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Des Moines MPO  
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October 22, 2007

**Document Name- STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project**

I am requesting the following from the MPO:

1. That this document be attached to any application for funding for the NE 18<sup>th</sup> Overpass project in Ankeny when it is submitted. This includes applications for STP or ICAAP funding.
2. That I be informed when any application for funding for the NE 18<sup>th</sup> Overpass project is received.
3. That I receive a copy of any funding applications and all supporting documentation for the NE 18<sup>th</sup> Overpass project when received by the MPO.
4. That I be informed of and be given an opportunity to reserve time at the next public input meeting which permits discussion of the NE 18<sup>th</sup> Overpass project. I also need details on the requirements for presentations; specifically I need a means to present graphical information via the computer.
5. That I be notified of all times and places that the MPO allows public discussion of the NE 18<sup>th</sup> Overpass project in 2007 & 2008.
6. That I be notified of the date of the next Certification Review of the Des Moines MPO by the Federal Highway Administration and Federal Transit Administration.

**Purpose of This Document**

To demonstrate that the City of Ankeny's NE 18<sup>th</sup> Feasibility Study is misleading and incomplete and that any application for funding needs to resolve the issues discussed in this document. I will definitively demonstrate that the construction of the NE 18<sup>th</sup> Overpass as proposed in the NE 18<sup>th</sup> Feasibility Study is illegal and would violate numerous county ordinances. I also contend that critical engineering data required for construction of the project has not been collected and cannot be collected and that the City of Ankeny cannot legally obtain right-of-way for the project. I further argue that the Des Moines MPO is obligated to deal with these issues in accordance with the requirements and intent of the following:

1. "Surface Transportation Program Funding Application",
2. "Guide to Transportation Funding Programs Iowa DOT Surface Transportation Program"

**Ordinance Violations/Illegality**

First I will discuss the various omissions of the feasibility study that would result in violations of numerous Polk County ordinances if the project were to proceed. The following is taken from the NE 18<sup>th</sup> Feasibility Study authorized by the City of Ankeny:

**Environmental Impacts**

Environmental impact to Fourmile Creek was limited to **filling in the floodplain** and crossing a recognized wetland shown on the current National Wetland Inventory (NWI) map.

## STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project (Continued)

The NE 18<sup>th</sup> Feasibility Study clearly indicates the intention to fill in the floodplain. Now let's review the various Polk County ordinances associated with floodplains. Bridges and bridge approaches are allowed in floodplains as long as they meet the requirements of Subsections J & K. Compliance is mandatory:

### SECTION 7111. FLOODPLAINS

#### D. Compliance

No structure or land shall hereafter be used and no structure shall be located, extended, converted, or structurally altered without full compliance with the terms of this Section and other applicable regulations which apply to uses within the jurisdiction of this Section.

#### I. Use Regulations

##### 3. Uses Permitted Within Floodways and Floodway Fringes with Certain Additional Standards.

The following uses shall be permitted in Floodway and Floodway Fringe Areas if all applicable requirements of this section are met, including Subsections J. and K.

