OFFICE OF LEGISLATIVE RESEARCH
Objective Research for Connecticut's Legislature

ResearchReport

# Historic Preservation Reviews in Other States

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## Issue

Identify laws in other states relating to historic preservation review, particularly situations in which a state historic preservation office (SHPO) and public agency disagree as to whether (1) a proposed agency action would adversely affect historic property or (2) mitigation measures are prudent or necessary.

## Summary

Most states have laws requiring state agencies (and in some cases, local agencies) to consider whether action by the agency (e.g., a capital project) affects historic property (generally, property included in the national or state register of historic places). Generally, these laws require the agency to work with the SHPO to avoid or mitigate adverse impacts to historic property.

For this report, we reviewed historic preservation laws in numerous other states, focusing on provisions in those laws that address scenarios in which the SHPO finds an adverse impact. Below we provide examples of different approaches we identified. These include (1) allowing the agency, under certain conditions, to proceed with an action even if it cannot agree with the SHPO on mitigation measures; (2) requiring a mediation process if a public agency and the SHPO disagree; and (3) requiring that an entity besides the SHPO approve an agency's action if there is an adverse impact.

## Proceeding With Action in Event of Disagreement

We identified several states (including Connecticut's three neighboring states) in which state laws and regulations allow a public agency to proceed with an action with an adverse impact even if it cannot agree with the SHPO on mitigation measures. Generally, the agency must first follow a specified consultation process, and in some instances, it must receive approval from the governor or local governing body.

### *Massachusetts*

Under Massachusetts law, if the SHPO (i.e., the Massachusetts Historical Commission) determines that a project administered or funded by a state agency adversely impacts a historic property, then the agency and commission (and private party, if applicable) must work together to eliminate, minimize, or mitigate the adverse impact (M.G.L. c. 9 § 27C).

Under the commission's regulations, if the parties do not agree on a proposed course of action but the state agency or private party still wishes to proceed with the project, then they must follow several additional steps, including appearing at a public commission meeting and responding to proposed alternatives from the commission. If the parties continue to disagree after following all of the specified steps, then the project may proceed (950 CMR § 71.07(4) & (5)). The flow chart included in the regulations provides more information about the review process (see 950 CMR § 71.12).

### *New York*

Under New York law, if the SHPO finds that a state agency project will have an adverse impact on a historic property, then the agency and SHPO must explore alternatives to avoid or mitigate this impact (NY Parks Rec. & Hist. Preserv. Law § 14.09). State regulations prescribe several steps that the parties must follow in the consultation process, including the agency seeking public comment. After following these steps, the regulations allow the agency to proceed with the project if it determines that doing so is in the public interest and there are no feasible and prudent alternatives which would avoid or satisfactorily mitigate adverse impacts (9 NYCRR §§ 428.7 to 428.10).

### *Rhode Island*

Under Rhode Island law, advisories rendered by the SHPO (i.e., the Rhode Island Historical Preservation and Heritage Commission) with respect to state and local projects affecting historical sites must be followed unless there are compelling reasons for not doing so. In these cases, the governor makes the final determination (R.I. Gen. Laws § 42-45-5(a)(2)).

The commission's regulations prescribe the consultation process that an agency must follow if there is an adverse impact. These include negotiations with the commission's executive director and potentially allowing interested parties the opportunity to comment. If the parties do not reach agreement, then the matter is reviewed by the full commission. If the parties continue to disagree after the commission's review, then the commission issues an advisory to the governor stating that the agency violated the state's historic preservation act. As noted above, however, the governor may allow the project to proceed (530-RICR-10-00-1 § 1.5).

## *Vermont*

Under Vermont law, the state's Advisory Council on Historic Preservation must provide an advisory and coordinative mechanism by which state undertakings may be discussed and resolved, giving due consideration to competing public interests. State agencies undertaking projects that the council judges as having an adverse effect on historic property must allow the council reasonable opportunity to comment on the undertaking (22 V.S.A. § 742).

Additionally, under the state's land use and development law (i.e., Act 250), the permitting authority (referred to as the "district commission") must find that, among other things, a development will not have an undue adverse impact on historic sites (10 V.S.A. § 6086(a)(8)). Generally, permit applicants seek review from the state's SHPO (i.e., the Division for Historic Preservation), which makes a recommendation to the district commission regarding the permit. The division's regulations prescribe the steps that the SHPO must follow in the review process, including situations in which SHPO finds an adverse impact (CVR 11-050-001 (Rule 4)). This flow chart provides more information.

In practice, Vermont's SHPO told us that when reviewing proposed actions under the state historic preservation law or Act 250, it generally continues the consultation process with the state agency or permit applicant until agreement is reached; the office said it seldom opposes a proposed action outright.

## *South Dakota*

Under South Dakota law, if the state's SHPO (i.e., the South Dakota State Historical Society) determines that a state or local government project will encroach upon, damage, or destroy any historic property, then the project may not proceed unless the governor or local governing body, as appropriate, makes a written determination that, based on all relevant factors, (1) there is no feasible and prudent alternative and (2) the program includes all possible planning to minimize harm to the historic property. This flow chart provides more information about the review process.

The law requires that the historic preservation office be given 10 days' notice of the determination. A person aggrieved by a determination of the governor or local governing body may file an appeal (SDCL § 1-19A-11.1).

