TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 32 | Number 4 Article 6

2016

Does New York State's Implied Dedication Rule Encourage or Deter the Development of Temporary Parks and Community Gardens?

Catherine Breidenbach

DOES NEW YORK STATE'S IMPLIED DEDICATION RULE ENCOURAGE OR DETER THE DEVELOPMENT OF TEMPORARY PARKS AND COMMUNITY GARDENS?

COURT OF APPEALS OF NEW YORK

Glick v. Harvey
(Decided June 2015)

I. INTRODUCTION

In 1970, Justice Douglas dissented when the Supreme Court majority lifted an injunction on construction of a super highway that would negatively impact beautiful parkland in San Antonio, Texas, praising public parks as "the breathing space of urban centers."[1] Justice Black joined him, adding that "[t]he efforts of our citizens and the Congress to save our parklands and to preserve our environment deserve a more hospitable reception and more faithful observance . . . in the courts."[2]

Comparably, in *Glick v. Harvey*,[3] New York State appellate courts were in opposition with the trial court on whether several parks slated to be destroyed and replaced with high-rise construction should be preserved as public parkland.[4] In 2012, New York City (the "City" or "NYC") approved a massive expansion of the New York University ("NYU") campus into Greenwich Village that encompassed four well-established parks.[5] Residents and local officials protested the expansion and were both caustic—cursing out NYU leadership, and gracious—praising the parks for physically and emo-

[1] San Antonio Conservation Soc. v. Texas Highway Dep't, 400 U.S. 968, 974 (1970) (Douglas, J., dissenting).

[2] *Id.* at 971-72 (Black, J., dissenting).

[3] Glick v. Harvey, 2014 WL 96413 (Sup. Ct. 2014), *rev'd*, 994 N.Y.S.2d 118 (App. Div. 1st Dep't 2014), *aff'd*, 36 N.E.3d 640 (N.Y. 2015).

[4] *See infra* notes 47-106 and accompanying text.

[5] Joseph Berger, *N.Y.U.'s Plan for Expansion Draws Anger in Community*, THE NEW YORK TIMES (Mar. 9, 2012), http://www.nytimes.com/2012/03/10/nyregion/nyu-expansion-plan-upsets-some-greenwich-village-neighbors.html?_r=0.

tionally nourishing the community.[6] Individual residents, local officials and park advocates petitioned the court to protect the four parks under the public trust doctrine.[7] This doctrine provides that New York State's ("New York" or the "State") parks are "impressed with a public trust, requiring legislative approval before [they] can be [converted] for non-park purposes."[8] In *Glick*, the trial court held in favor of the plaintiffs and enjoined the NYU construction,[9] but the decision was reversed on appeal,[10] and the reversal was affirmed by the Court of Appeals.[11]

The Court of Appeals found that, although the parks had been an integral part of the community for decades, the City intended that they be temporary because the parcels were, at all times, technically leased to the Department of Parks (the "DPR") and remained within the City's control to repurpose whenever the City deemed that it would be in the best interests of the City and its residents.[12] This note examines the *Glick* court's holding and its implications—specifically, how the recent, freshly articulated implied dedication rule may affect the future creation of much-needed temporary public parks and other green spaces in New York's urban communities.

II. PROTECTING PUBLIC PARKS UNDER THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a common law doctrine that essentially holds that navigable bodies of water and other public spaces are held in trust for public use and enjoyment.[13] Open green spaces, such as public parks, have consistently been protected by American courts under the doctrine.[14] Parks and gardens in densely populated urban

---

[6] Leora Rosenberg, *Local Residents and NYU Faculty Protest NYU 203, Call Sexton's Defense "Complete Bullshit,*" NYULOCAL (Sept, 24, 2014), http://nyulocal.com/on-campus/2014/09/29/village-residents-nyu-faculty-protest-nyu-2031-call-sextons-defense-complete-bullshit/.

[7] *Glick*, 2014 WL 96413 at *1, *6.

[8] Friends of Van Cortland Park v. City of New York, 750 N.E.2d 1050, 1053 (N.Y. 2001).

[9] *Glick*, 2014 WL 96413 at *36.

[10] *Glick*, 994 N.Y.S.2d at 119.

[11] *Glick*, 36 N.E.3d at 645.

[12] *Id.* at 644.

[13] Kent D. Morihara, Comment, *Hawai'i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177, 183 (1997).

[14] Cyane Gresham, Note, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 FORDHAM ENVTL. L. REV. 259, 268-69 (2002).

communities considerably enhance the environment because the added green space benefits the overall health and welfare of local residents.[15] Hence, permanent public parks in New York are protected under the public trust doctrine and are therefore subject to legislative approval before a municipality may re-purpose the property for non-park purposes.[16]

A. The Public Trust Doctrine

The United States' public trust doctrine holds each state's government responsible for ensuring that the public at large has access to our waterways and other public space.[17] Originating in the Roman Empire, the doctrine was later adopted in England[18] and is now firmly embedded in our nation's common law.[19] As applied, the doctrine protects the public's right to access and enjoy our waterways and parkland.[20]

The Supreme Court acknowledged the public trust doctrine and adapted it to the United States' circumstances in 1892.[21] In *Illinois Central Railroad Co. v. Illinois*,[22] the Court evaluated the validity of a legislative grant of waterfront property to the Illinois Central Railroad Company.[23] The grant allowed the Railroad to use the land to build railway lines, but it did not give it exclusive control of the property.[24] The Railroad, believing it had rights to the surface of Lake Michigan and its waterbed, built piers protruding on to the lake.[25] The Supreme Court invalidated the legislature's conveyance of land to the Railroad as a violation of the public trust doctrine,[26]

---

[15] Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?*, 10 S.C. ENVTL. L.J. 23, 23-24 (2002).

[16] *Van Cortland*, 750 N.E.2d at 1053-54.

[17] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 454-55 (1892).

[18] Morihara, *supra* note 13, at 181.

[19] Gregory Berck, *Public Trust Doctrine Should Protect Public's Interest in State Parkland*, 84-JAN N.Y. St. B.J. 44, Jan. 2012, at 45.