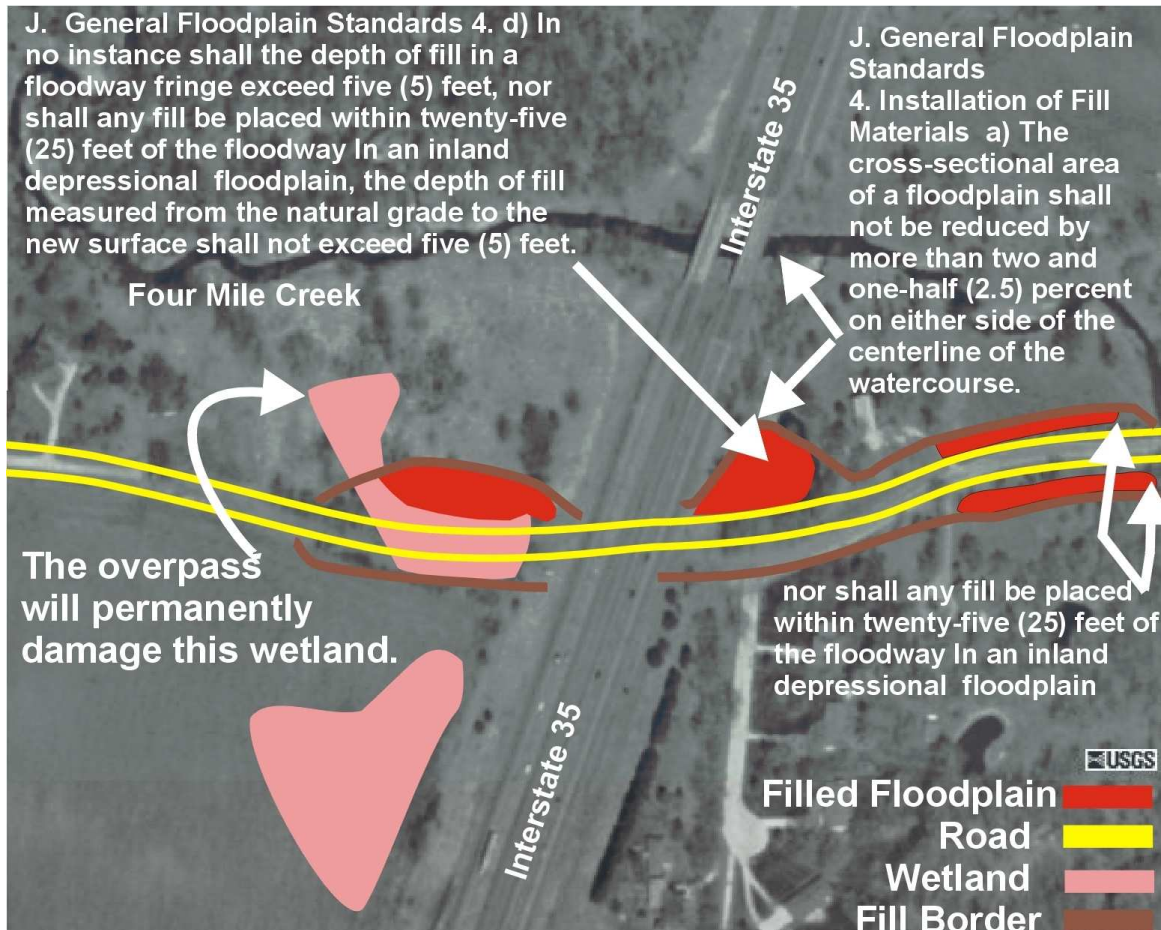
a. Boat launching ramps, boat docks, piers, bridges and bridge approaches, marinas, and stormwater detention facilities.

#### J. General Floodplain Standards

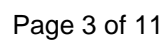
##### 4. Installation of Fill Materials

a. The cross-sectional area of a floodplain shall not be reduced by more than two and one-half (2.5) percent on either side of the centerline of the watercourse. {92/54, 11-12-92}

d. In no instance shall the depth of fill in a floodway fringe exceed five (5) feet, nor shall any fill be placed within twenty-five (25) feet of the floodway or in a location which might be endangered by, or accelerate, a meander. In an inland depressional floodplain, the depth of fill measured from the natural grade to the new surface shall not exceed five (5) feet. {90/96, 5-17-90}







## STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project (Continued)

According to information contained within the NE 18th Street Feasibility study construction would deviate from Polk County ordinances in subsection J, item 4a and several items in 4d. According to the vertical profiles in the feasibility study fill depths in some areas of the floodplain exceed 32 feet, 27 feet over the allowed limit of 5 feet. The cross-sectional area of the flood plain appears to be reduced by approximately 35%, approximately 14 times the amount allowed. Fill will be placed within 25 feet of the floodway which is not allowed. If Polk County were to collaborate with the City of Ankeny on the NE 18th Street Overpass project they would have to disregard these ordinances and ignore subsection "D" compliance.

