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Save the Park and Build the School

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAVE THE PARK AND BUILD THE SCHOOL,

Plaintiff,

v.

NATIONAL PARK SERVICE; DAVID L. BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; DAVID VELA, in his official capacity as Director of the National Park Service; LISA MANGAT, in her official capacity as Director of the California Department of Parks and Recreation; and CARDIFF SCHOOL DISTRICT,

Defendants.

Case No. 3:20-cv-01080-LAB-AHG

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAVE THE PARK AND BUILD THE SCHOOL'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Ctrm.: 14A
Judge: Hon. Larry Alan Burns

Complaint Filed: June 12, 2020
Trial Date: Not set

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I.

INTRODUCTION

At stake in this case is the unlawful usurpation and irreparable injury to George Berkich Park, a Land and Water Conservation Fund protected park which has provided the Encinitas community a place to recreate and enjoy the outdoors since 1978. Also at stake, and of at least commensurate import, is the public interest in assuring our government agencies that serve our citizenry abide by the law. As readily revealed by the record, this case is not premised on mere trivial missteps made by an agency in carrying out its obligations under federal law. Instead, the events described herein reveal multiple and egregious derogations of duty and failures to follow the law which no doubt undermine public trust and confidence in our government's agencies. Plaintiff filed this lawsuit to save George Berkich Park from being unlawfully converted from public outdoor recreation space into biofiltration basins, a concrete parking lot and a multipurpose building - none of which serve a recreational purpose and all of which will be constructed in violation of the Land and Water Conservation Fund Act ("LWCFA").

As will be discussed herein, since the Park is LWCFA protected, it cannot be converted for a non-recreational use without the approval of the Secretary of the United States Department of the Interior or the Director of the National Park Service ("NPS"), and must satisfy strict conversion prerequisites set out in 36 C.F.R. § 59.3.

In this case, the State Liaison to NPS, the Office of Grants and Local Services, California Department of Parks and Recreation ("OGALS"), approved the Cardiff School District's (the "District") conversion in exchange for the District's covenant not to sue OGALS. Subsequently, and despite overwhelming evidence that the District had not satisfied the 36 C.F.R. § 59.3 conversion prerequisites, NPS rubberstamped OGALS' approval, dispensing with required independent review.

Prior to NPS's conversion approval, and in blatant violation of a written agreement entered into between Plaintiff and the District, the District razed the Park's baseball backstop and its walking track used by the Encinitas's elderly population.

Upon learning of this challenge, the District then proceeded to take its construction plans unnecessarily out of order – fast tracking the improvements in the Park. Before filing this motion, Plaintiff asked the District to stop construction until a motion for preliminary injunction could be heard, and the District refused.

As a consequence, Plaintiff seeks a temporary restraining order against Cardiff School District precluding further construction and injury to George Berkich Park until the Court can hear Plaintiff's motion for preliminary injunction. Undoubtedly, the Park will be destroyed absent a TRO since the District is constructing at a rapid clip. In the event the Court finds in favor of Plaintiff on the merits and sets aside NPS's approval, the District is not entitled to construct in the Park. For this reason, the Park should be preserved pending a determination of the merits of Plaintiff's claim.

As will be discussed, the facts in this case overwhelmingly support issuance of a TRO. Given that NPS's approval of the conversion of the Park is in violation of 36 C.F.R. § 59.3, Plaintiff is likely to succeed on the merits of its claims. The approval greenlighted the District's demolition of parkland, swapping it for non-recreational concrete improvements, which is an environmental injury that our Courts have found is by nature irreparable. *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Further, given that the District has decided to unnecessarily expedite construction of the concrete improvements in the Park, ostensibly motivated by this TRO, and given that doing so will cause environmental injury, the balancing of the equities weighs heavily in Plaintiff's favor. Lastly, a TRO is undoubtedly in the public interest. As will be explained, the District and NPS violated federal law in allowing George Berkich Park to be converted to a non-recreation use.

II.

STATEMENT OF FACTS

A. George Berkich Park is a LWCF-Protected Park Which Must Be Maintained for Recreation Use in Perpetuity.

The story that gave rise to this lawsuit begins with George Berkich Park - a

historic and cherished community asset in Cardiff-by-the-Sea that lies directly east of Highway 101 with unobstructed views of the Pacific Ocean to the West. The Park sits on property adjacent to Cardiff Elementary School in a protected coastal overlay zone. The Park was developed in 1978 to create a local neighborhood park in the City of Encinitas, which was and is sorely lacking in public outdoor recreation space for its community. (See Index of Exhibits ("IOE"), Ex. 1.) Indeed, over time, budgetary restrictions and cutbacks have diminished the community's resources for park capital funding, and George Berkich Park has become a rare and valuable community resource for adults, children and the elderly to recreate and enjoy scarce grassy parkland. (*Id.*)

In 1991, the City of Encinitas ("City") and the District entered into a joint facilities agreement which made their respective facilities available for public use (Ex. 2); and in 1993, the Park became a federally protected park, having received Section 6(f)(3) protection by the Land Water Conservation Fund Act. (Ex. 3.)

The LWCFA is widely regarded as one of America's cornerstone conservation programs funding the acquisition, development and preservation of America's most treasured land, preserving scarce state and local parks, forests and scenic land adjacent rivers, lakes and oceans for their recreational use, natural beauty, wildlife habitats and scientific value.

