

**VERMONT DIVISION FOR HISTORIC PRESERVATION**

**Department of Economic, Housing and Community Development**

Agency of Commerce and Community Development

**VERMONT HISTORIC PRESERVATION ACT RULES**

**Effective March 15, 2001**

**NOTE:** These rules incorporate the revised Rule 4 language, which was adopted in July 2010. This document was produced in November 2011 by the Division for Historic Preservation.

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## **Rule 1. AUTHORITY AND STATEMENT OF PURPOSE**

The Division for Historic Preservation (Division) is authorized by 22 V.S.A. § 723(10) to adopt rules and carry out the purposes of the Vermont Historic Preservation Act (VHPA), 22 V.S.A. chapter 14.

These Rules address the responsibilities of the Division, the State Historic Preservation Officer (SHPO), and the Vermont Advisory Council on Historic Preservation (Council) with respect to the Act 250 Environmental Board process, designation of resources to the State and National Registers of Historic Places, and other functions with which the Division, the SHPO, and the Council are charged pursuant to the VHPA.

## **Rule 2. DEFINITIONS**

The Definitions set forth herein apply to the rules of the Division for Historic Preservation, with the exception of Rule 3. Additional explanatory information, citations, and examples may be found in supplemental materials prepared by the Division.

**2.1 "Act 250"** means 10 V.S.A. chapter 151, as amended from time to time.

**2.2 "Adverse effect"** means a change in a historic property's or historic resource's integrity of location, design, setting, materials, workmanship, feeling, and association resulting from: physical destruction, damage or alteration; introduction of incongruous or incompatible effects such as isolation of a historic structure from its historic setting; new property uses; or new visual, audible or atmospheric elements.

**2.3 "Agency" (including "state agency" or "independent agency")** means any agency, board, department, division, commission, committee, branch or authority of the state.

**2.4 "Applicant"** means the property owner, developer of the project, or other person who has applied for an Act 250 permit.

**2.5 "Archeological Guidelines"** means the Guidelines for Conducting Archeological Studies in Vermont, adopted or promulgated by and periodically updated by the SHPO to provide guidance on statewide policies and on appropriate archeological field methodology, documentation, reporting, management of archeological collections, and public education requirements for archeological investigations.

**2.6 "Archeological landmark"** means an archeological site of significance to the scientific study or public representation of the state's historical, prehistorical or aboriginal past designated pursuant to 22 V.S.A. § 763.

**2.7 "Archeological site"** means any aboriginal mound, fort, earthwork, village location, burial ground, historic or prehistoric ruin, mine, cave, or other location which is or may be a source of important archeological data, as set forth at 22 V.S.A. § 701(8).

**2.8 "Area of potential effects"** means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, should such properties exist. Such area shall include the project area, and may include additional areas outside of the project area. Identification of the area of potential effects shall be determined after consideration of the scale and nature of an undertaking, and may vary with different kinds of effects caused by the same undertaking.

**2.9 "CLG"** means Certified Local Government, a federal program established by the National Historic Preservation Act (NHPA) that is administered by the Division under Rule 3 of these rules.

**2.10 "Council" or "Advisory Council"** means the Vermont Advisory Council on Historic Preservation as created by the VHPA at 22 V.S.A. § 741.

**2.11 "Cultural Landscape"** means a geographic area associated with a historic event, activity, or person which exhibits other cultural values. There are four general types of cultural landscapes, not mutually exclusive: historic sites; historic designed landscapes; historic vernacular landscapes; and sites of non-western and western world view landscape value, including places of religious or other traditional significance to other ethnic or cultural communities.

**2.12 "Days"** means calendar days. If the final day of an allowed timeframe falls on a Saturday, Sunday, or holiday, the timeframe shall extend to the following business day.

**2.13 "District"** means a group of buildings, sites, structures, objects, and/or landscape features linked together by a common history and development and forming a cohesive and recognizable entity such as, but not limited to, a historic village center, residential neighborhood, adjacent historic farms along a rural valley, the archeological remains of such areas, or a group of related archeological sites in a given geographic area.

**2.14 "Division"** means the Division for Historic Preservation as created by the VHPA at 22 V.S.A. § 721.

**2.15 "Effect"** means an alteration of a characteristic or characteristics of a historic property which characteristics may qualify such property for inclusion in the State or National Register.

**2.16 "Eligible for the State and National Register"** means meeting the criteria for listing, though not officially listed in either Register. See Rules 2.27 and 2.40.

**2.17 "Field inspection"** means visiting a project area to quickly assess the physical landscape for archeological sensitivity, to identify areas that have been significantly

disturbed in the past, and to identify potential archeological issues that should be considered during project planning.

**2.18 "Field investigation"** means the study of the traces of human culture at any land or water site by means of surveying, digging, sampling, excavating, removing surface or subsurface objects, or going on a site with that intent, as set forth at 22 V.S.A. § 701(4).

**2.19 "Ground disturbance" or "soil disturbance"** means a natural or man-made alteration of the soil that alters or destroys the integrity of any archeological sites contained in that soil.

**2.20 "Historic preservation"** means the research, protection, restoration, and rehabilitation of buildings, structures, objects, districts, areas, and sites significant in the history, architecture, archeology or culture of this state, its communities, or the nation, as set forth at 22 V.S.A. § 701(5).

**2.21 "Historic property" or "resource"** means any building, structure, object, district, area, or site that is significant in the history, architecture, archeology or culture of this state, its communities, or the nation, as set forth at 22 V.S.A. § 701(6). When used without the term "historic" in these rules, the term "resource" shall mean any building, structure, object, district, area or archeological site which is the subject of evaluation, though not yet identified as significant.

**2.22 "Historic site"** means, for the purposes of Act 250 and as defined in 10 V.S.A § 6001(9), any site, structure, district or archeological landmark which has been officially included in the State Register of Historic Places and/or the National Register of Historic Places, or which is established by testimony of the Council as being historically significant.

**2.23 "Historically Significant"** means a historic property or historic resource that is eligible for the State Register or National Register.

**2.24 "Mitigation"** means one or more measures that would modify an undertaking in order to avoid an adverse or an undue adverse effect on a resource, or otherwise compensate for its damage or loss.

**2.25 "National Historic Preservation Act (NHPA)"** means 16 U.S.C. §§ 470 – 470x-6, as amended from time to time.

**2.26 "National Register"** means the National Register of Historic Places established by the NHPA.

**2.27 "National Register Criteria"** means the criteria set forth at 36 CFR 60.4, used by the Secretary of the Interior and related National Register Bulletins published by the U.S. Department of the Interior, National Park Service to evaluate the qualifications of historic properties for the National Register.

**2.28 "Participation"** means under 22 V.S.A. § 742(a)(8), the performance by the SHPO and Division of certain functions in federal and nonfederal undertakings, as delegated by the Council.

**2.29 "Potential archeological site"** means an area that has a high probability of containing a significant archeological site.

**2.30 "Potentially significant property or resource"** means a property or resource that may meet the criteria for eligibility for the State and National Registers, or that shows a likelihood of containing historic or prehistoric archeological sites based on historic maps, information provided by individuals knowledgeable about the history or prehistory of the area, a predictive model(s) adopted by the Council, or other archival sources. (See Rule 2.21)

**2.31 "Predictive model"** means an analytical tool developed and used by professional archeologists to identify the archeological sensitivity of a particular property or landscape. A predictive model predicts where archeological sites are likely to be found based on a clustering of needed human resources such as food, water, shelter, and raw materials, and other environmental factors. Predictive models must be approved by the Council.

**2.32 "Project Area"** means, for the purposes of review by the Division and the Council of an Act 250 application, the entire area subject to the application, including portions to be developed and those to be left undisturbed.

**2.33 "Qualified Professional"** means a person who meets the Professional Qualifications Requirements published by the National Park Service at 36 CFR 61, as may be supplemented by the SHPO's policies from time to time. In addition, a Qualified Professional may be a professional who meets the standard for historic preservationist or other discipline, as adopted and published by the Division and/or the National Park Service.

