

Section 4(f) Exceptions for Public Parks, Recreation Lands, Wildlife & Waterfowl Refuges, and Historic Sites (23 CFR 774.13)

Introduction

FHWA has identified various exceptions to the requirements for Section 4(f) approval. Section 4(f) Exceptions require documentation and approval by TxDOT's Environmental Affairs Division. This brochure describes some of the most common exceptions and provides examples of applicability.

Temporary Occupancy

What the regulation says:

23 CFR 774.13 (d)

Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:

- (1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;
- (2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal;
- (3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;
- (4) The land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and
- (5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

What it means:

For a proposed project, no additional ROW or permanent easements can be required and the above conditions must be satisfied. Temporary occupancy includes the construction of a roadway project that requires the **temporary use** of the 4(f) property; right of entry; temporary easement; or improvements within a 4(f) property that require temporary access to complete the construction and do not impact the use of the property.

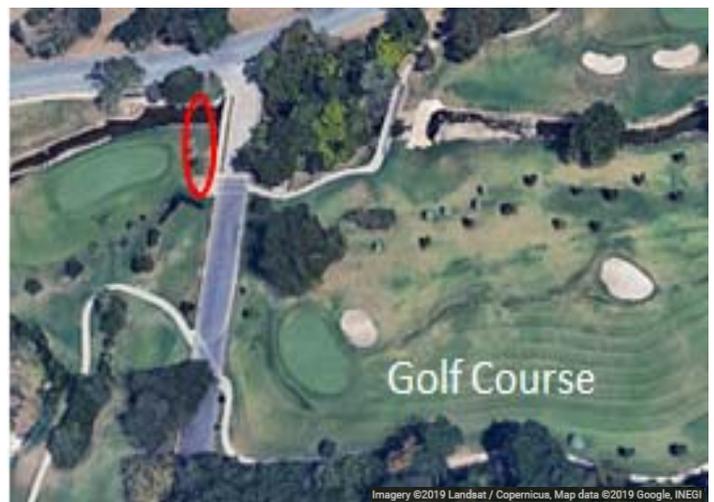
Consider This

Bridges and parks may also be historic or an archeological site may be present. **A single property can have multiple 4(f) requirements.**

Temporary Occupancy Examples



A proposed roadway project would require temporary occupancy of a public park property for construction equipment. Access to the park would not be affected. It was determined in the Section 106 process to not be historic. No ROW or permanent easements are required from the park. As part of the project, the park entrance would be improved. The project would not impact the use of the property and will be fully restored to the original or better condition. Therefore, the project would qualify for the 4(f) Exception.



The proposed project requires the replacement of a bridge adjacent to a public golf course. In order to gain access to the bridge for construction, a temporary construction easement would be required from the golf course. The project would not impact the use of the property, which would be fully restored to the original or better condition. An archeological site would be adversely affected by the proposed project, but it was determined to be important for its potential to yield information and has minimal value for preservation in place. Regardless of whether data recovery excavations would actually be undertaken on the site, the project could receive a 4(f) exception.

Trail, Path, Bikeway, or Sidewalk

What the regulation says:

23 CFR 774.13 (f)

Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

- (1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);
- (2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241- 1251, with the exception of those trail segments that are historic sites as defined in § 774.17;
- (3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and
- (4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.

What it means:

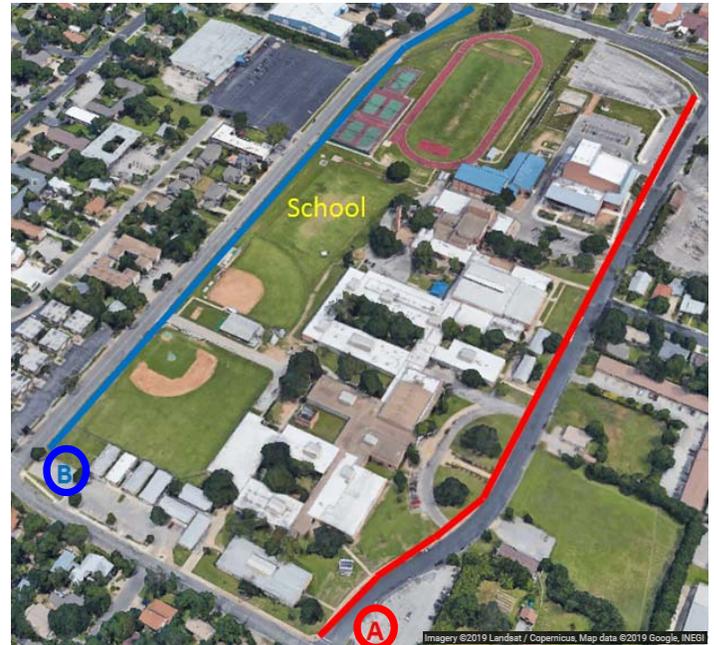
Projects that are part of a larger interconnecting system of trails and sidewalks and not limited to a single property typically qualify under this exception. This may also include connecting sidewalks to trails within existing parks; constructing new sidewalks on school property adjacent to a recreational facility; or constructing new trails or sidewalks as part of a citywide project.

