Right-of-Way Management

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Public Trust Doctrine and Right of Way Management

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Public Trust Doctrine – An Overview

The public trust doctrine is deeply rooted in common law with principles derived from ancient law of the Roman Empire, and provides that the state is a sovereign holding in trust certain valuable resources for the public's use. Historically, the doctrine kept water ways and shorelines out of private ownership for the benefit of public commerce, navigation, fishing, and recreation. The public trust doctrine has since evolved and expanded to protect certain lands, such as municipal parkland and rights of way, for use by the public. It should be noted that these lands and resources must not only serve a public purpose, but be readily available for public use.

I. Municipal Parkland

Courts have long held that any restriction on the use of parkland is considered an "alienation". In New York, the legislature retains control over use of protected areas, requiring legislative approval for most types of alienation.

Relevant Case Law

A. *Friends of Van Cortlandt Park et al. v. City of New York*, 95 N.Y.2d 623 (2001)

Facts: City of New York sought to place a water treatment plant ("Plant") on the Mosholu Golf Course for the purpose of treating the Croton Watershed pursuant to a stipulation with the New York State Department of Health. Construction of the Plant was expected to last approximately 5 years, during which time the Golf Course would be closed to the public. In addition, although the Plant was expected to be located mostly underground, it would change the gradient of the land. The Golf Course was located in Van Cortlandt Park, which was dedicated as parkland by an act of Legislature in 1884, thereby requiring legislative approval before the parkland could be used for the project. The City Council approved the application for construction of the Plant on parkland but had not sought the requisite legislative approval. The State sought relief in District Court, claiming that the City violated its commitment by failing to seek legislative approval for the Plant, and concerned citizens brought suit in State Supreme Court. The District Court granted the City's motion to dismiss concluding that legislative approval was not necessary since there was no transfer of an interest in land to another entity and no diminution of parkland available for public use after the Plant was built since the Plant was underground.

Holding: The Court of Appeals held that proposed construction of the Plant in a city park required state legislative approval, even though the Plant would be substantially underground.

Judicial Standard: Dedicated park areas are impressed with a public trust for the benefit of the people of the State and 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.

Analysis: The parties agree that the Plant is a non-park use; however, disagree over the application of precedent. The Court noted that, in prior cases, non-park related purposes should not be permitted to encroach upon parkland without prior legislative authority. The City argued that legislative approval was not required since there was no transfer of land, the Plant would be

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located substantially underground, and there was no proposed use inconsistent with park purposes. The Court noted that the Plant served an important public purpose, but disagreed with the City's arguments since the construction of the Plant would deprive the public of park use for at least 5 years and that some future uses of the land would be inhibited by the underground structure.

The Court relied on *Williams v. Gallatin*, 229 N.Y. 248 (1920) for the longstanding principle that legislative approval is required when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored. The Court also notes that this principle has been reaffirmed by New York Courts numerous times. See *Miller v. City of New York*, 15 N.Y.2d 34; *Incorporated Vil. Of Lloyd Harbor v. Town of Huntington*, 4 N.Y.2d 182.

The Court also noted that there are "de minimis" exceptions from the public trust doctrine. The Court distinguished this case from *Wigand v. City of New York*, (N.Y.L.J., Sept. 25, 1967), wherein the trial court authorized use of parkland to facilitate installation of two underground water tanks, after which the area was to be completely restored with beautification greater than that which originally existed and 27 acres of parkland added.

B. *Union Square Park Community Coalition, Inc. v. New York*, 22 N.Y.3d 648 (2014)

Facts: NYC Department of Parks and Recreation ("DPR") allowed operation of a restaurant in Union Square Park with certain conditions. Legislative approval was not required to operate the restaurant on parkland, since DPR retained significant control over the daily operations of the restaurant. Further, the restaurant did not retain exclusive rights to the premises, such that the public could use it without being patrons of the restaurant, and the restaurant was required to open its pavilion to the public once a week for community events. An action was brought against DPR challenging the agreement between DPR and the restaurant operator and plaintiffs argued that the restaurant constituted a non-park purpose and was unlawfully absent legislative approval.

Holding: The Court held that the agreement did not violate the public trust doctrine because the restaurant served a valid park purpose. Further, the agreement constituted a license instead of a lease requiring legislative approval.

Judicial Standard: Use of parkland for a restaurant does not implicate the public trust doctrine where it furthers or contributes to park purposes.

