



Assignment 3 | HP 602

NHPA, NEPA, and 4(f) in Action

Submitted by: [REDACTED]
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The reconstruction of a major road artery running north-south through the city of Greentown, South Carolina is being funded by the Federal Highway Administration (FHA). The agency tasked with developing the construction plans is the Highway Department and the plans must be approved by FHA prior to receiving funding. The project is divided into three segments and each of these segments touches upon various aspects of the natural and built environment. The agency, in this case the Highway Department, will need to review several different aspects of the project which deal with various situations that fall under the National Historic Preservation Act (NHPA) and NHPA's Section 106, the National Environmental Policy Act (NEPA), and the Department of Transportation (DoT) Section 4(f). As the various policies and laws must all be reviewed at regarding the various potentially contentious issues of the project it would be best to review them in tandem, and this should be completed prior to the commencement of any work. The agency will need to consider if the project is an undertaking for NHPA, if it's a major federal action for NEPA, and determine if it's a use for DoT Section 4(f). As this project is being funded by the FHA it is considered to be federally funded and therefore meets the requirements for addressing the above noted policies and laws. These reviews should be coordinated, and the final reports must be submitted to FHA for approval prior to the release of funds.

The current layout of this major road artery runs from the north along the coast, passing through the city center, and then terminates at an intersection with an interstate highway seven miles south of the city limits. Commuter traffic into Greentown is heavy which makes this a congested artery. An analysis of each of the three segments and their specific issues will be reviewed and addressed.

Segment 1 Northern Section

Proposal

The first segment will require rerouting the northern section of the highway further inland so that it connects to the northern interstate, which will provide out-of-state commuters with better access to Greentown. Doing this will also improve the aesthetic value of the coastal area and allow restoration of the coastal wetlands; however, it will require passing through a territory that was once a significant place for trade between colonists and Native Americans. There is one log cabin on the land that the connector will pass through that is on the National Register. There are a series of other structures in the area; however, not much is known about them and none is on the Register. There have been rumblings by a local group that a few of these buildings are very important to the community.

Issues to Consider

The first thing to understand is the Area of Potential Effect (APE) which, for this segment of the project, is the northern section of the highway. The positive benefits of the proposed plan for this segment include better access to Greentown for commuters resulting in improved aesthetic value of the coastal areas and allowing for restoration of coastal wetlands.

Unfortunately, this new route has some issues that need to be addressed prior to the plan development. The two issues that arise from this portion of the plan are the fact that the new road would go through a territory that was once a significant place for trade between colonists and Native Americans. The other issue deals with existing structures on the land that the connector would pass through. One log cabin on the land is currently listed on the National Register and there are other structures that would also be affected by the construction of this road although

there is currently little known about them. The fact that the community feels that a few of these other buildings are important to them needs to be addressed.

The first issue to be addressed would be the matter of the road passing through a territory that was once a significant place for trade between colonists and Native American. It would need to be determined if this territory was significant to Native Americans, a site of trade between colonists and Native Americans is not necessarily important for Native American. Questions that need to be answered would be: was this site a significant trading post for Native Americans? Was, or did, something significant happen at this site deemed important by Native Americans? To determine this, the local Tribal Historic Preservation Office (THPO) should be consulted. The Federal Preservation Officer (FPO) representing the agency, the Highway Department, should also consult with the State Historic Preservation Office (SHPO) to determine if the site was important to the state or nationally. It would also be prudent to consult with the local government. The site could be eligible for the National Register if the “Property [is] of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization,” 54 U.S.C § 302706(a).¹ NEPA is also required to consult with Tribal Governments according to Sections 1501.2 and 1501.7 of the Council on Environmental Quality (CEQ) Guidance and Executive Order 11375, Consultation and Coordination with Tribal Indian Governments.² Section 4(f) of the DoT also requires consultation with THPO when dealing with tribal land.³

¹ Sara C. Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell*. 2nd Edition. (St. Paul: West Academic Publishing, 2018), 51.; “54 U.S. Code §302706 – Eligibility for Inclusion on National Register.” *Legal Information Institute*. Cornell Law School. Accessed March 13, 2018.

² “CEQ Guidance and Executive Orders Related to Native Americans.” NEPA. Accessed March 13, 2018. <https://ceq.doe.gov/get-involved/tribes-and-nepa.html>

³ Sara C. Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell*. 2nd Edition. (St. Paul: West Academic Publishing, 2018), 170.

