APL-2015-00053

# Court of Appeals
## of the
# State of New York

DEBORAH GLICK, individually and in her representative capacity as Assemblymember for the 66th Assembly District, BARBARA WEINSTEIN, JUDITH CHAZEN WALSH, SUSAN TAYLORSON, MARK CRISPIN MILLER, ALAN HERMAN, ANNE HEARN, JEFF GOODWIN, JODY BERENBLATT, NYU FACULTY AGAINST THE SEXTON PLAN, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HISTORIC DISTRICTS COUNCIL, WASHINGTON SQUARE VILLAGE TENANTS' ASSOCIATION, EAST VILLAGE COMMUNITY COALITION, FRIENDS OF PETROSINO SQUARE, by and in the name of its President, GEORGETTE FLEISCHER, LAGUARDIA CORNER GARDENS, INC., LOWER MANHATTAN NEIGHBORS' ORGANIZATION, SOHO ALLIANCE, BOWERY ALLIANCE OF NEIGHBORS, by and in the name of its Treasurer, JEAN STANDISH, NOHO NEIGHBORHOOD ASSOCIATION, by and in the name of its Co-Chair JEANNE WILCKE, and WASHINGTON PLACE BLOCK ASSOCIATION, by and in the name of its president, HOWARD NEGRIN,

*Petitioners-Respondents-Appellants,*

For a Judgment Pursuant to CPLR Article 78

– against –

ROSE HARVEY, as Acting Commissioner of the New York State Office of Parks, Recreation and Historic Preservation, THE NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, PAUL T. WILLIAMS, JR., as the President and the Chief Executive Officer of Dormitory Authority of the State of New York, DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

*Respondents,*

*(For Continuation of Caption See Reverse Side of Cover)*

# BRIEF FOR *AMICUS CURIAE* NEW YORK CIVIC IN SUPPORT OF APPELLANTS

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Dated: April 23, 2015

VERONICA M. WHITE, as Commissioner of the New York City Department of Parks and Recreation, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, JANETTE SADIK-KHAN, as Commissioner of the New York City Department of Transportation, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, MATHEW M. WAMBUA, as Commissioner of the New York City Department of Housing Preservation and Development, THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, AMANDA BURDEN, as Director of the New York City Department of City Planning and Chair of the New York City Planning Commission, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, CHRISTINE QUINN, as Speaker of the New York City Council, THE NEW YORK CITY COUNCIL, and THE CITY OF NEW YORK,

*Respondents-Appellants-Respondents,*

– and –

NEW YORK UNIVERSITY,

*As a Necessary Third-Party Appellant-Respondent.*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of the Court of Appeals, New York Civic states that it has no parents, subsidiaries or affiliates.

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## INTEREST OF *AMICUS CURIAE*

New York Civic respectfully submits this brief as *amicus curiae* in support of Appellants to bring to the Court's attention the important role the Public Trust doctrine plays in ensuring transparency and accountability in New York government and the anti-democratic effect that an affirmance of the ruling on appeal would have on the disposition of parkland in this State.

New York Civic is a nonprofit, nonpartisan, good-government organization and public policy think tank that aims to advance political reform in the City and State of New York through education, community outreach, social networking, and grassroots activism. New York Civic works by highlighting in print and other media the best and worst practices in city government, advising government officials, leading political discussions, and bringing attention to citizen issues and complaints. Since its founding in 2002, New York Civic has published over 750 articles directed at making government more honest, efficient, and effective, and has built a community of over 12,000 citizens interested in implementing good government reforms. In the words of Former New York City Mayor Ed Koch,

"New York Civic is one of the most sensible and thoughtful good government groups active today and a true champion of reform of City Hall and Albany."[1]

As part of its mission, New York Civic is deeply invested in preserving public parkland. The founders of New York Civic, Henry J. Stern and Alan M. Moss, bring decades of experience and knowledge to this issue. Mr. Stern has been in public service in New York City since 1957. He was twice appointed Commissioner of the New York City Department of Parks and Recreation (from 1983 to 1990 and again from 1994 to 2000). Mr. Stern was credited, as Parks Commissioner, with improving the cleanliness and safety of New York City's 1,700 parks and playgrounds. Mr. Stern also supervised the acquisition of several thousand acres of additional parkland for the city, most coming from other agencies; the creation of over 2,000 "Greenstreets" at traffic intersections; and the posting of 2,500 historic signs and 800 yardarms for city park flagpoles. During his more than fourteen years as Parks Commissioner, Mr. Stern oversaw more than a billion dollars' worth of park improvements as part of the capital construction programs of Mayors Edward Koch and Rudolph Giuliani. Mr. Stern is also familiar with the facts of this litigation: For example, he personally presided over

[1] New York Civic: Our Mission, http://web.archive.org/web/20120323100925/http://nycivic.org/about-us#mission-statement (last visited Apr. 23, 2015).

the public dedication of Mercer Playground in 1995. The record includes an affidavit signed by Mr. Stern setting forth his recollection and understanding that the parcels at issue here have long been used and treated as dedicated public parkland.

Alan R. Moss is also a lifelong public servant dedicated to the promotion and preservation of public parkland. Mr. Moss held various senior positions in the Department of Parks and Recreation, including First Deputy Parks Commissioner, and he was instrumental in effecting improvements to the City's parks under Mr. Stern's Commissionership. In 2008, he was appointed Chairman of the New York City Water Board by Mayor Michael Bloomberg.

