

Town of Chevy Chase
Special Committee on Purple Line Mitigation
Meeting Minutes: Wednesday, August 10, 2016, Lawton Center

The meeting was called to order at approximately 7:00 by Mary Flynn, committee chair.

Members Present: Christine Real de Azua, Donald Farren, Frank Kline, Irving Kaminsky, Jeffrey Berger, John Bickerman (council liaison), John Fitzgerald, Mary Flynn (chair and council liaison), Richard English, Richard Reeves

Members Absent: Andy Hill, Don MacGlashen, Jacob Bardin, Jeff Marqusee, John Beale, Rich Brancato, Stuart Sessions

Agenda: <http://www.townofchevychase.org/AgendaCenter/ViewFile/Agenda/08102016-438>

General Business:

- Approved minutes for prior meetings: June 29, July 11 and July 25
- Distributed folders that include the Guiding Framework document and a list of online resources on the Town website
- No members of the public attended to make comments

Committee Member Reports:

- Mary Flynn: Town officials were invited to a meeting to discuss the Lynn Drive crossing and other design concerns related to the Purple Line. Tentatively scheduled for September 8.
- Jeffrey Berger presented his August 9 memorandum: *A Discussion of TOCC's Rights and Remedies Regarding MTA and FTA Mitigation Measures Effecting the Town's Environment and Resident Safety Prior to the Vacation of the Purple Line Record of Decision (attached)*.
- John Fitzgerald summarized the potential effects of the August 3 ruling by federal court judge Richard Leon that vacated the Record of Decision. Four potential outcomes are: (1) the FTA appeals (2) the FTA submits a draft supplemental environmental impact statement (DSEIS) (3) the FTA appeals and submits a DSEIS and (4) the state of Maryland cancels the project. Other outcomes are possible. Distributed to help facilitate conversation was *Notes on the Opinion Filed August 3, 2016 by Judge Leon in Friends of the Capital Crescent Trail, et al. v. FTA, MTA, et al.*, written by John Bickerman.

Other Discussions:

- Open discussion related to the public notice: "Purple Line Transit Partners (PLTP) is performing a series of preconstruction, subsurface geotechnical borings on behalf of the Maryland Transit Administration (MTA) in preparation for the design and construction of the Purple Line Project. Explanation of Work: PLTP is conducting geological studies,

exploring soil, rock, and groundwater conditions along the proposed corridor. To better understand underground conditions, borings will be drilled. Upon completion, boring locations will be filled and all excess soil will be removed from the site. Pavement or sidewalk borings will be patched with like materials." Town residents have asked the Town to investigate the legality of this work considering that the Record of Decision has been vacated.

Meeting schedule: the next meeting will be Wednesday, August 24 at 7:00 pm.

It is a working document that presents a committee member's analysis and potential action. It is intended to facilitate discussion among members of the Special Committee on Purple Line Mitigation. The committee's authority is restricted to advising the Town Council.

Links to prior committee research and official correspondence related to the Purple Line are at <http://bit.ly/2bZvTXO>.

General Committee Operating Procedures & Outline of Roles and Responsibilities are at <http://bit.ly/2bK8t7o>.

MEMORANDUM

**To: Mary Flynn and Jeff Marqusee, Co-Chairs, TOCC PLM,
PLMC Members
Todd Hoffman**

From: Jeffrey Berger

**Re: A Discussion of TOCC's Rights and Remedies Regarding MTA and
FTA Mitigation Measures Effecting the Town's Environment and
Resident Safety Prior to the Vacation of the Purple Line Record of
Decision**

Date: August 9, 2016

Cc: Scott Fosler

A. **SUMMARY**

This memorandum was initially prepared prior to the judge's order of August 3, 2016 vacating the Purple Line Record of Decision ("ROD") and the Commitments and Mitigation Measures, Attachment A thereto. The initial propose of the memorandum was to, a) compile and analyze commitments and mitigation measures pertaining to the Town's environment, ecology, and resident safety for which the Maryland Transportation Administration ("MTA") and Federal Transportation Administration were responsible, and b) identify the rights and remedies of the Town regarding such commitments and measures. This analysis was prepared in response to issues identified and requests by members of the TOCC Purple Line Mitigation Committee ("PLMC").

The specific terms of individual commitments and mitigation measures in Attachment A appear to be written vaguely and with substantial qualifiers so as to

render them unenforceable. In addition, Attachment A, on its face, provides no enforcement rights or remedies for TOCC or other such non-parties.¹ The ROD's Programmatic Agreement ("PA"), Attachment B thereto, does provide a limited dispute resolution process for a "member of the public"; however, it is drafted such that the MTA holds all the cards.

