Ensuring the Permanence of Parks and Other Public Open Space

Safeguards for Lands Entrusted to Local Government

What legal principles provide the means to reasonably protect parks and other public open spaces? What can local governments do to best ensure that these principles can be successfully applied to any particular property? This guide addresses these questions in the interest of minimizing misunderstandings and conflict regarding public lands, helping local governments take informed action for the public's benefit, and educating all interested parties regarding the nature of protections provided to public lands under the law.

WeConservePA

Introduction

For well over two centuries, Pennsylvanians have relied on parks, squares, and other community open spaces held and stewarded by local government for the benefit of the public. Every day in the Commonwealth, people make decisions on where to live and work based on proximity to these public lands, which they see as reliable places for fun, comfort, and rest. People expect that these places will always be there for them.

Is this expectation realistic? To a substantial extent, yes, but not always.

For those seeking to ensure the permanence of parks and other open spaces, there is good news; the law provides meaningful avenues to ensure the public's interest in these special places. The Pennsylvania Constitution, Pennsylvania statutory law, and Pennsylvania common law interlock in defense of the public's interest in public and natural spaces and resources and task state and local governments with their faithful stewardship.

These protections, while meaningful, are not absolute. Gray areas exist within and between these legal doctrines. This leaves governing bodies at risk of making badly mistaken assumptions that they are free to use or dispose of land, and thus pursue actions and incur considerable cost,

only to be challenged by citizens who feel that the governing body has no such freedom. These gray areas and disputes might only be resolved through the courts—an expensive pathway for addressing a problem easily avoidable with a modicum of advance planning.

This guide seeks to enhance public understanding of the applicable legal standards and to encourage proactive measures that may prevent the need for litigation to resolve disputes. Further, this guide seeks to arm local governments with the information they need to establish unambiguous protections, specify exceptions (if any), and establish clear understandings of appropriate and inappropriate uses regarding any parcel under their ownership or control.

The simplest, most straightforward course a local government can take to ensure the permanence of parkland and open space acquired by it is to make intentions clear in a recorded instrument. Dedicating the land to a particular set of purposes—such as by executing a formal declaration of public trust—provides clarity and assurance to the public while affording government leaders an opportunity to clearly state any pertinent limitations.

This guide begins by exploring key protections afforded to public land under Pennsylvania law:

- The common law public trust doctrine;
- The Donated or Dedicated Property Act;
- Article 1, Section 27 of the Pennsylvania Constitution, referred to as the Environmental Rights Amendment (the "ERA"); and
- The common law doctrine of equitable estoppel;

It then recommends procedures and tools, specifically the suite of model declarations of public trust published by WeConservePA, that help local government leaders advance the public's interest in these special places.

Legal Doctrines

Numerous legal doctrines and statutes protect the public's interest in parks and open spaces. This section will provide an overview of each, some additional relevant legal concepts, and a summary of their interplay.

Common Law Public Trust Doctrine

Public trust doctrine in the U.S. was adopted from the English common law: the Crown held title to submerged lands in tidal waters, ensuring open navigation. The Crown was said to hold the lands "in trust" or for the benefit of the public. When the colonies broke from England, ownership of submerged lands passed to the states.

Given the differences in English and American geography, the American rule expanded the scope of the public trust to include fresh waters on which commerce occurred. This typically included land up to the high-water mark. The doctrine has evolved in different ways across the United States.

In Pennsylvania, this evolution took form largely within the legal concept of "dedication," which was understood as an informal form of conveying real estate in favor of the public.[1] Courts applied the doctrine to property that was (1) dedicated for public use and (2) accepted by the public for that use. Dedication and public acceptance could both be accomplished informally, even by implication. As summarized in the 1950 case *Hoffman v. City of Pittsburgh,* "a municipality has no implied or incidental authority to [sell], or to dispose of for its own benefit, property dedicated to or held in trust for the public use or to extinguish the public uses in such property, nor is such property... or proceeds of sale thereof available for the payment of the debts of the municipality."[2]

The 1915 Pennsylvania Supreme Court case *Board of Trustees of Philadelphia Museums v. Trustees of the University of Pennsylvania*,[3] which has come to be cited as the

[1] Dedication in Pennsylvania, Earl H. Parsons, Dickinson Law Review, Volume 53, Issue 1.

[2] Hoffman v. Pittsburgh, 75 A.2d 649 (Pa. 1950).

[3] Board of Trustees of Philadelphia Museums v. Trustees of the University of Pennsylvania, 96 A. 123 (Pa. 1915).

leading case on the common law public trust doctrine in Pennsylvania, stemmed from a dedication by the City of Philadelphia of public land for a museum and botanical gardens, and a subsequent attempt to repeal the dedication and sell the property to a private institution. The Pennsylvania Supreme Court observed that the property was unequivocally "set apart . . . for the purpose of being improved for the health and public welfare" of the citizens. The expenditure by the City of public funds on the property, together with actual public use, demonstrated a complete dedication and acceptance. Accordingly, the Court held that dedication and acceptance:

> estops the city from interfering with or revoking the grant. . . . So long at least as the property and buildings occupied by the museums continue to be used for that purpose in good faith, the city is without power to alienate the property and thus interfere with its prior appropriation or dedication to public use.

