

CAPITOL HILL RESTORATION SOCIETY



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February 11, 2014

Mr. Joseph C. Lawson Transmitted by email to: Christopher.lawson@dot.gov
Division Administrator
Federal Highway Administration
DC Division
1990 K Street, NW, Suite 510
Washington, DC 20006-1103

Subject: Comments on January 2014 Draft Memorandum of Agreement Regarding the Reconstruction of the Virginia Avenue Tunnel

Dear Mr. Lawson:

The Capitol Hill Restoration Society (CHRS), which is a consulting party in the above-referenced project, hereby submits comments on the Draft Memorandum of Agreement (MOA) regarding the Reconstruction of the Virginia Avenue Tunnel (VAT/Project), which CHRS received by email on January 13, 2014. CHRS submits these comments by the extended deadline of February 11, 2014.

SUMMARY

The Draft MOA contains critical omissions and fails to address the post-construction period and its reasonably foreseeable, long-term, and cumulative adverse effects. . For example:

- The draft MOA fails to properly define and protect "historic properties" to include all contributing buildings within the Area of Potential Effects (APE), and as a result, it implies denying to hundreds of historic properties the protections in the draft MOA.
- The draft MOA fails to protect historic properties from foreseeable adverse effects after construction is completed.

WHEREAS CLAUSES

Historic Properties

The MOA language in the eleventh Whereas clause is very misleading and could cause readers to assume that there are only 17 historic buildings and one archeological site in the APE, when in fact there are a number of individually listed buildings as well as hundreds of contributing buildings, sites, structures, and other historic resources within the APE. It also suggests that one of the “historic properties” – the Capitol Hill Historic District (CHHD) – is wholly a “built” historic property, when in fact it also includes parks; L’Enfant Plan reservations, roads and parklets; and historic streetscapes. Similarly, another one of the 18 historic properties mentioned – the L’Enfant Plan – includes numerous historic components and contributing elements both within and outside the APE that are not necessarily “built”.

This Whereas clause must be rewritten to expressly and explicitly encompass all contributing buildings, parks, structures, historic streetscapes, and L’Enfant Plan reservations, roads, and parklets in the APE, along with the individually listed historic properties already included. This or another Whereas clause should also address unanticipated discovery of adverse effects of the Project on historic properties outside the APE. These issues revisions must be reviewed in a later draft of the MOA before being finalized.

Reasonably Foreseeable and Long-Term Adverse Effects

The last Whereas clause on page 2 appropriately acknowledges unanticipated adverse effects due to Project modifications or implementation. However, the MOA does not address other reasonably foreseeable adverse effects caused or enabled by the undertaking "that may occur later in time, be farther removed in distance or be cumulative." [36 CFR § 800.5(1)] Another Whereas clause needs to be added to the MOA to acknowledge these potential adverse effects as well, including those that could occur following construction due to vibrations caused by longer, taller, heavier trains running at greater speed to, through, and out of the tunnel, and sometimes passing each other in the tunnel. Such a clause, or an additional one, should also acknowledge the possibility of an accident in or outside the tunnel. In addition to one or more new Whereas clauses acknowledging these possibilities, the MOA should contain stipulations addressing these and other reasonably foreseeable adverse effects, including post-construction.

Number of Consulting Party Meetings

The second Whereas clause on page 3 states that FHWA and DDOT held 5 Consulting Party meetings, although there were only 4: on February 14, 2012; May 21, 2012; September 26, 2012; and July 31, 2013.

CSX Reports

The final Whereas clause references a final report from CSX to the Signatories upon completing all the stipulations in accordance with the MOA. Since CHRS holds that the MOA should also address post-construction monitoring and adverse effects, this clause needs to be revisited and revised.

STIPULATIONS

I.A. This should be revised to read "...CSX shall notify..."

I.B. Construction Protection Plan. The Construction Protection Plan (CPP) appears to cover only "construction activities" and not train operations during construction. The Draft Environmental Impact Statement (DEIS) states that during construction, CSX will be running double-stack trains in two directions through a trench on Virginia Avenue. As CHRS has pointed out, the vibration studies for train operations during construction are deficient because those studies were based on vibrations for only single-stacked trains, and vibration recording and analysis did not include the location of fragile historic buildings in the Capitol Hill Historic District. Other Consulting Parties identified in their DEIS comments additional deficiencies in the vibration studies. The Construction Protection Plan must expressly include adverse effects due to train operations.

