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## THESE PARKS ARE OUR PARKS: AN EXAMINATION OF THE PRIVATIZATION OF PUBLIC PARKS IN NEW YORK CITY AND THE PUBLIC TRUST DOCTRINE'S PROTECTIONS

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### INTRODUCTION

The Great GoogaMooga, advertised as “an amusement park of Food, Drink, & Music” was a music, artisan food, and drink festival in Prospect Park.<sup>1</sup> GoogaMooga lasted two days during the summer of 2012 and three days during the summer 2013,<sup>2</sup> and demonstrates the negative impact of private use on public space.<sup>3</sup> The Prospect Park Alliance, a non-profit organization founded to raise private funds to supplement the financing of Prospect Park,<sup>4</sup> and Superfly, a privately owned music festival company, organized GoogaMooga.<sup>5</sup> The festival was strategically placed in

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<sup>1</sup> About Great Googamooga, <http://brooklyn.googamooga.com/> (last visited Apr. 26, 2014).

<sup>2</sup> Florence Fabricant, *The GoogaMooga Festival Will Return in May*, N.Y. TIMES, Mar. 26, 2013, [http://dinersjournal.blogs.nytimes.com/2013/03/26/the-googamooga-festival-will-return-in-may/?\\_php=true&\\_type=blogs&\\_r=0](http://dinersjournal.blogs.nytimes.com/2013/03/26/the-googamooga-festival-will-return-in-may/?_php=true&_type=blogs&_r=0).

<sup>3</sup> Lauren Evens, Photos: *After GoogaMoogApocalypse, A Scorched Earth That Will Take Months To Recover*, THE GOTHAMIST (May 22, 2013), [http://gothamist.com/2013/05/22/great\\_googa\\_mooga.php#photo-1](http://gothamist.com/2013/05/22/great_googa_mooga.php#photo-1).

<sup>4</sup> The Prospect Park Alliance is an organization that partners with the City of New York for managing and maintaining the park. *What We Do*, THE PROSPECT PARK ALLIANCE, <http://www.prospectpark.org/learn-more/what-we-do/> (last visited Feb. 2, 2015).

<sup>5</sup> Michael Powell, *A Curious Cost/Benefit Analysis of a Park Fund-Raiser*, N.Y. TIMES (May 17, 2013), <http://cityroom.blogs.nytimes.com/2013/05/17/a-curious-costbenefit-analysis-of-a-park-fund-raiser/>.

Nethermead Meadow, a lovely tree-lined meadow located in the center of the park.<sup>6</sup> Nethermead Meadow is traditionally used by the public for dog walking, tossing a football, and gathering with friends for a picnic, the leisure activities one would expect to take place in a park meadow. Over the three-day event, Nethermead Meadows played host to approximately 120,000 people, and accommodated approximately 75 restaurant stands, 65 drink stations, and two stages where 20 bands performed.<sup>7</sup> As one Prospect Park local aptly put it, “It’s like bringing a boombox into a library – it doesn’t belong there.”<sup>8</sup>

The festival was intended as a fund-raising opportunity for the park.<sup>9</sup> The idea was that the event would raise sufficient funds to provide a benefit to all the park users.<sup>10</sup> Instead, the festival resulted in the destruction of the Nethermead Meadow and prevented the public from its use for a month after it ended.<sup>11</sup> Additionally, the festival was promoted as a community event.<sup>12</sup> The Great GoogaMooga website explains: “And that’s why The Great GoogaMooga is more than a festival. It’s a community brought together by a shared passion.”<sup>13</sup> However, many of the communities surrounding the park were unable to attend because of the high admission cost of \$79.50,<sup>14</sup> and the Nethermead Meadow prevented non-ticket holders from access by way of a fence.<sup>15</sup> The most disturbing aspect of The Great GoogaMooga experience is that in consideration for allowing the park’s use, The Prospect Park Alliance received a mere \$75,000.<sup>16</sup> Essentially, the

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<sup>6</sup>Nethermead Meadow, <http://web.archive.org/web/20140404034922/http://www.prospectpark.org/nethermead> (last visited Apr. 26, 2014).

<sup>7</sup>Jess Wisloski, *The Great GoogaMooga, a Bonnaroo For Brooklyn Foodies, Reveals Lineup*, THE HUFFINGTON POST (Apr. 12, 2012), [http://www.huffingtonpost.com/2012/04/24/the-great-googamooga-a-bonnaroo-brooklyn-lineup-music\\_n\\_1450543.html](http://www.huffingtonpost.com/2012/04/24/the-great-googamooga-a-bonnaroo-brooklyn-lineup-music_n_1450543.html).

<sup>8</sup>Powell, *supra* note 6.

<sup>9</sup>*Why the Great GoogaMooga*, Prospect Park Alliance, <http://web.archive.org/web/20140310224724/http://www.prospectpark.org/about/community-news-updates-post/why-the-great-googamooga?lpid=1538183> (last visited Apr. 25, 2014).

<sup>10</sup>*Id.*

<sup>11</sup>Powell, *supra* note 6.

<sup>12</sup>About Great GoogaMooga, <http://web.archive.org/web/20131019205106/http://brooklyn.googamooga.com/about/> (last visited Apr. 26, 2014).

<sup>13</sup>*Id.*

<sup>14</sup>Rachel Tepper, *GoogaMooga 2013: Festival Wises Up, Promises To Fix First-Year Mess*, HUFFINGTON POST (Mar. 27, 2013, 9:15 AM), [http://www.huffingtonpost.com/2013/03/26/googamooga-2013\\_n\\_2958510.html](http://www.huffingtonpost.com/2013/03/26/googamooga-2013_n_2958510.html).

<sup>15</sup>Powell, *supra* note 6.

<sup>16</sup>*Id.*

festival was intended to provide a substantial benefit to the public and promoted itself as a community event, when in reality the surrounding community lost part of its park for a month.

The GoogaMooga experience illustrates the effects privatization can have on the public's use of its parks. Public parks are areas of land that are dedicated to be used for the public interest.<sup>17</sup> Since the 1970s, there has been a steady trend toward the privatization of public parks in New York City.<sup>18</sup> Over the past ten years, new models of privatization have emerged, and, more than ever, the public is in danger of losing out on its use of parks.<sup>19</sup> This trend corresponds with a substantial decrease in state and city funding for public parks.<sup>20</sup> Since 2008, the City has slashed its overall maintenance and operation of parks budget by 21%.<sup>21</sup>

Accompanying the decrease of state and city financing, the beautification and expansion of the number of public parks in New York City have increased.<sup>22</sup> Under Mayors Rudy Giuliani and Michael Bloomberg, three new parks were created (High Line, Brooklyn Bridge Park, and The Hudson River Park).<sup>23</sup> The decrease in state and city financing coupled with an increase in public parkland have forced parks to seek out new structures of operating, managing, and financing, which often result in development or promotional use of parkland in a way that excludes or limits the public's access.<sup>24</sup> Additionally, the mechanisms in which these

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<sup>17</sup> 795 Fifth Ave Corp v. City of New York, 40 Misc. 2d 183, 183 (Sup. Ct. NY Cnty. 1963).

<sup>18</sup> See TOM ANGOTTI, *NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE 75-78* (The MIT Press 2011) (describing the NYC fiscal crisis of the 1970s, and the divestment in public resources including public space). See John L. Crompton, *Programs that Work: Forces Underlying the Emergence of Privatization in Parks and Recreation*, 16 J. PARK AND RECREATION ADMIN. 88, 90 (1998) (discussing the emergence of alternative models of managing parks).

<sup>19</sup> Michael F. Murray, *Private Management of Public Spaces: Nonprofit Organizations and Urban Parks*, 34 HARV. ENVTL. L. REV. 179, 190 (2010); Douglas Martin, *Clown Prince of the Emerald Empire*, N.Y. TIMES (Mar. 19, 2000), <http://www.nytimes.com/2000/03/19/nyregion/clown-prince-of-the-emerald-empire.html> (discussing Henry J. Stern and his reliance on free labor and private money for park maintenance).

<sup>20</sup> Christopher Rizzo, *Five Innovative Ideas for Funding Parks and Open Space*, 13 N.Y. ZONING LAW AND PRACTICE REPORT 1, 2 (Jul.-Aug. 2012).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; See Frank Bruni, *Our Newly Lush Life*, N.Y. TIMES (Jul. 14, 2012) (discussing parkland expansion under the Bloomberg Administration); Martin, *supra* note 20 (discussing parkland expansion under the Giuliani Administration).

<sup>23</sup> Rizzo, *supra* note 21 at 3.

<sup>24</sup> See Cathryn Swan, *Pushing Privatized "Partnership" agenda at New York City's Public Parks -Part 3*, THE HUFFINGTON POST (Aug. 19, 2013), <http://www.huffingtonpost.com/cathryn-swan/pushing-privatized-partnership->

structures are forming eliminate the parks' accountability to the public.<sup>25</sup>

Historically, the common law public trust doctrine in New York provided protections for the public's interest in its parks.<sup>26</sup> It limited development through public officials' accountability to state residents,<sup>27</sup> and sought to maintain parkland for the purpose of public use and enjoyment of traditional park purposes.<sup>28</sup> The primary principle of the public trust doctrine is that the state of New York holds the park in trust while the city manages and maintains it for the public interest.<sup>29</sup> To put this differently, the state and city are responsible for assuring that parks remain adequately maintained and are managed to remain accessible to its citizens.<sup>30</sup> If the city of New York wishes to sell, lease, or use public parkland for "non-park" purposes, it is required to receive legislative approval.<sup>31</sup> The development of New York's public trust doctrine has concentrated on distinguishing park purposes from non-park purposes, allowing park purposes to evade legislative approval.<sup>32</sup>

The public trust doctrine lacks proper definitions, is antiquated, and does not adequately address the current issues facing public park use and development today.<sup>33</sup> The creation of new privatized structures to operate public parks and subvert the public trust doctrine, result in greater use of

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<sup>25</sup> *Id.*

<sup>26</sup> 795 Fifth Ave. Corp., *supra* note 20; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1969) (discussing three restrictions on governmental authority imposed by the public trust doctrine including the holding of the property by the government for the public purpose and for use by the general public; *see* Brooklyn Parks Com'rs v. Armstrong, 6 Hand 234, 244 (1871)).

