Legal Tools for Fighting Freeways and Saving Historic Roads

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> ***Perhaps our age will be known to the future historian as the age of the bulldozer and the exterminator; and in many parts of the country the building of a highway has about the same result upon vegetation and human structures as the passage of a tornado or the blast of an atom bomb…***
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> — Lewis Mumford, *The Highway and the City* (Harcourt, Brace & World, 1963)

Planners and preservationists have long been aware of the devastating impact of highway development on natural and historic resources. These impacts, as we now know, go beyond the actual footprint of the roadway and have the potential to radically change the face of a landscape by inducing or accelerating changes in land use patterns that can further exacerbate impacts on historic properties. This unplanned or induced development (often referred to as "sprawl") has been dubbed one of the most significant economic, social, and environmental problems of our time, contributing to urban decline, racial polarization, worsening air and water quality, destruction of our rural heritage, and the erosion of community. This article will focus on the legal tools for protecting historic sites from highway projects that are subsidized to some extent by federal funds.

The primary federal laws that specifically protect historic properties threatened by transportation projects are Section 4(f) of the Department of Transportation Act, 23 U.S.C. § 138; 49 U.S.C. §303, and Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. Section 4(f) directs the U.S. Department of Transportation to give the protection of historic properties (as well as public parks, recreation areas, and wildlife refuges) paramount consideration in transportation planning. Transportation projects that require the use of these protected sites

may not be approved unless (1) there is no feasible and prudent alternative to harming the site, and (2) the project includes all possible planning to minimize harm. Section 106 requires all federal agencies to take into account the effect of their undertakings on historic properties prior to funding or approving permits or licenses for projects. In addition, federal agencies must conform their decision-making process to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332. This article will discuss how preservation advocates can make use of these legal tools in fighting destructive highway projects, starting with NEPA, which provides the overall framework for defining the range of alternative transportation solutions or designs that will be considered under both Section 106 and Section 4(f).

Review of Highway Projects under NEPA

NEPA is the overarching federal law requiring federal agencies to prepare an Environmental Impact Statement (EIS) prior to approving any "major federal action" that is likely to have a "significant impact on the human environment." An EIS is a detailed statement describing the environmental impact of the proposed project and exploring alternatives. Under binding regulations developed by the White House Council on Environmental Quality, environmental impacts include impacts on the built environment and on historic and cultural resources.[1]

While NEPA does not mandate that transportation agencies avoid or protect resources, the NEPA process can help to give agencies the information they need in order to do so. It also gives members of the public timely information about project impacts and alternatives and can help them to advocate more effectively for changes in the project to address historic preservation concerns.

Whether to Prepare an EIS

Whenever a transportation project is proposed for federal funding, the first step in the NEPA process involves determining whether the proposed actions are likely to be significant and thus require the preparation of an EIS. The Federal Highway Administration (FHWA) has developed its own procedural regulations for NEPA.[2] Under these regulations, a full EIS is normally required for a new controlled access highway or a road project of four or more lanes on a new location.[3]

If the project is not one that normally requires a full EIS, and the project is not "categorically excluded" from environmental review,[4] an Environmental Assessment (EA) must be prepared. Proposed actions for which only an EA may be required include projects to widen or expand the capacity of existing highways. An EA's assessment of impacts and alternatives is not as detailed or rigorous as that of a full EIS and is usually not subject to formal public review. Following completion of an EA, the FHWA will either issue a Finding of No Significant Impact (FONSI) or it will decide that a full EIS is required because the project will have significant environmental impacts.

If an EIS is prepared for a project, it must be circulated in draft form to the public and to a variety of resource agencies for review and an opportunity to comment. The agency must then respond to these comments in its Final EIS. The agency may not approve or begin the proposed project (including right-of-way acquisition and final design) until it has finalized

the EIS and issued a Record of Decision summarizing the reasons for its decision, including any mitigation adopted to address adverse impacts.

