

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

KARST ENVIRONMENTAL EDUCATION)
AND PROTECTION, INC.,)
WARREN COUNTY CITIZENS FOR)
MANAGED GROWTH, GAYLA CISSELL,)
JIM DUFFER and ROGER BRUCKER)
)
Plaintiffs) No. 1:05-cv-01190-RMU
)
v.)
)
U.S. ENVIRONMENTAL PROTECTION)
AGENCY,)
U.S. HOUSING AND URBAN)
DEVELOPMENT,)
and TENNESSEE VALLEY AUTHORITY)
)
Defendants.)

* * * * *

DECLARATION OF LENA SWEETEN

I, Lena Sweeten, make the following declaration based on personal knowledge, information, and belief:

1. **Qualifications.** I have a Bachelors of Arts degree in History from Western Kentucky University (Bowling Green), *summa cum laude*, and a Masters of Arts degree in Public History from Middle Tennessee State University. Over the past 8 years, I have participated in at least 30 projects involving historic preservation assessments; 5 nominations for properties or districts to the National Register of Historic Places ("National Register"); 10 projects involving eligible determinations for the National Register; and 11 projects involving the application for federal tax credits for rehabilitation or adaptive re-use of listed or eligible historic properties. I am currently employed with a private development firm involved in adaptive re-use of National Register eligible and listed historic properties.

I am from the City of Smiths Grove, which is approximately 2.4 miles from the border of the Kentucky

Trimodal Transpark. Since 2001, I have provided volunteer assistance to the City of Oakland for guidance for the City's successful listing on the National Register of Historic Places and for response to the Kentucky Trimodal Transpark.

I am providing this declaration as a volunteer and without compensation.

2. National Register of Historic Places ("National Register") Eligibility of Demolished Structures and Altered Landscapes at the Bowling Green Metalforming Facility.

I have reviewed the declaration of Robin Ziegler, Historic Preservation Planner for the Bowling-Green-Warren County Historic Preservation Board. The properties and landscapes that Ms. Ziegler stated she personally reviewed on June 23, 2005 and concluded were not National Register eligible *were not any of the properties* that have already been demolished or altered on the 123-ac. TVA-funded Bowling Green Metalforming LLC site, including the 80-ac. farm and house at 206 Hays Martin Rd.; the 1-ac. tracts (each) with houses at 809 Glasgow Rd. and 1075 Glasgow Rd.; a 27-ac. former dairy operations at an unspecified address on Hays Martin Rd.; and a 60-ac. farm at Glasgow Rd.

Ms. Ziegler's declaration includes other properties owned by the Intervener ITA, though not complete, which are under threat of demolition given the ITA's past actions. One of those homes, an 1895 very modest and simple one-story wood-frame saddlebag residence on 1.08 acres at 297 Fred Madison Rd., was determined **by ITA's consultant in 2001 as eligible for National Register listing under Criterion C** (architecture) because its simple design is not common in the area (Exhibit 1, Kentucky TriModal Transpark, Cultural/Historical Resources Survey Report, Jan. 2001, Logsdon & Logsdon). At the very least, the differing opinions of Intervener ITA's consultant and Ms. Ziegler, whose declaration was submitted by Intervener ITA, reveal that there needs to be a formal process for evaluating historic significance of the properties under threat of imminent demolition.

As detailed below, it is my professional opinion that one or more of these demolished homes, farms, farm fields, outbuildings (like barns, silos, dairy equipment) could have been determined to be eligible under at least

Criterion A (association with agricultural in Warren County) and Criterion D (archaeology/prehistory).

These properties that were demolished and landscapes that were altered are addressed in the Declaration of Allen Heidel, Operations Manager of the Intermodal Transportation Authority ("ITA"), which I have reviewed. The ITA procured the services of the demolition contractor. I have also reviewed the Phase I Environmental Site Assessment conducted by EnSafe Inc. for the ITA for the Bowling Green Metalforming site (the "EnSafe Phase I," relevant excerpts in Exhibit 2). Though this report was not conducted for the purpose of identification of National Register eligibility, it provides additional photo and descriptive documentation of the buildings, properties and landscapes that were demolished or irrevocably altered.

Mr. Heidel declares that "none of the *buildings...* have any historical or architectural significance and (sic) at the time they were demolished..." Mr. Heidel presents no professional qualifications to declare as to the significance and eligibility of above-ground standing structures, properties, historic districts, landscapes, and archaeological resources for the National Register. I am aware that he has an undergraduate degree in Business Administration.

