National Cooperative Highway Research Program

RESEARCH RESULTS DIGEST

DIGEST 138 - DECEMBER 1982

Areas of Interest: 15 socioeconomics, 17 energy and environment, 70 transportation law (1 highway transportation, 2 public transit, 3 rail transportation, 4 air transportation, 5 other)

Legal Aspects of Historic Preservation in Highway Programs

A report prepared under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by Richard Bower. Larry W. Thomas, TRB Counsel for Legal Research, is principal investigator, serving under the Special Technical Activities Division of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with legal questions surrounding the requirements for historic preservation.

This paper is included in a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, and a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981. A third addendum consisting of eight new papers, seven supplements, and an expandable binder for Volume 4 will be distributed early in 1983. The text now totals more than 2,200 pages comprising 56 papers, some 30 of which have been supplemented during the past 3 years. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries.

The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

CONTENTS

Legal Aspects of Historic Preservation in Highway and Transportation Programs

By Richard W. Bower

Attorney

California Department of Transportation
Sacramento, California

INTRODUCTION

In recent years the historic preservation movement has experienced enormous growth. Federal legislation has continued to evolve toward protecting historic properties by providing procedures for site identification and for review of actions that might affect sites. All of the states, as well as hundreds of local governments, now also have historic preservation-related legislation.

Interest in this movement is reflected in the attention it has been given recently in legal periodicals.[1] However, the vast majority of such material relates to accomplishing the primary goal—preservation. Less attention has been given to the problems facing an organization whose interest in preservation may be secondary at best, and which interest may on occasion conflict with its own primary goals.[2]

Such is the situation with state transportation and highway departments. No matter how sympathetic or supportive such organizations may be of the goals of the historic preservation movement,[3] sooner or later conflicting goals will collide, requiring compromise by both sides. Much of the federal and state legislation is devoted to providing a framework for identifying these conflicts and effecting compromises.

This is not to say that transportation programs and preservation programs never pursue the same goal. Indeed, identification, preservation, and continued use of transportation-related facilities are actively being pursued by the states. Examples of such preservation efforts in transportation programs include the preservation and continued use or adaptive reuse of historic bridges[4] and terminal facilities.[5] Further efforts include the mitigation of the effect of highway improvements on historic properties.[6]

The purpose of this paper is to review briefly the background and development of historic preservation law, and to outline the principal federal legislation and case law relating to historic preservation which may be encountered in the course of administering state highway and transportation programs.

It is recognized that there is also a substantial body of state and local law relating to historic preservation. As of 1981, more than 800 local governments had enacted ordinances relating to this subject.[7] Each of the states also has some form of historic preservation legislation.[8] However, because of the vast number and diversity of these laws, this paper will generally be confined to a discussion of the federal legislation—which, through federal-aid programs, affects all the states.

[1] At least six symposia devoted to the subject have appeared in law reviews: 36 LAW AND CONTEMP. PROB. 309 (1971); 8 CONN.L.REV. 199 1975; 12 WAKE FOREST L.REV. 5 (1976); 11 N.C. CENTRAL L.J. (1980); 12 URB.L. (1980); 1 PACE L.REV. (1981). For a list of early law review articles emphasizing the element of aesthetic regulation, see Morrison, *Historic Preservation Law* 55 (2d. ed. 1965). For bibliographies of law review articles on the subject see *A Bibliography of Periodical Literature Relating to the Law of Historic Preservation,* 36 LAW AND CONTEMP. PROB. 442 (1971); *Bibliography to Legal Periodicals Dealing with Historic Preservation and Aesthetic Regulation,* 12 WAKE FOREST L.REV. 275 (1976); Kettler and Reams, *Historic Preservation Law—An Annotated Bibliography,* National Trust for Historic Preservation (1976); *Bibliography to Legal Periodicals Dealing with Historic Preservation and Aesthetic Regulation,* 11 N.C. CENTRAL L.J. 384 (1980); *Selected Materials on Historic Preservation,* 36 RECORD OF N.Y.C.B.A. 536 (1981); French, *Annotated Bibliography of Law-Related Journal Citations on Historic Preservation,* 9 No. KY.L.REV. 45 (1982).

[2] See Gray, *Environmental Requirements of Highway and Historic Preservation Legislation,* 20 CATHOLIC U.L.R. 45 (1970); Netherton, *Transportation Planning and the Environment,* 1970 URBAN L. ANN. 65; Gray, *The Response of Federal Legislation to Historic Preservation,* 36 LAW AND CONTEMP. PROB. 314, 317–322 (1971); Gray, *Section 4(f) of the Department of Transportation Act,* 32 MD.L.REV. 327 (1973); Vardaman, *Federal Environmental Statutes and Transportation,* FEDERAL ENVIRONMENTAL LAW 1316 (1974); Comment, *Protecting Public Parkland From Indirect Federal Highway Intrusion,* 62 IOWA L.REV. 960 (1977). As a general reference see also the extensive orientation guide prepared by the Federal Highway Administration, *Historic and Archeological Preservation: An Orientation Guide.*

[3] Just how supportive such organizations may be to preservation has been subject to question. See Rose, *Preservation and Community: New Directions in the Law of Historic Preservation,* 33 STAN.L.REV. 473, 529 (1981).

[4] See, e.g., Newlon, *Criteria for Preservation and Adaptive Use of Historic Highway Structures,* Virginia Highway & Transportation Research Council, 1978; Zuk and McKeel, "Adaptive Use of Historic Metal Truss Bridges," *Transportation Research Board Record No. 834* (1981).

[5] See, e.g., *Recycling Historic Railroad Stations: A Citizen's Manual,* U.S. Department of Transportation, 1978. See also note 95, *infra.*

[6] For examples of mitigation measures, see Jacobs, *Historical Preservation and Mitigating Measures,* 63d Annual AASHTO Meeting Proceedings, page 35, 1977. For the FHWA mitigation policy generally, see 23 C.F.R. § 771.105(d). Note also the statutory authorization to exempt landmark signs from outdoor advertising control. 23 U.S.C. § 113(c)(4); 23 C.F.R. § 750.710. For examples of exceptions to administrative procedures intended to afford greater protection to historic properties, see 23 C.F.R. § 712.204(d)(2), limiting hardship acquisitions of historic properties, and 23 C.F.R. § 771.117(c)(3), potentially limiting categorical exclusions of historic properties from the environmental review process.

[7] National Trust for Historic Preservation, Directory of American Preservation Commissions (1981).

[8] For a listing of state statutes, see 11 N.C. CENTRAL L.J. 308–340 (1980).

BACKGROUND OF HISTORIC PRESERVATION

Although the historic preservation movement began many years ago, its growth for many years was both slow and random. It was not until the 1960s that a framework of federal and local laws began to knit together to form a relatively comprehensive body of preservation laws.

The development of this law seems to have taken place in four phases, beginning about one hundred years ago. First, there were the random efforts by individuals for the private acquisition of historic properties for the purpose of preservation, such as the acquisition and restoration of George Washington's home by the Mount Vernon Ladies' Association in 1859.[9] The role of private individuals in the early stage of preservation was recognized by the Supreme Court of Kansas in *State ex rel. Smith v. Kemp.*[10]

> As evidence of the efficiency of historical memorials as influences affecting citizenship, the Legislature had before it the work of a multitude of patriotic societies having many thousands of members. The chief aim of these organizations is to perpetuate the memory of service to country in order to develop an increasing love of country. To this end they have secured the preservation of many historic houses and other buildings and of historic places, have erected monuments commemorative of historic events, have erected statues, and have raised commemorative tablets and other memorials.[11]

Next, public agencies began isolated attempts to acquire historic properties with public funds. Much of the appellate case law which developed from such attempts involved the propriety of the acquisition by condemnation.

One of the first such cases was *United States v. Gettysburg Electric Ry. Co.*,[12] involving the acquisition by condemnation of the site of the Gettysburg battlefield.

The Supreme Court approved the preservation of the battlefield as a public use, stating:

> Upon the question whether the proposed use of this land is a public one, we think there can be no well founded doubt. And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution.[13]

The Supreme Court similarly upheld the constitutionality of a state statute authorizing condemnation of places invested with unusual historic interest in *Roe v. Kansas ex rel. Smith:*[14]

> In view of what was said in *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680, there is no basis for doubting the power of the State to condemn places of unusual historic interest for the use and benefit of the public.[15]

The next phase in the development of historic preservation law involved the enactment of statutory protection for historic properties through various restrictions, such as of use or appearance. Such land-use controls for the protection of historic properties are generally closely related to conventional zoning restrictions.

The threshold of the development of this area of historic preservation law, as well as zoning law generally, was the landmark Supreme Court decision of *Village of Euclid v. Ambler Realty Co.*[16] *Euclid* involved a comprehensive zoning plan imposing use and height restrictions over the entire area of a town. The specific question was whether the restriction of certain property to residential uses, resulting in an uncompensated reduction in value, violated the federal and state constitutions in depriving the owner of property without due process of law. The Supreme Court upheld the zoning control as a valid exercise of the police power.

Following the lead of *Euclid,* scores of local governments imposed use restrictions, including restrictions for the preservation of historic properties,[17] beginning with Charleston, South Carolina, in 1931.[18]

Shortly after Charleston followed the much litigated Vieux Carre ordinance for the preservation of buildings within the French Quarter of New Orleans.[19] Many other cities have enacted comparable ordinances for the preservation and protection of historic districts. However, the most significant recent case involved the application of New York City's landmark law, in *Penn. Central Transportation Co. v. New York City.*[20]

---

[9] See Hosmer, *Presence of the Past,* 41–62 (1965).

[10] 261 Pac. 556 (Kan. 1927).

[11] *Id.* at 559.

[12] 160 U.S. 668 (1896).

[13] *Id.* at 680.

[14] 278 U.S. 191 (1929).

[15] *Id.* at 193.

[16] 272 U.S. 365 (1926).

[17] See Morrison, *Historic Preservation Law,* 129–186 (2d ed. 1965).

[18] *Id.* at 17.

[19] See City of New Orleans v. Impastato, 3 So.2d 559 (La. 1941), upholding the power of the City to regulate the exteriors of structures not fronting on public streets; City of New Orleans v. Pergament, 5 So.2d 129 (La. 1941), announcing the "tout ensemble" rule—that is, the City's power to regulate a historic area includes the power to regulate nonhistoric structures within that area; City of New Orleans v. Levy, 64 So.2d 798 (La. 1953), upholding the constitutionality of the ordinance as a valid exercise of the police power; Vieux Carre Property Owners and Assoc., Inc. v. City of New Orleans, 167 So.2d 367 (La. 1964), declaring an attempt to exempt certain areas from the jurisdiction of the Vieux Carre Commission in violation of the state constitution; Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), upholding ordinance as not amounting to an unconstitutional taking; City of New Orleans v. Dukes, 427 U.S. 297 (1976), upholding ordinance restricting vending from pushcarts in the Vieux Carre.

[20] 438 U.S. 104 (1978).

In a decision which has been compared in importance to historic preservation as *Euclid v. Ambler Realty Company* was to zoning,[21] the Supreme Court held that the application of the Landmark Preservation Law to the Grand Central Terminal property did not constitute a taking simply because it might interfere with future exploitation of the property. Rather, there was no interference with present uses, nor interference with the owner realizing a "reasonable return" from the property.

The fourth and final phase in the development of historic preservation law has been the enactment of laws to provide procedures for the protection of historic properties from the intrusion of other developments, especially developments funded by public agencies.

FEDERAL LEGISLATION

The Antiquities Act of 1906

Until the end of the 19th century, federal legislative efforts at preservation were basically pursued on an individual site basis, such as the acquisition of the site of the Gettysburg battlefield. However, concern over vandalism of prehistoric sites (specifically, the Casa Grande ruins in Arizona [22]) caused Congress to enact the Antiquities Act of 1906.[23] This Act sought to protect historic places, as well as other lands of significant value, by authorizing the President to set aside such places situated on federal lands as national monuments. Further, the Act provided for penalties for destroying or damaging historic or prehistoric sites on public lands, and authorized the Secretaries of the Interior, Agriculture, and the Army to promulgate regulations governing such sites on land within their jurisdiction. However, no provision was included for the acquisition of land for protection of sites on nonfederal property, nor for the review of federal activities which might affect historic sites.[24]

The Historic Sites Act of 1935

The next major federal legislation affecting historic preservation was the Historic Sites Act of 1935.[25] This Act declared, for the first time, a national policy regarding historic preservation:

> It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.[26]

Other significant provisions of the Historic Sites Act included authorization for the Secretary of the Interior to initiate various preservation programs, including the identification and evaluation of cultural resources, and to acquire, restore, and maintain historic properties of national significance. Under the direction of the Act, the Department of the Interior, through the National Parks Service, initiated the National Survey of Historic Landmarks. More recently, the Historic American Buildings Survey and the Historic American Engineering Record have been instituted to record and document historic structures.[27]

Some 62 National Historic Sites (that is, historic properties of national significance meeting criteria established by the Secretary of the Interior) have been acquired under the Act.[28] A registry of National Historic Landmarks was initiated under the authority of the National Historic Sites Act. Under the National Historic Landmarks Program, nonfederally owned properties may be designated as landmarks if determined by the Secretary of the Interior to meet certain criteria.[29] Public acquisition (including acquisition through condemnation) and ownership authorized by the Act would provide some degree of protection to historic properties; however, the Act afforded little protection to properties merely designated as National Historic Landmarks under the Act but remaining in private ownership, until the National Historic Preservation Act, discussed below.[30]

The Department of the Interior's unpublished procedures for the designation of National Historic Landmarks were found to violate due process in *Historic Green Springs, Inc. v. Bergland.*[31] The property owners' principal due-process argument was that without published rules of procedure and substantive criteria for qualification, they were denied any meaningful opportunity for responding to the proposed action, and for review of the decision of the Secretary. The court noted that the government activity in designating the property as a landmark, though not confiscatory, was intrusive. That is, designation of the property as a National Historic Landmark (which designation automatically placed the property on the National Register of Historic Places [32]) trig-

---

[21] Hershman, *Critical Legal Issues in Historic Preservation,* 12 URB.L. 19 (1980).

