

PROGRAMMATIC AGREEMENT

Among

The U.S. Department of the Interior, National Park Service;
the United States Army Corps of Engineers (Philadelphia District),
the State Historic Preservation Office of Delaware,
and the Fort DuPont Redevelopment and Preservation Corporation

Regarding

the Rehabilitation, Redevelopment and Preservation
of

Fort DuPont, Delaware City, Delaware

WHEREAS, The Fort DuPont Redevelopment And Preservation Act (7 DE Code § 4733 [2015]) created the Fort DuPont Redevelopment & Preservation Corporation (FDRPC) with a mandate to oversee, manage, and implement the redevelopment and preservation of the Fort DuPont complex; and

WHEREAS, FDRPC is authorized to hold, own, preserve, develop, improve, construct, rent, lease, sell, or otherwise acquire or dispose of any real property, including without limitation any real property comprising the Fort DuPont complex or any portion thereof transferred to the Corporation; and

WHEREAS, the lands overseen and proposed for preservation, rehabilitation and redevelopment by the FDRPC are contained within the Fort DuPont Historic District (FDHD) which was listed in the National Register of Historic Places on March 29, 1999 ; and

WHEREAS, FDRPC has developed and is proceeding with the implementation of a comprehensive master plan for Fort DuPont that involves the restoration or rehabilitation of over fifty historic buildings contributing to the FDHD; and

WHEREAS, the FDRPC has prepared a document entitled the Fort DuPont Historic District Design Guidelines (2019) that shall govern the design of new construction and the treatment of historic properties within the boundaries of the Fort DuPont Historic District under the direct or indirect jurisdiction of the FDRPC; and

WHEREAS, the State of Delaware Division of Parks and Recreation received a grant in 1992 from the Land and Water Conservation Fund to support the redevelopment of an area within the Fort DuPont complex as Sports & Playfields; and

WHEREAS, the National Park Service (NPS), an agency within the Department of the Interior is the Federal Agency responsible for processing and approving a request by the FDRPC to approve the conversion of a “Section 6(F) property” within the Fort DuPont complex in exchange for the substitution of a replacement property as per 36 CFR 59.3(b)(1); and

WHEREAS, the U.S. Army Corps of Engineers, Philadelphia District (USACE) administers a Department of the Army permit program under the authority of the Rivers and Harbors Act of

1899, Section 10 (33 USC 401 and 403), and the Clean Water Act of 1973, Section 404 (33 USC 1344) to which certain of the improvements proposed by the FDRPC may be subject; and

WHEREAS, NPS has agreed to be the lead federal agency for complying with Section 106 of the National Historic Preservation Act (Section 106) and responsible for consultations under 36 CFR 800; and

WHEREAS, in accordance with 36 CFR § 800.6(a)(1), the NPS has notified the Advisory Council on Historic Preservation (ACHP) of the development of a programmatic agreement pursuant to 36 CFR § 800.6(a)(1)(iii); and

WHEREAS, pursuant to 36 CFR 800.14 (b)(2), which implements Section 106 of the National Historic Preservation Act (NHPA), the entities listed above have been invited to sign this Programmatic Agreement (PA); and

WHEREAS, the NPS has invited federally-recognized Indian tribes with an interest in potential archaeological resources within the APE which may be eligible for the National Register of Historic Places and have religious and cultural significance, to participate in the Section 106 consultation. The following Tribes have been invited to participate in this PA as invited signatory parties: **the Delaware Tribe of Indians, Delaware Nation, and Stockbridge-Munsee Community.** ; and

WHEREAS, the Fort DuPont complex has suffered in previous years from a lack of maintenance that has led to the deterioration of buildings and infrastructure; and

WHEREAS, the FDRPC has taken responsibility for Fort DuPont and has invested several million dollars into improvements and maintenance to the complex and has undertaken the rehabilitation of multiple historic buildings; and

Now therefore, the NPS, ACOE, the Delaware State Historic Preservation Officer (SHPO) and the FDRPC agree that redevelopment activities undertaken within the Fort DuPont Historic District by the FDRPC shall be subject to the following stipulations in order to satisfy the NPS's and the ACOE's Section 106 responsibilities for the undertaking.