Prior to the judge's order vacating the ROD, we were suggesting that the PLMC obtain legal advice on what, if any, enforcement right and remedies exist to protect the Town from the adverse effects of the Purple Line, whether such rights are under the ROD, case law, applicable statutes, permitting, or otherwise. We likewise were suggesting that the PLMC base its efforts and activities going forward on such rights and remedies, if any, rather than focusing on first on potential harms, i.e., putting the cart before the horse. While, at this time, it is not necessary for the PLMC to focus on deficiencies in the commitments and mitigation measures, as they are now vacated, it is useful for the PLMC to review and understand them so it may take action to better protect the Town's interest in the event the Purple Line project moves forward.

B. DISCUSSION

1. Objectives of the PLMC

Per the PLMC Guiding Framework (Version 0420160801), there are two objectives:

Objective 1: Mitigate potential negative effects of the Purple Line on the Town's ecology and physical environment, *e.g.*, water quality, storm water flow, noise, parking and

¹ The discussion and analysis herein are based on my experience, prior to retiring from law practice, in regulatory matters, administrative law and litigation, and occupational safety and health and employment regulation and enforcement. I do not have experience or training in environmental law or mass transit matters, nor is anything herein intended as legal advice.

traffic, pedestrian safety, visual mitigation of elevated tracks, nighttime light pollution, tree removal, and property owner rights.

Objective 2: Ensure safe access to and across the Capital Crescent Trail, particularly for the Town's BCC students, and propose funding sources for related expenses if necessary.

Included in PLMC's proposed activities to support these objectives is compiling a list of relevant MTA and FTA mitigation measures as stated in ROD and Attachment A thereto. A corollary to identifying mitigation measures and commitments affecting the Town is the identification of its rights and remedies, if any, in the event of non-compliance, injury, or potential injury to the Town or its residents.

2. Commitments and Mitigation Measures

Attachment A, now vacated, described the commitments and mitigation measures that "will be undertaken" by the MTA and FTA for the Purple Line Project. The general mitigation framework established for the MTA and FTA in the ROD was as follows:

- a. upon FTA's signing of the ROD, FTA will require that MTA establish a mitigation monitoring program to monitor and track the commitments and mitigation measures.
- b. Using its monitoring program, MTA will track the implementation and completion of each commitment and mitigation measure during the appropriate design, construction and/or operational action periods.
- c. FTA and MTA will conduct quarterly reviews of the mitigation monitoring program.

We note that under this framework, MTA was, like a fox guarding the hen house, responsible for monitoring the implementation and completion of its own commitments and mitigation measures. On its face, Attachment A did not provide for or refer to any enforcement mechanism for non-compliance by MTA; however, the Programmatic Agreement, Attachment B to the ROD provided a limited dispute resolution process that arguable may apply. See, Section B.4. below.

3. Commitments and Mitigation Measures Potentially Affecting the Town and its Residents

The following were those MTA/FTA commitments and mitigation measures in Attachment A that were most relevant to the PLMC objectives stated above. We underlined operative language therein that appeared to, a) minimize the possibility of enforcement by the Town or other ROD non-parties, b) render the commitment or mitigation measure so vague as to be unenforceable or without substantive consequence, or c) provide the MTA or FTA discretion to act as it deemed appropriate. Such language, underlined below, included phrases such as MTA will “work”, “coordinate”, or “consult” with an affected party; and MTA will take action “as appropriate”, “to the extent reasonable feasible”, or “as reasonable.” Without an obligation to remedy legitimate concerns of or damage to affected parties, consulting or coordinating with them and taking action deemed appropriate by the MTA is ineffective.

Construction—Detours

MTA will work with Montgomery County to designate, communicate, and sign detour routes for the Interim Capital Crescent Trail throughout project construction. MTA will also minimize the time of trail closure.²

² There are numerous grammatical errors in the commitments and mitigation measures that which were pasted herein directly from Attachment A and which we have not taken the time to designate as errors.

Construction—Schools

During design and construction, MTA will coordinate with the University of Maryland, Rosemary Hills Elementary School, Sligo Creek Elementary School, and Silver Spring International Middle School to minimize disruptions due to project construction during school operations to the extent reasonably feasible.

Construction—Business Impacts

Prior to construction, MTA will work with stakeholders and local businesses affected by the temporary loss of loading zones, or access to loading zones during construction, to identify alternate or temporary loading areas. MTA will implement the alternate or temporary loading areas during construction.

Construction— Construction Areas

MTA will restore properties it temporarily occupies to reasonably similar pre-construction condition at the end of construction activities, in accordance with easement agreements.

Long-term—Permanent Right-of-way

During design, MTA will coordinate with affected property owners and tenants to develop means to reduce the area of permanent right-of-way and displacements for the project.