I have applied the standards and criteria for determining eligibility of and listing properties in the National Register. These properties include individual buildings, historic districts, such as rural districts (a collection of contributing buildings, landscapes), and archaeological features. In addition to an age criterion (typically, the property must be older than 50 years), there are four criteria, **any one of which may separately** render a property, site, district, or structure as eligible. Criterion A is associated with **events** that are significant in local, state, or national history, such as the farming in north Warren County. Criterion B is associated with a **person** notable in local, state, or national history. Criterion C is associated with buildings with notable or distinctive **architectural** style, features or workmanship. Criterion D is associated with **archaeology** or prehistory.

The three demolished properties at the Bowling Green Metalforming site (1075 and 809 Glasgow Rd., 206 Hays

Martin Rd.; Heidel Composite Photos 1, 2, 3; EnSafe Phase I, Photos 31, 32, 36) all clearly were more than 50 years old, which would have placed them within the age requirement for assessment for National Register eligibility. The EnSafe Phase I photos 31 and 32 of the home at 809 Glasgow Rd. additionally shows a potential cistern and pad suggesting the potential for significance under Criterion D (archaeology) that Mr. Heidel does not address. Additionally the EnSafe Phase I report (pg. 4) states that "an abandoned cemetery is reportedly located on parcel 062A-058," which is a 60-ac. farm field, now the site of the Bowling Green Metalforming plant. Cemeteries are also assessed for significance under National Register Criterion D. Mr. Heidel's declaration does not address a cemetery and it is not known whether one was located and, if so, its fate during construction of the Metalforming plant.

Mr. Heidel states that the demolished homes "do not differ significantly from thousands of farm homes and barns that dot the landscape." Ubiquity of a resource type (dwelling, barn, bridge, skyscraper, etc.) does not automatically detract from the potential National Register eligibility of a resource. If this were true, then the National Register would be a list of properties that numbered in the hundreds, not in the tens of thousands. The various criteria for National Register eligibility (age, setting, integrity, historical association, etc.) must be applied in order to gain a more accurate judgment of eligibility. Further, the eligibility determination for the properties affected by the Transpark must take place in the context of Section 106 of the National Historic Preservation Act, including the involvement of Consulting Parties and the public (see paragraph 6 *infra*).

The context of the setting within which the property is located also must be considered. Mr. David Morgan, the Kentucky State Historic Preservation Officer, told this to Wilbur Smith Associates (ITA consultant) in 2000, specifically that an agricultural context may be an important historic theme under which some properties may need to be assessed and re-documented (see Exhibit 3). To the best of my knowledge this was never done, even in the 2001 Logsdon report. An early twentieth century farmhouse that is located at the intersection of a busy four-lane highway and is surrounded on all sides by fast food restaurants and gas stations does not have the same

likelihood of eligibility as would a similar farmhouse in a rural area surrounded by actively farmed land. I am familiar with the Bowling Green Metalforming site and the surrounding area and the context is predominantly rural, pastoral, and agricultural. As the EnSafe Phase I Report even notes (pg. 4), the Bowling Green Metalforming property:

"...has most recently supported cattle grazing and corn and soybean production. In addition to the previously-referenced residences, the subject property supports numerous agricultural-related structures including barns. An abandoned dairy operation and associated equipment was located on a portion of parcel 62A-59. Several water bodies (ponds) were also observed during the site reconnaissance. According to information provided by DDS Engineering...an abandoned cemetery is reportedly located on parcel 062A-058."

All this considered, it is my professional opinion that one or more of the demolished homes, farms, farm fields, outbuildings (like barns, silos, dairy equipment) could have been determined to be eligible under at least Criterion A (association with agricultural in Warren County) and Criterion D (archaeology/prehistory).

Additionally, there was never a National Historic Preservation Act Section 106 process conducted by the Tennessee Valley Authority for its federal undertaking in providing Bowling Green Metalforming funding that would have served as the framework within which eligibility determinations would have been formally made, with the input of the Kentucky State Historic Preservation Officer, Consulting Parties, and the public. The Bowling Green Metalforming site is also outside the area in which the ITA had an initial survey done, the Cultural/Historical Resources Survey Report, Jan. 9, 2001, Logsdon & Logsdon Architects.

