APL-2015-00053

Court of Appeals
of the
State of New York

DEBORAH GLICK, individually and in her representative capacity as Assemblymember for the 66th Assembly District, BARBARA WEINSTEIN, JUDITH CHAZEN WALSH, SUSAN TAYLORSON, MARK CRISPIN MILLER, ALAN HERMAN, ANNE HEARN, JEFF GOODWIN, JODY BERENBLATT, NYU FACULTY AGAINST THE SEXTON PLAN, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HISTORIC DISTRICTS COUNCIL, WASHINGTON SQUARE VILLAGE TENANTS' ASSOCIATION, EAST VILLAGE COMMUNITY COALITION, FRIENDS OF PETROSINO SQUARE, by and in the name of its President, GEORGETTE FLEISCHER, LAGUARDIA CORNER GARDENS, INC., LOWER MANHATTAN NEIGHBORS' ORGANIZATION, SOHO ALLIANCE, BOWERY ALLIANCE OF NEIGHBORS, by and in the name of its Treasurer, JEAN STANDISH, NOHO NEIGHBORHOOD ASSOCIATION, by and in the name of its Co-Chair JEANNE WILCKE, and WASHINGTON PLACE BLOCK ASSOCIATION, by and in the name of its president, HOWARD NEGRIN,

Petitioners-Respondents-Appellants,

For a Judgment Pursuant to CPLR Article 78

– against –

ROSE HARVEY, as Acting Commissioner of the New York State Office of Parks, Recreation and Historic Preservation, THE NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, PAUL T. WILLIAMS, JR., as the President and the Chief Executive Officer of Dormitory Authority of the State of New York, DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Respondents,

(For Continuation of Caption See Reverse Side of Cover)

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

GREGORY SILBERT
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Dated Completed: April 24, 2015

VERONICA M. WHITE, as Commissioner of the New York City Department of Parks and Recreation, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, JANETTE SADIK-KHAN, as Commissioner of the New York City Department of Transportation, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, MATHEW M. WAMBUA, as Commissioner of the New York City Department of Housing Preservation and Development, THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, AMANDA BURDEN, as Director of the New York City Department of City Planning and Chair of the New York City Planning Commission, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, CHRISTINE QUINN, as Speaker of the New York City Council, THE NEW YORK CITY COUNCIL, and THE CITY OF NEW YORK,

Respondents-Appellants-Respondents,

– and –

NEW YORK UNIVERSITY,

As a Necessary Third-Party Appellant-Respondent.

COURT OF APPEALS OF THE STATE OF NEW YORK

DEBORAH GLICK, individually and in her representative capacity as Assemblymember for the 66th Assembly District, BARBARA WEINSTEIN, JUDITH CHAZEN WALSH, SUSAN TAYLORSON, MARK CRISPIN MILLER, ALAN HERMAN, ANNE HEARN, JEFF GOODWIN, JODY BERENBLATT, NYU FACULTY AGAINST THE SEXTON PLAN, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HISTORIC DISTRICTS COUNCIL, WASHINGTON SQUARE VILLAGE TENANTS' ASSOCIATION, EAST VILLAGE COMMUNITY COALITION, FRIENDS OF PETROSINO SQUARE, by and in the name of its President, GEORGETTE FLEISCHER, LAGUARDIA CORNER GARDENS, INC., LOWER MANHATTAN NEIGHBORS' ORGANIZATION, SOHO ALLIANCE, BOWERY ALLIANCE OF NEIGHBORS, by and in the name of its Treasurer, JEAN STANDISH, NOHO NEIGHBORHOOD ASSOCIATION, by and in the name of its Co-Chair JEANNE WILCKE, AND WASHINGTON PLACE BLOCK ASSOCIATION, by an in the name of its President, HOWARD NEGRIN,

Petitioners-Respondents-Appellants,

For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules,

-against-

ROSE HARVEY, as Acting Commissioner of the New York State Office of Parks, recreation and Historic Preservation, THE NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, PAUL T. WILLIAMS, JR., as the President and Chief Executive Officer of Dormitory Authority of the State of new York, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, VERONICA M. WHITE, as Commissioner of the New York City Department of Parks and Recreation, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, JANETTE SADIK-KHAN, as Commissioner of the New York City Department of Transportation, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, MATHEW M. WAMBUA, as Commissioner of the New York

Case No. APL-2015-00053

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

City Department of Housing Preservation and Development, AND THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, AMANDA BURDEN, as Director of the New York City Department of City Planning and Chair of the New York City Planning Commission, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, CHRISTINE QUINN, as Speaker of the New York City Council, THE NEW YORK CITY COUNCIL, THE CITY OF NEW YORK,

Respondents-Appellants-Respondents.

