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Historic Landmark Designation: Protection from Road Construction?

by James D. Cameron, Esq.

Imagine a hypothetical Maryland property, a colonial farmhouse surrounded by rolling farmland. Assume that this historic property is in an area undergoing the development known as “urban sprawl.” Urban sprawl often occurs in conjunction with new road construction and with the improvement — usually the enlargement — of existing roads. Assume further that a new road has been proposed which would bisect the hypothetical property.

In this context, this article considers the following questions. To what extent would federal, state, and local historic designations protect the farmhouse from the proposed new road construction? Moreover, to what extent would these historic designations protect the farmland surrounding the house as well as the building itself? The answers to these questions require a review of federal, state, and local historic preservation laws.

The principal federal legislation with respect to historic preservation is the National Historic Preservation Act (“NHPA”).¹ Section 470 of the Act sets forth Congressional findings and declarations of policy.² These include findings that “historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency,”³ often “in the face of ever-increasing extensions of urban centers.”⁴ Apparently, Congress contemplated the kind of problem posed in the hypothetical when enacting NHPA.

The Act declares that the preservation of historic resources “will improve the planning and execution of Federal and federally assisted projects.”⁵ Road con-

struction is largely financed with federal funds. However, it is usually administered by state highway departments. Assume this is so in the case under consideration.

Section 470-1 of the Act expressly declares it to be the policy of the federal government, “in partnership” with state and local governments, to preserve publicly and privately owned historic resources.⁶ Thus, federal policy encourages the preservation of the hypothetical historic farm.

This policy is implemented through the creation of a National Register of Historic Places, maintained by the Secretary of the Interior.⁷ The listing of the hypothetical property in the National Register would depend upon the consideration of various criteria promulgated by the Secretary of the Interior.⁸

The criteria for inclusion on the National Register are as follows:

The quality of significance in American history, architecture, archaeology, engineering and culture is present in . . . sites [and] buildings . . . that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or

that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.⁹

These broadly worded criteria provide for the inclusion of “a wide diversity of resources” in the National Register.¹⁰

It is important to note that “eligible property is not restricted to property that has been officially *determined* eligible for inclusion in the National Register.”¹¹ Rather, the regulations define an eligible property as one “that *meets* the National Register criteria” not as one “that *has been determined* to meet such criteria.”¹²

These broader eligibility standards for historic landmark protection resulted from a Congressional amendment to the NHPA. “Before 1976, NHPA required federal agencies to consider the impact of a federally assisted undertaking only on property ‘included in the National Register.’ However, [in 1976,] Congress amended section 106 of the NHPA . . . [to read] ‘included in or *eligible for inclusion* in the National Register,’”¹³ Returning to the hypothetical, assume that the property has been duly listed on the National Register.

It has been suggested that the most important word in the criteria for listing in the National Register is “integrity.”¹⁴ The regulatory criteria previously quoted used this term in the phrase “integrity of location, design, setting, [and] materials.”¹⁵ The observation about the importance of integrity assists

in analyzing the level of protection the Act affords the land surrounding the hypothetical farmhouse. As will be seen, the particular site would be examined to determine whether the road construction would effect its "integrity."

Section 106 of the NHPA¹⁶ largely determines the measure of protection afforded the hypothetical property. This section directs the "head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking" to "take into account the effect of the undertaking" on any eligible property before approving the expenditure of federal funds or the issuing of any federal licenses.¹⁷

The Secretary of the Interior has promulgated regulations pursuant to section 106 of NHPA which detail specific procedural requirements imposed upon agency officials under the Act. These procedural requirements were concisely yet fully explicated by the United States District Court for the Central District of California in *Colorado River Indian Tribes v. Marsh*.¹⁸ That court summarized the regulations as follows:

NHPA requires all federal agencies to examine the effects of their actions on property included in or eligible for inclusion in the National Register of Historic Places . . . Executive Order 11593, 36 Fed. Reg. 8921 (May 13, 1971) buttresses the responsibilities of federal agencies under NHPA. Section 2 of the order requires federal agencies, no later than July 1, 1973, to locate, inventory and nominate properties under their jurisdiction to the National Register. Under NHPA and Executive Order 11593, the federal agency must exercise caution to assure the physical integrity of those properties that appear to qualify for inclusion in the National Register. 16 U.S.C. §470h-2(a)(2).

