
MEMORANDUM

Date: September 14, 2022

To: Javier Marques, General Counsel, Advisory Council on Historic Preservation *JM*

From: Anne R. Schuyler, General Counsel, National Capital Planning Commission *ARS*

Subject: Scope of the National Capital Planning Commission's Section 106 Consultation for Improvements to the Smithsonian Institution Building (Castle)

I. INTRODUCTION

During recent conversations between the General Counsel (GC) of the Advisory Council on Historic Preservation (AHP), the Acting Deputy GC of the Smithsonian Institution (SI), and the GC of the National Capital Planning Commission (NCPC), AHP's GC advised that NCPC's National Historic Preservation Act (NHPA) Section 106 consultation obligation may extend to review of interior portions of the Castle. Having reviewed two court cases provided by the AHP's GC, I have concluded NCPC's Section 106 consultation process does extend to certain limited areas of the Castle's interior. This conclusion results because certain exterior renovations impact the interior of the building and have no independent utility or rational need separate and distinct from the affected interior areas of the building.

Set forth below is a discussion of the scope of NCPC's review authority under the National Capital Planning Act (40 U.S.C. §§ 8701 et seq. (2020)); the scope of NCPC's Section 106 authority under the NHPA (54 U.S.C. § 306108 (2020); 36 C.F.R. §§ 801 et seq. (2004)); the scope of SI's Section 106 authority (Public Law 108-72 § 3(c)(2) (August 15, 2003), 117 Stat. 888, 889 (August 15, 2003)); and the impact of certain court decisions on the Section 106 obligation of both NCPC and SI. This discussion serves as the basis for my conclusion.

II. BACKGROUND**A. General Background**

The SI plans to undertake a major revitalization of the Castle, to include updates to windows, doors, venting, and egress. Underpinning, blast mitigation and seismic reinforcement of the Castle will be integrated into the renovation work. The Castle is a National Historic Landmark (NHL), listed in the National Register of Historic Places, and part of the National Mall Historic District.

As part of the Section 106 consultation process for the Castle project, certain stakeholders have questioned why the NCPC/SI review excludes interior components of the project. NCPC advised that its consistent interpretation of its authority under the Planning Act limited its Section 106 obligations to the exterior components of a project. It further noted that because SI's Section 106

obligation applies only when NCPC exercises approval over a SI project, SI's Section 106 obligation was also limited to consideration of exterior components. However, in recent conversations with the GC of the Advisory Council on Historic Preservation, NCPC learned that its limited view of its Section 106 obligation is incorrect.

B. NCPC's Planning Act Authority and Section 106 Obligation

NCPC has jurisdiction over the Castle revitalization project pursuant to the National Capital Planning Act. (40 U.S.C. §§ 8722(b)(1) and (d) (2020)) Specifically, NCPC's enabling legislation states that “[in] order to ensure the orderly development of the National Capital, the location, height, bulk, number of stories, and size of federal public buildings in the District of Columbia and the provision for open space in and around federal public buildings in the District of Columbia are subject to the approval of the Commission.” (40 U.S.C. § 8722(d)).¹ This authority conveys zoning authority to NCPC and requires an approval action by the Commission.

When NCPC takes an approval action for a project that constitutes an undertaking as defined in the NHPA and regulations promulgated by the ACHP,² NCPC must comply with the requirements of the Section 106 consultation process of the NHPA.

C. Smithsonian's Section 106 Responsibility

For purposes of the NHPA, SI is not deemed a federal agency. This means SI has no independent obligation to adhere to the requirements of the Section 106 Consultation process. However, in 2003 Congress enacted legislation that became Public Law 108-72, which required among others, “[i]n carrying out . . . projects in the District of Columbia which are subject to the review and approval of the National Capital Planning Commission in accordance with [40 U.S.C. § 8722(d)], the Smithsonian Institution shall be deemed to be an agency for purposes of compliance with regulations promulgated by the Advisory Council on Historic Preservation pursuant to section 106 of the National Historic Preservation Act [54 U.S.C. § 306108 (2020)].” This law requires the SI to comply with the NHPA's Section 106 consultation process but only when the project is subject to review and approval by NCPC. Since SI's Section 106 obligation is directly tied to NCPC's approval authority, SI believes the scope of SI's Section 106 consultation is limited in scope to that of NCPC's approval authority.