School Properties

A school property as a whole, unless historic, is not a Section 4(f) property. However, any recreational facilities on the school property are considered under Section 4(f); this includes playgrounds, stadiums, baseball or soccer fields, etc. The loss of parking at these facilities may also result in a 4(f) impact. These facilities **must be open to the public**. A recreational facility that is locked and is not available for public use would not be considered a Section 4(f) property.

To qualify as a 4(f) Exception, **NO additional ROW or permanent easements** can be acquired from the 4(f) property.

Trail, Path, Bikeway, or Sidewalk Examples



A—A sidewalk is proposed to be constructed along the front of the school property. There are no recreational facilities adjacent to the proposed project. There is no 4(f) impact. The project can therefore pursue a parkland 4(f) Exception. If, however, the school and its formal sidewalk and driveway configuration were determined to be historic, there may be 4(f) impacts, because the proposed sidewalk might affect the entrance. Therefore, a separate historic 4(f) Exception would be required.

B—A sidewalk is proposed to be constructed adjacent to recreational facilities on the school property. No ROW or permanent easement are required, therefore the 4(f) Exception would apply. The project can therefore pursue a parkland 4(f) Exception. Even if the school were historic, this sidewalk would be less likely to alter the characteristics that are significant and a 4(f) Exception might still apply.



The proposed project would construct sidewalks through two parks and a school, none of which were determined historic. The project occupies the ROW and is part of a larger local transportation system. Therefore, the 4(f) Exception would apply.

Transportation Enhancements or Mitigation

What the regulation says:

23 CFR 774.13 (g)

Transportation enhancement activities, transportation alternatives projects, and mitigation activities, where:

(1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and

(2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

What it means:

In contrast to the previous situation, where a trail, path, bikeway or sidewalk is part of a larger transportation network that may extend beyond the Section 4(f) property, an enhancement project, almost by definition, *enhances* the enjoyment of that property, perhaps by providing access to certain areas (such as a pond, basketball court, or swimming pool) or simply providing a scenic walkway.

In a mitigation scenario, perhaps a project would involve mitigation activities (for example, for wetland impacts elsewhere on a project) within an existing park or refuge. While there would be a use of, for example, a pond, the mitigation activities would be an improvement to that pond.

Note the phrase “...solely for the purpose of...”. What this means is that, under this specific section, the enhancement (or mitigation) is a stand-alone activity with regard to use.

What if the official with jurisdiction does not concur?

For a parks or recreational Section 4(f) Exception, the owner with jurisdiction must concur to proceed with an exception. If they do not concur, the property must be elevated to the next level of 4(f) analysis.

Section 4(f) Applicability

When determining if Section 4(f) applies, establish that the property is:

For Public Parks and Recreational Properties:

- Publicly owned
- Open to the public
- Primary purpose is recreational

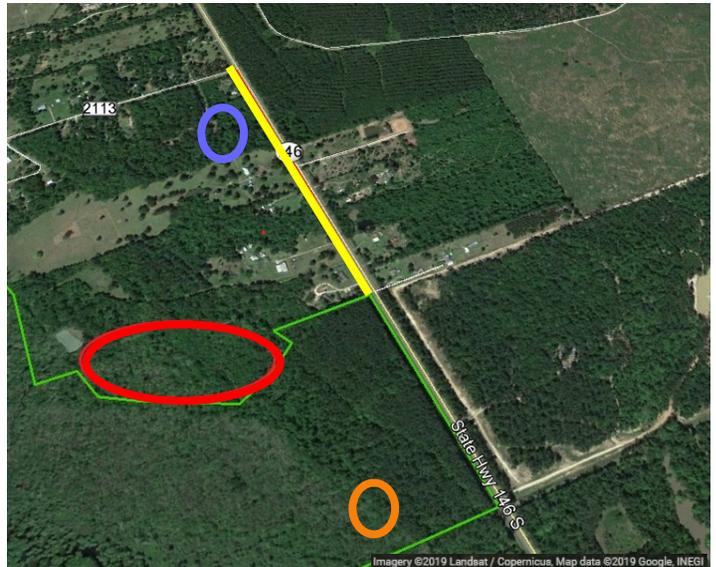
For Public Parks and Recreational Properties and Historical Sites:

