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RESTRICTING NONRESIDENT USE OF PUBLIC PARKS

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The Granite Falls News for January 1, 1976, reports that the town of Granite Falls, North Carolina, has recently enacted an ordinance charging fees for use of its municipal park and recreation program by nonresidents. Municipalities that own public parks sometimes seek to limit outsiders' use of the facilities so that residents who support the facilities with their taxes may derive the full benefit of what they are paying for. Counties are interested in the same limitations for parks created within county service districts. On the other hand, nonresidents may raise constitutional arguments alleging violations of equal protection and due process, or assert on statutory and property law grounds that public parks must be kept open to the public.

Within certain guidelines, it appears from the case law that a county or municipality may limit the use of a park to residents or charge higher fees to nonresidents. This bulletin examines the legality of such limitations and the courts' rationales for permitting them.

"DEDICATION" BY THE CITY OR COUNTY

The first determination is whether any statutory or contractual limitations prevent a county or municipality from closing a public park to nonresidents. The North Carolina General Statutes specifically authorize

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counties and municipalities to establish parks[1] and to "acquire real property . . . for parks . . . by gift, grant, purchase, lease, exercise of the power of eminent domain, or any other lawful method."[2] If the county or municipality already owns property for a park or acquires the fee to property by one of the above-mentioned means, nothing in the statute prevents the municipality from closing the park to outsiders.

Next, careful attention must be given to the manner in which the county or municipality establishes the park. As a general principle, a municipality may dedicate property to a public use just as a private person or corporation may.[3] The terms of the dedication, however, may be such as to preclude restrictions on use by nonresidents.

Dedication is generally defined as "the devotion of property to a public use by an unequivocal act of the owner . . . ."[4] For a dedication to be complete, the donor must have manifested an intention to dedicate and the public must have accepted the dedication. The dedication also must be intended to last forever, must be irrevocable after acceptance, and must remain for a public use. When a private person or corporation dedicates property, a public body--perhaps a county or a municipality--accepts on behalf of the public. The county or municipality acts as trustee for the public and manages the property for the dedicated public use. The situation varies slightly, however, when the dedicator is the county or the municipality. Cases are split over whether there must be an official acceptance when the dedication is made by the State.[5] The reason advanced for requiring acceptance is that acceptance acknowledges the duty to maintain and repair and the liability for neglect of the property. Nonetheless, if a county or a municipality intends to dedicate property, in effect to itself, it seems reasonable to suggest that no formal acceptance is required, or that acceptance can be implied from the very fact of dedication.[6]

Under former N.C.G.S. § 160-156, the legislature expressly authorized counties and cities to dedicate property for park uses and declared that the exercise of this power was in the public interest and for a public purpose. This statute was upheld by the North Carolina Supreme Court several times.[7] The present statute authorizes a county or municipality to appropriate funds for the establishment of parks and to "set aside" lands and buildings for park purposes.[8] Nothing suggests that this language

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1. N.C. Gen. Stat. § 160A-353 (1) and (2) (Supp. 1975).

2. N.C. Gen. Stat. § 160A-353(3) (Supp. 1975).

3. 11 McQuillan, The Law of Municipal Corporations § 33.14 (3rd ed. rev. 1969). See Spaugh v. Charlotte, 239 N.C. 149, 79 S.E.2d 748.

4. McQuillin, supra note 3 at § 33.02.

5. Oklahoma City v. State ex rel. Williamson, 185 Okla. 219, 90 P.2d 1064 (1939) (acceptance required to complete dedication). But see McKernon v. Reno, 76 Nev. 452, 357 P.2d 597 (1961) (formal dedication by the state complete without acceptance); Arques v. Sausalito, 126 Cal. App. 2d., 272 P.2d 58 (1954).

6. Gerwitz v. City of Long Beach, 330 N.Y.S.2d495 (Sup. Ct. 1972).

7. Atkins v. Durham 210 N.C. 295, 186 S.E. 380 (1936); White v. Charlotte, 209 N.C. 573, 183 S.E. 730 (1936).

8. N.C. Gen. Stat. § 160A-353(2) (5) (Supp. 1975).

could not be interpreted to include the dedication of county or municipal property for the statutory purpose of establishing parks.