**2.34 "RPC"** means a regional planning commission in Vermont.

**2.35 "Secretary"** means the Secretary of the Vermont Agency of Commerce and Community Development.

**2.36 "Secretary of the Interior's Standards"** means the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR Part 68, July 12, 1995 Federal Register (Vol, 60, No. 133), as they may be amended from time to time, and accompanying Guidelines. The Standards for Rehabilitation will apply to work on buildings, except in unusual cases involving reconstruction or museum-quality restoration of buildings when the Standards for Reconstruction or Restoration will apply.

**2.37 "Section 106"** means the section of the NHPA that requires each federal agency, and, by extension, any state agency, municipality or other entity using federal money or

applying for a federal permit or license for a particular undertaking, to take into account the effects of its actions on historic properties.

**2.38 "State Historic Preservation Officer" or "SHPO"** means the person appointed under 22 V.S.A. § 723(a), consistent with the requirements of the National Historic Preservation Act, for consultation on federal undertakings.

**2.39 "State Register"** means the State Register of Historic Places, which is the state's official listing of buildings, structures, objects, districts, and sites that are significant in local, state, and/or national history, architecture, archeology, and culture, as authorized by 22 V.S.A. § 723.

**2.40 "State Register criteria"** means the standards the SHPO has adopted pursuant to 22 V.S.A. § 723(a)(2) for listing a property on the State Register. The adopted State Register criteria are identical to the National Register criteria.

**2.41 "Undertaking"** means any project, activity, or program, including action on approval, authorization, license, and permit applications, that can result in a change in the character or use of an historic property or historic resource.

**2.42 "Undue adverse effect"** on a historic site for Act 250 purposes means an adverse effect that is not appropriately mitigated or reasonably avoided.

**2.43 "Vermont Archeological Inventory (VAI)"** means the written, photographic, and/or digital record of archeological sites that is maintained by the Division as the inventory of the state's archeological sites. Such archeological sites may be minimally or extensively documented, and may not necessarily meet the criteria for listing on the State or National Registers.

**2.44 "Vermont Historic Preservation Act (VHPA)"** means 22 V.S.A. chapter 14, as amended from time to time.

**2.45 "Vermont Historic Sites and Structures Survey (VHSS)"** means the written, photographic, and/or digital record of historic buildings, districts, structures and objects that is compiled in a standardized format and maintained by the Division as an inventory of the state's resources that are significant for their architectural, historic or engineering merit and that appear to meet the criteria for the State and National Registers of Historic Places.

## **Rule 3. REGULATIONS FOR THE VERMONT CERTIFIED LOCAL GOVERNMENT PROGRAM**

### **3.1 Introduction**

**3.1.1 Statutory background.** The National Historic Preservation Act of 1966, as amended (16 U.S.C. Section 470 et seq.) provides for matching grants-in-aid to the states from the Historic Preservation Fund for historic preservation programs and projects. Amendments to the Act passed in 1980 require that at least ten percent of each state's Historic Preservation Fund grant be designated for transfer to certified local governments which apply for the money. Vermont's participation in this federal program is authorized by the Vermont Historic Preservation Act, 22 V.S.A. chapter 14, which also creates the Vermont Division for Historic Preservation and directs the Division to adopt regulations to carry out the purposes of the Act. These regulations are issued to comply with that statutory directive and to implement a program known as the Certified Local Government, or CLG, program, which creates the opportunity for local governments to apply for CLG status and, once certified, to apply for grants-in-aid under the program.

**3.1.2 Historic preservation.** Historic preservation is the thoughtful management of the built environment. In some cases, preservation is a tool for economic development. In others, it is a mechanism to maintain a community's unique identity. But beyond these practical and aesthetic considerations, preservation is part of the Vermont ethic: you don't throw something away if it is still useful. It is good common sense in the fullest sense of the Vermont tradition to conserve, use, and improve what you already have. That is the spirit behind the Vermont CLG program and these regulations.

**3.1.3 Purpose of CLG grants.** Grants to Certified Local Governments will be for activities directly related to the identification, evaluation, or protection of historic and archeological resources that are eligible for Historic Preservation Fund grant assistance.

**3.1.4 Cooperation with local governments.** An integral part of the CLG program will be continuation of the Division for Historic Preservation's strong commitment to working cooperatively with local governments on historic preservation programs. Existing grant programs will continue, so that a community is not required to become a CLG in order to receive funds for historic preservation purposes. Grants received through the CLG program, however, will be locally administered. Along with this added local administrative responsibility goes the potential for significantly increased funding from Congress through future grant programs which may be based on CLG status. Local matching funds will be required for all CLG grants.

**3.1.5 Where to get more information.** Inquiries about the Vermont CLG program should be directed to the Vermont Division for Historic Preservation.

**3.2 Definitions.** These definitions apply to the Regulations for the Vermont Certified Local Government Program.

**3.2.1 "Certified Local Government" or "CLG"** means a local government that has been certified by the National Park Service to carry out the purposes of the National Historic Preservation Act, as amended, in accordance with Section 101(c) of the Act.

**3.2.2 "Chief elected local official"** means the chairman of a board of selectmen in a town, the mayor of a city, the chairman of the board of trustees in a village or any other elected head of a local government.

**3.2.3 "CLG share"** means the federal funding authorized for transfer to local governments in accordance with Section 103(c) of the National Historic Preservation Act, as amended, and these regulations.

**3.2.4 "Commission"** means the historic preservation review commission established by a local government in accordance with section 3.3.1(2) of these regulations.

**3.2.5 "Comprehensive historic preservation planning"** means an ongoing process that is consistent with technical standards issued by the United States Department of the Interior and which produces reliable, understandable, and up-to-date information for decision making related to the identification, evaluation, and protection/treatment of historic resources.

**3.2.6 "Council"** means the Vermont Advisory Council on Historic Preservation.

**3.2.7 "Designation"** means the identification and registration of properties for protection that meet criteria established by the State or local government for significant historic and prehistoric resources within the jurisdiction of the local government. Designation includes the identification and registration of resources according to State or local criteria which must be consistent with the Secretary of the Interior's Standards for Identification and Registration.

**3.2.8 "Division"** means the Division for Historic Preservation as created by the Vermont Historic Preservation Act, 22 V.S.A. chapter 14.

**3.2.9 "Historic Preservation"** includes identification, evaluation, recordation, documentation, curation, acquisition, management, stabilization, maintenance, interpretation, conservation, research, protection, restoration, and rehabilitation and education and training regarding the foregoing activities of any prehistoric or historic district, site, building, structure, or object significant in American history, architecture, archeology, engineering, or culture.

**3.2.10 "The Historic Preservation Fund Grants Manual"** means the document that sets forth federal administrative procedures and requirements for activities concerning the federally related historic preservation programs of the states, and certified local governments. This Manual includes requirements and procedures



for the administration of the historic preservation grants-in-aid program, which includes the program described in these regulations.

**3.2.11 "Historic property" or "resource"** means any building, structure, object, district, area or site that is significant in the history, architecture, archeology or culture of this state, its communities or the nation.

**3.2.12 "Local government"** means a town, city, village, or municipality, the existence of which is authorized by law, or any general purpose political subdivision of the state.

**3.2.13 "National Register of Historic Places" or "National Register"** means the national list of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture, maintained by the United States Secretary of the Interior under the authority of Section 101(a)(1)(A) of the National Historic Preservation Act, as amended.

**3.2.14 "Protection"** means a local review process under State or local law for proposed demolition of, changes to, or other action that may affect historic properties. The CLG's review process applies only to properties designated pursuant to State or local laws and procedures and does not include properties listed on or determined eligible for the National Register of Historic Places unless such properties were designated under the appropriate State or local process.

**3.2.15 "Secretary"** means the Secretary of the Interior. Unless otherwise stated in law or regulation, the Secretary has delegated the authority and responsibility for administering the National Historic Preservation program to the National Park Service.

**3.2.16 "State Historic Preservation Officer" or "SHPO"** means the person appointed under 22 V.S.A. § 722(a), consistent with the requirements of the National Historic Preservation Act for consultation on federal undertakings. Pursuant to 22 V.S.A. §723(b), the SHPO may delegate to a Deputy SHPO the duties and responsibilities of the SHPO in the SHPO's absence. In addition, the SHPO may delegate duties to such Division staff as are necessary to carry out the purposes of the Division.