Analysis: The Court found that the conditions of the agreement created a restaurant that complied with park purposes. The Court relied heavily on the precedent set forth in *795 Fifth Ave. Corp. v. City of New York*, 15 N.Y.2d 221. In that case, the Court found that the restaurant served a legitimate park purpose for several reasons, including that the undeveloped land was unused and unsightly and that the enclosed glass pavilion would enhance the aesthetic appeal of the area. The Court noted that, although it is for courts to determine what is and is not a park purpose, the DPR in this instance enjoyed broad discretion to choose among alternative valid park purposes. Restaurants had long been operated in public parks. The Court noted the substantial control DPR retained over the space, coupled with the right to terminate the agreement, created a revocable license not requiring legislative approval.

See also *Friends of Petrosino Square ex rel. Fleischer v. Sadik-Khan*, 126 A.D.3d 470 (1st Dep't. 2015) (structures and conveniences that are common incidents of a park serve park purposes so as not to implicate the public trust doctrine as long as they contribute to or facilitate the use and enjoyment of the park); *Williams v. Gallatin*, 229 N.Y. 248 (1920) (A park is a

pleasure ground set apart for recreation of the public, to promote its health and enjoyment. Many common incidents of a pleasure ground, including restaurants, monuments, and architecture, contribute to use and enjoyment of a park).

II. Public Rights of Way

Federal law permits the use of rights of way for communications providers. The objective of the federal Telecommunications Act of 1996 ("TCA") is to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition. In order to facilitate the purposes of the law, Section 253 of the TCA bars state or local government from prohibiting or having the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. The TCA further provides a framework for municipal review of a telecommunications application, prohibiting consideration of certain factors and setting forth standards for timely review of such applications. Section 253(c) does, however, provide that nothing in this section affects the authority of a state or local government to manage the public rights-of-way for use by communications providers or to require fair and reasonable compensation from communications providers.

Relevant Case Law

TCG New York, Inc. v. City of White Plains, 305 F.3d 67 (2002)

Facts: Plaintiff telecommunications carrier TCG sought approval from the City of White Plains to construct telecommunications facilities and place other equipment within the City's rights of way. TCG challenged the validity of the City's franchising ordinance and proposed franchise agreements for placement of equipment in public rights of way and alleged that the franchising ordinance and proposed franchise agreements violated Section 253 of the TCA, including financial provisions such as requiring TCG to provide the City with free conduit space for its own use. Non-financial provisions of the agreement also precluded TCG from transferring the franchise or ownership of more than 20% of TCG without prior consent from the City and required TCG to seek prior City approval for installation of any part of the network within its boundaries, including installations on private property.

Holding: The Court held that the City's ordinance as a whole violated Section 253 of the TCA by prohibiting the provision of communications services and struck down numerous provisions under Section 253(c).

Analysis: Here, the Court discussed whether the City's regulations are designed to manage the public right of way as permitted by Section 253(C) or impermissible under the TCA. The district court had concluded that substantial portions of the ordinance were invalid because they were not confined to managing public rights of way but instead impermissibly regulated telecommunications. The Court found that the district court properly invalidated sections of the ordinance pertaining to disclosures to be made about the telecommunications services to be provided, the carrier's sources of financing and qualifications to receive a franchise. The Court also found that the requirement for prior approval of the locations of TCG's network to be impermissible.

Biography

Leslie J. Snyder is a founding partner of the law firm Snyder & Snyder, LLP located in Tarrytown, New York. Leslie heads the firm's real estate transaction practice. Snyder & Snyder, LLP is a women owned business and has been listed in the New York Law Journal as one of the largest women owned law firms in New York State. She has appeared before numerous municipal agencies throughout the New York metropolitan area and garnered approvals for various projects ranging from wireless communications facilities, retail centers, private schools, religious centers, medical facilities, computer service centers, and transfer stations. She is a frequent lecturer on real estate, environmental and telecommunications matters. She is a graduate of the University of Pennsylvania's Wharton School, and New York University School of Law. Leslie has served as outside counsel to the Town of Harrison in connection with environmental, real estate and land use matters, and currently serves as a director of the Westchester County Municipal Planning Federation.

Angela M. Poccia is an associate at Snyder & Snyder, LLP, concentrating on land use and leasing transactions. A graduate of the City University of New York School of Law (J.D. 2019), Angela was chosen to participate in the law school's clinical program as a student attorney, and she continued to work for Snyder & Snyder, LLP as a paralegal while obtaining her J.D. in the evening program. Prior to joining the firm, Angela was selected to intern with the Westchester County District Attorney's Office. She received her undergraduate degree from Iona College in 2010 (B.A. Cum Laude) and was a member of the Honor Society.