The LWCFA states its purpose is "[t]o assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations . . . such quantity and quality of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States." Pub. Law No. 88-578.

In 1993, the City of Encinitas and Cardiff School District applied for and received a federal grant pursuant to the LWCFA. (Ex. 2.) As part of the application, and as required by the LWCFA, the City, School District and the Department of Parks and Recreation entered into a Project Agreement which obligates the parties to

maintain the property consistent with the LWCFA and as public outdoor recreational use ***in perpetuity***. (Ex. 3.) The Project Agreement and LWCFA further provide that the Park cannot be converted to uses other than public outdoor recreation use without the written approval of the Secretary of the United States Department of the Interior or his designee, the Director of the National Park Service. (*Id.*)

On August 19, 1994, the District and the City entered into an amendment to the Joint Use Agreement in which the District expressly stated "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***." (Ex. 2 (emphasis added).) In 1995, the renovation of George Berkich Park was complete, and consisted of, *inter alia*, the installation of play courts, concrete walkways, walls, handball walls, sand play areas, new play equipment and irrigation. The City contributed $298,400 for renovation and the State contributed $140,400 in LWCF grant money. (*See id*.)

B. <u>NPS may not Approve a Conversion of LWCF Protected Land Unless the Applicant Satisfies Strict Requirements.</u>

The LWCFA "assures that once an area has been funded with LWCF assistance, it is continuously maintained in public outdoor recreation use unless NPS approves substitute property of reasonably equivalent usefulness and location and of at least equal fair market value." 36 C.F.R. § 59.3(a). Specifically, the substitute property must provide similar types of recreational resources.

NPS is prohibited from even considering a conversion request until the prerequisites set forth in 36 C.F.R. § 59.3 are satisfied, including: the applicant's evaluation of "all practical alternatives to the proposed conversion," the "guidelines for environmental evaluation have been satisfactorily completed and considered by NPS . . . ," including compliance with the California Environmental Quality Act ("<u>CEQA</u>") and the National Environmental Policy Act ("<u>NEPA</u>"). Further, the applicant must have evaluated the property to be converted to determine what

recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation resources and opportunities available. The applicant must also evaluate the property being proposed for substitution to determine if it will meet recreation needs which are at least like in magnitude and impact to the user community as the converted site.

Any replacement property "must constitute or be part of a viable recreation area." 36 C.F.R § 59.3. "[T]he proposed conversion and substitution" must also be in accord with the Statewide Comprehensive Outdoor Recreation Plan ("SCORP") and/or equivalent recreation plans. Finally, any conversion application requires the sign-off by each project sponsor or party to the project agreement.

The Project Agreement allows for injunctive relief in the event of an unauthorized conversion of the parkland. (Ex. 3.)

The LWCF Manual (which is incorporated into the project agreement) provides that "[i]f the NPS is alerted or otherwise becomes aware of an ongoing conversion activity that has not been approved, NPS shall request the State Liaison Officer (SLO) to advise the project sponsor of the necessary prerequisites for approval of a conversion ***and to discontinue the unauthorized conversion activities.***" LWCF Manual at Ch. 8-4 (emphasis added). "If the conversion activity continues, NPS shall formally notify the State that it must take appropriate action to preclude the project sponsor from proceeding further with the conversion, use and occupancy of the area pending NPS independent review and decision of a formal conversion proposal." *Id.*

NPS is required to conduct an independent review of the proposal using the conversion prerequisites and any other critical factors that may have arisen during proposal development. *Id*. at Ch. 8-5-Ch. 8-9.

C. The District, In Knowing Violation of the LWCFA, Usurps Substantial Swaths of George Berkich Park Without NPS Approval

The Park enjoyed LWCFA protection up to 2016, when Cardiff School District decided to place Proposition 39 Measure GG on the November ballot, asking the

voters to approve $22 million in funding to renovate and repair Cardiff Elementary School (and Ada Harris). (Ex. 4.) On November 8, 2016 at least 55% of the voters approved the Measure, including members of Save the Park.

In May 2017, the District hired an architect to design its project and in August 2017, the District released conceptual design plans to the public. (Ex. 5.) The concept plans showed for the first time that the District did not intend to renovate and repair the Elementary School, despite its representations to the voters. Instead, the plans revealed a nearly total demolition of the school to be replaced by a much larger sprawling campus. Notably, the concept plans also showed for the first time what can only be described as a land grab from George Berkich Park. The plans revealed alarming and substantial encroachments into the Park, including the grading and demolition of substantial swaths of the Park, and the construction of non-recreational use improvements in the Park, all of which violated the Project Agreement and the LWCFA. (*See id.*)

That same month, the District entered into a lease-leaseback with its general contractor surrendering possession and control of the Park to its contractor in violation of the District's Project Agreement and the LWCFA.

In February 2018, an attorney and resident of Cardiff-by-the-Sea wrote to the District explaining its obligations under the LWCFA and Project Agreement, including the requirement to maintain George Berkich Park for recreational use in perpetuity and the prohibition on converting the parkland without the approval of the Secretary of the Interior. (Ex. 7.) As of that date, the District had already finalized its project design which encroached into the Park despite not having applied for, much less having received, an approval of its conversion of the Park from 6(f)(3) protected parkland to a school use. (*See* Ex. 5.)

