

## **Rule 4. HISTORIC AND ARCHEOLOGICAL RESOURCES AND THE ACT 250 PROCESS**

Criterion 8 of Act 250, 10 VSA § 6086(a)(8), directs District Environmental Commissions to take into account the effects of proposed projects on historic sites in deciding whether to issue an Act 250 permit. The Division for Historic Preservation is a statutory party in the Act 250 process and offers comments to the District Commissions and Environmental Board on the significance of resources, the potential effects of proposed projects, and as appropriate, measures to avoid or mitigate adverse effects. The Advisory Council on Historic Preservation may evaluate the significance of resources. An applicant planning to apply for an Act 250 permit should contact the Division for Historic Preservation as early as possible in the planning stages of the undertaking, preferably before filing the permit application. The Division and the District Commissions distribute a guidebook on historic and archeological resources in the Act 250 permit process. If the proposed project has the potential to impact historic resources, issues that may arise are more easily resolved before plans for the undertaking are finalized. An applicant is encouraged to retain the services of a qualified historic preservation or archeological professional, especially in those cases where there may be an adverse effect on a historic resource.

### **4.1 Introduction**

**4.1.1 Scope of rules,** This Rule delineates the responsibilities of, and establishes procedures for use by, the SHPO, the Division and the Vermont Advisory Council on Historic Preservation with respect to participation in the Act 250 process. This Rule, in and of itself, imposes no obligation on any Act 250 applicant unless such applicant has chosen to seek the cooperation of the SHPO, the Division, or the Vermont Advisory Council with respect to the testimony it may provide to the District Commission or the Environmental Board on the applicant's Act 250 permit application. This Rule is intended to encourage collaboration, and to result in timely and predictable participation in the Act 250 process by the SHPO, the Division and the Council. The testimony ultimately provided will depend on the results of the process set forth herein. A determination by the Council that a site is historically significant is not a determination of historic significance under Act 250 unless accepted by a District Commission or the Environmental Board, or unless such site is listed on the State Register of Historic Places or the National Register of Historic Places.

**4.1.2 Pre-filing and post-filing Division consultation.** An applicant may consult the Division as outlined in these rules before or after filing an application for an Act 250 permit.

**4.1.3 Applicability of these rules to a project.** This Rule shall apply when the applicant's project may affect historic or archeological resources. Generally, a project may affect historic or archeological resources when there exists:

- (1) a building, structure, district, or site in the project area or area of potential effects that is listed on the State or National Register of Historic Places;
- (2) a building, structure, district, or site in the project area or area of potential effects that is 50 years old or older;

- (3) a possibility of ground disturbance in the project area or area of potential

effects that may affect significant archeological resources; or

(4) the possibility of disturbance of underwater archeological resources.

**4.1.4 Participation and Delegation.** Pursuant to 22 V. S.A. § 742(a)(8), the Council has delegated to the SHPO, or his or her designee in the Division, performance of certain functions in the Act 250 process with respect to buildings, structures, objects, districts, areas and archeological sites, including, but not limited to.

(1) identification of historic significance, including application of the State Register criteria to provide testimony on behalf of the Council to a District Commission or the Environmental Board as to whether a resource is historically significant,

(2) presentation of evidence to the Council to aid the Council in evaluating whether a building, structure, object, district, area or archeological site is historically significant, in the event an applicant requests an evaluation of significance from the Council;

(3) presentation of testimony about the Council's evaluation of significance to the District Commission or Environmental Board, when requested by the Council.

For any reason, an applicant, the SHPO, or the chairperson of the Advisory Council may request that the Council evaluate the historic significance of a resource under Rule 4.

**4.1.5 Time limits.** The Division shall evaluate the historic significance of a property and effect of a project on a Historic Site, if any, within 45 days of receipt of sufficient information from the applicant. The Division shall, within 20 days of receipt of such information determine whether additional information is required, and request such additional information from the applicant. The Division shall complete its evaluation within 30 days of receipt of such additional information from the applicant. These time limits may be extended for archeological evaluations as reasonably required by winter conditions.

