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Commissioner M. Barnett Lawley
Alabama Department of Conservation and Natural Resources
64 N. Union Street, Suite 468
Montgomery, AL 36130

Dear Commissioner Lawley:

On behalf of Citizens for the Preservation of Shell Toomer Parkway, this letter is to explain why granting commercial access to a private development on the Shell Toomer Parkway in Auburn, Alabama would be a violation of the law.

The Alabama Department of Conservation and Natural Resources (DCNR) is currently considering whether to grant commercial access to the Shell Toomer Parkway, for the benefit of a private shopping center development. We are writing to assert that this would be a violation of the laws and regulations concerning this unique parkway in the State of Alabama. Firstly, DCNR does not have the authority to grant such commercial access to the public parkway. Secondly, under the precedent established in *Ex Parte LEAF*, even if DCNR did have the authority to alter the terms of the creation of this public roadway, they do not have any regulations in place defining the terms and process for approval of such a change. And finally, a grant of access to this road for a recreational golf course neither changed the fundamental character of the parkway nor set a precedent allowing DCNR to now ignore the status of the road. A gradual erosion of the public nature of a state asset such as this parkway does not remove the DCNR's duty to enforce the law.

The DCNR has specific legal requirements regarding lands designated as parks and parkways such as the Shell Toomer. There is no doubt that this roadway (including the bike path) is entitled to these protections.

It is well established legal character of land in the state of Alabama is determined by the language in the deeds of sale. In this case, the "Right of Way Deeds for Parkway," which legally transferred the land to the Department of Conservation in 1941, state that the land was

transferred “for a parkway.” In addition, the construction of the road was funded by the federal government for this specific purpose. Highway plans dating from 1946 reveal the design of the Shell Toomer road as a parkway with 300 ft. of right of way. The express condition in the creation of the parkway cannot now be altered by an agency decision.

The Alabama legislature has defined a parkway as “Any elongated strip of land suitable for recreation and a pleasure vehicle road to which the owners or lessees of abutting property shall have no right of direct access.” Alabama Code (1975), § 9-14-1.

The American Association of State Highway and Transportation Officials, a nonprofit organization representing highway and transportation departments in the 50 states, the District of Columbia and Puerto Rico, has a more elaborate definition of the term parkway. The association defines a parkway as “an arterial highway for noncommercial traffic, with full or partial control of access, and usually located within a park or a ribbon of parklike developments.” The Free Lance-Star, *Outer Connector, Link to I-95 Still Years in the Future*, September 16, 2002, available at <http://fredericksburg.com/News/FLS/2002/09002/09162002/720259>. This definition has also been adopted by several states including Nebraska (Neb. Rev. Stat. § 39-1302 (2003)) and Alaska (Alaska Preconstruction Manual Section 1100.5 (2003) available at http://www.dot.state.ak.us/stwddes/dcsprecon/assets/pdf/preconstmanual/revised_sections/sect1100_0603.pdf).

The term has been further explained:

“A parkway is much more than the roadway. It is a corridor, which is set within a context. The right-of-way includes medians and buffers, overpasses and tunnels, entrances and exits, and adjacent parkland. These constitute its built components (hardscape) and soft components (landscape). The context includes scenic views, adjacent neighborhoods, features and sites accessible from the roadway -- in short, everything that contributes to its unique character.”

The Henry Hudson Scenic Byway Initiative, *The Parkway Defined*, available at <http://www.henryhudsonparkway.org/hhp/facts1.htm>.

In 1938, the National Park Service identified eight factors that differentiated parkways from ordinary highways:

- * designated for noncommercial, recreational use
- * avoided unsightly buildings and other unattractive roadside developments
- * were built within a much wider right-of-way to provide an insulating strip of parkland between the roadway and the abutting private property
- * eliminated frontage and access rights and preserved the natural scenic value of the landscape they passed through
- * preferably took a new location, bypassing existing built-up communities and avoiding congestion aimed to make accessible the best scenery in the country it

traversed, hence the shortest or most direct route was not necessarily a primary consideration

- * eliminated major grade crossings

- * had entrance and exit points spaced at distant intervals to reduce interruptions to the main traffic stream

Id.

