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THE FAA TARNISHES A NATIONAL PARK—*FRIENDS OF GATEWAY V. SLATER*: THE SECOND CIRCUIT IGNORES CONGRESSIONAL INTENT AND CONTRADICTS ITS OWN HOLDING IN *NATURAL RESOURCES DEFENSE COUNCIL, INC. V. MARSH*

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IN 1999, THE Federal Aviation Administration (“FAA”) authorized installation of a Terminal Doppler Weather Radar System (“Radar Tower”) on federal land located at Floyd Bennett Field, an air station situated within the Gateway National Recreation Area (“Gateway”).¹ In *Friends of Gateway*, petitioners argued that the Gateway National Recreation Area Act of 1972² (the “Gateway Act”) restricted the FAA from building the Radar Tower on Gateway land at Floyd Bennett Field.³ The FAA disputed that the Gateway Act did not limit the FAA’s use of its own land.⁴ Applying flawed reasoning, the Second Circuit held that the Gateway Act did not prevent the FAA from installing the Radar Tower at Floyd Bennett Field.⁵ The Second Circuit never considered a crucial issue: whether the FAA properly acquired the land, and, therefore, whether it had a right to use such land.

In 1972, Congress approved the creation of Gateway, a new national seashore within the states of New York and New Jersey.⁶ Congress undertook this project after recognizing that the majority of United States national parks, seashores, and recreation areas were located in distant parts of the country not typically

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¹ See *Friends of Gateway v. Slater*, 257 F.3d 74, 75 (2d Cir. 2001).

² 16 U.S.C. § 460cc (1994).

³ *Friends of Gateway*, 257 F.3d at 75 (citing 16 U.S.C. §§ 460cc to 460cc-4 (1972)).

⁴ *Id.*

⁵ *Id.* at 83.

⁶ See *Natural Res. Def. Council, Inc. v. Marsh*, 836 F.2d 87, 88 (2d Cir. 1987).

accessible to the majority of the population.⁷ As an extension of the national park system, Gateway became the first federal recreation park located within an urban development, providing 26,172 acres of priceless land and water to over 20 million people within two hours of travel time.⁸ This national recreation park offers millions of people the only opportunity they might ever have to visit truly significant wildlife sanctuaries, or enjoy meaningful outdoor recreation and oceanfront beaches.⁹

House Report 92 supported the transfer of all federal lands within Gateway to the Secretary of the Interior.¹⁰ The military, however, was still using some of the land included in the transfer.¹¹ Congress, made it clear they would not interfere with the military's use of such property as long as the lands were "reasonably required to fulfill the mission assigned to them."¹² The Secretary of the Interior would allow the military to continue using essential land "subject to the terms agreed upon between him and the head of the agency previously having jurisdiction over the property."¹³ If any of the military controlled land was suitable for recreation and was not needed by the controlling agency, then the land "should be developed and opened to the public as soon as is reasonably possible."¹⁴ The Secretary of the Interior was not to permit any "expansion or installation of new facilities," unless such facility was "essential to the national interest."¹⁵ All military controlled lands would be transferred to the Department of the Interior once they were "no longer needed for Coast Guard or Defense purposes."¹⁶

Floyd Bennett Field is located within the former Naval Air Station, Brooklyn, New York.¹⁷ The Department of Defense (the "DOD") decided to inactivate the Air Station by March 1970.¹⁸ The DOD allowed the Department of the Navy to retain control

⁷ H.R. REP. NO. 92-1392 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4882, 4883-84.

⁸ *Id.* at 4884.

⁹ *See id.* at 4883-84.

¹⁰ Congress recognized the existence of federal lands being used for military purposes within Gateway. However, Congress provided that "title to all Federal lands within the recreation area shall be transferred to the Secretary of the Interior." *Id.* at 4889.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 4896.

¹⁷ *Id.* at 4904.

¹⁸ *Id.*

of 96 acres of land on which a Naval Air Reserve Training Center and other military facilities were located.¹⁹ Another 107 acres were transferred to the United States Coast Guard, which conducted air-sea rescue operations in the area.²⁰ Since 1967 the Coast Guard has been under the authority of the Department of Transportation (“DOT”).²¹ Once the Naval Air Station was inactivated, the Coast Guard facility remained operational under DOT jurisdiction.²² In 1997, the DOT reassigned 1.8 acres of Coast Guard land to the FAA, an agency also under DOT control.²³ The FAA decided to use these 1.8 acres as the site for the proposed Radar Tower.²⁴

Friends of Gateway petitioned the Second Circuit to review a FAA order approving construction of the Radar Tower at Floyd Bennett Field.²⁵ Friends of Gateway argued that the FAA’s order to erect the Radar Tower was a violation of 16 U.S.C. § 460cc-2(e), providing:

The authority of the Secretary of Transportation to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with the establishment, maintenance, and operation of airway facilities: Provided, That nothing in this section shall authorize the expansion of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field.²⁶

¹⁹ *Id.* at 4904-05.

