

National Trust Legal Defense Fund

JANUARY 2008 UPDATE



GUARDING AMERICA'S HERITAGE . . .

The National Trust **Legal Defense Fund** works with local preservation advocates across the country, fighting to protect the irreplaceable qualities that make our communities special. Our first goal is to avoid the need to go to court at all, by using advocacy to encourage better government decisions that protect historic sites, neighborhoods, and landscapes. When necessary, however, the **LDF** is prepared to litigate to protect the Nation's historic resources.

This update, summarizing a few of our current advocacy efforts, represents only a fraction of the controversies we work to resolve each year. More information is available on the Trust's website: www.nationaltrust.org/law.

LDF IN ACTION ON THE GULF COAST . . .

LDF WORKS TO ENSURE THAT FEDERAL RECOVERY FUNDS IN THE GULF HELP—RATHER THAN HARM—HISTORIC RESOURCES

Hurricanes Katrina and Rita resulted in unfathomable damage to historic resources in New Orleans, and across the Gulf Coast. But another source of damage and destruction to historic resources has been the subsequent infusion of federal funds, which in many cases has encouraged widespread demolition and redevelopment, without adequate consideration of the fragile—but very significant—part of America's heritage left in the balance by the storms.

During the past two years, the National Trust has been actively engaged in the recovery effort in the Gulf region, and the National Trust's legal staff has played an important role on a number of fronts. Because of the Trust's depth of experience with federal preservation law, the LDF has become a key player in ensuring that federal recovery programs give full consideration to impacts on historic resources, and provide mitigation when feasible.

In New Orleans, for example, the LDF has worked closely with the National Trust's field office and local preservationists to seek to avoid—or at least to mitigate—the adverse impacts of federal funding pro-



Home in New Orleans damaged as a result of Hurricane Katrina. [NTHP]

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Some federal funding programs have provided recovery assistance that has required even historic structures to be raised eight to ten feet up in the air. [NTHP]

grams. The principal means of doing so has been the consultation process required under Section 106 of the National Historic Preservation Act.

Because of the urgent need for deployment of federal recovery funding—most of which has come through the Department of Housing and Urban Development (HUD) and the Federal Emergency Management Agency (FEMA)—there has also been a need for a very intensive and expedited series of consultations to develop a dizzying array of Programmatic Agreements (PAs) under Section 106 of the National Historic Preservation Act, to mitigate the harm caused to historic properties as a result of the funding programs. And the potential harm is significant: for example, some of the financial assistance from FEMA creates incentives for demolition rather than repair of damaged properties. Other funding programs provide assistance for homeowners, businesses, and local governments to elevate properties to newly developed flood levels, which in some cases require even historic structures to be raised eight to ten feet up in the air. In cases such as these, where millions or billions of dollars are being distributed to individuals throughout large parts of Mississippi and Louisiana, harm to historic properties is inevitable, and likely to be so pervasive that the agencies would not even be able to quantify or monitor it.

In both Louisiana and Mississippi, the LDF has been able to provide crucial expertise, using its significant experience with federal preservation law to supplement the on-the-ground presence of the New Orleans Field Office and Southern Regional Office. As a result—and working closely with State Historic Preservation Office (SHPO) staff for both Mississippi and Louisiana—the Trust has had a significant influence on the mitigation measures developed for these federal funding programs. Mitigation measures have included, for example, additional funding for SHPO staff positions to assist in the heavy work-load generated by the funding programs. FEMA has also committed to funding extensive re-survey work in Mississippi, in order to update statewide inventories of historic properties in the wake of Hurricane Katrina, and has also agreed to develop a GIS database for historic properties throughout the state.

Most recently, the Mississippi Development Authority (MDA), using HUD funds, agreed to provide \$2.5 million to the SHPO for a grant program for historic properties, as mitigation for funding the elevation of homes and other structures. The MDA will also be preparing design guidelines and technical assistance for local preservation commissions to help them work with historic property owners to design elevation projects in a way that will reduce the adverse impact on their properties. The \$2.5 million grant program was a direct result of the LDF advocacy in the Section 106 consultation process.

