



STATE OF DELAWARE  
**DEPARTMENT OF TRANSPORTATION**

800 BAY ROAD  
P.O. Box 778  
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.  
SECRETARY

October 28, 2009

Mr. Timothy Slavin, Director  
Division of Historic and Cultural Affairs  
21 The Green, Suite A  
Dover, Delaware 19901

Dear Mr. Slavin:

The Delaware Department of Transportation (DelDOT) Environmental Studies Section is pleased to submit the Documentation in Support of for a Determination of Effect with attached Memorandum of Agreement for the SR 1, Little Heaven Grade Separated Intersection Project. The project is funded under state contract # 24-122-02 and federal aid number NH-K008(6). The report document reflects all our multi stage coordination efforts as far as incorporation and Section 106 consultation of adverse effect. The Memorandum of Agreement (MOA) memorizes Section 106 consultation, effect determinations, mitigation measures, and future archaeological needs.

We hope that you will also provide an accompanied letter acknowledging to DelDOT and FHWA that Section 106 consultation has been effectively implemented and your agency's opinion on the direct impacts to historic properties. The MOA and Effect document with relevant agency opinions will be included in the Final Environmental Assessment and Section 4(f) Evaluation prepared for the Little Heaven Project.

Please coordinate your review directly with Michael Hahn at 302-760-2131 of my section. As always, thank you for your continued cooperation.

Sincerely,

Therese M. Fulmer, Manager  
Environmental Studies

TF/mh  
Enclosure

Nick Blendy, FHWA (with copy)  
Dan Montag, FHWA  
Gwen Davis, DE SHPO  
Robert McCleary, Assistant Director, Engineering Support  
Brian McIlvaine, Project Engineer  
Michael Hahn, Environmental Studies  
David Clarke, Environmental Studies  
Kevin Cunningham, Environmental Studies  
William Conway, Century Engineering, Inc.  
File

State of Delaware  
Historical and Cultural Affairs

*M. Hahn  
DelDOT*

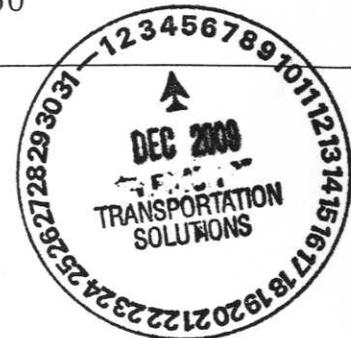
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November 24, 2009

Mr. Nicholas Blendy  
Environmental Specialist  
Federal Highway Administration  
J. Allen Frear Federal Building  
300 South New Street  
Dover, DE 19904-6726



RE: SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, DE; State Contract No. 24-122-02; Federal Aid Project No. NH-K008(6); Finding of Adverse Effect and draft MOA

Dear Mr. Blendy:

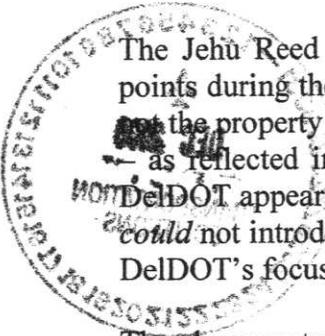
The DE SHPO has reviewed the documentation supporting the finding of Adverse Effect and draft Memorandum of Agreement (MOA) for the above-referenced undertaking, prepared by the Delaware Department of Transportation (DelDOT) on your agency's behalf. Additionally, this office has been considering DelDOT's proposed approach for evaluating archaeological sites within the project's Area of Potential Effect (APE). The DE SHPO would like to offer its formal comments on these aspects of the consultation under Section 106 of the National Historic Preservation Act, and its implementing regulations (36 CFR Part 800).

The Adverse Effect documentation indicates that DelDOT staff have applied the Criteria of Adverse Effect (36 CFR Part 800.5) to those properties within the undertaking's APE that are known to be listed in, or are eligible for listing in the National Register of Historic Places. These properties include: the Jehu Reed House (Cultural Resource Survey # K00137, listed); Barratt's Chapel (K00103, listed); the Mt. Olive Colored School (K02685, eligible); the Thomas James House (K02686, eligible); and the W.C. Fountain Agricultural Complex (K01689, eligible).