D. Extent of NCPC's 106 Review (Exterior vs. Interior)

NCPC typically limits its Section 106 consultations to exterior renovations because, as noted above, its zoning authority only extends to exterior components of a project. However, in recent conversations with the GC of the ACHP, NCPC learned that its limited view of its Section 106 obligation is incorrect. The basis for this conclusion is case law that addresses extending the scope

¹ A corresponding provision extends the Commission's zoning authority to District buildings in a geographic area known as the central area, defined as the area encompassed by the Downtown and Shaw Redevelopment Plans. 40 U.S.C. § 8722(e) (2020).

² 54 U.S.C. § 306108 (2020), 36 C.F.R. § 800.16(y) (2004). The regulatory provision states, “Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”

of the Section 106 process to include other components related to the project/undertaking if the component under review has no independent utility or rational need absent consideration of the other, related components in which case the other components must also be considered in the Section 106 consultation process. Under this concept, two potential external components³ of the project directly impact the Castle interior and have no independent utility/rational need without consideration of certain interior portions of the Castle. The exterior components and the interior areas affected are as follows:

- Replacement of Basement Level Windows with Exterior Doors for Emergency Egress. SI intends to lower the basement floor of the Castle to create a new full-height, lower level occupied by an expanded visitor center and other related spaces. The creation of lower-level occupiable space necessitates replacement of certain basement exterior windows with doors for emergency egress.
- Installation of Blast Resistant Windows. The SI intends to replace non-historic windows with blast resistant replacement windows or storm windows. Installation of blast windows will require the removal and in-kind replacement of historic interior finishes immediately adjacent to the masonry openings.

III. APPLICABLE LAW

Two court cases shared by the ACHP's GC articulate what is known as the rule of independent utility/rational need. In 1973, the District Court for the Eastern District of Virginia grappled with whether the Federal Highway Administration's funding of one expressway in Richmond, Virginia would require consideration of the effects of a separate expressway that, while also in Richmond, did not have such federal funding. (*River v. Richmond Metropolitan Authority*, 35 F. Supp. 611 (E.D. VA 1973), aff'd, 481 F.2d 1280 (4th Cir. 1973)). In declining to look at the two expressways as one project for Section 106 purposes, the court explained that ". . . if the Court concludes that the two highways each have such little value in their own right that their separate construction could be considered arbitrary or irrational, the court will find them to be a single project."

In another case, District Court for the Eastern District of Virginia held that the U.S. Army Corps of Engineers could not issue a clean water permit for a wastewater treatment plant without first considering, under Section 106, the effects of an associated sewer interceptor which received flow from multiple sewers and conducted the wastewater to the treatment plant, even though the interceptor was not part of the permit application submitted by the applicant. (*Crutchfield v. U.S. Army Corps of Engineers*, 154 F. Supp. 2d 878 (Eastern District VA, 2001)). In determining whether the interceptor was part of the project subject to review, the court saw the issue as essentially whether the specifically permitted plant had independent utility without the interceptor. (*Id.* at 889) It held that it did not, because the treatment plant served no rational need in its own right without the interceptor. (*Id.* at 902) Accordingly the court ruled that for purposes of Section

³ The Smithsonian originally informed NCPC that four potential projects would result in interior changes lacking independent utility/rational from the exterior work submitted for NCPC approval: the two projects described here and two elevator replacement projects, one in the east wing and one in the south tower. During the preparation of this memo, the Smithsonian informed NCPC that it intends to use "machine-room-less" equipment for the elevators that will not result in exterior changes and that, therefore, will not require NCPC review and approval.

106, “. . . the determination of the effect of the undertaking on any historic property could not be properly made because the interceptor was not considered part of the ‘undertaking.’” (Id. at 905)

IV. ANALYSIS

The concept of independent utility/rational need is best understood in the context of the *Crutchfield* case. In that case, the interrelationship between the two projects is clear. Simply put, the sewage treatment plant required sewage to treat, and the only way for sewage to get to the treatment plant was by way of the interceptor. Without the interceptor, the treatment plant could not function, had no independent utility, and there was no rational need for it. Therefore, the two were an integrated whole for purposes of the Section 106 process.

As noted above, in the case at hand, two potential exterior renovations trigger the independent utility/rational need standard. Addressing the basement work first, the basement level is being lowered and a new below-grade addition for building support spaces is being added. The new below grade addition extends beyond the Castle’s existing footprint. The addition of new, below grade space necessitates the addition of new exterior doors for egress purposes. The exterior doors would not be added (nor feasible) unless the interior changes to the basement were occurring. As such, the new exterior doors and interior changes to the basement are connected, and therefore both components are subject to Section 106 consultation.