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Gregory Silbert, dated April 24, 2015, twenty-two New York State Legislators will move this Court at the New York State Court of Appeals, Court of Appeals Hall, 20 Eagle Street, Albany, New York 11207 on May 4, 2015, for an Order pursuant to Rule of Practice 500.23 of this Court granting permission to file their attached brief as *amici curiae* in the above-captioned matter; and granting permission to amend the proposed brief solely to include additional New York State Legislators who engage counsel to represent them in this matter before the filing date of the proposed brief; and for such further relief as the Court may deem just and proper. A copy of the proposed brief is annexed as Exhibit A to the affirmation of Gregory Silbert, dated April 24, 2015.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, must be served and filed in the Clerk's Office of the Court of Appeals, with proof of service on or before the return date of this motion pursuant to this Court's Rules of Practice 500.21(c).

Respectfully submitted,

_____

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COURT OF APPEALS OF THE STATE OF NEW YORK

DEBORAH GLICK, individually and in her representative capacity as Assemblymember for the 66th Assembly District, BARBARA WEINSTEIN, JUDITH CHAZEN WALSH, SUSAN TAYLORSON, MARK CRISPIN MILLER, ALAN HERMAN, ANNE HEARN, JEFF GOODWIN, JODY BERENBLATT, NYU FACULTY AGAINST THE SEXTON PLAN, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HISTORIC DISTRICTS COUNCIL, WASHINGTON SQUARE VILLAGE TENANTS' ASSOCIATION, EAST VILLAGE COMMUNITY COALITION, FRIENDS OF PETROSINO SQUARE, by and in the name of its President, GEORGETTE FLEISCHER, LAGUARDIA CORNER GARDENS, INC., LOWER MANHATTAN NEIGHBORS' ORGANIZATION, SOHO ALLIANCE, BOWERY ALLIANCE OF NEIGHBORS, by and in the name of its Treasurer, JEAN STANDISH, NOHO NEIGHBORHOOD ASSOCIATION, by and in the name of its Co-Chair JEANNE WILCKE, AND WASHINGTON PLACE BLOCK ASSOCIATION, by an in the name of its President, HOWARD NEGRIN,

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Case No. APL-2015-00053

AFFIRMATION OF GREGORY SILBERT IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

City Department of Housing Preservation and Development, AND THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, AMANDA BURDEN, as Director of the New York City Department of City Planning and Chair of the New York City Planning Commission, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, CHRISTINE QUINN, as Speaker of the New York City Council, THE NEW YORK CITY COUNCIL, THE CITY OF NEW YORK,

Respondents-Appellants-Respondents.

I, Gregory Silbert, an attorney duly admitted to practice in the State of New York, hereby affirm under penalty of perjury that the following is true to the best of my knowledge:

1. I am a partner with the law firm of Weil, Gotshal & Manges LLP and a member of the Bar of the State of New York. I make this affirmation in support of the motion of the New York State Legislators to file a brief as *amici curiae* in the above-captioned matter.
2. The proposed *amici curiae* are members of the New York State Senate and New York State Assembly.
3. The proposed *amici curiae* include Senator Brad Hoylman; Senator Bill Perkins; Senator Gustavo Rivera; Senator Daniel L. Squadron; Senator Liz Krueger; Assemblymember Harry B. Bronson; Assemblymember Ellen Jaffee; Assemblymember Jeffrey Dinowitz; Assemblymember Kevin A.

Cahill; Assemblymember Crystal D. Peoples-Stokes; Assemblymember Victor M. Pichardo; Assemblywoman Barbara Lifton; Assemblymember William Colton; Assemblywoman Catherine Nolan; Assemblyman Steve Englebright; Assemblymember Victor M. Pichardo; Assemblyman Steven Otis; Assemblymember Daniel J. O'Donnell; Assemblywoman Michelle Schimel; Assemblymember Jo Anne Simon; Assemblyman Fred W. Thiele, Jr.; and Assemblyman Keith L.T. Wright.[1]

4. The proposed *amici curiae* have a unique interest and perspective on this matter, and seek permission to file a brief as *amici curiae* in order to assist the Court's consideration of this matter.