About the Firm

Snyder & Snyder, LLP is a regional law firm founded in 1990 with a team of 18 attorneys and paralegals. The firm is a certified women's business enterprise. The firm maintains practice areas in land use and zoning, environmental law, real estate development, commercial transactions, telecommunications, and litigation. The firm's attorneys have been responsible for securing land use approvals for a wide variety of projects including wireless communications facilities, private schools, religious institutions, medical facilities, retail complexes, fiber optic networks, landfills and resource recovery plants. For additional information, please contact Leslie Snyder at lsnyder@snyderlaw.net, 914-333-0700.

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RIGHT-OF-WAY MANAGEMENT

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Municipal Issues in Right-of-Way Management

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Constitutional Background: Rights of Way as Traditional Public Fora

The United State Supreme Court has developed a "forum analysis" to determine "'when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.'" U.S. v. Kokinda, 497 U.S. 720, 726 (1990). There are three types of public fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Arkansas Educ. Tel. Com'n v Forbes, 523 U.S. 666, 677 (1998).

A traditional public forum is defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate." Id. Examples of traditional public fora include public parks, streets, and public sidewalks. U.S. v. Grace, 461 U.S. 171, 177 (1983). In these quintessential public forums, the government may not prohibit all communicative activity. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In order to enforce a content-based restriction on speech, the government must show that the restriction is necessary to serve a compelling government interest. Id. However, if the government instead seeks to impose regulations on time, place, and manner that are content-neutral, the government must only show that the regulations are narrowly tailored to meet a significant government interest and leave open ample alternative channels of communication. Id.

Regulating Signage in the Right-of-Way

Municipalities have a legitimate government interest in regulating signage in the right of way, whether to promote traffic safety, protect property values, or eliminate visual clutter in the right of way. However, the First Amendment limits the means by which municipalities may regulate signage. General bans on signage are unconstitutional restrictions on freedom of speech,

but municipalities may implement reasonable "time, place, and manner" restrictions on signage to establish criteria under which signs may be displayed. Per the U.S. Supreme Court, "time, place, and manner restrictions will be sustained as constitutional if the regulations:

1. Address signage in a content-neutral manner
2. Are narrowly tailored to serve a significant government interest; and
3. Leave open ample alternative channels for communication of the speech.

See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Unlike general "time, place, and manner" restrictions on signage, sign regulations aimed at the content of speech in a traditional public forum, such as a right of way, are subject to strict scrutiny by the courts. The strict scrutiny test places on the government the burden of proving that the regulation on speech serves a compelling state interest and is narrowly drawn to achieve that purpose. *Boos v. Barry,* 485 U.S. 312, 321 (1988). Content based restrictions rarely pass the strict scrutiny test.

Content based restrictions are laws and ordinances which are triggered by the content of a message conveyed. Signage ordinances are often found unconstitutional as content-based restrictions when municipalities attempt to issue exceptions to sign ordinances for specific forms of speech that the municipality finds valuable, or generally subject signs to different requirements based on content. *See e.g.,* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231-32 (2015) (overturning a municipal ordinance subjecting signs to disparate requirements based on categories of sign content, and exempting some categories from permitting requirements entirely); Sugarman v. Village of Chester, 192 F.Supp.2d 282, 302 (S.D.N.Y. 2002). Exemptions for specific types of speech from an ordinance of general applicability may represent a governmental attempt to promote a specific kind of speech by placing it at an advantage in its expression. *See* Lovell v. Griffin, 303 U.S. 444, 452 (1938).

Municipal ordinances affecting signage in the right-of-way must also further a significant governmental interest. Often traffic safety and aesthetic concerns are listed as significant government interests underlying sign regulations governing placement in the right-of-way. Matter of Cromwell v. Ferrier, 19 N.Y.2d 263, 270-71 (1967). However, the rationale for the ordinance must be clearly stated to withstand judicial review. *See* National Advertising Co. v. Babylon, 900 F.2d 551, 553 (2nd Cir. 1990).

Finally, restrictions on signage in the right-of-way must leave open ample channels for communication of speech, in terms of location for displaying signage. Local ordinances may restrict how a sign can be displayed, but the ordinance must allow signage to be displayed somewhere in the community. Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388-89 (6th Cir. 1996).

