Village of Mamaroneck

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TO: Mayor Murphy and the Board of Trustees
Jerome Barberio, Village Manager
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FROM: Robert A. Spolzino, Esq.

RE: Sportime/Alienation of Parkland

DATE: April 2, 2019

You have asked me to address whether the license agreement authorizing the presence of the Sportime facility in Harbor Island Park as presently licensed is an impermissible alienation of parkland that violates the common law public trust doctrine. For the reasons that follow, my conclusion is that it does.

The public trust doctrine prohibits the use of parkland for private purposes unrelated to the park without the approval of the state legislature. It was for this reason, as the Board may recall, that legislation was required to allow Westchester County to construct a utility building necessary for the sewage treatment facility adjacent to the park. There are three issues that have to be addressed in order to determine whether a particular use violates the public trust doctrine. First, is the land on which the use is to be located a park? Second, do the rights given the user constitute an alienation? Third, is the alienation impermissible without legislative approval?

There does not appear to be any question about the first issue here. I have not researched the history of Harbor Island Park or identified the act by which it came to be designated as a park, but that is not necessary to determine this issue. Harbor Island Park became a park for these purposes as soon as it was owned by the Village and used for park purposes. See *Chateau Rive Corp. v. Enclave Dev. Associates*, 22 A.D.3d 447 (2d Dep't 2005).

There is also little doubt about the second issue. An agreement that grants only a temporary personal privilege is a license. See *Lordi v. Nassau County*, 20 A.D.2d 658 (2d Dep't 1964). An agreement that grants rights more extensive than a temporary use is an alienation. The fact that the agreement with Sportime is denominated a "license," rather than a "lease" is immaterial. "A document calling itself a 'license' is still a lease if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy that land." *Miller v. City of New York*, 15 N.Y.2d 34 (1964). The actual rights that are granted control. Here, Sportime has exclusive use of a specific are in the park for a fixed term, pays rent based on a percentage of gross receipts and built its facility at its expense. Those are the precise elements that caused the Court of Appeals in *Miller* to find the "license

agreement" allowing the licensee to construct a golf driving range and accessory buildings in a public park to give rise to an alienation.

The third issue, whether the alienation is impermissible depends upon the specific factual circumstances.

Uses consistent with a park and available to the general public are permissible without legislative approval. See *Union Square Park Community Coalition, Inc. v. New York City Dep't of Parks and Recreation*, 22 N.Y.3d 648 (2014) (restaurant); *795 Fifth Ave. Corp. v. City of New York*, 15 N.Y.2d 221 (1965) (restaurant); *Long Island Pine Barrens Society v. Suffolk County*, 159 A.D.3d 805 (2d Dep't 2018) (commercial horse boarding and equine activities, including "u-pick," hay rides and crop mazes); *Matter of City Club of New York v. Hudson River Park Trust*, 142 A.D.3d 803 (1st Dep't 2016) (performing arts facility where "51% of the performances [must] be free or low cost"); *Friends of Petrosino Square v. Sadik-Khan*, 126 A.D.3d 470 (1st Dep't 2015) (bike share station); *Matter of Mansour v. County of Monroe*, 1 A.D.3d 976 (4th Dep't 2003) (license for seasonal light show in park); *Committee to Preserve Brighton Beach v. Planning Commission*, 259 A.D.2d 26 (1st Dep't 1999) ("charging a fee for some of the services provided by the facility does not negate the overall recreational purpose of the concession"); *Port Chester Yacht Club, Inc. v. Village of Port Chester*, 123 A.D.2d 852 (2d Dep't 1986) (yacht club on public dock could be permissible if public access "is sufficient to characterize the lease as one which serves 'public purposes'"); *Blank v. Browne*, 217 App. Div. 624 (2d Dep't 1926) (lease of property adjacent to a public beach for parking, but not "purveying," other than gasoline).

Uses that are not closely related to public use of the park are not permitted. See *Matter of Avella v. City of New York*, 29 N.Y.3d 425 (2017) (shopping mall); *Capruso v. Village of Kings Point*, 23 N.Y.3d 631 (2014) (pistol range for local police and storage for highway materials and supplies); *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623 (2001) (aboveground disturbance of park for five years for construction of subsurface water treatment plant); *Lake George Steamboat Co. v. Blais*, 30 N.Y.2d 48 (1972) (lease of public dock space on Lake George for sightseeing boats); *Williams v. Gallatin*, 229 N.Y. 248 (1920) (museum and library in Central Park); *Kenny v. Board of Trustees*, 289 A.D.2d 534 (2d Dep't 2001) (private assisted living facility); *Johnson v. Town of Brookhaven*, 230 A.D.2d 774 (2d Dep't 1996) (private cottages); *Matter of Ackerman v. Steisel,* 104 A.D.2d 940 (2d Dep't 1984) (storage of snow removal equipment); *Williams v. Hylan*, 223 App. Div. 48 (1st Dep't 1928) (candy and cigar store with luncheonette in Battery Park); *People ex rel. Swan v. Doxsee*, 136 App. Div. 499 (2d Dep't 1910) (lease of dock space for ice house used in fish wholesaling business).

Here, the agreement with Sportime gives it an "exclusive license . . . to operate a recreational facility" in the designated area of Harbor Island Park. Sportime pays an annual license fee equal to 10 percent of its gross sales or a designated minimum annual license fee, whichever is less. The agreement provides that "Licensee will construct and operate the Premises as a 'Family Tennis and Multi-Sport Club' offering individual and family memberships along with a wide variety of leagues and instructional programs for adults and children." It establishes a fee schedule that is somewhat ambiguous but appears to allow Sportime to establish a pricing structure for 2002-2003, with limits on increases thereafter. The fee schedule sets a separate membership rate for residents and requires that residents receive a 10 percent discount on all fees other than membership. The agreement further requires as follows:

> Licensee shall provide free group lessons to children, below the age of 18 who are residents of the Village, during the outdoor tennis season, and free introductory clinics year-round. Licensee shall offer a "scholarship program providing instruction, practice and facility use to children below the age of 18

> who demonstrate financial need. The Village and the Licensee shall establish a procedure to qualify residents for the scholarship program. The Village shall administer the qualification of residents for the scholarship program.

It is unclear from Sportime's website whether it is complying with these requirements.

Applying the applicable precedent to the particulars of Sportime's agreement, it is my opinion that a court would find that the agreement constitutes an impermissible alienation of parkland. The use is primarily private and for profit, the public is generally excluded and the public benefits the agreement requires Sportime to provide are minimal. A privately-managed tennis facility could certainly be permissible in the park, but it would have to be operated in such a manner that the public use is primary and the private use is secondary. That is not the case here.

Finally, the fact that Sportime has been located in the park for many years does not insulate its use from challenge. Because the unlawful use of the park is a "continuing wrong," there is no statute of limitations. See *Capruso v. Village of Kings Point*, 23 N.Y.3d 631 (2014).

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