

**PHMC-DEP Policy Review Comments, re:  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
Policy Office**

**DOCUMENT NUMBER: 012-0700-001**

**TITLE: Policy for Pennsylvania Historical and Museum Commission (PHMC) and Department of Environmental Protection (DEP) Coordination During Permit Application Review and Evaluation of Historic Resources**

**And review of related document:**

**PROJECT REVIEW FORM – “Request to Initiate SHPO Consultation on State and Federal Undertakings”**

**Prepared by Randolph Harris, Consulting Historian, Lancaster, PA - January 25, 2020**

Page i: Draft policy states:

**“AUTHORITY:** Pennsylvania History Code 37 Pa. C.S.A., § 101 *et seq.*”

For many years, PHMC’s review letters have contained standard language citing the legal basis for its environmental reviews and recommendations directed to other state agencies, municipalities and to private sector applicants seeking state permits, etc. The Commonwealth Constitution’s Article I Section 27 – the Environmental Rights Amendment – routinely has been cited in these review letters, in addition to the PA History Code as authorizing PHMC involvement in these activities. The same should be included here.

In addition, there should be collateral reference in Policy Guidelines and on the related Form regarding the Municipalities Planning Code, with directives on the applicability of this PA statute. Some recommendations are shown below/on the attached. The added citation and recommendations should be considered since the MPC includes the most definitive language that guides and directs municipalities to enact planning and zoning measures that actually protect and preserve historic, natural and cultural resources. Language that reflects this clear mandate, among others in this statute which encourage and enable preservation and conservation measures in municipal planning and zoning, should be considered and included in this Policy:

**“Zoning ordinances shall provide for protection of natural and historic features and resources.”**  
MPC Article VI, Section 603(g) (2).

Commonwealth agencies should no longer operate in self-imposed “silos” but should take proactive efforts to interface with local governments, where the vast majority of decisions are made that affect environmental resources, which the over-arching mandates of Article I Section 27, the Pennsylvania History Code and the MPC were adopted to protect.

**Please see further detailed comments below (in the case of on line submission, in an attached document):**

**Page i -APPLICABILITY:** Draft Policy States:

“This policy should be used when evaluating the protection of property that is or may be a significant archaeological site or a significant aboveground historic resource. When evaluating protection of these resources, this policy should be considered by: applicants for DEP plan approvals and permits; DEP

staff; and permit review staff of County Health Departments and County Conservation Districts when conducting delegated duties on behalf of DEP.”

When conducting delegated duties on behalf of DEP, County Conservation Districts could serve as intermediaries between municipal governments and state agencies, by serving as a conduit for early, accurate information from citizens and their municipal governments to state agencies and vice versa.

However, with Conservation District operating scope limitations, more strategic and effective inter-governmental cooperation with local municipalities is long overdue. Information flow from PHMC-DEP reviews may form one key element of such cooperation.

Despite decades of historic preservation programming, other outreach efforts, and some popular bricks and mortar projects as functional examples, only a small fraction of the 2562 municipal governments in Pennsylvania has accepted the responsibility...their Constitutional duty...to enact local ordinances and to adopt policies that fairly and effectively protect historic properties, according to a recent statewide report and analysis.

An evaluation of this weakness and strong guidance toward solutions are offered through the referenced report, “Inventory and Analysis of Historic Preservation Ordinances in Pennsylvania Municipalities,” published November, 2018, by the Center for Land Use and Sustainability, Shippensburg University of Pennsylvania, and Millersville University of Pennsylvania. The report was made possible by a grant from the Center for Rural Pennsylvania, a bipartisan, bicameral legislative agency that serves as a resource for rural policy within the Pennsylvania General.

The report’s authors state: “This research provides the first comprehensive statewide inventory and analysis of historic preservation ordinances in Pennsylvania municipalities.”

According to the report, “The research team identified 294 municipalities (not including Philadelphia and Pittsburgh) that have enacted one or more types of historic preservation regulations. These municipalities comprise about 12 percent of the state’s 2,562 municipalities. Within the 294 municipalities, 105 (about 4 percent of the state total) have enacted Historic District Act-empowered ordinances and 195 (about 8 percent) used Municipalities Planning Code authority to enact zoning ordinances that provide for historic preservation.”

In addition, the report found: “Notably, only about 5 percent of rural municipalities have enacted historic preservation ordinances.”

Also reported: “Geographically, rural municipalities with these designations are overwhelming in the eastern (25) and central (43) regions, with only 11 in the western region.”

