a public park is seen by the court as so long and expensive that the public investment must be protected from private interference.[69] Although other municipal parks have not received the resources of Prospect Park,[70] protection of public investment is still a compelling rationale for requiring limits on what can be done with parkland. In fact, the only other rationale of park

---

PERSPECTIVE 107–16 (1985) (recounting controversy over boundaries for Prospect Park and what land should be used).

66. GRAFF, *supra* note 65, at 246–48. The court noted that the legislature had conveyed the authority to sell parkland, but the City was prevented from doing so because the land had been put up as security for bonds, and the liens acted as contractual obligations forcing the City to retain title. *Id.* The court spends about three-quarters of the opinion on the public trust protection issue and only about one-quarter on the bond obligations. *Id.*

67. *Id.* at 239–40.

68. *See id.* at 111. Prospect Park was intended by Brooklyn to surpass the famous Central Park that its rival Manhattan was building. *See id.* (describing how land for Prospect Park was purchased in 1860, while construction was delayed by the war); *see also* HARNIK, *supra* note 48, at 11 (stating that 20,000 laborers worked on Central Park and that the same designers Olmsted and Vaux designed in Prospect Park a similar "tour de force").

69. Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 239–40 (1871).

70. *See generally* WITOLD RYBCZYNSKI, A CLEARING IN THE DISTANCE, FREDERICK LAW OLMSTED AND AMERICA IN THE NINETEENTH CENTURY 184, 269–77 (1999) (recounting the ground-breaking approach taken in establishing Central and Prospect Parks: to create a perfected or idyllic version of a natural environment, with huge outlays of labor and capital). In 1859 Central Park was the largest public works project in the United States. *Id.* at 184.

purposes to be offered was articulated by the same court fifty years later in *Williams v. Gallatin*.[71]

B. *Non-Park Uses*

In 1920, the New York Court of Appeals extended public trust protections, barring non-park uses without legislative authorization.[72] Whereas *Brooklyn Park Commissioners* involved sale of parkland,[73] the *Williams* court found that when land remained a public municipal park but was put to non-park uses, state legislation authorizing the use was also necessary.[74]

It is ironic that *Williams v. Gallatin* is so often looked to for guidance on park purposes and uses, since the court actually held that exhibitions of safety displays was a non-park use.[75] The Commissioner of Parks for New York City had authorized a ten-year lease of the Arsenal[76] in Central Park to the Safety Institute of

---

71. 128 N.E. 121, 122–23 (N.Y. 1920).

72. *See* Friends of Van Cortlandt Park v. City of new York, 750 N.E.2d 1050, 1054 (N.Y. 2001) (indicating that *Williams v. Gallatin* is controlling precedent); *see also* United States v. City of New York, 96 F. Supp. 2d 195, 202 (E.D.N.Y. 2000). "The leading New York Court of Appeals decision is *Williams v. Gallatin* which held that, once land has been dedicated to use as a park, it cannot be diverted for uses other than recreation, in whole or in part, temporarily or permanently, even for another public use, without legislative approval." *Id.* (citations omitted).

73. *Brooklyn Park Comm'rs*, 45 N.Y. at 235.

74. *Williams*, 128 N.E. at 122–23.

75. *Id.* at 123.

76. *See* BERENSON & CARROLL, *supra* note 2, at 19–21. The Arsenal is an historic building in Central Park. It was built in 1847–51 as a storage repository for munitions and had been used prior to 1920 as: an arsenal, parks administration, an art gallery, Municipal Weather Bureau, and a restaurant. *Id.* It now houses DPR central administration, the City Parks Foundation, Partnership for Parks, the Historic House Trust, the Wildlife Conservation Society, a public gallery for art shows, and a park library. CITY OF N.Y./PARKS & RECREATION, HISTORICAL SIGN (2000), *at* http://nycparks.complete

America for displays of safety devices.[77] Williams, as a taxpayer, sued Commissioner Gallatin and the Safety Institute, enjoining issue of the lease.[78] The Court of Appeals reversed the appellate division and ruled for Williams, agreeing that the proposed use was "foreign to park purposes."[79]

The important point in *Williams v. Gallatin* is that activities with no connection to park purposes (that is non-park uses) require "legislative authorization plainly conferred."[80] The court does not clearly differentiate between park purposes and uses, but mingles examples of both in its discussion.[81] In divining the meaning of this influential opinion, it is fair to say that park purposes are the general aims or goals of public parks, (e.g. recreation, amusement, exercise or pleasure).[82] Park uses would logically then be the specific ways that parkland is employed to meet those goals. The court listed proper park uses of monuments and aesthetic embellishments, zoos and horticultural displays, playgrounds and restaurants.[83] Non-park

---

inet.net/sub_your_park/historical_signs.html (last visited Apr. 14, 2002).

77. *Williams*, 128 N.E. at 121–22. The Safety Institute of America was incorporated by New York statute in 1911 as a private corporation with a quasi-public function of improving the public health and safety through research, education and demonstration. *Id.* Terms of the lease included no rent but improvement of the building, termination if use of the building was required for other park purposes, and public access to displays. *Id.*

78. *Id.*

79. *Id.* at 121, 123.

80. *Id.* at 253–54.

81. *Id.* at 122–23.

82. *See id.* at 122. "A park is a pleasure ground set apart for recreation of the public to promote its health and enjoyment." *Id.* at 123. "[T]o provide means of innocent recreation and refreshment for the weary mind and body is the purpose of the system of public parks." *Id.* The court contrasts the purpose of the Safety Institute of America as being quite different. *Id.*

83. *Id.* at 122–23. Proper park uses are

> [M]onuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor; floral and horticultural displays, zoological gardens,

uses such as a court house, or schools would require legislative authorization.[84]

Although *Williams v.. Gallatin* is an influential decision, its distinctions are neither clear nor easy to apply. *Williams* appears to be based on the public trust doctrine, like *Brooklyn Park Commissioner*, but the doctrine is not articulated as it was in the earlier case, leaving the theoretical base vague.[85] The *Williams* decision, even in 1920, was not an adequate guide to when state legislative authorization would be required. For example, the *Williams* court did not clarify whether the lease itself was offensive, or the purposes and uses of the Safety Institute.[86] In fact, given the court's own language, the purposes of the Safety Institute and park purposes are difficult to distinguish.[87] Today, the court's vision of park uses and purposes sounds very dated.[88] In short, *Williams v. Gallatin* does not provide a sufficiently clear statement of park purposes and uses to direct future judicial and administrative decisions. It has, however, continued to influence later courts, as evidenced by *Friends of Van Cortlandt Park v. City of New York.*[89]

> playing grounds, and even restaurants and rest houses and many other common incidents of a pleasure ground contribute to the use and enjoyment of the park. The end of all such embellishments and conveniences is substantially the same public good. They facilitate free public means of pleasure, recreation and amusement and thus provide for the welfare of the community.

Id.

84. *Id.* at 122.

85. *Id.* (citing Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234 (1871) but nowhere does the court mention the public trust).

86. *Id.* at 121.

87. *Id.* at 123. Safety Institute purpose is to promote safety and education about safety and health. *Id.* Park purposes are general welfare through pleasure, recreation and amusement and to promote health. *Id.* at 123.

88. *See supra* note 82; *see also infra* Part II.B.1.

89. 750 N.E.2d 1050, 1053 (N.Y. 2001) (beginning analysis of the case with the statement that all parties agree that *Williams v. Gallatin* is controlling precedent).

C. *Disruption of Public Park Access by a Non-Park Use*

The New York Court of Appeals, relying explicitly on common law and not statutory authority,[90] reinvigorated the public trust doctrine of earlier cases[91] in the recent decision *Friends of Van Cortlandt Park v. City of New York.*[92] The court held that a five-year disruption of public access to a park recreational facility for construction of an underground city water treatment plant ("WTP") was a non-park use requiring state legislative authorization.[93] The court noted that although no title was conveyed and the parkland would be restored, legislative authorization was required both because of construction and because of future impacts of the underground facility.[94]

Friends of Van Cortlandt Park was the culmination of a long, contentious process in which the City of New York was caught between the State, the federal government, and citizens' groups.[95] In

---

90. *Id.* at 1055. "Finally, we reach this conclusion as a matter of common law, without the need to address General City Law § 20(2)." *Id.*

91. *Id.* at 1053. "In the eighty years since Williams, our courts have time and again reaffirmed the principle that parkland is impressed with a public trust [] requiring legislative approval before it can be alienated or used for an extended period for non-park purposes." *Id.* (citations omitted).

92. 750 N.E.2d 1050 (N.Y. 2001).

93. *Id.* at 1054.

94. *Id.* at 1054. The court noted as relevant to the decision the scale of construction, multi-year disruption of access for more than five years, and inhibition of future uses by aboveground protrusions. The court also found it unnecessary to consider the questions of any *de minimis* exception, or a completely underground facility. *Id.*

95. *See* Christopher Rizzo, Comment, *Environmental Law & Justice in New York City, Where a Park is Not Just a Park*, 18 PACE ENVTL. L. REV. 167 (2000) (recounting the history of contention and introducing some of the scientific issues behind the decision on a water filter facility); Stephen L. Kass & Jean M. McCarroll, *Alienating Parks: Clean Water v. Recreation*, N.Y.L.J., Feb. 28, 2001, at 3 (recounting the history of the case and analyzing the decisions).

1992 through 1993, the State Department of Health and the U.S. Environmental Protection Agency had pressured the City to filter and disinfect 10–30% of the city's water coming from the Croton Watershed in Westchester, Dutchess, and Putnam Counties.[96] Water from the heavily developed Croton Watershed was determined to require filtration; water from the Catskill/Delaware Watershed was allowed to escape filtration, at least for the medium term, with a watershed protection program.[97] In 1997, the federal government sued the City in federal district court and the State intervened as a plaintiff.[98] A Consent Decree resolving the claims was approved in 1998 and laid out twenty-six compliance milestones for the City to obtain permits and construct a WTP.[99] The City went through the

---

96. United States v. City of New York, 96 F. Supp. 2d 195, 198 (E.D.N.Y. 2000) (describing the pressure that New York City is under based on Safe Drinking Water Act, 42 U.S.C. § 300g–1; Surface Water Treatment Rule, 40 C.F.R. §§ 141.70–.75; and a state sanitary code similar to federal requirements); *see also* Michael Cooper, *With Reservoirs Low, Mayor Plans to Issue Drought Warning*, N.Y. TIMES, Jan. 28, 2002, at B3; Andrew C. Revkin, *In Drought, Fears of a Dry Future, Planners Worry About Water Supply in the Long Term*, N.Y. TIMES, Feb. 24, 2002, at 29 (describing conflicts over water from the Delaware river and strategies to reduce city dependence). During times of drought Croton water becomes more important because reservoir water from the Delaware watershed to the northwest may be required to maintain flow volume in the Delaware River. *Id.*

97. The heavily developed Croton watershed has about 250,000 people in 375 square miles, whereas the Catskill/Delaware watershed has 125,000 in about 1,600 square miles. *See* Joel A. Miele Sr., *An Enormous Amount of Work to be Done: Protecting the New York City Watershed*, 12 FORDHAM ENVTL. L.J. 467, 474 (2002); Marc A. Yaggi, *Impervious Surfaces in the New York City Watershed*, 12 FORDHAM ENVTL. L.J. 489, 491–92 (2002).

