

ECONOMIC DEVELOPMENT ONGOING THREAT TO LWCF LEGACY

James C. Kozlowski, J.D., Ph.D.

© 2016 James C. Kozlowski

The legacy of the Land and Water Conservation Fund (LWCF) program is constantly under threat by political and economic pressure at the state and local level to divert public park and recreation resources to inappropriate non-recreational uses. Specifically, absent public awareness and opposition, it may go unnoticed that land acquired and developed for public recreation with LWCF funds is being converted to purposes inconsistent with the terms of the original LWCF grant issued years or even decades earlier. Moreover, lax enforcement on the part of the National Park Service (NPS) and/or NPS apparent willingness to accommodate state/local government conversion requests will continue to erode the legacy of public recreation resources acquired and/or developed with LWCF grants.

The LWCF Act provides for compliance and enforcement to protect LWCF projects in perpetuity. The effectiveness of this legal protection, however, necessarily assumes that advocates for public parks and recreation not only understand, but ensure state/local government adheres to LWCF compliance requirements and NPS fulfills its enforcement responsibilities under the LWCF Act. NPS, itself provides the following advice:

If you have concerns about threats to a park area that you think might have received a LWCF grant, contact one of the National Park Service field offices or your State Agency, as listed in the "Contact List."

[https://www.nps.gov/nrcr/programs/lwcf/contact\\_list.html](https://www.nps.gov/nrcr/programs/lwcf/contact_list.html)

Administrators have databases of grant-assisted sites that will help them to determine whether Fund protections apply; also some States have their own grant programs that afford similar protection.

<https://www.nps.gov/nrcr/programs/lwcf/protect.html#LegalProtection>

In addition, perhaps more importantly, NPS provides an on-line database to identify state and local LWCF assisted projects listed by county: <http://waso-lwcf.nrcr.nps.gov/public/index.cfm>

### LWCF STATE SIDE GRANTS

Since its inception in 1965, the National Recreation and Park Association (NRPA) has been a major proponent and advocate for the continued authorization and appropriations for federal grants to States under the Land and Water Conservation Fund Act of 1964. This legislation created the Land and Water Conservation Fund (LWCF) to "create and maintain a nationwide legacy of high quality recreation areas and facilities and to stimulate non-federal investments in the protection and maintenance of recreation resources across the United States."

In 1964, the LWCF Act was initially authorized for a 25-year period, the LWCF was extended for another 25 years and expired September 30, 2015. The fund was temporarily extended for 3 years in the Consolidated Appropriations Act, 2016, and will expire September 30, 2018.

The LWCF program is divided into grants to State and local governments as well as the Federal portion of the LWCF that is used to acquire lands, waters, and interests necessary to achieve the natural, cultural, wildlife, and recreation management objectives of the NPS and other federal land management agencies. <https://www.nps.gov/subjects/lwcf/index.htm>

The State Side of the LWCF provides matching grants to States and local governments for the acquisition and development of public outdoor recreation areas and facilities. Over its first 49 years (1965 - 2014), LWCF provided more than \$16.7 billion to acquire new Federal recreation lands as grants to State and local governments. The fund has provided \$4.1 billion (matched for a total of \$8.2 billion) for 40,400 grants to state and local governments over 40 years.

Grants have supported purchase and protection of 3 million acres of recreation lands and over 29,000 projects to develop basic recreation facilities in every State and territory of the nation. Seventy-five percent of the total funds obligated have gone to locally sponsored projects to provide close-to-home recreation opportunities that are readily accessible to America's youth, adults, senior citizens and the physically or mentally challenged. <https://www.nps.gov/subjects/lwcf/stateside.htm>

#### LWCF GRANT COMPLIANCE

The Secretary of the Interior, through the National Park Service (NPS), is charged with monitoring compliance with the terms of LWCF grants. The State is responsible for compliance and enforcement of the contractual agreement between NPS and the State that secured LWCF assistance for acquisition and/or development of State and locally sponsored projects. State compliance and enforcement responsibilities extend to the area described in project documentation approved by NPS, in particular the project boundary map.

Section 6(f)(3) of the LWCF Act provides the following provision to protect Federal investments and the quality of assisted resources:

No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and 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.

Conversion approval under Section 6(f)(3) allows some reasonable flexibility to accommodate "changes in land use or development [which] may make some assisted areas obsolete over time, particularly in rapidly changing urban areas." That being said, the flexibility in the required Section 6(f)(3) approval process discourages casual "discards" of park and recreation facilities by ensuring that changes or "conversions from recreation use" will bear a cost - a cost that assures taxpayers that investments in the "national recreation estate" will not be squandered.

