

Michael Krantz

From: Board of Commissioners
Sent: Friday, November 13, 2020 1:32 PM
To: Commissioners; Department Heads; Jesse Bane; Patti Parker
Subject: Public Input Peg Lucas FW: Annexation of Historical Liriodendron property into the Town
Attachments: Federal Regulation 106 (1).pdf; Viewshed-ProtectionPreservation.Law.Educational.pdf

See messages below.

From: peglucas@aol.com <peglucas@aol.com>
Sent: Thursday, November 12, 2020 6:06 PM
To: Board of Commissioners <boardofcommissioners@belairmd.org>
Subject: Fwd: Annexation of Historical Liriodendron property into the Town

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

FYI ...I had an incorrect email address when originally sending this missive

-----Original Message-----

From: peglucas@aol.com
To: jonathanwestart@gmail.com <jonathanwestart@gmail.com>; Commissioners@aol.com <Commissioners@aol.com>; ksmall@belairmd.org <ksmall@belairmd.org>
Sent: Thu, Nov 12, 2020 6:02 pm
Subject: Re: Annexation of Historical Liriodendron property into the Town

Mr. West,

See my notations below.

As I point out, you have offered no documentation by an appropriate authority describing a defined viewshed which would directly affect subject property.

You say that you "...possibly stand corrected". I ask that you thoroughly study that which I have provided you. I believe I have addressed all of your incorrect/misleading/undocumented arguments at considerable expense of my time and I do not intend to again address this matter with you.

Peg Lucas

p.s to Commissioners and Kevin Small

I have included the attachments that accompanied Mr West's missive of 11.12.2020.

-----Original Message-----

From: Jonathan West <jonathanwestart@gmail.com>
To: peglucas@aol.com
Sent: Thu, Nov 12, 2020 4:00 pm
Subject: Re: Annexation of Historical Liriodendron property into the Town

Thank you very much for responding, Peg Lucas.
I appreciate your additional research, possibly I stand corrected.
The Maryland Historic Trust will know better than I do.

If the field IS to be built on,Any structure will still fall directly in the VIEWSHED of the South Portico of the Mansion,which is important as they are a wedding venue.

There are Strict Federal Viewshed laws. Has a specific area encompassing the viewshed of the South Portico of the Mansion been identified by an appropriate authority? And, does that area specifically include subject property. If so, please furnish documentation. Your "National Trust...Viewshed Protection..." attachment, on pages 2 and 3, cites only Annapolis in Maryland.

In addition section 6 calls for an architectural and cultural survey to take place before any construction can be considered. Section 6 of what? This land is not included in the Liriodendron parcel and you have not yet identified documentation of a specific viewshed.

The landscape itself is described in the Register. mht.maryland.gov HA-229 graybeal -kelly house

Section 106 calls for any structure that IS seen blend in with the natural environment, in this case the other standing buildings from the original estate,circa 1898. Again, where is the documentation identifying a defined viewscape that would affect the subject property?

Of course,My personal,million dollar nightly view of the sunset falls into play, and must NOT be blocked or hindered in any way. no comment

I saw in the Bel Air Historical Commission meeting notes that Kevin Small was demanding everyone replace their OLD folders with NEW ones.

Perhaps you have not gotten yours yet,due to Covid restrictions. Unrelated to this subject; but yes, that has been accomplished and I do have the most up-to-date information.

I am curious to find out what the HPC Strategic Plan is all about. It is public record.

Thank you once again.I will look closer at the documents you forwarded. Please do!

Jonathan





On Thu, Nov 12, 2020 at 3:12 PM <peglucas@aol.com> wrote:

Mr. West,

In answer to your request that I, as Chair of the Historic Preservation Commission of the Town of Bel Air, "uphold my duty" and intervene in the subject annexation process based on your assertions in this missive, I must decline to support the stand you are taking.

I have reviewed your statements and find that there are **many** errors and misleading assertions throughout and have noted them below within the text.

Also, you have failed to note that the subject property was included in the 2.50 acre parcel that was separated from the larger Kelly tract by Deed from Friedrich H. Kelly to Friedrich H Kelly and Margaret Smith Kelly dated 06/16/1972, HDC 900/1000 The description in the Deed dated 06/16/1972, HDC 899/694, from Friedrich H Kelly to The County Commissioners of Harford County, by metes and bounds description and by reference to Plat 26/7, does NOT include subject property

I urge to address and correct the errors contained in your argument and make the correct information available to all parties involved.

Peg Lucas

-----Original Message-----

From: Jonathan West <jonathanwestart@gmail.com>

To: peglucas@aol.com; Whitlow, James <jwhitlow@baltsun.com>; Jesse Bane <jbane@belairmd.org>; Streett, Jon <jonathan.streett@2wglobal.com>; Elizabeth Hughes -MDP- <elizabeth.hughes@maryland.gov>; Kathy Monday -MDP- <kathy.monday@maryland.gov>; boardofcommissioners@belairmd.org; news@theaegis.com

Sent: Tue, Nov 10, 2020 11:04 am

Subject: Annexation of Historical Liriodendron property into the Town

Peg,

I understand that you are the Chairperson of the Historic Preservation Commission for the Town of Bel Air. correct I am certain that you are aware of the Town of Bel Air's Planning Commission's efforts to assist County backed ,greedy developers efforts to annex the open field of original Kelly family property ,referred to as 1.46 acre Parcel 001 on tax map 0049 by the Planning commission. I am aware of the location of that property and the request for annexation to the Town of Bel Air.