**3.2.17 "Vermont Archeological Inventory"** means the written, photographic, and/or digital record of archeological sites that is maintained by the Division as the inventory of the state's archeological resources. Such archeological sites may be minimally or extensively documented, and may not necessarily meet the criteria for listing on the State or National Registers.

**3.2.18 "The Vermont Historic Sites and Structures Survey"** means the written, photographic, and/or digital record of historic buildings, districts, structures and objects that is compiled in a standardized format and maintained by

the Division as an inventory of the state's resources that are significant for their architectural, historic, or engineering merit and that appear to meet the criteria for the State and National Registers of Historic Places.

### **3.3 The certification process.**

#### **3.3.1 Request for certification.**

**3.3.1.1** Any local government may request certification from the SHPO on forms provided by the Division. A request for certification shall be approved by the SHPO for forwarding to the National Park Service when the local government making the request has submitted written documentation of compliance with the following requirements:

(1) The local government has agreed to enforce, within its jurisdiction, the provisions of the Vermont Planning and Development Act (24 V.S.A. chapter 117), the Vermont Historic Preservation Act (22 V.S.A. chapter 14), and any other state or local legislation which may be enacted for the designation and protection of historic properties.

(2) The local government has established by action appropriate to its procedures a historic preservation review commission of not less than three nor more than nine members appointed by the legislative body of the local government. The action establishing the commission shall include the following information:

(A) That the commission be composed of professional and lay members, a majority of which reside within the jurisdiction of the local government.

(B) That all members have demonstrated interest, competence or knowledge in historic preservation.

(C) That to the extent available within the jurisdiction of the local government, at least a majority of the members shall be professionals who meet "the Secretary's Professional

Qualifications Standards" published by the National Park Service in 36 CFR 61 including those from the disciplines of history, prehistoric or historic archeology, architectural history, architecture and historical architecture who meet the requirements of Appendix A.

Members representing other historic preservation related disciplines, such as urban planning, American studies, American civilization, cultural geography, or cultural anthropology, and lay members are encouraged.

**(D)** That all activities of the commission shall be conducted in accordance with the terms of the Vermont Open Meeting Law (1 V.S.A. chapter 5, subchapter 3), and that the commission shall take additional steps as it deems appropriate to stimulate public participation in commission activities, such as, publishing its minutes, publishing the procedures by which assessments of potential National Register nominations will be carried out or using public service announcements to publicize commission activities. The commission may withhold from disclosure to the public information about the location, character, or ownership of archeological resources if such disclosure might risk harm to the resource.

**(E)** That the commission shall have written rules of procedure, including conflict of interest provisions incorporating the detailed requirements involving conflict of interest set out in the "Historic Preservation Fund Grants Manual."

(F) That the commission shall have the following responsibilities, to be carried out in coordination with and in accordance with format and standards established by the Division:

(i) Creation and maintenance of a system for the survey and inventory of historic properties within its jurisdiction that is coordinated with the *Vermont Historic Sites and Structures Survey* and the *Vermont Archeological Inventory*.

(ii) Preparation, for submission to the Division by the legislative body of the local government, of a report concerning properties within its jurisdiction which are under consideration for nomination for inclusion on the National Register. The report shall be prepared in cooperation with the Division and shall be prepared in a manner consistent with the following requirements of the National Historic Preservation Act:

101(c)(2)(A) "Before a property within the

jurisdiction of the certified local government may be considered by the State to be nominated to the Secretary for inclusion on the National Register, the State Historic Preservation Officer shall notify the owner, the applicable chief local elected official, and the local historic preservation commission. The commission, after reasonable opportunity for public comment, shall prepare a report as to whether or not such property, in its opinion, meets the criteria of the National Register. Within sixty days of notice from the State Historic Preservation Officer the chief elected local official shall transmit the report of the commission and his recommendation to the State Historic Preservation Officer. Except as provided in subparagraph (B), after receipt of such report and recommendation, or if no such report and recommendation are received within sixty days, the State shall

make the nomination pursuant to section 101(a). The State may expedite such process with the concurrence of the certified local government."

101(c)(2)(B) "If both the commission and the chief elected local official recommend that a property not be nominated to the National Register, the State Historic Preservation Officer shall take no further action, unless within thirty days of receipt of such recommendation by the State Historic Preservation Officer an appeal is filed with the state. If such an appeal is filed, the state shall follow the procedures for making a nomination pursuant to section 101(a). Any report and recommendations made under this section shall be included with any nomination submitted by the state to the Secretary."

**(iii)** When determined to be appropriate in the discretion of the commission, preparation and submission for

approval by the local government's legislative body of grant applications to the Division for funds from the CLG share of the state's annual Historic Preservation Fund (HPF) grant award.

(iv) Advising and assisting the legislative body of the local government, planning commission and other appropriate persons on matters related to historic preservation.

(v) Performance of additional responsibilities in accordance with a mutual written agreement between the Division and the Certified Local Government.

(G) That the commission shall meet no less than four times annually, and maintain an attendance rule for commission members.

(3) The local government has agreed to cooperate with the Division with respect to the Division's monitoring and evaluation of the CLG program.

**3.3.1.2** A request for certification will be approved without the minimum of professional persons on the commission if the local government demonstrates to the SHPO that it has made a reasonable effort to fill the positions with persons from appropriate disciplines. When a discipline is not represented on the commission, the commission shall seek expertise in this area from

persons meeting the Secretary of the Interior's Professional Qualification Standards when considering National Register nominations.

**3.3.2 Approval of certification request by SHPO.** The SHPO shall review certification requests from local governments and within forty-five days of receipt issue a letter of approval or disapproval, stating the reasons for the action taken. This review shall be based on compliance with all requirements set forth in Section 3.3.1 of these regulations

**3.3.3 Certification agreement.** When a certification request has been approved, the SHPO shall prepare a written certification agreement incorporating the requirements and responsibilities agreed to by the local government in the certification process and the responsibilities of the SHPO and the Division to the CLG as set out in these regulations.

**3.3.4 Approval by federal authorities.** Within ten business days of receipt of signature of the certification agreement by the chief elected local official and the SHPO, the SHPO shall forward to the United States Secretary of the Interior a copy of the approved certification request, the signed certification agreement and a certification by the SHPO that the CLG application is complete and the local government meets the requirements for CLG status, in a form approved by the NPS. As specified by federal regulations, if the Secretary of the Interior does not take exception to the request within fifteen working days of receipt, the local government shall be regarded as certified.

### **3.4 Grants to Certified Local Governments (CLGs)**

**3.4.1** Any CLG may apply to the Division for a grant from the CLG share of Vermont's annual HPF grant award. Applications will be evaluated and grants awarded based on the criteria established in this chapter and the annual grant program priorities established by the Division and the Vermont Advisory Council on Historic Preservation. The Division is not required to award grants if there are no qualifying applications. However, at least ten percent of Vermont's annual HPF allocations shall be designated by the Division for transfer to CLGs, as subgrantees, which submit applications meeting the criteria of these regulations. In addition, in any year in which the federal HPF grant appropriations for all states exceeds \$65,000,000, one-half of Vermont's share of the excess shall be transferred to CLGs according to procedures to be provided by the United States Secretary of the Interior.

**3.4.2** Annually the Division shall notify all CLGs of the current year's deadline for receipt by the Division of grant applications from CLGs. The notice shall be sent no less than sixty days prior to the deadline, unless federally imposed time limits require a shorter notice period. Only applications received prior to the deadline will be considered.



**3.4.3** Grant applications shall be on forms prescribed by the Division.

**3.4.4 Matching fund requirements.** All grants to CLGs shall be matching grants. No grant shall be for more than 60 percent of the aggregate cost of carrying out the proposed project or program. Except as specifically permitted by federal law, the local share for CLG matching grants shall come from non-federal sources. Grant monies transferred to CLGs shall not be applied as matching share for any other federal grant.