In keeping with previous consultation with this office, DelDOT has, on behalf of your agency, determined that the project: will not affect the W.C. Fountain Agricultural Complex; will not adversely affect Barratt's Chapel or the Thomas James House; but will adversely affect the Mt. Olive School. The DE SHPO concurs with these findings.

However, different from the understanding reached earlier, DelDOT presently proposes that the project will not adversely affect the National Register-listed Jehu Reed House. The DE SHPO does not agree with this finding. DelDOT's decision in this regard confuses the property's integrity with the potential for the property to be adversely affected by the undertaking.





The Jehu Reed House's physical integrity has certainly suffered in recent years. At several points during the six-year consultation for this project, our agencies have considered whether or not the property retains sufficient integrity to sustain its National Register status. The conclusion – as reflected in DelDOT's documentation – has been that the property is still eligible. Yet DelDOT appears to be stating that because the property's integrity is diminished, that the project *could* not introduce adverse effects of its own. The DE SHPO disagrees with this interpretation. DelDOT's focus on the property's integrity really amounts to questioning its eligibility.

The documentation also applies an exceptionally narrow reading of the Criteria of Adverse Effect, examples 36 CFR Part 800.5(a)(2)(iv) and (v) to the Jehu Reed House. The approach is inconsistent with DelDOT's assessments for other projects, found to adversely affect similar historic properties. This office also finds that, contrary to statements in the documentation, the current viewshed of the property is not significantly different than it was at the time of its listing in the National Register. The project's construction of a 22-foot tall, grade-separated intersection directly in front of the house will, however, introduce a significant change. In assessing whether this change constitutes an adverse effect, DelDOT fails to consider the cumulative effects of the undertaking on the Jehu Reed House.

Therefore, the DE SHPO recommends that FHWA and DelDOT either reconsider their assessment of the project's adverse effects on the Jehu Reed House, or formally re-address the question of resource's eligibility by seeking the opinion of the Keeper of the National Register, an avenue provided for under the Section 106 process (36 CFR Part 800.4(c)(2)).

That said, the DE SHPO agrees that adverse effects to the Jehu Reed House cannot be avoided or directly mitigated. Based on earlier consultation, DelDOT has already undertaken alternatives analysis and supported its reasons for the current project design. The property has already been sufficiently recorded. Other typical mitigative treatments – landscaping and altering project design materials – would not be effective in this circumstance. Alternative forms of mitigation should be sought. DelDOT's documentation and draft MOA includes some suggestions that could be explored further.

In addition to concerns with the proposed finding for the Jehu Reed House, the sections of the draft MOA pertaining to architectural properties requires both substantive and technical revisions before the DE SHPO can agree to sign the document. This office is committed to working expeditiously with FHWA and DelDOT to resolve these issues.

With respect to potential archaeological properties, the documentation accurately states that efforts to identify and evaluate sites that may be eligible for listing in the National Register of Historic Places have not yet been completed. DelDOT has elected to phase these efforts, as permitted under the Section 106 regulations. The draft MOA outlines the process for: further efforts to identify and evaluate archaeological sites; assessing the effects of the project on eligible archaeological sites; consulting on ways to avoid, minimize and/or mitigate for adverse effects; and involving other consulting parties, including Native Americans, and the public. This

office agrees that the measures outlined in the draft MOA for archaeological resources are appropriate. Only a few minor technical changes are suggested for this section of the MOA.

Consultation concerning the results of the archaeological survey to date is ongoing. Artifacts have been found on nearly all of the tested parcels within the APE. DE SHPO and DelDOT archaeologists have been working with the consultant to determine which areas constitute archaeological sites (15 at last count), and of those sites, which would require further evaluation to determine their National Register eligibility (9 at last count, cited in the documentation).

DelDOT has suggested that for some of these sites, alternatives measures be considered in lieu of evaluating eligibility. After considerable discussion among our staff, the DE SHPO cannot support this proposal as is. Such alternatives are best considered at the mitigation stage, when there is better understanding of what may be lost and how that loss can be appropriately compensated.

However, in discussing these issues with DelDOT staff, it is clear that our agencies' share the basic goal that inspired their proposal. That is, to ensure that the "reasonable and good faith effort" to identify historic properties achieves both the intent of Section 106 and adds to our understanding of Delaware's past. Such efforts should include: applying well-defined sampling strategies; applying clearly stated (and perhaps more stringent) criteria for eligibility of sites, which may allow for making better decisions at the identification phase; and considering the most judicious use of available funds.