As *amicus* argues below, this appeal unites two objects of New York Civic's concern and expertise: That government in this State operate with transparency and accountability and that parkland be afforded the full protection to which the law entitles it. The decision of the First Department would allow parkland in New York City and throughout New York State to be diverted to non-park uses without approval of the State legislature whenever it has not been formally mapped as a park, effectively precluding the implied dedication of land to the public at large for park uses. This is not merely a harm to the public's interest in parks. It deprives the citizens of New York State of any role in the disposition of vital public resources.

## INTRODUCTION

The Public Trust doctrine protects both the public's right to dedicated parkland and its voice in decision-making about parkland. This appeal concerns whether, when it is most needed, that protection will be forceful or toothless.

For decades, four parcels of municipally-owned land in Greenwich Village, a dense neighborhood in New York City, have been held out to the public at large as parks, and the public at large has used them as parks in reliance on the City's manifest intent. These four parcels abut two so-called superblocks of private property owned by New York University. In July 2012, NYU secured approval from the City Council of a massive construction project on the two superblocks. The project would eliminate one of the four parks and subject the other three to an easement in favor of NYU, allowing it to use them as construction staging areas for at least 20 years. Yet the State legislature did not approve this alienation of parkland envisioned by the project, as required by the Public Trust doctrine.

The Supreme Court, New York County (Donna M. Mills, J.) ("Special Term"), reviewed the extensive record and determined that three of the four parcels were impliedly dedicated as parks so that "the public trust doctrine applies." A.1:51 (Trial Op. at 38). This conclusion rests on several factual findings. Most critically, Special Term found that "petitioners have certainly shown long continuous [use] of the four parcels as parks." A.1:48 (Trial Op. at 35). The

Appellate Division, First Department, reversed Special Term's ruling that the three parcels had been impliedly dedicated as parks. The First Department did not, however, disturb the trial court's findings of fact. Instead, the First Department based its conclusion on three observations: one of the parcels was also used as a "pedestrian thoroughfare[]"; the Parks Department's management of the parcels was pursuant to "revocable permits or licenses"; and the parcels were mapped as streets on an internal city planning document "and the City has refused various requests to have the streets de-mapped and re-dedicated as parkland." A.1:5 (App. Div. Op. at 74). With this reasoning, the First Department embraced a theory that, without formal recognition as a park, property cannot be impliedly dedicated as parkland.

Appellants explain in detail why the First Department's decision eviscerates the concept of implied dedication and ignores some 150 years of New York precedent; *amicus* joins those arguments. See Appellants' Br. at 32–69. *Amicus* writes to place the First Department's legal error in the context of the fundamentally democratic aims of the Public Trust doctrine and thereby emphasize the stakes here.

All agree that parks are precious environmental resources, "set apart for recreation of the public, to promote its health and enjoyment." Williams v. Gallatin, 229 N.Y. 248, 253 (1920). Under the Public Trust doctrine, however,

they are more than that: The creation and protection of parkland involves the public at large in decisions about how State resources are allocated. First, land dedicated as parkland cannot be alienated or substantially interfered with unless the State legislature expressly approves the action. This requirement of express approval at the State level maximizes transparency and democratic accountability in the disposition of parkland after it has been dedicated as a park. As a result, public parks are sheltered from the whims of municipalities captured by private interests or driven by parochialism. Moreover, the law governing the creation of parkland yields another democratic dividend. This case involves parkland dedicated as such by implication rather than by express declaration. And implied dedications essentially occur when the owner of land (here, a municipality) holds it out to the public as a park and the public continuously uses it as such over a sufficient period of time. Thus, in an implied dedication the public's own direct action partly determines the policy question of whether property becomes a park in the first place.

Once the animating principles of the Public Trust doctrine are understood, it becomes plain that the parcels at issue here were impliedly dedicated as parks under New York law. Indeed, evidence the trial court relied on—including the testimony of Henry Stern, longtime Parks Commissioner and one of the founders of *amicus* New York Civic—makes clear that not only has the public continuously

used these parcels as parks for years, but the City has affirmatively signaled its acquiescence in and encouragement of that use.

The error in the First Department's reasoning thus comes into sharp relief. It contravenes the logic of the Public Trust doctrine for implied dedication to turn on formalities such as zoning maps and inter-agency licensing agreements. Indeed, that these parcels remain mapped as streets evinces no hidden municipal refusal to dedicate them as parks; on the contrary, the City was prepared to change the mapping of these parcels. As the trial court found, in a finding unaltered by the First Department, the only reason this formal change did not occur was because NYU obstructed it. Recognizing that remapping would merely have formalized what was already publicly understood fact—these parcels were parks—the City determined that it would not expend scarce resources unnecessarily. Thus, by assigning dispositive weight to the City's zoning map, the First Department did not honor municipal intent; it subjected implied dedications, which are supposed to recognize the public's reasonable expectations, to the veto of powerful private interests. That result undoes the promise of the public trust, and it must be reversed.

