CLERK'S OFFICE U.S. DIST. COURT
AT CHARLOTTESVILE, VA
FILED
FEB 22 2011
JULIA C. DUDLEY, CLERK
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

COALITION TO PRESERVE McINTIRE PARK
324 Parkway St.
Charlottesville, VA 22902,

DANIEL BLUESTONE
501 Park Hill
Charlottesville, VA 22902,

Plaintiffs,

v.

VICTOR MENDEZ, Administrator,
Federal Highway Administration
1200 New Jersey Avenue, S.E.
Washington, DC 20590,

Defendant.

3:11-cv-00015

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action seeks declaratory and injunctive relief for violations of federal law by the United States Federal Highway Administration ("FHWA") in approving and providing federal funding for a highway project known as the "Route 250 Bypass Interchange at McIntire Road," (hereinafter "the Project"). As depicted and described more fully below, the Project would dramatically expand the existing Rt. 250 Bypass and McIntire Road intersection in a way that compromises and destroys many acres of McIntire Park, Bailey Park and McIntire Skate Park (hereinafter collectively "the Park"). Similarly, the Project would destroy or impair many of the historic and natural features found therein, as well as many of the historic and natural features

located near the proposed project including Hard Bargain, Rock Hill Estate/Garden/Monticello Area Community Action Agency, residences at 501 Park Hill and 502 Park Hill, and the McIntire/Covenant School.

2. The Project is part and parcel of a larger government endeavor, some 52 years in the making, to construct a highway of approximately three miles in length, starting at Rio Road on the north and extending southward to and through the length of McIntire Park, to and beyond the Rt. 250 Bypass.

3. Plaintiffs contend that (1) the FHWA was required by federal law to select an alternative alignment that would have had no or lesser impact on the Park and the nearby historic resources, (2) the scope of its environmental review was far too narrow, and (3) federal law required the FHWA to prepare an environmental impact statement ("EIS") for the Project.

JURISDICTION

4. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the laws of the United States, including Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 & 23 U.S.C. § 138, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.*. This Court may issue a preliminary injunction and other relief pursuant to 28 U.S.C. § 2201 (declaratory relief) and § 2202 (injunctive relief). All available administrative remedies have been exhausted. The challenged agency action is final and subject to this Court's review.

VENUE

5. Venue is proper in this District pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e).

PARTIES

6. The Coalition to Preserve McIntire Park ("CPMP") is a non-profit, unincorporated conservation organization dedicated to the protection and enhancement of the Park, located in Charlottesville, Virginia, and the neighboring communities. CPMP has 36 members; it brings this action on behalf of its members. CPMP's members use and appreciate the lands in the Park for their scenic beauty and for hiking, watching birds, and viewing wildflowers and other flora and fauna, as well as outdoor recreational and educational activities. The construction of the Project will directly and significantly affect the interests of Plaintiffs and the members of CPMP, because it will degrade all of these values and uses.

7. CPMP's Steering Committee has authorized the filing of this action.

8. John Cruickshank is a member of CPMP – as well as a member of its Steering Committee. He resides at 324 Parkway St., Charlottesville, VA 22902. His residence is located approximately one-half mile from the Park. He and his wife chose to live there in large part because of the neighborhood's proximity to the Park. Mr. Cruickshank is a "consulting party" to the ongoing governmental review of potential harms to regional historic properties as a result of proposed highway construction in McIntire Park.

9. Additionally, Mr. Cruickshank is a regular user of the Park, for hiking, bird watching and other recreational purposes. He plans to continue these activities in the Park for the indefinite future. If the proposed highway interchange were to be built, it would adversely affect the quality of his life, as it would reduce the aesthetic beauty of the area in which he lives, and impair his enjoyment of the Park.

10. Richard Collins is a member of CPMP – as well as a member of its Steering Committee. He resides at 108 Wilson Court, Charlottesville, VA 22901. His residence is

located approximately one-half mile from the Park. He and his wife chose to live there in large part because of the neighborhood's proximity to the Park. Additionally, Mr. Collins is a regular user of the Park, for hiking, golfing and other recreational purposes. He plans to continue these activities in the Park for the indefinite future. If the proposed highway interchange were to be built, it would adversely affect the quality of his life, as it would reduce the aesthetic beauty of the area in which he lives, and impair his enjoyment of the Park.

