The Other Often Overlooked Review: Adaptive Reuse and Federal Section 106 Historic Process

By John Tess, Heritage Consulting Group

The federal government in May announced plans to dispose of 12,218 excess properties – and that number is considered just the tip of the iceberg. These buildings include the spectrum of federal properties, including offices and warehouses.

At first blush, the idea of buying a surplus government building is an attractive one. In Portland, Ore., the magnificent full-block 1901 Customs House was acquired at auction for only $2.5 million. However, as in life, things are not always without headaches.

When a federal agency disposes property, it must undergo federal Section 106 historic consultation. The same is true if there is a direct federal investment in real property or a federal permit involved.

Section 106 of the National Historic Preservation Act of 1966 (36 CFR Part 800) "requires federal agencies to consider the e ects of projects they carry out, approve, or fund on historic properties." The consultation process is intended to ensure that historic resources in federal public undertakings are not inadvertently destroyed or demolished without first assessing the potential effects of the action(s).

The Section 106 process is most often associated with large projects, including highway construction or light rails. However, the process must also be initiated for the construction of bank branches, installation of cellular towers, issuance of federal wetlands permits, and use of Department of Housing and Urban Development (HUD) funds, and, as we are discussing, the disposition of federally owned properties. Basically, Section 106 comes into play whenever federal funds are involved in a project.

The Section 106 process is initialized when the responsible federal agency determines that an undertaking, may affect an historic resource(s). In bureaucrat-ese, an "undertaking" is parlance for 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.

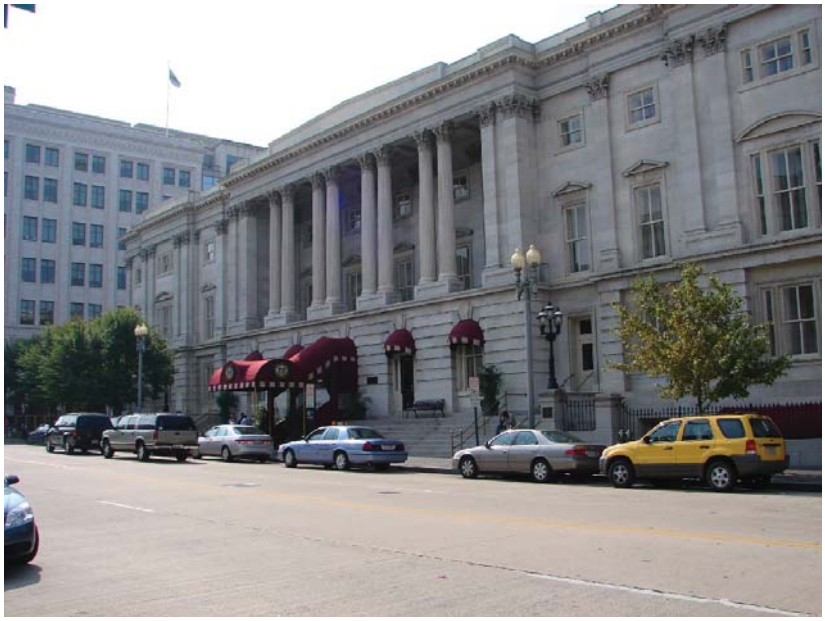

Photo: Courtesy of Heritage Consulting Group
A Section 110 lease to Kimpton Hotels for the Tariff Building in Washington D.C. required that the Section 106 process be completed.

For these purposes, a historic resource is defined as a district, site, building, structure or object that is listed in the National Register of Historic Places (the Register), or is eligible for listing in the Register. The responsible federal agency is obligated to define an "area of potential effects" (APE) for the undertaking and must determine if any listed or eligible historic resources are within the boundary.

While the agency makes the determination of whether a resource is or is not historic, it must secure concurrence from the State Historic Preservation Office (SHPO). Traditionally, the Register and the associated SHPOs considered resources less than 45 years old to be ineligible for

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the Register for purposes of Section 106 – except in truly iconic and exceptional situations.

In recent years, these agencies have tended to cast a broader net – apparently with the view that it is better to err on the side of caution. Thus, there is a growing tendency to consider many if not most buildings "eligible" if they are essentially intact. When there is a disagreement of whether a building is historic, the decision may be appealed to the Keeper of the National Register.

Once an agency has determined the APE and all historic resources have been identified, the agency then reviews the undertaking (project) and its possible effects on the historic resources. The agency determines whether the project has no adverse effect or an adverse effect. Adverse effects include the demolition, alteration, relocation and alterations completed on the resource that are not consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties. The transfer of a resource out of federal ownership is considered an adverse affect.

