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Section 4(f) Resources

4.1 Introduction

The purpose of this section is to address Section 4(f) as it applies to the Project, and to provide an overview of the completed and anticipated Section 4(f) determinations. Under Section 4(f) of the USDOT Act as amended by the Federal-Aid Highway Act of 1968 (Public Law 90-495, 49 U.S.C. § 1653), the Secretary of Transportation shall not approve any program or project which:

“requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance as so determined by Federal, state, or local officials having jurisdiction thereof, or any land from a historic site of national, state or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and waterfowl refuge, or historic site resulting from such use.”

In 2005, Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), made the first substantive revision to Section 4(f) since the USDOT Act, simplifying the process and approval of projects that have only a *de minimis* impact on Section 4(f) resources.

The purpose of this chapter is to document the Section 4(f) resources within the Study Area, characterize the Project’s use of these resources, and summarize the evaluations that have been performed including the consideration of alternatives where required, measures to minimize harm resulting from the use of Section 4(f) resources, and coordination with state and local agencies.

4.1.1 Definition of “Use”

Per 23 C.F.R. §774.17 (and with the certain exceptions noted in 23 C.F.R. §774.11 and §774.13), the use of Section 4(f) resources occurs

- when land is permanently incorporated into a transportation facility;
- when there is a temporary occupancy of land that is adverse in terms of the statute’s preservationist purposes as determined by the criteria in §774.13(d);
or
- when there is a constructive use of land as described in §774.15.

Land is considered permanently incorporated into a transportation facility when it has been purchased as right-of-way or sufficient property interests have otherwise been acquired for the purpose of project implementation (such as a permanent easement for maintenance access).

Per 23 C.F.R. §771.15:

A constructive use occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

Per 23 C.F.R. §774.13(d): temporary occupancy will not constitute a Section 4(f) use when all of the following conditions are satisfied:

- Duration is temporary (less than the time needed for construction of the project) and there is no change in ownership of the land;
- Scope of work must be minor (the nature and magnitude of the changes to the Section 4(f) property are minimal);
- There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property on a temporary or permanent basis;
- The land being used must be fully restored, *i.e.*, returned to a condition which is at least as good as the condition that existed prior to the project;
- There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

Section 4(f) protects several types of resources including publicly- owned public parks, recreation areas, wildlife and waterfowl refuges and historic sites. However, with respect to the Project, only **historic sites** and **public parks** would be affected.

4.2 Proposed Action

Based on the requirements of Section 4(f) and based on input from FHWA, VTrans, the Town and the public, the following alternatives were evaluated for the Project: 1) a No Action alternative, 2) rehabilitation of the existing structures, 3) building new downtown bridges at new locations, 4) rail realignment (Eastern Rail Bypass), and 5) complete bridge replacements on the current alignment using moveable or fixed bridge options (see **Map 2.3-1**). The evaluation of alternatives is discussed in **Chapter 2** and the results of the analysis summarized in **Table 2.4-1**.

The Proposed Action is discussed in detail in **Section 2.5**. In summary, the Proposed Action consists of replacing the existing rail bridges on Main Street and Merchants Row, and enclosing the intervening open cut trench segment between them, with one approximately 360-foot-long tunnel. Constructing the tunnel and correcting long-standing drainage concerns in the rail corridor will require lowering the track over a distance of approximately 3,550 linear feet along the VWRC line, from a point just north of the Otter Creek Truss Bridge (No. 239) to a point approximately 380 feet north of the Elm Street overpass (see **Map 1.2-1**).

The tunnel section between the bridge limits would be covered with granular fill and finished with topsoil to establish a grassy park area that links Triangle Park with the remainder of the Village Green. Crash-tested railing would only be required on the west side of the Main Street Bridge and south side of the Merchants Row Bridge at the ends (termini) of the tunnel.

Other improvements include track realignment; the relocation and upgrading of the Town water and sanitary utilities; the installation of drainage infrastructure to convey stormwater through the Project Area and provide drainage for the tunnel; the undergrounding of electrical and telecom utilities; and sidewalk and roadway rehabilitation and reconstruction.

4.3 Description of Section 4(f) Resources

Section 4(f) protects several types of resources including publicly-owned public parks, recreation areas, wildlife and waterfowl refuges and historic sites. The following sections describe these resources with respect to the Project Area.