5. A copy of the brief that proposed *amici curiae* New York State Legislators seek to file is attached hereto as Exhibit A.

6. The brief of proposed *amici* seeks to provide this Court with further explanation as to why the decision below impairs the State's authority by removing parkland from legislative oversight. The proposed *amici*, as legislators, are uniquely situated to explain how this decision alters the

[1] Three additional legislators indicated a desire to participate as *amici* but had not yet returned signed engagement letters to counsel for *amici* as of the service date of the accompanying motion. The motion therefore requests that the proposed brief, if accepted for filing, may be amended solely to include additional New York State legislators who engage counsel to represent them in this matter before the filing date of the brief.

careful allocation of authority between State and local governments created by New York's constitution and laws.

7. The proposed *amici* have a substantial interest in: (1) preserving and protecting valuable parkland within the State; (2) preserving the established concept of implied dedication of parkland; (3) ensuring that municipalities obtain necessary legislative approval prior to alienating parkland.

WHEREFORE, Gregory Silbert respectfully requests that the Court grant this motion to file a brief of law as *amicus curiae* in the above-captioned matter.

Dated: April 24, 2015
New York, New York

_____
Gregory Silbert

Exhibit A

APL-2015-00053

Court of Appeals
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DEBORAH GLICK, individually and in her representative capacity as Assemblymember for the 66th Assembly District, BARBARA WEINSTEIN, JUDITH CHAZEN WALSH, SUSAN TAYLORSON, MARK CRISPIN MILLER, ALAN HERMAN, ANNE HEARN, JEFF GOODWIN, JODY BERENBLATT, NYU FACULTY AGAINST THE SEXTON PLAN, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HISTORIC DISTRICTS COUNCIL, WASHINGTON SQUARE VILLAGE TENANTS' ASSOCIATION, EAST VILLAGE COMMUNITY COALITION, FRIENDS OF PETROSINO SQUARE, by and in the name of its President, GEORGETTE FLEISCHER, LAGUARDIA CORNER GARDENS, INC., LOWER MANHATTAN NEIGHBORS' ORGANIZATION, SOHO ALLIANCE, BOWERY ALLIANCE OF NEIGHBORS, by and in the name of its Treasurer, JEAN STANDISH, NOHO NEIGHBORHOOD ASSOCIATION, by and in the name of its Co-Chair JEANNE WILCKE, and WASHINGTON PLACE BLOCK ASSOCIATION, by and in the name of its president, HOWARD NEGRIN,

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Respondents,

(For Continuation of Caption See Reverse Side of Cover)

BRIEF FOR *AMICI CURIAE* NEW YORK STATE LEGISLATORS IN SUPPORT OF APPELLANTS

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Dated Completed: April 24, 2015

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INTEREST OF AMICI CURIAE

Amici are twenty-two Members of the New York State Legislature, the State's lawmaking body: Senator Brad Hoylman; Senator Bill Perkins; Senator Gustavo Rivera; Senator Daniel L. Squadron; Senator Liz Krueger; Assemblymember Harry B. Bronson; Assemblymember Ellen Jaffee; Assemblymember Jeffrey Dinowitz; Assemblymember Kevin A. Cahill; Assemblymember Crystal D. Peoples-Stokes; Assemblymember Victor M. Pichardo; Assemblywoman Barbara Lifton; Assemblymember William Colton; Assemblywoman Catherine Nolan; Assemblyman Steve Englebright; Assemblymember Victor M. Pichardo; Assemblyman Steven Otis; Assemblymember Daniel J. O'Donnell; Assemblywoman Michelle Schimel; Assemblymember Jo Anne Simon; Assemblyman Fred W. Thiele, Jr.; and Assemblyman Keith L.T. Wright.

The *amici* have an interest in maintaining the Legislature's unique role overseeing lands maintained as part of a public trust, and in ensuring that parkland is not alienated without proper legislative approval. Through open debate and scrutiny at the State level, the public trust doctrine ensures that local governments and agencies do not convey lands held in trust for the public benefit to private interests through covert and inconspicuous channels.