Note that the phrase "public trust" has been adopted by courts (often applied retroactively to older dedication cases[4]) to describe the obligations that arise from dedication of property to public use. In this context, the term "trust" is not typically used in its technical sense,[5] but as a descriptor of the status of property interests that, while titled to a government entity, are equitably owned by the people collectively.

Donated and Dedicated Property Act

In 1959, the Pennsylvania General Assembly passed the Donated or Dedicated Property Act (the "DDPA").[6] The DDPA applies to all real estate interests donated to political subdivisions[7] for use as public facilities or dedicated for public use, whether or not there is a formal record of the political subdivision's acceptance of the dedication.[8]

The DDPA defines "public facility" to mean "without limitation any park, theatre, open air theatre, square, museum, library, concert hall, recreation facility *or other public use*." The inclusion of "or other public use" suggests that the exact bounds of property interests and uses protected by the DDPA are flexible. While a series of cases has tested the boundary, future cases are likely to provide additional clarity.

Relationship between DDPA and Common Law

Because courts understand the DDPA to "incorporate the salient common law principles" of the public trust doctrine, they look to common law cases for guidance when deciding DDPA issues.[9] However, as statutory law, the DDPA takes precedence over the common law doctrine if the two come into conflict.

One clear example of where the DDPA expands upon the common law doctrine is in the formalization of process and standards for governments seeking relief from public trust requirements. Relief is possible where the original use for which the land was donated or dedicated "is no longer practicable or possible and has ceased to serve the

[4] For example, the phrase "public trust" appears nowhere in the opinion *Board of Trustees of Philadelphia Museums* despite frequent citation to that case as exemplifying the concept.

[5] A conventional trust, whether private, charitable, or otherwise, is a specific type of legal arrangement, typically regulated by state law, whereby a trustee assumes a fiduciary responsibility to administer trust property on behalf of one or more trust beneficiaries. Extensive legal formalities attach to a conventional trust that have no clear place in the common law public trust doctrine.

[6] Act of December 15, 1959, P.L. 1772, 53 P.S. §§3381-3386

[7] A political subdivision commonly refers to a county, city, township, or other municipality having legislative powers.

[8] In re Erie Golf Course, 992 A.2d 75 (Pa. 2010).

[9] *Jackson* at 1086. "Section 3383's restriction of a municipality's power to unilaterally change the purpose for which property has been dedicated to the public trust is a codification of a bedrock tenet of the common law public trust doctrine, which is that a municipality cannot revoke or destroy, after dedication and acceptance, the right of the public to the exclusive use of the property for the purpose designated." In re Borough of Downingtown, 161 A.3d 844, 877 (Pa. 2017) (internal quotations omitted).

public interest."[10] If a local government believes this is the case, it may apply to the county court of common pleas (in some counties the orphans' court) for relief. If it does so, the DDPA provides that residents have the right to defend the public trust before the court.

If the municipality can demonstrate that the property has ceased to serve the purpose to which it was dedicated, it will be required to replace the lands leaving the public trust with property of equal size and value for the same purpose or to use any proceeds of sale for the same purpose. In other words, the municipality cannot sell off a park to raise cash for just any purpose; proceeds would have to be directed back into acquiring new parkland.

If the use of a public facility no longer makes sense anywhere, the DDPA provides for application of the proceeds to other public purposes.

Relationship between DDPA and state-imposed restrictions

Many county and local municipal park properties are subject to restrictive covenants limiting use of the land to recreation and conservation purposes, the covenants having been imposed as a condition of the local government receiving state grant funds for acquisition and development of the land. The statutes authorizing these grants and requiring these restrictive covenants also establish mechanisms for the state to release the restrictions. The question had existed as to whether the state's release of restrictions eliminated the need to follow the requirements and approval process set forth in the DDPA for removing land from the public trust. This question was answered in 2017, at least in regard to properties that benefited from grants under the Project 70 Land Acquisition and Borrowing Act. The Pennsylvania Supreme Court found that the Pennsylvania General Assembly's approval of the release of restrictions did not obviate the application of the DDPA.[11]

What constitutes a dedication?

Consistent with common law principles, the DDPA applies to formal and informal dedications. The Pennsylvania Supreme Court has affirmed that "[d]edication may be found in a single act, such as the giving of a deed or the recording of a plan, or it may be found from a series of acts, all consistent with and pointing to the intention to dedicate."[12] The statute provides no hard and fast rules. Each court will weigh the facts and make its own judgment. Factors suggesting that an informal acceptance has occurred include the posting of park signs, the referencing of the land as a "park" in municipal publications, the installation of park facilities, or the offering of park programs on the land. Any one of these or other factors could be enough—or not. Again, each court will have its own view.

For example, in *In Re: Petition of the Township of Jackson*,[13] which involved a township attempt to divest land it believed to be unsuitable as parkland, there had been no explicit expression of dedication by the township, and no development any public recreational facilities. However, the township had approved a subdivision plan showing a reserved parcel as a proposed public park, subsequently accepted title with the language "forever as a public park" written in the deed, included the park in its recreation plan, and budgeted for recreational development. The Commonwealth Court affirmed that that pattern of conduct was sufficient to constitute a dedication.

When is property no longer being used for the public purpose for which it was dedicated?

