STATE OF MICHIGAN

IN THE SUPREME COURT

CAROL DRAKE and CLELLEN BURY,
Plaintiffs-Appellants,

v

CITY OF BENTON HARBOR, a Michigan Municipal Corporation and HARBOR SHORES COMMUNITY REDEVELOPMENT, INC., a Michigan nonprofit corporation,
Defendants-Appellees.

Supreme Court Case No. 140685

Court of Appeals
Docket No. 287502

Lower Court No. 08-0247-CE
Honorable Scott Schofield
Niles Division, by assignment

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE

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DESCRIPTION OF AMICUS CURIAE

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief was authorized by the Legal Defense Fund's Board of Directors, in response to the Supreme Court's order of September 15, 2010 in which the Michigan Municipal League was invited to file an amicus curiae brief. The brief focuses on some aspects of municipal law that are raised or implicated by the facts and issues presented to the Supreme Court.

STATEMENT OF QUESTIONS PRESENTED

I. CAN THE CITY OF BENTON HARBOR LEASE A PORTION OF JEAN KLOCK PARK TO HARBOR SHORES REDEVELOPMENT CORPORATION TO DEVELOP THREE HOLES OF A PROPOSED 18 HOLE CHAMPIONSHIP JACK NICKLAUS GOLF COURSE WITHOUT VIOLATING THE RESTRICTION IN THE 1917 DEED TO THE CITY?

APPELLANTS SAY	"NO"
APPELLEE CITY SAYS	"YES"
APPELLEE HARBOR SHORES SAYS	"YES"
AMICUS MML SAYS	"YES"

II. CAN THE CITY OF BENTON HARBOR LEASE A PORTION OF JEAN KLOCK PARK TO HARBOR SHORES REDEVELOPMENT CORPORATION TO DEVELOP THREE HOLES OF A PROPOSED 18 HOLE CHAMPIONSHIP JACK NICKLAUS GOLF COURSE WITHOUT VIOLATING THE JANUARY 27, 2004 CONSENT JUDGMENT?

APPELLANTS SAY	"NO"
APPELLEE CITY SAYS	"YES"
APPELLEE DEVELOPMENT CORP SAYS	"YES"
AMICUS MML SAYS	"YES"

STATEMENT OF FACTS

The statement of facts submitted by the City of Benton Harbor and the statement of facts submitted by Harbor Shores are complete and correct.

INTRODUCTION AND SUMMARY OF ARGUMENTS

This case presents competing views of what constitutes permitted "park purposes" or an "other public purpose." There is the donor's view of what should be a permitted park purpose according to the grant and dedication of land to the City, and the City of Benton Harbor's view of what should be a permitted park purpose according to its status as a home rule city, and the Plaintiffs' view of what is a permitted park purpose according to their ideas as park users. This case poses a significant risk of producing a new legal standard by which home rule cities will have their legislative decisions regarding the use and development of municipal park land challenged by

interested citizen groups and scrutinized by the courts. Where the decision of what to put in a city park is made by the city commission of a home rule city, the standard of review employed by the courts should be whether or not the decision was within the power of the city to make, and authorized by law. Otherwise the courts may be called upon to rule on whether a soccer field, petting zoo, picnic shelter, golf course, ice arena or an archery range is a park purpose or a public purpose deserving of being established in a municipal park.

There is no overriding public policy in state or federal law that compels Michigan municipalities to preserve, develop, or use municipal parks in any particular manner by which Plaintiffs or the courts can select passive recreational use over a golf course, dog park, or basketball court as a more proper, legal, or preferred park purpose or other public purpose. Plumbing the intellectual depths of the phrases "park purposes" and "other public purpose" with real property law tenets is a futile exercise without an established legal standard of measure by which the proposed use of park land by a home rule city can be evaluated by the courts consistent with principles of Michigan municipal law.

Care should be taken to avoid a ruling in this case by which any member of the general public could cite the language in the dedication and file suit to challenge Benton Harbor's decision to develop some of its park land as a golf course by claiming the golf course is not a "park purpose" or any "other public purpose." Because the restrictive

covenant or condition in the deed invokes the general standards of "park purposes" or "other public purpose," the dedication imposes no restriction on Benton Harbor's use of the land other than the ultimate standard of a municipal public purpose.

ARGUMENT

I. THE CITY OF BENTON HARBOR CAN LEASE A PORTION OF JEAN KLOCK PARK WITHOUT VIOLATING THE RESTRICTION IN THE 1917 DEED.

Standard of review

Although not stated precisely and uniformly in the various cases on municipal power and authority, the standard of review employed by the courts when reviewing a local legislative decision of a Michigan municipality is limited to the determination of whether or not the decision is within the power of the municipality and authorized by law. In this case the local legislative decision also must be within the terms of the Klock dedication.