This office is committed to working with FHWA and DelDOT on these issues, for the SR 1/ Little Heaven project and others. The DE SHPO is also open to seeking further guidance on these issues, from the Advisory Council on Historic Preservation, the Federal Highway Administration, and other states.

In sum, as a result of our review of DelDOT's adverse effect documentation and draft MOA, and consultation on archaeological properties, the DE SHPO recommends that:

1. FHWA and DelDOT consider the project's effects on the Jehu Reed House to be Adverse, and consult with the DE SHPO to identify and implement an alternative form of mitigation, or seek the opinion of the Keeper of the National Register; and
2. FHWA, DelDOT and DE SHPO consult further to craft a mutually acceptable Memorandum of Agreement to resolve the project's adverse effects; and
3. Under the auspices of the MOA, DelDOT and DE SHPO staff continue to work together to clearly define a defensible sampling strategy and evaluation process for archaeological sites that may be affected by the project, and thereby reduce the overall level of effort.

Thank you for your consideration of these comments. As noted above, this office is committed to resolving differences of opinion among our agencies, and successfully concluding the Section 106 consultation for the SR 1/Little Heaven Intersection project. DE SHPO staff will be

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Letter to N. Blendy  
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available to work on these issues with FHWA and DelDOT at the next coordination meeting, scheduled for December 9, 2009. In the interim, if you have any questions, please do not hesitate to contact me (at [stephen.marz@state.de.us](mailto:stephen.marz@state.de.us) or 302-736-7400) and/or Gwen Davis, who is reviewing this project (at [gwen.davis@state.de.us](mailto:gwen.davis@state.de.us) or 302-736-7410).

As requested, the DE SHPO will also provide comments on the project's direct effects on historic properties. To this end, please provide a copy of the draft Section 4(f) Evaluation for our review.

Sincerely,



Stephen Marz, Deputy Director  
and Deputy State Historic Preservation Officer

cc: Dan Montag, Federal Highway Administration  
Rob McCleary, Asst. Director, Engineering Support, DelDOT  
Therese M. Fulmer, Manager, Environmental Studies, DelDOT  
Brian McIlvaine, Project Engineer, DelDOT  
Michael C. Hahn, Senior Highway Planner, DelDOT  
Kevin Cunningham, Archaeologist, DelDOT  
David Clarke, Archaeologist, DelDOT  
Gwenyth A. Davis, Archaeologist, SHPO, Division of Historical & Cultural Affairs  
Joan Larrivee, Architectural Historian, SHPO, Division of Historical & Cultural Affairs



24-122-02

**STATE OF DELAWARE**  
**DEPARTMENT OF TRANSPORTATION**

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**CAROLANN WICKS, P.E.**  
**SECRETARY**

January 11, 2010

Mr. Timothy Slavin, Director  
Division of Historic and Cultural Affairs  
The Green Suite 21A  
Dover, Delaware 19901

Dear Mr. Slavin:

On behalf of the Federal Highway Administration (FHWA), the Delaware Department of Transportation (DelDOT) Environment Studies Section has recently received comments regarding the Documentation Support for the Determination of Effect (dated October 2009) for the SR 1/Little Heaven Grade Separated Intersection Project. We are specifically focused on your 11/24/09 letter to FHWA and in subsequent agency discussions on 12/18/09.

For records and on-going coordination, DelDOT acknowledges that the undertaking's effects upon the Jehu Reed House (Delaware CRS No. K-137) are adverse for Section 106 consultation. After direct access onto the property, our agency does not dispute the fact that visual aesthetic effects will likely occur. As the property's relevant defining characteristics are sparsely seen from the road or involved with the project, the question remained is whether the proposed undertaking is really negatively impacting the property and deemed as adverse?

Although the defining characteristics of the Jehu Reed House were never specifically defined and those remaining defining characteristics have been compromised to some degree, it is safe to say that the integrity of location and/or design might be adversely affected (visually) by the undertaking.

After discussion with your office and FHWA and rather than choosing an alternative path for the Keeper of the National Register's opinion of its listing, we deem the visual effect to this listed property as adverse under 36 CFR 800.5(a)(2)(v). As such, we have revised our final Section 106 Finding of Adverse Effect with an accompanied Memorandum of Agreement to reflect this change. In addition, since the effect is considered adverse we have proposed mitigation measures for the historic Jehu Reed property. Proposed measures were already discussed with your office on the property and are simply recognized as un-mitigated.

