

PRELIMINARY COMMENT: The Commission has suggested that this ordinance was informed by the recent Supreme Court decision in *In re Erie Golf Course*, 992 A.2d 75 (Pa. 2010). Does the Commission believe that the Donated or Dedicated Property Act, 53 P.S. §§ 3381-3386, and/or the common law public trust doctrine, both analyzed in *Erie*, would apply to any transfer or conveyance of outdoor, public park and recreation land in the City to non-park or non-recreation use? Stated another way, does all outdoor, public park and recreation land in the City qualify as “donated” or “dedicated”? Notably, these terms were not defined by the Supreme Court in *Erie*, and they are not defined in the Donated or Dedicated Property Act. But courts in other cases considering these terms seem to suggest that they contemplate transfer or conveyance by a third party to a municipality. See, e.g., *White v. Township of Upper St. Clair*, 799 A.2d 188, 193 (Pa. Cmwlth. 2002) (“Dedication, like a contract, requires both offer and acceptance, and once there is acceptance, in whatever form it takes, dedication is irrevocable”). Has all outdoor, public park and recreation land in the City been acquired in such a manner?

AN ORDINANCE

Amending Chapter 15-100 of the Philadelphia Code, entitled “Parks,” **to ensure the appropriate protection of outdoor, public park and recreation land in the City** by establishing procedures and requirements before **outdoor, public park and recreationsuch** land **in the City** may be transferred **for** or converted **to non park or non recreation use,** under certain terms and conditions.

Comment [MSOffice1]: The added language is intended to emphasize that the purpose of the ordinance is protection.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Chapter 15-100 of The Philadelphia Code is amended to read as follows:

CHAPTER 15-100. PARKS AND OUTDOOR SPACES

[(RESERVED)]

Comment [MSOffice2]: The amendment to the Philadelphia Home Rule Charter at Section 5-601(a) requires the Commission to adopt 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” (emphasis added). Will the Commission address acquisitions in subsequent guidance to discharge its obligations under Section 5-601(a)?

§ 15-10 . Findings.

§ 15-101. Definitions. In this Chapter, the following definitions apply:

Comment [MSOffice3]: The ordinance at Section 15-103(2) also establishes procedures and requirements before land can be converted to a different park or recreation use.

(1) “Convert” and “Conversion” mean a change to the physical characteristics or use of land, **if authorization by ordinance of City Council is required under the Home Rule Charter for the change.**

Comment [MSOffice4]: Could the Commission include findings that emphasize that the purpose of the ordinance is protection?

(2) “Outdoor Park or Recreation Land” means land (a) that was under the jurisdiction of the former Fairmount Park Commission or former Recreation Department as of June 30, 2009, or is under the jurisdiction of the Department of Parks and Recreation, and (b) used for outdoor, public park and recreation activity. For example, without limitation, “outdoor park or recreation land” includes the following, where each is owned or held by the City for public use or enjoyment: woods; hiking trails; recreation paths; picnic areas; lawns; gardens; baseball, softball and other athletic fields; outdoor fountains and plazas; horseback riding corrals;

Comment [MSOffice5]: We understand that the Commission intends to prepare a frequently asked questions (FAQ) document in connection with the ordinance? Could the Commission explain in the FAQ document when “authorization by ordinance of City Council is required under the Home Rule Charter”?

playgrounds; outdoor tennis courts and outdoor basketball courts. “Outdoor park or recreation land” does not include the following:

A. Land occupied by any building or other structure enclosed by a roof and walls at the time this Section became law, but the land surrounding the building or structure is outdoor park or recreation land.

B. Land acquired by the City under Philadelphia Code Chapter 16-400 unless the City by ordinance specifies that the City is acquiring the land for outdoor park or recreation activity or the City by later ordinance designates the land for outdoor park or recreation activity.

(3) “Transfer” means a change in physical or legal care, custody or control of land, whether by any form of written document or otherwise, including but not limited to sales, conveyances of title, leases, licenses, permits, grants, easements, or concessions, if authorization by ordinance of City Council is required under the Home Rule Charter for the change.

(4) “Transferee” means the party to whom land is proposed to be transferred or who proposes to convert land.