[20] Morihara, *supra* note 13, at 182.

[21] Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 5-6 (2007).

[22] 146 U.S. 387 (1892).

[23] *Id.* at 436-37.

[24] *Id.* at 440.

[25] *Id.* at 438.

[26] *Id.* at 460.

holding that the Illinois government had a responsibility to "preserve [the] use of navigable waters from private interruption and encroachment."[27] The Court further declared that navigable waters must be "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[28] This seminal Supreme Court case established state governments' responsibility to preserve navigable waterways for the general public's use and enjoyment.

While the *Illinois Central R.R.* decision dealt primarily with water rights, the Court acknowledged that the public trust doctrine is "amphibious"[29] and has "evolved" to incorporate "all publicly-held resources."[30] As such, the public trust doctrine is increasingly used to protect parks[31] because courts recognize the importance of providing open green space for public enjoyment.[32] In *Williams v. Gallatin*,[33] the New York Court of Appeals referred to parks as "a pleasure ground" created for "recreation of the public," adding that the components of parks (gardens, playgrounds, etc.) "attract the eye and divert the mind of the visitor . . . contribut[ing] to the use and enjoyment of the park." [34] The court further noted that parks are a "free public means of pleasure" and are therefore a great benefit to the entire community.[35] Moreover, as one commentator observed, parks are especially important in an urban setting because they "provide . . . an outlet for recreation, physical activity, and relaxation" and they "mitigate air and water pollution, combat suburban sprawl, stabilize property values, attract businesses, and reduce crime." [36] Thus, under the public trust doctrine in New York, a municipality must first obtain legislative approval before conveying a public park to another non-park purpose.[37]

---

[27] *Ill. Cent. R.R.*, 146 U.S. at 436-37.

[28] *Id.* at 452.

[29] Berck, *supra* note 19, at 45.

[30] *Id.* at 45-46.

[31] *See, e.g.*, Williams v. Gallatin, 128 N.E. 121, 123 (N.Y. 1920) (disallowing the use of Central Park in New York City for non-park purposes).

[32] Berck, *supra* note 19, at 45.

[33] 128 N.E. 121 (N.Y. 1920).

[34] *Id.* at 122-23.

[35] *Id.* at 123.

[36] Williams, *supra* note 15, at 23.

[37] *Van Cortland Park*, 750 N.E.2d at 1053.

One of the first decisions where the public trust doctrine was used to preserve a New York public park was in 1871.[38] In *Brooklyn Park Commissioners v. Armstrong*,[39] Brooklyn attempted to sell property that it was given in trust to be used for a public park.[40] The court held that because "[t]he city took the title to the lands . . . for the public [to] use as a park[,]" it "held it in trust for that purpose" and "could not convey [the park] without the sanction of the legislature."[41] Accordingly, New York courts have consistently reaffirmed the principle that legislative approval is required before a municipality may convey, convert, or diminish the aesthetic value of one of its public parks.[42]

B. Protecting Parkland under the Public Trust Doctrine

To be protected under the public trust doctrine, a municipal park must be "dedicated" either expressly or by implication.[43] The express dedication of parkland occurs through an official government act, such as the passage or adoption of a formal resolution or local law.[44] Absent express dedication, parks are subject to the public trust doctrine when the court finds that the property in question was dedicated as a park by implication.[45] In determining whether a municipality has impliedly dedicated its property as parkland, courts ascertain the municipality's intent by examining its acts and declarations,

---

[38] *See infra* notes 39-41 and accompanying text.

[39] 45 N.Y. 234 (1871).

[40] *Id.* at 235.

[41] *Id.* at 243.

[42] *See, e.g.*, *Williams*, 128 N.E. at 123 (holding that "[a] park . . . need not, and should not, be a mere field or open space, but no objects, however worthy . . . which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred . . . ."); s*ee also Van Cortlandt Park*, 750 N.E.2d at 1053 (asserting that "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."); and Matter of Angiolillo v. Town of Greenburgh, 735 N.Y.S. 2d 66, 73 (App. Div. 2d Dep't 2001) (maintaining that "[i]t is well settled that parkland is inalienable, held in trust for the public, and may not be sold without the express approval of the State Legislature.").

[43] Lazore v. Bd of Trs. of Massena, 594 N.Y.S.2d 400, 402 (App. Div. 3d Dep't 1993).

[44] *Id.*

[45] Kenny v. Board of Trustees of Village of Garden City, 735 N.Y.S.2d 606, 607 (App. Div. 2d Dep't 2001) (holding that when property is acquired for recreational purposes, and then used for recreational purposes, the property is protected under the public trust doctrine, even though never expressly dedicated as parkland).

as well as the circumstances surrounding the establishment and use of the park.[46]

III. *GLICK V. HARVEY*

The implied dedication rule was recently put to the test in *Glick v. Harvey* by New York's highest court in June of 2015.[47] In *Glick*, a coalition of Greenwich Village residents, local community organizations, and elected officials brought an Article 78 proceeding against various city agencies to protect four parks in the City from being consumed by a proposed expansion of the NYU campus.[48] The trial court found that the City had dedicated the parks by implication, thereby subjecting the transfer of title to legislative approval.[49] On appeal, the First Department reversed the trial court's holding,[50] and the Court of Appeals affirmed, allowing the expansion to go forward.[51]

A. Relevant Facts and Issue

The City Council approved NYU's major construction project in July of 2012, permitting it to expand further into Greenwich Village and encompass four community parks that had been enjoyed by the public for decades.[52] Local residents, joined by Deborah Glick, Assemblywoman for the 66th Assembly District, and various city organizations, petitioned the court to enjoin NYU from commencing construction, asserting that the parks were protected under the public trust doctrine, and that the conveyance for non-park purposes was subject to legislative approval.[53]

In its response, the City maintained that the parcels were not parks protected under the public trust doctrine because the City had not expressly dedicated them, and the petitioners could not establish an implied dedication.[54] The City stated that it had formally mapped