## ARGUMENT

### I. THE PUBLIC TRUST DOCTRINE IS A DEMOCRATIC SAFEGUARD OF PUBLIC INTERESTS AGAINST MUNICIPAL ENCROACHMENT AND FAVORITISM

#### A. In the American Legal Tradition, the Public Trust Doctrine Protects Public Resources and Promotes Democratic Accountability

In New York, parkland is impressed with a public trust, which governs its disposition and limits the power of government to alienate the property or put it to uses inconsistent with its purpose as a park. Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623 (2001). Under this Public Trust doctrine, the law recognizes both "constraints on alienation by the sovereign and . . . an affirmative protective duty of government—a fiduciary obligation—in dealing with certain properties held publicly." Joseph L. Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C. Davis L. Rev. 185, 185 (1980).

The Public Trust doctrine has a long history and wide application. It originated in the "Roman law idea of common properties (*res communis*) and [in] certain provisions of Magna Carta." Id. The Institutes of Justinian, which codified Roman law, summarize the doctrine's original focus: "By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea." See Susan J. Kraham & Lisa K. Perfetto, Scratching the Surface: Does New York's Public Trust Law Prevent Subsurface

Access?, 19 Buff. Evntl. L.J. 43, 47 (2012) (citation omitted). This Roman-law concept was ultimately adopted into English common law through the Magna Carta, and from there subsequently made its way to the American colonies. See Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 412–15 (1842) (tracing common rights of navigation, fishing, and bathing in the sea to Magna Carta); Arnold v. Mundy, 6 N.J.L. 1, 3 (1821) (explaining that Magna Carta, "which simply restored the principles of the ancient law [in this area,] . . . applied [in the American colonies] in full force").

Importantly, "[t]raditional public trust law also embraces parklands, especially if they have been donated to the public for specific purposes; and, as a minimum, it operates to require that such lands not be used for nonpark purposes." Joseph L. Sax, The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 556 (1970); see also Douglass v. City Council of Montgomery, 24 So. 745, 746 (Ala. 1898) ("If, however, the lands have been dedicated by private individuals for a public park or square, the legislature has no authority to authorize any diversion from the uses to which they were originally dedicated.") (quoting 17 Am. & Eng. Enc. of Law, 417)); City of Cincinnati v. White's Lessee, 31 U.S. 431, 438 (1832) ("All public dedications must be considered with reference to the use for which they are made; . . . the

principle, so far as respects the right of the original owner to disturb the use . . . applies equally to the dedication of the common [i.e., a park] as to the streets.").

In the United States, "the Public Trust Doctrine survives . . . as one of the most important and far-reaching doctrines of American law." David C. Slade et al., Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States, at 5 (Coastal States Org., 2d ed. 1997) (internal quotation marks omitted). Over many years, courts throughout the country have applied the doctrine "in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals." Sax, 68 Mich. L. Rev. at 556. As early as 1842, the United States Supreme Court blocked private claims to shellfish beds in New Jersey based on the understanding that the royal grant to which the claimant traced his title was impliedly limited by the public's rights of navigation, fishing, and bathing along the shore and in the sea. Martin, 41 U.S. at 413–14. Fifty years later the Court blocked the conveyance of Chicago shoreline to a railroad company because "the idea that [Illinois's] legislature can deprive the state of control over [the] bed and waters [of Lake Michigan], and place the same in the hands of a private corporation, created for a different purpose—one limited to transportation of passengers and freight

between distant points and the city—is a proposition that cannot be defended." Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–54 (1892).

More recently, the Supreme Judicial Court of Massachusetts held that the Public Trust doctrine precluded the development of a ski resort on a mountainside reservation. Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 126 (Mass. 1966). Other cases have applied the Public Trust doctrine to protect parkland, the seashore, and rights to use other common resources. See, e.g., Tuten v. City of Brunswick, 418 S.E.2d 367, 370–71 (Ga. 1992) (enjoining city from alienating public parkland to a church group); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 732 (Cal. 1983) (applying the doctrine to stop Los Angeles from diverting a nontidal tributary of an inland lake); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365–66 (N.J. 1984) (granting public rights of access to and recreational use of privately-owned beach above the high-water mark); Fairhope Single Tax Corp. v. City of Fairhope, 206 So.2d 588 (Ala. 1968) (enjoining municipality from erecting a civic center building and recreation building on property dedicated to the city as a park).

Courts and commentators ascribe to the Public Trust doctrine two critical, democracy-promoting functions. First, courts have employed the doctrine "to provide the most appropriate climate for democratic policy making." Sax, 68 Mich. L. Rev. at 496. Thus, in Martin, the Supreme Court declined to read a royal

grant of title to shellfish beds as extinguishing the public's right to fish those beds. The result was that the States, which of course act through processes more democratic than did the English sovereign in granting title to colonial lands, were the only authority that could extinguish those rights. See Martin, 41 U.S. at 410 ("[W]hen the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.").

As Professor Joseph Sax pointed out in a seminal article on public trust law, the Supreme Judicial Court of Massachusetts achieved a similar result in Gould. There, the Court invalidated a project approved by a commission administering a mountainside reservation, which had leased the park to a private concern to build a private ski resort, on the ground that the statute authorizing the commission did not expressly permit that use. In so holding, "the court devised a legal rule which imposed a presumption that the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses." Sax, 68 Mich. L. Rev. at 494. This ruling, Professor Sax explained, "forced agencies to bear the burden of obtaining specific, overt approval of efforts to invade the public trust" and thus "struck directly at low-visibility decision-making, which is the most pervasive

manifestation of the problem" of "inequality of access to, and influence over, administrative agencies." Id. at 498.

