

Comments by Amos Loveday 7/16/2017

Mr. Chairman, Members of the Committee.

It is an honor to be invited to testify at this hearing on the National Historic Preservation Act. It was 51 years ago almost to the day (July 15, 1966) that your predecessors on the National Parks and Recreation Subcommittee of the Committee on Interior and Insular Affairs held hearings on S bill 3035 very near where we are today (Rm 1328). That bill would become the National Historic Preservation Act.

Your "Hearing Memorandum" described well the program that NHPA created so I will focus on the "determined eligible" issue highlighted on page seven.

Let me begin by observing the National Historic Preservation Act as passed rested on two assumptions:

- First, there would be created a National Register of Historic Places, a well-researched, public listing of historic sites worthy of preservation. The National Park Service was to develop criteria and then through partnerships with states conduct a nationwide survey to identify sites that were eligible.<sup>1</sup> Those sites after careful review and documentation were to be listed in the Register.
- Second, Federal Agencies in the course of carrying out their responsibilities would consult that Register and where possible avoid listed sites. When listed sites could not be avoided the agency was to consult with a body called the Advisory Council on Historic Preservation to devise a strategy to minimize harm.
- I emphasize for purposes here that Federal agencies were not expected to extend the provisions of the Act to a site until it was listed in the National Register and that listing had been published.

The approach was logical, reasonable, efficient, and broadly supported.<sup>2</sup> The bill passed both Houses in late September and the president signed it on October 15, 1966.

Problems appeared immediately that led to the "determined eligible" issues you alluded to in your memorandum!

To find money to finance the War in Vietnam and Great Society Programs the Johnson Administration decided not to ask Congress to appropriate the money to support the states' survey.<sup>3</sup> Hence the National Register, the foundation part of the program, was unfunded.

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<sup>1</sup> The Administration representative, George Hartzog, NPS Director, advised the Committee on July 15 that the survey would cost \$40,000,000 and require four years to complete. The same figures and schedule were repeated at August hearings and as late as mid-September the Administration indicated a request for about \$10,000,000 would be in it next budget submission.

<sup>2</sup> No one testified against the bill.

To compensate the Park Service devised what was promoted as a temporary solution. It would rely on agencies rather than the states to identify and nominate sites. In summary, each agency was to do the research to determine if eligible historic sites were present in its holding or project areas before it took actions that may cause an adverse effect.

In theory, the agency was to go through the National Register nomination and review process for any eligible sites it discovered. However, when the nomination and review process proved to be time consuming the Advisory Council devised an approach that allowed agencies to skip the actual nomination if they agreed to treated eligible sites as if they were actually listed.

In a series of guidance documents that culminated in 36 CFR 800 ACHP laid down rules to guide agencies – rules that gave preservation considerable leverage when using the “determined eligible” approach. As Robert Garvey, the first Director of the Advisory council put it the agencies “...didn’t know what that meant [ to consult with ACHP] nor how to go about it, so we started giving them guidelines that ended up in sort of forty pages of regulations that leaves no stone unturned – tell you exactly what to do every step of the way.”<sup>4</sup>

This approach was ratified by the Nixon administration in Executive Order 11593 and the phrase “or eligible for inclusion in the National Register” added to Section 106 of the Act in 1976.<sup>5</sup> The temporary fix had become permanent.

While the eligible approach did not preclude actual listing it rendered listing on the Register unnecessary for Section 106 protection. In doing so it had several pernicious consequences. Let me discuss four.

- It redefined the point at which the protective benefits of the Act commenced. Under the 1966 Act as passed a discrete act of government – The Keeper of the Register adding the site to the National Register - granted historic status and the privileges that carried. Under the Eligibility approach a site acquired historic status when it met the criteria for consideration. A significant consequence of this change was the triggering of the Act’s provisions without the owner or anyone else knowing it had occurred.<sup>6</sup>

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<sup>4</sup> Charles B. Hosmer Jr., *Interview with Robert Garvey Conducted on or about August 4, 1981* (College Park, MD: University of Maryland, 1991), 51-52.

<sup>5</sup> Executive Order 11593 (May 6, 1971) Sec. 2 (b)

<sup>6</sup> For example, the owner of a property might be prepared to lease space to a cell tower builder only to be told by the builder that because the property was discovered to eligible for listing the company was choosing another site. More disturbing the owner of a property that was not eligible in its own right might find that a neighboring property was eligible and to avoid mitigation cost the tower builder is abandoning the site.

