

TRANSPORTATION PLANNING MUST MITIGATE PARK IMPACTS

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In light of ongoing calls for increased federal spending on infrastructure projects, the park and recreation field should be familiar with the regulations and administrative process associated with Section 4(f). As illustrated by the case study described herein, Section 4(f) plays an integral role in the overall environmental review process when a federally funded transportation project impacts public park and recreation properties.

(SEE: <https://www.environment.fhwa.dot.gov/4f/index.asp>)

Pursuant to Section 4(f) of the Transportation Act, 49 U.S.C. § 303(c), when a federally funded transportation project requires the use of publicly owned park or recreation land, the Secretary of Transportation must determine that "there is no prudent and feasible alternative to using that land." If there is no "prudent and feasible alternative" to using public park and recreation land, the Secretary must ensure that the project includes "all possible planning to minimize harm" resulting from use of the land for a transportation project.

A park avoidance alternative is not feasible if it "cannot be built as a matter of sound engineering judgment." A park avoidance alternative would be considered "not prudent" if it is "unreasonable to proceed with the project in light of its stated purpose and need," or it "results in unacceptable safety or operational problems." After "reasonable mitigation," a project would be considered "not prudent" if it still caused any of the following:

- (A) Severe social, economic, or environmental impacts;
- (B) Severe disruption to established communities;
- (C) Severe disproportionate impacts to minority or low income populations; or
- (D) Severe impacts to environmental resources protected under other Federal statutes

MINIMIZE ADVERSE IMPACTS

Reasonable measures identified in the [Section 4\(f\)](#) evaluation to minimize harm or mitigate for adverse impacts and effects on public parks and recreation lands could include the following: "design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways."

To evaluate the reasonableness of possible remedial measures to effect the "least possible harm" to public parks and recreation lands, Section 4(f) regulations require the Secretary to balance the following factors:

- (i) The ability to mitigate adverse impacts to each [Section 4\(f\)](#) property (including any measures that result in benefits to the property);
- (ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each [Section 4\(f\)](#) property for

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protection;

(iii) The relative significance of each [Section 4\(f\)](#) property;

(iv) The views of the official(s) with jurisdiction over each [Section 4\(f\)](#) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by [Section 4\(f\)](#); and

(vii) Substantial differences in costs among the alternatives.

23 C.F.R. § 774.3(c)(1).

The regulatory intent of such balancing is to total "the harm caused by each alternate route to [section 4\(f\)](#) areas" and select "the option which does the least harm." That being said, the Secretary is "free to choose among alternatives which cause substantially equal damage to parks or historic sites."

SUPREME COURT PRECEDENT

In the landmark case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court of the United States recognized that the language of [Section 4\(f\)](#) is "a plain and explicit bar to the use of federal funds for construction of highways through parks -- only the most unusual situations are exempted."

As characterized by the Supreme Court, [Section 4\(f\)](#) was "Congress's response to growing public concern over the preservation of our nation's parklands, recreation areas, wildlife and waterfowl refuges, and historic sites." Accordingly, Congress provided "clear and specific directives" for the construction of federally funded roads and highways through public lands to ensure "paramount consideration" be given to land protected by [Section 4\(f\)](#).

Given economic realities, Congress had recognized the political vulnerability of public parkland and the need to enact "so high a bar" in [Section 4\(f\)](#) to preserve these lands:

In most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. There will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business.

BRIDGE PROJECT 4(f) CASE STUDY

In the case of *Conservation Alliance of St. Lucie County, Inc. v. U.S. Department of Transportation*, 2017 U.S. App. LEXIS 1922 (11th Cir. 2/3/2017), environmental groups challenged the Secretary of Transportation's decision to approve a [planned path for a new bridge](#) spanning the North Fork St. Lucie River (NFSLR). The proposed bridge project would impact three properties protected under [Section 4\(f\)](#) - the North Fork St. Lucie River Aquatic Preserve

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(AP), the Savannas Preserve State Park (SPSP), and Kiwanis Park.

