

**MEMORANDUM OF AGREEMENT
AMONG THE U.S. ARMY CORPS OF ENGINEERS, LOUISVILLE DISTRICT,
THE KENTUCKY STATE HISTORIC PRESERVATION OFFICER,
AND HAGAN PROPERTIES, LLC**

REGARDING

**THE SHADOW WOOD TOWN PLAZA PROJECT
IN LOUISVILLE, JEFFERSON COUNTY,
KENTUCKY**

WHEREAS, Hagan Properties, LLC (Hagan) proposes to construct a commercial and residential development at the intersection of Outer Loop and I-65 in Louisville, Jefferson County, Kentucky (the Project); and

WHEREAS, Hagan has submitted an application to the U.S. Army Corps of Engineers, Louisville District (the District) for a Department of the Army permit (Permit) to authorize impacts to jurisdictional wetlands (the Undertaking, ID No. 200500917); and

WHEREAS, the District has defined the Undertaking's area of potential effects (APE) as the entire 55.75-acre area of the Project; and

WHEREAS, the District has consulted with the Kentucky State Historic Preservation Officer (SHPO) and the following federally recognized Indian tribes: the United Keetoowah Band of Cherokee Indians in Oklahoma, the Eastern Band of Cherokee Indians, the Cherokee Nation of Oklahoma, the Shawnee Tribe, the Absentee-Shawnee Tribe of Oklahoma, and the Eastern Shawnee Tribe of Oklahoma (the Tribes) pursuant to 36 C.F.R. Part 800, regulations implementing the National Historic Preservation Act of 1966 (NHPA), as amended (16 U.S.C. 470f); and

WHEREAS, the District has determined that the Project would have an adverse effect upon prehistoric archaeological site 15Jf674, which has been determined by consensus with the SHPO to be eligible for inclusion in the National Register of Historic Places (NRHP); and

WHEREAS, the District has consulted with the SHPO, the Tribes, and Hagan, in accordance with Section 106 of the NHPA, 16 U.S.C. §470 (NHPA) and its implementing regulations [36 C.F.R. §800.6(b)(1)] to resolve the adverse effects of the Project on historic properties; and

WHEREAS, pursuant to 36 C.F.R. § 800.6(c)(2), the District has invited Hagan to become a signatory to this Memorandum of Agreement (MOA); and

WHEREAS, pursuant to 36 C.F.R. §800.6(c)(3), the District has invited the Tribes to concur in this MOA; and

WHEREAS, in accordance with 36 C.F.R. § 800.6(a)(1), the District has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination, providing the specified documentation, and the ACHP has chosen not to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii);

NOW, THEREFORE, the District, the SHPO, and Hagan agree that upon the District's decision to issue a Department of the Army permit, the District shall ensure that Hagan shall implement the following stipulations in order to take into account the effects of the Project on historic

properties, and that these stipulations shall govern the Project and all of its parts until the MOA expires or is terminated.

Stipulations

The District shall condition the permit, if issued, to ensure that the following stipulations are implemented:

I. PROJECT DESIGN

Hagan shall ensure that the proposed new service road will follow the alignment depicted on the proposed Development Plan, dated October 11, 2006, a copy of which is attached as Figure 1. The southern-most part of archaeological site 15Jf675 will be adversely affected by the new service road and will be considered ineligible for inclusion in the NRHP.

No buildings, structures, playgrounds, or parking facilities shall be constructed over the remaining, intact and NRHP-eligible portions of archaeological site 15Jf674 (which comprise 6300 square feet), the boundaries of which are depicted on attached Figure 1.

Should the project design change, Hagan must provide the District with those plans so that the District may coordinate with all consulting parties, including the Tribes. The revised plans and their potential impacts to historic properties shall be evaluated pursuant to 36 C.F.R. Part 800 prior to commencement of construction.

II. ARCHAEOLOGICAL RESOURCES

The District and Hagan shall ensure that identified archaeological site 15Jf674 is treated as outlined below. Hagan, as the permittee, is responsible for the following:

- A. No further excavation or ground disturbance shall occur within the boundaries of the NRHP-eligible portion of archaeological site 15Jf674. This area is 6300 square feet (0.14 acre) in size and is depicted on the attached Figure 1. The area containing the archaeological site shall be fenced off during construction so that it is not inadvertently disturbed.
- B. The entire area of archaeological site 15Jf674 shall be covered by a geotechnical fabric and then covered by fill material. The fill material to be placed shall be clean sand or topsoil so as not to adversely impact site conditions.
- C. Heavy machinery shall not be driven across the area containing archaeological site 15Jf674 when ground conditions are wet.
- D. The Phase II archaeological investigation report will conform to the Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation" (48 Fed. Reg. 44716) and the most current Specifications published by the Kentucky Heritage Council. Hagan shall submit a draft of its Phase II archaeological investigation report to the District within six (6) months following execution of this MOA. Copies of the draft report shall be provided for coordination with the SHPO and the Tribes.