98. *See* Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1051 (N.Y. 2001). The Federal government sued for violation of Federal law. "The State intervened as plaintiff, alleging noncompliance with the State Sanitary Code." *Id.*

99. *United States v. City of New York*, 96 F. Supp. 2d at 199–200 (describing the Consent Decree, which lays out compliance dates for

site selection process and chose Mosholu Golf Course in Van Cortlandt Park in the Bronx.[100] The City wrote reports evaluating sites, had public hearings, went through the environmental review and city zoning process, and received approval from the City Planning Commission and the City Council.[101] The City, however, did not seek state legislative authorization for building a twenty-three acre WTP underneath a popular public golf course or for closing it for the five or more year period of construction.[102]

The suit by the State Attorney General was joined by two citizens' suits[103]. The complaints in *United States v. City of New York* relied on "the common law doctrine against alienation of parkland," which indicates that "parkland in the state may not be diverted to any uses that are not recreational or otherwise consistent with the public use and enjoyment of a park . . . [i]n the absence of specific approval by the State Legislature."[104] The City answered that the construction of the WTP was not an alienation because, there was no conveyance of property interest, and the WTP would be built underground and the park restored on top of it, with any disruption being temporary.[105] The district court, distinguishing the facts from *Williams v. Gallatin*, agreed with the City that no state legislation was necessary because no land was to be transferred, the public would have undiminished use after restoration, any change in grade of soil was unimportant,

---

selecting a site, permits, obtaining legislative authorization, environmental review, construction and operation).

100. *Id.* at 200.

101. *Id.*

102. *Id.* at 198, 201.

103. *Id.* at 198. Actions originally brought in Bronx County Supreme Court "under Article 78 of the New York CPLR and for declaratory and injunctive relief" against the City's selection of the Mosholu Golf Course. *Id.* at 198, 201. The State Attorney General and citizens' groups all asserted that the City had not met the obligations of the Consent Decree by not obtaining state legislative approval. *Id.* One of the citizen groups argued in addition that a zoning change was needed and that the city agency approvals were invalid. *Id.*

104. *Id.* at 201. The plaintiffs also relied on sections 20(2) and 20(7) of the General City Law. *Id.*

105. *Id.* at 201–02.

and underground use and temporary disruption were permissible if future use was for park purposes.[106] The district court dismissed the Attorney General's claim and granted summary judgment for the City.[107]

The plaintiffs' appeals were consolidated and heard by the Second Circuit Court, which granted a motion by the plaintiffs to certify as a state law question "the park alienation issue or public trust issue."[108] The New York Court of Appeals accepted certification of the question whether any aspect of the WTP required state legislative approval.[109] In an opinion by Chief Justice Kaye, the court ruled unanimously that legislative approval was required because of the multi-year disruption and interference with future park use.[110]

The two opinions, *United States v. City of New York* from the federal district court and *Friends of Van Cortlandt Park* from the Court of Appeals, illustrate that the same set of facts and case law can lead to very different opinions on when state legislative authorization is required.[111] Whereas the federal district court followed the City in downplaying disruption of public park access,[112]

---

106. *Id.* at 202–04; *see also* Kass & McCarroll, *supra* note 95, at 3 (analyzing the district court opinion).

107. United States v. City of New York, 96 F. Supp. 2d 195, 209 (E.D.N.Y. 2000).

108. Friends of Van Cortlandt Park v. City of New York, 232 F.3d 324, 327 (2d Cir. 2000) (allowing certification because the parties contentions "frame a substantial issue on which the law of New York is not clear," which involved important public interest issues, and because the State and City were on opposite sides on a controversy of state law).

109. Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1053 (N.Y. 2001).

110. *Id.* at 630–31. The City was now in the difficult position of having been taken to court to stop the construction of a WTP that it had been taken to court to force to construct. *Id.*

111. *See* Kass & McCarroll, *supra* note 95, at 3 (pointing out how opposing parties characterized the facts very differently).

112. United States v. City of New York, 96 F. Supp. 2d at 201–02 (noting that the WTP would: affect 28 of 1,146 park acres, reduce total open space ratio from 26 to 23 acres per 1000 residents when

the Court of Appeals accepted the *Friends of Van Cortlandt Park* and Attorney General's argument that maximized the negatives of the large construction project.[113] Although both courts cited *Williams'* protections against parkland alienation,[114] the federal district court dismissed them as irrelevant to an underground municipal facility.[115] The Court of Appeals, however, based its decision that legislative authorization was required to a large extent on *Williams* restrictions against non-park uses in parkland.[116] In fact, the result was almost a foregone conclusion with the court's assumptions that the WTP was a non-park use[117] that would negatively impact public use of an important recreational facility at a very large scale.[118]

The history and controversy surrounding *Friends of Van Cortlandt Park* underscore that *Williams* is simply not an adequate guide in the twenty-first century to what are proper park uses, as distinct from non-park uses requiring state enabling legislation. While the Court

---

minimum is 2.5, remove 268 trees, and rebuild and restore the park so that use would be unaffected with the facility underground).

113. *Friends of Van Cortlandt Park*, 750 N.E.2d at 1051–52 (listing the effects of the project which would disrupt public use: total closure of the only city public golf course directly accessible by subway for more than five years, construction of a 473,000 square foot industrial facility that would protrude up to thirty feet above ground, filtering 290 million gallons of water and producing 61 tons of sludge waste every day, removal of a million cubic yards of fill, destruction of rare vegetation, influx of over 1,000 workers and hundreds of heavy construction vehicles, as well as unspecified impact on future use).

114. *Id.* at 1053 (beginning with the remark that *Williams v. Gallatin* is controlling precedent).

115. *United States v. City of New York*, 96 F. Supp. 2d at 202–03 (finding *Williams* irrelevant to construction of an underground facility when there is no transfer of parkland and no diminution of public use).

116. *Friends of Van Cortlandt Park*, 750 N.E.2d at 1054.

117. *Id.* at 1055.

118. *Id.* at 1054–55.

of Appeals flatly assumed that a WTP was a non-park use,[119] the federal district court had seen the WTP as an "essential public service" underneath the park.[120] *Williams,* of course, talks of monuments, horticulture, zoos, playgrounds and other delights of recreation and amusement.[121] While *Williams* may stand for the proposition that non-park uses should not be allowed without state authorization, it was not an adequate guide to proper park uses in 1920, and it is even less so now.

II. COMMON LAW PUBLIC TRUST PROTECTIONS ARE IMPORTANT BUT NOT SUFFICIENT

A. *Common Law Public Trust Requirements of State Legislative Authorization Are a Significant Barrier to Alienation*[122] *of Parkland*

The public trust doctrine is important as a protection of parkland, but it is not sufficient. While the process of obtaining state legislative authorization for a proposal often takes a year to complete, it does hold decision makers accountable to community opinion in a rough way. Regulatory requirements for environmental review or zoning changes present procedural barriers that can cause delay and expense, but are not answerable to citizens of affected communities. Although common law may not generally be viewed as making decision makers responsive to community and voter wishes, the particular requirements of public trust protections are a starting point, foundation, or indication of what is needed.

Existing common law park protections are not sufficient first and foremost because they lack clear definitions of park purposes and uses. They do not address the existing range of contractual activities

---

119. *Id.* at 1055. Kass & McCarroll, *supra* note 95, at 3. Pointing out that the Court of Appeals was very influenced by the facts of the case, which showed a considerable intrusion on parkland for non-park use, although by another city agency for a beneficial public purpose. *Id.*

120. *United States v. City of New York,* 96 F. Supp. 2d at 202.

121. Williams v. Gallatin, 128 N.E. 121, 122–23 (N.Y. 1920); *see also supra* notes 81–85, and accompanying text.

122. *See supra* note 38 (defining alienation).

in parks. They have been ignored, creating bad precedent and pre-existing conflicting uses. Finally, they do not adequately define what is and is not a park.

1. The Process of State Legislative Authorization Often Takes a Year to Complete

Great ramifications flow from a determination that a proposed activity is a non-park use since the process of obtaining state legislative authorization often takes at least a year, and can be blocked by opposition among the local community and their legislators.[123] Other regulatory and administrative requirements may further delay the project and increase the cost, but do not make a proposed activity dependant on support from the local community.[124]

The process of introducing an alienation bill authorizing a non-park use and getting approval by both bodies of the state legislature takes six to nine months if all goes smoothly and more than a year if complications arise.[125] Based on case law and custom, authorizing

---

123. *See* Tina Kelley, *City to Consider Two Sites for Plant to Filter Water*, N.Y. TIMES, Dec. 13, 2001, at D3 (reporting that the City had identified two other sites for a WTP, and suggesting that passage of approval by the state legislature for the Van Cortlandt Park site was "highly unlikely" in such a contentious battle); *see also infra* note 125.

124. *See* discussion *infra* this Part II.A.1.

125. Interview with Alison Wenger, Director of Government Relations, Department of Parks and Recreation, in New York, N.Y. (July 23, 2001). The process followed by the City of New York Department of Parks and Recreation is as follows:

1) Every year by the beginning of September the agency's legislative agenda is due to the Mayor's Legislative Coordinating Committee.

2) For state legislation authorizing park alienation, a draft of the legislative bill and a memo of support must be submitted to the Mayor's Office of State Legislative Affairs (part of the Office of Intergovernmental Affairs).

3) The draft bill must be sponsored in the legislature by the local senator and assemblyperson. It is introduced by the sponsors, given a date and identifying numbers for the House and Assembly, and

bills should be as specifically drawn as possible.[126] In general, the state encourages substitution of equivalent land (based on acreage or market value) for discontinued parkland.[127] When parkland is used by a municipality for another purpose, it should specify replacement for the alienated land, or set aside equivalent funds for capital park improvements.[128]

2. Local Community Opposition Can Prevent State Legislative Authorization of Non-Park Uses

Although there is no explicit requirement for local community support to authorize non-park uses, it is effectively very difficult to obtain state legislative authorization without it. First, the bill must be accompanied by a "Home Rule Request" from the local

---

assigned to a committee (the Committee on Cities or the Committee on Local Government).

4) A Home Rule Request must be obtained from the local legislature. The resolution of the New York City Council and memo of support from the New York City Mayor are necessary for the bill to move beyond committee.

5) The bill must be passed by both the Senate and Assembly.

6) The authorizing bill must also be signed by the governor within sixty to ninety days.

126. N.Y. STATE OFFICE OF PARKS, RECREATION, & HISTORIC PRESERVATION, GUIDE TO THE ALIENATION OR CONVERSION OF MUNICIPAL PARKLANDS 8–9 (1990) [hereinafter STATE GUIDE TO ALIENATION].

127. *See id.* at 8. It is the policy of State Office of Parks, Recreation and Historic Preservation to encourage substitution of parkland; requirement cannot be waived for parkland funded by state bonds. *Id.*

128. *See, e.g.*, 1998 N.Y. Laws 497 (authorizing discontinuance of a small portion of Verdi Park in Manhattan taken by the 72nd Street subway station expansion in exchange for replacement land and improvements); 1994 N.Y. Laws 341 (authorizing Waverly in Franklin County to use parklands for a sewage line easement on condition that the ground surface be restored for park use and consideration paid for park improvements).

legislature and a Memo of Support from the local executive.[129] Second, the bill must be supported by the local senator and assemblyperson.[130] Third, the bill must be passed by both the Senate and the Assembly.[131] Public support for extremely unpopular uses will be difficult to get from politicians with a vocal constituency. The proposed WTP in Van Cortlandt Park demonstrates that a controversial use of parkland can meet all the regulatory requirements but not garner the political support necessary to pass a bill through the state legislature.[132] From 1990 to 2000 the New York legislature has passed less than twenty bills each year authorizing park alienations.[133]

3. Regulatory Requirements for Alienating Park Uses Are More Procedural and Less Responsive to Public Opinion Than Obtaining State Legislative Authorization

Environmental review as well as land use/zoning review will be necessary to execute a transfer of municipal parkland in most cases, even if legislative authorization is successfully obtained.[134] Environmental review by the agency responsible for sponsoring or permitting is mandated by the State Environmental Quality Review Act ("SEQRA"),[135] and, in the city, City Environmental Quality

---

129. Interview with Alison Wenger, *supra* note 125. In New York City, this would mean a Home Rule Request from the City Council and a Memo of Support from the mayor.

