



COMMONWEALTH of VIRGINIA

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The Honorable J. Randall Minchew
Member, Virginia House of Delegates
Post Office Box 385
Leesburg, Virginia 20178

Dear Delegate Minchew:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether the Virginia Department of Transportation ("VDOT") is required to repair and maintain an historic brick retaining wall (the "Structure") located along U.S. Route 50. If repair and maintenance are required, you further ask whether the work must conform with the *Secretary of the Interior's Standards for Rehabilitation* under Section 106 of the National Historic Preservation Act of 1966 (the "NHPA").

Background

You have related that the Structure is within VDOT's right-of-way in or near the town of Aldie,¹ located within the Aldie Mill Historic District² and that it originally may have been part of an adjacent historic building that is now privately owned. You have not indicated that the Structure creates a hazard to the public or a dangerous condition to motorists, or that it is a nuisance.

¹ Based on the facts presented, it is unclear whether the Structure is entirely within the VDOT right-of-way and whether the Structure is owned by VDOT.

² The Aldie Mill Historic District was included on the Virginia Landmarks Register on June 2, 1970, and the National Register of Historic Places on September 15, 1970. See <http://www.dhr.virginia.gov/register/RegisterMasterList.pdf>.

Applicable Law and Discussion

Absent a statute or regulation to the contrary, any decision about maintenance or repair within a VDOT right-of-way is within VDOT's exclusive administrative powers. The Supreme Court of Virginia has specifically held that, "the legislature has delegated broad powers to the highway officials of this state and has vested them with wide discretion in the discharge of their duties with respect to the construction, improvement, and maintenance of highways."³ We have discovered nothing in any applicable federal or state laws, regulations, or manuals that specifically obligates VDOT to restore the Structure.⁴

Further, there is nothing contained in the NHPA that obligates VDOT, as a state agency, to repair or maintain the Structure. Section 306108 [formerly Section 106] of the NHPA applies only when a federal agency is involved, directly or indirectly, with an undertaking affecting historic property.⁵ The Structure lies within the Aldie Mill Historic District, which makes it part of an "historic property" for purposes of the NHPA.⁶ The repair and maintenance of the Structure would be considered an undertaking under the NHPA where such work involves a federal agency, federal funding, or federal permitting.⁷ Therefore, if VDOT, in its discretion, were to replace or maintain the Structure, § 306108 [formerly Section 106] of the NHPA would apply only if such repair or maintenance were accomplished with the use of federal funds, in this case funds provided by the Federal Highway Administration (the "FHWA") or required federal permits.

The "Section 106 process"⁸ is the procedure used to outline how federal agencies comply with the requirements of § 306108 [formerly Section 106] of the NHPA.

The [S]ection 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties,

³ *Ord v. Fugate*, 207 Va. 752, 759 (1967) (citing VA. CODE ANN. § 33-46, now replaced by § 33.2-317 (2014)).

⁴ VDOT's activities with respect to the construction, maintenance, and repair of its highways are regulated by Title 33.2 of the *Code of Virginia*; Title 24, Agency 30 of the Virginia Administrative Code; various VDOT manuals; Titles 23 and 49 of the United States Code; and Titles 23 and 49 of the Code of Federal Regulations.

⁵ "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the [Advisory] Council [on Historic Preservation] a reasonable opportunity to comment with regard to the undertaking." 54 U.S.C. § 306108.

⁶ "[T]he term "historic property" means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object." 54 U.S.C. §300308.

⁷ "[T]he term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – (1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. 54 U.S.C. § 300320.

⁸ 36 C.F.R. §§ 800.3-800.13 (2015).

commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.⁹

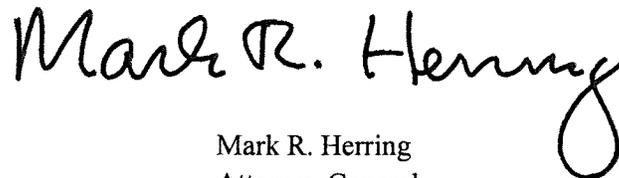
Once a federal agency has complied with the procedural requirements of the Section 106 process, it can proceed with any course of action it believes to be appropriate with respect to the undertaking.¹⁰ Such course of action may or may not include a FHWA requirement that VDOT's work conform with the *Secretary of the Interior's Standards for Rehabilitation*.¹¹

Conclusion

For the foregoing reasons, it is my opinion that, under the facts you have presented, VDOT is not required to repair and maintain the Structure, and any decision about this matter is within VDOT's sole administrative discretion. It is my further opinion that if VDOT makes a discretionary decision in the future to repair the Structure, and federal funds or federal permits are involved, any decisions to require compliance with federal requirements for historic preservation must be made by the FHWA.

With kindest regards, I am

Sincerely yours,



Mark R. Herring
Attorney General

⁹ 36 C.F.R. § 800.1 (2015).

¹⁰ 36 C.F.R. § 60.2 (2015). "While Advisory Council comments must be taken into account and integrated into the decision making process, program decisions rest with the agency implementing the undertaking." *Id.* It should be noted that a *Programmatic Agreement Among the Federal Highway Administration, the U.S. Army Corps of Engineers, Norfolk District, the Tennessee Valley Authority, the Advisory Council on Historic Preservation, the Virginia State Historic Preservation Officer, and the Virginia Department of Transportation Regarding Transportation Undertakings Subject to Section 106 of the National Historic Preservation Act of 1966*, was entered into in August 2016. The Section 106 process allows a federal agency to enter into a memorandum of agreement with its consulting parties, and a memorandum of agreement created in accordance with the procedures of the Section 106 process will govern the particular undertaking and all of its parts. *See* 36 C.F.R. § 800.6(b) (2015). Without more information we are unable to determine at this time whether this Programmatic Agreement would apply to the repair and maintenance of the Structure.

¹¹ The *Secretary of the Interior's Standards for Rehabilitation* have been used by Federal agencies to guide them in carrying out their historic preservation responsibilities. *See* W. BROWN MORTON III ET AL., *THE SECRETARY OF THE INTERIOR'S STANDARDS FOR REHABILITATION & ILLUSTRATED GUIDELINES FOR REHABILITATING HISTORIC BUILDINGS*, at v (U.S. Department of the Interior, National Park Service Heritage Preservation Services 1997).