PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Robert W. Ryerss, Deceased
O.C. No. 36 DE of 1896
Control No. 081027

Introduction

The City of Philadelphia has filed a petition seeking court approval of a lease agreement that would permit Fox Chase Cancer Center to expand its campus into Burholme Park in Northeast Philadelphia. The petition is opposed by neighbors and taxpayers. This controversy arises out of conflicting interests that raise a vital issue of significant public interest: can a municipality lease for more than 80 years dedicated park land that is actively used for recreational purposes?

The residents, taxpayers and neighbors who oppose the petition are fighting to maintain the integrity and borders of Burholme Park, a magnificent 65 acre park gifted to the City in trust over 100 years ago and located in a densely populated residential area of Northeast Philadelphia. The petitioners Fox Chase Cancer Center (hereinafter "Fox Chase") and the City of Philadelphia seek court approval for an 80 year lease (with options to extend) of 19.4 acres of Burholme Park to allow the hospital to expand its $350 million facility which borders the park directly to its north. The planned expansion in five stages over many years would result in the construction of as many as 18[1] large buildings between 4 and 9 stories high through the very center of the lush park, uprooting old growth trees, destroying vital recreational areas and irrevocably altering the unique character of this singularly beautiful park land and open space.

[1] Ex. P-12, the "Fox Chase Center Master Plan," displays 18 enumerated and often interconnected buildings. See also Ex P-47.

Throughout seven days of hearings, the parties presented numerous witnesses and documents. The petitioners, in particular, should be commended for the comprehensiveness and transparency of their documents. The hearing followed nearly five years of rancorous, heated and divisive debates within the community in over eighty-five meetings. The proposed lease was eventually approved by a divided Fairmount Park Commission, culminating in March of this year with the approval of the City Council and the Mayor.

Fox Chase shares the distinction with the Hospital of the University of Pennsylvania (hereinafter "Penn") of being a level one comprehensive cancer center. Like Penn, Fox Chase is an internationally renowned hospital with state of the art facilities and a treasured private resource for the City. In 2002, the leadership of Fox Chase began considering the need to expand their facilities to accommodate anticipated patient and research demands. Accordingly, they set about an ambitious goal of creating a 39 acre expanded campus by annexing that land from neighboring Burholme Park. The Fairmount Park Commission, however, rejected this initial proposal in 2004. In its final request, Fox Chase now seeks 19.4 acres in an 80 year lease with options to extend in exchange for payment of $12.25 million to the City. If denied, Fox Chase has signaled its intent to leave the City eventually as it would finance an expansion facility elsewhere.

The Fairmount Park Commission, city officials, members of City Council and the Mayor all sought to negotiate the best deal for the City by exchanging park land for the promise of direct and indirect financial gains including construction jobs, additional employees hired, and wage tax revenues.

An essential aspect of the negotiations involved acquiring "swap" land to replace the park land taken in the expansion. At the very end of the negotiations, these efforts were abandoned because no vacant parcels were available for a reasonable price. Instead, the lease agreement was intended to guarantee that a portion of Fox Chase's payment of $4.5 million be used exclusively to purchase park land when available,[2] but the actual language in the lease merely provides that these monies be used for general capital improvements with "first priority given to park land and open space."

Councilman O'Neill, in whose district Burholme Park is located, asserted his council manic privilege in various ways by rejecting available swap land not in his district. Final approval of the lease was delayed to accommodate his request that the $4 million Fox Chase payment be available for "improvements in existing facilities" in his District. Objectors cite the councilman's actions as examples of capricious and arbitrary conduct which polluted the final decision-making process by sacrificing the commitment to reserve the Fox Chase payment exclusively for the purchase of replacement park land and open space.

No evidence was presented that any public official acted other than in the best interests of the City and, indeed, nothing in this decision should be interpreted otherwise. In reaching this result, this court is not imposing its judgment as to the wisdom or economic benefits of the proposed lease. Nor does this court challenge decisions made by responsible public officials, who from all the evidence, exerted their best efforts to

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[2] See, e.g., 9/10/08 a.m. N.T. at 30-31(Dr. Young) (testifying that when the replacement land could not be found, "we were talking about an escrow agreement, which would say, 'Okay. We will put the money in, and somebody can buy it"). See also id. at 32-34 (Dr. Young) As Dr. Young observed, "So we started out, and we were told that a land swap was necessary, and we spent probably close to three years searching for that land swap. It became clear to everybody, for a variety of reasons that we have discussed, that a land swap satisfactory to everyone was not available, and that's when we moved to an alternative strategy for satisfying the interested parties." Id. at 34.

accommodate Fox Chase and benefit the City. Instead, this Court is simply required to apply the rule of law which requires that the City maintain Burholme Park as a park so long as it remains an active park. The public trust doctrine, the appropriate rule of law applied in these circumstances, leaves no doubt and requires that the petition for court approval to lease Burholme Park be denied.

Procedural History

On May 23, 2008, the City of Philadelphia ("City") filed a petition for authorization to lease 19.4 acres of land in Burholme Park through a Ground Sub-sublease (hereinafter "sub-sublease" or "Fox Chase lease") between Fox Chase Cancer Center and the Fairmount Park Conservancy ("Conservancy"). In seeking this approval, the City invoked the Inalienable Property Act, 20 Pa.C.S.A. § 8301 *et seq.* and its predecessor statute, the Revised Price Act of 1917, P.L. 388, 20 P.S. § 1561 *et seq.* (repealed 1974). As the petition notes, on March 6, 2008, the Philadelphia City Council unanimously approved an Ordinance that "found that it is no longer practicable or possible, and it does not serve the public interest, to continue to use all of Burholme Park for park purposes because the exclusive use will preclude Fox Chase from expanding its campus and may compel Fox Chase to relocate outside the City of Philadelphia.[3] As will be discussed below, this ordinance is legally unsound in its emphasis on the need of a nonprofit hospital to expand rather than on the fiduciary duty of the City to preserve actively used park land.

In response to the City's petition, a petition to intervene was filed by two organizations (the Society Created to Reduce Urban Blight (SCRUB) and "Save Burholme Park") as well as by thirteen individuals who seek to challenge the lease. By

[3] 5/23/08 City Petition, ¶ 96 (citing Ex. 16).

order and opinion dated August 25, 2008, which are incorporated herein, this court granted the petition to intervene to those individuals seeking to intervene as taxpayers, while denying party status to the two organizations, the Ryerss heirs and nontaxpayers.

Beginning on August 28, 2008, seven days of hearings were held. The parties then submitted post-hearing briefs. The Attorney General submitted a letter taking the position that "the Commonwealth does not oppose the Petition of the City or the granting of the relief requested."[4] On October 28, 2008, the court personally inspected and walked through the entirety of the 65 acres of Burholme Park for one and a half hours and was accompanied by counsel for the City, Fox Chase as well as by other neighbors who had all been asked not to address the court. The next day, oral argument was held.

Factual Background

The Ryerss Will and City Ordinances

In a will dated June 25, 1895, Robert W. Ryerss bequeathed to the City of Philadelphia "all that part of my Farm near Fox Chase with my Country seat called Burholme in the Thirty-fifth Ward to be used as a Public Park, the same to be called 'Burholme Park'" upon the death of his wife, Mary. In so doing, Ryerss specifically stated:

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[4] 10/6/08 Letter from Senior Deputy Attorney General (emphasis in original). The Attorney General quixotically chose to challenge vigorously all opposition to the proposed lease, arguing that it alone, as parens patriae, had exclusive standing to voice objections even while reserving until the case was over before announcing his position. Even at the end of the case, the Attorney General limited his role to deciding either to take no position or offer no opposition. No personal criticism is intended by these observations except to urge the Attorney General to consider a more substantive role in the future.

This court disagrees with the Attorney General's position on standing as set forth in the August 25, 2008 opinion incorporated herein. In addition, PEF code provisions relating to the enforcement of charitable trusts do not support the claim that the Attorney General has exclusive authority to enforce charitable trusts. Instead, 20 Pa.C.S. § 7735(c) provides:

> (c) PROCEEDING TO ENFORCE TRUST, -- A proceeding to enforce a charitable trust may be brought by the settlor during the settlor's lifetime or at any time by the Attorney General, a charitable organization expressly named in the trust instrument to receive distributions from the trust or any other person who has standing to do so.
> 20 Pa. C.S. § 7735(c)(emphasis added).

> **The Park to be for the use and enjoyment of the people for ever;** also my dwelling-house on the hill with free access thereto, the grounds to be included in the Park. The house to be fitted up as a Public Library and reading rooms in which are to be placed my books, and one or more rooms reserved for my pictures, old china, silver, glass and other curiosities as my wife during her life or by Will may designate as a Museum, so that the house may be used as a Library and Museum Free to the public[5]

Not only did Ryerss bequeath land to the City to be used as a park forever, but he also provided a monetary endowment to go to the "City of Philadelphia, the said City to use the income of their share in maintaining the Park and Library at Burholme."[6]

Mary Ryerss did not delay the delivery of this bequest until her death. Instead, after the death of her husband, Mary Ryerss remarried and donated her life estate in Burholme to the City.[7] The City accepted this devise by Ordinance dated July 27, 1905 ("1905 Ordinance") and specifically incorporated the language from the Ryerss Will specifying that the donated land "to be used as a park, to be called 'Burholme Park,' and to be free for the use and enjoyment of the people forever:"

> AN ORDINANCE
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> To accept the devise contained in the will of Robert W. Ryerss, deceased, of a tract of land and buildings near Fox Chase, in the Thirty-fifth Ward of the City of Philadelphia, and the life estate of Mary R. Bawn, his widow, therein, to place the same upon the City plan under and by the name of 'Burholme Park' and to direct the Commissioners of Fairmount Park to assume the custody and maintenance thereof.
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> WHEREAS, Robert W. Ryerss in and by his last will and testament did *inter alia* give, devise, and bequeath, after the death of his wife, all that part of his farm near Fox Chase with his country seat called 'Burholme' and his dwelling house on the hill, with free access thereto, the house to be fitted up and used as a library, reading room and museum, to be free to the public, and the grounds

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[5] Ex. P-1, June 25, 1895 Will of Robert Ryerss (hereinafter "1895 Ryerss Will"), at 3-4 (emphasis added). By codicils dated July 15, 1895 and October 8, 1895, Ryerss modified the tract of land that was to go to the City upon the death of his wife: "all the part of it lying West of a line, beginning at the intersection of the Township line and the Cheltenham roads; the line to be run straight North to the fence, which separates my land from the Jeanes Farm;" Ex. P-1, October 8, 1895 Codicil..

[6] Ex. P-1, 1895 Ryerss Will. After making numerous specific bequests in his 1895 Will, Ryerss provided that the remainder of his estate real and personal from which annuities were paid after the death of the annuitants should be paid to the Pennsylvania Company for Insurance on Lives and Granting Annuities to be held in a trust for 20 years. After the passage of 20 years, the principal of the residuary estate was to be divided into 4 shares—one of which was to go to the City of Philadelphia. Ex. P-1, 1895 Ryerss Will at 4.

[7] 5/23/08 City Petition, ¶17.

to be used as a park, to be called "Burholme Park," and to be free for the use and enjoyment of the people forever;[8]

Ten years later, the City obtained a parcel of land approximately 21 acres adjacent to Burholme Park. By Ordinance dated July 16, 1915, the Philadelphia City Council also dedicated this adjacent land "for public park purposes as an addition to Burholme Park."[9] It gave jurisdiction over this addition to Burholme Park to the Commissioners of Fairmount Park "to take possession of said ground for public use…"[10]

The Fairmount Park Commission and Its Mission to Preserve Park Land

The Fairmount Park Commission was created by the Act of March 26, 1867, P.L. 547, as amended by the Acts of April 14, 1868, P.L. 1083, April 21, 1869, P.L. 1194, and March 16, 1870, P.L. 451.[11] The 1867 Act empowered the Fairmount Park Commission to acquire land and maintain it for public use and as open space.[12] It also provided that the "legal title to the ground is vested in the city, and the place is to be forever maintained 'as a public place and park for the health and enjoyment of the people of said city, and the preservation of the water supply of the city of Philadelphia."[13] Throughout its history, generous donors gave land to Fairmount Park either during their lifetime or as bequests upon their deaths.[14] In addition, park land was acquired along both sides of the Schuylkill river during the first several years, with approximately 1800 acres in the Wissahickon Valley. Additional park lands, particularly regional parks, were added to

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[8] Ex. P-2, July 27, 1905 Ordinance (emphasis added).
[9] Ex. P-3, July 16, 1915 Ordinance.; 5/23/08 City Petition, ¶ 20.
[10] Ex. P-3, July 16, 1915 Ordinance.
[11] 9/12/08 N.T. at 155 (Price). See also City of Phila. v. Friends Asylum, 46 Pa. D. & C. 251 252 (Phila. C. P. 1942).
[12] 9/12/08 N.T. at 155-56 (Price).
[13] City of Phila. v. McManes, 175 Pa. 28, 34 A. 331, 1896 LEXIS at 6 (1896).
[14] Ex. P-10, 7/24/06 Fairmount Park Comm. N.T. at 55-56(Price)(noting gifts of land to Fairmount Park from the Sedgley Park Estate; Joseph Wharton and Fisher Park; Morris family donation to Morris Park/Cobbs Creek Park; Fernhill Park in North Philadelphia donated to honor Thomas Lucane; donations by Woodward and Muscent (ph) families as additions to the park in the Wissahickon valley).

protect the watershed of various areas of the City by Cobbs Creek, Tacony and Poquessing.[15] According to Philip Price, a Fairmount Park Commissioner who testified at the hearing in opposition to the Fox Chase Lease, the "mission was simply to acquire land for park purposes for the health and enjoyment of the citizens of Philadelphia" and "it was done very successfully for all those years."[16] He was unaware of any active park land being sold, although land was taken to construct the Schuylkill Expressway and the Roosevelt extension in the 1950's.[17] Fairmount park has a longstanding policy of not selling park land.[18] Even those who testified in favor of the Fox Chase lease agreed that the "paramount mission of Fairmount Park is to protect open spaces for its citizens."[19]

Burholme Park

Burholme Park is managed and cared for by the Fairmount Park Commission in Northeast Philadelphia. With the passage of time, Burholme Park has evolved into a popular, active, "very important park"[20] of approximately 65 acres.[21] To its west, the park is bordered by a lush wooded area that slopes steeply down to a stream that flows to

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[15] 9/12/08 N.T. at 156 (Price).

