

PARK CONVERSION PROTECTION IN LWCF PROJECT MAP

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Since the enactment of the Land and Water Conservation Fund Act in 1965 (LWCF), 16 U.S.C. § 4601-8, the National Recreation and Park Association (NRPA) has traditionally been the primary and most steadfast advocate in the federal budget process to secure Congressional appropriations for LWCF state grant funding. One can not assume, however, that past federal funding necessarily ensures acquired LWCF resources will remain inviolate in perpetuity. On the contrary, ongoing community awareness and activism by park and recreation advocates is essential to prevent the piecemeal erosion of LWCF program gains over time.

According to the National Park Service (NPS) website, LWCF has appropriated over \$3.6 billion for more than over 40,000 projects to support acquisition of open space for park lands or the development of outdoor recreation facilities in every U.S county, and almost all localities. LWCF grants have been matched 50/50 by State and local contributions, for a total LWCF grant investment of \$7.2 billion. States have received about 8,300 grants and counties some 5,300 while cities, towns and other local agencies matched more 26,000.

Of the total number of LWCF projects, about 10,500 have helped states and localities to acquire some 2.6 million acres of park land. Almost 29,000 projects have been for the development of outdoor recreation facilities. Seventy-five percent of the total funds obligated have gone to locally sponsored projects to provide close-to-home recreation opportunities. In addition to thousands of smaller recreation areas, grants have helped to acquire and develop new parks of statewide or national significance.

With or without future appropriations in the federal budget, the LWCF legacy is under siege. Public recreation resource values and opportunities already acquired through LWCF grants are constantly threatened and may be lost through unauthorized conversions. Once acquired or developed with LWCF assistance, sometimes years later, public park and recreation areas are often subject to increasing political pressure to convert these lands to other uses, in particular public and private economic development projects. Local community organizations and citizen groups must, therefore, be vigilant and knowledgeable in the LWCF law, regulations and process to ensure the State and NPS fulfill their contractual and legal obligation to protect LWCF project public outdoor recreation values in perpetuity. A list of LWCF projects by State and county is available at <http://waso-lwcf.ncrc.nps.gov/public/index.cfm>

When public outdoor recreation resources have been acquired or developed with an LWCF grant, the LWCF provides some procedural safeguards against the threat of conversion to another use. In so doing, when land has been acquired or developed with LWCF assistance, the LWCF may provide some leverage to park and recreation advocates to challenge plans by their own local government to convert local park resources to something inconsistent with the values and terms of the original LWCF grant.

Section 6(f)(3) is a core compliance provision of the LWCF. Section 6(f)(3) “ensures that once a

property is assisted by an LWCF grant, it shall be preserved in perpetuity for public outdoor recreational use — or replaced by a substitute property of equal value, usefulness, and location”:

No property acquired or developed with assistance under this section shall, without the approval of the Secretary [of the Interior], be converted to other than public outdoor recreation uses.

The Secretary [of the Interior, through the National Park Service] shall approve such conversion ... only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location. 16 U.S.C. § 4601-8(f)(3).

Once infused with a LWCF grant, the benefited property is then governed by LWCF post-grant processes found in Title 36 of the Code of Federal Regulations, Part 59. Section 59.3 emphasizes the centrality of LWCF § 6(f)(3). Section 59.3(c), more critically, details the procedural steps of conversion if a State wishes to designate a property for something other than public outdoor recreation, notwithstanding the LWCF investment.

In such a contingency, the State must evaluate "all practical alternatives to the proposed conversion," determine the fair market values of the property to be converted and the replacement property, and satisfy the criteria for replacement properties.

Finally, § 59.3(d) reiterates that, even with regard to proposed changes from one LWCF-eligible use to another, changes to other than public outdoor recreation use within the context of the original LWCF grant agreement require National Park Service (NPS) approval and the substitution of replacement land in accordance with Section 6(f)(3).

KEEP THE PROMISE

In the case of *Brooklyn Heights Association v. National Park Service*, 11-CV-226 (ENV)(VVP), 2011 U.S. Dist. LEXIS 74642 (E.D. N.Y. 7/11/2011), plaintiffs Brooklyn Heights Association, Inc., the Fulton Ferry Landing Association, the New York Landmarks Conservancy and the Preservation League of New York State (hereinafter referred to collectively as “BHA”) alleged the National Park Service had violated Section 6(f)(3) of the LWCF in “revising” the original LWCF project map more than five years after a LWCF State grant had been awarded to develop a state park. This revision effectively removed historic structures, including the Tobacco Warehouse and Empire Stores, from the procedural requirements and safeguards under Section 6(f)(3) of the LWCF.

