

NCSHPO

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Via email: dnull@achp.gov

RE: ACHP's call for comments on the Application and Interpretation of the Secretary of the Interior's Standards for the Treatment of Historic Properties.

In response to the Advisory Council on Historic Preservation's (ACHP) call for comments on the application and interpretation of the Secretary of Interior's Standards (the Standards), the National Conference of State Historic Preservation Officers (NCSHPO) submits the following thoughts, observations, and ideas. State Historic Preservation Officers (SHPOs) are fundamental stakeholders and practitioners in the interpretation of the Standards and, perhaps more than many preservation constituencies, are required to utilize them daily as foundational principles. As such, while we always appreciate the opportunity to examine aspects of our national historic preservation program, we urge measured care when examining specific aspects of the Standards for study when, as a whole, they are so integrated into many different parts of the federal historic preservation program as both regulatory and philosophical foundations.

Given SHPOs' unique position, the NCSHPO has established a working group to take a more deliberative look at the Standards, consider the overlapping and complex roles they play in various aspects in our national program, and to invite input from a variety of stakeholders. We, therefore, provide the following general comments with the caveat that we believe the thirty-day comment window the ACHP has opened is but a start to evaluating the Standards in the fashion they deserve. We think a broader, intentional effort, which would necessarily involve the National Park Service and other stakeholders (both within and beyond the preservation community) is a more desirable path forward. As a result, these comments are largely preliminary and general in nature. The subject is nuanced and complex.

Generally speaking, we find the Standards to be inherently flexible, as they should be. They are informed by almost 50 years of experience and conscientious practice and have been successfully used by thousands of practitioners in a multitude of regulatory and advisory settings to help preserve and rehabilitate countless historic properties all over the United States. In regards to the ACHP's line of inquiry concerning what actions may be appropriate to "improve the federal response to equity, housing

supply, energy efficiency, renewable energy or climate-change concerns,” we sincerely hope that the effort is not intended to be mutually exclusive. In our view the preservation of our historic places is of equal public benefit – so we look forward to hearing how federal housing-supply, energy efficiency, renewable energy and climate-change related policies can be improved to include the preservation of our heritage. Historic preservation itself is a worthy societal objective, and too often has to compete and stand aside compared to just as worthy competing interests. We strongly believe that historic preservation can exist in harmony with other concerns, missions, and needs.

Background and Applicability of the Standards

The Secretary of Interior’s Standards cover four different treatments – restoration, preservation, rehabilitation and reconstruction. It is important to note, specific to the ACHP’s primary interest in “rehabilitation,” that “rehabilitation,” specifically, is covered in two ways in regulation:

1. The Secretary of Interior’s Standards as a whole are codified in 36 CFR Part 68. According to these regulations, these Standards are NOT regulatory except for “...all proposed grant-in-aid development projects assisted through the National Historic Preservation Fund,” although this requirement is not explicit in the National Historic Preservation Act (NHPA).
2. An additional version of the Rehabilitation Standard, although nearly identical, is additionally included as a requirement for Historic Tax Credit projects, codified in 36 CFR Part 67 for “certified historic structures.”

The *Secretary’s Standards For Historic Preservation Projects* appeared as a final rulemaking in the Federal Register in December of 1978 and were “...for planning, undertaking, and supervising historic preservation grant-in-aid projects under the provisions of the National Historic Preservation Act of 1966 as amended through the creation of a National Historic Preservation Fund.” Guidelines for applying the standards were first published in 1979. The Standards were substantially revised in 1992 (codified in 1995) and were renamed the *Secretary of Interior’s Standards for the Treatment of Historic Properties*, however the intent was the same – to set standards for “...all proposed grant-in-aid development projects assisted through the National Historic Preservation Fund.”

Applicability to Federal Agencies and Local Governments

Regarding a Federal agency nexus, it is important to note that the Act charges the Secretary of Interior with establishing standards for historic property in Federal ownership, *in consultation* with other agencies:

- c) PROFESSIONAL STANDARDS FOR PRESERVATION OF FEDERALLY OWNED OR CONTROLLED HISTORIC PROPERTY.—The Secretary shall establish, in consultation with the Secretary of Agriculture, the Secretary of Defense, the Smithsonian Institution, and the Administrator of General Services, professional standards for the preservation of historic property in Federal ownership or control.