The protection of the DDPA is robust and reaches any instance where the public purposes to which land is dedicated are subordinated to a different use. Caselaw has provided a series of useful principles.

It is the type of use, not the scale, that matters.
In several cases, Pennsylvania courts have affirmed that it is the *fact* of a change in use, not the *scale* of the change,

[10] DDPA at §§3384.
[11] *Downingtown* at 874.
[12] *Downingtown* at 856.
[13] In Re: Petition of the Township of Jackson to Sell Lot 107, Wheatland Manor, 280 A.3d 1074 (Pa. Commw. Ct. 2022).

that counts.[14] For example, the Commonwealth Court held that the leasing of a .428-acre portion of a 200-acre tract of parkland for erection of a cellular tower was a sufficient change in use to permit residents to state a cause of action under the DDPA.[15]

The DDPA captures partial interests in real estate.

The leasing or granting of other partial interests in land dedicated to a public purpose are prohibited by the DDPA. The leasing of land for a cell tower in the preceding section was one such example.[16] Similarly, when a municipality sought to grant easements over a portion of a public park to allow stormwater discharge by a private developer, the Pennsylvania Supreme Court determined that the municipality was subordinating the public purpose to which the land was dedicated to a private purpose, triggering DDPA review. [17]

The DDPA applies to all changes in use, whether the new use is of a public or private nature.

Public uses are also proscribed if inconsistent with the purpose to which land was dedicated. While a municipality may have wide latitude to read specific compatible uses into a general dedication (basketball courts, monuments, libraries, and conservatories may all be consistent with a "public park" dedication), not all public uses are permissible.[18] Where a municipality sought to build a firehouse on a portion of land dedicated as a public park, the Commonwealth Court held that such use is not reasonably compatible with parkland.[19]

What are the standards for "impracticability"?

To obtain relief from the DDPA restrictions, a government must demonstrate that the purpose for which the land was donated or dedicated "is no longer practicable or possible and has ceased to serve the public interest."

A showing that the land (or funds derived from its sale) is needed for another valid public purpose is not sufficient.

The DDPA prevents leaders from tapping the trust contents for even the most pressing competing public purposes. In *In re Estate of Ryerss*, a municipality sought to allow expansion of a privately-operated healthcare facility onto neighboring public parkland, arguing prohibition of the expansion could result in the closure of the facility. The Commonwealth Court acknowledged the stakes of the scenario, but blocked the effort under the DDPA, affirming that the question is strictly "whether the original use has '*ceased* to serve the public interest,' not whether another use would *better* serve the public interest."[20] The Court went further, explaining that the policy considerations go far beyond the subject parkland. To permit balancing of park permanence against competing, legitimate public purposes, "every donated park in the Commonwealth would be at risk of being leased so that cash-strapped municipalities could balance their budgets.... [I]t would likely discourage individuals from donating their property to be used for public purposes in the future."

The result is the same where a government entity seeks to sell off property to fund improvements to other facilities of the same type. In *Jackson*, the Court cited *Ryerss* in

[14] Borough of Ridgway v. Grant, 425 A.2d 1168 (Pa. Commw. Ct. 1981) ("The size of the area used is not the critical factor. It is the nature of the use that governs.") .

[15] White v. Township of Upper St. Clair, 799 A.2d 188 (Pa. Commw. Ct. 2002).

[16] *White* at 195 ("Not only is the sale of dedicated public land prohibited, so is the lease of dedicated public land. A municipality has been found to lack authority to lease dedicated public property to private concerns where the lease would be inconsistent with the terms of the dedication.").

[17] *Downingtown* at 877.

[18] "Indeed, under Pennsylvania law, the Township's obligation to uphold the dedication is absolute, not discretionary. A political subdivision lacks authority to assent to the use of public land for any purpose—even a public purpose—other than the intended purpose, no matter how exigent the circumstances." White v. Township of Upper St. Clair, 799 A.2d 188, 195 (Pa. Commw. Ct. 2002).

[19] See *Borough of Ridgway*.

[20] In re Estate of Ryerss, 987 A.2d 1231 (Pa. Cmmw. Ct. 2009).

rejecting an argument that the public interest would be better served by selling the subject undeveloped park, and allocating its funding toward improvements to parks elsewhere in the township, even if the result would serve a "wider group of residents."[21]

A lack of funds to develop recreational facilities is not sufficient.

In some instances, implementing the use to which land was dedicated may prove more difficult or costly than anticipated. Courts interpret the public "use" to which the property was dedicated broadly—not limited to the specifics of an initial plan. For example, in *Jackson*, a municipality cited "heavy vegetation and steep slopes" and the resultingly high development costs as reasons why the dedication of a parcel to recreational purposes had become impracticable.[22] The court cited the dictionary definition of "recreation" ("refreshment of strength and spirits after work" or "a means of refreshment or diversion") in finding that the land was still adequate for recreational use, even if left in its undeveloped state.[23] The court also noted that the DDPA plainly applies to "unimproved" land: "That Lot 107 has been sitting vacant and unimproved does not change the nature of its dedication to a recreational use."[24]

What is the role of the Court in a DDPA Petition?