Finally, I am aware that the National Trust for Historic Preservation submitted a position statement to the Kentucky Transportation Cabinet indicating that federal funding for the project should be denied based on "anticipatory demolition" by the ITA of these properties (Exhibit 4).

3. Dec. 2004 Construction Intrusion into a Cave Containing Prehistoric Human Remains and Petroglyphs.

Mr. Heidel's declaration describes the penetration into a 2,000-ft. long cave by an ITA construction contractor building a groundwater treatment system at the Transpark Technical Training Center on December 27, 2004. According to a Feb. 10, 2005 *Bowling Green Daily News Report*, the skeletal remains of a prehistoric Native American were found, intentionally placed and "common practice during the Late Archaic (3,000-1,000 B.C.) and during the Early Woodland (1,000-500 B.C.) periods in the region. Petroglyphs (prehistoric writings) were also found. With regard to the episode of the cave discovery (and its human remains), if nothing else the incident utterly proves that the limited Phase I archaeological survey for the main access road (see para. 4 *infra*) is hardly adequate to prove that no archaeological resources exist within the Kentucky Trimodal Transpark.

Indeed, in 2001, the Director of Archaeobiology Program, of the Smithsonian Institution, National Museum of Natural History, Washington, D.C., wrote to Dan Cherry, President, ITA, regarding the significant potential for archaeological resources within the Transpark, ***of the very age that were intruded upon*** (Exhibit 5). Bruce D. Smith indicated that "The cave and karst sinkhole landscape of the region has yielded, over the years, a remarkably well-preserved record of ancient human societies, including some of the earliest evidence yet discovered of the independent domestication of local seed plants in the eastern woodlands of North America...It will be important to assemble a research team well qualified to search out, identify, and assess the significance of the often elusive karst and cave deposits...."

To my knowledge, such an investigation has never been conducted by ITA or any federal agency. Ms. Ziegler's personal review of additional properties that the ITA owns which are at risk of demolition does not constitute the type of evaluation that the Smithsonian Institution has recommended. At the very least, a Phase II investigation is warranted. This would involve a more extensive subsurface investigation than the shovel tests that typically are taken every 50 feet in a Phase I investigation. The entire site of the Kentucky Trimodal Transpark should be subjected to this investigation, not

just the access road area. Federal and state funds, licenses, and permits are being directed to the entire KTT, which should bring all of it under the umbrella of Section 106, NEPA, and Section 4(f), to name just a few of the federal regulations that apply.

Further, Mr. Heidel describes the prayer and tobacco "ritual" that was performed by he and the Warren County Deputy Coroner (at the recommendation of the Warren County Judge Executive, the lead elected official promoting the Transpark, a party to this action [see Buchanon Declaration]), when the cave was sealed with the remains and cave art. The fact that the Deputy County Coroner, "whose grandmother happens to be a Native American," and Mr. Buchanon, "whose great, great grandmother was a Native American," in no way qualifies them to perform sacred rituals as a tribal representative with either the right or the expertise to determine appropriate treatment of human remains.

The regulations of the Advisory Council on Historic Preservation, 36 Code of Federal Regulations ("CFR") Sec. 800.2(c)(2)(ii) provide that there shall be consultation on historic properties of significance to Indian tribes and that the formal representative of all Indian tribes that may hold a site in significance be notified, *Id.* at 800.2(c)(2)(ii)(C). The ITA's informal communication with two Native Americans who happened to email them about the discovery (Heidel, para. 20.) does not comport with the federal processes for such discoveries.

4. Archaeology Report, Kentucky State Historic Preservation Officer (SHPO).

Mr. Heidel states that a Phase I archaeological survey was conducted for the main access road at the Transpark and infers that the Kentucky SHPO's acceptance of the report somehow would have reasonably led ITA to conclude that there was no potential for archaeological discoveries in adjacent land, i.e., the cave that was punched through in Dec. 2004. The only thing that can be said is that the report would have only shown the potential for archaeological resources within the exact alignment of the road. The report and conclusions are inapposite to the issue of the potential for archaeological resources that were actually discovered within the 2,000-ft. long cave and within the rest of the Transpark, including those

properties currently owned by ITA and under threat of demolition or irrevocable alteration. This survey was only for a 100-ft. wide x 4,700-ft. long strip of land, and was not conducted for the entire Transpark, or for any phase, including ITA's description of a 900-acre Phase I. Further, an archaeological survey would not assess eligibility of above-ground standing structures (e.g., houses, barns, rural historic districts) as the April 2004 report makes clear.

