

Department of Legislative Services  
Maryland General Assembly  
2007 Session

FISCAL AND POLICY NOTE

House Bill 882 (Delegate Weldon)  
Environmental Matters

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Maryland Historical Trust - Maryland Advisory Council on Historic  
Preservation and Review of State Undertakings

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This bill authorizes a person with standing to bring a private writ of mandamus against a State unit if a State unit fails to consult with the Maryland Historical Trust (MHT) on the effect of certain projects, including a capital project, on historical properties. It also expands the definition of State unit to include an independent unit of State government, and the University System of Maryland, Morgan State University, and St. Mary's College.

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Fiscal Summary

**State Effect:** State operating expenditures (all funds) could increase due to litigation costs associated with a person with standing seeking a writ of mandamus. In addition, delays associated with projects and programs subject to MHT review could increase expenditures.

**Local Effect:** Local expenditures could increase due to litigation costs; in addition, delays associated with local projects licensed, permitted, or financially assisted by a State unit could increase expenditures; however the exact magnitude of this increase cannot be reliably determined at this time.

**Small Business Effect:** Potentially significant.

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## Analysis

**Bill Summary:** A person with standing may seek a private writ of mandamus forcing a State unit to consult with MHT when a State unit fails to consult on the effect of a capital project on historic properties. This applies to:

- capital projects undertaken by a State unit or for which a State unit is otherwise responsible;
- capital projects undertaken using the proceeds of general obligation bonds; and
- undertakings that are licensed or permitted by a State unit or for which a State unit provides financial assistance.

If the director of MHT determines that a State unit has failed to consult with the trust on a capital project, that determination is prima facie evidence that the State unit had a duty to consult and failed to do so. The bill also clarifies that failure of a State unit to consult with MHT does not create a private cause of action for money damages or equitable relief.

When a State unit consults with MHT on the effect of a capital project on properties that are either listed or eligible to be listed in the Historic Register, the consultation must occur as early in the project or program planning process as possible, and before a decision that precludes any viable option. It must include a meaningful discussion and consideration of the views of other interested parties, and an attempt to reach an agreement where feasible. In addition, this consultation process now applies to historic properties owned, controlled, regulated, or assisted by State units.

The bill also lengthens the period of time from 30 to 45 days that the Maryland Advisory Council on Historic Preservation has to comment on a State unit's report on the consultation if the State unit and MHT cannot agree on a plan of action.

The council's comments on a report must include feasible, as well as practicable, alternatives to avoid, mitigate, or satisfactorily reduce any adverse effect of the capital project if the council does not accept the adverse effect. In addition, the bill increases the time period that a State unit cannot proceed with a project after comments by the council from 10 to 20 days.

The bill adds two members to the council: the Secretary of Business and Economic Development as an *ex officio* member; and a fourth appointee of the Governor. The bill also requires that of the four non-*ex officio* members of the council, one have expertise in archaeology, and one have experience in economic development and finance. It also removes the requirement that at least one member be a member of the general public.

The definition of an undertaking is expanded and includes a project, activity or program under the direct jurisdiction of a State unit, including those:

- carried out by or on behalf of a State unit;
- carried out with State financial assistance;
- requiring a State permit, license, or approval; and
- subject to local regulation in accordance with a delegation or approval by a State unit.

**Current Law:** A State unit that submits a request for a capital project or is otherwise responsible for a capital project must consult with MHT to determine whether the project will adversely affect any property listed in or eligible to be listed in the Historic Register.

The consultation must occur:

- before the State unit submits a request to the Department of Budget and Management (DBM);
- before or as part of the final project planning phase for a major transportation project; or
- as early as possible for a capital project that uses nonbudgeted money and is subject to reporting requirements to DBM.

Capital projects that use general obligation bond proceeds, but are not carried out by a State unit are also subject to review by MHT.

State unit includes a unit in a principal department of the Executive Branch and the governing body of a single county or multi-county authority. It does not include the governing body of a municipal corporation or a unit of a county or municipal corporation.

If MHT determines that a State unit's action or approval may adversely affect historic properties, the unit in question must consult with the director to determine whether a practicable plan exists to avoid, mitigate or satisfactorily reduce the adverse effect.

If the director and the State unit cannot agree on a plan, the State unit must submit a report on the consultations to the Maryland Advisory Council on Historic Preservation, including the findings and recommendations of the State unit.

Within 30 days of receipt, the council must submit to the State unit comments either accepting the adverse effect, or recommending practicable alternatives to avoid, mitigate

or satisfactorily reduce the effect. If the State unit disagrees with the comments, the unit must respond to the council, explaining why it refuses to adopt the council's recommendations. It must also wait 10 days before proceeding with the project. Failure by a State unit to comply with this section does not create a private cause for action under State law.

This consultation applies to any undertaking subject to the National Historic Preservation Act.