---

46 *In re Angiolillo*, 735 N.Y.S.2d at 73.
47 *Glick*, 36 N.E.3d at 644.
48 *Glick*, 2014 WL 96413 at *1.
49 *Id.* at *16, *36.
50 *Glick*, 994 N.Y.S.2d at 119.
51 *Glick*, 36 N.E.3d at 645.
52 *Glick*, 2014 WL 96413 at *6.
53 *Id.*
54 *Id.* at *9.

the parcels in dispute as city streets in 1954 in contemplation of construction of an expressway, and that the parcels remained mapped as streets.[55] Petitioners acknowledged that the parcels were not formally mapped as parks and also conceded that, since the expressway plan had been abandoned, the community had made several unsuccessful attempts to have the parcels remapped to expressly dedicate them as parkland.[56] In addition, all parties concurred that (1) the DPR marked the parks with the department's signage and logos, and also listed the parks on its website together with permanent NYC public parks; (2) a City Council member had allocated $250,000 in discretionary capital funds (designated for public projects with a public purpose) to build a playground in one of the parks; and (3) the City had held formal opening day ceremonies, at which public officials presided, including four City mayors: Abraham D. Beame, Edward I. Koch, David N. Dinkins, and Rudolph Giuliani.[57] Finally, all parties acknowledged that there were internal documents reiterating the Department of Transportation's ("DOT") refusal to remap its parcels as parks and their desire to maintain control over the parcels.[58] The parties disagreed, however, on which specific acts or circumstances conclusively established that the parks were dedicated by implication and therefore protected under the public trust doctrine.[59]

B. The Lower Courts' Decisions

The Supreme Court, New York County (the "trial court") relied solely on a continued-use test[60] and held that, despite the fact that the parcels were mapped as streets, the parks had been dedicated by implication.[61] The trial court noted that the facts in the *Glick* case were analogous to the facts in *Matter of Friends of Petrosino Square v. Sadik-Khan*.[62] Like the park in *Glick*, the *In re Petrosino Square* park was (1) identified as a park by both the DPR and the DOT; (2) used continuously as a park; (3) marked with DPR logos and signage; (4) opened with a groundbreaking ceremony which was sponsored by

---

55 *Id.* at *7.

56 *Id.*

57 *Glick*, 2014 WL 96413 at *7-*13.

58 *Id.* at *17.

59 *Id.* at *7.

60 *Id.* at *15.

61 *Id.* at *16.

62 977 N.Y.S.2d 580, 584 (Sup. Ct. N.Y. Cty. 2013).

the DPR; and (5) the DPR had actively participated in the dedication ceremony.[63] Thus, the trial court followed the *In re Petrosino Square* court's holding that "the long-continued use" of the city-owned parcels as public parkland constituted an implied dedication,[64] and that petitioners had established a public trust.[65]

In addition, the trial court gave considerable weight to the local residents' expectations and perceptions of the four parks in their neighborhood.[66] Citing *Gewirtz v. City of Long Beach*,[67] the *Glick* trial court reasoned that the actions and expectations of the public must be taken into consideration.[68] In *Gewirtz*, the city of Long Beach had dedicated a beach area to public use and allowed non-residents to use the beach for a period of time before enacting an ordinance restricting use of the beach to Long Beach residents only.[69] The *Gewirtz* court held that, given the non-residents' reliance on use of the beach, the city could not reclassify the beach's status from a public beach to a private beach.[70] Similarly, the trial court in *Glick* found that the Greenwich Village community had reasonably perceived the parks to be permanent and that, because they had come to believe them to be permanent parks, the public trust doctrine was triggered.[71]

On appeal, the First Department reversed the *Glick* trial court's holding because the petitioners failed to show that the City's "acts and declarations manifested a *present, fixed and unequivocal* intent to dedicate any of the parcels at issue as parkland."[72] The First Department applied a test more stringent than the continued-use test, focusing instead on various restrictive written agreements and the City's refusal to honor requests to have the parcels "de-mapped and

---

[63] *Id.*

[64] *Glick*, 2014 WL 96413 at *15 (internal citations omitted).

[65] *Id.* at *16 (finding that "petitioners have certainly shown [a] long continuous use of land as parks by the public[,] [triggering] the notion of a 'public trust' ").

[66] *Id.*

[67] 330 N.Y.S.2d 495 (Sup. Ct. Nassau Cty. 1972), a*ff'd*, 358 N.Y.S.2d 957 (App. Div. 2d Dep't 1974).

[68] *Glick*, 2014 WL 96413 at *16.

[69] *Gewirtz*, 330 N.Y.S.2d at 500.

[70] *Id.* at 507, 514.

[71] *Glick*, 2014 WL 96413 at *16.

[72] *Glick*, 994 N.Y.S.2d at 119 (emphasis added) (citing Riverview Partners v. City of Peekskill, 710 N.Y.S.2d 601, 602 (App. Div. 2d Dep't 2000); Powell v. City of New York, 924 N.Y.S.2d 370, 372 (App. Div. 1st Dep't 2011), *lv. denied*, 17 N.Y.3d 715 (2011)).

re-dedicated as parks."[73] Particularly, the court simply stated that "[w]hile the City has allowed for the long-term continuous use of . . . the parcels for park-like purposes[, the] management of the parcels by the Department of Parks and Recreation was understood to be temporary and provisional, pursuant to revocable permits or licenses."[74] Petitioners appealed this decision.

C. The Court of Appeals Decision

The Court of Appeals in *Glick* affirmed the First Department's holding[75] and applied a two-pronged test for implied dedication that was first articulated by the Court of Appeals in the 1800s.[76] The court held that a party alleging an implied dedication must show that:

> (1) [t]he acts and declarations of the land owner indicating the intent to dedicate his land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use.[77]

In other words, the petitioners in *Glick* had the burden of proving that (1) the City had "unmistakably" and "decisively" intended to dedicate the parcels as parkland, and (2) the public had accepted the parcels as parks.