**3.4.5 Grant award criteria**

**3.4.5.1** The following priorities will be used by the Division and the Council in the selection for funding of CLG applicants unless specific priorities are defined for the fiscal year and are made available to all CLGs and local governments whose applications for certification are pending, as part of the annual notice of funds availability:

- (1) Activities contributing to completion within the CLG of the Vermont Historic Sites and Structure Survey or the Vermont Archeological Inventory.
- (2) Preparation of nominations to the National Register for significant districts, buildings, structures, sites or objects.
- (3) Comprehensive historic preservation planning in communities.
- (4) Activities contributing to a broader understanding and appreciation of historic resources by the general public, such as, educational programs or printed materials concerning historic preservation activities in the community.
- (5) The identification and evaluation of significant features of National Register or National Register eligible properties.
- (6) Pre-development planning, which means the planning necessary for the protection, stabilization, restoration or rehabilitation of a historic property according to federal standards.
- (7) Activities made eligible for funding by future federal legislation or regulations.

(8) Activities providing integration of historic resources, when appropriate, into community recreation plans or plans for public access or enhancement of cultural resources.

**3.4.5.2** For development projects, the following specific priorities will be used by the Division and the Council in selecting among CLG applicants for such projects:

(1) Projects that provide local, long-term economic impact.

(2) Projects that promote the best long-term use of historic resources.

(3) Projects that best preserve the qualities and features of a historic resource that make it eligible for the National Register.

(4) Projects that are most likely of completion and sustained benefit because of the capabilities of the applicant.

**3.4.5.3** Review of applications and selection of applicants for funding shall also be based on the following:

(1) Funds awarded to each grantee should be sufficient to produce a specific tangible impact and to generate effects directly as a result of the funds transfer. This may not be waived even if the applicant is otherwise eligible.

(2) To the extent consistent with paragraph 3.4.5.3 of this section, the Division will make reasonable efforts to distribute CLG grants among the maximum number of CLGs and to ensure a reasonable distribution between urban and rural areas.

(3) No CLG may receive a disproportionate share of the state CLG allocation.

**3.4.6 Public access.** The Division shall make available to the public, upon request, the rationale for the applicants selected and the amounts awarded.

**3.4.7 Minimum requirements for CLGs.** The following minimum requirements must be met by a CLG before it may receive a portion of the state CLG share:

(1) The local financial management system shall be maintained in accordance with the standards specified in OMB Circular A-102, Attachment G, "Standards for Grantee Financial Management Systems" and shall be auditable in accordance with General Accounting Office's *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions*.

(2) In its historic preservation activities, the CLG shall adhere to all requirements of the Historic Preservation Fund Grants Manual. Indirect costs may be charged as part of a CLG grant only if the applicant meets the requirements of the Guideline and has a current indirect cost rate approved by the cognizant federal agency.

(3) The CLG must agree to adhere to any requirements which may be mandated by Congress regarding use of CLG funds.

**3.4.8 Grant agreements.** Before transfer of CLG funds to a successful CLG grant applicant, a written grant agreement prepared by the Division shall be entered into between the Division and the CLG which shall include the minimum requirements set out in this chapter.

**3.4.9 Closeout with decertification.** When a CLG is decertified, the Division will conduct financial assistance closeout procedures in accordance with the Historic Preservation Fund Grants Manual.

### **3.5 Training, Monitoring and Evaluation**

**3.5.1 Training.** The Division shall make available to all local historic preservation review commissions orientation materials and training programs designed to provide a working knowledge of the roles and operations of federal, state and local preservation programs.

**3.5.2 Financial audit.** The Division is responsible, through financial audit, for the proper accounting of Vermont's CLG share monies in accordance with OMB Circular A-133 "Audit Requirements." Accordingly, the Division evaluation of CLG performance which occurs once every four years shall include an assessment of the fiscal management of CLG grant monies.

#### **3.5.3 Monitoring and evaluation**

**3.5.3.1** The Division is required to inform all CLGs about the contents of the statewide comprehensive historic preservation plan, provide all CLGs with an opportunity to participate in the planning

process and monitor CLG performance to ensure consistency and coordination with the statewide comprehensive historic preservation planning process. Accordingly, the Division shall evaluate the performance of each CLG not less often than once every four years.

**3.5.3.2** The evaluation shall include a review of CLG program operation and administration by such methods as an annual report (prepared in accordance with Appendix C), site visits, interviews with local commission members, elected officials and citizens, comparison of program progress since the last evaluation and review of CLG financial and program records.

**3.5.3.3** The evaluation shall be based on the procedures and guidelines set out in the Historic Preservation Fund Grants Manual, and the Division's Performance Evaluation Checklist (Appendix B to this Rule), on compliance with the terms of the CLG agreement and current grant agreements, and on consistency with the statewide comprehensive historic preservation planning process. The evaluation shall also be based on the following specific factors, among others:

- (1) Maintenance of qualified commission membership;
- (2) Number and frequency of commission meetings;
- (3) Educational activities or programs conducted;
- (4) Fiscal management of Historic Preservation Fund subgrants;
- (5) Consistency and coordination with the state historic preservation planning process.

**3.5.3.4** A written report of the evaluation shall be sent to the local historic preservation review commission and the chief elected local official within thirty days of completion of the evaluation.

#### **3.5.4 Decertification**

**3.5.4.1** When the Division determines, after evaluation, that the performance of a CLG is inadequate, the Division may recommend to the United States Secretary of the Interior that the CLG be decertified. The recommendation shall contain specific reasons for the decertification request.

**3.5.4.2** Before recommending decertification to the Secretary of the Interior, the Division shall notify the CLG of the reasons why its performance is deemed to be inadequate and provide advice and assistance to the CLG to improve its performance. If the Division determines that sufficient improvement has not occurred within ninety days of the notice to the CLG, the decertification recommendation may be made.

**3.5.4.3** When a CLG is decertified, the Division will conduct financial assistance closeout procedures in accordance with the Historic Preservation Fund Grants Manual for any CLG funds the CLG received.

**3.5.4.4** The SHPO may recommend decertification to the Secretary of the Interior if a CLG requests to be decertified in writing. The SHPO shall forward a copy of the CLG's letter with the SHPO's written request to the Secretary to decertify the CLG. Compliance with the conditions stipulated in sections 3.5.4.1 and 3.5.4.2 above, is not required, if the CLG has requested its own decertification.

## **Rule 4. HISTORIC AND ARCHEOLOGICAL RESOURCES AND THE ACT 250 PROCESS (Adopted July 2010)**

### **4.0 Authority and Purpose**

This Rule 4 is promulgated pursuant to the authority granted to the Division for Historic Preservation (the "Division") by 22 V.S.A. § 723(5) and (10) and sets forth the Division's process for reviewing projects under Criterion 8 of Act 250, 10 VSA § 6086(a)(8), and 30 VSA § 248. This Rule is only binding upon the Division and any applicant who voluntarily seeks the cooperation of the Division, the SHPO, or the Advisory Council under the Rule. It does not impose any obligation upon, or substantively or procedurally affect, the District Environmental Commissions, the Public Service Board, or the Environmental Court.

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. Because Title 30 of VSA § 248 directs the Public Service Board (PSB) to use the Act 250 criteria during review of applications for Certificates of Public Good, these rules will be used by the Division in front of the PSB in the same manner in which they are used in front of District Commissions.

**4.1 Relevant definitions.** These are repeated from Rule 2 for the convenience of the reader.

**4.1.1 "Adverse effect"** means, for the Division's review purposes, a change in a historic property's or historic resource's integrity of location, design, setting, materials, workmanship, feeling, and association resulting from: physical destruction, damage or

alteration; introduction of incongruous or incompatible effects such as isolation of a historic structure from its historic setting; new property uses; or new visual, audible or atmospheric elements.

**4.1.2 “Area of potential effects”** means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, should such properties exist. Such area shall include the project area, and may include additional areas outside of the project area. Identification of the area of potential effects shall be determined after consideration of the scale and nature of an undertaking, and may vary with different kinds of effects caused by the same undertaking.

**4.1.3 “Archeological site”** or “site” means any aboriginal mound, fort, earthwork, village location, burial ground, historic or prehistoric ruin, mine, cave, or other location which is or may be a source of important archeological data as defined in 22 V.S.A. § 701(8).

**4.1.4 “District”** means a group of buildings, sites, structures, objects, and/or landscape features linked together by a common history and development and forming a cohesive and recognizable entity such as, but not limited to, a historic village center, residential neighborhood, adjacent historic farms along a rural valley, the archeological remains of such areas, or a group of archeological sites in a given geographic area.

**4.1.5 "Effect"** means an alteration of a characteristic or characteristics of a historic property which characteristics may qualify such property for inclusion in the State or National Register.

