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The Public's Property: Municipal Rights in Using or Disposing of Donated, Dedicated or Purchased Land

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Many municipalities own or have interests in real property that were acquired by donation, dedication, gift, purchase or otherwise. Historically, most municipal land holdings were primarily limited to property used for municipal buildings and related facilities, roadways, utilities, and traditional parks. More recently, however, the land holdings of some municipalities have increased dramatically as a result of: property being deeded and easements being granted for historic preservation and environment conservation, and the tax benefits that often follow such acts of good will; land being condemned for some public open space purpose; or land being dedicated or otherwise acquired as part of the subdivision/land development process. Often these land holdings were donated, dedicated or acquired for specific "public" purposes, such as for parks and recreation, open space, natural areas, and the like. In other cases, the transfer was for a more general, unspecified "public" purpose. In many cases, particularly in the case of purchased property, the restrictions on the municipality's use are stated in the deed or other title transfer document(s) which are recorded and become part of the property's chain of title.

As land holdings have proliferated, municipalities are encountering a myriad of issues. These include the increased costs associated with maintaining and managing municipal properties, many of which are sizeable and/or which may contain structures that are often older and of historic significance. Other issues include an inability to finance improvements necessary to utilize the property for the intended recreational or other purpose, and the costs and manpower concerns involved in policing unauthorized use of the properties, including use of open space properties by off road vehicles. Also of concern are lost tax revenues because the properties have been removed from the tax rolls. These financial concerns are particularly troubling given the current monetary problems affecting local governments.

Many municipalities are considering their options with regard to managing their real estate portfolios. For example, to generate income and assure proper maintenance, can a historic structure on a property acquired for a general "public purpose" be leased or sold to someone desirous of living or operating a business from that structure? Likewise, is it permissible to allow a new structure to be constructed and used by a private enterprise on a municipally held property that was acquired for general "public" purposes? Can a portion of a property acquired for more specific "open space" or "recreational" purposes be leased for some commercial purpose if the revenues help support the desired use of the remainder? Would leasing a field acquired for 'public open space' to a farmer violate that use restriction, if the public does not

then have access to the property even for passive use? And if a municipality determines that it no longer needs or can afford a particular property, can that property be sold or otherwise transferred?

When answering these types of questions, the first source of information should always be the dedication, donation, or title transfer documents associated with the municipal acquisition. These should be reviewed thoroughly to develop an understanding of the specific restrictions, if any, that are in place. The next step in the review should be an analysis of applicable law. These questions implicate a variety of legal principles, some based in common law, and some based in existing Pennsylvania statutes, including the various and often differing municipal codes.

Where property is donated by deed with a restrictive covenant, certain common law principles apply. As a basic principal, restrictive covenants are not favored because they restrict an owner's free use and enjoyment of real property. Therefore courts are often reluctant to find a violation of such a covenant unless the desired use is clearly in plain disregard of the express wording of the restriction. Where the wording is somewhat unclear, courts will look to the intention of the parties at the time the restriction was put in place. To ascertain the intentions of the parties, Pennsylvania law requires that restrictive covenants be construed in light of: (1) their language; (2) the nature of their subject matter; (3) the apparent object or purpose of the restriction; and (4) the circumstances or conditions surrounding their execution. Typically, courts will enforce a restriction if the donee's actions are in clear defiance of the covenant, or where the restriction is still of substantial value to the donors of the restricted tract. To void or change a restriction, courts look for proof that the original purpose of the restriction has been materially altered or destroyed by changed conditions. Moreover, restrictive covenants have been discharged by the courts in instances where there has been acquiescence in the breach by others, an abandonment of the restriction, or changes in the character of a neighborhood such that there is no longer a substantial benefit to be derived from the restriction.

Another common law principle applicable to the question of how municipal property may be used or disposed of is the public trust doctrine. Under that doctrine a political entity is prohibited from undermining the public's right to use property after its dedication and acceptance. The municipality is considered to hold the property it acquired as a fiduciary for the benefit of the public. Based on this doctrine, courts have typically prohibited municipalities from selling, conveying, or otherwise abandoning the property or any specific uses for which the property was acquired.

Pennsylvania also has relevant statutory law, most notably the Donated or Dedicated Property Act. Similar to the common law public trust doctrine, this Act specifically states that "All lands ... heretofore ... donated to a political subdivision for use as a public facility, or dedicated to the public use or offered for dedication to such use, shall be deemed to be held by such political subdivision, as trustee, for the benefit of the public with full legal title in the said trustee."

This Act specifically permits political entities to sell or dispose of certain donated or dedicated property upon Orphans' Court approval, subject to certain conditions and in defined circumstances. The Act indicates that when a municipality or other trustee determines that the continuation of the original use is no longer practicable or possible, and no longer serves the public interest, the trustee may apply to the Orphans' Court for appropriate relief. The statute authorizes the Orphans' Court to permit the trustee to (1) Substitute other lands ... in exchange for the trust property in order to carry out the trust purposes; (2) If other property is not available, sell the property and apply the proceeds to carry out the trust purposes; (3) where the original trust purpose is no longer practicable, possible, or in the public interest, apply the property or the proceeds of a sale to a different public purpose, or (4) relinquish, waive or otherwise quitclaim all right and title of the public to the property.

There is some uncertainty as to the overlap and interplay of the common law principles with the Donated or Dedicated Property Act. Recent court decisions have concluded that the Act essentially codifies some of the common law principles. These decisions have also tangentially addressed certain of the unresolved issues, such as whether the Act applies to property which is purchased, as distinguished from property which was donated or dedicated. The Pa. Supreme Court in *In re Erie Golf Course*, 992 A.2d 75 (2010) seems to indicate that purchased property can be considered to be committed or "dedicated" to the public trust upon public use, and that the Act may in fact be applicable to such purchased trust property. The decision left open the question of whether the Act is applicable to property acquired where recorded deed restrictions are actually in place.

To summarize, municipalities that purchase or accept the donation of an interest in property must do so in the public interest and must be willing to accept the obligation of its long term care and maintenance. The municipality's right to use, lease or sell property acquired for a public purpose lies in the application of common law principals and statutory law to the specific facts of each situation. Any municipality considering an acquisition or acceptance of property for a public purpose should build into the transaction the greatest possible flexibility concerning its future use. In some cases the wise choice will be to decline the gift or forego the purchase. Finally, with respect to the use of currently held property, any specific issue relating to its sale, lease, or use that is not consistent with the purposes for which it was acquired should be discussed with experienced legal counsel.