

Memorandum

To: Jillene Bellchamber-Glazier, Chief Administrative Officer
Municipality of Kincardine
From: Paula Lombardi
Date: February 4, 2024

Subject: Opinion - Bluewater Trailer Park/MacPherson Park

Question

You have asked us to provide an opinion on whether the property currently used for the Bluewater Trailer Park and MacPherson Park can be used for a purpose other than the current trailer park use or alternatively other than a parkland use and the corresponding risks if it the lands are not used for those purposes.

Short Answer

The Bluewater Trailer Park based on the information provided does not appear to be consistent with the specific purposes of the grant being the use of the property for a public park, walkway, or garden. To be consistent with the grant the Municipality should be using these lands for the intended purpose – a public park, garden or walkway. These uses will avoid the property reverting back to the grantor.

The MacPherson Park we understand has been used for the purposes of a park consistent with the grant. However, as soon as the Macpherson Park lands stop being used for the purposes of a public park the lands will revert to the Donor (or their successors / assigns).

Overview

Based on our review of the information provided, it is our opinion that Bluewater Trailer Park was conveyed to the Municipality on the basis of a dedication and acceptance for public purpose, specifically the lands were to be used for a “*public park garden or walkway*” in and for the Town (Kincardine).

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The first issue is whether there was ever acceptance of the lands for the specific purpose identified. We are assuming that at the time of the transfer in the late 1880s the lands were used for the purposes of a public park, garden or walkway as required by the transfer.

To determine whether the trailer park is in keeping with the original grant we need to determine whether the current trailer park use is considered a public park use (which we do not think it would), or alternatively, whether the trailer park was originally used as part of the public park purpose at the time of “grant.” It does appear that any member of the public can book a camping site at the Bluewater Trailer Park and from our investigation open the general public¹.

However, if we are incorrect and the trailer park is not (and has not) been considered a public park, garden, or walkway, then we may not be able to prove acceptance of the dedication, and the grant would be void. In other words, the trailer park use is not consistent with the original grant which was for the purposes of a public park, garden, or walkway. If there is evidence of use as a trailer park at the time of dedication, and that the grantor never complained of the use, it could be argued that there was an implied dedication and acceptance for the trailer park purpose.

If the Municipality wants to get rid of the trailer park and use for the purposes of a public park, walkway or garden such uses would fall squarely within the terms of the dedication and be consistent with the purpose intended by the grantor².

We note that a public park has a specific definition in the Municipality's current Zoning By-law and does not include a trailer park, mobile home park or campground. This indicates Kincardine's intention that a trailer park / mobile home park is not defined the

¹ [Bluewater Trailer Park | Kincardine ON | Facebook](#)

² The Habendum states “to have and to hold unto the said parties [being Kincardine] .. in trust to and for a public park, garden or walk in and for aid Town of Kincardine according to the provisions of the Municipal Act for Ontario and of said By-law of the Town.”

same as a public park³. The trailer park use is not consistent with the original grant of the land to the Municipality for a public park, garden, or walkway⁴.

MacPherson Park on the other hand is subject to a very clear reversionary interest in its transfer. In other words, the lands will revert to the Donor and its successors and assigns if the lands ever cease being used as a public park. It is clear that Macpherson Park was dedicated solely for the purpose of a park and no other use. As soon as the Macpherson Park lands stop being used for the purposes of a public park the lands will revert to the Donor (or their successors / assigns).

Facts

You are in the midst of a Parks and Recreation Planning process and are contemplating the future use(s) of the Bluewater Trailer Park and MacPherson Park.

BLUEWATER TRAILER PARK

Bluewater Trailer Park is comprised of four separate lots: 5, 6, 7, and 8.

Lots 5 and 6 were conveyed to the Municipality in 1885 in Instrument No. 4115. Instrument No. 4115 specifically stipulates that the property is being conveyed for the purpose of a public park, garden or walk.

The property was to be held in trust by the municipality for the public park, garden, or walkway purposes. Instrument No. 4115 appears to indicate that Lots 7 and 8 were previously conveyed for the same purpose. However, a copy of this instrument was not provided. The opinion of Mahood & Darcy notes that Lots 7 and 8 had no similar trust provisions (transferred from W. C. Loscombe), and we will be relying on this as the basis for our opinion.

MACPHERSON PARK

MacPherson Park is comprised of lots 10, 11, 12 and 13. The Instrument provided (no instrument number provided) notes that the property would be used for the exclusive

³ 'Public Park' means an area of land which is owned by a public agency, and which may include therein one or more athletic fields, field houses, bleachers, wading pools, bandstands, outdoor ice skating rinks, tennis, or badminton courts, bowling greens, fairgrounds, picnic area, historic site, interpretive centre, maintenance buildings or other such similar uses.