4.3.1 Public Parks, Recreation Areas, Wildlife and Waterfowl Refuges

Parks, recreation areas, and wildlife and waterfowl refuges are considered Section 4(f) resources under the following conditions:

- It must be publicly owned,
- It must be open to the public (except for certain cases in refuges),
- Its major purpose must be for park, recreation, or refuge activities, and
- It must be significant as a park recreation area, or refuge. Significant means that in comparing the availability and function of the resource, with the park, recreation, or refuge of the agency, community or authority, the property plays an important role in meeting those objectives. The determination of significance is made in coordination with the official(s) with jurisdiction.

Eligible resources for the Project Area include:

- Village Green (which contains the section commonly referred to as “Triangle Park”) is a contributing resource to the MVHD, as well a significant public park.
- Marble Works Riverfront Park is a significant public park within the MVHD, though it is not a contributing historic resource.

4.3.2 Archaeological Resources

There are no known archaeological resources that qualify as Section 4(f) resources within the Study Area.

4.3.3 Historic Properties

The historic properties in the Study Area consist of the MVHD, the RRHD and their contributing resources. Contributing resources within these historic districts are considered Section 4(f) resources. Each of these resources is described in detail in **Section 3.12**.

4.4 Use of Section 4(f) Resources / Types of Section 4(f) Approvals

This section discusses the use of land from Section 4(f) resources, as it is associated with the Proposed Action, and how the use have been or will be approved under Section 4(f). The definition of “use” is described above in **Section 4.1.1**. “Use” applies to the historic bridges because they will be adversely affected by their removal. “Use” applies to the easements in the historic district and the public parks because land from these resources will be incorporated into the transportation system by means of a permanent easement. Use would also apply as temporary occupancy that does not

meet conditions of 23 CFR 774.13(d)(see definition in **Section 4.1.1**). Temporary occupancy that does not result in adverse effects to the resources does not rise to the level of Section 4(f) “use.”

The three types of Section 4(f) approvals that FHWA can make include:

- 1) Making a *de minimis* impact determination
- 2) Applying one of the five nationwide Section 4(f) programmatic evaluations, and
- 3) Circulating an individual Section 4(f) evaluation when criteria for using *de minimis* and the programmatic evaluations cannot be met.

Based on an understanding of the scope of the Proposed Action in the context of the original and amended Section 106 determinations of effect, two types of Section 4(f) approvals are required: a programmatic evaluation for the use of historic bridges and a *de minimis* determination. The *de minimis* determination include both historic resources and public parks. It is anticipated that the temporary occupancy of land by during construction of the Proposed Action will not rise to the level of a Section 4(f) use. All programmatic, *de minimis*, temporary occupancy are discussed below.

4.4.1 Programmatic Evaluation – Historic Bridges

A Section 4(f) Historic Bridge Programmatic Evaluation was issued in December 2013 by FHWA (**Appendix G**). The evaluation falls under the *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*. This statement set forth the basis for a Programmatic Section 4(f) approval that there are no feasible and prudent alternatives to the use of certain historic bridge structures to be replaced or rehabilitated with Federal funds, and that the projects include all possible planning to minimize harm resulting from such use.

The programmatic Section 4(f) applies to FHWA projects that meet the following criteria:

1. The bridge is to be replaced or rehabilitated with Federal funds.
2. The bridge will require the use of a historic bridge structure which is on or eligible for listing in the National Register of Historic Places.
3. The bridge is not a National Historic Landmark.
4. The FHWA Division Administrator determines that the facts of the Project match those set forth in the section of the document labeled Alternatives, Findings, and Mitigation.
5. Agreement among the FHWA, the SHPO, and the ACHP have been reached through procedures pursuant to Section 106 of the NHPA.

Demolition of the historic bridges to accommodate the Proposed Action is considered a use under Section 4(f). The Proposed Action satisfies the criteria to use the *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*. The programmatic evaluation can be found in **Appendix G**.

4.4.2 *De Minimis* Impact Determinations

A *de minimis* impact involves the use of Section 4(f) property that is generally minor in nature. A *de minimis* impact is one that, after taking account avoidance, minimization, mitigation, and enhancement measures, results in no adverse effect to the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under Section 4(f).

