New York State Office of Parks, Recreation and Historic Preservation

The Governor Nelson A. Rockefeller Empire State Plaza • Agency Building 1, Albany, New York 12238
www.nysparks.com

David A. Paterson
Governor

Carol Ash
Commissioner

June 2, 2010

Richard W. Breslin
County Attorney
Chenango County Attorney's Office
Chenango County Office Building
5 Court Street
Norwich, NY 13815

RE: Natural Gas Leasing of Subsurface Rights beneath Municipal Parkland

Dear Mr. Breslin:

I am writing on behalf of Commissioner Carol Ash with regard to your letter dated April 16, 2010. In your letter, you raise questions concerning whether the leasing by a municipality of subsurface oil and gas rights beneath municipally owned parklands constitutes an alienation requiring prior enactment of state legislation. In particular, you discuss whether a lease providing for directional drilling from adjacent properties, which would not have any surface impacts within a park, constitutes municipal parkland alienation. Based on my analysis, I offer the following on behalf of the Office of Parks, Recreation, and Historic Preservation ("State Parks").

You suggest that the Court of Appeals case in *Friends of Van Cortland Park v. City of New York*, 95 N.Y.2d 623 is applicable. However, the Court of Appeals in that case specifically chose not to address whether non-park activities that would take place completely beneath parkland, with no surface disturbance, rise to the level of an alienation.

To our knowledge, there have not been any court rulings in New York State that definitively speak to the question of whether entering into an oil and gas lease, in the case where there is no surface disturbance of parkland, constitutes municipal parkland alienation. With that in mind, it is difficult to predict how a Court would rule should a case concerning directional drilling under municipal parkland come before it.

However, generally speaking, real property law holds that land carries with it a bundle of rights, including not only that which is on the surface, but that which is beneath and above the surface as well. *See, e.g., Lupo v. Town of Huron*, 799 N.Y.S.2d 405, 410 (Sup. Ct. Wayne Co. 2005) (property rights include not only "the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include every thing terrestrial, under it or over it." (quoting 3 James Kent, Commentaries on American Law, 1st Ed. 1828 at 321)). This would suggest that any resources removed from parkland, whether on the surface or beneath, are also held in trust for the People of the State. Accordingly, just as a municipality can't sell its parkland, it could be argued that a municipality cannot sell the resources beneath the parkland without first obtaining permission from the Legislature.

With regard to the separate pipeline easement question you raise, once again, the Court of Appeals case of *Friends of Van Cortland Park* should be considered. Unfortunately, once again the Court chose not to directly address the question of whether the placement of a utility completely underground with the surface restored and used as parkland constituted an alienation. However, we note that the New York State Legislature routinely passes bills that address underground easements for utilities such as water and sewer. These bills require that the surface of the lands be restored and continue to be used for park purposes, and that the proceeds of the fair market value lease be dedicated toward either the acquisition of additional parkland and/or capital improvements to existing park and recreation facilities.

It is the position of State Parks that, absent clear judicial guidance, a municipality should secure enactment of a municipal parkland alienation bill by the state Legislature prior to selling, leasing, or otherwise conveying an interest in any of the resources on or beneath municipal parkland, including subsurface oil and gas resources. Further, State Parks believes that such legislation should require that the proceeds of any sale or leasing of subsurface oil and gas rights be used for capital improvements to existing municipal parks and/or for the acquisition of additional municipal parkland. This would maintain the public trust that exists in the property, and would safeguard the municipality from the risk of future litigation claiming that it had alienated parkland without prior legislative approval.

I have enclosed a copy of our publication *The Handbook on the Alienation and Conversion of Municipal Parkland*. While this publication does not directly address your question, it does provide an abundance of useful information concerning the subject generally. Because this issue is one that will likely be coming up with some regularity, the next version of the *Handbook*, which is currently being drafted, will discuss these issues.

Should you have any further questions concerning this issue, please feel free to contact me at (518) 474-4410.

Sincerely,

Jeffrey A. Meyers
Associate Attorney

Cc: Andy Beers
Erik Kulleseid

Enclosure: *Handbook on the Alienation and Conversion of Municipal Parkland*