



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

**MCPB**  
**Item # 5**  
**3/04/04**

To: Montgomery County Planning Board

Date: March 4, 2004

From: ICC Internal Review Team(301/495-4545)

Subject: Intercounty Connector Study/Planning Board Briefing #2 and Status Report.

The main focus of the current briefing is to engage the Planning Board in matters dealing with park impacts, the existing 1989 Memorandum of Understanding with the State Highway Administration (SHA) and its implementation; the present status of the Alternatives Retained for Detailed Study (ARDS); and current schedules and processes as identified in attachment # 2.

### **Alternatives Retained for Detailed Study**

As a result of the Planning Board briefing on January 22, a letter summarizing the Board's comments has been sent to the SHA. This letter will form the beginning basis for today's presentation. Both the County Council and the Planning Board submitted comments and questions to SHA regarding the Alternates Retained for Detailed Study (ARDS) in letters of December 1, 2003 and February 9, 2004 respectively. These letters are included as attachment # 1 to this memorandum.

SHA anticipates publication of a final ARDS package reflecting all agency comments and concurrence from the US Army Corps of Engineers (USCOE) and the Maryland Department of the Environment (MDE) within the next few weeks. SHA is developing written responses to the thirteen specific comments in the County Council and Planning Board correspondence. During the March 4 worksession, SHA staff will present available responses to those specific comments as well as provide a timeline for responding to the specific issues for which a response is not yet available.

Substantial discussion at the January 22 worksession regarded the relationship between Norbeck Road Extended and the ICC Corridor 2 alignment. Staff understands

that the ARDS package will reflect that Corridor 2 would replace Norbeck Road Extended for its entire length between Layhill Road (MD 182) and New Hampshire Avenue (MD 650). In other words, this roadway segment is recommended in our master plans as a four-lane major highway. If Corridor 2 were built, the four-lane highway would be replaced with a six-lane limited access highway with interchanges at both Layhill Road and New Hampshire Avenue and no access between those two interchanges.

### **Section 4(f) Evaluation**

The Section 4(f) Evaluation is part of the Draft Environmental Impact Statement (DEIS) and is on a schedule that is given below. The schedule indicates meeting dates during which the Board will have an opportunity for comment. This schedule forms a part of the overall schedule referenced as attachment 2.

#### **“PRELIMINARY” DRAFT SECTION 4(f) EVALUATION REVIEW**

**March 4, 2004**

#### **Planning Board Meeting**

May 2004 (tentative)

Submit “Preliminary” Draft Section 4(f) Evaluation materials to FHWA, NPS and Interested Agencies for Review.

**May 20, 2004**

#### **Planning Board Meeting**

July 2004 (tentative)

Submit Revised “Preliminary” Draft Section 4(f) Evaluation materials to FHWA and Interested Agencies for Final Review.

**July 15, 2004**

#### **Planning Board Meeting**

Planning Board comments on: the determination of locally significant parks and historic sites; constructive uses that may exceed the transportation right-of-way; and appropriate mitigation of those constructive uses.

Section 4(f) of the Transportation Act of 1966 deals with transportation projects requiring use of a publicly owned park, recreation area, or wildlife and waterfowl refuge areas and publicly or privately owned significant historic sites. The Secretary of Transportation may approve a transportation project requiring the use of publicly owned land that is a public park, recreation area, or wildlife and waterfowl refuge, or land from a historic site of national, state, or local significance – as determined by the federal, state, or local officials having jurisdiction over the park – only if: (1) there is no prudent and feasible alternative to using that land; and (2) the project includes all possible planning to minimize harm of the park, recreation, wildlife and waterfowl refuge resulting from that use. It is important to note that the Secretary is not required to find an alternative that

imposes no harm, but rather the most prudent and feasible alternative. Federal law provides that local officials with jurisdiction over a park, recreation area, refuge, or historic site have the authority to make an initial determination that those resources are “significant.” The Federal Highway Administrator then makes the final determination as to the application of Section 4(f) to the project.

The use of a public park, recreation area, refuge, or historic site for a transportation project includes any permanent physical occupation of land and any temporary use of property that will result in permanent destruction of the resource. A finding of “temporary occupancy” requires that (1) the scope of work is minor and there is no change in ownership of the land; (2) the changes in the 4(f) resource are minimal; (3) there will be no interference with the activities or purposes of the resource; (4) the land must be fully restored; and (5) there is documented agreement of the appropriate local officials with jurisdiction over the resource regarding these conditions.