<sup>27</sup> *Williams v. Gallatin*, 229 N.Y. 248, 253 (1920) ("...no objects, however worthy... which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred..."); Cyane Gresham, *Improving Public Trust Protections on Municipal Parkland in New York*, 13 FORDHAM ENVTL. L.J. 259, 284-86 (2002) (discussing the local community's ability to prevent legislation if legislative approval is required).

<sup>28</sup> *Williams*, 229 N.Y. 248 at 253; Cyane Gresham, *Improving Public Trust Protections on Municipal Parkland in New York*, 13 FORDHAM ENVTL. L.J. 259, 284-86 (2002).

<sup>29</sup> *SFX Entertainment, Inc. v. City of New York*, No. 124059/01, 2002 Sup. Ct. WL 1363372, at \*8 (N.Y. Cnty. 2002); *Friends of Van Cortland Park v. City of N.Y.*, 95 N.Y.2d 623 ("dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State. Their 'use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred.").

<sup>30</sup> *See* *SFX Entertainment, Inc.*, 2002 WL 1363372 at \*8.

<sup>31</sup> *Id.*

<sup>32</sup> *See* *Williams v. Gallatin*, 229 N.Y. 248 (1920).

<sup>33</sup> Cyane Gresham, *Improving Public Trust Protections on Municipal Parkland in New York*, 13 FORDHAM ENVTL. L.J. 259, 276-77, 282-83 (2002).

park space for private, corporate interests, and limits the accessibility of the general public. Courts need to account for the recent neo-liberal adaptations through expansion of the doctrine's protections,<sup>34</sup> and the city's residents need more responsibility in the decision making process of park development.<sup>35</sup>

This Comment advocates for two major changes. First, it argues that courts need to more heavily consider the public's access to public parkland, in the face of major development, which excludes a large portion of the public from the use and enjoyment of parkland, in its analysis of what is a park/non-park purpose. Second, the approval of park purpose developments on parkland should give the affected community more responsibility in the decision-making process.<sup>36</sup> It will include two case studies to examine the trend toward the evisceration of the public trust doctrine, and the failure of private-public partnerships to develop parkland. These case studies will look at the role the municipality plays in the formation and operation of the degree to which they are accountable to the public, how their exclusivity prevents access to much of the public, and to what extent they are limited [or not] by the public trust doctrine.

This Comment will begin in section I with a discussion of the transformation in financing of public parks in New York City, from publicly financed to reliance on private and corporate support to maintain its public parks. Section II examines The Brooklyn Bridge Park ("BBP") and The Hudson River Park ("HRP") as case studies, illustrative of how the new managing and financing structures subvert the public trust doctrine and the failures of private-public partnerships in their management of public

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<sup>34</sup> This Comment defines neo-liberalism as a political and economic paradigm that seeks to combine political freedom with the concept of free market capitalism and the privatization of the public domain. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM 2* (Oxford University Press 2005) ("Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.").

<sup>35</sup> Cathryn Swan, *Union Square FOR Sale? ... Judge rules NYC Parks Department and local BID can Proceed with Renovation that Will Likely Include Privatized Restaurant*, WASHINGTON SQUARE PARK BLOG (Apr. 2 2009), <http://washingtonsquareparkblog.com/2009/04/01/union-square-for-sale-judge-rules-in-favor-of-nyc-saying-historic-public-space-can-be-privatized/>.

<sup>36</sup> The concept of relying more heavily on the municipal citizenry to participate in decision-making stems from the broader idea of "deliberative democracy." Deliberative democracy is a participatory governance model that promotes the removal of decision making from the politicians and placed in the "public sphere." This theory suggests that deliberative decision-making will ensure government is run by the public standards. Patricia E. Salkin and Charles Gottlieb, *Engaging Deliberative Democracy at the Grassroots: The Effects of the Fiscal Crisis in New York at the Local Government Level*, 39 *FORDHAM URB. L.J.* 727, 756-58 (Mar. 2012).

parks. Section III returns to the common law public trust doctrine, examining the original purposes behind its formation, its current status, and how it falls short of that protective purpose vis-à-vis the rise of newly privatized public parks. Section IV will suggest proposals for the courts' future analysis of park/non-park purposes. Section V will discuss the connection between this analysis and the disparity of maintenance of parks in wealthy and low-income neighborhoods as a conclusion.

## I. BACKGROUND

*"In Real Estate 101, we learn that the three universal principles of real estate for people who own property are location, location, location."*

– Tom Angotti

In New York City, land is scarce and valuable. Alone, the land on Manhattan is worth billions, and the metropolitan region, trillions.<sup>37</sup> While land value is based on many different interplaying factors, one major determinant of valued land is whether it is next to a park, on a waterway, or even better, both.<sup>38</sup> For example, Central Park adds an estimated \$17.7 billion in value to its surrounding buildings.<sup>39</sup> Additionally, a 2002 survey by Ernst and Young indicates an 8%-30% increase in property value near a park.<sup>40</sup> For example, the Highline, a private/public venture and relatively new park that is built atop an abandoned elevated railway, has helped to promote some of the most rapid gentrification in the City's recent history.<sup>41</sup> The Highline has been attributed to increasing the property values in the neighborhood by 103 percent.<sup>42</sup>

New York City urban planning is heavily influenced by the real estate industry.<sup>43</sup> Therefore, there is a major financial incentive for New York City to expand its park space.<sup>44</sup> Since 2002, three major parks have opened: the

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<sup>37</sup> Angotti, *supra* note 19, at 38.

<sup>38</sup> Felix Simon, *Why Privately-Financed Public Parks are a Bad Idea*, REUTERS (Nov. 22, 2013), <http://blogs.reuters.com/felix-salmon/2013/11/21/why-privately-financed-public-parks-are-a-bad-idea/>.

<sup>39</sup> Rizzo, *supra* note 21, at 2.

<sup>40</sup> *Id.* at 1-2; see New Yorkers for Parks & Ernst & Young, *How Smart Parks Investment Pays its Way*, 1 (2003).

<sup>41</sup> Jeremiah Moss, *Disney World on the Hudson*, N.Y. TIMES, Aug. 21, 2012, available at <http://www.nytimes.com/2012/08/22/opinion/in-the-shadows-of-the-high-line.html>.

<sup>42</sup> New York City Economic Development Corporation, *Economic Snapshot: a Summary of New York City's Economy* (Aug. 2011), available at [https://www.nycdc.com/sites/default/files/files/economic-snapshot/EconomicSnapshotAugust2011\\_0.pdf](https://www.nycdc.com/sites/default/files/files/economic-snapshot/EconomicSnapshotAugust2011_0.pdf).

<sup>43</sup> Angotti, *supra* note 19, at 46.

<sup>44</sup> Rizzo, *supra* note 21, at 2.

High Line, Brooklyn Bridge Park, and The Hudson River Park.<sup>45</sup> In contrast to this expansion of public park space, New York City underwent a major divestment in its parks department and public parkland.<sup>46</sup> Now, it relies more and more on quasi public-private structures to maintain its parkland.<sup>47</sup>

This divestment did not happen overnight, and is part of a much larger trend in New York City of substituting the use of public monies for public spaces with a reliance on private entrepreneurship and philanthropic donations to support its public spaces.<sup>48</sup> The 1970s marked New York City's fiscal crisis,<sup>49</sup> the closest New York City has come to bankruptcy. New York City's bankruptcy could have had far reaching repercussions for urban municipalities across the Northeast.<sup>50</sup> While the Federal Government under Gerald Ford essentially told New York to "drop dead,"<sup>51</sup> the state eventually prevented the world's largest city from declaring bankruptcy.<sup>52</sup> The typical discussions at the time simplified the complex causes of the fiscal crisis, and were generally framed within the rhetoric of too much short-term borrowing and debt load, loss of revenues, and the inability of New York City to manage its budget.<sup>53</sup> By simplifying the causes, the response was also simplistic; New York City must slash expenditures, contract out government responsibilities to the private sector that could more efficiently and responsibly manage its budget, and rely on development and entrepreneurship to replace municipal expenditure cuts.<sup>54</sup> Essentially, the fiscal crisis resulted in a lack of trust in the city to manage its finances, which has continued until today.<sup>55</sup>

In the wake of the fiscal crisis and the shift from New Deal toward neo-liberal politics, a major divestment in city resources took place.<sup>56</sup> Arguably,

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<sup>45</sup> *Id.* at 3.

<sup>46</sup> *Id.*

<sup>47</sup> See Swan, *supra* note 25.

<sup>48</sup> See Angotti, *supra* note 19, at 77 (discussing the dramatic effect of divestment from city resources on public parks and open space, and the private models that have filled the financing gap); Murray, *supra* note 20, at 190.

<sup>49</sup> See WILLIAM K. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS I* (1982).

<sup>50</sup> *Id.* (explaining that the fall of New York City could have been the beginning of the fall of the urban cities all across the northeast).

<sup>51</sup> Angotti, *supra* note 19, at 76.

<sup>52</sup> Patricia E. Salkin & Charles Gottlieb, *Engaging Deliberative Democracy at the Grassroots: The Effects of the Fiscal Crisis in New York at the Local Government Level*, 39 *FORDHAM URB. L.J.* 727, 731 (2012) (discussing the fiscal crisis of 1970 and its results on the federal, state, and municipal governance roles).

<sup>53</sup> Tabb, *supra* note 50, at 2-3 (discussing the ways that the fiscal crisis was viewed by many within both the federal and state governments).

<sup>54</sup> *Id.*

<sup>55</sup> Angotti, *supra* note 19, at 77.