After lower court decisions concluded that petitioning government entities were entitled to deference on their findings of impracticability, the Supreme Court clarified that discretion belongs to the court, not the petitioning government entity.[25] Though the law of charitable trusts is distinct from the DDPA and public trust doctrine more broadly, the power of a court evaluating a DDPA petition is analogous to a court exercising *cy pres* jurisdiction[26]—the authority of a court to redirect the contents of a charitable trust when the trust purposes have become impossible. In this context, the court is not acting as arbiter of a dispute between two parties; it instead stands in defense of the public's interest in seeing the purpose of the trust faithfully fulfilled.

Accordingly, discretion belongs to the court, not the municipality, and relief should be granted only if the municipality produces sufficient evidence.[27]

Who may get involved in a DDPA matter?

Section 5 of the DDPA lays out the procedural requirements. The petitioning entity must notify the Attorney General, who may become a party. Public notice is required in two publications, a legal journal and a newspaper of general circulation. Any interested person or organization is entitled to "file a protest" and, subject to the court's discretion, may be heard in court.

In an ordinary civil action, courts apply the rules of civil procedure, a highly technical set of rules designed to ensure that disputes proceed through the courts in a consistent and predictable manner with a well-developed record. However, proceedings under the DDPA are statutory in nature and are not subject to the rules of civil procedure. As a result, the rules of civil procedure may not be asserted against residents seeking to intervene in a DDPA petition, providing latitude for the public to be heard, consistent with the purpose of the statute.[28]

Additionally, the Commonwealth Court has held that where a municipality fails to commence a proceeding under the DDPA, residents have standing to bring an action

[21] *Jackson* at 1088.
[22] *Jackson* at 1078.
[23] *Jackson* at 1088.
[24] Jackson at 1088
[25] *Erie Golf Course* at 87 ("While substantial deference may be due generally to discretionary administrative and legislative acts, presently, the sale of the property was not discretionary with the City in the first instance in light of its fiduciary obligations and recorded covenant.")
[26] *Erie Golf Course* at 87
[27] Of course, whether evidence is sufficient is a question for the court.
[28] *Jackson* at 1082. ("Statutory proceedings, such as those initiated under the Donated Property Act, are not generally governed by the Pennsylvania Rules of Civil Procedure. Our Supreme Court has held that unless statutory proceedings have "incorporated the [R]ules [of Civil Procedure] by reference, they cannot be mandatorily imposed upon the trial courts or parties who litigate such matters.").

in equity to assert the public's interests protected by the DDPA.[29]

Gray areas remain.

Despite the range of court opinions illuminating the application of the DDPA, unknowns remain.

Is failure to maintain a park a violation?

What if a local government simply ceases to maintain a park in its care? What then?

Assuming the park has been dedicated or other protections were previously established, it is possible that citizens could petition a court to require the municipality to deliver a minimal level of service to the facility, particularly if actions or inactions of the municipality result in an informal change of use.[30] The effectiveness of the DDPA in these scenarios is unclear. What about non-park open space?

In the situation where land is owned by the local government for the purpose of providing open space benefits, none of which include providing park-like experiences or public access to the public, then the law is less settled regarding the permanence of the particular open space.

Does the DDPA apply to protected open space?

As discussed above, the DDPA applies to land dedicated to public use as "public facility." The definition of public facility includes specific examples, such as park, square, and library, as well as a general catch-all: "or other public use." It's reasonable to characterize protected open space, with its clear public benefits—clean air, clean water, aesthetic enjoyment—as a public use. Where a municipality acquires and dedicates land to remain as open space, why should the public be any less entitled to rely on the continuation of that use? At present, the applicability of the DDPA to this type of property has not been tested in Pennsylvania courts.[31]

What about government-held conservation easements?

The DDPA plainly applies to government-owned land and buildings, but conservation easements are a different breed of property interest. Can the interest of a municipality in a conservation easement be reasonably characterized as a "public facility" within the meaning of the act? The text of the statute is an awkward fit, but the principles and purposes that animate the DDPA should arguably capture the public's interest in seeing that publicly held conservation easements are faithfully enforced and retained. This too remains untested in Pennsylvania courts.[32]

Pennsylvania Constitution

Article 1 of the Pennsylvania Constitution—the *Declaration of Rights*—is the state's bill of rights for the people. It sets forth rights to free speech, trial by jury, bearing arms, and religious freedom. It also sets forth environmental rights. Section 27, entitled *Natural resources and the public estate* (commonly referred to as the Environmental Rights Amendment), reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.
>
> Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.

[29] Though private citizens cannot compel a political subdivision to make an application pursuant to Section 4 of the Donated or Dedicated Property Act, "[r]esidents have a private right of action to enforce the mandatory duty set forth in Section 3 of the Donated or Dedicated Property Act." *White* at 200.

[30] For example, consider a parcel dedicated for use as a public park. Neighbors of the park begin using the land to park personal vehicles, and the municipality does not enforce its rights to prevent that activity.

[31] There is not necessarily a clean dividing line between what is a park and what is public, non-park open space, further complicating understandings of where park protections end.

[32] WeConservePA publishes a *Model Declaration of Public Trust for Conservation Easements* to explicitly subject a government-held conservation easement to public trust standards.

