Section 4(f)

Why don’t we build the road through this green space over here?
Objectives
“Section 4(f)”

• What is Section 4(f)?—understand the basics of the law and applicability;
• Is this a Section 4(f) situation?--develop the ability to identify a 4(f) resource; and
• What has changed?--highlight current changes
Background-Section 4(f)

- Provision of the DOT Act of 1966
- Applies only to DOT Agencies (FHWA, FTA…)
- Independent of NEPA and §106
- Often challenged and controversial
- Criteria defined by case law
c. Subject to subsection (d), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) 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 a 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-

1) there is no prudent and feasible alternative to using that land, and

2) 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) Resources

- Parks
- Recreation Areas
- Wildlife and Waterfowl Refuges
- Historic property
Section 4(f) Resources

- Parks, recreational areas, wildlife and waterfowl refuges
  - Publicly owned
  - Public park
  - Major purpose
  - Significant property
- Historic property
  - On or eligible for National Register of Historic Places
Public Ownership

Parks, recreation areas, and refuges

- Fee simple ownership
- Public easement
- Lease agreements

Policy Paper - Qs. 1B, 2B, 2D
Public Park

- Entire public is permitted visitation
- Visitation not limited to a select group only
Major Purpose

- Primary function of the property is for park, recreation, or refuge purpose or activities.
- Activities must be other than:
  - Incidental
  - Secondary
  - Occasional or
  - Dispersed
4(f) Significance

- Compares the availability and function of the resource with the park, recreational, or refuge objectives of the community
- The resource in question plays an important role in meeting these objectives
- Determined by the officials with jurisdiction
- Resource is presumed significant in the absence of a determination
- Subject to review by FHWA for reasonableness
Historic & Archeological Sites

• Historic property …
  … On or eligible for the National Register

• Archeological sites
  … National Register eligibility and important for preservation in place - not data recovery only

• Historic districts
  … Individually historic, integral to, or contributing elements

23 CFR 771.135(e)
Policy Paper Qs. 3A, 3B
Section 4(f) “Use”

- Fee simple use
- Permanent easement
- Temporary easement or occupancy (in certain circumstances)
- Constructive use
Fee Simple Use

Highway ROW

4(f) Resource

Policy Paper – Q. 1A
Permanent Easement

Corridor Z

Highway ROW Line and Park Boundary

Section 4(f) Resource (Park)

Permanent Easement

Policy Paper – Q. 1A
Temporary Easement

Not a use of property when:

- of short duration - less than the time needed for construction
- no change in ownership of property
- does not create long-term or indefinite property interests in the land
- no temporary or permanent adverse change to the property
- involves only a minor amount of land

23 CFR 771.135(p)(7)
Temporary Easement

23 CFR 771.135(p)(1) & (p)(7)
Policy Paper Qs. - 1A & 22
Constructive Use

• No actual incorporation of land
• Proximity impacts
• **Use defined by substantial impairment**
  • Activities, features, or attributes that qualify a resource for section 4(f) protection are **substantially diminished**

23 CFR 771.135(p)(2)
Constructive Use

Potential constructive use impacts:

• Noise impacts
• Visual impacts
• Access restrictions
• Vibration
• Ecological intrusion

23 CFR 771.135(p)(4)
Constructive Use

23 CFR 771.135(p)(2)
Applicability - Historic Sites

Property Boundary

Section 106 Historic Boundary

4(f) Policy Paper Question 3
Section 106 and 4(f)

• Section 106 process is essential to completion of the Section 4(f) process …
  • NR eligible property is a 4(f) resource
  • Locally historic property may be determined significant by FHWA
• Section 106 “adverse affect” does not equate to a 4(f) use
Historic Bridges and Highways

- Rehabilitation, repair, or improvement
  - No historic properties affected or no adverse effect – **not a 4(f) use**
  - Adverse effect - **4(f) use**

- Donations
  - Historic integrity maintained – **not a 4(f) use**
  - Historic integrity not maintained - **4(f) use**

- Demolish bridge - **4(f) use**

23 USC 144(o), 23 CFR 771.135(f), Policy Paper – Qs. 4A & 4B
Public Multiple Use Land Holdings

National Forests, State Forests, BLM Lands, ...

• 4(f) applies to historic sites
• Designated or management plan in place
  • 4(f) applies to park, recreation, or refuge activities
  • No 4(f) for any other activities
• No management plan
  • 4(f) applies if primary function for park, recreation, or refuge activity
  • No 4(f) if primary function for other activities

23 CFR 771.135(d)
Policy Paper - Q. 6
Bodies Of Water

• Apply multiple use / primary function concept
• Rivers, generally no 4(f) except for:
  • Publicly owned recreational trails
  • National Wild and Scenic Rivers
Bodies of Water - Lakes

Private Property

Fishing pier

Swimming Area

Marina

Policy Paper – Q. 11
School Playgrounds

- No 4(f) use where:
  - Structured PE class and recess for students
  - Serves only school activities
  - No or little walk-on activity

- 4(f) use where:
  - Organized recreational activities are significant
  - Substantial walk-on activities are significant
 Trails & Bikeways

- Recreational trails
  - Publicly owned - 4(f)
  - Privately owned - no 4(f)

- Bikeways - primary function
  - Transportation - no 4(f)
  - Recreation - 4(f)

- Historic trails identified in PL. 95-625 are exempt from 4(f)

Policy Paper - Q. 12 & 13
“Planned” Facilities & Resources

- Property that is planned to be, but not currently functioning as, park, recreation area, or refuge
  - 4(f) Applies if the property is formally designated and determined to be significant for park, recreation, or refuge purposes by the official with jurisdiction

