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Designating cultural properties in the United States of America

1. Introduction

In examining the designation of cultural property in the United States, one must consider its federal system of government and the authority given to each level of government to regulate historic properties. The United States' Constitution is based on the premise that power should not be concentrated in one person or group, or in one place. Power at the federal government level is divided among three branches of government: the executive (President), legislative (Congress), and judicial (federal courts) branches. Power is also shared among the different levels of government: federal, state, and local. The federal Constitution specifies which powers are granted to the federal government, such as defense, foreign relations, and currency regulations, for example. However, the Constitution also limits the power of the federal government and the Tenth Amendment further specifies that "The powers not delegated to the United States (i.e., the federal government), nor prohibited by it to the states, are reserved to the states respectively, or to the people".

Each state has its own constitution, which specifies which powers the state may exercise and which powers are delegated to local governments. The relationship between states and local governments is very complex, and differs from state to state. Local governments have no inherent power of their own – their authority comes from the state. Some states have given broad powers to local governments while others have given more limited powers.¹

Among the powers traditionally reserved to the states is the so-called "police power", a concept derived from Anglo-Saxon law. This is the inherent authority of the state to regulate, protect and promote public health, safety, morals, and general welfare. Exercising this power, states have enacted laws regulating the use of land and have delegated some of their authority to local governments. Many local governments, in turn,

¹ T.J. Tryniecki, P.W. Salsich, *Land Use Regulation: A Legal Analysis & Practical Application of Land Use Law*, United States of America: Section of Real Property, Probate and Trust Law, American Bar Association 2003, pp. 5–7.

have enacted local planning, zoning, and historic preservation laws. The U.S. Supreme Court has held that the power to protect buildings and areas with special historic, architectural, or cultural significance is a legitimate use of the police power.²

2. Designation at the federal level

The National Historic Preservation Act³ of 1966 (NHPA) forms the framework for the current American preservation program. It embodies the philosophy that preservation must be a partnership between the federal, tribal, state and local governments, and the private sector. It has had great influence on the evolution of preservation in the United States since the 1960s by establishing national standards and by promoting those standards through both regulations and incentives.

A key component of the national preservation program is the National Register of Historic Places. Authorized under the NHPA, the National Register is the official list of properties deemed worthy of preservation in the United States. There are over 95,000 properties listed in the Register comprising districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.⁴

Any person or organization can prepare the documentation for a nomination to the Register – property owners, local governments, preservation organizations, etc. Nominations from the state level are submitted to a state review board composed of professionals in the fields of history, architecture, archaeology, and related disciplines, who recommend its nomination if the members believe it meets the criteria for listing. Formal nominations are submitted by State Historic Preservation Officers (SHPO).⁵ Properties under the ownership or control of the federal government or Native American tribes may be nominated by Federal Preservation Officers (FPO) or Tribal Preservation Officers (TPO), respectively.

The National Park Service has compiled a detailed guide to assist in determining whether properties meet the criteria for designation: “How to Apply the National Register Criteria for Evaluation”.⁶ In addition, there are a number of publications designed

² *Penn Central Transportation Co. v. New York City*, 438 U.S. 105 (1978).

³ Public Law 89-665; 16 U.S.C. 470 *et seq.*

⁴ National Register of Historic Places, <https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm> (accessed: 10.10.2020).

⁵ The SHPO is a state official who has been appointed under the provisions of the NHPA to administer the federal-funded preservation program in his/her state under in accordance with federal regulations and grant agreements. During the review period at the state level, property owners of properties being considered may object to their listing. If the owner of an individual property, or the majority of owners within a district, objects to their nomination, the historic property cannot be listed in the Register.

⁶ How to Apply the National Register Criteria for Evaluation (1995 Edition, Revised for Internet 1995), *National Register Bulletin*, https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf (accessed: 10.10.2020).

specifically to assist in evaluating particular types of properties: historic residential suburbs, archaeological properties, historic aviation properties, aids to navigation, battlefields, cemeteries and burial places, landscapes, mining properties, properties that have achieved significance within the past fifty years, post offices, rural historic landscapes, traditional cultural properties, and vessels and shipwrecks.

Federal procedures require that a property considered for nomination must be significant – that is, “it must represent a significant part of the history, architecture, archaeology, engineering, or culture of an area, and it must have the characteristics that make it a good representative of properties associated with that aspect of the past.”

In order to determine whether a property is significant, the Park Service guidelines require that it be evaluated in its historic context – “those patterns or trends in history by which a specific occurrence, property, or site is understood and its meaning (and ultimately its significance) within history or prehistory is made clear. Historians, architectural historians, folklorists, archaeologists, and anthropologists use different words to describe this phenomenon such as trend, pattern, theme, or cultural affiliation, but ultimately the concept is the same.”