It does appear that when the Standards were published as a notice in the Federal Register in 1983 to address the 1980 amendments to the NHPA that more explicitly articulated federal agency requirements, that these agencies, in addition to the ACHP, State Historic Preservation Officers (SHPOs) and the National Trust for Historic Preservation were consulted. Rather than issuing completely separate standards for federal agencies or for federally-owned properties, however, the NPS states in the

“Purpose,” that this single set of standards was to “integrate the diverse efforts of many entities performing historic preservation...” They go on to “encourage” federal agencies to utilize them to meet their Section 110 responsibilities under the National Historic Preservation Act – though noting that additional guidance was in development. In addition to encouraging SHPOs, they further encourage their use by “local governments wishing to establish a comprehensive approach to identification, evaluation, registration and treatment of historic properties within their jurisdictions.” This period would appear to be when local governments began using the standards for the basis of local ordinances, coinciding with the NHPA amendments that created the Certified Local Government as the third governmental preservation partner next to the federal government and the States.

By the time the Standards were revised again in 1992, and codified in 1995, they were substantially rebranded as the *Secretary of Interior’s Standards for the Treatment of Historic Properties* and simplified to the format familiar to users today. According to the 1995 Federal Register notice, consultation took place with NCSHPO, the National Trust and “a number of outside organizations,” and no comments were received during the 60-day public comment period. While no specific federal agency consultation was noted for this version of the Standards, by that time, the ACHP had begun altering their regulations to comply with the 1992 Amendments to the NHPA. A 1996 version published in the Federal Register named the Secretary’s Standards as a “Standard Treatment,” by which an “adverse effect” can be avoided. By 1999, however, the Final Rule, which *did* note substantial consultation with Federal agencies, SHPOs, tribes and many preservation groups, defined any alteration of a property not consistent with the Secretary’s Standards (36 CFR 68) as an adverse effect. This time would appear be the moment when the Secretary’s Standards took on a regulatory role, rather than an advisory one, for federal agencies – despite not being regulatory themselves and despite being the domain of another federal agency. By default it would seem to, in some cases, lead to conflicts over the interpretation of the Standards relative to adverse effect determinations.

This overlapping jurisdiction, at times, can create inconsistencies. For example, the ACHP specifically calls out “removal” of a property from its original location as an adverse effect, regardless of circumstances. This principle does conflict with the NPS Guidelines on Flood Adaptation for Rehabilitating Historic Buildings – which acknowledges, due to sea-level rise and other climate hazards, that relocation may be necessary and can be achieved while meeting the Standards.

Recommendation: Examine the intersection of the Secretary’s Standards with ACHP regulatory references and develop mechanisms to assure consistency and, if necessary, to explore whether and the degree to which every action that is considered as not meeting the Standards (which of themselves are advisory and open to interpretation) must be treated as an adverse effect.

Reasonable Manner, Economic and Technical Feasibility

Beyond the limited regulatory function of the Secretary’s Standards for projects funded via the Historic Preservation Fund and Tax Credit projects, the primary intent is “...to provide general guidance for work on any historic building.” Underscoring this approach is an often-overlooked statement located both in the regulations (36 CFR 67 and 68), and in the printed text: “The Standards will be applied taking into consideration the economic and technical feasibility of each project.” The language in 36 CFR 67 covering Historic Tax Credit projects takes it a step further by stating the “...Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility.”

Recommendation: This issue, in particular, arises in Historic Tax Credit projects. What is absent at this time is any guidance on what this “reasonable manner” language means and, as a consequence, these statements are interpreted on a case-by-case basis. While this scenario provides abundant flexibility, it may also be the source of conflict and may further complicate a process that by design relies upon individual interpretation. A specific piece of guidance with examples and/or case studies – similar to what the IRS offers for various tax law situations – would enhance the understanding of how practitioners could/should approach this topic from different access points – federal agency projects, historic tax credit projects (which already include “reasonable manner” as an additional instruction), HPF grant projects, and local commissions. Such guidance could also help contextualize interpretation relative to the nature of the resource at hand.

