National Trust *for* Historic Preservation®

Preservation Law Workshop



St. James-Santee Episcopal Church, McClellanville, SC



San Francisco Plantation, Garyville, LA



Bisbee Historic District, Bisbee, AZ

SEPTEMBER 29, 2026
CHRIS CODY
SENIOR ASSOCIATE GENERAL COUNSEL

Schedule and Objectives

1. Historic Preservation Laws: Introduction and Overview

2. Recent Preservation Law Cases

3. Current Issues in Preservation Law



General Electric Building, New York, NY

National Trust *for* Historic Preservation®

Historic Preservation Laws: Introduction and Overview



Century Building, Chicago, IL



San Xavier del Bac Mission, Tohono O'odham Nation, AZ



Ames Monument, Albany County, WY

Background

- Birth of Historic Preservation movement in the 19th century
  - Mount Vernon Ladies Association founded 1853
- Antiquities Act, 1906
- First local ordinances, 1930s
  - Charleston, SC, 1931
  - New Orleans, LA, 1936
- Historic Sites Act, 1935
- National Trust for Historic Preservation,1949



Mount Vernon, VA

Urban "Renewal" 1950s-1960s



Houston, 1970s



Denver, 1970s

Penn Station Demolition 1963











National Historic Preservation Act of 1966

The NHPA broadened the policy of federal government with regard to historic preservation by:

1. Expanding properties protected to include nationally significant properties AND those of state and local significance as well; and
2. Creating stronger federal policy on historic preservation to balance other federal priorities.



President Johnson signing the NHPA, Oct. 15, 1966

National Historic Preservation Act of 1966

- Created the National Register program
- Created the Advisory Council on Historic Preservation (ACHP)
- Created SHPOs
- Professional standards (SOIS)
- Section 106 – Stop, look, and listen
  - Consultation with SHPOs
- Section 110 – Federal agency stewardship
  - Sections 110(f) and 110(k)



National Register Criteria

Criteria for Evaluation

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess **integrity** of location, design, setting, materials, workmanship, feeling, and association, and:

A. That are associated with events that have made a significant contribution to the broad patterns of our history; or

B. That are associated with the lives of significant persons in our past; or

C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

D. That have yielded or may be likely to yield, information important in history or prehistory.



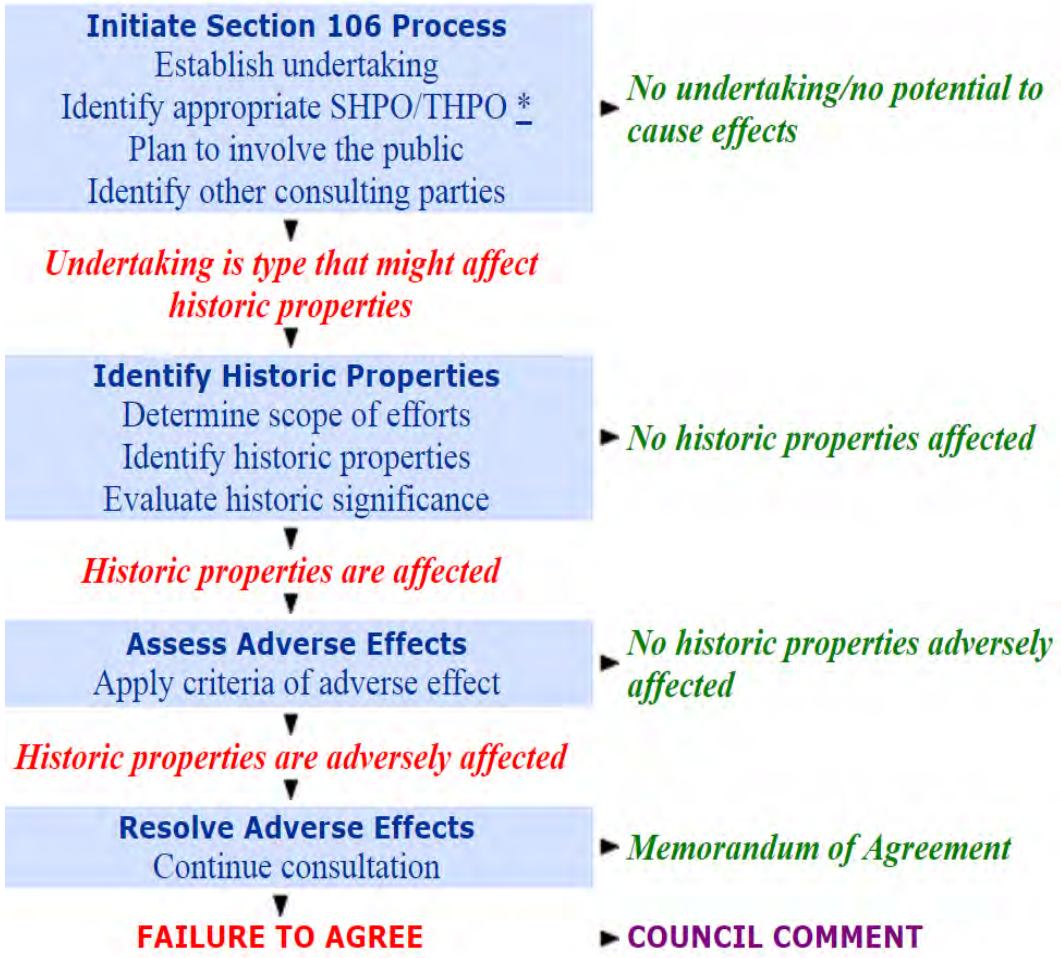
Section 106
54 U.S.C. § 306108 and 36 C.F.R. § 800

"The head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking…shall, prior to the approval of the expenditure of federal funds on the undertaking or prior to the issuance of any license,… take into account the effect of the undertaking on any [historic property] that is included in or eligible for inclusion in the National Register."

Threshold:

- Is there a federal undertaking?
- Will the undertaking affect historic properties?
- If yes, how will the adverse effects be minimized, mitigated or avoided?