Second, the Public Trust doctrine respects the reasonable expectations of the public over time: "The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title." Sax, 14 U.C. Davis L. Rev. at 188; see also id. at 193 ("The historical lesson of customary law is that the *fact* of expectations rather than some formality is central."). For example, the U.S. Supreme Court in White's Lessee held that a landowner could not secure ejectment of the city from land used as a park notwithstanding that the landowner held title to the land in fee. In so ruling, the Court emphasized the settled expectations of the public, explaining that because "the land has been enjoyed as a common for many years[,]" divesting the public of their rights of possession would constitute "a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." 31 U.S. at 438–39. Similarly, in enjoining owners of undeveloped land fronting the ocean from blocking public access to the beach, the California Supreme Court contrasted the fact of private title with the public's settled expectations of continued access. Gion v. City of Santa Cruz, 2 Cal.3d 29, 34–35 (1970) ("Most of the area, however, has never been used for anything but the pleasure of the public. . . . In fact, counsel for [a

plaintiff-landowner] offered to stipulate at trial that since 1900 the public has fished on the property and that no one ever asked or told anyone to leave it."). Thus, the Public Trust doctrine gives force to the settled expectations engendered by public use, even if there is not formal recognition of such use in a written instrument.

The Public Trust doctrine serves a dual purpose. It protects important resources for public use, including parkland, but it does so by preserving the public's voice in the disposition of public resources and protecting the public's reasonable expectations that uses of land developed over time will be respected. The New York law protecting dedicated parkland shares these characteristics.

### B. New York Has Applied the Public Trust Doctrine to Protect Parkland Against Encroachment by Municipalities Captured by Private Interests

New York has long adhered to the Public Trust doctrine. Elements of the doctrine are found in the State Constitution and in various statutes. *See* N.Y. Const. Art XIV § 1 ("The lands of the State . . . constituting the forest preserve . . . shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private[.]"). Under the General City Law, "the rights of a city to its . . . parks," among other "public places," are "declared to be inalienable." N.Y. Gen. City Law § 20(2). New York courts, too, have long applied the doctrine to protect the public's rights and

interests in various resources. See, e.g., Fulton Light, Heat & Power Co. v. State of New York, 200 N.Y. 400, 412 (1911) (navigable waters). This judicial solicitude extends with particular force to New York's parks.

This Court has vigilantly guarded the vigorous protections the Public Trust doctrine affords to parkland. Fundamentally, the doctrine prohibits municipalities from selling or alienating parks without the State legislature's express approval. See Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 243 (1871). This Court has likewise demanded legislative approval for non-park uses—even those with clear public benefits. See Williams, 229 N.Y. at 253 ("[N]o objects, however worthy, such as courthouses and schoolhouses, which have no connection with park purposes, should be permitted to encroach upon [a park] without legislative authority plainly conferred."). Even temporary disruption of public access to parks, if material, violates the Public Trust doctrine. Friends of Van Cortlandt Park, 95 N.Y.2d at 631 (requiring legislative approval where "the public will be deprived of valued park uses for at least five years" because of construction of water treatment plant). And there is typically no time-limitation to challenging a city's improper disposition of parkland, since the use of a park for non-park purposes constitutes a "continuous or recurring wrong" that keeps the statute-of-limitations period open. See Capruso v. Vill. of Kings Point, 23 N.Y.3d 631, 639–40 (2014).

The effect of these strictures is to place authority over the elimination, alienation, or interference with parkland with the State legislature, thus ensuring democratic accountability for infringements of the interest of all New Yorkers in the parks. See Aldrich v. New York, 208 Misc. 930, 940 (Sup. Ct. Queens Cnty. 1955) (explaining parks are more than "purely local concern[s]"). Indeed, legislative approval is harder to come by than municipal approval (as this case demonstrates), not least because state legislatures, entrusted with protecting resources on a statewide basis, are less susceptible to the parochial temptations that might prompt local entities to use parkland for development. By strictly construing the requirement of legislative approval, and thereby "prohibiting the delegation to local entities of trust issues that are of statewide significance," New York courts "encourage greater democratization of decision-making." Michael C. Blumm & Rachel D. Guthrie, Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision, 45 U.C. Davis L. Rev. 741, 751 n.36 (2012); see also Sax, 68 Mich. L. Rev. at 498 (arguing that requiring "specific, overt [state legislative] approval of efforts to invade the public trust" strikes directly at "low-visibility decision-making"). As this Court has put it, "[s]ound public policy forbids that [a municipality] should [have] any power to divert [public trust property] to a private use, for, once such power being assumed, the dangers which may follow either from favoritism or ill-judgment may

speedily hamper or practically destroy the fundamental purpose of the public use." Lake George Steamboat Co. v. Blais, 30 N.Y.2d 48, 51 (1972) (citation omitted).