Plaintiff Conservation Alliance of St. Lucie County is a nonprofit corporation whose mission is "to protect the water, soil, air, native flora and fauna upon which all the Earth's creatures depend on for survival." Many of its members regularly visit the Halpatiokee Trail to hike, sightsee, and take pictures.

DISTRICT COURT COMPLAINT

In its complaint, Conservation Alliance claimed the United States Department of Transportation (DOT) through the Federal Highway Administration (FHWA) had violated Section 4(f) by failing to identify and adopt as "feasible and prudent" a bridge project alternative which would "completely avoid the use" of [Section 4\(f\)](#) properties.

The avoidance alternative preferred by the Conservation Alliance (Alternative 6A) would have involved "spliced-beam support structures" for the proposed bridge. Spliced-beam construction uses multiple prestressed concrete beams to span longer lengths.

The FHWA had rejected this alternative because "the amount of land used for spliced beam support structures would be far greater than pile bent support structures, causing harm to neighboring wetland habitats." Spliced-beam construction does not require piers in the riverbed but would require placing footings in the wetlands on the banks of the river that are fifteen times greater than the supports required for pile-bent construction.

For this particular bridge project, FHWA had concluded pile bent support structures (Alternative 1C) was "the option with the least overall harm to [Section 4\(f\)](#) lands." Although Alternative 1C would use 0.02 acres of the AP and 2.14 acres of the SPSP after mitigation, the FHWA had determined that Alternative 1C had the least overall net harm" because "it had fewer social impacts than any other build alternative, it had the least number of residential relocations, and it required no business relocations."

The federal district court agreed with FHWA. The federal district court, therefore, entered summary judgment in favor of the FHWA. The Conservation Alliance appealed to the United States Court of Appeals for the Eleventh Circuit.

APA REVIEW ON APPEAL

On appeal, the Conservation Alliance claimed FHWA's Section 4(f) decision was "arbitrary and capricious" in violation of the federal Administrative Procedure Act (APA).

In order to determine whether the agency's decision was arbitrary and capricious, the federal appeals court would "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Accordingly, in this particular instance, the federal circuit court would review the administrative record to determine whether FHWA had, indeed, considered all the relevant factors in selecting a particular alternative path for the bridge project (Alternative 1C) among the available alternatives. Further, the federal

appeals court would determine whether there was there a clear error in judgment when FHWA rejected the alternative path (Alternative 6A) preferred by the Conservation Alliance for the bridge project.

Under the APA, the federal appeals court recognized "the Secretary's decision is entitled to a presumption of regularity." That being said, the court noted such judicial deference under the APA would "not shield his action from a thorough, probing, in-depth review" by the federal court. While "judicial inquiry under the APA should be "penetrating," the court acknowledged APA review did not empower the court to "substitute its judgment for that of the Secretary." Rather, a court could "only agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

In conducting an APA review of FHWA's decision, given the "paramount consideration" to be accorded preservation of Section 4(f) properties, the federal appeals court would "put a thumb on the scale in favor of alternatives that avoid Section 4(f) lands." However, in this particular instance, the federal court noted: "All of the proposed paths for the new bridge would impact publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge which are protected by Section 4(f)."

SELECTING PREFERRED ALTERNATIVE

As noted by the appeals court, the Final Environmental Impact Statement (EIS) for this particular project had "candidly acknowledged that all build alternatives, including the Preferred Alternative [Alternative 1C], use at least one Section 4(f) property." In making this determination, the Final EIS had included a Section 4(f) analysis with an extensive discussion of avoidance alternatives for both the SPSP and the AP.

Moreover, in finding no feasible and prudent avoidance alternatives existed, FHWA had also rejected as "imprudent" the spliced-beam construction 6A Alternative favored by the Conservation Alliance.

Using spliced-beam construction would allow Alternative 6A to completely span the AP and thus avoid § 4(f) land but, on account of the larger footings, it would use more than 67 times as much wetland acreage as pile-bent construction (0.1012 acres versus 0.0015 acres).