I have a certified original DEED to the property. Dec.5,2005 Land records of Liber.J.J.R.6587 folio 151. That Deed 6587/151 does fall within the chain of title to this property but *has been superseded by subsequent transfers of title* culminating in the current title deed, JJR 13732/321 from Olga Elizabeth Mitchell, etal to LIRIOD, LLC

This deed of gift with life estate reserved,along with the Maryland Historic Trust mht.maryland.gov HA-229 description of the land,clearly link this open green space,surrounded by a canopy of trees planted by Dr.Kelly himself to both the Maryland and National Historic Register. I reviewed a copy of JJR 6587/151, which Deed makes no mention of the National Historic Register. The Maryland Inventory of Historic Properties File HA-229 includes within its description the subject property but does not in itself create any restrictions as to its use. The Historic Preservation Act of 1966 also protects the 80 acres of wooded land behind Kelly ave. down to Bolton Street and as far as the land behind the post office. The Ma and Pa trail and the bypass run through this Federally protected property. Federal Protection does NOT prohibit this annexation or the proposed use of the property.

Heavenly Waters was a gift to the County by The Kelly family.The Register must be considered and respected as Mrs.Kelly's living will. The 1972 Deed from Freidrich H Kelly to The County Commissioners of Harford County, recorded among the Land Records of Harford County in Liber HDC 899 folio 694, conveyed 103.30 acres as shown on Plat 26/7. That acreage does NOT include subject property for which annexation is requested. Based on the chain of title, I have no idea how a 'living will' of Mrs. Kelly could have any bearing.

Please advise the Planning Commission that any Annexation of the property in the Viewshed of Liriodendron would result in immediate designation of the property as that belonging to a Historic Site under code 246-4. :Which it more than obviously is...Also advise the Town that code 246-5 Requires the Town to acquire,develop and PRESERVE Historic or Cultural properties,not offer them up for destruction. No such designation or requirement is appropriate. The Town of Bel

Air codes to which you refer are not at all applicable to this annexation request. They do NOT state the necessity/requirement to take action in this matter.

When I asked Kevin Small, why he didn't just say , "NO" to the developers, he told me he could not stop it. When I asked Charlie Keenan why anyone would try to annex the land, knowing of the Federal protection, he answered, "The Town has NO opinion in this matter. " The Townspeople have expressed their opinion in the form of a petition which has been ignored. I would ask the 'Townspeople' to whom you refer if they based their opinion on the incorrect and misleading statements that you have put forth in this missive.

Now the land has been divided into three parcels with survey stakes, even in parts of land which Gordon Smith and myself lay claim to by adverse possession. Has a valid claim for adverse possession been initiated?

The original DEED states that the " property presently NOT on water and sewer system." There is no requirement for a Deed to indicate water and sewer system availability.

I realize that this small piece of land completed Len Parrish's Monopoly set and is the Keystone of the entire PLOT to have sewer and water provided here first, so the rest of the property behind Kelly Ave can also get Town of Bel Air services. I have no knowledge of this and deem it irrelevant

There is a meeting scheduled concerning annexation on Monday , November 16th @ 7:30.

Please advise the Town that you will uphold your duty under Town Code 246 as Chairperson of the Bel Air Historic Preservation Commission. As stated above, Town code 246 has no bearing on this. Thank you for your integrity and service.

Sincerely,
Jonathan West
411 W. Gordon St.
Bel Air, Md.
21014
410-638-9264



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Preservation Law Educational Materials . . .

APPROACHES TO VIEWSHED PROTECTION AROUND THE COUNTRY

A variety of laws have been adopted around the United States to protect historic and scenic viewsheds. Some laws protect a resource's natural or scenic views,¹ while others protect the views and settings of landmark buildings.² A handful of laws focus on views to and from a specific historic building,³ while others protect only public views of a particular resource from afar.⁴ A few communities protect views through the application of design criteria to proposed changes to property within an historic or buffer district.⁵ Others apply prescriptive zoning restrictions, such as height and setback requirements, to properties located in a pre-determined viewshed.⁶

As with any effort to protect historic properties, viewshed protection also requires extensive analysis of the land affected by viewshed restrictions. This may entail identification of the underlying zoning of land in private ownership that sits within a property's viewshed (and other sites under consideration for protection) and the political feasibility of adopting restrictions that would reduce or preclude development within that viewshed. For example, the capitol view protection law in effect in Austin restricts height through the application of a complex height on structures located within specific sight-lines to the capitol building. Sacramento imposes maximum height and setback (step-back) requirements, which vary according to the distance of the project from the capitol building and its location within a pre-defined area. Indeed, many view protection laws include specific restraints on height and setbacks.⁷

Fairfax County and Princeton Township offer examples of how viewsheds of individual historic sites can be protected through the application of specific criteria to overlay and/or buffer districts. In these communities, viewsheds are protected through the application of detailed criteria and maps, which guide not only the design of new construction but also the siting, size, and configuration of structures to be constructed within the district or buffer district. This approach works well to protect the impact of new construction on a resource's immediate setting. It is less effective in protecting distant views of a single resource, such as Austin's capitol building or Seattle's Space Needle.

¹ See, e.g., Denver, CO, Portland, OR, Palo Alto, CA, and Redland, WA. An ever-increasing number of jurisdictions also regulate views through hillside protection laws. See, e.g., Boulder Cty, CO and Colorado Springs, CO.

² See Seattle, WA, which protects views of the city's natural setting as well as certain landmarks.

³ See, e.g., Sacramento, CA.

⁴ See, e.g., Austin, TX.

⁵ See, e.g., Fairfax County, VA and Princeton Twp., NJ.

⁶ See, e.g., Austin, TX.

