

3.4 Understanding Historic Preservation Issues

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Military bases often contain properties that have historic significance and that are protected from destruction by federal, state, or local laws. Identifying such sites and understanding the scope of protection for these properties can be crucial because the location of historic sites can affect redevelopment plans.

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Introduction

The laws promoting the preservation of historic property may restrict a local government's or developer's ability to redevelop the property. For instance, such laws may prevent the sale, demolition, or use of the property for a purpose that conflicts with its historic value. They also may restrict federal and state agencies from financing, licensing, or authorizing activities by the private sector.

While historic preservation laws can be a disincentive to redevelopment, these laws need not always inhibit redevelopment. Many federal and state laws also provide opportunities for grants or loans for rehabilitation and preservation activities that could enhance the value of the property.

The LRA should include a plan for negotiating federal and state historic preservation laws in its overall reuse strategy

If it appears that the military installation may include historic properties, the Local Redevelopment Authority (LRA) should develop an early strategy for negotiating the web of historic preservation laws so that the property's historic status can be used as an advantage and not an impediment to redevelopment planning.

Federal Laws

The principal federal statute governing historic property is the National Historic Preservation Act.¹ *Section 106 of that law requires federal agencies to consider the effects of their actions on historic properties and to seek comments from several government agencies before they take any action that might adversely affect historic sites.* The purpose of section 106 is to avoid unnecessary harm to historic properties. The statute, enacted in 1966, grew out of a concern that, in the 1950s and 1960s, hundreds of federal (and federally funded) projects, such as roads, dams, and urban projects, had been completed with little regard for their effects on local historic properties. Congress recognized the need for federal legislation that would ensure that the federal government considered the effect of its actions on historic properties.

¹ National Historic Preservation Act, 16 U.S.C. § 470f (Public Law 89-665; subsequently amended).

Because the reuse of military facilities always involves an action by the military, all redevelopment activities potentially are subject to the provisions of section 106. It is important to understand, however, that *section 106 is purely procedural, meaning that it is enough for the relevant agencies to follow a set of defined procedures, regardless of the outcome.* Even if a proposed activity is likely to cause adverse effects to a historic property, the activity can proceed so long as the procedures set forth in section 106 have been followed meticulously.



The procedures for complying with section 106 of the National Historic Preservation Act are set forth in regulations published by the federal Advisory Council on Historic Preservation and are called the "section 106 process."² The Advisory Council is an independent federal agency charged with advising the President and Congress on matters relating to historic preservation. While most historic properties are covered by the section 106 process, other *more stringent regulations apply to special types of historic properties including Indian historic properties and National Historic Landmarks.* These types of properties are not likely to be encountered on most military facilities.³

There are five essential steps to the section 106 process prescribed by federal regulations.⁴

The threshold for beginning the section 106 process is an "undertaking," which is defined as "any project, activity, or program [under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a federal agency] that can result in changes in the character or use of historic properties" and includes "new and continuing projects, activities or programs and any of their elements not previously considered under section 106."⁵ The term "historic properties" includes any "historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register [of Historic Places]."⁶

Although the section 106 process is procedural, the Advisory Council and many interest groups guard the process aggressively. Thus, it is critical to encourage the military agency to comply precisely with the procedures.

² 36 C.F.R. Part 800 (1994).

³ While most of these laws rarely will be implicated by redevelopment of closed military facilities, it is wise to be alert to their potential application. For example, the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa - 470ll, requires permits to excavate or remove archeological resources; the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 - 3013, requires protection and repatriation of Native American remains; the National Historic Sites Act, 16 U.S.C. §§ 461 - 467, provides a higher standard of protection for certain nationally significant historic sites than for other properties listed in the National Register of Historic Places.

⁴ For a detailed discussion of the section 106 process, see Advisory Council on Historic Preservation, *Section 106 Step-by-Step* (1986).

⁵ 36 C.F.R. § 800.2(o).

Step One: Identification and Evaluation of Historic Properties

Step One involves the initial determination of the "undertaking's area of potential effects" (APE), which is "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist."⁷

Although not required by regulation, federal agencies frequently seek concurrence in the definition of the APE from the state historic preservation officer (SHPO).⁸ Every state has a designated state historic preservation officer.

Following delineation of the APE, the federal agency — here the military — is required to review existing information on historic properties potentially affected by the undertaking and to solicit the views of the SHPO, local governments, and organizations concerning any historic properties which might be located within the APE.⁹

After identifying any such properties, the military agency must consult with the SHPO to determine whether any of the historic properties which have been identified within the APE are listed in or are eligible for listing in the National Register of Historic Places. If no Register-listed or Register-eligible properties are found, the section 106 process ends.