<sup>56</sup> *Id.* at 12, 76 (discussing the deregulation and support structures of the federal

the most drastic cuts were from the Parks Department and management of public spaces.<sup>57</sup> Public spaces are an easy target for municipal cuts, because the Parks Department receives little support from the state and federal government and is therefore easy to cut from the city's discretionary budgets.<sup>58</sup> Since the 1990s, the Parks Department's full time employees were cut by 50%, and its overall budget by 11%.<sup>59</sup> Between 2008 and 2013, New York City further cut its maintenance and operation budgets by 21%.<sup>60</sup> Even more noteworthy, is that although New York City's parks and playgrounds occupy 14% of the city's land, the 2010 budget allocated a mere .5% of its annual budget for parks.<sup>61</sup>

Coupled with this major divestment of municipal funds from public spaces has been a movement toward creating quasi private-public arrangements for the maintenance and operation of public parks.<sup>62</sup> The first of these structures was The Central Park Conservancy, created in 1980.<sup>63</sup> Upon its creation, The Conservancy immediately stepped in and raised approximately \$180 million for capital projects and restoration of the park.<sup>64</sup> There are certainly issues with the Conservancy model, because much of that \$180 million is tax deductible and therefore the government still fronts much of the bill.<sup>65</sup>

Since the establishment of the Central Park Conservancy, public parks in New York City have followed suit. The Prospect Park Alliance was established in 1987,<sup>66</sup> and The Battery Park Conservancy in 1994.<sup>67</sup> As this

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government beginning in the 1970's, and the way these policies "diluted" the role of social movements in American cities).

<sup>57</sup> See John L. Crompton, *Forces Underlying the Emergence of Privatization in Parks and Recreation*, 16 J. OF PARK AND RECREATION 88, 90 (discussing the emergence of new privatized models of services after the 1970s).

<sup>58</sup> *Id.* at 174.

<sup>59</sup> Anemona Hartocollis, *Parks in a Tangle, a Plan to Tame*, N.Y. TIMES (May 8, 2005), available at [http://www.nytimes.com/2005/05/08/nyregion/thecity/08colm.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2005/05/08/nyregion/thecity/08colm.html?pagewanted=print&_r=0).

<sup>60</sup> Rizzo, *supra* note 21, at 2.

<sup>61</sup> New Yorkers for Parks, *Supporting Our Parks: A Guide to Alternative Revenue Strategies*, 3 (2006) available at <http://www.ny4p.org/research/other-reports/or-altrevenue10.pdf>.

<sup>62</sup> Angotti, *supra* note 19, at 77.

<sup>63</sup> Interview by Amy Eddings with Karen Putnam, President, Central Park Conservancy (Feb. 20, 1998), available at <http://www.loe.org/shows/segments.html?programID=98-P13-00008&segmentID=1>.

<sup>64</sup> *Id.*

<sup>65</sup> See Felix Simon, *The Problematic Charitable-Donation Tax Deduction*, REUTERS (Nov. 28, 2011), <http://blogs.reuters.com/felix-salmon/2011/11/28/the-problematic-charitable-donation-tax-deduction/>.

<sup>66</sup> *The Alliance*, THE PROSPECT PARK ALLIANCE, <http://www.prospectpark.org/learn->

shift toward privatization evolves, parks seek out models that will allow for more development in order to raise funds, and fewer limitations on the decision to develop the parks, which by its nature means side-stepping the Public Trust Doctrine.<sup>68</sup>

## II. CASE STUDIES, THE BROOKLYN BRIDGE PARK AND THE HUDSON RIVER PARK: THE SUBVERSION OF THE PUBLIC TRUST DOCTRINE AND THE FAILURES OF SELF-SUSTAINABLE PRIVATE/PUBLIC MODELS

Reserving public parks for the availability and use of the general public is a major principle underlying the public trust doctrine. In New York a public park cannot be alienated or used for a non-park purpose without the approval of the legislature and a “home rule” request.<sup>69</sup> The following section develops case studies of two NYC parks to demonstrate the effects of commercial use on parks, including the lack of accountability to the public, the exclusion of certain vulnerable populations from any calculus in the parks decisions to develop, how private/public partnerships are failing, and how these new structures are able to avoid the public trust doctrine’s limitations.

### A. *The Brooklyn Bridge Park*

This first section considers how a properly dedicated park can circumvent the public trust doctrine and its protections. The Brooklyn Bridge Park is an example of the shift toward privatization of public park space and the control that private entities have over the parkland.<sup>70</sup>

The history of the Brooklyn Bridge Park is unique and provides insight into the intentions behind the creation of the park. In the 1980s the Port Authority wanted to sell its abandoned piers to private developers for the creation of luxury apartment buildings.<sup>71</sup> The result would have meant a

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more/ (last visited Feb. 9, 2015).

<sup>67</sup> *About the Battery Conservancy*, THE BATTERY CONSERVANCY, <http://www.thebattery.org/the-conservancy/> (last visited May. 7, 2014).

<sup>68</sup> Rizzo, *supra* note 21.

<sup>69</sup> N.Y. MUN. HOME RULE LAW § 40; Uniform Land Use Review Procedure § 2-01; Joseph L. Sax, *The Public Trust Doctrine in Natural Law: Effective Judicial Intervention*, 68, MICH. L. REV. 471, 476-78 (1969) (discussing restrictions on state authority).

<sup>70</sup> Alex Ulam, *Our Parks Are Not for Sale: From the Gold Coast of New York to the Venice Biennale*, DISSENT MAGAZINE, Winter 2013, available at <http://www.dissentmagazine.org/article/our-parks-are-not-for-sale-from-the-gold-coast-of-new-york-to-the-venice-biennale>.

<sup>71</sup> Angotti, *supra* note 19, at 174.

blocked waterfront view for the rest of Brooklyn.<sup>72</sup> The Brooklyn Heights Association and a number of affected community groups, neighborhood associations, and civic groups rallied in opposition to this sale.<sup>73</sup> The proposal was defeated, and followed by a long process of creating a park, accessible to all, on the property.<sup>74</sup>

The Brooklyn Bridge Park Coalition (“the Coalition”) engaged in a ten-plus year process to formulate a plan for the Brooklyn Bridge Park.<sup>75</sup> In 1992, the Coalition issued a statement of “13 guiding principles” for the future development of a plan,<sup>76</sup> and subsequently began planning to implement the project.<sup>77</sup> In 1998 the Downtown Waterfront Local Development Corporation (“DWLDC”) was created for the purpose of planning the park.<sup>78</sup> The result of the DWLDC, public forums, and thousands of affected community members’ input was the issuance of the “Illustrative Master Plan”,<sup>79</sup> and the signing of a Memorandum of Understanding (“MOU”) between the Governor and the Mayor (“the Parties”).<sup>80</sup> The MOU lays out the parties’ intentions for the creation of the Brooklyn Bridge Park, and reads in pertinent part:

1. The State of New York and the City of New York share a common determination to preserve and provide public access to waterfront areas in order to allow for recreation and public enjoyment and to enhance economic development
2. The Port Authority of New York and New Jersey has agreed to transfer parcels of real property for dedication to the Project, including Piers 1-5 adjacent to the East River on Brooklyn Waterfront for purposes of creating a public park.
3. The Parties agree that the Project will be guided by the provisions contained in the Illustrative Master Plan subject to any refinements thereto arising from the completion of the planning and environmental review processes for the Project.
4. No less than eighty (80) percent of the Project will be reserved as

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Brief for Petitioner at 9-10, *Brooklyn Bridge Park Legal Defense Fund v. NY State Urban Development Corporation*, 50 A.D.3d 1029 (2008) (No. 2006-11988).

<sup>75</sup> Angotti, *supra* note 19, at 175.

<sup>76</sup> Brief for Petitioner, *supra* note 75, at 9.

<sup>77</sup> *Id.* at 9-10

<sup>78</sup> Brief for Respondents, at 8-9, *Brooklyn Bridge Park Legal Defense Fund v. NY State Urban Development Corporation*, 50 A.D.3d 1029 (2008) (No. 2006-11988).

<sup>79</sup> Brief for Petitioner, *supra* note 75, at 10.

<sup>80</sup> Brief for Respondents, *supra* note 79, at 10.

open space and will be dedicated as parkland that is subject to the protective provisions of State and City law pertaining to park properties.

5. Upon completion of construction of the Project or phases thereof, the state-owned areas designated as open space under the General Project Plan shall be transferred to the jurisdiction of state parks and shall be afforded the protections of state law relating to the non-alienation of state park lands.<sup>81</sup>

In addition to these agreements above, the MOU created a new subsidiary of the Empire State Development Corporation called the Brooklyn Bridge Park Development Corporation (“BBPDC”) that was responsible for implementing the project and creating a General Project Plan in accordance with the Memorandum of Understanding and the Illustrative Master Plan.<sup>82</sup>

The BBRDC completed the General Project Plan (“GPP”), but ignored many of the community efforts to put the Brooklyn Bridge Park into action.<sup>83</sup> It eviscerated the original purpose of creating the Brooklyn Bridge Park—to prevent high-rise luxury apartment buildings that would obstruct views of the East River.<sup>84</sup> In the GPP, two major developments were proposed on piers 1 and 6.<sup>85</sup> On Pier 1 a hotel and residential development were proposed to replace two existing warehouses.<sup>86</sup> Two buildings would be built, one 55 feet high and another 100 feet high.<sup>87</sup> The second proposal on pier 6 called for either one residential building 315 feet high, or alternatively, two buildings 215 feet high.<sup>88</sup> Additionally, an existing building on pier 6 would be transformed into another residential building of 54 feet.<sup>89</sup> Lastly, an existing manufacturing building would be converted to a residential building of 169 feet.<sup>90</sup> All in all, the proposed GPP would create a hotel and either 4 or 5 residential buildings on land that was defined as a public park in the MOU.<sup>91</sup>

This long history was the backdrop for a lawsuit decided in 2006 that is

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<sup>81</sup> Memorandum of Understanding, Brooklyn Bridge Park Defense Fund v. NY State Urban Development Corp., 2006 WL 6589451 (N.Y.Sup. 2006) (No. 2006-14764).

<sup>82</sup> Brief for Respondent, *supra* note 79, at 10.

