

**HORSING AROUND WITH CONSERVATION:  
HOW A CAROUSEL PLANNED FOR A  
BROOKLYN PARK MAY VIOLATE THE LAND  
AND CONSERVATION FUND ACT AND  
STATE LAW**

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Previously, the author was senior adviser for government reform for the N.Y. state senate majority conference, director of national election advocacy for the Brennan Center for Justice and northeast director of People for the American Way. The opinions expressed herein are those of the author as a member of the *Albany Government Law Review* and not of his employer. In full disclosure, the author is a former member of Brooklyn’s Community Board #2, where he opposed a land use change within the borough sought by the developer discussed in this post. See Christine Haughney, *Wondering if a New School in Brooklyn Is Worth Blocking the View*, N.Y. TIMES, Jan. 21, 2009, at A20.

## INTRODUCTION

The carousel is a universally beloved amusement ride. The very thought of a carousel evokes images of smiling children atop colorful faux galloping horses accompanied by the sounds of pleasing circus music. However, the federal government may not be child-like amused about a carousel planned for a park in northwest Brooklyn, New York.

Enter David Walentas, a developer with enormous real estate holdings in Dumbo (Down Under the Manhattan Bridge Overpass),<sup>1</sup> an area in northwest Brooklyn more or less bounded by the East River to the north, Brooklyn-Queens Expressway to the south, Brooklyn Bridge to the east and Manhattan Bridge to the west.<sup>2</sup> Jane Walentas, Mr. Walentas's wife, recently donated a restored carousel to be placed in Brooklyn Bridge Park, a green space that is under development along the coastline of the area.<sup>3</sup>

The carousel is destined for an area that was once known as Empire-Fulton Ferry Park, which was recently conveyed from the New York State Office of Parks, Recreations and Historic Preservation (OPRHP), to the Brooklyn Bridge Park Development Corporation (BBPDC), a state-city body.<sup>4</sup> The nine-acre park, formerly maintained by the OPRHP, juts out to the east of the Brooklyn Bridge and features scenic views of New York City Harbor and the Manhattan skyline.<sup>5</sup> The park also features a cove, one of the few places in New York that provides access to the waterfront and is a vibrant location for marine life.<sup>6</sup>

Unknown to most is a "fun house" of federal and state laws that the carousel impacts. Empire Fulton Ferry Park was the beneficiary of a ten-year-old federal Land and Water Conservation Fund (LWCF) grant that bars conversion of the

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<sup>1</sup> Vivian Marino, *Square Feet—The 30-Minute Interview—David C. Walentas*, N.Y. TIMES, Jan. 24, 2010, at RE9.

<sup>2</sup> For a map of Dumbo, Brooklyn, see GOOGLE MAPS, <http://tinyurl.com/2cxx3ab> (last visited Oct. 20, 2010).

<sup>3</sup> Andy Campbell, *Ride on! Bridge 'Park' Directors Accept Jane's Carousel*, BROOK. PAPER, Dec. 17, 2009, available at [http://www.brooklynpaper.com/stories/32/51/32\\_51\\_ac\\_janes\\_carousel\\_in\\_bridge\\_park.html](http://www.brooklynpaper.com/stories/32/51/32_51_ac_janes_carousel_in_bridge_park.html) (stating that Walentas made a cash gift of \$3.45 million for landscaping and initial operation of the carousel); Interactive Map, Brooklyn Bridge Park, <http://www.brooklynbridgeparknyc.org/interactive-map> (last visited Oct. 20, 2010).

<sup>4</sup> Campbell, *supra* note 3; Diane Cardwell, *State Agrees to Let the City Finish Brooklyn Bridge Park*, N.Y. TIMES, Mar. 10, 2010, at A24.

<sup>5</sup> Brooklyn Bridge Park, <http://www.brooklynbridgeparknyc.org/the-park/empire-fulton-ferry> (last visited Oct. 20, 2010).

