



**Report and Recommendations on
the Application and Interpretation of
Federal Historic Preservation Standards**

DELIVERED TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

BY CHAIR SARA C. BRONIN

MARCH 1, 2024

“It is the policy of the Federal Government... to use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

THE NATIONAL HISTORIC PRESERVATION ACT OF 1966

“Preservation does not mean merely the setting aside of thousands of buildings as museum pieces. It means retaining the culturally valuable structures as useful objects: a home in which human beings live, a building in the service of some commercial or community purpose. Such preservation insures structural integrity, relates the preserved object to the life of the people around it, and, not least, it makes preservation a source of positive financial gain rather than another expense.”

LADY BIRD JOHNSON, FOREWORD, *WITH HERITAGE SO RICH*, 1966

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Foreword



March 1, 2024

As Chair of the Advisory Council, I've had the privilege of hearing from people who have experienced the joy and satisfaction of rehabilitating their beloved places. Many of those same people, though, have told me about the challenges of appropriately following federal historic preservation standards in their projects – especially in the face of changing climate and housing needs.

Wanting to understand more about these challenges, I issued a call for public comments about the standards last summer. The comments we received opened my eyes to a broad range of issues and inspired me to dig deeper into the history of our creation and interpretation of these standards.

Based on that history and the recent comments, this report makes a few recommendations to federal partners and to the Advisory Council. Even while making those recommendations, I want to underscore that the burden of proactively addressing the issues identified in this report does not fall on the federal government alone. As preservationists, we must work together to ensure that preservation achieves all that it should, and continues to see widespread support. That means debating the ideas in this report, adding new or different ideas where I've fallen short, and moving forward where we find common ground to improve the way we evaluate changes to treasured sites.

I thank all those who helped inform this report, and I hope it is taken in the spirit in which it is offered: a diagnosis, a conversation-starter, and a hope that preservation may continue to evolve, as it has and as it must.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Sara C. Bronin'. The signature is fluid and cursive, with a prominent initial 'S'.

The Honorable Sara C. Bronin
Chair
Advisory Council on Historic Preservation

Executive Summary

Federal historic preservation standards developed by the Department of the Interior have become central to historic preservation practice.¹ This report examines their application and interpretation and makes recommendations pursuant to the Advisory Council's statutory duty to "review the policies and programs of Federal agencies and recommend to Federal agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under this division."²

This is not the first time the Advisory Council has initiated or been involved with public discussions about federal historic preservation standards. Nearly fifty years ago, the Advisory Council spurred the Department of the Interior to develop guidelines to help practitioners understand how to use the standards in the field.³ In the intervening years, the Advisory Council has participated in or led various efforts to understand the standards' impact and recommend improvements. This report is offered in the same spirit as the Advisory Council's past involvements, and is updated to reflect new issues raised by the standards' contemporary application and interpretation.

As documented in Part I of this report, federal historic preservation standards were created in the 1970s pursuant to the National Historic Preservation Act of 1966 and have been evolving ever since. To help clarify their meaning, the Department of the Interior (through the National Park Service) has issued various guidance documents.

Although originally written for programs administered by the Department of the Interior, federal historic preservation standards have taken on a life of their own. As Part II outlines, these standards have been embedded in key federal, state, and local regulatory processes, and they have thus been applied and interpreted in various contexts beyond the direct purview of the Department. Annually, these standards determine whether 120,000 federal undertakings affect historic resources, \$8.8 billion in rehab projects are eligible for federal rehabilitation tax credits, and thousands of individual projects are approved by local historic commissions.

¹ This report uses the phrase "federal historic preservation standards," in lower case, to refer collectively to both the Standards and the Tax-Related Rehabilitation Standards, as defined herein. This phrase should not be taken to mean other standards, such as the Secretary of the Interior Professional Qualification Standards or any other standards promulgated or used by the federal government.

² 54 U.S.C. § 304102(a)(6).

³ See U.S. Department of Housing and Urban Development & U.S. Department of the Interior, "Guidelines for Rehabilitating Old Buildings: Principles to Consider When Planning Rehabilitation and New Construction Projects in Older Neighborhoods," 1977 ("The Guidelines were initiated when the Advisory Council on Historic Preservation perceived a growing need for basic professional guidance when Federal assistance was used to rehabilitate buildings of historical and architectural value.") (hereinafter, the "1977 Guidelines").

