

**MEMORANDUM OF AGREEMENT**

**AMONG THE FEDERAL HIGHWAY ADMINISTRATION,  
THE DELAWARE STATE HISTORIC PRESERVATION OFFICE, AND THE  
THE DELAWARE DEPARTMENT OF TRANSPORTATION**

**REGARDING IMPLEMENTATION OF THE  
BOYD'S CORNER INTERSECTION IMPROVEMENTS  
NEW CASTLE COUNTY, DELAWARE**

**STATE CONTRACT NUMBER: 25-041-04  
FEDERAL AID NUMBER: ESTP-N022(2)**

WHEREAS, the Federal Highway Administration (FHWA) with the Delaware Department of Transportation (DelDOT) propose to improve an intersection at the corners of Boyd's Corner Road / Poles Bridge Road and ~~US 13~~, New Castle County, Delaware (Figure 1); and

WHEREAS, the FHWA in consultation with the Delaware State Historic Preservation Office (DESHPO) and DelDOT has established the undertaking's Area of Potential Effect (APE), as defined in 36 CFR 800.16(d), as those areas within the Limit of Construction (LOC), Temporary Construction Easements (TCE), Permanent Easements (PE), Right of Way (ROW), and adjacent or contiguous properties where visual effects may occur; and

WHEREAS, the FHWA has consulted with the DESHPO in accordance with Section 106 of the National Historic Preservation Act, 16 U.S.C. Part 470, and its implementing regulations (36 CFR Part 800) to resolve any adverse effects that may occur as a result of this Project; and

WHEREAS, FHWA has afforded the public an opportunity to comment on the effects of the Project on historic properties through the National Environmental Policy Act (NEPA) of 1969, as amended; and through DelDOT's Public Involvement Procedures; and

WHEREAS, FHWA pursuant to 36 CFR Part 800.4 (a)(2), has determined that within the APE, the following properties are listed or eligible for the National Register of Historic Places:

Boyd's Store and House archaeological site (7NC-G-169);  
Elm Grange (N-5181);  
Gassway Watkins house (N-5156);  
Gassway Watkins Store and Post Office (N-5157); and  
Commodore McDonough House (N-424); and

WHEREAS, FHWA have applied the criteria of adverse effect to historic properties, and determined that the undertaking will have no affect on:

Elm Grange (N-5181);  
Gassway Watkins house (N-5156);  
Gassway Watkins Store and Post Office (N-5157); and  
Commodore McDonough House (N-424); and

WHEREAS, FHWA, pursuant to 36 CFR 800.4(c) through DelDOT has determined that this project will have an Adverse Effect upon the Boyd's Store and House archaeological site (7NC-G-169), a property that is eligible for inclusion in the National Register of Historic Places (National Register); and

WHEREAS, FHWA and DelDOT have notified the Advisory Council on Historic Preservation (the Council) of the Project's adverse effect on historic properties and it declined to participate in the consultation; and

NOW, THEREFORE, the FHWA, DE SHPO, and DelDOT agree that the Project will be implemented in accordance with the following stipulations, in order to take into account the effect of the undertaking on historic properties, and mitigate for the Adverse Effect.

#### STIPULATIONS

The FHWA shall ensure that the following stipulations are implemented:

##### I. Archaeological Treatment and Survey

A. DelDOT shall, in consultation with DE SHPO, develop and implement a treatment plan for the Boyd's Store and House (7NC-G-169) site that will include, but is not necessarily limited to:

##### 1. Data Recovery:

- a. DelDOT shall have a qualified cultural resource consultant carry out data recovery excavation of the portion of the Site that may be affected by the construction, in accordance with an agreed-upon data recovery plan, as devised under Stipulation I.B of this Agreement;
- b. DelDOT shall include in its construction plans and other instructions to its contractors measures to at all times protect the remainder of the Site from the construction activities;

##### 2. Public Involvement:

DelDOT, with the assistance of its consultants, and in consultation with the DE SHPO, will develop and implement a public involvement program that may include but is not necessarily limited to:

- a. Written description of interesting work for the Archeological Society of Delaware's *Inksheds* newsletter, local newspapers, and DelDOT's web site; and
- b. On-site public tour(s) during the data recovery effort; and

- c. Public education brochure about the site for distribution to the general public and for placement on DelDOT's web site; and
- d. Final product(s) in PDF format for placement on DelDOT's web site.