The blast resistant windows require the temporary displacement of historic finishes on the interior of the Castle, adjacent to the masonry openings. This is required to imbed structural supports into the building structure to adequately brace the blast resistant windows. The blast windows have no independent utility or rational need without these structural supports, which in turn require the alterations to the historic finishes around the masonry openings. Therefore, the blast resistant windows and associated interior alterations require both to be considered as part of the Section 106 consultation process.

It is important to note that for the two internal improvements discussed above, the Section 106 consultation is limited to a defined area of potential effect determined by the SI and NCPC during the Section 106 consultation process. It does not extend to the entire interior.

V. CONCLUSION

A. The Section 106 Consultation for the Castle Rehabilitation Applies to Certain, Limited Portions of the Castle Interior.

For purposes of the Castle renovation, under the legal standard of independent utility/rational need, NCPC must include certain portions of the Castle interior in the Section 106 consultation process to satisfy its Section 106 consultation obligations. The impacted interior areas include the egress paths that connect to new exterior doors that are being added for emergency egress and typical conditions for interior changes required by installation of blast windows.

NCPC has consulted with SI on the inclusion of the above referenced interior portions of the Castle in the Section 106 consultation process. SI agrees with NCPC that these interior renovations will

be included in the Section 106 consultation process to satisfy NCPC's and SI's collective Section 106 obligations.

B. While the Scope of NCPC's Section 106 Obligation Must Extend to Interior Portions of a Building Impacted by Exterior Renovations, NCPC's Review and Approval of Projects Under the National Capital Planning Act Will Continue to Focus Only On Exterior Elements of A Project.

For applications submitted to the Commission for review and action pursuant to the Commission's zoning authority, the Commission's jurisdiction and decision will only apply to exterior elements of the project. This is true even if Section 106 of the NHPA applies to the project and the consultation process must include interior portions of the building. The interior review requirement derives from NHPA related case law and only applies to NHPA obligations and the scope thereof. This case law cannot alter non-NHPA jurisdiction and authority conferred by an agency's enabling legislation.

C. The Legal Concept of Independent Utility/Rational Need Will Apply to NCPC's Section 106 Obligation for Projects/Undertakings of Other Federal Agencies Subject to Review by NCPC.

The independent utility/rational need legal standard must be considered in the context of all projects for which NCPC has a Section 106 obligation. Accordingly, going forward, NCPC will remain cognizant of the legal standard and determine its applicability to projects when NCPC has an approval authority and therefore a Section 106 obligation. This includes review of projects on federal land in Washington, DC and District projects within the central area of Washington, DC. There are other times when NCPC has a Section 106 obligation outside of Washington DC, however, in these instances, the projects are largely parks and open space improvements.

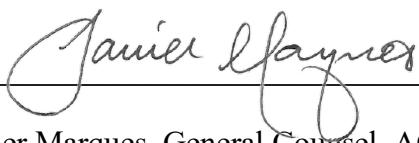
When NCPC has a Section 106 obligation, staff will consult with the applicant in making its decision regarding the inclusion of internal areas implicated by the independent utility/rational need standard to ensure the parties mutually agree on the extent of the Section 106 review. NCPC will determine the scope of undertakings, including those internal portions of a project, that must be included in its Section 106 obligation and will establish the limits of NCPC's internal review. If the applicant determines it wants to extend the Section 106 consultation to internal areas not identified by NCPC as required under the independent utility/rational need legal standard, they may do so on their own initiative. However, NCPC will not include these areas in its Section 106 obligation for the applicable project.

VI. ACHP Concurrence

NCPC seeks ACHP concurrence on the extent of NCPC's limited interior Section 106 obligation as outlined in this memorandum for the SI's Castle renovation project. NCPC also seeks ACHP concurrence on the way NCPC will determine the applicability of the independent utility/rational need standard as set forth in this memorandum for each project submitted to NCPC for review and approval in the future to which Section 106 applies.

The obligations stated in this memorandum shall go into effect on the date ACHP provides its concurrence.

Please indicate your concurrence below.



Javier Marques, General Counsel, ACHP

9/16/2022

Date

cc: Marcel Acosta, Executive Director, NCPC
 Diane Sullivan, Director, Urban Design and Plan Review, NCPC
 Matthew Flis, Senior Planner, NCPC
 Lee Webb, Historic Preservation Officer, NCPC
 Farleigh Earhart, Acting Deputy General Counsel, SI