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September 30, 2014

Renee Sigel  
Pennsylvania Division Administrator  
Federal Highway Administration  
1200 New Jersey Avenue, SE  
Washington, DC 20590

James D. Ritzman, P.E.  
Deputy Secretary for Planning  
Pennsylvania Department of Transportation  
Commonwealth Keystone Building 8th Floor  
400 North Street  
Harrisburg, PA 17120-0095

**RE: Federal Project Number X051302L40E – SR\_73 & Genesis Drive**

Dear Ms. Sigel and Mr. Ritzman:

The Pennsylvania Department of Transportation (“**PADOT**”) proposes to construct a corridor improvement project along SR 222 (“**Project**”) in Maiden Creek Township, Berks County, Pennsylvania. The Project involves:

- Widening of SR 222 from one traffic lane in each direction to a five-lane cross section with two lanes in each direction and a center turn lane (“**Route 222 Widening**”)
- Improvements to the existing traffic signal at Route 222 and Route 73, including turn lanes on the intersection approaches (“**Route 73 Intersection Improvements**”)
- The replacement of an existing traffic signal at Route 222 and Tamarack Boulevard/Genesis Drive with a dual lane roundabout (“**Genesis Roundabout**”)

- The replacement of the unsignalized T intersection of Route 222 and Shaeffer Road with a new dual lane roundabout (“**Shaeffer Roundabout**”).

The Project is proposed to be 100% funded with federal monies. PADOT has been delegated the authority to execute the Project on behalf of the Federal Highway Administration (“**FHWA**”).

I represent Maiden creek Associates, L.P., the owner of 85 acres of undeveloped land adjacent to Route 222 and the Proposed Shaeffer Roundabout. MCA has submitted plans to Maiden creek Township for the development of a 608,000 square foot shopping center (“**Proposed Shopping Center**”) on its property. The Shaeffer Roundabout interferes with MCA’s ability to proceed with the Proposed Shopping Center.

Since it is being 100% funded by federal monies, the Project is subject to the environmental procedures mandated under the National Environmental Policy Act (“**NEPA**”). I am writing to make you aware that PADOT has failed to comply with its duties under NEPA and is executing the Project in an unlawful manner.

Pursuant to 23 C.F.R. § 771.115, FHWA has established three classes of reviews for transportation projects completed by the federal government and/or funded by the federal government -- an EIS, EA, or CE - each requiring different levels of NEPA documentation. 23 C.F.R. § 771.117(a) of the FHWA's NEPA regulations define categorical exclusions as follows:

- (a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

Under its delegated authority from the FHWA, PADOT has prepared a Categorical Exclusion Evaluation for the Project. The Categorical Exclusion Evaluation was submitted by PADOT on August 4, 2014 and was approved by PADOT two days later, on August 6, 2014. A copy of that Categorical Exclusion Evaluation is attached hereto as Exhibit “A”.

As set forth below, we do not believe that the Project qualifies for a Categorical Exclusion.

23 C.F.R. § 771.117(c) of the FHWA regulations list twenty-three actions that meet the criteria for a categorical exclusion and generally do not require further NEPA documentation. The Project does not fall within the criteria for any of the categorical exclusions established by 23 C.F.R. § 771.117(c).

23 C.F.R. § 771.117(d) enumerates additional actions which meet the criteria for a Categorical Exclusion only after the FHWA approval. The Project does not fall within the criteria for any of the additional categorical exclusions established by 23 C.F.R. § 771.117(c).

PADOT's Categorical Exclusion Evaluation states that the purpose and need of the Project is "to reduce congestion and improve safety while accommodating pedestrians and non-motorized vehicles including horse and buggies and bicycles". The Categorical Exclusion Evaluation is a form which contains a series of statements which are required to be answered, including the following:

**There is no substantial controversy associated with the traffic control measures**

(answered true)

**Will the project induce impacts (positive and negative) on planned growth, land use, or development patterns for the area?**

(answered no)

**Is the project consistent with planned growth?**

(answered yes)

**Will the project induce impacts to economic activity, including employment gains and losses?**

(answered no)

The statements made by PADOT in response to these questions were fundamentally false.