STIPULATIONS

I. PURPOSE

The purpose of these stipulations is to insure that the historic integrity of that portion of the FDHD under the control and purview of the FDRPC is managed and preserved in accordance with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* and related regulations, standards, and guidelines. These efforts are, and will remain, in compliance with Section 106 of the National Historic Preservation Act of 1966 (as subsequently amended) and "The Fort DuPont Redevelopment And Preservation Act."

II. APPLICABILITY

This PA applies to all undertakings for historic properties proposed within the Fort DuPont complex that are under the jurisdiction of the FDRPC. Before the FDRPC's final approval of any project, or any construction activities, or any irrevocable commitment by the FDRPC for construction, repairs, maintenance, rehabilitation, moving, sale or demolition covered by this PA, all provisions required hereunder must be completed.

III. RESPONSIBILITIES OF THE SIGNATORIES

A. The FDRPC shall use state, staff, or contractor staff whose qualifications meet the *Secretary of the Interior's Professional Qualifications Standards* (Professional Qualifications) set forth in the Federal Register at 48 Fed. Reg. 44716-01 (September 29, 1983), as amended, in completing identification and evaluation of historic properties and in making determinations of effects.

B. SHPO shall review FDRPC's delineation of Areas of Potential Effects (APE) and effect findings, and respond within timeframes required by this PA.

C. As requested, SHPO staff shall be reasonably available as a resource and for consultation through site visits, written requests, telephone conversations or electronic media. In those instances where consultation with SHPO has occurred, FDRPC shall provide a written summary via e-mail or regular mail to SHPO, including any decisions that were reached.

D. SHPO shall respond to submissions or requests in accordance with the time frame specified within this PA.

IV. PROFESSIONAL STANDARDS

A. All work pursuant to this PA regarding historic buildings and structures will be reviewed by, or under the supervision of, a person having five years or more experience in historic preservation and meeting the professional qualifications for Architectural Historian included in *The Secretary of the Interior's Historic Preservation Professional Qualification Standards*.

B. All work pursuant to this PA regarding archaeological resources will be carried out by or under the supervision of a Registered Professional Archaeologist having five years or more experience in prehistoric or historic archaeology and meeting the professional qualifications for Archaeologist included in *The Secretary of the Interior's Historic Preservation Professional Qualification Standards*.

C. All analyses to determine if an undertaking is an "Exempted Activity" under Appendix A and therefore requires no further review will be carried out by persons who meet the standards set forth above in Stipulation IV.A. All such persons are deemed for purposes of this PA as "qualified personnel" under the standards and guidelines.

V. BUILT HISTORIC PROPERTIES

A. IDENTIFICATION OF HISTORIC PROPERTIES

For purposes of this PA, historic properties are those extant properties identified as resources contributing to the FDHD by the Fort DuPont Historic District National Register of Historic Places nomination of 1993 or identified as contributing resources by the report entitled *“The Fort Opposite Fort Delaware” Archival Research, Architectural Reconnaissance, Archaeological Predictive Model and Phase IB Archaeological Testing of Area Y for the Fort DuPont Historic District, Delaware City, New Castle County, Delaware* [Dovetail Cultural Resource Group, March 2018] (2018 Dovetail Report).

B. GUIDING PRINCIPALS OF DESIGN

All activities that involve new construction or the restoration, rehabilitation, reconstruction or relocation of existing buildings, structures or objects under the direct or indirect jurisdiction of the FDRPC within the boundaries of the Fort DuPont Historic District shall adhere to the design principal, standards and stipulations laid out within the Fort DuPont Historic District Design Guidelines [2019] (Historic Guidelines). The Historic Guidelines, which may be amended from time to time by FDRPC, were developed to insure that all proposed activities subject to the stipulations of this PA shall be in keeping with the “Secretary of the Interior’s Standards for the Treatment of Historic Properties.”

