

Philadelphia Parks Alliance Refined Comments re: Commission on Parks and Recreation's Draft Open Land Protection Ordinance, October 26, 2010

1. The emphasis of the ordinance should be on protection rather than on transfer and conveyance.

The tone and tenor of the “Outdoor Park and Recreation Land Protection Ordinance” will impact how it will be interpreted by those who will be applying it in the future, many of whom may not be as conservation-minded as this administration. In the attachment, we offer several suggestions for how the Commission can put the emphasis back on protection.

In Section 15-102(2), there is a presumption of Commission approval if the Commission does not timely submit its determination. We believe that any presumption should be that of disapproval. We further believe that the Commission should be required to timely submit a written determination and explanation, as your expertise is absolutely critical for informing the ultimate decisions on conversions and transfers that will be made by City Council.

2. The public participation provisions of the ordinance should be enhanced and more detailed.

The Commission has stated that “[r]equiring public input on a proposed conveyance is a key component of the legislation.” However, as currently drafted, the ordinance will not ensure meaningful public participation.

First, as Section 15-102(2) requires the Commission to make determinations about the “public interest”, we believe that the Commission would benefit from hearing from the public before making its determinations. We recommend that the ordinance require that the Commission hold a public hearing and solicit and consider written comments from the public before making its determinations. It would be worth considering if the ordinance should require the Commission to prepare and include with its determination a “Comment and Response” document, in which it would summarize and respond to all of the public comments that were offered, ensuring that they are given appropriate consideration in the determination process.

Second, Section 15-102(3) provides for a public hearing conducted by a “Committee of Council” but allows that hearing to be conducted as early as “ten days after the Commission delivers its written determination to the Mayor and Council President.” We do not believe that ten days will be sufficient time to advertise the hearing or for the public to review the Alternatives Analysis and Council’s written determination so it can offer intelligent comments on the proposed transfer or conveyance. We recommend that the ordinance extend this ten-day time frame to at least 60 days.

3. The Substitute Land concept needs clarification and refinement.

Section 15-102(5) of the ordinance requires that “[t]he City receives or acquires land to substitute for the transferred or converted land on or before the transfer or conversion” and then identifies certain prerequisites that must be met for such land.

One of those prerequisites is that the Substitute Land be of “at least equal value” as the land to be transferred or converted “based on professional, independent appraisals which assume the parcels’ highest and best use without regard to their existing zoning.” It may make sense to appraise the “land to be transferred” by assuming its “highest and best use without regard to [its] existing zoning,” in order to maximize its appraisal value and thereby the value of the “Substitute Land” that must be received in exchange. Appraising the “Substitute Land” on this same basis, could have the exact opposite effect. Perhaps the “Substitute Land” should be appraised based on its use as “park or recreation land” -- the actual use to which it will be put. We believe that the ordinance should require that “Substitute Land” actually be put to park or recreation use.

Another of the prerequisites of Substitute Land is that it be of “at least equal . . . park or recreational usefulness as the land to be transferred or converted.” We suggest that supplemental guidance define what is meant by “park or recreational usefulness” and provide criteria to help the Commission make these evaluations.

We believe the ordinance should require the Commission to consult with all departments, boards, commissions and agencies whose opinions may be relevant to its evaluation, and to include in its written determination a description of the outcomes of those consultations.

The final prerequisite of Substitute Land is that it be of “at least equal . . . size” as the land to be transferred or converted. A requirement that Substitute Land be of greater size than the land to be transferred or converted, would ensure not only “no net loss of property,” but also an ever-increasing gain of property, which could, among other things, help the city meet its *Greenworks Philadelphia* goal of adding new acres of green public spaces in the city.

4. The ordinance should commit the Commission to issue guidance materials both that address acquisition and that provide direction on how to apply the ordinance.

The amendment to the Philadelphia Home Rule Charter at Section 5-601(a) charges the Commission with adopting standards and guidelines relating to “the conveyance and acquisition of park and recreation land or facilities, including criteria for the assessment and evaluation of proposed conveyances or acquisitions.”

The ordinance addresses conveyance but not acquisition. Clear standards and guidelines relating to acquisition are necessary to avoid the improvident acquisition of park and recreation lands that provide more costs than benefits to the city. Because the Commission will be required to issue guidance materials on acquisition to discharge its

obligations under the Charter amendment anyway, we believe that it would be efficient for the Commission to commit to issuing guidance that both addresses acquisition and that provides direction on how to apply the ordinance, as there is likely to be substantial overlap.

We recognize that it is difficult to include every detail in an ordinance. That is why we believe the Commission and the public would benefit from guidance materials that provide direction on how to apply the ordinance. These materials could, for example, elaborate on how to prepare an Alternatives Analysis, how to determine whether exemptions and exclusions apply, and how to determine which departments, boards, commissions and agencies should be consulted in evaluating Substitute Land. Perhaps most importantly, guidance materials could identify the criteria to use to determine “park and recreational usefulness” when evaluating Substitute Land, which criteria are likely to overlap with the criteria to be used in evaluating acquisitions. (We also recommend that the Commission develop an inventory of its holdings so “park and recreation usefulness” of existing park and recreation lands can be evaluated before a transfer or conveyance is proposed. Such an inventory would also help the Commission determine its acquisition needs.)

For all of these reasons, we believe that the Commission should commit itself to issuing guidance materials both on acquisition and on how to apply the ordinance.

5. The ordinance should provide for judicial review.

The Donated or Dedicated Property Act (DDPA), 53 P.S. §§ 3381 – 3386, the Inalienable Property Act, 20 P.S. §§ 8301 – 8306, and the common law public trust doctrine all provide a means for an aggrieved person to seek judicial review of, or to participate as an intervenor in the judicial review of, a transfer or conveyance of property donated or dedicated to the public. But it is not entirely clear to us that these statutes and common law doctrine would apply to all of the park and recreation land in the city, because it is not entirely clear to us how broadly a court would interpret the terms “donated” and “dedicated.”

The most recent Supreme Court decision that addresses the issue, In re Erie Golf Course, 992 A.2d 75 (Pa. 2010), seems to imply that these statutes and doctrine only apply when there is a third-party conveyance of property to a municipality. See id. at 86 (finding that the Legislature intended the DDPA to apply to fully-realized dedication), and at 78 n.2 (“[p]ursuant to the common law, a fully-realized dedication of property, like a contract, entails both an offer and an acceptance”) (emphasis added, citations omitted).

For these reasons, we recommend that the ordinance provide how aggrieved persons can seek review of transfers or conversions that are effectuated in a manner inconsistent with the ordinance in those instances when the DDPA, the Inalienable Property Act, and the common law public trust doctrine do not apply.