- Determined significant by official with jurisdiction

Transportation Enhancement or Mitigation Examples



The proposed project would construct a trail in a historic park. The trail is not part of a larger network and is only within the park boundaries. No right of way or permanent easements would be required from the park property. Project staging, however, would require a temporary easement within the boundaries of the historic property. Through the Section 106 process, the SHPO agreed there would be no adverse effect to the property; TxDOT can pursue a 4(f) exception. A separate exception is required for the park and the historic property.



A—A “take” of vegetation adjacent to a proposed widening project (yellow) could be mitigated for by the purchase of a portion of private vegetated acreage (red) for incorporation into the adjacent (green) National Wildlife Refuge. Since the impact to the vegetation is mitigated the 4(f) Exception could apply.

B—To mitigate for a project impact to wetlands (blue) a new wetland (orange) is created within the boundary of the adjacent National Wildlife refuge. Since the impact to the wetland would be mitigated the 4(f) Exception could apply.

Other Exceptions:

23 CFR 774.113 (a): Historic Transportation Facilities in certain circumstances including some bridges and culverts.

23 CFR 774.113 (b): Archeological sites impacted that are on or eligible for the National Register when the resources are important chiefly for what can be learned by data recovery and has minimal value to preservation in place.

23 CFR 774.113 (e): Federal lands transportation facilities described in 23 U.S.C 101(a)(8). The term “Federal Lands transportation facility” means a public highway, road, bridge, trail, or transit system that is located on, is adjacent to, or provides access to Federal lands for which title or maintenance responsibility is vested in a State, county, town, township, tribal, municipal, or local government.



Section 4(f) Exceptions Tips and FAQ

◆ When determining if Section 4(f) applies, ask the following questions:

Is the property publicly owned?

Public ownership in Section 4(f) refers to ownership by a local, state or Federal government agency. Property may be privately owned, but if it is managed and operated by a city for public use, Section 4(f) should be considered.

Is the property open to the public?

The property must be open to the public during regularly scheduled hours. If access is restricted, membership is required, or the facility is locked when not in use the property is not subject to Section 4(f).

If the property is a school, is there a recreational facility adjacent to the project?

A school property is not protected under Section 4(f). Any recreational facilities open to the public present on the school property are protected. If the project would result in impacts adjacent to a recreational facility on the school property, Section 4(f) would apply.

◆ FAQ related to Section 4(f) Exceptions:

If the proposed work is strictly within the park for the benefit of the park does 4(f) apply?

A Section 4(f) Exception is required for any work in a public park. This includes the construction of trails within the park, even when no ROW or easements are required.

Is a trail a 4(f) property?

Trails are a recreational facility and are subject to Section 4(f). If a proposed project would require the closure, relocation or restrict access to the trail, Section 4(f) must be addressed.

Can you have an Exception and a De Minimis for the same property?

If a 4(f) Exception applies for a park property, an exception for the same property may not apply for an associated historic or archeological property. Each 4(f) resource must be evaluated independently to determine the appropriate 4(f) applicability. For example, a property may qualify as an exception for the park, but if the park property also has a historical component it may require a Section 4(f) *De Minimis*.

A trail project passes through multiple parks. Can one checklist be completed for the entire project?

A checklist is required for each Section 4(f) property. If a project proposes sidewalks through three parks then three separate checklists would be completed. Multiple checklists may also be required for a single property if an exception is required for both a park and a historic or archeological property.

If a city is the official with jurisdiction, how do I know where to send the concurrence letter?

This may vary depending on the city. The city's parks department is typically a good place to start followed by the city manager's office. Determine the individual with the authority to sign the concurrence.

How is the exception for eligible archeological sites handled?

ENV staff will handle coordination with the OWJ (the SHPO) and complete the checklist. District staff should make sure that the checklist and documentation are completed in a timely fashion.

Additional Resources

FHWA Section 4(f) Policy Paper:

<https://www.environment.fhwa.dot.gov/legislation/section4f/4fpolicy.aspx>

TxDOT Section 4(f) Toolkit:

<https://www.txdot.gov/inside-txdot/division/environmental/compliance-toolkits/section-4f.html>

