

February 21, 2014

VIA U.S. MAIL

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Federal Highway Administration
2520 West 4700 South Suite 9A
Salt Lake City, UT 84129

**RE: *West Davis Corridor – Improper 4(f) Designation Regarding
Farmington City Conservation Easements***

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Ms. Kocher,

This Firm has been retained by Farmington City to represent its interests during the National Environmental Policy Act (“NEPA”) process for the West Davis Corridor Project (“WDC”). On December 19, 2013, Farmington City staff members met with representatives of the Utah Department of Transportation (“UDOT”), as well as a representative from the Federal Highway Administration (“FHWA”) in Farmington. The purpose of that meeting was to discuss the decision by FHWA not to designate Farmington City’s three Conservation Easements as Section 4(f) properties in the Draft Environmental Impact Statement (“DEIS”) and Section 4(f) Determination dated April 2013. Despite Farmington City’s request for additional documents regarding the specific basis for this Determination, the representatives from FHWA and UDOT simply provided a six page Memorandum (hereinafter the “FHWA Memorandum”) at the meeting, which purported to summarize the FHWA’s decision making process for its Section 4(f) applicability determinations included in the DEIS related to the Farmington City Conservation Easements. That was not the request. Farmington City has asked this Firm to respond to the content of the FHWA Memorandum, to discuss the problems attendant to the entirety of this 4(f) Determination process and to point out the fatal and fundamental flaws the process and result selected by FHWA has created within the entire NEPA process for the WDC.

This letter reiterates some of the points made in Farmington City’s public comments on the DEIS dated September 6, 2013, wherein the City correctly argued that the Section 4(f) applicability determinations in the DEIS for the Farmington City Conservation Easements were flawed and contrary to law, as well as the controlling FHWA Regulations and Guidance on this issue. As mentioned above, Farmington City formally requested specific documents from both UDOT and FHWA prior to the meeting that pertained to and formed the basis for conclusions reached by FHWA regarding these 4(f) resources, so the City could better understand how these results came about. That request was refused, ostensibly because FHWA and UDOT claimed their decision regarding 4(f) status was not final. It is clear from the text of the DEIS that FHWA

believed at that time it had made the “final determination” regarding treatment of these Conservation Easements as 4(f) resources, however, FHWA has affirmatively stated the determination is not final so Farmington City will rely on this lack of finality regarding this issue going forward.

I. LOCAL DECISION MAKERS ARE ENTITLED TO DEFERENCE UNDER SECTION 4(F).

In the legislative history for the Section 4(f) statute, it was plainly stated that if a “local” body found a recreation area, public park or waterfowl and wildlife refuge to be “significant”, Section 4(f) would unequivocally apply:

Mr. Cooper: I invite the attention of the Senator from West Virginia to the interpretation given in the report of the managers on the part of the House. I believe it is wrong, and is contrary to our discussions in the conference House. I believe this is in an interpretation that will hold it is contrary to our discussions in the conference. But most important – and I believe this is in an interpretation that will hold—it is contrary to the language of the section. There is nothing concerning discretion of the Secretary in the section itself. I recall no discussion in the conference of any such intent. Furthermore, the language of the section gives no discretion. *If a local official, as State official, or a Federal official having jurisdiction finds one of these areas or sites to be of significance, there is no discretion given to the Secretary of Transportation to permit its use for a highway.* Will the Senator agree with me on that?

Mr. Randolph: I agree with what the distinguished Senator from Kentucky has said in referring to the language of the House Managers on page 32 of the conference report. That, I say with due deference to the House, is the interpretation of the House. It is not our interpretation. I agree with the Senator from Kentucky. This is not as we believe it.

Mr. Cooper: The Legislative language, if it is clear on its face, of course must be interpreted that way. *The language prohibits any intrusion upon or invasion of these lands or areas if one of these bodies finds it is of National, State or local significance,* and the highway cannot be built, unless there is no feasible and prudent alternative to doing so.

Mr. Randolph: I agree with the Senator.