Conversely it was not our understanding that the project's effects to the Jehu Reed property (and others) were not fully conceived and agreed upon in earlier consultation. We apologize for this misconfusion. However, as part of this, our agency still declares under 36 CFR 800.5(a)(2)(iv), that the change in character of the property's use or of physical features within the property's setting that contribute to its historic significance is not adverse. This is explained in the documentation. The Jehu Reed property will remain as residential and the change of physical features within the setting of the property that contribute to its historic significance is really not applicable. Within the undertaking area, all adjacent land uses, setting, and feeling surrounding the Jehu Reed House (property) does not contribute, nor indemnify, to the property's historic significance. In sum, nothing within the surrounding area that is identified as physical feature contributes to this property's local



significance. Thus, transportation changes within the surrounding area would not be considered adverse. Your 11/24/09 comments did not dispute or support this with reasoning.

Lastly, our staff had modified language in the current adverse effects document to reflect the future and on-going archaeology studies. It is apparent that "alternative" field measures or methodologies may be employed in the field, but not as a specific parameter to identify and then discard any number of archaeological sites identified under the Phase I effort. Our staff will elaborate and discuss the details with your office and FHWA as we progress.

In this regard, we have revised and are resubmitting the Documentation Support for the Determination of Effect with MOA. We also specifically request your agency comments and opinions with respect to historic properties, their effects, and formalized mitigation measures under the MOA.

In addition to the "Finding", as the agency with jurisdiction, we will request your opinion in writing on the effects to properties applicable to Section 4(f) of the U.S. Department of Transportation Act and those under the new *de minimus* Section 4(f) application. As a point of reference, please refer to the informational draft provided directly to Ms. Gwen Davis.

Under the Section 4(f) Evaluation, the only property involved is the Mount Olive School. This former schoolhouse would be impacted by takes and uses in of the property. Your concurrence is also needed (in writing) under 23 CFR 774.13 that minor takes or temporary occupancy and use of the property upon the Barratt's Chapel and Cemetery and the Thomas James House meets exception or are qualified and not considered adverse under the Section 4(f) *de minimus* finding. This is a necessary step for FHWA and as part of the final NEPA compliance.

For these reasons, we request your 30-day concurrence in writing. Should you have a question or further comment regarding the above direction, please immediately contact Michael C. Hahn directly at (302) 760 2131 ([MichaelC.Hahn@state.de.us](mailto:MichaelC.Hahn@state.de.us)).

Thank you for your continuing efforts.

Sincerely



Therese M. Fulmer, Manager  
Environmental Studies

TMF/mh (attachment)

cc: Dan Montag, FHWA  
Nicholas Blendy, FHWA  
Steven Marz, SHPO  
Gwen Davis, SHPO  
Joan Larrivee, SHPO  
Robert B. McCleary, Assistant Director, Engineering Support  
Brian McIlvaine, Project Engineer  
Kevin Cunningham, Environmental Studies  
David Clarke, Environmental Studies  
Michael C. Hahn, Environmental Studies  
Jon Schmidt, Environmental Studies  
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Mike

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February 17, 2010

Mr. Nicholas Blendy  
Environmental Specialist  
Federal Highway Administration  
J. Allen Frear Federal Building  
300 South New Street  
Dover, DE 19904-6726

RE: SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, DE; State Contract No. 24-122-02; Federal Aid Project No. NH-K008(6); *Revised* Finding of Adverse Effect and draft MOA

Dear Mr. Blendy:

As noted in an email dated February 9, 2010, the DE SHPO has reviewed DelDOT's revised documentation supporting the finding of Adverse Effect for the above-referenced undertaking. Although this office does not agree with some of the content of the documentation, the revised version signifies that the FHWA, DelDOT and DE SHPO concur on the basic findings. That is, the project, as currently designed, will:

- not affect the W.C. Fountain Agricultural Complex (K01689);
- not adversely affect Barratt's Chapel (K00103) or the Thomas James House (K02686);
- adversely affect the Mt. Olive School (K02685) *and* the Jehu Reed House (K00137);
- likely adversely any archaeological sites that are found eligible for listing in the National Register of Historic Places.