In addition, the Construction Protection Plan is inappropriately limited to "known historic properties" and implies limiting it to "other older structures located near Virginia Avenue SE between 2nd and 9th Streets", when instead the Construction Protection Plan, including required monitoring, must encompass all contributing buildings and structures within the APE, with the highest level of attention given to designated and contributing buildings south of I-695, including all those in the CHHD. As CHRS noted in its DEIS letter of September 25, 2013 regarding effects on historic properties, Virginia Avenue is not the only place where damage could occur since, for instance, the haul routes running through the CHHD on 8th, 7th and L Streets and other activities within the APE can also damage fragile contributing historic buildings by vibrations.

The Construction Protection Plan must list all individually listed and contributing buildings and structures. It must also require CSX to notify all owners of designated and contributing buildings and structures in the APE, prior to beginning pre-construction baseline assessments, about the CPP and all of its provisions, including but not limited to pre-construction assessment and vibration monitoring, vibration monitoring during construction, mechanisms for reporting damage, and repair of and/or compensation for damage, as well as post-construction monitoring, reporting, and recourse. All provisions pertaining to the CPP must apply to all historic buildings and structures in the APE, including contributing buildings. The DC State Historic Preservation Officer (DCSHPO) can assist in identifying historic buildings and structures, including contributing ones, and CHRS will assist in this process if DCSHPO requests. The addresses of all the historic/contributing buildings in the APE must be posted online so owners can readily see whether their historic properties are in the APE and subject to the CPP.

To ensure a systematic means of compensating property owners in the APE for damage incurred during construction, CSX should be compelled to create a fund for damages of at least \$3 million, pre-funded and administered similar to the Preservation Fund described in Stipulation I.D, pp. 4-5, with any remaining balance to be returned to CSX after a specific period of time, such as 180-365 days following completion of construction.

Post-construction damage to historic properties. The Construction Protection Plan is also inappropriately limited to damage occurring only during construction. The appropriate timeframe for potential damage to historic properties extends substantially beyond the construction period. For example, if one of the build alternatives is selected, the cumulative impact of post-construction vibration from train operations, when added to vibration caused by demolition and construction, may further damage historic properties. The CPP also does not include foreseeable damages that could be caused post-construction including, as noted above, “those that could occur following construction due to vibrations caused by longer, taller, heavier trains running at greater speed to, through, and out of the tunnel, and sometimes passing each other in the tunnel.” Continued monitoring and reporting, as well as abatement, repair, and compensation for post-construction damage, must also be addressed by additional MOA stipulations.

For these reasons, to compensate owners of historic properties whose buildings might incur project-related or project-enabled damage, the MOA should compel CSX to create an additional fund of \$3 million pre-funded and administered similar to the Preservation Fund described in Stipulations I.D, pp. 4-5. The duration of this fund should be 25 years.

I.C. HAER Recordation. CHRS is happy to see that stipulation I.C providing for HAER recordation of the historic tunnel is in the draft MOA, since CHRS recommended such recordation in its January 18, 2012, letter to FHWA.

I.D. Preservation Fund. Capitol Hill and nearby areas within the APE – not the entire District of Columbia – will be most immediately affected by the Project. Accordingly, CHRS feels strongly that the community most affected by the Project and enduring its effects should be the community which benefits from the Preservation Fund. Accordingly, the Preservation Fund must be limited only to projects in the Capitol Hill Historic District, or to the Capitol Hill area (as defined by the Office of Planning), with priority given to preservation projects within the APE. This fund also must not be used for projects in the part of the CHHD south of the freeway that would not follow and comport with the provisions of the Eighth Street Southeast Overlay District established by the DC Zoning Commission Order No. 901 in 1999.

The proposed \$200,000 fund should be sufficient to fund preservation projects within the APE and other areas of Capitol Hill. The MOA must clarify that the Preservation Fund shall not be used to satisfy any of CSX's other obligations under the MOA (e.g., restoring Virginia Avenue, SE or Virginia Avenue Park). This fund should not be limited to preservation projects having a public benefit.

If DCSHPO (and/or other Signatories) wishes to provide through the resolution of adverse effects process for funding from CSX that is intended for city-wide “off-site” mitigation (outside the APE and the Capitol Hill area), a second Preservation Fund could be established with an additional \$200,000.00 designated for this purpose and administered by DCSHPO for preservation projects that meet the Secretary of the Interior’s Standards and provide a public benefit.