C. DESIGN REVIEW PROCESS

The FDRPC shall evaluate the potential of any proposed undertakings to affect historic properties in accordance with 36 CFR 800.5. The term undertaking shall be defined so as to encompass any activity that has the potential to adversely affect any historic or archaeological resource. Appendix A consists of a list of activities that do not constitute undertakings under this definition. These activities would not be subject to review under Section 106 (in accordance with the terms of this PA) independently or as components of larger projects that do qualify as undertakings. An evaluation of the potential of a proposed undertaking to affect historic properties shall be made only by an individual meeting the qualifications for Historian or Architectural Historian outlined in *The Secretary of the Interior’s Historic Preservation Professional Qualification Standards*. The results of this evaluation shall be documented in a submission (Project Submission) submitted on behalf of the FDRPC to all signatories of this PA that shall, and at minimum, include;

1. An illustration that delineates the Historic Architectural Area of Potential Effects,
2. A listing of the historic properties/resources contributing to the Fort DuPont Historic District that may be potentially impacted by the proposed undertaking,
3. A complete and thorough description of the proposed undertaking including measures to be taken to protect historic resources during construction activities,
4. Preliminary Project Plans and Specifications, and

5. A clear and concise statement outlining whether or not the proposed undertaking will be in conformance with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* and the *Fort DuPont Historic District Design Guidelines 2019*. Projects involving new construction or the rehabilitation or restoration of historic properties that meet the stipulations of the Design Guidelines shall be deemed to not constitute an adverse effect on historic architectural resources as per 36 CFR 800.5 and to be conformant with the Secretary of the Secretary of the Interior's Standards for the Treatment of Historic Properties.

Within 30 calendar days of receipt of the documentation to any design submission pursuant to this PA, SHPO shall provide a written response either, (1) concurring with the assessment, or (2) disputing the assessment. Depending on the complexity and sensitivity of the undertaking, the SHPO may also concur conditionally by issuing an assessment of no adverse effect on historic properties pending review of the final design documents. SHPO will respond within 30 calendar days of receipt of the documentation to any design submission pursuant to this PA, or it will be concluded that SHPO is in agreement with the documents as submitted.

D. FINDINGS OF ADVERSE EFFECT

If FDRPC finds a proposed undertaking will result in an adverse effect, FDRPC may consult with SHPO to determine if the adverse effect may be avoided. Where FDRPC and SHPO agree on how to avoid such adverse effect, they shall document their agreement and the Project Submission shall be amended to reflect such agreement. Implementation of the undertaking in accordance with the documented agreement shall be deemed to be resolution of the adverse effect.

If FDRPC finds a proposed undertaking will result in an adverse effect and that adverse effect cannot be avoided, FDRPC shall consult to identify methods of mitigating the anticipated adverse effect.

E. Treatment

Mitigation efforts shall be both commensurate with the scale of the undertaking and the extent of the adverse effect.

F. SALVAGE AND SUSTAINABILITY

If a historic property or a portion of a historic property is to be demolished, the FDRPC qualified personnel will conduct a documented inspection to identify architectural elements and objects that may be reused in rehabilitating similar historic structures or that may be preserved in a museum archival collection.

VI. ARCHAEOLOGY

A. IDENTIFICATION

1. The treatment of archaeological properties shall be handled in accordance with the guidelines for Archaeological Survey in Delaware [February 2015] (Delaware Archaeological Guidelines) and shall be conducted in conformance with the Delaware Antiquities Act (7 Del Code Ch. 53) and the Unmarked Human Remains Act (7 Del. Code Ch. 54).

