

**MIDTOWN AND THE CLEVELAND CLINIC'S
PUBLIC COMMENT IN OPPOSITION TO DEIS AND THE
REMOVAL OF INNERBELT INTERCHANGES AT
CARNEGIE AND PROSPECT AVENUES**

I. Introduction

This public comment is being filed on behalf of MidTown Cleveland, Inc. and the Cleveland Clinic in opposition to the removal of the Innerbelt Trench interchanges at Carnegie and Prospect Avenues as suggested in the Draft Environmental Impact Statement (hereinafter "DEIS"). MidTown Cleveland, Inc. (hereinafter "MidTown") is a community development corporation representing over 650 businesses with over 18,000 total employees that rely on direct interstate access from Carnegie and Prospect for their livelihood. The Cleveland Clinic is the largest employer in northeastern Ohio with over 39,000 employees, whose viability is dependant upon millions of patients and those employees being able to easily access the hospital campus from the Innerbelt via Carnegie and Prospect.¹

Discussions regarding the Innerbelt Project between ODOT and both the public and private sector can be characterized by one consistent theme: an impasse between (a) ODOT's predetermined decision, based on a one-track concern for formulaic highway standards, to remove a total of four highway access points from a two-mile stretch of the Innerbelt Trench and (b) the efforts of MidTown, the Cleveland Clinic, and dozens of other MidTown businesses who have testified on the record to prevent the destruction of their

¹ Indeed, with the completion of the Euclid Corridor Project, Euclid has become only a one-lane street each way for access to the Cleveland Clinic's northern entrances. Carnegie is the only four-lane street which intersects its large and growing hospital campus. This document and the attached appendices are being provided for the public record in opposition to the DEIS, and its preferred alternative in the Trench area, which recommends the removal of the Carnegie and Prospect interchanges.

businesses and the loss of jobs that would follow, as well as the degradation to the social and economic vitality of Cleveland's urban core. Instead of engaging the public in an honest and objective search of the most beneficial alternative, ODOT has advanced its own predetermined agenda, which is based solely on freeway operational success, without regard to the business and local community the Innerbelt serves. As a result, ODOT's approach to the Innerbelt Trench section revisits social policies reminiscent of Urban Renewal discarded as destructive so long ago and violates a maxim posited by a Federal District Court:

"A transportation system, in other words, should be planned to serve the goals of the community; the goals of the community should not be restructured to serve a transportation system."
Movement Against Destruction v. Volpe, 361 F.Supp. 1360 (D. Md. 1973).

As a result of ODOT's planning and study goal, in direct violation of binding federal case law, the public process and involvement phase of the Innerbelt Project planning has been devoid of objective assessment of alternatives and in violation of the National Environmental Policy Act (hereinafter "NEPA"). See *Burkholder v. Wykle*, 268 F.Supp.2d 835 (N.D. Ohio 2002) (comprehensive "hard look" assessment "mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made"). In fact, ODOT's failure to consider factors other than operational highway standards has caused it to bypass assessment measures required by its own Project Development Process and required under NEPA. As a result of ODOT's procedural failures, ODOT's decisions reflected in the DEIS lack input from an ODOT-

informed and properly engaged public, lack objective assessment of alternatives, and have resulted in flawed decision making.

Given this, the DEIS, unless rejected or modified as suggested herein, will not withstand judicial scrutiny. See *O'Reilly v. U.S. Army Corps. Eng.*, 477 F.3d 225 (5th Cir. 2007). MidTown and the Cleveland Clinic therefore request that the DEIS be disapproved or segmented so as to reconcile ODOT's decisions with the overwhelming objection, voiced through MidTown, the Cleveland Clinic, and hundreds of other businesses and non-profit entities, to the removal of freeway access at Prospect and Carnegie Avenues.

II. Background

MidTown, the Cleveland Clinic, and other stakeholders have opposed the removal of the Carnegie Avenue and Prospect Avenue Innerbelt interchanges throughout the Planning Phase of the Innerbelt Project. Despite substantial public opposition, ODOT filed the DEIS in August of 2007 and selected Preferred Alternative A, a plan that involves the removal of a total of four highway interchanges in a two-mile span of the Innerbelt Trench. Removal of these access points, particularly at Carnegie and Prospect, stands to significantly reduce business vitality and land value of firms in Cleveland's urban core serviced by in the Innerbelt Trench.

