

APPENDIX
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SAMPLE SECTION 106 MEMORANDUM OF AGREEMENT



MEMORANDUM OF AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE DISTRICT DEPARTMENT OF TRANSPORTATION,
THE DISTRICT OF COLUMBIA STATE HISTORIC PRESERVATION OFFICE,
AND
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
REGARDING
TRANSPORTATION IMPROVEMENTS AT
XYZ Street, WITHIN THE DISTRICT OF COLUMBIA

This Memorandum of Agreement (“MOA”) is made as of the ___ day of _____ 2012 by and among the Federal Highway Administration (“FHWA”), the District Department of Transportation (“DDOT”), the District of Columbia State Historic Preservation Office (“DCSHPO”), and the Advisory Council on Historic Preservation (“ACHP”) (referred to collectively herein as the “Signatories” or individually as a “Signatory”), pursuant to Section 106 of the National Historic Preservation Act (“NHPA”) of 1966, as amended, 16 U.S.C. § 470f and its implementing regulations, 36 CFR Part 800.

RECITALS

WHEREAS, FHWA is the lead federal agency responsible for compliance with Section 106 of the NHPA, as amended, and the implementing regulations; and

WHEREAS, FHWA and DDOT plan to construct Street XYZ to provide connectivity and access to adjacent neighborhoods (collectively, the “Undertaking”). The Undertaking includes the realignment and construction of upgraded roads, parking lanes, new sidewalks, and bicycle lanes; and

WHEREAS, FHWA administers the Federal-Aid Highway Program in the District of Columbia authorized (23 U.S.C. 101 et seq.) through Federal-aid Agreement with DDOT as project sponsor (49 CFR 1.48) and, as such, DDOT is responsible for executing the Undertaking in accordance with the terms of this MOA; and

WHEREAS, FHWA anticipates funding and DDOT plans to construct the Undertaking, making the Undertaking subject to review under Section 106 of the NHPA, 16 U.S.C. § 470f, and its implementing regulations (36 CFR part 800); and

WHEREAS, XYZ Street is listed in the National Register of Historic Places (“NRHP”); and

WHEREAS, the area of potential effect (“APE”) for the Undertaking has been determined by FHWA in accordance with the definition provided in 36 CFR 800.16(d) and is demarcated by the boundaries, as illustrated in Attachment A; and

WHEREAS, FHWA has consulted with the DCSHPO pursuant to Section 106 of the NHPA and its implementing regulations, “Protection of Historic Properties” (36 CFR. part 800); and

WHEREAS, FHWA has determined that the Undertaking will have an adverse effect on the XYZ Street, which is comprised of elements that contribute to the significance of the NRHP property (“Contributing Elements”), as noted in Attachment B; and

WHEREAS, in accordance with 36 CFR § 800.6(a)(1), FHWA and DDOT notified the ACHP of its adverse effect determination providing the specified documentation, and the ACHP chose to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

WHEREAS, the obligations of DDOT and the DCSHPO under this MOA are subject to the provisions of: 23 CFR 771.109 and (i) the federal Anti-Deficiency Act, 31 U.S.C 1341, 1342, 1351; (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code 47-355.01-335.08; (iii) D.C. Official Code 47-105; and (iv) D.C. Official Code 1-204.46 (2006 Supp.), as the foregoing statutes which may be amended from time to time, regardless of whether a particular obligation has been expressly so conditioned; and

WHEREAS, ACHP’s and FHWA’s obligations under this MOA are subject to the availability of appropriated funds, and the stipulations of this MOA are subject to the provisions of the federal Anti-Deficiency Act. ACHP and FHWA will make reasonable and good faith efforts to secure the necessary funds to implement this MOA in its entirety. If compliance with the Anti-Deficiency Act alters or impairs ACHP’s and FHWA’s ability to implement the stipulations of this MOA, they will consult in accordance with Sections XIV and XV of this MOA.

WHEREAS, DDOT is authorized to enter into this MOA pursuant to Sections 5(1)(A)-(D) and 6(b) of the Department of Transportation Establishment Act of 2002, D.C. Law 14-137, D.C. Official Code 50-921.04(1)(A)-(D) and 50-921.05(b); and

WHEREAS, since DDOT is the agency coordinating the Undertaking and has participated in consultation regarding the Undertaking’s effects on the NRHP property, FHWA has invited DDOT to execute this MOA as a Signatory; and

WHEREAS, FHWA and DDOT have, through the Section 106 process, consulted with the following parties (collectively referred to as the “Consulting Parties”): DCSHPO, the ACHP, National Park Service (NPS), National Trust for Historic Preservation, U.S. Commission of Fine Arts, National Capital Planning Commission, District of Columbia Office of Planning (“DCOP”), DC Department of General Services (formerly DC Department of Real Estate Services), the District of Columbia Preservation League, Joe Public, ANC, ABC Civic Association; and

WHEREAS, FHWA and DDOT have consulted with the Consulting Parties and other members of the public both at consulting party meetings and at NEPA public meetings in accordance with 36 CFR 800.8(a), regarding identification of historic properties and the effects of the Undertaking on historic properties; and

NOW, THEREFORE, FHWA, DDOT, DCSHPO, and ACHP agree that the Undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the Undertaking on historic properties.

STIPULATIONS

FHWA shall ensure that the following measures are carried out:

- I. FHWA and DDOT shall construct the XYZ Street in accordance with this MOA and the Site Plan in Attachment C.