Historic resources and parks, recreation areas, and wildlife and waterfowl refuges have different qualifications for a determination of a *de minimis* impact.

A determination of *de minimis* impact on a historic site may be made when all three of the following criteria are satisfied:

1. The process required by Section 106 of the NHPA results in a determination of No Adverse Effect or No Historic Properties Affected.
2. The SHPO is informed of the USDOT's intent to make a *de minimis* impact determination based on their written concurrence in the Section 106 determination.
3. USDOT has considered the views of any consulting parties participating in the Section 106 process.

A determination of *de minimis* impact on parks, recreation areas, and wildlife and waterfowl refuges, may be made when all three of the following criteria are satisfied:

1. The transportation use of the Section 4(f) resource, together with any impact avoidance, minimization, and mitigation or enhancement measures incorporated into the Proposed Action, does not adversely affect the activities, features, and attributes that qualify the resource for protection under Section 4(f);
2. The public has been afforded an opportunity to review and comment on the effects of the Proposed Action on the protected activities, features, and attributes of the Section 4(f) resource; and
3. The official(s) with jurisdiction over the property are informed of FHWA's intent to make the *de minimis* impact determination based on their written concurrence that the Proposed Action will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f).

A *de minimis* impact determination does not require an evaluation of feasible and prudent avoidance alternatives. According to the definition of *all possible planning* (5) in 23 C.F.R §774.17, a *de minimis* impact determination is considered to have already included measures to minimize harm by reducing the impacts on the Section 4(f) properties to a *de minimis* level. For historic properties, mitigation developed through the Section 106 process are being incorporated. For park properties, impacts have been reduced through coordination with park officials.

The *de minimis* determinations are addressed in three letters, which can be found in **Appendix G**. They are as follows:

- Parks *de minimis* – for the use of Riverfront Park
- Historic *de minimis* – for the use of Historic resources
- Historic/Parks *de minimis* – for the use of Village Green

4.4.2.1 Historic Resources

Permanent use of land from historic sites will be required in the form of permanent easements throughout the Study Area for maintenance access, underground utilities (including drainage, water, sewer), and one for a sidewalk easement.

The anticipated easements are shown on **Maps 4.4-1** through **4.4-10**. The easements are detailed in **Table K-1** in **Appendix K**, which shows the involved parcels and the area of the easement in square feet. The minor use of land for the permanent easements will not adversely affect the integrity of the historic resources.

4.4.2.2 Public Parks

Permanent use of land from public parks will be required for access easements and utility easements. A permanent easement is required in Marble Works Riverfront Park for a 10-foot wide maintenance access corridor, which will be maintained as a grassed surface. A permanent easement is required in the Village Green for underground utilities (drainage installation).

Use of land within the Village Green is shown on **Map 4.4-4** (parcels numbered 17 and 18) and within Riverfront Park on **Map 4.4-9** (parcel numbered 34). Note that the Village Green is considered a historic resource as well as a park resource under Section 4(f). A tabular summary of the easements, including their square footage, is provided in **Table K-2** in **Appendix K**.

4.4.3 Temporary Occupancy

In addition to the permanent easements, there will be temporary easements. As discussed in **Section 4.1.1**, there are conditions that must be met in order for a temporary easement (temporary occupancy) to not be considered a “use” under Section 4(f).

Temporary easements allow temporary access in order to complete the required construction work, whether drainage, water, sewer or other underground utility installation, microtunneling, or staging. Temporary easements on historic properties were reviewed by the VTrans Historic Preservation Officer (the Official with Jurisdiction over historic properties) in order to ensure that they meet the required five conditions of temporary occupancy. The temporary easements for the Proposed Action will not cause any adverse effects to historic resources, will be shorter than the duration of the overall Project, and the land will be restored to its original (or improved) condition. Effects to historic resources are described in the Section 106 documentation (**Appendix G**).

Temporary easements within public parks are reviewed by the VTrans Historic Preservation Officer as well as the Town of Middlebury (the Official with Jurisdiction for public parks). The temporary easements in Marble Works Riverfront Park are associated with the access road. The easement for construction access will be based on an access road 16 feet in width, whereas the permanent easement for maintenance access will be based on an access corridor that is ten feet wide. This represents a small portion of the park and as part of the Proposed Action, the park area will be reestablished post-construction. The permanent access easement currently running through grassed areas will be grassed upon the completion of construction. Occupancy will be shorter than the duration of the overall Project. Only a portion of the access road is considered under public ownership, as portions pass through the Green Mountain Power property and the Marble Works Partnership property. See **Maps 4.4-9** and **4.4-10**.