Alternatives Under NEPA

The heart of the EIS is the consideration of alternatives. This is the place where the FHWA must identify the transportation needs to be addressed by the project (the "purpose and need"), which in turn will determine the range of alternatives to be considered. Highway projects generally address one or more of the following needs: system linkages, capacity, roadway deficiencies, legislation, social demands, or economic development.[5] Only alternatives that satisfy some or all of the identified transportation needs will be evaluated in the EIS.[6]

One issue frequently challenged in highway cases is FHWA's refusal to consider alternatives that would reduce or avoid impacts on historic and/or natural resources, based on the conclusion that the alternatives would not provide a desirable "level of service"[7] or satisfy "current design standards." These alternatives may include "mass transit" such as bus or rail, "Transportation System Management" (TSM),[8] and road improvements, such as straightening or banking curves, flattening hills that limit sight distance, adding passing or turning lanes, paving shoulders, or making other improvements to roadway geometrics that improve safety or travel speed. While some courts have held FHWA in violation of NEPA when it failed to consider such alternatives to building or expanding a highway,[9] other courts have upheld FHWA's refusal to do so, based on deference to the agency's determination that alternatives would not provide sufficient capacity to handle a projected traffic increase or meet other transportation needs.[10]

However, the continued ability of highway agencies to reject these "low build" alternatives out-of-hand is increasingly called into question. Current research shows that building or widening roads is not necessarily an effective long-range solution to traffic congestion. To the contrary, building more highways can have the opposite result of stimulating additional trips (called "latent demand") and accelerating new development ("induced growth"), which in turn generates more traffic.[11] As one court pointed out, "[h]ighways create demand for travel and expansion by their very existence."[12] These stud-

ies offer persuasive authority that EISs evaluating the impacts of new or expanded highways should rigorously evaluate alternative transportation solutions, such as improving the existing roadway or investing in mass transit, rather than adding capacity for single occupancy automobiles.

Likewise, highway agencies can no longer justify intrusive highway designs as necessary to adhere to "current design standards."[13] In response to concerns by frustrated citizens, who have long pushed highway engineers to place community and preservation values on par with the needs and convenience of motorists, Congress has now amended federal funding statutes so that highway design standards "may take into account . . . (A) the constructed and natural environment of the area; (B) the environmental scenic aesthetic, historic, community, and preservation impacts of the activity."[14] FHWA regulations and guidance now acknowledge that highways can be flexibly designed to protect scenic and historic values.[15] The explicit recognition of these values in federal law and policy provides strong authority for designing highway projects that respect rather than destroy the history and character of the communities through which they pass.[16]

Section 106

Section 106 of the National Historic Preservation Act (NHPA) is the basic federal law requiring all federal agencies, including FHWA, to take into account the effects of their actions (called "undertakings") on historic properties, in consultation with preservation agencies and interested members of the public. The key participants in the Section 106 process are the state historic preservation officer (SHPO) (or, for proj-

Interstate 95 squeezes both sides of the historic Main Street Station in Richmond, Va. Photo by Richard Cheek

FEDERAL HISTORIC PRESERVATION LAWS AT A GLANCE

	Section 106	Section 4(f)	NEPA
Citations	16 USC § 470f 36 CFR Part 800	49 USC § 303 23 CFR § 771.135	42 USC § 4332 40 CFR Part 1500
Properties Protected	Nat'l Register listed or eligible	national, state, or local historic sites; parks; wildlife refuges; recreation areas	all environmental resources, including cultural and historic
Triggering Federal Action	"undertaking"	"approval" of transportation project	"major federal action"
Effect	any "effect"	"use" or "substantially impair" constructive use	"significantly affecting the quality of the human environment"
Standard for Consideration	"take into account"	avoid unless not feasible and prudent	disclose and consider impacts
Procedure v. Substance	combination (procedure + MOA)	substantive	procedural
Mechanism for Compliance	negotiation/ consultation; MOA	4f determination or EIS chapter	EIS or EA; public hearings
Involvement of Other Agencies	ACHP/SHPO at the table with veto over some decisions	DOT has sole authority; Interior comments	EPA review; CEQ referral

ects on tribal lands, the tribal historic preservation officer (THPO)) and the federal Advisory Council on Historic Preservation, an independent agency created by Congress to implement and enforce Section 106.

The Section 106 process is governed by the Advisory Council's binding regulations, which outline three basic steps: identifying historic properties; assessing the effects of the project; and resolving any adverse effects.[17] In carrying out each of these steps, the federal agency must consult with the applicable SHPO/ THPO and the Advisory Council, if it elects to participate in the consultation, and provide opportunities for public involvement.