- II. PREPARE HISTORIC AMERICAN BUILDING SURVEY/HISTORIC AMERICAN ENGINEERING RECORD (HABS/HAER) DOCUMENTATION:** FHWA and DDOT will produce Level I HABS documentation for Building 123 prior to reconstruction of the Street. The HABS documentation will include: measured drawings, photographs, and a history of the building, in accordance with Federal Register, Volume 68, No. 139 (Monday, July 21, 2003; ppg. 43159 - 62), and shall be provided to the NPS, DCSHPO, and the Washingtonian Division of the DC Public Library.
- III. INTERPRETIVE MARKERS:** FHWA and DDOT will coordinate development of interpretive markers and educational materials regarding the Undertaking with interpretive materials. DDOT, in consultation with DCSHPO will develop and install interpretive markers explaining the history of the Undertaking's site,, the landscape and trees, the architecture, the pedestrian and vehicular circulation, and the scientific studies conducted on the site. Proposed marker text and location within the Site will be completed prior to the initiation of construction and provided to Signatories for review and comment. Wherever possible, the location of the markers should be consistent with the preferred locations for public art, historical markers, and street enlivening uses.
- IV. VIBRATION MONITORING:** The Undertaking may result in vibrations that could affect Contributing elements of the Site. FHWA and DDOT, in coordination with the Signatories, will prepare and adopt a Vibration Monitoring Plan to be implemented during construction of the Undertaking. The Vibration Monitoring Plan will set out the vibration criteria and monitoring provisions to be taken during construction of the Undertaking, where appropriate. The Vibration Monitoring Plan shall provide for an engineer and/or historical architect meeting the Secretary of the Interiors Historic Preservation Professional Qualifications Standards 62 Federal Register 33,707 (June 20, 1997) to supervise implementation of the plan. The Vibration Monitoring Plan shall establish appropriate monitoring based in part on the types of construction planned, the equipment to be used, and the proposed depth of excavations for each type of construction activity. FHWA and DDOT will assure that the contractors have the vibration monitoring plan.
- V. PERSONNEL QUALIFICATIONS:** DDOT, in consultation with FHWA, shall ensure that all work performed on the Undertaking's site that has the potential to have a direct or indirect effect on Contributing Buildings and/or Contributing Landscapes is performed or supervised by qualified individuals and/or teams that meet the Secretary of the Interior's Historic Preservation Professional Qualifications Standards 62 Federal Register 33,707 (June 20, 1997) for history, architectural history, architecture, historic architecture and conservation, landscape architecture, and/or archaeology, as appropriate.
- VI. DURATION:** This MOA will be null and void if its stipulations are not carried out within ten (10) years of the date of its execution. At such time, and prior to work continuing on the Undertaking, FHWA shall either (a) execute memoranda of agreement pursuant to 36 CFR § 800.6, or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR § 800.7. FHWA may consult with the other Signatories to reconsider the terms of this MOA and amend it in accordance with Stipulation XIV below. FHWA shall notify the Signatories as to the course of action it will pursue.
- VII. POST-REVIEW DISCOVERIES:** If potential historic properties are discovered or unanticipated effects on historic properties are found or are reasonably foreseeable (beyond those already accounted

for herein), at the Undertaking's site, FHWA shall implement the Inadvertent Discoveries Plan included as Attachment E of this MOA.

- VIII. MONITORING AND REPORTING:** Each twelve (12) months following the execution of this MOA until it expires or is terminated, FHWA shall provide all Signatories a summary report detailing work carried out pursuant to the MOA's terms, including the status of any plans or reports resulting from activities carried out under these Stipulations. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes or objections received in FHWA's efforts to carry out the terms of this MOA.
- XIII. DISPUTE RESOLUTION:** Should any Signatory object at any time to any actions proposed under the Undertaking or the manner in which the terms of this MOA are implemented, FHWA shall consult with such Signatory to resolve the objection. If FHWA determines that such objection cannot be resolved, FHWA will:
- A. Forward all documentation relevant to the dispute, including the FHWA's proposed resolution, to the ACHP. The ACHP shall provide FHWA with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, FHWA shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and Signatories. FHWA will provide the Signatories with a copy of the written response. FHWA will then proceed according to its final decision.
 - B. If the ACHP does not provide advice regarding the dispute within thirty (30) days, FHWA may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, FHWA shall prepare a written response that takes into account any timely comments regarding the dispute from the Signatories, and provide the Signatories with a copy of the written response.
 - C. FHWA's responsibility to carry out all other actions subject to the terms of this MOA that are not the subject of the dispute, remain unchanged.
- XIV. AMENDMENTS:** This MOA may be amended when such an amendment is agreed to in writing by all Signatories.
- XV. TERMINATION:** If any Signatory determines that its terms will not or cannot be carried out, that Signatory shall immediately consult with the other Signatories in an attempt to develop an amendment per Stipulation XIV, above. If within thirty (30) days (or another time period agreed to by all Signatories) an amendment cannot be reached, any Signatory may terminate the MOA upon written notification to the other Signatories.

If this MOA is terminated, FHWA must either (a) execute new memoranda of agreement pursuant to 36 CFR § 800.6, or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR § 800.7. FHWA shall notify the Signatories as to the course of action it will pursue.

- XVI. COUNTERPARTS:** This MOA may be executed in counterparts, each separately and together constituting one and the same document. Execution and delivery of this MOA by facsimile or electronic mail shall be sufficient for all purposes and shall be binding on any party to this MOA.

XVII. SIGNATURES

Execution of this MOA by FHWA, DDOT, DCSHPO, and ACHP and implementation of its terms evidence that FHWA has taken into account the effects of this Undertaking on historic properties and afforded the ACHP an opportunity to comment.

District Department of Transportation

XYZ,
Director Date _____

District of Columbia State Historic Preservation Office

XYZ,
District of Columbia State Historic Preservation Officer Date _____

Federal Highway Administration

XYZ,
Division Administrator, DC Division Date _____

Advisory Council on Historic Preservation

XYZ,
Executive Director Date _____

Attachments: Area of Potential Effect Map; etc.