3. Registration of the Site:

After the completion of the data recovery effort, DelDOT shall, in consultation with the DE SHPO and other interested parties, as deemed appropriate by the FHWA, reevaluate the Site to determine if it has yielded and/or may still yield information important in the history of Delaware. If DelDOT and the DE SHPO agree that the Site still meets the Criteria for eligibility to the National Register of Historic Places, then DelDOT shall instruct its qualified cultural resource consultant to prepare a Determination of Eligibility form for possible use as a formal nomination to the National Register of Historic Places for the remaining areas of the site, and submit it to the DE SHPO for review and further revision, as necessary;

B. Data Recovery Plan Requirements:

1. DelDOT shall ensure that all data recovery plans meet the Secretary of the Interior's Standards and Guidelines for Archaeological Documentation (48 FR 44734-37) and the DE SHPO's Guidelines for Architectural and Archaeological Surveys in Delaware, and will take into account the Council's guidance Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites, May 18, 1999. The DE SHPO will have 30 days to review proposed data recovery plans. DelDOT will complete all necessary data recovery work prior to commencing construction in the site areas. The plan shall specify at a minimum:
  - the property, properties, or portions of properties where data recovery is to be carried out, and any property that will or may be destroyed without data recovery;
  - research questions to be addressed through data recovery, with an explanation of their relevance and importance;
  - the research methods to be used, with an explanation of their relevance to the research questions;
  - the methods to be used in analysis, data management, and data dissemination, including a schedule;
  - a provision for assessing materials that may be in need of conservation
  - proposed disposition of recovered materials and records;
  - proposed methods for involving the interested public in the data recovery, and for disseminating the results of the work to the interested public;
  - a proposed schedule for the submission of progress reports to the relevant DE SHPO; and
  - provisions to meet on-site in order to evaluate the success of the initial fieldwork phase of any data recovery program, and near the end of the fieldwork efforts to validate substantial completion.

2. DelDOT shall provide all draft and final archaeological reports and public information materials to the DE SHPO for review and comment. All final reports shall meet the Secretary of the Interior's Standards and Guidelines for Archaeological Documentation (48 FR 44734-37), and the DE SHPO's Guidelines for Architectural and Archaeological Surveys in Delaware. The final archaeological report will address all phases of survey as well as the mitigation treatment of 7NC-G-169.
3. DelDOT shall ensure that all records and materials resulting from the archaeological investigations will be processed, prepared for, and curated in accordance with 36 CFR Part 79 and the Division of Historical and Cultural Affairs' (the Division) "Guidelines for the Curation of Archaeological Collections" (2001). These records and materials shall be curated at the Division, or its designee, following the policies of the institution.
4. DelDOT shall ensure that all archaeological work carried out pursuant to this MOA is carried out by or under the direct supervision of a person meeting at a minimum the Secretary of the Interior's Professional Qualifications Standards for Archaeologists (48 FR 44738-9).
5. DelDOT will cooperate with additional archaeological investigations, on adjacent parcels, of the Boyd's Store and House (7NC-G-169). DelDOT will share all information that pertains to work carried out via this MOA on site 7NC-G-169, with other interested parties.

#### C. Additional Archaeological Survey:

DelDOT shall consult with the DE SHPO to determine if cultural resources survey is necessary for three proposed tree mitigation locations within the APE. If so, DelDOT shall have a qualified cultural resources consultant carry out Phase I and if necessary Phase II survey investigations of the unevaluated and untested portions of the project for all tree mitigation areas. If DelDOT and the DE SHPO agree that an eligible site(s) will be impacted by the project, DelDOT shall develop and implement a data recovery plan, as devised under Stipulation I.A. and I.B. of this Agreement, for those portions of the site(s) that may be affected. If DelDOT and the DE SHPO agree that no eligible sites are present, no further field work will be required.

#### II. Cemeteries and Human Remains

DelDOT shall notify the DE SHPO and the Council within 24 hours of the discovery of any human remains encountered during the archaeological investigations or the project construction. DelDOT shall cease all activities that may disturb or damage the remains, and comply with the Delaware Unmarked Human Remains Act (7DE Code Chapter 54). If the human remains are of Native American affiliation, then FHWA will determine an appropriate course of action, in accordance with 36 CFR Part 800, and the above cited Delaware law. The FHWA will include the Delaware Nation and Stockbridge Munsee Community, and the DE SHPO in such consultation. The DE SHPO will comply with the Native American Graves Protection and Repatriation Act of 1990 (PL 101-601) with regard to disposition of the remains and/or associated funerary objects, as applicable.