PRELIMINARY STATEMENT

The public trust doctrine entrusts the State with an important responsibility—one that rests particularly with state legislators, like *Amici* here. It is the Legislature that must determine whether to enact a law permitting a local government to alienate parkland, and, if so, on what conditions. The Legislature does not undertake this task lightly. In 2014 alone, it passed ten laws allowing parcels of parkland to be transferred, and each time it insisted that the affected locality meet alienation guidelines, including devoting funds equal to or greater than the parcels' fair market value to purchase replacement parkland or improve existing parkland. These laws, and the careful scrutiny the Legislature applies when enacting them, reflect the State's unique and irreplaceable role as the trustee of public lands.

The Appellate Division's decision in this case diminishes the State's authority over parkland and impermissibly reallocates that authority to the City. The Appellate Division held that parcels long used by the public as parkland could be diverted to private owners without the Legislature's approval, in large part because the City formally mapped those parcels as streets and made equivocal statements about their status as parkland in internal memoranda. But the City's powers to map streets and manage property—in fact, all its powers—are derivative of the State. It has only those powers the State has delegated to it. It cannot use its

derivative authority over local matters to displace the State from its position as trustee over parkland.

The City especially should not be permitted to do so when the means it chooses to keep parkland outside the public trust are invisible to members of the public. Street mapping and the exchange of internal city memoranda will rarely catch the public's attention. The public dedication of a new playground or park, on the other hand, will earn the gratitude and goodwill of the community. The decision below permits local governments to reap the political benefits from dedicating public parks but—through means hidden from public view—retain the option to transfer those parcels to locally powerful interests without state oversight.

BACKGROUND

A. The State's Role of Trustee of Public Lands

The public trust doctrine is founded on the principle that certain resources are held in trust by the government for the benefit of the "people" or the "public at large." Karl P. Baker & Dwight H. Merriam, Comment, *Indelible Public Interests in Property: The Public Trust and the Public Forum*, 32 B.C. Envtl. Aff. L. Rev. 275, 278 (2005). The doctrine is rooted in both the Roman and English law notion that certain public uses ought to be specially protected. *See* Joseph L. Sax, Comment, *The Public Trust Doctrine in National Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475 (1970). While this protection does not

render public trust lands inalienable *per se*, as "there is no general prohibition against the disposition of trust properties, even on a large scale," *id*. at 486, it does impose certain restrictions on the government's ability to dispose or change the use of protected property. English public use law, for example, restricted the King from alienating public trust land, and while it was "nonetheless within the authority of Parliament, exercising what we would call the police power, to enlarge or diminish the public rights," it could only do so "for some legitimate public purpose." *Id*. at 475.

After the American Revolution, state legislatures assumed the role of trustee and, with it, the power to extinguish the rights of the unorganized public in public trust lands. *Appleby v. City of New York*, 271 U.S. 364, 381 (1926). But this power is not unlimited, as more than a century of public trust jurisprudence has repeatedly reaffirmed that a state, as trustee, must act for the public's benefit with regard to public trust lands. In a landmark public trust case, for example, the Supreme Court invalidated the Illinois State legislature's extensive grant to the Illinois Central Railroad—one that included all of the land underlying Lake Michigan for one mile out from the shoreline and extending one mile in length along the central business district of Chicago—because Illinois held title to this land in trust for the people of the state that "they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed

from the obstruction or interferences of private parties." *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 452 (1892). As this case illustrates, when a state holds a resource that is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct that is calculated *either* to reallocate that resource to more restricted uses *or* to divert public land to the self-interest of private parties. Sax at 490.

By requiring the approval of the state Legislature to alienate public lands, the public trust doctrine also ensures that public rights in those lands may be diminished only through explicit and visible legislative action. "[P]ublic officials are frequently subjected to intensive representations on behalf of interests seeking official concessions," which "are often of limited visibility to the general public so that public sentiment is not aroused." Sax at 496. Submitting these requests for legislative approval creates "an openness and visibility which is the public's principal protection against overreaching, but which is often absent in the routine political process." *Id.* In this way, the public trust doctrine works to counteract the influence that powerful interest groups may have with administrative agencies or local government officials when that influence is exerted at the expense of public rights. *See id.* at 492.