130. *Id.*

131. *Id.*

132. *See* Kelley, *supra* note 123.

133. *See* N.Y. PARKS REC. & HIST. PRESERV. LAWS Index (McKinney 1990) (statutes for park discontinuance, transfer, easements, sale, deaccession, and imposition of admission fees).

134. *See* STATE GUIDE TO ALIENATION, *supra* note 126, at 5 (noting that a legislative action only gives authorization but does not accomplish a transfer).

135. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 2002) (codified at N.Y. COMP. CODES R. & REGS. tit. 6, § 617.10–.20 (2000)); *see* Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency, 646 N.Y.S.2d 741, 747–48 (App. Div. 1996) (holding that under SEQRA environmental review must be carried out by the

Review ("CEQR")[136]. In New York City, proposed changes in the zoning map trigger the Uniform Land Use Review Procedure ("ULURP"),[137] and siting of city facilities is subject to review under the Fair Share criteria.[138] At least in New York City, a ULURP application is necessary for transfer of parkland,[139] and a ULURP application will not go through without the necessary environmental review.[140] A plaintiff challenging the sufficiency of regulatory determination is unlikely to prevail.[141] If a plaintiff does prevail, it will likely be on procedural grounds and not because of community opposition.[142]

---

agency responsible for undertaking, funding, or approving an action and reciting the necessary standard that the agency take a "hard look" at areas of environmental concern).

136. New York City Charter ch. 8, § 192-e (2001); NEW YORK, N.Y., 62 R.C.N.Y. ch. 5 (2001) (CEQR rules of procedure); DEP'T OF CITY PLANNING, RULES OF PROCEDURE FOR CITY ENVIRONMENTAL QUALITY REVIEW (1991) (prepared under Mayor Dinkins and the New York City Planning Commission); CITY OF NEW YORK, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL (1993) [hereinafter CEQR TECHNICAL MANUAL].

137. New York City Charter ch. 8, § 197-c (2001); NEW YORK, N.Y., 62 R.C.N.Y. chs. 2, 6 (2001).

138. New York City Charter ch. 8, § 203 (2001) (listing criteria for location of city facilities); *see also* N.Y. COMP. CODES R. & REGS. tit. 6, app. A (2001).

139. *See* New York City Charter ch. 8, § 197-c (2001) (ULURP required for change in city map or zoning map, conversions in land use; sale, lease, or purchase of city property; or a zoning variance).

140. *See* DEP'T OF CITY PLANNING, UNIFORM LAND USE REVIEW PROCEDURE 3 (1990) (ULURP application will not be certified as complete unless necessary environmental review has been done).

141. *See* Michael B. Gerard, *Ten Years of SEQRA Litigation: A Statistical Analysis*, N.Y.L.J., Mar. 24, 2000, at 3 [hereinafter "*Ten Years of SEQRA*"] (reporting ten to twenty-eight percent of 635 S.E.Q.R.A. cases where plaintiffs won; and based on the substantive legal issues, five of forty-one CEQR cases, four of fifty-six ULURP decisions, and one of eleven Fair Share decisions).

142. *See id.*

a. *Environmental Review*

SEQRA and CEQR require that a proposed action be assessed for its effect on the environment.[143] The purpose is to force consideration of possible environmental effects of a proposed action early in the process.[144]A "Type II Action" is defined as having less significant environmental impact and thus not requiring intensive study.[145] "Type I Actions" are likely to require an exhaustive study of environmental impact and alternatives in an Environmental

---

143. The following are indicators of significant adverse environmental impact:

> i) substantial adverse change in air quality, water quality or quantity, traffic, noise, solid waste production, erosion, flooding, leaching, drainage;
> ii) removal or destruction of large quantities of flora or fauna, substantial impacts on species or habitat
> iii) impairment of Critical Environmental Area
> iv) conflict with community goals
> v) impairment of important historical or aesthetic resources or existing community and neighborhood character
> vi) major change in quantity or type of energy
> vii) creation of hazard to human health
> viii)substantial change in land use
> ix) attracting large numbers of people
> x–xii)actions which would indirectly result in listed significant impacts

N.Y. COMP. CODES R. & REGS tit. 6, § 617.7(c) (2001).

144. *See* Scenic Hudson, Inc. v. Town of Fishkill Town Bd., 685 N.Y.S.2d 777, 780 (Sup. Ct. 1999) (holding that the purpose of SEQRA was to bring in evaluation of environmental impacts early in the decision and annulling a town zoning decision that did not consider environmental impacts).

145. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(a) (2001). State Type II Actions listed include maintenance or repair, agricultural practices, small construction projects, minor temporary land uses, ministerial acts, and actions of the legislature and governor but not actions of local legislatures. City Type II Actions are similar. CEQR TECHNICAL MANUAL, *supra* note 136, at 1-2, 1-3.

Impact Statement ("EIS").[146] An Environmental Assessment Form is used to determine the significance of a Type I or Unlisted Action and whether an EIS is required.[147] The EIS examines the impact of a proposed action on various factors with a projected baseline without the action, as well as alternatives to the action.[148]

---

146. N.Y. COMP. CODES R. & REGS. tit. § 617.4 (2001). State Type I Actions listed include: adoption of a municipality's land use plan, zoning changes affecting twenty-five acres or more, land transfer of a state agency over a hundred acres, construction over set limits, structures over a certain height when there is no zoning in place, certain non-agricultural uses in agricultural area, actions affecting historic preservation landmarks, actions that exceed certain thresholds. *Id.* City Type I Actions are similar, with the addition of thresholds for institutions and major office centers. CEQR TECHNICAL MANUAL, *supra* note 136, at 1-2, 1-3; *see also Scenic Hudson*, 685 N.Y.S.2d at 780 (finding that SEQRA requires an EIS whenever authorization is given for an action that may have significant environmental impact).

147. N.Y. COMP. CODES R. & REGS. tit. 6 § 617.6 (2001; CEQR TECHNICAL MANUAL, *supra* note 136, at 1-3; *see also* Omni Partners L.P. v. County of Nassau, 654 N.Y.S.2d 824, 826 (Sup. Ct. 1997) (finding that when an Environmental Assessment for an upgrading of athletic facilities showed significant environmental impact possible that a full impact statement should be prepared and overturning the county planning commission negative determination). An EIS is required presumptively by a listed Type I action or when an EAF results in a positive determination. *Id.*

148. *See, e.g.*, CEQR TECHNICAL MANUAL, *supra* note 136, at Table of Contents. Factors examined include land use, zoning, and public policy; socioeconomic conditions; community facilities and services; open space; shadows; cultural resources; urban design, visual resources; neighborhood character; natural resources; hazardous materials; Waterfront Revitalization Program; infrastructure; solid waste and sanitation; energy; traffic and parking; transit and pedestrians; air quality; noise; construction impacts; and alternatives. *Id.*

Although the process of environmental review includes public comment and a hearing,[149] community opposition will not necessarily stop a proposed project.[150] In fact, the party proposing a project is the one that assembles the data and writes the EIS. The lead agency determination of environmental impact and written findings may incorporate public comment but is not bound by it. Agency determinations can be challenged in court as "arbitrary and capricious or an abuse of discretion",[151] limited by a four month statute of limitations.[152] Courts usually defer to administrative agency determinations in environmental review challenges.[153]

---

149. *See, e.g. id.* at 1-12. The lead agency solicits public comments for the scoping of critical issues and reviewing the draft EIS. *Id.*

150. *See, e.g.*, United States v. City of New York, 96 F. Supp. 2d 195, 200 (E.D.N.Y. 2000) (recounting how public comments and hearings were held for SEQRA, CEQR, and ULURP in the consideration of the Van Cortlandt Park WTP and reporting that despite numerous critical comments, approvals were granted); *cf.* Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 223, 227–28 (1980) (holding that federal environmental review did not impose substantive requirements but mandated that agencies follow the procedural steps).

151. *See, e.g.*, Cathedral Church of Saint John the Divine v. Dormitory Auth. of the State of N.Y., 645 N.Y.S.2d 637, 640 (App. Div. 1996). The appeals court reviewed a SEQR Declaration of Negative Impact by the respondent state agency for an expanded nursing home facility next to city land that the petitioner claimed was a park. *Id.* at 639. The review of the issuance of a negative impact statement was an Article 78 proceeding. The proper standard of review was "whether the determination was arbitrary and capricious or an abuse of discretion." *Id.* at 640. The court affirmed the agency determination that no EIS was required. *Id.*

152. *See* Douglaston and Little Neck Coalition v. Sexton, 535 N.Y.S.2d 634, 635–36 (App. Div. 1988) (rejecting because the four-month statute of limitations had expired an Article 78 claim that SEQRA and ULURP reviews were deficient). *See* N.Y. C.P.L.R. § 217 (McKinney 2001).

153. *See* Michael B. Gerrard, *A Review of 2000 SEQRA Cases*, N.Y.L.J., Mar. 23, 2001, at 3 (reporting that the Court of Appeals

Statutes of limitations are commonly a successful defense to challenges of environmental review by plaintiffs.[154] Traditionally, plaintiffs were environmentalists challenging a completed review in order to stop or delay a project.[155] In an interesting change, applicants or developers of proposed projects are starting to come to courts to overturn adverse agency determinations.[156]

b. *Land Use Review*

A ULURP application must be submitted to the City of New York Department of City Planning for a change in land use, including sale of parkland or use for a non-park purpose.[157] Although the New

---

consistently rules for government defendants in SEQRA cases) [hereinafter *Review of 2000 SEQRA Cases*].

154. *See id.* (statute of limitations often used to defeat plaintiffs' claims).

155. *See, e.g.*, Sierra Club v. Unites States Army Corps of Engineers, 701 F.2d 1011, 1016, 1029–33 (2d Cir. 1983) (finding that an environmental review document was inadequate in a case brought by citizen and environmental activists). The ensuing delay ultimately meant that the proposed "Westway" high-speed road was not built along the west shore of Manhattan. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION; LAW, SCIENCE, AND POLICY 896 (2000) (noting that the resulting delay from the injunction of this decision led to abandonment of the Westway). *But cf.* Adam Nagourney, *A Ghost of Westway Rises Along the Hudson*, N.Y. TIMES, Mar. 3, 2002, at 33 (suggesting that the Westway might have been environmentally beneficial and that similar plans are being once again proposed). The Westway would have put a high-speed road along the Hudson shore with a park promenade built on top. *Id.* The article points out that opponents of the Westway overcame one New York mayor, two governors, and three presidents, as well as the promise of $1.7 billion in federal funds. *Id.*

156. *See Review of 2000 SEQRA Cases*, *supra* note 153 (plaintiffs in year 2000 SEQRA cases included project applicants and not just environmentalists opposed to projects).

157. *See, e.g.*, N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., *supra* note 40 at 1. ULURP review is triggered by: a change in the city map or zoning map, conversions in land use,

York City ULURP process opens a proposed project to review by the public and the local community board, their opposition cannot halt a project because ultimate authorization is dependant on approval by the City Planning Commission, the City Council and the Mayor.[158] In ULURP review of a city project, the city is reviewing an action proposed by one of its own agencies and denial would be unlikely. As with environmental review, trends of the last decade show that about ten percent of plaintiffs contesting ULUPR decisions prevail.[159] Rulings of ULURP appeals reported have turned on procedural questions such as whether ULURP applied to the action and whether procedural rules were followed.[160] Siting of city facilities also triggers the Fair Share criteria.[161]

In the reorganization of New York City government in 1989, criteria were set up to encourage consideration of equity issues in siting of city facilities.[162] Fair Share review by the Department of

---

platting of streets, special permits, capital projects; and sale, lease or purchase of City real property, or granting of a zoning variance. *Id.* Because parkland is not mapped with a zoning designation, use for another purpose would trigger the ULURP process. New York City Zoning Resolution art. 1, § 11-13 (1974).