Section 4(f) regulations also discuss the concept of “constructive use.” Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Examples of constructive use include: noise levels that substantially interfere with the use and enjoyment of a park where serenity, peace and quiet are a significant part of the park experience; the proximity of the proposed transportation project substantially impairs aesthetic features or attributes of a 4(f) resource; or the ecological intrusion of the project substantially diminishes the value of wildlife habitat adjacent to the project. Constructive use does not occur when: (1) the action impacting the 4(f) resource was concurrently planned with the park; and (2) proximity impacts are mitigated to a condition equal to or better than that which would occur under a no-build scenario. Significant 4(f) resources subject to constructive use should include an assessment of appropriate mitigation measures, which if implemented, would allow the 4(f) resource to be taken out of the constructive use category.

Major components of the 4(f) document include an introduction describing the importance of the 4(f) statement; descriptions of the 4(f) resource; avoidance and minimization; mitigation; and coordination.

### **Characterization of natural and cultural resources and calculation of impacts resulting from ICC alternatives**

In 1997, staff selected a number of qualitative and quantitative factors to characterize natural resources and recreational facilities potentially impacted by the ICC alternatives. The results of this work appear in *M-NCPPC Staff Review: ICC Alternatives* (M-NCPPC, July 1997). The factors included the following: acres of M-NCPPC parkland defined by section 4(f); number of park units impacted; bedrock acreage (by bedrock type); slope and aspect; acreage of wetlands impacts (by wetland type); estimated number of seeps and springs impacted; number of stream crossings for first, second, third, and fourth/fifth order streams; acreage of floodplain soil disturbance (by

soil type); acreage of upland soil disturbance (by soil type); acreage of M-NCPPC stream buffer disturbance; imperviousness (based on a qualitative assessment of how stream condition may be affected by projected increases in sub-watershed imperviousness); water quality (qualitative assessment of which water quality parameters defined by temperature, sediment loads, and base-flow are of particular concern for each impacted stream); acreage of high quality, medium quality, and low quality forest impacted; impacts to forest interior birds; impacts to rare, threatened, endangered and watch-list species; impacts to significant natural areas; impacts to the Paint Branch brown trout fishery; acreage of forest interior bird habitat lost; noise impacts (including width of the noise impact area and a list of park facilities and /or uses within park areas impacted by noise); and number and type of recreational facilities and activities potentially affected by ICC alternatives.

In the present EIS study, SHA plans to use a variety of data taken from previous ICC studies and technical reports, other relevant research and analyses, and the *M-NCPPC Staff Review: ICC Alternatives* document – to provide the basis for a complete characterization of affected natural and cultural resources and an accurate calculation of impacts due to the ICC alternatives. Broad factor categories include: topography; geology; soils; climate; prime farmland soils and soils of statewide importance; impervious cover; groundwater; floodplains; water resources and aquatic biota; wetlands, including waters of the U.S.; vegetation, including forests and specimen trees; forest interior dwelling birds and their habitat; wildlife; rare, threatened, and endangered species of plants and animals; unique and sensitive areas, including M-NCPPC’s biodiversity areas and best natural areas in parks; archaeological resources; historic structures; traffic noise; air quality; and hazardous materials. Details associated with each factor are described in SHA’s draft *Intercounty Connector GAP Analysis and Scope of Work Summary for Interagency Work Group Review* (September 10, 2003).

**Given the high level of detail associated with SHA’s proposed characterization of affected natural and cultural resources and the fact that M-NCPPC staff have provided SHA and/or their consultants with all known information regarding natural resources, cultural resources, and parks in the study area, M-NCPPC staff propose to rely upon the Draft EIS and Final EIS for a complete characterization of affected natural and cultural resources and an accurate calculation of impacts resulting from the ICC alternatives.**

### **Mitigating Impacts of the ICC on County Parks**

The Intercounty Connector Memorandum of Understanding (1989) provides an interagency understanding of park replacement, land transfer, design, implementation, impact minimization, impact mitigation, and construction management associated with the ICC project. The issue of mitigation, and more specifically park replacement, is addressed on page 2 of the memorandum:

*“At a minimum, parkland required for the project, including such off-site acreage required for stormwater management and wetlands mitigation, will be replaced by SHA*

*on an acre-for-acre basis. The replacement land will be of equal or greater natural resource, recreation, and economic value as the parkland taken for or impacted by the project.”*