[22] H.R. REP. No. 96–1457, page 18; 1980 U.S. Code Cong. and Admin. News 6381.

[23] 16 U.S.C. §§ 431 *et seq.*; Pub. L. No. 59–209; 34 Stat. 225.

[24] For a detailed discussion of this and other early federal legislation involving historic sites see Fowler, *Protection of the Cultural Environment in Federal Law,* FEDERAL ENVIRONMENTAL LAW 1466, 1468–1481 (1974). See also Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law,* 12 WAKE FOREST L.REV. 31 (1976).

[25] 16 U.S.C. §§ 461 *et seq.*; Pub. L. No. 74–292; 49 Stat. 666.

[26] 16 U.S.C. § 461.

[27] See Fowler, *Protection of the Cultural Environment in Federal Law,* FEDERAL ENVIRONMENTAL LAW 1466, 1477–1479 (1974).

[28] See annotation following 16 U.S.C.A. § 461.

[29] See generally 36 C.F.R. part 65.

[30] Additional protection for such properties results from the automatic inclusion of Historic Landmarks on the National Register of Historic Places discussed below. 16 U.S.C. § 470a(a)(1)(B). However, neither designation can be made as to privately owned properties over objection of the owner since the National Historic Preservation Act Amendments of 1980. 16 U.S.C. § 470a(a)(6).

[31] 497 F.Supp. 839 (E.D.Va. 1980).

[32] 36 C.F.R. § 60.2(d)(2), deleted by interim rules published November 16, 1981.

gered the application of various federal statutes. This could impede or discourage commercial and industrial development, and have potential adverse tax consequences. The court ordered that the designation of plaintiffs' property as a landmark and placement on the National Register be set aside, and further ordered the Secretary of the Interior to develop and promulgate regulations setting out substantive criteria and procedural guidelines for landmark designation.[33]

The National Historic Preservation Act of 1966

The preservation movement gained significant strength with the enactment of the National Historic Preservation Act (NHPA) on October 15, 1966.[34] This has been the most far reaching and comprehensive federal legislation relating to historic preservation. The House report accompanying the bill to be enacted as the NHPA summarized the purpose of the bill as follows:

> (1) To strengthen and expand the work being done under Section 2B of [the Historic Sites Act of 1935] and to establish a national register of sites, structures, and the like which are significant in American history, architecture, archeology, and culture;
>
> (2) To encourage local, regional, State, and National interest in the protection of such properties; and
>
> (3) To establish an Advisory Council on Historic Preservation charged with the duties of advising the President and the Congress on matters relating to preservation of such properties, recommending measures to coordinate public and private preservation efforts, and reviewing plans for Federal undertakings and the undertakings of others involving Federal assistance or requiring a Federal license which affects sites, structures, and the like listed in the National Register referred to above.[35]

Many new programs were authorized by the Act to accomplish these purposes. First, grants-in-aid were authorized for historic preservation purposes. Second, the Act created the Advisory Council on Historic Preservation, which, among other things, provides advice on matters related to historic preservation, including the process for review and comment under Section 106 of the Act, described below. The Advisory Council consists of 19 members, 7 of whom are federal officials and 12 appointed from outside the federal government.[36] Third, the Act created the National Register of Historic Places, expanding earlier registers, such as the registry of National Historic Landmarks established under the Historic Sites Act of 1935.[37] Eligibility for inclusion on the National Register is determined by criteria established and published by the Secretary of the Interior through the National Park Service.[38] The National Park Service has further established procedures for reviewing nominations of properties for inclusion in the National Register.[39] Although inclusion in the National Register may make the property eligible for financial assistance under the Act, the significant factor is the protection provided by Section 106 of the Act, discussed below.

An important feature of the Act is that its application is not limited to historic properties of national significance, as were the Antiquities Act of 1906 and the Historic Sites Act of 1935. Thus, properties of local, state, and regional significance became eligible for inclusion in the National Register, and subject to some degree of protection under the Act.

Finally, the Act provided protection for properties included on the Register from federal actions which might affect such properties. This protection is contained in Section 106 of the Act, which, as amended, provided as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The

46 F.R. 56183. The National Historic Preservation Act Amendments of 1980 added a similar provision to the NHPA. 16 U.S.C. § 470a(a)(1)(B).

[33] Section 201 of the National Historic Preservation Act Amendments of 1980 (16 USC § 470a(a)(1)(B)) ultimately served to validate the listing of the *Historic Green Springs* property: ". . . All historic properties included in the National Register on December 12, 1980 shall be deemed to be included on the National Register as of their initial listing for purposes of [this Act]. All historic properties listed in the Federal Register of February 6, 1979, as 'National Historic Landmarks' or thereafter prior to the effective date of this Act are declared by Congress to be National Historic Landmarks of national historic significance as of their initial listing as such in the Federal Register for purposes of [this Act] and the Act of August 21, 1935." The Amendments further provide, however, that privately owned property shall not be designated as a National Historic Landmark or included in the National Register over objection of the owner. (16 U.S.C. § 470a(a)(6)). In addition, the Amendments direct the Secretary of the Interior to promulgate or revise regulations concerning the designation of properties as National Historic Landmarks and the nomination of properties for inclusion in the National Register (16 U.S.C. § 470a(a)(2)).

[34] 16 U.S.C. §§ 470 *et seq.*; Pub. L. No. 89-665.

[35] 1966 U.S. Code Congr. and Admin. News, 3307-3308.

[36] 16 U.S.C. § 470i.

[37] 16 U.S.C. § 470a(a)(1).

[38] 16 U.S.C. § 470a(a)(2); 36 C.F.R. § 60.4.

[39] See generally interim rules contained in 36 C.F.R. part 60, 46 F.R. 56183.

head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470t of this title a reasonable opportunity to comment with regard to such undertaking.[40]

As originally enacted, Section 106 extended this protection only to properties that were "included in the National Register." In 1976 this provision was amended to provide protection for properties that are "included in *or eligible for inclusion in* the National Register." This amendment conformed the Act to earlier administrative rule-making by Presidential Executive Order issued in 1971.[41] Thus, the lengthy process often required for nomination and listing in the Register was avoided. This significantly increased the scope of the Act in its application towards potentially affected properties, by affording protection to sites not yet included in the Register. Other details of procedures under Section 106 are discussed later.

In 1980 substantial amendments and additions to the Act were enacted,[42] primarily relating to preservation programs at the federal, state, and local levels. In addition to clarifying and expanding the roles of federal agencies and the states, and providing a role for local governments, the Amendments provide preservation incentives for the private sector. Section 106 was not affected.

The National Environmental Policy Act of 1969

Although concerned with matters beyond cultural resources, the National Environmental Policy Act (NEPA)[43] includes in its statement of policy that the federal government is to "preserve important historic, cultural, and natural aspects of our national heritage."[44] The basic protection of NEPA is afforded through the Environmental Impact Statement requirement under Section 102 of the Act for "major Federal actions significantly affecting the quality of the human environment."[45]

[40] 16 U.S.C. § 470f.

[41] Executive Order No. 11593. See text accompanying note 54.

[42] Pub. L. No. 96-515, 94 Stat. 2987.

[43] 42 U.S.C. §§ 4321 *et seq.*

[44] 42 U.S.C. § 4331.

[45] 42 U.S.C. §§ 4332. For regulations prescribing FHWA procedures for implementing NEPA, see 23 C.F.R. part 771. For an extensive discussion of NEPA and the related case law affecting the federal-aid highway program, see Yarrington, "Environmental Litigation; Rights and Remedies," 3 *Selected Studies in Highway Law* 1583, Transportation Research Board, 1978. For discussions of NEPA and historic preservation laws generally, see Comment, *Federal Historic Preservation Law: Uneven Standards for Our Nation's Heritage,* 20 SANTA CLARA L.REV. (1980); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation,* 33 STAN. L.REV. 473, 526-529 (1981); Gray, *A Guide to Historic Preservation for the California Practitioner,* 21 SANTA CLARA L.REV. 613 (1981).

With rare exception, federal courts have held that NEPA applies to historic properties.[46] In one such exception, *St. Joseph Historical Society v. Land Clearance for Redevelopment Authority,*[47] plaintiff sought to enjoin the demolition of buildings as part of an urban renewal project funded in part by a federal grant, on the basis that NEPA and NHPA had not been complied with. The properties had been placed on the National Register for Historic Places after the federal grant was made. The court concluded that neither act applied, distinguishing authority to the contrary[48] on the basis that in *St. Joseph* none of the properties were listed in the National Register at the time of the federal action—disposing of the NHPA—and that the properties involved covered a limited urban area, as opposed to a large rural area—disposing of NEPA.

In another exception, *Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta,*[49] also involving the proposed demolition of a structure not yet included in the National Register, the court concluded that the project was not a "major federal action significantly affecting the quality of the human environment," and therefore not subject to NEPA. In arriving at that conclusion, the court made a distinction between an impact on an historic property—stated to be a social concern—and an impact on "the physical environment," and followed case law to the effect that NEPA's threshold requirement is that of a primary impact on the physical environment.[50]

Regulations promulgated by the Council on Environmental Quality require that, to the fullest extent possible, draft Environmental Impact Statements be prepared concurrently, and integrated, with analyses required by the NHPA.[51] Regulations of the Advisory Council on Historic Preservation also include procedures for the implementation of NEPA.[52]

However, the NHPA and NEPA are not coextensive. See, for example, *Hall County Historical Society, Inc. v. Georgia Department of Transportation,*[53] where the approval by the Federal Highway Adminis-

[46] See, e.g., Save the Courthouse Committee v. Lynn (S.D.N.Y. 1975) 408 F.Supp. 1323; Wisconsin Heritages, Inc. v. Harris (D.C.Wis 1978) 460 F.Supp. 1120.

[47] 366 F.Supp. 605 (W.D.Mo. 1973).

[48] Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971). However, the court in *St. Joseph* did not distinguish the case of Boston Waterfront Residences Assoc. v. Romney, 343 F.Supp. 89 (D.Mass. 1972) which involved a strikingly similar factual situation.

[49] 497 F.Supp. 504 (N.D.Ala. 1980).

[50] Image of Gr. San Antonio, Texas v. Brown (5th Cir. 1978) 570 F.2d 517. The social concern in that case, however, was much further removed from the physical environment—the discharge of civilian employees from a military base.

[51] 40 C.F.R. § 1502.25.

[52] 36 C.F.R. § 800.9; 36 C.F.R. part 805.

[53] 447 F.Supp. 741 (N.D.Ga. 1978). For a detailed discussion of the substantive and procedural differences and the overlap between NHPA and NEPA, see Comment, *Federal Historic Preservation Law: Uneven Standards for Our Nation's Heritage,* 20 SANTA CLARA L.REV. 189 (1980).

was examined. A determination had been made that certain property "may be eligible," as opposed to being "likely to meet the National Register criteria," the test under 36 C.F.R. 800.3(f).[58] This led the District Court to conclude that the protection of Executive Order 11593 did not apply.

On appeal, the Court of Appeals for the Ninth Circuit reversed, stating:

> We are absolutely unable to perceive any meaningful distinction between "may be eligible" and "is likely to meet the criteria" for inclusion in the National Register.[59]

Section 1(3) of the Order provided some additional protection to non-federally owned properties, in requiring federal agencies to consult with the Advisory Council on Historic Preservation, to:

> . . . institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures, and objects of historical, architectural, or archaeological significance.

In 1974 the regulations that had been promulgated by the Advisory Council on Historic Preservation the year before setting forth Section 106 procedures were revised to include procedures for federal agencies to comply with Section 1(3) of the Executive Order.[60]

Archeological and Historic Preservation Act of 1974

In furtherance of the Historic Sites Act of 1935,[61] the Congress enacted the Reservoir Salvage Act of 1960,[62] specifically providing for the preservation of historical and archeological data that might otherwise be lost or destroyed as a result of the construction of dams by any federal agency, or by any other person by license of a federal agency. Provision was included for surveys to be made to determine whether areas to be flooded contained historical and archeological data that should be preserved, and for the collection and preservation of such data, if feasible.