Given the broad reach of federal historic preservation standards, over the years many policymakers and agencies – including leaders and representatives of the Department of the Interior and the Advisory Council on Historic Preservation – have sought to improve and clarify their application and interpretation. Part III documents several relevant prior attempts to suggest improvements. In 2023, the Advisory Council called for additional public comments on the federal historic preservation standards, and Part IV provides an overview of comments received. Parts III and IV are intentionally laden with detail: Part III because prior analyses do not appear to be summarized in this manner elsewhere, and Part IV because submitted comments richly illustrated key points better than a summary could.

The prior analyses and more recent comments urge improvement of the manner in which federal historic preservation standards are applied and interpreted by a range of actors. One repeated theme is that the application and interpretation of federal historic preservation standards is often more strict than the standards themselves require, undermining the confidence of private parties in the regulatory process and actually hindering preservation itself. Based on the analyses and comments, it is apparent that the public policy goals of economic growth, environmental sustainability, equity, and indeed effective historic preservation itself may be thwarted by outdated applications and interpretations of the federal historic preservation standards. Commenters pointed to common changes like adding renewable energy, adding energy efficient features, or converting vacant commercial buildings to residential use that were made more difficult, or in some cases impossible, by stringent interpretations of the standards.

Part V offers recommendations to address these issues and to ensure that federal historic preservation standards are applied and interpreted by all levels of government and by private parties in a manner that facilitates not only historic preservation, but also economic growth, environmental sustainability, and equity. Despite the decentralized manner of applying and interpreting these standards, federal agencies can play a leadership role in correcting current misalignments. Part V thus offers suggestions for immediate federal action not requiring regulatory or legislative change, including the issuance of new guidance on specific topics with an eye toward balancing other key values, as well as a launch of review of existing guidance, expanded trainings, and an acknowledgement of the utility of precedent. It also calls on the Advisory Council to consider reviewing the current structure of the federal historic preservation program.

Part V goes on to recommend that the Department of the Interior, in the medium term, initiate rulemaking⁴ to expand the Standards, including by potentially restoring previously-deleted standards on protection and stabilization and adding new standards for relocation, intentional release, and deconstruction. It suggests additional rulemaking to improve the appeals process for decisions related to the Tax-Related Rehabilitation Standards. And finally, it encourages consideration of a graduated approach to the National Register of Historic Places, which could in turn inform a graduated approach to federal historic preservation standards.

⁴ “Rulemaking” is a term referring to the typical open, public process by which a federal agency creates administrative rules, including regulations like the Park Service regulations enshrining the Standards and the Tax-Related Rehabilitation Standards.

I. Federal Historic Preservation Standards

The federal government’s development of historic preservation standards has roots in the National Historic Preservation Act of 1966. That statute assigned responsibility for promulgating regulations articulating these standards to the National Park Service, an agency within the Department of the Interior. This Part documents the evolution, over the last five decades, of these regulations and related guidance the Park Service has issued to facilitate their interpretation.

The Park Service developed its first set of standards-related regulations for grant programs that it administered pursuant to the National Historic Preservation Act (the “Grant-Related Standards”). It developed a separate set of regulations for the federal rehabilitation tax credit that it administers pursuant to the Tax Reform Act of 1976 and subsequent laws (the “Tax-Related Rehabilitation Standards”). In 1995, the Park Service updated and expanded the Grant-Related Standards to become the Secretary of the Interior’s Standards for the Treatment of Historic Properties (the “Standards”), outlining the manner in which four different approaches to (or “treatments” of) tangible historic resources should be carried out. The Park Service has issued, and continues to issue, guidance on the way the Standards and the Tax-Related Standards should be applied and interpreted.

In documenting the contributions of Congress and the Department of the Interior in the evolution of federal historic preservation standards, this Part aims to make clear that the standards have never been static. Rather, they have evolved as new opportunities and issues have arisen.

A. GRANT-RELATED STANDARDS

The Grant-Related Standards evolved out of a requirement in the National Historic Preservation Act that the Department of the Interior develop a program offering grants promoting the preservation of historic properties. In 1973, after the Department received funding for and initiated a grants program, the Park Service published a manual indicating how grantees should perform three treatments: stabilization, restoration (including adaptive use), and reconstruction.⁵ In 1976, the Park Service published another manual which expanded its guidance to grantees to include four additional treatments: acquisition, protection, preservation, and rehabilitation.⁶

These manuals were used in administering the grant program, but the Park Service did not promulgate regulations – a more “official” and permanent way to enshrine guidance into federal policy – until 1978. That year, the Department of the Interior finalized regulations for what it called the Standards for

⁵ National Park Service, *Historic Preservation Grants-in-Aid: Policies and Procedures* (1973).