Under Section 5A-326 of the State Finance and Procurement Article, a State unit that issues permits or licenses or provides financial assistance to undertakings that are subject to review under the National Historic Preservation Act must cooperate with MHT by giving notice on request to MHT of each application for a permit, license or financial assistance, and requiring where appropriate that an applicant consult with MHT before the State unit takes final action on the application. After consulting with MHT, and to avoid, mitigate, or satisfactorily reduce any significant adverse affect on a property listed in or eligible to be listed in the Historic Register, a State unit may put reasonable conditions on a license, permit, or award of financial assistance.

By regulation, MHT must establish professional standards, guidelines, and procedures to preserve historic properties owned, controlled, regulated, or assisted by State units, to minimize the need for MHT review.

An undertaking is a project that involves or may result in building construction, building operation, or land disturbance.

**Background:** MHT was formed in 1961 to assist the people of Maryland in identifying, preserving, and protecting the State's significant prehistoric and historic districts, sites, structures, cultural landscapes, and traditions. MHT is also required to review the policies and programs of each State unit that affect historic properties, and recommend ways to improve the effectiveness and coordination of these policies and programs.

MHT advises that it already consults with State units under Section 5A-326 of the State Finance and Procurement Article on projects that are licensed, permitted, or financially assisted by the unit. These capital projects are undertaken by local governments or private entities.

MHT has reviewed over 70,000 State projects to determine the effect of a capital project on historic properties. In addition, MHT performs the historical preservation review for federal projects under the National Historic Preservation Act. MHT typically performs 2,900 federal reviews a year, and 1,100 reviews for State units.

In a recent Baltimore City Circuit Court case, *Baltimore Heritage Inc. v. University of Baltimore* (2004), the plaintiffs sought a writ of mandamus against the University of Baltimore (UB) to force it to consult with MHT over the disposition of a building known as the Odorite Building. UB sought to demolish the building.

The court held that the building was in fact a building that could be included in the Maryland Register of Historic Properties; however, the court also held that UB had consulted with the Maryland Historical Trust. The court held that in order to determine that UB had not consulted with the trust, the court would have had to have found that no communication took place with the historical trust, and that the amount of consultation was at the discretion of UB.

**State Fiscal Effect:** According to the Attorney General's Office, a writ of mandamus usually applies to forcing a government entity to perform an imperative duty, not a discretionary act. The Attorney General advises that the duty to consult in current law is considered nebulous and discretionary. The bill specifies that a writ of mandamus is applicable to a State unit's consultation with MHT, thereby securing the remedy of mandamus to a private person with standing where it is questionable that it exists under current law. Therefore, State expenditures could increase due to increased litigation from a person with standing seeking a writ of mandamus against a unit. In addition, lengthening the period during which a unit cannot take action on a capital project could delay the project, increasing costs; however the magnitude of this effect would depend on the type of project, how many persons have standing, and whether or not the delays significantly affect expenditures.

Earlier consultation on capital projects could result in changes to plans occurring before significant time and money has been invested. Making changes early in the process can cost less than making significant alterations later.

However, requiring a State unit to consult earlier with MHT and other interested parties could delay project planning until an agreement had been reached, or until it became apparent that an agreement would not be reached. Delays often increase the costs of a capital project. In addition, more studies could need to be performed, which would raise costs to perform the studies. MHT advises that the Odorite case is the only one in which it has not been able to come to an agreement with a State unit; however there could be other projects in the future where agreement is difficult to achieve.

Requiring MHT to consult with a State unit on an undertaking licensed, permitted, or financially assisted by the unit codifies existing practice and would not have a fiscal impact. In addition, MHT advises that the expanded definition of undertaking is based on

the federal definition of undertaking. MHT has been applying this definition to State units for at least a decade to determine what programs, grants, and projects are subject to review by MHT. As such, the bill is codifying existing practice. The Department of Business and Economic Development advises that it could handle any additional expenses for representation on the council with existing resources.

**Local Fiscal Effect:** A writ of mandamus to force a unit to consult with MHT could delay a project that involved a county government. In addition, to the extent that a county is involved in the litigation over the writ of mandamus, related expenditures could increase. Lengthening the consultation time on a capital project could also delay the project.

Any delay in a capital project or undertaking could affect local expenditures or revenues; however the exact effect would depend on the types of projects being undertaken and the extent of county involvement, which cannot be reliably estimated at this time.

**Small Business Effect:** Small businesses involved with capital projects could be impacted by delays in the project. The project could potentially be delayed by a private person with standing requiring a writ of mandamus to force consultation with MHT, or from extending the time period in which the Maryland Advisory Council on Historical Preservation or a State unit has to comment on certain part of the consultation. In addition, to the extent that a small business is involved in the litigation over the writ of mandamus, expenditures related to litigation could increase.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Harford County, Queen Anne's County, St. Mary's County, Department of Budget and Management, Department of Business and Economic Development, Department of General Services, Maryland Department of Planning, Department of Legislative Services

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