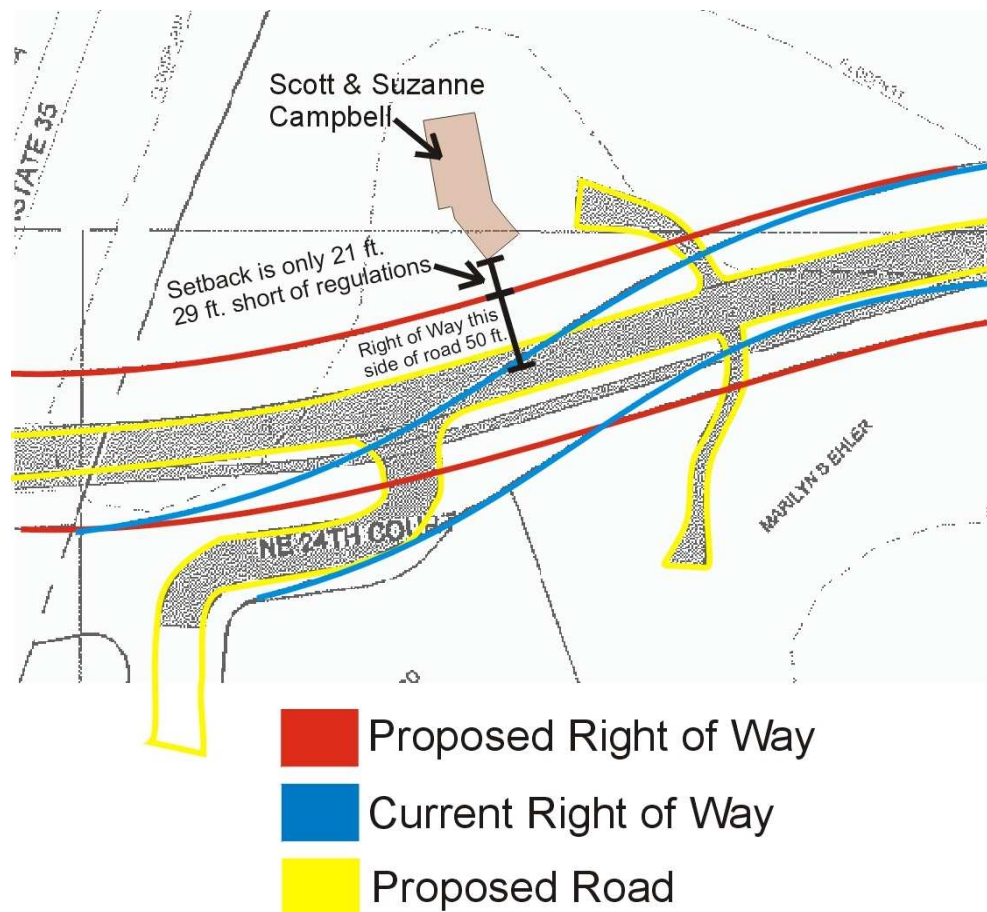
From the NE 18<sup>th</sup> Feasibility Study Authorized By the City of Ankeny:

### Right-of-Way

- Existing Zoning east of Interstate 35 = mostly SE (Polk County)
- Front yard setback for SE zoning = 50 feet

If zoning along the corridor is changed to R-1 (35-foot setback) in the future, there will be a conflict with the existing garage at 2480 NE 102 Avenue. The house located at 10200 NE Frisk Drive would not have a conflict with Ankeny's setback requirements from the proposed right-of-way line, but would have if the zoning remains SE, which is 50 feet.

The following graphic shows that another violation of county ordinance involving setbacks will occur:



According to information contained within the NE 18th Street Feasibility Study authorized by the City of Ankeny, the proposed overpass road will be placed so close to the Scott Campbell primary residence that it will violate county setback rules. The house must be setback at least 50 feet from the right-of-way in Polk County. The right-of-way will be nearly 30 feet too close to the house.

## **STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project (Continued)**

I have clearly documented numerous proposed violations and omissions of violations not included in the NE 18<sup>th</sup> Feasibility Study. I encourage the MPO to discuss the violations proposed by the NE 18<sup>th</sup> Feasibility Study and to arrive at solutions early in the process before the next application for funding is submitted to the Iowa DOT. Open discussion of the problem and proposals for solutions will best serve the public at large not ignoring, denying or hiding the issue.

### **Critical Engineering Data has not been Obtained**

From the NE 18<sup>th</sup> Feasibility Study Authorized By the City of Ankeny:

#### **VII. RECOMMENDATIONS**

An extensive field survey will need to be completed prior to final design for the preferred alignment. The survey will increase accuracy for earthwork volume calculations and provide boundary retracement for acquisition and easement plats.