**4.1.6 Programmatic review.** The SHPO may negotiate programmatic approaches for the review of large numbers of similar projects proposed by the same applicant, or for the review of a single project affecting numerous resources, if such an approach is also being used to satisfy federal Section 106 review requirements. Such programmatic approaches shall include review by qualified professionals and shall be in writing.

**4.1.7 Revised Project Plans.** Unless specifically waived by the Division, an applicant shall submit to the Division any revisions to its plans for an undertaking for further review and comment. The timeframes set forth at Rule 4.1.5 shall apply with respect to such resubmission.

#### **Rules 4.2 to 4.17 Review Process.**

**4.2 Act 250 Historic Preservation Review.** When undertaking a project that may affect historic or potentially significant archeological resources, an applicant shall provide to the Division information sufficient to allow the Division to evaluate the project's potential for effect on a Historic Site, ~~or potentially significant property or resource~~. Sufficient information shall include a project summary, and information on the location, history, environmental character, existing building and structures, current

and past land use, and potential project impacts to the historic site ~~or potentially significant archeological resources~~; and attachments including, but not limited to, photographs, plans, and maps. An applicant who is also submitting information for review under Section 106 may submit a Section 106 report to satisfy this requirement.

**4.2.1 Division Review.** The Division shall review the applicant's information in accordance with Rule 4.1.5. The Division may request in writing that the applicant provide more information within 20 days of receipt of the applicant's initial information.

**4.3 Area of Potential Effects.** The Division shall identify the area of potential effects of the undertaking.

**4.4 No Affected Historic Properties.** If the SHPO determines that there are no historic properties in the area of potential effects, the SHPO shall so notify the applicant and the District Commission or Environmental Board in writing within 45 days of receipt of sufficient information to make such determination.

**4.5 Historic Properties Listed in State or National Register.** The Division shall determine if any building, structure, object, district, area or archeological site in the area of potential effects is listed in the State or National Register. The Division shall review the information about the proposed undertaking in accordance with these Rules to evaluate if a listed historic property may be affected by the undertaking.

**4.6 Historic Buildings, Structures, Objects, Districts, or Areas Not Listed in State or National Register.**

**4.6.1** If the undertaking's area of potential effects contains a building, structure, object, district or area that is 50 years old or older, the SHPO shall apply the State Register criteria to determine whether the resource is historically significant. The SHPO may ask the Council to review the resource and list it in the State Register.

**4.6.2** If the applicant disagrees with the SHPO's determination under Rule 4.6.1, the applicant may, pursuant to Rule 4.9, request that the Advisory Council review the resource or resources and determine whether the resource is historically significant. The Council's determination will be the determination that is then submitted to the District Commission. The Council shall evaluate historic significance within the timeframes established at Rule 4.9.

**4.6.3** If the SHPO or Council concludes that the area of potential effects contains a Historic Site ~~historically significant resource~~, the SHPO shall then determine the effect of the project in accordance with these Rules, and recommend that the District Commission or the Environmental Board make the same determination.

**4.6.4** If the SHPO or Council determines that the area of potential effects contains no Historic Site, the Division shall notify the applicant in writing of that determination within 45 days of receipt of sufficient information to make such determination. If **the Council evaluates significance, the timeframes in Rule 4.9 shall apply.**

**4.6.5** The applicant and/or landowner may request, under Rule 9, that the property be considered for listing on the State Register. The consideration of listing shall proceed under Rule 9.4.

#### **4.7 Archeological Sites Not Listed in the State or National Register.**

Project areas may contain significant archeological sites that have not yet been discovered. Identifying such resources often requires research and field investigation. It is noted that the applicant has the responsibility of producing sufficient information so that the District Commission or Environmental Board can render a finding of fact and conclusion of law with respect to 10 V.S.A. § 6086(a)(8). Division for Historic Preservation staff may gather initial information, as outlined in 4.7.1:1 1 through 4.7.1.1.3 below, or the applicant may, at its option, retain a qualified archeological professional to gather initial information. If, after evaluation of such initial information, the Division staff determines that an archeological field investigation is warranted, the SHPO may recommend to the District Commission that the applicant retain a qualified archeological professional to conduct the studies as outlined at Rule 4.7.1.2. All archeological studies must meet the SHPO's Guidelines for Conducting Archeological Studies in Vermont.