Accordingly, New York courts "have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before

it can be alienated or used for an extended period for non-park purposes."[1] *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630 (2001). Three cases in particular have established the public trust doctrine's essential features in New York law. In *Brooklyn Park Commissioners v. Armstrong*, this Court first recognized the requirement for legislative approval, holding that because "[t]he city took the title to the lands . . . for the public use as a park, and held it in trust for that purpose . . ., it could not convey without the sanction of the legislature." *Brooklyn Park Commissioners v. Armstrong*, 45 N.Y. 234, 243 (1871). This protection was extended beyond conveyance to any non-park use of the land in *Williams v. Gallatin*, where this Court stated that "no objects, however worthy . . . , which have no connection with park purposes, should be permitted to encroach upon [a park] without legislative authority plainly conferred." *Williams v. Gallatin*, 229 N.Y. 248, 253 (1920). Finally, this Court made clear that even when a temporary non-park use will serve an important public purpose (such as installing a water treatment plant), the use of dedicated parkland "for other than park purposes, either for a period of years or permanently, requires the direct and

[1] While historically, the public trust doctrine applied to navigable or tidal waterways, it has expanded in some jurisdictions, including New York, to protect certain inland resources, such as public parks. *E.g.*, *Williams v. Gallatin*, 229 N.Y. 248 (1920). New York State has long recognized the importance of land preservation, even going as far as explicitly protecting forest land in the state Constitution itself. *See* N.Y. Const. art. XIV, §1.

specific approval of the State Legislature, plainly conferred." *Friends of Van Cortland Park*, 95 N.Y.2d at 632.

B. The State Legislature's Exercise of Its Public Trust Responsibilities

To carry out its duties as trustee of public lands, the State Legislature subjects any request to alienate parkland to an evaluation designed to ensure that the overall supply and quality of the State's parkland is not compromised. When a municipality wants it alienate parkland, it must first—with the help of the local State legislative sponsor and State Parks Counsel's Office—prepare a draft of a proposed New York State Legislative bill authorizing the transfer. The municipality then asks that the bill be introduced in the appropriate committees of the State Assembly and State Senate. These committees then assess whether the proposed alienation of parkland complies with alienation guidelines. *See, e.g.*, New York State Assembly Standing Committee on Local Governments 2014 Annual Report, available at : http://assembly.state.ny.us/comm/LocalGov/2014Annual/index.pdf ("Local Gov. Comm. 2014 Rpt."). "Committee guidelines for authorizing parkland alienation . . . require[e]," among other things, "that the fair market value of such lands be dedicated for the purchase of replacement parkland of equal or greater fair market value or for capital improvement of existing parkland." *Id.*

While the proposed legislation makes its way through the appropriate committees, the municipality completes a review of the environmental impacts of the alienation as required by the State Environmental Quality Review Act (SEQRA), often in conjunction with a related action, project, development, etc. The municipality's governing body (*i.e.*, city council, town board, county legislature or village board of trustees) passes a home rule resolution requesting State Legislative authority to alienate parkland. Upon receipt of the home rule request, the State Legislature takes up the issue and votes on the bill that was submitted by the municipality. Only if a bill authorizing the transfer is enacted into law by the State Legislature and signed into law by the Governor is the municipality empowered to alienate parkland.

Ten different parkland alienation bills were passed and signed by the Governor in 2014. *See* Local Gov. Comm. 2014 Rpt. at 11-13. Each law required that the affected municipality purchase replacement parkland of at least equal value and/or expend equal sums on capital improvements of existing parkland in the region. *See id.*

ARGUMENT

I. THE CITY HAS ONLY THOSE POWERS DELEGATED TO IT BY THE STATE, AND IT CANNOT USE THOSE POWERS TO REDUCE THE STATE'S OVERSIGHT OF PARKLAND

The court below held that the disputed parcels in this case are not subject to the public trust doctrine in large part because the City formally mapped those parcels as streets, despite their long-standing use as parks. But the City's powers to map streets and manage property—indeed, all its powers—are derived from the State, and cannot be used to diminish the State's authority over parkland or its responsibility to oversee those lands as part of a public trust. While New York's home rule provisions permit local governments to act autonomously over matters of purely local concern, the diversion of parkland into private hands is never a purely local matter. The public trust doctrine exists to ensure that, in the balance between state and local authority, the alienation of parkland always falls under the purview of the State. Thus, when, by implied dedication, lands are made part of the public trust held by the State, the City cannot displace state authority over those lands by exercising its derivative authority over matters of only local interest, like the mapping of streets.