**4.1.6 “Field inspection”** means visiting a project area to quickly assess the physical landscape for archeological sensitivity, to identify areas that have been significantly disturbed in the past, and to identify potential archeological issues that should be considered during project planning.

**4.1.7 “Field investigation”** means the study of the traces of human culture at any land or water site by means of surveying, digging, sampling, excavating, removing surface or subsurface objects, or going on a site with that intent as defined in 22 V.S.A. § 701(4).

**4.1.8 “Historic site”** means any site, structure, district or archeological landmark which has been officially included in the National Register of Historic and/or the State Register of Historic Places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant, as defined in 10 V.S.A § 6001(9).

**4.1.9 "Historic property" or "historic resource"** means any building, structure, object, district, area, or site that is significant in the history, architecture, archeology or culture of this state, its communities, or the nation as defined in 22 V.S.A. § 701(6).

**4.1.10 "Historically Significant"** means an historic property or historic resource that is eligible for the State Register or National Register.

**4.1.11 “National Register criteria”** means the criteria set forth at 36 CFR 60.4, used by the Secretary of the Interior and related National Register Bulletins published by the U.S. Department of the Interior, National Park Service to evaluate the qualifications of historic properties for the National Register. On the Internet at: <http://www.nps.gov/history/Nr/regulations.htm>.

**4.1.12 "Predictive model"** means an analytical tool developed and used by professional archeologists to identify the archeological sensitivity of a particular property or landscape. A predictive model predicts where archeological sites are likely to be found based on a clustering of needed human resources such as food, water, shelter, and raw materials, and other environmental factors. Predictive models must be approved by the VT Advisory Council on Historic Preservation.

**4.1.13 “Project area”** means for the purposes of review by the Division and the Council of an Act 250 application, the entire area subject to the application, including portions to be developed and those to be left undisturbed.

**4.1.14 "Qualified professional"** means a person who meets the Professional Qualifications Requirements published by the National Park Service at 36 CFR 61, as may be supplemented by the SHPO's policies from time to time. In addition, a Qualified Professional may be a professional who meets the standard for historic preservationist or other discipline, as adopted and published by the Division and/or the National Park Service. On the Internet at: [http://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](http://www.nps.gov/history/local-law/arch_stnds_9.htm).

**4.1.15 “Resource”** means any building, structure, object, district, area or site which is the subject of evaluation, though not yet identified as significant.

**4.1.16 “Secretary of Interior Standards”** means the Secretary of the Interior’s Standards for the Treatment of Historic Properties, 36 CFR Part 68, July 12, 1995 Federal Register (Vol, 60, No. 133), as they may be amended from time to time, and accompanying Guidelines. The Standards for Rehabilitation will apply to work on buildings, except in unusual cases involving reconstruction or museum-quality restoration of buildings when the Standards for Reconstruction or Restoration will apply. On the Internet at: <http://www.nps.gov/history/hps/tps/standguide/>.

**4.1.17 "Section 106"** means the section of the National Historic Preservation Act that requires each federal agency, and, by extension, any state agency, municipality or other entity using federal money or applying for a federal permit or license for a particular undertaking, to take into account the effects of its actions on historic properties. On the Internet at: <http://www.achp.gov/work106.html>.

**4.1.18 “State Register”** means the State Register of Historic Places, which is the state’s official listing of buildings, structures, objects, districts, and sites that are significant in local, state, and/or national history, architecture, archeology, and culture, as authorized

by 22 V.S.A. § 723. On the Internet at:  
<http://www.leg.state.vt.us/statutes/fullchapter.cfm?Title=22&Chapter=014>

**4.1.19 “Undertaking”** means any project, activity, or program, including action on approval, authorization, license, and permit applications, that can result in a change in the character or use of an historic property or historic resource.

**4.1.20 “Underwater historic property”** means any shipwreck, vessel, cargo, tackle or underwater archeological specimen, including and found at refuse sites or submerged sites of former habitation, that has remained unclaimed for more than ten years on the bottoms of any waters, as defined in 22 V.S.A. § 701(10).

**4.1.21 "Undue adverse effect"** on an historic site means, for the Division’s review purposes, an adverse effect that is not appropriately mitigated or reasonably avoided. The Division considers four factors in determining whether an adverse effect is “undue”:

- (1) the failure of an applicant to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site;
- (2) interference on the part of the proposed project with the ability of the public to interpret or appreciate the historic qualities of the site;
- (3) cumulative effects on historic qualities of the site by the various components of a proposed project which, when taken together, are so significant that they create an unacceptable impact;
- (4) violation of a clear, written community standard which is intended to preserve the historic qualities of the site.

**4.2** The Division is a statutory party in the Act 250 process and offers comments to the District Commissions and the Environmental Court<sup>1</sup> on the existence of historic sites within a project’s area of potential effects, the potential impacts of proposed projects on historic sites and, as appropriate, measures to avoid or mitigate adverse impacts to historic sites. The Advisory Council on Historic Preservation (Advisory Council) is also a statutory party in the Act 250 process and may evaluate the significance of resources in accordance with Rule 4.1.8.

### **4.3 Pre- application project planning.**

The Division encourages applicants to contact it as early as possible in the planning stages of the undertaking, preferably before filing their application, to identify and discuss potential historic and archeological concerns. Potential impacts on historic sites are more easily resolved the earlier they are identified. A qualified historic preservation or archeological professional can

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<sup>1</sup> It’s understood that this process applies to both a District Commission and Environmental Court. However, for convenience all references will be limited to “District Commissions” even though equally applicable to the Environmental Court.



provide valuable assistance in addressing potential impacts and minimizing project delays. The Division encourages a person to implement Rule 4.12 (see below) at his or her option prior to applying for an Act 250 permit. This is the most efficient method for working out historic preservation issues early in the process.

#### **4.4 Act 250 projects that may have federal Section 106 jurisdiction.**

An Act 250 project may be subject to Section 106 review under the National Historic Preservation Act if it contains federal funding, or requires a federal permit or license. Such a project is subject to similar standards but different rules and requirements than an Act 250 project without federal involvement. The Division encourages an Act 250 applicant whose project is or may be subject to federal Section 106 review to contact the Division at the earliest stage of project planning to ensure that the federal requirements are met, avoid redundant tasks, and minimize delays.

#### **4.5 Introduction**

**4.5.1 Scope of rules.** This Rule delineates the responsibilities of, and establishes procedures for the State Historic Preservation Officer (SHPO), the Division and the Advisory Council concerning the Act 250 process. This Rule imposes obligations on the Division and on any Act 250 applicant who voluntarily seeks the cooperation of the SHPO, the Division, or the Advisory Council on testimony to the District Commission under this Rule. This Rule encourages collaboration resulting in timely and predictable participation in the Act 250 process by the SHPO, the Division, and the Advisory Council, and operates independently of the Act 250 rules that govern a District Commission's consideration of an application for a land use permit.

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

**4.5.3 Applicability of these rules to a project.** This Rule shall apply to the Division and any applicant who voluntarily seeks the cooperation of the SHPO, the Division, or the Advisory Council under this Rule when the applicant's project may affect historic resources. Generally, a project may have the potential to affect historic resources when there exists:

- (1) A building, structure, district, or archeological 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 known or as-yet-undiscovered archeological sites.

- (4) A possibility of ground disturbance in the project area or area of potential effects that may affect known or as-yet-undiscovered underwater historic property.

#### **4.5.4 Participation and Delegation.**

Pursuant to 22 V. S.A. § 742(a)(8), the Advisory Council has delegated to the SHPO, or his or her designee, 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 in order to provide testimony on behalf of the Advisory Council to a District Commission on whether a resource is historically significant;
- (2) An applicant may request that the Advisory Council evaluate a resource's historic significance. SHPO or designee may present evidence to aid the Advisory Council in evaluating a building, structure, object, district, area or archeological site's historic significance;
- (3) The Advisory Council may request that the SHPO or designee present testimony about its evaluation of significance to the District Commission.
- (4) 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.

#### **4.5.5 Time limits.**

The Division shall evaluate the historic significance of a resource 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 15 days of receipt of such information determine whether additional information is necessary for the evaluation, 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.