11. Plaintiff Daniel Bluestone is a member of CPMP – as well as a member of its Steering Committee. He resides at 501 Park Hill, Charlottesville, VA 22902. His residence is located on the perimeter of the Park. He chose to live there in large part because of the neighborhood's pastoral character, which would be destroyed by the introduction of automobile traffic.

12. Mr. Bluestone is a regular user of the Park, for hiking, birdwatching and other recreational purposes. He plans to continue these activities in the Park for the indefinite future. If the proposed highway interchange were to be built, it would adversely affect the quality of his life, as it would reduce the aesthetic beauty of the area in which he lives, and impair his enjoyment of the Park.

13. Defendant Victor Mendez is the politically-appointed Administrator of the FHWA. The FHWA is an agency within the United States Department of Transportation and has the duty to administer the national highways system, and to distribute federal highway funds, in compliance the laws established by Congress for such administration. Defendant Mendez is sued in his official capacity.

STATUTORY BACKGROUND

The National Environmental Policy Act ("NEPA")

14. "NEPA . . . makes environmental protection a part of the mandate of every federal agency and department," *Calvert Cliffs Coord. Comm. v. United States*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), and is the "basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a). Its purpose is "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(c).

15. To accomplish this purpose, NEPA requires that all federal agencies prepare a "detailed statement" regarding all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The "detailed statement" is known as an "environmental impact statement" ("EIS"). To determine whether a proposed action significantly affects the quality of the human environment, and whether an EIS is therefore required, regulations promulgated by the Council on Environmental Quality provide for the preparation of an "environmental assessment." Based on this analysis, a federal agency either decides to prepare an EIS or issue a finding of no significant impact ("FONSI"). 40 C.F.R. § 1501.4.

16. NEPA also requires that every agency must "study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . . ." 42 U.S.C. § 4332(2)(E).

17. FHWA regulations implementing NEPA require that:

> "In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements."

23 C.F.R. 771.111(f).

Section 4(f) of the Department of Transportation Act

18. Forty-four years ago Congress recognized the propensity of government transportation planners preferentially to route proposed highways through parkland, and to reject alternative routes through residential areas due to the increased political opposition and higher costs of acquisition through eminent domain. Section 4(f) of the Department of Transportation Act of 1966 prohibits federal approval or funding of a transportation project that requires "the use of publicly owned land of a public park, recreation area, or . . . land of an historic site of national, State, or local significance," unless (1) "no prudent and feasible alternative" exists, and (2) the agency engages in "all possible planning to minimize harm" to protected property. 49 U.S.C. § 303(c). *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971) (noting that "the very existence" of this law demonstrates that the "protection of parkland was to be given paramount importance.")

FACTUAL BACKGROUND

Fifty-Two Years in the Making: A 2.1-mile North-South Highway Through the Park

19. The Project is preceded by a long history of governmental attempts to construct a road through McIntire Park.

20. This history begins in or before 1959, when government transportation planners proposed to construct a north-south highway of approximately three miles in length through and beyond McIntire Park in order to relieve traffic congestion along residential streets and facilitate ingress/egress to and from downtown Charlottesville. This so-called "McIntire Road Extension project" or "Meadowcreek Parkway" was formally incorporated into the Charlottesville Major Arterial Street and Highway Plan in 1967.

21. In 1979 the Virginia Commonwealth Transportation Board approved the construction of a new, limited-access highway through McIntire Park, between Preston Road on the south and Rio Road on the north. This project, too, ran north-south through and beyond the Park for a distance of approximately three miles.

22. On August 28, 1985, the Charlottesville/Albemarle County Metropolitan Planning Organization incorporated a similar, approximately 2.1-mile variant of the "McIntire Road Extension project" or "Meadowcreek Parkway" into its Charlottesville Area Transportation Study (CATS) Year 2000 Transportation Plan, denominating it a "committed project." Also in 1985, FHWA prepared and approved a Draft Environmental Impact Statement ("DEIS") for the above-referenced project.

