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**RE: Segmenting U.S. 431 around North Eufaula Avenue in order to evade federal laws**

Dear Mr. Cooper, Mr. Bartlett, Ms. Toney, and Mr. Nelson:

The Southern Environmental Law Center is writing on behalf of the Save North Eufaula Avenue Coalition and the National Trust for Historic Preservation to express concerns regarding the Alabama Department of Transportation's ("ALDOT") plan to widen U.S. Highway 431 from two to four lanes through the north side of the City of Eufaula, Alabama. The section of U.S. 431 that ALDOT proposes to widen is also called North Eufaula Avenue and is listed on the National Register of Historic Places under the Seth Lore and Irwinton National Historic District ("the Historic District"); it is less than a mile long. Widening this segment of the road would cut into the existing median of the road and damage or destroy the iconic tree canopy and historic properties along North Eufaula Avenue, which are the central character-defining features within the historic district, and the reason that the historic district was established.

ALDOT plans to use only state funds for this project in an apparent effort to avoid the application of federal laws, including Section 4(f) of the Department of Transportation Act, Section 106 of the National Historic Preservation Act ("NHPA"), and the National Environmental Policy Act ("NEPA"). See 49 U.S.C. § 303; 23 U.S.C. § 138; 16 U.S.C. § 470f; and 42 U.S.C. §§ 4332(2)(C) *et seq.*

However, the pervasive involvement of federal funding in U.S. 431 generally, and the issues facing North Eufaula Avenue specifically, trigger mandatory duties under these federal laws even if no federal funds are used for this discrete segment of the project. ALDOT, FHWA, EPA, and the Advisory Council on Historic Preservation must fully discharge their legal obligations under these laws before any widening proceeds.

## **I. Eufaula's Historic District**

Eufaula is a small town in southeast Alabama with a population of approximately 13,000 people. Central to the city is the Seth Lore and Irwinton National Historic District which encompasses 942 properties, including 738 buildings of architectural or historical significance that were built between the 1820s and the 1940s.<sup>1</sup> Because of this unique historic district, Eufaula hosts a tour of homes in the historic area each spring called the Eufaula Pilgrimage. A study by Randall Travel Marketing assessed the economic impact of the annual Eufaula Pilgrimage and found that visitors during that 3-day event contributed more than \$1.2 million - or approximately \$86 per resident - to the Eufaula economy.<sup>2</sup> The beauty of this district has been captured in numerous magazines and films, including the movie *Sweet Home Alabama*, where it served as Reese Witherspoon's home.<sup>3</sup> It has been designated a Tree City by the Arbor Foundation for the past twenty-nine years.<sup>4</sup>

Much like the street parks in Savannah and Charleston, this historic district contains several roads with prominent medians or central parkways. These parkways, particularly North Eufaula Avenue, are lined with majestic old live oaks, cypress, and maples. According to Alabama State Historic Preservation Officer Frank White, "North Eufaula Avenue is the heart of this district and is one of the most recognizable and beautiful streetscapes in Alabama. Springtime photographs of this iconic avenue are nothing short of magnificent."<sup>5</sup> (See photograph attached to Exhibit 3.) The mayor of Eufaula calls the North Eufaula Avenue Parkway "our central calling card".<sup>6</sup>

Indeed, preserving these parkways was one of the principal motivations for creating the historic district. ("Fear that all of these [parkways] will ultimately be eliminated is one of the

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<sup>1</sup> Seth Lore and Irwinton Historic District, National Register of Historic Places Inventory–Nomination Form, 1 (Aug. 14, 1986), available at <http://pdfhost.focus.nps.gov/docs/NRHP/Text/86001534.pdf> (Accessed Sept. 12, 2014).

<sup>2</sup> Letter from John Hildreth, Regional Vice President of the National Trust for Historic Preservation, to Mayor Jack Tibbs (May 8, 2014) (attached as Exhibit 1).

<sup>3</sup> Phillip Rawls, "*Sweet Home Alabama*" town in traffic turmoil, Washington Times, May 17, 2014, available at <http://www.washingtontimes.com/news/2014/may/17/sweet-home-alabama-town-in-traffic-turmoil> (Accessed Sept. 12, 2014) (attached as Exhibit 2).

<sup>4</sup> Arbor Day Foundation, Tree City Directory, <http://www.arborday.org/programs/treeCityUSA/treecities.cfm?chosenstate=Alabama> (Accessed Sept. 12, 2014).

<sup>5</sup> Letter from Frank White, State Historic Preservation Officer, Alabama Historical Comm'n (June 5, 2014) (attachment to e-mail from Lee Anne Wofford to Frank White (June 5, 2014 9:43 AM)) (attached as Exhibit 3).