⁷ Communities with laws designed to protect natural or scenic views often rely on height restrictions. Denver's "Mountain View Ordinance," codified at Denver Revised Municipal Code, Ch. 10, Articles III and IV, restricts buildings heights to protect panoramic views of the Rocky Mountains and the Denver downtown sky line from specific areas within the city. Portland, Oregon, protects scenic vistas through the establishment of height and length limits on structures and vegetation within specific view corridors. See Portland Code, Ch. 33, § 33.44 (establishing "scenic resource zones").

Even where design review is contemplated, zoning classifications should not be ignored. Georgetown, Colorado provides a good example of such an approach, whereby zoning laws reinforce the objectives of the town's comprehensive design review process. Indeed, Georgetown illustrates how effective laws can become in achieving view protection goals when the link between historic setting, viewshed, and tourism is well-understood.

Moreover, in situations where viewsheds are protected through the application of criteria on a case-by-case basis, it is important to consider the scope of the decisionmaker's authority as well as the decisionmaker. Will the decisionmaker be able to reduce the height of a building or can it only mitigate impacts by shifting bulk or height? In Seattle, for example, the city may take into consideration height, siting, and setbacks, among other mitigation measures, when considering proposals to construct buildings within protected viewsheds. Will the decisionmaker understand the need for view protection? In Annapolis, views of the city's NHL historic district are protected only through the city's site plan review process, which requires review by its planning rather than preservation staff.

Significantly, Kansas,⁸ through its state historic preservation act, protects historic resources by also requiring review of projects within the environs of a historic resource. Under this state's approach, any project that would "damage, destroy or encroach upon" a historic resource (including projects to be located within 500 feet of a historic property) cannot be approved unless it finds "based on a consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to [the] historic property." See Kan. Stat. Ann. § 75-2724. Although the law has withstood court challenges over the years, each decision has invited controversy and unsatisfactory results, invariably due to unresolved conflicts with zoning laws.⁹ Under the Kansas statute, final review authority rests with the city council.

Set forth below are examples of laws in effect around the country, which seek to protect the views or viewsheds of one or more historic resources. No single approach presents the ideal model. However, attributes of these various laws could be adapted to develop workable legislation for individual resources.

Annapolis, Maryland

Objective: Protect historic context and critical views of historic districts.

Approach: Site design plan review and approval based on site design standards.

Decision-Making
body: Planning and Zoning Director

Legal authority: Annapolis Municipal Code, Ch. 21, §§ 21.22

Website: <http://bpc.iserver.net/codes/annapolis/>

Summary: In Annapolis, resources within the city's National Historic Landmark Historic District are protected under a historic preservation ordinance that, in addition to design-based review, restricts height and bulk. In addition, the city imposes "site design standards" on any projects requiring a site design plan, which include:

⁸South Dakota has enacted a similar law. SDCL § 1-19A-11.1.

⁹See, e.g., *Reiter v. City of Beloit*, 947 P.2d. 425 (Kan. 1997) (upholding city's determination that there was no feasible and prudent alternative to the construction of a store within the environs of a home listed on the National Register and that all plans were considered to minimize impact to the historic property, despite SHIPO's determination that store was visually incompatible and would destroy the historic house's relationship with neighborhood).

“new developments, construction, enlargement or alteration of any building, other than a single-family or two-family dwelling, and other than development approved as part of a planned development.” Included within the city’s design standards is a special requirement relating to views. The provision states:

21.62.060 Scenic, historic, archaeological and landmark sites and views.

Scenic, historical, archaeological and landmark sites and features that are located on or adjacent to the proposed development shall be preserved and protected to the maximum extent as practicable through site design, building location, and parking layout. Special consideration shall be given to the impact of projects on views of the Annapolis historic district from the following points:

1. From Eastport and the City dock; and
2. From Truxtun Park; and
3. From the Severn River Scenic Overlook; and
4. From Rowe Boulevard.

Comment: This law, administered by the Planning and Zoning Dept., seeks to regulate development outside the district which could impact on views of the district from specific view points, through its site plan review process “to the maximum extent possible.” Another approach may be to regulate siting through comprehensive design regulations that apply to projects located within a building or area’s viewshed and that are administered by a preservation-based authority. Other zoning-based restrictions, such as height and setbacks, should also be considered.

Austin, Texas

Objective: Protect views and prominence of capitol building throughout city.

Approach: Regulate height in established view corridors and area within a ¼ mile radius from capitol building. View corridors and capitol dominance district established as zoning overlays.

Administrative
Body: Office of Development/Environmental Services

Legal
Authority: Austin Land Dev. Code, §§ 25-2-161, 25-2-162, 25-2-641, and 25-2-642 and Appendix A. Texas Statute § 3151.

Website: Texas statute: <http://www.capitol.state.tx.us/Home.aspx> (Government Code)
Austin city code: <http://www.ci.austin.tx.us/development/>

Report: http://www.ci.austin.tx.us/downtown/downloads/CVC_Report_Final.pdf

Summary: Views of the Texas state capitol from various vantage points around Austin are protected under both state and local law. The state has identified 30 specific view corridors and the City of Austin has identified 26. (In cases where conflicts appear, the more restrictive law applies). Each view corridor is described through coordinates. Maximum allowable height in a protected corridor is established through the use of a complex formula, taking into consideration changes in topography and distances from the capitol building.

