

Legal Protections against the Construction of the BWRR Superconducting Maglev within the Greenbelt Forest Preserve

The Forest Preserve Advisory Board (FPAB) recommends that the City Council submit additional information regarding legal protections of the Forest Preserve to the National Environmental Policy Act review process for Baltimore Washington Rapid Rail's (BWRR) proposed superconducting maglev (SCMaglev) routes J1 and J. The city property known as the Forest Preserve, specifically the several parcels that make up the North Woods Tract and Hamilton Woods Tract,¹ is protected by laws, covenants, and easements at the municipal, county, state, and federal levels, which limit or prohibit construction within the Forest Preserve. Some of these protections also prohibit any construction outside of the Forest Preserve that would be close enough to impact the Forest Preserve's ecosystem or the public enjoyment of the Forest Preserve. FPAB recommends that the City Council submit the following comments to BWRR, Maryland Department of Transportation, and the Federal Railroad Administration as a follow-up to comments that Council has already submitted as part of the NEPA review process.

Background

The legal protections listed on the following pages expand on the items mentioned in the City Council's October 2017 letter to the Environmental Impact Study. The October 2017 letter was the City Council's immediate response to BWRR's announcement of alternatives J1 and J, the two alternatives for the SCMaglev route alignment that pass through the City of Greenbelt.

Among the two alternatives, Alternative J1 would be the more destructive to the City-owned Greenbelt Forest Preserve. First, Alternative J1 would involve the construction of a cut-and-cover tunnel through the Hamilton Woods Tract of the Forest Preserve that would destroy a wide swath of the forest. Second, Alternative J1 would have a tunnel entrance close to the City's astronomical observatory. Any lighting associated with the SCMaglev project and the vibrations of the train would preclude the use of the astronomical equipment. Third, Alternative J1 would exist as an elevated viaduct along the wetlands of the Goddard Creek floodplain in the North Woods Tract. This floodplain forest is likely to be more than 100 years old, and the canopy trees are 100–120 feet tall. Alternative J1 would require that these canopy trees be cut down in a swath at least 250-feet wide to ensure clearstory for the 46-foot-wide viaduct.² Additionally, the

¹ The North Woods Tract includes Parcel 1. The Hamilton Woods Tract is also known as the South Woods.

² 46-foot width stated on a poster displayed in October 2017 at public meetings hosted by the SCMaglev Environmental Impact Study, available online at <http://www.bwmaglev.info/index.php/october-2017-open-house-boards>.

passage of the 300-mph maglev trains would create a noise nuisance that would impact the public's ability to enjoy recreational visits to the Forest Preserve. The noise nuisance could extend 1,900 to 3,000 feet on either side of the elevated viaduct according to Federal Railroad Administration guidelines.³

In contrast to Alternative J1, Alternative J would not pass through the Greenbelt Forest Preserve, but it would parallel the Forest Preserve's eastern border, passing 800 feet to the east. As currently configured, Alternative J is aboveground to the north of the Forest Preserve while remaining underground where closest to the Forest Preserve. If alternative J were to become an elevated viaduct near the Forest Preserve (rather than an underground track), then a noise nuisance would extend into the Forest Preserve, impacting the public's ability to enjoy recreational visits to the Forest Preserve.

Municipal Protection

1. The Greenbelt Forest Preserve is city-owned property. The City Council's October 2017 letter asserts the City Council's intent that these lands remain protected green space. Furthermore, Greenbelt City Code protects the Forest Preserve by stipulating that the land can only be removed from the Forest Preserve by a public referendum.⁴

County Protection

2. Prince George's County has an interest in the Greenbelt Forest Preserve remaining protected green space. In 1990 the Maryland-National Capital Park and Planning Commission (M-NCPPC), purchased a woodland covenant on Parcel 1 within the Forest Preserve.⁵ Alternative J1 would violate this covenant by converting covenanted woodland to transportation infrastructure. The noise from the maglev train's passage would also violate the covenant by diminishing public enjoyment of the natural setting.