²⁰ *Id.* at 4905.

²¹ *Friends of Gateway*, 257 F.3d at 75.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 76.

²⁵ The United States Court of Appeals has exclusive jurisdiction over an FAA decision in an order issued by the Secretary of Transportation if the person filing the petition has a substantial interest in the order. 49 U.S.C. § 46110(a) (1994). The interested person must reside or have a principal place of business within the Circuit where the claim arises. The statute of limitations for such petition is 60 days from issuing of the order. The Court may affirm, amend, modify, or set aside any part of the order. *Id.* The Court accepted jurisdiction after reviewing petitioners’ allegations of standing; petitioners repeatedly used areas affected by construction of the Radar Tower; use would be affected by the construction of the Radar Tower; and petitioners had a concern in preserving their use of the land. *Friends of Gateway*, 257 F.3d at 78.

²⁶ 16 U.S.C. § 460cc-2(e) (1994).

The court agreed that the land claimed by the FAA was within the physical boundaries established by 16 U.S.C. § 460cc.²⁷ The court, however, concluded that the Department of the Interior had not yet acquired control over this land in accordance with 16 U.S.C. § 460cc-1.²⁸ Judge Fred Parker, writing for a 2-1 majority, stated that the lands in question were not under administrative control of the Department of Interior, and, therefore, “§ 460cc-2 does not apply to [the FAA’s] use of that property.”²⁹

The court also relies on the differences between the Gateway Act and the Golden Gate National Recreation Area Act of 1972³⁰ (the “Golden Gate Act”) to reach its decision.³¹ The court explains that the Golden Gate Act expressly “provided for . . . automatic transfer of most federal lands within the boundaries of Golden Gate.”³² House Report 1391 states that under the Golden Gate Act:

Federal title to all of these lands would shift to the administrative jurisdiction of the Secretary of the Interior, but he is required to permit the continued use and occupancy of those areas which are essential to the national defense as long as necessary. This action will assure the availability of non-essential military holdings for public use and enjoyment and will guarantee their preservation in their present relatively natural condition.³³

According to the court, the Golden Gate Act automatically transferred jurisdiction to the Secretary of the Interior, whereas the Gateway Act did not.³⁴ On the contrary, closer examination of the Golden Gate Hearing Reports and the Gateway Hearing Reports shows that Congress intended to transfer administrative jurisdiction of Gateway to the Secretary of the Interior in the

²⁷ This section establishes the composition and physical boundaries of the entire recreation area. The Jamaica Bay Unit comprises “all [lands] in Jamaica Bay, Floyd Bennett Field, the lands . . . between highway route 27A and Jamaica Bay, and the area of Jamaica Bay up to the shoreline of John F. Kennedy International Airport.” 16 U.S.C. § 460cc (1994).

²⁸ The court explained that the land in question was within the “boundaries” of Gateway but had not been acquired by the Department of the Interior as prescribed by 16 U.S.C. §§ 460cc-1(a) to 460cc-1(b). This land was, therefore, not “part” of Gateway and “not subject to ‘administration’ pursuant to § 460cc-2.” *Friends of Gateway*, 257 F.3d at 80 (citing 16 U.S.C. §§ 460cc-1(a) to 460cc-1(b) (1994)).

²⁹ *Friends of Gateway*, 257 F.3d at 80.

³⁰ 16 U.S.C. § 460bb (1994).

³¹ *Friends of Gateway*, 257 F.3d at 80.

³² *Id.*

³³ H.R. REP. NO. 92-1391 (1972), reprinted in 1972 U.S.C.C.A.N. 4850, 4857.

³⁴ *Friends of Gateway*, 257 F.3d at 80.

same way as it transferred administrative jurisdiction of Golden Gate Park.³⁵ Gateway land under federal agency control is, therefore, part of the recreation area, even if not under the direct administrative control of the Secretary of the Interior. The DOT is restricted to using this land consistently with the purpose of the Gateway Act.³⁶ Any new facilities are to be approved first by the Secretary of the Interior concurrently with the Secretary of Transportation; furthermore, neither Secretary can approve the expansion of air facilities into this land, as it is not consistent with preservation of the land's natural state.³⁷

The court also relies on *Natural Resources Defense Council, Inc. v. Marsh*³⁸ to explain that the Gateway Act "imposes no limitations on the [Department of Transportation's] intervening use of its own property."³⁹ In *Marsh*, the Court correctly allowed the assignment of Gateway land from the United States Army to the United States Navy without approval from the Secretary of the Interior.⁴⁰ The House Committee on Interior and Insular Affairs proposed the original Gateway Act.⁴¹ It provided the Secretary of the Interior with sweeping control over Gateway land.⁴² The Secretary of the Interior would receive immediate assignment of all Gateway land "subject to the continuation of such existing uses as may be permitted by the Secretary for such reasonable periods as may be agreed upon with the head of the agency formerly having jurisdiction over the property."⁴³ The provision was inconsistent with House Armed Services Committee authority to assign property within the several departments under control of the Department of Defense.⁴⁴ All United States military branches are under the control of the Department of Defense due to the need for close coordination of air, land, and sea forces.⁴⁵ The Armed Forces Committee requested

³⁵ Congress will not interfere with the existing use of recreation area land under military control as long as it is needed to fulfill a present military mission, however, "title to all Federal lands within the recreation area shall be transferred to the Secretary of the Interior." 1972 U.S.C.C.A.N. at 4889.

