

# Section 4(f) Training

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Based on a presentation by  
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# Agenda

- Section 4(f) Introduction
- Section 4(f) Requirements
- Identifying Section 4(f) Properties
- Use Section 4(f) Properties
- *De minimis* Impact
- Programmatic Section 4(f) Evaluations
- Individual Section 4(f) Evaluations
- Feasible and Prudent
- Least Harm
- Section 4(f) and Section 106

# What is Section 4(f)?

23 CFR 774.1





# What is Section 4(f)?

- Part of **US Dept. of Transportation Act** (1966)
- Peak of Interstate system construction
- Requires consideration of park and recreational lands, wildlife & waterfowl refuges, and historic sites
- “**Preservation purpose** of the statute”
- “**thumb on the scale**” in favor of protecting Section 4(f) properties

# What is Section 4(f)?

- Now codified in 23 USC 138 & 49 USC 303
- Applies to projects that receive **funding** from or require **approval** by an agency of US DOT
- Regulation: **23 CFR 774**, a joint regulation between the **FHWA** and **Federal Transit Administration** (effective in April 2008)

# Section 4(f) Resources

- Guidance
  - FHWA Policy Paper
  - Re:NEPA Community of Practice  
(<http://nepa.fhwa.dot.gov>)
  - [www.environment.fhwa.dot.gov](http://www.environment.fhwa.dot.gov)
- Other Resources
  - [www.section4f.com](http://www.section4f.com) – Web-based Training developed by Maryland DOT and FHWA

# What does Section 4(f) Require?

23 CFR 774.3



# What does Section 4(f) require?

- FHWA may not approve the use of land from a Section 4(f) property unless it is determined that:
  - the use is *de minimis*, or ...
  - there is no feasible and prudent alternative to the use of land, and that all possible planning to minimize harm has been included in the action
- Before we discuss *de minimis*, we will learn how to identify Section 4(f) properties and when they are used

# What are Section 4(f) Properties?

23 CFR 774.17





# What are Section 4(f) Properties?

- Section 4(f) Properties or resources:
  - Parks, recreation areas, wildlife and waterfowl refuges, and historic properties with qualities that satisfy specific criteria
- Not every open space, conservation easement, public property, wildlife management area or old building are Section 4(f) resources



# Parks and Recreation Areas Criteria

- Publicly owned
  - Fee simple ownership, permanent easement and certain lease agreements
- Public park
  - Entire public permitted access during normal operating hours (visitation not limited to select group)
- Major purpose for park or recreation
  - Not incidental, secondary, occasional, or dispersed activities
- Significant resource
  - Officials w/ jurisdiction call but subject to FHWA discretion

# Wildlife/Waterfowl Refuge Criteria

- Publicly owned
  - Fee simple ownership, permanent easement and certain lease agreements
- Open to the Public?
  - Access may be restricted in some areas or at certain times
- Major purpose for refuge
  - Not incidental, secondary, occasional, or dispersed functions
- Significant resource
  - Officials w/ jurisdiction call but subject to FHWA discretion

# Historic Property Criteria

- On or eligible for listing on National Register of Historic Places
  - Criteria relate to association with historic persons and/or events, engineering or architectural styles, or potential to yield important information
- Public ownership **not** required
- Archeological sites must be deemed to be important for preservation in place



# Section 4(f) Exceptions

- Certain late designations
  - Post-NEPA & right-of-way already owned
- Certain trails/paths/bikeways
  - Not limited to specific location in ROW
  - Designated primarily for transportation
- Transportation Enhancement projects and mitigation activities
  - For preserving or enhancing Section 4(f) site
- Park Roads/Parkways under Federal Lands Program

# When are Section 4(f) properties used?

23 CFR 774.17



# Definition of "Use" 23 CFR 774.17

- When land is **permanently incorporated** into a transportation facility.
- When there is **temporary occupancy** of land that is adverse [refer also to 23 CFR 774.13(d)]
- When there is a **constructive use** (refer also to 23 CFR 774.15)

# Use via Permanent Incorporation

- Fee simple acquisition of Right of Way from the Section 4(f) property
- Permanent easement or long term lease
- For a historic property, it is acquisition of land from within the National Register boundaries of the eligible site
  - Historic site may not always include the entire parcel.

# Temporary Occupancy not resulting in a “Use”

- No change in land ownership
- Duration is less than the time needed for construction of the project
- Scope of the project must be minor – i.e. changes to the Section 4(f) property are minimal
- There are no anticipated permanent adverse physical impacts & land restored after project
- There is no interference with the protected activities or attributes
- Documented agreement of Official w/ Jurisdiction

If these criteria are not met, then the activity is adverse in terms of the **preservation purpose** of the statute.

# Use via a “Constructive Use”

- No land is incorporated into the project
- Project’s **proximity** impacts are so severe that they “**substantially impair**” the qualities, activities, or attributes that qualified the property for 4(f) protection
- Determinations of Constructive Use must be coordinated with your FHWA HQ NEPA contacts

# Examples of “Constructive Use”

- Noise level increase where noise-sensitive activities such as amphitheaters and campground sleeping areas exist on the site
- Blocked views, changes in setting
- Restriction of Access
- Vibration Impacts
- Ecological Intrusion

# What is a *de minimis* impact?

23 CFR 774.3(b), 774.5(b),  
774.7(b) & 774.17; and  
December 13, 2005 guidance



Identify all Section 4(f) properties in the project area per 23 CFR 774.11 and Section 4(f) Policy Paper

Identify all “uses” for each alternative per 23 CFR 774.13, 774.15, 774.17, and Section 4(f) Policy Paper

Is the use *de minimis*?

