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GOLF DEVELOPMENT PARK LEASE ENVIRONMENTAL REVIEW

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In the case of *Weiss v. Kempthorne*, 580 F. Supp. 2d 184 (Dist. D.C. 10/6/2008), plaintiffs, residents of Benton Harbor on the shore of Lake Michigan, alleged that the National Park Service ("Park Service") violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., by failing to require a full Environmental Impact Statement (EIS) and inadequately considering practical alternatives when it approved a lease which would result in the conversion of a portion of a public park into three holes of a public golf course.

Plaintiffs further alleged that the Park Service violated the Land and Water Conservation Fund Act ("LWCF"), 16 U.S.C. § 460l-4 et seq. in approving the lease because it failed to "assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location."

Accordingly, plaintiffs asked the federal district court to issue a temporary restraining order (TRO) prohibiting "all destruction, conversion, and construction activities which are planned within Jean Klock Park, pending completion of litigation to address whether the Park Service had complied with the substantive and procedural requirements of NEPA and or LWCF.

A TRO would effectively maintain the status quo within the park until the court conducted further proceedings to address plaintiffs' NEPA and LWCF claims. In determining whether to issue a TRO, the federal district court would consider whether plaintiffs had shown a substantial likelihood of success on the merits of their NEPA and LWCF claims.

APA REVIEW

In considering whether the Park Service had complied with the substantive and procedural requirements of NEPA and or LWCF, the federal court reviewed the Park Service's approval of the conversion under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. As noted by the court, "in order to be successful on their claims under NEPA and LWCF via the APA, Plaintiffs must show that the Park Service acted arbitrarily and capriciously in approving the City's lease of 22 acres of the Park to Harbor Shores."

As described by the court, the scope of judicial review under the APA "arbitrary and capricious standard" is quite "narrow" and "agency action under review is entitled to a presumption of regularity." Further, the court would uphold an agency's decision if It could "reasonably discern" the agency's path in reaching its determination.

In applying the APA "arbitrary and capricious" standard, the federal court would "consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

> An agency action usually is arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider

> an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

As a result, under APA review, a federal court will generally defer to agency decision making and not "substitute its judgment for that of the agency," particularly on issues within the realm of agency expertise. In other words, where reasonable minds could differ, absent a "clear error in judgment" or violation of the law, a federal agency will generally prevail in federal court challenges to its administrative decisions, particularly those involving natural resources.

FACTS

Jean Klock Park is a 73-acre park is located in Benton Harbor, in southwestern Michigan, about 90 miles from Chicago. The Park's natural features include sand dunes running along its entire half-mile stretch parallel to Lake Michigan. John and Carrie Klock, whose daughter Jean died in early childhood, donated the property for the Park to the City of Benton Harbor in 1917. The Klocks gave the Park to the City in perpetuity to preserve the dunes and lakeshore and dedicated the Park to "the children." In 1977, the federal government provided a $50,000 LWCF grant for improvements at Jean Klock Park.

A nonprofit developer, Harbor Shores Community Redevelopment, Inc. ("Harbor Shores"), planned to build three golf fairways and holes in Jean Klock Park. These golf holes are part of a 500 acre project including an 18-hole championship signature golf course designed by Jack Nicklaus and a residential and commercial development.

In order to build three golf holes in part of the Park, the City obtained federal approval to lease 22.11 acres of the Park to Harbor Shores for a term of 35 years, with two 35 year renewal options. The portion of the Park covered by the lease included a picnic pavilion, an overlook pavilion, and a large parking lot; it did not include the beach or the lake side of the sand dunes.

In exchange for the lease, Harbor Shores granted the City "mitigation property" which included various parcels of land along the Paw Paw River, totaling 38 acres. The City planned to combine the new parcels with existing public trails and to develop a twelve mile public trail system that will include fishing decks, boat launch facilities, picnic facilities, and parking.

