IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Citizens to Keep Radnor Park Public and Albert B. Murphy, III and Heather Murphy and David M. Humphrey and Gayla McClusky and Ralph Thomas, Appellants	:	
v.	:	No. 412 C.D. 2012
	:	Argued: October 15, 2012
Radnor Township Board of Commissioners and the Agnes Irwin School	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: January 11, 2013

Citizens to Keep Radnor Park Public (Citizens) appeal an order of the Court of Common Pleas of Delaware County (trial court) denying their petition to preliminarily enjoin Agnes Irwin School from constructing an athletic field on public park land leased from Radnor Township. Discerning no error by the trial court, we affirm.

In 1993, Morgan's Run Corporation dedicated two parcels of real estate in the Township as a public park. The two parcels were known as the "Township Satellite Parking Parcel" (4.8 acres) and the "Heli-pad Parcel" (2.8

acres). In August 1999, Radnor Township, the Radnor School District and Radnor Center Associates[1] entered into a comprehensive Covenants, Restrictions and Easements Agreement consolidating the two parcels to form Radnor Memorial Park. The Covenants Agreement stated:

> **Restrictions on Use of [Radnor Memorial Park]**.
>
> Township hereby covenants and declares that the two Township-owned parcels of real property [forming Radnor Memorial Park] shall always be used for public park lands and public open space, and no artificial structure shall be built or placed inconsistent with this use on the [parcels]; provided, however that *Township, its successors and assigns, may construct upon such parcels paved parking areas (including but not limited to the Township Satellite Parking Lot), access drives, sports fields, restrooms, water fountains*, facilities for maintenance and park equipment, related park amenities, and the southern terminus of the Pedestrian Bridge.

Reproduced Record at 53a (R.R. __) (emphasis added). Radnor Memorial Park consists of an all-purpose field, a walking path, wooded open space with park benches, a parking area, restrooms and a water fountain. Since its dedication it has remained accessible to all residents of the Township for active and passive recreational use from dawn to dusk, 365 days per year, except when the all-purpose field is in use.

In June 2011, the Township executed a lease agreement with Agnes Irwin School, a private, all-girls elementary and secondary school located in the Township. Pursuant to the Lease, Agnes Irwin will lease Radnor Memorial Park for 15 years, with options to extend for five additional one-year periods. Agnes Irwin will pay the Township yearly rental of $35,000; will convert the existing all-

[1] Radnor Center Associates is the successor to Morgan's Run Corporation.

purpose field into an artificial turf athletic field; and will assume responsibility for maintenance of the field and surrounding walking track.

The Lease further granted Agnes Irwin certain periods of exclusive use of the artificial turf athletic field:

> a. During the academic year, from Monday through Friday, from 3:00 p.m. to 6:00 p.m. for athletic practices and games, provided that the time may be extended for games in progress ….
>
> b. During the academic year, twelve (12) times, in the evening from Monday through Friday from 6:00 p.m. to 9:00 p.m.
>
> c. During the academic school year, four (4) Saturdays for scheduled games from 9:00 a.m. to 5:00 p.m.
>
> d. Prior to the start of the academic year for pre-season practice for three (3) weeks in August from 9:00 a.m. to 5:00 p.m.
>
> e. During the summer months when school is not in session for joint sports and recreational camps with Radnor Township, for six (6) weeks from 9:00 a.m. to 5:00 p.m. The parties will meet on an annual basis to develop cooperative sport and recreational camps during this time period.

R.R. 20a-21a. The above schedule grants Agnes Irwin exclusive use of the athletic field for approximately 22% of the total daylight hours in a year. R.R. 131a. At other times, the field is available to the public. The Lease states that

> the artificial turf field shall be open and accessible for general use by Radnor Township residents when not being used by [Agnes Irwin] sponsored programs or Township sponsored programs, and the general public shall have access to the walking track and other amenities at all times, even during active field use by [Agnes Irwin] or Radnor.

R.R. 25a. The Township's Board of Commissioners effected the lease by enactment of Ordinance No. 2011-16.

In July 2011, Citizens, an unincorporated association of Township residents, filed an amended complaint against the Township, the Commissioners and Agnes Irwin seeking a declaratory judgment that the Lease violates the public trust doctrine, as codified in the act commonly known as the Donated or Dedicated Property Act, Act of December 15, 1959, P.L. 1772, 53 P.S. §§3381-3386. Citizens also asserted that the proposed grandstands and field illumination surrounding the new athletic field will violate the building and use restrictions in the Covenants Agreement.