The "anti-conversion" requirement in Section 6(f)(3) applies to all parks and other sites that have been the subject of Land and Water grants of any type, whether for acquisition of parkland, development or rehabilitation of facilities. Even a relatively small LWCF grant (e.g., for development of a picnic shelter) in a park of hundreds or even thousands of acres provides anti-conversion protection to the entire park site.

To ensure the continued effectiveness of Section 6(f)(3) protection, NPS has developed several management tools to monitor and correct changes in assisted sites from year to year. Specifically, NPS requires on-site inspections of all grant-assisted areas and facilities at least once in every five years most of which are conducted by cooperating state agencies.

In addition, with each application, the grantee submits a dated "6(f)(3) project boundary map" showing the park area to be covered by Section 6(f)(3) anti-conversion protections. This map need not be a formal survey document, but it contains enough site-specific information to serve several purposes: (1) it ensures that both the grantee and the administering agency agree on the proper boundaries of the covered site at the time of project approval; (2) it provides location, size indicators and a picture of key facilities and landmarks to help later project inspectors better identify and evaluate the site. <https://www.nps.gov/subjects/lwcf/protection.htm>

#### PROJECT BOUNDARY MAP DISPUTE

In the case of *Boston Redevelopment Authority v. National Park Service*, 125 F. Supp. 3d 325; 2015 U.S. Dist. LEXIS 113260 (Dist. Mass. 8/26/15), the federal district court considered whether conversion of an open-air structure into a proposed restaurant on Long Wharf Boston Harbor was within the "6(f)(3) project boundary map" of the original LWCF funded development project in 1981. If so, the proposed conversion would be subject to Section 6(3) compliance requirements and require approval of the Secretary of the Interior, including "substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location."

Plaintiff Boston Redevelopment Authority (BRA) is the owner of Long Wharf Pavilion built an open-air structure built in 1988 on Long Wharf in Boston Harbor. In 1980, BRA applied for LWCF funding for the "first phase reconstruction of Long Wharf and the construction of a portion of Long Wharf Park" to include:

- (1) repairing and rebuilding Long Wharf's granite seawall;
- (2) repairing and rebuilding the wood piling and decking around the perimeter of Long Wharf; and
- (3) construction of new pavement and platforms, with a park and public open space on the seaward end of the wharf.

NPS documents included a "project area map" with a notation: "6f boundary map 3/27/80." The Massachusetts Division of Conservation Services (DCS) approved BRA's application and forwarded the state approved application for final federal approval to the Heritage Conservation and Recreation Services (HCRS) in the Department of the Interior for final approval. (HCRS and its LWCF responsibilities were later absorbed into NPS.) NPS approved the LWCF grant to BRA in May 1981. At the time, a public open-air structure on the seaward tip of Long Wharf

was also part of BRA's redevelopment efforts.

In 1983, mindful of a potential violation in the 6(f) restricted area, BRA sought NPS permission to grant easements to the Massachusetts Bay Transportation Authority (MBTA) for subway tunnel construction, specifically an emergency stairwell and ventilation shaft underneath the Long Wharf project. NPS found "the project would not constitute a conversion of any 6(f) restricted area and approved the construction of the structure." In so doing, NPS found "the easements will not have a significant impact upon the recreational utility of the wharf." On the contrary, NPS found "recreation opportunity will be increased by the addition of the pavilion which will provide shade and protection from the weather on the otherwise open facility."

In 1988, MBTA completed construction of the structure known today as Long Wharf Pavilion. In 2006, BRA began exploring the possibility of converting Long Wharf Pavilion into a restaurant. BRA issued a Request for Proposal to developers and obtained a construction license from the Massachusetts Department of Environmental Protection.

Concerned Boston residents contacted NPS headquarters, asking about potential LWCF restrictions on the pavilion. NPS forwarded these questions to DCS, where a state employee found in its records a 1983 map of Long Wharf with "Long Wharf 6-F" in red handwriting. Based on this map, DCS e-mailed NPS in February 2009 and stated that Long Wharf Pavilion was not located in the 6(f) restricted area.

An NPS employee in Philadelphia replied via e-mail that he concurred with DCS's findings. As a result, DCS informed BRA and the Massachusetts Department of Environmental Protection that it could move forward with converting Long Wharf Pavilion into a restaurant, assuming certain minor accommodations.

In 2012, NPS changed its position after being contacted by two retired NPS employees. The employees had read an article about citizens appealing the Department of Environmental Protection's decision to issue BRA its construction license. They then contacted NPS, recalling that the Long Wharf Pavilion was inside the 6(f) restricted area established by the 1981 LWCF grant.

In response, NPS asked DCS to send over the 1983 map from its file. NPS also dug into its own records and uncovered the 1980 map. It saw the notation on the map: "6f boundary map 3/27/80." Based on these documents, NPS changed its mind in December 2012 and found that Long Wharf Pavilion was part of the 6(f) restricted area.