A. Only the State and the Federal Government Possess Sovereign Authority

As this Court recently observed, "the State Constitution establishes the state government as the preeminent sovereign of New York." *Matter of Baldwin Union*

Free School Dist. v. County of Nassau, 22 N.Y.3d 606, 619 (2014). "[A] city," in contrast, "is not sovereign, as are the federal government and the states." *LaGuardia v. Smith*, 288 N.Y. 1, 7 (1942). Rather, a city is "simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature." *Id.* (internal quotation marks omitted). "Given that the authority of political subdivisions flows from the state government and is, in a sense, an exception to the state government's otherwise plenary power, the lawmaking power of a . . . political subdivision can be exercised only to the extent it has been delegated by the State." *Baldwin Union*, 22 N.Y.3d at 619.

The derivative nature of municipal authority ordinarily prevents cities from enlarging their own power or jurisdiction at the expense of the State's. For example, with limited exceptions, a city cannot sue the State to invalidate state legislation. *See City of New York v. State*, 86 N.Y.2d 286, 290 (1995) ("as purely creatures or agents of the State, . . . municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants"). Similarly, local legislation is preempted when it "directly conflicts with a State statute" or "when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility." *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 95 (2001).

As this Court put it, "the power that the Legislature wields over a municipal corporation is supreme and transcendent," *Brown v. Bd. of Trustees*, 303 N.Y. 484, 488 (1952), and "local governments have only the lawmaking powers the Legislature confers on them," *DJL Rest.*, 96 N.Y.2d at 94.

B. The Home Rule Provisions Empower Local Governments to Act in Matters of Local Interest, But Do Not Limit State Authority Over Matters of Statewide Concern

The home rule provisions of New York law afford municipalities with legislative authority over certain matters of purely local concern, but do not compromise the State's plenary power over issues of statewide importance. Article IX of the Constitution and the Municipal Home Rule law authorize local governments to adopt legislation relating to the municipality's "property, affairs or government" and other defined policy areas so long as the legislation is not "inconsistent with the provisions of the Constitution or any general law." N.Y. Const. art. IX, § 2(c); McKinney's Municipal Home Rule Law § 10(1)(ii)(a)(1)-(13).

Local governments' authority over matters of local concern is not exclusive; the State Legislature retains the power to enact legislation affecting solely local interests, as long as it complies with home rule requirements. The Legislature may do so by general law (with state-wide application) or by special law (applying to only certain localities). It may enact a special law relating to local affairs only if it

receives a "home rule message" from the locality. A home rule message may be a vote of two-thirds of the municipality's legislative body, a request from the chief executive officer concurred with by majority of the legislative body, or (except in the case of New York City) on a certificate of necessity from the Governor and the concurrence of two-thirds of the members in each house of the State Legislature. N.Y. Const. art. IX at § 2(b)(2).

The areas of local concern subject to home rule requirements are narrowly circumscribed. "The words 'property, affairs or government' in the home rule provisions of the State Constitution have always been given a narrow interpretation." *Manes v. Goldin*, 400 F. Supp. 23, 28 (E.D.N.Y. 1975) (holding state statute increasing court filing fees in New York City was not invalid under home rule provision, because filing fees in statewide Supreme Court was an issue of statewide importance). And even when local matters are implicated, the State Legislature may still "freely legislate" on "matters of State-wide importance." *Kelley v. McGee*, 57 N.Y.2d 522, 538 (1982) ("State legislation which also affects local concerns does not implicate local governmental home rule powers."). As Judge Cardozo put it, "if the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality." *Adler v. Deegan*, 251 N.Y. 467, 489-90 (1929) (Cardozo, J., concurring).

So while the home rule provisions authorize local governments to legislate in matters of local concern (when consistent with the State Constitution and general law), the delegation of home rule authority is never so broad as to give local governments autonomy over matters of state concern.

C. The Public Trust Doctrine Ensures that the Alienation of Parkland Always Remains a Matter of Statewide Concern

The public trust doctrine refines this balancing of state and local authority by requiring that the alienation of parkland must always receive state approval. *See supra* pp. 3-7. As this Court has explained, "[t]he ultimate control over the uses of public places is in the Legislature, and the only powers in this respect possessed by a municipality are derivative." *Matter of Lake George Steamboat Co. v. Blais*, 30 N.Y.2d 48, 51-52 (1972). Thus, the State must sanction any diversion of parkland to private purposes, even when the same use of non-park municipal property would be a purely local concern. Parkland, in other words, never falls within a municipality's autonomous authority over its "property, affairs or government." When the supply or quality of parkland may be diminished, the City cannot act alone.