Section 106
54 U.S.C. § 306108 and 36 C.F.R. § 800



Section 110 of the NHPA (54 U.S.C. § 306108)

Under the law, the head of each Federal agency must do several things. First, he or she must assume responsibility for the preservation of historic properties owned or controlled by the agency. **Each Federal agency must establish a preservation program** for the identification, evaluation, nomination to the National Register, and protection of historic properties. Each Federal agency must consult with the Secretary of the Interior (acting through the Director of the National Park Service) in establishing its preservation programs. Each Federal agency must, to the maximum extent feasible, use historic properties available to it in carrying out its responsibilities. The 1992 additions to section 110 also set out some specific benchmarks for Federal agency preservation programs, including:

(a) historic properties under the jurisdiction or control of the agency are to be managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values;

(b) historic properties not under agency jurisdiction or control but potentially affected by agency actions are to be fully considered in agency planning;

(c) agency preservation-related activities are to be carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations, and the private sector;

(d) agency procedures for compliance with section 106 of the Act are to be consistent with regulations issued by the Advisory Council on Historic Preservation; and

(e) an agency may not grant assistance or a license or permit to an applicant who damages or destroys historic property with the intent of avoiding the requirements of section 106, unless specific circumstances warrant such assistance.

Section 110(f)

§306107. Planning and actions to minimize harm to National Historic Landmarks

Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall **to the maximum extent possible** undertake such planning and actions as may be necessary to minimize harm to the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

(Pub. L. 113–287, §3, Dec. 19, 2014, 128 Stat. 3226.)



Evergreen Plantation, Wallace, LA



Evergreen Plantation, Wallace, LA

Section 110(K)

§306113. Anticipatory demolition

Each Federal agency shall ensure that the agency **will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant** that, with intent to avoid the requirements of section 306108 of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

(Pub. L. 113–287, §3, Dec. 19, 2014, 128 Stat. 3227.)



Hulett Ore Unloaders, Cleveland, OH



Hulett Ore Unloaders, Cleveland, OH

Other Federal Laws: Section 4(f), 23 C.F.R. § 774

The Administration may not approve the use, as defined in § 774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no **feasible and prudent avoidance alternative**, as defined in § 774.17, to the use of land from the property; and

(2) The action includes **all possible planning**, as defined in § 774.17, **to minimize harm** to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in § 774.17, on the property.

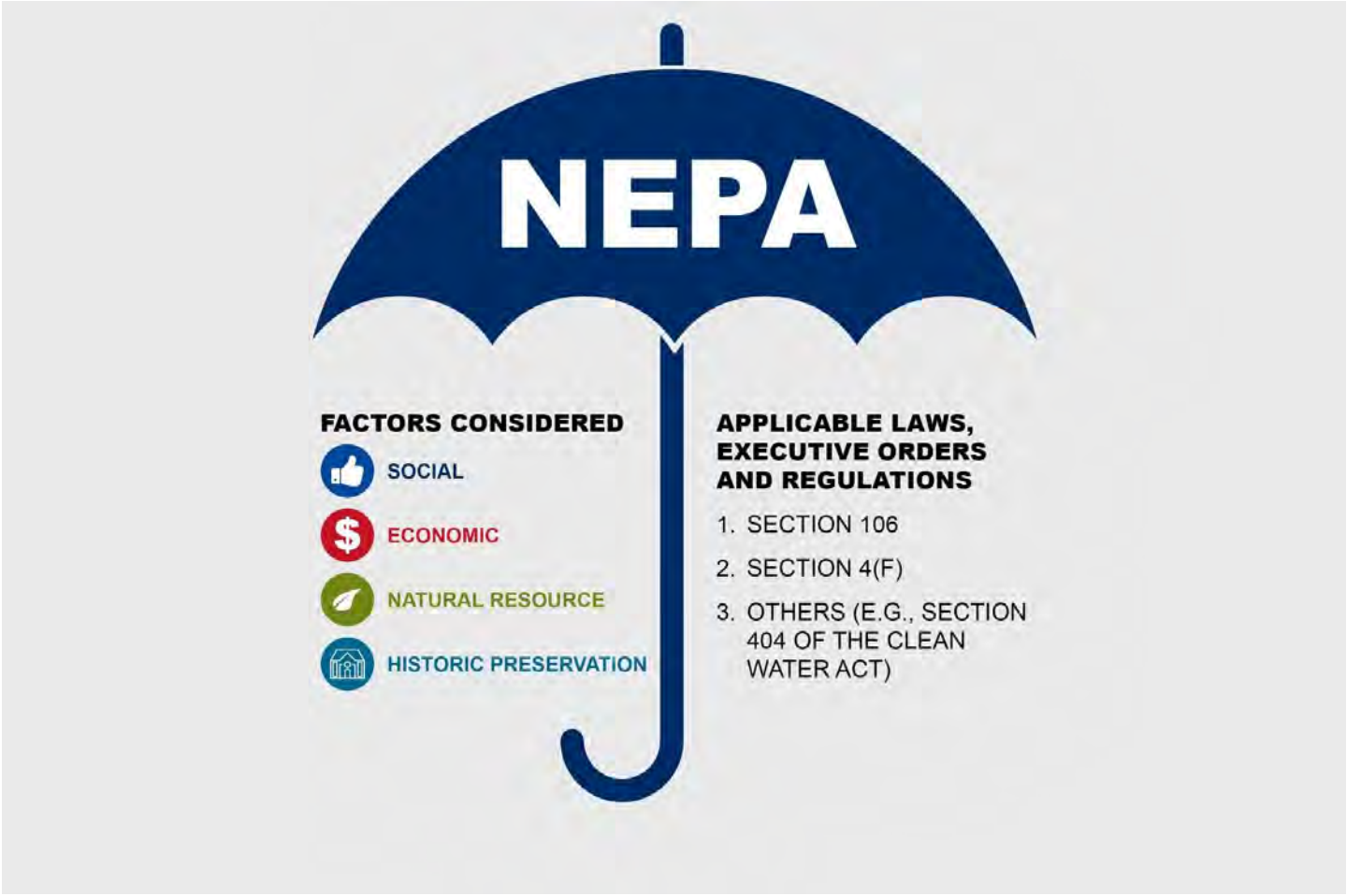
(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in § 774.17, to minimize harm to Section 4(f) property.

Other Federal Laws: National Environmental Policy Act (NEPA), 42 USC § 4371

"Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."



State Historic Preservation Laws

- State Historic Preservation Acts
- State Environmental Protection Acts
- State Planning Acts
- And many more...