<sup>83</sup> See Brief for Petitioner, *supra* note 75, at 12-13.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> Brooklyn Legal Defense Fund v. NY State Urban Development Corp., 14 Misc.3d 515, 518 (Sup. Ct. 2006).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Brief for Petitioners, *supra* note 75, at 7-8.

fundamental to understanding the changing circumstances and limitations of the public trust doctrine.<sup>92</sup> The court, in *Brooklyn Bridge Park Legal Defense Fund, Inc. v. New York State Urban Development Corp.* found that the MOU between the City and State did not define the actual parameters of the parkland, but rather the GPP determined what was considered dedicated parkland.<sup>93</sup> Additionally, the court interpreted the MOU to allow for approximately 80 percent of the park to be used as parkland, and the MOU to permit any use on the remaining 20 percent, regardless of what that use is.<sup>94</sup> The court held that “[w]hile this doctrine continues unabated, beyond peradventure, the parcels designated for residential/commercial development herein are not parkland, have never been parkland and were never designated to become parkland. As such, they fall entirely outside the scope of our Public Trust Doctrine.”<sup>95</sup> This holding allows for parks to be dedicated through an MOU and then for the GPP to determine which areas of the park are for parkland and which areas can be used for commercial and residential uses.<sup>96</sup>

The MOU above clearly dedicates piers 1-5 as a public park.<sup>97</sup> However, the GPP placed a hotel and residential building in the park, which is a direct violation of the public trust doctrine.<sup>98</sup> What is more concerning is the possibility that this holding would allow for unlimited commercial and residential development in public parks dedicated in MOUs.<sup>99</sup> In its reply brief, the petitioners caution, “For this court to ignore this threat to the Public Trust Doctrine is to allow this case to be a precedent for unlimited commercial and industrial development in or adjacent to public parks,”<sup>100</sup> for example, placing residential apartments on the edges, entrances, and possibly within the park.<sup>101</sup> The court disagreed with this argument, finding that the GPP redefined what is dedicated parkland, and that the planned

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<sup>92</sup> *Brooklyn Legal Defense Fund v. NY State Urban Development Corp.* 14 Misc. 3d 515 (Sup. Ct. Kings County 2006).

<sup>93</sup> *Id.* (interpreting the MOU to defer to the GPP when designating the area to be dedicated as parkland).

<sup>94</sup> *Brooklyn Legal Defense Fund*, 14 Misc. 3d at 523 (discussing the GPP proposal for approximately 90 percent of the project to remain open space, which is in agreement with the MOU).

<sup>95</sup> *Id.* at 524.

<sup>96</sup> *Brooklyn Legal Defense Fund*, 14 Misc. 3d at 523.

<sup>97</sup> Brief for Petitioners, *supra* note 75, at 10.

<sup>98</sup> *See id.* at 24-28 (arguing that the private development takes place “close” to the edges of the park and “within” the proposed park).

<sup>99</sup> *See Rizzo*, *supra* note 21, at 5.

<sup>100</sup> Reply Brief For Petitioners at 8, *Brooklyn Bridge Park Legal Defense Fund v. N.Y. Urban Development Corp.*, 50 A.D.3d 1029 (2008) (No. 20006-11988).

<sup>101</sup> *Id.*

location of the residential and hotel buildings are not within parkland.<sup>102</sup>

The analysis of the case was flawed. The MOU should not be permitted to act as a dedication device only to be thwarted by a GPP.<sup>103</sup> The GPP should guide the planning, but those guidelines should be restricted by the original MOU.<sup>104</sup> This case was affirmed by the Appellate Division 2nd Department,<sup>105</sup> but never reached the Court of Appeals. In the event another private/public venture attempts to utilize a similar dedication model, the Court of Appeals will have an opportunity to strengthen the public trust doctrine and find that when a park is dedicated through an MOU the parameters of the parkland cannot be subsequently changed in the GPP, if they have already been specified.

### B. The Hudson River Park

The Hudson River Park (“HRP”), more than anything, exemplifies the failure of private parks.<sup>106</sup> The NY State Legislature adopted the Hudson River Park Act (“HRPA”) on September 8, 1998.<sup>107</sup> The HRPA’s purpose was to effectuate a self-sustainable public park.<sup>108</sup> This meant the employees, operations, and maintenance of the park were to be independently supported by income generated within the park.<sup>109</sup> Commercial tenants’ rent, fees from park-operated concession revenues, and independent grants and private donations were intended to secure sufficient income for the park’s operation.<sup>110</sup>

The HRP was the first park that envisioned complete self-sustainability through commercial use, and many viewed the quasi-public/private partnership envisioned in the HRPA as the future of New York City parkland.<sup>111</sup> The Senate’s statement in support of the act described the HRP

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<sup>102</sup> Brooklyn Bridge Park Legal Defense Fund v. NY State Urban Development Corp., 50 A.D.3d 1029, 1031 (2d Dep’t 2008).

<sup>103</sup> See Brief for Petitioners, *supra* note 75, at 8.

<sup>104</sup> Amicus Curiae Brief of Sierra Club at 5-6, Brooklyn Bridge Legal Defense Fund v. N.Y. Urban Development Corp., 50 A.D.3d 1019 (2008) (No. 20006-11988), 2007 WL 5232222 (arguing that the MOU agreed that the GPP was to be guided by the Illustrative Master Plan, which did not intend to allow “specialized” commercial uses).

<sup>105</sup> Brooklyn Legal Defense Fund v. NY State Urban Development Corp., 50 A.D.3d 1029 (2d dep’t 2008), *aff’g* 14 Misc. 3d 515 (Sup. Ct. Kings Cnty. 2006).

<sup>106</sup> *Trouble in Parkland*, Op-Ed, N.Y. TIMES, Jan. 9, 2005, available at [http://www.nytimes.com/2005/01/09/opinion/opinionspecial/09CI\\_hudsonpark04.html](http://www.nytimes.com/2005/01/09/opinion/opinionspecial/09CI_hudsonpark04.html).

<sup>107</sup> Hudson River Park Act, N.Y. UNCONSOL. LAW § 1642 (1998).

<sup>108</sup> Hudson River Park Trust, About Us, <http://www.hudsonriverpark.org/about-us/hrpt> (last visited March 3, 2015).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Ulam, *supra* note 71 (describing the HRP as the first park to be financed through

as “the most significant public space to be created in Manhattan since the creation of Central Park.”<sup>112</sup>

The HRP’s intention was clear, to develop a self-sustainable public park, with the interest of serving all New Yorkers:

The planning and development of the Hudson River Park as a public park is a matter of state concern and in the interest of the people of the state. It will enhance the ability of New Yorkers to enjoy the Hudson river, one of the state’s great natural resources; protect the Hudson river, including its role as an aquatic habitat; promote health, safety and welfare of the people of the state; increase the quality of life in the adjoining community and the state as a whole; help alleviate the blighted, unhealthy, unsanitary and dangerous conditions that characterize much of the area; and boost tourism and stimulate the economy . . . . It is in the public interest to encourage park uses and allow limited park/commercial uses in the Hudson river park . . . . [It is intended that] the costs of the operation and maintenance of the park be paid by revenues generated within the Hudson river park and that those revenues be used only for park purposes.<sup>113</sup>

There are two important features of this statement of intent. First, it makes it clear that the HRP is created as a public park and for the public.<sup>114</sup> Second, it suggests that the operation and maintenance of the park are to be paid through private commercial uses.<sup>115</sup> Additionally, the HRP created the “Hudson River Park Trust” (“the Trust”), a public benefit corporation to oversee the development plan, design, construction, and future operation and maintenance of the park.<sup>116</sup>

As mentioned above, some of the park’s revenue has come through commercial use of the space.<sup>117</sup> However, the planning and operation of the park have been remarkably underfunded.<sup>118</sup> In 2005 the Park only generated

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the model of complete reliance on the private sector).

<sup>112</sup> Senate Statement of Support, dated June 19, 1998, Bill Jacket, S.B. 7845, Ch. 592.

<sup>113</sup> Hudson River Park Act, N.Y. UNCONSOL. LAW § 1642 (McKinney 1998).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; Press Release, Governor George Pataki, Governor Pataki Names Appointments To Hudson River Park Trust (Mar. 4, 1999).

<sup>117</sup> *Hudson River Park Trust*, HUDSON RIVER PARK,

<http://www.hudsonriverpark.org/about-us/hrpt> (last visited May 15, 2014).

<sup>118</sup> Hudson River Park Trust, 2004 Annual Financing Plans – Capital Commitments by

approximately \$47,646,270 in operating revenue (after depreciation and operating expenses were subtracted).<sup>119</sup> In 2013, this number only slightly increased to \$34,169,250.<sup>120</sup> The initial investment of approximately \$200 million was not enough to adequately complete the park, nor was the operating revenue enough to properly maintain the parks.<sup>121</sup> By 2005 most of the initial investment was drained and the HRP only halfway finished.<sup>122</sup> Currently, thirty percent of the park remains uncompleted,<sup>123</sup> and the Trust is estimated to have a \$7-plus million deficit.<sup>124</sup> These facts that point to the park's lack of revenue, current deficit, and inability of the Trust to finish the park show how the park was underfinanced from the start, and the risks involved in a quasi-public/private structure.<sup>125</sup>

The legislature recently amended the HRP to encourage transfer of development rights ("TDR")<sup>126</sup> to generate more revenue.<sup>127</sup> However, if the TRD program does not adequately finance the current and future operations of the park, a question remains as to how the park will be funded. The most likely response is longer leases, more commercial development, and possibly residential buildings.<sup>128</sup> The HRP identifies

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Source, available at

<http://www.hudsonriverpark.org/assets/content/general/2004AnnualReport.pdf>.

<sup>119</sup> HUDSON RIVER PARK TRUST, FINANCIAL STATEMENT (2005), available at <http://www.hudsonriverpark.org/assets/content/general/FinancialStatements2005.pdf>.

<sup>120</sup> *Id.*

<sup>121</sup> Op-Ed, *Trouble in Parkland*, N.Y. TIMES, Jan. 9, 2005,

[http://www.nytimes.com/2005/01/09/opinion/opinionspecial/09CI\\_hudsonpark04.html?\\_r=0](http://www.nytimes.com/2005/01/09/opinion/opinionspecial/09CI_hudsonpark04.html?_r=0) (last visited Mar. 3, 2015).

<sup>122</sup> *Id.*

<sup>123</sup> Paula A. Ullman, *Let's embrace this key moment for Hudson River Park*, THE VILLAGER, Nov. 14, 2013.