The value of highway interchanges and direct highway accessibility is well-known and documented. Results of corporate executive surveys reviewed in *Area Development* demonstrate that highway accessibility "undeniably forms the essential nexus between workers, suppliers, producers, distributors, and markets." Brandon, D.V. Highway Accessibility Underpins Location Decisions. *Area Development*, Aug./Sept. 2008 (online

edition available at <http://www.areadevelopment.com/corpSurveyResults/aug08/highway-accessibility-location-decision.shtml?Page=1> (accessed May 17, 2009)). In fact, "[a]t the site level, redundant ingress/egress points" are important "not only to minimize potential barriers to access, but also to ensure access for fire-fighting, emergency medical, police, and other essential services" needed by businesses and also to facilitate commercial traffic. *Id.* As a result, Brandon writes that highway accessibility consistently ranks among the top five in priorities among all site-related factors considered by businesses when choosing a site location. Brandon concludes that "one fact is inescapable: highway accessibility exerts a preponderant influence on the distribution of economic activity throughout the United States." *Id.*

Because highway access is a priority among locational factors, real property near highway interchanges is in high demand, is very valuable, and commands rent premiums. Bollinger, C., Ihlanfeldt, K., Bowes, D. Spatial Variation in Office Rents Within the Atlanta Region. *Urban Studies*, Vol. 35, No. 7, 1097-1118, at 1112 (1998). Indeed highway accessibility was one of the primary reasons Applied Industrial Technologies decided to locate its headquarters in Cleveland near the Innerbelt Trench as opposed to the suburbs. See testimony of Michael Coticchia, Chief Administrative Officer and Vice President of Government Business of Applied Industrial Technologies, at the public hearing on November 17, 2005.

ODOT itself acknowledges in the DEIS that economic development concerns are created and left unresolved by its Preferred Alternative A. In fact, ODOT stated that "key issues" of concern regarding the removal of the Carnegie exit ramp alone included:

"loss of companies in the MidTown corridor area; a negative impact on the economic development efforts of the neighborhoods; reduced access to the Cleveland Clinic and University Circle; shifting traffic to Chester Avenue from Carnegie Avenue; the negative impact of a traffic incident at the Chester Avenue interchange; and increased congestion on local streets." DEIS at 5.10.

In accordance with these site selection and land valuation realities, hundreds of MidTown businesses and the Cleveland Clinic rely on direct access to the Innerbelt at Carnegie and Prospect Avenues. Furthermore, the success of Cleveland's urban core at the MidTown District, as well as the Cleveland Clinic-University Circle area, relies on the Carnegie and Prospect interchanges. Conceding both of these points, the record states

"[t]he University Circle area, second only to the [Central Business District] of Cleveland as a regional employment center with over [40,000] jobs, is located 4 miles east of the central business district.... Access between the Innerbelt freeway and the University Circle area is provided at I-90 and Carnegie Avenue/Prospect Avenue interchanges and at I-90 and Chester Avenue interchange on the south end of the Innerbelt Trench."

Conceptual Alternatives Study (the "CAS") at 2.1.4.

Despite Cleveland's otherwise general economic malaise, MidTown, the Cleveland Clinic, and University Circle continue to commit assets to the City and represent unique and significant growth areas that provide jobs, opportunity, and economic benefit to the County and City in taxes and other revenues.

Despite the adverse economic and social consequences that will be thrust upon these areas and institutions by ODOT's pending decision, ODOT has failed to deliver economic impact studies promised to stakeholders or adequately assess the economic impact of the removal of the Carnegie and Prospect Avenue interchanges. ODOT

promised stakeholders that an economic impact study would be performed for the MidTown corridor before preferred alternatives were selected in the planning process. Craig Hebebrand also promised stakeholders at the public hearing held on November 17, 2005, that ODOT would revisit and modify alternatives if the economic impact study demonstrated that further study of the MidTown corridor was warranted because of likely adverse economic impacts in the Trench. Transcript of Public Hearing on November 17, 2005, pages 115-121; see also Letter from Stephen O'Bryan to Craig Hebebrand dated February 15, 2006, attached as Exhibit A.