Tombstone Courthouse State Park, Tombstone, AZ

Arizona State Parks
STATE HISTORIC PRESERVATION OFFICE

Local Historic Preservation Ordinances

Generation One

- 1930s-1980s
- Broad, non-specific language
- As short as one sentence
- "ensure compatibility"

Generation Two

- 1980s-2010s
- Detailed written guidelines
- References to specific local contexts

Generation Three

- 2010s-Present
- Even more detailed written guidelines
- Even more references to specific local contexts
- All vague language removed
- Tools and examples to help the public

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Appendix F:Williams Code of Ordinances: Sign, § 158.195 PURPOSE. 48



Figure 13: One-Story Building Massing



Figure 14: Two-Story Building Massing



Figure 15: Preservation of Original Wood Window



Figure 16: Vertical Window with Transom



Figure 17: Second Floor Vertical Windows



Figure 18: Storefront withTransom



Figure 25: Mixed Masonry Types (brick and stone)



Figure 26: Brick Facade/Wood and Glass Storefront



Figure 27: Painted Brick Facade
(acceptable but unfinished preferred)



Figure 28: Stone Facade



Figure 29: Stucco (as an accent only)



Figure 30: Wood Trim

Local Historic Preservation Ordinances

BOARD OF ARCHITECTURAL REVIEW

GUIDELINES: URBAN TYPES

CITY OF CHARLESTON, DEPARTMENT OF PLANNING PRESERVATION AND SUSTAINABILITY



1A. Best Practice: Charleston Single House



2A. Acceptable Practice: Charleston Warehouse



1B. Best Practice: Charleston Shopfront



2B. Acceptable Practice: In General



1C. Best Practice: Large Scale Building



2C. Discourage Practice: In General

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BOARD OF ARCHITECTURAL REVIEW

APPROVAL MATRIX

CITY OF CHARLESTON, DEPARTMENT OF PLANNING PRESERVATION AND SUSTAINABILITY

GENERALLY EASIER TO APPROVE < ..... > MORE DIFFICULT TO APPROVE

URBAN GUIDELINES

TALLER CEILING HEIGHTS <	> SHORTER CEILING HEIGHT
NARROW TO THE FRONTAGE <	> WIDER TO THE FRONTAGE
BASE DIFFERENTIATED <	> BASE CONTINUOUS
MANY SMALL BUILDINGS <	> FEW LARGE BUILDINGS
PARKING MASKED FROM FRONTAGE <	> PARKING VISIBLE FROM FRONTAGE
PARKING PROVIDED <	> EXCESS PARKING PROVIDED

ARCHITECTURAL GUIDELINES

NATURAL & INTEGRAL MATERIALS <	> COMPOSITE & CLADDING MATERIALS
STRUCTURAL EXPRESSION <	> SURFACE EXPRESSION
APPLICATION OF LOCAL CRAFT <	> ABSENCE OF CRAFT
UNIFIED STOREFRONT DESIGN <	> STOREFRONT BY COMPONENT
CLEAR GLAZING <	> DARK OR MIRROR GLAZING
VERTICAL PROPORTIONS <	> HORIZONTAL PROPORTIONS
REPETITIVE FENESTRATION <	> MIXED FENESTRATION
SMALL MULLIONS <	> LARGE OR NO MULLIONS
THICKER WALL DEPTH <	> THINNER WALL DEPTH
SIMPLE MASSING <	> COMPLEX MASSING
SHADING ELEMENTS PROVIDED <	> NO SHADING ELEMENTS

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Local Historic Preservation Laws

EXAMPLE: Charleston, SC

- City Council
  - 12 Districts plus the Mayor
- Planning Commission
  - Rezonings and Ordinance Changes
- Board of Zoning Appeals- Zoning
  - Special Exceptions and Variances
- Board of Architectural Review- Large and Small
  - Design Review in Historic District and Main Corridors
- Design Review Board
  - Design Review Everywhere Else
- Technical Review Committee
  - Site Plan Review



Charleston, SC

Constitutional Issues

First Amendment

- Freedom of Speech
- Free Exercise of Religion

Fifth Amendment

- Due Process
- Government Takings

Fourteenth Amendment

- Equal Protection



Freedom of Speech

Burke v. City of Charleston, 139 F.3d 401 (4th Cir. 1998)



Globe Newspaper Company v. Beacon Hill Architectural Commission, 100 F.3d (1st Cir. 1996)



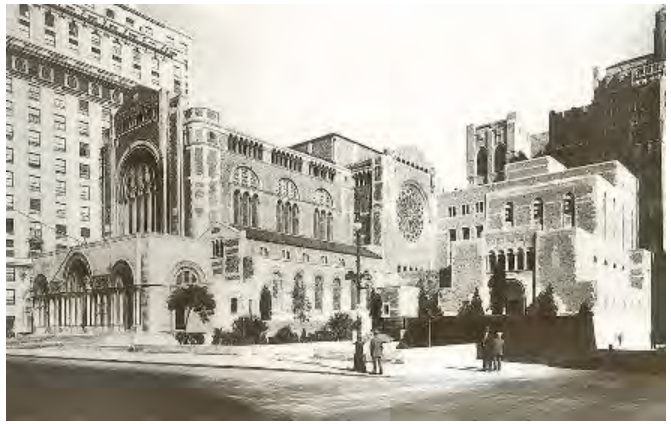
Freedom of Religion

- Per *Employment Division v. Smith*, 494 U.S. 872 (1990), "neutral laws of general applicability" like historic preservation laws need not be justified by a "compelling governmental interest," even if "the law has the incidental effect of burdening a particular religious practice."



Freedom of Religion

Rector, Wardens, & Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F. 2d 348 (2d Cir. 1990)









Freedom of Religion

Religious Land Use and Institutionalized Persons Act of 2000
(RLUIPA)
42 U.S.C. § 2000 et seq.

(1) General Rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(a) is in furtherance of a compelling government interest; and
(b) is the least restrictive means of furthering that compelling governmental interest.



