

MEMORANDUM

Date: January 30, 2019

To: Angela Richter, Executive Director, Save Barton Creek Association
From: Jeffrey W. Appel, Esq.
Re: Final Environmental Impact Statement and Record of Decision – Oak Hill Parkway

I have been retained by the Save Barton Creek Association (“SBCA”) to review the above-referenced Final Environmental Impact Statement and Record of Decision (“FEIS/ROD”), together with the National Environmental Policy Act (“NEPA”) process undertaken by the Texas Department of Transportation (“TxDOT”). SBCA has retained me to review this process in its entirety, to determine what legal challenges might be mounted in the future and to support SBCA in any negotiation efforts. While I have not yet completed the in-depth review necessary to prepare all of those findings, I have found significant areas of concern regarding how this NEPA process proceeded and the results thereof based upon my initial review of certain documents. Some of these concerns are set forth below.

1. FLAWED PURPOSE AND NEED FOR THE PROJECT

The Purpose as articulated in the FEIS/ROD at page 4 is:

[t]o improve mobility and operational efficiency, facilitate long-term congestion management in the corridor by accommodating the movement of people and goods for multiple modes of travel,



and improve safety and emergency response throughout the project area.

And at the same page, the Need is specified as follows:

The proposed project is needed because population growth in Travis County has increased roadway congestion, which has caused a decrease level of service and increase in travel time throughout the U.S. 290/SH 71 project area. The proposed project is also needed to increase safety for the travelling public and create a more reliable connection through the corridor for citizens, transit and emergency vehicles.

The first seriously problematic issue is how “need” has been demonstrated and supported in the NEPA process. I have read the report by Bruce Melton, P.E. entitled “CAMPO Transportation Model 30-Year Overestimation of Traffic Growth in Oak Hill,” in which he makes a sound case that the CAMPO Transportation Model is flawed because it contains a “fundamental engineering error” that has “consistently and robustly overestimated traffic growth in Oak Hill by 44 to 92 percent since 1989. This is a long term systemic problem with the model that has been occurring for 30 years that has resulted in a vast overdesign of this Project.” If this is the case, then the “need” for this project has not been properly developed and supported and there is no basis for the State to require or permit it be built.

Beyond this systemic problem, I am told that virtually the entire Draft Environmental Impact Statement (“DEIS”) process assumed this Project would be a Toll Road. I am told a Toll Road requires significantly different features from the freeway alternative approved in the DEIS and FEIS for this Project. Of import is the fact that all of the technical reports underlying the DEIS and FEIS, as well as all the analysis of impacts and reasonable alternatives appears to pertain

to the Toll Road, rather than what is now planned for construction. This outcome is inconsistent with NEPA and its underlying regulations and, once that change was made, what should have occurred was the creation of a new DEIS or a Supplemental DEIS and/or FEIS under Title 23 Section 771.130. The pertinent part of that Regulation requires:

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS must be supplemented whenever the Administration determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or

(2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

Under these facts, it was unreasonable for TXDOT to assume or conclude there are no significant environmental impacts that were not evaluated, or that this new information or circumstances is not relevant to environmental concerns and bears on impacts resulting in significant environmental impacts yet to be evaluated in the EIS. There are simply too many unknown factors, impacts and issues to reach these conclusions absent further environmental review under NEPA and a Supplemental document.

In fact, if it has been initiated, the Supplemental DEIS (or FEIS) would have been required to engage in a new study of “all reasonable alternatives” as required in 40 C.F.R. §1502.14(a), because the Project that was analyzed and reviewed in the technical reports and otherwise was not the project TxDOT currently intends to construct. As it now stands, these are simply unknowns,

though the strong likelihood is that significant factors, issues and impacts are out there.

This is critically important because the Mayor and Austin City Council only have incomplete information and stale data for their review of this matter and to make the decisions before them. This is an irresponsible action by TxDOT and the Council and Mayor should not be placed in position where they are committing funds or entering into Memorandums of Understanding without a full view of the facts regarding impacts that will affect their constituents. I think everyone understands improvements need to be made to the transportation infrastructure in this area, but selecting the appropriate alternative is very important not only from an environmental and social aspect, but from a financial one.

2. IMPACT OF THIS FLAW ON REASONABLE ALTERNATIVES

This significant change in the transportation feature not only required, but provided the opportunity to bring all reasonable alternatives back into play for a full analysis and review. I understand the SBCA and its sister and brother organizations have promoted an alternative for a number of years that was not adequately reviewed in the DEIS and FEIS. It may well be this reasonable alternative represents a better solution to the transportation challenges that meets Purpose and Need, with a significantly lessened impact on the social setting and the environment of the area. Again, the Mayor and Council are entitled to a full and fair NEPA process that, by design, unveils all reasonable alternatives and

adequately arrays and discusses the many impacts required under the NEPA process. They do not have that now.