<sup>6</sup> Phillip Rawls, "*Sweet Home Alabama*" town in traffic turmoil, supra note 3, (Exhibit 2).

prime concerns in preservation as highways 82 and 431 pass through this district.”<sup>7</sup> Consequently, the original town plan and the historic district intentionally encompassed not only the historic homes but also the parkways and their central medians.<sup>8</sup> North Eufaula Avenue is also part of the Barbour County Governor’s Trail, an Alabama Scenic Byway. The Alabama Scenic Byway Program was created to “preserve, protect and enhance scenic, historic, natural, recreational, cultural and archaeological resources”.<sup>9</sup>

## II. ALDOT’s Proposal

ALDOT has proposed adding two lanes along 0.795 miles of U.S. 431 from north of Broad Street to 400 feet south of Cotton Avenue in Eufaula, AL.<sup>10</sup> This segment of U.S. 431 is also known as North Eufaula Avenue and lies in the heart of the historic district. These lanes would be created by reducing the road’s current median, and the project is estimated to cost \$1.19 million.<sup>11</sup> Although ALDOT has stated that this widening plan is not yet final,<sup>12</sup> in March 2014, ALDOT allocated \$365,000 to the project.<sup>13</sup> ALDOT has retained the services of an engineering firm to study the project.<sup>14</sup> As a visible indicator of ALDOT’s intentions, it has already staked out the median on North Eufaula Avenue. [See attached photographs at Exhibit 7-8]. In addition, it has created detailed engineering plans for widening the project,<sup>15</sup> and Ronnie Baldwin, Chief Engineer of ALDOT, has indicated that the target date for the project to be let is November 7<sup>th</sup>.<sup>16</sup>

The primary justification offered for the project is to make U.S. 431 a contiguous four-lane highway down much of eastern Alabama. In a letter to Eufaula Mayor Jack Tibbs, ALDOT Director Cooper wrote:

United States Highway 431 is the primary north/south route down the east side of Alabama. In recent years, ALDOT has spent over \$150 million to provide four travel lanes on US 431 from Interstate 85 to the Florida line (approximately 137 total miles). The section of US 431 being discussed at this point is the one-half mile in the City of Eufaula along North Eufaula Avenue that remains two lanes.<sup>17</sup>

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<sup>7</sup> See Lore Historic District, National Register of Historic Places Inventory–Nomination Form, 2 (Dec. 12, 1973) available at <http://pdfhost.focus.nps.gov/docs/NRHP/Text/73000330.pdf> (Accessed Sept. 12, 2014).

<sup>8</sup> *Id.*

<sup>9</sup> ALDOT, Governor’s Trail Council, *Governor’s Trail Corridor Management Plan*, Sept. 2006, p. 1-1.).

<sup>10</sup> ALDOT, Rural Planning Document, 2014-2019, Barbour County, p. 5 (attached as Exhibit 4).

<sup>11</sup> *Id.*

<sup>12</sup> Ed Trainer, *City of Eufaula, Chamber Officials Pledge Fight Over North Eufaula Avenue*, Eufaula Tribune, April 25, 2014, available at [http://www.dothaneagle.com/eufaula\\_tribune/news/article\\_d0e3ec68-cc8a-11e3-af3e-0017a43b2370.html](http://www.dothaneagle.com/eufaula_tribune/news/article_d0e3ec68-cc8a-11e3-af3e-0017a43b2370.html) (Accessed Sept. 12, 2014).

<sup>13</sup> ALDOT Budget allotment documents, March 7, 2014 (attached as Exhibit 5).

<sup>14</sup> Letter from Jeffrey Stephenson, SAIN to Daryl Calhoun, ALDOT, 7th Div., Re: Scope and Fee U.S.- 431, Traffic Operations Study, June 25, 2014 (attached as Exhibit 6).

<sup>15</sup> ALDOT Plans of Proposed Project Number ST-003-001-005, Additional Lanes on SR-1 (US-431) From North of Broad Street to 400 Feet South of Cotton Avenue, Barbour County (attached as Exhibit 30).

<sup>16</sup> Email from Ronnie Baldwin, Chief Engineer, ALDOT to Doug Purcell (Sept. 17, 2014) (attached as Exhibit 31).

<sup>17</sup> Letter from Director John Cooper to Mayor Tibbs, May 19, 2014 (attached as Exhibit 9).

ALDOT underscored this position in a recent press conference: “From a transportation standpoint we have spent too much on this corridor and this corridor is too important to the state, particularly the southeast corner of the state, not to pursue trying to eliminate this bottleneck.”<sup>18</sup>

ALDOT also argues that this segment of U.S. 431 “is the most heavily traveled two-lane road in the State of Alabama with over 21,000 vehicles per day.”<sup>19</sup> ALDOT reports receiving numerous complaints of “significant traffic slowdowns through this area.”<sup>20</sup> However, both these traffic counts and reports of traffic “slowdowns” are overstated. ALDOT’s 21,000-vehicles-per-day estimate was extrapolated from counters placed elsewhere around the region, and not recorded from actual counters on U.S. 431.<sup>21</sup> When counters were installed on this section of U.S. 431, the average daily traffic numbers, for the large majority of days, ranged well below 21,000 cars per day, even in the peak summer season when traffic on this key route to Florida’s beaches would be expected to be heaviest.<sup>22</sup>

Likewise, as explained in an opposition letter by local elected officials Senator Billy Beasley, Representative Berry Forte, Mayor Jack Tibbs, Council President Bob Powers and neighborhood President Jim Martin, any congestion issues in this corridor are sporadic and infrequent:

We acknowledge that traffic slows to a crawl on numerous weekends typically from Memorial Day thru the date School starts in late August. The congestion lasts 5 to 6 hours on any given day and occurs approximately 12 weekends/24 days during the year, or 7% of the days in a year...