On behalf of ODOT, Economic Development Research Group ("EDR") and URS released a "draft" economic impact study entitled Economic Effects of the Cleveland Innerbelt Plan Access Changes (see ODOT summary at Exhibit B, hereinafter "Draft Economic Effects Study"). However, an economic impact study performed by MidTown's own expert, George Vredevelde, Ph.D., University of Cincinnati, challenged the methodology and many of the findings of the Draft Economic Effects Study. See Vredevelde Study attached as Exhibit C.

At the public hearing held on February 21, 2006, Gordon Proctor, the then Director of ODOT, admitted that (a) ODOT has been historically unsuccessful with economic analyses, (b) the methodology of the Draft Economic Effects Study needed to be revisited, (c) a finalized economic impact study would be performed, and (d) the public would have an opportunity to give input thereafter. ODOT never produced the promised final economic impact study. As a result, the public had no opportunity to comment on findings of an ODOT-approved economic impact study prior to the selection of Preferred Alternative A. The DEIS states at 4-38 that instead of carrying out its promise, ODOT and FHWA

"decided to use a different approach to resolve the issues." The approach became a nontransparent "negotiation" over traffic models with an undefined "community". DEIS 4-38.

Even if ODOT considered the Draft Economic Effects Study, the study clearly states that, within the area relevant to the Trench, at least two thirds of the projected job losses will be concentrated on Carnegie, Prospect, Superior, and Lakeside Avenues. Draft Economic Effects Study.

In addition, job losses on these same four avenues will be accompanied by a loss of between \$5.0 and \$5.8 Million in sales by MidTown firms. Draft Economic Effects Study. Thus, even ODOT's consultant agrees that the businesses represented by MidTown and the Cleveland Clinic will experience a loss of jobs and a significant loss in sales. In sum, the Draft Economic Effects Study is wholly inadequate even according to ODOT. By failing to procure an accepted and finalized economic impact study, ODOT failed to adequately assess the economic effect of the Innerbelt Project in the Trench, failed to provide such assessment to the public to allow for feedback, and failed to fulfill its promise to the Cleveland business community generally and MidTown specifically.

ODOT's recognition of the value of highway accessibility to MidTown, the Cleveland Clinic, University Hospitals, and other similarly situated firms is implicit in the DEIS. In the Purpose and Needs statement in the DEIS, ODOT cites that "there is a need to maintain and improve access to and from the University Circle area to address current and future access demand." DEIS 2.1.4. In addition, the Purpose and Needs section cited the need for discussion of issues related to access because of "the critical role of the freeway-to-

local street connections." DEIS ES-2. Moreover, the DEIS admits that because 85% of the traffic on the Innerbelt has a destination or origin in the studied area during peak hours, the "interrelationship and connection between the city street grid and the Innerbelt Freeway becomes even more crucial." DEIS ES-2. Ultimately, the DEIS designates as a Project Need "preserv[ing] of the local roadway connectivity function of the Innerbelt Freeway and provid[ing] continued access and mobility to the CBD, adjacent neighborhoods, and commercial/industrial areas...." DEIS ES-2.

Despite ODOT's acknowledgment that such issues must be addressed by the Innerbelt Project and recognition of the need to maintain access to MidTown, the Cleveland Clinic, and University Circle, ODOT selected Preferred Alternative A, which removes the access points at both Carnegie and Prospect Avenues that the DEIS cites as crucial to business growth. ODOT's selection of Preferred Alternative A is thus wholly inconsistent with the stated Project Need to "maintain and improve access to and from University Circle" and to "preserve the local roadway connectivity function of the Innerbelt...." The suggested removal of Carnegie and Prospect interchanges certainly does not meet this "Need." CAS 2.4.1.

Furthermore, and again despite ODOT's recognition of the importance of access to MidTown, the Cleveland Clinic, and University Circle, ODOT's traffic studies failed to account for roughly 4 million cars per year representing traffic of certain business patrons and patients visiting the Cleveland Clinic and University Hospitals. Exhibit D. A study performed by Dr. Mark Rosentraub, Ph.D., Levin College of Urban Affairs, Cleveland State University, on behalf of MidTown and other stakeholders (hereinafter "Rosentraub Study") demonstrated that ODOT's traffic models included only traffic due to inpatient visits and not

also outpatient visits or visits by families of patients. As a result, ODOT failed to consider enormous numbers of vehicles when it represented that all of the traffic currently flowing through exits at Carnegie, Prospect, and Chester Avenues into MidTown could be adequately serviced by a single highway interchange at Chester Avenue.