⁶ National Park Service, *Preservation Project Standards* (1976).

Historic Preservation Projects, including the following seven treatments previously contained in the 1976 manual:

- Acquisition (“acquiring fee title or [other interest]”)
- Preservation (“applying measures to sustain the existing form”)
- Protection (“applying measures designed to...[defend or guard a property] from deterioration”)
- Reconstruction (“reproducing by new construction the exact form...of a vanished building, structure, or object”)
- Rehabilitation (“returning a property to a state of utility through repair or alteration”)
- Restoration (“accurately recovering the form and details”)
- Stabilization (“applying measures designed to reestablish a weather resistant enclosure and... structural stability”)⁷

The regulations on point were relatively brief, offering broad statements about how each of these treatments should be approached. Eight “general standards” covered all historic preservation projects, and twenty-one additional standards were divided among the seven different treatments.

B. TAX-RELATED REHABILITATION STANDARDS

The Tax Reform Act of 1976 required that the Department of the Interior develop standards by which proposals for projects seeking the federal rehabilitation tax credit would be evaluated. These standards focused solely on one treatment, rehabilitation. In 1977, the Park Service issued final federal regulations, calling them the Secretary of the Interior’s Standards for Rehabilitation. (To reduce confusion and emphasize their specific purpose and scope, this report calls these standards the “Tax-Related Rehabilitation Standards.”) In 1990, the Park Service made minor updates to the Tax-Related Rehabilitation Standards and updated federal regulations accordingly.⁸ These regulations have not been changed since.

Like the Grant-Related Standards, the Tax-Related Rehabilitation Standards are brief and contain general principles about how rehabilitation work should be carried out, stating that they “are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility.”⁹ This language thus allows and anticipates significant flexibility in applying the rehabilitation treatment to federal historic tax credit projects. See Appendix A for the full text of the Tax-Related Rehabilitation Standards.

C. TODAY’S STANDARDS

In 1995, the Park Service proposed revisions to the Grant-Related Standards. In the Federal Register announcement of the proposed rule, the Park Service clarified that the new regulations would apply to

⁷ 36 C.F.R. Part 68 (1978).

⁸ Id. § 67.7.

⁹ Id. § 67.7(b).

all resources on the National Register of Historic Places, not just to buildings.¹⁰ Thus, it explained, these standards would need to have a new and different title: the Secretary of the Interior's Standards for the Treatment of Historic Properties (again, the "Standards").

The Park Service also noted in the Federal Register that the goal of the revision was to "reduce the part in length, sharpen it in format and language and, in consequence, make it easier to understand and apply."¹¹ To achieve this goal, the Park Service consolidated the seven approaches to four: the previous treatment approaches of protection and stabilization were incorporated into the preservation treatment, while acquisition was removed as a treatment type. It also reduced length of the Standards to just fifty-five sentences.¹² See Appendix B for the full text of the Standards.

The proposal was formally enshrined in federal regulations later in 1995. The provisions reveal the distinct aims of each of the four remaining treatments:

- Preservation, to maintain a property, including later additions, consistent with historically significant materials and historically consistent uses ("applying measures necessary to sustain the existing form, integrity, and materials of an historic property").
- Reconstruction, to recreate a property as it existed historically ("depicting, by means of new construction, the form, features, and detailing of a non-surviving site, landscape, building, structure, or object").
- Rehabilitation, to enable new uses of a property ("making possible an efficient compatible use for a property").
- Restoration, to bring a property back to a certain time period ("accurately depicting the form, features and character of a property as it appeared at a particular period of time").¹³

Because Parts III and IV include analyses and comments that speak to all four treatments and their relative "strictness," it bears emphasizing that rehabilitation is written to be, and is intended to be, the treatment that is least "strict" in terms of fidelity to any particular material outcome or time period. The restoration treatment – which requires accuracy in material outcome, relative to a particular time period – might be seen as the "strictest" treatment. The preservation treatment might be seen as somewhere in the middle, insofar as it requires the maintenance of materials but does not require fidelity to a particular time period. But even across the spectrum of four treatments, the Standards are all subject to a flexibility provision included in the regulations and nearly identical to the provision in the Tax-Related Rehabilitation Standards: "The Standards will be applied taking into consideration the economic and technical feasibility of each project."¹⁴