§ 15-102. Conditions to Conversion or Transfer of Park or Recreation Land. No All land that the City owns or holds now or in the future as outdoor park or recreation land shall be protected for such use and may be transferred or converted unless only if each of the following conditions is satisfied:

(1) The proposed transferee provides to the Commission on Parks and Recreation (the “Commission”) and to City Council a complete written “Alternatives Analysis” in compliance with Section 15-104. If the transferee intends to transfer the land to another person or entity, then the Alternatives Analysis may be submitted by that proposed subsequent transferee of the land;

(2) After reviewing the Alternatives Analysis, the Commission submits to the Mayor and the Council President, along with a written explanation, the Commission’s written determination and explanation (collectively hereinafter referred to as its determination) whether, in its judgment, (i) the continuation of the original use of the land as outdoor park or recreation land is no longer practicable or possible and has ceased to serve the public interest; (ii) the proposed transfer or conversion is necessary for the public interest; (iii) there is any reasonable and practical alternative to the proposed transfer or conversion; and (iv) the Substitute Land (defined below) has the same or greater usefulness as outdoor park or recreation land as the land to be transferred or converted is of at least equal value, size, and park or recreational usefulness as the land to be transferred or converted. If the Commission does not submit its determination within 120 days following its receipt of the Alternatives Analysis, or within 45 days after the first Commission meeting held not less than 30 days after receipt of the Alternatives Analysis, whichever is earlier, or by a later date as may be agreed to by the proposed transferee in writing with copies submitted to the Commission and the Council President, then Council may presume the Commission’s approval.

Comment [MSOffice6]: See preceding comment.

Comment [MSOffice7]: Are there instances where this would be the city, such that the city would essentially be providing the Alternatives Analysis to itself?

Comment [MSOffice8]: The added language is intended to emphasize that the purpose of the ordinance is protection.

Comment [MSOffice9]: Wouldn’t the Commission benefit from hearing from the public before making determinations about “the public interest”? Shouldn’t the Commission conduct a public hearing and/or solicit and consider written comments from the public before submitting its determination? Shouldn’t these kinds of details be included in the ordinance?

Comment [MSOffice10]: Shouldn’t the Commission make determinations that all of the prerequisites for Substitute Land have been met, even if it bases some of these determinations on independent, third party appraisals?

Comment [MSOffice11]: Shouldn’t the Commission be required to submit a determination?

Comment [MSOffice12]: Why should there be a presumption of approval? For a proposed “Outdoor Park and Recreation Land Protection Ordinance,” shouldn’t the presumption run the other way (i.e., presumption of disapproval)?

(3) A Committee of Council conducts at least one public hearing on the bill authorizing the proposed transfer or conversion at which the Commission shall provide testimony, no less than ten days after the Commission delivers its written determination to the Mayor and Council President;

Comment [MSOffice13]: Shouldn't the Commission be required to make itself available to testify about its determination?

(4) The ordinance that authorizes the transfer or conversion includes findings that: (i) the continuation of the original use of the land as open park or recreation land is no longer practicable or possible and has ceased to serve the public interest; (ii) the proposed transfer or conversion is necessary for the public interest; ~~and~~ (iii) there is no reasonable and practical alternative to the proposed transfer or conversion; and (iv) the Substitute Land (defined below) is of at least equal value, size, and park or recreational usefulness as the land to be transferred or converted.

Comment [MSOffice14]: Is ten days sufficient time to advertise the hearing and for the public to review the Alternatives Analysis and the Commission's determination (on both of which they would presumably be commenting)?

Comment [MSOffice15]: How will this determination and the Alternatives Analysis be made available to the public, and how will the public be notified of their availability? Shouldn't these kinds of details be included in the ordinance?

Comment [MSOffice16]: Shouldn't City Council also be required to recite this important finding in its ordinance?

(5) The City receives or acquires land to substitute for the transferred or converted land (the "Substitute Land") on or before the transfer or conversion. The Substitute Land must be of at least equal value, size, and park or recreational usefulness as the land to be transferred or converted, as determined by the Commission after consultation with all other relevant departments, boards, commissions and agencies; except that the respective value of the Substitute Land and the land proposed to be transferred or converted must be based on professional, independent appraisals which assume the parcels' highest and best use without regard to their existing zoning. To the extent reasonably feasible, the Substitute Land must be located in the same or an adjacent City Council district as the transferred or converted land, and it must be put to a park or recreational use.