<sup>124</sup> Laura Kusisto, *Hudson River Park Plan Is Questioned*, THE WALL STREET JOURNAL (July 22, 2013),

<http://www.wsj.com/articles/SB10001424127887323848804578605843365387704>.

<sup>125</sup> See Ulam, *supra* note 71.

<sup>126</sup> Transfer of development rights (TDR) programs allow a property owner to sell their development rights to other owners. This is generally allowed because the municipality wants to preserve areas in a specific way, but does not want the property owner to be financially burdened. Rizzo, *supra* note 21, at 6.

<sup>127</sup> See Lisa W. Foderaro, *Law Says Hudson River Park Is Allowed to Sell Air Rights*, N.Y. TIMES, Nov. 14, 2013 ("Wednesday night, Gov. Andrew M. Cuomo signed into law the bill that will let Hudson River Park...sell development rights in order to collect much-needed revenue.").

<sup>128</sup> In the past the Hudson River Park has made exceptions regarding longer leases. An exception was made for Chelsea Piers, and the lease for Pier 57 has been extended to allow for 49 years. Lincoln Anderson, *With long lease at Pier 40, would Related re-emerge?*, THE VILLAGER, June 2009, available at [http://thevillager.com/villager\\_319/withlongerlease.html](http://thevillager.com/villager_319/withlongerlease.html). Additionally, prior to its amendment to allow the sale of air rights, discussions arose allowing housing on Pier 40. *In*

and defines “permitted uses” to mean, “park use” and “park/commercial use”, and “prohibited uses”.<sup>129</sup> Therefore, any “permitted use” has been approved by the legislature.<sup>130</sup> Although the HRP Act provides for a public hearing prior to any “proposed” significant action, it is unclear what action will receive public comments.<sup>131</sup> Additionally, the definitions in the act do not take into consideration accessibility, meaning the Trust could potentially approve a festival or enter into a lease with a luxury restaurant without any public accountability.<sup>132</sup> Alternatively, a public hearing prior to any Trust action would give all community members the option of expressing their views.

The Trust is required to deliver its annual financing plan and any amendments to the general project plan to a number of local officials.<sup>133</sup> An option that would likely yield a result that benefits the public good is to allow for a deliberative democracy process in the financing plan.<sup>134</sup> A deliberative democracy structure would promote civic engagement and provide an opportunity for all community members to deliberate about future park services, allowing all sides to better understand what park uses benefit all.<sup>135</sup>

### III. THE PUBLIC TRUST DOCTRINE: AN EXAMINATION OF THE DOCTRINE AS IT PERTAINS TO PUBLIC PARKS IN NEW YORK

This section examines the history of the public trust doctrine and its competing views. It will discuss the how the public trust doctrine’s definitions of park/non-park purposes have included analysis of public access to parks, but how the focus has shifted toward relying primarily on proper functions of parks. This section seeks to demonstrate the necessity of more emphasis on access to parks in the court’s analysis, especially in the midst of the changing structures of parks to a private/public model and their reliance on entrepreneurship on public space.

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*the News: A Possible Hudson River Park Solution*, TRIBECA CITIZEN, June 20, 2013, available at <http://tribecacitizen.com/2013/06/20/in-the-news-a-possible-hudson-river-park-solution/>.

<sup>129</sup> Hudson River Park Act, N.Y. UNCONSOL. LAW § 1643 (McKinney 1998).

<sup>130</sup> *Id.*

<sup>131</sup> Hudson River Park Act, N.Y. UNCONSOL. LAW § 1647 (McKinney 1998).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Salkin & Gottlieb, *supra* note 53, at 756-58 (discussing the benefits of deliberative democracy).

<sup>135</sup> *Id.*

*A. Doctrinal History*

The origins of the public trust doctrine in the U.S. are grounded in preventing private ownership of property from disrupting the public interest.<sup>136</sup> Under this doctrine, certain lands are held by the state in trust for the public's interest.<sup>137</sup> Generally, the justification behind this principle has been to "encourage and direct economic growth", by allowing for the navigable waterways to remain under the ownership of the state in which it resides.<sup>138</sup> Additionally, the public-trust doctrine has been a state's issue, and therefore differs from state to state.<sup>139</sup> Professor Joseph Sax in his influential article lays out three general limitations the doctrine has on state governmental authority: 1) the property must be used for the public purpose and available for use by the general public; 2) the property may not be sold; and 3) the property should be limited to traditional or related uses.<sup>140</sup> This section will examine the public trust doctrine in New York as it pertains to parkland and how its analysis has concentrated mostly on preserving the latter two of Sax's principles to the detriment of the first.

In New York, the public trust doctrine includes protection of public parks from alienation and use for non-park purposes,<sup>141</sup> reflecting the principle that state parkland is held by the state, in trust for the public.<sup>142</sup> Any alienation of parkland or use for non-park purposes requires approval by the legislature.<sup>143</sup> The policy behind requiring legislative approval for non-park use or alienation is that there is more public accountability in that process, which includes a "Home Rule Request" and the ULURP process.<sup>144</sup>

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<sup>136</sup> *Shively v. Bowlby*, 152 U.S. 1, 13 (1894) (discussing the origins of the concept of *jus privatum* and its subjugation to *jus publicum*: "though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified."); *Martin v. Wadell's Lessee* 41 U.S. 367, 383 (1842).

<sup>137</sup> *See Shively*, 152 U.S. at 13.

<sup>138</sup> Michael Seth Benn, *Towards Environmental Entrepreneurship: Restoring The Public Trust Doctrine in New York*, 155 U. PA. L. REV. 203, 209 (2006) (quoting MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY 1789-1920*, at 11-12 (Harold Hyman & Stuart Bruchey eds.1987)).

<sup>139</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476-78 (1969) (discussing restrictions on state authority).

<sup>140</sup> *Id.* at 477.

<sup>141</sup> *Friends of Van Cortland Park v. City of N.Y.*, 95 N.Y.2d 623, 630 (2001).

<sup>142</sup> *See id.*

<sup>143</sup> *Id.* at 630-31.

<sup>144</sup> Gresham, *supra* note 34, at 284-85, 290-91. Prior to any legislative act that alienates parkland or allows for the non-park use of parkland a "home rule request" must be sent after approval by 2/3 of the local legislature. N.Y. Mun. Home Rule Law § 40.

This general rule is complex, and has been defined and redefined in over 150 years of state court decisions.<sup>145</sup> Additionally, the doctrine has been critiqued as inconsistent, lacking clear definitions or guidance for parks, and allowing for too much discretion and flexibility for judges in the determinations of when parkland should be protected by the doctrine.<sup>146</sup> A look at the leading cases that have defined the doctrine offers an understanding of the doctrine's benefits and limitations.

The landmark Court of Appeals case from 1871, *Brooklyn Park Commissioner v. Armstrong*, initially articulated the public trust doctrine's protections against alienation of parkland.<sup>147</sup> In *Armstrong*, the city of Brooklyn acquired a large tract of land through eminent domain.<sup>148</sup> In an action by the legislature in the act of 1861 the municipality was authorized to take lands for a public place, for public use, and for a public park.<sup>149</sup> Additionally, upon the fulfillment of the act of 1861 the acquired lands were vested "forever in the city".<sup>150</sup> The act of 1861 authorized and issued bonds to raise the necessary funds for the land.<sup>151</sup> In subsequent legislation, the act of 1870 sought to sell a parcel of the parkland to the defendant, who refused to take title, claiming, "the city had not the power to convey a clear title in fee, free from all encumbrances." The case was commenced as a test case.<sup>152</sup>

The court in *Armstrong* held that the land in question could not be sold, because of prior bond obligations and contracts with those bondholders.<sup>153</sup> However, the case also provides the basis, in its discussion, for the public trust doctrine as it pertains to parkland.<sup>154</sup> The court explained that dedicated parkland might only be sold through proper legislative

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Prior to a change in land use, which includes the alienation of parkland or use for a non-park purpose a ULURP application must be submitted to the City of New York Department of City Planning. The ULURP process includes direct recommendations from the community board after a public hearing. However, the recommendation from the community is not dispositive and cannot halt the process. Uniform Land Use Review Procedure § 2-01. Additionally, any actions to "approve, fund or directly undertake an action which may affect the environment are subject to review under the State Environmental Quality Review Act. Division of Environmental Permits New York State Department of Environmental Conservation: The SEQR Handbook 12 (2010).

<sup>145</sup> Rizzo, *supra* note 21, at 3.

<sup>146</sup> See Gresham, *supra* note 34, at 276.

<sup>147</sup> *The Brooklyn Park Commissioners v. Armstrong*, 45 N.Y. 234, 243 (1871).

<sup>148</sup> *Id.* at 235.

<sup>149</sup> *Id.* at 239.

<sup>150</sup> *Id.* at 241.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 238.

<sup>153</sup> *Id.* at 248.

<sup>154</sup> *Id.* at 243.

approval.<sup>155</sup> The act of 1870 demonstrated proper legislative approval; however, the obligations to bondholders ultimately prevented the sale.<sup>156</sup>

Fifty years later the Court of Appeals extended the public trust doctrine's protections of parkland in *Williams v. Gallatin*, where it prohibited the use of parkland for a non-park purpose without legislative approval.<sup>157</sup> In *Williams*, the New York City Park Commissioner entered into a ten-year lease with the Safety Institute of America ("The Institute") for the use of the Arsenal Building located in Central Park.<sup>158</sup> The Institute sought to provide studies and promote methods of safety and sanitation through its use of the property.<sup>159</sup> The lease required that the Arsenal Building remain open to the public and free of charge five days of the week.<sup>160</sup> However, it reserved two days a week when the building was closed to the public.<sup>161</sup> Additionally, the lease prohibited commercial transactions for gainful purposes without any rent charges.<sup>162</sup> The Institute agreed to make no less than \$50,000 in repairs, alterations, and improvements to the Arsenal Building in exchange for its use.<sup>163</sup> The plaintiff claimed that the construction and alteration of the Arsenal Building would damage and injure Central Park for the use and enjoyment of the New York City public.<sup>164</sup>

The court held that the lease did not establish a park purpose, and therefore the Park's Commissioner must seek legislative approval before the lease could be valid.<sup>165</sup> The court's discussion provides guidance on how park purposes "should be viewed":

A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. It need not, and should not, be a mere field or open space, but no objects, however worthy, such as courthouses and schoolhouses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred, even when the dedication to

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 248.