Guidance versus Regulation

While the Standards are designed to be regulatory for projects funded via the Historic Preservation Fund (HPF) and for Historic Tax Credit projects, they are simultaneously meant to be advisory for everyone else. Over the years, they have been regarded as the “gold standard” by which historic properties are approached and, in many cases, at the early suggestion of the NPS, have in turn been adopted as regulatory by local preservation commissions all over the country. Therefore, an inherent tension can exist in their interpretation – reconciling how various approaches can be both required and recommended.

Recommendation: Consider whether one set of standards is still the best approach if they are to be used as both advisory and regulatory and, if they are, perhaps providing clearer introductory language on exactly how the standards should be approached depending upon the access point.

One-Size Fits All

Shortly after passage of the NHPA, discussion took place on whether or not there should be a “grading” of historic properties that would inform level of significance and corresponding treatments. For a variety of reasons, both practical and philosophical, the only differentiation that has been maintained has been between listings on the National Register of Historic Places and National Historic Landmarks – with the latter being awarded a higher standard of care and consideration. For everything on the National Register, however, no such gradation exists, and for good reason. This fact however means that when applying the Standards, there is really no formal distinction between a highly significant individual National Register listing and a rowhouse that is simply a contributing building in a historic district. While 36 CFR 68 states “one set of standards...will apply to a property undergoing treatment, depending upon the property’s significance, existing physical condition, the extent of documentation available, and interpretive goals, when applicable,” the reality is that other than steering users towards the “rehabilitation” standard, the application of the standards relative to significance has become the subject of art rather than science.

We do not disagree with an earlier generation of preservationists that following the “grading” model could deem some properties of a “lower” grade expendable. Conversely, the “grading” metric may change depending on rarity from century to century, and indeed, what certain buildings represent positively or negatively within society at a particular time. Those are indeed valid concerns, but we believe that the Standards could bear examination in this regard.

We also recognize and acknowledge that some practitioners value the elastic nature of the Standards, and believe that they do allow for these distinctions to be made as is, relying instead on the character defining features on a building-by-building basis.

Recommendation: Develop additional guidance, case studies and examples on how to apply the standards relative to significance and how to define character defining features.

Preservation Briefs and Bulletins

Because of the necessarily broad nature of the Standards and the panoply of building types, periods, and styles throughout United States, it has been necessary for the National Park Service to develop 50 Preservation Briefs and 22 Tech Notes covering a range of topics from masonry to the identification of character-defining elements. In some cases, those documents have not been updated in more than 40 years. While some technologies may not change, many certainly do. The ACHP specifically expressed in this call for comments an interest in Substitute Materials – a topic that has been raised by federal agencies and private developers alike. Preservation Brief 16: The Use of Substitute Materials on Historic Building Exteriors, for example, has not been updated since 1988. Fortunately, a revision to this Bulletin is already underway by the NPS and, hopefully, will address some of the questions raised by current practitioners. Other issues, such as lead paint treatment, however, are more complicated. As EPA standards evolve and individual Federal agencies develop their own policies, they be in conflict with guidance relative to the Standards. The Army, for example, citing a requirement to remove any interior trim, window or door that had even trace amounts of lead present, contradicts current preservation practice that recommends paint removal and encapsulation.

Recommendation: With additional funding and more staff capacity, the NPS would be able to dedicate the resources necessary for us to simply recommend that Preservation Briefs and Bulletins are always current and feature the most up-to-date scholarship. Short of that eventuality, we would recommend the development of a regular publishing schedule so that there can be consistent and regular updates at appropriate intervals.

Leveraging Expertise

When the Secretary of Interior was tasked via the NHPA to develop “...training in, and information concerning, professional methods and techniques for the preservation of historic property and for the administration of the historic preservation program at the Federal, State, and local level,” historic preservation as a field in the United States had yet to be formalized or professionalized as we now know it. In its early days, the federal historic preservation program relied upon the NPS for resources and expertise that agencies, states and local governments did not yet have for themselves. Today, however, after almost 60 years, the professional landscape is very different. Preservation professionals work at virtually every level of government, within Tribal governments, private practice, and in allied industries. This growth of the discipline means that the profession does not necessarily look solely to the NPS as the definitive expert on historic preservation practice in the way it used to.