[16] 9/12/08 N.T. at 156 (Price). Coincidentally, Mr. Price's great-great-grandfather was Eli Price, who drafted the Price Act invoked by petitioners. Id. at 216.

[17] 9/12/08 N.T. 156-57 (Price). When asked whether "[o]ther than the Schuylkill Expressway acquisitions in the fifties from the Park Commission, land for the Schuylkill Expressway, are you familiar with any active land being taken from active park use and given to a business, a nonprofit or a hospital," Duane Bumb, Senior Deputy Director of the City's Finance Department, responded "no." 8/28/08 p.m. N.T. at 113.

[18] 8/28/08 p.m. N.T. at 56 (Bumb).

[19] Ex. P-15, 11/26/07 Phila. City Council Jt. Comm. on Rules N.T. at 11 (Focht- Exec. Dir. Fairmount Park Commission)("A paramount mission of Fairmount Park is the protection and preservation of open space for the citizens of Philadelphia and the protection of our watersheds"). See also 8/28/08 a.m. N.T. at 25 & 8/28/08 p.m. N.T. at 31-32 (Binswanger)(noting that Fairmount Park Commission adopted a Strategic Plan in 2003 to increase parkland); 8/28/08 p.m. N.T. at 123-24 (Bumb)(main purpose of Fairmount Park Commission is to protect park land).

[20] 8/28/08 a.m. N.T. at 31 (Binswanger). See also 9/10/08 p.m. N.T. at 43 (Gervner)("absolutely" agreeing with Stretton that "this park is used regularly, repeatedly by all the people").

[21] 5/23/08 City Petition, ¶ 21. According to Ex. P-4, Burholme Park parcel A and parcel B total 65.998 acres. Curiously, a document prepared by the petitioners at the request of this court indicates that Burholme Park is 53.54 acres. See Ex. C-1 at 7. The site analysis by Cairone & Kaupp, Inc. states that the park is 65 acres. See Ex. P-31.

the Tacony Creek. Towards the north is a grassy picnic grove and playground area. To the east, the Ryerss Mansion, Burholme, was built in 1859 upon a hill that now offers a view of the center city skyline.[22]

In the 1950's, the City licensed a tract of land in Burholme Park to a private enterprise as a for-profit driving range, miniature golf course and batting cages to bring revenue to the park system.[23] According to the manager of the driving range, all kinds of organizations use this resource: "Philadelphia PAL, the Philadelphia Recreation Department, Boys and Girls Clubs," summer day camps, "boy scouts, girl scouts, cub scouts, church groups, school teams, high school golf teams and college golf teams." [24] The fees from this concession benefit of the park system as a whole. For example, in calendar year 2008, the concession fee for Fairmount Park from the Burholme Driving Range is approximately $179,194.75 which would increase to an annual concession fee of $262,781.51 in calendar year 2015.[25]

The public areas of Burholme Park provide a variety of recreational opportunities. Barry Bessler, chief of staff of the Fairmount Park Commission for the past 15 years, testified that Burholme Park is "very heavily used on a regular basis" by people of all ages. There are picnic groves and hiking trails along a stream. There are athletic fields where teams play baseball and softball in the spring; soccer and football in the fall, with a mixture of games in the summer. The Park has a museum and a playground that

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[22] Ex. P-31 (Site Analysis for Burholme Park); 10/2/08 a.m. N.T. at 50 (Bessler).

[23] 10/2/08 a.m. N.T. at 53 (Bessler); 8/29/08 N.T. at 10 (Bumb)(the driving range is "licensed" to a for profit entity); Ex. P-54 (the driving range, miniature golf and batting cage is "an approximate 10.00 tract of land"); Ex. C-1 at 1 (Burholme Park driving range is 14.4 acres).

[24] 10/2/08 a.m. N.T. at 4-5 (Lee – Manager of Burholme Park Driving Range).

[25] Ex. P-54 (Coyle). See also Ex. R-15, "A Bridge to the Future – Fairmount Park Strategic Plan-Summary Report" dated June 2004 at 14 (In fiscal year 2003, concession revenues from the Burholme Driving Range totaled approximately $139,410).

are used on a regular basis. In the winter, the hill near the museum is used for sledding.[26] As John Binswanger, a Fairmount Park Commissioner who favors the lease agreement, observed, Burholme Park is "a wonderful place for the community to come out and really benefit from the outdoors and park atmosphere."[27]

Over the course of years, taxpayer funds and revenue have been expended on the care and maintenance of Burholme Park.[28] In addition, the monetary fund Ryerss established for the mansion and park has been used for its care and maintenance. That fund has an approximate present value of one million two hundred and "fifty plus" dollars.[29]

Fox Chase: Its Need to Expand and Vision for Excellence

In 1949, Fox Chase located its 17 acre campus in Northeast Philadelphia, directly north of Burholme Park.[30] Fox Chase was founded in 1904 with a mission to reduce the burden of human cancer not only in its own region but nationally and internationally as well. It is a comprehensive cancer center engaged in basic science, clinical trial research, translational research and the development of new therapies to offer patients a variety of treatment options.[31] Over the past two decades, Fox Chase has been ranked by U. S. News and World Report in the top twenty cancer centers; it recently was the highest

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[26] 10/2/08 a.m. N.T. at 50, 60-63 (Bessler). See also Ex. P-7 (Burholme Park map highlighting mansion, athletic fields, golf concession). See Court Ex. 1 (showing portions of Pennypack close to a 1 mile radius with other areas of Pennypack Park within a 2-3 mile radius. Pennypack Park is classified as a regional/watershed park of 1335.12 acres).

[27] 8/28/08 a.m. N.T. at 31(Binswanger).

[28] 10/2/08 a.m. N.T. at 81 & 84 (Bessler- Chief of Staff of Fairmount Park Commission).

[29] 9/12/08 N.T. at 169 (Price-as treasurer of Fairmount Park Commission); see also 8/28/08 a.m. N.T. at 33 (Binswanger)(estimating the park endowment of "somewhere above one million dollars").

[30] 5/23/08 City Petition, ¶¶ 26 & 28.

[31] 8/29/05 at 63-65 (Dr. Young). A comprehensive cancer center encompasses the endeavors of both basic science centers and clinical cancer centers. Id. at 64. See also Ex. P-55 at 7 (Economic Impact Report).

ranked cancer center in the region. Two scientists at Fox Chase have been awarded Nobel Prizes: one in medicine; the other in chemistry.[32]

Fox Chase is also the second largest employer in Northeast Philadelphia and the largest employer in the Fox Chase-Burholme area. It employs approximately 2500 employees of whom just under 50% reside in the city. The average salary is $82,000 with 80% of employees making over $47,000.[33] Moreover, as a premier international medical center, Fox Chase contributes to the life science industry in Philadelphia which is a large, important sector of the City's economy.[34]

The Center treats all kinds of cancer except pediatric cancer. Unfortunately, the need for cancer care in this region is growing due to the aging population.[35] In the past 20 years, there has been extraordinary growth in the number of patients treated at Fox Chase. While in 1980, there were approximately 700 new patients a year, by the present year there were 8,000 new patients. As President and CEO of Fox Chase, Dr. Robert Young was responsible for long-term strategic planning. In 2002, Fox Chase and its board began focusing on long-term planning to meet future patient needs and to assure that the center could maintain its role as an outstanding comprehensive cancer center. After a year of retreats by faculty, both physicians and basic scientists, it became clear that the Center should be prepared by 2015 to treat about 12,000 new patients a year with 120,000 outpatient visits.[36] They also needed to increase their hospital capacity from 100

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[32] 8/29/08 N.T. at 73-74 (Dr. Young).
[33] 8/29/08 N.T. at 77-78 (Dr. Young); Ex. P-17 (2/12/2008 Philadelphia City Council Comm. on Parks, Recreation and Cultural Affairs Meeting) at 13-14 (Bumb).
[34] 8/28/08 p.m. N.T. at 42-44 (Bumb).
[35] 8/29/08 N.T. at 78 & 85 (Dr. Young).
[36] 8/29/08 N.T. at 80-81 (Dr. Young); Ex. P-17, 2/12/08 Philadelphia City Council Comm. on Parks, Recreation and Cultural Affairs at 64-65 (Dr. Young). See also Ex. P-28.

beds to 200 beds; they needed increased outpatient facilities as well as a 50% increase in its laboratory science and basic science facilities.[37]

To meet these needs, Fox Chase decided it was necessary to expand its campus. Although Fox Chase is currently building a 125,000 square foot building for outpatient care and a 600 car parking garage on its present campus, it concluded that it could not expand on its present campus without building a 35 story building that would be unacceptable to the neighbors. Moreover, such construction would necessitate closing down certain buildings and would disrupt operations for several years.[38]

The Fox Chase campus presently approximates a quadrangle with a courtyard that creates a campus-like atmosphere for the patients, staff, basic scientists, physicians and nurses.[39] Maintaining a unified, campus-like comprehensive center for research and treatment of cancer patients is an integral element of the Fox Chase vision; it helps stimulate "the interaction between the basic scientists who are focused on cancer, the translational researchers who take these observations and bring them rapidly into the clinic, and the clinical trialists who provide the clinical trial structure in which these drugs and these treatments are explored and definitively defined to be either successful or not."[40] To achieve this vision of an innovative, comprehensive cancer center at the cutting edge of research and treatment, Fox Chase decided to explore the possibility of expanding its present campus into the contiguous property located in Burholme Park.[41]

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[37] 8/29/08 N.T. at 86 (Dr. Young). See also Ex. P-28 (chart illustrating growth in Fox Chase Total Patient Visits 1993-2018); Ex. P-55 at 18 (Economic Impact Report).
[38] 8/29/08 N.T. at 90-92 (Dr. Young).
[39] 8/29/08 N.T. at 91 & 96 (Dr. Young).
[40] 8/29/08 N.T. at 70 (Dr. Young).
[41] 8/29/08 N.T. at 109 (Dr. Young)

When asked why Fox Chase did not simply purchase a building several miles away from its existing campus, Dr. Young explained:

> Well, the biggest reason is that we believe deeply that the success of a comprehensive cancer center is based on the ability of the various entities within it to integrate with each other, and that we need to be on a central campus. And while it may be hard for people who don't run cancer centers to understand that, it's a fact. And we have certainly looked fairly extensively at anything that has been proposed as a potential option. We have not been particularly interested in two acre or four acre plots that are in the middle of residential areas that wouldn't solve our problem, but for pieces of property that were extensive enough to potentially address a comprehensive cancer center's needs for the future.[42]

It was not satisfactory, he explained, to have researchers and physicians in separate facilities because "it simply decreases the capacity of those people to interact directly with each other to work out specialized cancer research studies, design new clinical trials, utilizing the data that is emerging out of our own laboratories."[43]

Over the course of several years, Fox Chase investigated as many as 20 or 25 properties including Byberry, the Women's Medical College and the Naval Shipyard as possible sites for expansion but none proved satisfactory. Since Fox Chase has close to $350,000,000 invested in its present campus, it decided that its best option was to stay where it is but expand into contiguous land located in Burholme Park.[44]

Negotiations to Accomplish Expansion of Fox Chase

In early 2004, Fox Chase approached the Fairmount Park Commission with the possibility of expanding into 39 acres of Burholme Park.[45] The Fairmount Park Commission rejected that initial proposal. They were "not terribly enamored with giving that much land away;" they therefore encouraged Fox Chase to redesign its plans "to

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[42] 8/29/08 N.T. at 99 (Dr. Young).
[43] 8/29/08 N.T. at 100 (Dr. Young).
[44] 8/29/08 N.T. at 102-09 (Dr. Young).
[45] 8/29/08 N.T. at 109-10 (Dr. Young). See also Ex. P-19 (Time Line of Key Events-Fox Chase Expansion Proposal).

minimize the impact on the park."[46] By October 2004, Fox Chase decided to cut back its proposed expansion into the park to 25 acres in response to public comment.[47]

To gain public support for its expansion, Fox Chase held as many as 85 meetings of which at least 30 were public meetings. It also engaged Fairmount Capital Advisers to conduct a study of the economic benefits of its expansion to the City. The Economic Impact Report concluded that over the course of Fox Chase's 25 year $ 1 billion expansion program nearly 4,000 permanent direct and 2,181 "indirect and induced" jobs would be created. Over the course of this period, city wage tax receipts were predicted to total $25.7 million.[48]

The Fairmount Park Commission at its February 16, 2005 meeting formed a Burholme Park Committee to explore the possibility of permitting Fox Chase to expand into the park.[49] John Binswanger, a member of that Committee, acknowledged that the primary mission of the Fairmount Park Commission was "maintaining and protecting the park and the watershed within the park."[50] Yet during the February 16, 2005 Fairmount Park Commission meeting, he also signaled his receptivity to the lease proposals when he noted that "[c]ircumstances change over the years" and "I also look, however, at the economic benefits to the city, and particularly to Fox Chase and that community and what would be lost to Fox Chase if by any reason they have to leave that site."[51] The ad

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[46] 8/28/08 a.m. N.T. at 37 (Binswanger); 8/29/08 N.T. at 110 (Dr. Young).
[47] 8/29/08 N.T. at 111-114 (Dr. Young); Ex. P-19.
[48] Ex. P-55 at 1-2 (Economic Impact Study by Fairmount Capital Advisors); Ex. P-5 and Ex. P-40. See 10/15/08 Petitioners' Post-Hearing Brief at 32 (Economic benefits of Fox Chase expansion); See also 8/29/08 N.T. at 111-14 (Dr. Young).
[49] Ex. P-8, 2/16/05 Fairmount Park Comm. N.T. at 36. Commissioners Baum, Binswanger, Mason, Makadon, and Nix ex officio, were named as members of this committee. Id. See also Ex. P. 9, 3/9/05 Fairmount Park Comm. N.T. at 26.
[50] 8/28/08 a.m. N.T. at 25 (Binswanger).
[51] Ex. P-8, 2/16/05 Fairmount Park Comm. N.T. at 35 (Binswanger).

hoc committee continued its negotiations and hired an architect, Bob Thomas, to evaluate Fox Chase's plans and develop design guidelines.[52]

On March 9, 2005 at a Fairmount Park Commission meeting, the ad hoc committee proposed a resolution (" March 9, 2005 FPC resolution") to allow Fox Chase to expand into 19.4 acres of Burholme Park in five phases. This resolution emphasized that the health care industry is vital to the City's economy; Fox Chase's expansion will create thousands of construction and permanent jobs, and; it will generate millions in tax revenues. The commissioners approved the resolution with 2 votes in opposition.[53] It authorized the Commission President and Executive Director of Fairmount Park to execute one or more agreements that would allow Fox Chase to expand into 19.4 acres of Burholme Park upon the payment of certain sums. It also required Fox Chase to convey to the City of Philadelphia "all of that certain property owned by Fox Chase, approximately 15 acres in size and commonly called the 'Hope Lodge Parcel,' along Laurel Road and adjacent to Tacony Creek Parkway" subject to certain conditions.[54]

On July 24, 2006, a revised proposed sub-sublease was presented at a Fairmount Park Commission special meeting and public hearing for review and comment. Discussions of the proposed land swap, however, were held in a closed executive session, ostensibly due to the delicacy of negotiations involving real estate.[55] It is thus not clear what changes, if any, were made as to the prior March 9, 2005 FPC resolution's proposal for using the Laurel Avenue property as substitute land. In any event, the

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[52] Ex. P-9, 3/9/05 Fairmount Park Comm. N.T. at 26 (Goldstein).
[53] Ex. P-9, 3/9/05 Fairmount Park Comm. N.T. at 27-36 & 46.
[54] Ex. P-9, 3/9/05 Fairmount Park Comm. N.T. at 33, 27-32.
[55] Ex. P-19; Ex. P-10, 7/24/06 Fairmount Park Comm., N.T. at 18, 21-22 &36. See also Ex. P-11, 2/8/08 Fairmount Park Comm.
N.T. at 9 (Copeland)(suggesting that because Fox Chase was targeting specific land as a potential swap, it could not be publicly identified).

