



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

May 27, 2008

1200 New Jersey Avenue, SE
Washington, DC 20590

The Honorable Paul E. Kanjorski
U.S. House of Representatives
Washington, DC 20515-3811

Dear Representative Kanjorski:

At our meeting with Acting Federal Highway Administration (FHWA) Administrator Jim Ray on May 1st, you requested the Department of Transportation's Office of General Counsel's opinion regarding a provision in section 1702 of the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1256, which lists high priority projects that are authorized to receive Federal-aid highway funding subject to section 117 of title 23, United States Code. At that time, you also requested technical guidance on legislative changes necessary to overcome title 23 restrictions on use of Federal-aid funds for construction of parking facilities. In a more recent conversation, and by letter dated May 20, 2008, you asserted that the parking garage would serve many mass transportation users as well as commuters in carpools traveling on Interstate 81 (I-81) and therefore would qualify as a "fringe and transportation corridor parking facility," as defined in 23 CFR §810.4.

Section 1702, among other things, authorizes \$5.6 million for fiscal years 2005 through 2009 "For the Nanticoke City Redevelopment Authority to design, acquire land, and construct a parking garage, streetscaping enhancements, paving, lighting and safety improvements, and roadway redesign in Nanticoke." See High Priority Project (HPP) No. 2436, 119 Stat. at 1351.

FHWA has determined that the parking garage would be required to be built in accordance with applicable State and Federal law, including other provisions of title 23, United States Code. FHWA has further determined that the proposed Nanticoke parking garage under section 1702 does not meet title 23 requirements for federal-aid funding. My office has reviewed these issues and concurs in these determinations.

I. The Proposed Parking Garage Is Inconsistent with Federal-aid Funding Requirements

Title 23 provides that a parking facility is eligible for Federal-aid funding if it is a facility located in conjunction with a public transportation facility outside the central business district of an urban area of 50,000 or more in population as required by 23 U.S.C. 137(a) or it is a fringe or transportation corridor parking facility that serves high occupancy vehicles (HOVs) and public mass transportation passengers as required by 23 U.S.C. 142(a)(1).

It is our understanding that the proposed Nanticoke parking garage will serve community college students, faculty, and staff that commute to the college. The garage would be located in downtown Nanticoke (population 10,955 in the 2000 Census), and will not function as a fringe or transportation corridor facility serving high occupancy vehicles and public mass transportation passengers. As a facility located in a downtown central business district, “the project must be limited to space reserved exclusively for the parking of high occupancy vehicles used for carpools or van pools.” *See* 23 CFR 810.102(d). The proposed Nanticoke garage does not meet this standard. Because the proposed Nanticoke parking garage does not meet the statutory criteria of 23 U.S.C 137(a) or 23 U.S.C. 142(a)(1), it is not eligible for Federal-aid funding.

A “fringe and transportation corridor parking facility” under 23 CFR §810.4 (cited in your May 20th letter), must be “intended to be used for the temporary storage of vehicles ... located and designed so as to facilitate the safe and convenient transfer of persons traveling in such vehicles to and from high occupancy vehicles and/or public mass transportation systems including rail.” Since the parking facility is located approximately one mile from the nearest bus service and approximately 4.5 to 6 miles from I-81, and there is a free park and ride lot less than one mile from I-81 for use by commuters, the assertion that it would serve many mass transportation users as well as commuters in carpools using I-81 does not address the primary purpose of the facility. As stated earlier, the primary purpose of the parking facility will be for parking by college staff, faculty and students, not commuters, and therefore it does not “facilitate the safe and convenient transfer of persons ... from public mass transportation systems” as contemplated in 23 CFR §810.4.

Moreover, the parking facility is located approximately one mile from the nearest bus service. While FHWA regulations do not define proximity which facilitates the use of public mass transportation facilities, under FTA guidance on Eligibility of Joint Development Improvements Under Federal Transit Law, “the use of FTA funds for joint development improvements located outside the structural envelope of a public transportation project... may extend across an intervening street, major thoroughfare or unrelated property, (however) functional relationships should not extend beyond the distance most people can be expected to safely and conveniently walk to use the transit service... (generally) within a radius of 1,500 feet... (from) the public transportation project.” 72 Fed. Reg . 5788-01 (Feb. 7, 2007). Thus, if FTA guidance were employed as an analogical means to measure whether the parking garage “serves” public mass transportation users, it would fail the test under FTA’s final agency guidance, since the parking facility is located approximately one mile from the nearest bus service.

II. A Subsequent Authorization Does Not Override Title 23 Statutory Requirements

The argument has also been raised that the latest act of Congress including the statutory earmark was a subsequent authorization for a parking garage to be constructed, effectively overriding other title 23 provisions. However, the Government Accountability Office (GAO) has indicated in its Principles of Appropriations Law (“GAO Redbook”) that “[w]hile it is true that one Congress cannot bind a future Congress. . . an authorization act is more than an academic exercise and its requirements **must be followed** unless changed by subsequent legislation” (*emphasis added*). *See* GAO Redbook, Vol. I at 2-43.

Absent an unambiguous expression in the law to the contrary, the enactment of statutory language describing a project in general terms does not enable a State to construct a project or

activity contrary to Federal highway law or regulations. This determination is grounded in principles of statutory construction, appropriations law, and FHWA regulations that have the force and effect of law under the Administrative Procedure Act.

