



# United States Department of the Interior



NATIONAL PARK SERVICE  
Interior Regions 8, 9, 10, and 12  
333 Bush Street, Suite 500  
San Francisco, CA 94104-2828

IN REPLY REFER TO:

8.A.2 (PR-LWCF)

September 11, 2020

## RECONSIDERATION MEMO

CONVERSION AMENDMENT – GEORGE BERKICH PARK DEVELOPMENT/06-01346.1

REVIEW OF STATESIDE LWCF COMPLIANCE AMENDMENT

### Document Summary

Date: September 11, 2020  
Project Number: 06-01346.1  
Project Type: Partial Conversion  
Project Name: GEORGE BERKICH PARK  
Applicant: Cardiff School District  
Scope: See Below

This Memo provides background information and discussion regarding the reconsideration by the National Park Service (NPS) of the approval of the partial conversion under the Land and Water Conservation Fund (LWCF) Act (54 U.S.C. § 200305(f)(3)) of an existing park to non-recreation uses and replacement with areas not in recreation use for the above-referenced project. Based on the findings and conclusions set forth below, the NPS hereby rescinds its conversion approval. Therefore, the following documents are no longer valid: Conversion Amendment Review dated April 23, 2020, the National Environmental Policy Act Categorical Exclusion dated April 23, 2020, the Amendment to Project Agreement signed by the NPS on April 24, 2020, and the Conversion 6f Map signed by NPS on April 24, 2020.

The NPS will continue to work with our partner, the California Department of Parks and Recreation - Office of Grants and Local Services (OGALS), to resolve this outstanding

INTERIOR REGION 8 • LOWER COLORADO BASIN\*  
INTERIOR REGION 9 • COLUMBIA—PACIFIC NORTHWEST\*  
INTERIOR REGION 10 • CALIFORNIA—GREAT BASIN  
INTERIOR REGION 12 • PACIFIC ISLANDS

---

AMERICAN SAMOA, ARIZONA\*, CALIFORNIA, GUAM, HAWAII, IDAHO, MONTANA\*,  
NEVADA, NORTHERN MARIANA ISLANDS, OREGON, WASHINGTON

\*PARTIAL

conversion. As provided by the regulations at 36 C.F.R. § 59.3, there are several options for resolving this conversion. The NPS will consider a conversion request that meets the prerequisites and that is submitted by the State. Such a request could be for a partial or full conversion with eligible replacement property. The regulations at 36 C.F.R. § 59.3(c) also provide that if it is not possible to identify replacement property prior to the State's request for a conversion, a conversion may be approved if the State submits "an express commitment to satisfy [LWCF Act section 6(f)] substitution requirements within a specified period, normally not to exceed one year following conversion approval."

### **Scope of this Memorandum**

As set forth below, the NPS has concluded that at least three issues warrant reconsideration and the rescission of the NPS' prior conversion approval. The scope of this memorandum is therefore limited to a discussion of the NPS' findings and conclusions as to only these three issues. The limited scope of this memorandum should not be construed as an indication that the NPS has either accepted or rejected any other items for reconsideration.

### **Brief Background on Reconsideration Process**

In 1993, the NPS executed a grant agreement (contract) for an LWCF grant to OGALS, who in turn awarded (or sub-granted) the funds to the Cardiff School District (District) and City of Encinitas, for the renovation (or development) of outdoor recreation amenities at George Berkich Park (LWCF Grant # 06-01346). Funds obligated for a grant agreement are available for expenditure until the project is completed. At grant closeout, the park is to remain open and available for the public in perpetuity. If the property owner wants to convert the park to non-recreation uses, the only remedy provided in the Act is to meet the conditions for a conversion (54 U.S.C. § 200305(f)(3)) further detailed in the post completion compliance responsibilities regulation (36 C.F.R. § 59.3) and the LWCF State Assistance Program Federal Financial Assistance Manual, Volume 69 (2008 LWCF Manual).

On April 24, 2020, the NPS approved a partial conversion for George Berkich Park. Save the Park and Build the School (Save the Park) first requested reconsideration of NPS' prior conversion approval in a submission dated May 22, 2020 (STP 1), and Save the Park augmented its request in two subsequent submissions dated May 29, 2020 (STP 2) and June 4, 2020 (STP 3). Collectively, Save the Park's submissions asserted more than a dozen separate arguments for reconsideration.

The District responded to Save the Park's request for reconsideration by providing two submittals dated June 8, 2020 (District 1), and June 12, 2020 (District 2) arguing against reconsideration. These District submittals were provided to OGALS who then provided them to the NPS along with two OGALS submittals dated June 11, 2020 (OGALS 1), and June 17, 2020 (OGALS 2). The District provided a further submittal dated September 4, 2020 (District 3).

In addition on June 12, 2020, Save the Park initiated litigation, Save the Park and Build the School v. National Park Service, et al., Case No. 3:20-cv-01080-LAB-AHG (S.D. Cal.), against various parties including the NPS, District, and the Director of the California Department of Parks and Recreation. On July 24, 2020, the Court issued an Amended Order of Preliminary

Injunction in the litigation that among other things renewed a request for NPS prompt reconsideration.

Following receipt of the request for reconsideration, the NPS began a comprehensive review of the conversion approval decision focusing on the proposed replacement property's eligibility as replacement property under the LWCF program. The NPS also conferred directly with representatives of the California Department of Parks and Recreation to secure the state agency's input.

The following is an overview of three issues that, upon reconsideration, the NPS has concluded warrant rescission of the prior conversion approval.

