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Preserving America's Heritage

May 3, 2017

Mr. Walter C. Waidelich, Jr.
Acting Deputy Administrator
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

Dear Mr. Waidelich:

In accordance with Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108) and its implementing regulations, "Protection of Historic Properties," (36 C.F.R. Part 800), I am providing to you the final comments of the Advisory Council on Historic Preservation (ACHP) for the termination of the I-95 Providence Viaduct Programmatic Agreement.

You must take these comments into account, and respond to them, prior to making your final decision on the project. As required by Section 110(l) of the Act (54 U.S.C. § 306114), you may not delegate this responsibility. The regulations at 36 C.F.R. § 800.7(c)(4) delineate the requirements of the response.

The ACHP appreciates the efforts of FHWA to protect these properties and welcomes the opportunity to work with it to implement these recommendations.

We look forward to your response.

Sincerely,

Milford Wayne Donaldson, FAIA
Chairman

Enclosures



Preserving America's Heritage

**Comments of the Advisory Council on Historic Preservation
To the Federal Highway Administration Regarding the I-95 Viaduct Project
In Providence, Rhode Island
May 3, 2017**

I. Introduction

The Advisory Council on Historic Preservation (ACHP) provides the following comments to the Federal Highway Administration (FHWA) regarding the termination of the Providence Viaduct Programmatic Agreement, pursuant to Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, and its implementing regulations at 36 C.F.R. Part 800 (Section 106). The Programmatic Agreement (PA) was negotiated to resolve adverse effects to historic properties resulting from the reconstruction of two bridges along the I-95 corridor in downtown Providence, Rhode Island. Funding for this project was provided to the Rhode Island Department of Transportation by FHWA. After several attempts to resolve an impasse in the implementation of that Programmatic Agreement, on January 19, 2017, FHWA terminated it, having determined that further consultation to resolve the impasse was unlikely to be productive. The termination triggered the need for the ACHP's comments in accordance with 36 C.F.R. § 800.7 and Section 110(l) of the NHPA, 54 U.S.C. § 306114.

The ACHP received documentation from the FHWA along with its notice of termination and its response to a subsequent request from the ACHP for more information. The ACHP has also received written comments from the Narragansett Indian Tribal Historic Preservation Officer; Rhode Island Department of Transportation (RIDOT); Rhode Island Attorney General's Office; Rhode Island State Historic Preservation Officer (SHPO); the Town of Charlestown, Rhode Island; and two private citizens regarding the proposed undertaking.

Because the Section 106 consultation process has been terminated prior to all stipulations within the PA being carried out, the FHWA Administrator must take into account the ACHP's comments in making a final decision on how to proceed with the undertaking. The Administrator also must provide to the ACHP a summary of the decision that contains the rationale for the decision and evidence of consideration of the ACHP's comments, and provide this information to all of the Section 106 consulting parties and the public. Once these steps have been completed, the Section 106 process for this undertaking will have concluded.

II. Background

The project includes the re-construction of two elevated sections of the I-95 corridor in downtown Providence, Rhode Island. Construction will require the installation of approximately 40 piers and abutments, each supported by multiple pilings driven through fill deposits to depths that will reach or exceed 30 feet. The previously disturbed area contains archaeological resources significant to the Narragansett Indian Tribe (tribe), including portions of the Providence Covelands Archaeological District (RI 935). The Providence Covelands Archaeological District was identified and found eligible for listing on the National Register of Historic Places in 1982. Although the area had been previously disturbed

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during the original construction of the Interstate system, subsequent archaeological investigations associated with the Northeast Rail Corridor track relocation and the Civic Center Interstate Highway I-95 interchange construction discovered intact cultural deposits dating back at least 5,000 years.

The FHWA determined that the undertaking would have adverse effects on historic properties and obtained the concurrence of the SHPO on this determination. It invited the ACHP's participation in consultation in accordance with 36 C.F.R. § 800.6(a)(1). The ACHP declined to participate, noting at that time the parties appeared likely to reach agreement on reasonable steps to resolve these adverse effects.

Early on, the FHWA determined, in consultation with the SHPO, RIDOT and the tribe, that a Phase III archaeological data recovery program to mitigate the effects of the undertaking on remains within the Archaeological District was not feasible due to environmental, logistical, and cost factors, and, thus, alternative mitigation measures were negotiated.