Comment [MSOffice17]: Guidance could help explain what is meant by "park or recreational usefulness" and how this determination is to be made.

The use of the disjunctive "or" here could be construed to allow for park land to be transferred for or converted to recreation land and vice versa. Was that intended?

Comment [MSOffice18]: Wouldn't the Commission benefit from hearing from certain city agencies (e.g., the Water Department, the Planning Commission, the Zoning Board, etc.) when making some of these determinations?

§ 15-103. Exemptions.

(1) The provisions of § 15-102 do not apply to the following transactions:

(a) Renewals of any license, lease, professional services agreement, permit, temporary easement, grant agreement, or concession agreement in effect on the date this Section became effective, each of which may be renewed in accordance with its terms;

(b) Transfers or conversions for public utility sub-surface easements that do not impair outdoor, public park or recreational use (except temporarily during construction);

(c) Transfers or conversions for stormwater management facilities that do not impair outdoor, public park or recreational use;

(d) Adaptive re-use of an historic structure, or of any other structure on park or recreation land existing at the time this Section became law, that promotes preservation of the structure but that does not require more than a de minimus increase in impervious coverage on park or recreation land;

Comment [MSOffice19]: 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. But does it also make sense to appraise the "Substitute Land" on this basis, which could have the exact opposite effect? Might it not make more sense to appraise "Substitute Land" based on its use as "park or recreation land" -- the actual use to which it will be put?

Comment [MSOffice20]: We believe this was intended, but shouldn't it be expressly provided?

(e) Modifications or corrections of roadways, curb lines, sidewalks, paths, and similar adjustments that result in only a de minimus increase in impervious coverage on park or recreation land.

(2) The provisions of § 15-102(2)(i) and (iv), (4) and (5) do not apply to conversion of outdoor park or recreation land that changes the use of the land to a use that would be permissible under Pennsylvania law.

§ 15-104. "Alternatives Analysis."

(1) The "Alternatives Analysis" required by Section 15-102(1) must include:

(a) Detailed explanations of: (i) why the continuation of the original use of the land as outdoor park or recreation land is no longer practicable or possible and has ceased to serve the public interest; (ii) why the proposed transfer or conversion is necessary for the public interest; and (iii) why there is no reasonable and practical alternative to the proposed transfer or conversion;

(b) A description of the current outdoor park or recreation land proposed to be transferred or converted, the impact of the transfer or conversion on current outdoor, public park or recreational uses at the site, and the effects of the proposed new use, including without limitation on traffic and parking;

(c) An analysis of the most reasonable alternatives that do not require the transfer or conversion, including but not limited to an analysis of those alternatives' costs, environmental impact, and traffic and parking impact, and why those alternatives were judged to be impractical or unreasonable; and

(d) A description of the proposed Substitute Land, including a map, photographs, and analysis of its built and natural resources and its usefulness as outdoor, public park or recreation land, including without limitation consideration of traffic, parking and proximity to other open space.

(2) Despite the other provisions of this Section 15-104, an Alternatives Analysis for a transaction that, under Section 15-103(2), is exempt from the requirements of Section 15-102(2)(i) and (iv), (4), and (5), also does not need to comply with the provisions of Section 15-104(1)(a)(i) and (1)(d).

§ 15-105. Review.

§ 15-106. Guidance.

Within XXX days of the enactment of this ordinance, the Commission shall issue guidance on how to apply this ordinance.

Comment [MSOffice21]: Could the Commission explain in the FAQ document what use changes "would be permissible under Pennsylvania law" (e.g., could park land be converted to an all terrain vehicle (ATV) course without full review under this provision?)? And what happens if Pennsylvania law hasn't yet determined whether a particular use is permissible? Would a conversion to such a use be subject to a complete or abridged review?

Comment [MSOffice22]: To avoid disputes about "standing", could the ordinance provide who may seek review of transfers or conversions that are effectuated in a manner inconsistent with the ordinance, and how they may do so?

Comment [MSOffice23]: Several of the comments above suggest the need for additional guidance.