158. *See* N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., *supra* note 40, at 12–13. The Mayor appoints the Director of the Planning Commission and also can exercise a vote in the ULURP decision. The public can make comments and the local community board and borough president can make recommendations. *Id.* The City Council does have an opportunity to vote on every ULURP application. But if no City Council action is taken within fifty days, the Planning Commission decision stands. *Id.*

159. *See Ten Years of SEQRA*, *supra* note 141, at 3. Although total prevailing plaintiffs may be higher, only ten percent involved consideration of the ULURP. *Id.*

160. *See id.* (showing examples of four cases where plaintiffs won, out of fifty-six reported decisions, which turned on whether ULURP applied).

161 *See infra* note 166.

162. New York City Charter ch. 8, §§ 203, 204.

> The criteria shall be designed to further the fair distribution among communities of the burdens and

City Planning has only affected about 800 facilities in ten years.[163] The Fair Share criteria are procedures, not requirements, to help balance spending, program needs and geographic distribution of facilities.[164] During the period 1990 to 1999 only one Fair Share consideration was successfully challenged.[165] Whether Fair Share-type considerations of environmental justice will have to be included in an environmental review is still unsettled.[166]

B. *Existing Common Law Public Trust Park Protections are Not Sufficient*

Public trust protections of New York parks add an essential requirement that prohibits non-park uses without state legislative approval. Not only is obtaining the state authorization an onerous process, but it is one that can be stopped by vigorous community opposition.[167] Public trust protections are limited, however, by unclear definitions of park purposes and uses, a failure to address the full range of contractual arrangements, and the fact that the public

---

> benefits associated with city facilities, consistent with community needs for services and efficient and cost effective delivery of services and with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites.

Id § 203. *See generally* David Karnovsky, *Fair Share: New York City's Experiment in Equitable Siting of City Facilities and Its Relationship to Environmental Justice*, 13 ENVTL. L. IN N.Y. 37–44 (2002) (describing the history of the city's Fair Share Criteria and analyzing it with an environmental justice analysis).

163. Barbara Weisberg, Assistant Executive Director, Department of City Planning, Comments made at Fordham University School of Law (Oct. 31, 2001).

164. *See* Karnovsky, *supra* note 162, at 39 (pointing out that the author Charter Revision Commission had a goal of procedural fairness rather than uniform geographic distribution).

165. *See Ten Years of SEQRA, supra* note 141, at 3.

166. *See* Karnovsky, *supra* note 162, at 43–44 (examining challenges for an environmental justice analysis similar to Fair Share under SEQRA).

167. *See supra* Part II.A.

trust requirements have at times been ignored.[168] In addition, roads and parks together and modern changes in funding structures have acted to confuse the jurisdiction of public trust protections.[169] Central Park illustrates the changing conceptions of park function.

1. Common Law Does Not Articulate Proper Park Purposes

Conceptions of the purposes or functions of parks have expanded over time among both those who administer and those who use parks.[170] Central Park is possibly the first consciously designed public green space. Prior public plazas were city structures, although gardens had been private spaces.[171] The original rural pastoral landscape[172] sought by its designers before the Civil War, was by 1900 was overtaken by a park that was a "pleasure ground", site of carousels, zoos, and horse-trotting.[173] Increasingly, in the twentieth century, the idea of a park as a place for active recreation took hold.[174] From the 1960s on, multiple visions of the functions of parks have competed and coexisted:[175] rural pastoral landscape art,[176]

---

168. *See supra* Part II.B.4.

169. *See supra* Part II.B.5.

170. *See, e.g.*, ROY ROSENZWEIG & ELIZABETH BLACKMAR, THE PARK AND THE PEOPLE, A HISTORY OF CENTRAL PARK 493, 497, 512–13 & 518–19 (1992) (recounting recent history of Central Park, evolution of commissioners' concepts of park purposes and park uses allowed).

171. *See* 19 THE NEW ENCYCLOPEDIA BRITANNICA 659 (1994) (claiming that Central Park was the first "designed public green space").

172. *See* ROSENZWEIG & BLACKMAR, *supra* note 170, at 142 (describing the goal of Central Park designers Calvert Vaux and Frederic Law Olmsted in 1857).

173. *See id.* at 366, 374, 387 (recounting amusements encroaching in Central Park and competing visions of the purpose of the park).

174. *See id.* at 392–95 (beginnings of popular active recreation in parks started with playgrounds).

175. *See id.* at 491–93 (listing three DPR commissioners and curator of the 1960s with differing ideas on park purposes).

176. *See id.* (pastoral park original conception of park designers endorsed by curator Henry Hope Reed).

eclectic pleasure garden,[177] progressive recreational park,[178] commons for political discourse and social organizing,[179] nature conservation and restoration,[180] and even site of social programs for the disadvantaged.[181] Allowable park uses are a direct function of the purpose which parks are assumed to provide.[182] Unfortunately, changing conceptions of park purposes are not reflected in common law.[183] If New York courts are relying only on *Williams v. Gallatin* as a definition of park purposes, then only one view of park purposes is being used as a basis for consideration.

a. *Rural Pastoral Landscape Art*

Central Park in Manhattan was created as "perfected nature" in the English tradition,[184] a place to uplift the spirit and improve the senses.[185] The park was seen as a tangible manifestation of and way

---

177. *See id.* (the pleasure garden was endorsed by commissioners Hoving & Hekscher).

178. *See id.* (progressive recreation view of commissioner Robert Moses).

179. *See id.* at 497 (Mayor Lindsay forced park commissioner in 1967 to allow large antiwar demonstration).

180. *See infra* note 211 and accompanying text.

181. *See infra* note 212.

182. If active recreation is the purpose, then areas designated as ball fields may be desirable uses. If nature conservation is the purpose for an area, then a ball field may be considered an encroachment.

183. *See* Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1053–54 (N.Y. 2001) (relying almost exclusively on *Williams* in discussing park purposes and non-park uses).

184. *See* RYBCZYNSKI, *supra* note 70, at 86–87, 121, 161. Calvert Vaux, who handled the structure, was English and Frederic Law Olmsted, who designed the landscape, had been greatly influenced in his ideas about landscaping by a visit to England. *Id.*

185. See ROSENZWEIG & BLACKMAR, *supra* note 170, at 5, 104, 107–08 (discussing initial conceptions of Central Park's function as landscape art that would reveal the hand of God in nature, a symbolic statement of "shared civic goals," and a rural tranquil "Eden").

to advance democracy: the government was physically supporting culture and the arts, and providing a place for all citizens of all classes.[186] Art and design of the entire landscape were calculated to achieve the function of the restful rural pastoral retreat in the city.[187] The Olmstedian[188] vision underlies the assumption of what a park should do in *Brooklyn Park Comm'rs.*[189]

b. *Pleasure Ground*

The vision of park as eclectic pleasure ground has competed with the rural pastoral approach since the beginning of formal park design.[190] A park as pleasure garden functions to provide amusement and diversion and produce profits by attracting crowds with: ornamental gardens, grottoes, fountains, stages, circuses, carousels, concerts, theater, fireworks, and inspirational statues.[191] *Williams v. Gallatin* could not have provided a better description of the park as pleasure ground.[192] Clearly, if a park is assumed to function as a pleasure ground, monuments, floral displays, zoos, playgrounds,

---

186. *See id.* at 136–39 (describing Vaux and Olmsted's slightly differing conceptions of how to manifest democracy in the public park).

187. *See* 9 THE NEW ENCYCLOPEDIA BRITANNICA 156 (1994) (describing the original park concept as a romantic green open space to escape from the industrialized city to more healthful open air). "The primary purpose was to provide passive recreation–walking and taking the air in agreeable surroundings reminiscent of the unspoiled country." *Id.*

188. *See* HARNIK, *supra* note 48, at 3 (calling Olmsted the father of landscape architecture and emphasizing his view of the importance of city parks).

189. Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 239–40 (1871) (describing the work and expense in altering and improving the natural processes of the landscape).

190. *See* ROSENZWEIG & BLACKMAR, *supra* note 170, at 104 (characterizing "popular eclecticism" as an early competing vision of how Central Park should function).

191. *See id.* (listing uses proposed by advocates of the park as profit-generating pleasure garden).

192. *See* Williams v. Gallatin, 128 N.E. 121, 122 (N.Y. 1920).

restaurants and rest houses are in,[193] but displays of safety devices to lessen the number of casualties and avoid physical suffering and premature death are out.[194] As rentals and rides, concerts and carousels,[195] franchises and food,[196] museums,[197] zoos[198] and a casino[199] were added to Central Park in the nineteenth century, active recreation began to emerge as a function of parks.[200]

c. *Center of Active Recreation*

It was only in the 1880's that tennis, football, bicycling, baseball and other active and competitive sports were allowed in Central Park.[201] Earlier park policies had discouraged organized sports as being incompatible with the rural pastoral ideal of enjoying nature.[202] However, in the twentieth century, parks began to be seen as a playground.[203] The first playgrounds were built after 1910, and by the 1920s Manhattan had almost a hundred.[204] The real expansion of parks and parklands in New York City, was during Robert Moses' tenure as park commissioner from 1934 to 1960.[205] Moses was able to accomplish his massive construction and rehabilitation campaign

193. *See id.* The Court of Appeals in Williams lists these park uses. *See supra* note 82 and text accompanying.

194. *See Williams*, 128 N.E. at 123.

195. *See* ROSENZWEIG & BLACKMAR, *supra* note 170, at 309 (boat rentals, pony rides, concerts, sail boats, carousel).

196. *See id.* at 315.

197. *See id.* at 357.

198. *See id.* at 345.

199. *See id.* at 399.

200. *See id.* at 312 (relating how active sports began to be allowed in parks).

201. *See id.*

202. *See id.* at 251.

203. *See id.* at 392–93 (recounting how this view was led by progressive reformers promoting play programs for children).

204. *Id.*

205. *See* ROBERT CARO, THE POWER BROKER 7 (1975) (enumerating 777 playgrounds, 288 tennis courts, and 673 baseball diamonds built during Moses' tenure).

because of huge infusions of New Deal federal money.[206] To a large extent, the infrastructure that Moses put in place constrains today's park functions.

d. *Social and Political Commons*

Although the notion that parks functioned as a common area for political discourse was suggested earlier,[207] the 1960s forced a reassessment of park function.[208] Antiwar protests and civil rights demonstrations were allowed in Central Park, causing a reconsideration of park policy.[209] There was great debate as well about whether parks should function as a place for cultural festivals and public concerts.[210] Park functions in the 1960s came to include providing a commons for social expression and experimentation, as well as the pre-existing rural pastoral landscape, pleasure garden,[211] and center for recreation.[212]

---

206. *See* ROSENZWEIG & BLACKMAR, *supra* note 170, at 372 (reciting the money and accomplishments during just Moses' first year as commissioner in 1934).

207 *See id.* at 314–15, 391 (political functions in parks limited to labor picnics in Central Park as well as athletic/patriotic/historical pageants).

208. *See id.* at 489.

209. *See id.* at 495–97 (describing the conflict between Mayor Lindsay's efforts to open parks for gatherings and the park commissioner's goal of providing a pleasure garden for residents).

210. *See id.* at 499–501.

211. *See id.* at 493–95 (describing Central Park events such as love-ins, be-ins, paint-ins, yippie gatherings, as well as freer sexual expression and counterculture activities; as well as describing the 1966 Central Park curator as being dedicated to Olmstead vision and pleasure garden concept).