A Consultative Process

While Section 106 is similar in many respects to the assessment of cultural resource impacts under NEPA, the Section 106 process is distinctive in its heavy reliance on consultation with preservation

agencies and interested parties. One unique aspect of Section 106 is the ability of affected members of the public to request "consulting party" status. Under the Advisory Council's regulations, certain entities (such as the permit or funding applicant, an Indian tribe or Native Hawaiian organization, or representatives of local governments) are entitled to participate in the Section 106 process as "consulting parties." In addition, other individuals or organizations with a concern about the effects of the project, or having a legal or economic stake, such as owning an affected property, may seek to become consulting parties.[18] Consulting parties are entitled to receive and comment on most documentation prepared as part of the Section 106 process. Preservation advocates often request consulting party status to ensure that they receive timely notification about a project's impacts on historic properties and an opportunity to comment on the project.

Another important difference between NEPA and Section 106 is that, unlike NEPA, the agency proposing the undertaking does not have the final say over whether the effects on historic properties have been adequately considered. Rather, as described below, the final decision about whether historic properties are eligible for the National Register of Historic Places and whether the project's effect on those historic properties will be "adverse" rests with other agencies with expertise in historic preservation.

Identifying Historic Properties

The agency is responsible for identifying historic properties within the "area of potential effects," that is, the geographic area within which an undertaking may directly or indirectly cause changes in the character or use of any historic properties.[19] In doing so, the agency must make a "reasonable and good faith effort" to identify properties that may be eligible for listing in the National Register of Historic Places.[20]

In the event of a dispute over whether a property that may be affected by a highway project is National Register-eligible, or over the boundaries of a historic property, the FHWA is not free to disregard the views of the SHPO, the Advisory Council, Indian tribes, or the public. Instead, these disputes are submitted to the Keeper of the National Register, a unit within the U.S. Department of the Interior, National Park Service, for a final determination of National Register eligibility or boundaries.[21]

Assessing Adverse Effects

In assessing effects on historic properties, the FHWA is required to apply the "criteria of adverse effect" in the Advisory Council's regulations. These regulations define "adverse effects" as including not just physical destruction of or damage to a historic property but also indirect effects such as the "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features," and any "[c]hange...of physical features within the property's setting that contribute to its historic significance."[22] This standard is particularly important in the case of highway projects, whose effects typically extend beyond the roadbed and include visual intrusion, noise, vibration, and vehicle fumes, as well as secondary impacts, such as highway-induced development. Again, in the event of disputes over the application of the criteria of adverse effect, the Advisory Council or SHPO, not the FHWA, makes the final determination.[23]

Interstate 30, which looms next to the historic Texas & Pacific Railway Terminal in Fort Worth, Tex., will be relocated rather than widened in place, thanks to a successful lawsuit based on Section 4(f). Photo by James Lindberg

Negotiating a Memorandum of Agreement

Once adverse effects are identified, the FHWA and the other parties must consult to determine whether changes can be made in the project to avoid or mitigate adverse effects on historic properties. Generally, this involves making minor shifts in a highway's alignment to avoid resources directly near the highway's path rather than a major reevaluation of alternative designs or transportation modes. However, preservation advocates should also use the process to develop a creative mitigation package, considering elements such as noise mitigation, less intrusive design, landscape and streetscape improvements, easement programs, traffic mitigation, historical interpretation, and funding for adversely affected businesses.

The Section 106 process is usually completed by the execution of a Memorandum of Agreement (MOA), a binding and enforceable contract embodying all mitigation commitments. If no agreement is reached, the Section 106 process is terminated by the head of the federal agency requesting and receiving the formal comments of the Advisory Council on Historic Preservation. These comments are not binding, but are intended to urge the agency to make a more preservation-minded decision.

While Section 106 does not require the FHWA to protect or preserve historic properties, it is nonetheless an important legal tool for protecting resources that may be harmed by transportation projects. With its strong emphasis on procedure and public participation, Section 106 can be used by preservation advocates to help ensure that effects on historic sites are accurately identified and assessed. This, in turn, helps to ensure that historic resources are protected by Section 4(f) of the Department of Transportation Act, the most stringent federal preservation law in existence.[24]

Section 4(f) of the Department of Transportation Act

Section 4(f) of the Department of Transportation Act prohibits the Secretary of Transportation from approving any transportation project or program that would "use" land from any park, historic site, recreational area, or wildlife refuge, unless (1) there is "no prudent and feasible alternative" to harming the site, and (2) the project includes "all possible planning to minimize harm" to the pro-

tected resources, 23 U.S.C. § 138; 49 U.S.C. § 303. The circumstances under which a preservation alternative may be rejected under Section 4(f) have been narrowly defined by the U.S. Supreme Court: transportation officials are forbidden from rejecting alternatives that would avoid or minimize harm to protected sites unless they can show that the less harmful alternatives would result in costs or community disruption of "extraordinary magnitude," or other unique factors.[25]