At the same time, the requirement of State legislative approval does not freeze local development whenever it affects parkland. It wisely balances the needs of justifiable development with the protection of public resources. Thus, "[t]he state legislature approves a number of parkland alienations each year," but in doing so "it generally will impose conditions including an obligation to replace alienated parkland with new parkland of at least an equal area and quality." 9 N.Y. Prac., Envtl. Law & Regulation in N.Y. § 1:10.50 (2d ed.). For example, when this Court held in Friends of Van Cortlandt Park that the construction of a water treatment plant, which would have rendered part of Van Cortlandt Park in the Bronx unusable for five years, could not proceed without legislative approval (95 N.Y.2d at 631), that was not the end of the story. The legislature ultimately approved the project on the condition that the City acquire additional parklands of "equal or greater fair market value" or perform "capital improvements to existing park and recreational facilities which are equal to or greater than the fair market value of those lands." 2003 N.Y. Sess. Laws. Ch. 175 (A.8069-C § 2) (McKinney). And the City pledged "to spend at least $243 million on acquiring new park lands or making capital improvements to existing parks and recreational

facilities in the Bronx and restoring and improving Van Cortlandt Park." 9 N.Y. Prac., Envtl. Law & Regulation in N.Y. § 1:10.50 (2d ed.).

By taking seriously the strictures of the Public Trust doctrine, in other words, this Court has not stymied important municipal projects. It has ensured that such projects can be fully assessed and fairly implemented by providing a statewide forum for the voice of the public at large to be heard.

This Court has recognized the Public Trust doctrine's role in thwarting municipal encroachment and the favoritism by local officials of narrow private interests. In Lake George Steamboat, for example, this Court invalidated a five-year lease of a dock and related facilities on land owned by the Village of Lake George on the ground that the lease "clearly diverted part of this public trust to exclusively private purposes, without legislative sanction." 30 N.Y.2d at 51. In reaching its conclusion, this Court expressed skepticism that, left to their own devices, municipalities could control usurpation of the public trust by powerful local actors. "Sound public policy," Lake George Steamboat explained, "forbids that there should be any power to divert a part [of public lakefront] to a private use, for, once such power being assumed, the dangers which may follow either from favoritism or ill-judgment may speedily hamper or practically destroy the fundamental purpose of the public use." Id. (internal quotation marks omitted).

Lower courts, too, regularly employ the Public Trust doctrine to prevent private encroachment on the public's right to use parkland, no matter how potentially salutary the project. Thus, the Second Department invalidated a 12-year lease of public parkland to a private homeowner's organization, even though the Town claimed that "revenue from the lease will finance the eventual restoration of the public parkland." Johnson v. Town of Brookhaven, 230 A.D. 2d 774, 774–75 (2d Dep't 1996). "The use of th[e] public parkland for private summer cottages," the Court held, was simply "an improper use to the exclusion of the public." Id. at 775. Following this Court's lead in Lake George Steamboat, the Second Department realized that the public trust characterizing the park could not be reconciled with the Town's plan to promote "the exclusively private use of the property [and] the private entity's profit-making goal[.]" Id. (citing Lake George Steamboat, 30 N.Y.2d at 51) (internal quotation marks omitted).

Thus, since the nineteenth century New York courts, and especially this Court, have recognized that the Public Trust doctrine promotes democratic decision making, protects the reasonable expectations of the public at large, and checks municipal encroachment and favoritism. As explained below, however, the First Department's decision would effectively neuter the doctrine where its protections are most needed.

## II. IMPLIED DEDICATION FURTHERS THE DEMOCRATIC PURPOSE OF THE PUBLIC TRUST DOCTRINE BY RESPECTING PUBLIC EXPECTATIONS BASED ON OUTWARD MUNICIPAL CONDUCT

The Public Trust doctrine protects property dedicated as parkland. Such dedication can be express—through the passage of a formal resolution or local law by a municipal governing body—or implied. Implied dedication occurs "[i]n the absence of a formal dedication of land for public use," "when a municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate." Friends of Petrosino Square v. Sadik-Khan, 42 Misc. 3d 226, 230 (Sup. Ct. N.Y. Cnty. 2013) (quoting Riverview Partners, LP v. City of Peekskill, 273 A.D.2d 455, 455 (2d Dep't 2000)).

Appellants have ably traced the history and scope of the law of implied dedication in New York (see Appellants' Br. at 32–43), and *amicus* joins in that presentation. As Appellants explain, long and continuous public use of land for a particular purpose is paradigmatic evidence that the land has been impliedly dedicated to the public, and accepted by the public, for that use. See, e.g., Powell v. City of New York, 85 A.D.3d 429, 431 (1st Dep't 2011) ("A parcel of land may constitute a park either expressly, such as by deed or legislative enactment, or by implication, such as by a continuous use of the parcel as a public park."); Riverview Partners v. City of Peekskill, 273 A.D.2d 455, 455 (2d Dep't 2000) (citing as evidence of implied dedication, inter alia, that a property "was used as

park by the public since its purchase"); Vill. of Croton–on–Hudson v. Cnty. of Westchester, 38 A.D.2d 979 (2d Dep't 1972) ("[T]he long-continued use of the land for park purposes constitutes a dedication and acceptance by implication."), aff'd, 30 N.Y.2d 959 (1972); see also Friends of Petrosino Square, 42 Misc. 3d at 230 ("Dedication of parkland is implied where the City holds land out as a park and the public uses the land as a park."). Long and continuous public use demonstrates both that the municipality has *manifested* an intent that the land be available to the public for that use (since it has acquiesced in that use), *and* that the public understands and relies upon that manifest intent.