⁴ The exception being again is if it can be demonstrated that the trailer park specifically existed at the time of the transfer and was agreed to by the grantor.

purpose of a public park and will bear the name of “MacPherson Park”. This Instrument further allows for a reversionary interest that says that the dedicated lands will revert to the seller/its successors in the event that the lands are used for other purposes. In other words, if not utilized for a public park which in our opinion would include a public walkway with some benches etc. along the way, the lands would revert back to the grantor’s successor (or assigns) in title.

ANALYSIS

BLUEWATER TRAILER PARK

Dedication of Land for Public Purpose

Instrument No. 4115 as written suggests a dedication of lands for public purpose (public park, walkway, garden), rather than a transfer subject to a restrictive covenant or purpose. This is an important distinction as it means that the lands are not subject to the forty year expiry period for restrictive covenants. In other words the uses designated in the dedication must continue for the dedication to remain valid.

In order for the dedication to continue to be valid there are two requirements that must be met:

1. an intention on the part of the owner to dedicate; and
2. an acceptance by the public.

Note that the payment of consideration in exchange for the land does not bar a finding of public dedication.⁵ However, there is no information that a payment occurred in this case.

When lands are dedicated to the public for a particular purpose, the lands must be used for that particular purpose. In this case the particular purpose set out in the dedication is for a “*public park, garden, walkway.*” The municipality would be in breach of the dedication to continue to hold the lands and apply them to a different use.⁶ In other words the only uses permitted on the Bluewater Trailer Park lands for the dedication to remain valid is for a public park, garden or walkway.

⁵ Bailey v. City of Victoria, 1920 CanLII 367 (SCC), 60 SCR 38, <<https://canlii.ca/t/gd9p6>>

⁶ Ibid citing re Peck and The Town of Galt (1881), 46 U.C.Q.B. 211

In the *Township of Cornwall v. McNairn et al.*⁷ case, the deed conveying the lands to the municipality stated that “Windmill Fort and Lots 322 and 323 – Donated by Miss Bertha Colquhoun to the Township of Cornwall to be permanently maintained by the said Township as an historic site and public part –In the event of the premises hereto not being kept in reasonable repair same will revert to the Donor or her legal representatives”.

While other issues were noticed in the deed the Judge found that the important part was that the municipality’s acquisition was subject to the restriction placed on the use. The municipality demolished the historical site, and the Donor proceeded to convey the lands to an individual because the historic use identified in the deed were no longer being met. The judge held that the lands had reverted to the legal representative (as a result of the change in use) making the transfer of the lands valid resulting in the Municipality no longer having a right to use the land.

In McNairn, the Court held that there was no acceptance by the Municipality of Miss Colquhoun’s dedication as they demolished the historical site and proceeded to make the use of the lands for a historical site impossible.

While there is very little caselaw available regarding public dedication for a public purpose, what is available suggests that if the property is never used for the intended purpose, that there can be no acceptance. The transfer is an express contract regarding the dedication and acceptance by the Municipality of the lands. Therefore, it is more likely that there would be a breach of faith for the inconsistent use of the lands. Noting that there will only be a breach of faith if the actual purpose is contrary to the intended purpose. In other words, are the use of the Bluewater Trailer Park lands contrary to the intended public purpose of a park, garden, or walkway. It does appear that the trailer park use is contrary to the intended public purpose. However, should the Municipality choose to utilize the lands for the intended purpose being the public park, walkway or garden then the concern would be rectified and uses consistent with the original dedication.

If the Municipality wants the trailer park use to continue an implied dedication could be argued provided that it can be proven that that the donor was aware of the use of the lands and took no steps to reclaim the property. In our opinion this would be a difficult, next to impossible, task. To retain the dedication the Municipal needs to utilize the lands for the purposes of a public park, garden or walkway. However, should the Municipality

⁷ 1946 CanLII 105 (ON SC), <<https://canlii.ca/t/q14jj>>

desire the trailer park to remain on the lands we can discuss what modifications are required to ensure that the lands meet the requirements of the dedication to avoid any risk of revision to the Donor.

Does a trailer park fit within the “public park” intended purpose?