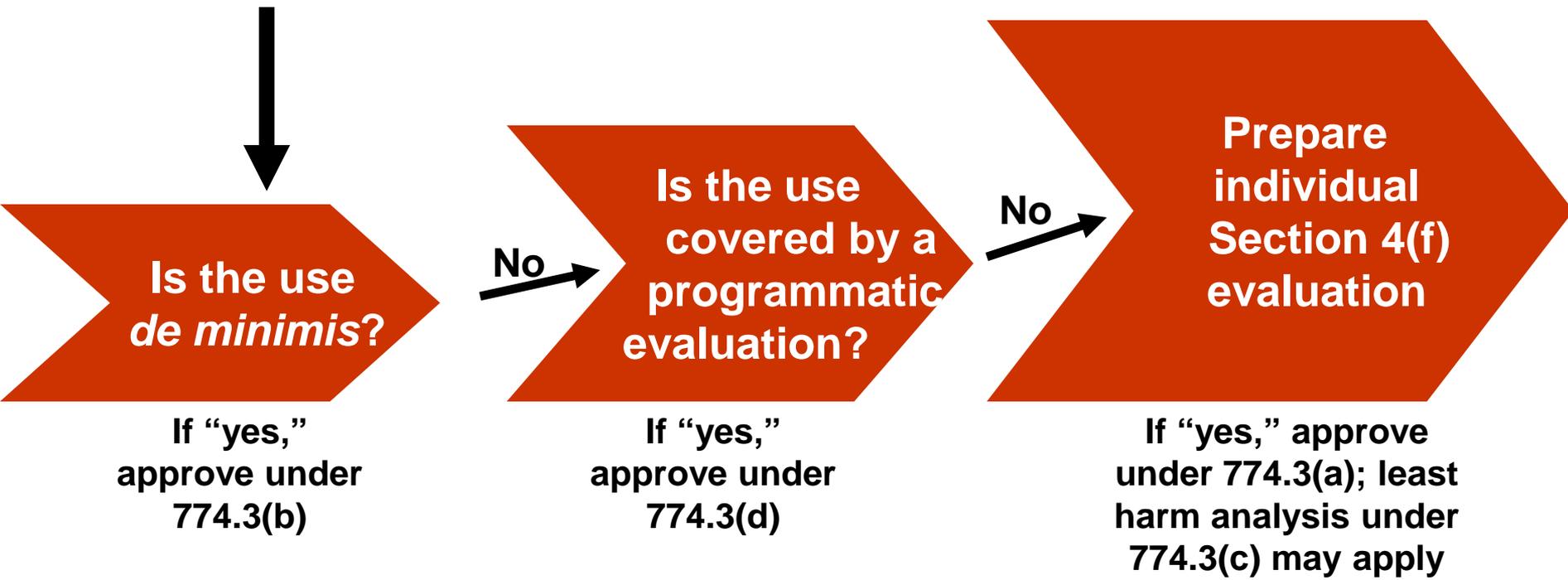
If “yes,” approve under 774.3(b)

Is the use covered by a programmatic evaluation?

If “yes,” approve under 774.3(d)

Prepare individual Section 4(f) evaluation

If “yes,” approve under 774.3(a); least harm analysis under 774.3(c) may apply



# *De Minimis* Impacts

- *De minimis* → trivial, minimal
- Purpose → simplify processing & approval of projects with minimal Section 4(f) impacts
- Applicable on all classes of NEPA action
- Determined on a property by property basis, not project-wide or alternative-wide
- Neither legal sufficiency review nor evaluation of **avoidance alternatives** required

# *De Minimis* Impacts

- “In making any (de minimis) determination, the Secretary shall consider to be part of a ... project any avoidance, minimization, mitigation, or enhancement **measures** that are required to be implemented as a condition of approval of the ... project.”
- Key distinction between **avoidance alternatives** and mitigation/minimization **measures**

# *De Minimis* Impacts

## HISTORIC SITES

- Section 106 consultation results in “no adverse effect” to historic properties or “no historic properties affected”
- Inform SHPO or THPO (and ACHP if participating) of intent to make *de minimis* finding based on written Section 106 concurrence
- Consider views of consulting parties

# *De Minimis* Impacts

## PARKS, RECREATION AREAS, REFUGES

- No adverse effect to activities, features and attributes of the Section 4(f) property
- Inform officials with jurisdiction over property of intent to make *de minimis* finding based on their written concurrence
- Public notice and opportunity for review & comment required prior to officials' concurrence

# *De Minimis* Impacts

- May not be used for constructive use
- May be used for temporary occupancy if exception in 23 CFR 774.13(d) is not met
- Does not affect programmatic evaluations

# Programmatic Section 4(f) Evaluations

23 CFR 774.3(d), 774.5(c),  
774.17; Policy Paper (page 8)



# Programmatic Evaluations

- Time-saving **procedural** alternative to preparing individual Section 4(f) evaluation
- Specific set of conditions including project type, degree of use, & evaluation of avoidance alternatives apply
- **Legal sufficiency review** not required
- Neither a **waiver** from nor a form of automatic compliance with Section 4(f)

# Programmatic Evaluations

- Independent Bikeway or Walkway Construction Projects (5/23/77)
- Use of Historic Bridges (7/5/83)
- Minor Involvement with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges (12/23/86)
- Minor Involvement with Historic Sites (12/23/86)
- Net Benefit to Section 4(f) Property (4/20/05)

# (Individual) Section 4(f) Evaluations

23 CFR 774.3(a), 774.5(a),  
774.7(a) & 774.17; throughout  
Section 4(f) Policy Paper



# Section 4(f) Evaluation

- Incorporated into EIS or EA, or processed as a separate document for CE projects
- Minimum 45-day comment period prior to Section 4(f) approval
- May assume lack of objection if comments not received within 15 days after deadline
- Coordination with officials having jurisdiction and U.S. Dept. of Interior
- Legal sufficiency review by FHWA lawyers

# Section 4(f) Evaluation

- Coordination with officials having jurisdiction and U.S. Dept. of Interior
- Department of Agriculture and Department of Housing & Urban Development, as appropriate
- Legal sufficiency review by FHWA lawyers



# Section 4(f) Evaluation - Contents

- Project purpose and need
- 4(f) resources and properties (applicability)
- Use and impacts
- Alternatives considered, including **avoidance** and **minimization**
- Measures to minimize harm and mitigation
- Coordination - significance, impacts, mitigation, land conversions
- Finding of no feasible and prudent alternative

# Feasible and Prudent

23 CFR 774.3(a) & 17 Section 4(f) Policy Paper (page 5)



# What does “Feasible and Prudent” mean?

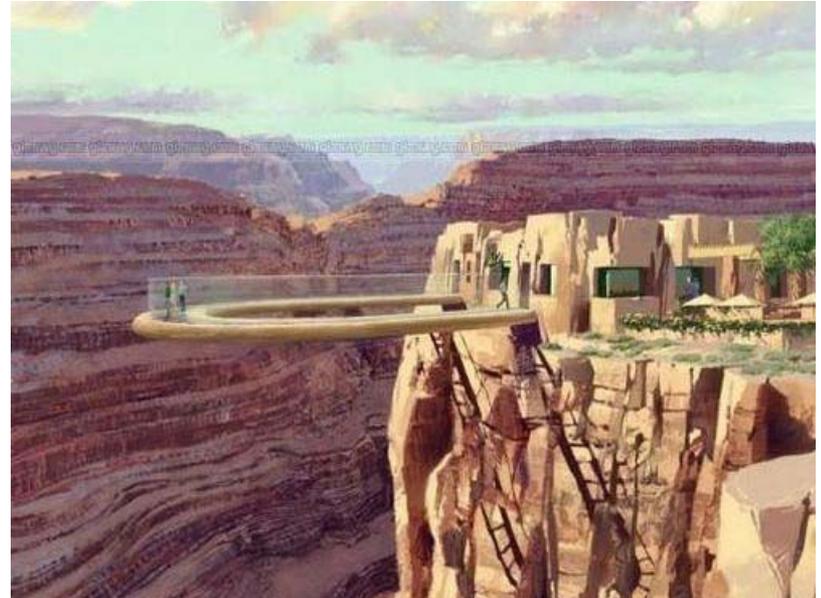
- Federal-aid transportation project may not use land from Section 4(f) properties unless a determination is made that ...
- ... “there is no **feasible and prudent alternative**, as defined in 774.17, to the use of land from the property”
- For the first time ever in regulation form, we clarified the standards to consider in assessing avoidance alternatives (as directed by Congress)

## What does “Feasible and Prudent” mean?

- “A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.”