There could also be confidentiality concerns when dealing with Native American issues therefore all consulting parties need to be aware and sensitive to this.

During consultation, primarily with the THPO, it would be determined if the site was important to Native Americans. If it is determined that it is not important then the road could be constructed, at least from this perspective. For NEPA the Environmental Assessment (EA) would conclude with a Finding of No Significant Impact (FONSI). For the DoT Section 4(f) if there was no “use” determined then the result would be a Finding of No Use. If it was determined that the site was important to Native Americans, then several things come into play. NHPA has an evaluation of adverse effects during the Section 106 process which would indicate the issues with proceeding with this road. This project would not qualify as a programmatic agreement under NHPA as it is not a routine or repetitive circumstance.⁴ The Federal Preservation Officer (FPO) as part of the agency, the Highway Department, would consult with the Advisory Council on Historic Preservation (ACHP) to “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on the historic properties,” 36 C.F.R. § 800.6.⁵ NEPA would move from an EA into an Environmental Impact Statement (EIS). The EIS would need to provide information on the impact of the proposed road construction, what the adverse effects would be if the road was constructed, alternatives to the proposed road construction, the impact of the short and long-term impacts and uses, as well as noting any irreversible and irretrievable commitments of resources if the road is constructed.⁶ Under DoT Section 4(f) if use was determined, then De Minimis would not be applicable because

⁴ Sara C. Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell*. 2nd Edition. (St. Paul: West Academic Publishing, 2018), 109.

⁵ Bronin, *Historic Preservation Law in a Nutshell*. 106.; “36 C.F.R 800.6 – Resolution of adverse effects.” *Legal Information Institute*. Cornell Law School. Accessed March 13, 2018. <https://www.law.cornell.edu/cfr/text/36/800.6>

⁶ Bronin, *Historic Preservation Law in a Nutshell*. 135.

constructing a road through the Native American territory would have an impact and De Minimis means no impact.⁷ A programmatic evaluation does also not apply in this case therefore an individual evaluation would need to be conducted. An individual evaluation is similar to NEPA's EIS process. The individual evaluation is conducted in two parts, a draft and then a final evaluation. The draft would "...identify and evaluate alternatives to using the historic site (including avoidance alternatives), describe harm-minimizing or harm-mitigating features of the proposed action, and recounts how federal transportation officials have coordinated with official(s) with jurisdiction and other relevant parties."⁸ One of the alternatives that must be looked at is a no-build option as well as alternatives that would alter the route of the road to avoid the Native American site altogether. As DoT Section 4(f) is substantive, where NHPA and NEPA are procedural, "If there is a prudent and feasible alternative that avoids the use of the historic site, that alternative must be selected."⁹ Therefore if the territory was considered important to Native Americans according to DoT Section 4(f) the road would have to be moved possibly further inland, or the agency would have to create an alternate route, if these alternatives were prudent and feasible.

The other concern in this segment of the project is that the construction of the road would directly impact a property listed on the National Register. Under NHPA this project is considered a federal undertaking and has an effect on an historic property which is listed on the National Register, therefore it involves Section 106. This would require consultation with the Keeper and the ACHP, the SHPO, the local government, the agency, the Highway Department, and possibly the local preservation organization. Similarly to above situation with the Native American

⁷ Sara C. Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell*. 2nd Edition. (St. Paul: West Academic Publishing, 2018), 174-175.

⁸ Bronin, *Historic Preservation Law in a Nutshell* 178.

⁹ Bronin, *Historic Preservation Law in a Nutshell*. 179.

territory this issue would involve Dot Section 4(f) as the property is listed on the National register and therefore would require the agency to consider a “no-build” option and other alternatives, “One of the options reviewed should be a “no-build” alternative, which means the program or project would not be built, avoiding negative impacts... Alternatives that avoid the use of the resource should also be considered where possible. Such “avoidance alternatives” may involve re-routing or relocating the project to avoid the use of a historic site...or redesigning or resizing the project to eliminate adverse impacts to the historic site.”¹⁰ Although other policies come into play in this situation DoT Section 4(f) is substantive therefore it would be the most effective in keeping the property from adverse effects.