2. All planned undertakings within areas identified as possessing archaeological sensitivity on Figure 5 of the 2018 Dovetail report (Appendix B) shall be reviewed by a qualified archaeologist (as per Section IV.B. of this PA), prior to final design and/or approval of any activities in those areas that include subsurface disturbance or other actions that have the potential to impact archaeological resources.
3. The archaeologist shall prepare an archaeological research plan that will specify appropriate archaeological investigations include testing for NR (needs definition) eligibility or data recovery from prehistoric or historic sites that are known to be NR eligible or that have been identified as resources contributing to the significance of the FDHD. Whenever feasible, the archaeological research plan shall be in accordance with the recommendations provided in Table 3 of the 2018 Dovetail Report (Appendix C).
4. SHPO shall review and provide comments on any submitted archaeological research plan within 15 calendar days of the receipt of such plan.
5. FDRPC shall complete and report survey efforts to identify resources potentially eligible for inclusion in the NRHP that may be impacted by proposed undertakings in the identified archaeologically sensitive areas. All work will be undertaken in accordance with the Delaware Archaeological Guidelines.
6. SHPO shall review and provide comments on any submitted archaeological reports within 30 calendar days of the receipt of such reports.

B. EVALUATION

FDRPC will evaluate the NRHP eligibility or undertake archeological monitoring of any archaeological site that may be impacted by an undertaking. FDRPC shall complete the investigations in consultation with SHPO and in accordance with 36 CFR 800.4(c) and the Delaware Archaeological Guidelines. FDRPC shall provide the results of any such evaluation efforts to the SHPO, NPS and relevant consulting parties for review and comment. If SHPO does not provide comments within 30 calendar days of receipt, the FDRPC may assume that SHPO accepts with the reported results.

C. TREATMENT OF NATIONAL REGISTER ELIGIBLE ARCHAEOLOGICAL RESOURCES

1. Consultation to Resolve Adverse Effects

If FDRPC and SHPO shall determine that archaeological resources that are eligible for listing in the NRHP or that contribute to the NRHP eligibility of the FDHD may be adversely effected by a proposed undertaking, FDRPC shall develop a plan for its avoidance, protection, recovery, destruction without recovery and/or public education/interpretation in consultation with SHPO and relevant consulting parties.

2. Data Recovery

Should data recovery investigations be selected as an appropriate treatment measure, the FDR&PC shall ensure that a data recovery plan is developed in consultation with SHPO, NPS and relevant consulting parties. The plan shall (at minimum) include:

- The identification of the property where investigations shall take place;
- Any portions of the property that will be destroyed without data recovery;
- The research questions to be addressed through data recovery with a description of the relevance and importance of each question;
- The research and field methods to be used, with the explanation of their relevance to the research questions;
- The methods to be used in analysis, data management and dissemination of data including a schedule; and
- Proposed methods for involving/informing the public.

SHPO shall review and provide comments on any submitted data recovery plan within 15 calendar days of the receipt of such plan. FDRPC will be responsible for the implementation of such a plan as appropriate.

FDRPC and SHPO will meet on-site to evaluate the success of the fieldwork phase of any data recovery program, near the end of the fieldwork effort. FDRPC shall submit a management summary to SHPO documenting the completion of fieldwork. SHPO shall review and provide comments on any management summary within 15 calendar days of the receipt of such report. Upon receipt of written concurrence, FDRPC may proceed with the construction activities on the site concurrent with the completion of the remaining laboratory, analysis and reporting phases of the data recovery work.

All records associated with excavations and excavated materials not subject to NAGPRA (**need definition**) that are deemed important for preservation will be accessioned, catalogued, and managed in accordance with the Delaware Division of Historical and Cultural Affairs (DHCA) "Guidelines and Standards for the Curation of Archaeological Collections." Artifacts shall either remain in the possession of the FDRPC for display and interpretation at the Fort DuPont complex or shall be held by DHCA's designated archaeological collections repository. FDRPC shall be responsible for any required curation fees in accordance with normal fee schedules. In the event that DHCA's designated archaeological collections repository shall decline to or be unable to accept curatorial responsibility for any collections, said materials may be deposited at a mid-Atlantic facility meeting the standards of 36 CFR 79. FDRPC shall consult with SHPO regarding the selection of such a facility before any decisions are made regarding the permanent disposition of collections.