> The power and authority is vested in the commission to govern as its discretion dictates so long as its action is not contrary to law or opposed to sound public policy. So long as the city commission acts within the limits prescribed by law, the court may not interfere with its decision.

Veldman v City of Grand Rapids, 275 Mich 100; 265 NW 790 (1939). An alternative standard of review was mentioned in *Veldman*, page 113, that is rooted in the same principle:

> In order to warrant the interposition of a court of equity in municipal affairs, there must be a malicious intent, capricious action, or corrupt conduct, something which shows the action of the body whose acts are complained of did not arise from an exercise of judgment and discretion vested by law in them.

Stated in the affirmative, judicial review of Benton Harbor's decision allowing part of a public golf course to be located within a portion of Jean Klock Park should be limited to a determination of whether or not the decision involved the exercise of judgment vested by law in the city commission, complied with the terms of the Klock deed, and complied with the terms of the consent judgment. In the end, all three actually are governed by the same standard.

By using the terms "park purposes" and "other public purpose" the dedicating instrument invoked the full powers of a Michigan home rule city to establish and maintain its park and public works in whatever manner it deemed appropriate on the dedicated land. By using the terms "park purposes" and "other public purposes related to bathing beach or park use," the consent judgment invoked the full power of Benton Harbor to establish and maintain its park in whatever manner it deemed appropriate as a park purpose or a "public purpose related to bathing beach or park use." The "park purposes" phrase is the same as the constitutional authority of a city to establish and maintain its parks described in Const 1963, art 7, §23. The "other public purpose" phrase is the same as the constitutional authority of a city to expend funds on a "public purpose" as "provided by law" in Const 1963, art 7, §26, which necessarily includes a

park purpose and all public works referenced in Const 1963, art 7, §23. Therefore, the donor dedicated land to the City of Benton Harbor and restricted it to classes of permitted uses that the City is constitutionally and statutorily authorized to select.

Terms of the dedication

> Said lands and premises are conveyed to said City of Benton Harbor upon the express condition, and with the express convenent that said lands and premises **shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose;** and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as said City of Benton Harbor may make and adopt.

This was a dedication of land to the City of Benton Harbor on the express condition that the land be used "for bathing beach, park purposes, or other public purpose." The language is broad and expansive, with no limitation on "park purposes" or "other public purpose." Plaintiffs strive to restrict the City of Benton Harbor's choice of "park purposes" and an "other public purpose" by filing suit and asking the courts to enjoin redevelopment of a portion of the park with part of a golf course on it. The trial court and the Court of Appeals reached the correct result, but the trial court's consideration of Benton Harbor's municipal powers was not reflected or developed in the opinion of the Court of Appeals. In addition, the peculiar form of the condition or restrictive covenant in the dedicating instrument lists a sequence of three expanding classes of permitted public uses, which Plaintiffs translate into the unduly narrow limitation of passive recreational use.

Interpretation of the dedicating instrument

The language in the deed is characterized as a restriction or a condition, but the expanding classes of permitted uses operate as a list of uses preferred by the donor: bathing beach, park, or other public purpose, with the last encompassing the first and second. The specific preferred use of a "bathing beach" is listed first, followed by the broader preferred use of "park purposes," with the most expansive (and presumably least preferred) use of an "other public purpose" at the end. The second class of permitted uses, "park purposes," certainly includes a public golf course. The third class of permitted uses, an "other public purpose," certainly includes a public golf course. The arguments offered by Benton Harbor and Harbor Shores on the permitted use of a public golf course are correct, as were the decisions of the Court of Appeals and the trial court. For the list of permitted uses to work as restrictions or conditions on the acceptance of the land by Benton Harbor, it must be applied sequentially. This gives effect to all of the language in the deed, rather than ignoring "bathing beach" and "park purposes," in favor of the all encompassing "other public purpose." As long as the City of Benton Harbor uses the land as a bathing beach, Benton Harbor can use a portion of the land for "park purposes," or an "other public purpose." This interpretation gives effect to all of the language in the dedicating instrument, preserves the obvious intention of the donor to provide for a bathing beach, while allowing the rest of the land to be used for "park purposes" or an "other public purpose." It assigns priority to the

donor's preferred use of a bathing beach, which was listed first in a sequence of three expanding classes of permitted uses. It resolves the potential contradiction caused by language restricting Benton Harbor's use of the donated land to three expanding classes of permitted uses. This interpretation is completely consistent with the historical use and development of the dedicated land by Benton Harbor, the arguments on appeal by the City of Benton Harbor and Harbor Shores, the ruling of the trial court, and the opinion of the Court of Appeals. No special rule of construction is required, because all of the plain language of the deed is given effect. The donor recognized not all of the donated land could be used as a bathing beach, so the list of permitted uses allowed for park purposes or an other public purpose on the land. The donor selected the City of Benton Harbor to receive the land, rather than a nonprofit shoreline conservancy, or a nature preservation society. The dedicating instrument should be construed accordingly, giving full force and effect to the donor's grant of land to the City of Benton Harbor, and allowing the City to select which "park purpose" or "other public purpose" will be developed on it.

