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Identifying Landmarks

JERRY L. ROGERS*

It is important to underscore a remark of an earlier speaker today, because I will echo that point of view in my remarks: the foundation of any legal protection for landmarks lies in political support.

I was asked to deal with two basic questions: first, what constitutes a landmark and what makes it historic; and second, is there an agreed upon system for identifying landmarks and is such a system necessary? While I shall attempt to address my remarks directly to those two points, I hope I do not get too esoteric when I say that I have a slight problem with the terminology in the first question: to wit, "landmark," and "historic." The term "landmark" implies, to me and to the general public (from whence political support is derived), great importance. That implication confuses both people who are working in the preservation field and those who are working against preservation. It induces hairsplitting over what particular thing is great enough to be preserved. Such nit-picking is really irrelevant when it comes to our greater job, which is protecting the elements of the man-made environment that are worthy of protection. The other term, "historic," implies great antiquity; in a country as young as ours, that is not applied very conveniently. It also implies great events so that people are inclined to dismiss the historic element unless the item to be preserved has appeared in the political or military history of the United States.

Federal preservation law focuses on the word "significance." As you are probably aware, the National Historic Preservation Act of 1966¹—the central law that provides federal protection to historic resources—authorizes the Secretary of the Interior "to expand and maintain a national register of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, and culture. . . ."² "Significance," therefore, is the term that describes what we are looking for, from a federal perspective, when trying to identify a resource.

Prior to the Act of 1966, the federal government protected landmarks important to the nation at large, but, while we were preserving the great landmarks of this country, our cultural heritage was disappearing in huge chunks; people were not able to protect and preserve those things that were important to them locally. I would like to repeat a statement made by the State Historic Preservation Officer of Vermont, William Pinny, a few months ago, when he emphasized that many of us in the historic preservation field travel a great deal, and we see and absorb a lot of cultural background from the entire world; but to the majority of people who do not do that, their local heritage is their national heritage. The historic resources they grew up with, and that they see and use on a daily basis, are the ones that really influence their cultural values. Such "landmarks" must not be forgotten by the historic preservation movement.

You are probably familiar in great detail with the National Register criteria for identifying significance. I am not going to spend a lot of time discussing it, but I want to take about a minute to point out the basic elements of significance as those criteria express it. Properties are significant:

(a) [t]hat are associated with events that have made a significant contribution to the broad patterns of our history; or (b) [t]hat are associated with the lives of persons significant in our past; or (c) [t]hat embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) [t]hat have yielded, or may be likely to yield, information important in prehistory or history.³

A very common analysis of those National Register criteria, particularly from people whose job it is to build things like railways, highways, airports, and canals, is that anything can be put in the National Register under those criteria and that the criteria are meaningless. I do not agree with that, but it is true that the criteria are extremely broad. Remember that these criteria have to address the question of local significance on a nationwide basis and, as a practical matter, the comprehensiveness needed for that task is staggering. We have to protect properties that range in type from a New Mexico Governor's Palace (the oldest public building in the United States), to Grand Central Station, to the

Breakers Mansion in Newport, from the dugout shelter of an Oklahoma pioneer settler to a 1928 frame house in Alaska or to a grass hut on the island of Palau. We have to include within these criteria the ability to identify and protect the antiquity of a 12,000-year-old prehistoric site and the stunning architecture of Dulles International Airport.

I think that the importance of these National Register criteria is that they provide a basic threshold of guidance for everyone involved in the protection of historic resources. I do not want to force anyone into the National Register, but some type of general measure is essential. I think the National Register and its criteria give consistency and, from that consistency, a degree of political strength otherwise absent. I want to emphasize a point that should be obvious, but that many seem to discover with great surprise. A judgment of significance is an inescapably subjective judgment, and it should never be anything else. People whose job it is to build things, who wish they could ignore historic resources, are inclined to say we need to develop a more objective set of criteria. Just try it, within the range of resources that I mentioned a moment ago. You cannot add, subtract, multiply, divide, weigh or measure historic significance; it will always be subjective.

This discussion leads to the second question which I will address in a moment. If the criteria are, of necessity, subjective, is there an agreed upon system for identifying historic resources and is such a system required? I think we are moving toward an agreed upon system. I want to emphasize, however, not how much we agree, but the word "system" and the importance of a systematic approach.

Because this conference is concerned largely with the use of the police power to protect historic resources, I would like to make it absolutely clear that we in the federal government dislike the police power, and the reasons for our flight are pretty obvious. The easiest way in the world to lose a lawsuit when you are in the federal government is to get caught regulating someone's property without just compensation. The protective mechanisms of federal historic preservation law are not built upon police power, but upon the federal government's ability to regulate itself. The federal government can say to all agencies within the Executive Branch, in effect, "you will adhere to a certain set

of principles and practices, you will take note of historic resources, and you will consider them positively in the processes of planning your projects." That means that federal agencies must allow the Advisory Council on Historic Preservation⁴ an opportunity to comment on their project, must receive positive input about the preservation of historic resources, and must take it into account in their planning under the National Environmental Policy Act of 1969⁵ and other authorities.