We recommend exploring an option to excavate borrow from the floodplain area north of the proposed alignment and west of Interstate 35. This area is in the Fourmile Creek floodway and is therefore undevelopable. One drawback would be obtaining borrow on the east side of Interstate 35 without a long haul route. It may be necessary to have two borrow sites for this project. The western floodway borrow site will supply material for roadway embankment and the Interstate 35 Bridge berm west of Interstate 35 and the eastern floodway borrow site will supply material for the eastern road embankment and bridge abutments. An extensive soil survey would need to be completed for the borrow area(s), roadway corridor, and all bridge abutments. Another recommendation is to incorporate the NE 18 Street extension with the East 1st Street and NE 36 Street IJR.

As indicated by the feasibility study it is necessary to obtain soil samples. Borings are certainly required for the bridge abutments and in areas requiring large amounts of fill, such as the approaches. The City of Ankeny has not obtained subsurface borings at the proposed overpass construction site on the east side of I-35 on the Scott Campbell property. Snyder Engineering staked out locations of critical boring samples that were required on the property at 2480 NE 102<sup>nd</sup> Avenue. All of the requested samples were within 330 feet of the primary residence and have not been taken. The borings are necessary for verification of the feasibility of the project. Section 314.9 *Entering Private Property* of the Code of Iowa will be strictly adhered to concerning this matter. Section 314.9 states that, "No such soundings or drillings shall be done within twenty rods of the dwelling house or buildings on said land without written consent of owner". Twenty rods is 330 feet (6.5 feet per rod). Written permission will not be granted by the owner, since I am the owner I can certainly make this claim. The bridge abutment is within 330 feet of the Scott Campbell residence. Below is a section taken from an Iowa DOT bridge checklist.

#### **Bridge or Culvert Plan Supplementary Checklist**

For Local Public Agency (LPA) Projects Let by the Iowa Department of Transportation

##### **SITUATION PLAN or PLAN AND PROFILE SHEET(S)**

Centerline Section. The following information shall be shown:

**Sounding Data.** The sounding data or soil information shall be plotted or shown, including the depth of each layer and a description of the layer. Include the blow counts if they are available. If the soil borings use an elevation datum that is different than the plan elevation datum, the soil boring and plan elevations shall be related to one another by means of an elevation equation. If soils information is scanned and inserted on the plans, it shall be legible when printed on 11x17 size plan sheets

It is obvious that borings and/or sounding data is required before a structure such as the NE 18<sup>th</sup> Overpass can be constructed.



## **Right-of-Way**

It is my contention that due to the numerous violations of Polk County ordinances previously discussed and due to its inability to obtain critical engineering data the City of Ankeny does not have the power to exercise eminent domain which will be required to assure acquisition of the necessary right-of-way for the project.

From the code of Iowa section 6B.2C *Approval of the Public Improvement*

The authority to condemn is not conferred, and the condemnation proceedings shall not commence, unless the governing body for the acquiring agency approves the use of condemnation and there is a reasonable expectation the applicant will be able to achieve its public purpose, comply with all applicable standards, and obtain the necessary permits.

Section 6B.2C *Approval of the Public Improvement* of the Code of Iowa shifts the burden from landowners to the acquiring authority to prove that there is a reasonable expectation that the acquiring authority will achieve its public purpose, comply with all applicable standards, and obtain the necessary permits. The sanction for failure to meet these standards is the loss of the acquiring authority to use the power of eminent domain. The City's engineering plans for the NE 18<sup>th</sup> Overpass project do not conform to applicable standards and will violate Polk County zoning ordinances. The property in question lies outside of the corporate limits of the City of Ankeny. Even the Iowa League of Cities, which is an advocate of expanded city powers, appears to agree with my position concerning violation of county ordinances by the acquiring agency. Below are comments made by the Iowa League of Cities in reference to the amendment of Section 364.4 that was proposed and adopted in HF 2351:

While the Senate has also expanded the opportunity to cities to use the power of eminent domain for airports in Section 3 of HF 2351, the League continues to take the position that since that both cities and counties have home rule power under both the Iowa Constitution and by express legislation, it is inappropriate to place any limitations on the power to establish necessary city uses and facilities outside of cities on any basis other than appropriate planning considerations under county zoning ordinances, just as it would be inappropriate to place any limitations on the power to establish necessary county uses and facilities inside a city on any basis other than appropriate planning considerations under city zoning ordinances.