In support of its holding in *Glick*, the Court of Appeals relied on three of its cases from the nineteenth century, as well as a more recent decision from the First Department.[78] In the 1876 action, *Niagara Falls Suspension Bridge Co. v. Bachman*,[79] the Court of Appeals analyzed whether a private landowner intended to dedicate his property to the municipality for use as a highway.[80] Bachman allowed the parcel in question to be mapped as a street, and he also allowed the public to use his property as a street, but he expressed a

---

[73] *Id.* at 120.
[74] *Id.* at 119-20.
[75] *Glick*, 36 N.E.3d at 642, 645.
[76] *Id.* at 644.
[77] *Id.* (internal quotations omitted).
[78] *Id.*
[79] 66 N.Y. 261 (1876).
[80] *Id.* at 261.

reservation of rights on the face of the filed map.[81] The court observed that the map "reserved to [the owners and] their heirs . . . a discretionary power to direct how much and what part of said streets and avenues shall be . . . appropriated to public use."[82] Moreover, when the municipality redrew the map at a later date to include a proposed railroad line, the express reservation was again printed on it.[83] The court recognized that the property was mapped as a street and that the public perceived the street to be permanent but held that, given the express reservations printed on the maps, the property was not impliedly dedicated.[84]

In a prior case, *Holdane v. Trustees of Village of Cold Spring*,[85] the Court of Appeals held that a landowner had not dedicated his property to a municipality when he allowed his neighbors to use a strip of his land which connected his property to a public highway.[86] The strip limited highway access to his neighbors, yet the owner allowed it to be labeled as an "avenue" on a published map.[87] The village sought to remove fencing and incorporate the land in its highway, and the landowner sued the Village.[88] The Court of Appeals held that, because the strip of property was intended for the exclusive use and benefit of the landowners' immediate neighbors, his intention to "permanently abandon" his property was not "deliberate, unequivocal and decisive," and, thus there was no implied dedication.[89]

Likewise, in *Flack v. Village of Green Island*,[90] the Court of Appeals held that the "intent and acts" of a landowner, which may be "in writing or oral declarations," determine whether or not a parcel had been impliedly dedicated.[91] In *Flack*, a municipality sought to remove a structure owned and built by the plaintiff on leased municipal property that had been mapped as a municipal street, but no long-

---

81 *Id.* at 268.
82 *Id.* at 263.
83 *Id.* at 268.
84 *Niagara Falls*, 66 N.Y. 261 at 269.
85 21 N.Y. 474 (1860).
86 *Id.* at 477.
87 *Id.*
88 *Id.* at 475-76.
89 *Id.* at 477-78.
90 25 N.E. 267 (1890).
91 *Id.* at 267-68.

er resembled a street.[92] The court reasoned that, while the property had not been preserved as a street in several years, it had been maintained with municipal funds for twenty years prior, and the municipality did not unequivocally abandon the street just because it no longer maintained it.[93]

Finally, in *Powell v. City of New York*,[94] which is factually analogous to *Glick*, the First Department found that municipal parcels used as a park had not been dedicated by implication because the municipality did not unambiguously intend to make the park permanent.[95] In *Powell*, an assemblyman challenged the City's decision to build a waste transfer station on city-owned parcels that were being used as a park.[96] The assemblyman argued that the parcels were dedicated as parkland by implication and therefore protected by the public trust doctrine.[97] The court held that the parcels had not been dedicated parkland because (1) neither area had been mapped as a public park; (2) the parcels had not been purchased for park purposes; and (3) the 1989 assignment of the property to the DPR clearly stated that the property could "not be formally 'mapped' as parkland."[98] Hence, the court held that there had been "an unambiguous intent" to keep the property in the City's control by not making the park permanent, and that there was no implied dedication.[99]

Correspondingly, the Court of Appeals in *Glick* held that the first prong of the implied dedication test had not been satisfied because petitioners failed to meet their burden to show that the parks had been unequivocally dedicated.[100] *Glick* is factually similar to the aforementioned cases in that documents with "restrictive terms" demonstrated the City's clear intent to maintain possession of the parcels.[101] The relevant documents included: (1) a letter accompanying a temporary permit for one park stating that "[i]t is expressly understood" that the DOT shall assume possession of the parcel if it

---

92 *Id.* at 267.
93 *Id.* at 269.
94 924 N.Y.S.2d 370 (App. Div. 1st Dep't 2011).
95 *Id.* at 372-73.
96 *Id.* at 372.
97 *Id.* at 373.
98 *Id.* at 373.
99 924 N.Y.S.2d at 373.
100 *Glick*, 36 N.E.3d at 644-45.
101 *Id.* at 642-43.

needed the parcel for construction work;[102] (2) a memorandum of understanding declaring that another parcel will always remain as DOT jurisdictional property, available for DOT purposes as needed;[103] and (3) evidence that a third parcel had been leased to the DPR by the DOT "on an interim basis."[104] The court held that the dedication was not unequivocal because these documents clearly indicated the City's desire to keep the parcels under the DOT's control for other possible use at a later point in time.[105]

Having found that the first prong had not been met, the court did not address the second prong, decisively holding that the parks had not been dedicated, either expressly or by implication.[106] However, and perhaps in reference to both the second prong and the trial court's continued-use test, the court added, "[t]hat a portion of the public may have believed that these parcels are permanent parkland does not warrant a contrary result."[107]

D. The Implied Dedication Rule in Other States

The two-pronged implied dedication rule as articulated by the Court of Appeals in *Glick* is consistent with similar rules in other states. For example, the long-standing rule in Wisconsin is almost identical to that in New York. The Wisconsin Supreme Court held in *Knox v. Roehl*[108] that a common-law dedication (another term for implied dedication)[109] requires "intent to dedicate on the part of the owner" as well as "acceptance of the dedication by the proper public authorities or by [the] public user."[110] The Wisconsin court also held that the dedication of property must be "absolute and complete."[111] Likewise, Ohio courts recognize a common-law dedication as having the same effect as an express dedication,[112] and also require clear evi-

---

[102] *Id.*

[103] *Id.* at 643 (internal quotations omitted).

[104] *Id.*

[105] *Glick*, 36 N.E.3d at 644.

[106] *Id.* at 644.

[107] *Id.*

[108] 140 N.W. 1121 (Wisc. 1913).