I think under both approaches to protection—state local police power and federal self-regulation—public opinion is the only real enforcer. A federal agency is not required to adhere to the comments of the Advisory Council, and therefore is not required to preserve historic resources. When, as in most instances, federal agencies make a positive decision to preserve historic resources, it is largely in response to public opinion. It does not matter whether the public opinion takes the form of an active and unpleasant controversy, or whether it is merely a potential controversy foreseen by the agency. The concern of citizens for their historic resources is the only really effective protection the resources have.

Now let us address the word "system" and the need for a systematic approach. The federal system for identifying historic resources is, as you very well know, based upon a series of systems within each state. One of the things I was handed as I came in the building today was a card exhorting the Secretary of the Interior to conduct a federal survey of the historic resources of the United States. As a matter of fact, we have the authority to do that under the National Historic Preservation Act of 1966. One way of doing a job like this would be to hire a few thousand surveyors and go out and do the whole job ourselves. If this were the 1930s, that is precisely what would have been done; but that cannot be done now. I cannot get even two or three positions, let alone two or three thousand. The system that is used instead is based upon action by people in communities working through a structure of local, state, and federal governments. The State Historic Preservation Officer, who alone can nominate properties to the National Register, is appointed by the Governor and endowed with the authority of the State Executive.⁶ The staff which works for the State Historic Preservation Officer must include historians, architects and archeologists whose credentials

are submitted as a part of the state's qualifying documents to the Secretary of the Interior⁷ and are approved in advance by us. The work of that staff is approved by a similarly qualified and similarly approved review board⁸ before that work is forwarded to the federal level. The recommendation of a state, to list a property in the National Register is reviewed by our own staff professionals who are also qualified in history, architecture, and archeology.⁹ Thus, it is obvious that a system has been established in which the subjective judgments about historic properties are made by more than one person whose authority and expertise have been established in advance. I can tell you, from the times I have been on witness stands, that the first question asked by any lawyer is "Now, sir, just who says this trashy old building is historically significant?" When you have gone through the system I have just outlined—with its basis in established expertise—the answer is usually adequate in the mind of the judge.

As a result of these subjective decisions, there is the possibility that the federal government will be unable to remain out of the direct property regulation business. Almost every time the government is attacked by someone who does not want his property registered the attack is on the grounds of interfering with property rights. Whether or not this constitutes a legal hazard, it does pose a very real political hazard. As you know, on many occasions courts have held that when the federal government behaves like a regulator, it becomes a regulator. In the interest of time, I will not list a series of recent laws, that, in my opinion, threaten our ability to say that we are regulating only the federal planning process, but not regulating the private use of private property. I will ask you to accept on faith my view that every time the federal law is tightened a bit to make it less and less possible for someone to alter a registered historic property, the threat increases to the federal government's ability to contend that it is only regulating itself.

A system is essential, and a system exists. It can be legally sufficient regardless of whether it is agreed upon by all. Functionally, managerially, and administratively, it will not be sufficient unless your state and local system fits into and sufficiently meshes with the nationwide effort. I am not pleading for uniformity in state and local criteria for evaluation. I am not plead-

ing for uniformity in the way surveys are done, but I am asking you to search for ways to make your criteria and activities consistent and adaptable. This way state and local police powers can be used to take advantage of the influence we are able to exert in the federal planning processes. In addition, and even more important than consistency and adaptability, is authoritative decisiveness. I think the world out there wants to know clearly whether something is or is not subject to protection. Most people nowadays are not prepared to argue against protection of historic properties. They just want to know the answer: is it or is it not historic, and do we have to deal with preservation limitations or not?

What is needed in the United States is a conservation ethic. This would provide the political strength that is needed to sustain the legal authorities that have been developed.

We, your federal partners, have a great deal of authority that comes from the law. Those of you who work in state and local government have even more through the police power. But true power—meaning the ability to really carry out authority—does not really come from the law. It comes from the people. We have to use legal authority very carefully in order to build and retain the political power that we need in order to be effective.

Identifying Landmarks

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1. National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1970 & Supp. III 1979), *amended by* 16 U.S.C.A. §§ 470-470w-6 (West Pam. 1981).

2. *Id.* § 470a.

3. 36 C.F.R. § 60.6 (1981).

4. The Advisory Council on Historic Preservation was established pursuant to 16 U.S.C. §§ 470i - 470n.

5. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1976 & Supp. III 1979).

6. 36 C.F.R. § 61.2.

7. *Id.* § 61.3 provides for approval of the state professional staff by the Secretary and sets forth minimum qualifications for this staff. The professional qualifications referred to in § 61.3 are defined in 36 C.F.R. §§ 61.4-.5.

8. The composition and qualifications of the members of a state review board are set forth in 36 C.F.R. §§ 61.4-.5.

9. For the composition of the Advisory Council on Historic Preservation and the basis on which the citizen members are appointed, *see* 36 C.F.R. § 800.1(a) (1981).