Regulations implementing NHPA and Executive Order 11593 have been adopted by the Advisory Council [on Historic Preservation, which is created by the Act]. The general procedure set forth in the regulations requires an agency as early as possible, and in any event before taking any action that would foreclose the Advisory

Council's opportunity to comment, to identify any National Register or eligible property located within the area of the undertaking's potential environmental impact which may be affected by the undertaking. 36 C.F.R. §800.4.¹⁹

In the hypothetical, it is highly likely that the investigating official would be a federal highway official. This official would need to ascertain whether any eligible properties are affected by the proposed construction. He would also need to consider any such effect in his decision.

The hypothetical highway official would also have an affirmative duty to meet with the State Historic Preservation Officer ("SHPO") to evaluate the scope of the protected area. The scope of the protected area would determine the protection afforded the land surrounding the hypothetical historic farmhouse. The regulations define this area

"the most important word in the criteria for listing . . . is 'integrity.'"

as "that geographic area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur and thus cause a change in the historical, architectural, archaeological, or culture qualities possessed by a National Register or eligible property."²⁰

The official would then have the additional burden of evaluating whether the proposed construction would have an "effect" on the property.

The agency must then determine the effect of a proposed undertaking on any National Register or eligible property. An "effect" occurs (1) "whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archaeological, or cultural characteristics that qualify the property to meet the criteria of the National Register,"

or (2) when an undertaking "changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property" that contributes to its historic significance. 36 C.F.R. §800.3 (a) and (b). An effect may be either direct or indirect. Indirect effects include "changes in the pattern of land use, population density or growth rate that may affect on [sic] properties of historical, architectural, archaeological, or cultural significance. *Id.*"²¹

Thus, as a threshold matter, the official would have to make a determination with respect to any "effect" the highway construction would have on the property based on these criteria.

If we assume that such an effect exists, the official would then need to determine whether it is adverse.

Where an effect is found, the agency, in consultation with the SHPO, must then determine whether the effect would be adverse, applying the criteria of adverse effect, which include:

- (1) Destruction or alteration of all or part of a property;
- (2) Isolation from or alteration of the property's surrounding environment;

- (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting. . . .²²

The character of the effect would depend upon circumstances unique to the site and to the proposed construction.

The next step in the process depends on whether the effect is determined to be "adverse" or not.

If a determination of no adverse effect is made by both the agency and the SHPO, the agency must send adequate documentation of such determination to the Executive Director of the Advisory Council. 36 C.F.R. §800.4(c).

If the agency or the Executive Director finds an adverse effect, the agency must (1) prepare a Preliminary Case Report requesting the comments of the Council, (2) notify the SHPO of this request, and (3) undertake the consultation process set forth in Section 800.6.

Until the Council issues its comments pursuant to section 800.6, the agency is precluded "from taking or sanctioning any action or making any irreversible or irretrievable commitment that could result in an adverse effect on a National Register or eligible property or that would foreclose the consideration of modifications of alternatives to the proposed undertaking that could avoid, mitigate, or minimize such adverse effects." 36 C.F.R. §800.4 (d).

Under the consultation process set forth in section 800.6, the agency, SHPO, and the Executive Director of the Advisory Council are the consulting parties who must "consider feasible and prudent alternatives to the undertaking that could avoid, mitigate, or minimize adverse effects on a National Register or eligible property." *Id.* The consulting parties must execute a Memorandum of Agreement either specifying how the adverse effects will be avoided or mitigated, or acknowledging that they cannot be avoided or mitigated and specifying any recording, salvage, or other measures to minimize the adverse effects that shall be taken before the undertaking proceeds. *Id.* The Memorandum is then reviewed by the Council. It constitutes the comments of the Council and satisfies the agency's responsibilities under section 106 of the NHPA, section 2(b) of the Executive Order, and the Regulations 36 C.F.R. §§800, *et seq.*²³

One can see that the Act would require the hypothetical official to follow complex procedural requirements. The Act also places tremendous responsibility on the official to make the required determinations. This is consistent with the Congressional intent that properties "worthy of protection because of their historical, architectural, or cultural significance at the community, state or regional level" be protected by being "brought to light and that attention be focused on their significance whenever proposals are made in, for instance . . . the public road program."²⁴