The City's engineering plans for the NE 18<sup>th</sup> Overpass project do not comply with the applicable standards of Polk County and violate numerous zoning ordinances. Thus the City will be unable to meet the requirements of 6B.2C and the power to condemn will not be conferred. This means that the City of Ankeny cannot assure acquisition of right-of-way.

Additionally, the City's engineering plans for the NE 18<sup>th</sup> Overpass project are not sufficient to prove that the project can achieve the public purpose and thus do not conform to section 6B.2C of the Iowa Code. The sanction for failure to meet this standard is the loss of the acquiring authority to use the power of eminent domain. As previously discussed the City has not obtained critical subsurface borings or soundings at the proposed overpass construction site and will not be able to demonstrate the viability of the project from an engineering standpoint. The City does not provide for a method or means in the feasibility study by which they can obtain these borings. This means that the City of Ankeny cannot assure acquisition of right-of-way since it cannot prove it can achieve the public purpose.

Finally, the NE 18<sup>th</sup> Feasibility Study includes plans for a recreational or bicycle trail. Recently limitations have been placed on section 364.4 of the Iowa Code with the passing of HF 2351. The use of eminent domain outside of the city limits is not permitted for the construction of bicycle paths or recreational trails. Remember the property in question lies outside of the corporate limits of the City of Ankeny:

Section 29 of HF 2351 as enacted by the House amends Section 364.4 of the Code. Section 364.4 provides that "(A) city may"... "(A)cquire, hold, and dispose of property outside the city in the same manner as within."

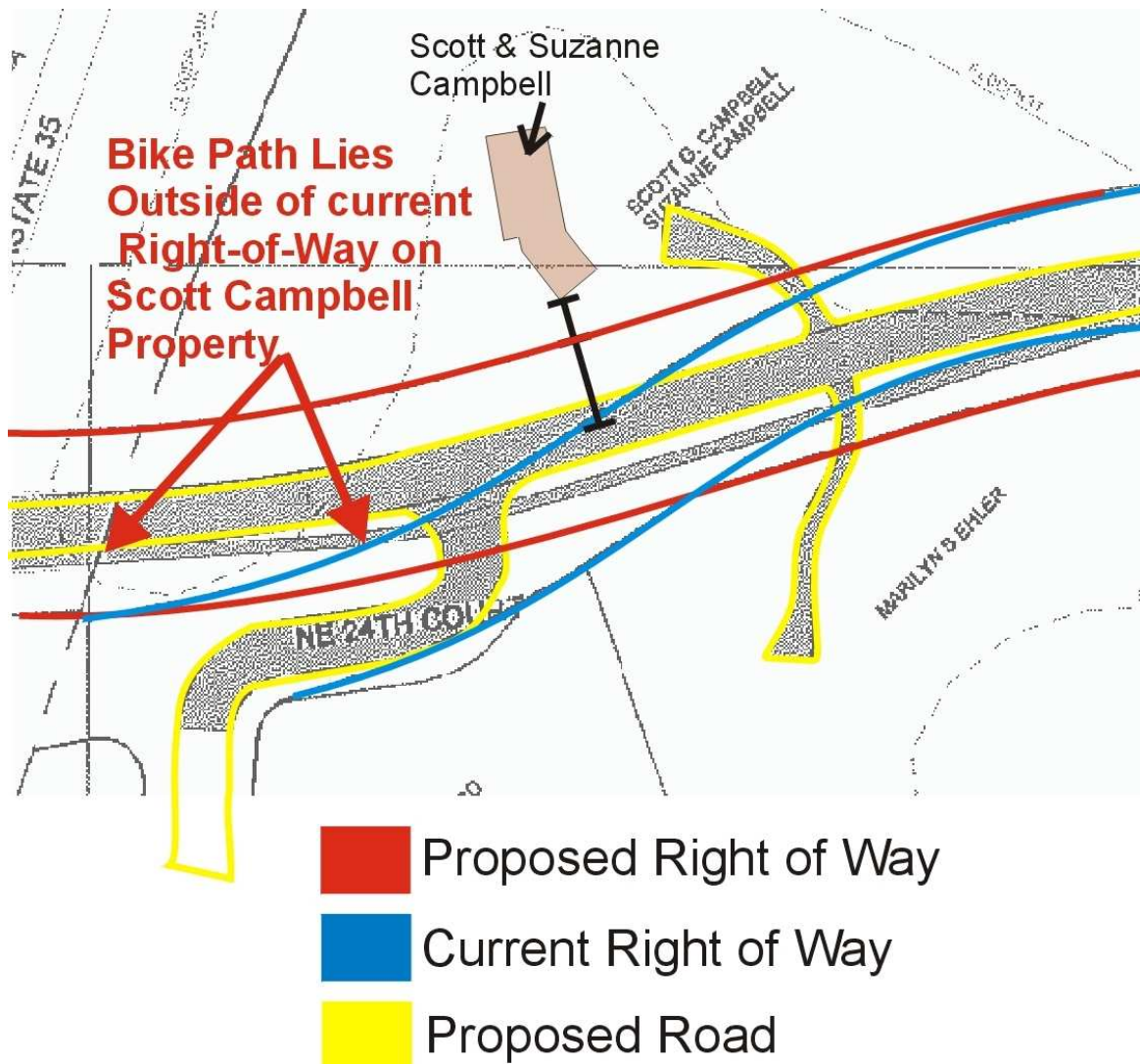
Section 29 of HF 2351 amends this Section to add the following provisions:

"However, the power of a city to acquire property outside the city does not include the power to acquire property outside the city for eminent domain, except for the following, but only to the extent the city had this power prior to July 1, 2006:

## STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project (Continued)

- a. The operation of a city utility as defined in section 362.2.
- b. The operation of a city franchise conferred the authority to condemn private property under section 364.2.
- c. The operation of a combined utility system as defined in section 384.80.
- d. The operation of a municipal airport.
- e. The operation of a landfill or other solid waste disposal or processing facility.
- f. The use of property for public streets and highways.
- g. The operation of a multistate entity, of which the city is a participating member, created to provide drinking water that has received or is receiving federal funds, but only if such property is to be acquired for water transmission and service lines, pump stations, water storage tanks, meter houses and vaults, related appurtenances, or supporting utilities.

Below is a modified graphic of a drawing from the NE 18<sup>th</sup> Feasibility Study showing the position of the bicycle path in relation to the current and proposed right-of-way.



While I understand that land necessary for critical structures such as water and sewer lines may still be acquired under the new provisions of HF 2351 via 364.4, **there is no mention of the use of eminent domain outside of the city limits for the acquisition of property for bike paths or recreational trails.** Since there is no mention of recreational trails in the HF 2351 amendment to 364.4 the bicycle trail detailed in the City of Ankeny's NE 18<sup>th</sup> Overpass project will not be allowed in eminent domain procedures outside of the corporate limits. This would disallow the proposed project in its current form, since Iowa code section 6B.2C would prevent the use of eminent domain in cases where Iowa law is violated.

## **The Des Moines MPO's Obligations:**

It is common sense and thus assumed that the MPO would require the most accurate and reliable information to be contained within any application it receives for federal funding. Item #4 Right of Way Acquisition in the application below requires determination of the amounts required for ROW acquisition. It would seem that the information in this document needs to be considered and the issues resolved before this amount can be accurately determined. The amount clearly requires preparation for trials of condemnation cases and the issues outlined in this document significantly impact this item. The current NE 18<sup>th</sup> Feasibility Study does not address these issues and it would be inappropriate to use this study when applying for federal aid unless corrections are made to the study.

### **SURFACE TRANSPORTATION PROGRAM FUNDING APPLICATION**

#### **IV. BREAKDOWN OF PROJECTED COSTS *(required for all roadway applications)***

Note: The combined amounts included in the STP grant for Items 1, 2, 3, and 6 cannot exceed the amount of the local match, as directed in the Des Moines Area MPO STP Funding Guidelines.

	Part of STP Grant	Not Part of STP Grant	Total Cost
1. Planning Costs			
2. In-house Engineering Services [1]			
3. Preliminary Engineering Services [2]			
4. Right of Way Acquisition [3]			
5. Utility Relocation or Railroad Work			
6. Construction Engineering Services [4]			
7. Construction Improvements			
	Total Funds Requested	Additional Funds	Total Project Cost
Totals =			

[1] May include Preliminary Engineering, Construction Engineering, and Right of Way Services.