Comment: Austin has protected views of its capitol building since the mid-1980s. Views were originally selected based on a detailed study from 1983 that evaluated 60 different views based on four categories: (1) stationary parks; (2) threshold views (from entryways into the CBD); (3) sustained approaches (continuous views along a corridor); and (4) dramatic glimpses. From this study a height calculation formula was developed to determine height allowances within each corridor. See http://www.ci.austin.tx.us/downtown/downloads/Capitol_View_Preservation_Study.pdf. Austin reevaluated each view corridor as part of a 2007 study conducted by a “downtown commission,” which includes recommendations on adjustments to specific corridors. See http://www.ci.austin.tx.us/downtown/downloads/CVC_Report_Final.pdf. In some situations, the study suggested that alterations may be justifiable under a cost/benefit analysis.

Fairfax County, Virginia

Objective: Protect historic sites and their settings.

Approach: Regulate changes affecting historic sites within historic overlay districts. Boundary lines are established to protect historic sites and visual encroachments on such sites. A district may include “lands closely related to and bearing upon the visual character of the district core and that contribute to the historic context of the district.”

Decision-making Body: Architectural Review Board (ARB)

Legal Authority: Fairfax County Zoning Ordinance, Art. 7, Part 2 § 7-200

Websites: <http://www.fairfaxcounty.gov/dpz/zoningordinance/>
<http://www.fairfaxcounty.gov/dpz/historic/>

Summary: Fairfax County, located just outside Washington, D.C., protects historic sites and their settings through the designation of historic site districts, and the corresponding adoption of guidelines specific to each district. These guidelines seek to preserve the natural contours of the landscape and vistas to and from historic sites. For example, the Huntley Historic Overlay District protects not only the Huntley House, built in 1818 for Thomas Mason, but also views from the house to the south and views to the house from Harrison Lane, a winding road that provides an axial view of the house.

In Fairfax County, all applications for rezoning, special exceptions, special permits, variances, building permits for properties in designated districts are reviewed by the ARB. No applications may be approved unless they are architecturally compatible with the historic resource and conform to requirements set forth under the designating ordinance, which may include restrictions on use, bulk, open space, and so forth.

Comment: Following Fairfax County’s model, historic districts could be created around NHL sites, and the city’s preservation commission could be empowered to deny changes to properties within that area that would compromise important viewsheds to or from the resource. Detailed guidelines could be developed for

each district. As in Fairfax and other jurisdictions, it would be prudent to ensure that zoning meshes with the objectives set forth in each guideline

Georgetown, Colorado

- Objective:** Protect town's historic setting and sites, including views of mountains and historic sites.
- Approach:** Design review and comprehensive rezoning.
- Decision-making Body:** Design Review Commission (also performs as historic preservation commission); Appeal to Board of Selectmen.
- Legal Authority:** Georgetown Code, Title 17 (Land Use Code)
- Website:** <http://town.georgetown.co.us/> (Click on Government to find links to town code and guidelines)
- Summary:** Georgetown, Colorado, a historic mining town, seeks to preserve its natural setting and heritage through a unified regulatory system that places a high emphasis on contextual development. In Georgetown, permits for development may be issued only after review and approval by the town's Design Review Commission (DRC), which issues "certificates of appropriateness" based on a project's conformity with a comprehensive set of design guidelines. The entire town is divided into "design areas" and individual "character areas." Among the design areas is a "Historic Area," which includes most of the town's historic structures and its hillsides. The "Millside Area" serves as a buffer between the Historic Area and newer areas of the town.
- The DRC has adopted detailed design guidelines, which include typical preservation-based standards, but also allow for consideration of issues relating to height and views. For example, the guidelines for the Historic Area state: "Views to natural and historic features abound in Georgetown and contribute to its unique setting. These view corridors should be respected. Maintaining views to the mountains and historic landmarks are especially important." Georgetown is included in the Georgetown-Silver Plume National Historic Landmark District.
- Consistent with its unified development approach, the city's zoning laws are designed to reinforce the attributes of individual design and character areas. For example, maximum heights and minimum lot sizes are consistent with existing buildings and development patterns. "To the extent that the existing patterns of lots and locations of buildings on their sites contribute to the desired character of a district, it is the intent of the district area and bulk regulations to encourage continuation of such patterns so as to enhance and protect the historic character of the Town and its designation as a National Historic Landmark District." View protection requirements are also applied in other design districts, but the focus is on protecting views of the mountains rather than historic structures.
- Comment:** Georgetown's holistic approach to preserving its history and natural setting provides an interesting model. The town's entire land use program is designed to preserve its attributes while allowing for compatible development and individual decisions are made by a design review board.

Princeton Township, New Jersey

- Objective:** Protect historic sites and districts from encroachment.
- Approach:** Protect historic sites through the adoption of buffer zones. The Preservation Commission reviews and acts on proposed "preservation plans" (proposals for alterations, additions, demolition, new construction), for projects in locally designated historic districts and buffer zones. Proposed actions must not adversely affect a structure's setting.
- Decision-Making Body:** Historic Preservation Commission (HPC)
- Legal Authority:** Princeton General Ordinances, §§ 10B-27.5; 10B-41.1-2; and 10B-240.1
- Website:** <http://www.princetontwp.org/histpres.html>
<http://www.princetontwp.org/histdist.html>
http://70.168.205.112/princeton_nj/lpext.dll?f=templates&fn=site_main-j.htm&2.0
- Summary:** Princeton protects its historic sites through the designation of preservation zoning districts and historic buffer districts, which protect historic sites from encroaching development. The HPC has authority over development in both the historic district and buffer district. As part of the designation process, the HPC prepares a report that includes, among other things, a description and statement of justification for the boundaries. It also includes an explanation of its relationship to an adjacent historic district and design standards or guidelines.
- Comment:** Princeton offers a potentially useful model for the protection of viewsheds by establishing buffer zones adjacent to historic sites. Guidelines could be adopted through the designation process that identify the specific areas to be protected and the standards governing any proposed development within a buffer area.