*Amicus* emphasizes a critical reason New York law has come out this way. Implied dedication sounds in estoppel. It acts "not to deprive a party of title to his land, but to estop him . . . from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has." Hunter v. Trustees of Sandy Hill, 6 Hill 407, 407 (N.Y. Sup. Ct. 1844); see also Cook v. Harris, 61 N.Y. 448, 453 (1875) ("Land may be dedicated to the use of the public for a highway, without any writing . . . . It rests upon the doctrine of estoppel *in pais.*"). As with any concept based on estoppel, the effect of implied dedication is to bar a property owner from "reclaim[ing] at pleasure property which has been solemnly devoted to the use of the public . . . . The law . . . will not permit any one thus to break his own plighted faith; to disappoint honest expectations thus excited, and upon which

reliance has been placed." Hunter, 6 Hill at 407. *Amicus* argued above that the Public Trust doctrine protects the public's reasonable expectations and gives legal weight to the actions of ordinary citizens in determining public policy regarding resource allocation. The law of implied dedication is the vehicle through which New York law achieves this, "preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title." Sax, 14 U.C. Davis L. Rev. at 188.

For the same reason, what does *not* determine whether a parcel has been impliedly dedicated as a park is whether it has been mapped as a street or a park, the factor that predominated in the First Department's analysis of this case. After all, the Public Trust doctrine functions precisely to "prohibit[] the delegation to local entities of trust issues that are of statewide significance[.]" Blumm & Guthrie, 45 U.C. Davis L. Rev. at 751 n.36. Consistent with this insight, New York courts, especially this one, have applied a presumption of public-trust protection and given more weight to the fact of public expectations backed by conduct than to every jot and tittle of formal legal documents. See, e.g., Lake George Steamboat, 30 N.Y.2d at 52 ("[L]egislative sanction must be clear and certain to permit a municipality to lease public property for private purposes."); Miller v. City of New York, 15 N.Y.2d 34, 37–38 (1964) (holding that agreement between city and private developers to build a golf course on public parkland was a

lease, and therefore required legislative approval, notwithstanding that "the contract speaks of a 'license' and avoids use of the word 'lease,'" and noting that, "even if there were a doubt about it in a case like this, it would be our duty to deny the existence of the [city's] power" to make such an agreement); cf. Capruso, 23 N.Y.3d at 641 (applying "continuous wrong" rule to deem challenge under the Public Trust doctrine timely because "[i]t would be unreasonable to expect ordinary citizens who use . . . parks to know whether a particular use by a municipality has received approval by the State Legislature and whether municipal infrastructure located on parkland is intended to serve the park or public areas outside of the park").

Therefore, to rely on the formal mapping of a parcel of land to determine implied dedication would contravene the spirit of the Public Trust doctrine and the reasoning of the case law. It would make the protections of the doctrine depend on an esoteric document essentially unknown to the public rather than on outward manifestations of intent. And it would ignore history. Most of New York City's parkland—including Central Park—was not formally mapped as a "park." Instead, many of the City's parks were "made available and became known to the public as 'parks'" by long and continuous use. A.8:3141 (Affidavit of Henry J. Stern ("Stern Aff.") ¶ 11). And formal remapping of streets as parks is easily blocked by self-interested stakeholders, as occurred in this case. See infra, Section IV. In

short, the formal mapping process has little to do with the democratic expression of public will that the Public Trust doctrine credits and encourages. See A.8:3148 (Stern Aff. ¶ 25–26).

## III. THE FOUR PARCELS AT ISSUE HERE HAVE ALWAYS BEEN TREATED AS PARKS, DEMONSTRATING THEIR IMPLIED DEDICATION

With these principles in mind, it becomes clear that each of the particular parcels at issue in this litigation was impliedly dedicated as a public park by the City. Most importantly, Special Term found (and the First Department did not revisit or reverse this finding) that "petitioners have certainly shown long continuous [use] of the four parcels as parks." A.1:48 (Trial Op. at 35).

Moreover, as explained in the record by Henry Stern, one of the founders of New York Civic, there are additional indicia of municipal intent to impliedly dedicate a property as a park. These indicia are:

- Public statements by City officials identifying the property as parkland;
- Indications at the site of Parks Department jurisdiction and oversight, including Parks Department signage, Parks Department flags or insignias, and public access permitted to the site at posted times;
- Capital expenditures by the City to use or improve the land for park use, including regular maintenance and repairs by the Parks Department; and
- References on the Parks Department website to the property as parkland.

A.8:3142–43 (Stern Aff. ¶ 17). All of these factors, like the public's long and continuous use of property for park purposes, address a city's *manifestation* of intent—its holding land out to the public as a park. Mr. Stern's own experience, memorialized in an affidavit filed in the trial court, confirms that each parcel at issue here bears some or all of these indicia of implied dedication, and that there is little doubt they were always treated as parks.