### **Hard Court Area**

The key factor in the reconsideration of the eligibility of the hard court area is the commitment made by the District through a provision in the 1994 amendment to the Master Joint Use Agreement between the City of Encinitas and the District. This provision added a Section 15 to the Master Joint Use Agreement that read:

“District guarantees that the recreational facilities referred to as George Berkich Park consisting of turf playing fields, hard courts, basketball, handball and playground areas will be made available for general public recreational use after school hours and on weekends in perpetuity.”

Under the applicable regulation at 36 C.F.R. § 59.3(b)(4), land in public ownership that has been “dedicated or managed” for recreational use is not eligible as replacement property.

Both District and OGALS asserted that there was no evidence that the hard court area had been previously dedicated for public park uses. Points raised by them included that the 1991 Master Joint Use Agreement was subject to termination on six months' notice by either party, arguing that it was not a commitment in perpetuity because it could be terminated. We further understand that the District has indeed taken steps to terminate the Master Joint Use Agreement in December of 2019. See Cardiff School District, Minutes, Regular Meeting of December 12, 2019, Governing Board of Cardiff School District. The District also raised points about the California Civic Center Act (approved by the CA Governor on September 29, 2012) which the NPS did not find compelling because it addresses the use of school facilities or grounds for organized groups and supervised recreation, not fully reflecting the purpose of the LWCF Act.

Both the District and OGALS also noted the lack of specificity in the Master Joint Use Agreement. The NPS originally noted and continues to recognize the ambiguities in Master Joint Use Agreement regarding what facilities might be available for recreation. The NPS used the revised 6(f) map from the LWCF development grant agreement signed on March 5, 1993, to delineate what areas were dedicated and managed for recreation. As a result, the NPS originally considered the hard court area eligible as replacement property and requested its inclusion within the 6(f) boundary as dedicated park space.

Upon reconsideration, the NPS recognizes that the 1993 6(f) map does not delineate all areas that may have been dedicated or managed for recreation use and that the Amendment to the Master Joint Use Agreement establishes that the hard court area was dedicated or managed for recreation use. Consequently, the hard court area is not eligible as replacement property.

Although both the Master Joint Use Agreement and its Amendment do not appear to contain a map to delineate areas managed for recreation, the NPS cannot see how the reference to “hard courts, basketball, handball” (in the Amendment) does not include the hard court area at issue.

As part of the reconsideration, the NPS also determined that even land that had once been dedicated or managed for public recreation use, then taken out of public recreation use, would not qualify as eligible replacement property. Thus, even though the District took steps to terminate the Agreement in December 2019, the land had been previously “dedicated or managed” for recreational purposes. Added to the plain language of the Amendment that includes the hard court area, we are led to conclude that the hard court area is not eligible as a conversion replacement.

### **Parking Lot Area**

The key factor in the reconsideration of the eligibility of the parking lot area is that the bulk of the parking lot area is required to meet City of Encinitas minimum parking requirements. According to the City of Encinitas Municipal Code Section 30.54.030: Zoning: Schedule of Required Off-Street Parking, the parking spaces requirement for schools is “1.5 spaces for each classroom or lecture hall plus 1 for each 3 fixed seats in school auditorium, or if there are no fixed seats, then 1 for each 100 sq. ft. of auditorium floor area.” Another key factor is the regulation at 36 C.F.R. § 59.3(b)(4), that states land proposed as replacement property must “meet[] the eligibility requirements for L&WCF assisted acquisition,” as explained below.

The District and OGALS have raised points in defense of the eligibility of the parking lot as replacement property. These include that previously the parking lot could be closed off, that it was not protected by any agreement, and that parking lots are eligible for development grant funding as support facilities. The District also raised points about the California Department of Education Guide to School Site Analysis and Development (developed in 1999 and updated in 2000), which NPS did not find compelling because the guidelines allow for deviation from the standards. On reconsideration, the NPS has looked at the City of Encinitas’ parking requirements in light of the conversion replacement eligibility requirements contained in 36 C.F.R. § 59.3(b)(4), which requires that “[t]he property proposed for substitution meets the eligibility requirements for L&WCF assisted acquisition.”

This led to the examination of the eligibility of the parking lot as replacement property under the requirements for acquisition grants. The 2008 LWCF Manual, Chapter 3(B)(9)(c) provides when discussing acquisitions that will not be assisted: “Acquisition of land to help meet a public school’s minimum site size requirement as established by state or local regulations will not receive LWCF assistance.”

The NPS concludes that the addition of the parking lot area outside of the 6(f) boundary to satisfy this conversion is ineligible replacement property because this parking area replacement is necessary to meet the minimum school requirements for parking established by the City of Encinitas.

## National Historic Preservation Act Compliance

In our subsequent review of the consultation process we discovered that the Area of Potential Effects (APE) map provided to the SHPO was in error in its exclusion of the garden area in the school's northwest corner, since that area is proposed as conversion replacement property. The NPS and the State will work with the SHPO to provide that correction once the conversion footprint and proposed replacement property are clearly defined, thus articulating the undertaking for Section 106 and the full APE for this conversion. This will give the SHPO the opportunity to reconsider their initial agreement with our determination of effect and concurrence for an updated finding once provided to conclude Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108).

Signed,

**LINDA**  
**WALKER**

Digitally signed by  
LINDA WALKER  
Date: 2020.09.10  
20:16:01 -07'00'

Linda Walker  
Acting Regional Director  
Interior Regions 8, 9,10, and 12  
National Park Service