Commission passed a resolution approving "the proposed sub-sublease between the Fairmount Park Conservancy and Fox Chase Cancer Center as presented to the Commission today" with four votes in opposition.[56]

The Unsuccessful Quest for "Swap Land"

From the very beginning of the Fox Chase lease negotiations, the City and Fairmount Park Commission had a goal of finding land to substitute or "swap" for the 19.4 acres of Burholme Park. According to Duane Bumb, Senior Deputy Director of the City's Commerce Department, one of the conditions that the City and Fairmount Park had set in their negotiations with Fox Chase was locating appropriate land to replace "any property that may be needed for the Center's expansion."[57] As Commissioner Binswanger explained, the proposal to lease 19.4 acres of Burholme Park was "extraordinary." [58] When questioned about his support of the proposal to lease park land, he replied:

> This would only have been done where we had an opportunity to swap land or acquire other land in place of the 19 acres. It would not have been done if we didn't have the funds to do that.[59]

In light of Fairmount Park's longstanding policy against selling park land, a lease was the best option.[60] As Binswanger admitted, "[t]he Commission would have never approved an outright sale of the ground, so this (i.e. lease) is an alternative way to get the ground in place for Fox Chase and give them enough time to build as they need."[61]

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[56] Ex. P-10, 7/24/06 Fairmount Park Comm. N.T. at 49.
[57] 8/28/08 p.m. at 54 (Bumb). See also 9/10/08 a.m. N.T. at 30-34 (Dr. Young).
[58] 8/28/08 a.m. N.T. at 44 (Binswanger).
[59] 8/28/08 a.m. N.T. at 106 (Binswanger).
[60] 8/28/08 p.m. N.T. at 56 (Bumb-Senior Deputy Director of Phila. Commerce Dept.)(A long term lease was negotiated "[p]rimarily because Fairmount Park has a standing policy that it does not sell park land").
[61] 8/28/08 a.m. N.T. at 84 (Binswanger).

The proposal in the March 9, 2005 FPC resolution that the Laurel Avenue property be used as "swap land" for 19.4 acres of Burholme Park ultimately did not succeed. While Fox Chase's proposal that its land on Laurel Avenue could be used as a "swap" for the 19.4 acres of Burholme park was acceptable to the Fairmount Park Commission, this option was not acceptable to Councilman O'Neill because it was not located within his 10th Council District.[62] Binswanger recalled that Councilman O'Neill held up the deal until money was designated for his district.[63] Efforts to find alternative swap land within the district proved unsuccessful. Fox Chase spent at least a year negotiating with the International Medical Mission Sisters (hereinafter "Mission Sisters") for land they owned that might be used as "swap land," but they could not agree on a price.[64] While Fox Chase had obtained an appraisal valuing the land at $3 to $4 million dollars, the Sisters had it appraised at $5 million and demanded $7 million which was rejected by Fox Chase's board.[65]

Nearly two years after the Fairmount Park Commission's initial authorization to execute a lease agreement for 19.4 acres of park land to Fox Chase at its March 9, 2005 meeting, Councilman O'Neill introduced a bill to City Council on November 1, 2007 for approval of the Fox Chase lease agreements.[66] The Bill stated that the agreements would allow Fox Chase to lease "land currently part of Burholme Park on terms and conditions

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62 8/29/08 N.T. at 116 (Dr. Young). See also 10/1/08 p.m. N.T. at 56 (O'Neill).
63 8/28/08 p.m. N.T. at 12-13 (Binswanger)
64 8/29/08 N.T. at 115-16 (Dr. Young).
65 8/29/08 N.T at 120-22, 170-72 (Dr. Young).
66 See Ex. P-14 (Bill 070956-A proposed an ordinance authorizing the President of the Fairmount Park Commission, the Executive Director of Fairmount Park, and Public Property Commissioner, on behalf of the City of Philadelphia to enter into to lease with the Philadelphia Authority for Industrial Development ("PAID") to lease city-owned land south of Shelmire Avenue, so that PAID could enter into a sublease with the Fairmount Park Conservancy ("Conservancy") and then the Conservancy could enter into a sub-sublease with Fox Chase. For a breakdown of the structure of the transaction between the City (through the Fairmount Park Commission, PAID, the Fairmount Conservancy and Fox Chase, see Ex. P-20.

that preserve Burholme Park as an outstanding recreational, scenic and historic amenity and that ensure the City will acquire use of additional recreational land to substitute for land used by Fox Chase."[67] The bill further provided:

> It is no longer practicable or possible, and it will not serve the public interest, to use all the City's land comprising Burholme Park for park purposes because that exclusive use would preclude Fox Chase from expanding its campus and will likely compel Fox Chase to relocate its existing campus and future facilities outside the City of Philadelphia.[68]

In addition, another bill was introduced on November 1, 2007 to change the zoning of property bounded by Burholme, Napfle, Cottman, Filmore and Shelmire avenues from recreation to Institutional Development District ("IDD") to accommodate the proposed expansion.[69] Fox Chase concedes that this zoning change allows virtually limitless building on their present site.[70] The objectors argue that this zoning change obviates the need for expanding on parkland.

At a public hearing on November 26, 2007 before the City Council Joint Committee on Rules and Parks, Recreation and Cultural Affairs, Mark Focht, as Executive Director of the Fairmount Park Commission, spoke in support of the lease proposal allowing Fox Chase to expand into Burholme Park. After describing the general terms of the proposed lease agreement as the result of years of negotiation, he underscored how the Commission's sensitivity to the preservation of recreational opportunities close to Burholme Park encouraged a search for substitute land: "as Councilman O'Neill has referenced, accordingly, the proposed agreement would require the Cancer Center use its best efforts to acquire land near Burholme Park lease (sic.)

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[67] Ex. P-14, Bill No . 070956-A, ¶ H.
[68] Ex. P-14, Bill No. 070956-A, ¶ J.
[69] See Ex. P-46. On June 7, 2007, an earlier ordinance was passed to change the zoning to IDD to accommodate the construction on the Fox Chase campus. See Ex. P-45.
[70] See 9/10/08 a.m. N.T. at 52-52 (Dr. Young).

within a year of signing the lease with the City to use as park land under the Commission's jurisdiction." If that property could not be located, then Fox Chase would be required to deposit a sum mutually agreed upon by it and the City to the Fairmount Park Conservancy for park land acquisition and improvements.[71]

Councilman O'Neill responded by "correcting" Mr. Focht as to the commitment to find substitute land:

> Mr. Focht, you were mentioning financial arrangements between the Park Commission and the hospital. I don't know if you're aware of it because you were not involved in the conversations I had, nor was I solved (sic) in yours.
>
> But because we were not able to find local land at reasonable prices to add to the park, the hospital has agreed to set up a trust with $4.5 million that I'm still working on the arrangements with them between now and final passage so I don't expect a problem. But I just want the record to reflect the agreement that I reached is above and beyond the agreement that you have.[72]

The Bill to approve the lease transaction was not approved before the City Council adjourned in December 2007. Its companion bill to change the zoning to an Institutional Development District ("IDD") did pass. This ordinance requires that any expansion by Fox Chase adhere to the Master Plan.[73]

On January 29, 2008, the parties met with Mayor Nutter to resolve open issues. On January 31, 2008, a new bill for the lease transaction was introduced to City Council. At a February 8, 2008 meeting, the Fairmount Park Commission approved a revised sub-sublease. [74] The revised sub-sublease differs from the 2006 version which had "anticipated that Fox Chase might be able to acquire substitute land in the 10th councilmanic district to substitute for the land that it would be using in Burholme

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[71] Ex. P-15, 11/26/2007 City Council of Phila. Jt. Comm. N.T. at 14 (Focht).
[72] Ex. P-15, 11/26/2007 City Council of Phila. Jt. Comm. N.T. at 18-19 (O'Neill).
[73] Ex. P-17, 2/12/2008 City Council of Phila. Comm. on Parks, Recreation and Cultural Affairs N.T. at 12 (Bumb). See Exs. P-46 & P-47 (Master Plan); 9/10/08 a.m. N.T. at 88 (Gervner).
[74] Ex. P-19.

Park."[75] Although Fox Chase had attempted to obtain appropriate swap land, "City officials, Park officials now agree with Fox Chase that buying that land for all practical purposes is not a possibility."[76] Instead, Fox Chase agreed to pay an additional $500,000 to the Conservancy as base rent as well as $4 million into a city fund which will be restricted for use in the 10th councilmanic district.[77]

The revised sub-sublease was considered by the City Council Committee on Parks, Recreation and Cultural Affairs on February 12, 2008 at a public meeting where citizens were given an opportunity to comment.[78] On March 6, 2008, City Council approved the Bill for the Burholme Park lease, which was signed into law by Mayor Nutter on March 12, 2008.[79]

Terms of the Proposed Sub-sublease

The sub-sublease of land in Burholme Park to Fox Chase is part of an intricate series of agreements. There is a lease between the City of Philadelphia (through the Fairmount Park Commission) and the Philadelphia Authority of Industrial Development ("PAID"), with a sublease with the Fairmount Park Conservancy which is party to the sub-sublease with Fox Chase.[80] Under the sub-sublease, Fox Chase is required to pay $ 8.25 million to the Fairmount Conservancy. This sum is broken down as follows: there is a base rent of $2.25 million, a portion of which ($1.25 million) is designated for

[75] Ex. P-11, 2/8/08 Fairmount Park Comm. N.T. at 8-9 (Copeland).
[76] Ex. P-11, 2/8/08 Fairmount Park Comm., N.T. at 9 (Copeland).
[77] Ex. P-11, 2/8/08 Fairmount Park Comm., N.T. at 9 (Copeland).
[78] See Ex. P-17, 2/12/08 City Council Comm. on Parks, Recreation and Cultural Affairs.
[79] Ex. P-19.
[80] Ex. P-11, 2/8/08 Fairmount Park Comm. N.T. at 4-5(Copeland); Ex. P-20.

Burholme Park. There are development fees of $5.5 million over the period of the five phases with additional consideration of $500,000.[81]

In addition, under the sub-sublease Fox Chase is to pay $4 million to the City to be deposited in its capital account for improvements in the 10th district with $500,000 as additional consideration.[82] Since the parties had been unable to find acceptable replacement land, they provided instead for this specified sum of money. Duane Bumb, Senior Deputy Director of the City's Commerce Department, who was actively involved in the lease negotiations, explained that the "reason we removed the language about specific replacement property was because none could be identified that would allow this agreement to proceed. We replaced it with a funding stream that could substitute for the actual identification of the property."[83] The terms of this agreement are set forth in Article 26.1 of the sub-sublease which provides:

> 26.1 Additional Consideration. Starting on the first anniversary of the First Option Date, Tenant shall pay (a) Four Million Dollars ($4,000,000) to the City for deposit in an account dedicated to "Improvements to Existing Facilities" in the 10th City Council District, with first priority given to park land and open space, otherwise for other public purposes ("ITEF Funds"), and (b) Five Hundred Thousand Dollars to the Landlord ("Additional Consideration")…[84]

When asked why this $ 4 million was linked to the 10th Council manic District, Mr. Bumb initially suggested that it was an attempt to focus on the area most directly affected by the loss of 19.4 acres of parkland. On further questioning, however, he conceded that the support of Councilman O'Neill had been necessary to this deal.[85] No

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81 Ex. P-22. See also Ex. P-13C, Article 1.7.2.2 ("Development Fees"); Article 3.1.1 ("Base Rent"); Article 3.5 ($1,125,000) of base rent to be use for maintenance of Burholme Park).

82 8/28/08 a.m. N.T. at 61-63 (Binswanger); Ex. P-22; Ex. P-13C, Article 26.1.

83 8/29/08 N.T. at 47-48 (Bumb).

84 Ex. P-13C, Ground Sub-Sublease at Art. 26.1.

85 8/29/08 N.T. at 48-49 (Bumb).

contemporaneous appraisals were obtained to determine the values for the "park land" referenced in Article 26.1 of the sub-sublease—(or for the 19.4 acres that were to be leased to Fox Chase). As Mr. Bumb explained: "we didn't have it appraised, but we were using an approach that would be sort of what our estimate of replacement cost would be, was again for replacement purposes only."[86]

Councilman O'Neill was equally vague as to how the $4.5 million figure in Article 26.1 of the sub-sublease had been determined:

> Once the final final no came on the Medical Mission Sisters [i.e. replacement property], I said, well, we are going to have to put a number on whatever that is. And I suggested four-and-a-half million dollars as I remember. I am not sure whether I suggested it, but we wound up at four-and-a half million dollars. And that was the verbal handshake that I had with the hospital on that money.[87]

Although Councilman O'Neill stated in his direct testimony that he did not "think anybody should ever be able to use it [the designated $4.5 million] other than in Fox Chase and Burholme,[88] under vigorous cross-examination he agreed that Article 26.1 of the sub-sublease dedicates the $4 million to improvements in existing facilities in the Tenth Council District with no limitation to Burholme and Fox Chase or purchasing replacement park land.[89] As for finding replacement land, Councilman O'Neill held out little hope:

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[86] 8/29/08 N.T. at 52-53 (Bumb). This statement was clarified by the following question and response:

> Q: (The Court): Let's go back. Your answer, then, is you did not have an appraisal value; is that correct?
>
> A: Yes. 8/29/08 N.T. at 52-53 (Bumb) See also 8/28/08 a.m. N.T. at 61 (Binswanger).