The other buildings in this area also need to be considered as they may be significant as indicated by the local community. This falls under NHPA Section 106 and DoT Section 4(f). The agency would need to verify if any of the other buildings are eligible for the National Register, “Moreover agencies must consider whether properties that may be affected by certain agency actions – such as those triggering Section 106 or Section 4(f) processes – are eligible for the National Register.” 36 C.F.R. § 800.4(b); 23 C.F.R § 774.11(e).¹¹ Also noted in the NHPA is “...the agency official must make a “reasonable and good faith effort” to identify historic properties, in consultation with consulting parties.” 36 C.F.R. § 800.4(b)(1).¹² The consultation for this portion would involve the FPO from the agency, the SHPO, local governments, and the interested local community organization and local preservation organization. Should this review

¹⁰ Sara C. Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell*. 2nd Edition. (St. Paul: West Academic Publishing, 2018), 178-179.

¹¹ Bronin, *Historic Preservation Law in a Nutshell*. 54.; “36 C.F.R 800.4 – Identification of historic properties.” *Legal Information Institute*. Cornell Law School. Accessed March 13, 2018. <https://www.law.cornell.edu/cfr/text/36/800.4>; “23 C.F.R. 774.11 – Applicability.” *Legal Information Institute*. Cornell Law School. Accessed March 13, 2018. <https://www.law.cornell.edu/cfr/text/23/774.11>

¹² Bronin, *Historic Preservation Law in a Nutshell*. 101.; “36 C.F.R 800.4 – Identification of historic properties.” *Legal Information Institute*. Cornell Law School. Accessed March 13, 2018. <https://www.law.cornell.edu/cfr/text/36/800.4>

find additional buildings that are eligible for the National Register then the impact of this road construction project is even greater than with only one registered building. This may affect the consideration of prudent and feasible alternatives, meaning that the project would need to seriously address the issue of rerouting around this area.

Segment 2 – City Center

Proposal

The second segment involves expanding the portion of the artery that runs through the city from four lanes into eight and submerging this highway segment underground to reduce auto emissions into the air and improve the central city. There are a few historic districts in downtown Greentown. Although there hasn't been any research done, there are some major archaeological sites located in close proximity to the downtown.

Issues to Consider

The APE is the central downtown area of Greentown. The positive benefit of the proposed plan for this segment includes submerging a portion of the enlarged highway to reduce air pollution which also would allow traffic to flow at a more consistent speed rather than having to slow down to accommodate city movement. Would this negatively impact the commerce of the city center if the major traffic no longer came through it? The major issues to consider with this proposal though, are the effects of this construction to the existing historic districts as well as the potential archaeological resources.

Consultation for the first portion would involve the FPO, the SHPO, the local government, and the local preservation organization. Some questions to consider regarding this construction would be: would the vibrations of the underground tunnel construction adversely affect the historic properties? Would continual traffic running below these historic districts

overtime, have any adverse effects on the buildings? Are the downtown historic districts on the National Register? If so this would trigger an NHPA Section 106 review and DoT 4(f) evaluation similar to the process for the log cabin in the northern segment of the project. An individual evaluation under 4(f) would review these issues and alternatives to the underground highway would need to be considered if it was determined that the construction and ongoing effects of traffic below the historic districts would be adverse.

The other issue that would need to be considered in this segment is that there are major archaeological sites close to the downtown area of Greentown and this would need to be investigated. The consultation team would need to consist of the FPO, the SHPO, the local government, an archaeologist, preferably with local knowledge, and possibly the local archaeological society. Archeological sites can be listed in the National Register, the list considers "...districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture," 54 U.S.C. § 302101.¹³ There is a duty to identify hidden properties that are of significance and since this project has triggered a Section 106 review "the agency must make a reasonable and good faith effort to carry out appropriate and identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey," 36 C.F.R. § 800.4(b)(1).¹⁴ If it is found that there are archeological resources it needs to be determined if the resources are worth preserving in place, "Section 4(f) regulations have evolved to protect only those archaeological sites worth preserving in place...officials engaging in the federal program or project are obliged

¹³ Sara C. Bronin and Ryan Rowberry, *Historic Preservation Law in a Nutshell*. 2nd Edition. (St. Paul: West Academic Publishing, 2018), 91.; The National Historic Preservation Act. Accessed March 13, 2018.

<http://www.achp.gov/nhpa.pdf>

¹⁴ Bronin, *Historic Preservation Law in a Nutshell*. 376.; "36 C.F.R 800.4 – Identification of historic properties." *Legal Information Institute*. Cornell Law School. Accessed March 13, 2018.