Episcopal Student Foundation v. City of Ann Arbor, MI
341 F.Supp. 2d 691 (E. D. Mich. 2004)

Due Process

Procedural

Right to Be Heard

- Notice
- Public Hearing



Substantive

Right to an Impartial Proceeding

- Conflicts of Interest
- Bias
- *Ex Parte* Communications





Arbitrary and Capricious Standard

Government Takings

Zoning is Not a Taking

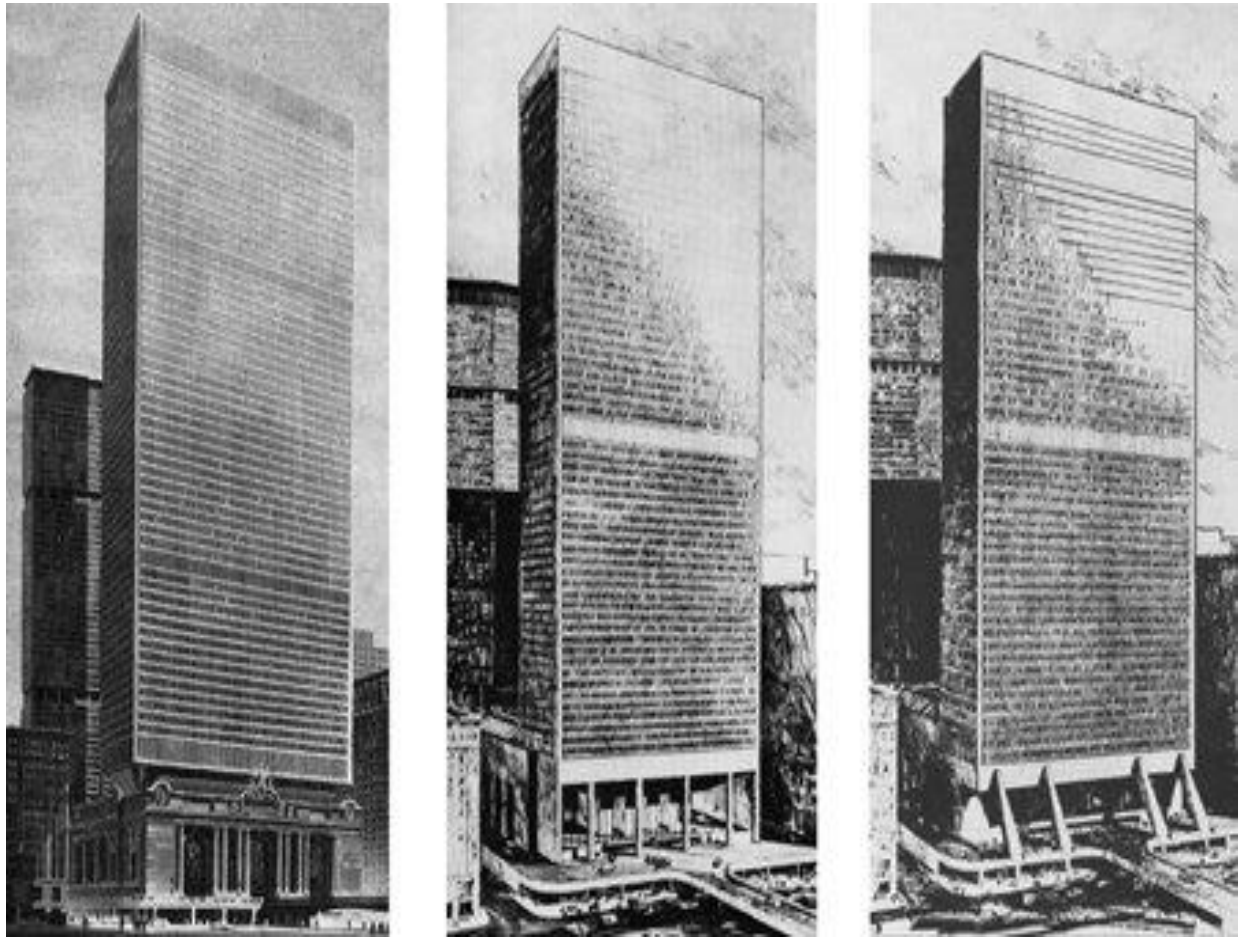
- *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)

Regulatory Takings: Permit Denials

- *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978)
    - Character of the Governmental Action
    - Economic Impact
    - Investment-Backed Expectations

Physical Takings: Eminent Domain

- *Kelo v. City of New London*, 545 U.S. 469 (2005)



National Trust *for* Historic Preservation®

Recent Cases



Middleway Historic District, Middleway, WV



Frank J. Wood Bridge, Topsham, ME

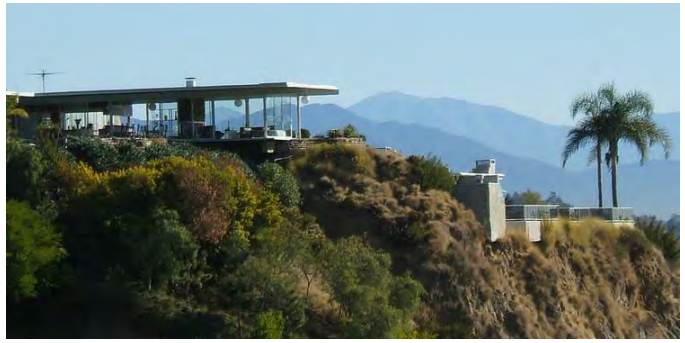


Manassas Battlefield Park, Manassas, VA

Volume and Scope of Work

Areas of Expertise

- Federal Laws
  - Section 106
  - NEPA
  - Section 4(f)
  - Antiquities Act
- State Laws
  - State Historic Preservation Acts
  - State Planning Acts
  - Preemption Laws
- Local Ordinances
  - Historic Preservation Ordinances
    - Demolition By Neglect
  - Zoning Law
  - Blight and Takings
  - Short-Term Rentals
  - Designation challenges



Stahl House, Los Angeles, CA



Chancery Building, Spokane, WA



Bears Ears National Monument, UT

Litigation Issues

- Standing
  - *Ex. Historic Fredericksburg Foundation*
- SLAPP suits
- Religious properties (RLUIPA)
- National Monuments
- Takings
  - *Ex. Penn Station*
- Section 106
  - *Ex. Charleston Cruise Ships*
- Section 4(f) - transportation
- Section 110(f) for NHL's
- Other
  - *Ex. Ashley River Road*