114 Cong. Rec. 24033 (1968) (emphasis added). Considering that Farmington City has determined and stated the three Conservation Easements held by the City are “significant” and they are also currently utilized and maintained by Farmington City for each of the purposes enunciated under Section 4(f), this local determination was required to have been given complete deference during the NEPA process for the WDC. This is the first of a series of fatal flaws in the Agencies WDC DEIS and Section 4(f) analysis.

II. FHWA GUIDANCE DOCUMENTS REQUIRE THE CONSERVATION EASEMENTS TO BE DESIGNATED AS SECTION 4(F) PROPERTIES.

The Federal Highway Administration’s Section 4(f) Policy Paper dated July 20, 2012 states that all “[p]arks and recreational areas of national, state, or local significance that are both publicly owned and open to the public” and “[p]ublicly owned wildlife and waterfowl refuges of national, state, or local significance that are open to the public to the extent that public access does not interfere with the primary purpose of the refuge” are subject to Section 4(f). *See* p. 5. The Farmington City Conservation Easements fall squarely with the purview of this Policy and are entitled to all Section 4(f) protections.

According to the Policy Paper “[w]hen private institutions, organizations, or individuals own parks, recreational areas or wildlife and waterfowl refuges, Section 4(f) does not apply, even if such areas are open to the public. However, *if a governmental body has a permanent proprietary interest in the land (such as a permanent easement, or in some circumstances, a long-term lease), FHWA will determine on a case-by-case basis whether the particular property should be considered publicly owned and, thus, if Section 4(f) applies (See Questions 1B and 1C).*” *Id.* at p. 6 (emphasis added).

The situation surrounding the three Farmington City Conservation Easements are specifically addressed in the Policy Paper at Question 1B:

Question 1B: Can an easement or other encumbrance on private property result in that property being subject to Section 4(f)?

Answer: Yes, in certain instances. Generally, an easement is the right to use real property without possessing it, entitling the easement holder to the privilege of some specific and limited use of the land. Easements take many forms and are obtained for a variety of purposes by different parties. Easements or similar encumbrances restricting a property owner from making certain

uses of his/her property, such as conservation easements, are commonly encountered during transportation project development. Easements such as these often exist for the purpose of preserving open space, protection of habitat, or to limit the extent and density of development in a particular area, and they may be held by Federal, State or local agencies or non-profit groups or other advocacy organizations.

Although a conservation easement may not meet all of the requirements necessary to treat the property as a significant publicly-owned public park, recreation area, or wildlife and waterfowl refuge, it is a possibility that mandates careful case-by-case consideration when encountered. The terms of the easement should be carefully examined to determine if Section 4(f) applies to the property. **Factors to consider include, but are not limited to, the views of the official(s) with jurisdiction, the purpose of the easement, the term of the easement, degree of public access to the property, how the property is to be managed and by whom, what parties obtained the easement (public agency or non-public group), termination clauses, and what restrictions the easement places on the property owner's use of the easement area.** Questions on whether or not an easement conveys Section 4(f) status to a property should be referred to the FHWA Division Office and, if necessary, the Division Office should consult with the Headquarters Office of Project Development and Environmental Review, the Headquarters Office of Real Estate Services, the Resource Center Environment Technical Service Team, or the Office of Chief Counsel.

(Emphasis added).

Assuming the questions regarding the Farmington City Conservation Easements were referred to these Offices, which they should have been, these review documents were formally requested by Farmington City and they were not provided. A review of the Farmington City Conservation Easements and the purposes for which they were acquired and are being maintained should have resulted in their designation by FHWA as Section 4(f) properties in the WDC Draft EIS. It is critical to note that these three Conservation Easements are part of a concerted strategic effort and plan by Farmington City to conserve and protect the numerous natural and other resources these three contiguous parcels and others yet to be acquired possess near and along the shorelines of the Great Salt Lake and to the East. Each Conservation Easement presents the 4(f) values mentioned and these three parcels connect to other 4(f) properties in Farmington City. Together, these other properties and the Conservation Easements have been

and will continue to be managed as a unitary resource. FHWA appears to have viewed these integrated parcels as separate properties unconnected to the other Farmington City 4(f) properties, but they must be viewed holistically. When they are, it is clear that areas within the three Conservation Easements contain passive recreational resources, passive parks and both wildlife and waterfowl refuges. Numerous wetlands and other natural conditions support each of these 4(f) purposes.