Within the NPS, the responsibility for the Standards and corresponding guidance rests within an underfunded Technical Preservation Services (TPS) whose primary daily responsibility is the administration of the Historic Tax Credit program, which is tied to 36 CFR 67. At the same time, the NHPA established the National Center for Preservation and Training which, despite its name and

responsibilities, appears to operate siloed in relative obscurity. Additionally, in a completely different directorate, the Historic Preservation Training Center is the NPS in-house team that provides hands-on training and technical assistance directly for preservation projects yet they have no formal relationship with TPS either.

With all of this expertise, there would seem to be an opportunity to expand and augment the capacity and knowledge base that informs the Standards, and to help foster a more collaborative environment for maintaining the currency of the Standards.

Recommendation: The creation of an Advisory Committee comprised of representatives of NPS (including their internal competing preservation divisions), ACHP, the National Trust, NATHPO, NCSHPO, Federal Agencies, The American Institute of Architects, and the Association for Preservation Technology that can convene regularly to provide input into changing trends, materials and approaches relative to the treatment of historic properties. Structured properly, this could take some of the burden off of TPS as the sole entity responsible for the Standards in helping them remain current, prioritize updates, and identify any coverage gaps. We realize that such committees provide a challenge to comply with the Federal Advisory Committee Act – but perhaps there is a way to leverage some existing structures within the National Park Service Advisory Board, through the Board established in statute for NCPTT, or short of that, as an independent effort. Whatever the mechanism, we feel that the Standards and corresponding guidance could benefit from and be renewed by additional input and experience.

Flexibility By Design

Too often we hear criticisms aimed at the “inconsistency” with which the Standards are applied or interpreted. A Federal agency or private developer who works in multiple states may state that there are differences between how two SHPOs review projects or question why one treatment was considered appropriate for one project but not another. However, such statements overlook the fundamental structure of our national historic preservation program – which is by design and intent decentralized. Instead of a top-down “ministry” or similar arbiter of historic preservation, our system is dependent upon our larger American model where we find participation of multiple levels of government, federal and state partnerships, an Advisory Council, Tribal governments, and substantial guidance. Very little of it is compulsory (save for the police powers of many local preservation commissions), very much of it is grounded in people-oriented consultation, and most of it by design is subject to interpretation. Early on there was a recognition that the Federal government could not be present in every state and community to the extent necessary to evaluate solely every historic property and that state and local significance, in particular, could be best evaluated by states and local governments. The delegation of certain functions to state and local governments combined with the many calls in the NHPA for consultation, advice, and cooperation, pretty clearly suggests a program that is meant to be variable depending upon a variety of circumstances and including the input of multiple stakeholders, and without doubt, with a strong vein of accountability. Rather than viewing this structure as a weakness or shortcoming, we view this as a strength – meaning for every project for which there appear to be obstacles, there is another one that manages to reach consensus. A strict and consistent approach without flexibility would generally not provide a net gain – eliminating flexibility for one project but providing certainty for another.

Recommendation: Celebrate the inherent flexibility of both the Standards and our national historic preservation program rather than bemoan their lack of “consistency.” We can strive for greater training,

guidance and understanding to achieve better outcomes without undermining the validity of our entire program.

Conclusion

There is no question that there are a number of competing policy goals that intersect with historic preservation. Federal agencies must balance their individual missions with the requirements of the NHPA. Policy decisions driving federal approaches to climate change, affordable housing, energy efficiency and other issues run the risk of development in a vacuum – each focused on their own area of concern without taking into account other societal priorities.

Unfortunately, historic preservation frequently is still overlooked or considered only as an afterthought, leaving it to be characterized as an inconvenient barrier or nuisance rather than a part of the solution. One can certainly dive into the minutiae of the Standards to see where policy tensions may lurk, however this effort only begins to address the underlying conundrum – how historic preservation should be considered *along with* other policy goals on equal footing rather than subordinate to them. In our view, this question underlines the rationale for the ACHP's very existence.

Respectfully,

A handwritten signature in black ink, appearing to read 'Erik Hein', written in a cursive style.

Erik Hein
Executive Director