The following recommendations in the report address the strong need and presents positive recommendations for PHMC to be more proactive in addressing this systemic weakness in the Commonwealth’s mandate to protect and preserve its environment in all of its forms – natural and built. Among the 15 recommendations are:

Recommendation No. 2: Expand the Pennsylvania State Historic Preservation Office (SHPO) Community Preservation Coordinators Program.

Recommendation No. 3: Increase SHPO support for rural county planning offices.

Recommendation No. 4: Extend better state oversight and reporting of MPC-related historic preservation activity.

Recommendation No. 15. Require SHPO to review MPC-enabled historic preservation ordinances.

The ongoing disconnect between state and local governments on these issues, and the strategic recommendations in this legislative report must be seen the basis for immediate change. Across the state there have been many successful private or public/private community development projects that involved historic buildings and places. Yet they are relatively limited in number due to a variety of reasons, not the least of which is a traditional lack of targeted, accessible revenue or other easily-secured incentives. But the prevailing lack of protections for historic properties in municipal ordinances represents a much broader basis for this lack of progress on policy and preservation-focused project outcomes. As such, without zoning based-protections there is little impetus for strategic or creative preservation solutions. With access to a well-maintained municipal inventory of potentially significant aboveground resources, and relevant local ordinances that require meaningful protections for those resources, the actions of property owners, retail or housing developers and others are more likely to treat our historic environmental heritage with care it deserves.

Also, for years educational programs and outreach initiatives through conferences and reports have extolled the virtues and values of preserving our heritage. An enormous amount of time, talent and treasure has been spent on these efforts. Legions of community volunteers and professional staffs, with sponsorship and various means of support from PHMC and statewide non-profit such as the Pennsylvania Downtown Center, Preservation Pennsylvania, 10,000 Friends of Pennsylvania, Pennsylvania Land Trust Alliance, the Chesapeake Bay Foundation, Pennsylvania Association of Township Supervisors, the PA Boroughs Association and many others, have not produced the desired broad-based effect statewide for meaningful protection for these ever-dwindling resources.

Local municipal government actions directly affect 90-plus percent of all final outcomes on how public or private land and associated buildings are used. In the current dynamic, municipal inaction equates more often to neglect and abuse. Municipal governments should be the leading protectors of citizens' environmental rights and environmental stewardship, which includes the right to experience and enjoy both the natural environment and the built/historic environment, as well as providing measures to identify and protect archaeological resources. These protections should be administered fairly at the municipal level, and should be accepted and respected on balance with the rights of citizens to use and enjoy their private property. This view is consistent with the most recent PA Supreme Court decision, *PEDF v. Commonwealth of Pennsylvania*, 2017. Also, see below: **Additional Considerations**.

It is more than disconcerting that recognition of individual environmental rights is not the norm in the Commonwealth of Pennsylvania, which is one of only three states in the nation to confer environmental rights on individual citizens. These rights are supposed to be upheld by all levels of government in the same regard as all other civil liberties enshrined in the State Constitution, which mirror those in the U.S. Bill of Rights.

Finally, on this broad set of issues, citizen awareness and potential positive grassroots actions could result from information provided in PHMC review letters and recommended follow up actions regarding these inter-governmental issues and interface opportunities. Hence, the need to more widely distribute such forms and notices. Note that Section 512 of the PA History Code gives any citizen standing to bring matters of historic resource protections to the attention of any court or administrative tribunal (including local governments) in the Commonwealth. Supplied early with information derived from PHMC and DEP reviews, citizens may be better able to direct more positive outcomes from within their local governments...where it matters most.

**Page 1 – Definitions.** Draft policy states:

***“Historic property** — Any historical building, ground, monument or cultural remain committed by statute to the custody of the commission. An historic property evaluated under this policy comprises any resource, including an archaeological site that meets National Register criteria and is listed in or eligible for listing in the National Register of Historic Places and requires consideration under the Pennsylvania History Code. Significant above ground historic resources and significant archaeological sites are both considered to be historic properties.”*

An explanation is in order here: Is this all-encompassing to possibly include properties identified in a local inventory of historic resources, or does this definition limit consideration only to NR-listed or NR-eligible properties?

There seems to be four classifications of properties the text spells out for inclusion:

- 1) A property “committed by statute to the custody of the commission.”
- 2) “An historic property evaluated under this policy comprises any resource, including an archaeological site, [insert comma here] that meets National Register criteria...”
- 3) “...and is listed in or eligible for listing in the National Register of Historic Places...”
- 4) “...and requires consideration under the Pennsylvania History Code.”

How should one interpret these segments of the definition?

**Page 2 – Definitions.** Draft policy states:

**“Significant above ground historic resource** — A building, structure, object, or district that is significant based on the application of the National Register criteria and is listed in or eligible for listing in the National Register of Historic Places. SHPO determines whether an above ground historic resource is significant.”