In another recent Gulf Coast funding program, FEMA has decided to make its grants for elevation projects retroactive, so that owners can get reimbursed for already completed projects, regardless of whether or not alterations to historic properties are compatible with the character of the property. In fact,

FEMA has even allowed a 60-day grace period (through mid-March 2008) for individual homeowners to complete any projects and have them eligible for the retroactive funding. Although FEMA acknowledged that the 60-day grace period would exacerbate adverse impacts on historic properties, by implicitly encouraging owners to go out and complete their alterations quickly in order to avoid review, the agency agreed to make several modifications to the program in response to strong advocacy from the Trust and other consulting parties. FEMA agreed to limit the grace period to individual owners, as opposed to local governments and nonprofit groups, and FEMA is working closely with preservationists to publicize appropriate and sensitive design approaches during the 60-day period.

These are just two of many examples of how the Trust and LDF have helped significantly to mitigate or minimize harm to historic properties affected by Gulf Coast recovery efforts, using Section 106.

NEW ORLEANS PUBLIC HOUSING DEMOLITION APPROVED OVER OBJECTIONS BY PRESERVATION ADVOCATES AND THE PUBLIC

A much less successful example of Section 106 at work involved the ill-fated consultation regarding four historic public housing projects in New Orleans. Despite many days of intensive consultation meetings, and thousands of hours of Trust staff time from January through August 2007, the four historic housing projects—Lafitte, B.W. Cooper, St. Bernard, and C.J. Peete—will be razed, destroying approximately 4,500 units of historic public housing, at a time when the lack of affordable housing is a crisis in New Orleans, and more than 12,000 people are homeless. Though hurricane damage to the complexes was relatively minor, HUD refused to repair all but a few of the historic buildings, seizing on the storm as an opportunity to implement a long-desired demolition and privatization plan.

National Trust involvement in the advocacy effort reached the highest levels, including not only countless hours of work by LDF and the New Orleans Field Office, but also a meeting by President Moe and former Community Revitalization VP Stanley Lowe with the HUD Secretary himself, who acknowledged that he had personally approved the demolitions about six months before the agency initiated Section 106 compliance.

The public housing complexes have all been turned over to private developers, who have agreed to replace some of the public housing units with affordable housing using tax credits, in exchange for the opportunity to develop mixed-income housing as well, with federal subsidies.

Although the Advisory Council on Historic Preservation (ACHP) signed off on four Memoranda of Agreement (MOAs) requiring only two or three historic buildings to be preserved in each complex, the ACHP did take the unusual step of commenting to HUD in addition to signing the MOAs. Among other things, the ACHP's September 2007 comments expressed concerns about the agency's failure to engage in timely consultation under Section 106 prior



The C.J. Peete housing complex, one of four historic complexes scheduled to be demolished at a time when lack of affordable housing is a crisis in New Orleans. [NTHP]

to foreclosing preservation alternatives through early tax credit commitments that prevented any meaningful changes to the pre-conceived demolition proposals.

More recently, as demolition plans have been presented for final approval by the City, local protesters have taken to the streets. New Orleans Field Office director Walter Gallas spent a hair-raising day in the City Council chambers on December 19, 2007, urging the City to consider preservation, as protesters outside were blocked from entry and attacked with mace and tasers by police on horseback. A variety of advocacy groups are considering litigation to save the public housing (and some litigation is already pending), based on civil rights, environmental justice, and/or historic preservation issues.

U.S. SUPREME COURT DECLINES REVIEW IN NEW ORLEANS COLISEUM SQUARE LAWSUIT

A long-running litigation battle over the destruction of another historic New Orleans public housing complex—St. Thomas—came to an end on October 1, 2007, when the U.S. Supreme Court declined to review a decision by the U.S. Court of Appeals for the Fifth Circuit upholding HUD’s decision not to prepare an Environmental Impact Statement (EIS) for the massive redevelopment project. Indeed, the redevelopment of the 1,500-unit St. Thomas site included construction of a Wal-Mart, in addition to a major mixed-income residential development in the Lower Garden District, with two residential towers at least 13 stories high.

In April 2007, the Trust had filed an *amicus* brief in support of the petition for certiorari filed by a coalition of local preservation groups. The Trust also helped to secure excellent *pro bono* representation for the local preservationists, by O’Melveny & Myers, a Washington firm with a major Supreme Court practice. In fact, the Supreme Court had taken the encouraging step of ordering the United States government to respond to the petition. In the end, however, even O’Melveny & Myers was not able to persuade the Court to review the case.