DelDOT shall ensure protection to the McDonough Cemetery, (station number 13+00). DelDOT shall instruct its contractors not to allow any construction equipment, or trespassing outside the established limit of construction (LOC) on the McDonough Cemetery property.

### III. Unexpected Discoveries

In the event that previously unidentified archaeological resources are discovered during construction, DelDOT shall instruct the contractor to cease construction in the immediate area, and shall proceed with consultation under 36 CFR Part 800.13 (b)(3).

### IV. Disposal of Project Related Materials

DelDOT shall consult with the DE SHPO concerning the location for disposal of materials produced by demolition, construction, excavation, and/or dredging. The DE SHPO will review all such locations to ensure the disposal will not adversely affect historic properties. DelDOT shall not use any such location if the DE SHPO objects.

### V. Review of Project Plans

DelDOT shall provide copies of the semi-final and final project plans to the DE SHPO, and to other consulting parties as may be subsequently identified. Consulting parties will have 30 days from the receipt of all materials to provide comments on the plans. DelDOT shall take into account any comments provided.

### VI. Subsequent Changes to the Project

If, subsequent to the implementation of Stipulation VI, DelDOT proposes any changes to the Project affecting location, design, methods of construction, materials, or footprint of the Project, DelDOT shall provide the DE SHPO and other consulting parties with information concerning the proposed changes. The consulting parties will have 30 days from the receipt of this information to comment on the proposed changes. DelDOT shall take into account any consulting party comments, prior to implementing such changes.

### VII. Dispute Resolution

Should any signatory to this Agreement object within 30 days to any plans, specifications or actions proposed pursuant to this agreement, FHWA shall consult with the objecting party to resolve the objection. If FHWA determines that the objection cannot be resolved, FHWA shall forward all documentation relevant to the dispute to the Council. Within 30 days after receipt of all pertinent documentation, the Council will either:

- A. Provide FHWA with recommendations, which FHWA will take into account in reaching a final decision regarding the dispute; or

- B. Notify FHWA that it will comment pursuant to 36 CFR 800.7(a) and proceed to comment. Any Council comment provided in response to such a request will be taken into account by FHWA in accordance with 36 CFR 800.7(c)(4) with reference to the subject of the dispute.

Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; FHWA's responsibility to carry out all actions under this agreement that are not the subjects of the objection will remain unchanged.

#### VIII. Duration

Execution of this Memorandum of Agreement shall remain active until the project meets final inspection by DelDOT or its assigned designee. This time period shall not exceed three (3) years from the date of the final signature. The FHWA, DE SHPO and DelDOT shall review the project annually, to monitor progress of the implementation of the terms of this Agreement.

#### IX. Amendments

Any party to this Agreement may propose to FHWA that the Agreement be amended, whereupon FHWA shall consider such an amendment in accordance with 36 CFR Part 800.6(c)(7).

#### X. Termination

- A. If the FHWA or DelDOT determines that it cannot implement the terms of this MOA, or the SHPO determines that the MOA is not being properly implemented, FHWA, DelDOT, or the SHPO may propose to the other parties to this MOA that it be terminated.
- B. The party proposing to terminate this MOA shall notify all parties to this MOA, explaining the reasons for termination and affording them at least 30 days to consult and seek alternatives to termination. The parties shall then consult.
- C. Should all consultation fail, FHWA or the SHPO may terminate the MOA by so notifying all parties.
- D. Should this MOA be terminated, FHWA shall either:
  - 1. Consult in accordance with 36 CFR 800.6(a)(1) to develop a new MOA;
  - or
  - 2. Request the comments of the Council pursuant to 36 CFR 800.7(a)(2)

Execution of this MOA by the FHWA, DE SHPO and DelDOT, and the implementation of its terms, evidence that FHWA has taken into account the effects of the Project on historic properties, and has afforded the Council an opportunity to comment on the proposed undertaking and its effect on historic properties.

FOR THE FEDERAL HIGHWAY ADMINISTRATION

By:  Date: 9/4/08  
NICHOLAS S. BLENDY Name and Title  
ENVIRONMENTAL SPECIALIST, FHWA

FOR THE DELAWARE STATE HISTORIC PRESERVATION OFFICER

By:  Date: 8/20/08  
Stephen Marz, Deputy State Historic Preservation Officer

FOR THE DELAWARE DEPARTMENT OF TRANSPORTATION

By:  Date: 9/4/08  
Name and Title  
Chief Engineer