Following the February 6, 2018 e-mail to the District concerning the LWCFA, in March 2018, the District reached out to OGALS concerning its proposed project. The District testified under penalty of perjury that OGALS informed the District that its

project would not be in compliance with the LWCFA, but that the District "did not need to redesign and [the District] could keep moving forward with [its] plans." (Ex. 8 at 108:5-7.) The District also testified that OGALS informed the District that the conversion of George Berkich Park "could be handled as a staff administrative action," despite the strict prerequisites set forth in 36 C.F.R. § 59.3. (*Id.* at 108:7-15.)

Thereafter, in the fall of 2018 the District prepared a Draft Environmental Impact Report ("DEIR") as required by the California Environmental Quality Act and released it for public comment. On December 3, 2018, NPS wrote to OGALS explaining that the District's projects raised questions concerning the eligibility of the District's proposed substitute land for conversion. (Ex. 9.) Nonetheless, on February 7, 2019, despite not having submitted an application for conversion of the LWCFA parkland, the District certified its Environmental Impact Report and approved its project in violation of the LWCFA and its Project Agreement. (Ex. 10.)

D. Save the Park Files Suit in the San Diego Superior Court Against the District for Violations of CEQA and for Taxpayer Waste; The Court Orders the District to Stop Conversion of the Park

Following the District's approval of its EIR and the Project, on March 8, 2019, Save the Park commenced a lawsuit against the District in San Diego Superior Court within the CEQA statute of limitations for, *inter alia*, violations of CEQA and taxpayer waste in connection with the District's approval of its Project (the "State Court Litigation"). Days later, OGALS sent a letter to the District stating,

> Based on the feedback from the National Park Service, ***it is unlikely that OGALS will recommend the boundary adjustment*** as outlined in the current draft PD/ESF provided by the school district. ***The City and the School District should continue to consider other options in moving forward with their proposal.***

(Ex. 11 (emphasis added).) The District responded to OGALS' letter stating that it cannot "acquire additional property for park purposes for a boundary adjustment/conversion [and] must work within the confines of its existing school site."

(Ex. 12.) ***In other words, the District explained that it could not comply with the statutory conversion requirements.*** The District also claimed ownership of the 6(f)(3) protected parkland and insinuated that the District was not bound by the Project Agreement or LWCFA since the District "could not contract away" its obligations to its students. (*Id.*)

E. OGALS and NPS Ignore Their Own Procedure and Permit the District to Continue the Unlawful Conversion of the Park Despite the Agencies' Admission that it was in Violation of the LWCFA

Subsequently, the District closed the Park to the public for a period of almost two years in order to start construction at the school site and within the 6(f)(3) boundary. (Ex. 13.) It did so despite its admission that it could not comply with the 36 C.F.R. § 59 conversion requirements. (*See* Ex. 12.)

After the District apprised OGALS that it could not satisfy the LWCFA conversion requirements, and having knowledge that the District intended to close George Berkich Park, on June 19, 2019, OGALS wrote to the District. (Ex. 14.) OGALS explained that it was not familiar with the District's project described in the District's certified Final EIR, that it needed additional information regarding how the proposed reconfiguration of the Park would provide reasonably equivalent recreational opportunities for a reasonably equivalent population, signed by both the District and the City. (*Id.*) **In other words, OGALS explained that the District and the City had not even applied for a conversion and that OGALS did not have enough information to process a conversion application.** Notwithstanding, the letter stated ***"OGALS is not requesting a stop of the construction."*** (*Id.*) The letter went on to say that a closure of the Park beyond six-months would result in a conversion of use. (*Id.*)

OGALS' letter is nothing short of incredible. With knowledge of the unauthorized conversion, the LWCFA obligated OGALS to "advise the project sponsor of the necessary prerequisites for approval of a conversion ***and to discontinue the unauthorized conversion activities***." LWCF Manual at Ch. 8-4 (emphasis added).

Instead, in the absence of any application for conversion, much less NPS approval of the conversion, OGALS greenlighted the District's unauthorized conversion.

Days later, Save the Park e-mailed NPS explaining that the District had closed the Park for two years and was staging construction trailers on the parkland. (Ex. 15.) On the same day, NPS responded that it had "not received any request to approve a closure of the park," and that "complete park closures are usually considered conversions of use… ***The announced closure makes it appear that the School District and City have decided to go ahead with their development plans prior to compliance with federal requirements***." (*Id.* (emphasis added).) Notwithstanding the foregoing statement, NPS did not notify OGALS "to take appropriate action to preclude the project sponsor from proceeding further with the conversion, use and occupancy of the area pending NPS independent review and decision of a formal conversion proposal" as required by the LWCF Manual at Ch. 8-4.

F. The District Closes the Park and Grades the Land in Violation of the LWCFA Refusing to Stop Absent a TRO and Preliminary Injunction Issued by the San Diego Superior Court

As a consequence of OGALS' and NPS's failure to follow their own procedures, the District was emboldened to proceed with its construction without required NPS approval of the conversion. To that end, a month later, the District obtained a grading permit from the City and began to grade the site. (Ex. 16.)

