
Chapter 4

Draft Section 4(f) Evaluation

Section 4.1 Introduction

This chapter discusses the environmental setting and effects of the alternatives analyzed in this Supplemental DEIS with regards to Section 4(f) resources. Specifically, this chapter describes applicable federal regulations, discusses the presence or proximity of Section 4(f) properties within the study area, and addresses potential adverse effects.

This chapter is based on the Draft EIR/EIS prepared by Santa Clara Valley Transportation Authority (Santa Clara Valley Transportation Authority 2004).

REGULATORY SETTING

Federal

Section 4(f) of the Department of Transportation Act of 1966 (49 USC 303), declares that

[i]t is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

Section 4(f) specifies that

[t]he Secretary [of Transportation] may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance, or land of an historic site of national, state, or local significance (as determined by the federal, state, or local officials having jurisdiction over the park, area, refuge or site) only if—

- there is no prudent and feasible alternative to using that land; and
- the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Section 4(f) further requires consultation with the U.S. Department of the Interior and, as appropriate, the involved offices of the U.S. Department of Agriculture and

U.S. Department of Housing and Urban Development, and relevant state and local officials, in developing transportation projects and programs that use lands protected by Section 4(f).

The proposed project as described below, is a transportation facility that may receive federal funding through FTA; therefore, documentation of compliance with Section 4(f) is required.

This Section 4(f) documentation has been prepared in accordance with the FHWA regulations for Section 4(f) compliance as mandated by 23 CFR 771.135 and the Section 4(f) Policy Paper (1989).

Section 4(f) Use

As defined in 23 CFR 771.135(p), the “use” of a protected Section 4(f) resource occurs when:

- land is permanently incorporated into a transportation facility through partial or full acquisition (“direct use”);
- there is a temporary occupancy of land that is adverse in terms of the preservationist purposes of Section 4(f) (“temporary use”); or
- there is no permanent incorporation of land, but the proximity of a transportation facility results in impacts so severe that the protected activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired (“constructive use”).

Direct Use

A direct use of a Section 4(f) resource takes place when property is permanently incorporated into a proposed transportation project. This may occur as a result of partial or full acquisition of a fee simple interest, permanent easements, or temporary easements that exceed regulatory limits noted below (see also 23 CFR 771.135[p][7]).

Temporary Use

A temporary use of a Section 4(f) resource occurs when there is a temporary occupancy of property that is considered adverse in terms of the preservationist purposes of the Section 4(f) statute. The FHWA regulations detail the conditions under which a temporary occupancy of property does not constitute a use of a Section 4(f) resource.

The following requirements must be satisfied:

- the occupancy must be of temporary duration (i.e., shorter than the period of construction) and not involve a change in ownership of the property;

- the scope of work must be minor, with only minimal changes to the protected resource;
- there are no permanent adverse physical effects on the protected resource, nor will there be temporary or permanent interference with activities or purpose of the resource;
- the property being used must be fully restored to a condition that is at least as good as that which existed prior to the proposed project; and there must be documented agreement of the appropriate officials having jurisdiction over the resource regarding the foregoing requirements.

Constructive Use

A constructive use of a Section 4(f) resource occurs when a transportation project does not permanently incorporate land from the resource, but the proximity of the project results in impacts (e.g., noise, vibration, visual, access, and/or ecological impacts) so severe that the protected activities, features, or attributes that qualify the resource for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only if the protected activities, features, or attributes of the resource are substantially diminished.

This determination is made through:

- identification of the current activities, features, or attributes of the Section 4(f) resource that may be sensitive to proximity impacts;
- analysis of the potential proximity impacts on the resource; and
- consultation with the appropriate officials having jurisdiction over the resource.

EXISTING CONDITIONS

Public Park and Recreation Resources

An inventory, including descriptive characteristics, of public park and recreation resources located within the study area (roughly defined as the 2.3 mile alignment of Capitol Expressway between Alum Rock Station and Eastridge Transit Center) is shown in Table 4-1. Figure 4-1 illustrates the location of public parks considered in this analysis. No wildlife or waterfowl refuges that are protected by Section 4(f) were identified within the Capitol Expressway Corridor.