According to Commissioner Binswanger, the overall price that Fox Chase was required to pay was determined based on "[t]he best estimate of value for what they were doing in relation to the cost of their buildings, and the value of the land, and what was generally understood to be values within the neighborhood." Id.. Binswanger testified that he played a role in making that determination. Id.

[87] 10/1/08 p.m. N.T. at 60 (O'Neill).

[88] 10/1/08 p.m. N.T. at 65 (O'Neill).

[89] 10/1/08 p.m. N.T. at 75, 62-63 (O'Neill). In further response, the Councilman stated: "Actually, this will be limited. I don't know how, but it will be limited, and it will be limited so that people that aren't impacted by this that live in Rhawnhurst or Bustleton or Somerton or different neighborhoods are not the beneficiaries because they are not the impacted area. It is my intent." Id. at 79.

> And the fact is that right now we only knew (sic) about two properties in this entire area that were potential in any way to provide additional open space for the future, become part of the park, and they weren't even close to being able to be accomplished. And unless either of those properties change dramatically, become less expensive, and a bunch of factors, a whole lot of factors change, it is going to be hard to find parkland.[90]

While the $4 million dollars referenced in Article 26.1 of the sub-sublease may not be clearly limited solely to the acquisition of replacement park land in Burholme or Fox Chase, it nonetheless is subject to various safeguards as Mr. Bumb carefully outlined. That money would be in an account within the City capital budget that is administered through the managing director. There would be a requirement that it be used for capital eligible expenditures for physical improvements with a priority for land acquisition.[91] But it is not explicitly linked to purchase of land to replace the 19.4 acres of Burholme Park. The actual contract language is vague and ambiguous for it fails to require purchase of replacement land. In fact, the word "purchase" is not even in the clause.

Appraisals Commissioned After the Lease Approval

No appraisals were done of the Burholme park land prior to consummation of the Fox Chase sub-sublease transaction. They were done afterwards as part of the court proceedings.[92] The absence of appraisals is cited as an example of capricious decision-making by the objectors, who argue, not without merit, that the Fox Chase payment was sheer guess work at valuing the park land. After the lease arrangements were approved, the City and counsel for Fox Chase hired two appraisers to appraise the land that was to

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[90] 10/1/08 p.m. N.T. at 63 (O'Neill).

[91] 8/28/08 p.m. N.T. at 62 (Bumb).See 8/28/08 a.m. N.T. at 62 (Binswanger)(The $4 million designated for the 10th district goes into a capital account with the city for improvements in that district). See also Ex. P-43, 2/11/08 letter from Rob Dubow, Director of Finance, City of Philadelphia, outlining procedures for the treatment of Fox Chase's payments of $4 million suggesting that those funds are not specifically designated for replacement of park lands though it would be a priority.

[92] 9/10/08 a.m. N.T. at 40 (Dr. Young); 8/29/08 N.T. at 52-53 (Bumb).

be leased and then offer an opinion as to the reasonableness of the total consideration required under the lease agreement.[93] Petitioners concede that these appraisals could not be used to as evidence of the good faith of the actions by the City and Fox Chase in obtaining the lease agreement because these appraisals had not been considered as part of that process. Instead, the appraisals were offered to satisfy Philadelphia Orphans' Court Rule 12.12 for obtaining court approval of the transaction under the Inalienable Property Act by showing there was sufficient value.[94] Both appraisers came out with a different value, but each concluded that the City was being adequately compensated for land which, in their opinion, had the highest and best use as single or multiple institutional facilities. Both values were below the $12.25 million that Fox Chase was required to pay under the sub-sublease: John Coyle concluded that the value of the 19.4 acres being leased was $7,750,000 as of May 20, 2008, while John Rush appraised the land as having a value of $6,300,000 or $324,000 per acre.[95]

Potential Impact of the Expansion of Fox Chase into Burholme Park

The sub-sublease between the Fairmount Park Conservancy and Fox Chase gives Fox Chase the option to expand into Burholme Park in phases. As Commissioner Binswanger explained: "I think it was done in phases because we did not want to turn over 19 acres of ground to Fox Chase, and they may never use it at all, or would not use part of it when it could remain as park land. That was very important."[96] Throughout the five phases, Fox Chase is required to conform to the Design Guidelines attached as an

[93] 9/10/08 p.m. N.T. at 62 (Coyle).
[94] 9/10/08 p.m. N.T. at 62-66.
[95] 9/10/08 p.m. N.T. at 71-74 (Cole)(appraisal conducted July and August 2008); Ex. P-41; 9/11/08 a.m. N.T. at 56 & 70 (Rush); Ex. P-42.
[96] 8/28/08 a.m. N.T. at 59-60 (Binswanger).

exhibit to the sub-sublease and to the Master Plan attached to the ordinance granting the IDD.[97]

According to the Design Guidelines, Fox Chase "contemplates constructing buildings from four(4) to (9) occupied stories."[98] The petitioners present graphic exhibits that clearly illustrate how these buildings will ultimately cut across the center of the park—cutting it into three parts. In the early phases of the expansion, hospital buildings will be constructed on the wooded areas of the park closest to the Fox Chase campus. The construction will then spread to the wooded areas to the west by the stream, with final construction of as many as 18 buildings penetrating south to the golf concession.[99]

The plan to use 19.4 acres of the park for hospital facilities is actually a compromise from Fox Chase's earlier plans to expand first into 35 to 39 acres of the park,[100] and then into 25 acres.[101] Those plans reflect differing calculations of building height and area sought: the less park land claimed for the expansion, the higher the buildings.[102]

Proponents of the expansion emphasize that the ball fields, the sledding hill, picnic pavilion, playground and mansion will remain. What would be consumed by the construction are the northern/western wooded areas, actively used recreational areas, and the golf driving range in the later phases of the project.[103] When all five phases are done,

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[97] Ex. P-13C, Art. 6.1 and Ex. C. See 9/10/08 a.m. N.T. at 89 (Gervner)(Fox Chase would have to conform to the Master Plan set for in Ex. P-46) See also Ex. P-47.

[98] Ex. P-13C, Ex. C at V.C. See also 9/10/08 p.m. N.T. at 5 (Gervner)(building heights will be 4 to 9 stories).

[99] See P-Ex. 7, Ex.P-12 ("Long Range Master Expansion Plan"); Ex. P-47

[100] See Ex. P-32; 9/10/08 a.m. N.T. at 86 (Gervner).

[101] See Ex. P-33; 9/10/08 a.m. N.T. at 87 (Gervner).

[102] 9/10/08 a.m. N.T. at 86, 96-97 (Gervner).

[103] Ex. P-17, 2/12/08 Phila. City Council Comm. on Parks, Recreation and Cultural Affairs 30-31(O'Neill and Focht)

the once pastoral unity of the park would be bisected by up to 18 buildings as high as nine stories.

Legal Analysis

I. Under the Public Trust Doctrine, the City Holds Burholme Park in "Trust" in Accordance With Its Dedication as a "Park" for the "Use and Enjoyment of the People Forever"

Nearly a century ago, the Pennsylvania Supreme Court articulated the public trust doctrine under which real property that has been dedicated to a public purpose may not be sold for private use where a city has acted to accept that dedication and the public has likewise accepted it. Trustees of the Phila. Museums v. Trustees of the Univ. of Pa., 251 Pa. 115, 123-24, 96 A. 123, 125 (1915). Like the dedication of Burholme Park, the dedication at issue in Trustees of the Phila. Museums was created by ordinance.[104] Towards the end of the nineteenth century, the City of Philadelphia enacted a series of ordinances, one of which dedicated certain tracts of land "for use as a public park forever" and provided for the construction of museum buildings "forever open to the free access of the public." Id., 251 Pa. at 118-19, 96 A. at 123. When the City subsequently decided to sell that property to the University of Pennsylvania, City Council enacted five ordinances to repeal the prior ordinances with the approval of the Mayor. This attempt to sell the dedicated land was successfully challenged by taxpayers.

The City lacked the authority to sell this land dedicated for public purpose, the Pennsylvania Supreme Court concluded, because as trustee it held the land in trust: "The city holds, subject to the trusts, in favor of the community and is but the conservator of

[104] There are various ways in which property may be irrevocably dedicated to a public purpose. A dedication of land to public purposes can be made by deed, White v. Township of Upper St. Clair, 799 A.2d 188, 193-94 (Pa. Com. 2002), or by municipal resolution or ordinance. See Pilchesky v. Redevelopment Auth. of Scranton, 941 A.2d 762, 765(Pa. Com. 2008).

the title in the soil and has neither power nor authority to sell and convey the same for private purposes." Id., 251 Pa. at 123-24, 96 A. at 125. The statement in the initial ordinances that the land should be set aside as a public park forever "was not inconsistent with the dedication of the property as a public park." Id., 251 Pa. at 123, 96 A. at 125 (citation omitted). Moreover, in reliance on this dedication, the state and city had appropriated certain funds. Consequently, not only was there a dedication of land, but also acts and funds expended by the city coupled with use of the property by the public: "[s]uch action upon the part of the municipality constitutes a complete dedication and acceptance for public use and estops the city from interfering with or revoking the grant." Id., 251 Pa. at 123, 96 A. at 125. See also White v. Township of Upper St. Clair, 799 A.2d 188, 195 (Pa. Com. 2002) (prohibitions against the sale of publicly dedicated land apply as well to leases).

The parameters of the public trust doctrine were further defined by the Pennsylvania Supreme Court in Bernstein v. Pittsburgh, 366 Pa. 200, 77 A.2d 452 (1951). In focusing on property dedicated as a public park, the Bernstein court analyzed the terms of its dedication to determine what uses would be consistent with its purpose as a park. The specific issue was whether construction of an open-air auditorium in Schenley Park was consistent with the public park dedication. Under Bernstein, the terms of the dedication were critical to the legal analysis. Where land is conveyed by the owner to a municipality for park purposes, the Bernstein court cautioned, "the terms of the grant must be narrowly construed and the uses to which the land may be put correspondingly restricted." Id., 366 Pa. at 205-06, 77 A.2d at 455. Even under this

narrow test, the court concluded that an open air- auditorium was consistent with park purposes.

In the case of Burholme Park, the City of Philadelphia by its July 27, 1905 Ordinance not only accepted the bequest of land in Robert Ryerss Will, but incorporated into that ordinance specific language of the Ryerss Will. After noting that the Ryerss Will devised "that part of his farm near Fox Chase and with his country seat called 'Burholme,'" the Ordinance recited that "the grounds to be used as a park, to be called 'Burholme Park,' and to be free for the use and enjoyment of the people forever."[105] In addition to this dedication of Burholme Park to public use in the Ryerss Will and City ordinance, testimony during the hearing established that public funds had been expended on the park, establishing the City's acceptance of the dedication.[106] Public acceptance of this dedication was likewise established by testimony describing the public's active use of Burholme Park for more than a century. There was no evidence whatsoever that the park suffered from lack of use or blight.[107]

Councilman O'Neill has suggested, however, that because the proposed expansion of Fox Chase under the lease in its final phase would primarily impact the privately licensed golf driving range, the lease would not impinge on the "public purpose" of the park. Councilman O'Neill, for instance, distinguished between the areas open to the public-at-large such as the ball fields, "the sledding hill which is sort of part of the fabric of that neighborhood, the pavilion, the covered pavilion along Central Avenue, the mansion, the area around the mansion" which "I don't think I could have

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[105] Ex. P-2, July 27, 1905 Ordinance.
[106] 10/2/08 a.m. N.T. at 81-84 (Bessler- Chief of Staff/Fairmount Park Commission).
[107] 10/2/08 a.m. N.T. at 50-63 (Bessler); 10/2/08 a.m. N.T. at 4-5 (Lee)(active use of Burholme driving range); 8/28/08 p.m. N.T. at 33 (Binswanger)(characterizing Burholme Park as one of the "priority parks in the system").

ever supported this," to the 13 acres of golf concession which he "never considered part of the park."[108]

This precise issue, however, has been addressed by the Pennsylvania Supreme Court in Cohen v. Samuel, 367 Pa. 268, 80 A.2d (1951) which held that the licensing of a 13 acre "compact" golf course to a private corporation of Philadelphia park land by Fairmount Park Commission was consistent with park purposes. There was no reason, the court suggested, why "park visitors who desire refreshment or special entertainment should not pay reasonable charges for such additional park privileges." Id., 367 Pa. at 271, 80 A.2d at 733 (citation omitted) In reaching this determination, the court applied Bernstein to analyze what constitutes park purposes generally.

The continued vitality of the common law public trust doctrine has been reaffirmed in more recent cases. They emphasize that where a dedication imposes a charitable purpose or trust upon park land, a court must consider whether a proposed use or lease is consistent with that purpose. Ridgway v. Grant, 56 Pa. Comm. 450, 456, 425 A.2d 1168, 1171 (1981). See also Bangor Mem. Park, 4 Pa. D. & C 4th 343 (Northampton Cty. 1988), *aff'd*, 130 Pa. Comm. 143, 567 A.2d 750 (1989). See generally Pilchesky v. Redev. Auth. of Scranton, 941 A.2d 762, 765 (Pa. Comm. 2008)(recognizing in the context of a standing dispute that "this case involves the public trust doctrine").

[108] 10/1/08 p.m. N.T. at 45-47 (O'Neill).

II. The Petitioners Invoke The Inalienable Property Act in Seeking Court Approval of the Fox Chase Sub-sublease But That Act Fails to Set Forth a Standard of Review

The petitioners acknowledge that the "City holds the land in 'trust' for the citizens of Philadelphia" by virtue of Burholme Park's dedication as a park in 1905.[109] They therefore properly seek court approval of the Fox Chase Sub-sublease. In so doing, they invoke the Inalienable Property Act, 20 Pa.C.S.A. §8301 et seq. and emphasize that this Act is the successor of the Price Act and Revised Price Act whose general purpose was to make land "freely alienable and productive to the living owners thereof."[110]

The specific statutory section the petitioners invoke to support their Petition is 20 Pa.C.S.A. § 8301 of the Inalienable Property Act which provides for court review of such petitions: "The court of common pleas, operating through its appropriate division, may authorize the sale, mortgage, lease or exchange of real property or grant declaratory relief with respect to real property: (1) Where the legal title is held:…(iii) by corporations of any kind having no capacity to convey, or by any unincorporated association; …[or] (3) Where the legal title is otherwise inalienable."[111] This very general affirmation of the court's authority, however, does not set forth a standard of review for petitions seeking court approval of a proposed lease or sale of dedicated public property.