**4.7.1 Identifying archeological sites.** The Division may identify archeological sites that have not been listed on the State or National Register, but are eligible for the State or National Registers, and thus may be ~~h~~Historic ~~s~~Sites as defined in 8 V.S.A. §6001(9).

A number of steps ~~are~~ may be necessary to identify archeological sites. Some steps are completed concurrently; other steps are completed only if results of a previous step warrant.

##### **4.7.1.1 Archeological Resource Assessment**

**4.7.1.1.1 Background Research.** Background Research shall include, but shall not be limited to, review of the Vermont Archeological Inventory, historic maps, and any other relevant source of information to identify recorded or potential archeological sites. Background Research may be completed either by the Division or the applicant's qualified professional.

**4.7.1.1.2 Applying predictive models.** Approved predictive models may be used to determine the likelihood that potential archeological sites exist within the project area. If such predictive models indicate a high likelihood that significant archeological sites exist in the project area, an archeological field inspection may be conducted. Application of a predictive model may be performed either by the Division or the applicant's qualified professional.

**4.7.1.1.3 Archeological Field Inspection.** The Archeological Field Inspection may be performed either by the Division or the applicant's qualified professional, for the purpose of identifying potentially significant archeological sites.

**4.7.1.1.4 Background research, application of predictive models and field inspection conducted by applicant's qualified professional.** An applicant may submit to the Division a report of its qualified professional's background research, application of predictive models approved by the Council, and archeological field

inspection that meets the SHPO's Guidelines for Conducting Archeological Studies in Vermont. In such case, the SHPO shall determine within 30 days whether he or she will recommend to the District Commission that the applicant's qualified professional conduct an archeological field investigation pursuant to Rule 4.7.1-2.1

#### **4.7.1.2 Archeological Field Investigation**

**4.7.1.2.1 Confirming presence of archeological sites through archeological field investigation.** If the District Commission determines, after the completion of an archeological field inspection, that If the project area is likely to contain significant archeological sites that cannot be avoided and preserved in-place through appropriate measures, and only in exceptional circumstances, the SHPO may recommend to the District Commission or Environmental Board can require that the applicant's qualified professional archeologist conduct an archeological field investigation. The purpose of the field investigation shall be to collect evidence sufficient for the SHPO to apply to the State Register criteria to determine whether the provide testimony to the District Commission as to whether an archeological site is historically significant. The archeological field investigation shall be completed within 90 days of the determination, except that an additional 30 days may be required when the determination is made during the months of November, December, January and February. Depending on the scope and the results of the field investigation, the SHPO may recommend additional evaluation to obtain information sufficient to permit the SHPO to apply the State Register criteria to determine whether the archeological site is historically significant.

#### **4.7.1.2.2 Management of Archeological Collections (Reserved.)**

**4.7.1.2.3 Payment of Costs Associated with Archeological Field Investigation.** The Commission shall pay any costs associated with the archeological field investigation determined to be necessary under Rule 4.7.1.2.1 and which is conducted on privately owned lands.

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**4.7.2 No affected archeological sites.** If the SHPO determines that there are no significant archeological resources in the area of potential effects, the SHPO shall so notify the applicant and the District Commission or Environmental Board in writing within 45 days of receipt of sufficient information to make such determination.

**4.7.3 Evaluating archeological sites.**

**4.7.3.1** When background research, a predictive model, field inspections or field investigations provide sufficient evidence, the SHPO shall apply the State Register criteria. A determination by the SHPO that the project area includes an archeological site which meets the State Register eligibility criteria shall be persuasive evidence for the District Commission to a determination that the project area contains a resource that is historically significant. The SHPO may then provide testimony to the District Commission or the Board seeking a final determination that the project area contains a Historic Site resource that is historically significant or request that the Council list the site on the State or National Register.

