

LBA/LBWID Liability Regarding the Dam & Parcel 165

Frequently Asked Questions

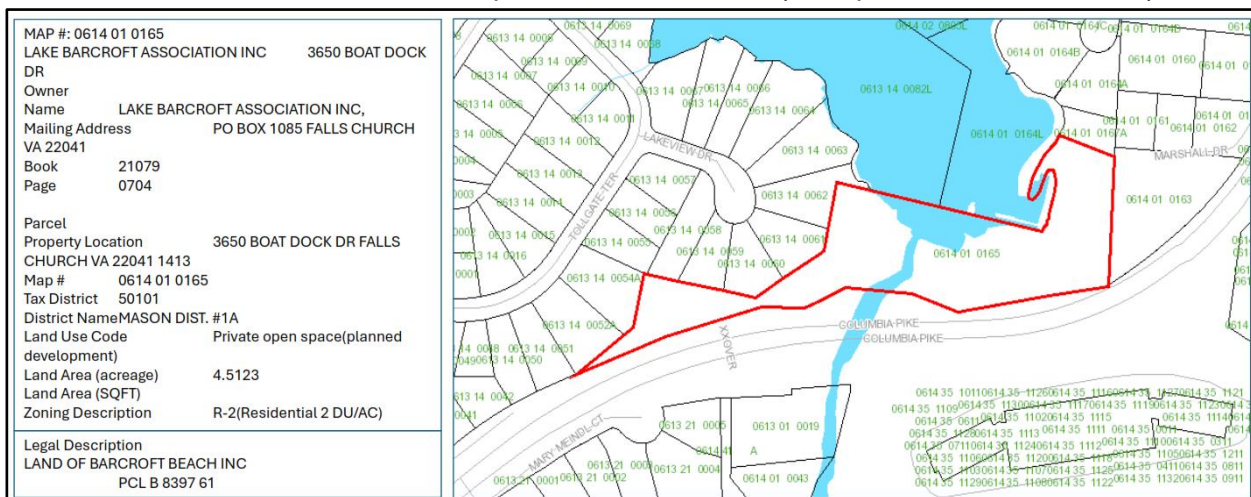
(9/10/2024)

1. Currently, who holds title to Lake Barcroft Dam and the land on which it is situated?

Answer: The Lake Barcroft Association (LBA) holds title to Parcel 165 and the Dam.

2. Which land parcel is Lake Barcroft Dam and the Lake Barcroft Watershed Improvement District (LBWID) Compound situated on?

Answer: Below is a map and description of the land (Parcel 165, also known as Parcel B) that the Lake Barcroft Dam and LBWID Compound is situated on (land parcel outlined in red).



3. Does the LBWID have any legal rights to Lake Barcroft Dam and Parcel 165?

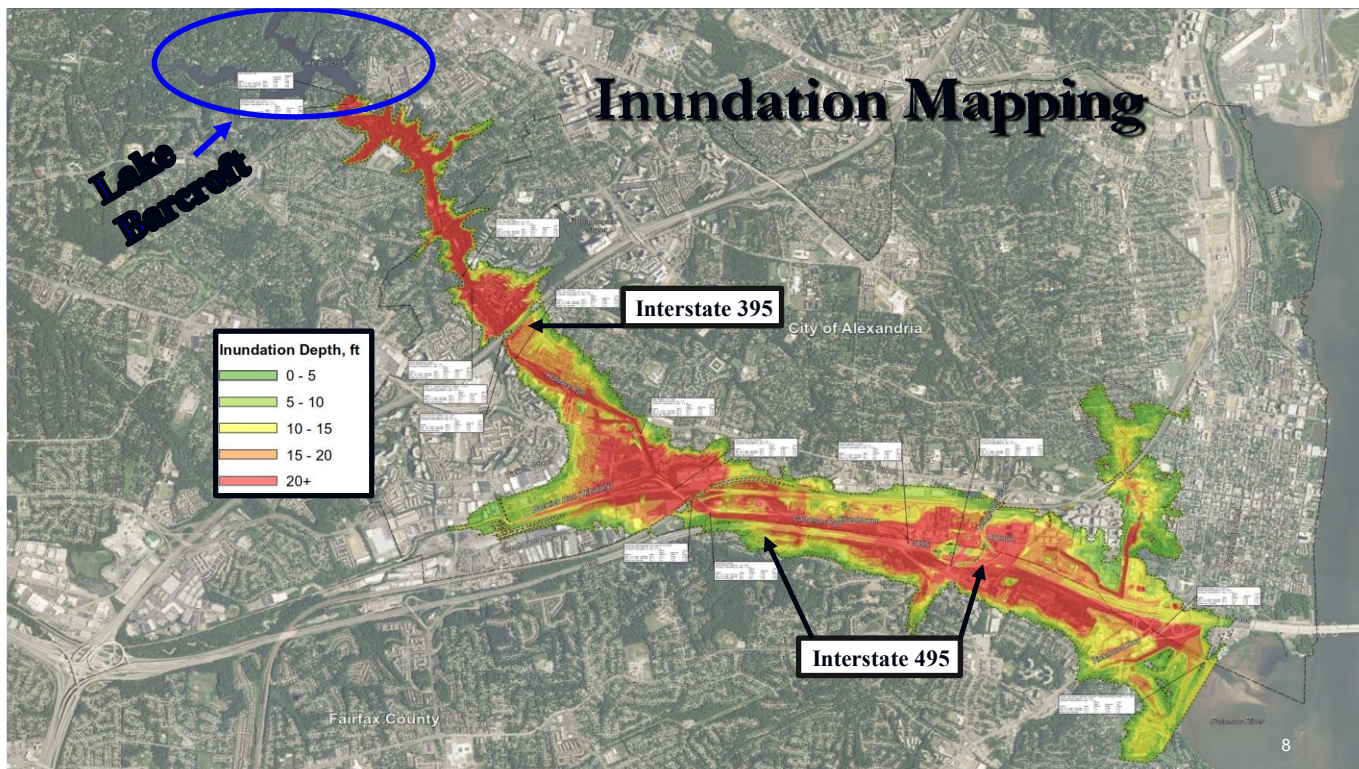
Answer: Yes, LBWID has the right to use and occupy Parcel 165 in order operate and maintain the Lake Barcroft Dam pursuant to a contract between LBA and LBWID and a recorded easement that was established in 1973.