By its express terms, section 8301 gives a court discretion in deciding whether to approve a proposed lease agreement of otherwise inalienable land. The problem, however--as petitioners concede-- is that the Inalienable Property Act contains no

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[109] 10/15/08 Petitioners' Post-Hearing Brief at 2.
[110] 10/15/08 Petitioners' Post-Hearing Brief at 11 (citing City of Dubois, 335 A.2d at 359; Acchione, 227 A.2d at 821).
[111] 5/23/08 City Petition, ¶ 9 (quoting 20 Pa. C.S.A. § 8301)(emphasis added).

specific standard of review [112] To fill in this statutory void, the petitioners propose alternative arguments as to the appropriate standard of review. First, they assert that the Inalienable Property Act should be interpreted as the successor of the Price and Revised Price Acts and borrow the standard of review contained therein.[113] The problem with this suggestion is that while the Revised Price Act contained clearly defined standards of review, those provisions were not retained after its repeal and the codification of the Inalienable Property Act in title 83 of the PEF code. To illustrate this statutory dichotomy, an historical analysis will be presented of provisions no longer in effect to underscore what provisions—or precedent-- are presently in effect.

Alternatively, petitioners argue that in the absence of clear statutory guidance, common law principles should apply. The common law principles most directly relevant to the proposed lease of 19.4 acres of Burholme Park flow from the public trust doctrine. Petitioners, however, argue that more general common law principles relating to review of governmental action apply so that this court should focus on whether the City's decision to lease a portion of Burholme Park was in good faith. More specifically, they invoke the general "established legal principles" set forth in Acchione/Goodman Appeal, 425 Pa. 23, 227 A.2d 816 (1967) and in Blumenschein v. Hous. Auth., 379 Pa. 566, 109 A.2d 331, 334-35 (1954) and its progeny. Ironically, the holding of one of the key cases petitioners invoke—Acchione(Goodman Appeal) -- refused to approve the sale of park land based on the relevant provisions of the Revised Price Act even as it outlined the four

[112] 10/15/08 Petitioners' Post-Hearing Brief at 17 ("The Inalienable Property Act does not contain a specific provision setting forth the standard of review that should be utilized by a court in considering a petition by a municipality to lease or sell land that has previously been dedicated as a park").

[113] See, e.g., 10/15/08 Petitioners' Post-Hearing Brief at 12 ("The Price Act and Revised Price Act Provided Authority for a Municipality to Sell or Lease Park Land Held in 'Public Trust'") and id. at 14 ("The Inalienable Property Act is the Successor of the Revised Price Act and Contains the Same Provisions Authorizing the Sale of Land Held in Public Trust").

"established legal principles" petitioners emphasize. It is therefore critical to focus more precisely on the actual statutory provisions within the factual context of the precedent the petitioners invoke.

Petitioners' two broad arguments premised on statutory history and common law precedent are addressed below; however, these arguments fail to trump the public trust doctrine and relevant PEF code provisions.

a. The Inalienable Property Act Does Not Contain Those Sections of the Revised Price Act That Set Forth a Standard of Review

As a part of their first attack, petitioners assert that the Inalienable Property Act—as the successor of the Revised Price Act—gives the City authority to lease Burholme Park.[114] Specifically, they claim that "[t]he Inalienable Property Act is the successor to the Revised Price Act, and the General Assembly, intending to maintain the existing substantive law, reenacted the operative provisions of the Revised Price Act that allow the sale or lease of otherwise inalienable land with court approval."[115] This argument is flawed, however, because petitioners are unable to identify those provisions of the Revised Price Act that set forth a standard of review that was reenacted in the Inalienable Property Act. A comparison of the past and present acts illustrates this gap.

Historically, where land was publicly dedicated, the appropriate procedure for obtaining court approval for its sale was to file a petition under the Revised Price Act or its predecessor, the Price Act. Loechel v. Columbia Borough School Dist., 369 Pa. 132, 137, 85 A.2d 81, 83 (1952). The Price Act was drafted by Eli K. Price in 1853 as Act of April 18, 1853, P. L. 503. In 1917, the Revised Act was adopted and remained in effect

[114] 10/15/08 Petitioners' Post-Hearing Brief at 11-12.
[115] 10/15/08 Petitioners' Post-Hearing Brief at 11-12.

until December 10, 1974. In 1972, the Fiduciaries Act of 1949 and the Incompetents' Estates Acts of 1951 and 1955 were repealed and replaced by the PEF code. The lengthy and complex provisions of the Revised Price Act of 1917, June 7, P.L. 388, as amended were set forth in their totality in Chapter 82 of the Probate, Estates and Fiduciaries Code. Chapter 82 was repealed in 1974 and was replaced by the Inalienable Property Act in Chapter 83 of the PEF code.[116]

There is a striking difference between the complex, lengthy provisions of the Revised Price Act and the much more succinct Inalienable Property Act. Many of the specific statutory provisions of the Revised Price Act simply do not appear in the Inalienable Property Act. [117] While the petitioners point to isolated common phrases or language in the two acts, they do not identify specific statutory provisions that set forth the same standard of review in both Acts.[118] Instead, they seek recourse in the legislative history of the Inalienable Property Act which states that "a closer []analysis of the[se] provisions will show that **no change from current law and practice was intended.**"[119] Based on this legislative history, Petitioners argue "it is clear that the Inalienable Property Act provides the same authority for a municipality to sell or lease park land as did the

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[116] 6 Remick's Pa. Orphans' Court Practice Rev. § 50.01 & § 50.02 (1981).

[117] 6 Remick's Pa. Orphans' Court Practice Rev. §50.02(b)(2); 8/11/08 Amicus Brief at 6.

[118] See, e.g., 10/15/08 Petitioners' Post-Hearing Brief at 15-16. Petitioners suggest that the generic language of section 2(a)(5) of the Revised Price Act regarding the sale or lease of land "subject to a trust of any description whatever" is presently reflected in 20 Pa.C.S.A. § 7780.6(a)(10) and (11) even though the language petitioners cite is not identical. Since the land at issue in this case is subject to a charitable trust, the currently applicable PEF code provisions that are most relevant are instead set forth in 20 Pa.C.S.A. § 7740.3 which specifically apply to charitable trusts. The terms of the trust instrument would apply to limit powers of a trustee set forth in section 7780.6. See 20 Pa.C.S.§ 7780.5 (powers of trust "[e]except as otherwise provided in trust document" limit the powers of a trust under section 7780.6).

[119] 10/15/08 Petitioners' Post-Hearing Brief at 15 (quoting Joint State Govt. Comm., Proposed Amends. to Probate, Estates and Fiduciaries Code Phase II at 5)(emphasis added by petitioners).

Revised Price Act."[120] This assertion, however, does not withstand a close comparative analysis of the respective statutes.

While the Inalienable Property Act may provide the same general authority for a municipality to sell or lease park land as the Revised Price Act, Chapter 83 of the PEF code does not provide its own specific standard of review as the following comparison of specific provisions demonstrates. To the extent that the Inalienable Property Act has the same standard of review as its predecessor, that standard would focus on the purpose of the trust. This analysis thus offers no aid and comfort to the Petitioners. The purpose of the trust is to provide a public park not land for a hospital's expansion.

b. The Revised Price Act Set Forth a Standard of Review That Focused on the "Purpose for Which Real Estate…Shall Be Held"

In contrast to the Inalienable Property Act, the Revised Price Act (repealed in 1974) provided clearly defined standards of review depending on the particular issues that were raised by the facts of a property dispute. For instance, the Revised Price Act provided a standard of review where parties argued over price, which was analyzed and applied in Acchione/Goodman Appeal.[121] The Revised Price Act also provided a more general standard of review for approving the sale or lease of property in the proviso to

[120] 10/15/08 Petitioners' Post-Trial Brief at 16. Petitioners cite the report of the Joint State Government Commission as to the effect of the Omnibus Bill over 30 sections of existing law which included the addition of the new Chapter 83 on Inalienable Property. That report observed: "Even though at first glance the amendments to the foregoing sections or additions of the new chapter and sections would appear to effect changes in the law, a closer analysis of their provisions will show that no change from current law and practice is intended. Jt. State Govt. Comm., Prop. Amends. to Probate, Estates & Fiduciaries Code Phase II, May 1973 at 5.

[121] In Acchione/Goodman Appeal, the Pennsylvania Supreme Court disapproved a proposed sale of park land because petitioners failed to satisfy Section 20(a) of the Revised Price Act, 20 P.S. §1761, which provided: "[t]he courts of the several counties of this Commonwealth, in all cases where under the provisions of this act such courts have power to order the sale of real estate, may authorize or direct a private sale, *if, in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale*, as where the interest shall be undivided *or for any other sufficient cause*." Acchione/Goodman Appeal, 425 Pa. at 32-33, 227 A.2d at 822 (quoting Section 20 (a) of the Revised Price Act, 20 P.S. §1761)(emphasis added by court).

Section 1 of that Act which focused on "Powers of courts to authorize sale etc. of certain lands:"

> Provided, That such court shall be of the opinion that such decree will be to the interest and advantage of all those interested therein, and without prejudice to any trust, charity, or purpose for which the real estate or ground rent-shall be held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.[122]

This requirement in the Revised Price Act that courts inquire as to any prejudice to the "purpose for which the real estate of ground-rent shall be held" served as a meaningful standard of review for courts to determine whether publicly dedicated land could be sold. See, e.g., Glatfelter Trust Deed Case, 372 Pa. 502, 94 A.2d 723 (1953); Girard Estate, 73 Pa. D & C 42 (1950). In Glatfelter Trust, for instance, the Pennsylvania Supreme Court interpreted this section of the Revised Price Act when it considered whether land conveyed to a school district in memory of the grantors' son for "the lasting benefit and happiness of the youth of the Community" could be sold by the school district. With these words and purpose, the Glatfelter court concluded, a charitable trust was created not just for the students of the school district but for all youth. Consequently, the school district, as trustee, lacked authority to convey the dedicated land for private purposes. This did not mean that the property was forever barred from sale despite changing times and conditions. Instead, the court suggested that if the school district or the community could establish a lack of funds necessary to maintain the fields, the purpose of the trust would fail, and the land—at that point—could be sold and the proceeds applied cy pres. In reaching that conclusion, the court explicitly applied the

[122] 20 PS §1561, 1917, June 7, P.L. 388, § 1; 1939, May 12, P.L. 126, § 1(emphasis added). See also 8/11/08 Amicus Brief at 6, citing 6 Remick, Pa Orphans' Court Practice § 50.03 at 315-16 (citing the RPA of 1917 (P.L. 388), Sec. 1, Proviso).

proviso to Section 1 of the Revised Price Act focusing on the "purpose" for which the land had been dedicated.

This standard of review set forth in the proviso of section 1 of the Revised Price Act was applied by another court to permit sale of dedicated property when necessary to preserve the purpose of the trust. The Philadelphia Orphans' Court in Girard Estate, 73 Pa. D & C 42, 45 (Phila. O.C. 1950)[123] applied this proviso in Section 1 of the Revised Price Act to conclude that 481 houses that were part of a trust established by Stephen Girard could be sold despite a prohibition in his will because this sale was necessary to preserve the ultimate purpose of the trust which was to provide income for Girard College. Focusing on the "purpose" of the trust is a species of cy pres analysis "under which it must be found as a fact and as a conclusion of law that the present situation is impractical, that the proposed sale is the only recourse open to the Board of City Trusts under the present circumstances in order to preserve the purposes of the trust, and that the failure to sell them will impair the trust."[124]

This focus on the "purpose" of the dedication or trust is similar to language in the Philadelphia Orphans' Court Rule petitioners invoked during the hearing in presenting two real estate appraisals.[125] Philadelphia Orphans' Court Rule 12.12.D is entitled

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[123] With its *cy pres* analysis, this case took a different approach than the infamous Girard trust case where both the Philadelphia Orphans' Court and the Pennsylvania Supreme Court concluded that the restriction in Girard's will that Girard College would admit "white" male orphans did not violate the Fourteenth Amendment of the United States Constitution. See Girard Will Case, 386 Pa. 548, 127 A.2d 287 (1956). That opinion was overruled by the United States Supreme Court which held that because the board that operated Girard College was an agency of the Commonwealth, "[s]uch discrimination is forbidden by the Fourteenth Amendment." Pa. v. Bd. of Dir. of City Trusts, 353 U.S. 230, 231 (1957).

[124] Id. at 44. The court specifically cited and applied Section 1 of the Revised Price Act, 20 PS §1561 and carefully analyzed the purpose of the trust created under Girard's will in light of the facts. The 481 houses at issue were part of Girard's estate. His will prohibited the sale of any real estate located in Pennsylvania and required that the properties be rented to good tenants in leases that did not exceed 5 years. Over time, the costs of maintaining these properties resulted in a loss of income that the court deemed vital to the main purpose of the trust which was maintaining Girard college.

[125] See 9/10/08 p.m. N.T. at 64-66.

Chapter 83 of the Probate, Estates and Fiduciaries Code (20 Pa.C.S. § 8301 et seq.)

Public Sale. Contents of Petition. Additional Requirements. This local rule provides that where a trustee seeks to sell real estate, his petition shall include:

> (f) sufficient facts to enable the Court to determine whether the proposed sale will be to the interest and advantage of the parties, and whether the said sale may be made without prejudice to any trust, charity, or purpose for which the real property is held, and without violation of any law which may confer an immunity or exemption from sale or alienation.
> Phila. O.C. Rule 12.12.A. (1)(f)(incorporated by Rule 12.12.D)(emphasis added).

Finally, this focus on the purpose of the trust in the Revised Price Act is evocative of the standard of review in the Donated or Dedicated Property Act ("DDPA") which the petitioners also suggest as an appropriate standard of review:

> When, in the opinion of the political subdivision which is the trustee, the continuation of the original use of the particular property held in trust as a public facility is no longer practicable or possible and has ceased to serve the public interest, or where the political subdivision, as trustee for the benefit of the public, is in doubt as to the effectiveness or the validity of an apparent dedication because of a lack of a record of the acceptance of the dedicated land or buildings, the trustee may apply to the orphans' court of the county in which it is located for appropriate relief. The court may permit the trustee to—
>
> > (3) In the event the original trust purpose is no longer practicable or possible or in the public interest, apply the property or the proceeds therefrom in the case of a sale to a different public purpose.[126]

This focus on the purpose of the trust gives the court a clear, narrow standard of review.