> As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[33]

The Environmental Rights Amendment was passed by the unanimous assent of both chambers of the General Assembly in 1971 and approved by a 4-to-1 majority of Pennsylvania voters. Despite its sweeping language, the Environmental Rights Amendment remained somewhat dormant for several decades, invoked and applied in a patchwork of cases.

In 2013, the Pennsylvania Supreme Court issued a plurality opinion in the case of *Robinson Township v. Pennsylvania Public Utility Commission*,[34] which reinvigorated the potential of the Environmental Rights Amendment to impose serious limitations on government and private action. The subsequent majority decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania* affirmed the general power and scope of the Environmental Rights Amendment, and its applicability to action by the Commonwealth, its agencies, and all municipalities and other political subdivisions.[35]

The Supreme Court has articulated the layers of meaning in the Environmental Rights Amendment. First, a prohibitory function—the first sentence enshrines the right of the people to environmental values, and thereby prohibits the commonwealth from acting (or permitting actions by others) contrary to those values. Second, it recognizes "the common ownership by the people, including future generations, of Pennsylvania's public natural resources, which includes government owned land, the natural resources on those lands, as well as natural resources not subject to private ownership, such as water and air. Third, the Environmental Rights Amendment establishes a "public trust," with the Commonwealth as the trustee; the people as the beneficiaries; and Pennsylvania's "public natural resources" as the corpus, or contents of the trust. Accordingly, the Commonwealth has duties to not unreasonably degrade (or permit the degradation of) natural resources, and to act as a fiduciary to protect public natural resources.

Relationship between the Environmental Rights Amendment and the DDPA

Both the Environmental Rights Amendment and the DDPA establish public trusts, but they are different in scope and effect. A single government action may trigger review under one, both, or neither.

- **The DDPA public trust is about the use of *specific* parcels of public land.** It is applied primarily in accordance with the common law public trust doctrine. The trust contains one or more parcels or buildings and charges the trustee with ensuring they are used only for the public purpose to which they were dedicated. These purposes may or may not have environmental purposes.[36]
- **The public trust recognized by the Environmental Rights Amendment is about protecting environmental resources generally.** The public trust established by the Environmental Rights Act has been interpreted by the Pennsylvania Supreme Court as an express trust, sometimes referred to as the "environmental public trust,"[37] subject to Uniform Trust Act 20 Pa. C.S. § 7701. It is concerned with protecting "public natural resources" generally. The trust contains all public natural resources and charges the trustee with preventing their unreasonable degradation, and reinvesting any proceeds derived from public

[33] Article 1, Section 27 is officially formatted as a single paragraph—the three sentences are separated here for emphasis.

[34] Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013). Individual justices of an appellate court may join the opinion of the court, concur (assenting to some aspects but withholding agreement on others), or dissent. A plurality opinion results when a majority of justices do not join the opinion. While a majority opinion results in binding law, a plurality opinion does not. However, as with *Robinson*, a plurality opinion can have tremendous persuasive value.

[35] Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 161 A.3d 911 (Pa. 2017) ("*PEDF I*").

[36] For example, a "public facility" under the DDPA may be a nature preserve or park, but it may also be a museum or theater.

[37] *Robinson* at 956.

natural resources to conserve and maintain other public natural resources.

As articulated by the Court, "the Commonwealth has a duty to treat the corpus of the trust with loyalty, impartiality, and prudence," which requires administration of the trust "as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by exercising reasonable care, skill and caution."[38] As applied, the Environmental Rights Amendment, unlike the DDPA, does not require the government to preserve the trust contents absent a showing of impracticability. Alienating trust property, such as timber and natural gas, is permitted in furtherance of other valid public interests, like economic development, but the Environmental Rights Amendment requires that any such action be conducted with care to prevent unreasonable degradation of environmental values.[39] Additionally, proceeds earned by the Commonwealth from sale or leasing of public natural resources is deemed to remain in the trust, and must therefore be specifically applied to maintaining and conserving the environment. For example, while courts have approved of the extraction and sale of natural gas on state-owned land as furthering a legitimate state interest in economic development,[40] the proceeds remain subject to the trust established by the Environmental Rights Amendment, and must therefore be used exclusively in service of maintaining and conserving public natural resources.[41]

How does the Environmental Rights Amendment affect disposition of parks or other public lands?

If a government entity can meet its burden under the DDPA, the Environmental Rights Amendment may further limit what may be done with the land and its affected resources.

First, if the land is to be repurposed or sold for a use that presents risks to natural resources, the government entity must take reasonable measures to prevent their degradation.[42] Second, because natural resources are the subject of the public trust as provided by the Environmental Rights Amendment, any proceeds from their sale to, or use by, a private party must be reinvested in service of the trust purposes—the maintenance and conservation of public natural resources. In practice, this likely requires that the proceeds of a properly divested park or open space property must be applied to replacing them elsewhere.

Open Space Act

In Pennsylvania, county and local governments have statutory authority to acquire land for "open space uses," pursuant to the act titled "Preserving Land for Open Air Spaces." (the "Open Space Act")[43] A 1996 amendment[44] to the act authorized townships, boroughs, and cities (but not counties) to establish, via voter referendum, dedicated taxes for funding open space preservation, which may include public parks, as well as conservation easements to protect open space with no public access.