Given Defendants' collective violation of federal law and procedure, Save the Park petitioned the San Diego Superior Court on July 24, 2019 for a temporary restraining order seeking to restrain the District from moving ahead with its conversion of George Berkich Park in the absence of NPS approval, which the Superior Court granted. (Ex. 17.)

Thereafter, on August 29, 2019, Save the Park filed its Opening Brief in support of its CEQA claim in the State Court Litigation, and on September 12, 2019, filed its motion for preliminary injunction. In its CEQA Opening Brief, Plaintiff contended,

inter alia, that the District unlawfully omitted any discussion of its project's impacts on parks and recreation in its CEQA Initial Study thereby calculatingly dispensing with the required analysis in its EIR. In its motion for preliminary injunction, Plaintiff contended that the District had wasted taxpayer funds on designing and constructing improvements in George Berkich Park without NPS approval and therefore in violation of federal law.

On November 18, 2019, the Superior Court for the State of California granted Save the Park's Petition for Writ of Mandate in full, finding that the District's EIR violated CEQA and that the Project was not categorically exempt from CEQA. (Ex. 18.) The same day, the Court granted Save the Park's motion for preliminary injunction, finding that Plaintiff was likely to prevail on the merits of its taxpayer waste claim, in part because the District had expended the taxpayer's money on the design and construction of improvements in George Berkich Park without NPS approval and in violation of the LWCFA. (*Id.*)

Even after the Court found that the District did not comply with CEQA and decertified its EIR, the District cavalierly continued with its construction of the Project, causing the Superior Court to admonish the District of contempt should it continue with construction. (Ex. 19 at 11:17-12:8.) After the Court's ruling, the District filed a writ of mandate with the Fourth District Court of Appeal, which was summarily denied by a three judge panel. (Ex. 20.)

G. OGALS Approves the Conversion In Exchange for the District's Covenant not to Sue after Unlawfully and Unilaterally Removing the City of Encinitas as a Party to the Project Agreement

As of November 18, 2019, the City, a co-LWCF sponsor and party to the LWCF Project Agreement, had repeatedly voiced its concerns with respect to the District's project, and the District's failure to keep the City apprised of its communications with OGALS. (Exs. 21-22.) Both the City's Director of Parks and Recreation and separately, a City councilmember had each written to OGALS pleading it to keep the City apprised of information concerning the District's conversion of the Park.

The City was rightfully concerned given that as a party to the project agreement, it was obligated to maintain George Berkich Park for recreational use in perpetuity, to not convert the parkland without NPS approval, and notably, it was required to sign off on any conversion application made to OGALS for the conversion of parkland.

As of November 25, 2019, the City had not signed off on the District's conversion application. On that day, OGALS undertook a series of actions, each of which violated the LWCFA:

A. OGALS wrote to the California Department of Wildlife explaining that "State Parks urgently needs a second 'Yellow Book' review of the [District's] attached real estate appraisal. ***It is part of a negotiated settlement Package that needs to be finalized no later than end of today, or it might actually fall apart***." (Ex. 23 (emphasis added).)

B. OGALS then sent a letter to the City unilaterally and unlawfully removing the City as a party to the project agreement as a "matter of convenience" thereby dispensing with the need for the City's sign-off on the District's conversion application. (Ex. 24.)

C. Thereafter, OGALS executed a supplemental project agreement wherein it officially terminated the City as a party to the project agreement, leaving the District as the sole grantee and recommended approval of the conversion in exchange, *inter alia*, an agreement by the District not to sue OGALS or NPS. (Ex. 25.)

D. Lastly, OGALS sent a letter to NPS recommending that NPS approve the District's conversion request. (Ex. 26.)

Following OGALS' removal of the City as a party to the Project Agreement, and in an apparent act to eliminate any further City objections to its conversion of the parkland, on December 12, 2019, the District unilaterally terminated its Joint Use Agreement with the City of Encinitas, nullifying its obligation to maintain George Berkich Park for public outdoor recreation use in perpetuity. (Ex. 27.)

On December 20, 2019, the District's Park closure exceeded six months, constituting a conversion of use requiring the "State/project sponsor to provide replacement property pursuant to Section 6(f)(3) of the LWCF Act." LWCF Manual at Ch. 8-13.

Following OGALS' November 25, 2019 actions, Save the Park notified NPS that any approval of the conversion was unlawful since, among other things,(1) the State Court had decertified the District's EIR and therefore, the District was not incompliance with CEQA or NEPA; (2) the District had admitted in deposition that it had **never** considered any alternatives to its project which precluded NPS's consideration of a conversion application; and (3) the District had not met the statutory eligibility requirements for its replacement property.

Thereafter, Plaintiff brought its taxpayer waste claim to trial before the San Diego Superior Court and on the day of trial, the parties settled. On February 26, 2020 the parties entered into a settlement agreement expressly conditioned on the agreement not being confidential and which was materially based on the District's promise not to construct in George Berkich Park or otherwise convert the parkland without obtaining NPS approval. (Ex. 28.)