4. What entity has the right to make all determinations relative to the operation, maintenance, repair, inspection, and testing of the Lake Barcroft Dam?

Answer: In the 1973 contract, the LBA agreed that the "WID (LBWID) shall have the sole right to make all determinations relative to the operation, maintenance, repair, inspection, and testing of the Lake Barcroft Dam where such determinations are reasonably related, in the sole determination of the WID, to its soil and water conservation functions and duties under the WID Act."

5. What is the extent of potential liability if the Dam were to fail, and downstream flooding resulted?

Answer: That is hard to predict, but more than 5,000 residential and commercial properties are located downstream of the Dam in the “inundation zone,” which is the area that could be affected by catastrophic flooding. These properties extend from Columbia Pike all the way to the Potomac River, as shown on the map below.



6. Does the LBA have potential liability risks that are associated with land on which the Lake Barcroft Dam and the LBWID Compound is situated?

Answer: Yes, as title holder to the land, the LBA could be sued for injury or damage claims. Examples: Flooding occurs and property is damaged, or someone is injured within the inundation zone; someone is injured while on Parcel 165.

7. Does the LBA have liability insurance that covers the land on which the Lake Barcroft Dam and the LBWID Compound are situated (Parcel 165)?

Answer: Yes, but per LBA's insurance policy, liability insurance is "subject to a policy exclusion for any and all exposures relating to the Dam." The LBA's liability insurance provides no coverage for damages or injuries that are caused by the Dam, the operation of the Dam, or any failures of the Dam.

8. Does the LBA have potential liability risks associated with the maintenance and operation of the Lake Barcroft Dam?

Answer: As owner (fee simple title holder) of Parcel 165, which includes the Dam, the LBA could be sued.

9. Does the LBA have liability insurance that covers the Lake Barcroft Dam?

Answer: The LBA's comprehensive general liability insurance policy covers all LBA common properties (Lake, lakebed, beaches, etc.) but contains an exclusion clause for any and all exposure relating to the Dam, therefore the LBA itself does not have liability insurance for the Dam. However, LBWID does have liability insurance which could provide limited coverage of the LBA. The LBWID insurance policy would only cover the LBA if the LBWID were named and remained in a lawsuit. According to LBWID's insurer, the LBWID's insurance policy would not cover the LBA if the LBWID was not named in a lawsuit or if LBWID was dismissed from the lawsuit. The amount of insurance that the LBWID and LBA might share is limited to \$5 million.

10. Can the LBA purchase its own insurance policy for liability of the Lake Barcroft Dam?

Answer: The LBA cannot purchase liability insurance for the Dam at this time. Until 3 years ago the LBA did have its own liability insurance that did not specifically exclude dam-related exposures, however the LBA's insurance provider would no longer renew the policy. The LBA has inquired about getting liability insurance coverage for the Dam from other providers, however, those other companies have declined coverage.