I.E. Restoration of Virginia Avenue, SE. Prior to any alteration of Virginia Avenue, the entire avenue within the APE should be photographed in the same manner as Virginia Avenue Park (see stipulation I.F.). The photographs should be promptly posted online, so that the public can access all photographs. CHRS agrees with ANC 6B that Virginia Avenue north of the freeway could be adversely affected by the significant increase in use during the project, and that restoration provisions should include the northern portion of the Avenue explicitly in stipulation I.E.1 by explicitly referencing “the portion between 3rd and 11th Streets SE along the north side of the freeway” that will be “affected by construction of the Project”.

In I.E.2, we find reference “in the manner described in the Final Environmental Impact Statement” to be, unacceptable, since the FEIS is not yet available. Thus accepting this provision without knowing what that “manner” would be, even implicitly, would be like buying the proverbial pig in a poke. The “manner” must be made much more clear in the MOA.

Regarding I.E.3, the MOA must state that more Consulting Parties and nearby residents of the affected community must be included in consultation regarding restoration than just DCSHPO and NPS. At the least, ANCs 6B and 6D, CHRS, Capitol Quarter, Barracks Row Main Street, and the Arthur Capper Senior Housing residents should be represented in this consultation.

I.F. Restoration of Virginia Avenue Park. CSX’s photos of existing conditions must include the entire park and be posted online when copies are provided to the Signatories. CHRS strongly objects to restoration of only those portions of the Park “that were affected by construction of the Project”, and also to restoration that may be no more than “at least as good as the conditions documented in the pre-construction photographs.” The community will be denied enjoyment and use of this Park (who can relax in a construction site?) for 3-5 years while enduring the burden of construction effects. Thus the affected community and Park deserve to benefit from mitigation that *restores the entire Park, enhances the entire Park beyond its present conditions, and provides community amenities* so that residents can enjoy a completely restored Park once construction is over, rather than a just patchwork of restored bits and pieces.

Further, the MOA must state that the affected community must be included in consultation with CSX regarding the nature of the restoration and enhancement mitigation, and a process for this consultation must be specified in the MOA. At the

least, consultation should include ANCs 6B and 6D, CHRS, and DCSHPO and must include a provision for input from residents in the APE.

I.G. Interpretive Signage for the Tunnel. The MOA must state that Consulting Parties representing the affected community and potential sign locations must be included in consultation regarding the location, design, and placement of the interpretive signage, which should be appropriate for historic siting such as in Garfield or Virginia Avenue Parks or at other locations in the CHHD. CHRS urges that a sign should be located, at the least, near each end of the Tunnel, plus possibly a third one on Barracks Row just south of the Tunnel. The MOA must specify in G.4 a date certain for sign installation that is keyed to Project completion, such as 30-60 days following Project completion.

I.H. Interpretive Signage for the L'Enfant Plan and Reuse of Virginia Avenue Paving. CHRS supports relocating paving stones along the original right of way of Virginia Avenue SE and coordinating the reuse with accompanying interpretive signage. The MOA must state that Consulting Parties representing the community must have a voice in consultation regarding the reuse of paving stones and signage, as well as their locations. I.4 must include a date certain for installation of the sign and relocation of the paving stones, keyed to project completion or, if applicable, completion of Virginia Avenue Park restoration, such as 60-90 days.

I.J. Designation of Control Point Virginia Tower. In J.3, replace “will” with “shall” and specify a date certain for submission of the nomination keyed to approval of the nomination package by DCSHPO, such as 60-90 days.

I.K. Rehabilitation of Control Point Virginia Tower. Plans for rehabilitation must contain a date certain by which the rehabilitation will commence and be concluded, which must meet the approval of DCSHPO.

II.A. Archaeological Stipulations Regarding Virginia Avenue Site (52SE062).

- The first sentence in A.3 does not stipulate the party responsible for removal of the paving stones, and must do so. If the party is not known until after the MOA is executed and the related work plan is completed, this sentence should be revised to reflect that; in any case, for clarity during implementation, the sentence should not be written in the passive voice.
- Three typos in this paragraph need correction to “identified”, “repair”, and “relocating”.
- Stipulation II.A.5 must specify by what time the final report must be prepared incorporating DCSHPO’s comments to DCSHPO’s satisfaction.
- Stipulation II.A.8 must specify a date certain by which preparation of the specified archaeological materials must be prepared for curation and be submitted to DCSHPO for curation. The word “will” should be changed to “shall”.