### A. Mercer Playground

The project NYU has proposed and the City has approved would adversely affect four parcels of land abutting two superblocks in the heart of Greenwich Village in New York City. See Appellants' Br. at 11–22. The parcel on the east side of the northern superblock is Mercer Playground. The Parks Department, in collaboration with the Lower Manhattan Neighbors Organization for Parks, Inc., designed, funded, and constructed Mercer Playground during Mr. Stern's tenure as Parks Commissioner. A.8:3145–46 (Stern Aff. ¶ 19(iii)).

The Parks Department and local elected officials opened Mercer Playground in 1999 at a public ceremony. Mr. Stern gave the welcoming address, and hundreds of members of the public attended. Signifying that Mercer Playground was, in fact, a park, the Parks Department's iconic flag (a maple leaf inside a circle) was raised. Id.

Today, the Parks Department conducts regular maintenance of the Playground. All Parks Department maps denote (and have always denoted) Mercer Playground as a park. The Department's website describes the Playground as "one of New York's youngest parks."[2] At least until March 8, 2013, the website went on to say that "[i]n 1995 the Department of Transportation gave Parks a permit to use the site. Two years later the site was formally transferred to Parks, and plans were made for capital improvements." A.1.31 (Trial Op. at 18) (citation omitted). And the encircled maple leaf is still prominently displayed throughout Mercer Playground—on signage, on the pavement within the Playground, and on the water drain cover inside the Playground. A.8:3146 (Stern Aff. ¶19(iii)).

Thus, Mercer Playground represents a classic case of implied dedication.[3] See Riverview Partners, 273 A.D.2d at 455–56 (holding that implied dedication had occurred because "the subject property was purchased in 1929 for park purposes, was named 'Fort Hill Park' on various city maps and on a sign at the park entrance, was used by the public as a park since its purchase, and was maintained and improved by the defendant for park and historic purposes"); Friends of Petrosino Square, 42 Misc. 3d at 230 (holding that land was impliedly

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[2] See Mercer Playground, http://www.nycgovparks.org/parks/mercer-playground (last visited April 23, 2015).

[3] In fact, the 1999 ceremony arguably constituted an *express* dedication.

dedicated as public park in part because "signage in and around the Park bears the [Parks Department] name and logos and the signs themselves describe the Park as a 'public space' and 'park'[;] [f]urther, [the Parks] Commissioner sponsored the groundbreaking renovation of the Park in 2008 and eventually presided over an official park dedication ceremony held on the southwest corner of the Park in October 2009").

### B. LaGuardia Park

The parcel of land on the western edge of the north superblock, known as LaGuardia Park, has served as a publicly accessible park space and green walkway since 1986. The Parks Department has maintained LaGuardia Park for nearly three decades, during which time Parks Department signage to that effect has been prominently displayed in the Park. The centerpiece of LaGuardia Park is a statue of former New York City Mayor Fiorello H. La Guardia, which was dedicated in 1995. The LaGuardia Statue is well-known, and the Parks Department website maintains a page devoted to it.[4] In September 2010, ground broke for Adrienne's Garden, a new toddlers' garden within LaGuardia Park. The Parks Department was instrumental in this project, allocating $350,000 for the construction of Adrienne's Garden. A.8:3143–44 (Stern Aff. ¶ 19(i)).

[4] See Fiorello La Guardia Statue, http://www.nycgovparks.org/about/history/historical-signs/listings?id=12183 (last visited April 23, 2015).

Just as with Mercer Playground, the indicia of implied dedication described by Mr. Stern characterize LaGuardia Park. The City has held the parcel out to the public as a park through the Park Department's website, administration and maintenance of the parcel, and funding of Adrienne's Garden.

### C. LaGuardia Corner Gardens

Further down LaGuardia Place, along the south superblock, sits LaGuardia Corner Gardens, which has served as a beloved community garden for more than three decades. In addition to this long, continuous public use, the Parks Department has long managed and administered LaGuardia Corner Gardens through the NYC Parks GreenThumb Program.[5] Because of the decades-long public relationship between the Parks Department and the Corner Gardens community, Mr. Stern affirmed that even persons *within* the Parks Department believed that LaGuardia Corner Gardens had been formally transferred to Parks. Thus, when the Parks Department under Mr. Stern's tenure tried to effect a formal dedication of LaGuardia Corner Gardens as a park, it was to recognize formally the informal park status the Corner Gardens had already obtained in the community. A.8:3144–45 (Stern Aff. ¶ 19(ii)).

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[5] See NYC Parks GreenThumb: The Largest Community Gardening Program in the Nation, http://www.greenthumbnyc.org/about.html (last visited April 23, 2015).

### D. Mercer-Houston Dog Run

Finally, the Mercer-Houston Dog Run has been located on the east side of the south superblock since 1981. Before then, the site—once occupied by tenement buildings razed before the 1960s—was used by neighborhood families for recreation. As a dog run, the parcel has long been considered a vibrant community asset. A.8:3146–47 (Stern Aff. ¶ 19(iv)).

The City and NYU have pointed out that there is a fee for being a member of the Dog Run. A.1:42–43 (Trial Op. at 29–30). But the fee is nominal—$50 per year. Nor does a fee-based membership structure negate the fact that the City has always held this space out as public parkland. See Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 774 (Sup. Ct. Nassau Cnty. 1972) (finding that the city had dedicated ocean front property as a public parkland even though access was "subject . . . to the payment of fees in accordance with a schedule established from time to time by the [City] Council"). Indeed, New York City is full of properties, which no one would question are entitled to protection as parks, that require fees for use, such as public recreation centers, public golf courses, public tennis and basketball courts, public swimming pools, and public ice skating rinks (including Wollmans Rink in Central Park and Citi Pond at Bryant Park). A.8:3146–47 (Stern Aff. ¶ 19(iv)).