Sacramento, California

- Objective:** Protection of views to and from state capitol building.
- Approach:** Regulates height and setbacks of surrounding buildings to protect views of state capitol building and surrounding grounds.
- Administrative Body:** Planning Commission
- Legal Authority:** Capitol View Protection Act, Sacramento City Code, § 17.96.100
- Website:** <http://www.cityofsacramento.org/planning/policies-and-programs/capitol-view.cfm>
- Summary:** The city, by ordinance, sets building height limits, setback requirements, and parking limitations in a prescribed area surrounding the state capitol building and park. The height and setback requirements are prescriptive, but vary by location/distance from capitol building. Setback areas may be encroached upon if pedestrian level features are built into a project, such as arcades or plazas, and

the size of the setback must increase as the height of the building increases. Parking is regulated through a special permitting process and excess height resulting from "architectural embellishments" may be exceeded on a case-by-case basis. Variances may also be granted on a case-by-case basis.

Comment: Sacramento's law, in effect since 1992, offers an example of a prescriptive approach to protecting views to and from the resource. Projects are also reviewed by the downtown design commission, which has design authority over all projects in the CBD-Special District and in some cases, the city's preservation commission. Design guidelines for the central city area, currently in draft form, reinforce the city's capitol view protection act. See <http://www.cityofsacramento.org/dsd/planning/urban-design/central-city-urban-design-guidelines/>.

Seattle, Washington

Objective: View protection of landmarks such as the Space Needle, Smith Tower, and King Street Station, as well as Mount Rainier, Cascade and Olympic mountain ranges, Puget Sound, Seattle lakes, and the downtown skyline.

Approach: Establishment of environmental policy that requires protection of identified public views through the application of "mitigation measures," which may include setback and height restrictions.

Decision-Making Body: Department of Planning and Development

Legal Authority: Seattle Municipal Code § 25.05.675P, Public View Protection

Website: Seattle Code: <http://clerk.ci.seattle.wa.us/~public/toc/25-05.htm>

Overview: http://www.seattle.gov/dpd/Planning/View_Protection/Overview/

Space Needle View Protection Report: http://www.seattle.gov/dpd/Planning/View_Protection/ProtectingSpaceNeedleViews/default.asp

Inventory of public view sites: http://www.seattle.gov/dpd/Planning/View_Protection/Inventory/default.asp

Summary: Seattle protects public views through its environmental review process. Under Seattle's approach, the city may conditionally approve or deny projects that would adversely affect protected views. Examples of mitigation may include, among other requirements, adjustments in height, bulk, setbacks, or re-location of the project on the site. Seattle protects 86 public views and viewscapes under this law. Protected views are listed in the city's code and more fully described in reports and inventories.

Although Seattle's environmental act specifically refers to public views of historic landmarks, the city has done little to protect views of historic landmarks thus far. The city adopted special legislation protecting 10 different vistas of the Space Needle in 2001. Protection of landmark sites is controversial and the general view is that only a very limited number of landmarks merit view

protection under this provision, such as the Smith Tower and King Street Station. As with the Space Needle, these structures are highly visible from various locations in the city.

Comment: Seattle's program is primarily designed around public vistas and viewpoints, mainly from parks rather than specifically identified view corridors. Even where views of specific buildings are protected, the objective is to protect a vista rather than the building's viewshed. Protection is achieved on a case-by-case basis rather than through the application of elaborate height formulas, as in Texas, and a broader range of potential mitigation measures may be considered.

36 CFR PART 800 -- PROTECTION OF HISTORIC PROPERTIES (incorporating amendments effective August 5, 2004)

Subpart A -- Purposes and Participants

Sec.

800.1 Purposes.

800.2 Participants in the Section 106 process.

Subpart B -- The Section 106 Process

800.3 Initiation of the section 106 process.

800.4 Identification of historic properties.

800.5 Assessment of adverse effects.

800.6 Resolution of adverse effects.

800.7 Failure to resolve adverse effects.

800.8 Coordination with the National Environmental Policy act.

800.9 Council review of Section 106 compliance.

800.10 Special requirements for protecting National Historic Landmarks.

800.11 Documentation standards.

800.12 Emergency situations.

800.13 Post-review discoveries.

Subpart C -- Program Alternatives

800.14 Federal agency program alternatives.

800.15 Tribal, State and Local Program Alternatives. (Reserved)

800.16 Definitions.

Appendix A – Criteria for Council involvement in reviewing individual section 106 cases

Authority: 16 U.S.C. 470s.

Subpart A-Purposes and Participants

§ 800.1 Purposes.

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of

project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 800.2 Participants in the Section 106 process.

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the

implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106,

provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.*

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) *Indian tribes and Native Hawaiian organizations.*

(i) *Consultation on tribal lands.*

(A) *Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) *Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.*

Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant

preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall

provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses and other approvals.* An applicant for Federal assistance or for a Federal permit, license or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government to government relationships with Indian tribes.

(5) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public.*

(1) *Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and

the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Subpart B-The section 106 Process

§ 800.3 Initiation of the section 106 process.

(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) *Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation, such as section 4(f) of the Department of

Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

§ 800.4 Identification of historic properties.

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews,

sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's Standards and Guidelines for Identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal and local laws, standards and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14 (b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance.*

(1) *Apply National Register criteria.*

In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, the agency official shall

apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation.*

(1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv)(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in

accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

§ 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with, or no objection to, finding.* Unless the Council is reviewing the finding pursuant to paragraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) *Disagreement with finding.*

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.*

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have

been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment.*

(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility

in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects.*

(1) *Resolution without the Council.*

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse

effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a

memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.*

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories

shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the

agency official when it executes the memorandum of agreement.