In January 2012, Agnes Irwin began construction of the artificial turf field. On February 10, 2012, Citizens sought a preliminary injunction to stop the construction. After a hearing, the trial court denied the petition, holding that Citizens failed to prove they were likely to prevail on the merits of their declaratory judgment action. Citizens appealed the denial of the preliminary injunction.

On appeal,[2] Citizens argue that the trial court erred in holding that they were not entitled to a preliminary injunction because they were not likely to

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[2] Our Supreme Court has summarized the scope and standard of review as follows:

> [O]n an appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the trial court.
>
> * * *
>
> Thus, in general, appellate inquiry is limited to a determination of whether an examination of the record reveals that any apparently reasonable grounds support the trial court's disposition of the preliminary injunction request.

(Footnote continued on the next page . . .)

succeed on the merits of their declaratory judgment action.[3] Specifically, Citizens contend that the trial court erred in finding that the Lease between the Township and Agnes Irwin did not violate the Donated or Dedicated Property Act and the use restrictions contained in the 1999 Covenants Agreement. The gravamen of Citizens' argument is that the Township violated its fiduciary duty to maintain the use of Radnor Memorial Park as a public park by entering into the 15-year lease with Agnes Irwin, a private educational institution.[4]

Having reviewed the record and the arguments of the parties, and applying a deferential standard of review to a denial of a preliminary injunction, we hold there were "apparently reasonable grounds" for the trial court's conclusion that Citizens are not likely to prevail on the merits of their declaratory judgment

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(continued . . .)

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 645-46, 828 A.2d 995, 1000-01 (2003) (internal quotations and citations omitted).

[3] In ruling on a preliminary injunction request, a trial court has apparently reasonable grounds for its denial of relief where it properly finds that any one of the following essential prerequisites for a preliminary injunction is not satisfied:

> (1) An injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.
>
> (2) Greater injury will result from refusing an injunction than from granting it, and, concomitantly, issuance of an injunction will not substantially harm other interested parties in the proceedings.
>
> (3) An injunction will restore the parties to their status as it existed immediately prior to the alleged wrongful conduct.
>
> (4) The activity to be restrained is actionable, the moving party's right to relief is clear, and the wrong is manifest. *In other words, the moving party must show that it is likely to prevail on the merits*.
>
> (5) The injunction is reasonably suited to abate the offending activity.
>
> (6) The injunction will not adversely affect the public interest.

Summit Towne Centre, 573 Pa. at 646-47, 828 A.2d at 1001 (emphasis added).

[4] Township resident and *amicus curiae* James D. Schneller has filed a brief, *pro se*, in support of Citizens' appeal.

action. Because the trial court accurately articulated and thoroughly analyzed the issues, and correctly applied the law, this Court affirms the trial court's order on the basis of the well-reasoned opinion issued by the Honorable Chad F. Kenney in *Citizens to Keep Radnor Parks Public v. Township of Radnor* (Delaware County Court of Common Pleas, Civil Division, No. 11-005331, filed February 23, 2012).[5]

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MARY HANNAH LEAVITT, Judge

[5] In response to the dissenting opinion, we note that the trial court reasonably interpreted the language of the Covenants Agreement, which expressly provides that the Township, or its "successors and assigns, may construct … sports fields [and] related park amenities …." R.R. 53a. Consistent with this language, the Township's assignee, Agnes Irwin, will convert the existing all-purpose field into an artificial turf field. Further, under the Lease Agnes Irwin has exclusive use of only a portion of the park, *i.e.*, the athletic field, for 22% of the daylight hours in a year. The public has access to the field the other 78% of those hours, and access to the remainder of the park, including the track, wooded and open areas, walking path, benches, restrooms and other amenities, 100% of the time. The dissent's so-called "micro level" observation that children will be denied access to the athletic field during the only "practical time" is based upon assumptions not supported by the record about when children eat dinner or do their homework. It assumes, without evidence, that children attending other schools will not use the athletic field for gym class or recess during the school day, *i.e.*, before 3:00 p.m. The dissent's "macro level" parade of horribles, *i.e.*, that the demise of public parks is imminent, is similarly speculative. Accepting the dissent's invitation to imagine worst case scenarios, one can conjure up images of once idyllic public parks lying fallow due to lack of funding for maintenance in strained municipal budgets. Indeed, in the case *sub judice*, the existing all-purpose field had fallen into a state of disrepair and, but for the Lease with Agnes Irwin, may have eventually become unusable by anyone.