3. In 2017, the M-NCPPC renewed its commitment to the Greenbelt Forest Preserve when it published the *Prince George's County Resource Conservation Plan*, a document that functions as a county-wide master plan. This master plan locates the Greenbelt Forest Preserve within a M-NCPPC-designated Special Conservation Area that also includes Greenbelt National Park, the Beltsville Agricultural Research Center, and the Patuxent Wildlife Research Refuge.⁶

³ Estimate based on an elevated track, a 300-mph train speed, and either 4 or 8 train passbys per hour using the general-assessment methodology in Federal Railroad Administration, 2012, *High-speed Ground Transportation Noise and Vibration Impact Assessment*, DOT/FRA/ORD-12/15, available online at <https://www.fra.dot.gov/eLib/details/L04090> .

⁴ Greenbelt City Code, Chapter 12, Article 9, Section 12-154(c).

⁵ The City of Greenbelt and MNCPPC entered into a woodland covenant after MNCPPC provided \$1,250,478 of Program Open Space funds to assist the City with purchasing Parcel 1 (Maryland Land Records, liber 7967, folio 441-445).

⁶ Map 3 in section 2 of MNCPPC, 2017, *PG County Resource Conservation Plan, A Countywide Functional Master Plan*, pg. 32, available online at <http://www.pgplanning.org/944/Publications> .

State Protection

4. In 1990 the City of Greenbelt used state funds from Maryland's Program Open Space (POS) to purchase Parcel 1.⁷ By Maryland state law, land purchased using POS funds means shall be perpetually-protected green space. Additionally, because POS also uses federal funds, this portion of the Forest Preserve is protected by federal statute, namely section 6(f)(3) of the Land and Water Conservation Fund Act of 1965.⁸

5. The Maryland Department of Natural Resources (DNR) has designated 6.5 acres of the 12 acres of wetlands within the Greenbelt Forest Preserve as "Wetlands of Special State Concern".⁹ Alternative J1 would damage this state-protected wetland within the Forest Preserve by removing a swath of canopy trees and the underlying ecosystem.

6. The Maryland Department of Natural Resources (DNR) designated the North Woods Tract of the Greenbelt Forest Preserve in 2005 as part of a hub in the state's green infrastructure. The state intends this determination to guide land-conservation efforts. The hub that contains the Greenbelt Forest Preserve is a contiguous forest that includes the Beltsville Agricultural Research Center and the Patuxent Wildlife Research Refuge. Reinforcing this designation in 2011, the Maryland DNR determined that this land is a Targeted Ecological Area, i.e., an area of "high ecological value that has been identified as a conservation priority."¹⁰

7. The Maryland Natural Heritage Service has provided the City of Greenbelt with a letter that states that the Maryland DNR is aware of at least one state-listed species in the Greenbelt Forest Preserve.

8. The Maryland Historic Trust has determined that NASA Goddard Space Flight Center is a historic district. This historic district abuts the Northway athletic field and the Greenbelt Forest Preserve. Alternative J tunnels under this historic district and Alternative J1 has a tunnel entrance within a few hundred feet of it.¹¹ In addition, there are several structures just north of the Greenbelt Forest Preserve within the Beltsville Agricultural Research Center that are listed as historical resources by the State of Maryland. The Maryland Historic Trust also recognizes the federally-designated Greenbelt National Historic Landmark, which includes the Greenbelt Forest Preserve as discussed in item #12, below. The proposed Maglev track's proximity to these historical resources may require the Maryland Historic Trust to review the impact of the proposed maglev line.

⁷ Program Open Space funds from FY1990: Maryland Land Records, liber 7967, folio 441-445.

⁸ Maryland DNR, 2006, *Local Program Open Space Manual*, available online at <http://dnr.maryland.gov/land/Pages/ProgramOpenSpace/Program-Open-Space-How-to-Apply.aspx> .