- It collapses the identification of sites and the evaluation of effects into the same process. This encouraged activists to use historic sites as surrogates for other agendas. Essentially, those opposed to change look for eligible sites and use their presence to delay or prevent projects they oppose.<sup>7</sup>

By the beginning of the 21<sup>th</sup> Century preservation standards had become so lax and the historic sites value as a surrogate so well known that activists routinely advised taking advantage of Section 106 and local versions. For example, one activists advised his readers that historic districts “are designated for any number of economic and social advantages [that] may in fact have little to do with genuine preservation.” For good measure, he continued “sometimes it’s just preservation as decoration. Other times it is not even that.”<sup>8</sup>

- The Eligibility approach, designed initially to compensate for a failed appropriation, appears to have become inefficient and costly.

Surveys done to satisfy the ACHP rules appear to identify very few sites. During the past decade agencies have averaged over 100,000 106 undertakings annually. Since National Register listings during that have averaged about 1350 sites per year, most of which come from Tax credit projects not Section 106 generated research, the surveys are not contributing much to the actual National Register program. At best agency efforts result in new register listings less than 1.4 % of the time.<sup>9</sup>

Nor do the surveys seem to identify harms to sites. For example, a 2012 CRS report indicated that Section106 surveys found about 2% of the federal undertakings had an adverse impact on historic sites.<sup>10</sup>

If the results appear to be meager the cost seems great. While we do not have comprehensive accounting of costs, a 2012 the American Cultural Resources Association (ACRA) study is suggestive. The study estimated members income from “investigations” carried out for, “both for private industry and for Federal, state, and local governments, so that these organizations can efficiently meet their legal obligations under the National Historic Preservation Act and related laws and regulations” at over a billion dollars.<sup>11</sup> If

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<sup>7</sup> Rick S. Kurtz, “Historic preservation: A statutory vehicle for disparate agendas,” The Social Science Journal, Vol 43 Issue 1, 2006, 67-83, p. 67.

<sup>8</sup>. William E. Schmickle, The Politics of Historic Districts: A Primer for Grassroots Preservation (Lanham, MD: AltaMira Press, 2007). 9.

<sup>9</sup> This data is taken from Annual reports THPO’s and SHPO’s submit to NPS to fulfill the reporting requirements of their Historic Preservation Fund Grants.

<sup>10</sup> Kristina Alexander, A Section 106 Review Under the National Historic Preservation Act (NHPA): How it Works. (Congressional Research Service, May 16, 2012) P.3

<sup>11</sup> The quote is from the ACRA WEB site. The site was changed in 2016(?) but hard copies of the pages are in the authors files. The data was also in Donn R. Grenda, Ph.D., Michael Heilen, Ph.D., Teresita Majewski, Ph.D.,

the ACRA estimate is approximately correct contract costs alone for National Historic Preservation Act compliance is greater than the combined budgets of the National Archives, The National Endowment for the Humanities, The National Endowment for the Arts, and the institute of Museum and Library Services. – or put differently, roughly 40% of the National Park Service budget<sup>12</sup>

- Finally, it may be observed that The Eligibility approach has not produced good history. The research it produces is often cursory and the elimination of the review steps the full National Register Nomination requires leaves the “determined eligible approach” open to abuse. As one writer on the American Cultural Resources Association “list serve” observed to his fellows in January 2002 “the present system...requires us to produce garbage documents for agencies which hold the resources in contempt and think even less of the law.”<sup>13</sup>

Indeed, from data NPS collected in 2005 on State Historic Preservation Office workloads and staff assignments, it appears that about 30 times more state historic preservation office effort went into each National Register Nominations review than into the reviews of the agency contractor reports that ACHP requires.<sup>14</sup> Yet each essentially requires the same level of protection,

It is instructive that at least 15 State Historic Preservation Office carry disclaimers as to the accuracy of the data in their files to their WEB sites or printed forms.<sup>15</sup>

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Characterizing the U.S. Cultural Heritage Management Industry with Independently Collected and Analyzed Data, Paper presented at the European Association of Archaeologists 19<sup>th</sup> Annual Meeting, Pilsen, Czech Republic, 2013, particularly slides 8-11. Marion Werkheiser, “The CRM Industry in the Age of Trump.” ACRA Webinar Presentation 11/28/2016 accessed at [http://www.acra-crm.org/resources/Pictures/WebinarTranscript\\_11\\_28\\_2016.pdf](http://www.acra-crm.org/resources/Pictures/WebinarTranscript_11_28_2016.pdf)

To be clear I make no claim that the entire billion is from Section 106 surveys, but clearly a large portion is.