212. FREQUENTLY ASKED QUESTIONS, *supra* not 49. In 2001 the DPR lists facilities in New York City of 614 ball fields, 991 playgrounds, 660 tennis courts, 33 outdoor swimming pools, 10 indoor swimming pools, 35 recreation centers, beaches 13 golf courses, 4 major stadium, and 4 zoos. *Id.*

e. *Nature Conservation and Social Programs*

After the 1970s, additional park functions have been added to the list. Environmental awareness of the natural resources of parks led to the important perceived functions of conservation and restoration.[213] Parks are starting to be seen by administrators and citizens as a way to preserve habitat and ecological systems.[214] Rare, endangered, and threatened species of plants have become important denizens in today's parks.[215] In addition, in New York City, the park system has provided social program functions, especially in education.[216] Whereas monuments had always been common in parks and were an accepted use under the pleasure ground approach, the use of parkland as a setting for conceptual or performance art has

---

213. *See* Kirk Johnson, *Return of the Natives: Playing God in the Fields*, N. Y. TIMES, Nov. 12, 2000, at 37 (describing Project X, an ecological restoration effort of the city DPR to replace invasive introduced plants with native ones). In 1984, the New York City Department of Parks and Recreation started a special unit, the Natural Resources Group ("NRG"), for conservation purposes. The NRG has programs to support natural resource protection of high-quality natural areas in parks. *See* NATURAL RES. GROUP, *supra* note 45.

214. Henry J. Stern, *The Politics and Science of Managing New York City's Emerald Empire: Sustaining Our City's Ecosystem in Blue Skies and Gray Clouds*, *in* SCI. IN SOC'Y POL'Y REP. 13–17 (1999) (describing DPR habitat restoration goals and accomplishments).

215. *See* NATURAL RESOURCES GROUP, CITY OF N.Y. PARKS & RECREATION, THE RARE PLANT PROPAGATION PROJECT (2001) (describing efforts since 1984 for "protection, acquisition and restoration of the City's diverse natural resources").

216. *See* CITY OF N.Y. PARKS & RECREATION, BIENNIAL REPORT 35–40 (2001) [hereinafter DPR BIENNIAL REPORT] (listing after-school programs, computer resource centers, and education programs); DEP'T OF CITYWIDE ADMIN. SERVS., GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 274 (2001) [hereinafter GREEN BOOK] (listing DPR special programs for "senior citizens, teenagers, pre-schoolers, the disabled, and homeless").

highlighted the idea of a park as a stage.[217] Competing visions of park functions can create conflict.[218]

By 2001, when Friends of Van Cortlandt Park was decided, at least six different policies of park functions competed for dwindling funds: the rural pastoral landscape, the pleasure garden, the center of recreation, the social and political commons, nature conservation, and provider of social services.[219] The courts, however have relied primarily on *Williams*, which briefly describes park functions and uses only from the 1920s pleasure ground approach.[220] This is an inadequate guide to the rich variety and complex possibilities of park function, especially when the assumptions of park function dictate allowable park uses.

2. Definitions of Non-Park Uses are Not Clear

Permissible park uses by a municipal park agency are those uses compatible with proper park purposes. Since park purposes have not been articulated by courts in any complete way, the only real guide

---

217. *See, e.g.*, Carol Vogel, *Why Is There a Steel Tree in Central Park? Well, Times Have Changed*, N.Y. TIMES, Feb. 27, 2002, at B1 (reporting on temporary installations of conceptual art in Central Park funded largely by outside investors). In 1981 the artist Christo and his wife were denied permits to put up cloth panels along 27 miles of Central Park pathways. *Id.*; *see also* N.C. Maisak, *Will the Gold Loin cloth be Oscar-Worthy?*, N.Y. TIMES, Mar. 3, 2002, at 6 (describing a performance artist who has performed at Central Park Bethesda Fountain intermittently over three years).

218. *See, e.g.*, Tara Bahrampour, *Abingdon Square Park: A Triangle in Controversy*, N.Y. TIMES, Feb. 24, 2002, at 4 (detailing a controversy over whether to highlight a memorial statue in a small city park or to redesign it "to more of a green landscape park, like in the 1820's and 30's when it was built").

219. *See generally* DPR BIENNIAL REPORT, *supra* note 216; *see also* GREEN BOOK, *supra* note 216.

220. *See* Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050 (N.Y. 2001); *see also* Williams v. Gallatin, 128 N.E. 121 (N.Y. 1920); Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 243 (1871).

to what park uses are permitted as opposed to those which would require legislative authorization is the common law record.

Because obtaining state legislative approval is difficult, time-consuming, and can be blocked by community opposition, the distinction between park and non-park uses is quite important. Common law furnishes some guideposts but no clear definitions.

Courts have found the following to be permissible uses, when conducted pursuant to park purposes:[221] a valid license for the operation of a park facility;[222] a valid permit for the use of park facilities;[223] buildings for park purposes;[224] dances, concerts, and theater;[225] monuments and statues;[226] restaurants and food facilities;[227] parking lots;[228] zoos and gardens;[229] and concessions.[230]

---

221. *See generally* 81 N.Y. JUR. 2D §§ 37–44, 60–69 (1989).

222. The license would have to be for a permissible park use. *See* STATE GUIDE TO ALIENATION, *supra* note 126, at 2; *see also* discussion *infra* Part II.B.3.

223. *See* STATE GUIDE TO ALIENATION, *supra* note 126, at 2; *see also* NEW YORK, N.Y., 62 R.C.N.Y. ch. 1, §§ 1-05 to -08 (2001) (listing regulated uses and permitted activities).

224. *See* Davis v. New York, 270 N.Y.S.2d 265, 269–70 (Sup. Ct. 1966) (finding an indoor recreational facility a valid park use).

225. *See* Terrell v. Moses, 163 N.Y.S.2d 770, 771 (App. Div. 1957) (observing that the park commissioner may issue permits or licenses for a musical production but not a lease and dismissing a suit for lack of standing); Campbell v. Hamburg, 281 N.Y.S. 753 (Sup. Ct. Erie County 1935) (observing that the conducting of dances contribute to the enjoyment of a park). *See generally In re* Shakespeare Workshop v. Moses, 187 N.Y.S. 2d 683, 684–87 (App. Div. 1959) (indicating that theater productions are a proper park use consistent with park purposes).

226. *See* Williams v. Gallatin, 128 N.E. 121, 122 (N.Y. 1920).

227. *See* 795 Fifth Ave. Corp. v. City of New York, 15 N.Y.2d 221, 225–26 (1965) (affirming that restaurants and cafes are established park uses and holding that it is reasonable for the park agency to decide on location and type); Gushee v. City of New York, 42 A.D. 37, 41 (App. Div. 1899).

228. *Cf.* Freidberg v. New York, 151 N.Y.S.2d 258 (Sup. Ct. N.Y. County 1956), *aff'd*, 153 N.Y.S.2d 541 (App. Div. 1956) (noting that some parking lots may be permissible in parks).

Courts have found the following to be non-park uses requiring state legislative approval: sale of parkland;[231] long-term leases for non-park purposes;[232] multi-year disruption of public access;[233] disposal of refuse by converting parkland to landfill;[234] storage of city highway and sanitation vehicles;[235] issuance of permits for private residences on public shores;[236] taking of parkland for city

---

229. *See Williams*, 128 N.E. at 122.

230. *See generally Gushee*, 42 A.D. at 41, 48 (restaurant license).

231. *See* Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 243 (1871). *See also supra* Section II.A.

232. *See Williams*, 128 N.E. at 122; *see also supra* discussion Part II.B.

233. *See* Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 630–31 (2001); *see also supra* Part II.C.

234. *See* Stephenson v. County of Monroe, 351 N.Y.S.2d 232, 233–34 (App. Div. 1974). "Mere speculation that one day people might ski down a mountain of garbage does not make it so." *Id.*; *see also* Vill. of Croton-on-Hudson v. County of Westchester, 331 N.Y.S.2d 883, 884–85 (App. Div. 1972) (disallowing diversion of twenty acres of public park to a waste disposal site).

235. *See* Ackerman v. Steisel, 480 N.Y.S.2d 556, 557–58 (App. Div. 1985), (ruling that storage of non-park vehicles for twenty-five and fourteen years was not a temporary park use).

236. *See* Tobin v. Hennessy, 223 N.Y.S. 618, 620, 622 (Sup. Ct. Bronx County 1927) (finding that the re-issuance yearly of the same permits was not temporary). "Pelham Bay Park is one of the beauty spots of our city, made so by God without the use of city money, and should be kept free and open for the unrestricted use of all the people." *Id.* at 620.

roads;[237] restricting a formerly open park to local residents;[238] and a diversion of a small portion of public space to private use.[239]

The following uses of parks are not clearly alienations or proper park uses: easements for underground facilities;[240] "discontinuance" of park facilities developed on lands of another;[241] and failure to maintain and operate park and recreational facilities[242].

Many contemporary uses of parks are not covered by case law. Parks, at least in New York City, have a dizzying array of activities that take place.[243] Much of the debate centers on activities that park agencies contractually agree to.[244]

---

237. *See* Central Parkway, 251 N.Y.S. 577, 579–81 (Sup. Ct. Schenectady County 1931) (observing that parks are held by a municipality in trust for the public by delegation and may not be used for non-park purposes).

238. *See* Gewirtz v. City of Long Beach, 330 N.Y.S.2d 495, 511–14 (Sup. Ct. Nassau County 1972) (public trust prevents restrictions to local inhabitants without legislative authority).

239. *See* Lake George Steam Boat Co. v. Blais, 30 N.Y.2d 48, 50–52 (1972) (disallowing a lease of village dock facilities to a private corporation even though public facilities and function would be provided).

240. *See* STATE GUIDE TO ALIENATION, *supra* note 126, at 2 (examples are sewer or water pipelines).

241. *See id.*

242. *See id.* at 3.

243. DPR BIENNIAL REPORT, *supra* note 216, at 5–53 (listing DPR activities providing: work experience for welfare recipients, environmental restoration, Greenstreets program, maintenance of parks, fund raising, education programs, development of Greenway paths, preservation of historic structures, planting and maintenance of street trees, contracting for food concessions, recreational activities, providing computer centers, partnering for summer concerts and sports events, hosting art exhibitions, and special events such as Easter egg hunts and cultural festivals). *See generally* CITY OF N.Y./PARKS & RECREATION, *at* www.nyc.gov/parks (last visited Apr. 14, 2002) (for links to additional information).

244. *See infra* pp. 303–06. Sporting events, educational programs, product launches and publicity, fund-raising events, concessions, historic house museums, restaurants, gas stations, art exhibits,

3. Common Law Does Not Address the Range of Contractual Park Uses

Early New York courts held that licenses were permissible and leases were not.[245] Later courts have looked at the terms of the agreement rather than what it its called and found that a permit which functions as a lease is beyond the park commissioner's power to issue.[246] Courts have also looked to see whether the proposed activity was a proper park use.[247] Contracts involving parks, however, are not limited to leases and licenses.[248] Case law suggests but does not answer the question whether every contract for use of parkland is subject to a *Williams* prohibition against park uses foreign to park purposes.

In early New York case law and the New York City Charter, licenses were permissible uses consistent with park purposes and

---

theater, active and passive recreation, as well as "First Amendment activities" such as religious talks and political petitioning.

245. Perhaps deciding based on the common law conception of a lease as conveying an interest in property.

246. *See generally* Miller v. City of New York, 203 N.E.2d 478, 478–80 (1964) (finding a license document functionally to be a lease that alienates park property as it conferred exclusive right to use park land for twenty years with a rental fee).