The interpretive doctrine of ejusdem generis mentioned by Plaintiffs (at page 25 of the Application for Leave to Appeal)[1] does not apply to the list of permitted uses in the Klock deed: bathing beach, park purposes, or other public purpose, because there is no specific enumeration of particular items or subjects. "This is a rule whereby in a

[1] Plaintiffs cite *Belanger v Warren Consolidated School District,* 432 Mich 575; 443 NW2d 372 (1989) which provides an anomalous description of ejusdem generis "[w]here *specific* words follow *general* ones." This approach has no application to the Klock deed.

statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." *People v Smith*, 393 Mich 432, 436; 225 NW2d 165 (1975). In S*mith,* the court reviewed the concealed weapons statute which made it illegal to "carry a dagger, dirk, stiletto, or other dangerous weapon" and held that the term "other dangerous weapon" was limited to a stabbing weapon when it followed the terms "dagger, dirk, stiletto." *People v Jacques*, 456 Mich 352, 356; 572 NW2d 195 (1998). The Klock deed contains no list or enumeration of specific terms by which the broader (park purposes) and broadest (other public purpose) permitted uses might be likened and limited. "This rule can be used only as an aid in ascertaining the [donor's] intent, and not for the purpose of controlling the intention or of confining the operation of a [dedicating instrument] within narrower limits than what was intended by the [donor]." In re: *Mosby,* 360 Mich 186, 192; 103 NW2d 462 (1960). In *Neal v Wilkes,* 470 Mich 661, 670; 685 NW2d 648 (2004), fn 12, the court said "it is appropriate to apply the doctrine of ejusdem generis to 'other recreational uses' because it follows a listing of several specific types of recreational uses," [but] "it is not appropriate to apply the doctrine of ejusdem generis to 'land' because 'land' does not follow a listing of several specific types of land." In the Klock deed the phrase "other public purposes," expands the preceeding class of "park purposes," which expands the first class of bathing beach purposes. There is no enumeration of specific permitted uses of land, so the doctrine of ejusdem generis is inapplicable to the Klock deed. Moreover, the

physical characteristics of the donated land include dunes and high ground away from the waterfront, which can and should be used for park purposes other than the bathing beach. Finally, a public golf course is within the class of "park purposes" on the high ground set back from the waterfront, and the public golf course does not interfere with the preferred specific use of the bathing beach.

Dodge v North End Improvement Association

There is a very similar case from almost one hundred years ago. In *Dodge v North End Improvement Association*, 189 Mich 16; 155 NW 438 (1915), the dedication of the late Senator Thomas W. Palmer and his wife to the City of Port Huron was at issue. The Palmers conveyed ten acres "to be used only as a public park," which was "dedicated to the use of the public forever," and subject to a reverter. The North End Improvement Association was incorporated and organized "for the purpose of improving the north end of the city in any way they could, to put it in a more sanitary condition, and trying to induce the people to keep their premises in a sanitary condition, and to beautify the same." *Dodge, supra*, pages 17-18. The North End Improvement Association offered to construct a pavilion on the park land and the city commission approved. The building was constructed. A person owning property across the street filed suit, complaining that the building "was used simply as a railroad waiting station and was not an adjunct of the park." *Dodge*, page 18. The city claimed "that under the terms of the gift the officials of the city are made the sole judges as to the character and extent of the changes

to be made in the said park and as to what modification thereof is best needed to secure the comfort, convenience, and public enjoyment of the aforesaid park." *Dodge*, page 19. The court reviewed several definitions of the words park and public park, which are quoted here with supporting citations omitted. *Dodge*, pages 27-28.

> A park is variously defined to be a pleasure ground in or near a city, set apart for the recreation of the public; a piece of ground inclosed for the purposes of pleasure, exercise, amusement or ornament; a place for the resort of the public for recreation, air and light; a place open for every one.
>
> In its common and ordinary significance, a public park is an open or inclosed tract of land and adapted for, set apart, maintained at public expense, and devoted to the purposes of pleasure, recreation, ornament, light and air for the inhabitants of the town near or in which it is located.
>
> Property constituting parks, public squares and commons may, in the absence of express restriction, be used in such manner as will promote the public interest and is not inconsistent with the purpose for which it was intended.
>
> A park may be devoted to any use which tends to promote popular enjoyment and recreation, although primarily involving the ideas of open air and space, occupation in part by monuments, statues, museums, galleries of art, free public libraries and other agencies contributing to the aesthetic enjoyment of the people, is not a perversion of the lands from park purposes. These are maintained for the use, convenience and recreation of persons resorting to and using public parks.
>
> Some of the powers of control and regulations for their use held to be reasonable and valid are: Power to lay out pleasure drives around the borders of a public square, authority to erect a building in a park for public purposes, **and if a building called a casino so erected is adapted to a public use, the court will not assume that it is to be used for private purposes**; to erect a dwelling house on park property to be used by the park superintendent and his

> family as a residence and also for an office by such superintendent and his associates.