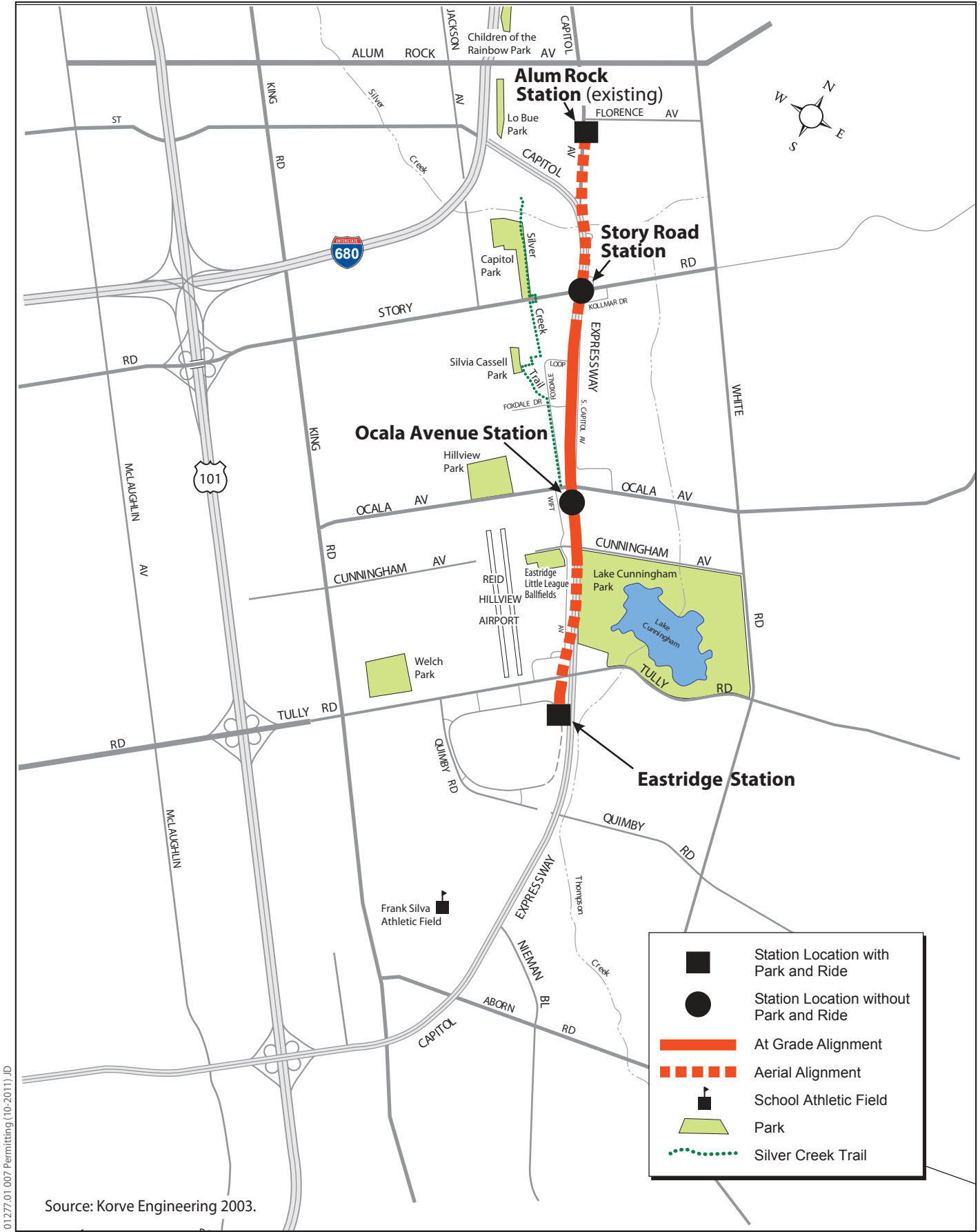
Public park and recreation resources located within approximately 0.25 mile of the alignment of the Light Rail Alternative were included in the inventory. Resources within approximately 0.5 mile were included if a primary point of access to them intersects the light rail alignment. In places where the track would be elevated, resources within approximately 0.5 mile of the alignment were included because of the expanded area of potential impacts.