(c) *Comments by the Council.*

(1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 Coordination With the National Environmental Policy Act.

(a) *General principles.*

(1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan

their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/THPOs, Indian tribes and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and

(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.*

(i) The agency official shall submit the EA, DEIS or EIS to the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

(ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

(iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this

subpart shall then be satisfied when either:

- (i) a binding commitment to such proposed measures is incorporated in
 - (A) the ROD, if such measures were proposed in a DEIS or EIS; or
 - (B) an MOA drafted in compliance with § 800.6(c); or
- (ii) the Council has commented under § 800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

§ 800.9 Council review of section 106 compliance.

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the

agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants.*

(1) *Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) *Compliance with Section 106.* If an agency official, after consulting with

the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) *Information from participants.* Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) *Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

§ 800.10 Special requirements for protecting National Historic Landmarks.

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When

commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

§ 800.11 Documentation standards.

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply with other laws to fulfill the

requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality.*

(1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

(d) *Finding of no historic properties affected.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) *Finding of no adverse effect or adverse effect.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties;

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) *Memorandum of agreement.* When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a memorandum of agreement.* Documentation shall include:

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

§ 800.12 Emergency situations.

(a) *Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) *Alternatives to agency procedures.* In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

§ 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries.*

(1) *Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the

Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

Subpart C-Program Alternatives

§ 800.14 Federal agency program alternatives.

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the Federal Register.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.*

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public Participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until

it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories.*

(1) *Criteria for establishing.* The Council or an agency official may propose a program or category of undertakings that may be exempted

from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) *Public participation.* The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic

properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The proponent of the exemption shall publish notice of any approved exemption in the Federal Register.

(d) *Standard treatments.*

(1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the Federal Register.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Termination.* The Council may terminate a standard treatment by publication of a notice in the Federal Register 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the Federal Register of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda and applicable provisions of law.

(2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views

into account in reaching a final decision on the proposed program alternative.

§ 800.15 Tribal, State, and local program alternatives. (Reserved)

§ 800.16 Definitions.

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day or days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local or tribal government has assumed or has

been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of

historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *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.

(z) *Senior policy official* means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

Appendix A to Part 800 -- Criteria for Council Involvement in Reviewing Individual section 106 Cases

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under

the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to § 800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other

authorities, such as the Native American Graves Protection and Repatriation Act.

Michael Krantz

From: Michael Krantz
Sent: Thursday, November 12, 2020 2:51 PM
To: Commissioners
Cc: Department Heads; Jesse Bane; Patti Parker
Subject: Public Input West FW: Annexation of Historical Liriodendron property into the Town

See message below.

From: Board of Commissioners
Sent: Thursday, November 12, 2020 2:49 PM
To: Jonathan West <jonathanwestart@gmail.com>
Subject: RE: Annexation of Historical Liriodendron property into the Town

Thank you for your feedback.
Town of Bel Air
410-638-4550
www.belairmd.org

From: Jonathan West <jonathanwestart@gmail.com>
Sent: Tuesday, November 10, 2020 11:04 AM
To: pegucas@aol.com; Whitlow, James <jwhitlow@baltsun.com>; Jesse Bane <jbane@belairmd.org>; Streett, Jon <jonathan.streett@2wglobal.com>; Elizabeth Hughes -MDP- <elizabeth.hughes@maryland.gov>; Kathy Monday -MDP- <kathy.monday@maryland.gov>; Board of Commissioners <boardofcommissioners@belairmd.org>; news@theaegis.com
Subject: Annexation of Historical Liriodendron property into the Town

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Peg,

I understand that you are the Chairperson of the Historic Preservation Commission for the Town of Bel Air.

I am certain that you are aware of the Town of Bel Air's Planning Commission's efforts to assist County backed ,greedy developers efforts to annex the open field of original Kelly family property ,referred to as 1.46 acre Parcel 001 on tax map 0049 by the Planning commission.

I have a certified original DEED to the property. Dec.5,2005 Land records of Liber.J.J.R.6587 folio 151.

This deed of gift with life estate reserved,along with the Maryland Historic Trust mht.maryland.gov HA-229 description of the land,clearly link this open green space,surrounded by a canopy of trees planted by Dr.Kelly himself to both the Maryland and National Historic Register.The Historic Preservation Act of 1966 also protects the 80 acres of wooded land behind Kelly ave. down to Bolton Street and as far as the land behind the post office. The Ma and Pa trail and the bypass run through this Federally protected property.

Heavenly Waters was a gift to the County by The Kelly family.The Register must be considered and respected as Mrs.Kelly's living will.

Please advise the Planning Commission that any Annexation of the property in the Viewshed of Liriodendron would result in immediate designation of the property as that belonging to a Historic Site under code 246-4. Which it more than obviously is...Also advise the Town that code 246-5 Requires the Town to acquire,develop and PRESERVE Historic or Cultural properties,not offer them up for destruction.

I realize that you are in a next to impossible position to oppose this Hostile defacement of our beloved Town, but the laws are written to give us integrity, even when our Governing Officials fail us.

When I asked Kevin Small, why he didn't just say, "NO" to the developers, he told me he could not stop it. When I asked Charlie Keenan why anyone would try to annex the land, knowing of the Federal protection, he answered, "The Town has NO opinion in this matter."

The Townspeople have expressed their opinion in the form of a petition which has been ignored.

Now the land has been divided into three parcels with survey stakes, even in parts of land which Gordon Smith and myself lay claim to by adverse possession.