A. Views of the Officials:

Given the legislative history regarding the manifest intent of Section 4(f), it is surprising FHWA left this factor until the end of its Memorandum. As previously stated, in its May 11, 2012 response to FHWA's April 27, 2012 request for information regarding the Conservation Easements, Farmington City unmistakably stated it considers the Conservation Easements significant, yet those statements were ignored by FHWA. The City states at pg. 2:

Yes. The lands are significant due to their location along the shore of the Great Salt Lake, and their unique conservation values previously mentioned, and the lands are identified on the City's Resource and Site Analysis Plan (an element of the City's General Plan) and must be preserved for such things as parks, recreation areas or wildlife/waterfowl refuges.

As stated in Section I above and in Farmington City's comments on the DEIS, the views of local officials should have received full and complete deference in making the Section 4(f) Determinations for these properties. FHWA's Memorandum and the DEIS ignored Farmington City's position on this matter and instead relied upon irrelevant arguments such as "the City of Farmington indicated that the zoning and general land use maps would allow the development of a park or recreation area or a wildlife or waterfowl refuge." Just because the zoning may allow this type of future development of a Section 4(f) property does not mean the Conservation Easements are not designated and currently managed for Section 4(f) uses today and are required to remain in those uses in perpetuity. In response to the April 27, 2012 questionnaire, Farmington City stated that the lands were currently used for "[r]ecreation (trails), natural scenic open space, wildlife habitat, farmland, floodplain and wetland preservation, and green space, preservation of streams, stream corridors, and water courses." The entirety of these easements are currently being managed and used for Section 4(f) purposes, including passive parks and recreational uses and also as refuge areas for waterfowl and wildlife. Farmington City considers these lands "significant" for the Section 4(f) Determination and importantly, due to the perpetual nature of the Conservation Easements, these very 4(f) purposes must be conserved, maintained and supported by Farmington City forever. Any attempt

to condemn or otherwise detrimentally affect these Easements will be strenuously resisted by the City, as required by the terms and conditions of the Conservation Easements.

While initial Management Plans are attached as exhibits to each Conservation Easement, the fact that more detailed Management Plans have not yet been completed cannot defeat the 4(f) status of these lands. Such Plans take time and careful consideration and Farmington City is entitled to ensure its Plans are sound products. The critical point is that the Conservation Easements have been actively managed for 4(f) purposes since their inception. Likewise, the fact that several different 4(f) purposes co-exist on each of the Conservation Easements may not be used to allow the WDC to destroy the property, as a 4(f) property need not be utilized for a single 4(f) purpose before 4(f) status must be imposed. A property may present more than one 4(f) value and it remains a 4(f) property for each value it presents. Importantly, these Conservation Easements will be managed as a single resource in conjunction with the other such properties in Farmington City, so the areas in which the 4(f) values are conserved and maintained will cross many single property boundaries.