Further, as noted by the federal appeals court, "both the Florida Department of Environmental Protection -- the agency with jurisdiction over the AP and the SPSP -- and the South Florida Water Management District expressed a preference for piers in the AP over additional impacts to any adjacent wetlands." In the opinion of the court, the agencies' preference for piers in the AP and the greater impact on adjacent wetland habitats associated with spliced-beam construction was sufficient "to deem that construction method imprudent."

Moreover, as noted by the court, the Section 4(f) analysis had "cross-referenced other sections of the Final EIS that discussed the City's evaluation process." This process included a scoring system that was designed by the FHWA, the City, and the FDOT. This scoring system included

five categories, each with different point totals reflecting their weight in the analysis: (1) meeting the project purpose and need (0-20 points); (2) social and community impacts (0-10 points); (3) natural environment impacts (0-10 points); (4) physical impacts (0-5 points); and (5) project cost (0-5 points).

Scoring was done first by an independent team of consultants and then by a panel of officials from the City, the FDOT, and the St. Lucie Transportation Planning Organization (TPO). Alternative 1C received the highest score on both rounds while Alternative 6A received the second-highest scores. This thorough scoring process contributed to the City's selection of Alternative 1C as the LPA (Locally Preferred Alternative).

CUMULATIVE ADVERSE IMPACTS

As cited by the federal appeals court, pursuant to applicable regulations, [23 C.F.R. § 774.17](#), "an alternative is not prudent if it involves multiple factors that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude." In this particular instance, the appeals court found the Section 4(f) analysis had detailed a series of negative impacts associated with Alternative 6A that would have a collective adverse social impact to the neighborhoods on both sides of the NFSLR, "even if design and construction issues were resolved."

In particular, the appeals court noted the FHWA's concerns with Alternative 6A stemmed from the route's construction of a new six-lane highway through an established residential neighborhood. Moreover, according to FHWA, Alternative 6A was also the only alternative with the "potential for affecting neighborhoods with a higher than average number of minority households."

While the U.S. Supreme Court in "Overton Park" had recognized that "protection of parkland is to be given paramount importance," the federal appeals court noted the Supreme Court had also acknowledged "Congress clearly did not intend that cost and disruption of the community were to be ignored." Applying these principles to this particular instance, the federal appeals court held the FHWA had acted well within its discretion in concluding that the cumulative harms rendered Alternative 6A imprudent. In so doing, the federal appeals court, found the Section 4(f) analysis had "yielded sound reasons" for the FHWA decision to reject Alternative 6A as imprudent.

LEAST HARMFUL ALTERNATIVE

Having concluded that "the FHWA acted within the scope of its authority in deciding that no feasible or prudent avoidance alternatives existed for avoiding Section 4(f) properties," the federal appeals court also considered "whether the FHWA's ultimate selection of Alternative 1C as the least-harm alternative was arbitrary, capricious, or an abuse of discretion."

The [Section 4\(f\)](#) evaluation in the Final Environmental Impact Statement had included a "least harm" analysis as required by [Section 4\(f\)](#). This analysis had relied on other portions of the Final EIS, and it measured the harms associated with the various build alternatives against the seven

factors drawn from the applicable federal regulation, 23 C.F.R. § 774.3(c)(1):

First, it considered the ability to mitigate adverse impacts to each § 4(f) resource. All of the alternatives were equal on this point, because the mitigation plan provided for the addition of 108.55 acres to the SPSP that would more than counterbalance the acreage used by any alternative.

Second, it considered the relative severity of the remaining harm to the protected areas after mitigation. Again, all of the alternatives were equal, because the mitigation plan would result in a net improvement to natural resources.

Third, it considered the relative significance of each § 4(f) property -- all of the affected properties are important natural communities that provide recreational opportunities, and the AP is additionally an important fish habitat.

Fourth, it considered the views of the officials with jurisdiction over the AP and the SPSP -- in this case, the Florida Department of Environmental Protection, which "agreed that the mitigation plan compensates fully for the impacts and provides substantial benefits to the SPSP."