Long-term—Capital Crescent Trail

During design and using context sensitive design practices, MTA will coordinate and consult with Montgomery County, the Town of Chevy Chase Mitigation Advisory Committee, and affected communities regarding the design of the permanent Capital Crescent Trail, including the finishes of walls and fences, while meeting safety and Americans with Disability Act (ADA) requirements.

Long-term—Connecticut Avenue Bridges

During design, MTA will coordinate and consult with Montgomery County and the surrounding communities, such as Chevy Chase and the neighborhoods along Chevy Chase Lake Drive, regarding the aesthetic treatment of the bridge structures over Connecticut Avenue.

Construction—Noise

As design advances and prior to construction, MTA will develop construction phase noise minimization measures. Typical measures MTA will consider include conducting construction activities during the daytime as reasonably feasible; designating construction vehicle routes to minimize disturbance to residents; locating stationary equipment away from residential areas to the extent reasonably feasible; employing noise control technologies to limit excessive noise when working near residences; and adequately notifying the public of construction operations and schedules.

Long-term—Vibration Prior to construction

MTA will perform a more detailed assessment of the potential for operational vibration impacts in those areas identified in the FEIS as being potentially impacted by project-related vibration. Where this assessment indicates potential for vibration impact, MTA will design minimization measures that are appropriate to the specific condition.

Long-term—Forest Conservation Plan

Prior to construction and in compliance with the MD Forest Conservation Act, MTA will prepare a Forest Conservation Plan to offset project related tree loss along the Georgetown Branch Trail and at other corridor locations. At the end of construction, MTA will implement the plan which will detail specific forest retention, tree-planting and/or forest mitigation banking.

Long-term—Natural Environment

During design, MTA will coordinate with federal and state regulatory agencies to identify measures to avoid or minimize natural environment impacts as part of obtaining applicable permits.

Long-term—Streams

As design advances, MTA will minimize alterations of stream configuration, characteristics, and hydrology.

Construction—Business Impacts

MTA will implement a corridor-wide Business Impact Minimization Plan before construction begins. MTA will develop this plan after evaluating best practices and lessons learned from other light rail construction projects. MTA will adopt this plan prior to initiating construction.

For example, to address access restrictions or detours to businesses, MTA will work with local business liaisons to understand the characteristics of local businesses (customer origins, peak business times, etc.) and to establish construction staging plans to minimize business disruptions.

MTA will continue communication with local businesses during construction to monitor effects and modify construction plans, if possible, to further reduce impacts. [Note - included for comparison purposes].

Construction—Vibration

Prior to construction, MTA will identify measures to minimize the potential for project-related vibration impacts in the corridor during construction. Possible vibration control measures are listed in FEIS Chapter 4.12.3.

Construction—Planning

MTA will develop and implement an Environmental Compliance Plan (ECP) for the project after the project's ROD is issued and prior to the initiation of project construction activities. The purpose of the plan is to identify and employ means and methods during construction to avoid or minimize impact to the environment

and general public in compliance with construction contract documents (for example maintaining secure construction sites, minimizing noise, dust, and vibration, pest control, and meeting applicable ordinances and requirements). *The plan will identify and describe how MTA will implement the environmental commitments and mitigation measures in the FEIS, ROD, Section 4(f) Evaluation and other documents such as environmental permits as the project design advances. MTA will consider suggestions made by the U.S. Environmental Protection agency in its October 29, 2013 letter regarding elements of the ECP and coordinate with them where appropriate.*

Construction—Duration

MTA will work to minimize construction impacts and the amount of time required to build the Purple Line and Capital Crescent Trail.

Construction—Outreach

MTA will work with affected communities, including enhanced outreach to environmental justice communities, during the design and construction phases of the project. The project’s public involvement plan includes community liaisons who will serve as the point of contact for local residents and businesses prior to and during the construction process.

4. Dispute Resolution

The PA in Section XII. B. made available a limited dispute resolution process for a “member of the public” that “raises an objection” pertaining to the PA.

Objections by Consulting Parties and the Public

At any time during the implementation of this PA, should a consulting party or member of the public raise an objection pertaining to this agreement or the effect of the Undertaking on historic properties, MTA shall consult with FTA, the objector, and the signatory parties to this agreement, as needed. After considering these discussions, MTA shall account for and resolve the objection in an appropriate manner.

Assuming the Town or its residents have the right under this process to raise an objection based on the failure of the MTA to meet its commitments or mitigation measures, we are unaware if any agency or court, other than the MTA, had authority to resolve such objection. The so-called “dispute resolution process” set forth above is troubling. On its face, it appears meaningless and cynical, and calls into question

whether, regarding the potential objections of the public, it was proposed and included in good faith.