## IV. THE FIRST DEPARTMENT'S DECISION ALLOWS NYU TO CIRCUMVENT THE PUBLIC TRUST DOCTRINE BY BLOCKING THE EXPRESS RECOGNITION OF IMPLIED DEDICATIONS

The foregoing discussion should suffice to show that the four parcels at issue are parks protected under the Public Trust doctrine. Yet the First Department accepted NYU's and the City's theory that there can be no implied dedication because each of these parks sits on land formally mapped as a street and because certain inter-agency memoranda purport to reserve the possibility that the parks might someday revert to the Department of Transportation. As argued above, to make such formalities the *sine qua non* of an implied dedication would effectively nullify the concept. And it would turn the Public Trust doctrine on its head. A city's outwardly manifested intent and the actions of the public at large in reasonable reliance on that intent would be irrelevant; instead, a property's status as parkland would turn on the internal minutiae of municipal bureaucracy. But see People v. Loehfelm, 102 N.Y. 1, 3 (1886) ("A dedication and acceptance may occur . . . by the acts of the parties and the circumstances of the case, *without an actual recording* of the boundary lines of such streets.") (emphasis added).

In the context of this case, especially, the First Department's reliance on obscure formalities cannot be correct. That is because there is "one reason, and one reason only," why the four parcels here were not formally mapped as parks: NYU systematically obstructed the change in order to be able to use the parcels for

its own purposes. A.8:3142 (Stern Aff. ¶ 14). At the instance of a neighborhood organization, during Mr. Stern's tenure as Parks Commissioner the City did attempt, through the Parks Department and with the support of the Department of Transportation, to have the parcels formally mapped as parks in recognition of the long public use and municipal treatment of them as parks. A.8:3147–48 (Stern Aff. ¶¶ 20–24). As part of the formal process, the City decided to seek the consent of abutting landowners to the remapping. See, e.g., A.6:2415–16 (letter from Deputy Parks Commissioner Alan M. Moss to abutting landowner Andrew F. Craig (May 26, 1995)) ("[P]rior to undertaking this mapping effort, Parks is requesting a written consent . . . .").

But the formal re-designation never happened, and it never happened simply because NYU, the "sole objector" to a project otherwise supported by community members and policymakers, "withheld its consent . . . and thereby blocked the transfers." A.8:3148 (Stern Aff. ¶ 25); see also A.6:2417 (letter from NYU to Commissioner Stern and DOT Commissioner Eliot Sander (Mar. 22, 1996)) ("[NYU] believe[s] . . . that demapping may limit the University's rights."). In response to NYU's self-interested refusal to consent, the City determined that it would not expend scarce resources on an unnecessary campaign, explaining to NYU that the City's "plans . . . do not require demapping." See A.6:2419 (letter from Parks Department counsel to NYU (Aug. 9, 1996)). That is, the City itself

understood that remapping merely would have formalized what was already publicly understood fact.

Relying on Mr. Stern's affidavit recounting the details of these events, as well as on other evidence in the record, Special Term found "little evidence that [the Department of Transportation] had any intention to reclaim the parcels as streets . . . . Rather," the trial court explained, "DOT resisted remapping to accommodate NYU's opposition to any change in the status quo, that might interfere with its own use of that property in the future." A1:50 (Trial Op. at 37). Critically, the First Department did not disturb this finding.

Thus, the real import of the failure to demap the parcels here as streets becomes clear. The factual record demonstrates, in the outward conduct of municipal actors on which the public justifiably relied, that the properties here were treated as parks. NYU, a private institution, thwarted formal recognition of that reality so that it could later use the parks for its own purposes. In other words, NYU and the City would have this case turn on just that "exclusively private use of the property [and] the private entity's profit-making goal," which New York's Public Trust doctrine does *not* allow to determine the fate of public parkland. Johnson, 230 A.D.2d at 775 (citing Lake George Steamboat, 30 N.Y.2d at 51). By accepting Respondents' cynical argument based on formalities, the First Department's decision robs the public of the protection of the Public Trust doctrine

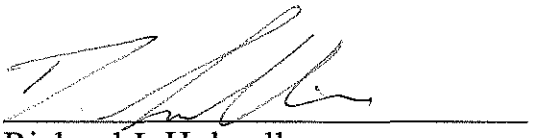
when it is most needed. This Court must not give powerful local interests with an influence over administrative technicalities a secret veto over the dedication of parkland in spite of what the public reasonably understood. As this Court warned over forty years ago, "once such power being assumed, the dangers which may follow either from favoritism or ill judgment may speedily hamper or practically destroy the fundamental purpose of the public use." Lake George Steamboat, 30 N.Y.2d at 51. That prescient warning should be heeded today.

## CONCLUSION

For the foregoing reasons, *amicus* New York Civic urges this Court to reverse the First Department's decision on appeal.

Dated: New York, New York
April 23, 2015

Respectfully submitted,

By: 

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