Emphasis added. The court concluded "that the use made of the building is a public use, and that such use is not foreign to that of a public park." *Dodge*, page 28.[2] Similar to how the City of Port Huron provided a pavilion and waiting area to the public through the efforts of the North End Improvement Association, the City of Benton Harbor is providing a public golf course to the public through a lease with Harbor Shores. And "if a [golf course] so erected is adapted to public use, the court will not assume that it is to be used for private purposes." *Dodge*, page 28. The same reasoning should be applied and the same result should be reached in this case.

Municipal determinations of park purpose and public purpose

Although framed as a challenge based on the restrictions in the deed by which the land was dedicated to the City of Benton Harbor, Plaintiffs really are challenging the legality of Benton Harbor's selection of a golf course as a "park purpose" or an "other public purpose" by which the park land will be developed and administered. Here one component of the local citizenry would like to see passive recreational use of the park land, rather than a public golf course selected by the city commission of Benton Harbor. This group took its arguments to court for another bite at the same apple, in

[2] The holding demonstrates that the court found the pavilion to be a "public use," which therefore was a permitted "park use" according to the terms of the dedicating instrument, suggesting that the legal limit of "park use" is defined by whatever constitutes a "public use," the broadest of all permitted municipal uses of land.

the judicial forum rather than the local legislative forum, hoping for an order directing Benton Harbor to develop the park for passive recreational use desired by the Plaintiffs.

The determination of a proper "park purpose" for a municipal park is a legislative function performed by the municipality that should be subjected to review by the courts only to the extent the municipal decision is outside the legal exercise of municipal powers or unauthorized as a matter of law. This is not an appeal of an administrative agency, like a zoning board of appeals, with a statutory framework for review of the agency decision. The power of a city or village to own, establish and maintain a park is of state constitutional dimension. Const 1963, art 7, §23:

> Any city or village may acquire, own, establish and maintain, within or without its corporate limits, parks, boulevards, cemeteries, hospitals and all works which involve the public health or safety.[3]

There is state constitutional recognition of the important role of local government in developing roads, streets, alleys, "and public places," presumably including public parks, which cannot be diminished by the state legislature. See Const 1963, art 7, §31:

> The legislature shall not vacate or alter any road, street, alley or public place under the jurisdiction of any county, township, city or village.

Plaintiffs cite no clearly established municipal law standard by which the courts should evaluate a legal "park purpose" or "other public purpose." This can be nothing other

[3] Const 1908, art 8, §22: Any city or village may acquire, own, establish and maintain, either within or without its corporate limits, parks, boulevards, cemeteries, hospitals, almshouses and all works which involve the public health or safety.

than a municipal powers question, regarding Benton Harbor's decision of what is a "park purpose" or an "other public purpose" suitable for development in its municipal park. Putting the words "park purpose" and "other public purpose" in a deed does not curtail the discretion or power of a Michigan home rule city to determine what "park purpose" or "other public purpose" will be developed on its land. The only legal limitation on Benton Harbor's decisions about how to develop and use its park land is the extent to which Benton Harbor's decisions are authorized by law and within the list of permitted uses in the Klock deed that Benton Harbor accepted.

There is a paucity of case law on what constitutes a proper or legal park purpose, probably because the question generally is shielded from judicial review. In *Torrent v Muskegon*, 47 Mich 115, 117; 10 NW 132 (1881), the Supreme Court thought it unwise to enjoin the City of Muskegon from constructing public buildings, commenting on the limited role of the courts in reviewing municipal decisions on matters within their charge.

> But in saying this we do not assume that it belongs to this court or to any other to dictate to the city how it shall spend its money. The council must use its own discretion where it will save and where it will spend; and the case must be a very clear one, and the subterfuge very plain, before that discretion can be regarded as having been exceeded so as to show an excess of power under a pretence of keeping within it. It is not the business of courts to act as city regulators, and unless the authority of the representatives of the citizens has been exceeded their action cannot be interfered with merely because it may not seem to other persons to be as wise as it might be.

It is a matter of municipal authority to exercise discretion and make a choice of how to develop a park, which should be analyzed the same way that the Supreme Court reviewed the City of Muskegon's actions, *Torrent*, page 117:

> We shall therefore confine ourselves to the question of power, merely adding, in view of the large range of the argument, that there is, in our opinion, nothing which indicates the slightest misconduct in the council, if they acted within their powers.

The touchstone is Benton Harbor's municipal authority and power to hold, develop, manage, and administer its park land for "park purposes" or an "other public purpose."