[109] 77 AM. JUR. PROOF OF FACTS 3D 1 §2.3 (observing that implied dedication is also referred to as common-law dedication).

[110] *Knox*, 140 N.W. at 1122-23.

[111] Galewski v. Noe, 62 N.W.2d 703, 705-06 (Wisc. 1954).

[112] Lessee of Village of Fulton v. Mehrenfeld, 8 Ohio St. 440, 444 (Sup. Ct. 1858); *see also* Wisby v. Bonte Partners, 19 Ohio St. 238, 243 (Sup. Ct. 1869).

dence of the owner's intent to dedicate property to public use.[113] Plaintiffs are therefore expected to show that a landowner's intent to dedicate his property was "unequivocal."[114] Michigan courts similarly require a "[clear]" intent on the part of the owner to dedicate his property and an "acceptance on the part of the public."[115] The party alleging an implied dedication in Michigan must present evidence that the facts and circumstances surrounding the dedication were "positive and unequivocal."[116] Accordingly, New York's implied dedication rule is in line with other states' rules.

IV. THE EFFECT OF *GLICK* ON THE CREATION OF TEMPORARY GREEN SPACE

In *Glick*, the New York Court of Appeals essentially held that temporary parks are not subject to protection under the public trust doctrine if and when a municipality documents the park's temporary status.[117] Several New York mayors and municipal officials filed a joint amicus brief in *Glick* urging the court to rule in favor of New York City, arguing that a decision supporting the City's action would encourage municipalities throughout New York State to continue to create temporary parks, greening urban settings throughout the State.[118] Park advocates, on the other hand, are disappointed with the *Glick* holding and fear that the "protections that all New Yorkers have enjoyed for public park space" are severely compromised.[119]

The conceivable implications of the *Glick* holding are best analyzed in the context of the Community Garden programs. In these

---

[113] Pennsylvania R. Co. v. Donovan, 145 N.E. 479, 482 (Ohio 1924).

[114] OTR, ex rel. State Teachers' Ret. Bd. of Ohio v. City of Cincinnati, 2003-Ohio-1549, ¶35.

[115] Hawkins v. Dillman, 256 N.W. 492, 494 (Mich. 1934).

[116] *Id.* at 495.

[117] *Glick*, 36 N.E.3d at 644-45.

[118] Brief for New York State Conference of Mayors & Municipal Officials, et al. as Amici Curiae Supporting Respondents at 10, Glick v. Harvey, 36 N.E.3d 640 (N.Y. 2015) (No. APL-2015-00053); s*ee also* Joel Stashenko, *Court of Appeals Backs Use of Land for NYU Expansion*, N.Y.L.J., July 1, 2015 (quoting New York City Law Department Office of the Corporation Counsel spokesperson, who was "pleased that the Court of Appeals' decision ensures that city agencies will continue to have flexibility to create temporary public green spaces without losing their prerogative to use city properties to meet current needs").

[119] Lincoln Anderson, *NYU Expansion Plan OK'd by State's Highest Court*, THE VILLAGER (Jun. 30, 2015), http://thevillager.com/2015/06/30/court-of-appeals-rules-in-favor-of-n-y-u-development-plan/ (quoting Andrew Berman, Director, Greenwich Village Society for Historic Preservation).

programs, a municipality leases city-owned parcels to volunteer residents who transform the parcels by planting trees, flowers and vegetables.[120] Municipalities seek out volunteers and assist them by providing plans and materials to create and maintain beautiful community gardens on otherwise barren, city-owned lots.[121] However, like the parks in *Glick*, the gardens are temporary and subject to revocation at any point in time.[122] When a municipality opts to revoke the lease and convert the garden to non-park purposes, there is defiant backlash from those who build and enjoy the garden.[123] Given the angst caused when a city asserts its right to reclaim community gardens that have become an essential social and focal point of the neighborhood, it is not hard to imagine that otherwise willing volunteers may not want to assume the responsibility of gardening and instead choose to let vacant lots remain barren.

A. Community Gardens

Community gardens are green spaces created by volunteer residents on city-owned property.[124] New York City encourages community members to create temporary gardens on its vacant lots through a city funded program called "GreenThumb,"[125] and all gardens are under the supervision of the DPR.[126] Presently, there are over 600 community gardens throughout the City.[127] They are often personalized with names like "Electric Ladybug Garden," "Tranquili-

---

[120] *See, e.g.*, GRASSROOTS GARDENS OF BUFFALO, http://www.grassrootsgardens.org/ (last visited Feb. 5, 2016); GREENTHUMB, http://www.greenthumbnyc.org/about.html (last visited Feb. 5, 2016); ROCHESTER GARDENS, http://www.cityofrochester.gov/horticulture/ (last visited Feb. 5, 2016).

[121] GREENTHUMB, *supra* note 120 ("GreenThumb provides programming and material support to over 600 community gardens in New York City. Workshops, which are the access point for supplies, are held every month of the year, covering gardening basics to more advanced farming and community organizing topics.").

[122] *See generally* Michael Tortorello, *In Community Gardens, A New Weed?*, N.Y. TIMES, Feb. 11, 2015, http://www.nytimes.com/2015/02/12/garden/in-community-gardens-a-new-weed.html (reporting on the City's plan to revoke several community garden leases to build affordable housing).

[123] *See infra* notes 170-97 and accompanying text.

[124] *Temporary Urbanism: Alternative Approaches to Vacant Land*, HUD USER (Winter 2014), https://www.huduser.gov/portal/periodicals/em/winter14/highlight4.html (last visited Feb. 5, 2016) [hereinafter *Temporary Urbanism]*.

[125] GREENTHUMB, *supra* note 120.