Panhandling and Solicitation in the Right-of-Way

Similarly, solicitation in public spaces, including panhandling and begging for charitable contributions, are activities protected by the First Amendment. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980); Loper v. New York City Police Dep't, 999 F.2d 699, 704 (2nd Cir. 1993). In turn, outright prohibitions on panhandling and solicitation are content-based

restrictions subject to strict scrutiny analysis, and therefore, are generally found unconstitutional. However, many municipalities nationwide have taken steps to prohibit "aggressive begging," or solicitation done in a coercive, aggressive, or threatening manner, or in certain confined areas such as ATM kiosks or subway stations. Fifth Ave. Presbyterian Church v. City of N.Y., 2004 U.S. Dist. LEXIS 22185, at *28 (S.D.N.Y. Oct. 28, 2004).

Aggressive begging laws are content-restrictive but may be upheld when such laws include a specific intent requirement and prohibit conduct that extends beyond speech and free expression. *See e.g.*, Seattle v. Webster, 115 Wash. 2d 635, 645 (1990). Generally, aggressive begging laws are challenged because the regulations are vague and overbroad, violate the rights to individual expression or equal protection, or constitute an unreasonable exercise of police power. In turn, aggressive begging laws should be narrowly tailored, and clearly drafted to describe the prohibited conduct.

Sidewalks

Under New York Law, for purposes of construction and maintenance sidewalks are treated as part of the street and may be managed and owned according to several potential arrangements. Municipalities may build and maintain sidewalks at the municipality's expense, elect to share costs with adjoining property owners according to a predetermined rate, or place the obligation for maintenance on the abutting property owner. NY Village Law § 6-622; NY General City Law § 20(11) NY Town Law § 200-a. Municipalities may, and often do, enact local laws to require adjoining property owners to install and maintain sidewalks entirely at the owner's expense. *Id.* Such local laws may also provide that upon default of the property owner's obligation to maintain a sidewalk, and upon notice, the municipality may perform repair work, or contract work out, and then charge or assess the costs of repair to the property owner.

Cities and villages may also enact local laws requiring owners of adjacent properties to remove snow and ice from sidewalks. 1985 Op. Atty. Gen. (Inf.) No. 85-13, p. 78. Such local laws should set out how long owners have to remove snow and ice after a storm, who is responsible for removal at leased premises, and a procedure for instances where ice is too thick to be removed. As penalties for noncompliance, municipalities may include provisions allowing the municipality to remove the snow and ice and charge the costs of removal to the responsible party. Highway Law § 142-c(1). Unpaid cleanup fees may become a lien against the property, or fees for noncompliance may be levied outright. 1985 Op. Atty. Gen. (Inf.) No. 85-13, p. 78.

Licensing in the Right of Way

Municipalities are empowered with authority to oversee the management of its streets and property. N.Y. Const. Art. IX § 2(c)(6). Among these powers, local governments have authority to grant franchises, leases, or licenses to use public streets and rights-of-way. City Law § 20; Town Law §64; Village Law § 4-412. Where property is held in the public trust, licenses are often use to avoid any actual transfer of an interest in the property. The revocable nature of a license further protects the municipality and provides better control over the use of the right of way.

Such licenses may be given for a series of uses, in both a commercial and residential sense. Utilities are among the most common entities to seek licenses to use the right of way to erect poles and other facilities, as well as licenses to erect commercial signage. *See e.g.*, Rochester Tel. Corp. v. Fairport, 84 A.D.2d 455 (4th Dep't 1982).

The rights of way often include areas outside of the paved street and sidewalk which may visually appear to be a part of the abutting property owner's property and is often used as same. Municipalities often grant these property owners, which in many cases are residential homeowners, licenses to use the public right of way for a variety of uses. Right of way licenses are commonly sought for fences and walls, and even more recently for geothermal wells.

With respect to use of the paved-street portion of the right of way, villages may restrict parking uses of the street as they require but must apply the restriction to all persons and classes uniformly. People v. Greeman, 137 N.Y.S.2d 388, 389 (1952). Accordingly, permitted street-parking schemes must be generally available to residents and nonresidents alike. *Id.* A municipality cannot grant a license for the exclusive use of the paved street for parking for any individual. If a municipality wishes to adopt a resident only parking permit scheme for a particular area, it must first obtain Home Rule Legislation from the State Legislature, which will approve same generally only in areas where commuters or others are parking on local residential streets. Such legislation will allow the municipality to adopt a law setting forth such residential permit parking but will require a number of restrictions with respect to same.