

**FOCUS:
REAL PROPERTY LAW**



Thomas McKeivitt

In most real estate transactions, a seller and an interested buyer agree on a price for a particular piece of property, enter into a contract, and after a period upon which there is a title examination, obtaining financing, and in commercial contexts, a due diligence period which often included environmental investigation, a closing is set to transfer a deed.

Land owned by a government has different rules, with the purpose to provide protections due to the fact that it is public land. A town is not authorized to sell a piece of property, until a permissive referendum period has passed.¹ After the town has passed the resolution, residents have 30 days to follow a petition with the signatures of 5% of the number of voters who cast ballots in the last gubernatorial election.² Obtaining the required signatures in a large municipality can be challenging due to the high threshold, but it does happen from time to time. The most recent example is when the Town of Oyster Bay agreed to sell town property to Simon Property Group for \$32 million, which would also have helped thwart the development of a shopping mall by a rival.³ The voters in that situation overwhelmingly approved the sale. But there are instances where transfers have been stopped by such a referendum.⁴

Selling land that has been designated as parkland is particularly challenging to convey. Parkland is considered to be held in the public trust, and as such, is for the benefit of the public. Interestingly, this doctrine is not enshrined in the New York State Constitution. It is a common law principle that has long been recognized by the courts.⁵ Although such land is held in the public trust, it can be sold, or alienated by an act of the New York State Legislature.⁶

It is not always clear whether a piece of property is indeed parkland. Where land is explicitly acquired by a municipality for the purposes to be used as a park, it is considered to be a formal dedication of parkland. However, there are instances where

I Have a Park to Sell You

property is considered to be parkland by implication through the use of the property. One local example was when the Village of Garden City acquired by eminent domain the property of the former St. Paul's School that was operated by the Episcopal Diocese of Long Island. The court determined that since the property was acquired for recreational purposes that the public trust doctrine applied, although there was no formal dedication. Therefore, the Village could not lease a portion of the property for a privately-operated assisted living facility.⁷

When property is considered to be parkland, state legislation is required, even though there may arguably be no alienation, and that the proposed use would be for an important public purpose. In 1995, New York City was required by the New York State Department of Health and the Environmental Protection Agency to build a filtration plant to treat water for the Croton Watershed, one of three principal drinking sources for the city. It was determined that the best location for the treatment plant was at the Mosholu Golf Course and Driving Range in Van Cortlandt Park. This plant would cover 23 acres and filter 290 gallons of water each day, take five years to build and would require the temporary closure of the golf course and driving range. The New York State Attorney General and a citizen group sued the city on the grounds that state legislation was required. The city argued that because the plant would be constructed underground with park surfaces to be restored, and that the use was not inconsistent with park purposes, that there would be no alienation. The Court of Appeals disagreed, holding that legislative approval is required where there is substantial intrusion on parkland for non-park purposes whether title will be conveyed or whether the parkland will be restored.⁸

If a municipality acquires land for public purposes from a grantor that includes a reversionary interest, then the requirement for state legislation does not apply.⁹ The doctrine also does not apply to uses incidental or related to park purposes, such as a restaurants¹⁰ or golf courses.¹¹

There has recently been a dispute between the Village of Freeport and the Freeport School District regarding the Cleveland Avenue Fields. This property is owned by the Village of Freeport but had



been used for many years by the Freeport School District for athletic purposes. The Village sought to sell the property for a significant sum to a private entity for use as a warehouse.¹² The Senate and Assembly passed a bill authorizing the Village to sell the land.¹³ However, in an unusual move, Governor Kathy Hochul vetoed the bill upon the grounds that there was litigation between the school district and the village regarding the property, and that the New York Attorney General had commenced litigation regarding a purported violation of the State Environmental Quality Review Act related to the property.¹⁴

In order for a municipality to alienate parkland, it usually approaches the local state senator and assemblymember to have them introduce bills to accomplish the task. Steven Cohen, the owner of the New York Mets sought to develop land around Citi Field for a casino. However, some of this land is technically designated as part of Flushing Meadow-Corona Park. The local Assemblyman introduced a bill for the alienation.¹⁵ However, the local state senator did not, and the most recent legislative session ended without any action.¹⁶

Although the local state senator and assemblymember are traditionally the sponsors of the alienation bill, it is not a requirement. Equinor has proposed to build a windmill farm off the coast of the City of Long Beach. The electricity produced by the windmill would be transmitted through a subterranean conduit and electrical distribution cable system that would go through City parklands. The local state

senator and assemblymember both objected to a parkland alienation bill to be advanced. However, tucked inside the Planned Offshore Wind Transmission Act was a provision to alienate the land. The bills passed both houses of the legislature but have not yet been sent to the Governor.¹⁷

1. Town Law §64(2).
2. Town Law §91.
3. Bill Bleyer and Ted Phillips, "Oyster Bay Land Sale Approved," *Newsday*, August 20, 2013.
4. Steve Lieberman, "Patriot Hills Golf Course Deal is Off the Table After Stony Point Ballot Defeat," *Rockland/Westchester Journal News*, November 4, 2021.
5. *Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234 (1871); *Williams v. Gallatin*, 229 N.Y. 248 (1920).
6. *People v. New York & S.I. Ferry Co.*, 23 Sickels 71 (1877)(holding that title to lands underwater held in public trust may be conveyed by act of the legislature).
7. *Kenny v. Board of Trustees of Village of Garden City*, 289 A.D.2d 534 (2d Dept. 2001).
8. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623 (2001).
9. *Rappaport v. Village of Saltaire*, 130 A.D.3d 930 (2d Dept. 2015).
10. *795 Fifth Ave. Corp. v. City of New York*, 15 N.Y.2d 221 (1965).
11. *Ott v. Doyle*, 117 Misc.2d 491 (Sup. Ct. Monroe Cty. 1997).
12. John Asbury, "Governor Vetoes Bill Allowing Development on Cleveland Avenue Fields in Freeport," *Newsday*, December 26, 2022.
13. S.8541-A/A.10002-A.
14. *Veto Message 155 of 2022*.
15. A. 5688.
16. Carl Campanille and Kyle Schnitzer, "Sen. Jessica Ramos Blocks Steve Cohen's Casino Bid Next to Mets Ballpark," *New York Post*, May 21, 2003.
17. S.6218-A/A.7764.



Thomas McKeivitt is Special Counsel with Sahn Ward Braff Koblenz in Uniondale. He is also a member of the Nassau County Legislature and is the former Minority Leader Pro Tempore of the New York State Assembly.