Located along the East River waterfront between the Brooklyn and Manhattan Bridges Empire, Fulton Ferry State Park (EFFSP) was established in 1978 and completed in 1987 by the New York State Office of Parks, Recreation, and Historic Preservation OPRHP. In 2001, OPRHP had successfully applied for LWCF assistance to benefit EFFSP. The stated purpose of the project was to make improvements to the "Cove Area" along the waterfront, stabilizing the shoreline, preventing erosion, and constructing a new path along the river. As of the 2001 LWCF mapping,

if not earlier, EFFSP included the Tobacco Warehouse and Empire Stores, both built in the 1860s.

As required by Section 6(f)(3), the original LWCF project included a contractual agreement that the property described in the boundary map would be “maintained in public outdoor recreation in perpetuity” and “not be converted to other than public outdoor recreation use” without the approval of the Secretary of the Interior. In addition, OPRHP acknowledged that the State or local sponsor had “been told (verbally or in writing) what a 6(f)(3) boundary is and the implications of conversion in use.” Further, OPRHP acknowledged agreement on the established designation of the “exact 6(f)(3) boundary” which included the Tobacco Warehouse and Empire Stores.

By 2002, the Tobacco Warehouse and Empire Stores were being used for public outdoor recreation use. Specifically, OPRHP had stabilized the walls of the Tobacco Warehouse, removed the remainder of its roof, and opened it for at least some public uses. OPRHP began allowing third-party groups to hold special events or public programming at the Tobacco Warehouse, and it is undisputed that “[w]hen the Warehouse was not programmed for a special event or use, it was often open to the public to enter and walk through.” In addition, OPRHP began using Empire Stores to house its administrative offices for EFFSP as well as the public restrooms for the park.

In 2003, NPS acknowledged receipt of the final closeout documentation for the LWCF grant in the final amount of \$274,525. In so doing, NPS noted that a review of the “closeout material has found the project to be in compliance with LWCF program requirements.”

PROJECT MAP REVISION

In 2008, OPRHP requested NPS to “revise the 6(f) boundary map” for EFFSP. In so doing, OPRHP acknowledged, “historically, when funding has been provided in a park, the entire park is mapped pursuant to section 6(f).” However, in this particular instance, OPRHP wanted NPS to revise the 6(f) boundary map for EFFSP because of “difficulties” associated with portions of the park that included “buildings that do not have an outdoor recreational component.” Specifically, OPRHP found four existing former warehouse buildings on the southern side of the park were “not suitable for nor used by the public for outdoor recreational opportunities in the park.” As a result, OPRHP maintained that a “revised” 6(f)(3) boundary map for EFFSP, excluding the Tobacco Warehouse and Empire Stores from the LWCF-protected boundary,” would “not adversely impact the utility and viability of the remaining parkland.”

In response, NPS noted “LWCF regulations do not normally allow for the re-alignment of the 6(f) boundary after a project has been Administratively and Financially Closed.” Accordingly, since the EFFSP grant was an “Administratively and Financially closed LWCF project,” NPS stated “6(f) maps are final, with no changes occurring, unless there is a conversion or significant error.”

In this particular instance, however, NPS found “the pre-existing warehouses should have been excluded” because “the LWCF Program does not provide assistance for existing or proposed

indoor recreational facilities and these former warehouses are not suitable for recreational use by the public.” As a result, NPS granted OPRHP’s request to revise “the legal 6(f) boundary map for this project” because “both NPS and OPRHP inadvertently overlooked the existence of four warehouse buildings located within the project boundary.”

In 2010, OPRHP conveyed title in EFFSP to the Brooklyn Bridge Park Development Corporation (BBPC), a subsidiary of the New York state-owned Empire State Development Corporation ("ESDC"). ESDC had been created to develop a larger Brooklyn Bridge Park (BBP). BBP would cover over 85 acres of the Brooklyn waterfront, including piers and appurtenant upland extending from the Manhattan Bridge to Brooklyn Heights. The plans for BBP all proposed the incorporation of EFFSP into BBP. In particular, the transfer agreement conveyed the Tobacco Warehouse and Empire Stores based on the revised § 6(f)(3) boundary map approved by NPS and included a 99-year ground lease to BBPC.

COMMUNITY ACTIVISM

In 2010, plaintiff BHA requested NPS to reverse its determination to exclude the warehouse properties in a revised boundary map. In 2011, in response to BHA’s request, NPS reviewed its "decision to approve a technical correction to the Section 6(f) boundary" for EFFSP. NPS recognized that “over time, regional staff have approved limited, technical corrections to the 6(f) boundary where they determined there was, in fact a significant mistake in how the boundary was mapped.” According to NPS, "typical reasons for excluding a portion of a public park or recreation area from 6(f) protection include private or commercial development, or pre-existing buildings or structures, with plans for uses not allowable in Section 6(f) areas."

In this particular instance, NPS found it was “clear that at the time of NPS approval of the State's application for Federal assistance (November 30, 2001), the Tobacco Warehouse was not suitable for public outdoor recreation use, and no plans were included in the LWCF application regarding the future disposition of the structures or their intended public outdoor recreation use."

