

Section 106

Taking Into Account the Effect of Federal Undertakings on Historic Properties

By Scott M. Grammer and Lance M. Werner

The enactment of the American Recovery and Reinvestment Act in 2009¹ resulted in an unprecedented amount of federal dollars being pumped into infrastructure and housing improvement programs throughout Michigan. This stimulus effort has compressed the time frame in which federal agencies have to initiate and complete mandatory regulatory reviews triggered by the use of federal dollars. One area of regulation seeing increased activity includes historic preservation-related review and compliance. This article provides the reader with a brief introduction to Section 106 of the National Historic Preservation Act of 1966 (NHPA)² and information necessary to better educate their clients on this provision of the law.

As noted in previous preservation-related articles in this series,³ Congress, after observing that preserving the nation's heritage was in the public interest, set as national policy the practice of encouraging historic preservation. Enactment of the NHPA placed upon federal agencies and their delegates the obligation to act as responsible stewards of the nation's heritage. Congress also facilitated grants of federal assistance to state and local governments and provided the necessary regulatory scheme to effectuate the new national policy. Section 106 of the NHPA⁴ is the cornerstone of historic preservation regulation and is triggered whenever an agency launches a federal or federally licensed action (e.g., grants, licenses, and permits) having the potential to affect significant historic properties.⁵ Cornell University Law School's Legal Information Institute offers open access to a contemporary version of Section 106 and is available at http://www.law.cornell.edu/uscode/uscode_sup_01_16.html. The Government Printing Office also furnishes access at <http://www.gpo.gov/>. Con-

gress established the National Register of Historic Places,⁶ state and tribal historic preservation offices (SHPO and THPO),⁷ and the Advisory Council on Historic Preservation (ACHP)⁸ in part to help effectuate the Section 106 review process.

Section 106

On its face, Section 106 may appear unremarkable—just one more regulatory hoop through which agencies must jump. However, first impressions can be wrong. Section 106 can be deceptively complicated and compliance with its requirements may be time consuming. Further complicating matters is that in addition to being unfamiliar with the Section 106 process, agencies frequently delay their Section 106 responsibilities until late in their planning process. Consequently, troublesome issues identified during Section 106 review are identified late in the federal undertaking, causing expensive delays in developing solutions and, in some cases, derailing the undertaking altogether.

To implement Section 106, the ACHP has issued regulations⁹ outlining the process including the Initiation of Section 106, Identification of Historic Properties, Adverse Effects,¹⁰ and Implementation.

Initiation of Section 106

Section 106 begins when the responsible federal agency or the agency's delegate identifies that its undertaking is the type of activity that may affect historic properties. If the undertaking is unlikely to affect historic properties, the agency has no further obligation. If the undertaking is likely to affect historic properties, the agency must develop a consulting process that includes the public and the SHPO and THPO, if appropriate, and identify any other consulting parties interested in the undertaking.

Identifying Historic Properties

The federal agency or its delegate is then responsible for determining the undertaking's area of potential effect (APE) and identifying historic properties within the APE. If no historic properties are found within the APE, the agency must consult with the SHPO/THPO to verify its conclusion, and the Section 106 process is essentially complete. If historic properties are found within the APE, the agency or its delegate must assess any potential adverse effect that its undertaking may have on those historic properties within the APE.

Adverse Effects

The agency—in consultation with the SHPO, THPO, and consulting parties and after considering public comment—determines whether its undertaking will have adverse effects. If the undertaking is determined to have no adverse effect, the agency proceeds as appropriate. If the undertaking is determined to have an adverse effect, the parties must work together to resolve it through avoidance, minimization, or mitigation. Depending on the complexity of the issues involved, the ACHP may be included to provide additional commentary and guidance on how the parties should best proceed. In the end, resolution of adverse effects typically results in the drafting of a memorandum of agreement (MOA) describing how all interested parties have agreed to avoid, minimize, or mitigate the adverse effect.

Implementation

Following negotiation and execution of the MOA, the agency moves forward with its undertaking according to the terms laid out in the MOA.