247. *See, e.g.*, Tompkins v. Pallas, 47 Misc. 309, 309–12 (Sup. Ct. N.Y. County 1905) (analyzing whether a license granted in Bryant Park for advertising was a park use consistent with park purposes). The court in *Tompkins* seemed to find the messages rather than the signs themselves objectionable to park purposes, describing them as advertisements for "cheap cigars and Russian teas, of Irish whiskey and Geneva gin, of a hair restorative and a complexion balm, of horses and automobiles, of shore dinners and pawnshops, of wall papers and hose supporters, of rye whiskey and headache powders, of chiropodists and chemists, and of various other trades and commodities." *Id.* at 310.

248. DPR BIENNIAL REPORT, *supra* note 216, 15–20, 25–29 (describing various contracts entered into by the agency: capital project renovations, requirements contracts, privatizing of parks vehicles, multi-year food service concessions, special events permits, and partnership agreements).

leases were not. A license consistent with park uses granted authority for a specific act or acts upon the land of another and did not convey an interest or estate in the land.[249] The license had to be temporary and personal, avoiding the creation of any property interest.[250] Finally, all licenses had to contain a "terminable at will clause" stating that the commissioner of parks reserved the right to cancel the license agreement whenever they decided in good faith to do so.[251] However, the commissioner can be subject to a N.Y. C.P.L.R. Article 78 requirement that a revocation decision not be arbitrary or capricious, having no basis in reason and fact.[252]

---

249. *See In re* Ford, 369 N.Y.S.2d 855, 857–58 (App. Div. 1975), *aff'd*, 39 N.Y.2d 1000 (1975) (finding a license and not an easement of passage after the City of New York had purchased watershed riparian rights through eminent domain). "This right, being a mere personal privilege giving authority to do acts on the land of another, did not create any interest in the land itself, and thus constituted a license rather than an easement." *Id.* at 857.

250. *See* Tobin v. Hennessy, 223 N.Y.S. 618, 620 (Sup. Ct. Bronx County 1927).

251. *See Miller*, 203 N.E.2d at 480 (finding that a clause reserving the right to revoke for paramount park purposes was not an adequate terminable at will clause, and the agreement was more properly an impermissible lease alienating parkland); Gushee v. City of New York, 42 A.D. 37, 37–39, 48–49 (App. Div. 1899) (finding that the Parks Department had discretion to grant and terminate licenses, but that the Parks Department had acted arbitrarily, capriciously and not in good faith in prematurely revoking a restaurant license).

252. *See In re* Shakespeare Workshop v. Moses, 187 N.Y.S.2d 683, 684–87 (App. Div. 1959) (refusing to allow the Commissioner's imposition of an unnecessarily high fee on free theater performances as being arbitrary and capricious and serving no useful park purpose); Theater Festival, Inc. v. Moses, 181 N.Y.S.2d 364, 366 (Sup. Ct. N.Y. County 1958) (noting that "in the absence of clear and convincing proof that a public official has acted arbitrarily, unreasonably or capriciously, his action will be sustained" in upholding Commissioner Moses decision to stop summer theater productions on an off-season ice rink).

Courts have upheld license agreements for gas stations on the Henry Hudson Parkway,[253] for restaurants and food services in parks,[254] and for allowing the United Nations to meet in a building in Flushing Meadow Park.[255]

In a surprising decision in 1986, the Appellate Division held that not all leases of parkland without legislative sanction were invalid.[256] The court seemed to be looking beyond the title of the contract to whether the proposed use served a public purpose.[257] In 1996 the Appellate Division found that a lease of parkland for private summer cottages was improper,[258] but it based the decision on the proposed use and not the lease itself.[259]

Although case law generally includes decisions involving leases and licenses, parks management agencies write various contractual agreements for all sorts of activities in parks.[260] The City of New York Department of Parks and Recreation , for example, issues very few leases, but many licenses, special events permits, memoranda of

253. *See* Kesbec v. City of New York, 67 N.Y.S.2d 900, 903–04 (Sup. Ct. N.Y. County 1946) (allowing an open bidding process for a gas station franchise on a parkway, noting that a valid license issued by the Park Commissioner must be motivated by a public purpose and not a business or profit motive).

254. *See Gushee*, 42 A.D. at 37, 41, 48.

255. *See* Curran v. City of New York, 88 N.Y.S.2d 924 (App. Div. 1949).

256. *See* Port Chester Yacht Club v. Vill. of Port Chester, 507 N.Y.S.2d 465, 467 (App. Div. 1986) (overturning the lower court's summary judgment finding invalid a lease of village parkland to a nonprofit membership corporation as it "turns on the nature of the use rather than the nature of the user").

257. *See id.* (asking whether the lease for a dock served a public purpose).

258. *See* Johnson v. Town of Brookhaven, 646 N.Y.S.2d 180, 181 (App. Div. 1996).

259. *See id.*

260. Interview with Laura LaVelle, Assistant Counsel, Department of Parks and Recreation, in New York, N.Y. (Oct. 30, 2001); *see also* HARNIK, *supra* note 48, at 10, 13 (various park contractual arrangements brought $36 million to the city in one year).

understanding, and contracts.[261] Leases may be issued for a large and long-standing use, like a stadium or the Metropolitan Museum.[262] Agreements for facilities like restaurants are generally written as a licenses.[263] Permits are issued for special events like concerts, movies, sponsored activities, or sporting and fund-raising events.[264] Memoranda of understanding are used for inter-agency agreements.[265] Contracts are the vehicle for capital construction projects with outside contractors.[266] New York courts have never definitively addressed whether any and all contractual agreements must be subjected to a *Williams* analysis. Case law certainly suggests that any use of a park must be consistent with park purposes, but judicial discussion has been confined largely to leases and licenses.

4. Public Trust Common Law Has Sometimes Been Ignored

While a range of activities may have been officially acknowledged as areas of questionable park alienation, various types of unacknowledged park uses have historically taken place and not been questioned. The historical record of activities allowed in parks includes both park and non-park uses, as defined by the courts.[267] Park commissioners are appointed to their agency offices, have a

---

261. Interview with Laura LaVelle, *supra* note 260.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *See, e.g.*, New York, N.Y., Resolution of the Board of Estimate of the City of New York, No. 192 (May 23, 1964), *in* 5 J. OF PROC. OF THE BOARD OF ESTIMATE 4157–62 (1964) (granting consent to the Consolidated Edison Company of New York, Inc. to construct, maintain and use a fuel oil pipeline near promenade in East River Park in Manhattan); Barbara Stewart, *Park Emerging From a Nightmare*, N.Y. TIMES, Aug. 1, 2001, at B1 (describing how in 1968 Columbia University started to construct a gymnasium in a leased area of Morningside Park and was stopped by protests of nearby residents).

great deal of discretion in directing park activities,[268] and, like other appointed officials, are subject to the political pressures of municipal government.[269] Most public trust suits are brought by citizens against the park commissioner, agency, or city.[270]

The long era of Robert Moses' domination of New York parks, roads and construction was a time of unprecedented expansion of parkland and uses of parkland, as well as unbridled discretion and power.[271] Moses built many facilities in his various capacities as City Park Commissioner, Construction Coordinator, member of City Planning Commission, State Parks Council, Long Island Park Commissioner, head of the Triborough Bridge and Tunnel Authority, and other positions.[272] However, he also used parks as his personal domain to build roads,[273] allow food concessions,[274] build up,[275]

---

268. *See* 795 Fifth Ave. Corp. v. City of New York, 15 N.Y.2d 221, 225 (1965). "The Park Commission is vested by law with broad power for the maintenance and improvement of the city's parks. . . ." *Id.*

269. *See* United States v. City of New York, 96 F. Supp. 2d 195, 200 (E.D.N.Y. 2000) (city agencies all supported park location as not requiring legislative approval, despite state attorney general's opinion that parkland would be alienated).

270. *See, e.g.*, Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050 (N.Y. 2001) (suit by citizen individuals, citizen groups, state and federal government against the city, city agencies, the mayor, and commissioners); Williams v. Gallatin, 128 N.E. 121 (N.Y. 1920) (suit by citizen against commissioner); Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234 (1871) (suit by citizen against park commissioners).

271. *See* CARO, *supra* note 205, at 9 (contending that Moses' effective control lasted from 1924 to 1968); *see also* HARNIK, *supra* note 48, at 12–13 (detailing the expansion of the park system under Moses).

272. *See* Barbara Stewart, *Hunger for Parkland of All Kinds*, N.Y. TIMES, Sept. 11, 2001, at B1 (noting that Robert Moses added the most park acres to New York City and built the modern park system).

273. *See, e.g.*, CARO, *supra* note 205, at 534–38 (describing West Side Highway placement in parks).

deconstruct,[276] or restrict access to the parks.[277] The lawsuits that do survive in the record contesting Moses' treatment of parkland do not discuss state legislative authorization.[278] The information extant concerning Robert Moses' use of parkland suggests that there were many unauthorized alienations and non-park uses, that his complete dominion over parkland was rarely challenged, and that he left a legacy of non-park uses in parkland.[279]

5. Common Law Does Not Adequately Address the Questions "What is a Park and When do Public Trust Protections Apply?"

The question of what is a dedicated park and when should public trust protections apply has never been an easy one.[280] When courts

---

274. *See, e.g., id.* at 374, 399, 614, 825 (describing how Moses created a restaurant concession in Central Park and let it to "cronies for favors").

275. *See, e.g.*, New York, N.Y., Resolution of the Board of Estimate of the City of New York, No. 258 (Apr. 23, 1964), *in* 5 J. OF PROC. OF THE BOARD OF ESTIMATE 3243 (1964) (approving $28,836,640 for construction of Shea Stadium).

276. *See, e.g.*, CARO, *supra* note 205, at 338, 678–83 (describing Moses' demolition of the Central Park Casino and attempted destruction of Fort Clinton in Battery Park).

277. *See, e.g., id.* at 318 (describing some of the many ways that Moses discriminated against African Americans in parks).

278 *See supra* notes 255–56. *See, e.g.*, Wetter v. Moses, 86 N.Y.S.2d 110 (Sup. Ct. N.Y. County 1941) (finding that Moses had authority to close the Battery Park Aquarium for construction of the Brooklyn-Battery Tunnel).

279. *See* Barbara Stewart, *A Reclaimed Park is Due in Fall 2002*, N.Y. TIMES, Nov. 25, 2001, at A41 (recounting how a park that had been illegally paved over by Robert Moses for construction without approval of the State Legislature was reclaimed through a suit by neighbors decades later); *cf.* HARNIK, *supra* note 48, at 13 (telling how Moses tried to run a highway through Washington Square Park).

280. The New York City Charter and Rules of the City, for example, define a park as a facility under the jurisdiction of the DPR. New York City Charter ch. 21, § 533 (2001); NEW YORK,

attempt to define a park they tend to rely on *Williams v. Gallatin* or similar cases.[281] In trying to discern whether public trust restrictions apply, courts look for an intent to dedicate, either express or implied, and an acceptance by the city or public, either express or implied.[282]

Questions about park jurisdiction can arise when parks occur together with roads or other public works. In a more fundamental way, the definition of a public municipal park is being thrown into question by increasing private funding and complex private-public partnerships. Common law does not address these questions explicitly.

a. *Roads and Public Authorities in Parks*

The background restriction on non-park uses in parks has at times been trumped by legislation specifically empowering certain uses, creating a scrambled legacy of roads and parks occurring together.[283]

N.Y., 62 R.C.N.Y. ch. 1, § 1-02 (2001). Community gardens are an example of a situation where the existence of dedicated parkland has been contested. *See, e.g.*, Stephen C. Kass and Jean M. McCarroll, *Environmental Justice and Community Gardens*, N.Y.L.J., Aug. 27, 1999, at 3; Seth Kugel, *Young Protestors Think Globally and Act Locally to Save a Garden*, N.Y. TIMES, Feb. 10. 2002, sec. 14 at 7 (reporting on a city conflict over a garden, which some community members and supporters claim is a protected park "Greenthumb" property, while a local nonprofit plans to use the lot for urban renewal housing); HARNIK, *supra* note 48, at 15 (recounting the conflicts over community gardens in New York City).