(emphasis added).<sup>23</sup>

Concerns that the proposed project would severely damage the trees in North Eufaula Road’s historic median are well founded. Art Chappelka, an Alumni Professor of Forest Biology at the Auburn School of Forestry, examined the proposal and the trees in the median. In his expert opinion, “there would be significant damage to the trees in the median if the road were widened.”<sup>24</sup> Widening North Eufaula Avenue by as little as five feet on either side of the parkway would cause crown die-back, declining growth, and eventual death of many live oaks.<sup>25</sup> A second report, provided by an arborist retained by ALDOT, likewise concluded that the construction activities proposed would “have an impact on the appearance and health of some of

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<sup>18</sup> Phillip Rawls, “*Sweet Home Alabama*” town in traffic turmoil, supra note 3, (Exhibit 2).

<sup>19</sup> Letter from Director John Cooper to Mayor Tibbs, May 19, 2014 (attached as Exhibit 9).

<sup>20</sup> *Id.*

<sup>21</sup> Telephone Conversation with Mike Jones, ALDOT Assistant Bureau Chief, Traffic Monitoring, July 15, 2014.

<sup>22</sup> Alabama Traffic Data, Reports/Shapefiles, May 2014, <http://algis.dot.state.al.us/atd/default.aspx> (Accessed Sept. 12, 2014) (attached as Exhibit 10).

<sup>23</sup> Letter from AL Sen. Billy Beasley, AL Rep. Berry Forte, Mayor Jack Tibbs, City Council President Bob Powers, and North Eufaula and North Randolph Neighborhood Ass’n President Jim Martin, to Governor Bentley, Aug. 18, 2014 (attached as Exhibit 11)

<sup>24</sup> Letter from Art Chappelka, Alumni Professor in Forest Biology, Auburn University to Mayor Jack Tibbs, Aug. 2, 2014 (attached as Exhibit 12).

<sup>25</sup> *Id.*

the trees in the area”<sup>26</sup> The letter provides recommendations to “*reduce* the possibility of tree failures.”<sup>27</sup> (Emphasis added). Accordingly, both the expert opinion from the Auburn Forestry Professor and the report of ALDOT’s own arborist conclude that the proposed widening would have a detrimental impact on the character-defining trees in the historic median.

Given the importance of the Eufaula historic district to the local community and the distinct likelihood that the proposed widening would severely damage North Eufaula Road’s historic median, the opposition to the project has been overwhelming. Twenty-seven local and state organizations, four members of Congress and the Alabama Legislature, 4,400 individuals from around the world, and one former Auburn football coach (Pat Dye) have voiced opposition to the project.<sup>28</sup> (See Exhibit 14). The Eufaula City Council and Chamber of Commerce have passed unanimous resolutions opposing the project. (Attached as Exhibits 15-16). The National Trust for Historic Preservation, the Alabama Historical Commission, the Alabama Scenic Byways Advisory Council, and the Alabama Tourism Department have all written letters in opposition. (All letters are attached.)<sup>29</sup> As one of these letters eloquently states:

In a world where we increasingly rush from Point A to Point B, oblivious to the sameness and ugliness on either side of the road, this lovely thoroughfare remains one of those special places that encourages us to slow down, enjoy the surroundings, and literally smell the flowers instead of the gasoline fumes. The experience reminds us that visual pleasure matters, too, when we speak of ‘quality of life.’<sup>30</sup>

Recognizing the irreparable damage that the proposed widening would cause to this part of Alabama’s cultural heritage, the Alabama Trust for Historic Preservation named this segment of North Eufaula Road as one of its 2014 Places in Peril.<sup>31</sup>

### **III. FHWA’s comprehensive and longtime involvement in the construction of U.S. 431, including the original North Eufaula Avenue segment, renders this an inherently federal project and triggers the protections of federal laws.**

As described below, this project is imbued with federal character, despite ALDOT’s segmentation, and would damage or destroy significant character-defining elements of a historic district listed on the National Register of Historic Places. Therefore, ALDOT and FHWA must comply with Section 4(f) of the Department of Transportation Act, Section 106 of the NHPA, and Section 4332 of NEPA before any widening proceeds. Section 4(f) provides that the Secretary of Transportation may not approve a project using historic property unless: “(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the . . . historic site resulting from the use.” See 49

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<sup>26</sup> Letter from McGukin Enterprises to Howard Peavey, Sr. Agronomist, ALDOT, April 23, 2014 (attached as Exhibit 13).

<sup>27</sup> *Id.*

<sup>28</sup> Save North Eufaula Avenue, [www.no4lane.com](http://www.no4lane.com) (Accessed Sept. 23, 2014).

<sup>29</sup> (See Exhibits 2, 4, 17, 27, 25)

<sup>30</sup> Letter from Robert Gamble, Senior Architectural Historian, Alabama Historical Comm’n (Dec. 13, 2013) (attached as Exhibit 17).

<sup>31</sup> Alabama Trust for Historic Preservation, Alabama Historical Comm’n, *2014 Places in Peril*, available at <http://preserveala.org/pdfs/PIP/2014PlacesInPerilWEB.pdf> (Accessed Sept. 12, 2014).

U.S.C. § 303(c); 23 C.F.R. § 774.17. Section 106 provides that any agency having authority over a project that would impact historic property, must “take into account” the effect of the undertaking on any site included in or eligible for the National Register, and must afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the project. *See* 16 U.S.C. § 470f; 36 C.F.R. Part 800. Finally, NEPA requires that jurisdictional agencies overseeing a major federal action significantly impacting the quality of the human environment must prepare a detailed statement on the environmental impact of the proposed action. *See* 42 U.S.C. § 4332(2)(C)(i).

ALDOT contends that these laws do not apply because federal funding would not be used.<sup>32</sup> FHWA staff has echoed this position, stating that: “Only when ALDOT chooses to use federal-aid funds, does the National Environmental Policy Act (NEPA) apply.”<sup>33</sup> However, as set forth below, the consistent and extensive federal involvement in U.S. 431 triggers Section 4(f), Section 106, and NEPA, even if ALDOT proceeds without federal funding for this segment of the widening project.

- a. Pervasive and ongoing federal involvement renders a project federal in nature even in the absence of federal funds or federal permits.

ALDOT’s position is that the protections of federal law do not apply to this project if no federal funds are used and no federal permits are required. Although this proposition may often be the case, federal courts have rejected this proposition as an absolute rule. *See Historic Preservation Guild of Bay View v. Burnley*, 869 F.2d 985, 990 (6th Cir. 1989); *Hawthorn Env’tl. Pres. Ass’n v. Coleman*, 417 F. Supp. 1091, 1099 (N.D. Ga. 1976), *aff’d*, 551 F.2d 1055 (5th Cir. 1977) (the state may not disregard otherwise applicable federal environmental requirements solely on the basis of the funding question); *Named Individual Members of San Antonio Conservation Soc. v. Texas Highway Dep’t*, 446 F.2d 1013, 1027 (5th Cir. 1971) (the state may not avoid NEPA and 4(f) “by a mere change in bookkeeping or by shifting funds from one project to another”). Indeed, major federal actions need not be federally funded to invoke NEPA requirements. *See* 40 C.F.R. § 1508.18(a).

Several circuit courts have reasoned that an aggregate of federal involvement will transform a state project into a major federal action even in the absence of federal funding for the most recent segment or project. *See Ross v. Federal Highway Admin.*, 162 F. 3d 1046, 1053 (10th Cir. 1998); *see also Scottsdale Mall v. Indiana*, 459 F.2d 484, 489 (7th Cir. 1977) (federal involvement at nearly every project stage qualified the entire project as a major federal action under NEPA). Here, ALDOT’s history of using federal resources to make improvements on U.S. 431 renders this project a *de facto* federal project.

First, federal funds have been utilized to upgrade and maintain U.S. 431 for decades, including for the adjacent segments that have resulted in additional pressure for this proposal. On at least 57 occasions since the 1960s, federal funds have been utilized to expand, maintain,

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<sup>32</sup> Email from Lee Anne Wofford, Alabama Historical Comm’n to Doug Purcell, Eufaula citizen, April 18, 2014 (attached as Exhibit 18).

<sup>33</sup> Email from Lynne Urquhart, Environmental Engineer, FHWA, to Dee Kellogg, Eufaula citizen, May 9, 2014 (attached as Exhibit 19).

resurface, or widen U.S. 431 in Barbour County alone.<sup>34</sup> (See attached map, Exhibit 20). These projects total over \$40 million in federal dollars expended on this highway, just in Barbour County.<sup>35</sup> In the most current Statewide Transportation Improvement Program, widening or resurfacing of U.S. 431 is mentioned five times, and all five of these projects will use federal funding (notably, this project was not included in the STIP as explained below). As recently as 2012, this specific segment of North Eufaula Avenue was repaved using federal funding.<sup>36</sup>

In fact, the stated justification for this project – creating a contiguous four-lane highway – only exists because ALDOT utilized federal funds to expand the adjacent sections of the road to four lanes. Beginning in 1981, U.S. 431 from Pleasant Hill to south of Eufaula was widened to four lanes using federal funding.<sup>37</sup> U.S. 431 from north of Eufaula to Russell County was also widened in the 1980s using federal funding.<sup>38</sup> Four-laning the highway resulted in increased traffic, including truck traffic, through the center of town.<sup>39</sup> The proposed widening cannot be viewed in a vacuum, nor does it exist independently from the adjacent projects. Both of the stated justifications for this project – creating a four-lane highway along the length of the state and alleviating the “bottleneck” when the road narrows to two lanes – now exist *because of* the past use of federal funds for projects on adjacent segments. Attempting to eliminate federal funds from this 0.7-mile segment does not negate the fact that U.S. 431 was built with federal funds and the justification for this project is a direct consequence of other federally-funded projects.