BRA met with NPS at Boston City Hall in April 2014 to convince NPS that it should rely on the 1983 map instead of the 1980 map. BRA was unsuccessful. NPS issued its final decision in June 2014, reiterating that "the map dated March 27, 1980 is the original Section 6(f)(3) map." BRA then challenged the NPS decision in federal district court under the LWCF Act and the Administrative Procedure Act (APA).

## APA JUDICIAL REVIEW

As cited by the federal district court, under the APA, courts may set aside agency actions, findings, and conclusions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

Further, as noted by the federal district court, an agency decision fails this APA standard of judicial review "if the agency relies on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise." Moreover, the court acknowledged that the APA "affords great deference to agency decisionmaking" and "the Secretary's action is presumed valid."

In this particular instance, the question before the federal district court was, therefore, whether "the 1980 boundary map was improperly included in NPS's records, and whether the 1983 map was the true 6(f) map of record." Applying the deferential standard of APA review, the federal district court concluded "BRA's challenges to NPS's decision falls short."

### 1980 BOUNDARY MAP

As noted by the federal district court, BRA had "denied that it ever submitted the 1980 map as part of its LWCF grant application or intended the map to outline the 6(f) boundary." Instead, BRA claimed "NPS mistakenly decided to treat the 1980 map as the 6(f) boundary map without a meeting of the minds." The federal district court rejected this argument.

In the opinion of the federal district court, there was "no evidence that NPS engaged in improper behavior by fabricating or mislabeling the 1980 map or otherwise relied on it in bad faith or by mistake." To the contrary, the court noted "BRA had several maps of Long Wharf in its records that looked quite similar to the 1980 map." Moreover, a former NPS employee stated he had written "6f boundary map 3/27/80" when reviewing BRA's LWCF grant application. In the opinion of the federal district court, "[t]hese facts establish that the 1980 map was created by BRA and received by NPS as part of the Long Wharf LWCF grant application."

Further, the federal district court found the 1980 map, labeled "Project Area Map," was "consistent with the LWCF Grant Manual in effect at the time" which provided as follows:

The area to be included under the conversion provisions of Section 6(f)(3) of the Fund Act ...shall be clearly delineated on a dated project boundary map to be included with each application or element in a consolidated project.

In the opinion of the court, it was "highly unlikely that NPS employees would have approved of BRA's grant application and checked off the boxes for 'Boundary Map' and 'Adequacy of 6(f) area' without a 6(f) boundary map like the 1980 map in the application." Further, the court found "[t]he project narrative that BRA submitted with its grant application confirms that the 1980 map was BRA's proposal for the 6(f) boundary." Specifically, the court noted BRA's narrative states that the "project area as shown on 'Project Area Map', includes Long Wharf, the public area around the Waterfront Hotel, and the small stretch of waterfront between Long and Central Wharves."

In addition, BRA's narrative stated the LWCF funds would also be used to rebuild wooden decks "along the northern, eastern and a section of the southern edge as shown on the attached plan."

The federal district court found these references to the "Project Area Map" and "wharf decks on the attached plan perfectly match up with the 1980 map but not with any other pictures or maps from BRA's application." In particular, the federal district court noted that the BRA's narrative stated that "the project would use LWCF funds to build a park at the eastern end of the wharf as shown on the attached plan."

Based upon these documents the court found no indication that "the area of the wharf occupied by Long Wharf Pavilion would be excluded from the 6(f) boundary." On the contrary, the court found "BRA proposed to use LWCF funds to redevelop Long Wharf generally, including the construction of a park on the eastern end of the dock." Further, the court noted DCS resubmitted the 1980 when it sought NPS's approval in 1983 for MBTA to build Long Wharf Pavilion.

Applying the deferential judicial standard of APA review, the federal district court therefore found BRA had "not shown that it was arbitrary or capricious for NPS to rely on these factors to conclude that the 1980 map contained the official 6(f) boundaries." In so doing, under the APA, the federal district court acknowledged that courts may not set aside an agency's determination so long as the agency's determination is "within the bounds of reasonable decisionmaking," regardless of whether the court may have reached an opposite decision.

Accordingly, in the opinion of the federal district court, "NPS reasonably concluded that the 1980 boundary map was part of BRA's application and therefore incorporated into the contract."

## COMMERCIAL STRUCTURES

BRA had also argued that it would have been "nonsensical to earmark the entirety of Long Wharf for public outdoor recreation-as the 1980 map indicates" because "certain parts of Long Wharf were historically used for commercial purposes," including "a docking facility for charter fishing boats, vessels belonging to various municipal and regional policing agencies, and excursion boats to Boston Harbor." As a result, BRA claimed "it would have lacked the authority to agree to 6(f) restrictions on the commercial portions of Long Wharf." BRA, therefore, contended the land now occupied by Long Wharf Pavilion was thought to be ineligible for LWCF funding in 1980. Moreover, BRA cited a January 1981 letter which indicated "BRA was planning to build a ferry terminal at Long Wharf that would not be a part of the LWCF project."