B. Specific Purposes of the Conservation Easements:

The purposes for which the Conservation Easements have been conserved specifically include parklands, recreation, and wildlife and waterfowl refuge purposes, each of which are specified Section 4(f) purposes. The Farmington Ranches Conservation Easement dated July 2, 2003, between Viking Real Estate and Farmington City states the property possesses “unique and sensitive natural, scenic, open space, wildlife, farmland, floodplain, and/or wetland values...of great importance to the Grantor Farmington City, and the public...” This Conservation Easement also states that Farmington intends to maintain the property in such a way as to provide “appropriate ecological, agricultural, open space, recreational and educational uses of the Property.” In addition to agricultural, riparian and equestrian uses, this easement also allows numerous recreational uses, protected under Section 4(f) such as “[c]ommunity open space uses, such as village greens, commons, picnic areas, community gardens, trails, and similar low-impact recreational uses.” *See* ¶5(b)(ii). The Conservation Easement dated December 22, 2005 between Farmington City and Boyer Wheeler Farm, L.C. for the Farmington Ranches contains the same language and so does the Conservation Easement dated October 12, 2007 between Farmington City, Boyer Farmington Meadows, L.C. and Pleasant Valley Investments. The Buffalo Ranch Trail Conservation Easement dated October 18, 2004 was granted to Farmington City to “construct, maintain, operate, repair, inspect, protect, install, a trail for public use and related facilities and public improvements...” on the Viking Real Estate Conservation Easement.

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As stated in Farmington City's May 11, 2013 Letter, "the first two easement[s][sic] primarily encompass wetlands and wildlife habitat with some acreage available for pasture and farm land. Meanwhile, the Buffalo Ranch Easement constitutes a horse farm, with several out-buildings. Nevertheless, this easement also includes significant areas of wetlands and wildlife habitat. All three easements include the obligation to maintain and conserve flood plains, natural and scenic areas, and open space. Public recreational opportunities including but not limited to, hiking, bicycling, bird watching, equestrian uses, etc. are also prevalent to all three easements."

The FHWA Memo ignored the individual purposes associated with the Conservation Easements and the statements made by Farmington City in its May 11, 2013 Letter that all of the easements are currently used for hiking, biking, bird watching and equestrian uses, even if those uses and 4(f) purposes have not yet been fully maximized. The FHWA Memo instead relies on the allegation that there are no park facilities currently located on the easements and that zoning would allow inconsistent uses. This assertion ignores the fact that there is no requirement for a "park or recreational facility" to be constructed under Section 4(f) to foster and support park and/or recreational purposes, and in the case of these Conservation Easements, a large "facility" would be anathema to the very type of passive park and recreational experience that was conserved under the Conservation Easements. The parcels represent passive park and recreational areas that allow a minimally invasive viewing experience to allow the enjoyment of the wildlife, waterfowl and natural character of the property.

For Section 4(f) uses related to wildlife and waterfowl refuges, the FHWA memo states, without support, that the Conservation Easements themselves do not make the areas wildlife or waterfowl refuges. However, the City has formally designated these areas as wildlife and waterfowl preservation areas where such 4(f) protected resources exist through the emplacement of the Conservation Easements and identifying the Conservation Easements in the City's Resource and Site Analysis Plan. The City is also actively managing the lands for these purposes and working on future management policies and direction within the purview of the Conservation Easements. FHWA's argument is simply not supported by the evidence submitted to the agency. Given the City's designation of these lands as "significant" for all of these uses, Farmington City's responses to FHWA's questionnaire and the City's current management of the lands, FHWA's decision that these lands are not Section 4(f) properties in the FEIS is arbitrary and capricious and at variance with law.

C. Terms of the Conservation Easements:

The terms of the Conservation Easements are perpetual. This factor also weights in Farmington City's favor that these lands are significant Section 4(f) properties. This factor was ignored in FHWA's Memo.

D. Degree of Public Access:

In that uses of these Conservation Easements must be passive in order to protect the conservation values, in most cases access is limited to the use of the trail system to, through and around them. Farmington City is working to further refine public access and use to best protect these conservation values, but the intent is that the public access relative to 4(f) uses and the Conservation Easements, such as parklands, recreation areas and wildlife and waterfowl refuges will be passive in nature. Such an approach does not disable these Conservation Easements as 4(f) properties; rather, it enhances them.

E. How Property is Managed and By Whom:

In response to the FHWA April 27, 2013 questionnaire, Farmington City stated the lands are managed by the Farmington City Community Development Department, with the assistance of its legal consultants, the City's Public Works and Parks and Recreation Departments, and the City's Trail Committee. It is clear these lands are being managed by the City itself and not the private property owner, through the respective Home Owner Associations render financial assistance. This factor should have been considered by the FHWA as giving great weight to Farmington City's position that these lands are Section 4(f) properties.