[126] *Id.*

[127] Tortorello, *supra* note 122.

ty Farm," and "Isabahlia," and are used to grow flowers, fruits or vegetables, to host events for youth and seniors, and to sell produce in farmers' markets, among a myriad of other functions.[128]

Municipalities throughout New York State also encourage and support residents to create community gardens on vacant city lots.[129] For example, Rochester Gardens is Rochester's formal gardening program.[130] On its website, residents are recruited to beautify their neighborhoods by converting abandoned properties into gardens, playgrounds or other recreational spaces.[131] This year, Rochester had thirty-eight active community gardens, and an additional sixty-four garden permits have been issued.[132] Likewise, the City of Buffalo partners with residents to convert vacant lots to green spaces with the support of its program, "Grassroots Gardens."[133] Independent organizations also support Buffalo gardeners by providing resources for planning and creating gardens,[134] including soil, compost, mulch, lumber for raised beds, and vegetable seedlings and seeds.[135]

In the same way, vacant lots are leased on a temporary basis elsewhere in the United States. For example, in Milwaukee, Wisconsin, the city encourages residents to purchase or lease vacant lots to create desirable green spaces in their communities.[136] Similarly, Ohio's "Re-imagining Cleveland" program urges residents to develop vacant lots, offering garden space to those who do not have a yard, and highlighting the benefits of partnering with neighbors.[137] Finally,

---

[128] *Id.*

[129] *See*, *e.g.*, GREENTHUMB, ROCHESTER GARDENS, and GRASSROOTS GARDENS OF BUFFALO, *supra* note 120.

[130] ROCHESTER GARDENS, *supra* note 120.

[131] *Garden Permit 2016*, CITY OF ROCHESTER, http://www.cityofrochester.gov/article.aspx?id=8589967831 (last visited Feb. 5, 2016).

[132] Brief for Respondents at 7-8, Glick v. Harvey, 36 N.E.3d 640 (N.Y. 2015) (No. APL-2015-00053).

[133] GRASSROOTS GARDENS OF BUFFALO, *supra* note 120.

[134] *See* GRASSROOTS GARDENS OF BUFFALO, http://www.grassrootsgardens.org/virtual-toolkit.html (last visited Feb. 5, 2016).

[135] Jane Kwiatkowsky Radlich, *Grassroots Gardens Buffalo Director sees fruits of her efforts throughout city*, THE BUFFALO NEWS (May 30, 2015), http://www.buffalonews.com/life-arts/people-talk/grassroots-gardens-buffalo-director-sees-fruits-of-her-efforts-throughout-city-20150530 (last visited Feb. 5, 2016).

[136] *Vacant Lot Handbook: A Guide to Reusing, Reinventing and Adding Value to Milwaukee's City-Owned Vacant Lots* 7, CITY OF MILWAUKEE (Fall 2013), http://city.milwaukee.gov/ImageLibrary/Groups/cityDCD/planning/pdfs/VacantLotHandbook.pdfhttp://city.milwaukee.gov/ImageLibrary/Groups/cityDCD/planning/pdfs/VacantLotHandbook.pdf.

[137] Cleveland Land Lab, *Re-imagining a More Sustainable Cleveland: Citywide Strategies*

Detroit, Michigan's "Adopt-A-Lot" program also invites residents to adopt vacant city-owned lots[138] for "community gardens . . . recreational uses, and more."[139] Indeed, the practice of repurposing vacant lots to green space is commonly employed and encouraged.

B. The Mutual Benefit of Community Gardens

Community gardens benefit both the municipality and its residents. Municipalities are often plagued by the accumulation of vacant land due to "widespread foreclosures and stalled development" during periodic economic downturns.[140] Maintaining vacant lots is costly because local governments must either demolish or secure any existing structures, care for the landscape and regularly remove trash.[141] The United States Department of Housing and Urban Development encourages transforming city-owned vacant land to more productive uses and identifies community gardens as one of the more common temporary use practices.[142] Community gardens lessen the "blighting effects of vacancy" until the municipality can permanently redevelop the parcel for another purpose.[143] At the time of vacancy, the need for a permanent project may not exist, making immediate development impracticable.[144] Moreover, political and economic uncertainty may deter a municipality from making long-term commitments.[145] Temporary community gardens benefit municipalities be-

for Reuse of Vacant Land 1 (2008), http://www.reconnectingamerica.org/assets/Uploads/20090303ReImaginingMoreSustainableCleveland.pdf.

[138] *See* CITY OF DETROIT PLANNING AND DEVELOPMENT DEPARTMENT; GUIDELINES FOR GARDEN PERMIT/ ADOPT-A-LOT PERMIT, http://www.detroitmi.gov/Portals/0/docs/Volunteer/Adopt_a_lot_program.pdf (last visited Feb. 5, 2016).

[139] John Gallagher, *Duggan: Lease Vacant Detroit Land for $25 a Year*, DETROIT FREE PRESS (May 20, 2015), http://www.freep.com/story/money/business/michigan/2015/05/20/duggan-detroit-vacancy-urban-land-blight/27638533/.

[140] *Temporary Urbanism*, *supra* note 124.

[141] *Vacant and Abandoned Properties: Turning Liabilities Into Assets*, HUD USER (Winter 2014), https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html [hereinafter *Vacant and Abandoned Properties*]. https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html.

[142] *Temporary Urbanism*, *supra* note 124.

[143] Mayors' Brief for the Respondents at 7, *Glick*, 36 N.E.3d 640 (No. APL-2015-00053).

[144] Brief of New Yorkers for Parks, et al. as *Amici Curiae* for Respondents at 5-6, Glick v. Harvey, 36 N.E.3d 640 (N.Y. 2015) (No. APL-2015-00053).

[145] Mayors' Brief for the Respondents at 12, *Glick*, 36 N.E.3d 640 (No. APL-2015-

cause they are cost-effective[146] and leave the door open for permanent alternatives.[147]

New York City's community gardening program is also valuable to residents. Green space in an urban setting can "ease urban tension" and create opportunities for exercise or rest and relaxation.[148] While vacant properties impair neighborhoods,[149] community gardens increase property values and make neighborhoods more secure by reducing crime, especially arson.[150] Moreover, community gardens contribute to improved air quality and the overall well-being of local residents.[151] Gardens are also beneficial to communities because, in many instances, they become permanent green spaces through formal dedication.[152] In the City, for example, approximately 300 community gardens have been made permanent and are managed by the DPR.[153] Once permanent, they are "out of the reach of the City for redevelopment."[154]

More importantly, community gardens engage neighbors in a collaborative way.[155] A garden is an outdoor, experiential classroom for children, and a space to host social and cultural events, bringing neighbors together.[156] Gardens can provide fresh fruits and vegetables for consumption or sale, benefitting residents physically and economically.[157] Finally, gardens provide aesthetic beauty to a neighborhood and "heighten people's awareness and appreciation for living things."[158] Undoubtedly, community gardens benefit both residents and local government officials.