H. The District, Without NPS Approval and In Blatant Violation of a Settlement Agreement, Razes Park Improvements and Thereafter, NPS Approves the Conversion Based on Numerous Errors of Law

On March 24, 2020, Plaintiff learned that the District, without NPS approval, had brazenly violated the settlement agreement by tearing out the Park's baseball backstop and walking track formerly utilized by the community's elderly population for exercise. (Ex. 29.) Notably, the District undertook this egregious act knowing that the San Diego Superior Courts were closed on account of COVID-19. As a consequence, Plaintiff was left without any practical legal option to enforce its agreement.

Despite all of the foregoing facts, on April 24, 2020, NPS approved the District's conversion of George Berkich Park and issued associated findings of fact, *inter alia*,

that (1) the District had considered alternatives to the Project, (2) the District's contribution of its school site's new paved parking lot was of reasonably equivalent recreational usefulness as the grassy parkland it will replace, (3) that the District's stormwater biofiltration basins constitute a "recreational use" such that there was no conversion of the grassy parkland that will be eliminated, (4) that the hardcourts, which were already available for public use through the Joint Use Agreement, could be used to substitute property taken by the District, and (5) the conversion was statutorily exempt from NEPA as it constituted a "small conversion." (Exs. 30-31.)

III.

ARGUMENT

A. Legal Standards

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm until a hearing on a motion for preliminary injunction. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 439 (1974); *see also Chalk v. United States Dist. Court for the Cent. Dist. of Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). The standard for issuing a temporary restraining order is the same standard for issuing a preliminary injunction. *Johnson v. Macy*, 145 F. Supp. 3d 907, 913 (C.D. Cal. 2015). A court may enter a preliminary injunction if it is established that (1) the plaintiff "is likely to succeed on the merits," (2) that the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief, (3) "that the balance of equities tips in [the plaintiff's] favor," and (4) "that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's "sliding scale" approach, "a stronger showing on one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

B. The Court Should Issue a TRO and Preliminary Injunction to Preserve the Status Quo

1. Save the Park is Likely to Succeed on the Merits of its Claims

To show a likelihood of success on the merits, a plaintiff seeking a preliminary injunction is not required to "prove his case in full." *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Instead, a plaintiff must demonstrate a "fair chance of success on the merits," or raise questions that are "serious enough to require litigation." *Brenda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978); *see also Koller v. Brown*, 224 F. Supp. 3d 871, 879 (N.D. Cal. 2016).

a. *Standard of Review Under the Administrative Procedure Act*

Under the Administrative Procedure Act ("APA"), a court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2). While an agency's decision "is entitled to a presumption of regularity," "that presumption is not to shield [its] action from a thorough, probing, in-depth review." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated in part as recognized in Califano v. Sanders*, 430 U.S. 99 (1977).

A court must ensure that an agency has fulfilled its duty to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "An agency decision is arbitrary and 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, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007) (quoting *State Farm*, 463 U.S. at 43).

Additionally, an agency's action may be arbitrary and capricious if "the agency has not really taken a 'hard look' at the salient problems and has not genuinely engaged in reasoned decision-making." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (quoting *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 951 (D.C. Cir. 1970)). A court may set aside an agency's arbitrary or capricious decision where the "action was clearly wrong." *Hughes Air Corp. v. Civil Aeronautics Bd*., 482 F.2d 143, 145-46 (9th Cir. 1973).

"It is arbitrary and capricious for agencies to depart from prior policy without explanation or 'simply disregard rules that are still on the books.'" *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1079 (D.Or. 2018) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Agencies are required to follow their own procedures "even where the internal procedures are possibly more rigorous than otherwise would be required." *Alcaraz v. I.N.S.*, 384 F.3d 1150,1162 (9th Cir. 2004) (quoting *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)); *see also Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) ("an administrative agency is required to adhere to its own internal operating procedures").

b. *Defendants Violated the LWCFA in Approving the District's Conversion Application*

The evidence overwhelmingly shows that NPS approved the District's conversion (and blessed its deplorable conduct) in patent violation of 36 C.F.R. § 59 which sets out the statutory prerequisites for a conversion.

NPS is prohibited from ***even considering*** a conversion request until the following prerequisites are satisfied: (1) the applicant evaluated "all practical alternatives to the proposed conversion;" (2) the "guidelines for environmental evaluation have been satisfactorily completed and considered by NPS . . . ," including compliance with CEQA and NEPA; (3) the applicant must have undertaken an evaluation of the property to be converted to determine what recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation

resources and opportunities available; and (4) the applicant must also evaluate the property being proposed for substitution to determine if it will meet the recreation needs which are at least like in magnitude and impact to the user community as the converted site. *Id.*

First, and most notably, the District ***never*** considered alternatives to their encroachment into the Park. Each and every proposed design considered by the District (as set forth in its EIR) included encroachments into the Park. (Ex. 5.) Indeed, both the District and the District's architects testified under penalty of perjury that the District ***never*** considered an alternative design which did not encroach into the protected 6(f)(3) boundary. (Ex. 8 at 195:23-196:20, 108:20-109:9, 157:8-13; Ex. 32 at 38:17-24, 39:9-13, 34:21-35:2, 55:7-12.)

For this reason alone, NPS's approval of the District's conversion cannot stand since it was made in violation of 36 C.F.R. § 59.