There is well established case law on the separation of powers involving municipal activities authorized by the constitution and statues. After citing the state constitutional provision authorizing a village to acquire, construct, own, and operate a municipal electric plant, and the statutory authority of the village to set utility rates, the Supreme Court observed that "we have recognized that a municipality's operation of a public utility, although it may be a proprietary activity, constitutes engaging in a public enterprise for a public purpose." *Wolgamood v Village of Constantine*, 302 Mich 384, 394; 4 NW2d 697 (1942). And, "[w]here a municipality has the power to engage in an activity for a public purpose, the courts will not interfere with the discretionary acts of its municipal officials." *Wolgamood, supra*, pages 394-395. The Supreme Court quoted with approval from its earlier opinion in *Putnam v City of Grand Rapids*, 58 Mich 416; 25 NW 330 (1885):

> There has been an idea in some places, as apparent from reported cases, that courts of equity can always stand between citizens and municipal authorities, to shield them from abuses and extravagant action. This is not one of the functions of courts. It is one of the incidents of popular government that the people must bear the consequences of the mistakes of their representatives. No court can save them from this experience. It is one of the means of teaching the necessity of choosing proper servants, and being vigilant to obtain reform from abuses. The discretion which is necessarily vested in public functionaries cannot be reviewed by any one else. If they go beyond the range of the discretion given them, and mischief happens or is likely to happen, a case arises for the interference of judicial authority to keep them within the lines bounding their agency. But their mistakes within those lines are beyond legal redress. Whether the present case authorizes it depends upon the effect of the city charter.

White v City of Grand Rapids, 260 Mich 267, 275; 244 NW2d 469 (1932):

> But the main thing plaintiffs forget is the principle of law so often approved by our Supreme Court, that the discretion vested in city officials is not subject to review by the Courts. If they transcend their power, the courts may interfere. But if acting within the scope of their power they make mistakes, it is not the business of a Court to amend or correct their errors.

In *Veldman v City of Grand Rapids*, 275 Mich 100, 109; 265 NW 790 (1936), the Supreme Court rejected a challenge to the acquisition of land for the expansion of a power plant, acknowledging that the city charter authorized the city "to acquire, construct, own, operate and maintain waterworks and electric lighting plants, and to acquire all property, real and personal, necessary and proper therefore, and to maintain and operate the same." The Court noted that "[c]ities and villages are the oldest of all

existing forms of government," page 111, and went on to explain the standard of review applied to local legislative decisions:

> **So long as the city commission acts within the limits prescribed by law, the court may not interfere with its discretion.** The judiciary is not charged with supervisory control over the exercise of governmental functions by the city commission of Grand Rapids. It is not the business of courts to act as city regulators and, unless the authority of the representatives of the citizens of Grand Rapids has been illegally exercised, their action cannot be interfered with merely because it may not seem to other persons to have been as wise as it ought to have been. *Torrent v. Muskegon, 47 Mich. 115, 10 N.W. 132, 41 Am.Rep. 715*.

Emphasis added. The limits prescribed by law are exactly the same as those explicitly stated in the Klock deed as "park purposes" and "other public purpose." The court restated the specific issue in succinct terms, *Veldman*, page 112, with emphasis added:

> **The question is one of the power and authority of the city commission, the governing body of the city of Grand Rapids.** If the city commission was authorized to accept the proposition made to it by Abe Dembinsky, Inc., to purchase and acquire for $157,000 the property in question and pay that sum to Abe Dembinsky, Inc., therefor, then this court may not interfere. If the city commission had legal authority to do what it did do, that ends the matter. The question of whether the commissioners acted wisely or unwisely is not for the consideration or determination of this court.

The second phrase in the Klock deed, authorizing the City of Benton Harbor to use the land for "park purposes," is indistinguishable from the state constitutional authority in Const 1963, art 7, §23 by which a city "may acquire, own, establish and maintain" its parks. The third phrase in the Klock deed, authorizing an "other public purpose" on the land, is indistinguishable from the state constitutional authority in Const 1963, art 7

§23 by which a city "may acquire, own, establish and maintain" its parks and "all works which involve the public health or safety." The legal standard by which an "other public purpose" of a municipality is measured is found in Const 1963, art 7, §26:

> Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose.

With such an expansive dedication of land to the City of Benton Harbor, there can be no residual control exerted by the grantor over what constitutes a proper, preferred, or desired "park purpose" or "other public purpose," except for the donor's primary preference for a bathing beach, which the City of Benton Harbor has maintained. The remaining choices are left to the City of Benton Harbor to make as a matter of law. The grantor gains no special standing by which he or any successor of his can direct what particular "park purpose" or "other public purpose" will be pursued or developed on the land dedicated to the City of Benton Harbor, as long as the bathing beach is preserved. The permitted uses in the Klock deed effectively adopt state constitutional standards of municipal powers to establish and maintain city parks and public works, in addition to requiring preservation of the bathing beach.