Alternative is not “feasible” if it ...

- ... it can not be built as a matter of sound engineering judgment



23 CFR 774.17 (Definitions)

# Alternative is not “prudent” if it ...

- Compromises project (unreasonable to proceed in light of **purpose and need**)
- Results in unacceptable safety/operational problems
- After reasonable mitigation, still causes:
  - **Severe** social, economic, or environmental impacts
  - **Severe** community disruption
  - **Severe** disproportionate impacts to minority or low income populations
  - **Severe** impacts to environmental resources **protected by other Federal statutes**

# Alternative is not “prudent” if it ...

- Results in construction, maintenance, or operational costs of extraordinary magnitude
- Causes other unique problems or unusual factors
- Involves multiple factors that cumulatively cause unique problems or impacts of extraordinary magnitude

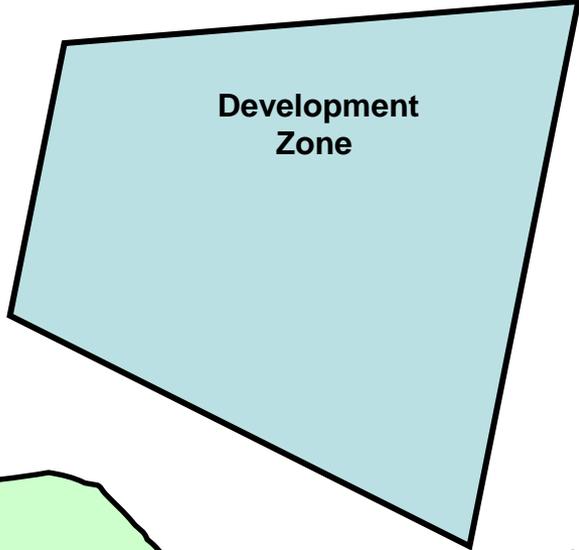
Consideration of avoidance alternatives must begin with a “thumb on the scale” in favor of avoiding the Section 4(f) property

Rte 4 I-95 US 40

No Build Alternative

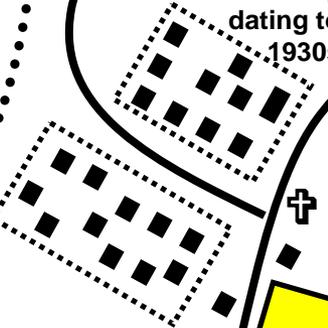
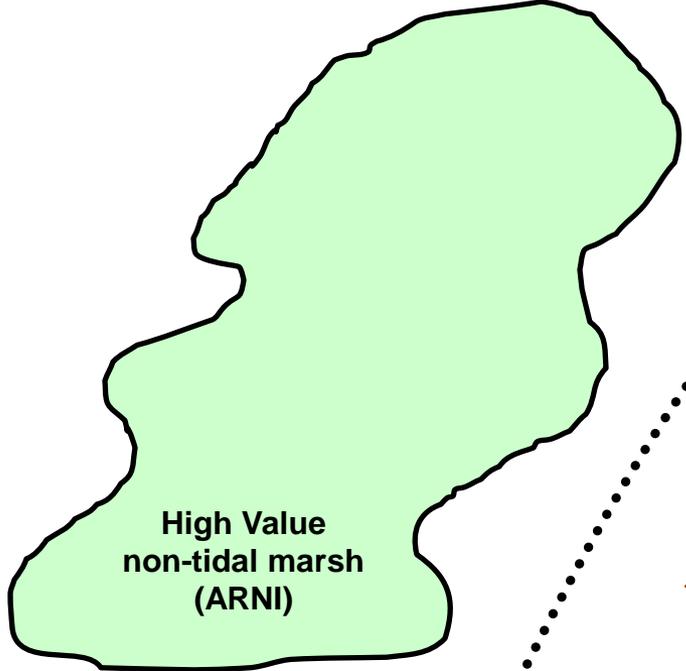
Amtrak

County Rte 55



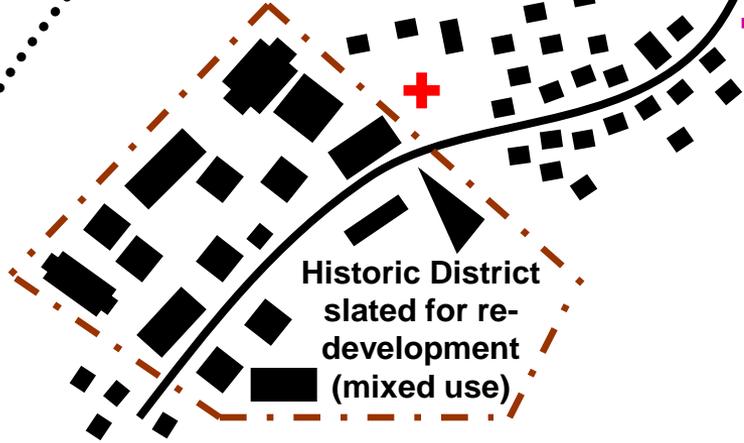
Factory Blvd.