II.B. Unanticipated Archaeological Discoveries.

- CHRS recommends a 50-foot radius in B.1.

- In B.2, 3, 5 and 8, all occurrences of the word “will” should be changed to “shall”.
- In B.3, we suggest that the first sentence be revised to read “...and if this resource is found to be eligible...”
- B.5 must specify in the second sentence exactly who shall prepare the management summary. We assume CSX is expected to prepare it, but the passive voice leaves the matter open for no party to take responsibility.
- In B.7, what appears to be the first sentence has no verb, leaving it unclear exactly who is supposed to do what. Perhaps it was intended to read “Draft and final technical reports detailing the results of data recovery and/or monitoring investigations shall be prepared by CSX in accordance with...”

II.C Treatment of Human Remains.

- In C.1 “will” should be changed to “shall” in both instances.
- In C.2 the second sentence should specify a date certain by which the “sufficient description of the discovery” shall be provided to OCME.
- C.5 should be revised to read “Native American Graves Protection and Repatriation Act”.

III.A.C. Curation. The word “will” should be changed to “shall” or “must”.

IV. Document and Deliverable Review. In IV.B and IV.E, “will” should be changed to “shall”.

V. Coordination and Reporting. Given the scope and duration of the Project and its effects on the community, CHRS strongly recommended in its October 13, 2011, scoping comments letter to FHWA full and frequent communication with the community. That portion of our letter went on to say:

This should include not only conveying information to the community, but also conducting a meaningful dialog between members of the community and CSX and DDOT that provides public forums for asking questions and providing answers. This needs to happen throughout project review, throughout construction, and for a designated period of time following [completion of] construction. We recommend the excellent model DDOT created for the 11th Street Bridge project – the 11th Street Bridge Community Communications Committee [11-CCC] – to provide a forum during planning, design, and implementation for communicating information to community representatives, asking questions, and providing answers.... We also recommend a website and/or hotline for reporting problems and communicating solutions.

So far the Consulting Parties meetings have provided a forum for discussing concerns regarding historic properties with project proponents and involved agencies. Once Section 106 review concludes with execution of this MOA, there will no longer be a forum for addressing ongoing concerns regarding adverse effects by the project on historic properties, either during or after construction. To address this lack, we strongly recommend that CSX and DDOT create a similar Community Communications Committee for this Project, which could provide a vehicle for addressing concerns

regarding historic properties along with other, broader concerns. The 11-CCC meetings, as DDOT calls them, have been excellent opportunities for DDOT and its 11th Street Bridge contractors to provide updates to community representatives, answer questions, and hear suggestions from those representatives.

If DDOT and CSX create a forum such as that described above – and CHRS urges that they do so – this section of the MOA needs to reference a commitment by CSX and DDOT to establish such a forum/committee, along with their commitment to meet with representatives of all Consulting Parties on a quarterly basis during construction, and on a specified schedule such as every three months for two or three years following completion of the Project.

VI. Dispute Resolution.

- In VI.A.1, change “FHWA will” to “FHWA shall”.
- VI.A.1.a should include a mechanism or process by which all Consulting Parties would be notified of objections and disputes and may provide input and comments regarding those objections and disputes which must be taken into account by FHWA, CSX, and the Council if and when the Council is involved.
- VI.B needs to clarify how the measures in this stipulation would mesh with the Construction Protection Plan.

ADDITIONAL COMMENTS

CSX's use of public property

The draft MOA fails to cover an important topic: CSX has recognized that the project will involve permanent use of underground right of way in public space beyond the area allowed in existing legislation. As CHRS pointed out in its comments on the DEIS, the DC government is entitled to compensation at fair market value for the use of this public property. Since this public property (Virginia Avenue and other parts of the L’Enfant Plan) is a historic property, by virtue of being included in the L’Enfant Plan, a stipulation regarding the city’s entitlement to compensation should be included in this MOA.

Thank you for the opportunity to submit comments on the draft MOA. CHRS continues to support the no-build option.

Sincerely,

Shauna Holmes

Chair, Historic Preservation Committee

cc:

DEIS comments email

contact@virginiaavenuetunnel.com

The Honorable Eleanor Holmes Norton, DC Delegate to the U.S. House of Representatives
Tommy Wells, Ward 6 Councilmember
Brian Flahaven, Chair, ANC 6B
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