---

[38] Pennsylvania Environmental Defense Foundation v. Commonwealth, 279 A.3d 1194, 1202 (Pa. 2022) ("*PEDF II*")

[39] "Of course, the trust's express direction to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development." Robinson Twp. V. Pa. Pub. Util. Comm'n, 83 A.3d 901, 958.

[40] "[W]e recognize that development promoting the economic well-being of the citizenry obviously is a legitimate state interest . . . [and] we do not perceive Section 27 as expressing the intent . . . to derail development . . . [but] economic development cannot take place at the expense of an unreasonable degradation of the environment." *Robinson* at 953.

[41] "[T]he legislature violates Section 27 when it diverts proceeds from oil and gas development to a non-trust purpose without exercising its fiduciary duties as trustee." *PEDF I*.

[42] See *PEDF I*.

[43] Act of January 19, 1968, P.L. 992, No. 442, 32 P.S. § 5001 *et seq.*, as amended. Its full title is "An act authorizing the Commonwealth of Pennsylvania and the local government units thereof to preserve, acquire or hold land for open space uses."

[44] Act of December 18, 1996, P.L.994, No.153.

Open space property interests acquired by municipal government *using voter-approved open space tax revenues* enjoy another layer of protection. The act provides that before local government officials can dispose of such open space property interests, they must first receive approval by a majority of voters in an election regarding the specific interests to be disposed.

Equitable Estoppel

Beyond the previous doctrines and statutes, which relate specifically to public land interests, other more broadly applicable common law remedies may be available, depending on the circumstances. Equitable estoppel is reviewed here as one example. As the following discussion will illustrate, whether one or more equitable remedies may be relevant to a particular case is fact sensitive.

Equitable estoppel is a legal doctrine applied by courts to prevent one party from asserting a claim that contradicts a prior representation or action. When Person A promises something to Person B, and Person B acts in reliance on that representation, Person A can be legally prevented, or *estopped*, from acting contrary to that promise.

Example: The developer of a subdivision, to induce a buyer to purchase a home, orally promises that the neighboring parcel will never be developed. Years later, the same developer begins construction on the vacant site. The developer may be equitably *estopped* from acting contrary to their prior representation.

Equitable estoppel may be asserted by individuals against government actors,[45] and has been used to successfully challenge the disposition of public land.

Example: A township approved a developer's subdivision plan which showed a large parcel reserved as park land. The developer subsequently conveyed the parcel to the township with deed language stating that it would be used "forever as a public park," and the township never communicated anything to the contrary to residents. When the township sought to sell off the land, individuals who purchased homes in the subdivision argued that they relied upon the township's representation that the land would remain as a public park when deciding to purchase their homes. The trial court affirmed that the doctrine of equitable estoppel (along with other doctrines) prevented the township from terminating the public nature of the land.[46]

Private Restrictions

Beyond the legal frameworks that constrain repurposing of public land by operation of law, there are a range of enforceable legal protections that may be created voluntarily.

Donor, Seller, or Funder Restrictions

In general, owners of land are free to enter agreements placing limits or requirements on the use of land. If one person sells land to another, the seller may condition the sale on the buyer's agreement to do or not do something on or with the property, at least so long as the requirements are properly documented and not illegal or contrary to public policy. These restrictions can be placed in the deed conveying title, or a separate document, but must be recorded to ensure enforceability against successors in title. For example, if a landowner donates land to a municipality, and includes conditional language, such as "for so long as the land is used as a public park," the landowner may enforce that use requirement to defend the continuation of that use.[47]

Similarly, government or private entities providing funding for acquisition or improvement of parks or other public lands may condition their financial contribution on the execution of a deed restriction to ensure the land is

[45] Chester Care Center v. Department of Public Welfare, 586 A.2d 379, 382 (Pa. 1991).

[46] *Jackson* at 107. Note that while the trial court's application of promissory estoppel was affirmed on appeal, it was not the sole grounds for rejection of the township's petition to sell land that was found to be dedicated to public use.

[47] As discussed in the guide *Making Restricted Gifts*, donor restrictions of this type have implications for the tax-deductibility of a gift.

used consistently with the purpose for which the funding was requested and provided. For example, the Pennsylvania Department of Conservation and Natural Resources requires recordation of a deed restriction in connection with the numerous grant programs it administers.

These restrictions will generally operate independently of the DDPA. As discussed above, the Pennsylvania Supreme Court has held that even the direct release of a use restriction by the General Assembly was not effective to obviate the requirements of the DDPA.

Conservation Easements

A municipality may grant a conservation easement to a private land trust, a charitable organization that acquires land or conservation easements, or that stewards land or easements, for conservation purposes. The easement empowers the land trust to block uses of the land detrimental to the purposes for the land—as agreed by the municipality and land trust—while keeping the land firmly in the local government's control. The grant typically imposes an obligation on the land trust to use its powers if and when needed to protect the land from inappropriate use. A number of Pennsylvania municipalities have partnered with land trusts using conservation easements to further protect municipal lands.[48]

A land trust-held conservation easement on public land is highly effective as a supplement to the legal protections discussed above. For example, a current board of township supervisors may be concerned that some future supervisors, faced with potent incentives to sell a piece of open space land, will exploit all legal avenues (some of which may not even exist yet), and perhaps more questionable avenues, to shed or dodge restrictions. Placing another check in the hands of a third party is a meaningful impediment to any such action.