Leasing and user fees

There is nothing in the dedication that prohibits Benton Harbor from leasing a portion of the park land. There is a reference in the deed to enjoining "tenants" from permitting the use of alcoholic beverages, which proves the donor anticipated the

leasing of the land or facilities on it by the City of Benton Harbor, as noted by the trial court and the Court of Appeals.

There can be no serious argument against charging fees to enter and use a public park or a public facility. Fees are collected routinely from persons who enter public parks, swimming pools, campgrounds, zoos, parking garages, picnic facilities, boat launches, and golf courses. There is no state, federal, or local law that prohibits a municipality from requiring the public to pay to use public park facilities. The examples of improvements a municipality could make within its parks are virtually endless, with some so expensive to build, administer, and maintain that user fees will be required to operate them, but the charging of fees does not contradict or invalidate a park purpose or other public purpose. Who is to say if a public golf course must be of modest size, cost, and difficulty to remain public, other than the municipality that provides it to its community, directly or by contractual agreement?

Gifts of property to municipalities, MCL 123.871

The municipal power to accept gifts of real or personal property "subject to the conditions, limitations, and requirements provided in the grant, devise, bequest, or other instrument" was codified in MCL 123.871, without a description of the standard by which the courts might determine that a municipality was violating a condition, limitation or requirement of the dedicating instrument. There is no state legislative

guidance as to what segment of the general public has standing to litigate the meaning and effect of a condition, limitation, or requirement of "the grant, devise, bequest, or other instrument." Where the condition, limitation, or requirement provided in the grant invites or allows the recipient municipality to exercise its local legislative decision making power to select "park purposes" or an "other public purpose," to be developed on the land, the selection by the municipality of a particular "park purpose" or "other public purpose" should not be subjected to judicial review, beyond a determination of whether or not the local legislative decision was authorized by law, and within the terms of the dedicating instrument.

Park purposes and public purpose

There may be some confusion in this case over the scope and definition of "park purposes" and an "other public purpose," because these phrases are defined infrequently by the courts in the municipal law arena. This is due in part to the polar opposites of "public purpose" and "private purpose," which generally categorize municipal activities as legal or illegal in the context of Const 1963, art 7, §26:

> Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose.

Plaintiffs' challenges to the lease of park land by the City of Benton Harbor should be analyzed according to Const 1963, art 7, §26, because the "other public purpose" text of the Klock dedication is the equivalent of "any public purpose" in the Michigan

Constitution. The scope of "any public purpose" is described in Const 1963, art 7, §26 as that which is "provided by law." Const 1963, art 7, §22 is a plain statement of municipal authority "provided by law" to own and establish a park, without any restriction on the type of park facilities, features, or development selected by the municipality:

> Any city or village may acquire, own, establish and maintain, within or without its corporate limits, parks, boulevards, cemeteries, hospitals and all works which involve the public health or safety.

Restrictions on this broad statement of municipal authority to own, establish and maintain a park cannot be drawn from the language of the Klock deed authorizing the City of Benton Harbor to use the land for "park purposes" or an "other public purpose." Nor can restrictions be found in some implied limitation of municipal powers.

The Supreme Court summarized the strength and significance of the constitutional statements of municipal powers in *Detroit v Walker*, 445 Mich 682, 689-690; 520 NW2d 135 (1994):

> The Michigan Constitution provides that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." *Const.1963, art. 7, § 34*. It also provides that "[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." *Const.1963, art. 7, § 22*.
>
> Accordingly, it is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise

> all powers not expressly denied. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance. See *Const.1963, art. 7, § 22*.

Although Const 1963, art 7, §22 is not self-executing, the legislature extended these municipal powers to home rule cities through the adoption of the Home Rule Cities Act, MCL 117.1, et seq, and MCL 117.4j(3) in particular:

> (3) **For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not**; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

Emphasis added. Section 2.1 of the Charter of the City of Benton Harbor adopts all of the municipal powers under the "Constitution and laws of the State of Michigan."

> Section 2.1. Unless otherwise provided or limited in this Charter, the City of Benton Harbor and its officers shall be vested with any and all powers, privileges, and immunities, expressed and implied, which cities and their officers are, or thereafter may be, permitted to exercise or to provide for in their charters under the Constitution and laws of the State of Michigan, and of the United States of America, including all the powers, privileges, and immunities which cities are permitted to or may provide in their charters by Act. No. 279 of the Public Acts of 1909, as amended, as fully and completely as though those powers, privileges, and immunities were specifically enumerated in and provided for in this Charter, and in no case shall any enumeration of particular powers, privileges, or immunities in this Charter be held to be exclusive. **The City and its officers shall have power to exercise all municipal powers in the management and control of municipal property and in the**

> **administration of the municipal government, whether such powers be expressly enumerated or not;** to do any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants, and through its regularly constituted authority, to pass and enforce all laws, ordinances, and resolutions relating to its municipal concerns, subject to the constitution and general laws of the State and the provisions of this Charter.