[58] Following the NHPA Amendments of 1976, and subsequent amendments to 36 C.F.R. part 800, the test now appears in 36 C.F.R. § 800.2(f): "'Eligible property' means any district, site, building, structure, or object that meets the National Register Criteria."

[59] Stop H-3 Assoc. v. Coleman, 533 F.2d 434, 440 (9th Cir. 1976).

[60] The procedures appear in 36 C.F.R. part 800. See discussion in text accompanying notes 104 to 122.

[61] 16 U.S.C. §§ 461 *et seq.*

[62] 16 U.S.C. §§ 469 *et seq.*; Pub. L. No. 86-523; 74 Stat. 220.

tration (FHWA) of the state's determination of no "significant effect" under NEPA was upheld. However, the court granted injunctive relief for the failure of FHWA to comply with the NHPA, because the determination of "no effect" under the NHPA was made by the state rather than by FHWA.

Executive Order No. 11593

Presidential Executive Order No. 11593,[54] entitled "Protection and Enhancement of the Cultural Environment," was issued on May 13, 1971, in furtherance of NEPA, NHPA, the Historic Sites Act of 1935, and the Antiquities Act of 1906. The policy stated in the Order was for the federal government to "provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation."

In addition to directing federal agencies to affirmatively locate and nominate properties within their jurisdiction for listing on the National Register of Historic Places, the Order expanded the protection afforded historic properties, especially federally owned properties, in several respects. First, Section 2(a) of the Order directed federal agencies to locate, inventory, and nominate all properties under their jurisdiction or control to the Secretary of the Interior that appeared to qualify for listing on the National Register. Second, until the inventory mandated by Section 2(a) was completed, Section 2(b) directed federal agencies to exercise caution to assure that federally owned properties which might qualify for nomination were not affected during the interim. "Questionable actions" were to be referred to the Secretary of the Interior for an opinion concerning the property's eligibility for inclusion on the National Register. If the Secretary determines the property is likely to be eligible, and the federal agency decides to proceed with the proposed action, the Advisory Council on Historic Preservation must first be provided an opportunity to comment on the proposal.

In *Save the Courthouse Committee v. Lynn*[55] the effect of the Executive Order on properties not yet listed in the National Register was stated:

> Thus, in effect, Sec. 2(b) applied the review process afforded National Register listings by Sec. 106 of NHPA (16 U.S.C. Sec. 470f) to federally-owned properties eligible for inclusion in the National Register.[56]

In *Stop H-3 Assoc. v. Brinegar*,[57] the threshold test of Section 2(b) of the Executive Order, eligibility for inclusion in the National Register,

[54] 36 F.R. 8921; see annotation following 16 U.S.C. § 470.

[55] 408 F.Supp. 1323 (S.D.N.Y. 1975).

[56] *Id.* at 1336.

[57] 389 F.Supp. 1112 (D.Haw. 1974).

The 1960 Act was significantly amended by the Archeological and Historic Preservation Act of 1974.[63] As amended, the Act applies to any federal or federally licensed project or program that might cause loss or destruction of historic or archeological data. Similar protection is afforded to projects where a federal agency provides financial assistance. The Act provides for the surveying and investigation of affected sites and the recovery and preservation of data. These efforts may be funded with funds appropriated expressly for that purpose or with project funds. If the work was to be done by the Secretary of the Interior, the Act provided that funds up to 1 percent of the project funds may be transferred to the Secretary. However, the National Historic Preservation Act Amendments of 1980 authorized federal agencies and the Secretary to waive that 1 percent limitation in appropriate cases.[64]

Archaeological Resources Protection Act of 1979

In the case of *United States v. Diaz*,[65] defendant was convicted of appropriating "objects of antiquity" from government land in violation of the Antiquities Act of 1906.[66] The objects in question were face masks found in a cave on an Indian reservation, which were determined to be only 3 or 4 years old. They were characterized as "objects of antiquity," apparently because of testimony as to their relationship to religious traditions of long standing. On appeal, the United States Court of Appeals for the Ninth Circuit found the Act unconstitutionally vague, because, although it prohibited the appropriation, excavation, or injuring of any historic or prehistoric ruin or monument, or any object of antiquity situated on government lands, the Act contained no definition of those terms.[67]

Concern resulting from the potential impact of this case [68] resulted in enactment of the Archaeological Resources Protection Act of 1979,[69] which provided more specific protection for archeological resources found on public lands (that is, lands owned by the United States) and Indian lands.

In addition to defining such terms as "public lands" and "Indian lands," the Act contains a rather detailed definition of the term "archaeological resource," to be made even more specific by regulations to be promulgated by the Secretary of the Interior.[70] Included is the qualification that objects must be at least 100 years of age to be treated as an archeological resource.

The Act generally provides that no person may excavate, remove, damage, or otherwise alter or deface any archeological resource on public lands or Indian lands without a permit issued by the agency having primary management authority over such lands. Issuance of such a permit does not require compliance with Section 106 of the National Historic Preservation Act of 1966.[71] However, such exemption from Section 106 compliance presumably would not extend to an activity which would otherwise be subject to Section 106 procedures in the absence of the permit process.

TRANSPORTATION-RELATED FEDERAL LEGISLATION

Federal-Aid Highway Act of 1956

The first significant federal legislation concerning preservation directly relating to a transportation program appeared in the Federal-Aid Highway Act of 1956.[72] The Act authorized, for the first time, federal participation in the cost of archeological and paleontological salvage. That authorization as amended and codified now provides:

> Funds authorized to be appropriated to carry out this title to the extent approved as necessary by the highway department of any State, may be used for archeological and paleontological salvage in that State in compliance with the [Antiquities Act of 1906], and State laws where applicable.[73]

Department of Transportation Act

The Department of Transportation Act of 1966,[74] creating the U.S. Department of Transportation, contained two provisions relating to historic preservation. First, under "Declaration of Purpose," Section 2(b)(2) of the Act stated as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

More important, however, was Section 4(f) of the Act, which provided as follows:

---

[63] Pub. L. No. 93-291, 88 Stat. 174.

[64] 16 U.S.C. § 469c-2; Pub. L. No. 96-515, § 208.

[65] 368 F.Supp. 856 (D. Ariz. 1973).

[66] 26 U.S.C. §§ 431-433.

[67] U.S. v. Diaz, 449 F.2d 113 (9th Cir. 1974) Cf. U.S. v. Smyer, 596 F.2d 939 (10th Cir. 1979).

[68] See H.R. REP. No. 96-311, page 8; 1979 U.S. Code Congr. and Admin. News 1711.

[69] 16 U.S.C. § 470aa-470ll; Pub. L. No. 96-95, 93 Stat. 721.

[70] 16 U.S.C. § 470bb(1).

[71] 16 U.S.C. § 470cc(i).

[72] Pub. L. No. 84-627, 120; 70 Stat. 374.

[73] 23 U.S.C. § 305. For a summary of the federal-aid highway archeological and paleontological programs, including a bibliography of highway-related materials, see *The Consideration of Archeology and Paleontology in the Federal-Aid-Highway Program*, U.S. Department of Transportation, January 1979.

[74] Pub. L. No. 89-670; 80 Stat. 931.

> The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[75]

Section 4(f) had several significant new impacts on the relationship of historic preservation to federal transportation programs.[76] First, unlike Section 106, which merely required the head of the federal agency having jurisdiction over an undertaking to "take into account the effect of the undertaking," Section 4(f) requires that there be "no feasible and prudent alternative" to the use of historic property. In *Citizens to Preserve Overton Park, Inc. v. Volpe* [77] the Supreme Court defined a "feasible alternative" as one that is feasible as a matter of sound engineering, and a "prudent alternative" as one that presents no uniquely difficult problems.

Second, Section 4(f) requires that "all possible planning to minimize harm" be included. Third, neither inclusion nor eligibility for inclusion in the National Register is a requisite for protection under Section 4(f).[78]

Section 4(f) was further amended by the Federal-Aid Highway Act of 1968 [79] to include the statement of policy from Section 2(b)(2) of the Department of Transportation Act, and to otherwise make the language of Section 4(f) and Section 138 of Title 23 of the United States Code, described further below, coincide. As amended, Section 4(f) provides as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

[75] 49 U.S.C. § 1653(f).

[76] For a detailed discussion of § 4(f), see Gray, *Section 4(f) of the Department of Transportation Act*, 32 MD.L.REV. 327 (1973), Vardaman, *Federal Environmental Statutes and Transportation*, FEDERAL ENVIRONMENTAL LAW 1316, 1370–1388 (1974), and Netherton, *Transportation Planning and the Environment*, 1970 URBAN L. ANN. 65.

[77] 401 U.S. 402 (1971).

[78] However, an FHWA regulation states that for purposes of § 4(f), a historic site is significant only if it is in or eligible for the National Register, unless the Administration determines that the application of § 4(f) is otherwise appropriate. 23 C.F.R. § 771.135(d).

[79] Pub. L. No. 90–95, 82 Stat. 815.

> The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[80]

As a result of the 1968 amendments, historic sites of national, state, or local significance, as so determined by federal, state or local officials having jurisdiction thereof, are subject to the protection of Section 4(f), regardless of whether they are on public or private lands. However, only publicly owned lands other than historic sites are entitled to the protection of the section.

Section 4(f) provides protection from federal transportation programs to any historic site "of national, State, or local significance" as determined by "the Federal, State, or local officials having jurisdiction thereof." In *Stop H-3 Association v. Coleman* [81] the court held that a federal official, who had determined that a site was not of *national* historic significance, had jurisdiction to determine whether the site had *state or local* significance:

> Under the NHPA, the Interior Secretary's "jurisdiction" to determine historic significance is not limited to properties of national importance.[82]

Section 4(f) is of particular importance to transportation programs because it applies to all activities within the Department of Transportation, including the Federal Highway Administration, the Federal Aviation Administration, the Urban Mass Transportation Administration, the Federal Railroad Administration, the Coast Guard, and the Federal Maritime Administration.

The Federal-Aid Highway Act of 1966

Somewhat confusing is the fact that in the same session of Congress in which the Department of Transportation Act was enacted containing Section 4(f), the Federal-Aid Highway Act of 1966 [83] was enacted, add-

[80] 49 U.S.C. § 1653(f).

[81] 533 F.2d 434 (9th Cir. 1976).

[82] *Id.* at 441.

[83] Pub. L. No. 89–574, 80 Stat. 766.

ing a very similar provision as Section 138 of Title 23 of the United States Code. As enacted, Section 138 provided as follows:

> It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use.[84]

Section 138 as enacted was somewhat weaker than Section 4(f) in several respects. First, it only applied to programs of the Federal Highway Administration. Second, its protection extended only to publicly owned parks and historic sites. Third, the protection afforded only required planning and consideration of alternatives to minimize harm, as opposed to the "no feasible and prudent alternative" limitation of Section 4(f). Most differences between Section 138 and Section 4(f) were resolved by the Federal-Aid Highway Act of 1968 which amended both sections so that they became nearly identical. Section 138 as amended reads essentially the same as Section 4(f) as amended, quoted above.

The Urban Mass Transportation Act

Although now also subject to the requirements of Section 4(f) of the Department of Transportation Act, the Urban Mass Transportation Administration in addition has its own legislative direction concerning historical properties. The Administration, created under the Urban Mass Transportation Act of 1964,[85] did not become part of the Department of Transportation until a reorganization effected in 1968.

As originally enacted, the Urban Mass Transportation Act of 1964 was administered by the Housing and Home Finance Agency. In 1967 the Act was amended to provide that it be administered by the Secretary of Housing and Urban Development, to reflect the transfer of functions by the Department of Housing and Urban Development Act. Subsequently, the Reorganization Plan No. 2 of 1968[86] in turn transferred those functions to the Secretary of Transportation, and created within the Department of Transportation the Urban Mass Transportation Administration.

[84] 23 U.S.C. § 138.
[85] 49 U.S.C. §§ 1601 *et seq.*
[86] Reorganization Plan No. 2 of 1968; 33 F.R. 6965; 82 Stat. 1369.

Up to this point the environmental related concern of the Urban Mass Transportation Act, as stated within the Act, was limited to a consideration of the control of air pollution. However, following its reorganization, Section 4(f) of the Department of Transportation Act became applicable to programs of the Urban Mass Transportation Administration, which section was soon to be reinforced by the Federal-Aid Highway Act of 1968.

Environmental protection afforded to programs under the Urban Mass Transportation Act was further strengthened by the Urban Mass Transportation Assistance Act of 1970.[87] The Act now declared the national policy to preserve, among other things, important historical and cultural assets, in the planning, designing, and construction of projects for which assistance is provided under Section 3 of the Act. Furthermore, as amended, the Act now provided that the Secretary shall not approve any application for assistance under Section 3 without a finding, among other things, that either no adverse environmental effect is likely to result from the project or there exists no feasible and prudent alternative to such effect, and that all reasonable steps have been taken to minimize any such effect.