The prudent land trust will take care in developing the terms for and accepting a conservation easement on public land. On the one hand, a grant of conservation easement for this context may be drafted simply to authorize the land trust to intervene to protect the precise uses to which the land was dedicated. This may result in a straightforward duty for the land trust to make sure that no development or uses occur outside of a broad range of public recreational and open space uses as provided in the unmodified Model Declaration of Public Trust. On the other, the grant of easement may be drafted to be substantially more detailed and onerous in limiting uses, perhaps more so than what the municipality has committed to in its formal dedication of the land. In the latter instance, a grant that is perfectly sensible when applied to privately owned property may raise issues across the decades when applied to land where the present or distant future public may expect more flexibility in the use of the public land. For example, a grant may be written to limit use of the land to primitive walking trails and to promote the growth of forest resembling pre-colonial times. These are perfectly reasonable purposes, but the land trust will be well served to carefully consider the long-term ramifications of being charged with blocking any efforts to use the land for park and open space purposes that do not fit with these specific purposes. The land trust may find itself one day in the difficult position of being obligated to block a proposal that is popular, consistent with general park and open space uses, and in conformance with applicable law.

[48] The General Assembly established clear authorization for local governments to give conservation easements, as well as land and money, to land trusts for the purpose of achieving open space benefits in the Act of Nov. 29, 2006, P.L. 1418, No. 154, which amends the Open Space Act.

Optimizing Protection and Creating Clarity

Patchwork Uncertainty

Taken together, the common law, DDPA, Environmental Rights Amendment, Open Space Act, and common law doctrines such as equitable estoppel offer an interwoven set of defenses to the divestment or repurposing of public parks, other public facilities, open spaces, and their natural resources. However, difficulty remains in reconciling their respective gray areas, and predicting their force and application in the real world. This creates challenges.

On the one hand, political leaders and their constituents may worry whether the legal doctrines sufficiently guard against future attempts to liquidate parks or other public open spaces or to otherwise harm the open space benefits provided by these lands. For example, might some future elected officials—whether driven by personal value systems that minimize the value of conservation, motivated by campaign contributions, or moved by other factors—seek to defeat or circumvent whatever protections are in place? Might they do irrevocable damage to a park or public open space before concerned citizens have the opportunity to elect new leadership? In the face of such questions, it can make sense in the present to make use of the previously discussed doctrines and tools to establish the strongest protections possible for the public lands.

On the other hand, the same leaders and constituents may worry that protective measures will overly confine the ability of governments to advance projects with critical public importance or respond to changing conditions in a way that is agile and responsive to democratic will. Will a dedication to recreational purposes prevent the siting of public water infrastructure? Will a dedication of land as a "natural" area prevent installation of a public fishing pier?

The following sections address tools to prospectively address these challenges and leave little to chance.

Creating Clarity with Formal Dedication

As discussed above, it is not necessary for land to be *formally dedicated* as parkland or for other open space purposes for the law to recognize it as land held in trust for the public by a local municipality or county (rather than being land that the local government is free to develop or dispose of at will). However, there is gray in determining: (1) whether land has been informally dedicated for park or other open space purposes (and accepted by the public for such), and (2) if informally or formally dedicated, whether a particular government action affecting the land is allowable.

To reduce risks of confusion, misunderstanding, and ill will regarding acceptable and non-acceptable uses of land held by a municipality or county, local government is advised to make a practice of formally dedicating lands it intends to hold in trust for the public and, at that time, explicitly stating any reservations, exceptions, or limitations applicable to the dedication.

Recording Dedications

While an unrecorded formal dedication is better than no formal dedication, recording maximizes its utility and avoids various problems that can arise in the absence of recording. Recording ensures that the formal dedication will not be lost with time. A dedication that is only filed in a local government's business files is more likely to be forgotten and harder to find than one recorded in the real property records of the county.

If, for example, someday the local governing board seeks to transfer the dedicated property to another party, the potential transferee will discover from the normal title investigation (if not before) that the land is held in trust for the public (and that a transfer, if at all possible, is still bound by that trust).

Dedication Supports Tax Exemption

Land held by Pennsylvania local government is not automatically exempt from property taxes; local governments must apply for exemption for each individual tax parcel.

The Pennsylvania Constitution and state tax-related statutes provide that property owned by a local political subdivision or municipal authority is exempt from taxation if the property is "actually and regularly used for public purposes." A formal dedication of a property to public purposes provides compelling support for a local government's application for exemption.

A Model for Dedication

Recognizing the absence of any state standards or guidelines for dedications in Pennsylvania, WeConservePA researched, developed, vetted, refined, then published a *Model Declaration of Public Trust with Commentary* for use by local government officials. It is posted at WeConservePA's library for all to review, use, and adapt at no charge.

Public Purposes

The model serves to dedicate land to public purposes in perpetuity. These purposes, briefly stated and customizable (and reviewed at length further below), are to:

1. Assure public access to the land for outdoor recreation, and
2. Assure that the land remains predominantly undeveloped and provides open space benefits.