[2] Location, design, and related work preparatory to the advancement of a project to physical construction. Involves making surveys and preparing plans, specifications and estimates.

[3] The preparation of right-of-way plats; appraisals for parcel acquisitions; review of appraisals; preparation for and trial of condemnation cases; furnishing of relocation advisory assistance; and other related labor expenses.

[4] The supervision and inspection of construction activities; additional staking functions considered necessary for effective control of the construction operations; testing materials incorporated into construction; checking shop drawings; and measurements needed for the preparation of pay estimates.



## STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project (Continued)

The Iowa DOT details requirements of the STP in the “Guide to Transportation Funding Programs Iowa DOT” (see below). One of these requirements is that “Right-of-way activities must comply with applicable federal and state laws”. I have demonstrated that the requested right-of-way in the NE 18<sup>th</sup> Feasibility Study cannot be legally obtained through eminent domain. **Does the MPO intend to facilitate the City of Ankeny in submitting an application which calls for right-of-way acquisition which cannot be legally obtained via eminent domain?** Bear in mind that the property in question is owned by Scott Campbell, the author of this document. I will not sell right-of-way via any standard acquisition process. I require the purchase of my entire property. Whenever the NE 18<sup>th</sup> Overpass project is approved and right-of-way acquisition begins I will force the City of Ankeny to institute eminent domain proceedings in this matter if my property has not been purchased in its entirety. The placement of the bridge is so close to my residence that the home would become uninhabitable if the overpass is constructed as proposed. So the question of whether or not eminent domain procedures will be required if my primary residence is not purchased is not in question. These issues will have to be dealt with sooner or later. It is not in the interest of the public at large to cover up or ignore this matter and proceed with federal funding applications with an erroneous and misleading feasibility study. The City of Ankeny and the MPO need to address the accuracy and omissions within the NE 18<sup>th</sup> Feasibility Study.

Guide to Transportation Funding Programs Iowa DOT  
Surface Transportation Program  
Special project requirements  
Highway projects

- Project contracts must be let by the DOT.
- FHWA must authorize work prior to contract letting.
- FHWA environmental concurrence is required.
- **Right-of-way activities must comply with applicable federal and state laws.**
- Plans and specifications must be prepared by an Iowa licensed professional engineer.
- If federal-aid dollars are used for a consulting engineer, the Federal-Aid Consultant Selection Process must be used.
- DOT design criteria for the appropriate road classification should be used.
- DOT approval of plans and specifications is required.
- Compliance with regulations regarding the following is required:
  - federal equal employment opportunity;
  - use of disadvantaged business enterprises;
  - Occupational Safety and Health Administration provisions; and
  - federal (Davis-Bacon) wage rates.

For those projects on Federal-aid routes, refer to Form FHWA 1273, Required Contract Provisions, Federal- Aid Construction Contracts for more information. Materials testing, construction inspection and final project acceptance is required to be done according to DOT procedures.

The following is taken from the MPO's “Surface Transportation Program Funding Application”:

### STATUS REPORTS

1. The MPO shall be advised semi-annually of the status and progress of a STP or STP TE funded project. The recipient jurisdiction/agency shall submit to the MPO's Executive Director a written synopsis of the progress accomplished, or delays encountered, in implementing the project.
2. If the status report is not provided to the MPO Executive Director by the date identified in the status report request, the MPO Executive Director will issue a notice of delinquency identifying a ten (10) calendar day cure period beginning upon receipt of the registered notice. If the status report is not submitted by the end of the cure period, the matter will be brought before the MPO STP Funding Subcommittee within thirty (30) calendar days for a recommendation for action that will be forwarded to the MPO Executive Committee for consideration and referral to the MPO.