Comments on the draft Phase II report shall be received by the District for a period of thirty (30) days following distribution of the draft report. The District shall provide copies of all such comments to Hagan. Hagan shall take into account any comments and submit a final report to the District within thirty (30) days following its receipt of such comments. Copies of the final report shall be provided to the Corps for distribution to the SHPO and the Tribes.

- E. Hagan shall ensure that all materials and records resulting from the Phase II archaeological investigation are curated in a manner consistent with 36 C.F.R. Part 79, and in particular the standards at 36 C.F.R. §§ 79.9 and 79.10. All such materials and records, including any artifacts previously identified and removed during the Phase II archaeological investigation, will be curated at the University of Louisville (subject to acceptance), or at another appropriate organization identified by Hagan and approved by the SHPO (if the University of Louisville does not accept curation).

III. PRESERVATION EASEMENT

- A. Hagan shall place a historic preservation easement in perpetuity on archaeological site 15Jf674, as depicted on Figure 1. Hagan shall submit draft language to the Corps for coordination with the SHPO and the Tribes. The Kentucky Heritage Council has model easements which may be used and customized to be project-specific.
- B. The easement shall prohibit any excavation, construction, or other disturbance within the boundaries of archaeological site 15Jf674, except for the placement of geotechnical fabric and fill material on such area. Such area shall be vegetated and preserved as “green space” in perpetuity.
- C. Such easement shall be held by the Kentucky Heritage Council.

IV. NATIONAL REGISTER NOMINATION

Hagan, with the assistance of Natural & Ethical Environmental Solutions, LLC (N&E) or another qualified historic preservation consultant selected by Hagan, shall prepare and submit the documentation required to nominate archaeological site 15Jf674 to the NRHP. Such documentation shall be completed and submitted to the National Park Service, Keeper of the National Register, within six (6) months of the full execution of this MOA.

V. PUBLIC EDUCATION

- A. Hagan will prepare and distribute a short (approximately 32-page) booklet aimed at general audiences which describes and interprets the archaeological resources identified at archaeological site 15Jf674. Specific archaeological site locations shall not be provided in this booklet. The booklet should contain information about state and federal laws relating to archaeological sites and burials, and why they are protected. This publication will be prepared in consultation with the District, the SHPO, the Tribes, and the editor of the Kentucky Archaeological Survey; and will be distributed to local libraries, educational facilities, historical societies, the SHPO, the

District, the Tribes, and other interested organizations. The District may withhold or limit public disclosure of information about historic properties in accordance with Section 304 of the National Historic Preservation Act and 36 C.F.R. §800.6(a)(5) and 36 C.F.R. §800.11(c). The parties to this MOA anticipate that this publication will be made available for inclusion in the Kentucky Archaeological Survey's publication series.

- B. A permanent outdoor exhibit sign will be designed and placed near the archaeological site. The sign will not identify specific archaeological resources or their locations within the site, but will discuss the general characteristics of the site and its historical context. The sign will be of a permanent, weather-resistant material similar to signs seen at national parks.

VI. INADVERTENT DISCOVERIES

If, during the implementation of the Project, a previously unidentified historic property is encountered, or a previously identified historic property is affected in an unanticipated manner, the District will consult with the SHPO, the Tribes, and Hagan, and will ensure that work shall cease in the area of the discovery until the previously unidentified historic property or unanticipated effect can be evaluated, and an appropriate treatment plan developed, pursuant to 36 C.F.R. Part 800, the Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation," and the most current Specifications published by the Kentucky Heritage Council. If human remains are discovered, the Jefferson County Coroner, law enforcement officials, and the District shall be notified immediately, and the SHPO and the Tribes shall be notified within two (2) business days.