23. FHWA's 1985 DEIS was criticized by the U.S. Department of the Interior and the Department of Housing of Urban Development. Both of these agencies argued that there were

"feasible and prudent" alternative alignments that would address local transportation needs yet comply with §4(f) because they would not destroy portions of McIntire Park.

24. Controversy swirled around the proposed highway because of the anticipated damage to the Park. Opponents argued that the use of federal funds was prohibited by §4(f). On or about 1997, federal funding was withdrawn from the "McIntire Road Extension project" or "Meadowcreek Parkway," and on October 6, 1997 FHWA determined that §4(f) (which applies only to federally-funded projects) was no longer applicable.

The Highway Project is Divided into Three Segments

25. In or about 2001, the overall highway project was subdivided into three segments. Albemarle County and the Virginia Department of Transportation proposed to construct a 1.4-mile **northern segment**, then renamed the "Meadow Creek Parkway," south from Rio road to Melbourne Road.

26. This segment received all necessary government approvals in or by 2008.

27. Construction of this segment began in 2009 and continues to this day. It is being built to a specific point on the northeast perimeter of McIntire Park.

28. The **middle segment** was renamed "McIntire Road Extended." This segment is being funded by the Virginia Department of Transportation; it is proposed to be built through the heart of the eastern half of McIntire Park, thus connecting the southern terminus of the Meadow Creek Parkway at Melbourne Road with the Rt. 250 Bypass at McIntire Road.

29. However, as currently configured, the proposed McIntire Road Extended project does not extend south to the Rt. 250 Bypass. Rather, it terminates at a point 775 feet north of the Route 250 Bypass.

30. A July 16, 2009 letter from J. Robert Hume III, Chief of the Regulatory Branch for the U.S. Army Corps' of Engineers Norfolk District, stated: "We have concluded that the project plans we are currently reviewing do not show a terminus at the southern end of McIntire Road [Extended]...".

31. The same letter stated that the Army Corps would suspend its review of the McIntire Road Extended project and that "In order for us to continue our evaluation of the proposed McIntire Road Extension, the work must be a single and complete project with logical termini."

32. This proposed project has yet to receive the necessary approvals from the City of Charlottesville, the Army Corps of Engineers and other regulatory agencies.

33. The McIntire Road Extended project has yet to complete the federal/state/local review required by the National Historic Preservation Act.

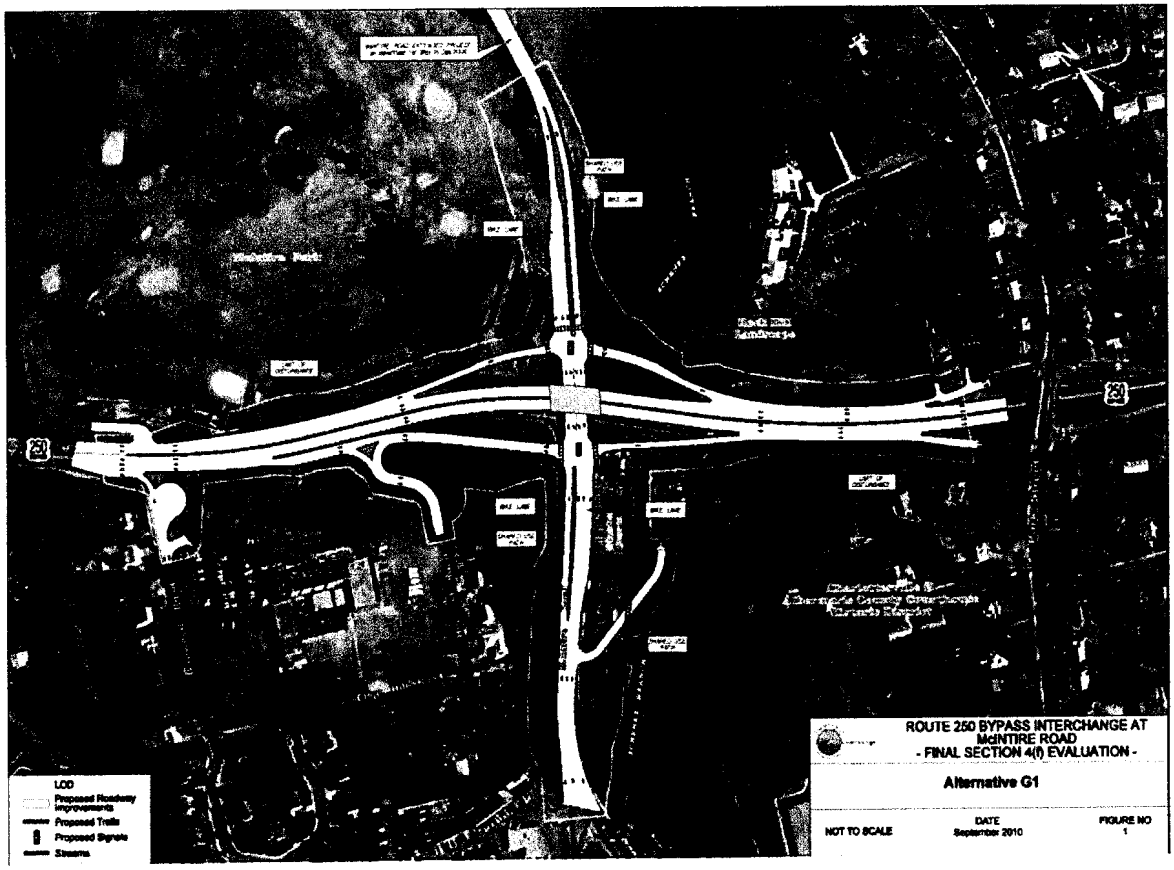
34. The **southern segment** of this long-standing proposal is the interchange project with which this lawsuit is chiefly concerned. The Project is the only one of the three segments for which federal funds will be used in its construction.

