

# Legal Framework for Preservation

Friday, June 3, 2022, at 3:30PM



**Dorothy P. Guzzo**  
Executive Director  
New Jersey Historic  
Trust



**Dr. Patty Gerstenblith**  
Director  
Center for Art, Museum  
& Cultural Heritage Law  
DePaul University



**Janine Bauer**  
Partner  
Szaferman Lakind

# Legal Framework for Preservation

Friday, June 3, 2022, at 3:30PM



Dorothy P. Guzzo  
Executive Director  
New Jersey Historic Trust

# Legal Framework for Preservation

Friday, June 3, 2022, at 3:30PM



Janine Bauer  
Partner  
Szaferman Lakind

# Section 106 of the National Historic Preservation Act: Promise and Experience

Janine G. Bauer, Esq.



# What Does NHPA, Section 106, Say?

- Section 106 of the National Historic Preservation Act (NHPA) provides:
- “The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. 16 U.S.C. § 470f (now 54 U.S.C. § 306108).

# The Purposes of the NHPA Are:

- (1) to strengthen and expand the work being done under section 2(b) of the act of August 21, 1935... and to establish a national register of sites, structures, and the like which are significant in American history, architecture, archeology, and culture;
- (2) to encourage local, regional, State, and National interest in the protection of such properties; and
- (3) to establish an Advisory Council on Historic Preservation charged with the duties of advising the President and the Congress on matters relating to preservation of such properties, recommending measures to coordinate public and private preservation efforts, and reviewing plans for Federal undertakings and the undertakings of others involving Federal assistance or requiring a Federal license which affect sites, structures, and the like listed in the national register referred to above.

[H.R. Rep. No. 1916, 1966 U.S. Code Cong. & Ad. News at 3307-08.]

# Section 106 Creates A Procedure And Meaningful Protection of Our Heritage

- The NHPA is often called a “procedural” statute designed to ensure that, as part of the planning process for properties under the jurisdiction of a federal agency, the agency takes into account any adverse effects on historical places from actions concerning that property. See Morris County Trust for Historical Preservation v. Pierce, 714 F.2d 271, 278-79 (3d Cir. 1983). In this regard, it is like the National Environmental Policy Act (NEPA).
- However, Section 106 and the NHPA itself is also a substantive Act protecting not only "nationally significant" properties but also properties of "historical, architectural, or cultural significance at the community, State or regional level... against the force of the wrecking ball." H.R. Rep. No. 1916, supra, 1966 U.S. Code Cong. & Ad. News at 3309. The House Report emphasized the importance of focusing attention on the significance of such community, state or regional properties, specifically in "the urban renewal field[.]" Id.

# How Section 106 Works

- The National Historic Preservation Act (NHPA) established a framework to foster a new ethic through all levels and agencies of the federal government.
- Section 106 of the NHPA requires federal agencies to consider the effects of their actions on historic properties and provide the Advisory Committee of Historic Preservation (ACHP) with an opportunity to comment on projects before implementation.
- Agencies have to assume responsibility for the consequences of their actions on historic properties and be publicly accountable for their decisions.
- All federal agencies to establish preservation programs and designate Federal Preservation Officers to coordinate their historic preservation activities.
- The NHPA has been amended and expanded a number of times since its original passage and is now in Title 54, not Title 16. Regulations are found at 36 CFR part 800 et seq.



# How Well Has §106's Promise Worked?

- It's hard to tell, because searching for results of the section 106 process is complicated, and contextual; perspectives may differ.
- Judicial opinions in cases where a particular result was appealed, often by preservationists not satisfied with the outcome of the Section 106 MOA process, usually rule that the agencies correctly balanced mitigation and preservation and defer to them; this means that adverse effects on historic properties or places are tolerated because of federal courts' deference to the agencies' decisions.
- ACHP keeps a list of "success stories" on its website by State (and nat'l government program agreements) – New Jersey's only listing in NJPAC in Newark.

# NJPAC: A Bit of History ...

**Military Park**



**NJPAC**



# Federal Constitutional Underpinning of Local Historic Preservation Protection: Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)

- The law challenged there was a NYC ordinance (“local law”).
- Railroad that owned GCT challenged local law as invalid and the NYC Landmarks Commission decision under the local law as a “taking” under the 5<sup>th</sup> Amendment to the U.S. Constitution without compensation.
- United States Supreme Court ruled that local laws could impose reasonable restrictions on private property to preserve structures/areas with special historical or aesthetic interest or value, if authorized by State. N.Y. State Enabling Act authorized local governments to impose reasonable restrictions to preserve structures and areas with special historical or aesthetic interest or value.
- Ruling recognizes historic preservation under NHPA and State and local laws as a legitimate governmental objective, and paves the way for public regulation of historic properties.



Thank you to our sponsor:

