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March 29, 2013

VIA EMAIL AND OVERNIGHT MAIL

The Honorable Edgar W. Ennis, Jr.
Superior Court Judge
Macon Judicial Circuit
Superior Court of Bibb County
601 Mulberry Street, Suite 310
Macon, GA 31201

Re: Holliday v Georgia Department of Transportation. Civil Action No. 12-CV-58472.

Dear Judge Ennis:

Please see the enclosed Notice of Potential Claim served on Georgia Department of Transportation (“GDOT”) by its General Contractor, R.J. Haynie & Associates, Inc., on March 25, 2013. Each day that the Court’s injunction against the Forest Hill Road (“FHR”) construction is in place is costing the citizens of Bibb County and the State of Georgia an unforeseeable amount of damages.¹

At the March 21, 2013 hearing, the Court held that if GDOT failed to seriously consider Plaintiff’s alternative engineering plan for Forest Hill Road (“FHR”), then GDOT may have acted arbitrarily and capriciously. GDOT submits that the Court’s requirement that GDOT seriously consider Plaintiff’s alternative plan is not supported by federal and state law. Therefore, in an effort to mitigate any damages due to the Court’s thirty-day restraining order

¹Pursuant to GDOT’s Standard Specification Section 105.13, which is part of every construction contract, the following items may be recoverable by the Contractor as damages: additional direct hourly rates paid to employees for job site labor, including payroll taxes, welfare, insurance, benefits and all other labor burdens, additional costs for materials, additional equipment costs, costs of extended job-site overhead, an additional 15 percent of the total of these damages for home office overhead and profit, bond costs and subcontractor costs. In the alternative, should GDOT terminate the Contract as a result of an injunction, the Contractor shall be eligible to receive, in addition to payment for the actual number of Items of Work completed, reimbursement for organization of the project and moving equipment to and from the job, materials obtained by the Contractor for the project, and payment adjustments to afford the Contractor a reasonable profit on work performed.

(“Order”), GDOT offers the following points of law and requests that the Court vacate its Order and allow construction to proceed. In the alternative, GDOT requests that the Court require Plaintiff to post a security bond for potential damages to be incurred by GDOT pursuant to O.C.G.A. § 9-11-65(c).

1. Plaintiff has failed to properly challenge the Project under the federal Administrative Procedures Act.

Pursuant to the Federal Administrative Procedures Act (“APA”), 5 U.S.C.S. § 706, Plaintiff’s claim that his alternative plan was not sufficiently reviewed by GDOT, as well as his claims that the current plans for the FHR Project have not been created pursuant to generally accepted engineering standards, are precluded as a matter of law. The Court lacks subject matter jurisdiction because Plaintiff’s claims fall within the ambit of the National Environmental Policy Act of 1969 as amended, 42 U.S.C.S. §§ 4321-434, (NEPA), which requires an exhaustion of administrative remedies through the federal system.

Specifically, without expressly stating in his Complaint, Plaintiff is challenging the NEPA process under which the FHR Project was approved for federal funding by the Federal Highway Administration (“FHWA”). NEPA does not provide a private right of action; and a challenge to the NEPA process must be brought under the Administrative Procedure Act, 5 U.S.C.S. §§ 706 et seq. GDOT is not subject to the Federal APA. Citizens for Smart Growth v. Sec’y of the DOT, 669 F.3d 1203, 1210 (11th Cir. Fla. 2012); see also Sierra Club v. United States Army Corps of Engineers, 295 F.3d 1209, 1214 (11th Cir. 2002).² Therefore, Plaintiff’s failure to exhaust administrative remedies precludes the Court’s consideration of Plaintiff’s claims here. Chattooga Conservancy v. Jacobs, 373 F. Supp. 2d 1353, 1369 (N.D. Ga. 2005); Headwaters v. Forsgren, 219 F. Supp. 2d 1121, 1126 (D. Or. 2002).

Because Plaintiff should have addressed his issues and alternative plan through the NEPA process, GDOT respectfully submits that this Court lacks subject matter jurisdiction and requests that the Court vacate its Order and allow construction to proceed on the FHR Project.

2. The Code of Federal Regulations does not require GDOT to consider Plaintiff’s alternative plan.

The Code of Federal Regulations governs the factors that must be considered by the local governments in planning highway projects that will be eligible for federal aid funding. An Environmental Assessment (“EA”) is performed for any construction project that does not clearly require the preparation of an Environmental Impact Statement (“EIS”). 23 C.F.R. 771.119(a). An EA must contain brief discussions of the needs for the proposal, of alternatives,

² Citizens for Smart Growth provides an excellent summary of the NEPA review and appeal process.

of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. Davis v. Slater, 148 F. Supp. 2d 1195 (D Utah July 2, 2001) (citing 40 C.F.R. § 1508.9(b)). The state and local government is not required to analyze every plan put forth by the public; instead, they should, *inter alia*, “rely on information, studies, or analyses provided by MPOs for portions of the transportation system located in metropolitan planning areas” and “[c]onsider the concerns of local elected and appointed officials with responsibilities for transportation in non-metropolitan areas. 23 C.F.R. 450.208(a)(1) and (4) (emphasis added).

