



October 2, 2013

Ms. Maureen Quinn, [maureen.quinn@treasury.gov](mailto:maureen.quinn@treasury.gov)

Mr. Mark McArdle, [mark.mcardle@treasury.gov](mailto:mark.mcardle@treasury.gov)

Mr. Eric Rosenfeld, [eric.rosenfeld@treasury.gov](mailto:eric.rosenfeld@treasury.gov)

US Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

RE: Hardest Hit Fund

Dear Ms. Quinn, Mr. McArdle, and Mr. Rosenfeld:

The National Conference of State Historic Preservation Officers (NCSHPO) has recently become aware of your agency's letter to the Advisory Council on Historic Preservation, dated September 20, 2013, regarding the Hardest Hit Housing Markets (HHF) program. In this letter, you take the position that Treasury's lack of involvement in Michigan's Blight Elimination Program activities, funded via your Housing Finance Agency Innovation Fund for the HHF program, disqualifies these Treasury funded activities as "undertakings" within the meaning of Section 106 of the National Historic Preservation Act (NHPA). NCSHPO strongly disagrees with this interpretation of the law and believes it is entirely feasible to both accommodate Treasury's goals while at the same satisfying Section 106 of the Act.

The basic and underlying purpose of Section 106 is straightforward. It is to assure that the use of federal funds, programs, permits or other undertakings will not adversely impact historic resources without the good faith evaluation of potential impacts and the consideration of reasonable alternatives. It is also meant to provide a process for meaningful input and review by agencies, applicants, consulting parties and the public. The responsibility for Section 106 review rests with the federal agency. Although agencies can delegate certain responsibilities to others or develop alternate procedures through devices such as Programmatic Agreements, they cannot delegate full legal responsibility without the statutory authority to do so. To our knowledge, no such authority was granted to Treasury in the Emergency Economic Stabilization Act of 2008 – the legislation that established the HHF program.

As per your letter, Treasury's argument against defining HHF program actions as federal undertakings rests upon the point that demolition decisions are made entirely by the "Eligible Entity" and its partners in the state of Michigan. Since federal funds have already been made available to the state under the HHF, and these funds are reimbursing demolition costs incurred by the state and its partners, you reason that Treasury lacks enough involvement for this to be defined as an undertaking.

Lack of involvement does not unilaterally disqualify an activity from being a federal undertaking. Courts carefully look at a variety of factors including the magnitude or the independent utility of the federal involvement. In this case, HHF is a program of Treasury and Treasury, as the initial source of federal funds, is the creator of the process used to qualify the delivery of those funds. Regardless of how many layers of administration are placed between Treasury and funding recipients, your agency must still carry out its legal and fiduciary responsibilities under Section 106 of the NHPA.

Further, failure to anticipate outcomes does not disqualify an activity from being a federal undertaking. While Treasury may not have initially foreseen the use of HHF program funds as having a potential impact upon historic resources, this changed once your agency added demolition as a specifically permitted program activity. Despite the reimbursable nature of the funding stream, but for the ability of states to recapture costs associated with demolition from Treasury (via the HHF), states would not have been able to carry out these demolition actions. Treasury's position that project goals and processes are too far removed from the agency to be considered a relevant undertaking is pre-empted and voided by your agency's decision to specifically identify demolition as an eligible activity under the HHF program. In short, not only did Treasury's decision further establish, increase and elevate your involvement, without it, these demolitions would not be taking place.

While your detailed description of the procedures voluntarily put in place by the state of Michigan may provide some protection of historic resources in that state, these state actions do not fulfill your agency's responsibility under Section 106, meet the spirit of the law, or address the potential impacts to historic resources in the 17 other states eligible to participate in the HHF program. As a consequence of the HHF delivery system as defined and recently amended by your agency, federal funds are directly facilitating demolition actions without the evaluation of impacts, the consideration of alternatives, or the opportunity for public input and consultation provided by the Section 106 process. While demolition can be part of a healthy community revitalization strategy, federally assisted actions that fail to consider effects on historic resources is in direct conflict with existing federal law. This is the fundamental point we should all be working to resolve.

NCSHPO recognizes that there is pressure to assure the expedient delivery of these funds. State Historic Preservation Officers (SHPOs), the Advisory Council on Historic Preservation, and other federal agencies have years of experience in the development of alternate procedures that streamlines, but at the same time satisfies, the Section 106 process. Programmatic Agreements and other vehicles can be used to categorically exclude certain types of actions from review or establish standardized methods of treatment and documentation. In fact, SHPOs already have procedures in place for dealing with very similar undertakings such as demolitions funded via the Department of Housing and Urban Development's (HUD) Community Development Block Grant (CDBG) program. NCSHPO is confident that a quick yet meaningful Section 106 solution to the HHF problem can be implemented without delay.

Treasury surely recognizes that our limited resources need to be wisely and responsibly spent. Rather than pursuing a strategy of avoidance, Treasury should demand "gold standard" compliance with all federal laws thereby assuring the best possible return for our public investment. Our members stand ready and willing to help find a solution that assures adequate review and consideration in each of the impacted states and the District of Columbia, while at the same time permitting use of funds to help achieve the

targeted and careful removal or abatement of properties serving as a catalyst of neighborhood blight or posing a threat to public health and safety. We encourage you to contact the Advisory Council on Historic Preservation with an offer to proceed with a solution as soon as possible.

Sincerely,



Erik M. Hein  
Executive Director

*The National Conference of State Historic Preservation Officers (NCSHPO) represents the State Historic Preservation Officers (SHPOs) present in every state and territory of the United States and defined in Title I, Section 101 (a)(b) of the National Historic Preservation Act of 1966 (NHPA). State Historic Preservation Officers (SHPOs) administer the national historic preservation program at the State level, review National Register of Historic Places nominations, maintain data on historic properties that have been identified but not yet nominated, and consult with Federal agencies during Section 106 review. SHPOs are designated by the governor of their respective State or territory.*

cc: Milford Wayne Donaldson, Advisory Council on Historic Preservation  
John Fowler, Advisory Council on Historic Preservation  
Horst Greczmiel, Council on Environmental Quality  
Elizabeth Merritt, National Trust for Historic Preservation  
Mark Epstein, Ohio Historical Society