Minority community dating to 1930s



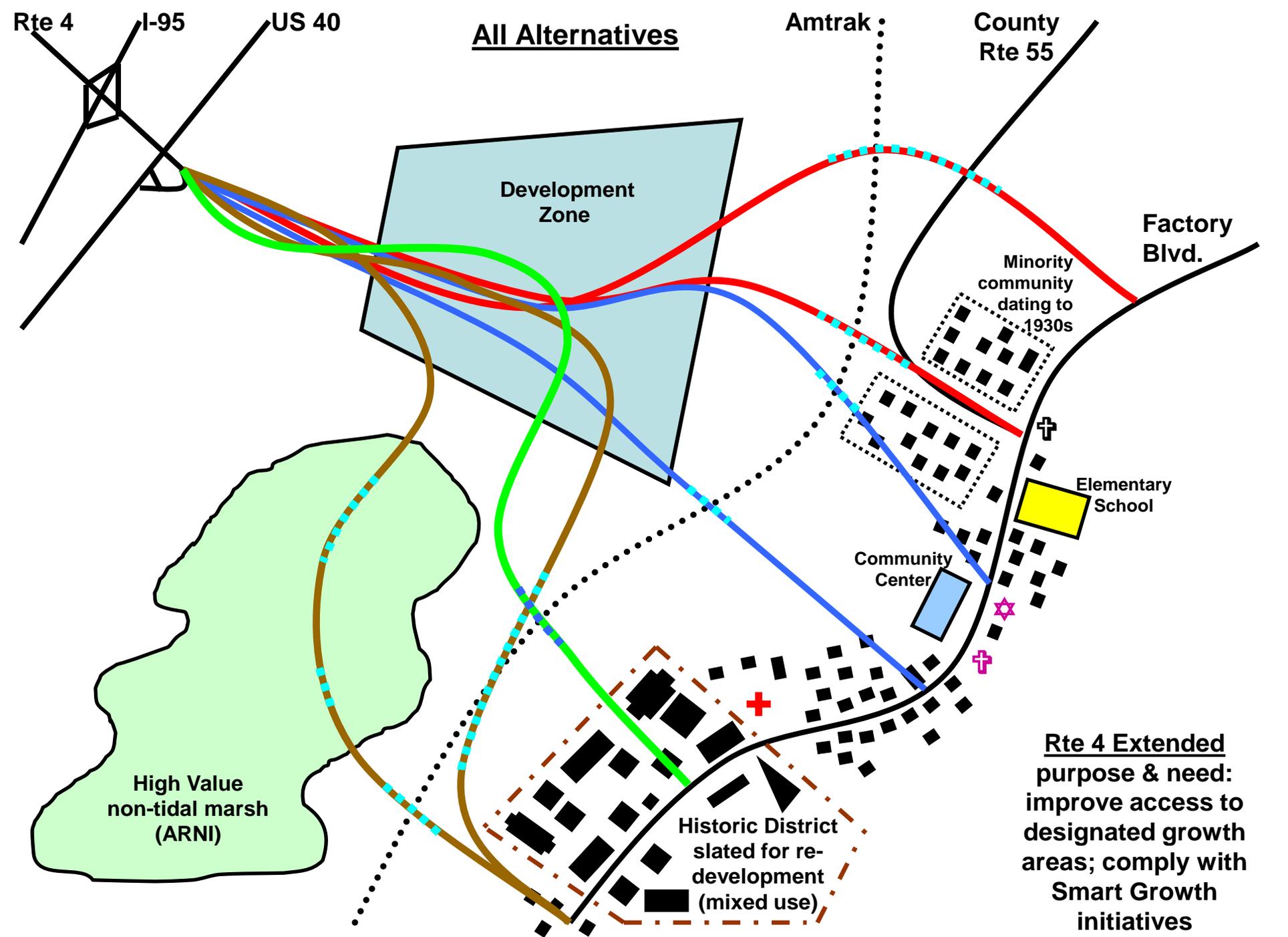
Elementary School

Community Center



Historic District slated for re-development (mixed use)

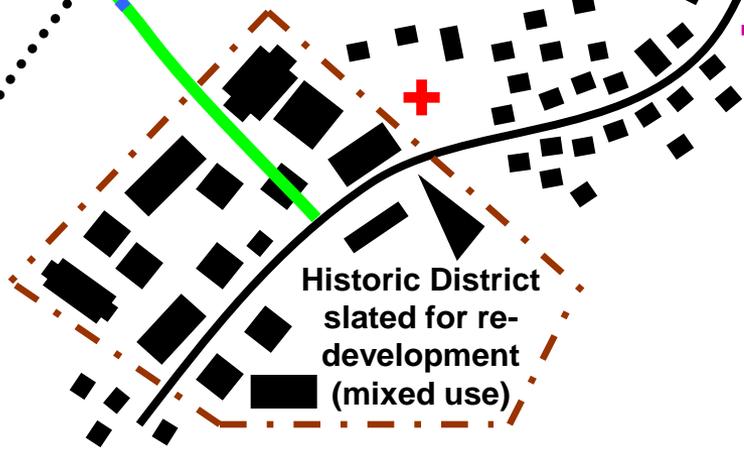
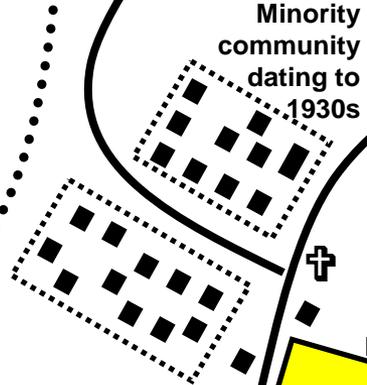
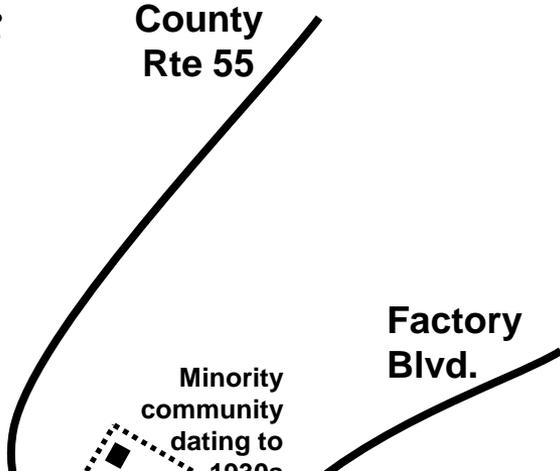
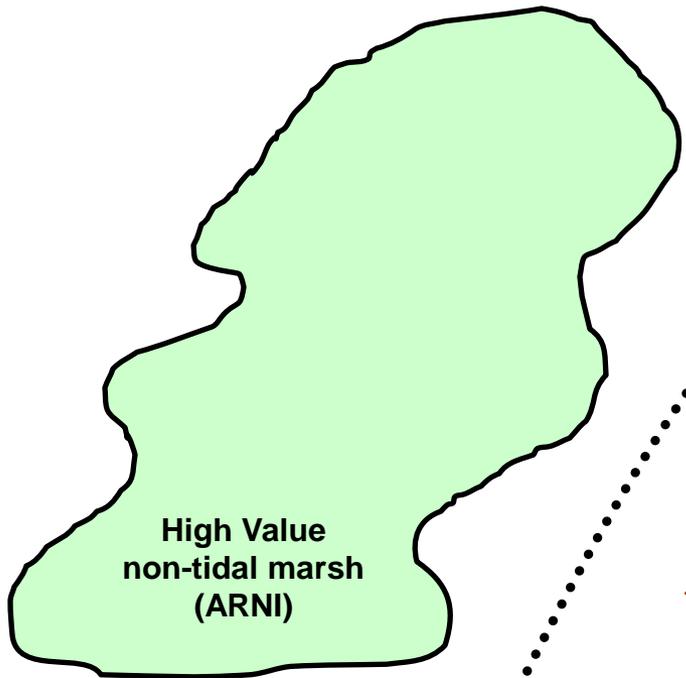
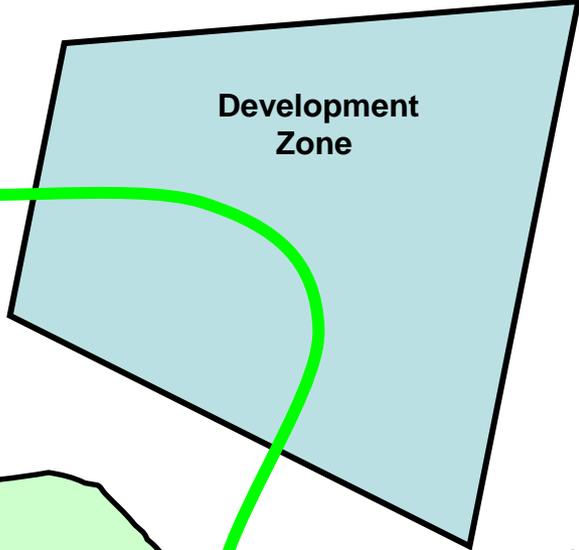
Rte 4 Extended purpose & need: improve access to designated growth areas; comply with Smart Growth initiatives