Second, the widening project is federal in character given its connection to a proposed bypass around Eufaula, a proposal on which millions of federal dollars have been expended.<sup>40</sup> The purpose of the bypass, according to its Environmental Assessment, was as follows:

Due to all the local and north-south ‘through’ traffic having to transit this constricted area, a major bottleneck to efficient travel on US-431 has developed.... [I]t will help relieve those congestion and safety problems by drawing off more than 16,000 vehicles per day in the design year.<sup>41</sup>

This need to accommodate north-south statewide travel is the same reason cited by ALDOT for widening North Eufaula Avenue. In a letter to the mayor of Eufaula, ALDOT further

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<sup>34</sup> See e-mail from Charles Calloway, Civil Rights Specialist, FHWA, to Sarah Stokes, Southern Environmental Law Center (June 20, 2014 2:59 PM) (Atch-Projects by County, April 30 2014 Email Hollenquest to Urquhart.xlsx) (attached as Exhibit 21).

<sup>35</sup> ALDOT, Authorized Project Listing from 01/01/1901-01/01/2200 in Barbour County, p. 11 (attached as Exhibit 22).

<sup>36</sup> See e-mail from Charles Calloway, Civil Rights Specialist, FHWA, to Sarah Stokes, Southern Environmental Law Center (June 20, 2014 2:59 PM) (Atch-Projects by County, April 30, 2014 Email Hollenquest to Urquhart.xlsx) (Exhibit 21).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Eufaula Tribune Editorial Remarks, *Let’s Slow Down and Get a Second Opinion*, June 1988 (attached as Exhibit 23).

<sup>40</sup> See 150 Cong. Rec. H1845, H1881 (daily ed. April 1, 2004) <http://www.gpo.gov/fdsys/pkg/CREC-2004-04-01/pdf/CREC-2004-04-01-pt1-PgH1845-2.pdf> (House voted 229 to 194, approving \$1 million to the U.S. 431 Eufaula bypass).

<sup>41</sup> FHWA, ALDOT, *Environmental Assessment, Project NHF-300(11), Relocation of US-431 from a Point North of Chenyhatchee Creek to a Point North of US-82, Barbour County*, Jan. 12, 2005, p. 1-2.

underscores the linkage between the bypass and the widening as competing alternatives serving the same essential purpose:

In past years, a number of approaches have been considered to deal with this issue. Those include (1) the intrusion into the median discussed above, (2) simply restriping the existing pavement to provide two narrow lanes of travel and (3) building a bypass around Eufaula.<sup>42</sup>

Finally, when engineers hired by ALDOT began work on the current widening proposal, their first step was to utilize analysis from the federally-funded Environmental Assessment for the bypass.<sup>43</sup>

Over \$1.2 million dollars in federal funds have been spent on the bypass proposal: to study the route, prepare the Environmental Assessment, and purchase protective Right-of-Way.<sup>44</sup> If the widening project were to render the bypass unnecessary, the right-of-way purchased with federal funds for that project would need to be disposed of pursuant to applicable federal regulations, and may require additional approvals from FHWA. *See* 23 C.F.R. §§ 710.403, 710.409. Given the functional link between the two projects, the use of federal funds for the proposed bypass federalizes the widening proposal for purposes of triggering the applicable federal laws.

Third, the designation of this portion of U.S. 431 as a State Scenic Byway also triggers the application of federal law. Congress created the National Scenic Byways Program to recognize outstanding corridors, promote tourism and protect the resources that make these facilities outstanding.<sup>45</sup> Through this federal program, states are encouraged to establish their own lists of state-level scenic byways, and roads on these state lists are eligible to apply for federal funds. 23 U.S.C. § 162.

The Alabama Scenic Byways Advisory Council was established to administer the state's scenic byways program. In 2000, the Barbour County Governor's Trail was designated an Alabama Scenic Byway by the state legislature.<sup>46</sup> The Barbour County Governor's Trail includes the segment of U.S. 431 at issue here. Recognizing the likely detrimental impact of the widening on the Barbour County Governor's Trail Scenic Byway, the Alabama Scenic Byways Advisory Council has expressed its unanimous opposition to this project.<sup>47</sup>

This segment's designation as a State Scenic Byway also has important federal funding implications. In 2002, Alabama's State Scenic Byway program was awarded a \$750,000 federal

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<sup>42</sup> Letter from Director John Cooper, ALDOT, to Mayor Tibbs, May 19, 2014 (attached as Exhibit 9).