Exclusions from the Dedication

Local governments may use the model to clearly exclude certain property interests from the dedication (e.g., a location for a future maintenance garage, salt dome, or administration building; or a right to install underground improvements unrelated to park purposes), ensuring that these interests are not inadvertently dedicated, whether formally or informally.

Maintaining the Character of the Land

Left to the operation of law, dedication to a general public purpose, such as a "park" or "for recreation," may accommodate a wide range of possible uses. Where it is of great importance to ensure the character of the land is not dramatically changed over time (e.g., replacing century-old woodland and walking trails with tennis courts), perhaps to honor the wishes of a major donor to a park or open space protection project, the model may be used to provide such assurance.

Establishing a Public Trust

In using the model, a governing body establishes a public trust (or confirms an already existing public trust). The model is crafted to thwart any effort by a future governing body to (1) deny that the land was dedicated to particular public purposes or (2) shirk its duty to serve as trustee of the land in support of the public purposes. If a future local government seeks to use or improve the land entrusted to it for purposes other than the use for which it is dedicated, it is violating the public trust.

The public trust is a legal device that has been used for centuries to assure the public of the long-term benefit of land dedicated to public purposes. As discussed above, every use of the term "public trust" is not the same. The enforcement of the public trust established by the Environmental Rights Amendment, for example, is not coterminous with enforcement of a public trust established by the DDPA.

The public trust declared in the model commits the trustee (the municipality or county) to exercise its rights and privileges for the benefit of the public for a described trust purpose. By executing a formal declaration, a declarant can make clear the contents, purposes, trustee, and beneficiaries of the trust, leaving little to chance.

Dedication to Public Purposes

The model sets forth twin purposes for which the public trust is being established: (1) assure public access to the land for outdoor recreation, and (2) assure that the land remains predominantly undeveloped and provides open space benefits. The thinking behind these customizable purposes is described below.

Public access

The model's first purpose is written to ensure that the land is always available to the public for outdoor recreation, recognizing that this access is subject to the need to protect the health, safety, and welfare of users. (The preservation of open space benefits provided for in the model's second purpose does not necessarily ensure that the public will have access to the land for permitted purposes on a continuous or regular basis.)

Access for public recreation may or may not be appropriate; for example, public recreation may not be appropriate on land that the local government intends to forever conserve as active farmland. In that case, the public access purpose can be deleted.

The model's expanded form provides the option to local governments to elaborate on the types of recreational use, appropriate locations, and constraints on access—if such detail is desired.

Open space benefits

The model's second purpose is written to ensure the continued and permanent open character of the land and the provision of open space benefits to the public. The list of possible open space benefits draws heavily from the open space benefits described in the Open Space Act. Section 2(1) of that act defines open space benefits as:

> The benefits to the citizens of the Commonwealth and its local government units which result from the preservation or restriction of the use of selected predominantly undeveloped open spaces or areas, including but not limited to: (i) the protection and conservation of water resources and watersheds, by appropriate means, including but not limited to preserving the natural cover, preventing floods and soil erosion, protecting water quality and replenishing surface and ground water supplies; (ii) the protection and conservation of forests and land being used to produce timber crops; (iii) the protection and conservation of farmland; (iv) the protection of existing or planned park, recreation or conservation sites; (v) the protection and conservation of natural or scenic resources, including but not limited to soils, beaches, streams, flood plains, steep slopes or marshes; (vi) the protection of scenic areas for public visual enjoyment from public rights of way; (vii) the preservation of sites of historic, geologic or botanic interest; (viii) the promotion of sound, cohesive, and efficient land development by preserving open spaces between communities.

The model's definition of open space benefits is purposely broad to furnish the local government with discretion to make the land available for a wide variety of uses so long as it remains predominantly undeveloped.

The model's expanded form provides the option for local governments to elaborate on what development is and isn't allowed consistent with the open space benefits purpose.

Four Variations and Customization Directions

The *Model Declaration of Public Trust* includes three variants of the Declaration for municipal lands. In addition, WeConservePA offers a fourth form of declaration designed for government-held conservation easements:

- **Basic form**. By signing and recording the declaration, the local government permanently dedicates the land to certain public purposes. It is the shortest and simplest of the three alternatives.
- **Expanded form**. This alternative expands on the basic form, providing options to exclude portions of the land from the dedication and detail the activities, uses, facilities, and improvements that are considered consistent with the public purposes. In using the expanded form, local governments may go into as much or as little detail as deemed best for the community and circumstances.
- **Expanded form that includes a grant of conservation easement**. This alternative builds on the expanded form. It grants to a land trust an interest in the property—a conservation easement—that empowers the organization to uphold the

public purposes of the dedication and enforce its covenants should the need arise in the future. It provides an additional layer of assurance that the public purposes set forth in the declaration will be respected in perpetuity.

- **Form for dedicating conservation easements held by government**. One of the gray areas discussed above is whether a government-held conservation easement is necessarily covered by the DDPA. Also unpredictable is the operation of the Environmental Rights Amendment in regard to the management of government-held conservation easements. This form provides a means to dedicate conservation easements held by government to the public trust.

Extensive commentaries accompany each variant, explaining the reasoning behind each provision and providing alternative and optional provisions that support the customization of the model to best meet local needs and situations.

WeConservePA produced this guide with support from the Colcom Foundation, the William Penn Foundation, and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.