Under the alternative mitigation plan in the PA, RIDOT committed to the purchase of other (offsite) properties that were identified specifically because they are of traditional religious and cultural importance to the Tribe and to transfer two of those properties to the tribe (the Providence Boys Club-Camp Davis and Chief Sachem Night Hawk properties). RIDOT also committed to transfer a third property to be jointly owned and managed by the tribe and the state (the Salt Pond Archaeological Preserve). According to the PA, all property transfers would include "appropriate covenants that preserve the property[ies] and [their] cultural resources." RIDOT, the SHPO, and the tribe executed the PA in October 2011. The ACHP was not a signatory to the PA as it declined to participate in the consultation.

III. Description of Impasse and Attempted Resolution

As RIDOT purchased multiple sites under the terms of the PA and subsequent amendments, it prepared deeds and covenants to transfer the properties to the tribe with conditions that the tribe also waives its sovereign immunity as it pertains to the mentioned covenants, and agree to the State of Rhode Island retaining civil and criminal jurisdiction over the properties. The tribe refused to agree to such conditions, and the state and RIDOT also refused to reconsider the conditions despite multiple requests from the FHWA.

From December 2013 to January 2017 the parties attempted but were unable to resolve this impasse. The parties sought assistance through mediation provided by the Institute for Environmental Conflict Resolution (IECR), however this mediation did not result in agreement. Onsite meetings and written guidance from the FHWA headquarters to RIDOT similarly were unproductive. Likewise, efforts by the ACHP to negotiate a compromise among consulting parties including the ACHP's attendance at a meeting on Narragansett tribal land, were also unsuccessful.

The ACHP and the FHWA concluded that the requirement by RIDOT that the tribe waive its sovereign immunity in order to receive these properties was not a requirement of the PA. However, efforts to convince the state to reconsider that condition were unsuccessful.

After multiple attempts to reach agreement on resolving this impasse and revising the PA accordingly, the FHWA terminated the PA consultation and requested the ACHP's comments under Section 106 of the National Historic Preservation Act. Stipulation 8 in the PA provides "If the signatories cannot agree to appropriate terms to amend the PA, any signatory may terminate the PA." Stipulation 9 of the PA then sets forth that if the PA is terminated, "FHWA shall comply with subpart B of 36 CFR 800 (800.3-800.13)." In this particular case, that process, as reflected in the impasse and unsuccessful attempts to resolve it, necessarily leads to the need for the ACHP to issue its formal comments to the head of the agency under 36 C.F.R. § 800.7. The ACHP chairman is issuing comments on behalf of the membership

after considering the mentioned comments from stakeholders and the public and input from ACHP members.

IV. Findings

The decision not to recover archaeological data from within the area of potential effects of the undertaking and instead to preserve the Salt Pond Archaeological Preserve (SPAP), the Providence Boys Club-Camp Davis property, and the Chief Sachem Night Hawk property was appropriate, reasonable, and in the public interest.

The SPAP is clearly significant and warrants protection. According to the SHPO “The SPAP Archaeological Site (Site RI 110), located at the head of Point Judith Pond in Narragansett, RI, is a large, complex, and nationally significant Narragansett Indian coastal village from the late Woodland period,” and the other two properties are of significance to the Tribe. These kinds of off-site mitigation measures are particularly appropriate in cases like the present one, where on-site measures may not be in the public interest and there may be a disparity between costs and expected benefits.

The impasse regarding state retention of jurisdiction over the lands and tribal waiver of sovereign immunity should have been foreseen and addressed before execution of the PA.

Regrettably, it appears that RIDOT and the tribe did not adequately anticipate the conflicts that the agreed-upon transfers with “appropriate covenants” could create. Existing Rhode Island state law requires the state to retain jurisdiction over all lands within its borders, with specific exceptions for federal ownership. R.I. Gen. Laws § 42-1-2. Moreover, the long history between the state and the tribe is one where the state has retained jurisdiction even over the Narragansett tribal lands per the terms of the Rhode Island Claims Settlement Act in 1978. Like other states, Rhode Island also relies on the ability of relevant parties to sue property owners to enforce protective covenants placed on their lands. The tribe, on the other hand, as is historically and widely common among tribes, places a high premium on protecting its sovereignty, including sovereign immunity against being sued without its consent. These facts, and the conflicts that ultimately and predictably flowed from them, should have been known and explicitly addressed and resolved by the state and the tribe before they executed the PA and its amendments.

The tribe has a legitimate role and is appropriately positioned to be a long-term caretaker of the SPAP (with the state), Providence Boys Club-Camp Davis, and Chief Sachem Night Hawk properties.