If there is a question concerning the eligibility of a particular resource for the National Register, or concerning the boundaries of a property that has been found to be eligible, the military agency can request a Determination of Eligibility by the Keeper of the National Register of Historic Places. The regulations governing Determinations of Eligibility provide for relatively brief review periods, but these review periods can be greatly extended if the Keeper requests additional information or if interested parties submit extensive comments on the proposed determination.¹⁰

Step Two: Assessment of Effects

In Step Two, the military agency must engage in a multi-step consultation and review process. The military must consult with the SHPO to determine (1) whether the undertaking would have any effect upon the Register-listed or Register-eligible properties identified during Step One, and (2) if such effects are found, whether the effects would be adverse.¹¹ Determinations of effect and adverse effect must be based upon the "Criteria of

⁶ *Id.* § 800.2(e).

⁷ *Id.* § 800.2(c).

⁸ 16 U.S.C § 470a(b)(1)(A).

⁹ 36 C.F.R. § 800.4(a), (b).

¹⁰ 36 C.F.R. Part 63

¹¹ *Id.* § 800.5.

Effect" and "Criteria of Adverse Effect" which are contained in the regulations of the Advisory Council.¹²

If the military agency determines (with the SHPO's concurrence) that the undertaking will have no effect, the section 106 process is concluded. If the SHPO disagrees and believes that there will be an effect on historic properties, however, the military must determine whether the effect would be adverse.

The determination of whether the reuse plan will adversely affect historic properties is the single most important part of the historic review process. The LRA should work closely with the military to coordinate strategy on identification of impacts to potential historic properties.

If the military determines (with the SHPO's concurrence) that, although an undertaking would have an effect, such effect would not be adverse, it is required to provide summary documentation to the Advisory Council. If the Advisory Council does not object to such determination, the section 106 process is concluded. The vast majority of section 106 processes are concluded as the result of a federal agency determination of "no effect" or "no adverse effect" with SHPO concurrence and Advisory Council acquiescence.

Step Three: Consultation with the Advisory Council

If the military agency determines that the undertaking would have an adverse effect on a historic property, or the Advisory Council objects to a determination of no adverse effect, the military is required to consult with the Advisory Council, the SHPO, and any other interested parties (including the head of the government of the affected area) in an effort to reach an agreement specifying means for avoiding or reducing those adverse effects.¹³ The agreed-upon measures are usually set forth in a Memorandum of Agreement (MOA). Execution of an MOA by the Advisory Council concludes the section 106 process.

If any historic property within the APE is a National Historic Landmark designated under the National Historic Sites Act of 1935,¹⁴ completing Step Three then represents a significant threshold in the section 106 process.

If an undertaking could have an adverse effect on a National Historic Landmark, section 110(f) of the National Historic Preservation Act requires that the federal agency, "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm" to the landmark.¹⁵ Such a determination also would require the Advisory Council to participate in the MOA consultations and report to the President, Congress, and the Secretaries of Interior and Transportation, and would enable the Advisory Council to request that the Secretary of Interior provide a report detailing the significance of the

¹² *Id.* § 800.9(a), (b).

¹³ 36 C.F.R. §§ 800.5(e), 800.10.

¹⁴ 16 U.S.C. § 461.

¹⁵ *Id.* § 470h-2(f).

property, describing the effects of the undertaking, and recommending measures to avoid or mitigate adverse effects.¹⁶

Step Four: Advisory Council Comment

Step Four occurs only when the military agency and the SHPO fail to negotiate an MOA or the Advisory Council does not concur in an MOA. In either case, the Advisory Council is provided an opportunity either to comment on the undertaking or to review, seek modifications to, and sign the MOA.¹⁷

Step Five: Agency Action

If the military agency executes an MOA with the SHPO and the Advisory Council, it is required to carry out the undertaking in accordance with the terms of the MOA. If there is no such MOA, the agency is required to "consider the Council's comments in reaching a final decision" on the merits of the proposed undertaking.¹⁸ In addition, with respect to a National Historic Landmark, the agency is required to the maximum extent possible, "[to] undertake such . . . actions as may be necessary to minimize harm to such landmark."¹⁹

Public Requests for Advisory Council Review

Apart from the five basic steps in the section 106 process, any person at any time may request that the Advisory Council consider the military agency's findings (1) that no historic properties are located within the area of potential impact, (2) that no properties within the area of potential impact are eligible for, or listed in, the National Register of Historic Places, or (3) that the undertaking would have no effect on properties which are eligible for, or listed in, the Register.²⁰ Such a request does not suspend action on the undertaking but does require that the Advisory Council advise the military, the SHPO, and the requesting person of its views within 30 days of receiving the request. The Advisory Council regulations state that the federal agency should — but is not required to — reconsider its finding in light of the Advisory Council's recommendations.²¹

The LRA should not let the military agency alienate local historic preservation advocates because those groups are likely to continue their efforts long after the military is gone.

