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VIA E-MAIL & MAIL

November 28, 2018

Stephen Wald, Esq.
Robins Kaplan, LLP
800 Boylston Street, Suite 2500
Boston, MA 02199

**RE: Proposed Development of Ninth Elementary School
Baldwin School / Baldwin School Playground**

Dear Mr. Wald:

As you may know, this Firm is acting as Special Town Counsel in the above-referenced matter. This letter responds to your ongoing assertions that the Brookline School Committee's proposed use of the Baldwin School Playground by Baldwin School students would be prohibited under Article 97 of the Amendments to the Massachusetts Constitution ("Article 97") and/or restrictions imposed by the federal Land and Water Conservation Fund Act ("LWCF").

Specifically, we have reviewed your July 26, 2018, September 11, 2018 and September 17, 2018 letters to Brookline boards, commissions and officials asserting that the proposed use of the Baldwin School Playground by Baldwin School students would constitute an impermissible "conversion" to other than public outdoor recreational use.¹

We disagree. Your arguments and conclusions appear to be based upon a fundamental misunderstanding of the Town's proposed use of the Baldwin School Playground. For the reasons that follow, it is our opinion that the proposed non-exclusive use of the Baldwin School Playground by Baldwin School students for outdoor recreational purposes while school is in session is consistent with Article 97, the LWCF Act, and the June 26, 1976 LWCF Project Agreement that governs the use and stewardship of the Baldwin School Playground property.

It is our understanding that the proposed use of the Baldwin School Playground is expected to include the following:

- (1) non-exclusive recreational use by Baldwin School students for outdoor recess and physical education while school is in session, meaning it would remain available for

¹ We are aware of a lawsuit that you have apparently filed this week in Norfolk Superior Court on behalf of the so-called "Taxpayers Concerned for Brookline" against the Town of Brookline and others, alleging violations of the Open Meeting Law and Public Records Law as well as unlawful expenditures of Town money. This letter responds only to your correspondence listed above, and not the lawsuit.



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outdoor recreational use by the general public when being used by students, similar to other parks adjacent to Brookline public schools (including the Lawrence School students' use of Longwood Park);

- (2) replacement of the Baldwin School Playground's existing play structures with new, modern play structures that are appropriate for safe use by a wider range of ages, and that are accessible to and inclusive for children with disabilities;
- (3) refurbishing the existing tennis court to encourage greater use by the public, both in terms of frequency and type of use, by making it accessible for a more diverse range of abilities and uses (perhaps by removing the tennis net and installing basketball hoops), consistent with the original intention of the LWCF grant for the "multiple-purpose" area;
- (4) maintaining the open grounds of the Baldwin School Playground without any additional fencing, building structures, or other impediments to public access and use; and
- (5) preserving the existing mature trees on the site to maintain the Baldwin School Playground's character.

In your July 26 letter, you state that the LWCF Project Agreement restricts the Baldwin School Playground "to the uses contained in the Application for Federal Assistance from the LWCF, and precludes uses contrary to achieving the purposes and benefits for which the LWCF assistance was provided." You opine that the LWCF Project Agreement's restrictions on the Baldwin School Playground "preclude using [it] for educational purposes like as [sic] recess and physical education." We see no basis for this conclusion.

Your analysis glosses over the fact that the LWCF Application and supporting materials explicitly and repeatedly reference use of the Baldwin School Playground by the general public and define the paved "multiple-purpose" play area as being located within an existing playground. You fail to mention that the School Committee has maintained the care, custody and control of the Baldwin School Playground at all times since the 1941 Special Town Meeting appropriated funds for the School Committee to purchase the land. You mischaracterize the Baldwin School Playground as "a pastoral area with one tennis court", ignoring the existing play structures in the Baldwin School Playground. You also fail to acknowledge that proposed improvements to those existing play structures and the tennis court would encourage greater use of the site by more members of the general public for a broader range of outdoor recreational activities.

In our opinion, these important facts make clear that the non-exclusive outdoor recreational use of the Baldwin School Playground by Baldwin School students would not constitute a conversion or be inconsistent with the LWCF Project Agreement. As the NPS guidance documents and case law illustrate, land obtained or improved with LWCF funds is



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“converted to other than public outdoor recreation uses” where public outdoor recreational use is terminated or severely restricted.² That would not be the case here. To the contrary, as described above, the public would not be excluded, and improvements to the existing play structures and the tennis court would encourage greater outdoor recreational use of the Baldwin School Playground by the general public in a manner that is true to the LWCF Project Agreement.