The parallel between the environmental protection required by Section 14 of the Urban Mass Transportation Act, as amended, and other federal legislation was noted in the case of *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*,[88] where the court stated:

> Section 14 is a combination of the requirements already imposed upon the federal defendant under Section 4(f) of the Department of Transportation Act and NEPA. While subsection (a) notes the important policy of protecting park and recreation lands and historic and cultural assets, subsection (b), which implements the policy, is written in broad terms which almost exactly track the provisions of Section [102(2)(C)] of NEPA. 42 U.S.C. 4332(2)(C)]. This subsection requires the same type of studies as are required by NEPA. 14(c), however, goes one step further then [sic] NEPA and requires the federal defendants to issue a statement similar to the statement required by 4(f).[fn]
>
> * * *
>
> [fn]One difference is that whereas 4(f) requires the federal defendants to include in any program all "possible" planning to minimize harm, 14(c) only requires all "reasonable" steps taken to minimize harm.[89]

Airport and Airway Development Act

Under the Airport and Airway Development Act of 1970[90] the Secre-

[87] Pub. L. No. 91-453, 84 Stat. 962.
[88] 414 F.Supp. 99 (N.D.Ga. 1975).
[89] *Id.* at 130.
[90] Pub. L. No. 91-258, 84 Stat. 219.

tary of Transportation is authorized to approve airport development projects to receive assistance. The Act contains a statement of environmental policy, without reference to historic preservation:

> It is declared to be national policy that airport development projects authorized pursuant to this part shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation.[91]

The Secretary is required to consult with the Secretaries of the Interior and Health, Education and Welfare, regarding the effect that a project may have on:

> . . . natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, . . . that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.[92]

Furthermore, the public agency sponsoring the airport development project must conduct public hearings for the purpose of considering the economic, social, and environmental effects of the airport location, and its consistency with the goals and objects of the community's urban planning.

In view of the provision of Section 4(f) of the Department of Transportation Act, and Section 106 of the NHPA, the fact that the Airport and Airway Development Act does not specifically mention historic sites does not seem significant.

Rail Passenger Legislation

The Amtrak Improvement Act of 1974,[93] in addition to amending the Rail Passenger Service Act of 1970,[94] amended Section 4 of the Department of Transportation Act to encourage the preservation and reuse of rail passenger service terminals of historical or architectural significance. New Section 4(i) of the Department of Transportation Act[95] was unique in establishing transportation programs that had the primary purpose of historic preservation, as opposed to other transportation-related statutes that are basically intended to measure and mitigate the impact of transportation projects on historic resources.

Under the legislation the Secretary of Transportation may provide assistance under four program areas:

1. Conversion of not less than three railroad passenger terminals into intermodal transportation terminals, on a feasibility demonstration basis, subject to certain criteria including the condition that the terminals be listed in the National Register of Historic Places.[96]
2. Preservation of terminals that have a reasonable likelihood of being converted or of being otherwise maintained pending the formulation of plans for reuse.[97]
3. The acquisition and utilization of space in buildings of historic or architectural significance, if feasible and prudent compared with available alternatives.[98]
4. The stimulation of state and local governments, local and regional transportation authorities, and others, to develop plans for the conversion of rail passenger terminals into intermodal transportation terminals and civic and cultural activity centers.[99]

IMPLEMENTING REGULATIONS AND PROCEDURES

State-Federal Organizational Relationship

The major federal role in determining criteria and procedures for identifying historic sites rests with the Department of Interior through the National Park Service. Similar authority at the federal level for establishing procedures for the review of actions that may affect historic properties rests with the Advisory Council on Historic Preservation. In either case, a major role is played at the state level by a state official—the State Historic Preservation Officer.

State Historic Preservation Officers are officials appointed by the Governor of each state or territory, with the responsibility of administering the State Historic Preservation Program and the National Historic Preservation Act within each state or jurisdiction. Originally created by administrative regulation,[100] the State Historic Preservation Officers received legislative recognition in the National Historic Preservation Act Amendments of 1980.[101] In addition to administering state historic preservation programs, their duties include surveying properties within each state for nomination to the National Register, and participating in the review of federal and federally assisted projects that may affect properties entitled to protection under Section 106 of the NHPA and Executive Order 11593.[102]

---

[91] 49 U.S.C. § 1716(c)(4).
[92] *Id.*
[93] Pub. L. No. 93-496, 88 Stat. 1526.
[94] 45 U.S.C. § 501 *et seq.*
[95] 49 U.S.C. §§ 1653(i).
[96] 49 U.S.C. § 1653(i)(1)(A).
[97] 49 U.S.C. § 1653(i)(1)(B.
[98] 49 U.S.C. § 1653(i)(1)(C).
[99] 49 U.S.C. § 1653(i)(1)(D).
[100] 36 C.F.R. § 800.2(m); 36 C.F.R. § 61.2.
[101] 16 U.S.C. § 470a(b)(1)(A).
[102] 16 U.S.C. § 470a(b)(3); 36 C.F.R. § 61.2; 36 C.F.R. § 61.8; 36 C.F.R. § 800.4.

The procedures adopted by the Advisory Council on Historic Preservation for the protection of historic and cultural properties are the basic guidelines for federal-aid highway projects that may use or affect historic properties. Regarding 4(f) statements, paragraph 20(b) of Section 2, Chapter 7, Volume 7 of the *Federal-Aid Highway Program Manual* provides as follows:

> If the project will use land from a historic property that is included in or eligible for inclusion in the National Register of Historic Places, the Section 4(f) statement should provide evidence that the provisions of 36 CFR Part 800 (Advisory Council on Historic Preservation, Procedures for the Protection of Historic and Cultural Properties) have been satisfied. If the project will use land from a historic site not included on or eligible for inclusion in the National Register of Historic Places, the Section 4(f) statement should provide evidence that the official having jurisdiction thereof has determined it to be of national, State or local significance.

See also 23 C.F.R. 771.135 regarding FHWA 4(f) procedures generally. Included is the provision that:

> In determining the application of section 4(f) to historic sites, the Administration in cooperation with the applicant will consult with the State Historic Preservation Officer and local officials and will identify properties on or eligible for the National Register of Historic Places. For purposes of section 4(f), a historic site is significant only if it is on or eligible for the National Register, unless the Administration determines that the application of section 4(f) is otherwise appropriate.[103]

Regarding other historic and cultural preservation procedures, paragraph 21(a) of Section 2, Chapter 7, Volume 7 of the Manual provides as follows:

> The Advisory Council on Historic Preservation promulgated Procedures for the Protection of Historic and Cultural Properties, 36 CFR Part 800, pursuant to the National Historic Preservation Act of 1966 and Executive Order 11593. A copy of these procedures is included as Attachment 1 of this directive. These procedures apply to all FHWA actions which could affect a property which is included or eligible for inclusion in the National Register of Historic Places.

Advisory Council Procedures for Review of Individual Projects

Section 106 of the NHPA requires federal agencies having direct or indirect jurisdiction or licensing authority over federal or federally assisted undertakings to afford the Advisory Council the opportunity to comment on the undertaking prior to the approval of federal funding.[104] The Council has issued regulations to implement this requirement establishing the procedure for agencies to allow the Council an opportunity to comment.[105] The procedure set up by the regulations, generally referred to as the "106 process," involves several steps.

First, the federal agency, in consultation with the State Historic Preservation Officer, must identify any properties that are within the area of impact of the undertaking that are listed or are eligible for listing in the National Register.[106] Once these properties are identified, the agency applies the National Register criteria and if properties are found that meet the criteria or if there is a question as to whether a property meets the criteria, the properties are referred to the Secretary of the Interior for a determination of eligibility. If the agency official and the State Historic Preservation Officer agree that no identified property meets the criteria, the project may proceed.[107]

Second, if there are National Register or eligible properties within the area of the undertaking's potential impact, the agency official, in consultation with the State Historic Preservation Officer, shall determine whether the project will have an effect on the property, using the "Criteria of Effect" established by the Advisory Council.[108] If the agency official, in consultation with the State Historic Preservation Officer finds no effect, the project may proceed.[109]

Third, if an effect is found, the agency official, in consultation with the State Historic Preservation Officer, shall apply the Advisory Council's "Criteria of Adverse Effect" to determine whether the effect of the undertaking on the property is adverse.[110] If no adverse effect is found, the agency official forwards supporting documentation to the Executive Director of the Advisory Council for review.[111] If the Executive Director makes no objection, the project may proceed.[112] If an objection is made, there are two alternatives:

1. The Executive Director may state conditions which, if met, will eliminate the objection. If these are accepted by the agency official, the project may proceed.[113]

2. If conditions are stated to eliminate the objection, which are not accepted, or if an objection is made without specifying conditions, the consultation process described below is initiated.[114]

---

[103] 23 C.F.R. § 771.135(d).

[104] 16 U.S.C. § 470f.

[105] These regulations appear generally in 36 C.F.R. part 800. In National Center for Preservation Law v. Landrieu (D.S.C. 1980) 496 F.Supp. 716, *aff'd* 635 F.2d 324 (4th Cir. 1980), these regulations were upheld against an attack that they did not afford the Advisory Council sufficient opportunity to comment. Note that the Advisory Council suspended three portions of the regulations effective July 6, 1982—§§ 800.4(a)(4), 800.6(c)(1), and 800.6(d)(2)(ii)—for the stated purpose of alleviating regulatory burdens while permanent amendments to the 106 process are under consideration. 47 F.R. 24306.

[106] 36 C.F.R. § 800.4(a).

[107] 36 C.F.R. § 800.4(a)(3).

[108] 36 C.F.R. § 800.4(b).

[109] 36 C.F.R. § 800.4(b)(1).

[110] 36 C.F.R. § 800.4(b)(2).

[111] 36 C.F.R. § 800.4(c).

[112] 36 C.F.R. § 800.6(a)(1).

[113] 36 C.F.R. § 800.6(a)(2).

[114] 36 C.F.R. § 800.6(a)(3),

Fourth, if an adverse effect is found, or if an objection to a finding of no adverse effect is not resolved, a consultation process is initiated between the agency official, the State Historic Preservation Officer, and the Advisory Council.[115] If the parties reach an agreement upon an alternative to avoid or mitigate the adverse effect, or they find that there is no satisfactory alternative to avoid or mitigate the adverse effect, but that it is in the public interest to proceed, they execute a "Memorandum of Agreement." An executed Memorandum of Agreement constitutes the comments of the Council, ending the 106 process, and allowing the project to proceed.[116]

Finally, if the parties fail to agree, the matter may be referred for consideration at an Advisory Council meeting.[117] Several alternatives are possible:

1. If the Chairman of the Council decides against consideration of the project at a Council meeting, unless three members of the council object, the project may proceed.[118]
2. If the Chairman of the Council decides that the matter should be considered by the Council, he may designate a panel of five members to hear the matter or refer it to the full Council.[119]
3. If the matter has been reviewed by a panel, and if the federal agency determines not to follow the panel's comments, the Chairman then decides whether the matter should be sent to the full Council for review. If the Chairman decides against further consideration of the matter, the project may proceed.[120]
4. If the matter has been reviewed by the full Council, the Council provides the agency with its comments. Upon receipt of the Council's comments, the federal agency official submits a written report to the Council describing the actions taken by the agency and others in response to the Council's comments, and the effect that such actions will have on the property. Submission of this report evidences fulfillment of the agency's responsibility for the project under Section 106 of the National Historic Preservation Act, and Section 2(b) of Executive Order 11593.[121]

The Advisory Council's regulations also provide for Programmatic Memoranda of Agreement for particular programs or classes of undertakings that would otherwise require numerous individual requests for review.[122]

[115] 36 C.F.R. §§ 800.4(d) and 800.6(b).
[116] 36 C.F.R. § 800.6(b) and (c).
[117] 36 C.F.R. § 800.6(b)(7).
[118] 36 C.F.R. § 800.6(d)(1).
[119] 36 C.F.R. § 800.6(b)(2).
[120] 36 C.F.R. § 800.6(d)(6).
[121] 36 C.F.R. § 800.6(d)(7).
[122] 36 C.F.R. § 800.8.

FEDERAL HISTORIC PRESERVATION LITIGATION

Jurisdiction, Standing, and Scope of Review in Federal Preservation Litigation

Jurisdiction

As a general proposition, federal agency action is presumptively reviewable by a federal district court under the provisions of the Administrative Procedure Act.[123] The question of judicial review under the Administrative Procedure Act was addressed by the Supreme Court in the case of *Citizens to Preserve Overton Park Inc. v. Volpe,*[124] involving a review of section 4(f) and section 138 compliance:

> A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701 of the Administrative Procedure Act, 5 U.S.C. § 701 (1964 ed., Supp. V), provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of clear and convincing evidence" of a legislative intent to restrict access to judicial review.[125]

In addition, the court noted in a footnote to the foregoing quotation that the Department of Transportation Act specifically makes the Administrative Procedure Act applicable to proceedings of the Department of Transportation.[126]

In addition to subject matter jurisdiction under the Administrative Procedure Act, courts have found jurisdiction under the provisions of 28 U.S.C. § 1331(a)—jurisdiction based on a federal question. In *Save the Courthouse Committee v. Lynn,*[127] involving questions of NEPA and NHPA compliance, the court stated:

> Moreover, the Court also has jurisdiction under the provisions of 28 U.S.C. § 1331(a) (federal question). It is incontrovertible that the issues presented raise federal questions. The concern here is with the applicability of federal statutes, an executive order and regulations issued by federal entities. With respect to the amount in controversy, generally, this is measured from the standpoint of the plaintiff or by the value of the interest he seeks to protect. . . . The plaintiffs herein are concerned with the preservation of a structure of purported historic and architectural significance. Obviously it is difficult—if not well-nigh impossible—to assign a precise value to such an interest. . . . [O]ne can fairly say that the "considerable interest" involved in the preservation of cultural resources "would seem to put beyond question the jurisdictional amount provided in § 1331(a)." [128]

[123] 5 U.S.C. § 701 et seq.
[124] 401 U.S. 353 (1971).
[125] *Id.* at 410.
[126] 49 U.S.C. § 1655(h).
[127] 408 F.Supp. 1323 (S.D.N.Y. 1975).
[128] *Id* at 1331.