State and Local Laws

Many states and some localities have enacted laws which, to widely varying degrees, are similar to section 106. All these laws require a review like that under section 106 in connection with any state agency, or any state-funded, -licensed, or -approved project

¹⁶ 36 C.F.R. § 800.10.

¹⁷ *Id.* § 800.6.

¹⁸ *Id.* § 800.6(c)(2).

¹⁹ 16 U.S.C. § 470h-2(f).

²⁰ 36 C.F.R. § 800.6(e)(1).

²¹ *Id.* § 800.6(e)(2).

affecting property listed in the National Register or in the state register. Moreover, some laws apply to projects undertaken, funded, licensed, or permitted by local governments, or, in a very few states, apply even to private projects.

In addition to capturing activities left untouched by section 106, some state historic preservation laws go beyond the procedural focus of section 106 and prohibit damage to historic properties unless the applicable state agency finds that there are no feasible or prudent alternatives to the project that would avoid an adverse effect upon the historic property.

Although there is no uniform state historic preservation code, many states have enacted laws creating state registers of historic places that employ criteria similar to those used for listing in the National Register and which automatically incorporate sites listed in the National Register.²² Most states also authorize local governments to enact local historic preservation ordinances, which use zoning restrictions to promote preservation. *In the spectrum of possible restrictions on historic property, local landmark designation unquestionably poses the most severe restraint on the use of historic property.*

Local landmark preservation laws are often overlooked by federal agencies because they do not have to comply with them. The LRA may not be exempt from such laws and thus should make sure that its interests are protected.

Numerous local governments, either directly or through locally created landmark preservation commissions, designate and restrict the development of properties even if such properties are privately owned, such development is privately financed, or the private owners opposed such designation or restriction.²³ Although listing of a property in the National Register or state register does not automatically trigger local designation in most instances, such a listing could enhance the possibilities of a local landmark designation.

Grant Programs as Incentives to Purchasers of Historic Properties

In developing its reuse plan, the LRA also should be aware that several government programs provide direct grants or other assistance to encourage the preservation and rehabilitation of historic structures.

Federal Historic Preservation Fund

Grant assistance may be available from the federal government's Historic Preservation Fund (HPF). The HPF was established by the National Historic Preservation Act and matches

²² For a good discussion of these state laws, see National Conference of State Historic Preservation Officers, *The Directory of State Historic Preservation Programs* (1993).

²³ A thorough review of local historic preservation laws and their effect on development is provided by Conservation Foundation and National Center for Preservation Law in *A Handbook on Historic Preservation Law* (1983).

state, local, and private rehabilitation funds. Federal HPF funds may be used in connection with the preservation, protection, reconstruction, rehabilitation, restoration, or stabilization of a property that is *listed* in the National Register or has been officially identified as contributing to the significance of a listed historic district.²⁴ The most significant practical limitation to access to the federal grant program has been the scarcity of funds for such activities. Also, grants require substantial documentation and project oversight by the SHPO and the National Park Service, are unavailable for projects involving federally or church-owned properties or buildings owned and used by state or local governments, are unavailable for projects accorded a federal income tax credit for historic rehabilitation, and are conditioned upon execution of an enforceable covenant to maintain and provide public access to the property for a specified period.

State Grant Programs

Several states maintain a separate state-funded grant or loan program to facilitate historic preservation in addition to funds appropriated to match federal HPF allocations. In recent years, only a handful of these states have actually made any grants in excess of \$200,000.

Federal Rehabilitation Loan Programs

National Register listing or a determination of eligibility for listing of a building in a depressed urban area may entitle the building owner to participate in preferential loan programs under the Housing and Community Development Act.

Under its Historic Preservation Loan Program, the U.S. Department of Housing and Urban Development may insure loans "for the purpose of financing the preservation of . . . residential structures which are registered in the National Register of Historic Places or which are certified by the Secretary of Interior to conform to the National Register criteria." Such loans may not exceed \$25,000 for a single-family residence or the lesser of \$60,000 total or \$12,000 per family residence in a multifamily dwelling. Prior SHPO review is required for applications.

Community Development Block Grant (CDBG) funds disbursed to local, state, and metropolitan governments pursuant to the Housing and Community Development Act also may be used for preservation or restoration of privately or publicly owned sites that are either listed on, or eligible for listing on, the National Register or a state or local inventory. The form of federal assistance can vary widely and can include various types of loans or grants. Like the Housing Preservation Loan Program, CDBG funds are targeted at rehabilitating depressed urban areas.

²⁴ To be eligible for HPF funds, a property must actually be listed on the National Register; a project that is simply eligible for the National Register is not necessarily eligible for HPF funds.

Conclusion

With proper planning, the LRA can negotiate the historic preservation process so that it has a manageable impact on the reuse plan. The key for the LRA is to identify potential historical sites early, and to make sure that the military abides by the preservation process carefully.