Fifth, it considered the degree to which each alternative would meet the project's purpose and need and concluded that Alternative 1C met the project's purpose and need more efficaciously than any other alternative.

[Sixth] The least-harm analysis devoted the most time to...the magnitude of adverse impacts from each build alternative on non-§ 4(f) properties after reasonable mitigation.

[Seventh] costs were determined to be substantially similar for all of the alternatives.

The Section 4(f) analysis of these factors had concluded that Alternative 1C would result in "considerably less overall non-Section 4(f) impacts compared with all other build alternatives." Specifically, the Alternative 1C pathway for the bridge "would not pass near or through any existing neighborhoods on the east side of the river and would be aligned with existing streets on the west side of the river." Moreover, while Alternative 1C was the only alternative that would affect the Halpatiokee Trail, the Florida Department of Environmental Protection (FDEP) had endorsed a mitigation plan that would relocate the trail entrance and improve the trails, which are "unimproved" or "inundated/flooded most of the year."

Accordingly, in the opinion of the federal appeals court, the FHWA decision to designate Alternative 1C as the least harmful alternative was "careful and thoughtful rather than arbitrary and capricious."

Section 4(f) does not require the FHWA to avoid parkland at all cost, and the agency could reasonably determine that the severe social costs associated with

adopting Alternative 6A far outweigh the social costs of Alternative 1C.

When the collective operational, visual, noise, cohesion, mobility, access impacts to neighborhoods, and impacts on non-[Section 4\(f\)](#) lands are taken into account, it was reasonable for the FHWA to conclude that Alternative 6A would pose more harms than Alternative 1C.

The federal appeals court, therefore, concluded, "FHWA's least-harm analysis was sufficient, its rationale was clearly explained, and its conclusions were reasonable, rather than arbitrary or capricious."

COMPENSATORY MITIGATION STRATEGY

Further, as required by [Section 4\(f\)](#), the appeals court found "FHWA's planning included careful consideration of reasonable measures to mitigate harm." In this particular instance, the FHWA had worked with the City, the Army Corps, the EPA, the National Marine Fisheries Service (NMFS), the South Florida Water Management District (SFWMD), and the Florida Department of Environmental Protection (FDEP) to develop a compensatory mitigation strategy. As described by the appeals court, "[t]he Final EIS's [Section 4\(f\)](#) evaluation included an eight-page section titled Measures to Minimize Harm" which included the following:

four water-quality improvement projects, the addition of nearly 110 acres to the affected parkland, rehabilitation of trails and other recreational opportunities, and the maintenance of all acquired lands by the FDEP.

In the opinion of the federal appeals court, "[t]he beneficial effects of these efforts well exceed the potential negative impacts of Alternative 1C, and the care with which they were considered evinces a careful and thorough analysis."

While recognizing that [Section 4\(f\)](#) "requires a thumb on the scale in favor of alternatives that avoid the use of [§ 4\(f\)](#) lands," in this particular instance, the federal appeals court found FHWA had "made its calculus carefully, giving thoughtful consideration to a wide variety of factors." In so doing, the court found FHWA had "worked with many agencies, even those that once opposed the project, to develop remediation plans that mitigate harms to the affected areas."

Having found "the FHWA was not arbitrary or capricious in choosing Alternative 1C, the federal appeals court affirmed the federal district court's grant of final summary judgment to the FHWA.

SEE ALSO:

[Parkland Protection "Paramount Importance"](#) James C. Kozlowski. *Parks & Recreation*. Mar. 2006. Vol. 41, Iss.3.

<http://cehdclass.gmu.edu/jkozlows/lawarts/03MAR06.pdf>

[Environmental Challenge To Federal Highway Project Through Park](#)
James C. Kozlowski *Parks & Recreation* . Feb 1994. Vol. 29, Iss. 2

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<http://cehdclass.gmu.edu/jkozlows/lawarts/02FEB94.pdf>

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