The guidelines suggest that to decide whether a property is significant the following must be determined:

- 1) the facet of prehistory or history of the local area, State, or the nation that the property represents;
- 2) whether that facet of prehistory or history is significant;
- 3) whether it is a type of property that has relevance and importance in illustrating the historic context;
- 4) how the property illustrates that history; and
- 5) whether the property possesses the physical features necessary to convey the aspect of prehistory or history with which it is associated.⁷

If the property is determined to represent an important aspect of the area’s history or prehistory and also is determined to possess integrity, it qualifies for listing in the Register.

The standards for evaluating the significance of properties nominated for listing in the Register were developed by the United States National Park Service through a process that sought to recognize the significant contributions of all peoples to the nation’s heritage. Properties must be shown to be significant for one or more of the four Criteria for Evaluation. The basis for judging a property’s significance is historic context. After identifying a relevant context with which the property or properties are associated, these criteria are applied: the quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects 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

⁷ These five steps are discussed in more detail in this bulletin.

- 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.

The kinds of events to which Criterion A applies would include an important event or pattern of events in American history that contributed to the development of a locality, state, or the nation. Criterion B could be applied to the home of an important industrialist, studio of a significant sculptor, or business headquarters of a commercial or industrial leader. Criterion C might be applicable to a building representing a significant architectural style or containing highly artistic decorative features, a significant designed landscape, or an engineering work such as a bridge representing technological advances. Criterion D is most often applied to archaeological sites where the artifacts, soil, or other features make it possible to answer important research questions or test hypotheses that amplify currently available information. Buildings can also qualify under Criterion D if they could yield information on construction techniques, local building materials, or evolution of local building practices, for example.

Applying these examples to a particular historic context of "19th Century Gunpowder Production in the Brandywine Valley", properties associated with important events in the founding and development of the industry would be considered under Criterion A. Criteria B would embrace persons significant in the founding of the industry or important in its development. Criteria C would apply to buildings, structures, or objects reflecting important design qualities integral to that industry, and Criteria D would be relevant for properties that convey important information about the industrial processes.⁸

There are special considerations for certain properties. Ordinarily cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past fifty years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

- 1) a religious property deriving primary significance from architectural or artistic distinction or historical importance; or
- 2) a building or structure removed from its original location but which is primarily significant for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

⁸ How to Apply the National Register Criteria for Evaluation...

- 3) a birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his or her productive life; or
- 4) a cemetery which derives its primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
- 5) a reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or
- 6) a property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or
- 7) a property achieving significance within the past fifty years if it is of exceptional importance.⁹

As part of the evaluation process, it is important to determine whether the property has local, state or national significance by examining the historical contexts at these different levels. Local historical contexts are used to establish the importance of a property within the history of a town, city, county, cultural area or region. State historical contexts help establish the importance of a property within the history of a state, as a whole, while national contexts are used to establish that properties represent an aspect of United States history. The bulletin emphasizes that properties of national significance must be “of exceptional value in representing or illustrating an important theme in the history of the nation”, but they need not be of a property type found throughout the entire country. An example given is a Civil War battlefield, found only in the eastern part of the country, but having great significance to the history of the whole country. Among the properties designated as nationally significant in the National Register are prehistoric and historic properties included in the National Park System.¹⁰ Also included are properties designated as National Historic Landmarks.

3. National Historic Landmark Program

Properties designated as National Historic Landmarks are distinguished from other properties considered of national significance by possessing “exceptional value or quality in illustrating and interpreting the heritage of the United States”.¹¹

The National Park Service primarily uses theme studies to identify potential National Historic Landmarks. These studies employ comparative analysis to establish the relative importance of properties associated with a specific area of American history.

⁹ Properties must generally be fifty years of age before listing in the Register; those less than fifty years of age must have exceptional significance.

¹⁰ This paper will not discuss criteria for acquisition or designation of properties as part of the National Park System.

¹¹ How to Prepare National Historic Landmark Nominations (1999 Edition; Reformatted for Web 2018), *National Register Bulletin*, <https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-bulletin.htm> (accessed: 10.10.2020).