The DE SHPO appreciates that FHWA and DelDOT took into account the DE SHPO's earlier comments (letter dated November 24, 2009) on the undertaking's effects on historic properties.

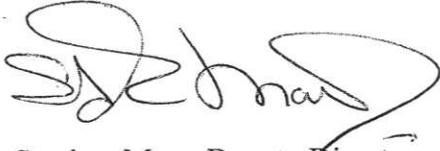
This office is currently reviewing the revised draft Memorandum of Agreement (MOA) and the draft Section 4(f) Evaluation, and will provide comments on those documents under separate cover. Our staff is also continuing to work with DelDOT's archaeologists toward resolving questions on the archaeological survey to date and next steps; the goal is to outline a scope of work for the evaluation (Phase II) level survey within the next month.



Letter to N. Blendy  
February 17, 2010  
Page 2

As our agencies continue efforts to conclude the formal Section 106 consultation, if you have any questions, please do not hesitate to contact Gwen Davis, who is reviewing this project (at [gwen.davis@state.de.us](mailto:gwen.davis@state.de.us) or 302-736-7410). Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Marz", with a large, sweeping flourish extending to the right.

Stephen Marz, Deputy Director  
and Deputy State Historic Preservation Officer

cc: Dan Montag, Federal Highway Administration  
Rob McCleary, Asst. Director, Engineering Support, DelDOT  
Therese M. Fulmer, Manager, Environmental Studies, DelDOT  
Brian McIlvaine, Project Engineer, DelDOT  
Michael C. Hahn, Senior Highway Planner, DelDOT  
Kevin Cunningham, Archaeologist, DelDOT  
David Clarke, Archaeologist, DelDOT  
Gwenyth A. Davis, Archaeologist, SHPO, Division of Historical & Cultural Affairs  
Joan Larrivee, Architectural Historian, SHPO, Division of Historical & Cultural Affairs

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February 17, 2010

Ms. Therese M. Fulmer, Manager  
Environmental Studies  
Delaware Department of Transportation  
800 Bay Road, P.O. Box 778  
Dover, DE 19904

RE: SR 1/Little Heaven Grade Separated Intersection Project (Clapham Road to Barratt's Chapel Road), Kent County, DE; State Contract No. 24-122-02; Federal Aid Project No. NH-K008(6); DE SHPO case no. 2003.06.02.02; "Section 4(f)" Evaluation

Dear Ms. Fulmer:

Thank you for providing the DE SHPO with an opportunity to comment on DelDOT's draft Section 4(f) Evaluation, prepared for compliance with U.S. Department of Transportation regulations 23 CFR Part 774, for the SR 1/Little Heaven project. According to the documentation, DelDOT's position is that the project's effects on the Thomas James House and Barratt's Chapel and Cemetery meet the US DOT's criteria for *de minimus* impacts, but that the effects on Mt. Olive School will constitute a use of the historic property that requires full 4(f) evaluation.

While confirmation of DelDOT's interpretation of 4(f) rules lies with FHWA, the DE SHPO will state that DelDOT's findings are consistent with those made under the Section 106 review process. That is, FHWA and DelDOT proposed, and the DE SHPO concurred that the project would not adversely affect the Thomas James House and Barratt's Chapel, but would adversely affect Mt. Olive School (see letters dated November 24, 2009, and February 17, 2010).

Several sections of the draft Evaluation would benefit from clarification, particularly with respect to analysis of the effects on the Mt. Olive School. On the attached pages, the DE SHPO offers several suggestions for revisions.

The 4(f) Evaluation makes several references to the Environmental Assessment that DelDOT has prepared for compliance with the National Environmental Policy Act. Please note that the DE SHPO does not have a copy of this document, and therefore cannot speak to its accuracy with regard to historic properties.



Letter to T. Fulmer  
February 17, 2010  
Page 2

If you have any further questions concerning this matter, please do not hesitate to contact Gwen Davis (at [gwen.davis@state.de.us](mailto:gwen.davis@state.de.us) or 302-736-7410), who is reviewing this project. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Marz", written in a cursive style.

Stephen Marz, Deputy Director  
and Deputy State Historic Preservation Officer

Enclosure

cc: Nicholas Blendy, Environmental Specialist, Federal Highway Administration (w/enclosure)  
Michael C. Hahn, Senior Highway Planner, DelDOT  
David Clarke, Archaeologist, DelDOT