Rte 4 I-95 US 40

**Alternative A**  
*Preferred Alternative*  
**5-lane X-section**

Amtrak County Rte 55



Overpass

**Rte 4 Extended**  
purpose & need:  
improve access to  
designated growth  
areas; comply with  
Smart Growth  
initiatives

# Least Harm

23 CFR 774.3(c)

Section 4(f) Policy Paper  
(page 6)





# What is Meant by Least Harm?

- If there is no feasible and prudent avoidance alternative, the one having **least overall harm** in light of the statute's **preservation** purpose must be selected
- Determined by balancing various factors with a “thumb on the scale” in favor of protecting Section 4(f) properties



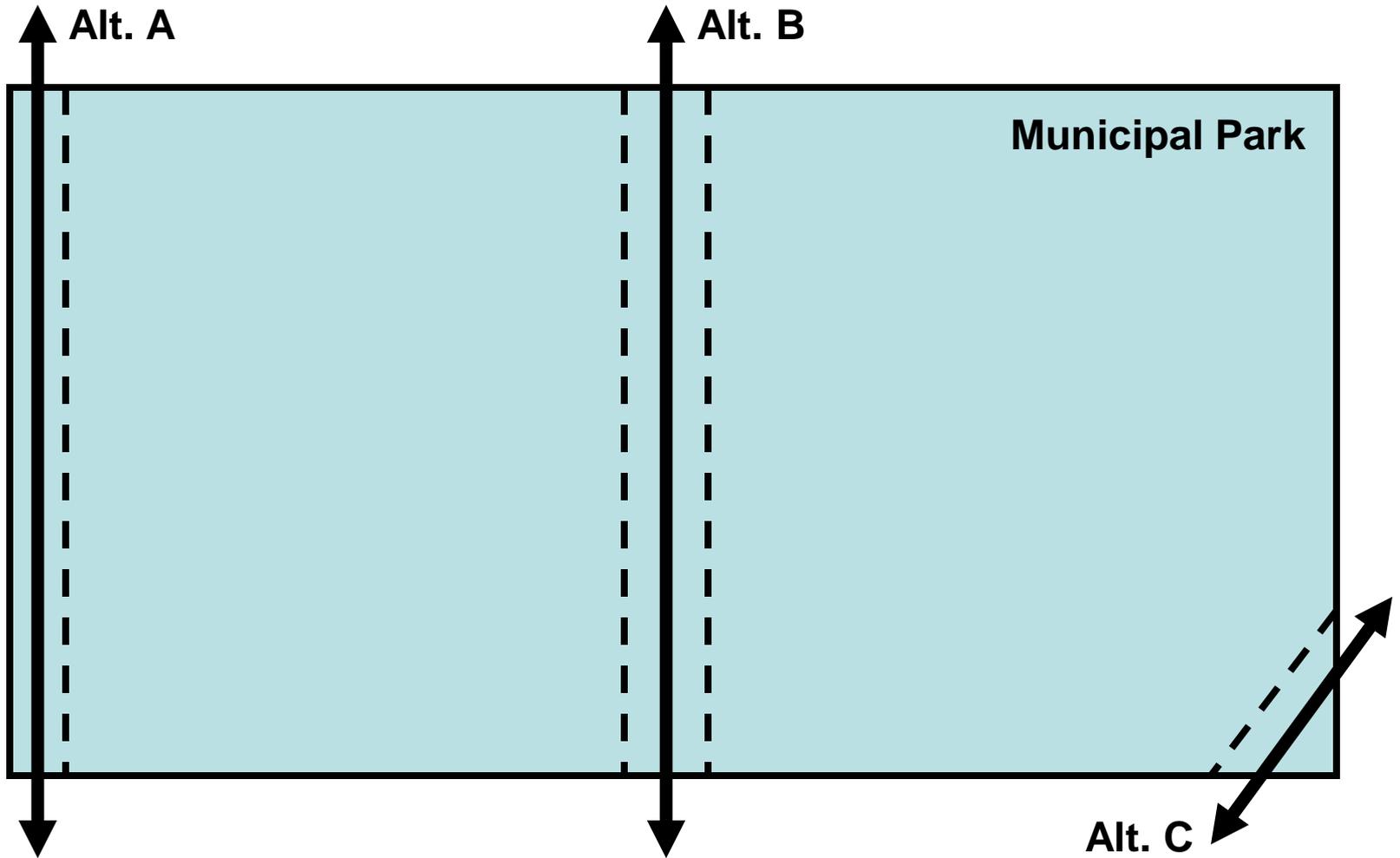
# Least Harm Factors

- Ability to mitigate impacts\*
- Relative **severity** of remaining harm to protected features, activities, or attributes\*
- Relative **significance** of each property\*
- Views of officials with jurisdiction\*
- Degree to which purpose and need is met
- Magnitude of adverse impacts to **non-4(f) properties** (after mitigation)
- Substantial differences in cost