Of the four treatments, rehabilitation is most commonly referenced by government bodies and most commonly used by property owners. The Park Service's regulations indicate that rehabilitation encompasses "repair, alterations, and additions while preserving those portions or features which convey

¹⁰ The Secretary of the Interior's Standards for Historic Preservation Projects, 60 Fed. Reg. 3,599 (January 18, 1995).

¹¹ Id.

¹² 36 C.F.R. § 68(3).

¹³ Id. § 68.2.

¹⁴ Id. § 68.3.

[a property’s] historical, cultural, or architectural values.”¹⁵ Note that the rehabilitation treatment articulated in the Standards differs slightly from the rehabilitation treatment articulated in the Tax-Related Rehabilitation Standards. The Tax-Related Rehabilitation Standards, last updated in 1990, were not updated in 1995 along with the Standards.

Today’s Standards are direct descendants of the prior Grant-Related Standards; they were written to govern the actions of grantees receiving Park Service funding through federal historic preservation appropriations. However, as will be described in Part II, these Standards have been integrated, explicitly or by reference, into many other governmental programs and projects extending far beyond the Park Service’s grant programs. That’s why this report refers to them as the “Standards.”

D. NATIONAL PARK SERVICE GUIDANCE ON THE FEDERAL HISTORIC PRESERVATION STANDARDS

In addition to promulgating the regulations containing the Standards and the Tax-Related Rehabilitation Standards themselves, the Park Service has provided supplemental guidance for the interpretation of those standards.

The Park Service has stated that all of its guidance is general in nature and non-binding, and is not intended to provide case-specific advice. Nonetheless, it is important to acknowledge that preservationists in both public and private roles have tended to rely on the guidance documents as if they contained official, binding, and immutable interpretations.¹⁶ Local governments and state historic preservation offices use this guidance when regulating and reviewing historic preservation projects. Private actors use this guidance when designing such projects and when determining whether to undertake a preservation project in the first place. Thus, the Park Service’s guidance has become as essential as the text of the Standards and the Tax-Related Rehabilitation Standards themselves.

This guidance has taken four primary forms: guidelines, *Preservation Briefs*, *Interpreting the Standards* bulletins, and tax-incentive guidance.

I. GUIDELINES

Official Park Service guidelines have informed governmental and public interpretation of both the Standards and the Tax-Related Rehabilitation Standards. Rarely issued and often developed over a period of several years, these guidelines are lengthy documents that attempt to address many different practical scenarios. They typically contain illustrations and photographs that illustrate actions deemed

¹⁵ Id. § 68.2(b).

¹⁶ A comment received from the National Conference of State Historic Preservation Officers in response to the Advisory Council’s call for comment explained the situation as follows: “While the Standards are designed to be regulatory for projects funded via the Historic Preservation Fund (HPF) and for Historic Tax Credit projects, they are simultaneously meant to be advisory for everyone else. Over the years, they have been regarded as the ‘gold standard’ by which historic properties are approached and, in many cases, at the early suggestion of the NPS, have in turn been adopted as regulatory by local preservation commissions all over the country. Therefore, an inherent tension can exist in their interpretation – reconciling how various approaches can be both required and recommended.”

to be either compatible or incompatible with the historic context. Though they offer many examples, these guidelines are not codified in regulations and do not provide clear, actionable criteria for whether work meets federal historic preservation standards.

In 1977, the Park Service published with the Department of the Housing and Urban Development (HUD) its first such guidance, *Guidelines for Rehabilitating Old Buildings*, which aimed to articulate how certain HUD-funded rehabilitations should be carried out.¹⁷ In that document, the two agencies expressed a hope that the guidelines might influence decisions beyond the federal program (i.e., the community development block grant program) for which they were developed, stating: “Although specifically developed to assist property owners... and for local officials responsible for the... grant program... these Guidelines will help any property owner or local official.”¹⁸

Listing actions that a property owner should “consider” or “avoid,” the 1977 guidelines set several precedents that carry forward through current guidance on rehabilitations, including recommendations to avoid:

- Altering the interior plan of a building by changing principal walls, partitions, and stairways.
- Substituting “inappropriate” new materials or materials unavailable when the building was constructed, including “artificial brick siding, artificial cast stone or brick veneer” for masonry buildings; “artificial stone, brick veneer, asbestos or asphalt shingles, [or] plastic or aluminum siding” for wood-framed buildings; and “vinyl plastic or imitation wood wall and floor coverings” on interiors (except kitchens and bathrooms).
- Painting a building a “not appropriate” color.