The first thematic framework was adopted in 1926 and revised in 1970 and 1987. Originally focusing primarily on military and political figures, later revisions adopted a more chronological and topical approach, but the concept of “stages of American progress” remained the same. The current framework was developed in 1993 in part because of a 1980 federal court decision that declared invalid a National Historic Landmark designation based on a “failure to prepare and publish rules of procedure to govern the designation process.”¹² This subsequently prompted the Department of the Interior to also seek an amendment to the National Historic Preservation Act that would “grandfather” all National Historic Landmarks designated prior to 6 February 1979.¹³ The revised framework recognized an expanded approach to examining and understanding American history that encompasses ordinary people and everyday lives in addition to the prior focus on great individuals and events.¹⁴ The historic importance of potential Landmarks is evaluated by the Park Service and an advisory board comprising citizens who are experts in the conservation of natural, historic, and cultural areas. While they are able to make recommendations, decisions on designation are made by the Secretary of the Interior.¹⁵

Criteria for selection as National Historic Landmarks are very similar to those for listing properties in the National Register of Historic Places. However, they must be of national significance, falling under one or more of the six National Historic Landmark criteria while retaining a high degree of integrity: “The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, technology and culture; and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling, and association”¹⁶ and also “retain, to a high degree, the physical features that made up its historic character and appearance.”¹⁷

Six Criteria of National Significance:

- 1) properties that are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represents, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained;
- 2) properties that are associated importantly with the lives of persons nationally significant in the history of the United States;
- 3) properties that represent some great idea or ideal of the American people;

¹² *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

¹³ 16 U.S.C. 470a(a)(1)(B).

¹⁴ National Historic Landmarks: <https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-thematic-framework.htm> (accessed: 24.10.2020).

¹⁵ National Historic Landmarks Program: <https://www.nps.gov/orgs/1582/index.htm> (accessed: 24.10.2020).

¹⁶ How to Prepare National Historic Landmark Nominations...

¹⁷ National Historic Landmarks: <https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-thematic-framework.htm> (accessed: 24.10.2020).

- 4) properties that embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for the study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction;
- 5) properties that are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture;
- 6) properties that have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

As in the case of National Register criteria, ordinarily, cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings and properties that have achieved significance within the past fifty years are not eligible for designation. Properties which fall into the following categories require special consideration.¹⁸

4. Results of designation at the federal level

In addition to wider recognition of listed properties, there are several consequential results of federal designation. Section 106 of the National Historic Preservation Act of 1966 requires that all properties listed in, or eligible for listing in, the National Register be given consideration in the planning of federal, federally licensed, and federally funded projects. The responsible federal agency must give consideration to the effects these projects may have on the listed properties and provide the Advisory Council on Historic Preservation an opportunity to comment. Provisions of the National Environmental Policy Act¹⁹ also require an environmental review process for any project that may adversely affect properties listed in, or eligible for listing, in the National Register. Federal regulations set out procedures for coordinating reviews that satisfy the requirements of each law in regard to consideration of National Register properties.²⁰ These protections are procedural rather than substantive. The decision to proceed with the project is within the discretion of the federal agency with responsibility over it. However, the object of the environmental review is to avoid, if possible, adverse impacts on

¹⁸ National Historic Landmarks: <https://www.nps.gov/subjects/nationalhistoriclandmarks/eligibility.htm> (accessed: 3.11.2020).

¹⁹ 42 U.S.C. paras. 4321 *et seq.*

²⁰ General Rules for NEPA-Section 106 Coordination, <https://www.npi.org/nepa-and-section-106-national-historic-preservation-act> (accessed: 10.03.2021).

historic properties through a process of disclosure, research, evaluation, consultation and, ideally, agreement among relevant governmental agencies, non-governmental organization, and affected members of the public. Federal law also contains provisions that specifically address federal agency responsibilities where National Historic Landmarks are involved. Agencies are directed “to the maximum extent possible (...) minimize harm” to National Historic Landmarks affected by federal undertakings.²¹

There are also economic incentives provided by federal designation, the most important being the investment tax credit. Owners of listed properties may be eligible for federal income tax credit amounting to twenty percent of expenditures incurred in a certified rehabilitation of designated income-producing properties (commercial, industrial, or residential rental). To be certified, a project must comply with the Secretary of the Interior’s Standards for Rehabilitation, ensuring that the character-defining features and integrity of the property are maintained. Federal tax deductions are also available for the charitable donation of a conservation easement ensuring the perpetual protection of historically important land areas or structures. In addition to tax benefits, designated properties may be eligible for federal historic preservation grants, when funds are appropriated by Congress. Grant-funded projects must also meet the same Secretary of the Interior’s Standards as tax assisted projects to ensure preservation standards are met on any construction work undertaken.

