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The Honorable John R. Griffin
Secretary of Natural Resources
Department of Natural Resources
Tawes State Office Building
580 Taylor Avenue
Annapolis, MD 21401 - 2397

Dear Secretary Griffin:

On April 28, 2011, the Montgomery County Board of Education (County Board) voted to select Rock Creek Hills Local Park (RCHLP) as the site for a second Bethesda-Chevy Chase (BCC) cluster middle school. One basis for the County Board's decision appears to be its belief that it possesses an unrestricted right to reclaim the park for school use. All involved agree that the deed conveying RCHLP from the county to the Montgomery County Planning Board (Planning Board) permits the County Board to reclaim the RCHLP for educational use subject to the approval of the County Executive. However, documentation we recently obtained suggests that Land Water Conservation Fund (LWCF) and/or Program Open Space (POS) restrictions attached to the funding used for the park's development in 1992 may impede its transfer and conversion to non-park use. At the same time, recent Planning Board correspondence stated that a general DNR "practice" limiting the enforcement of statutory and administrative restrictions on conversions to a 20-year period.

We have been unable to identify a regulatory or statutory provision that supports limiting the POS restrictions on conversion to a 20-year period for either park development or purchases. This absence of information has resulted in considerable uncertainty about the status of RCHLP and about whether the County Board can lawfully convert that park to non-park use without complying with all the requirements for

conversion of park that has been developed with LWCF and/or POS funds. For this reason, we request that you clarify whether federal and/or state conversion regulations apply at this time to the RCHLP and whether the Maryland Department of Natural Resources (DNR) will enforce the conversion requirements, associated regulations, and DNR's related Open Space Manual.

Background

On February 9, 1990, Montgomery County entered into a Transfer Agreement with the Maryland-National Capital Park and Planning Commission (MNCPPC), whereby the county conveyed to MNCPPC a specific “portion of the Kensington Junior High School site, located in Kensington, Maryland...,” which is now RCHLP¹, with the understanding that, if the park is needed for a school facility, MNCPPC will transfer it to the county under certain specified conditions.² Two years later, the Board of Public Works (BPW) approved a request that funds for the development of RCHLP be committed to MNCPPC “from the Federal Land and Water Conservation Fund [LWCF] that is allocated to the County and administered through Program Open Space [POS].”³ Specifically, on February 5, 1992, the BPW approved \$171,988.65 for “the development of a local park to include: soccer fields, basket ball [sic] courts, trails, playgrounds, tennis court [sic], and a parking lot.”⁴

In response to school capacity limitations within the BCC cluster, the County Board directed the formation of a Site Selection Advisory Committee (SSAC), which originally recommended Rosemary Hills/Lyttonsville Local Park as the site for a second cluster middle school.⁵ After considerable controversy⁶, on April 28, 2011, the County Board voted to select RCHLP as the location to be studied for the construction of a new

¹ Agreement, Ex. A. <http://www.scribd.com/doc/54569548/Kensington-Junior-High-School-site-transfer-agreement> (Agreement). Noteworthy is the fact that the other portion of the Kensington Junior High School site was transferred to the Housing Opportunities Commission for the creation of an elder care facility.

² Agreement, Clause 6.

³ Program Open Space Agenda – Supplement A, Feb. 5, 1992 (hereinafter POS Agenda) Ex. B.

⁴ *Id.*

⁵ Site Selection Advisory Committee Recommendation for Bethesda-Chevy Chase Middle School # 2 dated March 8, 2011 (SSAC Report).