In consultation with the Middlebury Official with Jurisdiction, the VTrans Historic Preservation Officer determined that the temporary occupancy of land in Riverfront Park and Village Green does not rise to a use under Section 4(f), as the temporary occupancy met the five conditions as defined in 23 CFR 774.13(d) (Exceptions; Temporary Occupancy). These five conditions, as they apply to each park, are addressed in the July 11, 2017 letter from the Town of Middlebury Selectboard to Judith Ehrlich, VTrans Historic Preservation Officer. FHWA concurred with this determination. The letter can be found in **Appendix G**.

The Middlebury Village Green has temporary construction easements. During the construction of the Proposed Action, a portion of the Village Green will be closed (the area known as Triangle Park) for staging, crane access, and due to public safety concerns. As part of this closure, the fountain, benches, and lights in the Triangle Park section of the Village Green will be removed and stored on Town property. The remainder of the Village Green will be accessible to the public for the duration of construction. There will be no permanent adverse physical impacts to the park; it will be improved by reestablishing the historic, contiguous appearance and use of the Village Green.

4.5 Measures to Minimize Harm

Based on the original and amended Section 106 memoranda included in **Appendix G**, it has been determined through the Section 106 process that the Project will have an Adverse Effect on the historic bridges. The use of other historic properties and the park properties will not adversely affect the resources.

All alternatives required for conformance with the *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* were evaluated. There were no feasible and prudent alternatives to the use of the bridge.

As the replacement results in an Adverse Effect to historic resources under Section 106, FHWA implemented the following measures to minimize harm, consistent with the 2013 Section 106 document, as amended, and the 2017 Section 106 document (see **Appendix G**).

1. Photographic Documentation,
2. Interpretive Signage,
3. Salvage of Architectural or Engineering Features, and
4. Design of a New Bridge.

4.6 Coordination

Consultation with the VTrans Historic Preservation Officer was initiated to determine whether Section 4(f) properties occur within the Project Area. Coordination and consultations among state and local agencies with jurisdiction over historic properties has occurred in past and was ongoing simultaneous with the preparation of this EA. A summary of these coordination meetings is provided in **Chapter 5** of this EA. The Town evaluated the proposed temporary easements in the Village Green and

Riverfront Park to assist FHWA in evaluating whether or not the temporary occupancy rose to a Section 4(f) use. The Town evaluated the proposed permanent easements in Riverfront Park in order to assist FHWA in determining whether or not the easements represented an adverse effect and a Section 4(f) use.

4.7 Section 4(f) Conclusion

All possible planning has been incorporated into the Proposed Action to minimize harm resulting from the use of the historic bridges. There are no prudent and feasible alternatives to the use of the historic bridges, which is addressed under the *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*.

The Proposed Action is anticipated to result in *de minimis* impacts to Section 4(f) resources determined to be present within the APE.

- Section 4(f) Historic Properties
 - Middlebury Village Historic District
 - Middlebury Village Green (including Triangle Park area)
- Section 4(f) Park Properties
 - Middlebury Village Green (including Triangle Park area)
 - Marble Works Riverfront Park

These *de minimis* impacts result from a minor use of historic and park properties, and do not cause adverse effects. Mitigation measures described in the Section 106 documentation, would be incorporated into the *de minimis* determination as measures to minimize harm. Therefore, no consideration of avoidance alternatives is required for these instances of *de minimis* determinations.

There are no known archaeological resources that qualify as Section 4(f) resources within the Study Area.

There are no wildlife or waterfowl refuges within the APE.

In summary, impacts to Section 4(f) resources include the removal of the historic bridges and associated wing walls/retaining walls, and easements for drainage, utilities, and access. Measures to minimize harm include the conditions imposed by the VTrans Historic Preservation Officer in the Section 106 documentation as well as mitigation and commitments described in **Sections 3.12** and **3.20** of this EA, which includes measures to minimize construction related impacts. In addition to the measures to minimize harm, the reestablishment of park property over the railroad to

reestablish the original extent of Village Green is being performed as an enhancement to the historic property.