5. The United States and the World Heritage Convention

The United States took a leadership role in the creation of the World Heritage Convention and became the first nation to ratify it in 1973 by a vote in the Senate of 95-0. The United States served as a member of the World Heritage Committee for much of that body’s existence and in 1978 hosted the first Committee meeting that listed sites. Of the twelve sites listed at that time, two were in the United States: Mesa Verde and Yellowstone National Parks. Since that time, implementing laws and regulations – and politics – have had the practical effect of limiting U.S. participation.

As a signatory to the Convention, the United States is obligated to “ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage (...) situated on its territory” and to take “effective and active measures” to protect this heritage.²²

After the Convention entered into force, implementing legislation was established in the U.S. by the 1980 Amendments to the National Historic Preservation Act (NHPA).²³ The 1980 amendments gave the Secretary of the Interior the responsibility of directing and coordinating U.S. activities under the Convention in coordination with the

²¹ 42 U.S.C. paras. 4321 *et seq.*

²² Convention Concerning the Protection of the World Cultural and Natural Heritage, 23 November 1972, 27 U.S.T. 37, 11 I.L.M. 1358, articles 4–6.

²³ The National Historic Preservation Act of 1966, 16 U.S.C. para. 470 *et seq.*

Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation.²⁴ Regulations setting forth policies and procedures used by the U.S. Department of the Interior to direct and coordinate participation were adopted in 1982 and continue in force. The regulations also address maintenance of the U.S. Indicative Inventory of Potential Future World Heritage Nominations and the nomination of sites to the World Heritage List.²⁵

The criteria for listing properties in the World Heritage List are established by the World Heritage Committee and are contained in the Operational Guidelines for the Implementation of the World Heritage Convention.²⁶ These criteria, of course, apply to properties nominated by the United States.²⁷

To date, twenty-four properties in the United States have been inscribed on the World Heritage List, two of which are sites jointly listed with Canada. Eleven listings are cultural sites, twelve are natural sites, and one is categorized as mixed.²⁸ Many of these properties are the property of the United States government.

The relatively small number of U.S. inscriptions on the World Heritage List given the size of the country and its rich resources is due in part to the owner consent requirement included in the 1980 Amendments to the NHPA. The law prohibits any non-Federal property from being nominated unless the owner concurs in writing. The Interior Department adopted regulations requiring written concurrence not only from the owner of an individual property but from 100% of property owners in a multiple property nomination.²⁹

Additionally, each owner must pledge to protect the property by executing a legal agreement specified in federal regulations. For non-governmental properties, the regulations require: 1) a written covenant executed by the owner(s) prohibiting, in perpetuity, any use that is not consistent with, or which threatens or damages the property's universally significant values, or other trust or legal arrangement that has that effect; and 2) the opinion of counsel on the legal status and enforcement of such a prohibition, including, but not limited to, enforceability by the federal government or by interested third parties.³⁰

Properties nominated to the World Heritage List also must be determined to be "nationally significant". A property will be considered "nationally significant" only if it is: a property that the Secretary of the Interior has designated as a National Historic

²⁴ Public Law 96-515, 12 December 1980, 94 Stat. 3000.

²⁵ 36 CFR 73.

²⁶ <https://whc.unesco.org/en/guidelines/> (accessed: 5.11.2020).

²⁷ The National Park Service provides a publication that discusses the World Heritage Criteria and how those criteria differ from criteria normally applied to listing in the National Register of Historic Places. See: Users Guide to World Heritage Criteria, <https://www.nps.gov/subjects/internationalcooperation/a-quick-guide-to-the-world-heritage-program-in-the-united-states.htm> (accessed: 5.11.2020).

²⁸ Properties inscribed on the World Heritage List (24), <https://whc.unesco.org/en/statesparties/us> (accessed: 15.10.2020).

²⁹ 16 U.S.C. 470a(a)(6); 36 CFR 60.6; 36 CFR 65.5(f)(1).

³⁰ 23 CFR 73.13(c).

Landmark³¹ or a National Natural Landmark³² under provisions of the 1935 Historic Sites Act;³³ an area the United States Congress has established by law as nationally significant; or an area the President of the United States has proclaimed as a National Monument under the Antiquities Act of 1906.³⁴ If a property proposed for nomination relates to an historical theme that has not been studied by the National Park Service, it may not be able to be listed as a National Historic Landmark, at least not in a timely matter.³⁵

Tab. 1. Differences between National Register and World Heritage Nomination Process in the USA