In 1977, the Park Service published guidelines for the Tax-Related Rehabilitation Standards, and revised those guidelines again in 1983 and in 1992 (adding illustrations).¹⁹ In the 1992 guidelines, the Park Service lists “recommended” and “not recommended” treatments, and it lists as “not recommended” the similar provisions on the “avoid” list in the 1977 Interior-HUD guidelines (i.e., interior alterations, material substitutions, and inappropriate paint colors).²⁰ In addition, the 1992 guidelines further suggest avoiding covering structural systems, installing new floors, creating new light wells, lowering ceilings, or adding or removing walls²¹ – activities that might be necessary for property owners to successfully convert a building to a new use. They caution against removing any interior feature that is “character-defining”; against “[d]ividing rooms, lowering ceilings, and damaging or

¹⁷ 1977 Guidelines. These agencies were directed by the Housing and Community Development Act of 1974 to develop such guidelines. 42 U.S.C. § 5320(a) (1974). In addition, the Advisory Council on Historic Preservation was directed to “prescribe regulations providing for expeditious action by the Council in making comments under section 106” of the National Historic Preservation Act. *Id.* § 5320(c).

¹⁸ 1977 Guidelines, at 5.

¹⁹ U.S. Department of the Interior, with W. Brown Morton III et. al, “The Secretary of the Interior’s Standards for Rehabilitation and Illustrated Guidelines for Rehabilitating Historic Buildings,” 1992 (the “1992 Tax-Related Guidelines”); U.S. Department of the Interior, with Gary I. Hume & Kay D. Weeks, “The Secretary of the Interior’s Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings,” 1983.

²⁰ In some cases, the 1992 guidelines slightly reword the 1977 Interior-HUD guidelines; the language on substitute materials cautions against “[u]sing a substitute material for the replacement part that does not convey the visual appearance of the surviving parts of the masonry [or wood] feature or that is physically or chemically incompatible.” 1992 Tax-Related Guidelines, at 7, 12, & 14.

²¹ *Id.* at 49, 52, & 55.

obscuring character-defining features such as fireplaces, niches, stairways, or alcoves, so that a new use can be accommodated”; and against “[i]nstalling permanent participations that damage or obscure character-defining spaces, features, or finishes.”²² The 1992 guidelines also address code compliance issues, stating that work to meet various building or energy code requirements must be “assessed for it[s] [sic] potential negative impact on the building’s historic character” and seeming to discourage life safety and code compliance updates where they would in any way alter “character-defining” spaces.²³ The guidelines even recommend against enclosing interior stairways for fire safety purposes,²⁴ in contrast to prior guidance prioritizing safety.²⁵ Overall, the 1992 guidelines prioritize the “preservation” of interior spaces, exactly as they were found – an interpretation seemingly at odds with the “rehabilitation” purpose of the federal rehabilitation tax credit.

In 1979, the Park Service published guidelines for applying the Grant-Related Standards adopted the prior year,²⁶ and in 1985, the Park Service republished those guidelines. In 1995, shortly after the Grant-Related Standards evolved into the Standards as we know them today, the Park Service issued the *Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings*. The latest version of that document, which explains how the Standards should be interpreted and is the most general of the guideline documents, was published in 2017.²⁷ These guidelines continue to emphasize the material integrity of the historic fabric, even in the rehabilitation treatment. For example, for interiors being rehabilitated, the guidelines suggest avoidance of “[a]ltering a floor plan, or interior spaces (including individual rooms), features, and finishes, which are important in defining the overall historic character of the building so that, as a result, the character is diminished”; “[a]ltering the floor plan by demolishing principal walls and partitions for a new use”; “inserting additional floors or lofts; cutting through floors to create lightwells, light courts, or atriums; lowering ceilings; or adding new walls or removing historic walls”; and relocating interior features like staircases.²⁸ These recommendations may be difficult to follow in a rehabilitation seeking to convert a building from one use to another.