35. The Project is now referred to as an "interchange" improvement. But, as discussed below, it would be much more than that.

FHWA Selects Alternative G-1, Rejects Avoidance Alternative 2

36. The FHWA, having nominally reduced its involvement in the larger highway development scheme to just the Project, released its Final Section 4(f) Evaluation on October 29, 2010, to document its claimed compliance with the requirements of §4(f) regarding the Project. In the Final Section 4(f) Evaluation, the FHWA revealed its selection of Alternative G1 as the best and final plan.

37. As described therein, the Project has the following elements: (1) the reconstruction and widening of the Rt. 250 Bypass for approximately .4 miles, along with associated ramps, (2) the reconstruction and widening of the northern end of McIntire Road for approximately 0.2 miles, along with associated ramps, and (3) the construction of 775 feet of new roadway, north from the intersection into McIntire Park. The Project is depicted on page 2 of the FHWA's Final Section 4(f) Evaluation as follows:



38. The Final Section 4(f) Evaluation assumes that **the middle segment** of the larger project – the so-called "McIntire Road Extended" – will be completed. *See id.* at § 2.2.4, p. 6.

39. However, this assumption is incorrect. The McIntire Road Extended project has not received the necessary government approvals (federal, City and state), and may not be approved.

40. The FHWA's arbitrary and capricious assumption regarding the completion status of McIntire Road Extended profoundly undermines and, indeed, invalidates the agency's conclusions as to the utility, and proper endpoints of, the Project.

41. The Final Section 4(f) Evaluation assumes that if and when the McIntire Road Extended is constructed, it will extend south to terminate at the Rt. 250 Bypass.

42. However, as explained above, the current plans for the McIntire Road Extended call for it to terminate not at the Rt. 250 Bypass but at a point 775 feet north of the Rt. 250 Bypass.

43. In the Final Section 4(f) Evaluation, the FHWA considered and rejected three "Avoidance Alternatives." *See* Final Section 4(f) Evaluation at pp. 20-24. Among these is Avoidance Alternative 2, which called for construction of 24 lanes of new road surface (counting all approaches).

44. Avoidance Alternative 2 differed from that which was finally selected – "Alternative G1" – chiefly in that it did not propose to build the 775-foot spur north into McIntire Park.

45. Avoidance Alternative 2 was rejected by the FHWA, in part because the proposed 24 lanes associated with that alternative were found insufficient to meet the official "purpose and need" for the proposed Interchange; 29 lanes would be necessary, according to the FHWA. *Id.* at 22.