In *Hall County Historical Society, Inc. v. Georgia Department of Transportation,*[129] also involving NHPA and NEPA issues, the court found jurisdiction under the Administrative Procedure Act and under 28 U.S.C. § 1331(a). The court observed that in injunction actions the amount in controversy is not the amount the plaintiff might recover, but rather the value of a right to be protected, which is not readily capable of a dollar valuation. Thus, the court concluded that there was a substantial probability that the amount in controversy exceeded the jurisdictional threshold of $10,000.

Standing

The earliest cases considering the NHPA tended to apply a rather narrow test regarding whether plaintiffs, as individuals or organizations, had sufficient interest to establish standing under either the Administrative Procedure Act or 28 U.S.C. § 1331(a). See, for example, *Kent County Council for Historic Preservation v. Romney,*[130] where, in addition to finding that the NHPA did not apply to a project approved before its enactment, the court concluded that plaintiff organization had no standing because it had no interest in the project subject to the protection of the Act:

> We are concerned with inanimate objects such as districts, sites, buildings, structures, or objects that are included in the National Register, rather than with individuals, organizations, or corporations.[131]

Similarly, in *South Hill Neighborhood Association, Inc. v. Romney,*[132] the Court of Appeals for the Sixth Circuit held that "real interest" to establish standing required either ownership, legal control, or title to the building which was to be demolished, or a significant involvement in the administrative process.

However, in *Sierra Club v. Morton,*[133] the Supreme Court held that "injury in fact" could involve a noneconomic injury, and could be suffered by those who "use" an area affected by lessened aesthetic and recreational values.

In *Neighborhood Development Corporation v. Advisory Council on Historic Preservation,*[134] the Court of Appeals for the Sixth Circuit applied the test of *Sierra Club v. Morton* to a case involving both the NHPA and NEPA, noting that it did not believe its earlier opinion in *South Hill Neighborhood Association, Inc. v. Romney* [135] had precedential value following *Sierra Club.* The court recognized that plaintiffs had no economic, ownership, or leasehold interest in the buildings which were to be demolished, but nevertheless found standing:

> In the instant case, the complaint states that "the plaintiffs include among their membership individual residents who enjoy and derive benefit from the preservation of [buildings] and others who use or can be expected to *use* the [buildings]." (Emphasis added). By alleging "use" of the buildings' aesthetic and architectural value, plaintiffs met the *Sierra Club* standard. This is sufficient to survive a Rule 12(b) motion to dismiss for lack of standing.[136]

The court noted that plaintiffs must be prepared at trial to particularize their alleged use of the historic and architectural value of the buildings. However, the court further observed that they need not be neighborhood residents:

> We do not believe that injury-in-fact is suffered only by residents of the neighborhood in which the historically and architecturally significant buildings are located.[137]

The court in *Hall County Historical Society v. Georgia Department of Transportation* [138] also observed that standing is no longer confined to those who show economic harm, and allegations of harm to an association and its members, although such harm may be merely aesthetic or environmental in nature, are sufficient to establish standing.

Scope of Review

The scope of review under section 4(f) was set forth by the Supreme Court in the landmark case of *Citizens to Preserve Overton Park Inc. v. Volpe.*[139] The court rejected defendant's argument for either a "substantial evidence" review, or a *de novo* review, on the basis that the decision to allow the expenditure of federal interstate highway funds involved neither rule-making nor adjudication. A three-step review process was set forth, involving first, the scope of authority of the decision maker, second, whether the decision was in accordance with law, and third, whether procedural requirements were followed. Although the court in *Overton Park* was considering the review of a decision under Section 4(f), with its stricter standard of "no feasible or prudent alternative," the same scope of review was adopted by the court in *Historic Green Springs, Inc. v. Bergland,*[140] which involved review of

---

[129] 447 F.Supp. 741 (N.D.Ga. 1978).

[130] 304 F.Supp. 885 (W.D.Mich. 1969). For a discussion of the early cases involving standing, see Vardaman, *Standing To Sue in Historic Preservation Cases,* 36 LAW AND CONTEMP. PROB. 406 (1971).

[131] 304 F.Supp. at 890.

[132] 421 F.2d 454 (6th Cir. 1969).

[133] 405 U.S. 727 (1972).

[134] 632 F.2d 21 (6th Cir. 1980).

[135] 421 F.2d 454 (6th Cir. 1969).

[136] 632 F.2d at 23–24.

[137] *Id.* at 24.

[138] 447 F.Supp. 741 (N.D.Ga. 1978). Compare Carson v. Alvord, 487 F.Supp. 1049 (N.D.Ga. 1980), where the court found standing, but concluded that plaintiffs' cause of action under the NHPA, NEPA, and the Archeological and Historic Preservation Act was limited to review under the Administrative Procedure Act. If the court in *Carson* had not found the agency action proper, presumably it would have set aside the action, but without further injunctive relief.

[139] 401 U.S. 402 (1971).

[140] 497 F.Supp. 839 (E.D.Va. 1980).

actions under the Historic Sites Act of 1935, the NHPA, and NEPA:

> This Court's scope of review of the administrative action challenged here is set out in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The Court's inquiry is described therein as "substantial," to be based on a "thorough, probing, in-depth review" of the Secretary's decision. *Id.* at 415, 91 S.Ct. at 823. This review is broken down into three steps. First, the Court is required to decide whether the Secretary acted within the scope of his authority. *Id.*; *Schilling v. Rogers,* 363 U.S. 666, 676–77, 80 S.Ct. 1288, 1295, 4 L.Ed.2d 1478 (1960). Second, the Court must decide, pursuant to § 706(2)(A) of the Administrative Procedure Act, that the Secretary's actual decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park, supra* at 416, 91 S.Ct. at 823. A corollary of this inquiry is a determination that the Secretary's action is not "contrary to constitutional right, power, privilege, or "immunity" under § 706(2)(B). The third and final step is to determine whether the Secretary's action "followed the necessary procedural requirements." *Id.* at 417, 91 S.Ct. at 824.[141]

The Question of "Effect" Under Section 106 and "Use" Under Section 4(f).

The definition of a "use" under Section 4(f) and an "effect" under Section 106, and the difference between the two, have been the subject of a fair amount of academic and litigation effort.[142] One of the best explanations of this difference was made by Professor O. Gray:

> If an historic site is listed on the National Register, therefore, an "effect" which might not be considered a "use" for purposes of section 4(f) could still require protective attention from the Secretary under the National Historic Preservation Act of 1966. Noise and other "visual . . . or atmospheric elements" clearly need not amount to a taking to be out of character with the property and its setting. An off-site interference with the view at an historic site could be considered such an "effect" in cases where it would be difficult to demonstrate that the project in question "uses" any land from the site. For instance, such questions have been raised over a proposed bridge in Baltimore harbor, which might spoil the visual setting in which Fort McHenry is situated. The bridge could hardly be considered to "use" Fort McHenry, but it might well be considered to affect it. . . .[148]

[141] *Id.* at 845.

[142] See Gray, *Section 4(f) of the Department of Transportation Act,* 32 MD.L.REV. 327, 362–368 (1973); Vardaman, *Federal Environmental Statutes and Transportation,* FEDERAL ENVIRONMENTAL LAW 1316, 1382–1383 (1974). For a detailed discussion of this difference and other differences between § 4(f), § 106, and NEPA, see Comment, *Federal Historic Preservation Law: Uneven Standards for Our Nation's Heritage,* 20 SANTA CLARA L.REV. 189 (1980).

[143] Gray, *Section 4(f) of the Department of Transportation Act,* 32 MD.L.REV. 327, 363 (1973).

The difference became even more murky with the development of the theory of "constructive use"—that is, that there may be a "use" in the absence of physical intrusion.[144] One of the first cases considering this theory was *Brooks v. Volpe,*[145] where the court held that a freeway which would encircle—but not penetrate—a campground would "use" the campground under Section 4(f).

See also *Stop H-3 Association v. Coleman,*[146] which involved, among other sites, a petroglyph rock that had been listed in the National Register. Defendants successfully argued before the district court that the rock was not subject to Section 4(f) requirement because it was an object, not a site, which object had, in fact, been moved from its original location a few years earlier. The Court of Appeals reversed, stating:

> After careful consideration, we cannot escape the conclusion that Pohaku ka Luahine, and its immediate environs, qualify for protection under section 4(f). It is clear that the rock was originally located in the Valley, and it is inseparably linked to historic events that there occurred long since. Consequently, so long as the rock remains in the Valley, even though it may stand a few feet from its original location, we believe that it forms the basis for an historic site. Further, we believe that H-3 which will pass near the rock, will "use" land from that historic site. See *Brooks v. Volpe,* 460 F.2d 1193, 1194 (9th Cir. 1972) (a proposed highway that would encircle a public campground would "use" that campground.[147]

However, see *Hall County Historical Society, Inc. v. Georgia Department of Transportation,*[148] where plaintiffs argued a "constructive use" of historic land by a highway improvement in the absence of physical use. The court held that plaintiffs failed to meet their burden of showing any "use" of the property that amounted to a direct and significant effect on the property, distinguishing cases which found a constructive use:

> The absence of any physical "use" of District land notwithstanding, the plaintiff and plaintiff-intervenor argue that the project will have certain alleged secondary effects upon the District constituting a "constructive use" of District land, citing *Brooks v. Volpe,* 460 F.2d 1193 (9th Cir. 1972). See also *Stop H-3 Assoc. v. Coleman,* 533 F.2d 434 (9th Cir. 1976). But see *id.* at 446 (Wallace, J., dissenting). In the court's view, however, these decisions from the Court of Appeals for the Ninth Circuit cited by plaintiff are clearly distinguishable from the case *sub judice* in that the projects being challenged in those cases were shown to have a direct and significant impact on section 4(f) lands.

[144] See Comment, *Protecting Public Parkland from Indirect Federal Highway Intrusion,* 62 IOWA L.REV. 960 (1977).

[145] 460 F.2d 1193 (9th Cir. 1972).

[146] 533 F.2d 434 (9th Cir. 1976).

[147] *Id.* at 445.

[148] 447 F.Supp. 741 (N.D.Ga. 1978).

Similarly, although the Court of Appeals for the Fifth Circuit has cited these Ninth Circuit decisions in dicta, it has not adopted a "constructive use" interpretation of section 4(f). See *Louisiana Environmental Society v. Coleman*, 537 F.2d 79 (5th Cir. 1976). Finally, assuming arguendo, that section 4(f) should be construed to apply to circumstances where there is a "constructive use" as well as an actual physical use of land from any historic site, the burden is upon the plaintiff to establish by a preponderance of the evidence that the project has or will involve a "constructive use" of District land. See *Arkansas Community for Reform Now* [ACORN] *v. Brinegar*, 398 F.Supp. 685 (E.D.Ark. 1975), *aff'd*, 531 F.2d 864 (8th Cir. 1976).[149]

The court in *Nashvillians Against I-440 v. Lewis* [150] made a distinction between the application of the "constructive use" theory under Section 4(f) in dealing with historic properties rather than park and recreation areas or wilderness areas. The court concluded that even if effects such as noise, land-use changes, and property value diminution are assumed to constitute "uses," such uses do not necessarily affect historic value or architectural integrity:

> . . . . Surely the means by which constructive use of property can be shown for purposes of section 4(f) should at least include proof that the claimed harm will affect the *historic* value or quality of the properties. The various historic districts addressed by this aspect of plaintiffs' complaint are designated as such because they encompass houses that are architecturally significant. The simple truth is that noise, land use changes, property value diminution, and to a substantial extent air pollution, will not affect the architectural integrity of these areas and will not impair their historic value. Most of the cases cited by plaintiffs in support of the "constructive use" theory deal with parks and recreation areas or wilderness areas, rather than historic properties. In those cases, the purposes for which such properties are protected were threatened by the "use." [151]

In *Cobble Hill Association v. Adams* [152] plaintiff claimed that there had been an improper delegation of the responsibility for determining whether there was an effect under the NHPA from the State Historic Preservation Officer to the State Department of Transportation. Although the project in question involved only the repair of the existing roadway, with no extensions, additions, or changes, and with only temporary changes in traffic flow, defendants attempted, in what the court characterized as "an excess of caution," to comply with the NHPA. At the suggestion of U.S. DOT, the State Department of Transportation wrote to the State Historic Preservation Officer summarizing the project, concluding, with concurrence of the federal authorities, that there would be no effect. Without making an independent study, and on the basis of the letter alone, the State Historic Preservation Officer provided a determination of "no effect" as to the historic district in the vicinity of the project.