00053).

146 *Temporary Urbanism*, *supra* note 124.

147 *See* Parks' Brief Supporting Respondents at 9, Glick v. Harvey, 36 N.E.3d 640 (No. APL-2015-00053) (identifying examples of long-term projects, including "affordable housing . . . health care facilities and schools in underserved neighborhoods").

148 Michel Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 853 (1994).

149 *Vacant and Abandoned Properties*, *supra* note 141.

150 Gardening Matters, *Multiple Benefits of Community Gardens* 1, 3 (2012), http://www.gardeningmatters.org/sites/default/files/Multiple%20Benefits_2012.pdf.

151 *Id.* at 2.

152 Tortorello, *supra* note 122.

153 *Id.*

154 *Id.*

155 GARDENING MATTERS, *supra* note 150, at 4.

156 *Id.*

157 *Id.* at 2.

158 *Id.* at 3.

C. The Need for Municipal Control in the Creation of Community Gardens

The *Glick* holding should encourage municipalities to continue their community garden programs because the decision allows them to manage properties as they see fit, without the apprehension of seeking state legislative approval when government officials choose to reclaim and redevelop one or more gardens.[159] New York mayors and municipal officials support the *Glick* holding, declaring that a contrary ruling would "negatively impact local governments' long-term, permanent development goals and plans," thereby reducing the number of community gardens throughout the state.[160] Various NYC organizations[161] also went on record in support of the holding, emphasizing the need to "[preserve] municipal control over city-owned land"[162] so that they may "plan and manage for the long term."[163] Moreover, the coalition believes that preserving municipal control "best serve[s] the public welfare and best provide[s] for political accountability."[164]

Similarly, a New York state trial court in *Pearlman v. Anderson*[165] acknowledged the need for municipal control in creating temporary green space.[166] The *Pearlman* court held that three parcels used as parks over a period of time had not been dedicated by implication,[167] reasoning that local elected officials should have the power to hold and manage municipal property, including the power to independently determine which temporary uses should be made of such

---

[159] Brief for Respondents at 10, Glick v. Harvey, 36 N.E.3d 640 (No. APL-2015-00053).

[160] *Id.* at 9-10.

[161] The organizations include: New Yorkers for Parks, Association for Neighborhood and Housing Development, New York Housing Conference, Phipps Houses, Greater New York Hospital Association of New York, The Healthcare Association of New York State, and The Commission on Independent Colleges and Universities. *Id.*

[162] Brief for Respondents at 1, Glick v. Harvey, 36 N.E.3d 640 (No. APL-2015-00053).

[163] *Id.* at 2.

[164] *Id.* at 1.

[165] 307 N.Y.S.2d 1014 (Sup. Ct. Nassau Cty. 1970), *aff'd*, 314 N.Y.S.2d 173 (App. Div. 2d Dep't 1970).

[166] *Id.* at 1017.

[167] *Id.* at 1016-17 (Taxpayers brought suit to enjoin the Village from constructing a village hall and parking lot where temporary parks had been created and the court found that the land in question had been acquired for general purposes and that, even though it had been used as parkland, there was no express or implied dedication and the trustees had authority to use it for other municipal purposes). *Id.*

property.[168] The court went one step further, warning that a contrary decision would discourage public officials from creating temporary parks, which "certainly would not be in the public interest."[169]

D. Residents' Control and the Creation of Community Gardens

On the other hand, the *Glick* ruling could dissuade residents from investing time and money in temporary community gardens. As evidenced in *Glick*, residents perceive the revocation of leased green space as fundamentally unfair.[170] Under New York law, Community Gardens are leased on an annual basis,[171] and each lease clearly states that "the City reserves the right to not renew the lease so that it may utilize the property for another purpose."[172] Yet when the gardeners sign the lease and then invest considerable time and money in the gardens, they never expect that they will be asked to vacate.[173]

Since the inception of the City's Community Gardens program, many gardeners have had to fight to maintain their cherished plots.[174] At the same time that *Glick* was moving through the courts, the City Department of Housing Preservation and Development (the "HPD") identified several community garden plots that would be cleared to make way for affordable housing units.[175] Some gardens had been established only a year earlier, while others had been growing for thirty years.[176] The gardens slated for redevelopment produce fruit and vegetables for community consumption, and they also provide activities for youths and seniors.[177] Their fate is not yet determined, but organized gardening coalitions are currently attempting to negotiate with the City and the HPD.[178] Furthermore, City Mayor Bill de Blasio has publicly offered support of the gardens, promising to make decisions about revocation in conjunction with the communi-

---

168 *Id.* at 1017.
169 *Id.*
170 Tortorello, *supra* note 122.
171 N.Y. AGRIC. & MKTS. LAW § 31-h(2)(b) (McKinney 2014).
172 Tortorello, *supra* note 122.
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 Tortorello, *supra* note 122.
178 *Id.*

ties in which the gardens grow.[179]

The gardeners also had to actively campaign to save gardens in the 1990s when then-mayor Rudolph Giuliani attempted to auction off hundreds of gardens to raise revenue and build housing.[180] While commercial development in the City was slow in the 1970s and 1980s, the economic upturn of the 1990s changed the climate, making the garden lots more desirable for development.[181] Giuliani, in turn, adopted a policy to reclaim all the community gardens for city development.[182] Most of the gardens provided much-needed green space in neighborhoods that lacked parks, but were temporarily leased from the city and subject to revocation.[183] In response to Giuliani's policy, gardening coalitions and public officials filed several lawsuits to preserve the gardens.[184] Most suits were unsuccessful,[185] but one suit the State filed resulted in an injunction and the gardens could not be reclaimed.[186]

New York State successfully enjoined Giuliani from selling the gardens, purporting to strike a balance between preserving necessary green spaces and providing affordable housing.[187] The suit alleged that the City had not complied with required environmental law and that the gardens were protected under the public trust doctrine.[188] The trial court granted the State's application for an injunction barring sale of the gardens,[189] "essentially paralyz[ing] any development

---

[179] *Id.*

[180] Anne Raver & Jennifer Steinhauer, *City in Talks to End Lawsuits Over Community Gardens*, THE NEW YORK TIMES (Apr. 26, 2002), http://www.nytimes.com/2002/04/26/nyregion/city-in-talks-to-end-lawsuit-over-community-gardens.html.