46. Avoidance Alternative 2 was also rejected because it would allegedly not meet the requirements of the associated "Congressional earmark," though those requirements were not described by the FHWA.

47. On October 6, 2009, FHWA released its environmental assessment ("EA") for the Project. The EA, like the Final Section 4(f) Evaluation, rejected from detailed consideration the alternative of improving the Rt. 250 Bypass/McIntire Road intersection without building a

highway spur north into McIntire Park . *See* EA at § 2.2.3, p. 7. No justification for this decision was provided within the EA.

CLAIMS FOR RELIEF

COUNT I
(Violation of the Department of Transportation Act)

48. The contents of the foregoing paragraphs are incorporated by reference.

49. Section 4(f) of the Department of Transportation Act of 1966 prohibits federal approval or funding of a transportation project that requires "the use of publicly owned land of a public park, recreation area, or . . . land of an historic site of national, State, or local significance," unless (1) "no prudent and feasible alternative" exists.... 49 U.S.C. § 303(c).

50. However, in the Final Section 4(f) Evaluation, the FHWA illegally rejected one or more "feasible and prudent" alternative project designs that would have dramatically reduced or entirely eliminated the taking of parkland and land of historic sites.

51. Section 4(f) also requires that the FHWA must conduct "all possible planning to minimize harm" to protected property. In the design and selection of Alternative G1, the FHWA violated that statutory requirement.

52. The conclusions of the Final Section 4(f) Evaluation are based on faulty assumptions regarding the future status and likely alignment of the McIntire Road Extended, and are therefore invalid as well as arbitrary and capricious within the meaning of the APA.

COUNT II

(Violation of the National Environmental Policy Act)

53. The contents of the foregoing paragraphs are incorporated by reference.

54. An environmental assessment must discuss and evaluate all reasonable alternative means of achieving the goals of a proposed federal action. However, the EA prepared by the FHWA violated NEPA because it failed to consider alternative alignments for the Project that would have taken little or no parkland and/or caused less harm to historic resources.

55. The conclusions of the EA are based on faulty assumptions regarding the future status and likely alignment of the McIntire Road Extended, and are therefore invalid as well as arbitrary and capricious within the meaning of the APA.

56. The scope of the environmental review presented within the EA is illegally truncated. Because the Project is inextricably intertwined, in terms of both traffic engineering and environmental impacts, with the McIntire Road Extended and the Meadow Creek Parkway, federal law required the FHWA to identify and evaluate the environmental harms (including indirect harms and cumulative impacts) that will foreseeably be caused by the three projects when viewed as a whole.

COUNT III

(Violation of the National Environmental Policy Act)

57. The contents of the foregoing paragraphs are incorporated by reference.

58. NEPA requires that all federal agencies prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

59. The environmental impacts of the Project exceed the statutory threshold of "significance," thus triggering the duty to prepare an EIS.

60. The FHWA's failure to prepare an EIS for the Project thus violated NEPA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court to provide the following relief:

a. A declaration that FHWA has violated the requirements of §4(f) of the Department of Transportation Act by approving the Project;

b. A declaration that FHWA has violated the requirements of NEPA by approving the Project on the basis of an EA of inadequate scope;

c. A declaration that FHWA has violated the requirements of NEPA by failing to prepare an EIS;

d. An order vacating FHWA's Final Section 4(f) Evaluation and EA;

e. Injunctive relief barring FHWA from implementing any aspect of the Final §4(f) Evaluation or EA, or transferring federal funds for the Project, unless and until the violations of law described above are remedied;

f. An order that Plaintiffs may recover their reasonable litigation expenses (including expert witness and attorney fees) pursuant to the the Equal Access to Justice Act and/or other applicable provisions of law; and

g. Such other relief as the Court deems just and proper.

Respectfully submitted this 22 day of February, 2011.

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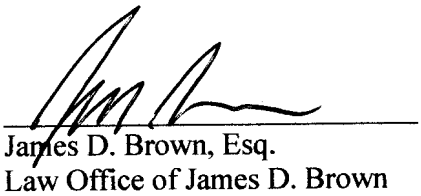

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