Congress also intended that "a mean-

ingful balance be struck between preservation of these important elements of our heritage and new construction to meet the needs of our evergrowing communities"²⁵ Perhaps for this reason "the Advisory Council's directives impose only a procedural obligation with no direct bearing" upon the agency's "substantive decision."²⁶ The Department itself has made clear in its regulations that, having once complied with the procedural requirements, the agency could "adopt any course of action it may feel appropriate."²⁷ In fact, the regulations continue by stating that "[w]hile the Advisory Council comments must be taken into account and integrated into the decision-making process, the program decision rests with the agency implementing the undertaking."²⁸

Clearly, under the Act, Congress has delegated substantial authority to the

*"Failure to comply
with the Act
has led to
injunctions. . . ."*

executive branch to balance preservation with current needs. Notwithstanding this broad administrative discretion, the judiciary may still play a role. Failure to comply with the Act has led to injunctions against construction and against disbursement of federal funds pending compliance.²⁹ In addition, appellate courts have reversed lower courts and remanded cases for failure to order compliance with the requirements of the Act.³⁰

Assume that the hypothetical highway official complied with the requirements of the Act. If this official or the executive director of the Advisory Council finds an adverse effect, the agency must allow the Council an opportunity to comment.³¹ The agency official, the State Historic Preservation Officer, and the executive director of the Council would then meet to explore alternatives.³² Any plan to mitigate the adverse effect would be clarified in a Memorandum of Agreement.³³ If no plan is reached, the Coun-

cil might meet and issue written comments to the agency.³⁴ After the agency has made its final decision, the agency would submit a written report to the Council explaining its decision.³⁵

The hypothetical property may have an additional avenue of protection. The historical nature of the property may be considered as a factor in an Environmental Impact Statement. Preparation of such a statement might be required pursuant to the National Environmental Policy Act of 1969 (hereinafter "NEPA").³⁶ NEPA, however, is beyond the scope of the instant inquiry.

Furthermore, the hypothetical property may be protected at the state level. Maryland has enacted enabling legislation to allow municipal regulation of "the construction, alteration, reconstruction, moving and demolition" of historic structures as well as their "appurtenances and environmental settings."³⁷ "Structures" in the enabling statute explicitly refers to "natural land formations and appurtenances and environmental settings."³⁸ "Appurtenances" and "environmental settings," in turn, include "walkways and driveways . . . trees, landscaping, and rocks."³⁹ Thus, the statute explicitly contemplates the regulation of the land surrounding the house in the hypothetical.

The hypothetical property may also be subject to the jurisdiction of an "historic district commission." The Maryland Code provides for the creation of historic district commissions by counties or municipalities.⁴⁰ The Code further provides that "when reviewing the plans for any such construction or change the commission shall give consideration to (inter alia) (1) the historic or architectural value and significance of the structure and its relationship to the historic value of the surrounding area; [and] (2) the relationship of the exterior architectural features of the structure to the remainder of the structure and the surrounding area."⁴¹ On their face, these restrictions only apply to any person, individual, firm, or corporation.⁴² Accordingly, they do not appear to apply to public highway construction. Nevertheless, the Court of Appeals of Maryland has held that a county is subject to the jurisdiction of an historic area commission.⁴³ Whether the state highway department would also be subject to the jurisdiction of an historic area commis-

sion does not appear to have been addressed by the Maryland courts. In any case, a commission would only have jurisdiction if a structural change were involved.

Still, counties and municipalities in Maryland have enacted local level historic preservation legislation pursuant to Article 23 and Article 66 B of the Maryland Annotated Code. The constitutionality of such ordinances have been upheld by the Supreme Court.⁴⁴ The Court of Appeals of Maryland has also recognized "that the preservation of architecturally or historically significant areas is a valid exercise of the police power."⁴⁵

Assume the hypothetical property is in Harford County. Harford County, a "charter county," has adopted historic preservation legislation pursuant to Article 25 A. The Harford County Code establishes "standards necessary to allow the preservation of historic structures and sites in the county."⁴⁶ The Code creates an "Historic Preservation Commission"⁴⁷ and prescribes a procedure for designation of historic districts.⁴⁸ However, the level of protection provided by the County to the hypothetical property remains unclear.

To summarize, the federal government, the State of Maryland, and numerous counties and municipalities in Maryland have explicitly stated their intent to preserve historic resources. NHPA creates the National Register of Historic Places, and it requires federal agency officials, including highway officials, to follow procedural safeguards with respect to the adverse effects of federally funded or licensed projects.