Market Street, Charleston, SC

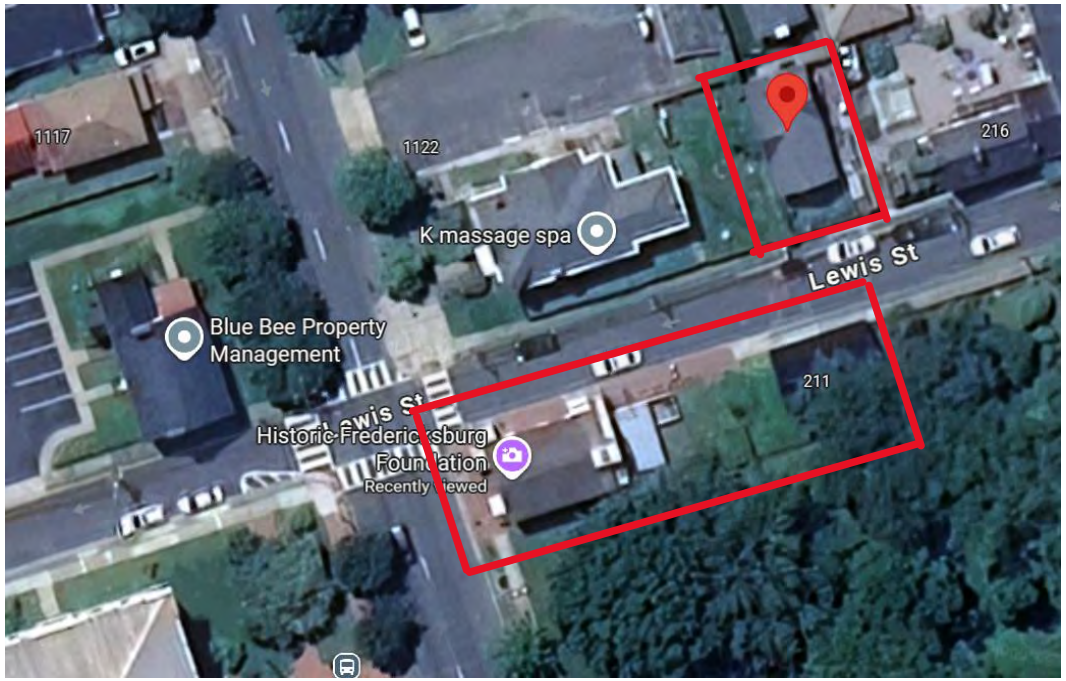
Recent Standing Cases- Fredericksburg, VA

Historic Fredericksburg Foundation, Inc. v. The City Council for the City of Fredericksburg, et al.,



Recent Standing Cases- Fredericksburg, VA





Recent Standing Cases- Tucson, AZ





Recent Standing Cases- Tucson, AZ

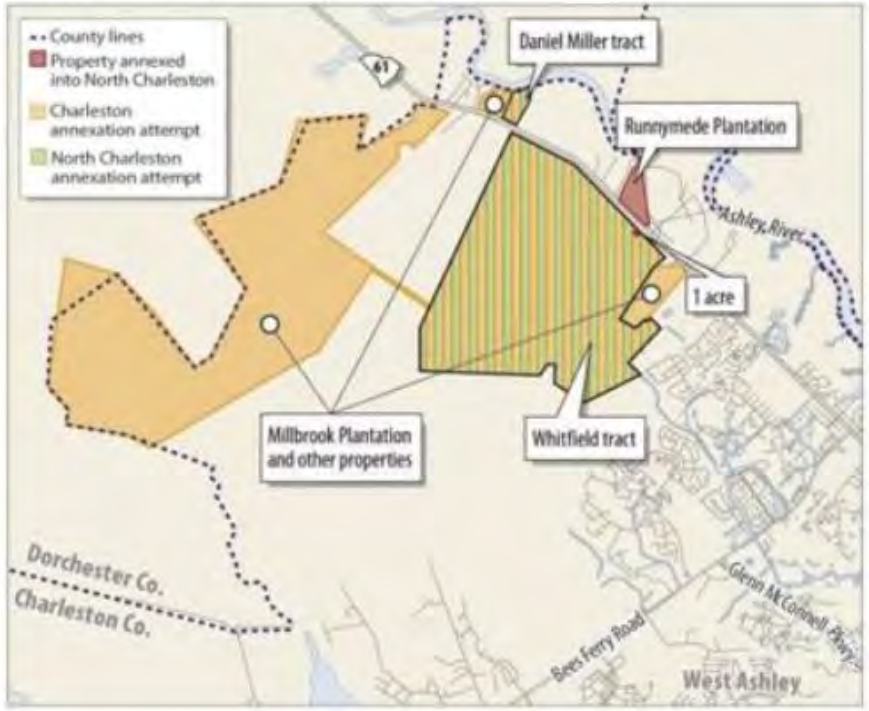
Tucson Historic Preservation Foundation v. Pima Community College



Annexation: Ashley River Road, SC

Properties in play

Both Charleston and North Charleston are seeking to annex thousands of acres in West Ashley, including two of the same properties. The legality of North Charleston's annexation of a 1-acre parcel may hold the key to which city succeeds.











Takings: Penn Station





FILED: NEW YORK COUNTY CLERK 02/21/2023 04:45 PM INDEX NO. 159154/2022
NYSCEF DOC. NO. 310 RECEIVED NYSCEF: 02/21/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PENN COMMUNITY DEFENSE FUND, 251 WEST 30TH STREET RESIDENTIAL TENANTS, CITY CLUB OF NEW YORK, and RETHINKNYC,

Petitioners-Plaintiffs,

- against -

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT and NEW YORK STATE PUBLIC AUTHORITIES CONTROL BOARD

Respondents-Defendants.

Index No.: 159154/2022

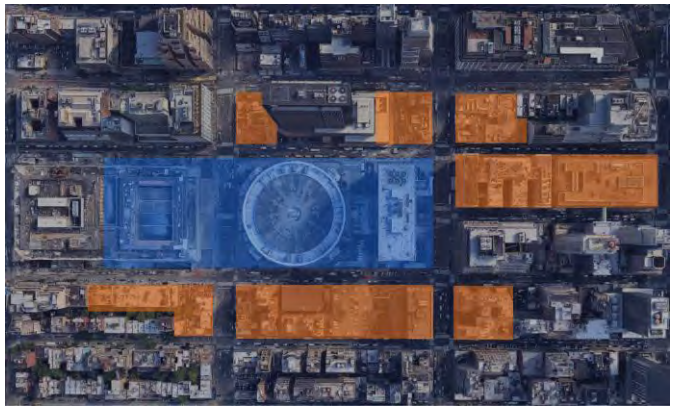
Motion Seq. No.:

Assigned to
Justice Lucy Billings
IAS Part 41

MEMORANDUM OF LAW ON BEHALF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, THE NEW YORK LANDMARKS CONSERVANCY, AND THE PRESERVATION LEAGUE OF NEW YORK STATE AS PROPOSED *AMICI CURIAE* IN SUPPORT OF PETITIONERS-PLAINTIFFS