Possible Roadblocks to Section 106 Completion

As mentioned previously, the Section 106 process appears deceptively straightforward. In practice, there are several points where the agency, SHPO/THPO, and the consulting parties can become lost in the process, creating roadblocks to its successful completion.

Perhaps the most easily avoidable roadblock to successful completion of Section 106 involves public participation. Failure to include public comment or invite interested parties to participate in the process as consulting parties can cause significant delay to Section 106 completion, particularly if an unplanned discovery forces an agency to include an interested party after the discovery.

In addition, federal agencies may simply be unaware of Section 106 and that it is the agency's responsibility to initiate Section 106. As a result, the agency is often made aware of its Section 106 obligations only after it has already invested heavily in the undertaking. This is frequently the case when a federal agency delegates its responsibility to an entity charged with administering its program. The agency's delegate fails to comply with Section 106 because the delegate does not completely understand what its responsibilities and obligations actually entail. Further adding to the confusion is that the agency does not or may not be able to provide its delegate with appropriate guidance on how the Section 106 process works.

For those agencies aware of their Section 106 obligations, the federal agency may choose to wait and initiate Section 106 late in its planning process. The ACHP's regulations address this approach by encouraging agencies to coordinate their Section 106 responsibilities "with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation."¹¹ Ignoring this advice can be a risky gamble depending on the nature and extent of the agency's undertaking and whether unanticipated discoveries await to further delay the Section 106 review process.

We hope that this information proves useful for anyone involved with an undertaking that falls within the purview of Section 106. ■

Scott M. Grammer is an attorney with the Michigan State Housing Development Authority's Legal Affairs Division and is assigned to the Michigan State Historic Preservation Office. He is a registered professional archaeologist who earned his MA degree from the University of South Florida and his JD at the Thomas M. Cooley Law School.

Lance M. Werner is the director of the Kent District Library. Previously he was the library law specialist at the Library of Michigan. He is licensed to practice law by the State Bar of Michigan. He earned a JD from Michigan State University and an MLIS from Wayne State University. He is the president-elect of the Michigan Library Association.

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FOOTNOTES

1. Pub. L. No. 111-5.
2. 16 USC 470 *et seq.*
3. Votta & Werner, *Property tales*, 90 Mich B J 3 (March 2011); Werner & Grammer, *Navigating Michigan's historic preservation rehabilitation tax credits*, 89 Mich B J 3 (March 2010); Werner & Bozen, *Using new tricks to help the old dog—Electronic resources for legal research in historic preservation law*, 87 Mich B J 48 (October 2008).

4. 16 USC 470f.
5. For Section 106, "historic properties" means historic properties listed on or eligible for listing on the National Register of Historic Places and includes both architectural works and archaeological sites.
6. 16 USC 470(a)(1)(A).
7. 16 USC 470(b)(1)(A). SHPOs and THPOs assist communities in identifying, evaluating, preserving, and revitalizing their historic, archeological, and cultural resources.
8. 16 USC 470(i). The ACHP is an independent federal agency that promotes the preservation, enhancement, and productive use of historic resources. The ACHP is tasked to advise both the president and Congress on national historic preservation policy. Additionally, as part of the Section 106 process, the ACHP must be provided a reasonable opportunity to comment on the federal undertaking.
9. 36 CFR §800.
10. Examples might include excavation for utilities on or near an archaeological site or the demolition of a historically significant structure.
11. 36 CFR §800(3)(b).

ADDITIONAL CITATIONS AND MISCELLANY

The Advisory Council on Historic Preservation website is available at <<http://www.achp.gov/>>. All websites cited in this article were accessed October 14, 2011.

The Michigan State Historic Preservation Office website is available at <http://www.michigan.gov/mshda/0,4641,7-141-54317_54371--,00.html>.

Thomas F. King, *Federal Planning and Historic Places: The Section 106 Process*. AltaMira Press, New York (2000).

Thomas F. King, *Cultural Resource Laws and Practice: An Introductory Guide*. AltaMira Press, New York (1998).

Numerous articles are available for a fee on HeinOnline at <<http://heinonline.org>>, e.g., 12 Urb Law 3 (1980).

Research articles are available through Google Scholar at <<http://scholar.google.com/scholar>>.