<sup>43</sup> Letter from Jeffrey Stephenson, SAIN to Daryl Calhoun, ALDOT, 7<sup>th</sup> Division, *Re: Scope and Fee U.S.- 431, Traffic Operations Study*, June 25, 2014 (attached as Exhibit 6).

<sup>44</sup> ALDOT, Authorized Project Listing from 01/01/1901-01/01/2200 in Barbour County, p. 8 (attached as Exhibit 22); *see also* FHWA, ALDOT ROW information (attached as Exhibit 26).

<sup>45</sup> Alabama Scenic Byway Program, p. 3 available at <http://www.alabamabyways.com/wp-content/uploads/2010/05/programmanual.pdf> (Accessed Sept. 12, 2014).

<sup>46</sup> ALDOT, Governor's Trail Council, *Governor's Trail Corridor Management Plan*, Sept. 2006, p. 1-1.

<sup>47</sup> Letter from Gale Main, Chair of Scenic Byways Advisory Council, to Director John Cooper, ALDOT, May 19, 2014 (attached as Exhibit 27).



grant from the National Scenic Byway Program. Among other purposes, these funds were used to prepare the Barbour County Governor's Trail's Corridor Management Plan and to purchase markers and signs along the road.<sup>48</sup> Accordingly, U.S. 431's inclusion on Alabama's federally-approved scenic byways list, and the state's use of federal funds pursuant to this listing, add to the road's federal character and render the proposal to widen U.S. 431 subject to Section 106 and other federal laws.

- b. Courts have rejected similar efforts to manipulate project scope and funding to avoid the application of federal protections.

Courts have rejected similar attempts by state agencies to selectively fund portions of a larger federal project for the purposes of evading federal environmental requirements. *See, e.g., Named Individual Members of San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 446 F.2d at 1028-29; *see also Sierra Club v. Volpe*, 351 F. Supp. 1002, 1007 (N.D. Cal. 1972). "Any acts of the defendants that suggest that they may have decided to treat the roads separately in order to avoid the requirements of federal law will weigh very heavily in support of the project splitting theory." *James River v. Richmond Metro. Auth.*, 359 F. Supp. 611, 635 (E.D. Va. 1973), *aff'd sub nom. River v. Richmond Metro. Auth.*, 481 F.2d 1280 (4th Cir. 1973). In such cases, the federal character of a project as a whole bars a state from evading federal environmental law through exclusive use of state funds. *See Thompson v. Fugate*, 347 F. Supp. 120, 124 (E.D. Va. 1972).

In *Thompson*, the Commissioner of the Department of Highways for the State of Virginia proposed to construct an 8.3-mile segment—entirely with state funds—of Route 288, a 29.2-mile beltway around Richmond. *Id.* at 123. The state constructed the remainder of Route 288 with 90% federal aid. *Id.* The Commissioner chose to segment this portion because it would impact Tuckahoe Plantation, a registered National Historic Landmark. *Id.* at 122. By segmenting Tuckahoe from federal aid, the Commissioner sought to avoid the expense of complying with federal law. The record in *Thompson* indicated several application attempts for federal aid as well as a federal grant of approval for the Route 288 beltway. *Id.* at 123. Because of the larger federal involvement with Route 288 as a whole, the court determined that the 8.3-mile segment must be considered along with the entire route. *Id.* at 124.

The meeting of federal requirements for 21 miles of a 29.2-mile highway project in order to partake of the federal financial allotments for that 21-mile segment, *and at the same time circumvent the need to protect the national environment to the fullest extent possible on the remaining 8.3-mile segment by labeling it as a separate project*, is to engage in a bureaucratic exercise which, if it is to succeed, must do so without the imprimatur of this Court—a task which is doomed to failure unless and until a superior court deems otherwise.

*Id.* (emphasis added). The court went on to require the FHWA and Virginia Department of Highways to consider the impacts of the project under Section 4(f) of the Department of Transportation Act, Section 106 of the National Historic Preservation Act, and the National Environmental Policy Act. *Id.* at 125-28.

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<sup>48</sup> Email from Mary Lou Crenshaw, Bureau of Transp. Planning & Modal Programs, ALDOT to Doug Purcell, Eufaula citizen, *Re: Barbour County Governors' Trail*, Aug. 20, 2014 (attached as Exhibit 28).

The facts of this case suggest the same type of bureaucratic evasion of federal law rejected by the *Thompson* court. ALDOT has utilized federal funding to widen U.S. 431 throughout the highway's history, including the segments immediately to the south and north of the North Eufaula Avenue segment. ALDOT has recently resurfaced this specific segment of the road and created a management plan using federal dollars. ALDOT now proposes to deviate from its longstanding historical pattern and widen just the historic segment with state funds. Allowing state DOTs to use federal funds for everything but the segment of a road project that would trigger federal protections would be a manifest injustice and would thwart the purposes of those federal laws. ALDOT disclosed that it viewed the Section 4(f) analysis as "costly and tedious" in the Environmental Assessment for the Bypass, and chose another route in order to avoid this analysis.<sup>49</sup> Indeed, ALDOT has admitted that the omission of federal funding from this proposal is a deliberate effort to "leave the debate" at the "state level".<sup>50</sup>

FHWA, EPA, and the Advisory Council on Historic Preservation are ultimately responsible with ensuring that these federal laws are faithfully applied. Should ALDOT proceed in a manner inconsistent with these statutes and applicable caselaw, the fundamental purposes of the laws implemented by the federal agencies would be subverted, and the federal agencies should do everything in their power to prevent and discourage this evasion of the law. Failure to require ALDOT to fully comply with the requirements of NEPA, Section 4(f), and Section 106 would be arbitrary, capricious, and fall short of the legal duties these statutes impose on the relevant agencies.