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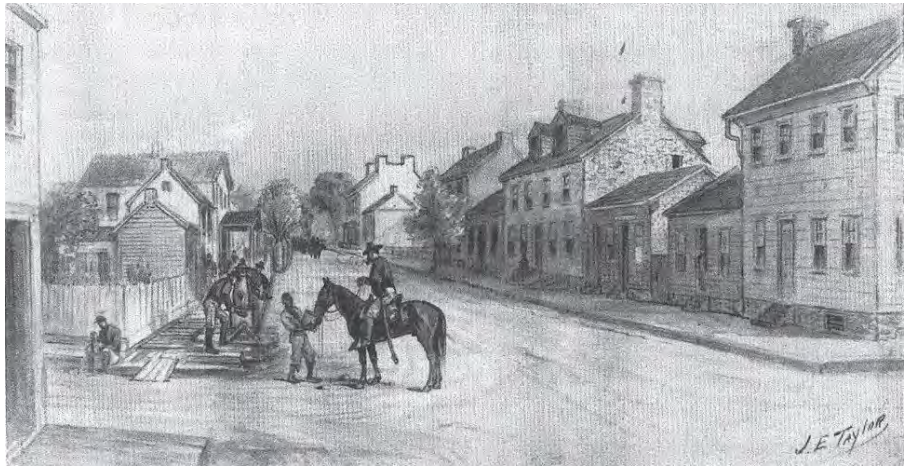
Challenging Local Government Actions: Manassas Digital Gateway, Prince William County, VA



Defending Local Government Actions: Middleway, WV



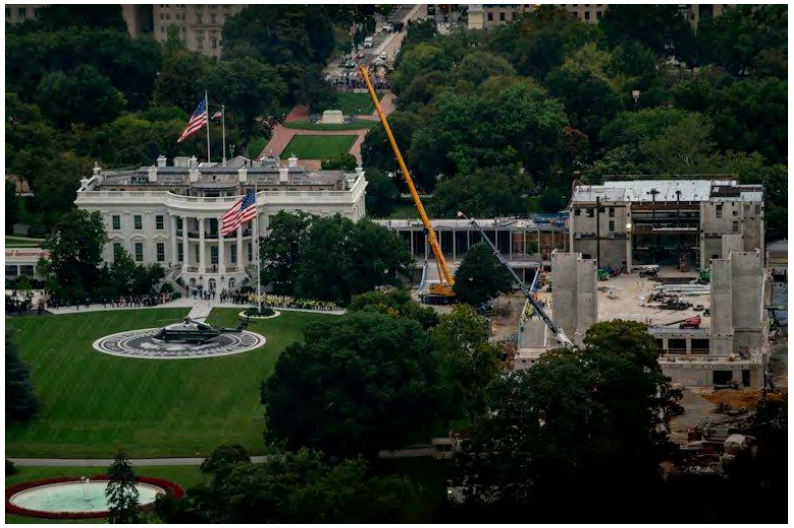






Civic Landscape of Washington, DC







National Trust *for* Historic Preservation®

Current Issues in Preservation Law



Zablocki VAMC, Milwaukee, WI



Desert View Watchtower, Grand Canyon National Park, AZ

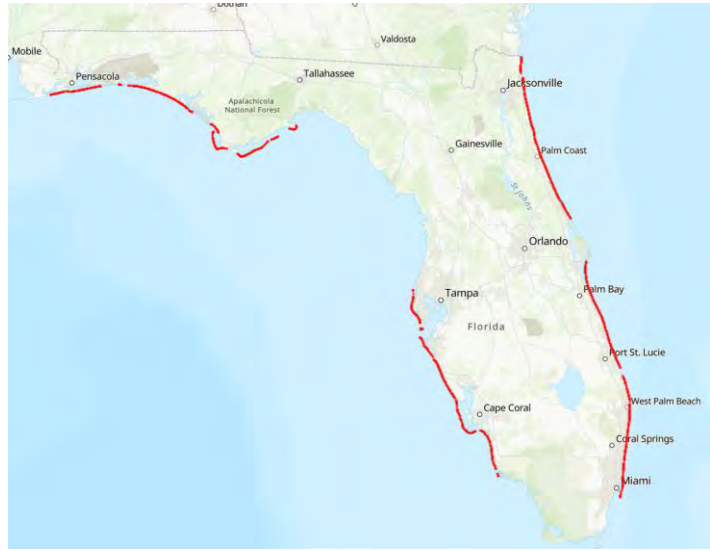


Deluxe Theater, Houston, TX

Recent State Legislation- Florida

Florida Resiliency and Safe Structures Act. Fla. Stat. § 553.8991 (2024)

- Eliminated ability of local governments to deny demolitions seaward of coastal construction control line
    - (4) RESTRICTIONS ON DEMOLITION PROHIBITED.—*A local government may not prohibit, restrict, or prevent the demolition of any structure or building identified in paragraph (3)(a) for any reason other than public safety*
- Provides for limited exemptions
    - (b) *This section does not apply to any of the following structures or buildings:*
        1. *A structure or building individually listed in the National Register of Historic Places.*
        2. *A single-family home.*
        3. *A contributing structure or building within a historic district which was listed in the National Register of Historic Places before January 1, 2000.*



Recent State Legislation- Florida

LOCAL NEWS

Magic Beach Motel to be demolished later this year, despite years of pushback

The county says that due to the motel's location, it cannot restrict demolition under state law.



Credit: Jessica Clark

Magic Beach Motel in Vilano Beach





Recent State Legislation- Florida

Florida city can't stop demolition of 2 historic hotels under new state law

Supporters say it promotes new development better designed to meet rising seas. Critics say it threatens scores of buildings in Beach historic districts.



The historic Coral Reef hotel from 1941 sits shuttered in Miami Beach. Developer 13th Floor Investments plans to demolish the buildings and its also-vacant historic neighbor, the Patrician hotel. [CARL JUSTE | Miami Herald]



Coastal Contruction Control Line, Miami Beach, FL

Recent State Legislation- Texas

89TH LEGISLATURE

SB 2639

Relating to the designation of a property as a historic landmark and the inclusion of a property in a historic district or similar preservation district by certain municipalities.

Overall Vote Recommendation

YES

Principle Criteria

Free Enterprise | Property Rights | Personal Responsibility | Limited Government | Individual Liberty

Digest

SB 2639 proposes amendments to the Local Government Code regarding the designation of historic landmarks and districts by municipalities with a population of 950,000 or more. The legislation places new procedural and substantive requirements on such designations to better protect property owners' rights and ensure transparency in the designation process.