A total of 9 public parks and recreational resources were identified as being within 0.25-0.5 mile of the proposed alignment.

Table 4-1. Section 4(f) Resources: Public Parks and Recreation Areas

No.	Name of Facility	Ownership/Jurisdiction	Size	Amenities	Distance from Corridor
1	Capitol Park (Bambi Lane and Peter Pan Way)	City of San Jose	11.6 acres	Restrooms, BBQ pits, two playgrounds, basketball court, tennis courts, softball field, soccer uses, children's water play feature	0.2 mile
2	Sylvia Cassell Park (Leeward Drive and Leeward Court)	City of San Jose	1.4 acres	BBQ pits, two playgrounds	0.25 mile
3	Hillview Park and Community Center (Adrian Way and Ocala Avenue)	City of San Jose	10.6 acres	Restrooms, BBQ pits, softball field	0.3 mile
4	Lake Cunningham Park (Tully Avenue and White Road)	City of San Jose	202 acres	Picnic areas, sports fields, restrooms, a 50-acre lake, and a marina.	Adjacent (east) to Capitol Expressway
5	Welch Park (Clarice Drive and Huran Drive)	City of San Jose	11.1 acres	Restrooms, BBQ pits, two playgrounds, softball field,	0.6 mile
6	Rainbow Park (Rainbow Drive and Donington Drive)	City of San Jose	9.6 acres	BBQ pits, two playgrounds, children's water play feature, community gardens, other recreational amenities.	0.3 mile
7	Lo Bue Park (Muirfield Drive and Sierra Meadow Drive)	City of San Jose	6.1 acres	BBQ's, playground, ½ basketball court, exercise course	0.25 mile
8	Eastridge Little League Ballfields (within Reid-Hillview Airport)	County of Santa Clara	~3.5 acres	Two baseball fields and one softball field	Adjacent (west) to Capitol Expressway
9	Silver Creek Trail	City of San Jose	0.5 miles	Pedestrian and bicycle access	Adjacent (west) to Capitol Expressway (>0.25 mile)

Source: City of San Jose Parks and Recreation webpage, accessed July 12, 2011. <http://www.sjpark.org/>
 Personal communication with Santa Clara County Roads and Airports Department, Bill Sprouse, July 25, 2011.



Source: Korve Engineering 2003.

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Figure 4-1
Existing Section 4(f) Resources

Historic Sites

For a detailed discussion of historic resources within the APE see *Cultural Resources Section 3.5*.

An inventory of historic and archeological resources located within the study area is shown in Table 4-2. Within portions of the project corridor where at grade is the only vertical profile under consideration, the architectural APE consisted of properties within the Capitol Expressway right-of-way, including new right-of-way to be acquired. Where portions of the properties are to be taken for new right-of-way, generally the whole property was considered to be within the APE. However, on large parcels where the buildings are set back 100 feet or more from the right-of-way, only the area to be acquired was considered within the APE. In these cases, acquired parcels requiring full or partial takes are within the APE, but the land beyond the subject parcels are not within the APE.

CA-SCL-327 is the only known archaeological resource in the Area of Potential Effect (APE). However, two other archaeological sites are located within 0.25 and 1.5 mile of the right-of-way, indicating that the project area is sensitive for the presence of archaeological resources.

A total of 16 historic resources were identified within the APE. Table 4-2 lists and describes these resources.

Table 4-2. Section 4(f) Resources: Historic Sites

No.	Address/Name	Significance	Distance from Project
Historic Architectural Resources			
1	420 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
2	440 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
3	460 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
4	480 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
5	13511 Westboro Drive	Built 1951—not eligible, fair integrity	In project area
6	13510 Westboro Drive	Built 1951—not eligible, fair integrity	In project area
7	500 Capitol Avenue	Built 1951—not eligible, poor integrity	In project area
8	520 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
9	540 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
10	560 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
11	13501 Highwood Drive	Built 1951—not eligible, fair integrity	In project area
12	13500 Highwood Drive	Built 1951—not eligible, fair integrity	Temporary Use

13	620 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
14	640 Capitol Avenue	Built 1951—not eligible, fair integrity	In project area
15	660 Capitol Avenue	Built 1920—not eligible, poor integrity	In project area
Historic Architectural Resources			
16	CA-SC1-327/Capitol Expressway and Tully	Only one in current APE	In project area
Source: Jones & Stokes 2003.			