In addition, ODOT's models were created before significant growth in the operations of the Cleveland Clinic, University Hospitals, and the Stokes VA Hospital were known. Since ODOT performed its traffic studies, the Cleveland Clinic constructed over 3.3 million square feet of new space, including the Miller Pavilion, an enormous complex that required the largest building permit ever issued by the City of Cleveland. University Hospitals also constructed a new cancer center and emergency center. The Cleveland Clinic will also shortly construct a new reference lab that will employ 3,500 new staff. Finally, the Stokes VA Hospital at University Circle will, due to the consolidation of other area VA hospitals, grow to become the fifth largest VA hospital in the nation. The magnitude of this new growth renders ODOT's traffic models and any study based thereupon inapplicable to presently known and demonstrated facts and, again, demonstrates that a single interchange at Chester Avenue will not adequately service the traffic needs of MidTown, the Cleveland Clinic, and University Circle.

While the above failures deprived both the public and decision makers of information needed to (1) satisfy due process and (2) support rational decisions regarding alternatives, ODOT similarly failed to produce and discuss numerous other documents and ignored published processes geared toward informing the public. In a letter to stakeholders dated November 17, 2005 (hereinafter "Hebebrand Letter" (Exhibit E)), Craig Hebebrand, ODOT Project Manager, stated that

"[a]s we move through the complicated process of reconstructing the Innerbelt, we felt it important to make sure our immediate stakeholders and the general public clearly understand the federal process that remains before us. And, specifically when and how public input correlates with the overall process."

The Hebebrand Letter then lists numerous studies or processes to be performed as part of the public feedback loop required under the federally mandated NEPA process. A comparison of the Hebebrand Letter with a string of two subsequent emails, dated August 30, 2007, and September 4, 2007 (Exhibit F), in which Mr. Hebebrand attempts to explain the non-performance of certain studies and processes shows that seven of the studies or processes outlined in the Hebebrand Letter have not been performed:

1. Final Economic Impact Analysis
2. Meeting with Stakeholders explaining results of Economic Impact Analysis
3. Alternatives Report for the Cleveland Innerbelt
4. Public comment period on the ODOT Recommended Alternative
5. ODOT Response to comments on ODOT Recommended Alternative
6. Circulation of preliminary environmental impact findings to public agencies
7. Public comment period on ODOT Preferred Alternative Impacts

In addition to failing to carry out published and mandated procedures, ODOT did not carry out bona fide negotiations with the community. In fact, when it became known that ODOT planned to remove interchanges at Carnegie and Prospect Avenues, every major constituency in the community came together to voice a unified concern regarding ODOT's plan. Frank Jackson, Mayor of Cleveland, and fourteen other signatories sent J. Richard Capka, Administrator of the Federal Highway Administration, and James G. Beasley,

Director of ODOT, a letter dated November 7, 2007, stating that the "Cleveland community, including government, business, community groups, and major institutions have reached complete consensus in support of [maintaining] a Carnegie Avenue exit ramp" as part of the Innerbelt. Exhibit G. Together, the institutions requesting that a Carnegie exit ramp remain open represent every major business and elected official in the study area. Just a few notable signatories, in addition to the Mayor, expressing the need to maintain the Carnegie Avenue exit include the following:

Timothy Hagan, President, Cuyahoga County Board of Commissioners
Delos Cosgrove, M.D., President, The Cleveland Clinic
Thomas F. Zenty, III, President, University Hospitals
Barbara Snyder, President, Case Western Reserve University
Christopher Ronayne, President, University Circle, Inc.
Michael Schwartz, President, Cleveland State University
James Haviland, Executive Director, MidTown Development Corporation

The Mayor's letter states that the signatories "believe that the omission of [a Carnegie] exit ramp will have significant economic and social impacts on our community." The letter also states that "Carnegie Avenue is a major connector" to the Central Business District, Midtown Corridor, and University Circle and that "it is imperative that direct access be part of the Innerbelt plan." Exhibit G. Neither this letter nor a documented response by the FHWA or ODOT appears in the DEIS or anywhere in the public record as of this date. We trust that now, however, the Mayor's letter will be duly noted.