<sup>157</sup> *See Williams v. Gallatin*, 229 N.Y. 248, 253 (1920).

<sup>158</sup> *Id.* at 250.

<sup>159</sup> *Id.* at 251.

<sup>160</sup> *Id.*

<sup>161</sup> *Williams v. Gallatin*, 108 Misc. 187, 191 (Sup. Ct. NY. Cnty. 1919).

<sup>162</sup> *Id.* at 190.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 187.

<sup>165</sup> *Gallatin*, 229 N.Y. at 254 (finding the purposes of the Safety Institute not related to the purposes of a park).

park purposes is made by the public itself and the strict construction for the private grant is not insisted upon.<sup>166</sup>

Moreover, the court provided examples of what it defined as “pleasure grounds.” It includes, “[m]onuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor, floral and horticultural displays, zoological gardens, playing grounds, and even restaurant and rest houses...”<sup>167</sup> The court’s holding therefore turned on the mission of the Institute, and concluded that its mission—to promote the understanding of safety and sanitation—does not advance this court’s definition of park purposes as pleasure grounds.<sup>168</sup>

The court’s decision has been influential in guiding future courts’ analyses of park and non-park purposes.<sup>169</sup> Cyane Gresham in her article, *Improving Public Trust Protections of Municipal Parkland in New York*, criticizes the *Williams*’ court for its failure to provide an adequate guide for future courts, given its failure to clearly define what purposes are park or non-park.<sup>170</sup> Gresham acknowledges that the *Williams* court lists specific examples of park purposes; her critique is that the court does not provide any concrete test or theoretical base for its distinctions between the park and non-park purposes.<sup>171</sup> This critique is accurate. The lack of a test or theoretical base for future courts leaves too much discretion for judges to determine arbitrarily what a park’s purpose is.<sup>172</sup>

A major problem with the definition provided by the *Williams* court is its failure to recognize how its definition would allow for park development without considering that a pleasure ground could easily exclude much of the public if the project was unaffordable.<sup>173</sup> For example, under the *Williams* analysis, a museum, zoo, or restaurant that charged high entrance rates could be constructed in a public park, which would fit the definition of a “pleasure ground”, but prevent access to much of the public, because it could be unaffordable.<sup>174</sup> The result would be a public park that charges an

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<sup>166</sup> *Id.* at 253.

<sup>167</sup> *Id.* at 253-54.

<sup>168</sup> *Id.* at 254.

<sup>169</sup> Gresham, *supra* note 34, at 276.

<sup>170</sup> *Id.* at 275.

<sup>171</sup> *Id.* at 276.

<sup>172</sup> See *795 Fifth Ave. Corp v. City of New York*, 40 Misc. 2d 183, 191 (finding the test for non-park use is “substantial satisfactions” to the general public); *SFX Entertainment, Inc. v. City of New York*, 297 A.D.2d 555, 555 (1st. Dep’t 2002) (finding a revocable license terminable at will cannot be a non-park purpose); *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.S.2d 623, 631 (finding a non-park purpose because of a 5-year long construction that inhibited use).

<sup>173</sup> See *Gallatin*, 229 N.Y. at 254.

<sup>174</sup> *Id.*

entrance fee. Unfortunately, this type of analysis has guided courts after *Williams*. Alternatively, this case could be analyzed as a violation of the public trust doctrine because the Institute's lease with the Park's Commission would have excluded the public from use of the Arsenal Building two days a week and at nights.<sup>175</sup> While the court did not explicitly mention the exclusion in its analysis, it did include relevant allegations from the petitioner's complaint, including that the lease would hinder the beneficial use by the public.<sup>176</sup>

Almost 45 years later the Court of Appeals again analyzed the public trust doctrine in the context of parkland, and like in *Williams* it concentrated its analysis on the type of facility being used for park purposes.<sup>177</sup> In *795 Fifth Ave. Corp v. City of New York*, the Court of Appeals held that a café-restaurant in the southeast corner of central park was a valid exercise of the Park Commissioner's discretionary power under section 51 of the General Municipal Law.<sup>178</sup> In 1959, the entrepreneur Huntington Hartford and Robert Moses began talks about constructing a "café operation" ("the café") in Central Park.<sup>179</sup> Mr. Huntington subsequently donated a sufficient amount of money to construct the café in the park.<sup>180</sup> In 1960 the Commissioner of Parks formally accepted the gift.<sup>181</sup> The plaintiff brought an action claiming that this sort of structure in the park was contrary to park purposes, alleging that the café operation would replace 22,000 square feet of parkland with a two-story rectangular glass building.<sup>182</sup> He claimed that the structure would remove foot paths, park benches, trees, and pave over existing lawn.<sup>183</sup> Lastly, he claimed that the restaurant would not be able to serve lower-income patrons who could not afford to eat there.<sup>184</sup>

The County Supreme Court found, and the Court of Appeals affirmed, that the claims were not proved at trial, and in fact the cafe would improve

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<sup>175</sup> *Id.* at 251.

<sup>176</sup> *Id.*

<sup>177</sup> *795 Fifth Ave. Corp v. City of New York*, 15 N.Y.2d 221, 225 ("Thus the case comes down to the choice of location and type of facility.").

<sup>178</sup> *Id.* (finding that section 51 of the General Municipal Law gives the Park's Commissioner broad discretion in managing public parkland and judicial interference should only be imposed when "a total lack of power" is demonstrated); New York City, N.Y., Charter, 21 Department of Parks and Recreation § 553 (2013).

<sup>179</sup> *795 Fifth Ave. Corp*, 15 N.Y. 2d at 224 (Robert Moses was the Park's Commissioner at the time and Huntington Hartford was a wealthy New Yorker).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *795 Park Ave. Corp. v. City of New York*, 40 Misc.2d 183, 184 (Sup. Ct. N.Y. Cnty. 1963).

<sup>183</sup> *Id.* at 184-85.

<sup>184</sup> *Id.* at 185.

park enjoyment, because the operation called for new footpaths, replaced benches, and provided lighting for bridges and ponds.<sup>185</sup> The court explained, “[the] transformation of parklands from their natural state to other park uses...does not involve a violation of park purposes. It merely involves a change from one proper park use to another.”<sup>186</sup> In its discussion of non-park use, the court articulates a “test”, which asks whether the proposed development “offers substantial satisfaction to the public.”<sup>187</sup>

The court further explained that when certain structures are placed in a park they provide a different and glorified aspect to that structure and therefore “offer substantial satisfaction to the public.”<sup>189</sup> 795 Park Ave., 40 Misc.2d at 191.] For example, people may attend a production in a traditional theater, but to see the same production in an open-air park theater has its own benefits and provides satisfaction to the public.<sup>188</sup> Likewise, a restaurant inside a park provides a special atmosphere that “offers substantial satisfaction” to the public.<sup>189</sup> Although inserting structures in a park can provide further enjoyment of the park, the court failed to consider significantly whether the entire public could enjoy these structures if they severely limit the accessibility of public parkland.<sup>190</sup> The court failed to adequately address the plaintiff’s claim that the café would be unaffordable to many and assumed without justification that any user would be able to receive the “substantial satisfaction” offered from a café in the park.<sup>191</sup> This begs the question of whose definition of substantial enjoyment the court should consider.

Further, the logic used by the court to assess “substantial satisfaction” makes little sense,<sup>192</sup> under which, anything short of a government building placed in a park will have an added benefit. A luxury apartment placed in a public park will also provide substantial satisfaction to certain members of the public, like a high-end restaurant, or a theater that charges substantial rates to attend.<sup>193</sup> Although, the court in 795 Fifth Ave, provides a more

<sup>185</sup> *Id.* at 187, *aff’d* 795 Park Ave. v. City of New York, 15 N.Y.2d at 225 (1965).

<sup>186</sup> *Id.* at 190.

<sup>187</sup> *Id.* at 191. Although the Court of Appeals affirmed the decision, it did not address whether the “substantial enjoyment” test articulated is a proper or improper test to be used. The Court of Appeals seemed to assume that a restaurant is a park purposes. *See* 795 Fifth Ave. Corp. v. City of New York, 15 N.Y.2d 221, 225-26 (1965).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 192 (describing testimony that from the architect of the pavilion that the restaurant kitchen could be used for any class of people).

<sup>191</sup> *Id.* (dismissing this complaint as speculative and advising to bring this complaint when the violation is “actual”).

<sup>192</sup> *Id.* at 191.

<sup>193</sup> This Comment does not argue that an amphitheater that remains free or affordable, or a restaurant that remains affordable should not be placed in a park. Rather it suggests

concrete test for future courts to follow, courts must consider more searchingly whether these developments offer “substantial” enjoyment to all, without limiting lower-income people’s access.<sup>194</sup>

More recently, the court has applied the public trust doctrine in two important cases, *Friends of Van Cortlandt Park v. City of New York* and *SFX Entertainment v. City of New York*. In *Friends of Van Cortlandt Park* the Court of Appeals held that the construction of a water treatment plant under Central Park, which would deprive the public of use of the area for five years, required legislative approval.<sup>195</sup> Here the court’s analysis turned on the temporal deprivation of the parkland.<sup>196</sup> The court found that the finished project would not impede the public’s use of the park, but the construction that would take at least 5 years to complete was a non-park purpose and therefore required legislative approval.<sup>197</sup> Here, the court’s holding focused on access, and could be expanded by future courts to apply to limitations on access based on the inability of some to afford the services.