The District was also required to provide an in-kind exchange of land to replace the land it intends to take for its non-recreation use improvements. Here, the District offered a 24,400 square foot concrete parking lot, nearly 10,000 square feet of biofiltration basins, and hardcourts to replace the grassy parkland.

Incredibly, NPS agreed despite the fact that it previously opined that the 24,400 square foot addition to the parking lot was ***not*** eligible replacement property. Further, the decision was made in direct contradiction of the LWCF Manual, which explains that a parking lot is a "support facility"—not a "recreational facility". *See* LWCF Manual at Ch. 3-13 (§ 5, Support Facilities); Compare *id.* at Ch. 3-10 - 3-13 (defining recreational facilities to include sports and playfields, picnic facilities, trails, swimming facilities, etc.). Moreover, basic common sense belies the conclusion that a paved parking lot serves as reasonably equivalent recreational use as grassy parkland, which certainly cannot meet the requirement that substation property "will meet recreation needs which are at least like in magnitude and impact to the user community as the converted site." 36 C.F.R. § 59.3(b)(3)(i).

Even more astonishing was NPS's finding that the biofiltration basins serve a recreational purpose. It goes without saying that biofitration basins are constructed to filter stormwater runoff, not for children to play in. But lest there be any doubt, when NPS made its finding, it was in possession of the District's EIR wherein the District admitted that the biofiltration basins are purposed–not for recreation use–but to ***filter pollutants such as "oil, fertilizers, pesticides, trash soil and animal waste"*** prior to release into the municipal stormwater system. (*See* Ex. 6.) For these additional reasons, NPS's approval is in violation of 36 C.F.R. § 59.3. However, the errors of law do not stop here.

NPS's determination that the hardcourts constituted a 6,550 square foot addition to the 6(f)(3) boundary is clearly wrong and an abuse of discretion. Under the express LWCFA conversion prerequisites, "[u]nless ***each*** of the following additional conditions is met, land currently in public ownership, including that which is owned by another public agency, may not be used as replacement land as part of an L&WCF project . . . (ii) [t]he land has not been dedicated or managed for recreational purposes while in public ownership." 36 C.F.R. § 59.3(b)(4) (emphasis in original). The hardcourts have been expressly dedicated for public recreational purposes *in perpetuity*, and are therefore unquestionably excluded from constituting replacement property. (Ex. 2 ("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***") (emphasis added).) Thus, NPS clearly erred when determining that the hardcourts constituted eligible replacement property.

Finally, and as a further independent basis to set aside the approval, the District had not completed adequate environmental review for its project or conversion, and therefore failed to meet the conversion prerequisites. *See* 36 C.F.R. § 59.3(b)(7). NPS relied on the findings set forth in the District's EIR, which was found to be in violation of CEQA and was decertified by the San Diego Superior Court, in order to approve

the conversion and to erroneously conclude that the District was entitled to a categorical exclusion under NEPA. (*See* Ex. 30.)

c. *Defendants Violated NEPA in Determining that the District's Conversion Application Qualifies for a Categorical Exclusion*

While the foregoing errors of law and abuse of discretion are sufficient alone to set aside the approval, NPS again erred in finding that the District was entitled to an exemption from NEPA.

In relying on the District's decertified EIR, NPS concluded that the conversion would qualify as a "small conversion" under LWCF policy, as it involved the conversion of less than 10% of the total existing 6(f)(3) protected park area. Even assuming, *arguendo*, that the District's conversion constituted less than 10% of the total existing 6(f)(3) protected park area,[1] the District's conversion constitutes an "extraordinary circumstance" under the Department of Interior's NEPA regulations.

"[A]n agency may not use a Categorical Exclusion" when 'extraordinary circumstances' exist." *Los Padres Forestwatch v. U.S. Forest Serv.*, 776 F. Supp. 2d 1042, 1044 (N.D. Cal. 2011); *see also* 40 C.F.R. § 1508.4. The Department of the Interior has defined extraordinary circumstances to include, *inter alia*, actions that "[h]ave highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources." 43 C.F.R. § 46.215.

Under NEPA, the term "highly controversial" refers to "cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Foundation for N. Am. Wild Sheep v. U.S. Dep't of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982) (quoting *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973)). As clearly evidenced by the State Court litigation and the rulings by the Superior Court, there is a substantial dispute as to the environmental effects of the 6(f)(3) conversion and the inadequacies of the District's environmental review. By the very nature of the claims raised in the State Court

[1] Save the Park disagrees with NPS' calculation of the size of the conversion.

Litigation, the District's conversion proposal is "highly controversial." *See id.* (finding that disputes over an EA's conclusion regarding significant effects on Bighorn sheep was "precisely the type of 'controversial' action for which an EIS must be prepared") *see also Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (holding that the agency's decision to rely on a categorical exclusion was improper where the record showed "the arguable existence of public controversy based on potential environmental consequences"). Where there is substantial evidence "that exceptions to the categorical exclusion *may* apply, . . . the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion." *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (emphasis in original).