In summary, given this Court's deferential standard of review of an order denying preliminary injunctive relief, there were "apparently reasonable grounds" for the trial court to conclude that the Lease did not violate the Donated or Dedicated Property Act or the Covenants Agreement. The mere possibility that Citizens may prevail in their declaratory judgment action does not require the issuance of a preliminary injunction.

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v.	:	No. 412 C.D. 2012
Radnor Township Board of Commissioners and the Agnes Irwin School	:	

O R D E R

AND NOW, this 11th day of January, 2013, the order of the Court of Common Pleas of Delaware County in the above-captioned matter dated February 22, 2012, is hereby AFFIRMED on the basis of the opinion issued by the Honorable Chad F. Kenney in *Citizens to Keep Radnor Parks Public v. Township of Radnor* (Delaware County Court of Common Pleas, Civil Division, No. 11-005331, filed February 23, 2012).

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MARY HANNAH LEAVITT, Judge

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BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

DISSENTING OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: January 11, 2013

Because a public park is dedicated to use by the public, not for the private use of a school, I would find that the lease between Radnor Township (Township) and the Agnes Irwin School (Private School) that gives that school use of a portion of Radnor Memorial Park (Park) during "prime time" violates both the Donated or Dedicated Property Act[1] (DDPA) and the Covenants, Restrictions and Easements Agreement (Covenants Agreement) establishing the Park, and I

[1] Act of December 15, 1959, P.L. 1772, 53 P.S. §§3381-3386.

respectfully dissent. I also dissent because the lease allows artificial structures specifically forbidden by the Covenants Agreement.

Section 3 of the DDPA states, in pertinent part, that "[a]ll such lands … held by a political subdivision, as trustee, shall be used for the purpose or purposes for which they were originally dedicated or donated, except insofar as modified by court order pursuant to this Act." 53 P.S. §3383. Paragraph 6 of the Covenants Agreement[2] states, in relevant part:

> 6. **Restrictions on Use of [Radnor Memorial Park].**
>
> Township hereby covenants and declares that [Radnor Memorial Park] shall always be used for public park lands and public open space, and no artificial structure shall be built or placed inconsistent with this use on the [Radnor Memorial Park] Parcel; provided, however that Township, its successors and assigns, may construct upon such parcels paved parking areas … , access drives, sports fields, restrooms, water fountains, facilities for maintenance and park equipment, related park amenities, and the southern terminus of the Pedestrian Bridge.

[2] Radnor Center Associates (RCA), a limited partnership, the Township, and the Radnor Township School District (School District) executed the Covenants Agreement in January 2000 to set forth their agreements regarding the development of Radnor Elementary School on two tracts of land owned by the Township and the School District that adjoined a business park owned by RCA. (R.R. at 48a.) The Covenants Agreement states a number of restrictions regarding the use of these school tracts in favor of RCA and the Township, and RCA granted the School District an easement over a road for ingress and egress to the school tracts. (*Id.* at 49a-51a, 53a-57a.) The Covenants Agreement also provided for improvements to Environmental Park in the Township, the establishment of the Park, as well as the construction of a pedestrian bridge from the school tracts to the Park. (*Id.* at 51a-53a.)

(Reproduced Record (R.R.) at 53a.) "A municipality has been found to lack authority to lease dedicated property where the lease would be inconsistent with the terms of the dedication. *Ormsby Land Co. v. City of Pittsburgh*, 276 Pa. 68, 119 A. 730 (1923)." *White v. Township of Upper St. Clair*, 799 A.2d 188, 196 (Pa. Cmwlth. 2002) (footnote omitted). The lease entered here is inconsistent with the dedication of the Park as a public park.

Under the lease with the Township, the Private School will control the use of the athletic field at the Park: (1) Monday through Friday from 3:00 p.m. to 6:00 p.m. during the academic school year; (2) Monday through Friday from 6:00 p.m. to 9:00 p.m. on twelve days during the academic school year; (3) Saturdays from 9:00 a.m. to 5:00 p.m. on four days during the academic school year; (4) from 9:00 a.m. to 5:00 p.m. for three full weeks in August prior to the start of the academic school year; and (5) from 9:00 a.m. to 5:00 p.m. for six weeks during the summer months for joint sports camps with the Township. (R.R. at 20a-21a.) The lease has an initial term of 15 years with an automatic renewal for an additional year if the Private School performs the terms and conditions of the lease. (*Id.* at 19a.) During those times, the lease in this case grants the Private School control of the athletic fields in the Park during "prime times" to the exclusion of the general public, year-round, which is forbidden by the DDPA.[3]

[3] *See, e.g., San Vincente Nursery School v. County of Los Angeles*, 174 Cal. App. 2d 79, 87, 304 P.2d 837, 842 (1956) (holding that a private nonsectarian nursery school's exclusive use of a "card shelter" and "horseshoe area" of a public park from 9:00 a.m. to noon on weekdays, and for storage when not in use, for seven years, was not a public use or for a public purpose because "[t]he use of the park by the school did not contribute to the enjoyment of the park by the general public but contributed only to the enjoyment of the park by the few children and their parents….").