Determining Whether the Project Will "Use" Historic Properties

The first issue that arises under Section 4(f) is whether the project will "use" historic sites. A project can "use" historic sites either directly, by physically encroaching within the boundary of a protected resource, or indirectly, if the project's proximity impacts would "substantially impair" the value of a protected site so as to constitute a "constructive use."[26] Under Section 4(f), any direct use of a Section 4(f)-protected resource, no matter how small, is subject to evaluation under Section 4(f).[27] A temporary use of protected land during construction of the project can also be a "use" under Section 4(f), if the construction activities result in permanent impacts to the protected site, such as removal of natural features or structures that contribute to the site's historic significance.[28]

A "constructive use" occurs under Section 4(f) "where the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired."[29] Courts have found constructive use in the case of highway projects that would come within 15 to 200 feet of historic properties in urban settings.[30]

Evaluation of "Prudent and Feasible" Alternatives

Once a project is determined to involve a "use" of a historic site, the FHWA must determine whether there are any prudent and feasible alternatives to that use. An alternative is infeasible only if it cannot be constructed as a matter of sound engineering.[31] Since very few designs are technically infeasible, most Section 4(f) disputes focus on the circumstances under which an alternative can be rejected as being "imprudent." In order to find that an alternative is "not pru-

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dent" under Section 4(f), the FHWA must find that it presents "unique problems," "truly unusual factors," or that the cost or community disruption resulting from the alternative would reach "extraordinary magnitudes."[32]

Even if there are no prudent or feasible avoidance alternatives, Section 4(f)(2) requires the FHWA to undertake all possible planning to minimize harm to Section 4(f)-protected sites. Where two or more alternatives would "use" Section 4(f) resources, the "all possible planning to minimize harm" requirement mandates that FHWA quantify the magnitude of the harm to protected sites for each alternative route and select the alternative that does the least total harm.[33] In determining which of two or more alternatives would involve a greater "use" of historic sites, the Secretary must take into account the views of the Advisory Council on Historic Preservation, but need not accord those views absolute deference.[34]

Conclusion

Transportation projects can be especially devastating for communities with historic resources, but preservation advocates have an array of strong legal tools that can be used to help prevent or minimize those adverse impacts. These legal tools should not be reserved for litigation—they are most effective when used early during the administrative process to persuade federal and state decision makers to modify their plans for transportation projects before final decisions are made, in order to be more sensitive to historic preservation concerns.

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Notes

1 40 C.F.R. § 1502.14(a).

2 *See* 23 C.F.R. Part 771.

3 *Id.* § 771.115(a).

4 Categorical Exclusions (CEs) are categories of actions that the FHWA has determined, based on past experience, do not involve significant environmental impacts. 23 C.F.R. § 771.117(a). For example, FHWA regulations categorically exclude from environmental review bridge replacement projects and highway modernization by resurfacing, restoration, rehabilitation and reconstruction, or adding shoulders or auxiliary lanes. *Id.* § 771.117(d). However, if the action normally classified as a CE would actually involve significant impacts on historic or environmental resources, the FHWA will conduct appropriate environmental studies to determine if the CE classification is proper. *Id.* § 771.117(b)(3).

5 *See* FHWA Technical Advisory T 6640.8A, "Guidance for Preparing and Processing Environmental and Section 4(f) Documents," at 14 (Oct. 30, 1987).

6 See *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) ("a discussion of alternatives that would only partly meet the goals of the project may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact").

7 "Level of Service" (LOS) is a measure used by highway engineers to describe operational traffic conditions based on factors such as speed, travel time, freedom to maneuver, traffic interruption, and safety. *See* Transportation Research Board, Special Report 209, *Highway Capacity Manual*, at Glossary (1992). LOS is reflected as a grade of A through F. Preservation and community advocates have long criticized the priority placed on "level of service" analysis, which considers only the comfort and convenience of the motorist, and fails to take into account the interests, values, and needs of surrounding communities and their environment.