If, after the reviewing agency and SHPO complete their reviews and it is determined that the undertaking will have no adverse effect on the historic resources, the agency responsible for the undertaking may proceed. In the event of an adverse effect, the agency will consult with the SHPO to seek a Memorandum of Agreement (MOA) to avoid, minimize or mitigate the adverse affect. Consultation also includes stakeholders and interested parties. These groups could include Native American tribes, but also may include local governments and preservation organizations. Consulting with stakeholders and interested parties does not require their concurrence only their review.

Legally, the Section 106 process only mandates consultation; technically, the reviewing agency is able to pursue any and all actions regardless of whether the affected resource is historic. As a practical matter, most agencies attempt to fulfill their mandates under the National Historic Preservation Act. In most instances, this means the agency will make every attempt to meet the requirements suggested by the SHPO.

The redevelopment of Sacramento Calif.'s McClellan Air Force Base is an example of Section 106 in practice. The base was closed in 2001. Because the property was to be transferred out of federal ownership, the entire base was determined to be the APE. In evaluating resource, the Air

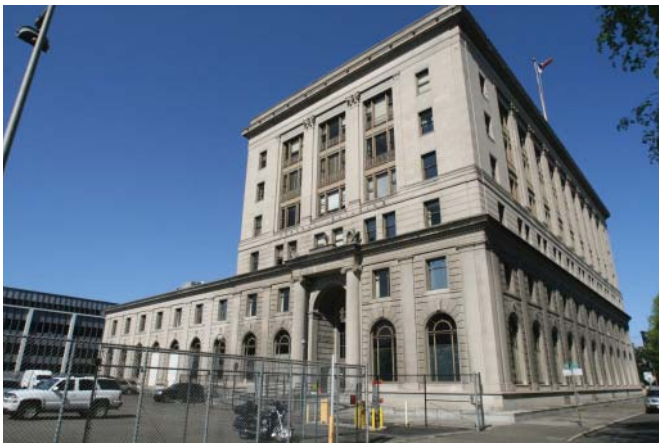

Photo: Courtesy of Heritage Consulting Group

This federal building in Portland, Ore. is being sold to the Pacific Northwest School of Art by the Government Services Administration.

Force worked with the SHPO to identify a historic district of older structures. These included officers' quarters, administration buildings as well as aircraft hangars. It also identified a majority of the base as not being historic.

The property was transferred to a county-sponsored redevelopment authority and a MOA was then developed that included restrictive design guidelines for the historic district. At that point, the redevelopment authority contracted with a development company to redevelop the base. Within the first nine years, the private developer, McClellan Business Park (MBP), invested more than $200 million, including $50 million in the historic district.

In general terms, the nonhistoric areas were enormously successful with more than 80 percent of the space leased. Unfortunately, MBP found the design restrictions on the historic buildings challenging and that district has remained largely unleasable. Yet, as MBP sought relief from the design restrictions, it faced a web of agencies, none of which were anxious to accept the challenge. Frank Myers, MBP senior vice president, said if he had to do it over again he would have liked to have been involved in the process earlier and had a clearer understanding of the potential limitations placed on the property as a result of the MOA.

Early involvement in the transfer of historic properties is a common concern by developers because quite often some of the financial incentives made available to properties are limited by the provisions of the MOA.

Other less contentious examples of where the Section 106 process comes in to play include affordable housing projects that often leverage low-income housing tax cred-

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its with historic tax credits. The housing credits, issued through HUD, require a Section 106 review. Typically, securing historic tax credit approval typically is considered sufficient mitigation for an adverse affect.

In all cases, it is of the utmost importance to begin the consultation process early. The process involves two bureaucracies seeking input from interested parties while discussing a project. Delays are nearly inevitable and the necessary mitigation is not always clear. In the past, documentation was often considered adequate and appropriate but there are increased incidences in which this documentation is not accepted and in some instances not even welcomed. In one recent example, mitigation consisted of a National Register Multiple Property Submission for the building type. In another, it was signage and interpretation.

While ignoring consultation may seem an easier path to the completion of a project, it is possible that the federal agency, SHPO, local government, preservation parties or interested citizens may later recognize that a Section 106 consultation was required and that knowledge could delay or halt your project and increase expenses. Should the Section 106 consultation process not occur where required by law, the Advisory Council on Historic Preservation (ACHP) has jurisdiction to require agencies to complete the process. Additionally, interested parties may file litigation to compel the responsible agency to undertake Section 106 review should they feel that the process was circumvented.

Finally, it is important not to confuse or equate Section 106 with other federal or state processes. For example, a historic tax credit project will use the Secretary of Interior's Standards for Rehabilitation to guide design review. Such design review is different from Section 106. It is quite often the case that Section 106 will require additional or different mitigation from local, state or federal design review.

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