On a *micro* level, the net result is that students who don't attend Private School will be denied access to the field before dinner and homework, the only practical time they can use field. On a *macro* level, the net effect is that parks will become less and less public with adjacent colleges, universities, schools and other entities being allowed to gain control over park facilities thereby depriving all citizens of the right to use parks at times they can actually use them.[4]

Not only does giving the Private School control over the Park during that time violate the DDPA and the Covenants Agreement, the Covenants Agreement specifically states that "no artificial structure shall be built or placed inconsistent with" the public park lands and public open space use of the Park. (R.R. at 53a). The proposed fencing, scoreboard, spectator seating, lighting, storage and storage

[4] The majority says that it is mere speculation on my part that children use the ball field when they come home from school and after dinner during the school year, seemingly suggesting that the children can either play hooky from school or go to the Park after dinner when it is too dark to play ball. As to the speculation of my "parade of horribles," those are listed because it illustrates the effect the majority holding has on parks across the Commonwealth. There are always expedient reasons to rent out, as here, or sell public parks – expensive to maintain or needed by adjacent entities to expand to foster job growth. However, expedient reasons are not sufficient to allow the sale because they are held in trust for the public. Otherwise, the General Assembly would not have enacted DDPA, which forbids mere expediency or present day "practical" reasons that the majority suggests justifies a private party to have exclusive use of part of a park forever or, as here, for 15 years. It is noteworthy that Radnor Township is the home of two universities, two colleges, a number of private schools and a hospital. Under the majority rationale, any one of those institutions can have exclusive use of a portion of a township park to the exclusion of the public if it pays for improvements, *e.g.*, if one of those institutions needs parking during the day for employees, as long as they paid for it, it would justify paving over part of the park for a parking lot. Specifically, there is no support for the proposition, as the majority seems to infer, that the DDPA and the Public Trust doctrine can be violated to allow the Park to be used for a private purpose to make money to defray expenses. If that were so, those doctrines would be meaningless. Moreover, there is no allegation that Radnor Township is unable to provide funding to adequately maintain the Park.

facilities that the Private School will construct under the lease, (*see id.* at 20a-22a), clearly fall within the foregoing prohibition.

Accordingly, unlike the majority, I would reverse the trial court's order because the Citizens to Keep Radnor Park Public has established that it will succeed on the merits because the 15-year lease granting the Private School year-round use of a portion of the Park along with the construction of prohibited artificial structures in the Park are inconsistent with the terms of the dedication of the Park in violation of the DDPA and the Covenants Agreement.[5]

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DAN PELLEGRINI, President Judge

[5] The cases cited by the trial court to support the order denying preliminary injunctive relief are inapposite. *Shields v. City of Philadelphia*, 405 Pa. 600, 176 A.2d 697 (1962), involved the question of whether the construction of a baseball field for the primary benefit of the non-profit Little League and its participants was consistent with property dedicated to be used as "[a] public park, on condition that no buildings shall be erected thereon other than those required for the comfort of the people, and also that the garden and trees shall be preserved as far as possible…." While the ball field was being used by the Little League, the Little League itself was open to all. Likewise, *Bernstein v. City of Pittsburgh*, 366 Pa. 200, 77 A.2d 452 (1951), involved the question of whether the construction of an open air auditorium to be used by the non-profit Civic Light Opera to present musical and theatrical performances for a fee was consistent with property dedicated to be used as "[a] Public Park and place of fee, attractive and healthful resort, and open air recreation for the people of Pittsburgh and the Public…." The ten-year lease at issue in that case only provided the Civic Light Opera with use of the open air auditorium in the public park, but again, the event would be open to the general public for a fee. *In re Condemnation by City of Coatesville*, 898 A.2d 1186 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 718, 919 A.2d 959 (2007) and *In re Saha*, 822 A.2d 846 (Pa. Cmwlth.), *appeal denied*, 576 Pa. 715, 839 A.2d 353 (2003) are also inapposite because they involved the condemnation of land for the construction of a municipal golf course that would be open for use by the general public.