Benton Harbor City Charter, Exhibit 1. The leasing of a portion of the park land for the development of a public golf course is well within Benton Harbor's power to exercise all municipal powers in the management and control of its municipal property, and in the administration of its municipal government. As the court said in *Detroit v Walker, supra*, page 690, home rule cities like Benton Harbor "enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied," by leasing a portion of its park land to provide part of a public golf course. It is not illegal for a municipality to be creative, innovative or different in developing its park land for the benefit of the public.

The Home Rule Cities Act in MCL 117.5(e) states that "A city does not have power: (e)…to sell a park, cemetery, or any part of a park or cemetery, except where the park is not required under an official master plan of the city … unless approved by 3/5 of the electors voting thereon at any general or special election." There is no state law providing that a city does not have the power to lease a park or any part of a park. There is no legal basis for the courts to interpret MCL 117.5(e) or the list of permitted

uses in the Klock deed as an absolute unstated prohibition against a long term lease of all or part of Jean Klock Park.

Nowhere in the Michigan Constitution or the Home Rule Cities Act is there a listing of permitted or prohibited park purposes, because the decision of how to establish, develop, and maintain a city park is left to each city to make. Interested citizens can voice their opinions to city officials at public hearings or board meetings about what facilities should be constructed in local parks, but there is no constitutional or statutory hierarchy of park uses that favors swimming pools over ice arenas, tennis courts over volleyball courts, flowers over grass, skateboards over bicycles, or arboreta over golf courses. There were extensive public hearings on the overall development and use of this park land conducted by the City of Benton Harbor, resulting in the City Commission's selection of specific facilities and improvements in the park. This is the way local government works.

Gregory Marina v Detroit

The most complete and informative discussion of a municipal public purpose that can be applied to this case is found in *Gregory Marina v City of Detroit*, 378 Mich 364; 144 NW2d 503 (1966). Three justices would have reversed, holding the construction of a marina was not a public purpose. Six justices found the construction of a marina to be a public purpose the City was authorized to pursue and complete. Four of the six justices

found the construction of a marina was not a business enterprise requiring voter approval, and two of the six found that it was. The survey of the law on a municipal public purpose and use is worth reviewing.

> 'What is a public use is not capable of absolute definition. A public use changes with changing conditions of society, new appliances in the sciences, and other changes brought about by an increase in population and by new modes of transportation and communication. The courts as a rule have attempted no judicial definition of a public as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances. **Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose.** The phrase 'municipal purpose' used in the broader sense is generally accepted as meaning public or governmental purpose as distinguished from private. The modern trend of decision is to expand and liberally construe the term 'public use' in considering state and municipal activities sought to be brought within its meaning. **The test of public use is not based upon the function or capacity in which or by which the use is furnished. The right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.**

Gregory Marina, page 396, emphasis added.

> **The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect.**

Gregory Marina, page 396, emphasis added.

Resorting to general definitions of what constitutes the "use" of land is somewhat helpful when examining what is a lawful or permitted public use by a municipality, but more attention should be paid to pertinent municipal law definitions. Plaintiffs point to the phrase "forever used by the City of Benton Harbor" and conclude that only the City can use the land as a park, and therefore the City cannot lease any part of the land to be developed as part of a golf course open to the public. The reasoning is flawed, because the City's use of the land is defined by Benton Harbor's status, powers and limitations as a Michigan Home Rule City, subject to the list of preferred uses expressed by the donor, which were the "bathing beach," "park purposes," or "other public purpose." How the City of Benton Harbor chooses to accomplish or deliver the use of land that provides a "bathing beach," other "park purposes" and an "other public purpose" is up to Benton Harbor to decide in fulfilling its municipal role of establishing and maintaining its park.

Because "[t]he test of public use is not based upon the function or capacity in which or by which the use is furnished," *Gregory Marina*, page 396, the Plaintiffs' attack on the lease as an unauthorized [public] use of the land is without any legal foundation.

Because "[t]he right of the public to receive and enjoy the benefit of the use determines whether the use is public or private," *Gregory Marina*, page 396, and the City of Benton Harbor made certain the golf course would be open to the public and subject

to oversight by the City, the use as a golf course remains a public use provided by the City through the lessee, Harbor Shores.

The temptation to superimpose the Plaintiffs' ideas of a park purpose or a public purpose on the City of Benton Harbor through the courts should be resisted, because "[a]ny authority in Michigan, supporting the proposition that public purpose is a judicial question, rests, ultimately, on dicta of ancient vintage." *Gregory Marina*, page 395.