Under the bill, municipalities cannot designate a property as a historic landmark or include it in a historic district without the owner's consent unless the action is approved by a three-fourths vote of both the municipal governing body and the zoning, planning, or historical commission. Additionally, the bill expands the contents of the required historic designation impact statement. This statement must now include detailed information on the regulations that would apply to the property, required repairs and code compliance, estimated restoration costs, and dual appraisals showing property values with and without the proposed designation.

If a municipality proceeds with a designation without owner consent, it must make a bona fide offer of compensation to the property owner for damages resulting from the designation. This

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Recent State Legislation- Texas

Protect Historic Preservation in Texas – Oppose SB 2639!



WE DID IT! Thanks to your support, SB 2639, which threatened the future of historic preservation across Texas, has died in the Texas Legislature. Together, we protected our history.

Since the bill was filed, Preservation Austin has vigilantly tracked this legislation, which aimed to rewrite how cities in Texas designate historic properties by requiring municipalities to pay damages to property owners who do not consent to historic designation. If passed, this bill would have effectively eliminated designation as a tool for cities to protect the most important pieces of Texas history. We give a big thank you to Representative Gina Hinojosa, who partnered with us throughout the legislative session and crucially identified a constitutional issue that ultimately stopped the bill from becoming law.

Preservation With Permission: Rethinking Homeowner Consent In Historic District Designations

Texas Tech Estate Planning & Community Property Law Journal, Volume 18, Issue 2

38 Pages • Posted: 23 Apr 2025

Emily Walden
Texas Tech University School of Law

Date Written: January 24, 2025

Abstract

Homeowners across the country are facing a severe challenge to their ability to use their own property freely: historic district designation. Each state has its own standard for historic district designation. States typically grant local governments within jurisdictional boundaries the power to designate historic districts, so long as the basic guidelines set forth by the state are followed. In Texas, like many other jurisdictions, a historic district overlay can be placed on a property by the local government, even if the property owner is adamantly against the designation. This Comment addresses the issues with historic district designation without property owner consent and proposes that the Texas legislature adopt the designation standard used in Houston, which allows property owners to vote for or against their neighborhood becoming a historic district. This historic district designation standard gives power back to the people who are directly impacted by the historic district designation the most.

Recent State Legislation- Washington

Published on Apr 11, 2025

Historic landmark bill passes Senate with helpful amendments

Contact: Carl Schroeder, Shannon McClelland

As HB 1576 worked its way through both chambers, it picked up amendments that provide protections for preserving historic landmarks under certain circumstances.

Here are the changes reflected in the version that passed the Senate:

- In addition to properties within a historic district established through a local preservation ordinance, properties that are more than 125 years old are also exempt from requirements in the bill.
- Properties may be nominated as a historic landmark without the property owner's consent; but, unless exempted above, must obtain consent before designation.

Because the Senate passed a different version than the House, the bill has not officially passed the Legislature until agreement is reached on the final version.



Recent State Legislation- Arizona

COMMUNITY VOICE

Op-ed: Arizona housing bill puts Phoenix historic homes at risk

Irreplaceable historic homes in Phoenix could be torn down and replaced with boxy, cookie-cutter development.

By W. Aaron Montaño Searles | September 18, 2025



Historic neighborhoods like the Willo Historic District were not exempted from the legislation that requires cities and towns to allow "middle housing." **Zach Buchanan**

PRESERVE PHX

Welcome About Donate Calendar Blog Friends of Mystery Castle

OCT 2 • WRITTEN BY ERIN LINDSEY

Preserve Phoenix Position Statement on HB 2721 and the Protection of Phoenix Historic Districts

FOR SALE:
Federal Historic Buildings

GSA









Proposed Changes to Section 106

Membership

- Chairman and Vice Chair
- 10 Federal Agency Heads
- 1 Governor
- 1 Mayor
- 1 Tribal Representative
- 3 General Members
- 3 Expert members
- 3 Preservation Organizations

16-5 with two abstentions

Timeline:

Public Input Opportunity ➡

Public Input Opportunity ➡

Date	Stage
7/17/2026	Advisory Council on Historic Preservation (ACHP) release of proposed changes to Section 106.
7/24/2026	ACHP member vote on changes.
Done	ACHP submits the proposed rules to the Office of Information and Regulatory Affairs (OIRA) within Office of Management and Budget.
Now	The regulatory review by OIRA includes an opportunity for interested parties to request meetings with OIRA and express concerns regarding the proposed rule. This includes nonprofit organizations; business and trade associations; and state, local, and tribal governments. Request a meeting [RIN 3010-AA10] and see the meeting schedule.
Coming Soon	After resolving OIRA and interagency comments on the proposed rule, ACHP publishes Notice of Proposed Rulemaking (NPRM) in the Federal Register for public comment. *Members of the public will be encouraged to participate in the comment process.*
TBD	ACHP reviews public comments along with additional stakeholder and ACHP member input.
TBD	ACHP member vote on final rule.
TBD	If it passes, ACHP resubmits final rule for OIRA review.
TBD	If it passes OIRA review, the final rule will be published in Federal Register and go into effect 30 days later.

ACHP Proposed Changes

End the requirement that federal agencies seek to avoid or minimize harm to historic resources.

The draft rule would eliminate the most fundamental purpose of the National Historic Preservation Act: the federal government should avoid the destruction of our nation's historic resources when it can be easily prevented, or when damage can be easily minimized. The draft rule would eliminate these common-sense considerations, which are broadly supported by the American public.



Federal Courthouse (demolished 1965), Chicago, IL

ACHP Proposed Changes

Only allow public participation at the discretion of federal agencies.

The draft rule would replace a legal requirement to consult the public with a mere option to notify communities, at the agency's own discretion, after key decisions are effectively already made. It would also let agencies unilaterally certify that "other considerations outweigh" preservation without considering the views of the public.



Proposed Riverfront Expressway, New Orleans, LA

ACHP Proposed Changes

Eliminate the role of state and local governments in Section 106 consultation.

State Historic Preservation Officers currently have a statutorily defined role in Section 106 consultation. Local governments also have a special seat at the table in the current review process. The draft rule would make these roles subject to agency discretion, allowing federal agencies to sideline elected state and local governments in decisions that affect their own jurisdictions — a significant, one-directional shift of authority from the people to Washington.