281. *See* 81 N.Y. JUR. 2D, *supra* note 221, at § 1 (citing *Williams* and others). "[A] park is a pleasure ground set apart for the recreation of the public to promote its health and enjoyment." *Id.*

282. *See, e.g.*, Gewirtz v. City of Long Beach, 330 N.Y.S.2d 495, 504–07 (Sup. Ct. Nassau County 1972) (laying out the necessary elements for a park dedication); Angiolillo v. Town of Greenburgh, 735 N.Y.S.2d 66 (App. Div. 2001) (finding no dedication, express or implicit, of parkway land).

283. *See, e.g.*, CARO, *supra* note 205, at 615–36 (describing the implementation of Robert Moses' dream of a system of parks and roads together in Long Island).

Roadways built with federal funds, and certain public authorities are examples of activities that have trumped public trust protections.

The Department of Transportation Act of 1966 Section 4(f) allowed a roadway funded by federal monies to be built through a park if there was "no prudent and feasible alternative" and the project was planned to minimize harm.[284] Well before the Department of Transportation Act was passed, Robert Moses had pioneered the building of highways through parks,[285] and even the concept of a restricted-access road with a linear park called a parkway.[286] The federal highway policy approach was modeled on the parkways and roads that Moses had built in and around New York City.[287] While a recent case found public trust restrictions did not apply to land adjacent to a parkway,[288] roads and parks together can create confusing jurisdictional issues.[289]

---

284. 49 U.S.C. § 303 (1994). The section in question is still called "Section 4(f)." Policy on lands, wildlife and waterfowl refuges, and historic sites.

285. *See, e.g.*, CARO, *supra* note 205, at 615–36 (detailing how Robert Moses used the public authority to gain vast power, to issue bonds, condemn land and create parks with transportation projects).

286. Although Olmstead and Vaux had begun the use of parkway design in America in Brooklyn in 1858, and thirty-eight miles of parkway were built in the city from 1860 to 1910, Robert Moses built 416 miles of parkways around New York City after 1920. *See* RYBCZYSNSKI, *supra* note 70, at 281–83; CARO, *supra* note 205, at 8.

287. *See* CARO, *supra* note 205, at 11–12 (noting that the chief administrative officer of the Interstate Highway system during the 1950s and 1960s credited Moses with teaching him the principles of highway construction, that Moses shaped the federal highway bills and, in fact, exerted more influence on the development of the federal highway system than any other person).

288. *See* Angiolillo v. Town of Greenburgh, 756 N.Y.S.2d 66 (App. Div. 2001) (distinguishing a park from a parkway).

289. *See, e.g.*, Rizzo, *supra* note 95, at 177 (Van Cortlandt Park has three highways, a railway, and a water tunnel shaft in its boundaries); Greg Wilson, *Happy Trails for the Bronx*, DAILY NEWS, Apr. 23, 2001, 1CN (describing a nature trail built in Van Cortlandt Park that must traverse three highway roads).

Public authorities are another legislative creation, which can have statutory authority to take and use parkland. For example, New York Public Authorities Law gives the Triborough Bridge and Tunnel Authority ("TBTA") wide powers to build, condemn property, raise funds, and acquire city property without compensation.[290] The powers extend to otherwise inalienable land.[291] Transactions can be effected with nothing more than a contract from the mayor.[292] Generally, one city agency would not bring suit against another, so there is no case law on point, but the statute allows parkland to be taken for use by TBTA. It should be no surprise that amendments to the statute creating and vesting almost unlimited power in the TBTA were written by Robert Moses, who was head of the authority.[293] Since each authority is created independently by the legislature, its enabling statute will determine the scope of powers and ability to take and use parkland.

b. *Private Funding and Partnerships*

The development of alternative funding sources and management structures for parks is not acknowledged in legal doctrine. Whereas the public trust approach may rest on an assumption that parks are paid for by the public's money,[294] the reality in New York City is that increasingly parks are funded by private donations.[295] In addition, private-public partnerships are being used to manage and

290. A PUBLIC AUTHORITIES LAW §§ 553-57 (2001).

291. *Id.* § 557-a(3)

292. *Id.* § 557-a(5)

293. *See* CARO, *supra* note 205, at 625–31 (describing how Moses, "the best bill drafter in Albany," wrote amendments granting himself as head of TBTA almost unlimited funding and power').

294. *See* Brooklyn Park Comm'rs v. Armstrong 45 N.Y. 234, 240 (1871).

295. *See, e.g.*, Letter from Regina Peruggi, President of the Central Park Conservancy, to Cyane Gresham (Nov. 2001) (on file with the *Fordham Environmental Law Journal*). "New York City gives us the help it can, but over 80% of the cost of maintaining the Park is borne by the Conservancy." *Id.*; *see also* Harnik, *supra* note 48, at 11–12.

run parks and programs.[296] Does a privatization of park funding and management threaten some of the functions that parks have played?

Parks in New York City have a history of relying on philanthropists when the city's money was not enough.[297] In recent decades, continued cuts in public funding for parks has drastically cut budgets.[298] The result has been a unprecedented dependence on donated money from private sources.[299] Money is raised from individuals and neighborhood groups.[300] The parks department in New York City actively works to encourage private non-profit

---

296. *See, e.g.*, CITY OF N.Y. PARKS & RECREATION, BIENNIAL REPORT (1999) [hereinafter 1999 BIENNIAL REPORT] (listing partnerships with the City Parks Foundation, Central Park Summer Stage, Partnerships for Parks, foundation grants, Randall's Island Sports Foundation, Historic House Trust, historical sign volunteers and various park conservancies); Lynda Richardson, *From a Room With a View, Going to Bat for Parks*, N.Y. TIMES, Nov. 8, 2001, at D2 (interviewing the new executive director of the City Parks Foundation, a "non-profit group that raises money to restore neighborhood parks"). The non-profit group's offices are in the Arsenal, headquarters of the City Parks Dept. and site of the 1920 Williams case.

297. *See* ROSENZWEIG & BLACKMAR, *supra* note 170, at 303, 484–86, 508 (describing three different eras where private donations were relied on in Central Park); HARNIK, *supra* note 48, at 11–12 (giving a brief history of New York City park philanthropy).

298. *See* Ira Milstein, *City Can't Afford to be Stingy With Parks*, DAILY NEWS, Apr. 22 2001, at 45 (reporting that the DPR budget has been cut by almost seventy percent in twenty-five years and arguing for an increase). The parks budget used to represent one percent of the city budget and now represents four-tenths of a percent. *Id.*; *see also* HARNIK, *supra* note 48, at 14 (inflation-adjusted public spending on city parks fell by 31% from 1987 to 1996).

299. *See, e.g.*, Letter from Peruggi to Gresham, *supra* note 295 (public money now pays for less than one quarter of Central Park budget); HARNIK, *supra* note 48, at 11–12.

300. *See, e.g.*, Seth Kugel, *In Washington Heights, Residents Wake Up, Smell the Roses and Save a Garden*, N.Y. TIMES, Dec. 2, 2001, sec. 14 at 8 (Fort Tryon neighborhood residents raised $60,000 to help city get a grant).

foundations that work to find resources and support for parks.[301] And, increasingly, corporations are looked to cover shortfalls in public funds, and even provide municipal services.[302]

The increasing reliance on private money in parks has led to complex public-private partnerships.[303] Developers, given special development privileges, pay for new park and recreational facilities and ongoing maintenance.[304] Sometimes, in such cases, a separate nonprofit organization is set up to manage the park project.[305] Lower-income neighborhood residents and community organizations may have to organize to get the political clout to obtain resources for their parks.[306] In New York City, DPR works with countless non-profit organizations that help raise funds for parks.[307]

---

301. *See* DPR BIENNIAL REPORT, *supra* note 216, at 26–31 (describing partnerships).

302. *See* Jennifer Steinhauer, *Bloomberg Passes Hat, Aiming at Corporate Help*, N.Y. TIMES, Feb. 6, 2002, at A1 (reporting that Mayor Bloomberg is asking corporations to help with the city's four billion dollar deficit). DPR is used as an example of a city agency that works with corporations. *Id.*

303. *See* HARNIK, *supra* note 48, at 16 (listing park partnerships involving Donald Trump, Riverbank State Park above a Harlem sewage treatment plant, Prospect Park-private foundation, and Bronx River-state department of transportation).

304. *See, e.g.*, David W. Dunlap, *Going Downtown, Downstream*, N.Y. TIMES, Dec. 10, 2001, at F1 (describing how Riverside Park South was paid for by a development consortium including Donald Trump); ROSENZWEIG & BLACKMAR, *supra* note 170, at 208–09 (describing how developers are given additional height authorization in return for terraces and plazas around high-rise buildings in Manhattan).

305. *See* Dunlap, *supra* note 304, at F1 (describing the Riverside South Planning Corporation).

306. *See, e.g.*, Barbara Stewart, *Gathering at the River to Save an Ailing Park*, N.Y. TIMES, Jan. 21, 2001, at B1 (recounting how eighteen church organizations formed a coalition to get attention for East River Park and funds for its rehabilitation).

307. *See, e.g.*, GREEN BOOK, *supra* note 216, at 274 (stating that the DPR is *ex officio* a director, trustee, or manager of thirty-seven organizations outside of DPR).

Conflicts among competing interests arose when parks were administered solely through municipal agencies;[308] not surprisingly questions and conflicts arise when parks are administered through private-public partnerships[309]. Who decides what purpose the parks serves and who decides what are proper park uses? Is a park funded largely by private money still a public trust resource protected by the traditional requirements of legislative authorization for non-park uses?[310] Although no answers are easy, there are no answers in common law because these kinds of questions have not been put to courts.

Concerns about loss of control to corporate donors and commercialization of public spaces has perhaps held back municipalities in the past.[311] If, however, a corporate donor is responsible for the payment of ongoing park maintenance, it is to be expected that issues of control, direction and authority to make decisions will arise.[312]

---

308. *See, e.g.*, ROSENZWEIG & BLACKMAR, *supra* note 170, 263–66 (describing political factions in the governing body of the 1880s city parks department).

309. *See* HARNIK, *supra* note 48, at 15 (describing how Hudson River Park is not owned by DPR but by a state-chartered authority which must juggle interests of developers, citizens, and commercial ventures in the park.)

310. *See id.* at 523 (asking who decides for Central Park).

311. *See* Steinhauer, *supra* note 302, at A1 (stating that the city's budget deficit and new mayor with corporate ties has helped to overcome previous barriers).

312. *See, e.g.*, Terry Pristin, *Bryant Park Agency Replaces Kiosk Operators*, N.Y. TIMES, Feb. 22, 2002, at B3 (reporting on an abrupt decision by the business group that oversees Bryant Park to replace concession operators). Bryant Park in mid-town Manhattan is an interesting example of this dilemma. Although it is a city park, it is funded largely through the Bryant Park Restoration Corporation and run by the Bryant Park Management Corporation. BRYANT PARK RESTORATION CORP., GARDEN NOTES (2001); *see also* Bryant Park General Information, *at* http://www.bryantpark.org (last visited Apr. 14, 2002). Uses of Bryant Park include movies, concerts, fashion shows, several food concessions, passive recreation, a traveling circus, and cultural festivals. *Id.* The Restoration Corporation raised

A more basic concern about privatization of some aspects of parks is whether the public trust will be sacrificed altogether. Are parks still democratic spaces if wealthy citizens have nice parks and poor citizens do not?[313] The ebb of public funding has brought to the fore front harsh questions, not only about public trust protections, but also about what a public park is.[314]

III. IMPROVING PUBLIC TRUST PROTECTIONS OF MUNICIPAL PARKLAND IN NEW YORK

The long history of public trust protections in New York makes outright sale of municipal parkland unlikely without legislative authorization.[315] Although it is also improbable that any one individual will accumulate as much discretionary power to build in parks as did Robert Moses, [316] park protections are far from assured.[317] The common law public trust doctrine as applied to New York parks is helpful but incomplete.[318] Preserving a functional and robust heritage of public parks accessible to all will require better articulation of park purposes and uses, enforcement of existing

---

funds to rehabilitate the dilapidated park from abutting property owners, the city, private donations, a bank loan, and park concessions. *See* HARNIK, *supra* note 48, at 12. On going management of the park is funded by rental fees, assessments from abutters, and in-kind entertainment contributions. *Id.*

313. *See* Denny Lee, *Washington Sq.: First in Their Hearts*, N.Y. TIMES, Feb. 3, 2002, sec. 14 at 3 (suggesting that private conservancies may not be successful in poor areas).