Section 4.2 Environmental Consequences

APPROACH AND METHODS

The effects of the proposed alternatives on Section 4(f) resources were assessed qualitatively, based upon the prior environmental documents and review of relevant literature. The assessment included evaluation of public park and recreation lands, wildlife and waterfowl refuges, and historic sites located within 0.5 miles of the study area.

Section 4.3 Impacts on Section 4(f) Resources

PUBLIC PARK AND RECREATION RESOURCES

No-Build Alternative

The No-Build Alternative would consist of no action that would result in any direct, temporary, or constructive use of public parks and recreation areas.

Light Rail Alternative

The potential effects of the Light Rail Alternative on public parks and recreation areas are summarized in Table 4-3.

Table 4-3. Impacts on Section 4(f) Resources: Public Parks and Recreation Areas

Name of Facility	Direct Use	Temporary Use	Constructive Use
Capitol Park	No	No	No
Sylvia Cassell Park	No	No	No
Hillview Park and Community Center	No	No	No
Lake Cunningham Park	No	No	No
Robert Welch Park	No	No	No
Frank Silva Athletic Field	No	No	No
Meadowfair Park	No	No	No
Children of the Rainbow Park	No	No	No
LoBue Park	No	No	No
Eastridge Little League Ballfields	No	No	No
Silver Creek Trail	No	No	No

Direct Use

There are three recreational uses that are adjacent to the proposed Light Rail Alternative: Silver Creek Trail, Eastridge Little League Fields, and Lake Cunningham Park. Silver Creek Trail ends approximately 150 feet from the intersection of Ocala Avenue and Capitol Expressway. There is a residence located between the trail and Capitol Expressway. The Eastridge Little League Fields are located less than 100 feet from Capitol Expressway southwest of Cunningham Avenue. Swift Avenue separates the fields from the expressway. Lake Cunningham Park is located 50 feet from Capitol Expressway southeast of Cunningham Avenue. As shown in Appendix E, Sheet 7, Capitol Expressway is separated from the park, which is owned by the City of San Jose, by a county-owned parcel.

The Light Rail Alternative will be operating in the median of Capitol Expressway at each of these locations. Right-of-way acquisition has been minimized through the removal of an HOV lane to accommodate the project. Where the Light Rail passes alongside a recreational use it is contained entirely within the existing transportation right-of-way. Construction would occur mostly within the expressway through lane closures. As a result, the Light Rail Alternative would not permanently incorporate or acquire property on which any of these recreational uses are located.

Temporary Use

As detailed in the construction scenario in Chapter 2, *Alternatives Analysis*, construction staging and equipment laydown areas for the Light Rail Alternative are

expected to be accommodated within vacant airport property between Cunningham Avenue and Tully Road and at Eastridge Transit Center. No temporary construction easement has been identified that would affect public parks and recreation areas. Therefore, no temporary use would result.

Constructive Use

This analysis focuses on the three recreational resources that are nearest to the Capitol Expressway Corridor. It involves identifying the characteristics of those resources that would be sensitive to proximity impacts and an analysis of potential proximity impacts of the Light Rail Alternative.

- **Silver Creek Trail:** This is a pedestrian and bicycle trail along the PG&E transmission corridor (See Figure 3.1-6). It travels mostly through residential neighborhoods and provides a landscaped setting for walking, biking, and other activities that is separate from motor vehicles. While the trail is quiet relative to the surrounding area, it is in an urban environment so ambient noise levels are high. Existing noise levels at the nearest residences to the trail are 67 dBA.

With mitigation, the Light Rail Alternative will be increasing noise levels at the residences adjacent to the trail by 1 dBA or less. This increase in noise level would not be noticeable to trail users and would not have an effect on users of the urban trail.

The Light Rail Alternative will also increase vibration levels at adjacent residences above the FTA vibration criteria for buildings. Given the added distance of the trail from the light rail tracks, the increase in vibration levels is not considered so severe that it would substantially impair the protected activities of the resource. Users of the trail would generally be involved in active recreation such as walking and biking and would not be sensitive to vibration of passing light rail vehicles.