\* = regarding **Section 4(f) properties**

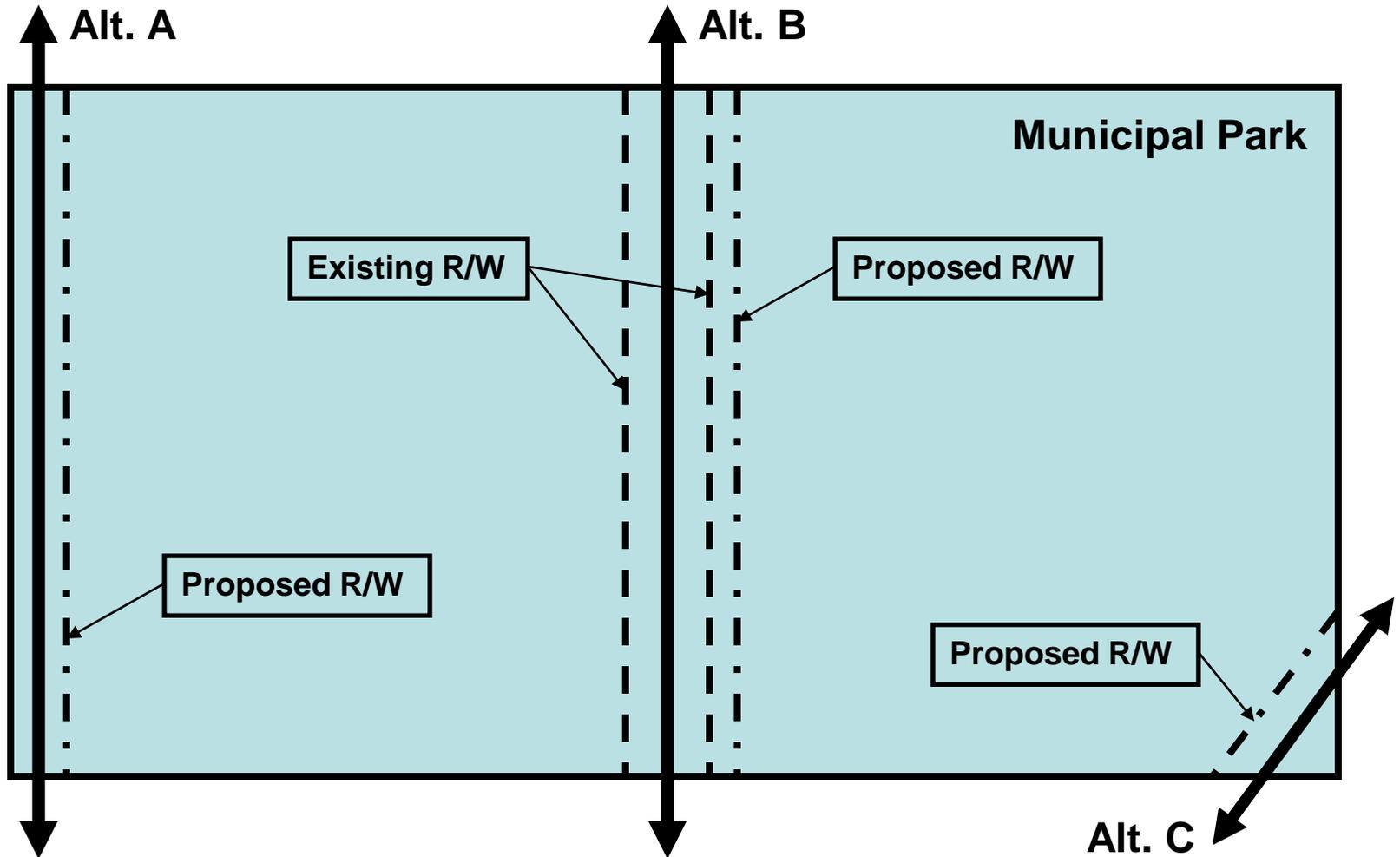


# Least Harm



All other factors being equal, which alternative (all on new location) has least overall harm on this park?