Is it accurate to interpret this definition as stating that only NR-listed or NR-eligible properties will be considered as the subjects of reviews and “voluntary” recommendations.

**Page 3 - Pennsylvania’s Cultural Resources Geographic Information System (CRGIS).** Draft policy states:

"It is important to remember that many parts of Pennsylvania have not been surveyed for above ground historic resources or archaeological resources and absence of data does not necessarily imply absence of resources. In addition, some of the documentation in CRGIS may be outdated and require reassessment. "

Issues of encouraging public comment and public involvement, along with municipal interface are paramount here, if indeed it is recognized that the PHMC CRGIS is not all-inclusive. The form should be modified to ask the submitter to indicate whether or not the subject property is identified in any local inventory of historic resources maintained by the municipality, an area historical society and/or non-profit preservation education and advocacy organization. The form should also be modified allow for inclusion of data on municipal-based provisions for historic resource identification and protections, if any. Standard terms that describe the extent and effectiveness of any local ordinances or codes should be developed and included on the Form.

PHMC should initiate an online initiative similar to PennDOT’s Project Path, using group e-mail to notify interested parties of environmental reviews undertaken in specific regions, counties or municipalities.

**Page 5 – Draft policy states:**

#### **IV. DEP’s PROCEDURES FOR PERMIT APPLICANTS AND PERSONS REQUESTING PLAN APPROVALS**

##### **A. DEP Permit Applications and Review of Plan Approvals**

“Activities that may affect significant above ground historic resources or significant archaeological resources listed on or eligible to be listed on the National Register of Historic Places are not exempt from PHMC project review regardless of the anticipated amount of earth disturbance.”

This is a very positive change since this policy appears not to limit reviews below a certain acreage, as has been established policy, which resulted in the probable loss of many historic, natural and cultural resources.

**Page 6: Draft Policy States: “Determinations that a project will have an “Adverse Effect to a Significant Above Ground Historic Resource or Significant Archaeological Resource”:**

“If PHMC provides the opinion that the project could have an adverse effect on significant above ground historic resource or significant archaeological resources, PHMC will notify both the applicant and DEP as to the adverse effect and develop a voluntary plan to minimize or mitigate the adverse effect.”

It is recognized here that compliance with PHMC reviews recommendations and related mitigation measures are voluntary on the part of applicants. However, the PA History Code at § 512. **Enforcement of historic preservation laws and policies**, states:

“The Attorney General, the commission, any political subdivision, person or other legal entity may maintain an action in an administrative tribunal or court for the protection or preservation of any historic resources in this Commonwealth.”

It should be noted that this Section addresses standing for the Commission (and others) to maintain an action relative to **“any historic resources in this Commonwealth.”** (*Emphasis added*).

This represents an opportunity for a potential change to the Form and to policy recommendations for notification and follow up actions: If an effect determination is made, and especially if adverse effect is cited, and an applicant’s completed form indicates that a municipality’s zoning ordinance does not address or fully provide for effective historic resource protections,\* PHMC should exercise its responsibility, per the Constitution and its operating statute, and remind the municipality of its responsibility under the MPC Article VI, Section 603(g) (2) which reads: **“Zoning ordinances shall provide for protection of natural and historic features and resources.”**

Such an overture to a municipality relative to a specific proposed project that involves a DEP permit could include an offer of technical assistance and advice through PHMC’s Community Preservation Coordinators Program. Such inter-governmental cooperation is consistent with the provisions of the PA History Code, while similar authorizations, policies and procedures may be found in the operating statutes, policies or regulations of other Commonwealth agencies.

\* Referenced here could be any ordinance that defines or references historic properties and resources but does not offer them ultimate protection, as enabled by state statutes and as has been upheld in the courts of the Commonwealth. Common among such are “demolition delay” ordinance provisions that increase application review time, but in which cases neither municipal staff, nor local elected representatives have taken on the duty and responsibility to, on rare occasions, deny an application that, if approved, would result in the loss through demolition of an historic property.

**See Page 6 to 7:** Draft policy states:

#### **Additional Considerations –**

“If the project or activity is subject to additional statutory or regulatory obligations applicable to DEP and relating to the protection of significant above ground historic resource or significant archaeological resources, DEP should evaluate whether the conditions identified by PHMC are necessary to meet those obligations. Any additional application information needed to satisfy the statutory or regulatory obligations should be identified in the appropriate instructions for permit or plan approvals.”

PHMC and DEP should include the “statutory or regulatory obligations” of municipal governments in this provision that calls for notifications and wider involvement for reviews.

**End:**

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