National Register	World Heritage
Must meet National Register eligibility criteria.	Must meet World Heritage Committee selection criteria.
No tentative list for National Register nomination.	Only properties on the Tentative List may be nominated.
Properties of national, state, or local significance, as determined by the State Historic Preservation Officer, Federal Historic Preservation Officer, or Tribal Historic Preservation Officer may be nominated to register.	Only nationally significant properties which are National Historic or Natural Landmarks, designated by Congress as nationally significant, or designated as a National Monument by the President qualify for nomination.
May be nominated by the State Historic Preservation Officer, Federal Historic Preservation Officer, or Tribal Historic Preservation Officer.	Only the Assistant Secretary of the Interior for Fish and Wildlife and Parks has the authority to nominate a property.
No agreement of a property owner to protect the historic integrity of the property is required.	The owner of any non-federal property must execute a legal instrument prohibiting in perpetuity any use that threatens the property's universally significant values. Opinion of council on the legal status and enforceability of the agreement is also required.
Listed unless a notarized objection from the owner of a single property or a majority of owners of properties in a district.	Not listed without written concurrence from 100% of property owners within the proposed boundaries.
Final decision on listing made by Keeper of the National Register of Historic Places in the U.S. Department of the Interior.	Final decision on listing made by World Heritage Committee.

Source: Own elaboration.

³¹ 36 CFR part 65.

³² 36 CFR part 62.

³³ Public Law 74-292; 49 Stat. 666; 16 U.S.C. 461 *et seq.*

³⁴ 16 U.S.C. 433.

³⁵ See the discussion on theme studies for National Historic Landmarks, above.

6. State registers of historic places

Many states operated historic preservation programs prior to the enactment of the National Historic Preservation Act (NHPA). Those programs were often limited in scope, involving for example, historic marker programs and management of state-owned historic properties or museums. The elements and operation of the programs tended to be quite different from state to state. The enactment of the NHPA brought much more uniformity to the programs by providing grants to the states, provided they assume certain responsibilities and adhere to federally-mandated standards and guidelines for those activities and programs.³⁶ Each of the state historic preservation offices has a role in nominating properties to the National Register of Historic Places. In addition, many states have established and maintain separate state registers of historic places. While different in a number of respects, the criteria for listing properties, and even the procedures, are often nearly identical to those of the National Register. However, the criteria are subject to different interpretations by state review bodies.

Most state registers include all properties and districts within their borders that are listed in the National Register. Maryland law requires all properties included in or eligible for National Register listing be included in the Maryland Inventory of Historic Properties (art. 83B, sec. 5-615 of the Maryland Code). Some state registers also include additional properties identified by state and local governments. The Connecticut Register, for example, includes properties *nominated* to the National Register by the state in addition to as those actually listed or determined eligible by the Keeper of the National Register. Additionally, the Connecticut Register includes properties surveyed by the State Historical Commission in the 1960s, all districts and individual properties approved by local preservation commissions (even if not subsequently designated by local elected officials), resources included in the 1987 survey of state-owned buildings, and all properties approved by the Historic Preservation Council at their regularly scheduled meetings.³⁷

There are several reasons for maintaining these seemingly duplicative listings. Officials in some states may wish, for political or other reasons, to withhold National Register listing for a property. In some cases, they may wish to list properties considered important in their state that were not accepted for listing in the National Register. While Kansas, for example, utilizes the same eligibility criteria for listing in the National Register and the Register of Historic Kansas Places, the state register allows more flexibility in the interpretation of the requirements.³⁸

³⁶ N. Tyler, I. Tyler, T. Ligibel, *Historic Preservation*, 3rd ed., New York 2017, p. 77.

³⁷ State Register of Historic Places, https://portal.ct.gov/DECD/Content/Historic-Preservation/01_Programs_Services/Historic-Designations/State-Registry-of-Historic-Places (accessed: 12.03.2021).

³⁸ National Register of Historic Places / Register of Historic Kansas Places, Kansas Historical Society, <https://www.kshs.org/p/national-register-of-historic-places-register-of-historic-kansas-places/14635> (accessed: 12.03.2021).

State law may also provide protection for properties listed in the state register from state-funded projects that would threaten them through state environmental protection acts³⁹. These are often broad in scope and protect such resources as air, water, and archaeological resources. Importantly, some environmental acts, such as the California Environmental Quality Act (CEQA) and the New York State Environmental Quality Review Act (SEQRA) apply to local government actions as well. The Georgia Environmental Policy Act of 1991, modeled on the National Environmental Policy Act, requires the disclosure of environmental effects of proposed state projects, including those affecting historic properties. The agency proposing a project must include an assessment of project impact on historic or archaeological properties listed in or eligible for listing in the Georgia Register of Historic Places.⁴⁰ Having an environmental assessment of a project affecting a historic place or cultural landscape does not ensure its preservation; however, the full disclosure and opportunity for public input can be effective in preventing or mitigating negative effects of a state project. Another approach to protection is illustrated by the Minnesota Environmental Rights Act (MERA) which creates a civil action for the protection of “natural resources”, including “historical resources”. Minnesota actions to prevent the demolition of historic properties are typically based upon MERA.⁴¹