As noted *supra* p. 7, the State Legislature, as trustee for the public, carefully evaluates each request by a municipality to alienate parkland to ensure that it complies with alienation guidelines. Among other things, the Legislature requires that funds equal to the fair market value of the lands being privatized be dedicated

to the purchase of new parkland or to the capital improvement of existing parkland. Applying these criteria, the Legislature enacted ten laws authorizing the alienation of parkland in 2014 alone.

The City has argued, and the court below held, that the public trust doctrine may be inapplicable when the City has formally mapped parcels as "streets" instead of parks. But that argument incorrectly subordinates the State's duties and powers as trustee beneath the City's authority to manage municipal property—an authority delegated to the City by the State, which can never take precedence over matters of statewide concern. The City's power to map streets is governed by N.Y.C. Admin. Code § 5-430 *et seq.* and N.Y. General City Law § 20(2). These provisions generally empower municipalities to acquire, manage, and convey property, matters of quintessentially local concern. They do not, however, make these local concerns superior to the State's interest in parkland. When the State delegated to municipalities the power to manage property generally, it did not (and probably could not) abjure its responsibilities as trustee of public lands.

II. THE DECISION BELOW IMPAIRS STATE AUTHORITY BY REMOVING PARKLAND FROM LEGISLATIVE OVERSIGHT

The Appellate Division's decision not only elevates municipal authority to manage local property over the State's authority to oversee parkland, it also diminishes the parkland that is subject to the public trust. Land that has for decades been used and enjoyed by the public as parkland, and even held out as

such by the City, would, under the rule embraced by the panel below, be alienated without state approval. Moreover, under the Appellate Division's decision, the City may keep lands outside of the public trust by means that are largely invisible to the public. Thus, a local government would be permitted to reap all the political benefits of dedicating land to public use but, through maneuvers unbeknownst to the public, still retain unchecked authority to divert that land into private hands. That result is directly contrary to the purposes of the public trust doctrine.

A. The Decision Below Diminishes Parkland Subject to Public Trust

The decision below dramatically scales back the parkland subject to the public trust. For more than a century, it has been clear that the long continuous public use of a parcel as parkland, particularly when the government actively encourages such use, constitutes implied dedication of parkland subject to the public trust. *See, e.g.*, *Flack v. Village of Green Island*, 122 N.Y. 107, 114 (1890) ("[l]ong continued and uninterrupted use of land by the public . . . furnishes strong evidence of dedication"); *Cook v. Harris*, 61 N.Y. 448, 454 (1875) ("acceptance may be proved by long public use"). Implied dedication stabilizes the expectations of local communities that when a municipality demonstrates its intent to commit a parcel for public use—and the parcel has been continuously utilized by the public as a park—it will remain available as parkland, even if not formally dedicated as such in official maps or elsewhere. And, the public trust doctrine requires that, just

like any public lands dedicated as parks, lands impliedly dedicated as parks receive legislative approval before they can be alienated. This restriction imparts significant state oversight and control, ensuring that a municipality's decision to alienate parkland will comport with the public interest.

The decision below disregards the long continuous public use standard and therefore permits the alienation of parkland devoted to public use for decades without legislative approval. The Appellate Division determined that the parcels had not been dedicated as parkland, ignoring the trial court's factual findings demonstrating the long continuous public use of the parcels as parkland and the record evidence showing that such use was both invited and encouraged by the City. The Appellate Division reached this conclusion essentially because the parcels were never formally dedicated as parkland, a conclusion fundamentally at odds with the basic notion of implied dedication of parkland.

By severely restricting, if not eviscerating, the long continuous public use standard, the Appellate Division significantly reduces the scope of parkland subject to state legislative oversight and impairs the State's ability to ensure that parkland is alienated only when it serves the larger public good. Under the rule espoused by the panel below, parklands throughout the state that local communities have come to expect will be available as parkland—including parklands specifically touted as such by municipalities—would become vulnerable to alienation because they were

not formally dedicated as parkland on official maps, notwithstanding their use as parkland for decades. The decision below therefore potentially removes one of the significant mechanisms for state oversight of local decision-making, reapportioning authority between states and localities in an area historically recognized as primarily one of statewide concern.