The New York County Supreme Court in *SFX Entertainment* was the first to comprehensively incorporate the affordability of the project into its analysis, when it found that an amphitheater, which was not accessible to the public and charged a \$30 admission fee, did not serve a park purpose.<sup>198</sup> However, the First Department overturned the County Supreme Court’s ruling on this issue, and found that because the project was issued through a license instead of a lease it did not violate the public trust doctrine.<sup>199</sup> Although the First Department did not agree with the lower court’s conclusion and put a greater emphasis on the contractual arrangements, it did not completely overturn the lower court’s analysis.<sup>200</sup> The First Department affirmed the lower court in so far as it was permissible to open up the proposal process, and concentrated its analysis of the public trust doctrine primarily on the contractual arrangements.<sup>201</sup> This leaves the court’s factorization of inaccessibility based on income a proper

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that the court should analyze whether a project would have the effect to excluding or limiting lower-income folks from use of the park, instead of dismissing the argument as unripe for judicial review.

<sup>194</sup> 795 Park Ave. Corp. v. City of New York, 40 Misc. 2d 183, 191.

<sup>195</sup> *Friends of Van Cortlandt Park*, 95 N.Y.2d at 631-32.

<sup>196</sup> *Id.* at 631.

<sup>197</sup> *Id.* at 631-32.

<sup>198</sup> *SFX Entertainment, Inc. v. City of New York*, No. 50226(U), slip op. at 9 (N.Y.S.2d June 13, 2002).

<sup>199</sup> *SFX Entertainment, Inc. v. City of New York*, 297 A.D.2d 555, 555 (1st Dep’t 2002) (holding that the concession agreement was inconsistent with the original proposal and therefore appropriate to open the proposal process).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 556.

factor for future courts to use.<sup>202</sup>

The important take away from these recent cases is that the courts are acknowledging that income restrictions and accessibility should be part of the analysis when determining valid park purposes and non-park purposes.<sup>203</sup> To conclude, the history of the public trust doctrine provides a few major themes. First, it is clear that when parks are dedicated to the municipality they remain in trust for the public purpose.<sup>204</sup> Second, the park cannot be alienated or used for a non-park purpose without approval of the legislature.<sup>205</sup> Third, the court's analysis of park use and non-park use looks at whether the proposed use furthers the recreational aspect of the park,<sup>206</sup> whether it "offers substantial enjoyment"<sup>207</sup>, and whether temporally the park would substantially prohibit the public's use.<sup>208</sup> Fourth, only one overturned County Supreme Court articulated substantial interference with park accessibility by reason of limiting use based on inaccessibility because of income.<sup>209</sup> For parks to remain protected and for the benefit of the public, the court should follow the approach of the County Supreme Court in SFX and provide an income means-sensitive analysis to determine if the purpose actually serves the public.<sup>210</sup>

### *B. Competing Views of Public Trust Doctrine*

Commentators differ on the efficiency of the public trust doctrine. As noted, Gresham argues that the doctrine is insufficient because it lacks clear definitions of what is and is not a park use.<sup>211</sup> Gresham explains, "[the courts' definition of park uses] do not address the existing range of contractual activities in parks. They have been ignored, creating bad precedent and preexisting conflicting uses. Finally, they do not adequately define what is and is not a park".<sup>212</sup> She critiques New York courts for relying too heavily on the definition of park articulated in *Williams*, claiming that park uses adapt and change over time and therefore the parks

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<sup>202</sup> *Id.*

<sup>203</sup> See *SFX Entertainment, Inc.*, 2002 Sup. Ct. WL 1363372 at \*8.

<sup>204</sup> *Friends of Van Cortlandt Park*, 95 N.Y.2d at 631.

<sup>205</sup> *Id.* at 632.

<sup>206</sup> *Williams v. Gallatin*, 229 N.Y. 248, 253 (1920).

<sup>207</sup> *795 Park Ave. v. City of New York*, 40 Misc.2d 183, 191.

<sup>208</sup> *Friends of Van Cortlandt Park*, 95 N.Y.2d at 632.

<sup>209</sup> *SFX Entertainment, Inc. v. City of New York*, No. 50226(U), slip op. at 9 (N.Y.S.2d June 13, 2002).

<sup>210</sup> *Id.*

<sup>211</sup> Gresham, *supra* note 34, at 276.

<sup>212</sup> Gresham, *supra* note 34, at 282-83.

must, too.<sup>213</sup> Gresham suggests that the common law doctrine could provide more support if its definitions were more clearly stated and suggests that the legislature could easily flesh out such definitions.<sup>214</sup>

Gresham does not discuss whether the courts should use income level when analyzing non-park use, but she is clearly concerned with the move towards privatization of parks.<sup>215</sup> Gresham's analysis assumes trust in the state legislature to articulate guidelines that strengthen the common law doctrine, which it very well may be able to.<sup>216</sup> However, the state legislator representing a region outside of the city may be too removed from the concerns of municipal politics. The courts have more flexibility to consider the circumstances of each specific case, and any legislation strengthening the definitions of park/non-park purpose should be accompanied by a modification by courts to look at accessibility of parkland through the lens of an income means sensitive analysis.

Michael Seth Benn's Note, *Towards Environmental Entrepreneurship: Restoring The Public Trust Doctrine in New York*, argues for a reversion of the public trust doctrine to the public use doctrine articulated in eminent domain cases such as *Morris and Kelo v. City of New London*,<sup>217</sup> theorizing that this articulation would allow for free market environmentalism.<sup>218</sup> Benn also views the non-park/park use distinction as insufficient, because it lacks clear definitions.<sup>219</sup> However, Benn's analysis seeks to formulate a clearer definition in the form of, simply, whether the use would benefit the public as formulated in *Morris and Kelo*.<sup>220</sup> This definition would allow for more entrepreneurship in the park, and would reject the park use/non park use dichotomy, because it bars consideration of the best-valued use of the

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<sup>213</sup> *Id.* at 294 (“If New York courts are relying on *Williams v. Gallatin* as a definition of park purposes, then only one view of park purposes is being used as a basis for consideration.”).

<sup>214</sup> *Id.* at 317 (suggesting that state statutes could flesh out definitions and that the Rule of the City of New York already list prohibited activities, were definitions about park/non-use could easily be added).

<sup>215</sup> *Id.* at 314 (posing the question “are parks still democratic spaces if wealthy citizens have nice parks and poor citizens do not?”).

<sup>216</sup> *See id.* at 316.

<sup>217</sup> *Yonkers v. Morris*, 37 N.Y.2d 478, 482 (finding that economic development in an underdeveloped area constituted a public purpose); *Kelo v. City of New London*, 545 U.S. 469, 478-79 (holding that economic development was a proper public use under the Fifth Amendment's Takings Clause).

<sup>218</sup> Benn, *supra* note 134, at 226-27 (free market environmentalism theorizes that the free market is better equipped to protect the environment than governmental regulation because the environment is an asset that the free market will protect).

<sup>219</sup> *See id.* at 203-04.

<sup>220</sup> *See id.* at 229-30.

parkland.<sup>221</sup>

Benn's analysis does not adequately consider the purpose of the public trust doctrine, which is to limit private control of space for the public's interest.<sup>222</sup> The public trust doctrine was originally established for the purpose of preventing private owners from inhibiting the public's use.<sup>223</sup> The public trust doctrine is about the government exerting its police power to preserve land for specific purposes, however, this is different than its power to take "private property for public use."<sup>224</sup> Additionally, under Kelo, "economic development" is a permitted public use for a takings, however, entrepreneurship in parks can severely limit the public's enjoyment of the park, which is a fundamental principle of the public trust doctrine.<sup>225</sup> Instead, the non-park/park use distinction should be defined more clearly along the lines of keeping parks accessible to the entire public.

Lastly, in his practice report, Five Innovative Idea for Funding Parks and Open Space, Christopher Rizzo, a practitioner with Carter Ledyard & Milburn LLP, articulates the crisis facing public parks and provides advice for moving toward more privatization of parks.<sup>226</sup> Rizzo explains that parks can employ different models, dedications, and functions to promote commercial use in public parks.<sup>227</sup> Rizzo's analysis provides guidance to these parks so that they remain well funded, and is not intended to focus on the public's access to parkland.<sup>228</sup> He views commercial use and private/public partnerships as the most effective way to maintain parks, and argues that the better maintained the park, the better it is for the public.<sup>229</sup> However, Rizzo does not take into consideration the fact that commercial use risks limiting access to the parks on the basis of income and resources, because private/public partnerships typically need to use parkland to raise money for park maintenance, which entails hiring personnel, and other necessary capital improvements to fit their idea of a park.<sup>230</sup>

The analysis developed in this Comment is most compatible with Gresham's approach. The public trust doctrine does not provide adequate

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<sup>221</sup> *Id.* at 228 (arguing that a Taking Clause "public use" definition will promote entrepreneurship in public parks, creating a more financial support and environmentalism).

<sup>222</sup> *See* Shively v. Bowlby, 152 U.S. 1, 13 (1894).

<sup>223</sup> *Id.*

<sup>224</sup> Sax, *supra* note 140, at 479 (discussing the problems with formulating the public trust doctrine around the takings clause).

<sup>225</sup> *See id.* at 476-78.

<sup>226</sup> Rizzo, *supra* note 21, at 1.

<sup>227</sup> *Id.* at 8-10.

<sup>228</sup> *See id.*

<sup>229</sup> *See id.* at 8.

<sup>230</sup> *See* Swan, *supra* note 25 (discussing how a private restaurant in Union Square would charge high prices and take away from the historic use of the park as a place for community and political speeches).

protections to the public enjoyment and access to parkland, nor does it provide adequate definitions so that courts can effectively limit the use of parkland from non-park uses.<sup>231</sup> This comment adds to Gresham's analysis that the test needs to include more attention to keeping parkland accessible to the public, irrespective of means or income levels, and more accountability to local politics in order to effectively provide these protections. The following section will provide suggestions for maintaining parks as open and accessible to all, including how the public trust doctrine can better serve as a protection for all to enjoy public parks.

#### IV. WHAT CAN BE DONE TO PROTECT OUR PARKS

The first step to creating equity of parks access is to increase the Parks Department's budgets.<sup>232</sup> Although the budget has increased over the past few years with the 2013 fiscal year targeted increase at approximately 28 million,<sup>233</sup> and advocates viewed the funding year 2015 preliminary budget with optimism,<sup>234</sup> the Parks Department is still inadequately funded.<sup>235</sup> A larger budget allows parks to make necessary improvements and properly maintain parks, without relying on private funding or entrepreneurship in parks.<sup>236</sup> Parks can therefore plan for and permit amenities that are accessible to all, because its focus can be on providing its services without concerns about funding.<sup>237</sup>

In addition, the Court of Appeals must set a well-defined test for

<sup>231</sup> See Gresham, *supra* note 34, at 316, 317.