Designation of a property in a state register may also provide property owners with the possibility of economic incentives. These incentives can make historic rehabilitation financially more feasible, attract private capital to areas that have seen disinvestment, create high-wage jobs, and provide the state with a strong return on its investment. Tax incentives are generally the most widely utilized economic incentive. The National Trust for Historic Preservation has developed a guide to best practices for state historic tax credits.⁴² Examples of well-crafted state historic tax credits include those from Texas⁴³ and Virginia.⁴⁴ The Georgia state income tax credit for rehabilitated historic property allows the owners of designated properties who follow state rehabilitation guidelines an income tax credit equaling 25% of qualifying rehabilitation expenses up to \$100,000 for a personal residence, and \$300,000, \$5 million, or \$10 million for other properties. Georgia also has a state preferential property tax assessment for rehabilitated property available for both owner-occupied residential properties and income-generating properties, one which freezes the county property tax assessment at its pre-rehabilitation value for more than eight years after rehabilitation.⁴⁵

³⁹ E. Lyon, D. Brook, “The States” [in:] *A Richer Heritage*, ed. R. Stipe, Chapel Hill, NC 2003, p. 88.

⁴⁰ Official Code of Georgia Annotated 12-16.1 *et seq.*

⁴¹ Minn. Stat. ch. 116B.

⁴² Report on State Historic Tax Credits: Maximizing Preservation, Community Revitalization, and Economic Impact (November 2018), <https://forum.savingplaces.org/viewdocument/report-on-state-historic-tax-credit> (accessed: 10.03.2021).

⁴³ Report on Historic Preservation Tax Credits in Texas, https://www.thc.texas.gov/public/upload/publications/Tax_credit_report_2020_final.pdf (accessed: 10.03.2021).

⁴⁴ Rehabilitation Tax Credits, <https://www.dhr.virginia.gov/tax-credits/> (accessed: 10.03.2021).

⁴⁵ State Tax Incentives, <https://www.dca.ga.gov/georgia-historic-preservation-division/tax-incentives-grants/state-tax-incentives> (accessed: 20.03.2021).

Governments and nonprofit organizations can also accept donations from property owners of conservation easements.⁴⁶ These restrictions on future use and development designed to preserve the properties' character-defining features can result in income tax deductions for the donor. There are a variety of state-funded grant programs for designated historic properties at the state level, in addition to the federally funded historic preservation grants administered by State Historic Preservation Offices. The Massachusetts Preservation Project fund, for example, is a state-funded 50% reimbursable matching grant program established in 1984 which provides grants of up to \$30,000 for pre-development, development, and acquisition projects.⁴⁷ The Georgia Heritage Grant program has distributed more than \$3.5 million in matching funds for development and pre-development preservation projects funded by special automobile license plate fees.⁴⁸ Generally, the amounts of the state grants are not as substantial as tax incentives, but may be particularly beneficial for tax-exempt nonprofit organizations and local governments or property owners that do not qualify for tax benefits.

7. Local historic preservation ordinances

Perhaps the most effective listing mechanism to protect cultural properties in the United States is found at the local level. States delegate authority to local governments to enact laws or ordinances for the protection of heritage resources. The specific scope and content of local preservation legislation varies considerably due to the differences among the states in the authority delegated to local governments, community need, and the type of resources protected. Generally, though, preservation ordinances regulate changes that would negatively affect or destroy the character-defining features of the designated historic properties or districts. There is a particular emphasis on mandatory control over changes in the exterior architectural features of designated buildings. Over 2,300 local governments across the United States have enacted some form of historic preservation ordinance. A typical preservation ordinance would generally contain provisions setting out criteria and procedures for designating historic districts and landmarks. While state enabling legislation and local ordinances vary, many contain remarkably similar criteria for designation, and the influence of National Register criteria is quite evident. Three examples follow.

The Georgia state legislation authorizing local governments to protect historic resources provides the following general criteria that local governments must incorporate in their own legislation. "Historic district" means a geographically definable area,

⁴⁶ N. Tyler, I. Tyler, T. Ligibel, *Historic Preservation...*, pp. 312–316.

⁴⁷ <https://www.sec.state.ma.us/mhc/mhcmpf/mppfidx.htm> (accessed: 10.03.2021).