- **Eastridge Little League Fields:** As a highly active use, this resource would be less sensitive to proximity impacts from the Light Rail Alternative, such as noise, vibration, or visual impacts. Existing noise levels at the nearest residences to the fields are estimated to be 65 dBA. The Light Rail Alternative would increase noise levels less than 1 dbA.

Estimated vibration levels would be less than the FTA criteria for buildings. As a result, the increase in noise and vibration levels would not create the potential for impacts and therefore would not impair the protected activities of the resource.

- **Lake Cunningham Park:** Raging Waters Water Park is the closest feature of the park to the Light Rail Alternative with rides, such as the “Bombs Away”, “Barracudda Blaster”, and “Wave Pool” located approximately 350 feet from the expressway. A berm that varies in height from 8 feet to 16 feet separates the expressway from Lake Cunningham Park. As a highly active use which is visually separated by a berm, this resource would have very low sensitivity to proximity impacts, such as noise, vibration, or visual impacts.

The Light Rail Alternative will be replacing electrical transmission towers with taller tubular steel poles (TSP) and relocating them from the median to the east side of the expressway (see Figure 3.15-2) closer to Lake Cunningham Park. Raging Waters Water Park is the recreational feature nearest the relocated TSP. The relocated TSP would not change the visual quality of the area adjacent to the park and would not block any scenic vistas to or from the park. The relocated TSP would be consistent with the existing visual setting and would not introduce a feature that would affect the use or enjoyment of the active recreational features of the water park.

HISTORIC SITES

None of the architectural historic resources identified in the APE is considered to be eligible for the NRHP; therefore, no impacts would result.

There are no previously recorded cultural resources in the APE for the Capitol Expressway Corridor.

However, one prehistoric archaeological site, CA-SCI-327, is recorded near the intersection of Quimby Road and Capitol Expressway, about ¼-mile from the Eastridge Station. Two additional prehistoric archaeological sites, CA-SCI-251 and CA-SCI-778, are recorded within a mile of the right-of-way, which suggests that the project area is moderately sensitive for the presence of archaeological resources, and therefore, there is a possibility of discovering cultural materials during subsurface excavation and construction activities. As discussed in Section 3.5, *Cultural Resources*, implementation of the standard practice if resources are encountered would minimize these effects.

Section 4.4 Avoidance Alternatives

Because no Section 4(f) impacts have been identified, no avoidance alternatives have been considered. A discussion of the project alternatives considered is provided in Chapter 2, *Alternatives Analysis*, of this document.

Section 4.5 Measures to Minimize Harm

Because there is no Section 4(f) use or de minimis use, all possible planning to minimize harm is not required. As part of its overall outreach program, VTA will continue consultation with agencies and individuals having responsibility over Section 4(f) resources.

Section 4.6 Consultation and Coordination

The City and County have participated in the planning and environmental process for the Light Rail Alternative most recently during the scoping process in September 2009.

Section 4.7 Determination

Based on the foregoing analysis, FTA will make a final determination about whether there is a direct, temporary, or constructive use of section 4(f) resources. Even without Section 4(f) use, consultations and coordination will continue with the City and County to ensure that all possible planning has been undertaken to minimize harm to Section 4(f) resources in the vicinity of the proposed project.

Section 4.8 Section 6(f)(3) Considerations

Section 6(f)(3) of the Land and Water Conservation Fund Act (LWCF Act) (16 USC 4601-4) contains strong provisions to protect federal investments in park and recreation resources and the quality of those assisted resources. The law is firm but flexible. It recognizes the likelihood that changes in land use or development may make some assisted areas obsolete over time, particularly in rapidly changing urban areas. At the same time, the law discourages casual “discards” of park and recreation facilities by ensuring that changes or “conversion from recreation use” will bear a cost that assures taxpayers that investments in park and recreation areas will not be squandered. The LWCF Act contains a clear provision to protect grant-assisted areas from conversion:

SEC. 6(f)(3): No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions he deem necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

This requirement applies to all parks and other sites that have been the subject of LWCF grants of any type, whether for acquisition of parkland, development or rehabilitation facilities. Because there would be no public park or recreation areas acquired for the proposed action, no LWCF-funded property in the area would be affected.