The federal district court rejected this argument. In so doing, the court cited precedent case law which had held "commercial structures can aid public outdoor recreation by "adding to the scenic character of the park." (See: "Park Conversion Protection In LWCf Project Map" <http://cehdclass.gmu.edu/jkozlows/lawarts/11NOV11.pdf> )

Specifically, the court found "BRA's application stated that building and remodeling boat terminals on Long Wharf would provide the public with continuing access and exposure to the

harbor and the Boston Harbor Islands Park System." As a result, the federal district court found "these terminals served an important public outdoor recreation use, even if they also had commercial utility." Moreover, the court noted "[t]he LWCF Grant Manual in effect in 1981" allowed "LWCF assistance for boating facilities and marinas," including "commercial charter fishing or sightseeing boats are permissible marina leaseholders due to their potential for expanding public waterfront access."

#### NPS RECONSIDERED MISTAKE

BRA had argued further that "NPS acted arbitrary and capriciously when it changed its mind, allowing the restaurant project to proceed before rejecting it." As characterized by the federal district court, BRA had effectively claimed "NPS cannot reconsider its decisions even after discovering a mistake." The federal district court rejected this argument.

Consistent with "well-established" APA legal precedent, the federal district court acknowledged: "an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review." Moreover, the court found "APA's finality requirement gives the agency an opportunity to apply its expertise and correct its mistakes." More importantly, the federal district court noted: "courts have found agencies to be arbitrary and capricious when they chose not to reconsider their position after being alerted to a potential mistake."

That being said, in reaching this determination, the federal district court noted that "there could be a problem if NPS unilaterally changed the 6(f) restricted area without proper notice and procedure." However, under the circumstances of this particular case, the court found NPS had "notified the BRA and had a meeting for interested stakeholders to present information... in light of newly discovered evidence from former NPS employees who had familiarity with the 6(f) boundaries established in BRA's 1981 grant application." After learning of this newly discovered evidence, the court found NPS had "merely realized that its earlier position was mistaken."

BRA also argued that "NPS should not be allowed to reverse course after telling the Massachusetts Department of Environmental Protection in 2009 that the Long Wharf Pavilion was not part of a 6(f) restricted area." While recognizing "NPS could have-and should have-looked more carefully through its own records at the outset rather than simply rely on the state agency's say-so," the federal district court found "NPS changed its position in good faith after realizing a mistake."

NPS was not harboring any bad faith when it changed positions regarding Long Wharf. When NPS was first asked to decide whether BRA could convert the Long Wharf Pavilion into a restaurant, nobody at NPS was aware of information concerning the specific boundaries of the restricted area established decades earlier. As a result, NPS understandably deferred to DCS's opinion, which was in part based on a map in its records from 1983. After two retired NPS employees alerted NPS that their memory differed, however, the agency conducted further investigation and changed its position.

In the opinion of the federal district court, "NPS's earlier position disadvantaged the government by surrendering Long Wharf Pavilion's LWCF protections." As noted by the court, "NPS is responsible for enforcing LWCF restrictions that preserve outdoor recreational spaces for the benefit of the public at large." Based on the record in this particular case, the court found "NPS's change in position is primarily because of over-reliance on a state official's research and inadequate investigation of the federal file."

The federal district court was, therefore, "not inclined to punish NPS for its good faith mistake." On the contrary, the court would not "force NPS to forfeit a significant land interest held for the public based on NPS's negligence." Accordingly, the federal district court granted NPS's motion for summary judgment, effectively dismissing BRA's lawsuit. As a result, BRA's development proposal would require review and approval by the Secretary of the Interior under Section 6(f)(3) of the LWCF, with substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

#### GRANT FUNDING/LEGAL EXPENSES

The NPS on-line database of LWCF assisted projects, listed by county, provides the following information: On May 15, 1981, the City of Boston in Suffolk County, Massachusetts, received an LWCF grant for \$795,307.51 for the Long Wharf development project.

By comparison, for the period 2008 through 2015, legal expenses alone for the lawsuit described herein have totaled \$552,386, not to mention future legal expenses associated with an appeal to the United States First Circuit Court of Appeals filed in November 2015. Any economic return from the proposed restaurant project would likely take years, if not decades, to recoup these legal expenses.

<http://northendwaterfront.com/2016/02/bra-long-wharf-legal-expenses-explode-in-2015-to-total-over-half-million-dollars/>

\*\*\*\*\*

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: [jkozlows@gmu.edu](mailto:jkozlows@gmu.edu) Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>