VII. UNANTICIPATED DISCOVERIES PROCEDURES

1. If it appears that an undertaking will affect a previously unidentified property that may be eligible for inclusion in the NR, or that may contribute to the FDHD, or affect a known historic property in an unanticipated manner, FDRPC will stop any potentially harmful activities in the

vicinity of the discovery and take all reasonable measures to avoid or minimize harm to the property until it concludes consultation with SHPO.

2. If a discovered property has not previously been included in or determined eligible for the NR and provisions for its treatment are not contained in an approved research design, FDRPC may assume that the property is eligible for purposes of this PA. FDRPC will notify NPS and SHPO at the earliest possible time and consult to develop actions that will take the effects of the undertaking into account. FDRPC will notify SHPO of any time constraints, and FDRPC and SHPO will mutually agree upon timeframes for this consultation but not to exceed 30 calendar days. If treatment of the discovery is not included in an approved research design, FDRPC will develop written recommendations reflecting its consultation with NPS and SHPO and as necessary, will present a plan and schedule to implement these recommendations.

IX. EMERGENCY ACTIONS

A. In the event that an emergency occurs at the Fort DuPont complex that impacts any of the properties under the oversight or control of FDRPC or its leases that affects historic properties, FDRPC may take actions without consultation to stabilize any involved historic properties and prevent further damage within 60 days from the termination of the emergency or longer with approval of the signatory parties. Where possible, such emergency measures will be undertaken in a manner that does not foreclose future preservation or restoration, with on-site monitoring by qualified personnel, and advance telephonic notification of NPS and SHPO.

B. Emergency response work will be conducted in a manner to avoid or minimize effects on historic properties. Should historic properties be discovered during emergency repair or response activity, work in the immediate area of the property will cease if the FDRPC determines that a work stoppage at the site will not impede emergency response activities. The FDRPC will advise NPS and SHPO by telephone of the emergency, the steps being taken to address the emergency, the discovered property and its apparent significance, and a description of the emergency work and potential effects on the discovered property.

C. Within 30 calendar days following this notification, the FDRPC will provide the SHPO with a written report documenting the actions taken to minimize effects, the work's present status, the planned treatment of the property, and the condition of any other properties encountered as post-review discoveries.

X. NATURAL DISASTERS

A. In the event of a natural disaster, the FDRPC shall undertake emergency actions consistent with the principles underlying this PA to stabilize historic properties and prevent further damage without SHPO consultation. Where possible, such emergency measures will be undertaken in a manner that does not foreclose future preservation or restoration. The FDRPC will immediately notify the NPS and SHPO on all emergency measures taken that impacted on or will impact on historic properties. Permanent repairs to historic properties beyond the scope of emergency repairs are not authorized by this stipulation.

B. This stipulation does not apply to undertakings that will be implemented more than 30 calendar days after the disaster terminates. Such undertakings shall be reviewed in accordance with 36 CFR Part 800 unless they are covered by other stipulations in this PA.

XI. ONGOING COORDINATION AND OVERSIGHT

A. Ongoing Coordination

The FDRPC and SHPO shall regularly consult to review implementation of the terms of this PA. If requested by the FDRPC or any of the signatories, the FDRPC shall schedule formal coordination meetings and invite NPA and SHPO, and relevant consulting parties, as needed throughout the duration of this PA.

B. Annual Report

Commencing from the date that this PA is fully executed and continuing until its termination the FDR&PC shall prepare an Annual Report (Report) and submit it to the other signatory and consulting parties. The Report shall include, at a minimum:

1. A list of all undertakings and activities carried out under the stipulations of this PA;
2. Any further efforts to identify and/or evaluate potential historic or archaeological properties and a list of any such new resources identified;
3. Changes of any points of contact for signatory or consulting parties to this PA; and
4. Any recommendations to amend this PA or improve communications among the parties.

Should SHPO object in writing to the FDR&PC regarding the Report, the objection will be resolved pursuant to Stipulation XVII.