A hypothetical highway official considering federally funded road construction would be under an affirmative burden to locate properties eligible for inclusion on the National Register. Moreover, such an official would be required to consider whether the proposed construction would have any adverse effects on any historic properties, and would have to take steps to mitigate any such adverse effects. Effects on surrounding land must be considered if the land is in the area of potential environmental impact. The highway official would have to consider both direct and indirect effects on the historical, architectural, archeological, or cultural qualities of this impact area. The SHPO would also

be involved, offering an expert perspective.

Nevertheless, the extent of the protection afforded the hypothetical property would appear to depend largely upon its particular circumstances. It would also depend largely upon the judgment of the highway official, and, to a lesser extent, upon that of the SHPO. Finally, the courts, particularly the federal courts, constitute a check. This check helps to further the intent of Congress that the preservation of our nation's historic resources be balanced against the present needs of our communities. Hopefully, those engaging in

"The Court of Appeals. . . has also recognized 'that the preservation of architecturally or historically significant areas is a valid exercise of the police power.' "

this balancing process possess the wisdom to solve one of the problems resulting from continuing population growth — the effect of development on historic resources.

Endnotes

¹16 U.S.C. §§470 to 470w-6 (1988).

²16 U.S.C. §470(b) provides:

The Congress finds and declares that—

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and in-

dustrial developments, the present governmental and non-governmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

³*Id.* §470(b)(3).

⁴*Id.* §470(b)(5).

⁵*Id.* §470(b)(6).

⁶16 U.S.C. §470-1 provides:

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the states, local governments, Indian tribes, and private organizations and individuals to —

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations;

(3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and

benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

⁷*Id.* §470a.

⁸*Id.* The Secretary has promulgated these regulations pursuant to the authority delegated to him by Congress. *Id.* at §470a(2). The Act defines an historic property as any "site, building, structure or object included in or eligible for inclusion on the National Register." *Id.* †470w(5).

⁹36 C.F.R. §60.4 (1990).

¹⁰*Id.*

¹¹*Boyd v. Roland*, 789 F.2d 347, 349 (5th Cir. 1986) (emphasis in original).

¹²*Hough v. Marsh*, 557 F. Supp. 74, 88 (D. Mass. 1982) (emphasis in original); *Lee v. Thornburgh*, 707 F. Supp. 600, 606 n.15 (1989).

¹³*Boyd*, 789 F.2d at 348-49 (quoting 16 U.S.C.A. §470(f) (1985)).

¹⁴Address by Steven Orens, Partner at Frank, Bernstein, Conaway and Goldman, University of Baltimore School of Law, November 21, 1988.

¹⁵36 C.F.R. §60.4 (1988).

¹⁶Section 106, codified at 16 U.S.C. §470f, provides:

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 head of any

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

¹⁷*Id.*

¹⁸605 F. Supp. 1425, 1434-1437 (C.D.Cal. 1985) (footnotes omitted).

¹⁹*Id.* at 1434-35.

²⁰36 C.F.R. §800.2(o).

²¹*Colorado River*, 605 F. Supp. at 1435.

²²*Id.*

²³*Id.* at 1435-36.

²⁴*U.S. Code Cong. & Admin. News* 3309 (1966).

²⁵*Id.*

²⁶*Hough*, 557 F. Supp. at 87.

²⁷*Id.*, quoting 36 C.F.R. §60.2(c) (1988)).

²⁸*Id.*

²⁹*See, e.g., Hall County Historical Soc'y v. Georgia Dep't of Transp.*, 447 F. Supp. 741 (N.D.Ga. 1978); *Colorado River*, 605 F. Supp. 1425.

³⁰*See, e.g., Hough*, 557 F. Supp. 74.

³¹Comment, *Preserving Historic Structures: An Analysis of Regulatory Legislation and Tax Incentives in Federal, Maryland, and Municipal Law*, 14 U. Balt. L. Rev. 557, 561 (1985) (citing 36 C.F.R. §800.4(e) (1984)).

³²*Id.* (citing 36 C.F.R. §800.6(b) (1984)).

³³*Id.* (citing 36 C.F.R. §800.6(b)(5) (1984)).

³⁴*Id.* (citing 36 C.F.R. §800.6(b)(7), (d)(5) (1984)).