The Park Service has also developed guidelines for sustainability²⁹ (in 2011) and flood adaptation³⁰ (in 2019) for property owners using a rehabilitation treatment. These two sets of guidelines apply only to rehabilitations and no other treatment, and to buildings but not the other four types of resources Places

²² Id. at 58-59.

²³ Id., at xii, 101-102.

²⁴ Id. at 59-60.

²⁵ See, e.g., 1977 Guidelines, at 9 (“[d]estroying original plaster” and “removing original material, architectural features, and hardware” could be undertaken where necessary for safety).

²⁶ U.S. Department of the Interior, with W. Brown Morton III & Gary L. Hume, “The Secretary of the Interior’s Standards for Historic Preservation Projects with Guidelines for Applying the Standards,” 1979.

²⁷ U.S. Department of the Interior, revised by Anne E. Grimmer, “Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings,” 2017.

²⁸ Id. at 128.

²⁹ U.S. Department of the Interior, with Anne E. Grimmer et al., “Secretary of the Interior’s Standards for Rehabilitation and Illustrated Guidelines on Sustainability for Rehabilitating Historic Buildings,” 2011 (hereinafter the “Sustainability Guidelines”).

³⁰ U.S. Department of the Interior, with Jenifer Eggleston, Jennifer Parker, & Jennifer Wedlock, “Secretary of the Interior’s Standards for Rehabilitation and Guidelines on Flood Adaptation for Rehabilitating Historic Buildings,” 2021 (hereinafter the “Flood Guidelines”).

(i.e., structures, objects, sites, and districts) listed on the National Register of Historic Places. At times, the sustainability guidelines prioritize material fidelity and visibility over climate-friendly infrastructure, for example, in recommending against alterations to accommodate solar panels and against the installation of solar panels in a “highly visible” or “prominent location,” even if installations can be removed with minimal or no damage to historic fabric.³¹ Similarly, the flood guidelines prioritize locational fidelity over adaptability, recommending against relocating a building in harm’s way, especially to a new site “noticeably different from the original setting.”³² The flood guidelines also explain that demolition “is not a treatment that meets the Standards for Rehabilitation,” even while recognizing that demolition may be needed to enable adaptive measures to be instituted or “protect other, more important historic buildings.”³³

2. PRESERVATION BRIEFS

In addition to the lengthy and rarely-issued guidelines, the Park Service has published fifty *Preservation Briefs*, which it explains “recommend methods and approaches for rehabilitating historic buildings that are consistent with their historic character.”³⁴ These briefs cover specific materials, such as ceramic tile floors and leaded stained glass; specific building types, such as gas stations and barns; and specific techniques, such as cleaning masonry and repointing mortar.

The Park Service continues to both publish new briefs and update existing briefs. The most consequential recent brief has been a revision of *Preservation Brief 16*, “The Use of Substitute Materials on Historic Building Materials.”³⁵ In the revised brief, the Park Service recognizes that historically, some materials have been substituted by property owners and builders to mimic other materials, such as terra cotta, cast iron, and stucco used to imitate stone.³⁶ In addition, the Park Service acknowledged that the use of substitute materials may be appropriate in situations where the original material has inherent deficiencies or where the new material will need to resist environmental hazards.³⁷ It also listed potential substitute materials, including composite and plastic materials that might replace siding, roofing, and masonry, among other things.³⁸ In these recommendations and others, the revised *Preservation Brief 16* represents a shift in the treatment of substitute materials, which prior guidance suggested avoiding.

3. INTERPRETING THE STANDARDS BULLETINS

The Park Service has published fifty-six *Interpreting the Standards* bulletins, each just a few pages long and posted together to a website, making them easy to locate. These bulletins explain specific decisions made by the Park Service in its interpretation of the Tax-Related Rehabilitation Standards. The first

³¹ Sustainability Guidelines, at 15.

³² Flood Guidelines, at 114 & 116.

³³ Id. at 126.

³⁴ National Park Service, “Preservation Briefs,” October 2023, at <https://www.nps.gov/orgs/1739/preservation-briefs.htm>.

³⁵ Department of the Interior, “Preservation Brief 16: The Use of Substitute Materials on Historic Building Materials,” 2023.

³⁶ Id. at 3-4.