## **STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project (Continued)**

3. If a jurisdiction/agency's STP or STP TE funded project does not make satisfactory progress, does not obligate the STP or STP TE funds provided within the year those funds were authorized by the MPO and noted for that project as previously documented, then the MPO may cancel the remaining STP or STP TE funding for that project and return those STP or STP TE funds for inclusion in the next fiscal year's STP or STP TE funding allocation for projects. Such action to cancel project funding shall be based on the following criteria:
- a. The MPO strongly believes it necessary to maintain rapid turnover of funds and implementation of specific projects so as not to jeopardize the loss of any funding.
  - b. The MPO strongly encourages jurisdictions/agencies to have at least preliminary project plans completed prior to submitting a project for the MPO's consideration for funding.
  - c. The MPO strongly believes that such a stipulation shall cause jurisdictions/agencies to provide better and more accurate project cost estimates and detailed traffic and engineering data, enabling both the TTC and the MPO to evaluate a project's feasibility in a more detailed manner.

If the Des Moines MPO is genuinely interested in receiving accurate information as is indicated by its own policy concerning project cost estimates and engineering data, then why is it purposely and proactively ignoring my attempts to discuss and resolve the issues surrounding the NE 18<sup>th</sup> Overpass project and the flawed NE 18<sup>th</sup> Feasibility Study? The Status Reports section of the surface transportation Program Funding Application clearly states the MPO is interested in a project's feasibility. Why is the MPO not addressing these issues? Why is the MPO using lawyers to obstruct a resolution to the problem and ignoring issues that have been brought before them which involve the legality and feasibility of the NE 18<sup>th</sup> Overpass project? Does the Des Moines MPO intend to accept and approve an application it knows it is not accurate or omits critical information? If these issues are not resolved I will be disputing the application. The information contained within the application must be true and accurate. I also contend that omissions of known issues which influence the feasibility of the project would also be inappropriate.

### **SURFACE TRANSPORTATION PROGRAM FUNDING APPLICATION**

#### **V. CERTIFICATION *(required for all applications)***

To the best of my knowledge and belief, all information included in this application is true and accurate, including the commitment of all physical and financial resources. This application has been duly authorized by participating local authority(s). I understand that attached ADOPTING RESOLUTION binds the participating local governments to provide the required matching funds, and to assume responsibility for adequate maintenance of any new or improved facilities.

It is my opinion that the MPO is obligated to review the feasibility and legality of the NE 18<sup>th</sup> Overpass project once the agency has been notified of complicating issues. It would also be irresponsible to allow the submission of an application for federal funding with incomplete or misleading information. I also feel it is inappropriate for the MPO to be expending public resources to avoid discussing the issue rather than trying to resolve the issues discussed in this document before an application for STP funding is submitted. The more the Des Moines MPO and the City of Ankeny try to avoid this matter the more the appearance of collusion between the two parties in regards to the STP funding process may be strengthened.

I am currently extensively updating a website that details the activities of the City of Ankeny in regards to numerous issues. The activities of the Des Moines MPO in regards to this matter will be discussed on this website. If the Des Moines MPO feels any statements made in the website are in error please feel free to comment. I will be happy to correct any factual errors that exist. This document will be available for download on the website. The website is located at [www.ankenywatch.com](http://www.ankenywatch.com) and will be updated in the near future. I will be contacting the press and notifying the public if the MPO does not become proactively involved in reviewing the documented allegations presented in this document. I specifically expect the Des Moines MPO, which administers the submissions process for STP funding, to carefully review the allegations when reviewing the STP application. The NE 18<sup>th</sup> Feasibility Study is a flawed document that needs to be corrected and should not be used to justify application submittals for funding.

**STP Funding and the Legality and Feasibility of the NE 18<sup>th</sup> Overpass Project (Continued)**

In closing I will repeat my request for the following:

1. That this document be attached to any application for funding for the NE 18<sup>th</sup> Overpass project in Ankeny when it is submitted. This includes applications for STP or ICAAP funding.
2. That I be informed when any application for funding for the NE 18<sup>th</sup> Overpass project is received.
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5. That I be notified of all times and places that the MPO allows public discussion of the NE 18<sup>th</sup> Overpass project in 2007 & 2008.
6. That I be notified of the date of the next Certification Review of the Des Moines MPO by the Federal Highway Administration and Federal Transit Administration.

I remain open and willing to discuss a resolution to the problems discussed in this document. I will be carefully reviewing the activities of the Des Moines MPO and the City of Ankeny and will be periodically contacting you.

Sincerely,

Scott Campbell