**4.5.6 Programmatic review.** As permitted under rules of the NRB or PSB, the SHPO may negotiate written programmatic agreements 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. Such programmatic agreements shall include review by qualified professionals.

**4.5.7 Revised Project Plans.** An applicant shall submit to the Division for further review and comment any revisions to its project plans currently under review. The timeframes set forth at Rule 4.5.5 shall apply with respect to the submission of revised plans.

## **Rules 4.6 to 4.19 Review Process.**

### **4. 6 Criteria used for determination of “Historic Site”.**

10 V.S.A. § 6001(9) defines “historic site” as “any site, structure, district or archeological landmark which has been officially included in the National Register of Historic and/or the State Register of Historic Places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.” For the Division’s review purposes, the historical significance of a resource can be determined by evaluation under the State and National Register criteria used to determine if a resource is eligible for listing on the State or National Registers. The State and National criteria are identical.

**Criterion A:** Sites that are associated with events that have made a significant contribution to the broad patterns of our history.

**Criterion B:** Sites that are associated with the lives of persons significant in our past.

**Criterion C:** Sites that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction.

**Criterion D:** Sites that have yielded, or may be likely to yield, information important in prehistory or history.

**4. 6.1 Challenges associated with Archeological Sites.** Vermont’s archeological sites include the remains of at least 12,000 years of human history, much of it pertaining to the state’s Indigenous people and cultures. This archeological heritage lies buried within the soil or has low visibility above the ground. Site discovery and documentation require field inspections and, often, field investigations to document and recover sufficient information to determine that a site may yield information important in prehistory or history.

**4.7. Act 250 Historic Preservation Review.** When planning a project an applicant should provide to the Division sufficient information for an evaluation of the project's potential impacts on an historic site. Sufficient information should include a project summary; information on the location, history, environmental character, existing buildings and structures, current and past land use, and potential project impacts to an historic site; and other relevant information including, but not limited to, photographs, plans, and maps. An applicant who is also submitting information for review under Section 106 may substitute applicable Section 106 documentation to aid in the Division’s review.

**4.7.1 Division Review.** The Division will review the applicant's information in accordance with the time limits set out in Rule 4.5.5. The Division may request in

writing that the applicant provide more information within the time limits established under 4.5.5 of this Rule.

**4.8 Area of Potential Effects.** The undertaking's area of potential effects will be identified by the Division or in consultation with the applicant's qualified professional.

**4.9 No Effect on Historic Sites.** The SHPO will notify the applicant and, where appropriate, the District Commission in writing within the time limits established under 4.5.5 of this Rule for receiving sufficient information from the applicant to determine there is no effect on historic sites.

**4.10 Historic Properties Listed in State or National Register.** The Division or the applicant's qualified professional will 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 alone, or in consultation with the applicant's qualified professional, will evaluate the potential impacts of the undertaking on a listed historic site.

**4.11 Historic Buildings, Structures, Objects, Districts, and Landscapes Not Listed in State or National Register.**

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

**4.11.2** If the applicant disagrees with the SHPO's determination under Rule 4.11.1, the applicant may, pursuant to Rule 4.14 (see below), request that the Advisory Council determine whether or not the resource is historically significant. The Advisory Council will evaluate historic significance within the timeframes established in Rule 4.14. The Division will submit the Advisory Council's determination to the District Commission.

**4.11.3** If the SHPO or Advisory Council concludes that the area of potential effects contains an historic site, the Division will determine the project's potential impacts on the historic site. SHPO will provide testimony supporting its determination of effect to the District Commission.

**4.11.4** If the SHPO or Advisory Council determines that the area of potential effects contains no historic site, the Division will notify the applicant in writing of its determination within the time limits established under 4.5.5 of this Rule. If the Advisory Council evaluates the historic significance of a resource, the timeframes in Rule 4.14 shall apply.

**4.11.5** An applicant-landowner may request, under Rule 9, that the property be listed on the State Register. The consideration for listing shall follow Rule 9.4.

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

A project's area of potential effects may contain as-yet-undiscovered historic sites that may be likely to yield information important in prehistory or history. Identifying historic sites may require research and archeological field investigation. The applicant must produce sufficient information for the District Commission to make a finding of fact and conclusion of law under 10 V.S.A. § 6086(a)(8).

The Division may gather initial information from an Archeological Resource Assessment, as outlined below. Alternatively, the applicant may, at its option, retain a qualified archeological professional to gather that information. If the Division's evaluation supports the need for an archeological field investigation, the SHPO may request the District Commission to require such action and that an applicant retain a qualified archeological professional to conduct it as outlined below. The applicant may voluntarily, retain a qualified archeological professional to conduct a field investigation without first being required to do so by the District Commission. All archeological studies must meet the SHPO's Guidelines for Conducting Archeological Studies in Vermont (on the Internet at: [http://www.historicvermont.org/general/Archeo\\_guidelines\\_final\\_2002.pdf](http://www.historicvermont.org/general/Archeo_guidelines_final_2002.pdf)).

**4.12.1 Identifying archeological sites.** During its review process, the Division may identify an historically significant archeological site that has not been listed on the State or National Register, but may be considered an historic site as a result of testimony from the Advisory Council, Division, or duly authorized designee for purposes delineated in 10 V.S.A. §6001(9).

A number of steps are necessary to identify historically significant archeological sites. Some steps are completed concurrently; other steps are completed only if results of a previous step warrant further investigation.

**4.12.1.1 Archeological Resource Assessment**

**4.12.1.1.1 Background Research.** Background Research includes, but is not limited to, review of the Vermont Archeological Inventory, historic maps, and any other relevant sources of information to identify archeological sites. Background Research may be completed either by the Division or the applicant's qualified professional.

**4.12.1.1.2 Applying predictive models and conducting Field Inspections.** Approved predictive models may be used to determine the likelihood of archeological sites existing within the project area. Application of a predictive model may be performed either by the Division or the applicant's qualified professional. If

such predictive models indicate a high likelihood that historically significant archeological sites exist in the project area, an archeological field inspection may be conducted by the Division or the applicant's qualified professional.

**4.12.1.1.3 No historically significant archeological sites.** If the SHPO determines that there are no historically significant archeological sites in the area of potential effects due to the low probability of encountering a site, the SHPO will notify the applicant and the District Commission in writing within the time limits established under 4.5.5 of this Rule.

**4.12.1.1.4 Information submitted by an applicant's qualified professional.** An applicant may submit to the Division a report prepared by its qualified professional documenting the background research, application of predictive models approved by the Advisory Council, and archeological field inspection. The report will meet the SHPO's Guidelines for Conducting Archeological Studies in Vermont. In such a case, the SHPO will determine and recommend in writing to the District Commission within 30 days whether or not the applicant's qualified professional should conduct an archeological field investigation pursuant to Rule 4.12.1.2.1.

#### **4.12.1.2 Archeological Field Investigation**

**4.12.1.2.1 Confirming presence of historically significant archeological sites.** If the Division determines, after the completion of an archeological field inspection, that the project area is likely to contain historically significant archeological sites that cannot be avoided and preserved in-place through appropriate measures, the Division may recommend to the District Commission further archeological investigations. The District Commission may then require the applicant to conduct an archeological field investigation. The purpose of the field investigation shall be to collect evidence sufficient for the District Commission to determine if an archeological site is historically significant. Although a District Commission has no control over an applicant's contractual arrangements, there is a reasonable expectation that in most cases the archeological field investigations will be completed within 120 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.

#### **4.12.3 Evaluating if an archeological site is historically significant.**

**4.12.3.1.** Application of the State Register criteria. The historic significance of an archeological site is determined under the State Register criteria A, B, C, and/or D. Archeological sites are most often evaluated under Criteria A, C, and D as set forth in Rule 4.6.

**4.12.3.2** No historically significant archeological sites. If the SHPO determines that there are no historically significant archeological sites in the area of potential effects, the SHPO will notify the applicant and the District Commission in writing within 45 days of receipt of sufficient information to make such determination.

**4.12.3.3** When background research, predictive model, field inspections or field investigations provide sufficient evidence, the SHPO will apply the State Register criteria. A determination by the SHPO that the project area includes an archeological site which meets the State Register criteria means that the archeological site may be found is historically significant by the District Commission and the SHPO will submit evidence to the District Commission to that effect.