3. THE IMPACT OF THIS FLAW ON THE REVIEW OF IMPACTS OF THE PROJECT

Under 40 C.F.R. § 1500.1, TXDOT is required to study the environmental and other impacts of the project before a decision on alternatives is made. Due to the change in the configuration of the Project, this has not occurred here with respect to impacts to water quality, the two endangered salamanders, the aquifer and creek impacts, as well as the impacts created by induced growth and from cumulative impacts. There is also no showing that the new highway configuration is consistent with local plans and planning such as WAPA, SOS, OEMS, IACP, OCNP and the transportation planning exemplified by the Park and Ride lot that will need to be relocated. Likewise, a review of new alternatives would affect the §4(f) analysis and the avoidance alternatives required for direct and constructive use of those resources. Lastly, a refreshed review of all reasonable alternatives available to build the newly defined project would likely result in better mitigation efforts.

4. ISSUES WITH THE CURRENT FEIS AND ROD FOR THE OAK HILL PARKWAY

In addition to what I believe to be fatal flaws as referenced above, the following issues appear to exist with the FEIS/ROD. My brief review of these documents and the comments thereon indicate that the following impacts were not properly and thoroughly reviewed. As to water quality, there appears to be an inordinate focus on total suspended solids (TSS), when other pollutant

constituents that are regulated by the SOS Ordinance of the City of Austin are also likely to be generated. As to the Barton Springs and Austin Blind Salamanders, there appears to be insufficient understanding of the impacts of pollutants generated by, or the pathways created by the project to and through, the karstic Aquifer that would conduct pollutants to the Edwards Aquifer and the Barton Springs. These are obviously very important water resources to the City of Austin and the elected officials simply do not have the necessary information available to understand the impacts. Likewise, the potential overall impacts to the Edwards Aquifer, Barton Springs and Williamson Creek appear to be poorly understood based on the comments. I understand each of these resources are important to the City of Austin, not only for drinking water purposes, but for environmental, social and recreational reasons.

Based on the comments I have read, the effort regarding the array and study of induced growth, as well as cumulative impacts also leaves much to be desired and many unknown impacts. These are important issues and they have regional implications, so without a full understanding of these impacts, it is impossible to understand a long term ramifications of this project.

It also appears that consistency with the local plans denominated as WAPA, SOS, OEMS, IACP, OCNP, and regional transportation planning has been given short shrift. In addition and as mentioned above, the 4(f) analysis appears truncated and inadequate. While there is some discussion regarding the direct impacts, the constructive use impacts to a variety of 4(f) resources do not appear to have been taken seriously. This is a very stringent requirement under

the operative statutes and is also very important to the population in the area. Lastly, the commenters appear less than impressed by the mitigation efforts committed to in the FEIS/ROD. Inadequate mitigation efforts and a lack of commitment to perform the ones that are set forth in the FEIS/ROD is a significant problem.

Lastly, at page 3 of the ROD, TxDOT included the following statement:

In combining the Final EIS and ROD to meet the statutory provisions and expedite project delivery under the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L 112–141, 126 Stat 405, Section 1319[b]), TxDOT has considered the facts and circumstances relevant to the EIS process. In doing so, TxDOT has determined that (1) there are no additional coordination activities that were not already known when the Draft EIS was available; (2) there are no unresolved interagency disagreements over issues that need identification in the Final EIS under 23 Code of Federal Regulations (CFR) 771.125(a)(2); (3) the Draft EIS identified a properly evaluated *Selected Alternative*; and (4) there is no compliance issue with any substantive requirement that must be resolved before issuance of the ROD, or that TxDOT wants to resolve before signing the ROD, that would merit deferring issuance of the Final EIS.

It cannot fairly be said that any of these conclusions are accurate based on the foregoing and the FEIS/ROD should be recalled to fix these problems with Supplemental NEPA documents.

5. CONCLUSION

Based on my initial review of the ROD/FEIS for this Project, it is fairly clear to me the Mayor and Council are not being provided with all of the relevant information to allow for a full and fair understanding of the potential impacts of this Project. Absent all of that information, it is impossible to make an informed decision on behalf of their constituents. Beyond the problems with the

ROD/FEIS, it appears the lion's share of the work accomplished was for a different project—the Toll Road. I believe it was irresponsible of TxDOT to ask the elected officials to make the decisions they need to make without all of the relevant facts before them. Putting aside the potential for successful litigation to stop this Project, I believe this is no way to treat the Government of the City of Austin, its population and its surrounding environs.