#### **IV. ALDOT and FHWA Improperly Segmented this Project from a Larger Federal Undertaking.**

Under federal law, DOTs are not allowed to segment projects in order to evade an analysis of the total impacts of a project. 23 C.F.R. § 771.111(f). Although the doctrine of segmentation is more frequently used to determine the scope of a project's impacts, the segmentation test also elucidates whether a project can be viewed as independent from the federally-funded projects it would connect. *Hawthorn Env'tl. Pres. Ass'n v. Coleman*, 417 F. Supp. 1091, 1100 (N.D. Ga. 1976), *aff'd*, 551 F.2d 1055 (5th Cir. 1977). "[I]f the Court concludes that the two highways each have such little value in their own right that their separate construction could be considered arbitrary or irrational, the Court will find them to be a single project." *James River v. Richmond Metro. Auth.*, 359 F. Supp. 611, 635 (E.D. Va. 1973), *aff'd sub nom. River v. Richmond Metro. Auth.*, 481 F.2d 1280 (4th Cir. 1973).

In the context of highway projects within city limits, courts have focused primarily on the independent utility of a segment. See *N.C. Alliance for Transp. Reform v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 680 (M.D. N.C. 2001). The question in this case is whether the segmented portion is a "mere extension of a federal road, or connective link," and if it is a connection, whether that connection has independent utility. *Hawthorn Env'tl. Pres. Ass'n v. Coleman*, 417 F. Supp. at 1100. *Hawthorn* and *Named Individual Members* have rejected segmenting "connector"

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<sup>49</sup> Letter from Don T. Arkle, Design Bureau Chief, ALDOT, to Elizabeth Ann Brown, Deputy State Historic Preservation Officer, Alabama Historical Comm'n (June 17, 2004) (attached as Exhibit 29).

<sup>50</sup> See Rawls, "*Sweet Home Alabama*" town in traffic turmoil, *supra* note 3, (Exhibit 2).

projects that have no independent utility without their federally funded bookends. *Id.*; *Named Individual Members*, 446 F.2d at 1023.

Without persuasive evidence to the contrary, this project must be treated as an extension of the federally-funded four lane segments north and south of North Eufaula Avenue. As stated previously, ALDOT Director Cooper admits, there is no reason for the North Eufaula Avenue widening except to link the federally-funded four-lane roads: “From a transportation standpoint we have spent too much on this corridor and this corridor is too important to the state, particularly the southeast corner of the state, not to pursue trying to eliminate this bottleneck.”<sup>51</sup> After using federal funding for these adjacent projects, ALDOT and FHWA should not now be allowed to subvert federal by omitting this last half mile through the most historically sensitive district from the protection of federal laws.

ALDOT and FHWA’s previous widenings on U.S. 431 “stand like gun barrels” pointed at the City of Eufaula that threaten to destroy the very reason the historic district was established. *San Antonio Conservation Soc. v. Texas Highway Dep’t*, 400 U.S. 968, 971-72 (1970) (Black, J., dissenting from denial of cert.). “The Secretary ... know(s) full well the difficulty of preserving the park’s heartland once the barrels have been loaded and the guns cocked. The efforts of our citizens and the Congress to save our parklands ... deserve a more hospitable reception.” *Id.* The proposed widening is a direct and foreseeable consequence of the previous federal actions that both created the problem and dictate the solution that ALDOT now seeks. This segment serves no purpose other than to connect and complete the previous federal actions. It therefore cannot now be treated as a separate and independent project. FHWA, EPA, and the Advisory Council on Historic Preservation all have the responsibility to ensure that the requirements of Section 4(f), NEPA, and Section 106 are faithfully and lawfully applied. Sanctioning this improper segmentation, through affirmative action or agency inaction, would be arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, under § 706(2)(A) of the Administrative Procedure Act. 5 U.S.C. §-706(2)(A). The federal agencies must take all steps necessary to ensure that ALDOT does not construct this project without complying with federal law. Should ALDOT proceed without the necessary federal approvals, it must be forced to disgorge all federal funds previously expended on the U.S. 431 corridor.