These properties are of cultural and religious significance to the tribe and play an important role in evidencing the long history of the tribe and others in the region. Given this connection and the tribe’s ancestral ties to these properties, the tribe is uniquely positioned to interpret these properties and ensure they are maintained and protected in a way that ensures their long-term preservation. Protection of the SPAP, Providence Boys Club-Camp Davis, and Chief Sachem Night Hawk properties now in state ownership is also clearly in the broader public interest.

V. Recommendations

Construction of this project should not be delayed

Recognizing the broad public interest, the construction of this project should not be delayed by the resolution of these issues. The federal policy behind the NHPA is to “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.” 54 U.S.C. § 300101(a). The importance of this transportation project, as part of the I-95 corridor, one of the most heavily used transportation corridors in the eastern United States, transcends any obstacles in implementing the remedies utilized to resolve this

dispute. Therefore, all parties are encouraged to work together to find an accommodation consistent with advice from the ACHP and to put their differences aside in the spirit of serving the overall public interest.

The Salt Pond Archaeological Preserve should be preserved as agreed to in the PA

FHWA should work with the state and the tribe to ensure the SPAP mitigation as proposed in the PA is carried out expeditiously. The mitigation provided for joint ownership of the property by the state and the tribe, joint management under an agreement between the two, preservation covenants, and reasonable and controlled public access. As RIDOT stated in its comments to the ACHP of March 20, 2017, it is willing to proceed with joint ownership of this property without requiring the waiver of tribal sovereign immunity.

As noted, this action will require a Memorandum of Understanding between the state and the tribe to adequately describe how the joint management will be carried out. The ACHP does not expect to be involved in the negotiation or implementation of such a memorandum; however, it is the ACHP's hope that the state and tribe are able to work collaboratively toward the long-term protection of these important properties.

As previously noted, the SPAP is of premier significance and warrants long-term preservation; therefore, complying with the terms of the PA regarding its preservation should be a priority among the parties.

The FHWA should encourage the state and the tribe to proceed with the transfer of the Providence Boys Club-Camp Davis and Chief Sachem Night Hawk properties to the tribe as sole owner, without the covenants and without the tribe being required to waive sovereign immunity, but with the state retaining jurisdiction

The pursuit of preservation covenants for these two properties under the PA, and the related state requirement for a waiver of immunity by the tribe, appears to be an unnecessary stumbling block. The ACHP understands the need to be able to enforce a covenant in order for it to properly function but disagrees with the continued demand for such covenants in this case. The stated purpose of having covenants on these properties was to “ensure that [they would] preserve the property[ies] and [their] cultural resources in perpetuity.” Stipulation 3(b) and (c) of the PA. However, the state agrees that the SPAP is the “marquee” property, and does not indicate why the historic preservation of these other two properties is of particular importance to the state. The state also does not provide any evidence to support its apparent belief that the tribe, which attaches significance to them and has an inherent interest in their preservation, might choose not to preserve them absent the covenants. The ACHP therefore recommends that FHWA encourage the state to forego the requirement for a protective covenant on these two properties and its related demand for a waiver of tribal sovereign immunity.

Regarding the issue of state retention of jurisdiction over the two properties, the ACHP is sensitive to the tribe's objections to such a condition. The ACHP recognizes that issues of tribal sovereignty, and its zealous protection, are of preeminent significance to all federally recognized tribes. However, it is also cognizant, as mentioned above, that the specific historic relationship of Rhode Island and the Narragansett Indian Tribe is unique in that the state, through a settlement agreed to by both entities, has retained civil and criminal jurisdiction over all lands held by the tribe. The ACHP declines advising on alterations to the existing practice regarding jurisdiction, particularly since the ACHP is already recommending that the two properties be transferred to the sole ownership of the Tribe so it can preserve the properties as it sees fit, without interference of the state regarding such preservation through covenants.

FHWA should seek the ACHP's assistance in the event impasses are anticipated

The ACHP notes that the FHWA sought and engaged in extensive mediation with the assistance of the IECR prior to notifying the ACHP of the potential for an impasse regarding the implementation of the PA. While mediators can provide value in such situations, the parties may have benefited from the ACHP's advice and assistance regarding the requirements of Section 106 prior to entering into such mediation. The ACHP urges the FHWA to consider seeking the ACHP's assistance earlier should such impasses be reached in other projects in the future.

VI. Conclusion

The efforts by FHWA and the signatories of the PA to protect the Salt Pond Archaeological Preserve, Providence Boys Club-Camp Davis, and Chief Sachem Night Hawk are laudable and consistent with the goals of the NHPA. The ACHP urges FHWA to adopt the ACHP's recommendations on resolving the unfortunate impasse that led to the termination of that agreement and to take steps to ensure these properties receive the long-term protection they are due.