Unfortunately, none of these clearly defined standards of review invoked by petitioners are set forth in the Inalienable Property Act. The petitioners acknowledge this

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[126] 53 P.S. § 3384 (emphasis added). The petitioners argue that "the General Assembly's adoption in the Donated and Dedicated Property Act ("DDPA") of the standard of review applied under the Revised Price Act for public trust property as to which there is no formal record of dedication is a strong indication that the General Assembly intended to adopt the same standard of review for all public trust property." 10/15/08 Petitioners' Post-Hearing Brief at 20. As petitioners suggest, the Donated or Dedicated Property Act applies to lands dedicated to a public purpose "where no formal record appears as to acceptance by the political division…" See 53 P.S. § 3382. In this case, the July 27, 1905 ordinance would appear to constitute a "formal record" of acceptance, thereby rendering the Act inapplicable. See Vutnoski v. Redev. Auth. of Scranton, 941 A.2d 54, 59 (Pa. Com. 2006).

conundrum. To resolve it, they suggest an alternative approach: to "the extent that the Inalienable Property Act is considered 'silent' on the ***standard of review*** this Court should apply in reviewing the City's exercise of that authority, this Court must look to common law principles to determine that standard."[127]

This advice is based on sound precedent. It is well established that "[s]tatutes are never presumed to make any innovation in the rules and principles of the common law or prior existing law beyond what is expressly declared in its provisions." Rahn v. Hess, 378 Pa. 264, 270, 106 A.2d 461, 464 (1954). Under the statutory construction act, 1 Pa.C.S. § 1921 et seq., the "legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded." Metropolitan Prop. & Liability Ins. Co. v. Ins. Comm., 525 Pa. 306, 310, 580 A.2d 300, 302 (1990). As the Pennsylvania Supreme Court ruefully observed, "we must assume that the General Assembly understands the legal landscape upon which it toils, and we therefore expect the General Assembly to state clearly any intent to redesign that landscape. The General Assembly did not do so here." In re: Rodriquez, 587 Pa. 408, 415, 900 A.2d 341,345 (2003).

The legislature likewise has been less than clear in its enactment of the Inalienable Property Act in Chapter 83. The legislative history as set forth in the Joint State Commission's Report on the Proposed Amendments to the PEF Code Phase II discusses the interrelationship of the lengthy provisions of the Revised Price Act and the subsequent enactment of the Inalienable Property Act in Chapter 83 of the PEF Code:

> Since the lengthy and complex provisions of the Revised Price Act of 1917, June 7, P.L. 388, as amended, could not be thoroughly reviewed and restated in appropriate language prior to the 1972 codification, it was determined to set forth

[127] 10/15/08 Petitioners' Post-Hearing Brief at 22.

> that ancient act at length as Chapter 82 of the Code without change, subject to a thorough review. Proposed Chapter 83 now rewrites the substance of that act and chapter to remove matters now more properly covered in other provisions of the Code and to clarify the substance of those provisions not elsewhere covered.[128]

What this comment does not state is that Chapter 82 with its lengthy, complex provisions was repealed on December 10, 1974 with the enactment of Chapter 83. Under the Statutory Construction Act, only those provisions subsequently reenacted remain in force.[129] Chapter 83 in "rewriting the substance" of the Revised Price Act eliminates its standard of review. What remains, of course, is the "powers of the court" to authorize the sale or lease of real property where legal title is held "by corporations of any kind having no capacity to convey, or by any unincorporated association"…"[w]here legal title is otherwise inalienable." 20 Pa.C.S.A. §8301(i)(iii)(3). As for those sections of the Revised Price Act not set forth in Chapter 83, the legislative history states that they are "now more properly covered in other provisions" of the PEF code.

The PEF code does contain provisions that specifically address charitable trusts, which, of course, would apply to Burholme Park and the proposed Fox Chase lease. Under the legislative history of the Inalienable Property Act invoked by petitioners, therefore, both common law principles and relevant PEF code provisions relating to charitable trusts set forth the appropriate standard for reviewing the petition to lease 19.4 acres in Burholme Park. The previously discussed common law principles embodied in

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[128] Jt. State Govt. Comm., Prop. Amends. to Probate, Estates & Fiduciaries Code Phase II, May 1973 at 9 (emphasis added).

[129] See 1 Pa. C.S.A. § 1962 which provides:

> §1962 Repeal and reenactment
>
> Whenever a statute is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing statute, the earlier statute will be construed as continued in active operation.
>
> 1 Pa.C.S.A. § 1962 (emphasis added).

the public trust doctrine are most relevant to this issue. See, e.g., Bernstein v. Pittsburgh, 366 Pa. 200, 77 A.2d 452 (1951); Bangor Mem. Park, 4 Pa. D. & C. 4th 343 (Northampton Cty. 1988), *aff'd*, 130 Pa. Comm. 143, 567 A.2d 750 (1989).

The PEF code provisions that deal with charitable trusts are set forth in 20 Pa.C.S.A. §7740.3 which provides:

> **Charitable trusts**
> **(a) General rule** - Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, or wasteful:
> (1) the trust does not fail, in whole or in part;
> (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
> (3) the court shall apply cy pres to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific.
> 20 Pa.C.S.A. § 7740.3(a)

Section 7740.3 of the PEF Code is strikingly evocative of the standard set forth in the proviso to Section 1 of the Revised Price Act as interpreted in Glatfelter Trust and Girard Estate, 73 Pa. D. & C. 42 (Phila. 1950). Like these cases, section 7740.3 focuses on the purpose of the charitable trust and whether that purpose is still viable. It is also compatible with the standard of review under the public trust doctrine that likewise focuses on the stated purpose of the trust. Moreover, if the purpose of a trust is no longer viable, section 7740.3 provides a standard based on cy pres analysis to fulfill as nearly as possible the charitable intent of the settlor. This approach likewise was taken under the Revised Price Act as illustrated in Girard Estate, 73 Pa. D & C. 42 (1950) and Glatfelter Trust.

Although petitioners generally agree that "provisions of the Probate, Estates and Fiduciary Code also provide authority for sales previously permitted under the Revised

Price Act,"[130] they invoke a different, general section of the PEF Code: 20 Pa.C.S.A. §7780.6(a)(10) and (11). These provisions, petitioners assert, give independent authority for a trustee to sell or lease real property at a public or private sale.

There are two reasons why this invocation of section 7780.6 of the PEF code must be rejected. First, the provisions relating to charitable trusts in section 7740.3 of the PEF code are more specifically relevant to the charitable trust at issue in this case. Under the rules of statutory construction, the more general and specific provisions "should be construed, if possible so that effect may be given to both," but if they prove irreconcilable "the special provisions shall prevail." 1 Pa.C.S.A. § 1933.

Second, petitioners' argument that section 7780.6(a)(10) and (11) of the PEF code gives a trustee authority to lease real property subject to a charitable dedication fails to take into consideration the interrelationship of section 7780.6 with section 7780.5. While section 7780.6 of the PEF Code does set forth "illustrative powers of trustee" which include the power to enter into leases, section 7780.6 also limits those powers to the "powers which a trustee may exercise pursuant to section 7780.5." 20 Pa. C.S.A. § 7780.6(a). Section 7780.5 provides that the powers of a trustee are limited by the terms of the trust instrument:

> § 7780.5 Powers of trustees
> (a) Exercise of power – Except as otherwise provided in the trust instrument or in other provisions of this title, a trustee has all the powers over the trust property that an unmarried competent owner has over individually owned property and may exercise those powers without court approval from the time of creation of the trust until final distribution of the assets of the trust.
> 20 Pa.C.S.A. § 7780.5(a)(emphasis added).

In sum, the applicable standard of review for the City's petition for court approval to lease 19.4 acres of Burholme Park is a focus on the stated purpose of the

[130] 10/15/08 Petitioners' Post-Hearing Brief at 15-16 & 17 n.10.

charitable trust to determine if the proposed use is consistent with that purpose. Trustees of the Phila. Museums v. Trustees of the Univ. of Pa., 251 Pa. 115, 96 A.123 (1915); Bernstein v. Pittsburgh, 366 Pa. 200, 77 A.2d 452 (1951);Bangor Mem. Park, 4 Pa. D. & C. 4th 343, *aff'd.*, 130 Pa.Commw. 143, 567 A.2d 750 (1989). In addition, a court would consider whether a particular charitable purpose has become unlawful, impracticable or wasteful as set forth in section 7740.3 of the PEF code. This standard must, by necessity, focus first on the terms of the trust instrument and then on the facts or record presented by the parties.

III. Under the Public Trust Doctrine and Relevant PEF Code Provisions, Leasing 19.4 Acres of Burholme Park for the Construction of Hospital Buildings Is Inconsistent with Its Purpose of the Dedication as a Public Park

The "trust instrument" in the case of the Fox Chase sub-sublease would be the dedication in the January 27, 1905 Ordinance of the land "to be used as a park, to be called 'Burholme Park,' and to be free for the use and enjoyment of the people forever."[131] There was no evidence whatsoever presented during the seven days of hearing that Burholme Park has ceased to fulfill its purpose as a vibrant public park. On the contrary, even proponents of the Fox Chase sub-sublease attested to Burholme Park's vitality and importance within the Fairmount Park System. John Binswanger, for instance, a member of the committee that negotiated the Fox Chase lease agreement, testified that Burholme Park is "a very popular park. It's a very active park. It's a very important park."[132] In fact, "[i]t's one of the priority parks in the system."[133] John

[131] Ex. P-2.
[132] 8/28/08 a.m. N.T. at 31 (Binswanger). He also observed that if "you compare it to the rest of the park system, it's probably on the higher side of maintenance." Id.
[133] 8/28/08 p.m. N.T. at 33 (Binswanger).

Gervner, Fox Chase's architect, "absolutely" agreed that the park was regularly used by all the people.[134]

Since there was no evidence that Burholme Park had failed in its purpose as a public park, the next inquiry under Bernstein is whether the proposed use of 19.4 acres to construct hospital facilities is consistent with that purpose. Throughout the hearings, there was testimony that the City in the past has leased out park land for various purposes. Memorial Hall, for instance, was leased to the Please Touch Museum; the boathouses along the Schuylkill river have been used for recreational purposes; the Mann Music Center has expanded within park land; the Arthur Ashe Tennis Center provides recreational opportunities as well as other historic buildings throughout the park system maintained by nonprofit organizations.[135]

There is precedent, however, that these uses would be consistent with the recreational purposes of dedicated public park land. In Bernstein, for instance, the Pennsylvania Supreme Court concluded that the construction in Pittsburgh's Schenley Park of an open-air auditorium—like the Mann Center—"would seem to come well within, and to be in no way inconsistent with the purposes of the deed…." Bernstein, 366 Pa. at 206, 77 A.2d at 455. The Bernstein court went on to describe the diversity of uses consistent with the purpose of a public park:

> While the entire park acreage or any substantial part of it cannot, of course, be built upon as unduly to destroy the enjoyment of fresh air, sunshine and exercise, the erection within its borders of monuments, museums, art galleries, public libraries, zoological and botanical gardens, conservatories, and the like is commonly recognized and accepted as being within the normal scope and ambit of public park purposes, and an open-air public auditorium comes within the same category as such another permissible structure.

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[134] 9/10/08 p.m. N.T. at 43 (Gervner).

[135] See, e.g., 8/28/08 p.m. N.T. at 108-113 and 8/29/08 N.T. at 9-10 (Bumb); 10/1/08 a.m. at 78-80 (Smith); 9/12/08 N.T. at 190-98 (Price).

Bernstein, 366 Pa. at 206-07, 77 A.2d at 455.

The test under Bernstein focuses both on the scope of the proposed construction as well as on whether the purpose is "commonly recognized and accepted as being within the normal scope and ambit of public park purposes." While there is precedent that a miniature golf course would not deviate from a park purpose, courts have concluded that even construction of such socially beneficial purposes as fire stations or schools would deviate from park purposes under the public trust doctrine. See, e.g., Ridgway v. Grant, 56 Pa. Commw. 450, 425 A.2d 1168 (Pa. Com. 1981)(construction of a fire station within a publicly dedicated park is inconsistent with that dedication); Bangor Mem. Park, 4 Pa. D. & C. 4th 343 (Northampton Cty. 1988), *aff'd*, 130 Pa. Comm. 143, 567 A.2d 750 (1989)(borough may not convey publicly dedicated park land for the construction of elementary school under public trust doctrine and Donated and Dedicated Property Act, 53 P.S. § 3381 et seq.).

The proposed use of Burholme Park in to a nonprofit hospital's expansion differs radically from the permissible uses recognized in Bernstein. The important question presented is whether 19.4 acres of Burholme Park should be leased for well over 100 years to Fox Chase, a premier level one cancer research and treatment health care facility.[136] The plans suggest that as many as 18 buildings could be built with heights up to nine stories.[137] This long term lease certainly constitutes a "taking" in every sense of the word as the expansion plan envisions five phases of building for patient treatment, cancer research, administration and parking facilities. The expansion plan, if approved

[136] The Proposed Sub-sublease has an initial term of 80 years, with options to renew for 40 year periods. See Ex. P-21.

[137] See, e.g., Ex. P-12 (Long Range Master Expansion Plan showing 18 enumerated--sometimes interconnected--buildings) & Ex. 13C, Ex. C, (V.C)(buildings 4 to 9 stories).

by this Court as requested by the City and Fox Chase, would alter, change and diminish Burholme Park forever. Both the scope and purpose of the proposed construction is inconsistent with park purposes.

IV. Petitioners' Argument that the "Certain Established Legal Principles" Set Forth in Acchione Should Serve as a Standard of Review for a Petition to Sell Dedicated Park Land for a Private Use Is Fundamentally Flawed

In reaching this conclusion, this court is rejecting petitioners' arguments concerning the appropriate standard of review. The Petitioners assert that four "certain established legal principles" that were cited by the Pennsylvania Supreme Court in Acchione Petition/Goodman Appeal, 425 Pa. 23, 227 A.2d 816 (1967) "establishes the appropriate standard of review a court should apply to decisions by a municipality to alienate property held in public trust."[138] In Acchione/Goodman Appeal, the Court observed:

> In determining this appeal we bear in mind certain established legal principles:
> (1) By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to a determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion*;*
> **(2)** a municipal corporation has neither implied nor incidental authority to sell for private use land dedicated to or held by it in trust for the public use;
> **(3)** however, land held by a municipal corporation and dedicated to a public use may be sold *with court approval* secured in compliance with the provisions of the Revised Price Act, but the proceeds of such court-approved sale must be held for same or like use;

[138] 10/15/08 Petitioners' Post-Hearing Brief at 18.