**4.12.3.4** Pursuant to 10 V.S.A. § 6088(b), if the District Commission makes a preliminary finding or any other communication suggesting there is no historic site within the project's area of potential effects and the Division disagrees, the Division then has the burden of persuading the District Commission there is an historic site and that the project will have an undue adverse effect on it.

**4.12.4 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.

**4.12.5 Management of Archeological Collections.** Archeological collections recovered in the course of field inspections or archeological field investigations are the property of the land owner. The state encourages the land owner to execute a deed of gift to the Division thereby enabling the collections to be deposited at the Vermont Archeological Heritage Center for care and management in perpetuity in accordance with the Division's policies and procedures. There are collections fees for collections recovered in the course of archeological investigations carried out under federal jurisdictions such as Section 106.

**4.13 Mitigation of Adverse Effects on an Historically Significant Archeological Site.** In the event the applicant recommends to the SHPO mitigation measures and permit conditions before the SHPO has evaluated whether or not an archeological site is historically significant, the SHPO will evaluate the project's effects as set forth in Rules



4.15 through 4.20. Archeological site avoidance is the preferred option for mitigating an undue adverse effect.

**4.13.1** The SHPO and the applicant may agree at any time on measures the applicant will take to avoid or minimize the undertaking's effect on an archeological site. The SHPO or the applicant's qualified archeological professional will prepare a letter or stipulated agreement that describes in detail all mitigation measures to which the applicant and the SHPO have agreed. The SHPO or applicant will request that the District Commission recognize the letter or agreement and include the agreed upon measures as conditions in any permit that may be issued.

#### **4.14 Referral to the Advisory Council for Determination that a Resource is Historically Significant.**

**4.14.1 Applicant Request.** The applicant may disagree with the SHPO's evaluation that a resource is historically significant. The applicant may then write to the Chairperson of the Advisory Council requesting an evaluation of the resource and submission of testimony to the District Commission.

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

**4.14.3 Notice of Advisory Council Meeting.** The Division will inform the applicant of the date, time and place of the Advisory Council's meeting for determining if the undertaking's area of potential effects contains an historically significant resource. The applicant must submit to the Advisory Council, at the Division's office, 9 copies of any information that the applicant wishes the Advisory Council to consider at least 15 days before the Advisory Council meeting. The SHPO in consultation with the Chairperson of the Advisory Council may waive the 15-day requirement in exceptional circumstances.

**4.14.4** The applicant, the SHPO and the Division may present pertinent information at the Advisory Council meeting about any buildings, structures, districts, objects, areas, or archeological sites in the area of potential effects.

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

**4.14.6** The Advisory Council will apply the State Register criteria to determine whether the area of potential effects contains an historic resource that is historically significant.

**4.14.7** The Advisory Council will deliberate and, unless it needs more information, will decide whether or not the area of potential effects contains an historically significant resource. The Advisory Council may list an historically significant resource in the State Register.

**4.14.8** If the Advisory Council needs more information for determining if the area of potential effects contains an historically significant resource, it will recess the agenda item to a future meeting. The Advisory Council will identify what further information is needed and who shall be responsible for providing it.

**4.14.9** Within 15 days after the Advisory Council has adjourned its meeting, the Division will send written notice to the applicant and, where appropriate, the District Commission of the Advisory Council's decision, or its need for more information.

**4.14.10** If the Advisory Council finds that the area of potential effects contains a historically significant resource, the SHPO shall determine the effect, if any, of the proposed undertaking, as set forth at Rules 4.15 through 4.20.

**4.14.11** If the Advisory Council determines that the area of potential effects contains no historically significant resource, the SHPO will inform the applicant and, where appropriate, the District Commission.

**4.14.12 Advisory Council Testimony.** If a party challenges a determination by the Advisory Council that a resource is historically significant or that an historic site exists within the project's area of potential effects, the Advisory Council may select an Advisory Council member to provide testimony on its determination to the District Commission.. Alternatively, the Advisory Council may delegate its role in accordance with Rule 4.5.4 to the SHPO or Division to provide testimony on its behalf.

#### **4.15 Evaluation of Effect on an Historic Site.**

The SHPO will evaluate and prepare testimony on whether the proposed undertaking will have any effect (as defined in Rule 4.1.5) on the historic site; whether the effect, if any, will be adverse (as defined in Rule 4.1.1); whether the adverse effect, if any, will be undue (as defined in Rule 4.1.21); 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 for a final determination.

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

**4.15.2** The SHPO shall notify the applicant of his or her determination within 45 days of receiving sufficient information in accordance with the time limits in Rule 4.5.5 to make the determination, unless Rule 4.15.3 applies.

**4.15.3** In cases when the Advisory Council finds that the area of potential effects contains an historically significant resource, the SHPO will determine the undertaking's effect on it. The SHPO will notify the applicant in writing of his or her determination within 15 days of the Advisory Council's decision.

#### **4.16 Determination of No Adverse Effect on Historic Buildings, Structures, Districts and Landscapes.**

**4.16.1** The SHPO applies the criteria of adverse effect, as defined in Rule 4.1.1. If appropriate, and if the historic site is a building, structure, district, or landscape the SHPO will apply the Secretary of the Interior's Standards (Standards). Where the SHPO determines an undertaking has no adverse effect on an historic site, the SHPO will notify the applicant in writing.

**4.16.2** The SHPO will make a determination of no adverse effect where the historic site is a building, structure, or district, and proposed plans meet the Standards to result in no adverse effect.

#### **4.17 Determination of No Adverse Effect on Archeological Sites.**

**4.17.1** A determination of no adverse effect on an historically significant archeological site can be achieved if conditions are stipulated that will result in no adverse effect. The Secretary of the Interior's Standards for Rehabilitation do not apply on historically significant archeological sites.

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

**4.18.1** The SHPO may find that the undertaking as proposed will be adverse, and if applicable, does not meet the Standards. In that case the SHPO may recommend to the District Commission that the applicant make changes or take steps to identify alternatives to the proposed project. The SHPO may recommend the applicant hire a qualified professional to identify alternatives. The SHPO may negotiate with the applicant to find a way to modify the undertaking to avoid an adverse effect, and if applicable, meet the Standards. See also Rule 4.13.

#### **4.19 Determination of Adverse Effect.**

**4.19.1** If the SHPO determines that the undertaking will result in an adverse effect as defined in Rule 4.1.1, the Division will inform the applicant in writing in accordance with the time limits set out in Rule 4.5.5.

**4.19.2** The applicant may notify the SHPO with proposed written changes, alternatives, or measures to mitigate the adverse effect of the undertaking.

**4.19.3** If the SHPO concurs with the applicant's proposed changes, alternatives, or mitigation measures to eliminate or reduce the adverse effect, the SHPO will inform the District Commission in writing within 15 days of receiving this information and the SHPO will request that the District Commission recognize the agreement and include such measures as conditions in any permit issued.

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

#### **4.20 Determination of Undue Adverse Effect.**

**4.20.1** 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."

**4.20.2** In cases in which the SHPO makes a determination that the undertaking will result in an undue adverse effect, SHPO may recommend to the District Commission in writing that it make the same finding and conclusion.

### **Rule 8. PROCEDURES FOR UNDERTAKING A STATEWIDE SURVEY: THE VERMONT HISTORIC SITES AND STRUCTURES SURVEY AND THE VERMONT ARCHEOLOGICAL INVENTORY.**

(Reserved)

### **Rule 9. THE STATE REGISTER OF HISTORIC PLACES.**

Rule 9 addresses the roles and responsibilities of the Division for Historic Preservation (Division), the State Historic Preservation Officer (SHPO), the Vermont Advisory Council on Historic Preservation (Council) and the public in carrying out the State Register of Historic Places program, as set forth in the Vermont Historic Preservation Act (VHPA), 22 V.S.A. §§ 723(a)(1) – (3), 723(11), 742(a)(1), and 742(a)(4).

The VHPA directs the SHPO to adopt standards for the listing of a property on the State Register, and to prepare and maintain the State Register. The law also requires a public notice

policy for the owners of properties being considered for inclusion in the State Register. The Advisory Council must approve nominations to and removals from the State Register.