Plaintiffs argue that expensive green fees contradict and detract from the public characteristics of the public golf course, because "[t]he right of the public to receive and enjoy the benefit of the use determines whether the use is public or private." *Gregory Marina*, page 400. The court rejected the identical argument against boat slips for the wealthy, who might lease a slip "for years to the exclusion of the general public." *Gregory Marina*, page 399.

> The United States Supreme Court has said that it 'is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use'. (Cites omitted.) The Illinois Supreme Court has clearly stated that the logical principle: 'If it can be seen that the purpose sought to be obtained is a public one and contains the elements of public benefit, the question of how much benefit is thereby derived by the public is one for the Legislature, and not the courts.' (Cites omitted.)

Gregory Marina, page 400. Plaintiffs' arguments simply miss the mark. The choice of how to develop the park and how much benefit is thereby derived by the public is one for the City of Benton Harbor to decide and not the courts.

Other cases

In *Gilbert v Traverse City*, 267 Mich 257, 261; 255 NW 585 (1934), the court found "a municipal harbor and park development, comprising a harbor and yacht basin, auditorium, casino, bathhouse, museum, storage yard for yachts and boats, and other park and recreational facilities" "seems to be authorized by section 22, art 8, conferring upon cities the power to construct and maintain parks and other works which involve the public health and safety." Benton Harbor's development is similar to that which was reviewed with approval by the court in *Gilbert*, without discussing the details of what entities might operate the harbor, bathhouse, auditorium, casino, museum, storage yard, and other park and recreational facilities through a contractual arrangement with Traverse City.

Plaintiffs' reliance on *Huntington Woods v Detroit*, 279 Mich App 603; 761 NW2d 474 (1984) *lv den* 483 Mich 887 (2009) is misplaced. In *Huntington Woods* the City of Detroit accepted bids to *sell* a public golf course, with a net loss of public park land. In this case Benton Harbor *leased* a portion of its park land for the use and development of part of a public golf course, retaining ownership and oversight over the leased land,

while increasing the amount of land within the park, and contracting for the performance of maintenance in the park.

In *Baldwin Manor Inc v City of Birmingham*, 341 Mich 423, 431; 67 NW2d 812 (1959) the court observed that "[d]edication of lands 'as public grounds' is, of course, an unrestricted dedication permitting any public use." In the Klock deed the "other public purpose" clause is synonymous with "public grounds," qualified only by the donor's stated preference for a bathing beach and park purposes. This case does not require a decisive interpretation of the scope of the "other public purpose" clause, because a public golf course is a well recognized park purpose. The dedicating instrument under consideration in *Baldwin Manor*, pages 425-426 was much more restrictive, requiring "that the land deeded to the village by this instrument be used by the village for the purposes of a park and for that only, and if not so used it is to revert to my heirs." The court did not approve of the proposed construction of highways through the dedicated land. Obviously, the present case involves language in the dedicating instrument that invites and endorses Benton Harbor's exercise of municipal powers to determine what park purposes will be served by the development of a portion of the park land as part of a public golf course.

II. THE CITY OF BENTON HARBOR CAN LEASE A PORTION OF JEAN KLOCK PARK WITHOUT VIOLATING THE JANUARY 27, 2004 CONSENT JUDGMENT.

Standard of Review

The standard of review employed by courts when reviewing a local legislative decision of a Michigan municipality is limited to the determination of whether or not the decision is within the power of the municipality, and is authorized by law. *Veldman v City of Grand Rapids, supra, Torrent v Muskegon, supra, White v City of Grand Rapids, supra,* and *Gregory Marina v Detroit, supra.*

Consent Judgment

The consent judgment purportedly amended the Klock dedication of land to the City of Benton Harbor by limiting other public purposes to those related to bathing beach or park use.[4] This is an issue of municipal power, by which the City of Benton Harbor decides how to use and develop park land in a manner that must be a "park purpose" or "related to park use." If the development of a public golf course over a portion of the land is "related to park use," then the City of Benton Harbor must be allowed to complete the proposed development. The City of Benton Harbor is the unit of local government charged with the responsibility and authority to acquire, own,

[4] The enforceability of the consent judgment was not challenged and litigated. However, it is not clear that a consent judgment between a small group of citizens and a municipality can modify the terms of a prior dedication of land, limit the exercise of municipal powers over land owned by the city, or authorize the sale of park land contrary to the dedication.

construct, maintain and operate public parks and "all works which involve the public health or safety." Const 1963, art 7, §23. The trial court and the Court of Appeals correctly found the golf course was a park purpose or related to park use. There is no reason to disturb the well reasoned opinions of the trial court and the Court of Appeals.

RELIEF

The amicus Michigan Municipal League suggests that the application for leave to appeal be denied, or that an order be entered affirming the decision of the Court of Appeals because the determination of what constitutes "park purposes" is constitutionally committed to the City of Benton Harbor to make, and its decision to lease a portion of Jean Klock Park for part of a public golf course is authorized by law.

Dated: _____

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