(4) when a municipal corporation acts *in a fiduciary capacity* it is not only the right but the statutory duty of the judiciary to inquire into the propriety of municipal officers in disposing of assets which the municipality holds in trust.
Acchione/Goodman Appeal, 425 Pa. at 30-31, 227 A.2d at 820-21 (citations omitted).

A. The Four Principles in Acchione/Goodman Appeal Recognize the "Statutory Duty of the Judiciary to Inquire Into the Propriety of Municipal Officers in Disposing of Assets Which the Municipality Holds in Trust"

The petitioners argue that these four well established legal principles in Acchione/Goodman Appeal, stand for the proposition that a court should review a municipality's decision to sell land held in a public trust "mindful of the deference to be given to the actions of municipal officials."[139]

This interpretation, however, fails to acknowledge the implications of these four principles when considered as a whole and especially of the last three legal principles posited in Acchione/Goodman Appeal. Principle two, for instance, states that "a municipal corporation has neither implied nor incidental authority to sell for private use land dedicated to or held by it in trust for public use." Principle three states that the municipality must obtain court approval to sell dedicated land by complying with the provisions of the Revised Price Act. Finally, and most significantly for the City's petition, the fourth principle states that "[w]hen a municipal corporation acts *in a fiduciary capacity* it is not only the right but the statutory duty of the judiciary to inquire into the propriety of the actions of municipal officers in disposing of assets which the municipality holds in trust."(emphasis added). When read together, these principles impose a statutory duty on a court to make sure that a sale of public land by a municipality acting as a fiduciary conforms

[139] 10/15/08 Petitioners' Post-Hearing Brief at 19.

to the Revised Price Act. These principles, however, did not set forth the standard of review actually applied in Acchione/Goodman Appeal. And, it must be remembered, that this case was decided under a statute which was repealed decades ago.

B. The Standard of Review Actually Applied in Acchione Was Based on The Revised Price Act and Not the Four "Established Legal Principles" Invoked by Petitioners

Although the petitioners suggest that these four established principles in Acchione/Goodman Appeal served as the standard of review in that case, an analysis of the facts and holding demonstrates that the standard of review in Acchione/Goodman Appeal was based on a particular section of the Revised Price Act—not broad principles.

The dispute in Acchione/Goodman Appeal centered on whether the price the Tinicum Township agreed to sell a piece of dedicated park land for in a private sale to an individual was better than could have been obtained in a public sale as set forth in Section 20(a) of the Revised Price Act, 20 P.S. § 1761. That section of the Revised Price Act set the standard of review which the court applied in analyzing the factual record. As the court observed, there "is not a scintilla of evidence upon this record to indicate that the price of $100,000 offered for a private sale of this land was better than could be obtained at a public sale." Acchione/Goodman Appeal, 425 Pa. at 32-33, 227 A.2d at 821-22.

The land at issue in Acchione/Goodman Appeal had been dedicated by a 1959 ordinance as 19 acres of public park land. When the township sold approximately one-third of the land to an adjoining church, the commissioners placed on the township records a "statement of principles" that the land was not for sale unless and until substitute land was available and that no agreement of sale would be made without a public hearing. Despite this "statement of principles," in 1966 an unpublicized resolution

gave the town commissioners authority to dispose of the remaining land by public or private sale. Although one potential purchaser, Goodman, was willing to pay $125,000 for the land, the commissioners agreed to sell it to another, Acchione, for $100,000. When Acchione sought to have the proposed sale approved by a court pursuant to the Revised Price Act, Goodman responded by filing an action in equity against the Commissioners and Acchione to have the sale enjoined. Based on the record of the township's complete failure to obtain the best price for the land as well as its haste and secrecy in pursuing the sale, the Pennsylvania Supreme Court held that the sale of this land should not have been approved. Acchione/Goodman Appeal, 425 Pa. at 35, 227 A.2d at 823.

C. Acchione/Goodman Appeal Does Not Support the Petitioners' Assertion that the Court Must Defer to the Decision of Municipal Officials and Trustees to Sell Public Parks Because the Acchione/Goodman Appeal Court Exercised Judicial Review to Reject the Proposed Sale of Park Land

Petitioners assert that "the holding in Acchione is that the Revised Price Act permitted the sale of land held in public trust, and the court should review the municipality's decision mindful of the deference to be given to the actions of municipal officials."[140] This astonishing assertion is belied by the facts of Acchione/Goodman Appeal in which the Pennsylvania Supreme Court concluded the "private sale of this land under the circumstances should not have been approved." Acchione/Goodman Appeal, 425 Pa. at 34, 227 A.2d at 823. In reaching this conclusion, the court applied the standard of review in the Revised Price Act to the record: "Our review of this record reveals no reason to justify a private rather than a public sale of this land upon which a

[140] 10/15/08 Petitioners' Post-Hearing Brief at 19.

trust had been imposed nor do we find any 'other sufficient cause' to justify the sale under the circumstances." Id., 425 Pa. at 35, 227 A.2d at 823.

The court in Acchione/Goodman Appeal did not meekly defer to the decisions of the Tinicum Commissioners based on a presumption that they were made in good faith. Instead, the court reviewed the record under the appropriate standard of review. In Acchione/Goodman Appeal, the petition by a disappointed purchaser triggered Section 20(a) of the Revised Price Act, 20 P.S. §1761, which applied to approval of private sales "if, in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided or for any other sufficient cause." Id., 425 Pa. at 33, 227 A.2d at 822 (quoting 20 P.S. §1761).

While the general principle of deference to the discretionary acts of governmental bodies was recognized in Acchione/Goodman Appeal, its ultimate holding was based on a specific section of the Revised Act which does not appear in the Inalienable Property Act as codified in Chapter 83 of the PEF code.

D. The Blumenschein Common Law Precedent of Judicial Deference to Discretionary Actions of Governmental Entities Absent a Showing of Bad Faith, Fraud, Capricious Action or Abuse of Power Is Factually Distinguishable and Relies on a Statutory Standard

The petitioners next urge that to "the extent that the Inalienable Property Act is 'silent' on the standard of review, this court should consider the general common law precedent they characterize as the "Blumenschein standard.[141] Under this standard, "it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire

[141] See 10/15/08 Petitioners' Post-Hearing Brief at 22.

into the wisdom of such actions or into the details of the manner adopted to carry them into execution" Blumenschein v. Pittsburgh Housing Auth., 379 Pa. 566, 109 A.2d 331, 334-35 (1954). The cases petitioners cite in support of this general principle, however, are factually distinguishable from the issues raised by the proposed Sub-Sublease of 19.4 acres of Burholme Park. Moreover, each case analyzed the actions of a particular governmental entity against the standard set by the relevant statute authorizing its action.

Blumenschein v. Pittsburgh Housing, 379 Pa. 566, 109 A.2d 331 (1954), for instance, focused on the propriety of a decision by the Pittsburgh Housing Authority to locate a housing project on a particular site. In concluding that the Housing Authority's decision was not arbitrary, the court focused not only on the facts indicating that the Authority based its decision on full and adequate information but on the relevant standards set forth in the Housing Laws of Pennsylvania and the United States. The other cases cited by Petitioners are similarly distinguishable. [142]

Resorting to the generic common law precedent invoked by the petitioners as the Blumenschein standard makes no sense where there is a clearly articulated body of common law precedent directly relevant to the City's proposed lease of land dedicated as a public park. As previously discussed, the public trust doctrine is directly relevant to the issues raised in the City's petition seeking approval for the Fox Chase lease.

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[142] See Slawek v. Commonwealth, 526 Pa. 316, 586 A.2d 362 (1991)(in analyzing whether a ruling by the State Board of Medical Education revoking the medical license of a physician for failure to obtain medical malpractice insurance as required by law was unduly hash, the Board's actions were analyzed based on the facts and the relevant standard set forth in the Health Services Malpractice Act); Weber v. Philadelphia, 437 Pa. 179, 262 A.2d 297 (1970)(City had not acted arbitrarily in rejecting bids for the operation of a general concession at a sport stadium based on the facts and the Home Rule Charter which specifically allowed for the rejection of all bids); Eways v. Reading Parking Authority, 385 Pa. 592, 124 A.2d 92 (Pa. 1956) (Reading Parking Authority did not abuse its discretion in selecting a particular site for a public parking facility based on the facts and the Parking Authority Law which gave the Authority the power to acquire such land); Mathies Coal Co. v. Com., 522 Pa. 7, 559 A.2d 506 (1989)(DER did not abuse its discretion in issuing effluent limitations on a particular coal mine without taking into consideration the specific costs to that company based on water quality standards and the Clean Streams Law).

IV. Even Under the Deferential Standard Advocated by Petitioners, the Fox Chase Sub-Sublease Cannot be Approved Due to Its Capricious Treatment of the $4 Million Designated for the ITEF Fund

Because the public trust doctrine bars the City's efforts to lease actively used public park land to Fox Chase, no other theories advanced by the objectors require legal analysis. However, because the petitioners initially and throughout the proceedings espoused the theory that the court was limited in its review to a single inquiry—whether the City acted in good faith—this court will address those arguments in the interest of judicial economy.

First, it is important to note the obvious: Fox Chase is not the City even though they joined together as petitioners. In fact, during the negotiations, Fox Chase acted independently and expended significant sums of money in its efforts to win the public over to its expansion plans. In every conceivable way, the visionary leadership of Fox Chase sought to address responsibly the concerns of the community. For example, Fox Chase sponsored and appeared at 85 meetings, commissioned a traffic study, altered the initial 39 acre design and engaged in good faith efforts to secure replacement park land.

One particular example of the good citizenship of Fox Chase's Board and leadership merits mention. In or about late 2007, a proposal was advanced by the City and/or Councilman O'Neill to have Fox Chase pay $4.5 million to be utilized in Councilman O'Neill's district encompassing Burholme Park. Fox Chase responded to these efforts by insisting that appropriate restrictions be placed on the expenditures of those funds and this eventually led to a brokered, responsible compromise by Mayor Nutter requiring that these funds be placed in the City's capital improvement account

which requires several layers of review before any expenditure is approved.[143] Fox Chase's commendable efforts to have this money reserved to purchase replacement park land failed as the eventual agreement does not guarantee this result, but instead allows these funds to be spent for unspecified capital improvements in Councilman O'Neill's district.

Second, it is important to note that Fox Chase's good citizenship was repeatedly challenged by the objectors with a plethora of unconvincing arguments. The objectors, for instance, insist that Fox Chase does not need park land because it can expand on its main campus or on small scattered home sites purchased by Fox Chase or on its Laurel Avenue property, which is at a ¼ mile distance, or share land and facilities of its neighbor, Jeanes Hospital. Fox Chase answers this criticism by stressing the beneficial synergies flowing from a unified campus. It is not the prerogative of the objectors—or of this court—to tell Fox Chase how to design comprehensive cancer treatment facilities or how to reform its expansion plans. That said, it is understandable that the objectors raise sound public policy arguments that redesigning the expansion plans of Fox Chase to preserve valuable park land is in the public interest. While this court finds no merit in the attacks on Fox Chase, the objectors' challenge to the City's role appears to have merit and for this reason will be addressed.

Throughout these proceedings, petitioners advocated as an elementary principle in reviewing the City's decision to lease a portion of Burholme Park to Fox Chase that the court should focus solely on whether the City acted in good faith. They emphasize more

[143] See, e.g., Ex. P-43, 2/11/08 letter from Rob Dubow, Director of Finance, to William Avery, Dr. Michael Seiden and Dr. Robert Young (for Fox Chase)(responding to Fox Chase's request for explanations of the procedures for Fox Chase's $4 million payment under the sub-sublease).

particularly that courts "will not review the discretionary actions of governmental entities absent a showing of bad faith, fraud, capricious action or abuse of power."[144]

There is no evidence of governmental bad faith, fraud or abuse of power; however, there is evidence of capricious and arbitrary conduct in the last minute drafting of Article 26.1 of the Fox Chase lease agreement pertaining to the $ 4 million payment. The fault lies with the City and not Fox Chase. While all public officials involved appear to have acted responsibly, the result of the negotiations reflect a desperate effort to contrive a way to accommodate Fox Chase's valid needs for expansion land and, in doing so, bargaining away the City's fiduciary duty to preserve actively used park land held in trust for the public.

The record established that from the very beginning of the negotiations over leasing 19.4 acres of Burholme Park, the City and the Fairmount Park Commission had a goal of finding land to substitute or "swap"for any park land that might be taken.[145] As the Senior Deputy Director of the City's Commerce Department testified, "it was one of the conditions that the City and Fairmount Park Commission had set, where we were definitely looking to definitively identify replacement property for any property that may be needed for the Center's expansion."[146] Similarly, Commissioner John Binswanger, a member of the committee charged with negotiating with Fox Chase, when asked about his support for the lease stated:

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[144] 10/15/08 Petitioners' Post-Hearing Brief at 22, quoting Blumenschein v. Hous. Auth. of Pittsburgh, 109 A.2d 331, 334-35 (Pa. 1954).

[145] 9/10/08 a.m. N.T. at 34 (Dr. Young)("So we started out, and we were told that a land swap was necessary, and we spent possibly close to three years searching for that land swap").

[146] 8/28/08 p.m. N.T. at 54 (Bumb).