<sup>6</sup> *Id.*

park area in perpetuity without prior approval from the Department of the Interior.<sup>7</sup> New York's public trust doctrine similarly bars conversion of the land without prior legislative approval.<sup>8</sup>

### I. LAND AND WATER CONSERVATION FUND ACT

The Land and Water Conservation Fund Act was enacted in 1965 to provide quality public outdoor recreation resources for present and future generations.<sup>9</sup> Under the LWCF, states and local governments are awarded grants to acquire and develop public outdoor recreation opportunities as part of states' comprehensive recreational plans.<sup>10</sup> The act's U.S. Senate report notes the need to improve "the physical and spiritual health and vitality of the American people."<sup>11</sup> "[W]hen President Kennedy first transmitted to Congress the draft legislation[,] . . . his accompanying letter referred specifically to the preservation of 'irreplaceable lands of natural beauty and unique recreation value' and to 'the enhancement of spiritual, cultural, and physical values resulting from the preservation of these resources.'"<sup>12</sup>

The Department of Interior recognizes the breadth of LWCF grants to include assistance for "lands and waters for public outdoor recreation . . ."<sup>13</sup> The purpose of a grant may be for "natural areas and preserves and outstanding scenic areas where the objective is to preserve the scenic or natural values, including areas of physical or biological importance and wildlife areas."<sup>14</sup>

### II. EMPIRE FULTON FERRY PARK'S LAND AND WATER CONSERVATION FUND GRANT

The carousel starts to look more like a scary haunted house when it is put into legal context. In late 2001, National Parks Service (NPS) approved a LWCF grant for \$275,535.00 for

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<sup>7</sup> 16 U.S.C. § 460l-8(f)(3) (2006).

<sup>8</sup> See 81 N.Y. JUR. 2D *Parks, Recreation, & Historic Pres.* § 37 (2010).

<sup>9</sup> Land & Water Conservation Fund Act of 1965, Pub. L. No. 88-578, §§ 460l-11 (1965) (codified as amended at 16 U.S.C. §§ 460l-(4)-(11)).

<sup>10</sup> *Id.*

<sup>11</sup> Letter from President John F. Kennedy to Vice President Lyndon B. Johnson & John W. McCormack, Speaker of the H.R. (Feb. 14, 1963), reprinted in 1964 U.S.C.C.A.N 3633, 3636.

<sup>12</sup> *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2d Cir. 1985).

<sup>13</sup> *Id.* (quoting Dep't of the Interior, Bureau of Outdoor Recreation Manual § 640.2.1 (Dec. 14, 1973)).

<sup>14</sup> *Id.*

Empire Fulton Ferry Park.<sup>15</sup> The improvements to the cove area in the park included “permanent shoreline protection, walkways, utilities, landscaping, site improvements and signage.”<sup>16</sup> The area covered in the grant includes the planned location of the carousel—and anywhere else in the park.<sup>17</sup>

The LWCF grant contains a series of assurances that include:

A. The State agrees, as a recipient of this assistance, that it . . . shall be responsible for compliance with the terms of the project agreement by such a political subdivision or public agency and that *failure by such political subdivision or public agency to so comply shall be deemed a failure by the State to comply with the terms of this agreement.*

B. The State agrees that the property . . . is being acquired or developed with the Land and Water Conservation Fund assistance . . . and that, without the approval of the Secretary, *it shall not be converted to other than public outdoor recreation use but shall be maintained in public outdoor recreation in perpetuity . . .*”<sup>18</sup>

In other words, property acquired or developed with LWCF funds cannot be converted to something that contradicts the purposes of the grant or non-public outdoor recreation uses without prior approval from the U.S. Secretary of the Interior.<sup>19</sup> The definition of outdoor public recreational use may depend on the context of the LWCF grant and includes preserving natural resources like scenic vistas.<sup>20</sup>

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<sup>15</sup> Letter from Jack Howard, Manager Conservation Assistance, Nat'l Parks Serv., Phila. Support Office, to Kevin Burns, Chief Recreation Grants Div., N.Y. State Office of Parks, Recreation & Historic Pres. 1 (Nov. 30, 2001), *available at* <http://www.scribd.com/doc/38854032/Land-and-Water-Conservation-Fund-Grant-Approval-Empire-Fulton-Ferry-Park-Brooklyn-New-York> [hereinafter Letter from Jack Howard].