# Least Harm

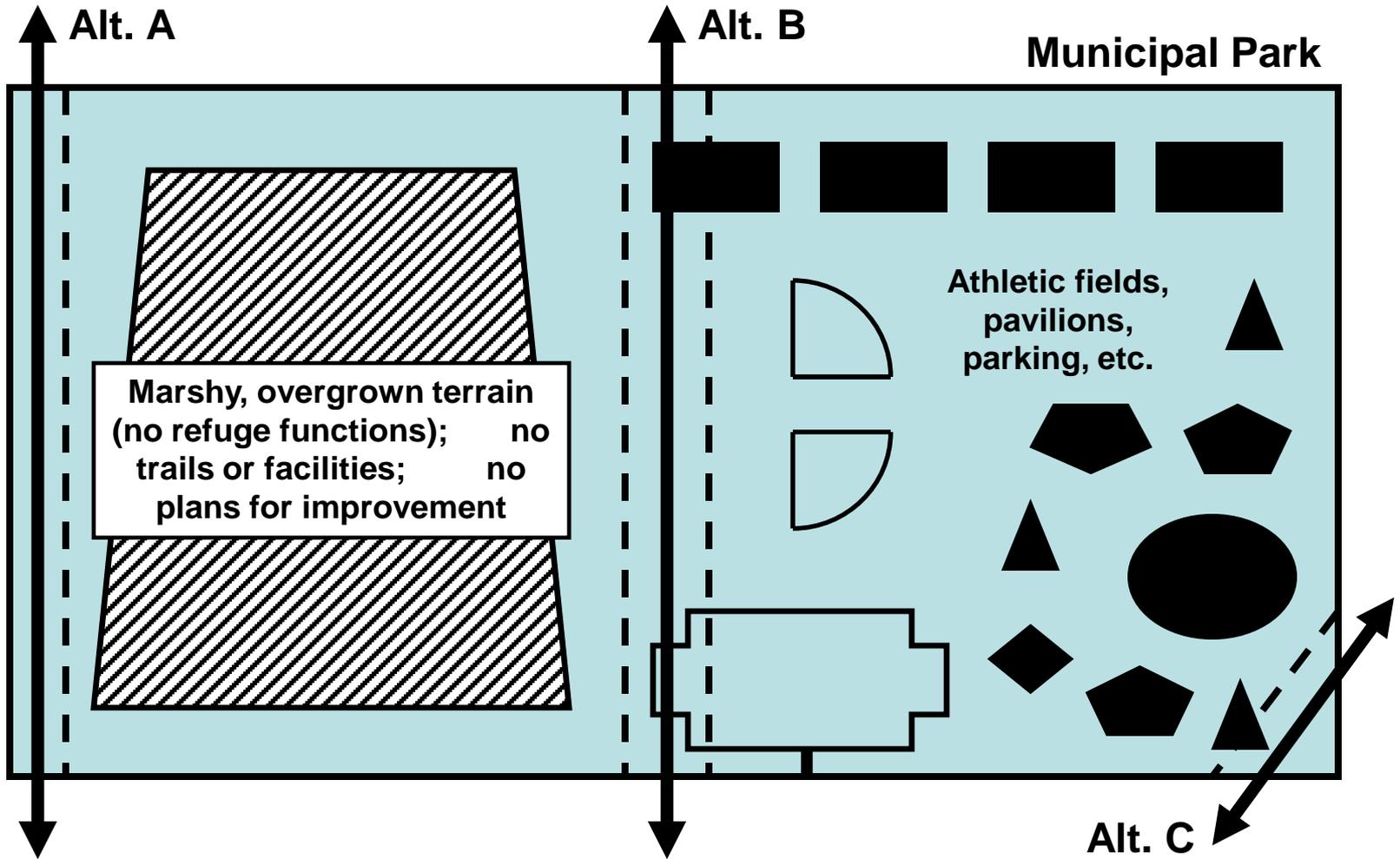


**Alternative B is widening on existing alignment.**

**Alternatives A & C are on new location.**

**All other factors being equal, which alternative has least harm?**

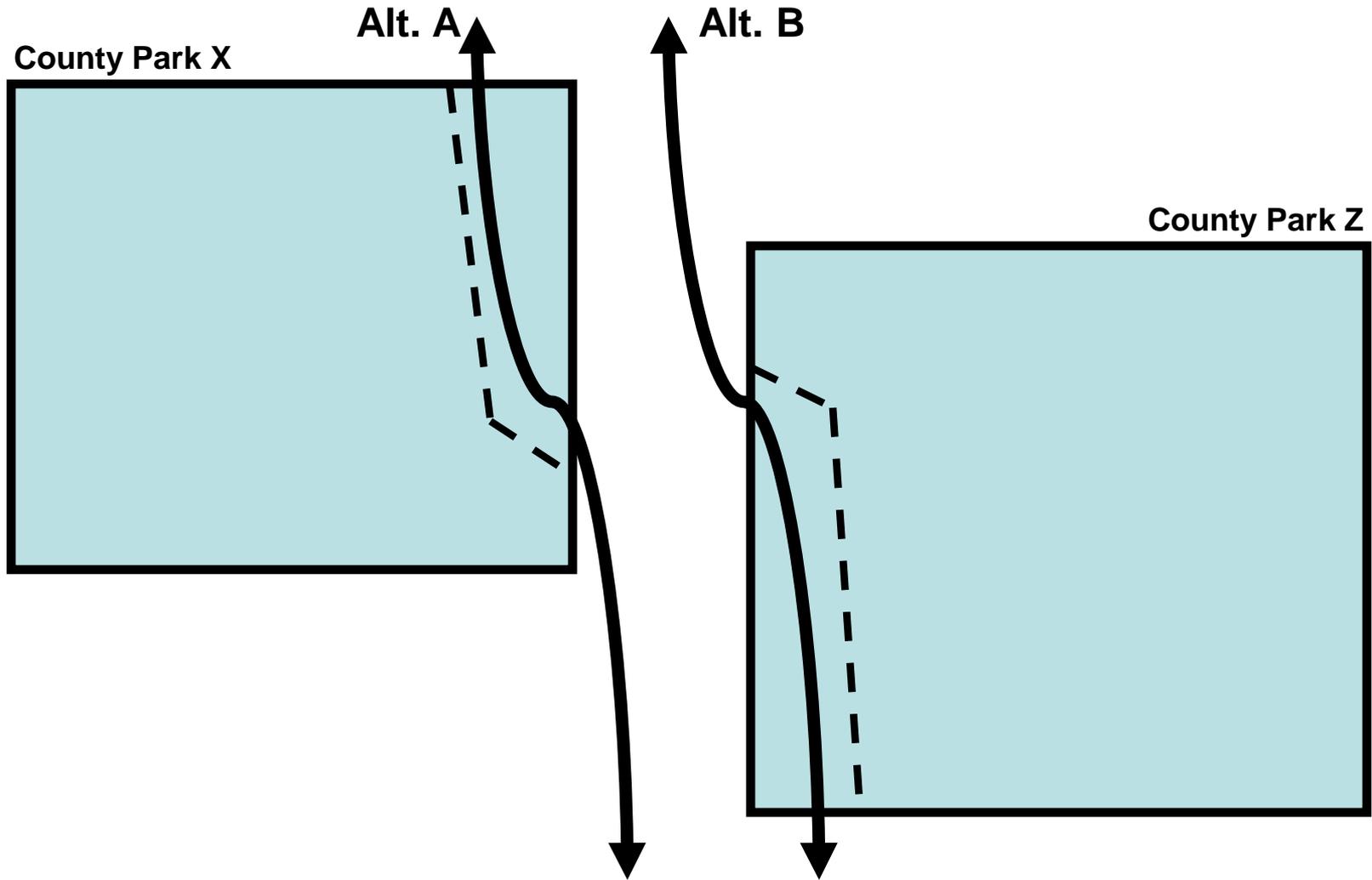
# Least Harm



Now which alternative (all on new location) has least overall harm on this park?