³⁶ 16 U.S.C. § 460cc-2(e).

³⁷ *Id.*

³⁸ *Natural Res. Def. Council, Inc. v. Marsh*, 836 F.2d 87 (2d Cir. 1987).

³⁹ *Friends of Gateway*, 257 F.3d at 79-83.

⁴⁰ *See Marsh*, 836 F.2d at 90-91.

⁴¹ *Id.* at 90.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 89.

that any land should be considered of excess to the military, and therefore assignable to the control of the Department of Interior only when no branch of the Armed Forces had any essential use for the land.⁴⁶ Consequently, Congress inserted § 460cc-1(b) as an amendment.⁴⁷ Section 460cc-1(b) requires Department of Defense approval before any federal land under its control can revert back to the Department of the Interior.⁴⁸

In *Friends of Gateway* there is no such need for close coordination between branches of the Armed Forces. In 1936, the Department of the Navy established the Coast Guard and kept it under Navy jurisdiction.⁴⁹ In 1967, the Coast Guard was reassigned to the Department of Transportation.⁵⁰ By 1998, the Department of Transportation assigned all but 1.8 acres of the Coast Guard land to the Department of the Interior.⁵¹ The 1.8 acres were assigned to the FAA.⁵² It is questionable that the DOT had authority to assign any land to the FAA. This land was to remain under DOT control as long as “[it was] reasonably required to fulfill the mission assigned to them.”⁵³ The Secretary of the Interior would allow the Coast Guard to use the land “subject to the terms agreed upon between him and the head of the agency previously having jurisdiction over the property.”⁵⁴ If any of the Coast Guard land was suitable for recreation and was not needed by the controlling agency, then the land “should be developed and opened to the public as soon as is reasonably possible.”⁵⁵ The Secretary of the Interior was not to permit any “expansion or installation of new facilities” unless such facility was “essential to the national interest.”⁵⁶ The land in question was to revert to the Department of the Interior the moment the Coast Guard Air Station ceased to use it for its intended mission.

⁴⁶ “[W]henver any special service of the Department of Defense no longer has use for an area, then it is offered to another service in the Defense first.” *Id.* at 90-91.

⁴⁷ “With the concurrence of the agency having custody thereof, any Federal property within the boundaries of the recreation area may be transferred, without consideration, to the administrative jurisdiction of the Secretary for administration as a part of the recreation area.” 16 U.S.C. § 460cc-1(b) (1994).

⁴⁸ *Id.*

⁴⁹ *Friends of Gateway*, 257 F.3d at 75.

⁵⁰ *Id.*

⁵¹ *Id.* at 75-76.

⁵² *Id.*

⁵³ 1972 U.S.C.C.A.N. at 4889.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

The FAA was not properly assigned this land, and therefore the Radar Tower cannot be built without violating the Gateway Act.

The DOT violated the Gateway Act by transferring excess land to the FAA without concurrent approval from the Secretary of the Interior. The FAA was required to seek DOI approval before installing any new facilities within Gateway land. Building a Radar Tower on recreation land is not consistent with the established purpose of Gateway. Even with DOT and DOI approval, it is questionable that the FAA could install a Radar Tower in Gateway land. The proviso in § 460cc-2(e) clearly prohibits expansion of air facilities into Floyd Bennett Field.⁵⁷

If followed by other Circuits, the *Friends of Gateway* decision could potentially harm numerous United States national parks. The legislative history behind the creation of Gateway and Golden Gate National Recreation Areas shows intent to create natural recreation environments for the population to enjoy without encroachment from any type of federal agency development. Allowing the FAA to build the Radar Tower sets the stage for more land intrusion by agencies presently controlling land situated within national recreation areas. Federal agencies such as the FAA will be able to prevent this land from being used for its designated purpose. If the DOT finds that one of its agencies no longer has a need for land, all it has to do is look for another one of its agencies to use it for one of its objectives. Such land, consequently, might never return to the people.

⁵⁷ An air facility may fall under the definition of "air navigation facility." It can be defined similarly as "a facility used. . .in aid of air navigation, including. . .apparatus or equipment for distributing weather information." *Friends of Gateway*, 257 F.3d at 88 (Cardamone, J., dissenting) (citing 49 U.S.C. § 40102(a)(4) (1994)); see also 16 U.S.C. § 460cc-2(e).