XII DISPUTE RESOLUTION

A. Objection By Signatories

Should any signatory party or concurring party object in writing to the NPS regarding the manner in which the terms of this PA are carried out, to any action carried out or proposed with respect to the implementation of this PA, or to any documentation prepared in accordance with and subject to the terms of this PA, NPS will notify all signatories to the agreement, take the objection into account, and consult as needed to resolve the objection.

B. Resolution of Objections

Disputes regarding the terms of or the implementation of the PA, as necessary, shall be resolved by the signatories. If the signatories cannot agree regarding the dispute, the NPS shall then initiate appropriate actions in accordance with the provisions of 36 CFR 800.6(b) and 800.7, as necessary.

XIII. MODIFICATIONS OR AMENDMENTS

If any signatory party or concurring party believes that this PA should be modified or amended, that party shall immediately so notify and consult with the other parties for no more than 21 calendar days to consider modifications of amendments to this PA. The parties may agree to a longer consultation period. This PA may be modified or amended only upon the written agreement of all signatory parties. Modifications or amendments shall be executed in accordance with 36 CFR 800.6(c).

XIV. TERMINATION

A. This PA may be terminated unilaterally by the FDRPC at any time for any reason. It may also be terminated by agreement of any two signatory parties. The signatory parties proposing termination shall notify all parties to this PA explaining the reasons for the termination. Prior to termination, whether by the FDRPC or any other signatory parties, the signatory parties shall consult for no more than 21 calendar days to consider alternatives that would avoid termination. The signatory parties may agree to a longer consultation period. Should such consultation fail, the signatory parties supporting termination may terminate this PA by so notifying all parties to this PA in writing.

B. If this PA is terminated, the FDRPC shall proceed in accordance with 36 CFR Part 800 Subpart B with regard to undertakings covered by this PA.

XV. DEFINITIONS

The definitions of terms appearing at 36 CFR 800.16 are incorporated by reference into this PA.

XVI. EFFECT OF THE PASSAGE OF TIME

In any case where a party fails to comment or act within a time frame that is specified or is otherwise agreed upon by the parties, the FDRPC may thereafter immediately proceed in the matter at issue without further regard to comments or actions by that party.

XVII. DURATION

This PA shall become effective upon execution by the FDRPC, NPS, SHPO, and shall remain in effect until January 1, 2030, or unless terminated prior to that time in accordance with Stipulation XIX, or unless it is extended for an additional period of time by mutual written agreement of the signatory parties.

SIGNATORY PARTIES:

THE FORT DUPONT REDEVELOPMENT & PRESERVATION CORPORATION

BY: _____ BY: _____

TITLE: _____ TITLE: _____

THE DELAWARE STATE HISTORIC PRESERVATION OFFICER

BY: _____

TITLE: _____

THE NATIONAL PARKS SERVICE

BY: _____

TITLE: _____

THE UNITED STATES ARMY CORPS OF ENGINEERS (PHILADELPHIA DISTRICT)

BY: _____

TITLE: _____

DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

BY: _____

TITLE: _____

APPENDIX A: EXEMPT ACTIVITIES

A. ROUTINE PROPERTY MAINTENANCE AND REPAIRS not involving the alteration or replacement of historic materials or features.

B. DEBRIS AND SNOW REMOVAL

C. TEMPORARY STRUCTURES AND HOUSING in place for periods of less than 18 months in duration in areas not identified as possessing archaeological sensitivity as per the 2018 Dovetail Report.

D. LANDSCAPING ACTIVITIES not involving earth moving activities, subsurface disturbance in archaeologically sensitive areas or the removal or alteration of historic landscape features, plantings or trees

E. TEMPORARY STORAGE OF SUPPLIES AND EQUIPMENT where no ground disturbance will occur; this does not include construction of temporary access routes.

F. TRANSPORTATION INFRASTRUCTURE, in areas not identified as possessing archaeological sensitivity as per the 2018 Dovetail Report, including any staging areas.

G. UTILITIES, COMMUNICATIONS SYSTEMS AND TOWERS, when proposed activities substantially conform to the original footprint and/or performed in previously disturbed soils, including the area where the activity is staged.