III. NEPA Requirements and Procedural Review of Environmental Impact Statements.

NEPA requires the filing of an Environmental Impact Statement (hereinafter "EIS") where a major federal action "significantly affects the quality of the human environment." *O'Reilly v. U.S. Army Corps. Eng.*, 477 F.3d 225, 229 (5th Cir. 2007), citing 42 U.S.C. § 4332(2)(C). Federal Regulations require that EISs provide "full and fair disclosure of significant environmental impacts" and "inform decision-makers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. §1502.1.

Federal Regulations require that EISs do more than merely justify decisions already made. 40 C.F.R. 1502.2(g). EISs must facilitate an *actual* assessment of the proposed action. *Burkholder v. Wykle*, 268 F.Supp.2d 835 (N.D. Ohio 2002) (comprehensive "hard look" assessment must be more than a mere subterfuge designed to rationalize a decision already made). Indeed, the portion of the EIS analyzing alternatives constitutes "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. Accordingly, an agency is obligated to analyze all available evidence and then articulate a "rational connection between that evidence and its exercise of discretion." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856 (1983).

Courts will set aside agency decisions under NEPA where the record demonstrates that the agency failed to take took a "hard look" at effects on the human environment. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, 96 S.Ct. 2718 (1976). Agency review of alternatives and adverse impacts, however, must also be grounded in "good

faith objectivity." *Piedmont Hts. Civic Club v. Moreland*, 637 F.2d 430, 436 (5th Cir. 1981). More generally, courts overturn agency decisions shown to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Agency decisions are deemed "arbitrary and capricious" where the agency relied upon "factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to difference in view or the product of agency expertise." *Audobon Naturalist Soc.*, 524 F.Supp.2d at 660.

In application, courts have held that an agency acts arbitrarily where the agency's administrative record does not contain data to support its conclusions. See *O'Reilly v. U.S. Army Corps. Eng.*, 477 F.3d 225, 231 (5th Cir. 2007). In *O'Reilly*, the court set aside an agency's action where the agency's Environmental Assessment ("EA") cited potentially significant adverse traffic impacts but discussed in only conclusory terms the manner in which mitigation techniques would alleviate the potential problem. *O'Reilly* at 233-34. Notably, the court recognized the fact that, while the EA mentioned that a traffic study would be performed, no such study was performed. *Id.* In short, where there was no data that rationally linked the anticipated adverse impacts with the purported alleviation through mitigation techniques, the agency's decision fell short of the "hard look" requirement and was thus arbitrary and capricious.

An EIS meets these procedural requirements only where "the treatment of alternatives, when judged against a rule of reason, is sufficient to permit a reasoned

choice among the various options." *Florida Keys Citizens Coalition v. U.S. Army Corps. Eng.*, 374 F.Supp.2d 1116, 1151 (N.D. Fla. 2005). Moreover, presentation of alternatives must "rigorously explore and objectively evaluate all reasonable alternatives...." 40 C.F.R. §1502.13. However, courts have held that alternatives "that are not significantly distinguishable" or "which have substantially similar consequences" do not constitute alternatives requiring separate analysis under NEPA. *Westlands Water Dist. v. U.S. Dep't Interior*, 376 F.3d 853, 868 (9th Cir. 2004).

IV. ODOT Violated its Published Project Development Process by Failing to Create Promised Reports Necessary for Reasoned Public Input and Federally Required Rational Decision-Making.

Given the failures outlined above, it is evident that ODOT failed to follow its own Project Development Process (hereinafter "PDP"). The PDP prescribes multi-step processes that ensure that information is gathered, presented to the public to allow for public input, and considered objectively in the selection of the best option available. Because ODOT failed to produce numerous informational tools integral to the decision-making process, ODOT has deprived the decision-making process of a rational, documented, and transparent basis upon which decisions could be made regarding the Innerbelt Trench. In view of federal case law regarding NEPA requirements and fundamental due process requirements, ODOT's flawed decisions provide MidTown and the Cleveland Clinic with ample grounds to insist that the DEIS be rejected as to its treatment of the Trench.