The problem may arise from the manner in which the county or municipality "dedicates" a park. Dedication may be achieved by an ordinance or resolution authorizing the use of property for park purposes or simply by a continuing pattern of use. In a New York case,[9] for example, a city had originally "created a public park" and some thirty years later tried to restrict use of the park to the residents of the city and their invited guests. In rejecting the restriction, the court noted that the park had been open to the public at large for thirty years. Quoting the rule that a dedication, once complete, is irrevocable,[10] it held that the thirty years' continuous use of the park by the public at large equaled dedication to the public at large and use of the park could not later be restricted. The court declared that the power to permit encroachments upon park purposes or to alienate public parks depends upon legislative authority. (North Carolina has much the same rule in that a city has no power to abandon an established public park.[11]) Once the property was properly dedicated to the public at large, the city held the property subject to a public trust for the benefit of the public at large. This public-trust doctrine prevented the city from excluding the public at large in any way.

The point is that if a county or municipality wishes to restrict the use of a park to its residents, it should do so clearly and when the park is created. Otherwise, once the public is allowed use of the facility, an implied and irrevocable dedication to the public at large may be found[12] and the unit cannot limit use thereafter.[13] A Maryland case illustrates that restrictions can be maintained if imposed before dedication to the entire public is completed. The town constructed and operated a swimming pool located inside a public park for its dues-paying residents only. Nonresidents complained of their exclusion, but the court held the restriction valid because it was total and from the beginning of operations.

Street and highway dedications are comparable with park dedications, and so a group of New York cases may be instructive. These cases have

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9. Gerwitz v. City of Long Beach, 330 N.Y.S.2d 495 (Sup. Ct. 1972).

10. McQuillin, supra note 3, at § 33.60.

11. Wishart v. City of Lumberton, 254 N.C. 94, 118 S.E.2d 35 (1961). Other states have the same rule. See Douglass v. City Council of Montgomery, 118 Ala. 599, 24 So. 745 (1947); Rayn v. City of Cheyenne, 63 Wyo. 72, 178 P.2d 115 (1947).

12. See Gion v. City of Santa Cruz, 84 Cal. Rptr. 162, 465 P.2d 50 (1970). There the court found an implied dedication of privately owned beach-front property to the general public because the public had used the property for more than five years with full knowledge of the owner, without asking permission, and without objection by anyone. In addition, the city took an active part in maintaining the beach area. All of this indicated to the court "that the public looked to the city for maintenance of and care of the land and that the city came to view the land as public land."

13. Logan v. Town of Somerset, 271 Md. 42, 314 A.2d 436 (Ct. of App. 1974).

upheld the validity of restricting municipal parking lots for the use of residents only. In one case the court found that the village had acquired the property for parking purposes, that the property had been so used on a continual basis, and that the general public had never been allowed to use the facility. As a result there was never any dedication of the property for highway purposes or to the public at large in any manner.[14]

A final point. North Carolina opinions contain language to the effect that a dedication must be made to the public and not to part of the public.[15] No case has specifically so held, but a nonresident might use such language to argue that the dedication of property for an exclusive park was invalid. A court might hold in the instance of an already existing park that the dedication must be to the public at large, thus defeating the attempted exclusion, or it might hold that the dedication granted an easement to the favored group. A county or municipality might be prohibited from granting such an easement without being adequately compensated because such a grant would in effect be giving away property. These possibilities are simply mentioned; given the case law from other states, it seems unlikely that the North Carolina dictum will be followed.