## **V. The Proposed Widening Is Contrary to Local Transportation Plans and Applicable Planning Requirements.**

The widening proposal is contrary to local transportation plans, and as a result runs afoul of both state and federal transportation planning laws. Alabama law makes clear that ALDOT expenditures are intended to serve the public interest and must be pursued in cooperation with the expressed desires of the impacted communities. *See* Ala. Code § 23-1-21.3 (directing ALDOT to administer the state’s public transportation program “to permit full cooperation between federal, state, and local entities, so as to result in effective and economical programs which are responsive to needs and found to be in the public interest”); *Id.* § 23-1-47(b) (authorizing expenditures of funds for the costs of maintaining, improving, repairing, constructing, and reconstructing streets and roads “in cooperation with the city or town involved”).

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<sup>51</sup> *Id.*

These mandates to encourage cooperation between the state DOTs and local governments are echoed in federal law. States, through their Departments of Transportation, are directed to prepare state transportation plans in “cooperat[ion] with affected local officials with responsibility for transportation” and to “consider coordination of transportation plans, the transportation improvement program, and planning activities with related planning activities being carried out outside of metropolitan planning areas.” 49 U.S.C. § 5304(e)(1),(3). These requirements apply to both the State’s long-range statewide transportation plan, *Id.* § 5304(f), and its Statewide transportation improvement program. *Id.* § 5304(g).

Despite these legal directives to ensure cooperation with local government and advancing local preferences, the widening proposal is clearly at odds with Eufaula’s expressed wishes. Eufaula’s Comprehensive Community Master Plan, adopted in April 2013, expresses the community’s clear preference to maintain the historic median. The Plan adopts the specific goal to “continue to improve and maintain the median along Eufaula Avenue as the ‘front-porch’ to the community.”<sup>52</sup> To maintain this median, Eufaula wants to “continue to invest and protect the tree canopy along North Eufaula Avenue and East Broad Street;”<sup>53</sup> and “continue to work with ALDOT to implement best practices in mitigating the effects of traffic along US Highway 431 and US Highway 82.”<sup>54</sup> The Community Master Plan reflects the opposition of the local government, and the community as a whole, to the widening U.S. 431, because it would cause the community to “lose several significant trees and severely alter the character of the historic district.”<sup>55</sup> The local community’s opposition to the widening has not changed since the plan was adopted, as the Eufaula City Council adopted a unanimous resolution this year to reiterate its opposition to the project.<sup>56</sup> Thus, it is not surprising that the proposed widening of U.S. 431 is not included in ALDOT’s long-range statewide transportation plan or its Statewide Transportation Improvement Program, since the local government adamantly opposes it. 23 C.F.R. § 450.216.

Rather than coordinating and cooperating with the local government, in this case the proposal is proceeding despite the clear opposition of the impacted community. Proceeding in this manner would render Eufaula’s local plans meaningless, its citizens powerless, and these legal provisions hollow. Such an outcome is not only inequitable and unjust, but also unlawful.

## **VI. Conclusion**

NEPA, Section 4(f), and Section 106 were enacted to protect our nation’s environment and its cultural heritage. Congress has placed a high value on historic districts and is willing to sacrifice them only when there is “no prudent and feasible alternative.” The proposal to widen this 0.7-mile segment of U.S. 431 is an obvious and direct consequence of the federally-funded expansion of the adjacent segments of this same road. Ignoring the connection between these

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<sup>52</sup> Eufaula Comprehensive Community Master Plan, April 2013, p. 23, available at <http://www.eufaulaalabama.com/Portals/0/Eufaula%20Comp%20Plan%20NEW%20FOR%20WEB%2004%2015%202013.pdf> (Accessed Sept. 12, 2014).

<sup>53</sup> *Id.* at 23.

<sup>54</sup> *Id.* at 21.

<sup>55</sup> *Id.* at 38.

<sup>56</sup> Eufaula City Council Resolution, 2-2014, Jan. 21, 2014 (attached as Exhibit 15).

other federal projects and the proposal at hand would turn a blind eye to the obvious. Allowing ALDOT to game these federal protections, and do so with impunity, would subvert the protections of these statutes and raise serious questions about whether Alabama's resources will receive the full benefit of their protections in the future. Such an outcome should not be permitted to stand.

We look forward to working with you on this important matter. If you have any questions or concerns please do not hesitate to contact us. Sarah Stokes can be reached at 205-745-3060 or [sstokes@selcal.org](mailto:sstokes@selcal.org), and Brian Gist can be reached at 404-521-9900 or [bgist@selcga.org](mailto:bgist@selcga.org).

Sincerely,



Brian Gist  
Senior Attorney



Sarah Stokes  
Staff Attorney

Cc (without attachments):

Governor Robert Bentley  
Senator Billy Beasley  
Senator Tom Whatley  
Representative Berry Forte  
Frank White, State Historic Preservation Officer  
Heinz Mueller, EPA Region 4  
MaryAnn Naber, Federal Preservation Officer, FHWA  
Horst Greczmiel, Council on Environmental Quality  
Charlene Vaughn, Advisory Council on Historic Preservation  
Chris Wilson, Advisory Council on Historic Preservation  
Javier Marques, Advisory Council on Historic Preservation  
Kelly Fanizzo, Advisory Council on Historic Preservation