The environmental review process for the lease began in April 2006 with six public comment sessions held in August 2006. The City presented a proposal to the Park Service, but the Park Service did not approve the initial request. The City revised the proposal and opened it to public comment from April 2 to May 17, 2008. The City held a public hearing during the comment period. The City then added the public comments and submitted the revised proposal to the Michigan Department of Natural Resources. The Michigan DNR recommended approval to the Park Service, and the Park Service approved the lease on July 25, 2008.

Plaintiffs all live within three miles of Jean Klock Park. According to plaintiffs, these three golf holes would "consume virtually all of the Park's lengthy dune summit" and encroach on a natural marsh. The City and Harbor Shores, however, viewed the larger development as a project that

would "revitalize the economy of an impoverished city." In so doing, the City stated that Benton Harbor is in great distress -- it has a 17% unemployment rate, a 57% illiteracy rate, and more than 42% of its population lives below the poverty line.

LWCF

In pertinent part, the Land and Water Conservation Fund Act provides that "[n]o property acquired or developed with assistance under this section shall, without the approval of the [Interior] Secretary, be converted to other than public outdoor recreation uses." 16 U.S.C. §§ 460l-8(f)(3) Before approving any proposed conversion, LWCF requires the Secretary of the Interior to "assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location." 36 C.F.R. § 59.3.

In general, the Secretary of Interior has delegated his statutory duty under LWCF to the director of the National Park Service who typically has regional offices conduct the actual review. In this particular instance, the Park Service had delegated authority to review the City's lease proposal to its regional director of the Midwest region.

According to the federal district court, once Jean Klock Park received LWCF funds in 1977, the federal government "acquired a protectable interest in their investment" under the LWCF. Specifically, the National Park Service had "an oversight role with respect to any disposition of the property subject to the grant" and Park Service "approval was required before conversion of some of the Park to golf holes and fairways." In so doing, the Park Service had to ensure that Jean Klock Park was "continuously maintained in public recreation use unless the Park Service approved substitution property of reasonably equivalent usefulness and location and of at least equal fair market value." 36 C.F.R. § 59.3(a).

As noted by the federal court, "conveyance of rights in park land (through lease, easement, or sale)" might meet "the regulatory definition of a conversion" of the LWCF. In this particular instance, the federal court found the Park Service approval requirement under LWCF was indeed "triggered by the City's lease of part of the Park to a private entity, Harbor Shores." On the other hand, contrary to plaintiffs' claim, the court found the City's plan to convert public park land to private use did not necessarily trigger the Park Service approval requirement because "the planned golf course will be public" and, therefore, it had not been "converted to other than public outdoor recreation uses" within the context of LWCF.

Although the private lease with Harbor Shores had triggered the LWCF approval requirement for any "conversion," the court found that plaintiffs had "not shown a likelihood of success on their claim that the Park Service acted arbitrarily and capriciously in finding that the mitigation property was of reasonably equivalent usefulness and location":

> The mitigation property expands recreational opportunity to include public trail system, fishing decks, boat launch facilities, picnic facilities, and parking. The mitigation parcels are located strategically to provide public access to the parkland, and are tied together through the creation of a 12.8 mile public trail

> system and foot bridges linking Jean Klock Park to park sites along the Paw Paw River, downtown Benton Harbor, and residential areas.

As a result, the federal district court rejected plaintiffs' LWCF claim that the Park Service had failed to "assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location."

EIS OR EA?

The National Environmental Policy Act (NEPA) requires federal agencies to prepare a detailed statement, known as the Environmental Impact Statement (EIS) for any major federal actions which significantly affecting the quality of the human environment. An EIS must consider the environmental impact of a proposed action, including any adverse environmental effects which cannot be avoided should the proposal be implemented. In addition, the EIS must consider alternatives to the proposed action, including a "no action" alternative. 42 U.S.C. § 4332(2)(C).

In their complaint, plaintiffs contended that the Park Service had violated NEPA by failing to prepare an EIS. In order to determine whether an EIS was warranted or not, the federal court acknowledged that the Park Service was required to conduct an Environmental Assessment ("EA") under NEPA (40 C.F.R. § 1508.9) "to determine if its approval of the lease was indeed "a major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EA is a concise public document which briefly provides sufficient evidence and analysis for determining whether to prepare a much more detailed (and costly in time and money) full environmental impact statement, or alternatively issue a finding of no significant impact (FONSI).