PARKS ESTABLISHED BY GIFT OR GRANT

If property is given to the county or municipality, any conditions or covenants placed on the property by the donor must be strictly adhered to--assuming, of course, that the restrictions are constitutional. In a New York case[16] property was dedicated to a town to be used and maintained in perpetuity as a park for the use and benefit of the residents of the town. The town thought that it could not restrict the use of the park, but also that it could actively encourage outsiders to visit the facilities, which it did by placing advertisements in newspapers of other towns. The result was a great influx of nonresidents. The court ordered the town to comply with the terms of the conveyance. "The acceptance of the deed obligated the town to maintain and use the park for the use and benefit of citizens and residents of the Town of Hamburg, which obligation can only be fulfilled by a reasonable exclusion of the nonresident public from this small town." Likewise, if property is dedicated to the public at large, a county or municipality cannot restrict use to its own citizens. In a Connecticut case[17] property was conveyed to a town to be used "forevermore as a public park." The court stated that the town "by accepting the conveyances, became bound to observe the provisions in them as to the use to which the land was to be put . . . and . . . that the legislature could not lawfully authorize a municipality to make a different use of [the] property . . . ."

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14. People ex rel. Village of Larchmont v. Gilbert, 137 N.Y.S.2d 389 (1954). See also People ex rel. Village of Lawrence v. Kraushaar, 89 N.Y.S.2d 285 (Dist. Ct. 1949).

15. Spooner's Creek Land Corporation v. Styron, 171 S.E.2d 215, 7 N.C. App. 25 (1969), rev'd on other grounds, 172 S.E.2d 54, 276 N.C. 494 (1970).

16. Campbell v. Town of Hamburg, 156 Misc. 134, 281 N.Y.S. 753 (Sup. Ct. 1935).

17. Town of Winchester v. Cox, 129 Conn. 106, 26 A.2d 592 (1942).

The court went on to state that the town did not hold the land as a park for the benefit of its inhabitants but rather for the benefit of the people of the state at large.[18]

CONSTITUTIONAL CONSIDERATIONS

Even if a county or municipality is not limited by statute or property law considerations, any attempt to restrict the use of its facilities to nonresidents raises fundamental constitutional questions. An early New Jersey court[19] flatly stated ". . . distinctions between inhabitants of our state, based upon no other ground than the place of actual residence are in restraint of trade, invidious, unjust, and illegal." In a more recent New Jersey case[20] a beach town sought to establish and regulate a paid bathing beach and charge nonresident users more than residents. The court held the town's ordinance discriminatory and therefore invalid because ". . . the law is settled that discrimination against non-residents in an ordinance invalidates it, excepting possible special circumstances which would justify the discrimination." No special circumstances were alleged.

Equal protection arguments, however, can be met by a showing of some reasonable justification for treating different citizens differently. Counties or municipalities need only show some rational basis for limiting or excluding nonresidents from the use of municipal facilities, and the limitations should be upheld.

In a California case,[21] use of a municipally owned and operated swimming pool was limited to the residents of the city. The limitation was not uniformly applied, and a black child denied admission to the pool brought suit. The court cited the appropriate standard for consideration of the city's rule:

> A regulation making different provision for people residing outside a municipality from those residing in it is valid if the classification is based on a reasonable distinction. Such a regulation is not unconstitutional because it results in some practical inequality. There is no arbitrary formula by which the reasonableness of a regulation such as that in question can be tested. Its validity depends, to a considerable extent, on surrounding circumstances and its purpose and operation. Regard must be had for its object and necessity.

The court went on to hold that a regulation designed to prevent congestion in a municipal pool was a valid exercise of the police power. The court

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18. The court held that the city was entitled to the fair market value when the state condemned the land for a highway.

19. Morgan v. City of Orange, 50 N.J.L. 389, 13 A.240 (1888).

20. Brindley v. Borough of Lavallette, 33 N.J. Super. 344, 110 A.2d 157 (1954).

21. McClain v. City of South Pasadena, 318 P.2d 119 (Dist. Ct. of App. 1957).

explained that since the pool was of limited size, for maximum usefulness some regulation was justified. It also pointed out that the regulation treated all persons similarly situated equally and nonresidents were not situated similarly to residents. The distinction was justified because the city had a duty to maintain the health of its residents that it did not owe to nonresidents. "The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness, and interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits."