⁶ Including the Planning Board's identification of the use of POS funds on that site. *See* Letter of Francoise M. Carrier, Chair, Montgomery County Planning Board to Mr. Christopher S. Barclay, President Board of Education, Apr. 27, 2011, at 3 (Carrier April 27 Letter) Ex. C.

middle school. This transaction caused the Rock Creek Hills community to appeal the County Board's decision to the Maryland State Board of Education.⁷

At the time of the County Board's action selecting the RCHLP, the Parks Department articulated its general opposition to the use of parkland for school sites.⁸ On June 2, 2011, MCPB Chair, Francoise Carrier, Chair of the Montgomery County Planning Board (Planning Board) wrote to County Board President, Christopher S. Barclay, identifying the LWCF as the source of funding for development of RCHLP. She stated that Park staff contacted "both State (Department of Natural Resources) and Federal (National Park Service) representatives who administer LWCF and [POS] funding to understand any conditions that use of those funds may place on [RCHLP]."⁹ Chair Carrier did not summarize Park staff's discussions with Federal representatives, but she did share the following without opining on DNR's views.

[DNR] has advised [P]arks staff that the fund source for the grant was actually [POS], and that the conditions of the state program apply. It appears that there are some significant conversion requirements if the site is converted from a public recreation or open space area. Those conversion requirements appear to include, among other things, provision of replacement land and recreation facilities of equal or great value. However, DNR also advises that by practice conversion requirements for projects funded by POS development monies are only enforced for 20 years from the date of the grant.¹⁰

Discussion

We believe it is important to clarify the obligations attached to the funds used to develop RCHLP in order to assure compliance with the relevant federal and state statutes and to affirm conformance to the intent of the programs that are the sources of those funds. In this regard, we are unable to find any documentation identifying the source of funds for the development of RCHLP other than the BPW POS Agenda, which states that the "Fund Source" was the "Federal Land & Water Conservation Fund."¹¹

⁷ *Rock Creek Hills Citizens Association, et al. v. Montgomery County Board of Education* (Revised).

⁸ Carrier April 27 Letter at 3.

⁹ Letter of Francoise M. Carrier, Chair, Montgomery County Planning Board to Mr. Christopher S. Barclay, President Board of Education, Jun. 2, 2011 (Carrier June 2 Letter) Ex. D.

¹⁰ *Id.* at 2.

¹¹ *Id.*

As we read the Federal LWCF statute, property “acquired or developed” with assistance from the LWCF may not “be converted to other than public outdoor recreation uses” without the approval of the U.S. Secretary of the Interior. That approval must be based on the Secretary’s finding that the conversion is consistent with an existing outdoor recreation plan and “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.”¹² Likewise, the Maryland POS statute, which reportedly DNR states is the fund source for the development of the park, appears to carry a virtually identical restriction on the conversion of the park to other than public outdoor recreation uses. It states that,

[I]and acquired or developed under a State grant from Program Open Space may not be converted, without written approval of the Secretary, the Secretary of the Department of Budget and Management, and the Secretary of the Department of Planning from outdoor public recreation or open space use to any other use. Any conversion in land use may be approved only after the local governing body replaces the land with land of at least equivalent area and of equal recreation or open space value.¹³

Notwithstanding these conflicting perspectives whether LWCF or POS funds were used to develop RCHLP, after a review of the express language of both governing statutes, we find no federal or state statutory source for DNR’s reported advice “that by practice, conversion requirements for projects funded by POS development monies are only enforced for 20 years from the date of the grant.” Nor does either of those sources appear to provide a grant of discretion to DNR in this regard. Indeed, even after a review of DNR’s POS Manual,¹⁴ we are unable to find any guidance for this stated practice (not that one would subscribe to the notion that a manual could overturn a requirement set forth expressly in statute).

DNR’s Manual states that, “Land acquired or developed with POS grant assistance may not be used for any purpose other than public recreation or public open space and will be restricted to such uses by covenants in the deed to the property.”¹⁵ Regarding

¹² 16 USC 4601-8(f)(3).

¹³ Natural Resources Article Sec. 5-906(e)(7).

¹⁴ Maryland Department of Natural Resources - Program Open Space Manual (2006) (Manual).