<sup>16</sup> *Id.*

<sup>17</sup> NAT'L PARK SERVICE, DEP'T OF THE INTERIOR, LAND & WATER CONSERVATION FUND PROJECT AGREEMENT GEN. PROVISIONS 1 (2001), *available at* [http://www.nps.gov/lwcf/forms/lwcf\\_general\\_provisions.frm.pdf](http://www.nps.gov/lwcf/forms/lwcf_general_provisions.frm.pdf).

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Friends of Shawangunks*, 754 F.2d. at 449, 452 (interpreting “section 6(f)(3) ‘public outdoor recreation uses’ broadly, to encompass uses not involving the public’s actual physical presence on the property. After all, Webster’s Third New International Dictionary (1971) defines ‘recreation’ as ‘refreshment of the strength and spirits after toil,’” (citation omitted) and holding “any future change that contravenes [a LWCF grant] . . . retroactively calls into question the basis for the original federal funding. Such a change necessarily requires the Secretary’s approval, whether or not the change falls within the Act’s definition of a ‘conversion.’”).

<sup>20</sup> *Id.* at 448.

## III. LAND AND WATER CONSERVATION FUND CASE LAW AND STATE LAW

In *Friends of Shawangunks, Inc. v. Clark*, the leading conversion case, the Second Circuit held that a conservation easement protected development of land and water purchased with a LWCF grant.<sup>21</sup> The land, located in the Shawangunks Range in Ulster County, New York, included a lake, nine-hole golf course, buildings and wooded land.<sup>22</sup> The LWCF grant barred developing or erecting new facilities, but allowed development of the existing facilities in the same place and for the same purpose.<sup>23</sup>

The importance of conservation is evident in state law—waterways in particular. In 1981, New York enacted a program of waterfront revitalization.<sup>24</sup> The act’s legislative findings and declaration are evidence of strong public policy. The findings begin:

New York state’s coastal area and inland waterways are unique with a variety of natural, recreational, industrial, commercial, ecological, cultural, aesthetic and energy resources of statewide and national significance. . . . The legislature further finds that it is in the interest of the people of the state that coordinated and comprehensive policy and planning for preservation, enhancement, protection, development and use of the state’s coastal and inland waterway resources . . . .<sup>25</sup>

The state’s public policy is explicit in the need to achieve a balance between economic development and preservation of coastal waterways and preventing “diminution of open space areas or *public access to the waterfront*, . . . [or] *impairment of scenic beauty* . . . .”<sup>26</sup>

In addition, New York’s public trust doctrine bars the conversion of parkland for non-park purposes. “[A] municipality holds [park] property in trust for the use of the public, and cannot use or permit its use for purposes other than those for which it was dedicated or acquired or appropriated.”<sup>27</sup> Parks must be kept

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<sup>21</sup> *Id.* at 450–51.

<sup>22</sup> *Id.* at 448.

<sup>23</sup> *Id.*

<sup>24</sup> 1981 N.Y. Laws 2224 (adding article 42 of the EXEC. LAW, Waterfront Revitalization of Coastal Areas & Inland Waters).

<sup>25</sup> N.Y. EXEC. LAW § 910 (McKinney 2010).

<sup>26</sup> N.Y. EXEC. LAW § 912 (McKinney 2010) (emphasis added).