As a result, in a “final administrative determination of the Department of the Interior in this regard,” NPS concluded that “the inclusion of the Empire Stores and the Tobacco Warehouse within Section 6(f) boundary was a correctable mistake," because "the State never intended prior to the grant completion to commit to use the Tobacco Warehouse solely for public outdoor recreation.” BHA challenged this decision in federal district court.

APA REVIEW

The issue before the federal district court was whether any alteration or construction in connection with the Tobacco Warehouse and Empire Stores triggered Section 6(f)(3) of the LWCFA. See: *Brooklyn Heights Association Inc. v. National Park Service*, No. 11-CV-226, 2011 U.S. Dist. LEXIS 38658, 2011 WL 1356758 (E.D.N.Y. Apr. 8, 2011).

Pursuant to the Administrative Procedure Act (APA), in pertinent part, a reviewing federal court shall "hold unlawful and set aside agency action found to be not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706. The APA standard of

judicial review is generally deferential to agency determinations, particularly in areas of agency expertise. In so doing, however, the reviewing court must be certain that an agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.

Further, in this particular instance, the court would determine whether the agency's action was based on a permissible construction of the LWCF statute. In addition, the court would determine whether the NPS adhered to its own regulations. In so doing, the court acknowledged "an agency's interpretation of its own regulations is entitled to substantial deference, unless it is plainly erroneous or inconsistent with the regulation."

PROCEDURE IGNORED

According to the federal district court, there was no dispute that "NPS did not follow the conversion process laid out in section 6(f)(3)" of the LWCF in 2008 and 2011 when deciding "the revision of the 6(f)(3) boundary map was the correction of a mistake, as OPRHP never intended to include the Tobacco Warehouse and Empire Stores on the map when it applied for and subsequently closed out the LWCF grant."

The federal district court rejected the claim of "OPRHP's mistake in its original boundary designation." Based on "the actual administrative record of the LWCF grant," the court found "[t]he § 6(f)(3) boundary map submitted by OPHRP and accepted by NPS contains not the slightest hint of mistake." Further, the court found "no suggestion of a cartographical error or any kind of inadvertent ministerial or clerical oversight." On the contrary, the court noted the "purposeful inclusion and acceptance of the structures within the 6(f)(3) boundary" to include "the Tobacco Warehouse and Empire Stores on the original 6(f)(3) boundary map."

Every indication, in other words, suggests that OPRHP, on behalf of New York State, intentionally included the entirety of EFFSP, as it then stood, on the map, as indeed the NPS Manual strongly advises is the normal practice. "Except in unusual cases where it can be shown a lesser unit is clearly a self-sustaining outdoor recreation resource, the area subject to Section 6(f) protection will be the park, open space, or recreation area being developed or expanded."

Moreover, the court found it was "clear that the site was operated holistically and exclusively as a park and recreation area by OPRHP both before and after the grant period," including the Tobacco Warehouse and the Empire Stores:

[I]t is uncontested that in 2002 while the grant was still open, OPRHP stabilized the Tobacco Warehouse and opened it to the public for both programmed events as well as unstructured activities. OPRHP's actions were not accidental — they were clearly for the purpose of allowing public recreation in the outdoor space of the Tobacco Warehouse, whether that recreation took the form of a dance class, strolling, or children building Frosty the Snowman.

As for Empire Stores, it is clear from the record that OPRHP began using it for

both administrative office space as well as public restrooms for EFFSP around the same time.

CORRECTION IS CONVERSION

NPS had argued that removing the Tobacco Warehouse and Empire Stores from within the 6(f)(3) boundary was “a correction rather than a conversion” because these structures were “not suitable or intended for “public outdoor recreation uses” at the time of the grant” and “should not have been included in the boundary.” In the opinion of the federal district court, it appeared “unlikely that NPS's interpretation of that language is based on a permissible construction of the statute.” According to the court, “public outdoor recreation uses” within the context of section 6(f)(3) are to be interpreted “broadly, to encompass uses not involving the public's actual physical presence on the property.”

Here, the Tobacco Warehouse and Empire Stores serve an analogous function, albeit in the context of New York City, by adding to the scenic character of the park and serving as a buffer between the waterfront parkland and the commercially developed DUMBO [i.e., Down Under the Manhattan Bridge Overpass] neighborhood (to say nothing of the actual public outdoor recreation use inside the Tobacco Warehouse and the public restroom and park administration offices located at Empire Stores). Indeed, BBPC itself markets the appeal of Empire Stores and the “iconic” Tobacco Warehouse as “Points of Interest” to draw visitors to the park.