Inclusion in the State Register is one threshold for consideration as an historic site under Criterion 8 of Act 250, a threshold for possible protection of properties owned, funded or permitted by the State of Vermont, a criteria for increased flexibility in application of state building and accessibility codes, and a threshold of historic significance often used by municipalities in planning documents and ordinances. In general, State Register designation or eligibility is an indication that a property is worthy of preservation.

**9.1 Types of Listings.** Properties may be listed on the State Register as historic buildings, structures, objects, complexes, districts or cultural landscapes, and as archeological sites, complexes, districts or cultural landscapes.

**9.2 Criteria for Listing.** The SHPO may adopt criteria for the State Register consistent with criteria for the National Register, as authorized by 22 V.S.A. § 723(a)(2). The criteria address the same areas of potential significance as those found in the National Register: historic significance; architectural and engineering merit; association with important persons of the past; and ability to yield information important to prehistory or history. The SHPO has adopted the criteria of the National Register of Historic Places as the State Register criteria. State Register properties may be significant at a local, state, or national level.

**9.3 Correspondence with National Register Listings.** Properties that are listed on the National Register are thereby also included in the State Register, with no further action required. Properties that are determined eligible for the National Register are thereby also determined eligible for the State Register.

#### **9.4 Procedure for Listing in the State Register.**

**9.4.1** The SHPO and the Division may propose properties to the Council for consideration for the State Register when VHSSS or VAI projects are completed, when an owner requests nomination, when an evaluation is needed for regulatory purposes under Rule 4, when undertaking publication of regional or topical resource inventories, or when otherwise appropriate.

**9.4.1.1** Municipalities, Certified Local Governments, or other groups representing a broad public interest, like a neighborhood organization or historical society, may request consideration of groups of buildings or archeological sites as historic districts.

**9.4.1.2** If the SHPO declines to schedule a property for consideration by the Council, a property owner may make a request for consideration directly to the Chairperson of the Council, who will decide whether the Council will consider the property.

**9.4.2** The SHPO and the Division shall present information to the Council that describes the resource and its significance. The information may be presented in a completed VHSSS or VAI form, an Historic Preservation Review Form, or other appropriate format. Relevant information supplied by the property owner, municipality, CLG, or other interested party shall be included with the information presented to the Council.

**9.4.2.1** If the Council does not have enough information to make a decision, they may ask the Division, the owner or other party to supply additional information.

**9.4.3** The Council may list a property on the State Register by a majority vote of the Council.

**9.4.4** The Council may determine by general consensus that a property is eligible for the State Register. A formal vote is not necessary.

**9.4.5** If the Council is reviewing a property related to a proposed Act 250 project, Rule 4.9 shall apply.

**9.4.6** The Council may reconsider a listing or eligibility decision when new information becomes available.

**9.5 Public Notice of Consideration for Listing.** Pursuant to 22 V.S.A. § 723(11), the Division shall notify affected property owners and the legislative body of a municipality that a property is being considered for inclusion in the State Register. The Division shall follow its adopted "State Register of Historic Places Public Notice in Review and Designation" policy and implementation guidelines, including a provision that the Division hold a public hearing if the affected municipality requests a hearing.

**9.5.1** All properties listed on the State Register at the time of the adoption of this Rule shall be deemed to have met the requirements of this Rule.

**9.6 Removal from the State Register** If a resource loses its historic integrity and changes to the degree that it no longer meets the State Register criteria, it may be removed from the State Register. The SHPO, the property owner, or the Council may initiate consideration for removal. The Council shall review information on the resource and may remove it, by majority vote.

## **Rule 10. THE NATIONAL REGISTER OF HISTORIC PLACES**

### **10.1 Federal Process**

Under federal law and the Vermont Historic Preservation Act (VHPA), 22 V.S.A. §§ 742(a)(1) and (5), the Division and the Vermont Advisory Council on Historic Preservation (Council) administer for Vermont the National Register of Historic Places, a federal program of the National Park Service (NPS). Detailed federal regulations for the National Register program are found in 36 CFR 60, a section of the Code of Federal Regulations that is available at most large libraries and on the internet.

The federal regulations include definitions, criteria for evaluation, information on the effects of listing, nomination requirements and procedures, public notice provisions, appeal procedures, and provisions for removal of properties from the Register. Nominations are reviewed by the Division, after which adequately documented nomination forms are reviewed and approved by the Vermont Advisory Council on Historic Preservation. In municipalities that are Certified Local Governments, the CLG commission and chief elected local official review and approve all nominations for historic properties within the municipality before they are submitted to the Advisory Council and NPS. The Division then submits nominations to NPS for review and official listing in the National Register. All property owners and the chief elected local official are notified and given an opportunity to comment on nominations. If the majority of private property owners of a property or historic district object to nomination, the property or district is reviewed by NPS for National Register eligibility but is not entered on the Register.

**10.2 Preliminary Review** The SHPO may request the Council's preliminary opinion on the eligibility of a property for the National Register.

### **10.3 Public Notice of Consideration for Listing**

**10.3.1** Pursuant to 36 CFR 60, the Division shall notify property owners and the chief elected local official of a municipality that a property is being considered for nomination to the National Register.

## **Rule 12. VERMONT ADVISORY COUNCIL ON HISTORIC PRESERVATION**

This rule describes the duties, responsibilities and procedures of the Vermont Advisory Council on Historic Preservation (Council), as laid out in the Vermont Historic Preservation Act (VHPA) and the federal rules (36 CFR 61) implementing the National Historic Preservation Act (NHPA). The Council serves as the State Review Board required by the NHPA. This rule succeeds and replaces the By-Laws previously adopted by the Council on January 17, 1979.

**12.1 Appointments.** The Council shall consist of seven members, appointed by the governor, who have a demonstrated competence, interest, or knowledge in historic preservation. At least four of the members shall fulfill the professional requirements of the National Park Service in history, prehistoric and historic archeology, architectural history, and historic architecture, as codified in 36 CFR 61.

**12.2 Terms.** The members shall serve for terms of three years or until their successors are appointed.

**12.3 Meetings.** The Council shall meet at least three times a year, ordinarily on a monthly basis as determined by the Council. The Council shall follow the Open Meeting Law, 1 V.S.A. §§ 310-314, as amended.

**12.4 Election of Officers.** Council officers shall be Chairperson, Vice-Chairperson, and Secretary. The Chairperson and the Vice-Chairperson shall be elected at the annual meeting, held in the month of March. The Secretary shall be a Division staff person designated by the State Historic Preservation Officer.

**12.5 Duties of Officers.** The Chairperson shall preside at all meetings and perform such other duties as are usual to the conduct of the office or are assigned by the Council. The Vice-Chairperson shall act in the absence of the Chairperson. The Secretary shall keep minutes of the meetings, shall send out notices of the time and place of meetings as required, and shall issue public information material authorized by the Chairperson or the SHPO.

**12.6 Rules of Procedure.** The meetings shall proceed in accordance with Robert's Rules of Order, as interpreted by the Chairperson.

**12.7 Conflict of Interest.** Members shall follow the Vermont State Executive Code of Ethics.

**12.8 Compensation for Members.** Members of the Council shall be compensated and shall receive their actual and necessary expenses as set forth at 32 V.S.A. § 1010.

**12.9 Duties and Powers of the Council.** The Council has the following duties and powers, as assigned in the VHPA:

**12.9.1** approve nominations to and removals from the State and National Registers of Historic Places as outlined in Rules 9 and 10.

**12.9.2** review and approve the Vermont Historic Sites and Structures Survey and the Vermont Archeological Inventory as in accordance with 22 V.S.A. § 742(a)(2).

**12.9.3** review and approve the content of the state historic preservation plan annually in accordance with the Division's schedule requirements.

**12.9.4** review and recommend projects to receive federal and state grants for historic preservation, including approval of criteria used for such grants programs.

**12.9.5** review state undertakings that may affect historic properties.



**12.9.6** advise the Division on participation in the review of federal undertakings that may affect historic properties.

**12.9.7** approve the participation of the Division in the Act 250 process in conformance with Rule 4.

**12.9.8** provide, as the Council determines necessary, testimony relating to the historical, architectural, and archeological significance of State Register and National Register sites.

**12.9.9** undertake other activities that promote historic preservation and benefit the people of the state of Vermont.