**4.7.3.2 Winter field inspections.** If the evaluation occurs when the ground is frozen and/or the area has deep snow cover, the SHPO may inform the applicant that a field inspection will need to wait until weather conditions are appropriate and request that the field inspection be scheduled as soon as weather conditions permit.

**4.8 Mitigation of Adverse Effects on a Potential Archeological Site.** The applicant may recommend to the SHPO, or his or her designee on Division staff, mitigation measures and permit conditions before the SHPO has made an evaluation of determination that a potential archeological site is significance t. The SHPO shall evaluate the effect of the project on the resources as set forth in Rules 4.10 through 4.15.

**4.8.1** At anytime the applicant and the SHPO may agree on measures the applicant shall take to avoid or minimize the undertaking's effect on the potential archeological site. The SHPO or the applicant's qualified archeological professional shall prepare a letter that clearly **states** all mitigation measures to which the applicant and the SHPO have agreed and requests that the District Commission or the Environmental Board recognize such agreement and include such measures as conditions in any permit that is issued. The SHPO and the applicant shall appropriately memorialize any such agreement.

**4.9 Referral to the Advisory Council for Determination of Historic Significance.**

**4.9.1 Applicant Request.** Should the applicant disagree with the SHPO's determination evaluation that a resource is historically significant, the applicant may request in writing addressed to the Chairperson of the Council that the Council evaluate the resource and provide testimony to the District Commission.

**4.9.2 SHPO and Council Request.** The SHPO or the Chairperson of the Advisory Council may ask the Council to review the resource and determine if it is historically significant or list it in the State Register pursuant to Rule 9.

**4.9.3 Notice of Meeting.** The Division shall inform the applicant of the date, time and

place of the Council's meeting when it will determine if the area of potential effects of the proposed undertaking will affect a resource that is historically significant. The applicant shall submit to the Council, at the Division's office, 9 copies of any information that the applicant wishes the Council to consider at least 15 days before the Council meeting. The SHPO in consultation with the Chairperson of the Advisory Council may waive the 15-day requirement in exceptional circumstances. **4.9.4** The applicant, the SHPO and the Division may present pertinent information at the Council meeting about any buildings, structures, districts, objects, areas, or archeological sites in the area of potential effects.

**4.9.5** The applicant's qualified professional or other representative may present information to the Council on behalf of the applicant.

**4.9.6** The Council shall apply the State Register criteria to determine whether the area of potential effects contains a resource that is historically significant.

**4.9.7** The Council shall deliberate and, unless it needs more information, the Council shall make a decision concerning *whether* or not any part of the area of potential effects contains a resource that is historically significant before the Council adjourns its meeting. The Council may *list any* resource it determines to be historically significant in the State Register.

**4.9.8** If the Council determines that it needs more information to determine if any part of the area of potential effects contains a resource that is historically significant, the Council shall recess the agenda item to a future meeting on a certain date, and identify what further information it needs and who shall be responsible for providing it.

**4.9.9** Within 15 days after the Council has adjourned its meeting, the Division shall send written notice to the applicant and the District Commission or the Environmental *Board of the* decision announced at the Council meeting, or the need for more information.

**4.9.10** If the Council finds that any part of the area of potential effects contains a resource that is historically significant, the SHPO shall determine the effect, if any, of the proposed undertaking, as set forth at Rules 4.10 through 4.15.

**4.9.11** If the Council determines that the area of potential effects contains no resource that is historically significant, and if the SHPO or the Division have been negotiating with the applicant pursuant to Rule 4.8, such negotiations with the applicant shall be terminated.

#### **4.10 Evaluation of Effect on a Historic Site.**

The SHPO shall evaluate and prepare testimony on whether the proposed undertaking will have any effect (as defined in Rule 2.15) on the Historic Site; whether the effect, if any, will be adverse (as defined in Rule 2.2); whether the adverse effect, if any, will be undue (as defined in Rules 2.42); and whether measures may be taken to effectively mitigate the undue adverse effect to the extent that it is no longer undue. The SHPO's evaluations shall be submitted to the District Commission or Environmental Board which shall make the final determination.