The original DEED states that the "property presently NOT on water and sewer system."

I realize that this small piece of land completed Len Parrish's Monopoly set and is the Keystone of the entire PLOT to have sewer and water provided here first, so the rest of the property behind Kelly Ave can also get Town of Bel Air services.

There is a meeting scheduled concerning annexation on Monday, November 16th @ 7:30.

Please advise the Town that you will uphold your duty under Town Code 246 as Chairperson of the Bel Air Historic Preservation Commission. Thank you for your integrity and service.

Sincerely,

Jonathan West

411 W. Gordon St.

Bel Air, Md.

21014

410-638-9264

Resource Information System



Show simplified view



#VOTE THEM OUT

OF THE
MARYLAND
HISTORIC
TRUST

PROTECT
THIS LAND

IT'S NOT TIME
TO FODDER
MOTHER
NATURE

WARNING NOTICE

YOU
READY?

mht.maryland.gov
HA-229
GRAYBEAL KELLY

THE
PLOT

THE 100th ANNIVERSARY of the
Maryland Historic Trust
is being celebrated on the 100th
anniversary of the Trust's
founding in 1901. The Trust
is a non-profit organization
dedicated to the preservation
of Maryland's historic
resources. For more information
visit our website at
www.mht.org

VIEWSHED!

#savegreen
SPACE

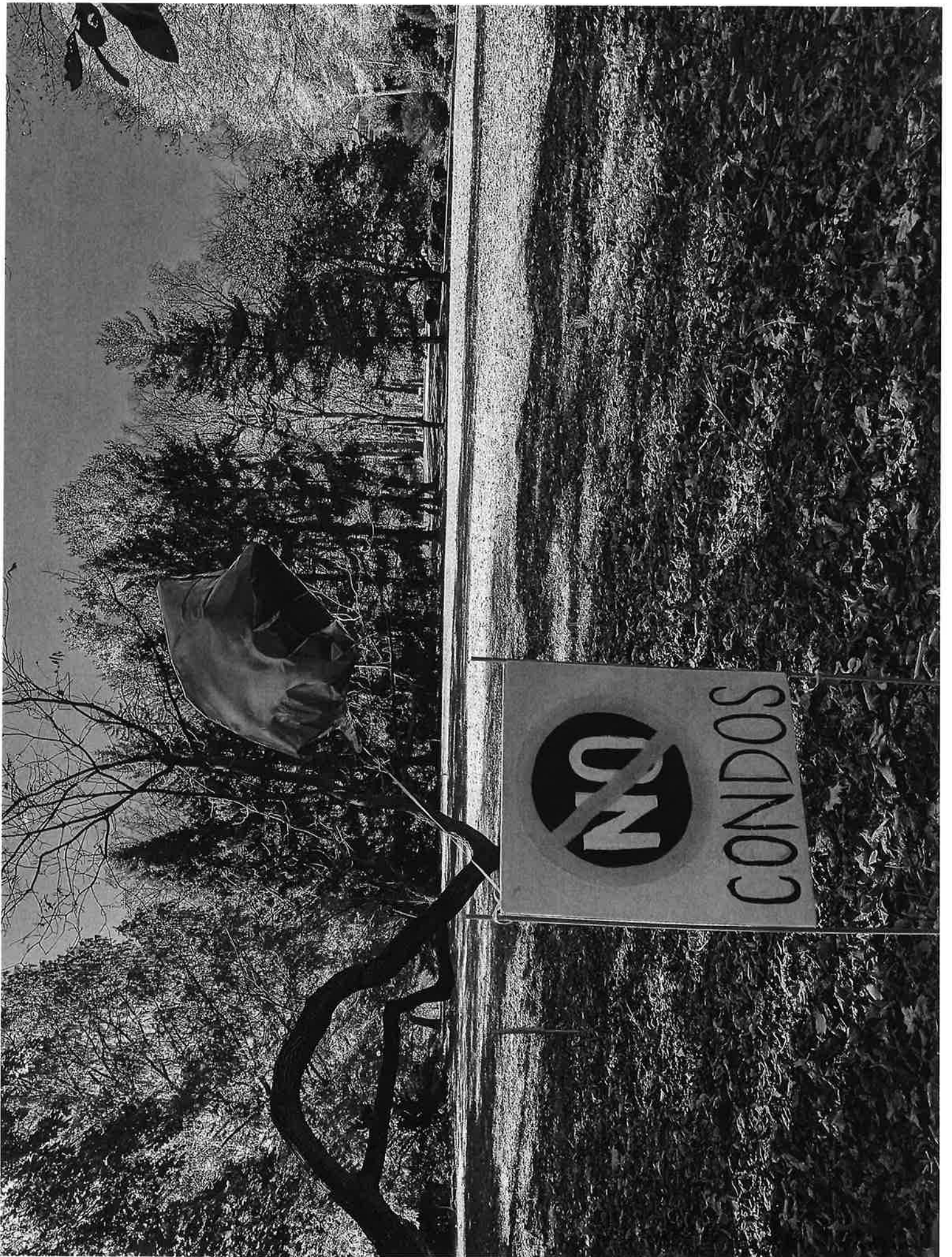
ALL 80
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THE SUN

THE SUN



Michael Krantz

From: Michael Krantz
Sent: Monday, November 09, 2020 7:04 AM
To: Commissioners; Department Heads; Jesse Bane; Patti Parker
Subject: Public Input Cempura Fwd: Liliodendron area annexation

See message below.