The evidence before the Court is that this the EA process has been fully and completed performed. As a matter of law, GDOT cannot be considered to have acted arbitrarily and capriciously because it did not consider Plaintiff’s alternative plan. Therefore, GDOT respectfully requests that the Court vacate the TRO as soon as possible. See, Piedmont Healthcare, Inc. v. Kowal, 314 Ga. App. 196, 198 (2012)(trial court abused its discretion by granting an injunction based on its erroneous legal interpretation).

3. The final EA considers Plaintiff’s criticisms of the FHR Project.

Despite GDOT’s lack of duty to consider Plaintiff’s plan, the fact is that GDOT and FHWA considered all of Plaintiff’s issues with the Project in 2011 prior to the finalization of the EA. I have enclosed a copy of a letter from GDOT to Dr. Holliday dated September 29, 2010, which shows that GDOT specifically reviewed his concerns in a meeting on June 17, 2010. The letter indicates that GDOT’s “project development process considers all elements collectively to make a selection based upon the best alternative. This process was completed and has considered all components It was determined that the methodology used to project the traffic volumes is consistent with GDOT policy, which was validated by GDOT. . . . the updated data does represent a change in data; however, it does not change the overall results significantly, which would affect the current design.”

Additionally, in 2011, Plaintiff met with FHWA and GDOT after he alleged that federal funds were being misused in the Project. Again, Plaintiff brought the same issues to the forefront and they were considered and rejected. The EA was subsequently re-evaluated in late 2011-2012 in order to let the Project for construction. The final EA was approved by FHWA in October 2012. I have enclosed a copy of the EA for the Court’s convenience. Along with the 2012 Re-evaluation, I have included a line-by-line description of where in the EA Plaintiff’s concerns are addressed. A brief review of this document will show that all of Plaintiff’s issues with traffic projections, road capacity, accident data and environmental impact were re-assessed using the most current data and the ultimate conclusion was that the FHR Project should remain as planned in the original Purpose and Need Statement.

In summary, because Plaintiff cannot show that GDOT or any other government entity or agent involved in the FHR Project acted arbitrarily and capriciously in planning this Project, and because the Plaintiff has not followed the proper procedure in challenging the Project, GDOT

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respectfully requests that the Court vacate its March 22, 2013 Order before the thirty-day period has run.

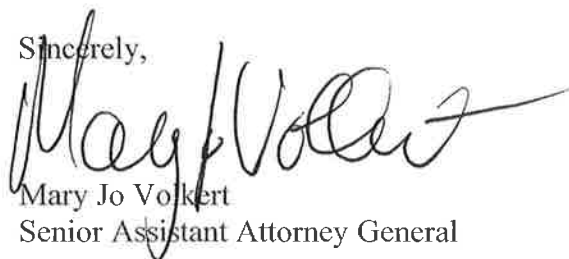
Should the Court decline to vacate the injunction, GDOT requests that the Court require Plaintiff to provide a security bond in an amount that is reasonable to support the payment of costs and damages under the \$8.4 million construction contract. See O.C.G.A. § 9-11-65(c) (“As a prerequisite to the issuance of a restraining order or an interlocutory injunction, the court may require the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been enjoined or restrained wrongfully.”) GDOT can provide an affidavit in an attempt to estimate the additional costs if the Court so requests.

Plaintiff has had approximately 15 to 20 years to convince Macon/Bibb County officials that his alternative plan should be adopted. He has simply been unable to do so. The evidence before the Court is that Plaintiff’s issues were considered and rejected by local, state and federal officials; and the current plan has been drafted by licensed professional engineers, complies with all state and federal standards, and has been approved by the FHWA. Plaintiff should not be allowed to stop construction of the Project at this late hour simply because he alleges that GDOT has acted “arbitrarily and capriciously.”

I have enclosed a proposed order for the Court’s consideration.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Jo Volkert", written over a printed name and title.

Mary Jo Volkert
Senior Assistant Attorney General

cc: John Draughon, Esq,
Keith Golden, Commissioner, GDOT
Russell McMurry, Chief Engineer, GDOT
Matthew Cline, General Counsel, GDOT
Thomas Howell, District Engineer, GDOT
Jane Smith, Legal Coordinator, GDOT
Robert J. Waddell Jr., Esq.
David Fortson, Chief Engineer, Bibb County
Erica Woodford, Clerk of Court (*via U.S. Mail*)