⁴⁸ <https://www.dca.ga.gov/georgia-historic-preservation-division/support-historic-preservation> (accessed: 10.03.2021).

urban or rural, which contains structures, sites, works of art, or a combination thereof which:

- A. have special character or special historical or esthetic interest or value;
- B. represent one or more periods or styles of architecture typical of one or more eras in the history of the municipality, county, state, or region; and
- C. cause such an area, by reason of such factors, to constitute a visibly perceptible section of the municipality or county.⁴⁹

“Historic property” means a structure, site, or work of art, including the adjacent area necessary for the proper appreciation or use thereof, deemed worthy of preservation by reason of its value to the municipality, county, state, or region for one or more of the following reasons:

- A. it is an outstanding example of a structure representative of its era;
- B. it is one of the few remaining examples of a past architectural style;
- C. it is a place or structure associated with an event or person of historic or cultural significance to the municipality, county, state, or region; or
- D. it is a site of natural or esthetic interest that is continuing to contribute to the cultural or historical development and heritage of the municipality, county, state, or region.⁵⁰

The State of North Carolina has published a model historic preservation ordinance for adoption by local governments. This model contains only very general criteria: “To be designated as a historic landmark, a property, building, site, area, or object shall be found by the Commission to possess special significance in terms of its history, prehistory, architecture, archaeology, and/or cultural importance, and to retain the integrity of its design, setting, workmanship, materials, feeling, and/or association.”⁵¹

The historic preservation ordinance in the City of Seattle, Washington, establishes the following designation criteria:

An object, site or improvement which is more than twenty-five (25) years old may be designated for preservation as a landmark site or landmark if it has significant character, interest or value as part of the development, heritage or cultural characteristics of the City, state, or nation, if it has integrity or the ability to convey its significance, and if it falls into one (1) of the following categories:

- A. it is the location of, or is associated in a significant way with, an historic event with a significant effect upon the community, City, state, or nation; or
- B. it is associated in a significant way with the life of a person important in the history of the City, state, or nation; or
- C. it is associated in a significant way with a significant aspect of the cultural, political, or economic heritage of the community, City, state or nation; or

⁴⁹ O.C.G.A. para. 44-10-22(5).

⁵⁰ O.C.G.A. para. 44-10-22(7).

⁵¹ 5.2. Criteria for Designation: <https://files.nc.gov/ncdcr/historic-preservation-office/CLG/Model-PreservationCommissionOrdinance.pdf> (accessed: 5.11.2020).

- D. it embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction; or
- E. it is an outstanding work of a designer or builder; or
- F. because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the City and contributes to the distinctive quality or identity of such neighborhood or the City.⁵²

8. Neighborhood Conservation Districts

Neighborhood conservation districts are similar to local historic districts, but their primary purpose is preservation of community character rather than a focus on historic fabric. In many cases, the property owners in the area are not prepared to accept the degree of control over their properties typical of a historic district. While some type of design review is part of most conservation districts, what is reviewed varies from ordinance to ordinance based on the resources to be protected and the desired level of protection. Binding review of exterior architectural alterations is usually not part of the review provided in conservation districts. The review in conservation districts may be mandatory or advisory. Many conservation district ordinances regulate demolition or new constructions on vacant lots. Others focus on general urban design issues such as height, scale, building placement, setback, materials, or landscape features.⁵³ These objectives may be implemented through incentives in addition to or in lieu of legal mandates. Conservation districts provide a vehicle for public education and encourage involvement in the local planning process. To the extent that they address overall environmental character, they may be quite appropriate for buffer zones.

The criteria for designation in many conservation district ordinances, particularly those that have a historic preservation planning purpose, may be quite similar to criteria in local historic district ordinances or for the National Register of Historic Places.⁵⁴

In San Antonio, Texas, to be designated as a Neighborhood Conservation District, an area must meet the following criteria:

- 1) contain a minimum of one blockface (all the lots on one side of a block);
- 2) at least 75% of the land area in the proposed district was improved at least 25 years ago, and is presently improved; and
- 3) possess one or more of the following distinctive features that create a cohesive identifiable setting, character, or association:
 - a) scale, size, type of construction, or distinctive building materials,

⁵² SMC para. 25.12.350.

⁵³ *Conservation Districts, Cultural Resources Partnership Notes*, ed. H. Renaud, Heritage Preservation Services, National Park Service (n.d.).