In the opinion of the federal district court, it was particularly “troubling” that “NPS accepted OPRHP's bare assertion of unsuitability and regurgitated it in a revisionist finding of its own: ‘since these former warehouses are not suitable for recreational use by the public, the pre-existing warehouses should have been excluded’.” According to the court, NPS had based its decision “on an invisible record, and, in a sweeping action, entirely failed to consider an important aspect of the problem,” viz., “the vital importance of the § 6(f)(3) protection of LWCF-assisted property.” As a result, the federal district court found NPS had acted “contrary to the statutory provisions of the LWCF and the regulations that govern its application.”

SUPPORT FACILITIES

As cited by the court, “NPS regulations make it clear that a 6(f)(3) boundary may protect properties — including not only the Tobacco Warehouse but also Empire Stores, with its OPRHP office space and public restrooms — that ‘support’ or ‘assure the protection of’ public outdoor recreation property without actually being used for public outdoor recreation themselves.”

These post-completion responsibilities apply to each area or facility for which Land and Water Conservation Fund (LWCF) assistance is obtained, *regardless of the extent of participation of the program in the assisted area or facility* (emphasis of court). See 36 C.F.R. § 59.1

Moreover, § 59.1 plainly indicates that some property may be included within the 6(f)(3) boundary despite not receiving LWCF assistance. In many instances, this mutually agreed to area exceeds that actually receiving LWCF assistance so as to assure the protection of a viable recreation entity.

The Manual also allows LWCF assistance for certain "eligible support facilities," including support facilities needed by the public for outdoor recreation use of an area, such as restroom buildings, as well as facilities that support the operation and maintenance of the recreation resource on which they are located are eligible, such as maintenance buildings and administrative offices. Manual at 3-13.

As a result, the federal district court concluded that the NPS decision was "contrary to its own regulations, which demonstrably support the position that the Tobacco Warehouse and Empire Stores were properly placed on the 6(f)(3) boundary map." Accordingly, the court found "any change to that map removing them constitutes a conversion requiring New York to consider alternatives and to provide substitute parkland" consistent with the legal requirements of Section 6(f) (3).

NO CHANGES

Further, the federal district court noted, "the LWCF regulations contain no allowance for a 'revision' or 'correction' to a 6(f)(3) boundary other than through the conversion process." On the contrary, the court found the expressed language in the LWCF Manual provided: "No changes may be made to the 6(f) boundary after final reimbursement unless the project is amended as a result of an NPS approved conversion."

Any change to the 6(f)(3) boundary after the close of an LWCF grant — regardless whether that change is referred to as a "revision" or "correction" — triggers the conversion process and requires the full consideration of alternatives and, if needed, the substitution of a replacement property. See 36 C.F.R. § 59.3(a)

This section of the Act assures that once an area has been funded with LWCF assistance, it is continually maintained in public recreation use unless NPS approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value." 36 C.F.R. § 59.3(d)

Further, the court noted that the Manual specified "what area must be covered in a § 6(f) boundary map":

At a minimum, the Section 6(f) boundary must encompass a viable public outdoor recreation area that is capable of being self-sustaining without reliance upon adjoining or additional areas not identified in the scope of the project.

Except in unusual cases where it can be shown a lesser unit is clearly a self-sustaining outdoor recreation resource, the area subject to Section 6(f) protection

will be the park, open space, or recreation area being developed or expanded.

The federal district court, therefore, held “any map change after the close of a grant requires adherence to the ordinary conversion process mandated by statute and regulation.”

Any circumvention of the statutory regime, for the sake of expedience or otherwise, will deprive the public of what Congress intended it to have: replacement property of equal value to *any* property removed from a 6(f)(3) boundary map after the close of a grant.

Accordingly, as applied to the facts of this particular case, the federal district court concluded that “NPS's interpretation of LWCF, allowing it to excise properties from a final 6(f) map after the close of a grant if they are later deemed ‘unsuitable’ or ‘not intended for’ public outdoor recreation use, is flatly impermissible and directly contrary to established law.”

CONCLUSION

Having found NPS violated the LWCF, the federal district court granted BHA’s motion for summary judgment. As a result, the court “vacated and declared void” the NPS decision to revise a final 6(f) map for a closed grant. The federal district court, therefore, remanded (i.e., sent back) this matter to the NPS for further administrative proceedings.

In so doing, however, the federal district court noted that NPS could legally delete the Tobacco Warehouse and Empire Stores from the original 6(f)(3) boundary map by complying with Section 6(f) conversion procedures.

Contrary to defendants' arguments — and perhaps contrary to plaintiffs' hopes — the outcome here does not forever forbid excision of the structures from the 6(f) map at some future date as a matter of federal law.

It simply requires that the federal government keep its promise, as embodied in LWCF, that parkland developed or improved with federal taxpayers' money will remain available for public use, or at the very least, will be replaced with substitute parkland of equal or greater value. That promise must be kept.

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