There is substantial evidence that an exception to the small conversion categorical exclusion applies, and NPS incorrectly determined that the District's conversion application was excluded from NEPA.

d. *Additional Bases for Setting Aside NPS's Approval are Detailed in Plaintiff's Complaint*

Given the page limitations set forth in the Local Rules, Plaintiff's motion does not address all of the arbitrary and capricious actions taken by Defendants in violation of the LWCFA. As detailed in Plaintiff's Complaint, NPS failed to comply with the nine prerequisites for a conversion proposal as set forth in 36 C.F.R. § 59.3, each of which constitute an independent ground for setting aside NPS's approval. NPS failed to prepare and consider a Resource Impact Analysis when analyzing the District's conversion application (36 C.F.R. § 59.3(b)(3)(ii)); failed to consider the Project's consistency with the Statewide Comprehensive Outdoor Recreation Plan (36 C.F.R. § 59.3(b)(9)); and failed to require an updated appraisal after the conversion proposal was amended. (*See* Doc. # 1 at ¶¶ 146-149, 158-159.) NPS has also allowed George Berkich Park to remain closed for over six months, which constitutes an additional conversion of George Berkich Park. (*Id.* at ¶¶ 150-157; LWCF Manual at Ch. 8-13.) Under the LWCFA, the District is required to provide replacement property for this

additional conversion, which it cannot do. NPS must therefore require the District to re-open the entirety of George Berkich Park for public outdoor recreational use.

Additionally, Defendants failed to comply with the requirements of the National Historic Preservation Act of 1966 (54 U.S.C. § 300101), (*see* Doc. #1 at ¶¶ 105-115; 186-193), and NPS abused its discretion and acted in violation of law when it removed the City of Encinitas as a project sponsor and approved the District's conversion application without the City's approval. (*See id*. at ¶¶ 138-142.)

2. <u>Save the Park will Suffer Irreparable Harm if the Status Quo is not Preserved</u>

The injury occasioned to George Berkich Park, in violation of the LWCF, constitutes an "environmental injury" that our Supreme Court has explained "… by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco*, 480 U.S. at 545. "Irreparable harm should be determined by reference to the purposes of the statutes being enforced." *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). Here, the operative statute is the LWCFA which "assures that once an area has been funded with LWCF assistance, it is continuously maintained in public outdoor recreation use unless NPS approves substitute property of reasonably equivalent usefulness and location and of at least fair market value." 36 C.F.R. § 59.3(a). The very purpose of the LWCFA is to preserve, develop, and assure "the accessibility to all citizens of the United States . . . such quality and quantity of outdoor recreation resources as may be made available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States . . . ." Pub. Law No. 88-578.

The environmental injury in this case is particularly acute when juxtaposed against other cases involving damage to a park. For example, in an action challenging NPS's closure of a dog park without complying with applicable federal regulations, the court found that the plaintiff's harm was "substantial and irreparable." *Ft. Funston*

Dog Walkers v. Babbitt, 96 F. Supp. 2d 1021, 1040 (N.D. Cal. 2000). The court adopted the reasoning that "every day the plaintiffs missed in the park constituted irreparable harm because no amount of money could compensate for the loss . . . and '[a]bsent preliminary relief, they will suffer an injury that is present, actual, and not calculable.'" *Id.* at 1039-40 (quoting *Galusha v. New York State Dep't of Envtl. Conservation*, 27 F. Supp. 2d 117, 122 (N.D.N.Y. 1998)). Since the plaintiffs sought "continued access to recreation that improves the quality of their lives" rather than money damages, they established a possibility of irreparable harm. *Id.* at 1040.

Notably, the Project Agreement in this case explains that an unlawful conversion amounts to an irreparable injury and recognizes that the benefits of the Project Agreement "exceeds ***to an immeasurable and unascertainable extent*** the amount of money furnished" by the LWCFA, and that payment by the District "of an amount equal to the amount of assistance extended under [the LWCFA] would be ***inadequate compensation***" for any breach. (Ex. 3.) *See also Brooklyn Heights Ass'n, Inc. v. National Park Service*, 777 F. Supp. 2d 424, 435-36, n.10 (E.D.N.Y. 2011) (granting preliminary injunction enjoining construction within 6(f)(3) boundary and noting that inadequacy of monetary damages "is further supported by the grant agreement itself").

In this case, the public has already been deprived the use of George Berkich Park for over a year. The fields, walking track, and dog park—all regularly used by the public—were closed to the public and recently razed. The District has graded the Park, removing the walking track and grass fields, excavated the land for construction of large stormwater biofiltration basins, and started pouring cement foundation within the 6(f)(3) boundary of George Berkich Park. (Ex. 34.) The District intends to complete its construction of the expanded parking lot in the Park by August and is quickly moving forward on the construction of the multipurpose room in the Park. (Ex. 35.) If the District is not enjoined from completing these improvements, the Park will be irreparably damaged, and any possible Park reopening will be further delayed if the District is required to remove the concrete, foundation, buildings, and other unlawful

improvements it is currently building within the Park. Not to mention that it is simply foolhardy for the District to proceed with construction knowing that NPS approval could be set aside. One would be hard-pressed to find a prudent developer who would take such an at-risk position, but unfortunately, this has been the District's modus operandi before Plaintiff filed its State Court Action, during the pendency of the case and through this date.

3. <u>The Balance of Equities Weighs Heavily in Favor of Save the Park</u>

The Ninth Circuit has "long held that when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *See, e.g.*, *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005) (quoting *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988)) (internal quotations omitted); *see also Amoco*, 480 U.S. at 545.