<https://www.law.cornell.edu/cfr/text/36/800.4>

only to document or relocate any archaeological sites not worth preserving in place.”¹⁵

Depending on the final outcome the project could either be re-routed or it could proceed with the archaeological items being documented and removed, depending on the final report.

Segment 3 – Southern Section

Proposal

The third and final segment of this project proposes that the Department extend the southern section of the artery another five miles so that it will be more accessible to growing communities along the southern shore. Local environmental groups have expressed concern that an endangered species of snail makes its home in and around the woods where the southern extension will be located. In the direct path of the proposed road is a small church and accompanying cemetery. According to a Department contact, it is “falling down” but it may or may not be the site where a famous civil rights leader spoke.

Issues to Consider

The APE of this portion is the southern section, five miles south of the Greentown city limits. There are two different issues that need to be addressed in this segment of the project, the concern of the construction of the project with regards to an endangered snail species whose home is in the woods which would be affected by the construction of the new road. The other being the church and cemetery which is in the direct path of the road construction.

The first things that would need to be addressed would be the endangered snail species. The consultation team would need to consist of the FPO, the agency representative, along with a representative from both the US Forest and US Wildlife Services, and any local community organization involved in the forest and wildlife areas, and the local environmental groups. It

¹⁵ Bronin, *Historic Preservation Law in a Nutshell*. 168.

would need to be verified if the species of snail is in fact endangered. The first step would need to be an EA and then possibly an EIS. The impact of the construction of the road through the forest would need to be recorded and the Endangered Species Act¹⁶ would be evoked and determination based on the finding would dictate if the construction of the road could even take place.

Another consideration is that virgin forest land is being affected for sprawl to accommodate growing communities. One of the considerations should be to avoid sprawl and to build within the parameters of the existing boundaries of the community, looking at densification rather than simply moving outwards.

The final consideration for this third segment of the project is the church and accompanying cemetery. The agency has indicated that the church is “falling down.” The first question that comes to mind is, is the FPO qualified to make such a judgement? This determination would require consultation and evaluation from an appropriate individual or party. The consultation team on this portion of the project would need to consist of the FPO, the SHPO, the local government, and the local preservation organization. The SHPO or a member of the local preservation group would research to determine if the property would be eligible for nomination citing Criterion B “Properties may be eligible for the National Register if they are associated with the lives of persons significant on our past,”¹⁷ or one of the other three criteria. If the church was considered to be eligible for the National register it would trigger further consultation and an individual 4(f) evaluation.

¹⁶ National Oceanic and Atmospheric Administration. Endangered Species Act. Accessed March 15, 2018. <https://www.fisheries.noaa.gov/national/endangered-species-conservation/endangered-species-act>

¹⁷ National Park Service. National Register Publications. National Register Bulletin 15. Accessed March 15, 2018. https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_6.htm#crit%20b

The other area to consider is the church's accompanying cemetery. While the church is being evaluated the cemetery should also be reviewed to determine if it is historic or associated with any Native American groups as this would trigger different laws and policies. Although no direct examples of how cemeteries are dealt could be found with regards to new construction it seems that a road should not be able to be built through an existing cemetery, there must be laws prohibiting the disturbance of such areas.

This proposed reconstruction of the major road artery through Greentown has several significant areas that need to be addressed and evaluated prior to the plan being approved by the FHA. As outlined in each of the three segments there are various aspects that need to be evaluated and considered all touching upon NHPA, NEPA, and DoT Section 4(f) with overlapping issues. The best course of action would be for assessment team to evaluate the entire project at one time. A third party consulting firm, similar to Cultural Resource Analysts Inc., here in Lexington, would be able to address each of these issues as their teams consist of architectural historian/ preservationists, as well as archaeologists. This third-party firm would consult with the SHPO, THPO, local governments, and local organizations, but one firm would be able to streamline the process so that duties are not duplicated or missed. It seems that this project has many serious issues to contend with and a thorough analysis is certainly required. There are a few positives that could come out of this project like the restoration of the coastal wetlands and a downtown center without a major highway running through it, but the potential for harm is also great. As this project is federally funded it is mandated by law, Dot Section 4(f), that alternatives be taken if they are prudent and feasible resulting in, hopefully, the preservation of sites and properties that are deemed significant to the state and nation.