⁵⁴ J. Miller, "Protecting Older Neighborhoods Through Conservation District Programs", *Preservation Leadership Forum, National Trust for Historic Preservation, Forum News*, November/December 2004, vol. 11, issue 2, <https://forum.savingplaces.org/viewdocument/protecting-older-neighborhoods-thro> (accessed: 5.11.2020).

- b) spatial relationships between buildings,
- c) lot layouts, setbacks, street layouts, alleys or sidewalks,
- d) special natural or streetscape characteristics, such as creek beds, parks, green-belts, gardens, or street landscaping,
- e) land use patterns, including mixed or unique uses or activities, or
- f) abuts or links designated historic landmarks and/or districts.⁵⁵

The Chapel Hill, North Carolina, ordinance is almost identical, but adds a fifth criterion: “The area must be predominantly residential in use and character.”⁵⁶ Incentives for designated historic properties are also found at the local level. Forms of assistance for property owners include zoning and building code relief. Zoning relief allows flexibility of use, design standards, and parking requirements, and building code relief allows planning officials to modify specific construction code requirements for designated properties. Transfer of development rights (TDR) programs authorize owners in designated districts to transfer or sell unused development rights to nearby properties or a TDR bank, thus compensating them for lost development potential caused by preservation regulations. The property owners who purchase development rights may use them to create higher density on their property than zoning would otherwise allow. Local governments, when authorized by state law, can also offer incentives in the form of property tax abatements or exemptions, tax freezes, or tax credits. Examples of cities offering such tax incentives include Cumberland, Maryland, Tampa, Florida, Spokane, Washington, and Chicago, Illinois, among others. There are also various preservation grant and loan programs offered to owners of locally designated properties. Hillsborough County, Florida, for example, offers a challenge grant program for rehabilitation or restoration of historic structures, compatible additions to historic properties, and improvements to historic sites or grounds. Grants must be matched by the recipient on a one-to-one basis not to exceed \$250,000 in any one year.⁵⁷ The City of Sacramento, California, jointly administers a grant program with the non-governmental Sacramento Heritage, Inc., funding projects up to \$25,000 to facilitate the preservation of designated residential and commercial properties in the city.⁵⁸

9. Conclusions

Since historic preservation in the United States operates independently – though cooperatively – at the national, state, and local levels, the criteria for designation of historic resources differ accordingly. However, the criteria for designation to the National Register of Historic Places have strongly influenced the criteria contained in state

⁵⁵ San Antonio Uniform Development Code, sec. 36-335(b).

⁵⁶ Town of Chapel Hill Land Use Management Ordinance, sec. 3.6.5(a) (2003).

⁵⁷ <https://www.hillsboroughcounty.org/en/businesses/business-community/grants/action-folder/apply-for-a-historic-preservation-challenge-grant> (accessed: 10.03.2021).

⁵⁸ <https://www.cityofsacramento.org/Community-Development/Planning/Urban-Design/Preservation/Historic-Places-Grant> (accessed: 10.03.2021).

registers and local ordinances. This influence comes not only from the prestige of the National Register, but its mandatory use in federal projects and programs and the economic incentive programs that are tied to it. The independence of the various levels of government within the framework, however, allows state and local programs to mold their criteria to meet political needs and to address local circumstances and unique resources. One National Register criteria has engendered a good bit of debate in recent years as interest grows in protecting the “recent past”: ordinarily properties that have achieved significance within the past fifty years are not eligible for designation. In spite of that debate, there seems to be general consensus that the criteria established over the past forty years at the various levels of government remain appropriate for the designating historic properties.

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Summary

James K. Reap

Designating cultural properties in the United States of America

The designation of cultural properties in the United States of America differs among the various levels of government – national, state, and local – because of the federal legal system. While the approach of the National Historic Preservation Act serves as a framework, state and local laws enable a varied and flexible approach based on local priorities while remaining compatible with the federal system.

Keywords: National Historic Preservation Act, federal legal system, National Register

Streszczenie

James K. Reap

Klasyfikacja rzeczy jako dóbr kultury w Stanach Zjednoczonych Ameryki

Zasady klasyfikowania rzeczy jako dóbr kultury w Stanach Zjednoczonych różnią się na poziomach krajowym, stanowym i miejscowym; co jest konsekwencją federalnego charakteru państwa. O ile ustawa o ochronie dziedzictwa historycznego (National Historic Preservation Act) ma charakter regulacji ramowej, o tyle prawo stanowe i miejscowe prezentuje zróżnicowane i zarazem elastyczne podejście, uwzględniające lokalne priorytety, ale z zachowaniem zgodności z prawem federalnym.

Słowa kluczowe: ustawa o ochronie dziedzictwa historycznego, federalny system prawny, narodowy rejestr