B. The Decision Below Would Let Municipalities Withhold Public Trust Authority

The decision below not only diminishes the scope of parkland subject to the public trust, but also threatens to subvert the core purposes of the public trust doctrine by allowing municipalities to alienate parkland while avoiding legislative oversight all together. In rejecting implied dedication, the decision below cited several factors, including that "management of the parcels by the Department of Parks and Recreation was understood to be temporary and provisional, pursuant to revocable permits or licenses." A.1:5 (App. Div. Op. at 74). This appears to be a reference to a few arcane, internal City documents—unknown to the public—that purport to restrict the scope of the assignment of the parcels to the Parks Department, in direct conflict with the City's public pronouncements. The Appellate Division also cited the fact that the parcels formally were "mapped as streets since they were acquired by the City, and the City has refused various requests to have the streets de-mapped and re-dedicated as parkland." A.1:5 (App. Div. Op. at 74). This factor, too, concerns activities largely obscured from the

public eye and in disharmony with the City's express invitation to the public to use the parcels for parkland and recreation.

These factors confuse what would be relevant for express dedication with those applicable to implied dedication, effectively disregarding the long continuous use doctrine. But the Appellate Division's factors do an even greater disservice to the public trust doctrine: they permit municipalities to have it both ways when it comes to parkland and to cut the legislature out of the decision whether to alienate parkland all together. On the one hand, municipalities remain free to dedicate parkland to the public, reaping the attendant political rewards. City officials can preside over ribbon-cutting ceremonies, laud the creation of new centers for recreation and enjoyment for local communities, and promote the dedication of new parkland on websites and signage, as they did with the parcels at issue here. Officials earn goodwill from local communities, and the City's promotion of the parcels as parkland feeds public expectations in the community that the space will be available for such uses.

But at the same time, the factors cited by the Appellate Division permit the city to retain unilateral authority to alienate parkland without legislative approval through internal mechanisms that are obscured from public view. Whereas the long continuous use standard is outward-facing, focusing on how a parcel has been enjoyed by the public, in the open, and with the City's affirmative invitation and

endorsement, the factors cited by the Appellate Division are subterranean. They would give outsized weight to internal city memoranda, licenses and permits, that could restrict the public's use of parkland in ways unknown to—or at least unadvertised to—the public. The factors also would treat as dispositive the formal entries on the City map, also generally inaccessible to the public, except when it matters to an influential special interest. And the Appellate Division's factors would elevate the importance of these internal, arcane mechanisms over the directly contrary public pronouncement of city officials. In short, the Appellate Division factors place new tools to secure the alienation of parkland in the hands of City officials who have the sole discretion to implement them. The City could, behind-the-scenes, lay the paperwork foundation for future alienation of parkland while at the same time publicly promoting its parkland use.

Employing the Appellate Division's factors, and giving municipalities the unilateral control over additional tools for the alienation of parkland, thus risks endangering the interests that the public trust doctrine was meant to protect. The public trust doctrine ensures that the State retains the authority to determine whether alienation of parkland is in the best interests of the people of the State, rather than leaving those decisions to local officials who may be vulnerable to special interests and private parties. *See Van Cortlandt Park*, 95 N.Y.2d at 631. The Appellate Division's factors threaten to undermine that purpose. They instead

leave room to encourage, or at the very least permit, back-room deals, negotiated and resolved in private, that give outsized influence to local special interests favoring the alienation of parkland. By implementing methods made possible by the Appellate Division's factors, those special interests can secure the alienation of parkland, and make that decision immune from review by the legislature serving the interests of the people of the whole State.

And these principles are at work even on the facts of this case. One the factors cited by the Appellate Division was the City's decision not to formally re-map parcels as parkland, even though the parcels were used for public recreational purposes for decades, and continued to be even after the decision not to re-map the parcels. That decision came at the urging, not of the general public, but of NYU. And, the Appellate Division's decision, if left to stand, would permit the City to alienate the parcels—for the benefit of NYU, no less—in a decision insulated from oversight by the legislature serving the general public. The Appellate Division's decision opens up avenues for the alienation of parkland favored by local interests that the public trust doctrine was meant to keep in check.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Appellate Division.

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