[181] Robert Fox Elder, *Protecting New York City's Community Gardens*, 13 N.Y.U. ENVTL. L.J. 769, 776-77 (2005).

[182] Raver & Steinhauer, *supra* note 180.

[183] *Id.*

[184] *Id.*

[185] *See* In re N.Y. City Coal. for the Pres. of Gardens v. Giuliani, 670 N.Y.S.2d 654, 659 (Sup. Ct. N.Y. Cty. 1997) (dismissed for lack of standing because the community garden leases were clearly revocable), *aff'd* 66 N.Y.S.2d 918 (App. Div. 1st Dep't 1998); *see also* New York City Envtl. Justice All. v. Giuliani, 50 F. Supp. 2d 250, 255 (S.D.N.Y. 1999) (dismissed for lack of likelihood of success on the merits), *aff'd,* 184 F.3d 206 (2d Cir. 1999), *aff'd* on other grounds, 214 F.3d 65, 73 (2d Cir. 2000).

[186] State v. City of New York, 713 N.Y.S.2d 360 (App. Div. 2d Dep't 2000).

[187] *Id.*

[188] Elder, *supra* note 181, at 784.

[189] *State v. City of New York*, 713 N.Y.S.2d at 360 (granting relief under the State Environmental Quality Review Act without addressing the public trust doctrine claim).

the city planned."[190] Thereafter, in 2002, the State and the City entered into an agreement that protected community gardens while making way for the development of affordable housing.[191]

The agreement did strike a balance between the City's need for affordable housing and the community's need to maintain its green space by allowing for 200 leased gardens to be saved, another 200 to be made permanent,[192] and slating 150 parcels for development.[193] Displaced gardeners were offered, wherever practicable, an alternate site to move their garden or the chance to start anew.[194] In addition, the agreement provided for a "public review process" of all the gardens proposed for redevelopment.[195] Significantly, the review was waived if and when the developer and gardener could mutually agree on which gardens to save and which to develop, in turn motivating negotiation.[196] Unfortunately, the above-mentioned protections expired in 2010,[197] leaving today's gardeners to largely fend for themselves.

V. CONCLUSION

The implied dedication rule in New York gives municipalities free rein to create temporary parks and gardens and then revoke them at will, regardless of the residents' enjoyment and reliance on that essential green space. The New York rule is also likely to subject municipalities to negative publicity and costly litigation when residents and supporters predictably oppose revocation. Finally, the rule may discourage residents from voluntarily greening their neighborhoods.

The *Glick* court essentially held that the internal documents identifying the Greenwich Village parks as temporary parks carried more weight than the overt representation by the City that the parks were permanent, owned and managed by the DPR.[198] Put another

---

[190] Jennifer Steinhauer, *Ending a Long Battle, New Yorkers Let Housing and Gardens Grow*, THE NEW YORK TIMES (Sept. 19, 2002), http://www.nytimes.com/2002/09/19/nyregion/ending-a-long-battle-new-york-lets-housing-and-gardens-grow.html.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] Elder, *supra* note 181, at 787.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 788.

[198] *Glick*, 36 N.E.3d at 644-45.

way, "the large print giveth and the small print taketh away."[199] This means that, as evidenced in Greenwich Village and community gardens throughout New York City, activists and local politicians throughout New York State must beg and fight to preserve temporary green space because there is no protection under the public trust doctrine.[200] Organizations such as the New York City Community Garden Coalition, born out of Giuliani's attempt to revoke and auction hundreds of gardens, actively advocate on behalf of community gardeners.[201] GreenThumb and City Council representatives negotiate with developers and city agencies to spare gardens slated for redevelopment.[202] Moreover, in an attempt to give gardeners more security, state senators have introduced pro-garden legislation: the New York State Senate recently passed a bill aimed at doubling the number of gardens statewide within five years,[203] and New York Senator Jesse Hamilton recently introduced a bill[204] "directing state authorities to use their powers to protect [gardens] from development and preserve [them] for the community."[205] These efforts are certainly encouraging, but gardeners, residents and municipalities deserve formal protection to ensure continued success of programs that create mutually-beneficial, much-needed green space in New York's urban communities.

Catherine Breidenbach[*]

---

[199] TOM WAITS, *Step Right Up*, SMALL CHANGE (Asylum Records 1976).

[200] Tortorello, *supra* note 122

[201] *Id.*

[202] *Id.*

[203] Leroy Comrie, *Senate Passes Legislation to Grow Community Gardens*, THE NEW YORK STATE SENATE (Jun. 11, 2015), https://www.nysenate.gov/newsroom/press-releases/leroy-comrie/senate-passes-legislation-grow-community-gardens.

[204] *Senate Bill 6073-2015*, THE NEW YORK STATE SENATE, https://www.nysenate.gov/legislation/bills/2015/s6073 (last visited Feb. 5, 2016).

[205] Jesse Hamilton, *Protect Our Community Gardens!*, THE NEW YORK STATE SENATE (Oct. 26, 2015), https://www.nysenate.gov/newsroom/articles/jesse-hamilton/protect-our-community-gardens.

[*] Juris Doctor Candidate, May 2017. Bachelor of Arts, Binghamton University. This Note is dedicated to Jacqueline Anne who inspires us by example to dream big, love unconditionally, and stand firm in our beliefs, even if standing alone.