The court rejected the claim, concluding first that the NHPA was intended to protect the historic heritage from extinction, rather than from temporary effects resulting from maintenance and repair activities, and second, if it were necessary, it would find that the record sufficiently supported the determination of no effect under the NHPA in spite of questions raised regarding defendants' procedure in obtaining that determination.[153]

In *DC Federation of Civic Associations v. Volpe*,[154] plaintiffs contended that the Secretary of Transportation failed to comply with the NHPA and Advisory Council regulations. The project involved a segment of Interstate highway between Virginia and Washington, D.C. The court noted that the NHPA obligated the Secretary to "take into account the effect" of the project on properties included in the National Register, and the advisory council's regulations further required the Secretary to "identify properties located within the area of the undertaking's potential environmental impact" that are included in the National Register, and to consult with the State Historic Preservation Officer to determine whether there would be impact on such properties. Although the Secretary decided to "identify" only properties located in Virginia, on the contention that there would have been no impact on historic properties in the District of Columbia, procedural compliance was upheld on the trial court's finding that even if historic properties would have been affected, the effect would not have been adverse.

The Segmentation Question: State Project or Federal Project

Courts occasionally are faced with the question of whether a project, or a segment of a project, has federal involvement requiring compliance with the NHPA, Section 4(f), and NEPA, or is purely a state matter. The general rule that the federal legislation is not applicable to state projects is illustrated by the case of *Civic Improvement Committee v. Volpe*,[155] where the court found no federal involvement in a highway project based on the representation of the federal defendants that the project was:

[149] *Id.* at 750.
[150] 524 F.Supp. 962 (M.D.Tenn. 1981).
[151] *Id.* at 976.
[152] 470 F.Supp. 1077 (E.D.N.Y. 1979).
[153] Compare Hall County Historical Society v. Georgia Department of Transportation (N.D.Ga. 1978) 447 F.Supp. 741, where the court declined to consider the reasonableness of the state's determination of "no effect."
[154] 459 F.2d 1231 (D.D.C. 1971).
[155] 459 F.2d 957 (4th Cir. 1971).

> . . . entirely a "State project, and is *not* to be approved or rejected by the Secretary of Transportation . . ., nor dependent upon 'Federal supervision' . . ., nor subject to any question of compliance with Federal "statutory or regulatory standards".[156]

However, when a project is segmented, or if the federal-state relationship is changed during its development, the question becomes more complex.

One of the first, and most litigated, of such cases was *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department,*[157] which involved an expressway that threatened Brackenridge Park in San Antonio, Texas. The project was divided into three segments, the middle of which would invade the park property. The Secretary of Transportation sought to approve the end segments independent of Section 4(f) consideration of the middle segment.[158] Litigation was begun in 1967 by the San Antonio Conservation Society to stop the proposed use of the park. Three years later, following summary judgment which would allow construction of the end segments, and denial of a stay by the Circuit Court pending appeal, the Society abandoned further litigation efforts. However, certain individual members of the Society decided to continue the suit. The "Named Individuals" managed to obtain a temporary stay from the Supreme Court.[159] However, within a couple of weeks, the Supreme Court vacated the stay [160] and denied *certiorari.*[161] Several months later, on the basis of the decision in *Citizens to Preserve Overton Park, Inc. v. Volpe,*[162] plaintiffs obtained a stay from the Circuit Court, which later reversed the summary judgment that had been granted by the District Court.[163]

The two principal arguments considered by the Circuit Court were whether the Secretary of Transportation could divide a project into segments for the purpose of Section 4(f) approval, and whether the state could avoid the necessity of 4(f) approval by building the segment with its own funds.

Regarding the first question, the Court concluded that Section 4(f) did not authorize the Secretary to separate a project into segments, giving additional reasons beyond the provisions of Section 4(f):

> The question therefore, is whether the Secretary may take a single "project" and divide it into "segments" for purposes of section 4(f) approval. We have already stated that such fragmentation of a "project" is unauthorized by section 4(f). But there is another reason why we refuse to authorize such action: The frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see. Patently, the construction of these two "end segments" to the very border, if not into, the Parklands, will make destruction of further parklands inevitable, or, at least, will severely limit the number of "feasible and prudent" alternatives to avoiding the Park. . . .[164]

Second, the Court rejected the argument that if the State proceeded without federal funding for the middle segment, Section 4(f) compliance would not be required:

> We are not impressed with this argument. If we were to accept it, we would be giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws. The supremacy of federal law has been recognized as a fundamental principle of our Government since the birth of the Republic. United States Constitution, Art. VI, cl. 2. The State may not subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another.[165]

However, on remand the District Court again granted summary judgment to defendants on the basis of Section 154 of the Federal-Aid Highway Act of 1973 [166] (enacted after the remand by the Circuit Court), which section provided in part:

---

[156] *Id.* at 958.

[157] 496 F.2d 1017 (5th Cir. 1974).

[158] Ironically, Brackenridge Park was specifically mentioned during the debates leading to the 1968 amendments to § 4(f): "Indeed, the legislative history of section 4(f) reveals that the Brackenridge Park controversy was foremost in the minds of the Senators as they debated this Act and rejected a House amendment that was specifically designed to allow federal participation in the North Expressway. The Senate version prevailed. *Compare* 114 Cong.Rec. 90th Cong. 2d Sess. 19914, 19915 with 114 Cong.Rec. 90th Cong. 2d Sess., 24023, 24032 (1968)." 446 F.2d at 1021, note 14.

[159] 400 U.S. 939 (1970).

[160] 400 U.S. 961 (1970).

[161] 400 U.S. 968 (1970).

[162] 401 U.S. 402 (1970).

[163] 446 F.2d 1013 (5th Cir. 1971),

[164] *Id.* at 1023.

[165] *Id.* at 1027. This conclusion was criticized in Cappalli, *Rights and Remedies Under Federal Grants* (1979) at page 86, where it was argued that if a state refuses federal participation, it can develop a highway project free from grant constraints: "It is submitted that the contrary decision in *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't.* 446 F.2d 1013 (5th Cir. 1971), *cert. denied,* 406 U.S. 933 (1972), is wrong. The majority reasoned that the project became 'federal' once approval was sought and obtained from the United States, and hence had to conform to federal standards whether or not the grantee opted to utilize only state funds thereafter. This is inconsistent with the withdrawal principle established in *Rosado v. Wyman,* 397 U.S. 397 (1970), and *Wheeler v. Barrera,* 417 U.S. 402 (1974). The Fifth Circuit feared 'the circumvention of an Act of Congress,' *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dept. supra* at 1027, forgetting that the grant-in-aid conditions are relevant only when federal funds are utilized. The dissent correctly reasoned that because federal funds had not been utilized, the court lacked authority to enjoin the completion of the project as a purely state action. *Id.* at 1029."

[166] Pub. L. No. 93-87, 87 Stat. 250.

(a) Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project.

On appeal the Circuit Court affirmed,[167] concluding that the Section 4(f) requirement was no longer involved in the case:

> We agree with defendants. Section 154(a) clearly states that "*Notwithstanding any other provisions of Federal law* or any court decision to the contrary, the contractual relationship between the Federal and state Governments shall be ended . . . and the expressway shall cease to be a Federal-aid project." (Emphasis added.) If Congress had not intended to exempt the Expressway from the environmental statutes, there would have been no purpose in passing the legislation. We cannot believe that Congress intended a vain and useless act. Any doubt about the matter, however, is fully resolved by the legislative history which shows without question that Congress drew the bill with the evident purpose of exempting the Expressway from the provisions of federal environmental laws including NEPA and section 4(f).[168]

The case of *Ely v. Velde,*[169] involving the proposed construction of a state penal facility with federal assistance was similar in some respects to *Named Individuals.* In *Ely* a federal grant was approved which would have required compliance with the NHPA and NEPA. When faced with the delay that would result from the federal environmental process, the state elected to withdraw the grant and proceed immediately using only state funds. However, instead of losing the federal grant funds, the state proposed to reallocate them to other projects. The court concluded that the state could not retain funds that it obtained for the facility on the premise that it would comply with NHPA and NEPA, while at the same time plan to construct the facility without compliance. The court further stated that if the state elected to proceed with the project, it must either comply with the federal legislation or reimburse the federal government for funds previously allocated to the facility but subsequently diverted to other projects.

Similarly, in *Hall County Historical Society, Inc. v. Georgia Department of Transportation,*[170] the court held that absent compliance with the NHPA by FHWA as to a segment of a highway project, the state could not proceed to construct that segment with its own funds unless federal funds for the remainder of the project were reimbursed:

> Because to allow defendant GDOT to complete construction of that portion of the project known as "the Green Street extension" without the use of federal funds would, in effect, result in a defeat of Congressional intent and of the policies behind the National Historic Preservation Act, the court concludes that unless and until defendant GDOT withdraws all requests for disbursement of further federal funds for the project construction and immediately and forthwith reimburses the federal government for all funds previously disbursed for the project construction, defendant GDOT, its employees, agents, and all others acting in concert with it, are hereby enjoined from construction of that portion of the project known as "the Green Street extension," pending the Federal Highway Administration's compliance with the National Historic Preservation Act.[171]

In *Thompson v. Fugate* [172] the question was whether federal legislation, including the NHPA, NEPA, and Section 4(f), applied to the final 8.3 mile segment of a 75-mile beltway around the City of Richmond, Virginia. Significant federal participation had been involved in the remaining 67 miles. The question arose because of the potential impact of the final segment on property known as the Truckahoe Plantation, designated as a National Historic Landmark and included in the National Register of Historic Places. The court held that the federal involvement in the overall project precluded the isolation of the final segment:

> The highway project with which we are concerned cannot be fractionalized. We do not deal here with an isolated street, local in nature, such as Sharon Lane in *Civic Improvement Committee, et al. v. Volpe, et al.,* 459 F.2d 957 (4 Cir. 1972), but with a major federal-state project. . . . Any conclusion to the contra would be to participate in the frustration of Congressional policy, a function which the courts are duty bound to avoid where possible. The meeting of federal requirements for 21 miles of a 29.2-mile highway project in order to partake of the federal financial allotments for that 21-mile segment, and at the same time circumvent the need to protect the national environment to the fullest extent possible on the remaining 8.3-mile segment by labeling it as a separate project, is to engage in a bureaucratic exercise which, if it is to succeed, must do so without the imprimatur of this Court—a task which is doomed to failure unless and until a superior court deems otherwise.[173]

The Effect of NHPA on the Authority to Condemn

The NHPA has occasionally been used in attacks on an agency's authority to condemn property for a project, as opposed to an attack

[167] 496 F.2d 1017 (5th Cir. 1971).
[168] *Id.* at 1022.
[169] 497 F.2d 252 (4th Cir. 1974).
[170] 447 F.Supp. 741 (N.D.Ga. 1978).
[171] *Id.* at 752.
[172] 347 F.Supp. 120 (E.D.Va. 1972).
[173] *Id.* at 124.

upon a project itself. However, courts have generally held that Executive Order No. 11593 and Section 106 procedures do not apply to condemnation proceedings.[174] In so holding, the court in *United States ex rel. TVA v. Three Tracts of Land,*[175] stated as follows:

> Executive Order No. 11593 and 16 U.S.C. § 470f impose specific obligations on the heads of federal agencies with respect to sites, structures or objects which have been listed or may become eligible for listing in the National Register of Historic Places. Neither can be construed as limiting a federal agency's authority to acquire property through condemnation. The duties created in the statute and the executive order arise once a federal agency obtains ownership or control of property. Since condemnation is a common means used to acquire ownership or control of property, it seems clear that neither the statute nor the executive order were intended by Congress or the President to operate as a defense in a condemnation proceeding. . . .[176]

A similar defense was raised by the property owner in *United States v. 162.20 Acres of Land,*[177] involving an acquisition for a federal waterway project. In focusing on the provisions of the Declaration of Taking Act (DOTA),[178] the court agreed with the opinion in *United States ex rel. TVA v. Three Tracts of Land,* noting that:

> The filing of a declaration [of taking], by which title vests, is a neutral act vis-à-vis NHPA compliance procedures and the policy concerns behind them. . . . [W]e conclude that only an express statement by Congress that NHPA noncompliance is a defense to a condemnation itself would be sufficient to achieve that result.[179]

State courts have reached similar conclusions regarding the condemnation authority of local agencies. In *Grey v. Urban Renewal Agency,*[180] the Supreme Court of Arkansas held that the fact that the property being acquired for a redevelopment project was placed on the National Register did not constitute a defense to the eminent domain action acquiring the property. To the same effect, see *Order of Friars v. Denver Urban Renewal Authority.*[181] In *Order of Friars,* the Supreme Court of Colorado held that the statutory authority of the Denver Urban Renewal Authority (DURA) to condemn was not invalidated by an alleged failure to comply with the NHPA, but recognized the possibility of problems to be encountered beyond the condemnation phase:

> We do not regard this alleged failure under the federal statute as invalidating DURA's statutory authority to condemn. *We express no opinion, however, concerning problems which may be encountered because of DURA's alleged failure to comply with the federal statute.*[182]

The court in *United States ex rel. TVA v. Three Tracts of Land*[183] recognized how the trial court could deal with such problems. First, although the trial court was without power to stay the passage of title under the DOTA, it did have the power under the Act to fix the terms upon which the parties in possession shall be required to surrender possession. Thus, the trial court could withhold possession by the government pending compliance with the requirements of the NHPA. Second, the condemnee might file a separate suit to enjoin the project until the NHPA has been complied with.