⁹ Wetland acreage measured using the Prince George's County Atlas, <http://www.pgatlas.com> .

¹⁰ Hubs: DNR, 2005, Maryland GIS Data Catalog, <http://data.imap.maryland.gov/datasets/maryland-green-infrastructure-green-infrastructure-hubs-and-corridors>. Targeted Ecological Areas: DNR, 2011, GreenPrint Map, available online at <http://geodata.md.gov/greenprint/> .

¹¹ Historic significance: [https://mht.maryland.gov/secure/Medusa/PDF/Prince Georges/Pg64-19.pdf](https://mht.maryland.gov/secure/Medusa/PDF/Prince%20Georges/Pg64-19.pdf) . Geographic boundary: <http://dnrweb.dnr.state.md.us/MERLIN/> .

Federal Protection

9. An active bald-eagle nest is located near the Greenbelt Forest Preserve, which means that there are federal restrictions on construction and associated tree removal within 660 feet of the nest.¹² This nest is located on Research Road at Beaverdam Creek, near the northwest portion of the Forest Preserve.¹³ Other bald-eagle nests may exist in the area, and bald eagles are known to fly over various properties adjacent to the North Woods and Hamilton Woods tracts of the Greenbelt Forest Preserve.¹⁴ Because of the known bald eagle nest, the Maglev project may be encumbered by the Bald and Golden Eagle Protection Act. The Greenbelt Forest Preserve and surrounding forest is also an excellent habitat for the northern long-eared bat *Myotis septentrionalis* and rusty-patch bumble bee *Bombus affinis*, both federally protected species.¹⁵

10. In 1972, the federal government transferred ownership of a 13.9-acre forested parcel to the City of Greenbelt under the Legacy of Parks Program.¹⁶ This federal program assisted states and local governments with acquiring parkland, forest, and wilderness located near densely populated areas because of the societal benefit of easy access to green space.¹⁷ The 13.9-acre parcel is part of the Greenbelt Forest Preserve. Alternative J1 would pass through this 13.9-acre parcel, negatively impacting its ecosystem and its use for outdoor recreation.

11. In 1995, the federal government purchased a scenic easement from the City of Greenbelt for Parcel 1 within the Greenbelt Forest Preserve. The City of Greenbelt sold this scenic easement in exchange for the financial assistance that the federal government provided in 1990 so that the City could purchase Parcel 1 from private developers. In addition, the federal government purchased a scenic easement in 1991 on the 13.9 acres of City-owned land in the northeast corner of the Greenbelt Forest Preserve. Both of these scenic easements prohibit construction.¹⁸ Both scenic easements are deeds that establish a federal interest in the green space, although the City of Greenbelt retains ownership of the land itself. Due to these easements, this land falls within the legal boundaries of the Baltimore-Washington Parkway, a

¹² In 2007, the U.S. Fish and Wildlife Service developed guidelines that include the 660-foot buffer based on the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. Available at <https://www.fws.gov/southdakotafieldoffice/NationalBaldEagleManagementGuidelines.pdf>.

¹³ Active nest: *Greenbelt News Review*, 21 May 2017, 21 Jan 2016, pg. 21; 21 April 2016, pg. 1; Jamie Jorgensen and Donn Ahearn, Greenbelt Biota, 24 Jan 2017, 04 Jan 2017, 27 Nov 2016, 17 Nov 2016, 19 April 2016, <https://www.facebook.com/groups/325927877605844>.

¹⁴ Eagle in flight near Hamilton Woods Tract: *Greenbelt News Review*, 21 Dec 2017, pg. 8. Eagle near North Woods Tract: Dawn LaRae-Deya, Greenbelt Biota, 20 Dec 2016.

¹⁵ Federal and state rare, threatened, endangered (RTE) species: http://dnr.maryland.gov/wildlife/Documents/rte_Animal_List.pdf. Rusty-patch bumble bee found in Prince George's County and Northern long-eared bat found in Montgomery County: Maryland Biodiversity Project, <https://www.marylandbiodiversity.com>.