In *Wright and Maginnis v. Village of Long Branch*⁸, an issue at the Court of Appeal was whether the parkette use was consistent with the dedication as a public highway. The court found that the use as a public square with hedges planted along the two streets sufficiently filled out the original intention of the grantor. In coming to this decision, the court concentrated on the fact that it was a public park that formed an intersection of two streets. This decision was reversed by the Supreme Court of Canada.

The Supreme Court⁹ noted that the war memorial would have likely been constructed with the acquiescence of the grantor’s estate. Rather than framing it as dedication of a public highway, the Court held that it was dedication of land for a limited purpose, being the erection and maintenance of a war memorial. Importantly, there was no transfer of legal title, the title remained in the name of the grantor. Therefore, the court noted, that if the memorial was removed from the land or ceased to permanently exist, the land would be free from the burden of the dedication (in other words the lands would revert back to the original grantor or their successors).

In regard to the Court of Appeal’s reasoning vis a vis the public highway, the Supreme Court noted that there was no evidence that the square was ever used as a public highway, and that the principle for determining whether a dedication has occurred is as follows:

The principle determining the nature of the interest created by dedication is analogous to that of other modes of creating public interests, as, for example, where land is conveyed to a municipal body for the purpose of a market place; the user for that object cannot be changed except by legislation; and if by authorized action its use as a market is abandoned, the beneficial interest revives in the original actor or his successors

⁸ [1957 CanLII 401](#) (ON CA)

⁹ *Wright and Maginnis v. Long Branch (Village)*, 1959 CanLII 6 (SCC), [1959] SCR 418, <<https://canlii.ca/t/1tvp5>>.

The Court referenced re *Peck v Galt* that found that the town did not have the power to close and dispose of a public square that had been dedicated because it was dedicated for the limited purpose “to remain always free from any erection or obstruction”.

In our opinion it is unlikely that the trailer park use fits within the broader “public park” purpose. Therefore, if the lands, or a portion thereof, were to be used for a walkway, public park, garden that would be more consistent with the original grant. In other words, if the goal is to utilize the lands or at least a portion of the lands for the specific purpose intended by the grant.

In order to fully understand whether the trailer park is consistent with the dedication we need to understand how long the trailer park has existed, is it fully publicly accessible and whether there are any parkettes or other public gathering spaces in Bluewater Trailer Park that can be accessed by the general public. For example, if the trailer park is open to the public (ability for any one to rent a space) and the public can access the trailer park for any parkettes or the lands are part of a walkway it may be interpreted as a publicly accessible area and public park.

However, in our opinion a walkway, garden or park would be more in keeping with the intention of the original dedication.

Breach of Faith Remedies

Both in the transfer and in some of the case law, the dedication is described as a trust arrangement, the lands are being held in trust by the Municipality for the public and the stated limited purpose. Although damages are the most common remedy for breach of faith, there is a strong possibility of rescission, that the property would revert to the Donor’s estate.

MACPHERSON PARK

The MacPherson Park appears to be more straightforward. The transfer created a reversionary interest benefiting the estate if the land is ever used for something other than the intended purpose set out under the dedication. The transfer specifically stated that the lands would be for “Park purposes” and will “always be held and used for the Exclusive purposes of a Public Park that will bear the name of “Macpherson Park.”¹⁰

¹⁰ Section 15(1) of the Conveyancing and Law of Property Act recognizes the creation of reversionary interests: **15** (1) Every conveyance of land, unless an exception is specially made therein, includes all

We note that the transfer of the MacPherson Park was made under the Short Forms of Conveyances Act. The reversionary interest of the MacPherson transfer is set out in the habendum¹¹ clause, that can in some circumstances be found void due to ambiguity. In this case, the language in the transfer is not ambiguous enough to be found void as it clearly sets out the specified use and the revision in the event that specified use, being the park, no longer continues.

Given the likely enforceability of the reversionary interest, the issue would be whether the current use fulfills the condition set out in the deed. If the MacPherson Park is used for the purposes of a publicly accessible park area that bears the name MacPherson Park it will be found to be in keeping with the transfer.

houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to such land belonging or in anywise appertaining, or with such land demised, held, used, occupied and enjoyed or taken or known as part or parcel thereof, and, if the conveyance purports to convey an estate in fee simple, also the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of the same land and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor into, out of or upon the same land, and every part and parcel thereof, with their and every of their appurtenances. (2) Except as to conveyances under former Acts relating to short forms of conveyances, this section applies only to conveyances made after the 1st day of July, 1886. [Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34 \(ontario.ca\)](#)

¹¹ The habendum clause is the part of a deed or conveyance that states the estate or quantity of interest to be granted, e.g., the term of the lease.