<sup>232</sup> Tupper Thomas, Op-Ed., *Park Equity Begins with a Better Public Budget*, GOTHAM GAZETTE (Apr. 17, 2014), <http://www.gothamgazette.com/index.php/opinions/4970-park-equity-new-york-budget-tupper-thomas>.

<sup>233</sup> Press Release, New Yorkers for Parks, New Yorkers for Parks Commends City Council, Mayor for Increases to Parks Department Budget (July 6, 2012), *available at* <http://www.ny4p.org/advocacy/advocacypdf/budget062912.pdf>.

<sup>234</sup> FY15 Preliminary Budget: Hearing Before the New York City Council Committee on Parks and Recreation (Mar. 27, 2014) (testimony of Tupper Thomas, Executive Director, New Yorkers for Parks), *available at* <http://www.ny4p.org/advocacy/Prelim%20budget%20march%202014.pdf> ("the mayor's preliminary budget for Parks not only baselines many of the important restorations made over the past few years, but funds items up front that are usually subject to the annuals budget dance.").

<sup>235</sup> *Equity in Parks: Hearing Before the New York City Council Committee on Parks and Recreation* (Apr. 23, 2014) (testimony of Daniel Squadron, New York State Senator), *available at* [http://www.nysenate.gov/files/pdfs/Squadron%20Parks%20testimony%2004.23.14%20\(1\).pdf](http://www.nysenate.gov/files/pdfs/Squadron%20Parks%20testimony%2004.23.14%20(1).pdf).

<sup>236</sup> See Press Release, *supra* note 235.

<sup>237</sup> See *id.* (discussing the benefits that come from increased governmental funding to parks).

determining park/non-park purposes that incorporates general accessibility of the public into its analysis of the public trust doctrine.<sup>238</sup> This Comment suggests a two-part test that is aligned with New York's precedent. First, courts should consider, as they have been, whether the proposed development functions for the typical uses appropriate for that park.<sup>239</sup> Under this step, the court should look at where the park is located, what prior functions the park has served, and should also consider the multiple and expanding functions of parks beyond the "pleasure ground" function articulated in *Williams*.<sup>240</sup> Second, the court should turn to whether the use will provide substantial benefits to all New Yorkers' use of the park.<sup>241</sup> Under this part, the court should take a hard look at any proposed agreement between the state and private venture to assure that the proposed benefit will be accessible to all.<sup>242</sup> This analysis should look at entrance fees and times of operation for the entire public.<sup>243</sup> Additionally, this analysis should consider whether the park is adequately separated from residential apartment buildings, because when residential apartment buildings are not separated from parkland the park essentially becomes a "backyard" of sorts for the residents, thereby excluding the public.<sup>244</sup> The Court's analysis must also consider a new test in light of the expanding privatization of public space, and the methods used to subvert the public trust doctrine.<sup>245</sup> For example, the court should not permit a General Project Plan to disregard the original agreement.<sup>246</sup>

Further, there must be more deliberate democracy included in the decision making process for park purposes.<sup>247</sup> When a court concludes that a venture is considered a non-park purpose, an arduous process is in place, requiring a "home rule request", and triggering the ULURP and SEQRA processes.<sup>248</sup> The ULURP protections are not required when a park purpose

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<sup>238</sup> See *supra* text accompanying notes 131-65.

<sup>239</sup> See *Williams v. Gallatin*, 229 N.Y. at 253 (discussing parks as a pleasure ground); Kusisto, *supra* note 125 (discussing the principles of the public trust doctrine).

<sup>240</sup> Gresham, *supra* note 34 at 294-297 (discussing the different park uses, such as its use as a "rural pastoral landscape," a "center for active recreation," a "social and political commons," and a "nature conservation."); see *Williams v. Gallatin*, 229 N.Y. at 253.

<sup>241</sup> See *Sax*, *supra* note 140, at 476; see also *SFX Entertainment, Inc. v. City of New York*, 2002 WL 1363372 at \*9 (Sup. Ct. N.Y. Cty. 2002).

<sup>242</sup> See generally *795 Park Ave.*, 40 Misc. 2d at 192 (discussing whether the restaurant would only provide luxury food and drink services).

<sup>243</sup> See *supra* text and accompanying notes 50-65.

<sup>244</sup> See *supra* text and accompanying notes 79-92.

<sup>245</sup> See *supra* text and accompanying notes 50-65.

<sup>246</sup> See *supra* text and accompanying notes 79-92.

<sup>247</sup> See *supra* note 36 and accompanying text.

<sup>248</sup> See *supra* note 140 and accompanying text.

is present,<sup>249</sup> and the SEQRA process may or may not be required.<sup>250</sup> Therefore, situations such as GoogaMooga can take place without any accountability to the community surrounding the park.<sup>251</sup> A process of deliberative democracy would allow for community members to deliberate on whether a festival, or other venture where a revocable license is used, would be something that they want in their park.<sup>252</sup> Additionally, this type of process would allow Park officials to explain and potentially justify the necessity of having the proposed venture, thereby eliminating community backlash afterwards. For example, there are some small projects that have sought to create public spaces outside of the marketplace and have been showcased in *Spontaneous Interventions: Design Actions for the Common Good*.<sup>253</sup>

This Comment will conclude by making the connection to another major issue facing parks today – the disparity of parks in affluent neighborhoods compared to lower-income neighborhoods.<sup>254</sup> The decrease in the Parks Budget and the rise of conservancies and privatized models has allowed parks in affluent neighborhoods to flourish and parks in lower-income neighborhoods to deteriorate.<sup>255</sup> The privatization of our parks has contributed to this in two major ways. First, a privatized model, such as a conservancy, allows for affluent areas to concentrate their wealth on preserving the parks in their “backyards” without accounting for any broader municipal structure.<sup>256</sup> For example, Logan Paulson has been scrutinized for his \$100 million donation to Central Park in 2012.<sup>257</sup> The Conservancy model has worked for parks in affluent neighborhoods, but when a neighborhood does not have ultra-wealthy individuals to donate for

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<sup>249</sup> Contra Uniform Land Use Review Procedure NY Code § 197-c (1990), available at [http://www.nyc.gov/html/dcp/html/ap/step5\\_rules.shtml](http://www.nyc.gov/html/dcp/html/ap/step5_rules.shtml).

<sup>250</sup> Contra State Environmental Quality Review § 617 (2000) (depending on the park purpose activity it may be required to SEQRA if it has a significant impact on the Environment).

<sup>251</sup> See *supra* text accompanying notes 1-22.

<sup>252</sup> See *supra* note 36 and accompanying text.

<sup>253</sup> Ulam, *supra* note 71.

<sup>254</sup> Testimony of Daniel Squadron, *supra* note 237.

<sup>255</sup> *Id.*

<sup>256</sup> See David J. Kennedy, *Restraining the Power of Business Improvement Districts: The Case of The Grand Central Partnership*, 15 YALE L. & POL’Y REV. 283, 307 (1996) (arguing that BIDs will decrease wealthy individuals’ willingness to tolerate other taxes and that if we allow communities to fund their own neighborhoods then the broader municipal picture may become ignored).

<sup>257</sup> Felix Simon, *Philanthropic Donation of the Day, John Paulson Edition*, REUTERS, Oct. 23, 2012, available at <http://blogs.reuters.com/felix-salmon/2012/10/23/philanthropic-donation-of-the-day-john-paulson-edition/> (criticizing philanthropy as a way for the wealthy to donate to services that support them, when tax payers have the burden of paying for much of the donation because of charitable deductions).

the maintenance of its parks then it suffers.

Second, parks in lower-income neighborhoods rely more on extravagant development projects than ones in wealthier neighborhoods.<sup>258</sup> For example, a new megamall has recently been approved in Flushing Meadow Park followed by a lawsuit claiming it violates the public trust doctrine.<sup>259</sup>

The best way to relieve these problems is with more public funding to the Parks Department. A better-funded Park Department would eliminate the “necessity” of privately funded parks and the issues that ensue. Daniel Squadron, in his recently proposed bill has attempted to alleviate this inequality by distributing 20 percent of private donations to parks in affluent areas to parks in lower-income areas.<sup>260</sup> This bill is a step in the right direction and assists in promoting the well-being of parks in lower-income neighborhoods. The bill, however is still a part of the city’s increased reliance on social charity and does not solve the underlying problems that come with the privatization of parks, such as limiting access and disparities between parks in affluent neighborhoods and lower-income ones.<sup>261</sup>

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<sup>258</sup> See Cathryn Swan, *Privatization of the Commons in Mayor Bloomberg’s New York*, THE HUFFINGTON POST, Apr. 15, 2013, available at [http://www.huffingtonpost.com/cathryn-swain/privatization-of-the-comm\\_b\\_3077292.html](http://www.huffingtonpost.com/cathryn-swain/privatization-of-the-comm_b_3077292.html) (discussing the major developments of Maconbs Dam Park and John Mullaly Park in the Bronx to build Yankee Stadium).

<sup>259</sup> Peter C. Mastosimone, *Suit Challenges Legality of Flushing Meadows Mall Plan in Queens*, QUEENS CHRONICLE, Feb. 10, 2014, available at [http://www.qchron.com/editions/north/suit-challenges-legality-of-flushing-meadows-mall-plan-in-queens/article\\_a0dc7a-92a9-11e3-b931-001a4bcf887a.html](http://www.qchron.com/editions/north/suit-challenges-legality-of-flushing-meadows-mall-plan-in-queens/article_a0dc7a-92a9-11e3-b931-001a4bcf887a.html).

<sup>260</sup> Squadron, *supra* note 237.

<sup>261</sup> Dana Neacsu, *A Brief Critique of the Emaciated State and its Reliance on Non-Governmental Organizations to Provide Social Services*, 9 N.Y. CITY L. REV. 405, 406 (2006) (discussing the ways that privatization leaves previously government provided social services eroded and has a greater negative impact on the social and gender minorities).