NCSHPO

National Conference *of* State Historic Preservation Officers

ACHP Proposed Changes

Substantially weaken the consultation role of Tribal Nations.

The draft regulations would also remove the guaranteed consultation role of Tribal Nations in the Section 106 process.



ACHP Proposed Changes

Completely eliminate protection for historic landscapes such as battlefields and national parks.

In addition, the regulations would redefine "historic property" to effectively write many Tribal sacred sites and traditional cultural landscapes out of the law's protection. The proposal would end consideration of impacts to historic places that are large and undeveloped, such as battlefields and national parks.



Grand Canyon National Park, AZ

ACHP Proposed Changes

Completely eliminate consideration of visual and audible effects, as well as indirect effects.

The proposed regulations would end consideration of all visual and audible impacts, regardless of their scale and massive adverse effect. All consideration of indirect and cumulative effects would also be eliminated.

AI Generated Images





What About the NHPA?

The relationship between federal law, regulation, and congressional intent.



Understanding the difference: Statute v. Regulation

Statute

- Enacted by Congress and signed by the President—or enacted over a veto.
- Establishes binding legal requirements.
- Defines the authority and limits of federal agencies.
- Can amend, supersede, or constrain existing regulations.

Regulation

- Developed by an agency pursuant to authority granted by Congress.
- Provides the procedures and details for implementing a statute.
- Must remain consistent with the statute.
- Can generally be changed by a subsequent administration through rulemaking.

Takeaway: Regulations implement statutes; they do not replace them.

What regulations can and cannot do:

Regulations CAN:

Establish procedures

Define how agencies conduct consultation

Create timelines consistent with the statute

Establish exemptions/alternatives where authorized

Regulations CANNOT:

- Contradict the statute;
- Eliminate statutory obligations
- Override Congressional requirements
- Rewrite congressional policy
- Exercise authority Congress did not grant
- Supersede subsequent legislation

Congress has given ACHP substantial discretion to structure the Section 106 process. That makes statutory boundaries and congressional direction particularly important.

Responsibilities of SHPOs
NHPA Statute
54 U.S.C. § 302303(b)

(5) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(6) cooperate with the Secretary, the Council, other Federal and State agencies, local governments, and private organizations and individuals to ensure that historic property is taken into consideration at all levels of planning and development;

* * * *

(9) consult with appropriate Federal agencies in accordance with this division on—

(A) Federal undertakings that may affect historic property; and

(B) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to that property;

Responsibilities of SHPOs
ACHP Proposal § 800.2(c)(1)

(c) ***Consulting parties***. The following parties may have consultative roles in the section 106 process.

(1) ***State historic preservation officer***. ~~The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage.~~ In accordance with section 101(b)(3) of the act, the State historic preservation officer (SHPO) advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are ~~taking~~ taken into consideration ~~at all levels of~~ in planning and development.

Role of Local Governments
NHPA Statute
54 U.S.C. § 304108(b)

"The Council shall by regulation establish such procedures as may be necessary to provide for participation by local governments in proceedings and other actions taken by the Council with respect to undertakings referred to in section [106] that affect the local governments."

Role of Local Governments
ACHP Proposal
§ 800.2(c)(3)

(3) ***Representatives of local governments.*** The agency official may invite a~~A~~ representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur ~~is entitled~~ to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

Definition of "Historic Property"

NHPA Statute

"'historic property' means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object." 54 U.S.C. § 300308

ACHP Proposal

"noncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify as [historic] property for the purposes of section 106."

(§ 800.16(k)(2))

Definition of "Undertaking"
NHPA Statute
54 U.S.C. § 300320

[T]he term ''undertaking'' means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

(1) those carried out by or on behalf of the Federal agency;

(2) those carried out with Federal financial assistance;

(3) those requiring a Federal permit, license, or approval; and

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

ACHP Proposed Definition of "Undertaking"

§ 800.3 Determining Whether There is an Undertaking~~Initiation of the section 106 process~~.

(a) ***Establish undertaking.*** The agency official shall determine whether the proposed ~~Federal~~ action is a~~n~~ Federal undertaking which section 106 analysis is required~~as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties~~.

ACHP Proposed Definition of "Undertaking" § 800.3(a)(2)-(3)

Section 106 does not apply:

(ix) For actions with no or minimal Federal funding, or with no or minimal Federal involvement where a federal agency cannot control the outcome of the project. A but-for causal relationship is insufficient to make an agency responsible for a particular action and thus, does not by itself convert that action into a Federal undertaking within the meaning of the language of the Act.

(3) In determining whether a proposed project constitutes an undertaking for which section 106 review applies, the agency official will consider only the action or project over which the agency has discretion and control to approve, fund, or otherwise authorize.

Conflicts with the Purpose and Intent of the NHPA

- 54 U.S.C. § 304102(a)(2)
  - "The Council shall encourage, in cooperation with the National Trust and appropriate private agencies, public interest and participation in historic preservation;
- 54 U.S.C. § 300101(6)
  - It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

Current Environment

Two reform efforts are happening simultaneously:

- **Administration / ACHP**: agency is pursuing a comprehensive revision of NHPA's Section 106.
- **Congress**: Senate negotiations and legislation seek to make federal permitting more predictable, efficient, and timely.
  - Legislative language reforming NHPA's Section 106 process is under development.



Congress Can Change the Equation



If Congress subsequently legislates on the same subject, the statute controls.

Suppose Congress says:

"For projects affecting historic properties, the agency shall consult with the SHPO and affected Tribes before making a final decision."

An agency regulation could not simply say:

"Consultation is unnecessary when the agency determines that consultation would delay a project."

The more specifically Congress legislates, the less room future administrations have to reinterpret the policy through regulation.

What Happens Next

- After resolving OIRA and interagency comments on the proposed rule, the ACHP will publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register
- The public will then have 30-60 days to comment on the proposed rules
- Be on the lookout for instructions on how to comment from the National Trust and other preservation advocates!!!



Federal Courthouse (demolished 1965), Chicago, IL

What Can I Do?

- Contact your Congressional delegation
  - Advocate both in district and in DC
  - Build relationships with staff
  - Identify federal advocacy pathways
  - Educate new advocates
  - Activate existing advocates
- Prepare your community
  - Update your state laws
  - Update your local laws
- Prepare to fight
  - Case studies
  - Litigation coalition
  - Fundraising