**There is a substantial controversy associated with the traffic control measures**

Two aspects of the Project have been the subject of much controversy: (1) the proposed Genesis Roundabout; and (2) the proposed Shaeffer Roundabout. This controversy is long-standing and well documented through:

- Maidencreek Township's website devoted to its opposition to the roundabouts. <http://maidencreek.net/Roundabouts.html>
- A community Facebook page for the group Stop the 222 Roundabout in Maidencreek. <https://www.facebook.com/MaidencreekRoundabout>
- An on-line Petition to PADOT, Berks County Commissioners, PA State House Representatives to Stop construction of the Maidencreek Township roundabout signed by 250 people. [www.change.org/...pa-state-house...the-maidencreek-township-roundabout](http://www.change.org/...pa-state-house...the-maidencreek-township-roundabout)
- Maidencreek Township Resolution 32-2012 adopted October 11, 2012 expressing its opposition to the proposed roundabouts. A copy of the Resolution is attached hereto as Exhibit "B".
- Fleetwood Area School District's Resolution expressing its opposition to the proposed roundabouts. A copy of the Resolution is attached hereto as Exhibit "C".
- Various letters from MCA to PADOT expressing its opposition to the proposed Shaeffer Roundabout. Copies of those letters are collectively attached hereto as Exhibit "D".
- Various newspaper articles documenting the opposition to the proposed roundabouts. Copies of those newspaper articles are collectively attached hereto as Exhibit "E".
- Objections to the proposed roundabouts have also been voiced at several public meetings with representatives of PADOT and are reflected in minutes of those meetings. Copies of those minutes are attached hereto as Exhibit "F".

Therefore, PADOT's statement in the Categorical Exclusion Evaluation that there is no substantial controversy associated with the traffic control measures is patently false and the falsity of such statement was well known to PADOT.

**The Project will induce negative impacts on planned growth, land use, or development patterns for the area and is not consistent with planned growth**

As clearly stated in Maidencreek Township Resolution 32-2012, the Township believes that the proposed roundabouts will have significant negative impacts on planned growth, land use and development patters within the Township. The Township Resolution states that:

- The proposed roundabouts will severely impede commercial development of the Route 222 Corridor in Maidencreek Township, which corridor is planned as the single largest area of future regional commercial growth in Maidencreek Township
- Existing businesses will suffer from restricted ingress and egress and thereby impair their ongoing viability;
- The proposed roundabouts will compromise the safety of motorists, bicycles, horse and buggies and pedestrians
- The proposed roundabouts will deprive the Township of the needed revenues, employment and provision of goods associated with commercial development.

The Proposed Shopping Center is an integral part of the Township's planned growth and creation of employment and tax revenues. Not only will the proposed Shaeffer Roundabout interfere with the development of the Proposed Shopping Center by requiring the condemnation of a portion of the MCA's land, the proposed Shaeffer Roundabout cannot adequately accommodate the amount of traffic that will be generated by the Proposed Shopping Center. Based on ITE trip generation projections prepared by MCA's traffic engineer, McMahon Associates ("McM"), the Proposed Shopping Center will generate 649 vehicular trips in the AM peak hour and 2,035 vehicular trips in the PM peak hour. A copy of MCA's trip generation analysis is attached as Exhibit "G".

On October 17, 2013, MCA submitted a preliminary traffic analysis to PADOT with its Highway Occupancy Permit Scoping Meeting Application. By email dated December 30, 2013 Brian Boyer, District Permit Manager for PADOT District 5-0, acknowledged that the proposed Shaeffer Roundabout cannot adequately accommodate the traffic from the Proposed Shopping Center. Specifically, Mr. Boyer stated that:

The Department has concerns based on the scoping application submitted that the size of the development and the projected traffic volumes will cause traffic congestion and failing levels of service at the site access driveways on U.S. Route 222. These concerns will be discussed at the Scoping Meeting to ensure that the applicant is aware at this early stage in the process that a highway occupancy permit may not meet the requirements of Chapter 441 of the Pa. Code given the size and scope of the development.