F. What party Obtained the Easement:

Farmington City owns the Conservation Easements. This satisfies the "publicly owned" requirement in Section 4(f). Again, FHWA should have weighed this factor in favor of designating these lands as Section 4(f) properties.

G. Termination Clauses:

These Conservation Easements are clearly perpetual in nature. The termination clauses for three of Farmington City's Conservation Easements are clearly intended to cover only unexpected events or legal proceedings that could interfere with the Conservation Easements. This supports Farmington City's view and position that these lands should be treated as Section 4(f) properties. The Farmington Ranches Conservation Easement dated July 2, 2003, between Viking Real Estate and Farmington City states the easement:

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“may be extinguished only by an unexpected change in condition which causes it to be impossible to fulfill the Easement’s purpose or by exercise of eminent domain in accordance with the provisions set forth herein. The fact that the Grantee may have title to the Property and, therefore, may become an Owner for the purposes of this Easement shall not cause a termination of this Easement by operation of the doctrine of merger or otherwise. The Grantee shall not voluntarily or willingly allow the termination of any of the restrictions of this instrument, and if any or all of the restrictions of the Easement are nevertheless terminated by a judicial or other governmental proceeding, any and all compensation received by the Grantee as a result of the termination shall be used by the Grantee in a manner consistent with the conservation purposes of the Easement...”

The Conservation Easement dated December 22, 2005 between Farmington City and Boyer Wheeler Farm, LC. for the Farmington Ranches contains the same language as does the Conservation Easement dated October 12, 2007 between Farmington City, Boyer Farmington Meadows, L.C. and Pleasant Valley Investments. The Buffalo Ranch Trail Conservation Easement does not contain a termination clause.

H. Restrictions on Property Owners Use of the Easements:

The restrictions on the Property owner’s use of all of the easements (with the exception of Buffalo Ranch) are all consistent with Farmington City’s duty to manage and use the properties for conservation, parkland, and recreational and other purposes under Section 4(f). All of these restrictions support the designation of these areas as Section 4(f) Properties. The Conservation Easements generally prohibit activity or use of the properties that are detrimental to the conservation values of the Conservation Easements and specifically prohibit numerous other activities that are inconsistent with the purposes of the Conservation Easements. These restrictions support Farmington City’s view that the lands are Section 4(f) properties.

CONCLUSION

The FHWA Memorandum failed to review and embrace all relevant factors provided by Farmington City with respect to the Section 4(f) status of these lands, rendering the decision presented in the DEIS arbitrary and capricious and in violation of applicable law. Foremost, the City’s viewpoint with regard to the “significance” of these lands has been completely ignored, the purposes,

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current uses and management of the lands were either misstated by the FHWA or ignored, and finally, the FHWA failed to consider the numerous other factors in relevant FHWA Guidance in making its determination with regard to these section 4(f) properties. This is a fatal flaw for the entire West Davis Corridor DEIS and Section 4(f) Statement that will legally disable the entire effort.

Farmington City believes this issue, as well as other issues render the entire DEIS for this Project void and the agencies must begin the NEPA process over again, undertake a detailed review of all relevant factors and information regarding Farmington City's Conservation Easements and then formally designate these areas as Section 4(f) properties. It is clear this 4(f) Determination effort was the result of a pre-determination of a preferred alignment and alternative that would require the use of these Conservation Easements because they offered open space in which to place a proposed highway. Then, the 4(f) review effort and conclusions were reverse-engineered to support that pre-conceived result. Operative law does not countenance such an approach and Farmington City will be required to protect its interests if these problems are not rectified by complete avoidance by the West Davis Corridor of these Conservation Easements.

Sincerely,
RAY QUINNEY & NEBEKER P.C.



Jeffrey W. Appel

cc: Dave Millheim, Farmington City Manager
Carlos Braceras, Executive Director UDOT

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