Mr. Heidel declares that the ITA "received confirmation from the State Historic Preservation Officer, Mr. David Morgan, that no historic properties existed within the area of potential impact of the main access road" and that the SHPO had "no further comments." What Mr. Heidel does not declare is that this exact same archaeological report had been submitted for the main access road two months earlier to the SHPO. Titled A Phase I Archaeological Survey for the Industrial Park Access Road, January 2004, University of Kentucky Dept. of Anthropology, Lead Agency, Federal Highway Administration, it was prepared before the ITA and the Kentucky Transportation Cabinet (KYTC) rejected the \$1.2 million in federal funds that had been programmed for the road.

When *this* report (Jan. 2004) was submitted to the SHPO, he responded by letter dated March 22, 2004 (Exhibit 6) questioning the relationship of the access road to the entire Transpark and noted that the Area of Potential Effect (to historic properties and archaeological sites) "continues to be of concern in our review of the Transpark," and that there is "strong public interest in the proposed Transpark." Morgan offers to meet to resolve these questions.

In April 2004, via email from Wayne Roach at KYTC to the UK archaeologist, Mr. Roach indicates that "the Federal money has been pulled from this project." He notes that ITA will pay for the report and have it issued as quickly as possible and the KYTC has agreed to this arrangement. He advises the project manager to start the process of replacing all KYTC references with ITA references.

The revised April 2004 report is identical in all places except the reference to the "KYTC" and "FHWA" was replaced with "ITA." It was resubmitted as an ITA report to the SHPO for the narrow corridor for the main access road. It

is in this context that Mr. Morgan's letter of June 2, 2004 regarding the absence of archaeological resources within the 100-ft wide x 4,700-ft long strip of land was issued.

5. **Sunnyside/Loving Community and Proposed Sunnyside National Register District.**

In response to Plaintiffs' Amended Complaint that the demolition of potentially eligible historic properties during the Bowling Green Metalforming facility construction are proximate to Reconstruction Era African-American communities, Mr. Heidel declares that the Loving/Sunnyside community is approx. 1.5 miles from Phase I of the Transpark. Loving/Sunnyside is a larger community in which the proposed Sunnyside National Register district is situated. The boundaries of the eligible Sunnyside district, depicted in the *Kentucky TriModal Transpark Cultural/Historical Resources Survey Report*, Logsdon & Logsdon, Jan. 2001, includes the properties and land at 455, 394, 365, 356, 296, and 297 Sunnyside-Gotts Road. This proposed district is approx. 2,000 ft. to the east of the Bowling Green Metalforming tract and directly abuts Transpark Phase I Lot 16A on its east side. The reason that the ITA's consultant evaluated the District is that it was within the overall Transpark boundary. Certainly, one would expect indirect and even cumulative impacts from the 900-ac. Phase I Transpark operations on the Sunnyside District as well as the Loving/Sunnyside community.

In 2001, I applied for and secured a grant from the Kentucky African-American Heritage Commission for the purpose of completing a study of the historic unincorporated community of Sunnyside/Loving in rural Warren County; the grant was matched by the City of Oakland. The unincorporated Sunnyside community is one of only three historic African-American communities in Warren County that have been documented with archival investigations or architectural surveys. The community is an historically significant, tangible link from the post-Civil War period to the present, and is illustrative of the development and evolution of African-American life in Warren County during the twentieth century. A total of 55 buildings were documented and evaluated during the course of fieldwork for this project. **The study area includes areas within the airport alignment selected by the ITA. The Intervener ITA currently owns properties within the Loving/Sunnyside study area.**

In addition to supporting the ITA's consultant's recommendation on the Sunnyside district and boundaries, the final results of my study (2002) were threefold. First, the Loving Union CME just north of 1295 Loving Road was recommended as eligible for individual listing in the National Register for its historical significance under Criterion A, specifically as related to its association with post-Reconstruction era African-American history in Warren County; Criteria Considerations A and D (for religious properties and cemeteries) also were met. Second, the project recommended several avenues for additional investigations, all of which would be for the purpose of increasing understanding of the complexities associated with African-American communities, lifeways, and traditions. These recommended avenues included archaeological investigations of privy sites; analysis of land subdivisions and land ownership patterns from the late nineteenth through the twentieth centuries; a more comprehensive inventory of all the small antebellum and postbellum cemeteries in the area; and a broader survey of historic resources associated with African-American communities and individuals.