According to principles of statutory construction, the enactment of the legislative language for HPP No. 2436 cannot repeal §137(a) or §142(a)(1) by implication. While “Congress is free to amend or repeal the requirements of prior legislation as long as it does so directly and explicitly. . . it is firmly established that ‘repeal by implication’ is disfavored, and statutes will be construed to avoid this result whenever reasonably possible.” *E.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189–90 (1978); *Morton v. Mancari*, 417 U.S. 535, 549 (1974); *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936); 72 Comp. Gen. 295, 297 (1993); 68 Comp. Gen. 19, 22–23 (1988); 64 Comp. Gen. 143, 145 (1984); 58 Comp. Gen. 687, 691–92 (1979); B-290011, Mar. 25, 2002; B-261589, Mar. 6, 1996; B-258163, Sept. 29, 1994; B-236057, May 9, 1990. Repeals by implication are particularly disfavored in the appropriations context. *See, e.g., Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). A repeal by implication will be found only where “the intention of the legislature to repeal [is] clear and manifest.” *Posadas*, 296 U.S. at 503; B-290011, *supra*; B-236057, *supra*. GAO Redbook, Vol. I at Page 2-43.

The applicable case law is unambiguous in providing that an authorizing statute would be subject to all generally applicable Federal laws, including title 23, unless such laws were explicitly excluded from application to the statute. The U.S. Court of Appeals for the District of Columbia Circuit has specifically found that Federal laws of general applicability remain applicable in the context of the Federal-aid highway program absent specific provisions to the contrary. *See District of Columbia Federation of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1265 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (provision of Federal-Aid Highway Act directing construction of a bridge notwithstanding any law to the contrary did not render inapplicable certain federal statutes regarding protection of historic sites). *See also* GAO decisions: B-290125.2, B-290125.3, Dec. 18, 2002 (finding that statutory directions governing certain aspects of an agency procurement “notwithstanding any other provision of law” do not override GAO’s bid protest jurisdiction under the Competition in Contracting Act).

HPP No. 2436 in our view did not explicitly or implicitly repeal other applicable title 23 requirements for construction of parking garages with Federal-aid funds, codified under §137(a) or §142(a)(1). The authorization for HPP No. 2436 must be read together with the plain language of such provisions and each statutory provision must be given effect where possible. Moreover, the statutes may be easily reconciled by the State DOT employing the contract authority funds authorized by HPP No. 2436 on other activities authorized in HPP No. 2436 that are eligible under title 23. The determination that a parking garage to be constructed in Nanticoke is not eligible for Federal-aid funds is no different than if the legislative description described general roadway construction in a particular county as the object of the authorized funding; such authorized title 23 funds would not be applied to local roads based upon title 23 limitations on uses of Federal-aid for local roads.

Likewise, principles of appropriation law make clear that Congress can decree, either in the appropriation itself or by separate statutory provisions, what will be required to make the appropriation “legally available” for any expenditure. As summarized by the GAO Redbook, “[i]t is . . . established that Congress can, within constitutional limits, determine the terms and conditions under which an appropriation may be used,” citing to *New York v. United States*, 505

U.S. 144, 167 (1992); *Cincinnati Soap Co.*, 301 U.S. at 321; *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981) (citing numerous cases); *Spaulding v. Douglas Aircraft Co.*, 60 F.

Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946). “It can, for example, describe the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may, and often does, use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.” GAO Redbook, Vol. I at 1-5.

The HPP Program is part of the Federal-aid highway program and is incorporated into highway law in chapter 1 of title 23 as section 117. Chapter 1 also contains provisions relating to the use of Federal-aid highway funds for fringe and corridor parking garages and parking facilities that encourage use of public transportation. The contract authority authorized by Congress in SAFETEA-LU for Federal-aid highways, including the HPP Program, permits FHWA to obligate funds in advance of an appropriation to liquidate expenses associated with an obligation. See 2 U.S.C. § 622(2)(A)(iii). Thus, the authorization of HPP contract authority for the parking garage functions as the “equivalent of an appropriation.” As GAO has indicated: “except as specified otherwise in the appropriation act, appropriations to carry out enabling or authorizing laws must be expended in strict accord with the original authorization both as to the amount of funds to be expended **and the nature of the work authorized**” (*emphasis added*). See 36 Comp. Gen. 240, 242 (1956); *see generally* B-258000, Aug. 31, 1994; B-220682, Feb. 21, 1986; B-204874, July 28, 1982; B-151157, *supra*; B-125404, Aug. 31, 1956.

23 CFR §1.9(a) provides that “Federal-aid funds **shall not** participate in **any cost** which is not incurred in conformity with Federal and state law, the regulations in this title or the policies and procedures prescribed by the Administrator” (*emphasis added*). FHWA therefore administers earmarked highway projects in accordance with all applicable Federal law, including title 23 requirements. Federal case law has affirmed this practice. See *Volpe, supra*.

Further, according to well-accepted canons of statutory construction, title 23 cannot be “cast aside” when determining whether one activity within a project description that contains multiple elements is eligible for funding under the Federal-aid highway HPP program, especially when other elements may be segregated and legally carried out in accordance with title 23 and the “purpose statute” (31 U.S.C. §1301(a)). “It is an elemental rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.” See *Sutherland*, §46:06, at 181 (6th ed. Rev’d 2000).

Under the plain language of current law, the parking garage proposed to be constructed in Nanticoke must comply with all applicable title 23 requirements since the statute does not explicitly override these requirements. The proposed parking garage, according to the facts as we understand them, does not satisfy such requirements.

The Department has assisted and will continue to assist you and your staff with the development of technical corrections legislation to achieve your intended result. In the meantime, please do not hesitate to call me at 202-366-4702 should you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "D.J. Gribbin". The signature is stylized with a large, sweeping initial "D" and a long, horizontal stroke extending to the right.

D.J. Gribbin
General Counsel