Compare *United States v. 45,149.58 Acres of Land,*[184] where the court, although stating that the NHPA is not a valid defense to a condemnation action, ordered the condemnor to conduct a survey of the area taken to determine whether or not sites eligible for protection under the NHPA did in fact exist, as alleged by the property owner, and if so, to comply with the NHPA.

Compare, also, *Hart v. Denver Urban Renewal Authority,*[185] which involved the proposed sale, as opposed to acquisition, of a building included in the National Register. In concluding that the NHPA did not apply, the court noted that first, the grant agreement between the Denver Urban Renewal Authority (DURA) and the Department of Housing and Urban Development, which approved the expenditure of federal funds, preceded the listing of the property in the National Register by over a year; second, the subsequent expenditure of federal funds by DURA when it purchased the property from a private owner was not the expenditure being attacked; and third, the proposed sale by DURA involved no expenditure of federal funds. However, the court found a "continuing responsibility" under NEPA, concluding that the sale should be enjoined pending compliance with NEPA.[186]

Award of Attorneys' Fees in NHPA Cases

The National Historic Preservation Act Amendments of 1980 added Section 305 to the Act, providing for the award of attorneys' fees:

---

[174] The only exception appears to be United States v. 4.18 Acres of Land, Civ. No. 3-74-33 (D. Idaho February 10, 1975), where the court held that a declaration of taking and complaint were premature prior to compliance with NHPA procedures, dismissing the action without prejudice.

[175] 415 F.Supp. 586 (E.D.Tenn. 1976).

[176] *Id.* at 588.

[177] 639 F.2d 299 (5th Cir. 1981).

[178] 40 U.S.C. § 258a.

[179] 639 F.2d at 304 (5th Cir. 1981).

[180] 585 S.W.2d 31 (Ark. 1979).

[181] 527 P.2d 804 (Colo. 1974).

[182] *Id.* at 806 (emphasis supplied).

[183] 415 F.Supp. 586 (E.D.Tenn. 1976).

[184] 455 F.Supp. 192, 203 (E.D.N.C. 1978).

[185] 551 F.2d 1178 (10th Cir. 1977).

[186] The District Court, in reaching the right decision for the wrong reasons, held that neither the NHPA nor NEPA applied, but that HUD approved regulations under the NHPA activated the procedural requirements set out in the NHPA, and enjoined the sale pending compliance with these regulations.

> Sec. 305. In any civil action brought in any United States district court by any interested person to enforce the provisions of this Act, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.[187]

In *WATCH v. Harris,*[188] the first reported case to be decided under this section, the court awarded plaintiff attorneys' fees and expenses, to be shared equally by the federal government and a local urban renewal authority. In *WATCH* plaintiff obtained an injunction against an urban renewal project until such time as defendants complied with NEPA, NHPA, and HUD's regulations. The court found the case to be "pending" as of the effective date of Section 305, even though essentially all of the litigation had been completed and a settlement agreement signed by the parties prior to the effective date, with only a hearing for the purpose of dissolving a permanent injunction occurring after that date. The court rejected the urban renewal authority's contentions that the attorneys' fees amendment was applicable only to the federal government, and that the 11th Amendment of the United States Constitution barred an award of attorneys' fees because of substantial financial contributions by the State of Connecticut to the project. Regarding the latter argument, the court concluded that mere receipt of state funds for a project by a local public agency does not make the agency "an arm of the state," and even if the urban renewal authority were considered to be "an arm of the state," under the facts of the case the 11th Amendment would not bar an award of attorneys' fees when sought by a plaintiff who has secured prospective relief against state officials.[189]

Even though the attorneys' fees amendment operates only in favor of the person seeking to enforce the provisions of NHPA, it is possible for a state transportation agency to recover some of its other costs resulting from an unsuccessful challenge of a project under NEPA and NHPA. In *National Trust for Historic Preservation v. Adams,*[190] plaintiffs sought to enjoin a South Carolina highway project because of the alleged failure to comply with the requirements of Section 4(f), NEPA, and NHPA. In an appeal from an order granting summary judgment against plaintiff because no federal involvement in the project was found, plaintiff was required to post a $56,000 bond to obtain a stay of the judgment pending appeal. That amount represented the estimated escalation in the cost of the project resulting from a 2-year delay in construction. On appeal, the Fourth Circuit affirmed the summary judgment and the bond requirement.

[187] 16 U.S.C. § 470w–4.

[188] 535 F.Supp. 9 (D.Conn. 1981).

[189] The court followed Class v. Norton, 505 F.2d 123 (2d Cir. 1974) which noted a distinction in Edelman v. Jordan, 415 U.S. 651 (1974), between suits for retroactive benefits from a state, found in *Edelman* to be barred, and those involving only "incidental effects" on the state treasury resulting from compliance with prospective orders. Compare Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 496 F.2d 1017, 1026 (5th Cir. 1974) which followed *Edelman.*

[190] Nos. 80–1022, 1252 (5th Cir. January 23, 1981).

OTHER HISTORIC-RELATED ISSUES

Condemnation and Valuation of Historic Properties

The preservation movement basically developed because of the belief that historic properties have some special intrinsic value which would justify special efforts towards their preservation. In litigation seeking to prevent the damage or destruction of historic properties by public projects, the actual measure of historic value is regarded as a rather nebulous subject:

> The plaintiffs herein are concerned with the preservation of a structure of purported historic and architectural significance. Obviously it is difficult—if not well-nigh impossible—to assign precise value to such an interest.[191]

However, it not infrequently occurs that valuation is the only issue before a court in litigation involving historic properties.[192]

That issue has been, and will continue to be, encountered by public agencies, including transportation agencies, in the acquisition of property of historic significance by purchase or eminent domain for public uses. Such acquisition may be for a change in use, as for a highway right-of-way, for an adaptive reuse, or for the purpose of preservation and continuation of a property's existing character and use, such as a railroad terminal.

The type of property of historic significance which might be acquired usually falls within three categories:

[191] Save the Courthouse Committee v. Lynn, 408 F.Supp. 1323, 1331 (S.D.N.Y. 1975).

[192] Published literature regarding valuation of historic properties has appeared primarily in appraisal journals. See, e.g., Reynolds and Waldron, *Historical Significance . . . How Much Is It Worth?* 37 APPRAISAL J. 401 (1969); Gordon, *Valuing Historically Significant Properties,* 42 APPRAISAL J. 200 (1974); Warsawer, *Appraising Post-Revolutionary Homes,* 44 APPRAISAL J. 344 (1976); Cloud, *Appraisal of Historic Homes,* 42 THE REAL ESTATE APPRAISER 44 (1976); Dolman, *Incremental Elements of Market Value Due to Historical Significance,* 48 APPRAISAL J. 338 (1980). See also Comment, *Historic Preservation Cases: A Collection,* 12 WAKE FOREST L.REV. 227, 234–235 (1976); Bishop, *Trial Tactics That Work,* Proceedings of the Institute on Planning, Zoning, and Eminent Domain 241, 266–270 (1981); Mann, *Valuation of Historic Properties,* 1 PACE L.REV. 667 (1981) (dealing with valuation for tax assessment purposes).

1. Open space, such as a battlefield or natural features of historic significance.
2. An historic structure.
3. The former location of something of historic significance, whether now occupied or unoccupied.

Although the element of historic significance in most cases would enhance market value of property, it could possibly indirectly result in the reduction of market value. The fact of historic significance could result in use restrictions, limiting market value. Such use restrictions could result from: (1) location of a property within a designated historic district, with related zoning restrictions, (2) designation of a specific property as a landmark, and (3) restriction to historic preservation uses by contract or grant of easement.[193]

Such restrictions, however, would not affect market value to be determined in the condemnation proceeding if they were subject to a "bail-out" provision in the event of condemnation. For example, some states have statutory procedures for private property owners to contract for the restriction of the use of property to historic preservation purposes, with related property tax benefits. However, in the event of condemnation, the contract may be considered terminated for the purpose of valuation.[194]

The nebulous role of historic significance in determining the value of property is illustrated by the Louisiana case of *Recreation and Park Commission v. German.*[195] In that case, plaintiff sought to acquire property for the purpose of preserving what was known as the "Prince Murat House." The house was generally regarded as the place where Charles Louis Napoleon Achille Murat—a nephew of Napoleon Bonaparte—lived while a resident of the Baton Rouge area. Strangely enough, plaintiff, although seeking to preserve the property, disputed its historic background, contending "that any claim to historical significance for this old house on its claim that Murat owned and occupied the same is spurious." The court observed that the fact that the public regarded the house as the place where Prince Murat lived was sufficient to give it historic significance, and whether he actually owned the property was immaterial.

All three of the traditional appraisal approaches (market data, income, and reproduction cost)[196] have been utilized in connection with the valuation of historic properties with a strong preference for the market data approach.

In *State of Montana v. District Court,*[197] the owners of an historic site being condemned attempted to create a presumption of comparability of sales of historic properties. In a writ proceeding the owner sought to resolve an ambiguity as to the need to establish a foundation for admissibility of the designated sales. The court rejected the concept of admissibility based upon historic significance alone:

> If historic significance in fact enhances the fair market value, the landowner, of course, is entitled to that enhanced value. The fact that other sales involved property having historic significance is not sufficient foundation, standing alone, to admit such sales as comparable to the property here involved.[198]

The admissibility of the income approach was considered in *Corrado v. Providence Redevelopment Agency.*[199] That case involved the acquisition of a building constructed in the late 1700s, located in an area designated as an historical district, and used by its owner as a location for an antique business. Although no rent or other income was generated by the building other than profits provided by the antique business, the court concluded that the use of the income approach by the owner's appraisers was justified:

> Accordingly, we believe the ennumerated characteristics of Mr. Corrado's property reflected its unique nature as a structure of some historic significance. Under these circumstances, we hold that it was not error for the trial justice to admit and consider evidence of appraised value based upon the capitalization of income.[200]

The court further noted that the property, while unique, did have a definite and ascertainable market value, and, therefore, was not a so-called "specialty property."

The utility of the reproduction cost approach in evaluating historic properties would seem to be rather questionable because it would tend to ignore the element of specific concern—historic significance.[201] Never-

[193] See Netherton, *Restrictive Agreements for Historic Preservation,* 12 URB.L. 54 (1980); Comment, *Alternatives to Destruction: Two New Developments in Historic Preservation,* 19 SANTA CLARA L.REV. 719 (1979). For a detailed discussion of the subject, including a compilation of state laws, see Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements,* 14 REAL PROPERTY, PROBATE AND TRUST J. 540 (1979). See also the Uniform Conservation Easement Act, approved by the National Conference of Commissioners on Uniform State Laws in 1981, and the American Bar Association in 1982.

[194] See, e.g., California Government Code sections 50280–50290.

[195] 202 So.2d 469 (La. App. 1967).

[196] One appraiser, concluding that the market data approach, the cost approach, and the income approach were not applicable to the valuation of a property claimed to have historic value, adopted a fourth approach—the "opinion approach." City of Mechanicville v. Fort (A.D.N.Y. 1973) 349 N.Y.S.2d 215, 216.

[197] 517 P.2d 359 (Mont. 1973).

[198] *Id.* at 361.

[199] 370 A.2d 226 (R.I. 1977).

[200] *Id.* at 232.

[201] See Reynolds and Waldron, *Historical Significance . . . How Much Is It Worth?* 37 APPRAISAL J. 401, 407 (1969). Compare United States v. Becktold Co., 129

theless, property owners have sought to use this approach. In *Thomas B. Gray, Inc. v. Providence Redevelopment Agency* [202] the property being acquired included a prerevolutionary building that had been designated a National Historical Landmark. In a preliminary hearing, the trial court found that there had been market transactions comparable to the property being acquired and that the availability of that evidence foreclosed the owner from presenting testimony by any method other than market data. The trial court rejected an offer of proof by the property owner to the effect that the sales used by the condemnor were not true comparables and that the value should be determined by the reproduction cost method, and directed a verdict in the amount of the condemnor's testimony. On appeal the court concluded that the offer of proof did not clearly demonstrate that the property was so exceptional as to require the conclusion that the trial court was "palpably and grossly wrong" in its ruling. The judgment was reversed, however, because the property owner should have been permitted to present testimony as to a proper adjustment of the condemnor's sales to reflect current market value.