While these criteria apply to parkways generally, they accurately characterize the Shell Toomer Parkway. The proposed commercial development and access to the parkway would destroy the character of this public resource and violate Alabama law.

The Department does have the authority to sell or lease lands under its jurisdiction when it is in the interests of the state for the development and management of state parks and parkways. Alabama Code (1975), § 9-2-3. However, the Department is prohibited from violating the terms of any contract or agreement with the federal government or other party. *Id.* The terms of the creation of this parkway are express and clear and establish that this road is to be used for public purposes. To change the character of the parkway would violate the terms of the deeds.

As held by the Supreme Court of Alabama in *Trustees of Howard College v. McNabb*, 288 Ala. 564, 573, 263 So. 2d 664, 672 (Ala. 1972):

“We are of the opinion that whatever distinctions there may be between public ‘parks’ and ‘parkways,’ by definition, both must be ‘for the benefit of the public’ at large, and open for the use and enjoyment of everyone, rather than for the use of those few individuals who own the adjoining property.”

Thus, the Department has no legal authority to allow use of the parkway as an access for private development and commercial uses on adjoining property.

The terms of the creation of the Shell Toomer prohibit the DCNR from changing its character. However, even if the agency were empowered to make such a change, relevant regulations must be in place prior to the issuance of any permission for access. State agencies must adopt regulations to implement legislation by following the rulemaking procedures of the Alabama Administrative Procedures Act before applying new policies. *Ex parte Legal Envtl. Assistance Found., Inc.*, 832 So. 2d 61, 66 (Ala., 2002). Since the granting of access to a parkway would be a matter of general applicability to anyone requesting such access on any state parkway, under the above case, the Department is legally unable to grant such access until such time as it has properly adopted regulations providing the procedures for such a grant of access. Such regulations must be adopted through the AAPA rule making procedures with full public notice and opportunity for comment.

Any past failure to preserve the nature of this parkway through negligence or illegal

decision does not change its fundamental character and the applicable protections. For example, the DCNR's previous grant of access to this parkway for a golf course is irrelevant to the current situation. This action cannot change the legal characteristics of the public road.

First of all, the golf course is defined in Auburn zoning regulations as "recreational," not commercial. And even if the Department had inappropriately granted access to the road in the past, the fact remains that a grant of such access is a violation of the terms of the deeds creating the parkway. There is no law that states that a violation of the law sets a precedent allowing future violations of the law. Prior improper grants of access do not and cannot set a precedent for any request for access now.

According to the development proposal, three intersections would be cut into the parkway and the public bike path. The middle access to the shopping center would be four lanes of traffic with a median, equivalent to five lanes. These intersections will be an obstacle to users of the bike path. One can assume that the access points will have to have flood lighting using poles, numerous traffic signs and sign poles, commercial signs and sign poles, traffic lights, etc. that are incompatible with park land conservation and the preservation of the natural landscape of parklands. The access creates adverse impact, a safety hazard, and is incompatible with the nature and purpose of State park lands.

For the foregoing reasons, we object to the Department granting access to the Shell Toomer Parkway for any commercial use. On behalf of Citizens for the Preservation of Shell Toomer Parkway, we are prepared to take all legal actions necessary to see that this unique and valuable resource is protected. We are confident that you are willing to fulfill your obligations to the public trust and do the same. We stand ready to assist you and your Department in protecting this parkway according to the law.

We request that you provide us with prompt notice of any permissions or other approvals granted for access to the Parkway or for the ALDOT to work on it in any way. We also request that you give us prior notice of any meeting you or any of your staff have or plan to have with ALDOT, the City of Auburn, and/or the developers seeking this access. We would like to attend any such meetings dealing with this public trust resource; they should be open to the public. Thank you for your time and attention.

Sincerely yours,

Ray Vaughan,
Attorney for Citizens for the
Preservation of Shell Toomer Parkway