> This would only have been done where we had an opportunity to swap land or acquire other land in place of the 19 acres. It would not have been done if we didn't have the funds to do that.[147]

In fact, during a March 9, 2005 meeting of the Fairmount Park Commission, a resolution was passed to allow Fox Chase to expand into 19.4 acres of Burholme Park in five phases and requiring Fox Chase to convey to the City of Philadelphia for the benefit of Fairmount Park "all of that certain property owned by Fox Chase, approximately 15 acres in size and commonly called the 'Hope Lodge Parcel,' along Laurel Road and adjacent to Tacony Creek Parkway'' subject to certain conditions.[148] Although this March 9, 2005 resolution to "swap" the Laurel Avenue Property was acceptable to the Fairmount Park Commission and Fox Chase, it was not acceptable to Councilman O'Neill.[149] In fact, Binswanger conceded that the Councilman held up the deal because he wanted money designated to his district:

> Q: Councilman O'Neill was holding up the deal because he wanted the designation of money for his district, correct?
>
> A: Correct. (Binswanger).
>
> Q: And after the Fairmount Park Commission approved this matter, it languished for several years until the City and the Commission and Fox Chase agreed to his $4.5 million, correct?
>
> A: Correct. (Binswanger)[150]

The Councilman gave several reasons for rejecting this swap: the property "wasn't in the City of Philadelphia proper and it wasn't contiguous to the park and it wasn't in Fox Chase or Burholme where the ground was coming out of, out of that

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147 8/28/08 a.m. N.T. at 106 (Binswanger).
148 Ex. P-9, 3/9/05 Fairmount Park Comm. N.T. at 33, 27-32.
149 8/29/08 N.T. at 116 (Dr. Young); 10/1/08 p.m. N.T. at 56 (O'Neill).
150 See 8/28/08 p.m. N.T. at 12-13.

area."[151] Fox Chase thereafter made diligent efforts to find alternative "swap land," engaging in more than a year of negotiations over land owned by the Mission Sisters on Pine Road. Ultimately, however, the Fox Chase Board concluded that a demand of $7 million dollars for that land was too high, based on a Fox Chase appraisal of $3 million and an appraisal for the Mission Sisters of $5 million.[152] No appraisals, however, were commissioned by any party of the 19.4 acres of Burholme Park that were to be leased prior to consummation of the deal.[153]

As late as November 26, 2007 at a public hearing before the City Council Joint Committee on Rules and Parks, Mark Focht, as Executive Director of the Fairmount Park Commission, spoke in support of the proposed Fox Chase Sub-sublease and stated:

> As Councilman O'Neill has referenced, accordingly, the proposed agreement would require the Cancer Center use its best efforts to acquire land near Burholme Park lease (sic.) within a year of signing the lease with the City to use as park land under the Commission's jurisdiction. If the Cancer Center cannot acquire the property within the designated time, then the Cancer Center will be required to deposit a sum of money mutually agreeable to the City and the Cancer Center <u>to the Fairmount Park Conservancy to be used for park land acquisition and improvements</u>.[154]

He was quickly corrected by Councilman O'Neill who stated:

> Mr. Focht, you were mentioning financial arrangements between the Park Commission and the hospital. I don't know if you're aware of it because you were not involved in the conversations I had, nor was I solved (sic.) in yours.
>
> But because we were not able to find local land at reasonable prices to add to the park, the hospital has agreed to set up a trust with $4.5 million that I'm still working on the arrangements with them between now and final passage, so I don't expect a problem.
>
> But I just want the record to reflect that the agreement that I reached is above and beyond the agreement that you have.[155]

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[151] 10/1/08 p.m. N.T. at 56 (O'Neill).
[152] 8/29/08 N.T. at 115-16, 120-22, 170-72 & 9/10/08 a.m. N.T. at 30-34 (Dr. Young).
[153] 9/10/08 a.m. N.T. at 40 (Dr. Young); 8/29/08 N.T. at 52-53 (Bumb).
[154] Ex. P-15, 11/26/07 City of Phila. Jt. Comm.. N.T. at 14 (Focht)(emphasis added).
[155] Ex. P-15, 11/26/2007 City Council of Phila. Jt. Comm. N.T. at 18-19 (O'Neill). Ex. P-43 indicates that Fox Chase was not dealing with the Councilman alone as his testimony suggests but instead it sought assurances that the $4.5 would be properly administered. The letter dated February 11, 2008 from Rob Dubow, Director of Finance, to Fox Chase representatives began by stating:

> This is in response to your request for an explanation of the procedures for handling the $4 million of payments to be made by the Fox Chase Cancer Center to the City of Philadelphia for capital

The Bill to approve the Fox Chase Sub-sublease did not pass before City Council adjourned in December 2007. After a meeting with the Mayor and interested parties on January 29, 2008 to resolve open issues, a new bill was introduced in January 31, 2008. It was approved by City Council on March 6, 2008 and signed into law by the Mayor on March 12, 2008.[156]

The Fox Chase sub-sublease that finally emerged from this process differs from the lease proposed in 2006, since "City Officials, Park Officials now agree with Fox Chase that buying that land for all practical purposes is not a possibility."[157] Instead, Fox Chase agrees to pay $4 million into a city account "dedicated to 'Improvement to Existing Facilities' in the 10th City Council District, with first priority given to park land and open space, otherwise for other public purposes ("ITEF Funds") and (b) Five Hundred Thousand Dollars to the Landlord ("Additional Consideration")."[158]

It is not unusual in the course of lease negotiations for terms to change and evolve. What is capricious about this aspect of the lease agreement, however, is the manner in which the $ 4 million figure was determined and the lack of clarity as to its use and purpose. No contemporaneous appraisals were conducted to arrive at this sum. As Mr. Bumb explained: "So the value of the park land like that—again, we didn't have it appraised, but we were using an approach that would be sort of what our estimate of

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improvements within the Tenth Council manic District related to the Burholme Park lease. The following standards and procedures are in place and are subject to enforcement by this Office: Ex. P-43.

156 Ex.P-19.

157 Ex. P-11, 2/9/08 Fairmount Park Comm. N.T. at 9 (Copeland). See also Ex. P-13C, Ex. H-2 at 7 (Comparison of Business Terms in Proposed Lease with Fox Chase Cancer with terms Approved by Fairmount Park Commission July 24, 2006).

158 Ex. P-13C, Ground Sub-Sublease, Art. 26.1.

replacement cost would be, was again for replacement purposes only."[159] Simply put, this manner of "estimating replacement cost" is capricious and arbitrary where: (1) no replacement land had been found that might serve as a basis of an appraisal, and; (2) potential replacement land such as the property owned by the Mission Sisters was deemed too expensive.

Even more problematic is the role played by Councilman O'Neill in determining this figure. While Duane Bumb initially testified that this $4 million was linked to the 10th Council manic District as compensation to the area most directly impacted by the loss of 19.4 acres in Burholme Park, upon further questioning he admitted that the support of Councilman O'Neill had been needed to conclude this deal.[160] Councilman O'Neill in his testimony suggested that he had arbitrarily determined this amount:

> Once the final final no came on the Medical Mission Sisters [i.e. replacement property], I said, well, we are going to have to put a number on whatever that is. And I suggested four and a half million dollars as I remember. I am not exactly sure whether I suggested it, but we wound up at four-and-a-half million dollars. And that was the verbal handshake that I had with the hospital on that money.[161]

Not only is this $ 4.5 million figure not based on any concrete appraisal of the cost of replacement land, the language of Article 26.1 of the sub-sublease does not restrict that money to purchasing park land. In his testimony, Councilman O'Neill expressed belated concern about the open-endedness of Article 26.1—ostensibly because there was no limitation to Burholme or Fox Chase--[162] and a resolve that "this will be limited:"

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[159] 8/29/08 N.T. at 52-53 (Bumb)(emphasis added). When asked the direct question of whether "Your answer, then, is that you did not have an appraised value," Mr. Bumb replied "[c]orrect." Id. at 53.
[160] 8/29/2008 N.T. at 47-49 (Bumb).
[161] 10/1/08 p.m. N.T. at 60 (O'Neill).
[162] 10/1/08 p.m. N.T. at 75 (O'Neill).

> I don't know how, but it will be limited, and it will be limited so that people that aren't impacted by this that live in Rhawnhurst or Bustleton or Somerton or different neighborhoods are not the beneficiaries because they are not the impacted area. It is my intent. There still has never been a fund established. It doesn't really matter what goes into the lease. The hospital isn't concerned about where the money goes. Fairmount Park is not concerned about where the money goes. The Mayor, myself and the people that were part of the deciding that this would go to the Tenth ITEF fund for Fox Chase and Burholme, and I would hope this Court would limit so everyone understands. I understand it. But you are correct. And whether I lose an election, there is a couple other ways unfortunately that I could not be in office. But I don't expect to be in office to spend this money other than for parkland.[163]

When the testimony is distilled to its core, it is clear that in spite of Fox Chase's best efforts, Councilman O'Neill succeeded in shifting $4 million of Fox Chase's money to capital improvements in his Tenth Council manic District subject, in part, to his selection and approval, thereby thwarting years of negotiations premised on giving up Burholme Park land for replacement park land.[164] Moreover, as Finance Director Dubow explains in a February 11, 2008 letter written to respond to Fox Chase's concern about the procedures for handling their $ 4 million payments, these capital projects would be defined as costing merely $7,500 with a useful life to the City of five years.[165]

Thus, the negotiators' salutary goal of restoring the park land leased to Fox Chase evaporated in the final lease language allowing for a diversion of these funds for nonpark

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[163] 10/1/08 p.m. N.T. at 79-80 (O'Neill). Ex. P-43 is evidence that notwithstanding Councilman O'Neill's comments, Fox Chase was concerned about safeguards for the proper administration of its $4.5 million in payments under the sub-sublease and appropriately addressed questions to Rob Dubow, Director of Finance for the City.

[164] Dr. Young explained that originally the Fairmount Park Commission had requested both land and cash as consideration for the lease. When the parties could not agree on proposed swap land, the proposal switched to pay money into escrow so "somebody could buy it." 9/10/08 a.m. N.T. at 31 (Dr Young). With the assistance of the Mayor, the ITEF mechanism was created as "a fixed and visible and public way in which the money was dispensed." Id. at 31. He acknowledged that "there is a part of the deal the ITEF agreement which shunts additional funds back into the 10th council manic district, the first priority being the identification of land." Id. at 32.

[165] See Ex. P-43. In explaining that the appropriations would be placed under the Managing Director's citywide facilities line in the capital budget dedicated specifically towards projects in the Tenth Council manic district, Mr. Dubow noted that after the Budget Office consulted with various City Departments, a list of proposed capital projects in the Tenth Council manic District would be compiled and the "Budget Director will transmit a list of recommended projects to the District Councilperson for consideration." Id.

expenditures. It merits emphasis, however, that there was no wrongful conduct by the Councilman. Nonetheless, the sudden and dramatic abandonment of the swap land exchange for Burholme Park land after all the public discussion and negotiations represents arbitrary and capricious behavior. Article 26.1, therefore, reflects a hasty, capricious attempt to finalize the lease transaction. As a precedent it would allow park land to be carved up and leased so long as sums are deposited in funds with special designation to the district of the Councilman who assisted in obtaining legislative support for the long-term lease of park land.

In the instant case, Councilman O'Neill's exercise of his council manic privilege led to an arbitrary, capricious valuation of the $ 4.5 million in consideration set forth in Article 26.1 which may or may not be adequate for the purchase of replacement land. The failure to obtain a disinterested appraisal for this consideration was capricious and a separate rationale for disapproving the Fox Chase Sub-sublease. This deficiency is compounded by the failure to clearly designate the $ 4 million for purchase of replacement land.

A case the petitioners invoke as a model for the application of the deferential standard In re Borough of Freeland, 66 Pa. D. & C. 2d 179 (Luzerne Cty. 1974) offers useful guidance when its facts are considered.[166] In Freeland, the Luzerne court approved the sale of park land used extensively only for 3 ½ months out of the year to the highest bidder pursuant to the Revised Price Act for use of an industrial area to provide jobs. In concluding that the Borough of Freeland had not acted in bad faith, fraudulently or capriciously, the court focused on various factors. It noted, for instance, that two independent appraisals had been obtained by council and there is "no evidence whatever

[166] See 10/15/08 Petitioners' Post-Hearing Brief at 27-28.

that it is not a fair price to the public for this land." Freeland, 66 Pa. D & C. 2d at 188. The court also required that "the proceeds of such court approved sale must be held in the same or like use as the trust impressed on the land, in this case for public parks and like uses." Id., 66 Pa. D. & C. 2d at 188. In contrast, in the present case not only did petitioners fail to obtain an independent appraisal to determine an appropriate sum for the purchase of replacement land, but Article 26.1 merely calls for the deposit of the $4 million in an account dedicated to "Improvements of Existing Facilities" with only a "first priority given to park land and open space."

From a broader perspective, the concept of finding land to "swap" for a 19.4 acre parcel of land within the center of a vital park with a one hundred year history in a community is capricious as well. The 65 acres of Burholme Park constitute a dynamic whole. The difficulties the parties encountered in finding any substitute land in the neighboring area demonstrates its uniqueness.

Conclusion

Public parks are protected by a common law rule of law known as the public trust doctrine which has been enshrined in Pennsylvania law since the early 1900's. The one exception allowing for the alienation of such lands concerns nonviable park land which all parties agree does not apply to Burholme Park. Simply stated, so long as a community or neighborhood actively uses dedicated park land, the City is required to hold such land in trust for their use, is legally estopped from divesting such land and is required to maintain these open spaces as public parks.

After extensive evidentiary hearings spanning several weeks, briefing and argument, this Court concludes that the public trust doctrine protects every square foot of

Ryerss' gift of Burholme Park which must remain as a public park until it ceases to be a viable and active park. This rule of law does not recognize any exception based on the valid needs of Fox Chase to expand or the City's salutary goal of protecting and increasing tax revenue obtained through the hospital's expansion. In these times of economic stress, it is understandable that states and cities facing severe budget crises will slash park spending, curtail the creation of new parks and even consider leasing or selling such lands. One hundred years of decisional law simply does not recognize such pressures as a raison d'etre for eviscerating our heritage to future generations and our need for recreational space for our inner city youth and adult population, many of whom have chosen to live, work and invest in the City, in part, because of the rich environment offered by our public park lands and open spaces.

For all the reasons stated, the petition to lease 19.4 acres of Burholme Park to Fox Chase is denied.

Date: December 9, 2008

BY THE COURT:

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John W. Herron, J.

PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Robert Ryerss, Deceased
O.C. No. 36 DE of 1896
Control No. 081027

ORDER

AND NOW, this 9th day of December, 2008, upon consideration of the Petition filed by the City of Philadelphia for Authorization to Lease 19.4 acres of Burholme Park pursuant to a series of agreements including a Master lease with the Philadelphia Authority for Industrial Development ("PAID"), under which PAID would execute a sublease with the Fairmount Park Conservancy ("Conservancy"), under which the Conservancy in turn would execute a Ground Sub-Sublease with the Fox Chase Cancer Center (hereinafter "Fox Chase"), it is hereby ORDERED that this PETITION is DENIED for the reasons set forth in a contemporaneously issued opinion.

This decision is based upon consideration of the petition and memoranda filed by the City, the supporting memoranda by Fox Chase, the opposition and memoranda filed by the Intervenors/respondents, the brief filed by the amicus curiae, Kevin Gilboy, Esquire, and the memoranda and correspondence by the Attorney General as well as the seven days of hearings thereon and the documents presented at that hearing.

BY THE COURT:

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John W. Herron, J.