However, in *Fusegni v. Portsmouth Housing Authority* [203] the property owner was permitted to use the reproduction cost approach. That case involved the acquisition as part of a redevelopment project of a three-story colonial house built in 1725. Plaintiff's expert witness gave his opinion of value based on the reproduction cost of the house less depreciation, in the amount of $50,000. He testified that this figure represented the upper limit of its fair-market value, notwithstanding the fact that the house had apparent historic value. The witness further testified that the income from the property had a capitalized value of $44,250. The condemnor's witness testified to a value of $20,500 based on a combination of the income approach and comparable sales approach. On appeal the jury verdict of $41,500 was affirmed. The court concluded that the use of the reproduction cost of a structure less depreciation is permitted where the structure is unique or has special characteristics not found in other comparable properties.

A pitfall occasionally encountered in valuing properties of historic significance is the attempt to place a separate increment of value attributable to its historic significance. Some appraisers have attempted to recognize an historic element of value by merely adding a percentage factor.[204] Courts have generally frowned on such a subjective approach. The general rule was stated in the early case of *5 Tracts of Land v. United States:* [205]

> There is no doubt that historic association may enter into the market value of the land, but you are not to give, as separate items—first, market value; and second, historic value.[206]

In *City of Mechanicville v. Fort,*[207] the trial court confirmed a Commissioners' Appraisal report which recited that their proposed award included "what we believe to be adequate compensation for the historical and architectural value of the Old Cobblestone House." The appellate court reversed, stating that whereas the award could include an increment of compensation for the house's historic and architectural character to the extent that such elements enhance its market value, the Commissioners' report erroneously included an increment for historical and architectural value with no evidence of comparable sales adjusted to reflect that increased element of value. Upon rehearing, the Commissioners arrived at the same value as the first hearing, but recited compliance with the appellate court's direction, which award was affirmed on the second appeal:

> The commissioners have considered and applied the income and market data approaches to value and have considered and awarded an increment of compensation for the historical and architectural character of the old cobblestone house only to the extent that such aspects enhance the market value of the old cobblestone house as a residence.[208]

In *State v. Wemrock Orchards, Inc.*[209] the New Jersey Department of Conservation and Development was condemning certain property, which was a part of the site of a famous Revolutionary War battle, the Battle of Monmouth. Four appraisers testified, each using the market data approach, with opinions of value ranging from $191,000 to $349,000. There is no indication that the comparable sales utilized included properties of historic significance. The property owner was further going to offer the testimony of a local Revolutionary War expert, but declined when the court indicated it would sustain an objection to such testimony "unless he [the witness] translates it into the market value of the land." The witness apparently was not prepared to do so. Although there was no supporting evidence in the record, the property owner's attorney was permitted to expound at length upon the historic element in his final argument.

The jury verdict was $450,000, more than $100,000 higher than the highest appraisal testimony of any witness. On appeal, the award was reversed. The appellate court concluded that the jury relied upon its knowledge of the battle, with no evidence of its effect on value, although testimony as to such value would have been proper if offered.

F.2d 473 (E.D.Mo. 1942), involving an acquisition under the Historic Sites Act of 1935 of a historic site upon which nonhistoric improvements were situated. Testimony as to the reproduction cost of the improvements less depreciation plus land value was held proper.

[202] 333 A.2d 143 (R.I. 1975).

[203] 317 A.2d 580 (N.H. 1974).

[204] See Dolman, *Incremental Elements of Market Value Due to Historic Significance,* 48 APPRAISAL J. 338, 352 (1980).

[205] 101 Fed. 661 (3d Cir. 1900).

[206] *Id.* at 665.

[207] 43 A.D.2d 645, 349 N.Y.S.2d 215 (1973).

[208] 56 A.D.2d 945, 392 N.Y.S.2d 508, 509 (1977).

[209] 95 N.J. Super. 25, 229 A.2d 804 (1967).

Other courts have been more liberal in permitting the inclusion of a subjective element of value representing historical significance. See, for example, *United States v. 12 Tracts of Land,*[210] involving the acquisition of various parcels for an addition to the Fort Raleigh National Historic Site on Roanoke Island, North Carolina. The findings of the court following a trial without jury recited the following regarding the value of the historic significance of one of the parcels:

> Its intimate connection with the attempted establishment of the first permanent English settlement in America adds to it an inherent historical attribute of such significance as to enhance the pecuniary value of the land. Simply put, there is but just so much land on which the historians are reasonably certain the Fort and its immediate perimeter were situate, and it seems reasonable to this Court . . . to conclude that there are many who would be more than willing, if given the opportunity, to pay more in order to own a home or cottage upon a portion of this land, whether for personal satisfaction or because of an interest in history for its own sake.[211]

In *Scott v. State of Arkansas,*[212] the Supreme Court of Arkansas, in what amounted to a *de novo* review of evidence in a condemnation proceeding for the acquisition of property with some historic significance in connection with a Civil War battlefield, concluded that the property had "a peculiar and special value over and above its value for agricultural purposes." Although several of the witnesses recognized an historic component in appraising the property, the court increased the award above the amount of the jury verdict because the condemnor's testimony "failed to fully take into consideration" the peculiar element of the property's value because of its historic association.

Potential Tort Liability

A further question faced by public agencies continuing the use of otherwise obsolete or outdated facilities because of their historic importance is that of potentially increased exposure to tort liability. Obvious examples include bridges, continued in use under modern-day circumstances, which were designed when vehicle speeds were slower, loads were lighter, traffic was less dense, and vehicles were smaller,[213] and facilities which, although designed for one use, have been "recycled" to new uses.[214]

The application of the rules of the various jurisdictions relating to sovereign immunity, design immunity, notice of dangerous conditions, and the adequacy of warning to the public, and the distinction between liability based on the conduct of governmental functions as opposed to proprietary functions appear straightforward and beyond the scope of this paper.

However, one such area of potential liability may be of particular interest to those concerned with the rebuilding or continuation in use of historic structures, such as bridges;[215] that is, the consequence of rebuilding or continuing to use such facilities which fail to comply with contemporary safety standards. Such standards have been adopted by the Federal Highway Administration, including standards for bridges,[216] pursuant to the Federal-Aid Highway Act and the Highway Safety Act of 1966. The scope of application of these standards is not entirely clear.[217] On the one hand, Section 109(a) of the Federal-Aid Highway Act provides:

> The Secretary shall not approve plans and specifications for proposed projects on any Federal-Aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durabilty, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.[218]

On the other hand, Section 402(c) of the Highway Safety Act provides:

> Implementation of a highway safety program under this section shall not be construed to require the Secretary to require compliance with every uniform standard, or with every element of every uniform standard, in every State.[219]

---

[210] 268 F.Supp. 125 (E.D.N.C. 1967).

[211] *Id.* at 138.

[212] 326 S.W.2d 812 (Ark. 1959).

[213] The Surface Transportation Assistance Act of 1978 (Pub. L. No. 95-599), 92 Stat. 2689), in amending the "Special Bridge Replacement Program" to become the "Highway Bridge Replacement *and Rehabilitation* Program" may tend to increase the continued use of historic bridges. See 23 U.S.C. § 144.

[214] See notes 4 and 5, *supra.*

[215] Also of particular interest is the erosion of the design immunity defense in cases where a highway, even though safe when constructed, has become hazardous because of a change of conditions. *See, e.g.,* Baldwin v. State of California, 99 Cal. Rptr. 145, 491 P.2d 1121 (1972).

[216] 23 C.F.R. § 625.3(b). See also 23 U.S.C. §§ 109, 315, and 402.

[217] See Harrison, "Legal Problems and Concerns Associated with Historic Preservation," *Transportation Research Circular No. 206,* at page 8 (1979): ". . . Although these standards are designed to be flexible, they are rarely applied in a flexible manner by highway engineers who have an understably [sic] high concern that their facilities provide the utmost in highway safety. We find the inflexible application of these standards often has detrimental effects on historic structures. The Elm Bridge in Woodstock, Vermont, is one case in which we appear to have reached a happy accommodation between ASHTO standards and historic preservation values. . . ."

[218] 23 U.S.C. § 109(a).

[219] 23 U.S.C. § 402(c).

The question then is whether liability will result from departure from such standards—that is, whether the standards create a duty.[220]

This contention was made by plaintiffs in *Daye v. Commonwealth of Pennsylvania.*[221] Plaintiffs, residents of New York, were injured when a bus skidded through a guardrail and over an embankment in Pennsylvania. Plaintiffs chose not to bring an action in a state court based on state law because of the defense of sovereign immunity. However, they faced two hurdles to overcome in order to state a claim in a federal court: (1) the 11th Amendment bar to suits in federal courts against a state by citizens of another state, and (2) establishing a cause of action under federal law. Plaintiff argued, first, that receipt of federal-aid funds operated as a waiver of immunity under the 11th Amendment, and second, that the Federal-Aid Highway Act and Highway Safety Act created implied causes of action for injuries resulting from the alleged violation of the design and safety standards, specifically those standards relating to skid resistance and guardrails.

The federal district court held that the *design* standards adopted pursuant to the Highway Safety Act could not be the basis of liability because the Act was enacted in 1966, after the highway was constructed in 1958. The court then further considered only those provisions and regulations contained in the standards relating to skid resistance and resurfacing of the pavement. The court concluded that there was no federal cause of action arising from any violation of the safety standards on the basis that the highway safety program was directory rather than mandatory. That is, the only sanction authorized under the Act for failure to comply with the standards is the withholding of federal funds. Therefore, the court concluded that the Highway Safety Act created no duty on behalf of the states and no cause of action for breach of the Act.

Archeological Salvage

Although one of the most difficult of the historic preservation programs to administer,[222] federal archeological programs have generated relatively little litigation.

[220] See Thomas, "Legal Implications of Highway Department's Failure To Comply With Design, Safety, or Maintenance Standards," *National Cooperative Highway Research Program Research Results Digest 129* (October 1981).

[221] 344 F.Supp. 1337 (E.D.Pa. 1972); *aff'd,* 483 F.2d 294 (3d Cir. 1973).

[222] See Report by the Comptroller General, *Uncertainty Over Federal Requirements for Archeological Preservation at New Melones Dam in California,* CED-80-29 (Dec. 21, 1979); Report by the Comptroller General, *Are Agencies Doing Enough or Too Much for Archeological Preservation? Guidance Needed,* CED-81-61 (Apr. 22, 1981).

The basic problem with the program has been uncertainty as to the requirements of federal law, resulting in lack of agreement as to how much data recovery is enough. As stated by the Comptroller General in a report to the House Committee on Interior and Insular affairs:

> Federal agencies, States, ACHP, and archeologists cannot agree on how much data recovery is enough. As a result, no one knows whether Federal agencies are doing too much or too little and these controversies lead to increased project costs due to construction delays. Data recovery is the (1) scientific retrieval and preservation of archeological and historical artifacts and information that would otherwise be lost and (2) study of these resources in their original context prior to removal.[223]

Neither can federal agencies agree as to the amount of funds available for data recovery. One agency views the 1 percent funding limit under the Archeological and Historic Preservation Act of 1974 [224] as applying only to data recovery, but not initial survey work, while another views it as applying to both.[225]

Examples of the impact of this uncertainty on highway programs are described in the Comptroller General's report:[226]

- Delay to a $22 million California project, where a consulting archeologist proposed a $1,164,000 excavation contract, while the Advisory Council suggested merely recording and covering the site.
- A 15-month delay to a $22 million California project, resulting in additional costs of $3.2 million, because of a controversy as to how to deal with the late discovery of artifacts not identified in the initial survey.
- A 15-month delay to a Georgia project because of confusion over archeological requirements.

The remarks of a representative of the U.S. Department of Transportation in 1976 at an Advisory Council symposium on archeology, in describing an analysis of the environmental process in eight states, gives an indication of the attitude of the states:

> What the State departments of transportation said about historic preservation was not complimentary. They look upon the whole program as obstructionist, as a slowing down of Federal funds to the States, as procedural overkill, and particularly emphasize that the National Register criteria needs overhauling. In fact, the believability of the National Register is being seriously hampered by quality of sites, both historical and archeological, that are entered into the Register. The procedures

[223] Report No. CED-81-61, *supra,* note 198, at 35.

[224] See note 55, *supra.*

[225] Report No. CED-81-61, *supra,* note 198, at 38.

[226] *Id.* at 44–45.

> really baffle most of them, and they look upon them as a duplication of effort, a series of review after review, paperwork upon paperwork, and they are asking the Federal Department of Transportation to see what it can do about changing and simplifying this whole process. While there is no outward feeling against preservation as a whole, the feeling is that the Federal process is causing great problems at the State level.[227]

CONCLUSION

Within the last 15 years, a rather well-defined body of federal statutory and case law has developed in the area of historic preservation. No small amount of this law has developed as a result of, and, in some cases, specifically directed toward, transportation programs. In addition, there are a great number of state laws and local ordinances related to the subject of historic preservation which may impact such programs.

The federal legislation and cases discussed above provide a summary of the laws relating to historic preservation most likely to be encountered in working with state highway and transportation programs.

---

[227] Crecco, *DOT: Problems With the Historic Preservation Program,* ACHP Report, "Issues in Archeology," Vol. V, Nos. 2–3, p. 31 (1977).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators and their legal counsel, and engineers responsible for the planning, design, and construction of facilities. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document.

NCHRP PROJECT COMMITTEE SP20-6

TRANSPORTATION RESEARCH BOARD
National Research Council
2101 Constitution Avenue, N.W.
Washington, D.C. 20418