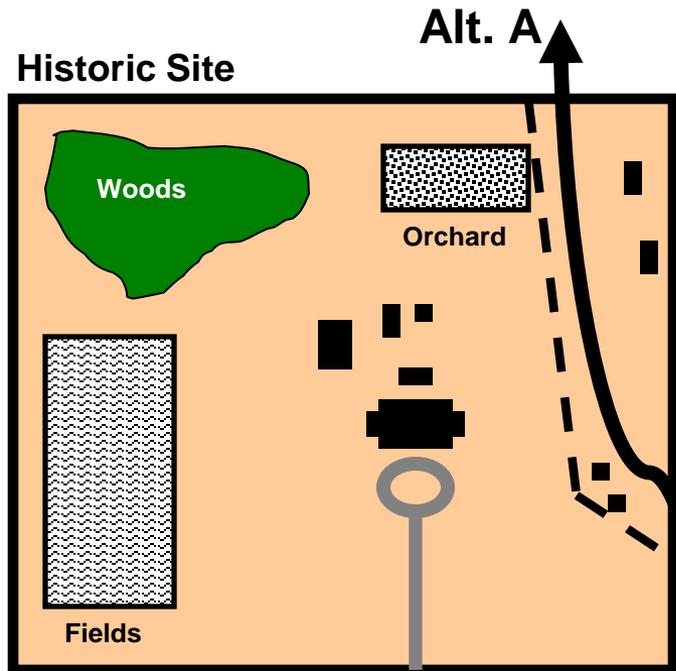


# Least Harm

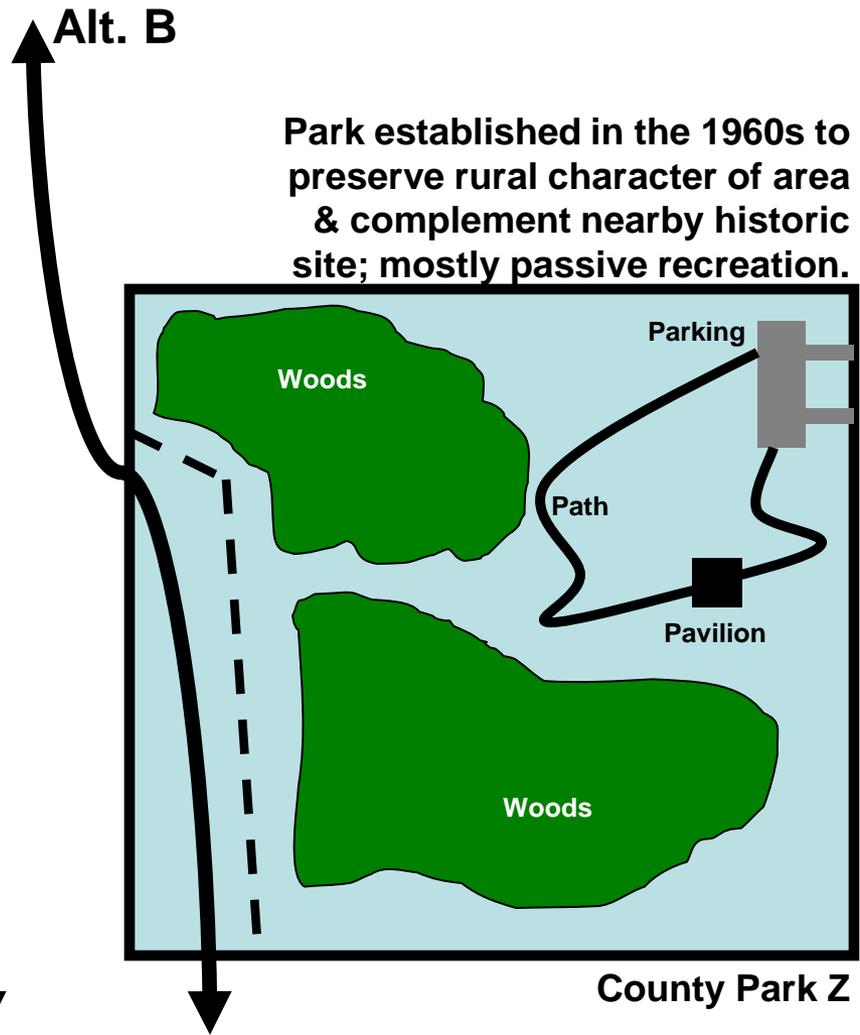


**Both alternatives (on new location) have comparable costs and impacts to these similar parks. Which one may be selected?**

# Least Harm



Estate of notable community founder, politician & Revolutionary War hero; historic integrity largely intact; several historic events occurred onsite; listed on National Register of Historic Places; National & local historic organizations oppose this alternative.



Park established in the 1960s to preserve rural character of area & complement nearby historic site; mostly passive recreation.

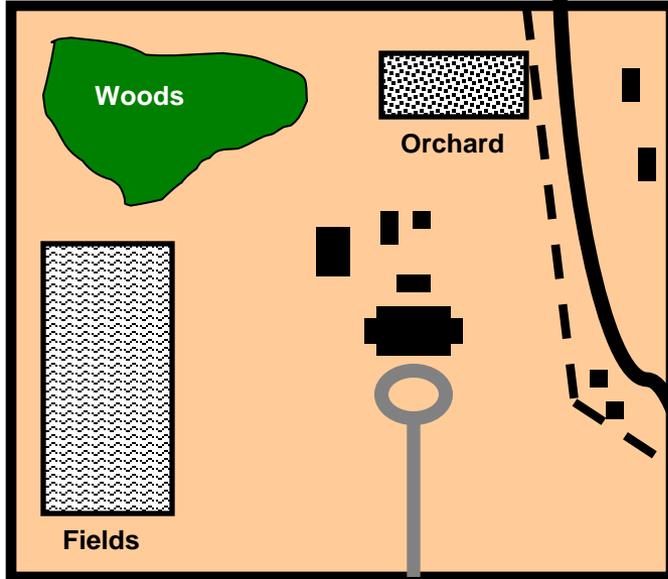
County Park Z

Both alternatives (on new location) have comparable costs but the Section 4(f) properties are very different. Which one may be selected?



# Least Harm

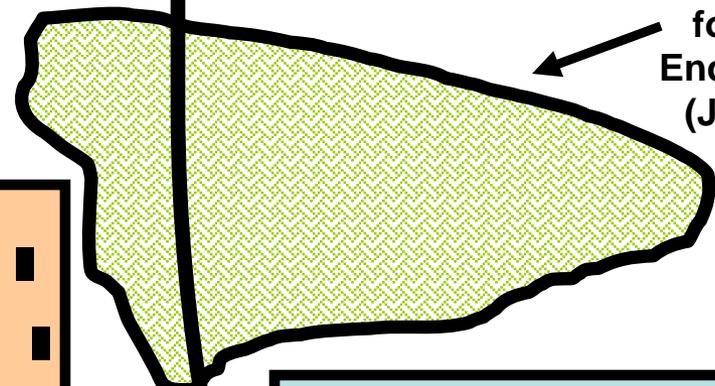
## Historic Site



Estate of notable community founder, politician & Revolutionary War hero; historic integrity largely intact; several historic events occurred onsite; listed on National Register of Historic Places; National & local historic organizations oppose this alternative.

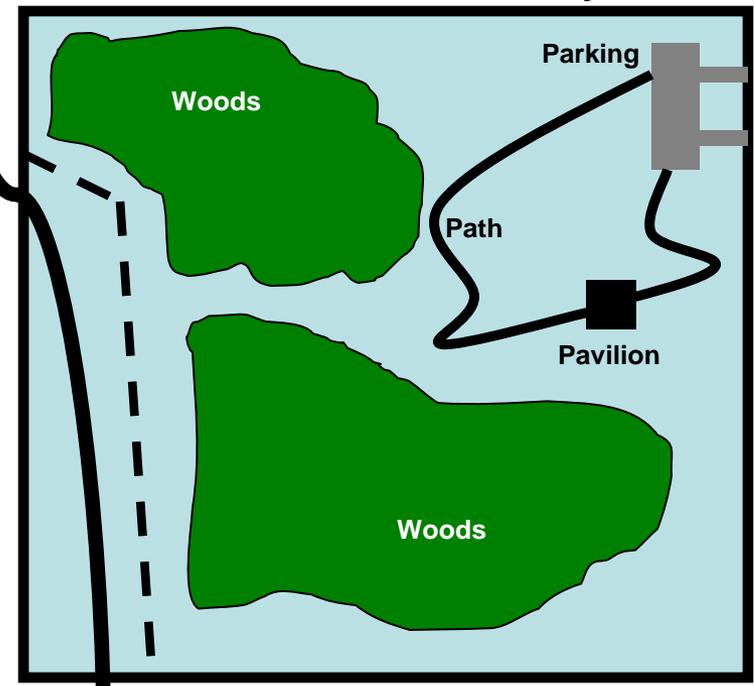


## Alt. B



Critical Habitat for Federally-listed Endangered Species (Jeopardy Opinion)

## County Park Z



Park established in the 1960s to preserve rural character of area & complement nearby historic site; mostly passive recreation.



Now which one may be selected?

# Section 4(f) and Section 106 of the National Historic Preservation Act





# 4(f) and 106 Relationship

- National Register eligibility necessary for 4(f) applicability to historic properties
- Adverse effect does not equal use
- Use is possible without adverse effect determination
- Section 106 MOA provides documentation of minimization of harm and of mitigation
- No adverse effect or No Historic Properties affected = *De Minimis* 4(f) use – must notify SHPO

We're Done!

Questions?

# Contact Info

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