VII. DISPUTE RESOLUTION

- A. Should any signatory, invited signatory, concurring party, or any of the Tribes object at any time in writing to the District regarding any action carried out or proposed with respect to the Undertaking or to the manner in which the terms of this MOA are implemented, the District shall consult with such party to resolve the objection. The District also shall notify the other signatories and concurring parties to this MOA of such objection, and provide them the opportunity to participate in any consultations to resolve the objection. If the District determines that such objection cannot be resolved, the District will forward all documentation relevant to the dispute, including the District's proposed resolution, to the ACHP. Within thirty (30) days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:
 - 1. Advise the District that the ACHP concurs in the District's proposed response to the objection, whereupon the District will respond to the objection accordingly; or
 - 2. Provide the District with recommendations, which the District shall take into account in reaching a final decision regarding its response to the objection; or
 - 3. Notify the District that the objection will be referred for comment pursuant to 36 C.F.R. 800.7 (a) (4), and proceed to refer the objection and comment. The

District shall take the resulting comment into account in accordance with 36 C.F.R. 800.7 (c) (4) and Section 110 (1) of NHPA.

- B. Should the ACHP not exercise one of the above options within thirty (30) days after receipt of all pertinent documentation, the District may assume the ACHP's concurrence in its proposed response to the objection.
- C. At any time during implementation of the measures stipulated in this agreement, should an objection pertaining to this agreement or the effect of the undertaking on historic properties be raised by a member of the public, the District shall notify the parties to this agreement and take the objection into account, consulting with the objector and should the objector so request, with any of the parties to this agreement to resolve the objection.

VIII. TERMINATION

- A. If the District determines that it cannot implement the terms of this agreement, or if a signatory or invited signatory determines that the agreement is not being properly implemented, such party may propose to the other signatories to this agreement that it be terminated, in accordance with 36 C.F.R. §800.6(c)(1) and (8).
- B. The party proposing to terminate this agreement shall so notify all parties to this agreement, including the concurring parties, explaining the reasons for termination and affording the parties at least thirty (30) days to consult and seek alternatives to termination. The parties shall then consult.
- C. If after the expiration of thirty (30) days (or such greater time period as may be agreed upon by all signatories) an agreement to avoid termination cannot be reached, the District or other signatory may terminate this agreement by so notifying all parties in writing.
- D. Should this agreement be terminated, the District shall either:
 - 1. Consult in accordance with 36 C.F.R. §800.6 to develop a new MOA; or
 - 2. Request the comments of the ACHP pursuant to 36 C.F.R. §800.7.

IX. AMENDMENTS

Any signatory to this agreement may propose to the District that the agreement be amended, whereupon the District shall consult with the other parties to this agreement to consider such an amendment. 36 C.F.R. §800.6(c)(1) shall govern the execution of any such amendment. The signatures of all of the signatories shall be required for any amendment hereto to be effective.

X. DURATION

If the terms of this agreement have not been implemented by the expiration date of the Permit (if such a permit is issued by the District), this agreement shall be considered null and void. In such event, the District shall so notify the parties to this agreement, and if Hagan chooses to continue with the undertaking, the District shall re-initiate review of the Undertaking in accordance with 36 C.F.R. Part 800.

This agreement shall be effective until such time as all of its terms are satisfied or it is amended or terminated and replaced.

Execution and implementation of this MOA, and its submission to the ACHP in accordance with 36 C.F.R. §800.6(b)(1)(iv), shall, pursuant to 36 C.F.R. §800.6(c), be considered to be an agreement with the ACHP for the purposes of Section 110(l) of the NHPA.

Execution of this agreement and implementation of its terms shall evidence that the District has afforded the ACHP an opportunity to comment on the Shadow Wood Town Plaza project and its effects on historic properties, and that the District has taken into account the effects of the Undertaking on historic properties.

SIGNATORIES:

U.S. ARMY CORPS OF ENGINEERS DISTRICT, LOUISVILLE

Raymond G. Midkiff
Colonel, Corps of Engineers
Commander and District Engineer

Date

KENTUCKY STATE HISTORIC PRESERVATION OFFICER

David Pollack
Acting Director, Kentucky Heritage Council

Date

INVITED SIGNATORY:

HAGAN PROPERTIES, LLC

Scott Hagan
President

Date

Shadow Wood Town Plaza MOA
Louisville, Jefferson County, Kentucky

CONCURRING PARTY:

Chief George Wickliffe
United Keetoowah Band of Cherokee Indians of Oklahoma

Date

Shadow Wood Town Plaza MOA
Louisville, Jefferson County, Kentucky

CONCURRING PARTY:

Principal Chief Michell Hicks
Eastern Band of Cherokee Indians

Date

Shadow Wood Town Plaza MOA
Louisville, Jefferson County, Kentucky

CONCURRING PARTY:

Chief Chad Smith
Cherokee Nation

Date

Shadow Wood Town Plaza MOA
Louisville, Jefferson County, Kentucky

CONCURRING PARTY:

Governor Larry Nuckolls
Absentee-Shawnee Tribe of Oklahoma

Date

Shadow Wood Town Plaza MOA
Louisville, Jefferson County, Kentucky

CONCURRING PARTY:

Chairman Ron Sparkman
Shawnee Tribe

Date

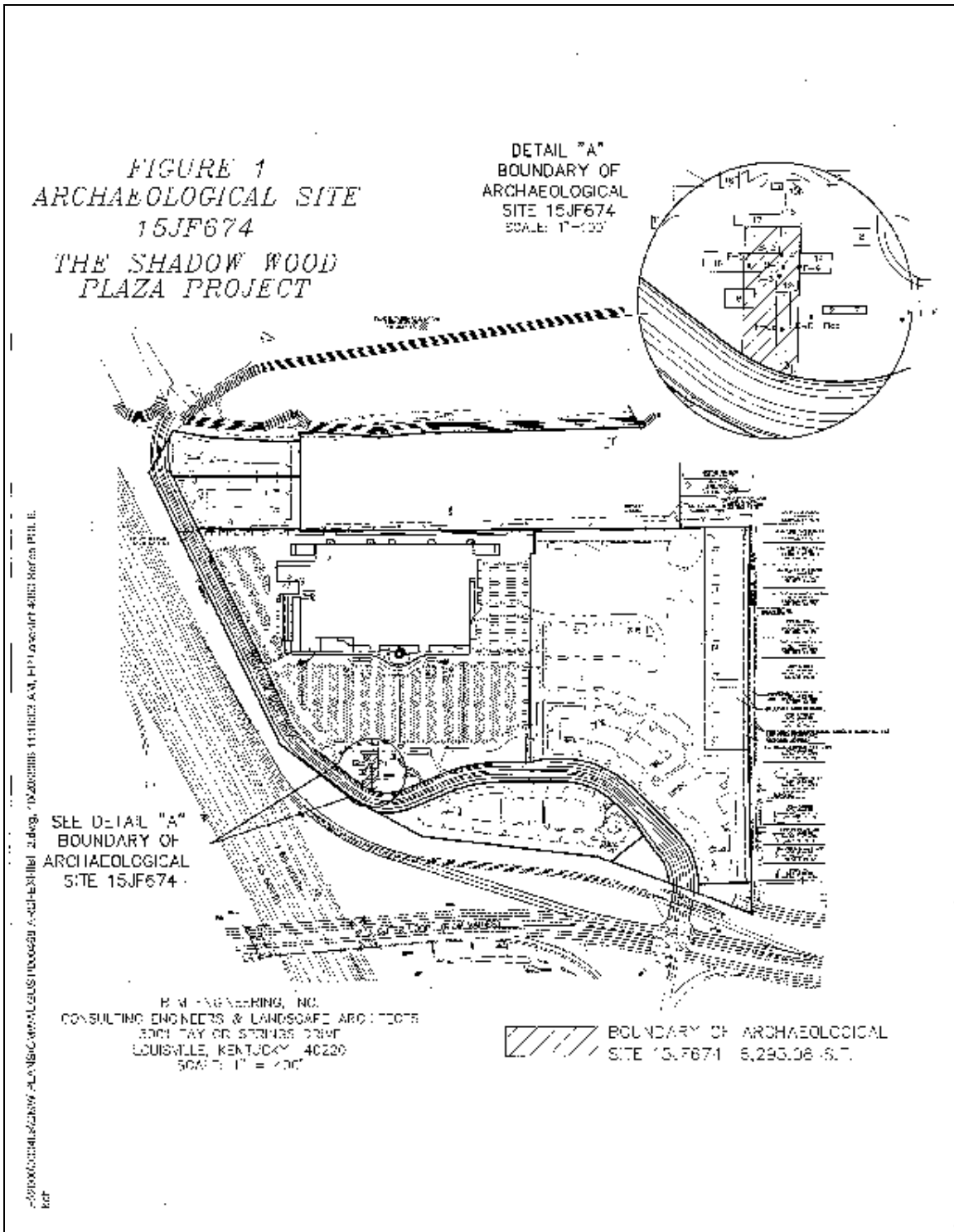


Figure 1. This plan shows the proposed development, including the alignment of the service road at the southern edge of the property, and site 15Jf674 (the area to be preserved as greenspace). North is to the top of the page.