11. Does LBWID have potential risks of being sued in connection with its maintenance and operation of the Lake Barcroft Dam?

Answer: Yes, as the operator of the Lake Barcroft Dam the LBWID might be sued if damage to property or injuries to persons resulted from the operation, maintenance, or repair of the Lake Barcroft Dam.

12. Does LBWID have liability insurance that covers the Lake Barcroft Dam and land on which the Dam is situated?

Answer: Yes, LBWID has a \$5 million liability policy. LBA is included as an additional insured under the LBWID's policy, but only to the extent that LBWID is also named as a defendant and remained in a lawsuit. According to LBWID insurer the LBWID's insurance policy would not cover the LBA if the LBWID was not named or if LBWID was dismissed from the lawsuit.

13. Can that policy limit be raised and why was it set at \$5 million?

Answer: No. LBWID's insurance is from a State municipal program that sets the limit of coverage at \$5 million.

14. Does LBWID have other means of defense for liability claims associated with the Lake Barcroft Dam?

Answer: The LBWID, as a government entity (officially a "Political Subdivision of the Commonwealth of Virginia") possesses additional protections from liability via sovereign immunity.

15. What protection does sovereign immunity provide to LBWID?

Answer: Sovereign immunity protects LBWID, its Trustees, and employees from liability that results from acts or omissions, including negligent acts or omissions, that are within the scope of the LBWID's responsibilities, are "governmental" in nature, and not simple breaches of a contract.

Example: If the gates on the Dam failed to close sufficiently due to a mechanical failure or operator negligence and downstream properties were flooded, sovereign immunity would be asserted to protect the LBWID from liability. In contrast, because LBA is a private entity, it has no sovereign immunity to assert to shield it from liability.

16. Is LBA afforded any liability protections via LBWID's sovereign immunity defense?

Answer: No, as a private (non-public) entity, the LBA would not qualify for any protection via LBWID's sovereign immunity.

17. If a settlement was entered into or an award was made by a court against the LBWID to someone who claimed injury or damages, how would that settlement or judgment be satisfied?

Answer: Because of the LBWID's sovereign immunity, it is likely that any claim against the LBWID would be dismissed by the courts. However, if the claim was not dismissed, LBWID's liability insurance would cover defense costs and a settlement or an award up to the \$5 million insurance coverage that LBWID has. If the amount was more than \$5 million, the LBWID would have to pay the excess out of its reserve funds or borrow via bonds. Because the LBWID is a political subdivision of the State, it is also possible that a special governmental appropriation could be lobbied for and enacted to satisfy the excess. Importantly, because the LBWID is not the title owner of the Lake or the LBA common grounds such as the beaches, these LBA assets could not be sold to satisfy the settlement or judgment solely against the LBWID, and the basic structure of the Lake Barcroft community would be preserved as it exists today.

18. How would LBA satisfy any liabilities relating to damage caused by the Dam, to the extent not covered by LBWID's policy?

Answer: If the defense costs and settlement or judgment amount exceeded \$5 million, (or if LBWID is not named in or does not remain in the lawsuit) the LBA may be solely responsible. In that case, LBA's assets (reserve funds, properties owned) would be at risk, and/or LBA might have to impose a special assessment on LBA homeowners, and/or raise membership dues.

19. Would LBA members (Lake Barcroft property owners) have any direct risk of liability associated with the Lake Barcroft Dam or the land it is situated on?

Answer: Because LBA is a separate legal entity from its member households and its member households are not the legal owner of the Dam or Parcel 165, the LBA members (Lake Barcroft property owners) should not have any direct liability for exposures involving the Lake Barcroft Dam or the land it is situated on.

20. What is the most effective step that can be taken to reduce or eliminate LBA's potential liability risk associated with the operation, maintenance and repair of Lake Barcroft Dam and Parcel 165 (the land on which the Dam is located), and to preserve the basic structure of the Lake Barcroft community as it exists today?

Answer: The Lake Barcroft Association Board of Directors and the Lake Barcroft Watershed Improvement District Trustees believe that the most effective step is for LBA to transfer its ownership of Parcel 165 and the Dam to the LBWID. This would be done by transferring the legal fee simple title of Parcel 165 and the Dam to LBWID and recording that deed in Fairfax County's land records. After this transfer, because the LBA would no longer be the owner of Parcel 165 or the Dam, it would not be a proper defendant in any lawsuit alleging injuries or property damage occurring on that parcel or from the operation, maintenance and repair of the Dam, i.e., it should be dismissed from any such lawsuit.