Much the same rationale was applied in a New York case[22] involving a municipal swimming pool and golf course. The court justified the exclusion of nonresidents from the facilities on the basis of limited capacity and possible congestion, and also noted that the facilities were maintained and operated by the city with its own funds. The same type of exclusion has been upheld with regard to parking lots on the ground that the residents pay the entire expense of such a facility.[23] And, finally, the Maine state supreme court recently concluded that municipalities could legitimately prohibit nonresidents from digging for clams in local clam flats because such regulation was reasonably necessary for the proper conservation of a valuable natural resource.[24]

One case to the contrary must be mentioned. A New Jersey ocean-front municipality enacted an ordinance that charged nonresidents higher fees for use of its beach area than residents. The lower court found a rational basis for the differentiation in the increased financial burden borne by the municipality during peak season. The increased population at the beach required an extra policeman and car, an additional session of municipal court, and extra parking, employees, and lifeguards. The citizens of the municipality were adversely affected by the influx of tourists while the public at large benefited. Therefore, as long as the higher fees charged bore a rational relation to the increased expenses of operation, the court found no constitutional violation.[25]

The New Jersey Supreme Court reversed.[26] Plaintiffs, residents of an adjacent inland municipality, raised equal protection arguments,

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22. Schreiber v. City of Rye, 53 Misc. 2d 259, 278 N.Y.S.2d 527 (1967).

23. People ex rel. Village of Larchmont v. Gilbert 137 N.Y.S.2d 389 (Co. Ct. 1954), aff'd 307 N.Y. 773, 121 N.E.2d 615 (1954).

24. The court feared violating the Supreme Court's holding in Toomer v. Witsell, 334 U.S. 385 (1948) (a state may not discriminate against nonresidents fishing for shrimp in its tidal waters), and went on to declare that the State has a compelling governmental interest in clam conservation. This standard would protect the exclusion regulation even if the nonresident classification were "suspect" under the Fourteenth Amendment, which presumably it is not.

25. Neptune City v. Avon-by-the-Sea, 114 N.J. Super. 115, 274 A.2d 860 (1971), rev'd 61 N.J. 296, 274 A.2d 47 (1972).

26. 61 N.J. 296, 294 A.2d 47 (1972). See also Van Ness v. Borough of Deal, 139 N.J. Super. 83, 352 A. 2d 599 (1975).

and also alleged a violation of the common law right of access to the sea possessed by all citizens of the state. The court accepted this latter argument and used the case as a springboard to explain the state's public-trust doctrine. Originally intended to protect the public's right to use natural water resources for navigation and fishing, the doctrine purports to be "a title held 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 of private parties." The court declared that the doctrine's flexibility required its extension in the twentieth century to include recreational uses of public waterways, including boating, swimming, and various shore activities. On the basis of this public-trust doctrine, the court ruled that an ocean-front municipality cannot totally exclude nonresidents from its beaches or discriminate in any respect between residents and nonresidents. The court did approve charging fees for beach use but ruled that the fees had to be charged equally to everyone. This case can probably be limited to its facts, since the holdings involved a beach-front town and public access to the sea. In other situations one could argue that this public-trust doctrine does not apply. Also, there is no statutory or case law authority for the doctrine in North Carolina.

CONCLUSION

The cases demonstrate that it should be possible for a county or municipality to limit or exclude nonresidents from a county or municipal park. The unit would have to use care in obtaining property to see that no title restrictions require open use. In dedicating its own property, the unit would have to be careful not to dedicate to the public at large by implication or otherwise. A county or municipality can surmount equal protection arguments by showing some rational basis for treating nonresidents differently from residents. For a small park, this could be done by demonstrating that the facility is not equipped to handle large numbers of people and that to permit overuse would destroy the facility for everyone. Such an argument might be more difficult to make with large tracts of land, but if the danger of overuse and spoilage exists, it should be capable of documentation. In addition, if residents must pay for the maintenance of a park or for recreational programs, that is further justification for limiting use to them.