The investigation also suggested, however, that a much larger historic district exists in the Sunnyside/Loving communities along Loving, Sunnyside-Gotts and Glasgow (68/80) roads, including properties now owned by the Intervener ITA. The period of significance for this district would extend from 1870 to 1975, which encompasses the Reconstruction era through to the fruition of the Civil Rights movement and is a period of enormous historical significance to American history and African-American development. One of the most interesting findings of the study was that many of the residential properties built after 1960 were the product of Warren County's first African-American homebuilder, a concrete example of the success African Americans enjoyed as a result of the Civil Rights movement. The historical significance of this period in local and national history satisfies Criteria Consideration G for resources less than 50 years old.

6. Required Section 106 Process under the National Historic Preservation Act. The federal defendants must satisfy the requirements of Section 106 of the National Historic Preservation Act ("NHPA").

The Section 106 regulations, 36 C.F.R. Part 800, define "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 36 C.F.R. § 800.16(y). The proposed Kentucky Trimodal Transpark is an "undertaking."

Section 106 required and requires EPA, HUD and TVA to examine the adverse effects of the proposed "undertaking" on sites on or eligible for the National Register of Historic Places, and afford the federal Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the undertaking. 16 U.S.C. § 470f.

The regulations require the federal agencies to determine the area of potential effect (APE), *id.* § 800.4(a)(1); identify, through consultation, the National Register-listed or eligible historic properties within the APE, *id.* § 800.4(b); determine whether the undertaking will adversely affect any identified historic properties, *id.* § 800.5; and resolve those adverse effects through avoidance or mitigation as documented in a Memorandum of Agreement, *id.* § 800.6(b).

An "adverse effect" is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." *Id.* §800.5(a)(1).

Broadly speaking, the federal agencies first must begin the Section 106 process by identifying the area of potential effect. In this process, they must involve Consulting Parties in its findings and determinations. 36 C.F.R. §800.2(a)4.

The Advisory Council rules implementing Section 106 require that Consulting Parties be identified and given an opportunity to participate in consultation with the private

applicant, other Consulting Parties, the State Historic Preservation Officer, the Advisory Council, and the public during each step of the Section 106 process, *id.* §800.3(f). "Consulting Parties" include "individuals and organizations with a demonstrated interest in the undertaking [who] may participate [in the Section 106 process] due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." *Id.* §800.2.

Second, the federal agencies must, "except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input." 36 C.F.R. §800.2(d)(2). State Historic Preservation Officers, "other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration." 36 C.F.R. §800.8(a)(2).

Third, the federal agencies "should ensure that preparation of . . . an Environmental Impact Statement . . . includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects." 36 C.F.R. §800.8(a)(3), keeping in mind that the federal agencies must "ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis." 36 C.F.R. §800.11(a).

All of this information is necessary to provide meaningful comment on the APE, identification of historic properties within the APE, potential effects upon those properties, and proposed measures to resolve (mitigate or avoid) any adverse effects. To the best of my knowledge, there has not been a comprehensive Section 106 process to identify National Register-listed and eligible historic and archaeological sites and assess and address direct, indirect and cumulative effects on those properties relating to the siting, construction, and operation of the Kentucky Trimodal Transpark.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this _____ day of _____ 2005.

LENA SWEETEN

EXHIBIT 1

Excerpt, Kentucky TriModal Transpark, Cultural/Historical Resources Survey Report, Jan. 2001, Logsdon & Logdson)

EXHIBIT 2

Excerpt, Ensafe, Inc., Phase I Environmental Site
Assessment

EXHIBIT 3

**Letter from Wilbur Smith & Associates, ITA Consultant, to
Kentucky State Historic Preservation Officer**

EXHIBIT 4

National Trust for Historic Preservation letter on ITA
"Anticipatory Demolition"

EXHIBIT 5

Smithsonian Institution's 2001 Letter to ITA

EXHIBIT 6

**Excerpt, Jan. 2004 Archaeological Report for Internal Road
and Kentucky State Historic Preservation Officer Response**