8 TSM, generally an option for urbanized areas, involves measures to optimize performance of the present system, such as synchronizing traffic signals or adding high occupancy vehicle (HOV) lanes to existing roadways. *See* FHWA Technical Advisory T 6640.8A, "Guidance for Preparing and Processing Environmental and Section 4(f) Documents," at 15.

9 See *Coalition for Canyon Preservation v. Bowers*, 622 F.2d 774, 784-85 (9th Cir. 1980) ("the improved two-lane road was a reasonable alternative to be considered"); *Rankin v. Coleman*, 394 F. Supp. 647, 658-59 (E.D.N.C. 1975) (EIS was invalid because it failed to consider alternative of improving existing state roads); I-291 *Why? Ass'n v. Burns*, 372 F. Supp. 223, 248-50 (D. Conn. 1974), *aff'd*, 517 F.2d 1077 (2d Cir. 1975) (same).

10 See *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999) (upholding FHWA's refusal to consider bridge replacement alternatives involving fewer than 12 lanes); *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999) (upholding FHWA's refusal to consider road improvement alternative); *Committee to Preserve Boomer Lake Park v. Department of Transp.*, 4 F.3d 1543, 1550 (10th Cir. 1993) ("The inability of an alternative to accommodate future traffic volumes is justification for rejecting that alternative"); *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159, 164 (4th Cir. 1990) (same).

11 See, e.g., Surface Transportation Policy Project, "Do New Roads Cause Congestion?" (March 1998); Patrick DeCorla-Souza & Henry Cohen, "Accounting for Induced Travel in Evaluation of Urban Highway Expansion" (FHWA 1997).

12 *Sierra Club, Illinois Chapter v. U.S. Dep't of Transp.*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997).

13 These standards are generally set forth in the American Association of State Highway and Transportation Officials (AASHTO) *Policy on Geometric Design of Streets and Highways*, also referred to as the "Green Book."

14 23 U.S.C. § 109(c)(1).

15 See 23 C.F.R. § 625.3; FHWA, *Flexibility in Highway Design*, at iii (FHWA-PD-97-062).

16 See Surface Transportation Policy Project, "Road Standards & Design Flexibility," *PROGRESS*, Vol. VII, No. 7 (Sept. 1997).

17 36 C.F.R. Part 800 (revised, effective June 18, 1999).

18 36 C.F.R. § 800.2.

19 Id. § 800.16(d).

20 Id. § 800.4(b)(1).

21 Id. § 800.4(c)(2).

22 *See* id. § 800.5(a)(2).

23 *Id.* § 800.5(c)(3).

24 See *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 371 (D.C. Cir. 1999) ("Because the historic properties protected by Section 106 are similarly defined, it follows that the FHWA must complete its section 106 determinations before it can comply with section 4(f)").

25 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971).

26 23 C.F.R. § 771.135(p).

27 See *Louisiana Env'tl Soc'y, Inc. v. Coleman*, 537 F.2d 79, 84 (5th Cir. 1976); *Falls Road Impact Comm., Inc. v. Dole*, 581 F. Supp. 578, 690-91 (E.D. Wis.), *aff'd*, 737 F.2d 1476 (7th Cir. 1984).

28 See *Coalition on Sensible Transp. (COST) v. Dole*, 826 F.2d 60, 65 (D.C. Cir. 1987) (taking of "temporary" construction easements on parkland, requiring the removal of mature trees and the permanent alteration of park topography, constitutes a "use" that must be evaluated under Section 4(f)).

29 See 23 C.F.R. § 771.135(p)(2).

30 See *Coalition Against a Raised Expressway, Inc. (CARE) v. Dole*, 935 F.2d 803, 811 (11th Cir. 1988) (elevated highway within 43-200 feet of historic buildings would result in constructive use); *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 427-28 & n.2, 441 (5th Cir. 1985) (elevated highway within 40-200 feet of historic buildings would result in constructive use); *City of South Pasadena v. Slater*, 56 F. Supp. 1106, 1122 (C.D. Cal. 1999) (below-grade freeway within 15 feet of residential historic district boundary would likely be a constructive use).

31 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

32 *Id.* at 413. *See Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), cert. denied, 471 U.S. 1108 (1985) (an alternative that would increase project's cost by over $40 million (or ten percent) did not represent a cost of "extraordinary magnitude" justifying rejection of the alternative under Section 4(f)).

33 *Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700, 716 (11th Cir. 1985).

34 See *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686 (3d Cir. 1999).