Meanwhile, one feature of the redevelopment project at the St. Thomas site has, ironically, become a model for preservation in the debate over the future of the four historic public housing projects currently slated for demolition in New Orleans. The Section 106 MOA for the St. Thomas project included a requirement that five historic buildings from the complex be preserved and mothballed, while the rest of the site was razed. Now, more than seven years later, those five historic buildings are being rehabilitated for residential use—exactly the use that the current developers have said is impossible.



Anti-Wal-Mart sign in Lower Garden District, New Orleans. [NTHP]

UPDATE ON POWERLINES . . .

TRUST ASKS ENERGY DEPARTMENT TO RECONSIDER MULTI-STATE “NATIONAL CORRIDOR” DESIGNATIONS FOR HIGH-VOLTAGE POWERLINES IN THE MID-ATLANTIC AND SOUTHWEST

In October 2007, the Department of Energy (DOE) issued a final decision designating two massive areas as “National Interest Electric Transmission Corridors” (NIETCs or National Corridors), a federal designation which triggers expedited approval requirements for high-voltage powerlines—and which could substantially limit the evaluation of impacts to significant historic properties and landscapes. The National Corridor designations include the entire states of New Jersey, Delaware, and Maryland; most of New York, Pennsylvania, and West Virginia; substantial portions of the Northern Virginia piedmont; and the entire area between Los Angeles, Phoenix, and San Diego. In response to the Corridor designations, the National Trust joined a formal petition for rehearing to the DOE, together with the Piedmont Environmental Council in Virginia (PEC), the National Parks Conservation Association (NPCA), and 16 other national and regional organizations, requesting that DOE reconsider its decision to designate these areas as National Corridors.

In addition to filing the Petition for Rehearing, PEC, NPCA and a number of other national and regional groups have also filed a lawsuit in federal district court challenging the National Corridor designations.

The Trust has been actively involved for more than a year in opposing the implementation of Section 1221(a) of the Energy Policy Act of 2005, which directed DOE to designate the National Corridors. The designation of specific National Corridors will have draconian results, including the potential of overriding or pre-empting reviews by state and local governments, and by other federal agencies. Corridor designation allows the Federal Energy Regulatory Commission (FERC) to step in and specifically authorize the construction of transmission facilities, notwithstanding any opposition or denial by other federal, state, or local agencies. The law also imposes severe time-limits for state agencies reviewing proposed powerlines, allowing only one year to approve transmission lines within the National Corridors, after which the applicant can ask FERC to take over the review. Section 1221 also authorizes the broad use of federal “eminent domain” power to advance transmission projects.

The petition for re-hearing argues that DOE failed to comply with the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Endangered Species Act, prior to designating the National Corridors. The designations, and DOE’s interpretation of Section 1221, could lead to the approval of transmission lines without fully considering harm to historic resources, and without adequate examination of alternatives. The re-



Historic rural landscapes of the mid-Atlantic, such as the northern Virginia Piedmont, are within one of the two “National Interest Electric Transmission Corridors” designated by the Energy Department, a federal designation which triggers expedited approval requirements for high-voltage powerlines. [NTHP]

sources most at risk include historic battlefields, historic landscapes, rural historic districts, and congressionally designated heritage areas.

The Trust listed the historic places within the proposed Mid-Atlantic National Corridor as one of America's 11 Most Endangered Historic Places for 2007. In addition, the Trust testified before Congress in April 2007 urging that Section 1221 be amended.

UPDATE ON FEDERAL LITIGATION . . .

TRUST ARGUES AS AMICUS BEFORE D.C. CIRCUIT COURT OF APPEALS ON STANDING ISSUE IN HISTORIC FORT RITCHIE BASE CLOSURE REDEVELOPMENT CASE

On December 7, 2007, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in an important case regarding who has "standing" to enforce agency compliance with Section 106 of the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). The lawsuit was filed by two individuals, Jim Lemon and Robin Biser, both of whom own property within one mile of historic Fort Ritchie. Initially, they were not represented by counsel. However, the federal district court ruled that the plaintiffs lacked standing to challenge the Army's redevelopment plan for the site under Section 106 and NEPA. Accordingly, the Trust helped to secure excellent *pro bono* representation for the plaintiffs' appeal from O'Melveny & Myers in Washington.

The Trust first became involved in the case last winter, when we joined the plaintiffs in successfully opposing the Army's motion for summary affirmance of the district court's ruling. In September 2007, the Trust, along with the Natural Resources Defense Council, filed an *amicus* brief with the D.C. Circuit urging the court to overturn the district court's decision. The Trust argued that the district court had failed to cite a single NHPA case, and disregarded an entire body of case law in which other courts have upheld standing under the NHPA in similar circumstances.