21. Why should title be transferred to LBWID versus some other entity?

Answer: As a political subdivision of the State, the LBWID is uniquely protected from liability due to its sovereign immunity defense. In addition, since its establishment in 1973 (51 years ago) the LBWID has been the sole entity that has managed the operation, maintenance, and repair of the Lake Barcroft Dam. Also, during those 51 years, the LBWID has possessed almost exclusive use and maintenance of the land that the Dam has been situated on. In addition to the Dam, the LBWID's office and maintenance facilities are located on the land.

22. Can LBA transfer title to the Dam, but not the land it is situated on?

Answer: Yes, but that would not lessen LBA's current exposure, because if LBA still owns the land they could still have responsibility for the activities that the land is being used for (including the operation of the Dam). This is very similar to the responsibilities that a landlord would have for a rental property they own. Examples: Flooding occurs and property is damaged, or someone is injured within the inundation zone; someone is injured while on Parcel 165.

23. If LBA were to transfer title of the Dam and the land it is situated on to the LBWID, would the relationship of the LBA, LBWID, and residents of the Lake Barcroft Community change?

Answer: No, the relationships between the LBA, LBWID, and the residents of the Lake Barcroft community would not change. Since 1973 LBWID has had sole authority over the maintenance and operation of the Lake Barcroft Dam and has financed the maintenance and operation of the Dam via the LBWID tax. LBWID would continue carrying out those responsibilities.

The LBA would maintain ownership of the Lakebed and the common grounds (beaches etc.) and would continue to have controlling authority over their recreational uses. The LBWID would continue performing its soil and water conservation duties of Lake Barcroft and the common grounds (dredging, debris removal, erosion control, etc.) via the contract and recorded easement that was established in 1973 and the responsibilities of Watershed Improvement Districts.

The three LBWID Trustees would still be required to be property owners in the Lake Barcroft community, and as they have for the past 51 years, they would continue representing the interest of all Lake Barcroft property owners. When LBWID Trustees vacancies arise, the LBA President and Vice President are involved with selecting a candidate/nominee to present to the Northern Virginia Soil and Water Conservation Board and the Virginia Soil and Water Conservation Board for approval.

24. Does the LBA Board of Directors have the authority to dispose of or sell land it owns without a vote of membership?

Answer: No, the LBA Board of Directors is required to take a vote of its membership to authorize the sale of land it owns, or to transfer its ownership. Such a conveyance must be accomplished pursuant to Article V, Section K of the Association's Bylaws, which permits the Association's Board of Directors to "sell, exchange, or otherwise dispose of real property" belonging to the Association if authorized by an affirmative vote of a majority of the Association's membership in attendance at a membership meeting.

25. What has changed and why is it important now to transfer ownership of the Dam and Parcel 165 to LBWID?

Answer: The most significant change in the last few years is the LBA's inability to acquire liability insurance that covers exposures related to the Dam. The other significant change is the major

construction project – the dam embankment armoring project – that is currently being planned (https://lakebarcroftwid.com/?page_id=496). This construction is being done because the Dam is required by the Commonwealth of Virginia to meet new, more stringent design standards. By transferring Parcel 165 and the Dam to the LBWID, the LBA would separate itself from the risk that is inherent with such a large-scale construction project. In addition, LBWID is pursuing governmental sources of funding for the armoring project, and LBWID owning the Dam and Parcel 165 would simplify, facilitate, and improve the likelihood for such funding.

26. If LBA transferred ownership to LBWID, what would happen to the Dam and land it is situated on if the LBWID were dissolved, terminated, or otherwise ceased to exist?

Answer: The recorded deed that transfers Parcel 165 and the Dam to LBWID would include a “reversion clause” that automatically reverts ownership of the Dam and that land back to LBA if the LBWID were to be dissolved, terminated, or otherwise ceased to exist.

27. Who would finance and manage the maintenance and operation of the Dam if the LBWID were dissolved, terminated, or otherwise ceased to exist?

Answer: Prior to any final dissolution or termination of the LBWID, the LBA and Northern Virginia Soil and Water Conservation District would have to identify and agree on another entity that has the financial means, expertise, and willingness to take on the responsibilities that LBWID has.

28. Has the LBA and the LBWID had their legal counsel review and provide guidance on the matter?

Answer: Yes, both the LBA and LBWID have had their own legal counsels independently review a proposed conveyance of Parcel 165. Both the LBA’s and LBWID’s legal counsel independently concur with the recommendation of the LBA Board of Directors and LBWID Board of Trustees to transfer ownership of Parcel 165 and the Dam.