314. *See* ROSENZWEIG & BLACKMAR, *supra* note 170, at 529–30 (arguing that in Central Park the "sovereign public" has "surrendered its commitment to provide free, well-maintained public spaces and has lost a measure of control over its most important public space").

315. *See supra* Part I.A (discussing *Brooklyn Park Commissioners v. City of New York*).

316. *See* ROSENZWEIG & BLACKMAR, *supra* note 170, at 498 (describing 1960s parks commissioner regretting that making decisions had become so slow and cumbersome).

317. *See supra* Part II.B.

318. *See supra* Part II.B.

protections, and more public funding. This can be accomplished through legislative and regulatory support, buttressing of the common law protections against agency overreaching, and inter-governmental cooperation and citizen involvement.

A. *Legislative and Regulatory Support*

Common law public trust applications are limited by courts to the facts of specific cases, leading to an inconsistent doctrine.[319] The common law public trust protections of shorelines have in some states been strengthened and supported by legislation and regulation.[320] This approach can be effective if coordinated and should be applied to park protection.[321] The legislature and agencies can provide better definitions, contracting guidelines, and special protections of natural resources.

---

319. *See* DAVID SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 345 (1990) (describing how limiting public trust shore enforcement to the courts results in inconsistent results and gaps in the doctrine's application); *cf.* Gionfriddo, *supra* note 19 (describing how the judiciary has, in some cases, stifled citizen public trust suits).

320. *See* SLADE ET AL., *supra* note 319, at app. I. Other states have implemented broader environmental statutes modeled on the public trust. *See supra* notes 18–19 and accompanying text.

321. *See* ARCHER ET AL., supra note 1, at 165.

> In Massachusetts, the judiciary, the legislature, and various administrative bodies have alternated over the last three centuries in taking the lead to develop and apply the public trust doctrine, but with limited overall coordination . . . [I]t is only in the last twelve years that this solid but fragmented legal base for the public trust doctrine has been codified and coherently restructured so that the doctrine can be effectively and consistently implemented.

Id.

1. Better Definitions

Park uses consistent with park purposes are already mandated by statutes funding parks.[322] Such statutes could flesh out general definitions for park, recreational, and forest preserve purposes and still leave considerable flexibility. DPR park regulations, part of the Rules of the City of New York, already list regulated, permitted, and prohibited activities.[323] Non-park uses could easily be added, as well as definitions of park purposes. The Court of Appeals in *Friends of Van Cortlandt Park* noted that public trust protections may have *de minimis* exceptions.[324] Such exceptions could be spelled out by legislation or regulations that define actions having such a small spatial or temporal impact that legislative approval would not be required. Funding bills and regulations can also effectively address the range of park contracts, general limits, and whether they are subject to the same public trust analysis. Contracting terms for park permits or concessions determine the uses of parks allowed by agencies.[325] The terms of dedication by which a municipality takes title to a park also determines future purpose and use.[326]

---

322. *See, e.g.*, N.Y. PARKS REC. & HIST. PRESERV. LAW § 15.09 (McKinney 1984). "Lands acquired by a municipality with the aid of funds . . . [shall not be] used for other than public park and related purposes without the express authority of an act of the legislature." *Id.* "Real property acquired or developed by a municipality with the aid of funds made available pursuant to this article shall not be sold or disposed of or used for purposes other than public park, marine, historic site or forest recreation purposes without the express authority of an act of the legislature." *Id.* § 17.09; *see* N.Y. ENVTL. CONSERV. LAW § 9-0303 (Gould 2001) (restriction on alienation).

323.); NEW YORK, N.Y., 62 R.C.N.Y. ch. 5 (2000).

324. Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1054 (N.Y. 2001). "While there may be *de minimis* exceptions from the public trust doctrine, the magnitude of the proposed project does not call upon us to draw such lines in this case." *Id.* (emphasis supplied).

325. *See supra* Part II.B.3.

326. *See* Kevin A. Bowman, Comment, *The Short Term Versus the Dead Hand: Litigating Our Dedicated Public Parks*, 65 U. CIN. L. REV. 595, 616–17, 642 (1997) (emphasizing that the nature of estate

2. "Forever Wild" Designation

High quality habitat and valuable natural resources in parks can be protected with special designations. The "Forever Wild" protection is used both by the state legislature and by at least one municipal agency in the state.

On the state level, perhaps the strongest form of protection the state can afford is a "Forever Wild" designation in the New York State Constitution.[327] It is written to protect designated "forest preserve" land owned by the state.[328] Any substantial encroachment on forest preserve land, including timber harvesting, requires a constitutional amendment.[329] There has been subsequent case law interpreting and applying the constitutional provision.[330] Statutes supplement the constitutional mandate.[331] Protections of park woodlands could be greatly strengthened if forest preserves were designated and constitutionally protected.[332]

In an attempt to achieve greater protections of high-quality natural areas in New York City the DPR Natural Resources Group initiated in 2001 its own "Forever Wild" program.[333] The DPR "Forever

---

and terms of dedication control future park uses and stressing the need for a coherent law of public dedication).

327. N.Y. CONST art. 14, § 1 (1996).

328. *Id.* "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild lands." *Id.*

329. *Id.*

330. *See id.*

331. *See* N.Y. ENVTL. CONSERV. LAW §§ 9-0301 to -0307, 71-0701 to-0715 (Gould 2001).

332. Some observers, however, maintain that the state "Forever Wild" protections in the Adirondack Park were too heavy-handed and caused a backlash. *See* Patricia E. Salkin, *The Politics of Land Use Reform in New York: Challenges and Opportunities*, 73 ST. JOHN'S L. REV. 1041, 1044, 1050 (1999).

333. *See* NATURAL RES. GROUP, *supra* note 45 (link available to view the DRP Natural Resources Group map); *see also* Maura E. Lout, *Forever Wild in New York City: What's With the New Signs?*, 18 URB. AUDUBON 2 (2002) (describing the new city Forever Wild program and contrasting it to the state program).

Wild" program has designated over 7,500 acres as off-limits to any development, to be protected by design review, impact assessment, negotiation, and litigation.[334]

B. *Common Law Support*

Common law itself can be a fertile source of doctrine to bolster public trust protections. The *ultra vires* doctrine and trust law duties for fiduciaries both are applicable and would enhance park protections against overreaching by municipalities that are entrusted with management of parks.[335] *Ultra vires* is a term meaning that an act or contract is unauthorized because the corporation or organization has gone beyond the power authorized by its charter or law.[336] Municipal corporations are held to strict compliance with delegated legislative authority.[337] When agencies act beyond their authority, they can be held to be *ultra vires*.[338]

Private trust and charitable trust law are other sources of common law support for restrictions on actions of municipalities.[339] These

---

334. *Id.*

335. *See* ARCHER ET AL., *supra* note 1, at 5–50 (discussing analogies of the public trust doctrine to trust law and legislative delegation of public trust responsibilities).

336. *See* BLACK'S LAW DICTIONARY, *supra* note 8, at 1525; *see also* N.Y. JUR. 2D § 175 (2001); WILLIAM F. FOX JR., UNDERSTANDING ADMINISTRATIVE LAW 42 (4th ed. 2000). "*Ultra vires* asks whether an agency is functioning within its statutory powers." *Id.*

337. *See* FOX, *supra* note 336, at 42 (explaining that an agency enabling act should set scope of authorization).

338. *See id.* (reporting that ultra vires challenges to agency actions are more common than non-delegation challenges, and the occasionally the ultra vires cases succeed); *see also* ARCHER ET AL., *supra* note 1, at 46.

339. *See* ARCHER ET AL., *supra* note 1, at 35.

> Given the consensus that states hold public lands in trust for the benefit of the public, and the dearth of cases which have addressed the obligations and responsibilities of the state as trustee, it is both reasonable and instructive for states and coastal managers to look to private and

arrangements involve a trustee who holds the trust asset for the benefit of another.[340] The heightened fiduciary duties of trustees include the duties of loyalty, of furnishing information, of taking and keeping control of trust property, of dealing impartially with beneficiaries, of enforcing claims, and preserving trust property.[341] Since the most substantial encroachments on park property are initiated, sanctioned and permitted by municipalities, it makes sense to turn to existing common law restrictions on what agency and trustee actions.

C. *Inter-Governmental Cooperation and Citizen Involvement*

Future challenges to parks will require inter-governmental cooperation and citizen involvement.[342] Cooperation of all branches of government helps to address the most difficult challenges of park protection. Only with concerted effort by the judiciary, the executive, and the legislative branch will thorny and complicated issues of overlapping jurisdiction, pre-existing alienations, and the need for better enforcement be addressed. Although not ideal, parks and roadways already coexist and will continue to in the future. Clear guidelines are lacking about what uses are allowed in parks and roadways. Guidelines will have to address the many different types of roads and transportation agencies. Pre-existing alienations are particularly thorny problem, but ignoring their existence weakens park protections. Park or state regulatory agencies should perhaps initiate efforts to compile guidelines for areas of overlapping park and road jurisdiction. Enforcement of already existing park

---

charitable trust law for guidance in determining their rights and obligations as trustees.

Id.

340. *See* BLACK'S LAW DICTIONARY, *supra* note 8, at 1519.

341. *See* SLADE ET AL., *supra* note 319, 325–30.

342. *See* Salkin, *supra* note 332, at 1051–54 (describing regional planning approach of the Hudson River Greenway Communities Council which involved over ten municipalities); Barbara Stewart, *Broken Path Along Hudson is Connected for Bicyclists*, N.Y. TIMES, Apr. 8, 2001, at 44 (describing how three city agencies and two state agencies cooperated to complete the Hudson River greenway in New York City).

protections could be improved so that common law public trust restrictions are not ignored. In that regard, citizen involvement is crucial, since individuals or parks advocate groups are often the ones who bring challenges to agency actions.

CONCLUSION

Although the common law public trust doctrine has been used as a theoretical support for increased governmental protection of common natural resources, in New York City, the reality for the last three decades has been decreasing government funding for parks and a resulting increase in privatization of agency functions. Public trust park protections in New York have succeeded in making sale or conveyance of municipal parkland very difficult, but they are not comprehensive enough to deal with the complexities of modern park contractual arrangements and park management partnerships. Clearer legislative and agency definitions of park locations, purposes and uses are essential. Common law doctrinal support and improved enforcement will certainly help. Intergovernmental cooperation will be necessary for the multi-party negotiations of the future. Citizens who organize to maintain and enhance their parks are often the ones who have filled in the gaps in what agencies can do. However, one of the best ways to allow public trust protections to work is to provide adequate public funding for public parks. That will require leadership and vision.[343]

343. *See* HARNICK, *supra* note 48, at 4 (emphasizing that leadership and vision are necessary in the design and management of public parks, and that parks are a vital factor in making cities competitive as attractive places to locate).