<sup>27</sup> In re Cent. Parkway, City of Schenectady, 251 N.Y.S. 577, 579 (Sup. Ct. 1931).

free of uses that would interfere with park purposes, which likely requires legislative approval.<sup>28</sup>

In *Friends of Van Cortland Park v. City of New York*,<sup>29</sup> a group sued to stop the construction of a water treatment plant serving New York City to be located underground, but would close a golf course in a public park for five years.<sup>30</sup> The public heavily used the year-round golf course; estimates were that 33,000 rounds were played annually.<sup>31</sup> The Court of Appeals held that even though a water treatment plant was an important public purpose, use of the park either temporarily or permanently violated the public trust doctrine.<sup>32</sup>

In *795 Fifth Ave. Corp. v. City of New York*,<sup>33</sup> a taxpayer sought to stop construction of a café in the southwest corner of Central Park.<sup>34</sup> The New York County Supreme Court held that the café, a tiny portion of the large park, enhanced the beauty and natural appeal of an area of Central Park.<sup>35</sup> The court further added that the café did not violate the park purpose as it was merely a change from one purpose to another.<sup>36</sup>

#### CONCLUSION

The planned carousel for Empire Fulton Ferry Park likely constitutes a conversion—and thus requires approval from the Regional Director of the National Parks Service<sup>37</sup>—because it contradicts the purposes of the grant and it is a non-outdoor recreational use in the LWCF project area. The purpose of the LWCF grant is to protect the waterfront which is “one of the few places on the New York City waterfront that gives visitors true access to the water . . . [and also exists as] a rich habitat for fish,

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<sup>28</sup> 81 N.Y. JUR. 2D *Parks, Recreation, & Historic Pres.* § 37 (2010).

<sup>29</sup> 750 N.E.2d 1050 (N.Y. 2001).

<sup>30</sup> *Id.* at 1051–52.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1054–55. The public use component of the water treatment plant should be underscored. The filtration plant would fulfill a federal directive for the Croton Watershed. When completed, the plant would have benefited millions of people daily. Still, the court found that the closing of a park, even for five years and for an important, public non-park purpose, was a violation of the public trust doctrine. *Id.*

<sup>33</sup> 242 N.Y.S.2d 961 (Sup. Ct. 1963).

<sup>34</sup> *Id.* at 962–63.

<sup>35</sup> *Id.* at 968.

<sup>36</sup> *Id.*

<sup>37</sup> 16 U.S.C. § 460l-8(f)(3) (2006) (stating the power to approve LWCF conversions is delegated to the regional directors of the National Parks Service).

crabs, and birds of the New York Harbor Estuary.”<sup>38</sup> A carousel abutting the waterfront—or anywhere else in the park—is a clear conflict with the LWCF grant.<sup>39</sup> The carousel would serve as an obstacle to access of the waterfront.<sup>40</sup> Moreover, the carousel, with the proposed large enclosing structure, will obstruct and destroy one of the most famous view corridors to the Brooklyn Bridge and New York City.<sup>41</sup>

The term “public outdoor recreation,” which is a requirement of LWCF grants, has three elements: (1) public, (2) outdoor and (3) recreation. It is undisputed that the carousel would be open to the public and constitute recreation. But, it is clearly not outdoor. One of the definitions of “outdoor” includes, “not enclosed: having no roof.”<sup>42</sup> The planned carousel would be enclosed by a roof.<sup>43</sup> The carousel thus appears to violate the plain meaning of “outdoor.”

Carousels in New York City public parks, however, are not without precedent; Central Park, Prospect Park and Bryant Park all have carousels.<sup>44</sup> Central Park and Prospect Park both feature diverse public outdoor recreation opportunities due to their large area, 843 and 585 acres, respectively. Bryant Park is a similar size to the former Empire Fulton Ferry Park, but it is landlocked, located within a manmade valley of steel.