4.10.1 The SHPO shall use the Secretary of the Interior's Standards (Standards) and accompanying Guidelines to determine adverse effect to buildings, structures, and historic districts and areas.

4.10.2 The SHPO shall notify the applicant of his or her determination within 45 days of receiving sufficient information in accordance with Rule 4.1.5 to make the determination, unless Rule 4.10.3 applies.

4.10.3 If an applicant asks the Council to determine if any part of the area of potential effects has historic significance, the SHPO shall determine effect and notify the applicant in writing of its determination within 15 days after the Council makes its determination.

#### **4.11 Determination of No Adverse Effect**

**4.11.1** If after applying the criteria of adverse effect, as defined at Rule 2.2, and, if appropriate, the Secretary of the Interior's Standards, the SHPO determines that the undertaking does not cause an adverse effect on ~~the a~~, Historic Site, the SHPO shall notify the applicant in writing of the determination.

**4.11.2** If the Historic Site is a building, structure, or district, and proposed plans meet the Standards, the SHPO shall make a determination of no adverse effect.

#### **4.12 Determination of No Adverse Effect with Conditions.**

**4.12.1** If after applying the criteria of adverse effect, as defined at Rule 2.2, the SHPO finds that the undertaking as proposed would not be adverse if one or more minor changes were made, or if specific performance standards were met, the SHPO may propose conditions to include in the permit to ensure that the undertaking will not have an adverse effect on the Historic Site or the potentially significant property or resource.

**4.12.2** If the SHPO finds that the undertaking as proposed would be adverse, and if applicable, does not meet the Standards, the SHPO may recommend to the District Commission or Environmental Board that it require the applicant to identify alternatives, may recommend to the applicant that it hire a qualified professional to identify alternatives, or may negotiate with the applicant to find a way to modify the undertaking to avoid an adverse effect, and if applicable, meet the Standards.

#### **4.13 Determination of Adverse Effect.**

**4.13.1** If the SHPO determines that the undertaking will result in an adverse effect as defined in Rule 2.2, the Division will inform the applicant in writing in accordance with Rule 4.1.5.

**4.13.2** The SHPO shall invite the applicant to provide changes or alternatives to the undertaking to eliminate or reduce the adverse effect, or to develop measures that would mitigate the adverse effect. The applicant, if agreeable to mitigation or avoidance, shall notify the SHPO in writing of proposed changes or alternatives to the undertaking, or proposed mitigation measures to eliminate or reduce the adverse effect.

**4.13.3** If the SHPO is agreeable to the applicant's proposed changes, alternatives, or mitigation measures, the SHPO shall concur in writing within 15 days of receiving such information, or shall prepare a letter that clearly states all changes, alternatives, or mitigation measures to which the applicant and the SHPO have agreed, and requests that the District Commission or the Environmental Board recognize such agreement and include such measures as conditions in any permit that is issued. The SHPO and the applicant shall appropriately memorialize any such agreement.

**4.13.4** If the applicant and the SHPO do not agree on mitigation measures, the SHPO shall notify the District Commission or the Environmental Board in writing and may recommend specific project changes, alternatives or mitigation measures that should be included as conditions in the permit to eliminate or reduce the adverse effect to an Historic Site.

**4.14 Determination of Undue Adverse Effect.**

**4.14.1** Undue adverse effects identified by the SHPO may be eliminated or reduced through appropriate mitigation measures. Undue adverse effects that cannot be mitigated through appropriate measures remain "undue."

**4.14.2** The SHPO may make a determination that the undertaking will result in an undue adverse effect and may recommend to the District Commission or Environmental Board in writing that it make such a finding and conclusion. The SHPO's evaluations and recommendations with respect to undue adverse effect in Act 250 proceedings shall be made in accordance with Vermont law, including Environmental Board case law, as periodically summarized in guidance materials published by the Division.

**4.15 Council Testimony.** If a party challenges the Council's evaluation concerning whether or not the area of potential effects contains an Historic Site, the Council may select, at its sole discretion, a Council member to provide testimony before the District Commission or the Environmental Board about the Council's determination. Alternatively, the Council may designate the SHPO or Division to provide testimony on the Council's behalf.