In a letter dated January 24, 1997 to Neil Pedersen, then Director of SHA’s Office of Planning and Preliminary Engineering, Planning Board Chairman William H. Hussmann articulated the Planning Board’s opinion regarding environmental mitigation and parkland replacement issues relative to the ICC project. (The Planning Board received a copy of this letter in the packet as Item #14: Briefing and Status Report/2004 Intercounty Connector Study dated January 22, 2004.) On behalf of his colleagues, Mr. Hussmann provided additional clarity on the issue of replacement parkland:

*“Replacement land should, as nearly as possible, be contiguous to existing parks, in the same watershed, preferably the same subwatershed, and duplicate the function and ecological/cultural value of lands impacted. These considerations also need to account for related edge and noise impacts where appropriate. For takings that affect park acreage beyond the proposed right-of-way, it may be necessary to consider replacement land on a greater than acre-for-acre basis. The findings of the DEIS (i.e., Draft Environmental Impact Statement) studies relative to the natural resources should address these concerns and assist in these determinations. We (i.e., the Planning Board) will need to see this impact and mitigation information to determine the adequacy of any needed replacement lands.”*

In the same letter, Mr. Hussmann acknowledged SHA’s concern that some mitigation sites (e.g., stormwater management facilities and created wetlands) will need to be considered in parks. Again on behalf of his colleagues, Mr. Hussmann stated:

*Such specific situations will need to be presented and reviewed on a project-by-project basis. However in accordance with previous guidance, we suggest that replacement parkland should be provided for mitigation which may be anticipated in parks.”* And that *“This also may be reviewed on a project-by-project basis in respect to the proposed mitigation measure.”*

And finally in regard to SHA’s suggested consideration of “already planned or programmed parklands for replacement lands,” Mr. Hussmann stated the Board’s concern to *“maintain no net loss in the overall park system.”*

**When the time finally comes to identify and approve replacement lands, staff believes that the Planning Board should give priority consideration to lands previously identified for future park acquisition on the current Park Acquisition Map; in the Legacy Open Space Functional Master Plan (M-NCPPC, 2001), in any area master plan, any park master plan, or through the ICC study process. Such a strategy would provide a valuable opportunity to acquire critically important land for future parks at a time when more traditional funding sources are not available.**

At the onset, the evaluation of potential replacement lands will require both a thorough understanding of the natural and cultural resources in parks potentially affected by the ICC and an accurate prediction of impacts to those resources. The basis of this understanding will be the characterizations of natural and cultural resources and related values prepared by SHA and their consultants with input from M-NCPPC staff, other regulatory staff, and the public. Given the high level of detail with which affected resources are being described in the DEIS process, staff does not believe that it will be possible to find identical replacement land. However, staff does believe that it will be possible to find replacement land that “*duplicates the function and ecological /cultural value of lands impacted* (Hussmann, 1997).” Staff proposes to define these values using a set of criteria that were employed in recognizing the best natural areas in county parks.

**The proposed criteria include:**

- 1. Large areas of contiguous, high quality forest, marsh, or swamp.**
- 2. The known presence of rare, threatened, endangered, or watch-list species of plants or animals or a high probability of their predicted occurrence based on an analysis of bedrock, soils, hydrology, vegetation, habitat size, and past land-use practices.**
- 3. The best examples of unique habitats in Montgomery County, *i.e.*, river-rock outcrops of the Potomac River Basin; serpentine influenced plant communities; diabase influenced plant communities; plant communities on soils derived from Triassic shales, siltstone, sandstone, and conglomerate; central Maryland floodplain forest; central Maryland swamp forest; mesic forest on acidic bedrock, dry forest on acidic bedrock, and limestone influenced plant communities.**
- 4. High quality wetlands, including those of *Special State Concern* as noted in COMAR Title 26.**
- 5. Aquatic communities rated as good or excellent in the *Countywide Stream Protection Strategy*.**
- 6. Special Trout Management Areas as noted in COMAR Title 08.**
- 7. Known prehistoric or historic archaeological sites or a high probability of their predicted occurrence based on an analysis of geology, soils, hydrology, topography, vegetation, historic roads and intersections, nucleated settlements, the location of standing structures, and the location of structures on historic maps.**
- 8. Areas of exceptional scenic beauty.**

**Coordination of M-NCPPC and SHA Processes and Schedule**

The ICC DEIS will be issued pursuant to the National Environmental Policy Act (NEPA), which creates a procedural review requirement for projects that will receive federal funding. NEPA is a federal statute that requires federal agencies proposing “major federal action” to prepare a detailed statement that identifies: the environmental impact of the proposed action; any adverse environmental effects which cannot be avoided should the proposal be implemented; alternatives to the proposed action; the

relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA further requires the federal officials to make available to the public during the review process the comments and views of the appropriate local agencies which are authorized to develop and enforce environmental standards.