In this particular instance, the Park Service conducted an EA and determined that "the lease, which converted property from general public park use to public golf course use, did not constitute a major federal action that significantly impacted the environment." Accordingly, the Park Service issued a finding of no significant environmental impact (FONSI) with regard to the Harbor Shores lease.

Under the circumstances, plaintiffs alleged that the Park Service had erred in issuing an EA/FONSI, rather than conduct a full blown EIS. In so doing, plaintiffs claimed the Park Service was legally required to "evaluate the impact on the full park or on the entire 500 acre development project on adjoining land to determine whether an environmental impact statement is needed."

> [T]he Park Service should have examined and inventoried the City's proposed development of the entire Park, including the building of a lakeside road with angled parking, and that the Park Service should have considered the impact of the entire 500 acre development on the environment [including the destruction of a climax forest on the private land portion of the golf course].

The federal district court rejected this argument. In the opinion of the court, "the Park Service was required to evaluate the proposed lease of only 22 acres of the Park to Harbor Shores."

> In conducting an EA where the proposal being reviewed is but a small piece of a larger project over which the agency has no authority, an agency does not go beyond the scope of its permitting authority to review the area over which it has no jurisdiction.

As a result, the federal district court held that the Park Service "was not required to consider the City's plans for development of the entire Park, let alone the plans for the entire 500 acre residential and golf course development." In so doing, the court concluded that plaintiffs had not shown a likelihood of success on their NEPA claim that the Park Service had acted arbitrarily by issuing an EA/FONSI instead of preparing an EIS.

ALTERNATIVES

Plaintiffs further contended that the Park Service had "failed to consider practical alternatives to the conversion as required by NEPA." According to the court, pursuant to NEPA regulations, "[t]he Park Service was not required to consider every alternative, only reasonable alternatives." 36 C.F.R. 59.3(b)(1). Under the circumstances of this particular case, the federal court found the Park Service had indeed "reviewed various alternatives" as "part of the EA and lease approval process":

> [T]he City submitted a "Conversion and Mitigation Proposal" to the Park Service indicating that the lease was the preferred alternative and indicating why it had not chosen six other alternatives, including no action. The City's proposal noted that by taking no action and leaving the Park "as is," the Park would remain underutilized, in continued disrepair, with poor accessibility.
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> Alternatives 2 and 6, options to build the golf course in areas outside the City, would undermine the City's purpose of attracting investment, increasing the City's tax base, and reaping the revenues to be generated by the golf course and related commercial and residential development.
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> Other locations were rejected due to a lack of easy access, due to the impediment created by the location of a railway, and because they were not feasible because of wetland protection, the need for environmental cleanup, or other regulatory constraints.

Based upon such consideration of relevant factors, under APA review, the court concluded that "plaintiffs have not shown a likelihood of success on their [NEPA] claim that the Park Service acted arbitrarily by failing to consider such alternatives."

The court also rejected plaintiffs' contention that it was necessarily "in the public interest to protect the environment" by issuing a temporary restraining order to block the Harbor Shores lease, pending further litigation. In the opinion of the court, "the balance of harm favors denial

of the request for a restraining order." In so doing, the court agreed with Harbor Shores and the City that "an injunction would harm them and their constituency, the public, because construction delays are expensive and delay could jeopardize the entire project due to the risk of lost financing." Further, the court found that an injunction would be "contrary to the public interest because the conversion of the Park and its development is for the benefit of the public and is part of a much-needed economic revitalization plan."

CONCLUSION

Applying the APA standard of judicial review, the federal district court, therefore, concluded it was "not likely that Plaintiffs can show the Park Service's approval of the conversion under LWCF and finding of no significant impact under NEPA was not based on a consideration of the relevant factors or was a clear error of judgment." Further, under APA review, the court reiterated the general principle that "the Court may not substitute its own judgment for that of the Park Service." As a result, the federal district court denied plaintiffs' motion for a temporary restraining order.