4(f) Policy Paper  Question 15
Temporary Occupancy of Highway ROW

- Section 4(f) **Does Not Apply** to either authorized or unauthorized occupancy of highway rights-of-way.
Joint Development

- **4(f) Does Not Apply** to reserved highway rights-of-way that are planned concurrently with a future 4(f) resource
Wildlife Areas

- National wildlife refuges - 4(f) applies
- Wildlife management area -
  - 4(f) applies if primary function is for refuge purposes
  - Otherwise, apply multiple use concept
Air Rights

- **4(f) Does Not Apply** to the bridging of resources, unless -
  - Piers, abutments, or other appurtenances are placed on the property
  - the structure harms the 4(f) qualities of the property
  - adversely effects historic integrity of historic site
Air Rights - Bridging

Recreation Trail

Towpath

Historic Canal

Policy Paper – Q. 19
Section 4(f) Evaluation

- Need *
- Describe proposed action *
- Describe 4(f) resource
- Present alternatives including avoidance
- Describe impacts
- Discuss mitigation measures
- Summarize coordination activities

* If processed as a separate document
Avoidance Alternatives

Location alternatives

Alt. AB-1

Alt. AB-2

~ 10 miles

Design shifts

~ 1 mile

Policy Paper – P. 4
Alternatives Analysis - Avoidance

- Evaluate total avoidance alternatives
  - If an avoidance alternative is feasible and prudent - it must be selected!
Feasible and Prudent

Overton Park Criteria

Feasible and prudent alternatives do not create truly unique problems … … One or Sum of

• Truly Unique Factors
• Cost of extraordinary magnitude
• Community disruption of extraordinary magnitude

23 CFR 771.135(a)(2)
**Unique Problems?**

**YES** - If unique problems are caused in avoiding the 4(f) use -
  - the alternative is not feasible and prudent

**NO** - If an avoidance alternative does not cause unique problems -
  - it is a feasible and prudent alternative
Alternatives Analysis - Least Harm

- When there is no feasible prudent avoidance alternative or all “build alternatives” use 4(f) resources -
  - the alternative with the least overall impact (harm) must be selected, unless ....
  .... it is not feasible and prudent
Least Harm

D C B A

Park Boundary
Section 4(f) Compliance

- Publicly owned
- Public park
- Major purpose
- Significant
- No feasible and prudent avoidance alternatives
- Project includes all possible measures to minimize harm
- Coordination with appropriate agencies
Programmatic Section 4(f) Evaluations

- Based on over 20 years of experience
- For minor uses only
- Optional
- **Not** an exemption - requires analysis
  - feasible and prudent avoidance alternatives,
  - least harm
  - minimization of harm, and
  - mitigation, ...
Approved Programmatic Evaluations

1. Independent Bikeway or Walkway Construction Projects (5/23/77) (Negative Declaration)
2. Use of Historic Bridges (7/5/83)
3. Minor Involvement with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges (12/23/86)
4. Minor Involvement with Historic Sites (12/23/86)
Recent Changes

• On August 10, 2005, President George W. Bush signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).
• Major Sections that affect NEPA process
  ✓ 6002: Changed the procedures for EISs
  ✓ 6003: 5 State Pilot – Taking over NEPA
  ✓ 6004: States can assume CE Responsibility
  ✓ 6007: Exemption of Interstate System
  ✓ 6009: De minimis impact for 4(f)
De Minimis Impacts

- Simplify the process and approval
- Once USDOT determines that a use of Section 4(f) property results in a de minimis impact,
  - analysis of avoidance alternatives are not required and
  - Section 4(f) analysis is complete
De Minimis Impacts

- Final Guidance issued on 12/13/2005
  - Joint with FTA

  - Then click the link “Attachment”
1) 4(f) use after mitigation or enhancement does not adversely affect activities, features and attributes of 4(f) resource

2) Officials with jurisdiction are informed of agency’s intent to make *de minimis* impact finding based on written concurrence

3) Public has been given an opportunity to review and comment on the effects to the Section 4(f) resource
Historic Properties

1) Concurrence of the SHPO and/or THPO in Section 106 “no adverse effect" or "no historic properties affected“

2) Agency informs the SHPO and/or THPO of intent to make de minimis impact finding based on written Section 106 concurrence

3) Agency has considered the views of the consulting parties in Section 106 consultation
De minimis Impacts

- All classes of action – CE, EA, EIS
- Individual resources - not project basis
- Impact after mitigation or enhancement
- Section 4(f) process complete upon making the finding
- Division Administrator’s authority
Proposed Regulations

- FHWA/FTA issued notice of proposed rulemaking; request for comments on new Section 4(f) regulations
- 49 CFR 774
  - Published in Federal Register on July 27, 2006
  - Not finalized
Where to get more info on 4(f)?

- FHWA’s Guidebook on the Internet
Section 4(f)

Legislation:

- Department of Transportation Act of 1966 (Section 4(f))
- 49 U.S.C. 303
- 23 USC 138

Regulations:

- 23 CFR 771.135

FHWA Policy and Guidance:

- Guidance for Determining De Minimis Impacts to Section 4(f) Resources (December 13, 2005)
- FHWA Section 4(f) Policy Paper (March 1, 2005)
- Guidance for Preparing and Processing Environmental and Section 4(f) Documents (October 30, 1987) (PDF File Size 4645 K)

Nationwide Programmatic Evaluations

- Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites (December 23, 1986)
- Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges (December 23, 1986)
- Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges (July 5, 1983)
- Negative Declaration/ Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects (May 23, 1977)

Other Guidance & Information

- A Five Minute Look at Section 4(f)