¹⁶ *Greenbelt News Review*, 25 May 1972, pg. 1; 19 Oct 1972, pg. 1; 1 Jan 1998, pages 1,12.

¹⁷ Jim Byron, 14 June 2010, Legacy of Parks, available online at <https://www.nixonfoundation.org/2010/06/legacy-of-parks/>. EPA, 1973, *Legal Compilation*, pg. 3058, available online at <https://nepis.epa.gov/Exe/ZyPDF.cgi/200158MI.PDF?Dockey=200158MI.PDF>.

¹⁸ 1995 easement on Parcel 1 (Maryland Land Records, liber 8015, folio 867–874). 1991 easement on the 13.9-acre parcel (liber 10,374, folio 347–359).

unit of the National Park Service, even though the City of Greenbelt retains ownership of the land.¹⁹ Alternative J1 would violate both scenic easements.

12. The North Woods and Hamilton Woods tracts are contributing resources to the Greenbelt National Historic Landmark listed in the National Registry of Historic Places.²⁰ These tracts are part of the original "belt of green" surrounding the planned community that was designed, built, and administered by the federal government during the New Deal. The plan developed during the New Deal called for the belt of green to be owned by the community in perpetuity (1) to avoid encroachment by any development that would be out of character with the residential community, (2) to provide recreation, and (3) to enable residents to enjoy a beautiful, natural setting at their doorsteps.²¹ The forest destruction associated with the construction of Alternative J1 and the noise associated with the operation of the 300-mph train would be detrimental to the continued functioning of this resource within this National Historic Landmark.

13. Section 4(f) of the 1966 U.S. Department of Transportation Act prohibits the construction of transportation projects within protected green space or historical landmarks unless it is shown that no "feasible or prudent" alternative exists that would avoid impact to these resources and also that all possible steps will be taken to "minimize harm" if no zero-impact alternative exists.²² This level of federal projection and review applies to the Greenbelt Forest Preserve because it is both protected green space and also part of a National Historic Landmark, as describe in detail above.

¹⁹ Online GIS: NPS Land Resources Division's Tract and Boundary MapServer, <https://mapservices.nps.gov/arcgis/rest/services/LandResourcesDivisionTractAndBoundaryService/MapServer> and <http://www.arcgis.com/home/webmap/viewer.html?url=https%3A%2F%2Fmapservices.nps.gov%2Farcgis%2Frest%2Fservices%2FLandResourcesDivisionTractAndBoundaryService%2FMapServer>.

²⁰ On 25 November 1980, the Greenbelt Historic District was added to the National Registry of Historic Places. National Historic Landmark status granted on 18 February 1997. NPS, 2017, *Spreadsheet of NHLs*, Excel spreadsheet, national-historic-landmarks-20171201.xlsx, available online at <https://www.nps.gov/nr/research/>.

²¹ Belt of green permanent: Resettlement Administration, 1936, *Greenbelt Towns*, pg. 9. Belt to provide recreation: Tugwell, R. G., 13 May 1936, Resettlement Administration program: Letter from the administrator of the resettlement program transmitted in response to Senate resolution No. 295, 74th Congress, 2nd session, Senate Doc. No. 213, pg. 7. Belt to prevent encroachment: Larsen, C., August 1938, Greenbelt, MD: federal planned community, *National Municipal Review*, 27, 413–420; Fulmer, O. K., 1941, *Greenbelt*, Am. Council on Public Affairs. Garden-city concept promotes the experience of the beauty of nature, including of forests: Howard, E., 1902, *Garden Cities of Tomorrow*, Swan Sonnenschein & Co., pp. 17–18, 130, Fig. 2.

²² Quotes from the Code of Federal Regulations (CFR) title 23 section 774, which codifies Section 4(f) of the 1966 Department of Transportation Act. CFR text available online at <https://www.law.cornell.edu/cfr/text/23/part-774>.