NEPA does not include any substantive review standards. It requires that agencies look at environmental impacts (which in the context of NEPA includes the impact on the man-made environment in addition to natural resources), but does not impose specific evaluation criteria. Instead, it requires the federal agency to consider environmental impacts and possible alternatives, before committing to a major federal project.

### **EIS Process/Schedule**

The first step in an implementation process for the ICC is the completion of environmental documentation following the requirements established by the National Environmental Policy Act (NEPA). For a project of the ICC magnitude, the NEPA process requires completion of a Draft Environmental Impact Statement (DEIS) and a Final Environmental Impact Statement (FEIS) before development of a Record of Decision (ROD) regarding which build alternative, if any, should move forward into design.

Staff proposes a total of eight worksessions to facilitate Planning Board and SHA coordination during the NEPA process for the ICC. The proposed worksession schedule is included in attachment 2 to this memorandum. The following paragraphs describe the context and details of the schedule.

### **Decision-Making**

Decision making for the ICC NEPA process will be led by the Maryland Department of Transportation (MDOT) and the Federal Highway Administration (FHWA). Ultimate decision-making authority rests with our Governor and Robert Flanagan, the Maryland Secretary of Transportation. To be successful, however, the process must incorporate the concerns of several constituencies, including:

- The study co-lead agency, the Federal Highway Administration (FHWA), who is responsible for issuance of the ROD.
- The two agencies primarily responsible for issuing permits, the US Army Corps of Engineers (USACOE) and the Maryland Department of the Environment (MDE). In the ICC study, these two agencies are described as concurring agencies as they are asked by the co-lead agencies to issue concurrence statements for the process to be completed.

- The remaining federal, state, and local agencies on the study team, including the Maryland-National Capital Park and Planning Commission. In the ICC study, these agencies are described as commenting agencies.
- Constituents who are not officially part of the study team but nevertheless influence the process, including elected and appointed government officials, affected property owners, special interest groups, and members of the general public.

While the categories described above relate to the decision-making process for the ICC, they do not reflect any particular ranking in terms of affecting the decision-making outcome. Any NEPA study is a balancing act; a public works project ultimately requires a substantial level of support from the permitting and funding agencies as well as a visible level of public support.

The Montgomery County Planning Board falls into two of the categories listed above:

- As the planning and zoning authority for the county, the Montgomery County Planning Board has the responsibility to comment on the means by which the ICC alternatives are consistent with the County's General Plan and local land use plans and consider how decisions on this project will affect the quality of life in Montgomery County.
- As owners, managers, and stewards of the park system, the Montgomery County Planning Board has the responsibility to ensure that park impacts are carefully considered and adequately mitigated.

In each of these two arenas, the Planning Board will be asked to confirm staff recommendations regarding the tradeoffs among several objectives in the General Plan related to providing adequate public facilities, developing livable communities, and preserving and enhancing the natural and cultural resources.

#### **Proposed Worksession Schedule**

As indicated in Attachment 2, the proposed worksession schedule has the following features:

- Each worksession has two categories of discussion topics relating to the Planning Board's two arenas of responsibility.
- Six technical worksessions, such as this March 4 worksession, facilitate an exchange of information, but do not include formal staff recommendations. These worksessions are established to review information as it becomes available through the study team. No formal public testimony is envisioned for these worksessions, but throughout the worksession process staff will keep Planning Board members informed of written correspondence regarding the ICC.



- Two worksessions would include a formal staff recommendation for the Planning Board to endorse or revise before forwarding to the County Council and the Maryland Department of Transportation. Both of these worksessions would follow closely behind SHA public meetings and would include the opportunity for formal public testimony.
  - Worksession #4, tentatively scheduled for July 15, 2004, would follow a series of open-house public meetings in late June or early July at which SHA will present a status report on the alternatives being documented in the DEIS.
  - Worksession #6, tentatively scheduled for January 20, 2005, would follow the SHA Location and Design Public Hearing, at which comments on the locally preferred alternate are elicited.

As indicated in Attachment 2, a review and comment on the worksession schedule itself is a recurring topic at each proposed worksession.

Attachments:

- # 1- February 9, 2004 letter from Chairman Berlage to Neil Pedersen, SHA.
- # 2- *Planning Board Worksession Schedule*, January 28, 2004 DRAFT.
- # 3- Packet of letters received by Chairman's office in order of receipt via C-Track since Planning Board briefing # 1.