Get [Outlook for iOS](#)

From: Jowanka Cempura <jowankac@yahoo.com>
Sent: Friday, November 6, 2020 7:43 PM
To: Board of Commissioners
Subject: Liliodendron area annexation

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Hello,

As a long time resident of Bel Air I urge the commissioners to either vote no or at least change the considered conditions:

Limit the number of single - family detached lots to two instead of three. As one looks at the lots, it is clear that in order to allow the third house to be build, considered number of beautiful mature trees would have to be removed. As we all know mature trees take decades to grow and planting the buffering landscape will not make up for it, especially in a surrounding historic Liliodendron area.

This area has been cherished by many.. for walks, family time, weddings, photo sessions and many more ocasions. Injecting the park with a new development just does not seem a right thing to do by the town. It is not in the best interest of the many.

I urge you when making decisions not to agree to a bad planning. As a interior designer I am aware of a good and bad design. Do not spoil the feel of Liliodendron parkland for your people! Two smaller houses, integrated into the green space without removing mature trees should be more than enough for this strip of parkland. There is never enough parks and trees and we should appreciate and preserve it. Isn't it what we teach our children in Harford county public schools? Lead by example! We all are watching and want to be represented fairly!

Best regards,

Jowanka Cempura
749 Orley Pl
Bel Air, MD 21014

Sent from Yahoo Mail on Android

Michael Krantz

From: Michael Krantz
Sent: Monday, October 26, 2020 12:15 PM
To: Department Heads; Commissioners; Jesse Bane; Patti Parker
Subject: Public Input Derby, Kajus Fw: Preserve the Liriodendron for the next generation

See message below.

From: Student - Derby, Kajus C. <kajusderby@student.hcps.org>
Sent: Sunday, October 25, 2020 5:34 PM
To: Board of Commissioners <boardofcommissioners@belairmd.org>
Subject: Preserve the Liriodendron for the next generation

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear Town of Bel Air Commissioners,

My name is Kajus Derby, and I am 16 years old. I am writing to you as both a concerned citizen and a future voter. I, like many people, like to indulge myself in a pleasant stroll out in the fresh air. It helps me clear my saturated cranium after an exhausting day of virtual education. The Liriodendron and its surrounding landscape are the chosen setting for my leisurely saunter. I enjoy the area because it possesses an aura of life and the untouched natural world. Though we possess, in this town, sparse undeveloped areas of greenery, they are mostly grounds of play for children, with interactive structures meant for them. I, as being at least six years older than the children those structures are meant for, find no pleasure in games such as 'Lava Monster' or 'Infection'. Nor does it please me to scamper and frolic through the suspended platforms, as they are always too small for me (I'm 6' 3"). I accordingly have no interest in wandering through such areas, as they often fill my mind with melancholy memories of my youth; Those times when I enjoyed nothing better than to be chased by my father over the whole playground. I, then, must choose something a little more universal, something that attracts due to its beauty and atmosphere, not its utility. The Liriodendron checks all these boxes as and a place where one can find both pleasure and enjoyment, regardless the season. In Autumn, all the leaves are changing colors and the fresh air turns crisp and cool. In the Winter, snow covers the landscape like a fluffy white blanket and the hill that slopes down from the Mansion becomes prime for sledding. In the Spring, the animals are returning after hibernation and the plants are starting to bloom. Everyone loves to enjoy the warming air and enjoy the beautiful scenery. Lastly, in Summer, there is lots of beautiful space for outdoor concerts, picnics, and play. If you allow the land that will be annexed to the town to be developed, you will get rid of this beautiful space that we already have so little of. In its place you will allow to be built three mega houses that benefit only the builders, contractors, and owners, but hurt so many more. It is for these reasons that I ask you, in the name of all who benefit from that greenspace, be it mentally, spiritually, or physically, please do not let that property to be developed.

Kajus Derby

Michael Krantz

From: Michael Krantz
Sent: Thursday, November 12, 2020 2:53 PM
To: Commissioners
Cc: Department Heads; Jesse Bane; Patti Parker; Ruth Seitler
Subject: Public Input Derby Susan FW: Property near Liriodendron

See message below.

From: Board of Commissioners
Sent: Thursday, November 12, 2020 2:49 PM
To: Susan <s.derby@hotmail.com>
Subject: RE: Property near Liriodendron

Thank you for your feedback.
Town of Bel Air
410-638-4550
www.belairmd.org

From: Susan <s.derby@hotmail.com>
Sent: Wednesday, November 11, 2020 10:59 AM
To: Board of Commissioners <boardofcommissioners@belairmd.org>
Subject: Property near Liriodendron

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

I am writing today to ask that the Board of Commissioners reconsider allowing a developer to build on the property adjacent to Liriodendron. I grew up in Bel Air and had my wedding at Liriodendron. Please do not allow anyone to build on this beautiful site. I have walked my dogs there often, and my children have played there. What a loss it would be to the residents of Bel Air, as well as those who visit Liriodendron, to lose this green space. Is tax revenue the only motivation? Why must every green space be developed? Please do not allow development on this site. Thank you for your consideration.

Sincerely,
Susan E. Derby

Michael Krantz

From: Board of Commissioners
Sent: Thursday, November 05, 2020 12:27 PM
To: Commissioners; Department Heads; Jesse Bane; Patti Parker
Subject: Public Input Passe FW: Property next to Lireodendrum

See message below.

From: Barbara Passe <barbpasse@gmail.com>
Sent: Monday, November 02, 2020 8:11 PM
To: Board of Commissioners <boardofcommissioners@belairmd.org>
Subject: Property next to Lireodendrum

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

This property should NOT have houses built on it. It is a lovely piece of land, it should be a park. We certainly do not have enough green space in Harford County. Everyone wants to put houses up. I say NO!

Barbara Passe
Bel Air, Maryland