Here, the Federal Defendants and State Parks will suffer no harm, since the interim relief requested by Save the Park is a temporary suspension of NPS's decision to approve the District's 6(f)(3) boundary conversion. Any suspension of the conversion decision would not result in any financial burden or other hardship to the Federal Defendants and State Parks.

a. *The District is the Cause of its Own Harm, and the Balance of Equities Therefore Favors Save the Park*

In balancing the harms, "[m]ore than pecuniary harm must be demonstrated." *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986) (affirming preliminary injunction enjoining mining activities until NPS completes proper environmental analysis, despite the "real financial hardship" suffered by the miners impacted); *Save Our Sonoran*, 408 F.3d at 1125 (holding environmental injury outweighed financial concerns). Consistent with the Supreme Court's decision in *Amoco*, 480 U.S. 531, the Ninth Circuit has held in an analogous case that "the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of

their underlying claim." *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled in part on other grounds by Winter*, 555 U.S. 7.

Notably, "a court need not balance the hardship when a defendant's conduct has been willful." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358-59 (5th Cir. 1996) (defendant "offers no reasons why this traditional principle of equity should not relieve a court of its normal obligation to balance the equities when dealing with a defendant who has willfully and repeatedly violated the environmental laws"). "This doctrine evolved in part from cases involving willful encroachments onto neighboring real estate . . . and remains good law today in a variety of contexts." *Id.* at 1359.

An agency becomes largely responsible for its own harm when it "jump[s] the gun" or "anticipate[s]" a pro forma result." *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), *abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell*, 893 F.3d 1276 (10th Cir. 2016)). Placing significant weight on financial liabilities that resulted from a defendant's decision about how to proceed in the face of litigation "would, in effect, reward them for self-inflicted wounds." *Sierra Club v. Trump*, 929 F.3d 670, 706 (9th Cir. 2019); *accord Davis v. Mineta*, 302 F.3d at 1116 (defendants "jumped the gun" on proceeding with a project before resolving environmental issues, and were therefore "largely responsible for their own harm;" accordingly, the environmental harms outweighed the legitimately incurred costs to defendants resulting from an injunction").

Here, the District unquestionably "jumped the gun" in proceeding with the demolition and reconstruction of the school before receiving NPS' approval of its conversion application and fast tracking its construction knowing of this challenge and lawsuit.

4. <u>An Injunction is in the Public Interest</u>

"When the alleged action by the government violates federal law, the public interest factor generally weights in favor of the plaintiff." *Western Watersheds Project*

v. Bernhardt, 392 F. Supp. 3d 1225, 1259 (D.Or. 2019) (citing *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1344 (N.D. Ga. 2017) ("the public has an interest in government agencies being required to comply with their own written guidelines instead of engaging in arbitrary decision making")). "[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)). When enacting NEPA, Congress determined that "the public interest requires careful consideration of environmental impacts before major federal projects may go forward;" thus, suspending a project until a full consideration of environmental impacts has occurred comports with the public interest. *South Fork Bank Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009).

Here, the public interest weighs in favor of Save the Park. While the District will presumably claim that a preliminary injunction will cause significant harm to students as their new classrooms will not be ready by August, that is false. Save the Park does not seek to enjoin construction of the entire school—instead, it only seeks to enjoin construction within the 6(f)(3) boundary. The only improvements that are designed to be constructed within the boundary are the multipurpose building, expanded parking lot, and outdoor amphitheater.

Save the Park is asking the Court for a narrowly-tailored injunction to allow the remaining portions of the project to proceed. If the Court enters the preliminary relief requested by Save the Park, the District's construction of new classrooms and a new lunch court will be able to proceed. Accordingly, the public impact to the students is de minimis compared to the impacts to the remaining public.

If a preliminary injunction is not issued, the District will continue to build permanent improvements within the Park; and, if the Court ultimately determines that the approval of the District's 6(f)(3) conversion was in violation of the LWCFA

(which it was), the District will be required to remove these expensive improvements constructed with taxpayer dollars. The public will once again suffer serious taxpayer waste and significant and unnecessary destruction to George Berkich Park. All of this can be easily avoided with the relief Save the Park is requesting here.

C. The Court Should Issue an Injunction Without Bond

"The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *People of State of Cal. ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985). If environmental nonprofit groups "were 'required to post substantial bonds . . . in order to secure preliminary injunctions . . . ,' the bonds might undermine mechanisms for private enforcement of environmental law." *Wilderness Soc'y v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988) (quoting *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (reducing "unreasonable" $4,500,000 bond to $1,000 in a NEPA case where "a private organization and citizens, with limited resources, obtained an interlocutory injunction against construction by a governmental entity")). "Courts routinely impose either no bond or a minimal bond in public interest environmental cases." *See, e.g.*, *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999) (setting no bond); *Central Or. Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D.Or. 2012) (no bond required, recognizing that "[f]ederal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond"). Accordingly, Plaintiff requests that the Court set no bond.

IV.

CONCLUSION

For the reasons stated above, Save the Park and Build the School respectfully requests that the Court issue a Temporary Restraining Order and an Order to Show Cause Why a Preliminary Injunction Should Not Issue.

DATED: June 26, 2020

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