### *Kansas*

Kansas law contains similar provisions to South Dakota's with respect to allowing (1) a project that will damage or destroy a historic property to proceed only if approved by the governor or local governing body and (2) any person to appeal if aggrieved by the governor's or local governing body's decision (K.S.A. § 75-2724). This page from the Kansas Historical Society provides more information.

### *Montana*

Under Montana regulations, if a state agency and the SHPO disagree about the existence of an adverse impact or sufficiency of proposed mitigation measures, then they may attempt to resolve their differences. If the negotiations are unsuccessful, then the agency decides how to proceed and provides the office with a copy of its final decision (ARM § 10.121.907).

Additionally, the law allows an applicant (e.g., for a state permit or license) or affected landowner to appeal a determination by the SHPO to the director of the state historical society. (The office is located within the society.) If the applicant or landowner is not satisfied with the director's decision, then he or she may appeal to court (MCA § 22-3-429).

## Mediation

In some states, the law provides for a mediation process if a public agency and the SHPO do not agree on proposed mitigation measures. In California, a governor's office mediates, while committees fill this role in Illinois and Minnesota.

### *California*

Under California law, if the state's SHPO (i.e., the Office of Historic Preservation) determines that a proposed state agency action will have an adverse impact on a historical resource, then the agency and office must adopt prudent and feasible measures to eliminate or mitigate the adverse impacts. If the agency does not cooperate, then the office must request mediation from the governor's Office of Planning and Research (Cal. Pub. Res. Code § 5024.5). This document from the Office of Historic Preservation provides more information.

### *Illinois*

Under Illinois law, if the SHPO finds that a proposed action will have an adverse impact on a historic resource, but the state agency and office do not agree on a feasible and prudent alternative after the required consultation process, then the agency must call a public meeting in the county where the undertaking is proposed. If the agency and office still disagree after this meeting, then the undertaking must be submitted to the Historic Preservation Mediation Committee.

By law, the committee consists of the SHPO director and five director appointees who serve three-year terms; each appointee must represent a different state agency and have a rank no lower than division chief. The committee must meet with the agency and office to review each alternative. If the parties continue to disagree, then the committee must provide a statement of findings or comments setting forth a proposed alternative to the undertaking or stating that there is no feasible or prudent alternative. The state agency must consider the committee's comments and respond in writing before proceeding with the undertaking (20 ILCS § 3420/4(e) & (f)).

### *Minnesota*

Under Minnesota law, if a state agency and the historic preservation office disagree on mitigation measures, either party may request that the governor appoint a five-member mediation task force consisting of two gubernatorial appointees, the administration commissioner or a designee, the chairperson of the State Review Board of the State Historic Preservation Office, and one appointed by the Minnesota Historical Society's director (Minn. Stat. § 138.665).

## SHPO Provides Initial Review Only

In New Jersey and Indiana, the law requires the SHPO to review applications and allows projects to proceed if the SHPO finds no encroachment or adverse impact. However, if the SHPO finds that there is an encroachment or adverse impact, then the law charges a different entity (the environmental protection commissioner in New Jersey and the Historic Preservation Review Board in Indiana) with deciding whether to approve the project.

### *New Jersey*

New Jersey law requires state and local government agencies to obtain the environmental protection commissioner's consent before undertaking any project that encroaches upon, damages, or destroys ("encroaches on") any area, site, structure, or object in the state's Register of Historic Places. (The state's SHPO is within the Department of Environmental Protection.) The commissioner must solicit advice and recommendations from the state's Historic Sites Council. If the commissioner does not act within 120 days after the application is submitted, then it is deemed approved (N.J.S.A. § 13:1B-15.131).

Under the department's regulations, historic preservation staff make an initial determination of whether an encroachment exists. If it finds no encroachment, the project may proceed. If it finds an encroachment, the application is referred to the Historic Sites Council, a gubernatorially appointed board of public members advising the commissioner.

The council must consider the application at a public meeting and make a recommendation to the commissioner. According to the historic preservation office, the council considers "whether the undertaking is in conformance with [specified] criteria and standards; the public benefit of the proposed undertaking; potential prudent and feasible alternatives; and the measures taken to avoid, minimize, or mitigate the encroachment."

After receiving the council's recommendation, the commissioner may (1) authorize the encroachment as proposed by the applicant, (2) authorize the encroachment with conditions, (3) temporarily deny the encroachment pending additional information from the applicant, or (4) deny the application.

This page from the state's SHPO provides additional information. The regulations also include provisions addressing emergency undertakings and defining encroachments (N.J.A.C. § 7.4).

## *Indiana*

Under Indiana law, with certain exceptions, a historic site or structure owned by the state or listed on the state or national register may not be altered, demolished, or removed by a state-funded project unless the Historic Preservation Review Board grants a certificate of approval. The board may approve the application, approve it with conditions, or deny it (IC § 14-21-1-18).

Under the board's regulations, applications are first reviewed by the SHPO, which may issue a letter of clearance if it finds no adverse impact. A letter of clearance exempts the applicant from needing a certificate of approval from the board; a project goes before the board only if the SHPO finds an adverse impact. (However, the regulations also allow interested parties to ask a designated board member to overrule a letter of clearance and require that the project be submitted to the board.)

For projects submitted to the review board, the SHPO must prepare a staff comment, which may include possible measures to eliminate, reduce, or mitigate the adverse impact. If SHPO cannot identify any such measures, it may recommend denial. The review board must allow the applicant and other interested parties the opportunity for oral or written comments at the meeting at which it considers the application (312 IAC §§ 20-4-11 to 20-4-13).

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