³⁵*Id.* at 561-62 (citing 36 C.F.R. §800.6(d)(7) (1984)).

³⁶*See, e.g., Wade v. Lewis*, 561 F. Supp. 913 (N.D.Ill. 1983); *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423 (5th Cir. 1985).

³⁷Md. Ann. Code art. 66 B §8.01(a)(2) (1957, 1988 Repl. Vol.).

³⁸*Id.* §8.01(a)(3).

³⁹*Id.*

⁴⁰*Id.* §8.03(a).

⁴¹*Id.* §8.06.

⁴²*Id.* §8.05.

⁴³*City of Annapolis v. Anne Arundel County*, 271 Md. 265, 316 A.2d 807 (1974).

⁴⁴*Pennsylvania Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

⁴⁵*Donnelly Advertising Corp. v. City of Baltimore*, 279 Md. 660, 671, 370 A.2d 1127, 1133 (1977). *See also City of Annapolis*, 271 Md. 265, 316 A.2d 807.

⁴⁶Code of Harford County, Part 2, Art. X, §267-59 (1986).

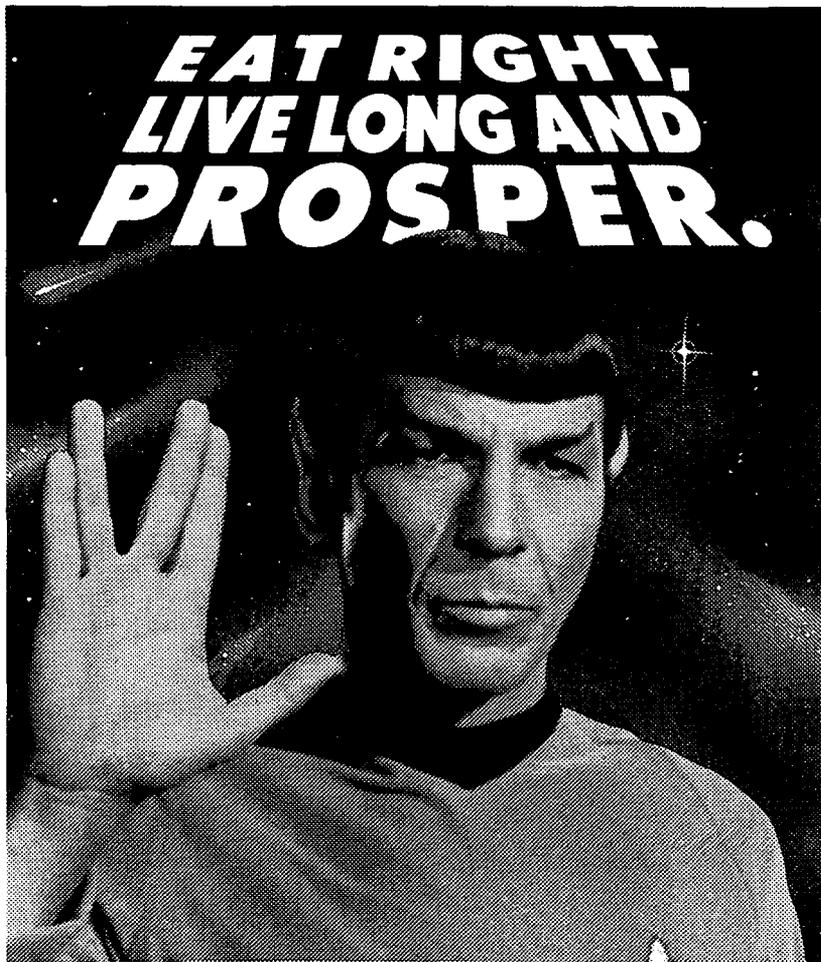
⁴⁷*Id.* Art. XI, §§267-61 to 267-67.

⁴⁸*Id.* Art. XII, §§267-68 to 267-74.

James Duryea Cameron graduated in May 1990 from the University of Baltimore School of Law, where he served as Associate Comments Editor of the *Law Review*. He is admitted to the practice of law in Pennsylvania and he has passed the July 1991 Maryland Bar Exam. He is currently the law clerk to Honorable Warren G. Morgan, President Judge of the Court of Common Pleas of Dauphin County, in Harrisburg, Pennsylvania.



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