You also argue in your July 26 letter that “the increased traffic associated with a school is contrary to other purposes in the Application for Federal Assistance, namely, ‘decrease[d] noise’ and ‘screening off ... traffic noises’.” This argument ignores the fact that the Project Agreement does not govern use of the Baldwin School site. Furthermore, the LWCF Application repeatedly states that the proposed screening on the site is intended to create a buffer with the adjacent commercial area, not the Baldwin School.

In your September 11 letter, you attempt to distinguish the Baldwin School Playground from the Longwood Playground, claiming without support that “[t]he Lawrence School was using the Longwood Playground for recess and physical education well before 1978” so there was “never any conversion after the grant was received”. This argument disregards the fact that any property acquired or developed with LWCF funds must thereafter be used for outdoor recreation purposes regardless of its use prior to the acceptance of LWCF funds. Consequently, use of the Longwood Playground by Lawrence School students for recess and physical education in the decades since LWCF grant money was used at the Longwood Playground supports the use of the Baldwin School Playground for the same purposes by Baldwin School students.

You also attempt to distinguish the Longwood Playground by pointing out that the LWCF “grant application discusses only one aspect of the [Longwood] playground – the tennis courts” and the Longwood “tennis courts are in a discrete area of the property, physically segregated from the rest of the playground.” These statements are true of the Baldwin School Playground as well.

In your September 17 letter, you point to a December 14, 2015 Park and Recreation Commission letter as support for your position that use of the Baldwin School Playground by elementary students would unduly exclude the public. As you observe in the same paragraph, NPS guidance states that land improved with LWCF funds must “be kept open for public use at reasonable hours and times of the year, according to the type of area or facility.” Again, it is our understanding that the Town does not intend to exclude the public from the Baldwin School Playground when it is in use by students. Instead, the site shall remain available for use by the

² NPS guidance documents indicate that conversion may take place in circumstances including: 1) conveyance of a property interest for private or non-public outdoor recreational use; 2) using all or a portion of the property for non-outdoor recreational uses (public or private); 3) construction of offending indoor facilities without NPS approval; and 4) termination of public outdoor recreational use. *LWCF Federal Financial Assistance Manual*, Volume 69, Ch. 8-4 (October 1, 2008); see also *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 449 (2nd Cir.1985) (Second Circuit Court of Appeals ruled that changing a portion of LWCF-protected land from a public conservation area to a private golf course constituted a conversion); *Weiss v. Secretary of U.S. Dept. of Interior*, 459 Fed. Appx. 497 (6th Cir. 2012) (Sixth Circuit Court of Appeals upheld an NPS determination allowing conversion of a portion of LWCF-protected land for a private golf course, where a proposed land swap would provide land with reasonably equivalent usefulness to that being converted, and was consistent with the Michigan SCORP).



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general public during reasonable hours and times of the year. Furthermore, you have vastly overstated the extent to which the Baldwin School Playground will be used by students. You may be unaware that Massachusetts schools are required to be in session for only 180 of 365 days each year, and not on weekends or holidays.

Finally, with respect to Article 97, you incorrectly characterize the *Westfield* case as being "essentially identical" to the present situation, ignoring a crucial difference. In *Westfield*, the City accepted and used LWCF funds to construct a playground (triggering both LWCF and Article 97 protection), then sought to unilaterally demolish that playground to make way for construction of a new school building. Here, the Town is exploring the feasibility of improving an existing school building on the Baldwin School site (which has no Article 97 protection) and using the adjacent Baldwin School Playground site (which does have Article 97 protection) for outdoor recreation by students during recess and physical education. In our opinion, allowing Brookline students to use the Baldwin School Playground for recess and physical education while school is in session, and improving the existing playground equipment and tennis court to encourage greater public use, is consistent with Article 97.

In summary, it is our strongly held opinion that the Town may proceed with development of a school building at the Baldwin School site without undergoing the Article 97 legislative approval process or seeking approval from EEA, NPS or the Secretary of the Interior, as that parcel is free from encumbrances under either Article 97 or the LWCF.

It is our further opinion that non-exclusive outdoor recreational use of the Baldwin School Playground by Baldwin School students while school is in session (without excluding the general public), with associated improvements to the existing play structures and tennis court, is neither a disposition, change in use or conversion of the Baldwin School Playground, and is consistent with Article 97 and the 1976 LWCF Project Agreement.

Very truly yours,



Luke H. Legere

cc: Joslin Ham Murphy, Esq.

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