<sup>12</sup> Data on Agency budgets is take from the respective organizations federal budget submissions

<sup>13</sup> Mark Campbell, e-mail message to [acra-l@lists.nonprofit.net](mailto:acra-l@lists.nonprofit.net), January 19, 2002 16:23:02.

<sup>14</sup> In 2005 (not an unusual year) the State Historic Preservation Offices employed a total of 214 people to review the 105,400 survey reports consultants and agencies prepared. Assuming a 260-day work year with allowances made for holidays and vacations each employee had to review two consultant reports (which can be well over 100 pages long and identify dozens of potential historic sites) per day. NPS Report

*The National Historic Preservation Program: The Historic Preservation Fund Grant (FY 2005) -- at a Glance March 3, 2006* (Washington: NPS, 2006). NPS, “Historic Preservation Fund National Register Program Area FY 2005 Products State Nominations Listed during 2005,” in *Historic Preservation Fund Grants to States FY 2005 Preliminary End of Year Reports* (Washington, D. C.: NPS, 2006).

<sup>15</sup> For example, the Delaware SHPO advises people seeking authorization to use its data base ““The use of any of this information is at your own risk. The Division of Historical and Cultural Affairs does not assume any legal responsibility for the information contained herein, which is provided “as is” with no warranties of any kind.” Delaware Division of Historical and Cultural Affairs, “Application Form for user account on the Cultural and Historical Resources Information System.”

I conclude with the observation that the “determined eligible approach,” a temporary measure created to compensate for Vietnam War time austerity, should be revisited and maybe even retired. We should return to the intent of the Act, - the identification of sites worthy of preservation for their historic value, a robust National Register Program grounded in excellent research that is fully visible to all citizens, and an administration of preservation rules firmly committed to resisting their use as tool for other agendas.

That is not what we have at present. Indeed, we have a complex and often opaque process. One, to use William Murtagh the first Keeper of the National Register words, in which “process and methodology have replaced subject in many instances.”<sup>16</sup> A process that Robert Stipe, an attorney and leading preservationist during the closing years of the 20<sup>th</sup> Century described as “highly technical, sometimes almost to the point of unintelligible...”<sup>17</sup>

The National Trust’s 2010 analysis of the National Historic Preservation Act’s Section 106 observed that some preservationists expected it and ACHP to be “a thumb on the preservation side of the scales.” Casting preservation as a practice that merchants at one time used to cheat customers explains the anger that often swirls around preservation controversies. As with the shopper of old who expected the butcher’s scales to provide an honest balance, many approach the preservation process expecting fairness but come away feeling cheated.<sup>18</sup>

As the Committee revisits the “determined eligible” matter it would be well to keep in mind that it arose out of austerity. Put candidly Congress passed a law, then failed to fund its implementation and staff devised a work around. If Congress expects to fix the problems that have arisen it must either increase funding so the Preservation Act can function as drafters intended or reduce the legal mandate to fit the resources. Whatever steps this Committee takes I

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Main advises “No guarantee, inferred or explicit is made regarding the accuracy of the survey information, addresses, locations on the maps, or eligibility assessments. Many of the surveyed properties in CARMA may have incomplete or missing addresses. The absence of a survey form for a specific property is no indicator of whether or not a property has been recorded or documented by the Commission. Cultural & Architectural Resource Management Archive (CARMA) Map Viewer, Site Information and Disclaimer

The authors of an article in the Public Historian, a professional publication that caters to historians who work outside of academia, reviewed non-academic research in 1993 and dismissed most Section 106 reports as “brief,” “inconclusive.” See Bastian and Bergstrom, “Reviewing Gray Literature: Drawing Public History’s Most Applied Works out of the Shadows,” The Public Historian, Vol 15, No 2, (Spring of 1993), 67.

<sup>16</sup>. William Murtagh, “The Preservation Act of 1966: 20 Years Later,” *Preservation News, Special Supplement*, October, 1986. S16.

<sup>17</sup>. White and Edmondson, *Procedural Due Process in Plain English: A Guide For Preservation Commissions*, 1.

<sup>18</sup> Lisa E. Barras, “Part 1, *Section 106 of the National Historic Preservation Act Back to the Basics* (Washington, D.C.: National Trust for Historic Preservation, 2010), p.29. <http://www.preservationnation.org/resources/legal-resources/additional-resources/Back-to-Basics-Summary.pdf> (accessed September 27, 2010).

would hope that a review of funding levels for the program gets as much attention as other problems.