Therefore, it cannot be disputed that the proposed Shaeffer Roundabout will induce negative impacts on planned growth, land use, and development patterns within the Township and is inconsistent with the Township's planned growth.

PADOT has not analyzed the impact of the Project on the future regional commercial growth envisioned and desired by Maidencreek Township. As evidenced by the limited traffic analysis PADOT has performed to date, PADOT did not take into account the Proposed Shopping Center or any other future commercial developments in determining whether the roundabouts would function acceptably. Rather, PADOT simply added a 1% annual background growth rate to its existing trip counts. Therefore, PADOT entirely failed to consider whether the Project will induce negative impacts on planned growth, land use, and development patterns within the Township. A copy of PADOT's traffic analysis is attached as Exhibit "H".

**The Project will induce impacts to economic activity, including employment gains and losses**

As stated above, the Route 222 Corridor in Maidencreek Township is planned as the single largest area of future regional commercial growth in Maidencreek Township. The Township's Resolution states that commercial growth of the Route 222 Corridor is vital to the economic well being of the residents and property owners of the Township in the form of employment, providing of goods and services and benefits the Township, the School District and the County by providing revenues through a stronger tax base and has a much lower ratio for the cost of providing services than a residential development.

If the Proposed Shopping Center and other anticipated commercial development along the Route 222 Corridor is unable to occur because of the Project, the Project will have a significant detrimental impact upon economic activity and the creation of jobs within the Township and the region.

Under the Administrative Procedure Act, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action may be set aside if the agency "relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency*, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43; see also *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1216 (11th Cir. 2002).

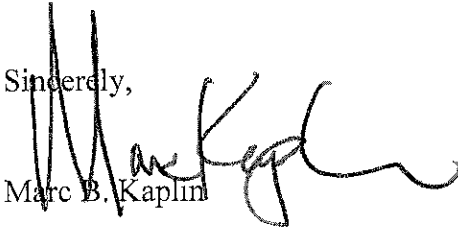
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PADOT's issuance of a Categorical Exclusion for the Project, rather than proceeding through the required NEPA process to evaluate the impacts of the Project was arbitrary, capricious and an abuse of PADOT's delegated authority by the FHWA. Unless PADOT revokes its Categorical Exclusion and proceeds with the full environmental analysis required under NEPA, we will have no choice but to proceed to Court to revoke the Categorical Exclusion and enjoin the further execution of the Project.

I sincerely hope that we will not have to resort to litigation to protect the NEPA process. However, all of our efforts to discuss these issues with PADOT representatives have been refused. PADOT was unwilling to provide us with any of their studies and analyses concerning the Shaeffer Roundabout and we were forced to file a Right to Know Law request in order to obtain the documents. PADOT has refused to consider alternatives to the Shaeffer Roundabout which would permit the construction of the Proposed Shopping Center. MCA's inability to construct the Proposed Shopping Center will have serious detrimental effects upon the Township and the School District's long-term tax rates as well as employment within the region.

Sincerely,

  
Marc B. Kaplin

Enclosures

Cc w/enclosures:

Steven B. Wolfson  
William Dion  
✓ Joseph Rudderow, Chairman, Maiden Creek BOS  
Diane Hollenbach, Maiden Creek Twp. Manager  
Peter W. Miller, Fleetwood School District  
Michael Rebert, PADOT District 5-0  
Brian Boyer, PADOT District 5-0  
Michael Mastaglio, PADOT District 5-0  
William Cressler, Esquire, PADOT General Counsel  
Charles J. Campbell, PADOT Environmental Quality Assurance Division  
Jerry Knowles, State Representative  
David Argall, State Senator  
Moises Marrero, Assistant Division Administrator FHWA  
Roger L. Ryder, Director of Operations FHWA  
Keith M. Lynch, Director of Program Development FHWA  
Camille Otto, Environmental Program Manager FHWA  
Alan Piper, Berks County Planning Commission  
Glenn Knoblauch, Berks County Planning Commission