¹⁵ *Id.* at 2.

development projects using POS funds, under “Post Completion Responsibilities,” DNR’s Manual states:

Retention and Use Property acquired or developed with assistance from the Program shall be retained and used for public outdoor recreation or open space. Any property so acquired or developed shall not be wholly or partly converted to other uses without the written approval of the Secretary of DNR, the Secretary of the Department of Budget and Management and the Secretary of the Maryland Department of Planning as defined in the chapter on Land Use Conversions.¹⁶

In addition, DNR’s Manual sets forth enforcement responsibilities and authorities:

The local jurisdiction and the County Liaison Officer (CLO) will be notified by registered mail of any violation of law or POS policy, as stated herein or in the General Conditions of the Project Agreement, that are found by DNR. The Department may take one or more of the following actions to obtain compliance with the POS law and policies for conversions:

- 1. Freeze Allocations** Freeze all current and/or future allocations of POS funds,
- 2. Freeze Encumbered Funds** Freeze encumbered funds and/or pending reimbursements,
- 3. Legal Action** Take any legal action necessary to obtain compliance or to transfer ownership of the property to DNR as provided for in the Project Agreement or deed restrictions.¹⁷

Finally, there even appears to be some confusion at the local level regarding the limitations imposed on the conversion of those parks improved with POS funds to non-park use. In its review of the possible use of the Rosemary Hills/Lyttonsville Local Park for a middle school site, the Planning Board concluded that it was an unlikely site candidate, in part, because portions of the site “were purchased with restricted funds, such as Program Open Space [funds], which limit[] the conversion of use from parkland.”¹⁸

¹⁶ *Id.* at 53.

¹⁷ *Id.* at 70.

¹⁸ Carrier April 27 Letter at 3.

From our perspective, if the use of POS funds could trigger conversion restrictions on that site, then logic dictates that the use of those funds should trigger the same restrictions on the RCHLP site. Although POS funds were not used to purchase land at the RCHLP site, as DNR reportedly confirmed, these funds were used for development of that site. In this regard, the Maryland statute states unequivocally that the restriction on conversion specifically applies to “[l]and acquired *or developed* under a State grant from Program Open Space...”¹⁹ Again, in sum, there appears to be no doubt that the federal and state POS statutory and regulatory conversion provisions literally apply to RCHLP, but we have identified no source that supports DNR’s stated practice of limiting enforcement of those provisions to a period of 20 years.

Requested Action

In light of the foregoing, you can understand why there is uncertainty regarding the future status of RCHLP and the possible limitations on its conversion to non-park use. Given the potential for the loss of a vibrant park and the impact on the availability of, and policies governing, the future use of LWCF and POS funds, we think it is imperative to understand the funding and conversion status of RCHLP with greater certainty, including a firm determination by DNR whether the conversion regulations will be applied in this case per the statutory requirements. These regulations specifically include the requirement that that local government request permission for the conversion; that the land be replaced, “with land of at least equivalent area and of *equal recreation* or open space *value*; and [that, f]or any conversion of *land ... developed ...*, the appraised monetary value of *the land proposed* for acquisition shall be equal to or greater than the appraised monetary value of *the land to be converted... .*”

Based on our concerns, we respectfully request that you clarify any restrictions that apply to the conversion of the RCHLP to non-park use with particular focus on (1) the sources of the development funds that were used for development of that park, (2) the specific documentation that DNR has regarding the use of LWCF and/or POS funds for the development of that park, (3) documentation regarding any limitations that were attached to the funds used for the development of that park, (4) the statutory basis for DNR's practice not to apply the statutory conversion provisions to parks for which development funds were used after 20 years, and (5) the statutory or regulatory provisions supporting your conclusions on the legal status of the LWCF and/or POS funds discussed here.

¹⁹ Note 15, *supra*. Emphasis added.

Given the controversy and litigation surrounding the selection of RCHLP as the site for the construction of the second middle school for the BCC, as well as the County Board's aggressive efforts to develop the park as a school site, your expeditious response would be appreciated.

Sincerely yours,

/s/

John M. Robinson

President, Rock Creek Hills
Citizens Association.

cc: The Hon. Isiah Leggett, Montgomery County Executive
The Hon. Valerie Ervin, President, Montgomery County Council
The Hon. Chris Van Hollen, Congressman