While a carousel may be an appropriate public recreational use for some parks, it likely constitutes a conversion at the former Empire Fulton Ferry Park, which is a mere nine acres along the southernmost portion of the East River. An area of this size and waterfront location is limited in terms of diversity of recreation.<sup>45</sup> The obvious public outdoor recreational purpose of the former Empire Fulton Ferry Park, unique for its views of New York Harbor, the Manhattan skyline and the East River, which is

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<sup>38</sup> BROOKLYN BRIDGE PARK CONSERVANCY: THE PARK TODAY, <http://www.brooklynbridgepark.org/go/the-park/the-park-today> (last visited Oct. 21, 2010).

<sup>39</sup> See Letter from Jack Howard, *supra* note 16, at 1.

<sup>40</sup> Interactive Map, *supra* note 3.

<sup>41</sup> See Campbell, *supra* note 3.

<sup>42</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 880 (11th ed. 2005).

<sup>43</sup> Campbell, *supra* note 3.

<sup>44</sup> *Carousel*, CENTRAL PARK CONSERVANCY, <http://www.centralparknyc.org/visit/things-to-see/south-end/carousel.html> (last visited Oct. 21, 2010); *Carousel*, PROSPECT PARK ALLIANCE, <http://www.prospectpark.org/visit/places/carousel> (last visited Oct. 21, 2010); *Le Carrousel in Bryant Park*, BRYANT PARK, [http://www.bryantpark.org/things-to-do/le\\_carrousel.html](http://www.bryantpark.org/things-to-do/le_carrousel.html) (last visited Oct 21, 2010).

<sup>45</sup> Because the LWCF grant is for Empire Fulton Ferry Park, the area should be measured in the grant's terms, not in the context of the entire planned Brooklyn Bridge Park.

apparent from the LWCF grant, is public access to the waterfront and unspoiled waterfront views or both natural and manmade vistas.

Even if the conversion is approved by the National Parks Service, the carousel may violate the state's public trust doctrine. The present facts are unique; they do not fit neatly into *Friends of Van Cortland Park* or *795 Fifth Ave.*, although the proportions of the conversion to total parkland in both cases may draw lessons. Both Van Cortland Park, at 1,146 acres, and Central Park, 843 acres, are distinguished from the Empire Fulton Ferry Park because of their comparative size. In *Friends of Van Cortland Park*, the golf course, which would have been closed for five years, was about 2.5% of the total park.<sup>46</sup> The proposed Central Park café in *795 Fifth Ave. Corp.* was 0.06% of the total area of Central Park.<sup>47</sup> In terms of sheer size, *Friends of Van Cortland Park*, where a golf course was not allowed to be closed even temporarily, is analogous to Empire Fulton Ferry Park because of the proportions. Building anything in a small, nine-acre park would be a significant reduction in land likely constituting a conversion.

Unfortunately, New York courts have not articulated a compressive standard or rule relating to the definition of park purposes.<sup>48</sup> There is no bright-line rule.<sup>49</sup> As noted above, although diverse public recreational uses may be found in significantly larger parks, the relevant question should be what is appropriate for a *particular* park. It is apparent that the carousel would encroach upon the unspoiled views of the harbor, skyline and river; thus resulting in a possible violation of the public trust doctrine, necessitating prior legislative approval.

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<sup>46</sup> *Friends of Van Cortland Park v. City of N.Y.*, 750 N.E.2d 1050, 1051–52 (N.Y. 2010).

<sup>47</sup> *795 Fifth Ave. Corp. v. City of N.Y.*, 242 N.Y.S.2d 961, 967 (Sup. Ct. 1963).

<sup>48</sup> Cyane Gresham, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 FORDHAM ENVTL. L. REV. 259, 299 (2002).

<sup>49</sup> *See, e.g.*, *Ackerman v. Steisel*, 480 N.Y.S.2d 556, 557–58 (App. Div. 1984) (holding that a storage for vehicles not associated with the park for more than a decade was not a temporary park use); *Vill. of Croton-on-Hudson v. Westchester County*, 331 N.Y.S.2d 883, 884–85 (App. Div. 1972) (disallowing twenty acres of a public park to be used for waste disposal).