The court of appeals also granted the Trust leave to participate in oral argument as *amicus curiae*. Ti Hays of the law department represented the Trust, while Scott Edson of O'Melveny & Myers argued on behalf of the plaintiffs.

At oral argument, the three judge panel sharply questioned the Army's position that the plaintiffs lacked standing. Several of the judges suggested, as the Trust had argued in its brief, that the Supreme Court's 1992 decision in *Lujan v. Defenders of Wildlife* likely controlled the outcome of the appeal. In *Lujan*, the Supreme Court commented in a footnote that owners of property adjacent to the site of a federal project likely have standing to allege procedural violations concerning the approval of the project in federal court.



Fort Ritchie (Maryland National Guard building) (1926) [USACE]

Fort Ritchie is a former Army base in north-central Maryland, which was closed through BRAC in 1995. It was originally developed in 1926 as a training post for the Maryland National Guard. In 1942, Camp Ritchie was converted to an Army base and used for military intelligence training and the development of psychological warfare. When the Fort was closed in 1995, the Army complied with Section 106, executing a Programmatic Agreement (PA) and adopting design guidelines for reuse of the property. PenMar Development Corp. (the Local Redevelopment Authority created by the Maryland legislature) leased the property to Corporate Office Properties Trust, who is developing the site as a mixed-use, residential, and high-security office complex. However, the current development proposal violates the design guidelines by calling for the construction of office buildings and parking lots within the historic parade ground.

UPDATE ON STATE LITIGATION . . .

MINNESOTA COURT OF APPEALS REJECTS CHALLENGE TO STADIUM CONSTRUCTION ON NICOLLET ISLAND IN MINNEAPOLIS; THE NATIONAL TRUST AND ITS LOCAL PARTNERS SEEK REVIEW BY MINNESOTA SUPREME COURT

On November 20, 2007, the Minnesota Court of Appeals issued a decision rejecting our legal challenge to the Minneapolis City Council's decision to issue a Certificate of Appropriateness for construction of an athletic stadium by DeLaSalle High School on historic Nicollet Island. In its decision, the court grossly misinterpreted the requirements of the Minnesota Environmental Rights Act (MERA), affirming the City Council's decision to allow the destruction of historic Grove Street on Nicollet Island. The National Trust, Preservation Alliance of Minnesota, and Friends of the Riverfront subsequently filed a petition with the Minnesota Supreme Court seeking review of the Court of Appeals' decision.

The petition for review points out that the Court of Appeals decision directly contradicts Minnesota Supreme Court precedent and misapplies MERA's requirements. Specifically, the Court of Appeals concluded: that DeLaSalle High School was entitled to define the project; that its definition should be given deference; and that any alternatives not meeting the school's own definition of the project could be rejected as infeasible and imprudent. Although the court's opinion was designated as "unpublished," limiting the precedential damage from the decision, we are concerned that the decision could undermine the previously strong interpretation of MERA's requirements for protecting historic and environmental resources, as well as allowing serious harm to a significant historic resource. The Minnesota Supreme Court has not yet ruled on the petition for review.

DeLaSalle High School has proposed a massive new athletic complex, including a 750-person stadium and a parking lot on several acres of open park land on Nicollet Island. All of Nicollet Island is within the St. Anthony Falls Historic



The National Trust and Friends of the Riverfront have asked the Minnesota Supreme Court to review a lower court ruling that could seriously weaken the Minnesota Environmental Rights Act. The case involves a proposal to allow a local high school to build an athletic stadium that would destroy historic resources, including Nicollet Island's Grove Street, which dates from 1866. [Friends of the Riverfront]

District, which is listed on the National Register and also designated by the Minneapolis Heritage Preservation Commission (HPC). Construction of the new stadium would destroy half of Grove Street (a historic street platted in 1866 as part of the original street grid), which would harm the character and integrity of the historic district. The lawsuit was prompted by the Minneapolis City Council's action overturning a decision by the HPC to deny the school's application to build the stadium. The City Council issued a Certificate of Appropriateness despite public opposition, including objections from the National Park Service, the Minnesota SHPO, the Preservation Alliance of Minnesota, and the National Trust.

CONTRIBUTORS, SPONSORS, AND SUPPORTERS . . .

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