³⁷ Id. at 12.

³⁸ Id.

such bulletin, for example, dealt with a shotgun house that was successfully approved for an interior alteration that kept virtually all interior features intact. The most recent such bulletin highlighted incompatible treatments at two commercial buildings, which were disapproved by the Park Service.

The Park Service has explained that “the bulletins are case-specific and are provided as information only; they are not necessarily applicable beyond the unique facts and circumstances of each case.”³⁹ Thus, like the other Park Service guidance, the bulletins have been deemed to lack precedential value that could be useful to applicants currently undergoing the tax-credit application process.

4. TAX-INCENTIVE GUIDANCE

Finally, the Park Service has issued about twenty other pieces of guidance relevant to the Tax-Related Rehabilitation Standards. They cover a range of topics, including “Changing Secondary Interior Spaces in Historic Buildings,” “Cumulative Effect and Historic Character,” and “New Additions to Historic Buildings.” They are also limited in scope in that, like the other guidance issued by the Park Service, they cannot be relied upon for precedential value. They do, however, provide some narrow clarity on how the Tax-Related Rehabilitation Standards should be interpreted with regards to specific situations.

For reference purposes, a copy of such guidance is located in Appendix C. The tax-incentive guidance documents dated 2007 were developed in response to the 2006 Department of the Interior Park Service Advisory Board Committee Report documented in Part III.C. The tax-incentive guidance documents dated 2016 were developed in response to the 2013 Department of the Interior Secretary-Commissioned Internal Review documented in Part III.E.

³⁹ National Park Service, “Interpreting the Standards Bulletins,” October 2023.

II. The Broad Reach of Federal Historic Preservation Standards

In the five decades over which the Standards and Tax-Related Rehabilitation Standards have evolved, federal agencies, as well as state and local governments, have integrated them into their regulatory frameworks. What that means is that many different groups engage with these standards: state and local officials, to be sure, but also practitioners (including architects, engineers, conservationists, and others) making recommendations to developers or property owners based on what they believe will be approved, and developers and property owners seeking an economically viable project that utilizes a historic property. Considering all of those groups, this Part offers five non-exhaustive illustrations of the application of these standards.

A. FEDERAL HISTORIC PRESERVATION GRANT PROGRAMS

At the federal level, the Standards are used to evaluate activities funded by historic-preservation grant programs administered by the Department of the Interior. As described above, these grant programs were the impetus behind the development of the original Grant-Related Standards.

B. SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

The Standards are also referenced in the Advisory Council of Historic Preservation regulations, which guide federal agencies in complying with the requirements of Section 106 of the National Historic Preservation Act.⁴⁰ The Section 106 process requires federal agencies to take into account the impact of their undertakings on properties listed on or eligible for the National Register of Historic Places.⁴¹ Undertakings include not only activities, like construction, directly initiated and overseen by a federal agency, but also include private activities permitted, licensed, or funded by federal agencies. The National Register lists one and a half million historic properties, and as federal agencies have undergone the Section 106 process, untold numbers of additional properties have been deemed eligible for listing.⁴² Overall, federal agencies review upwards of 120,000 agency undertakings annually pursuant to Section 106, and in so doing they must assess adverse effects of their undertakings on National Register-listed or -eligible properties.

⁴⁰ 36 C.F.R. Part 800.

⁴¹ 54 U.S.C. § 306108.

⁴² Federal agencies do not systematically maintain records of the numbers, types, or locations of properties deemed eligible for listing on the National Register of Historic Places through the Section 106 process, so it is impossible to determine a precise number of properties found eligible.

The Advisory Council explicitly incorporates the Standards into the part of the Section 106 process requiring participants in the process to evaluate adverse effects. The regulations provide as an example of an adverse effect “[a]lteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the [Standards]... and applicable guidelines.”⁴³ The regulations thus require federal agencies and other parties subject to Section 106 to review and apply not only the terms of the Standards themselves, but also the guidelines referenced in Part I.D.1.

Thus the Standards are highly consequential in regulating the impact of federal construction projects – from housing to hospitals and cultural landscapes to military facilities – and federal activities beyond construction projects. These activities generate significant economic activity and can also have significant environmental and equity impacts.

C. SECTION 110 OF THE NATIONAL HISTORIC PRESERVATION ACT

Also relevant, the Standards are referenced in the National Park Service guidelines for Section 110 of the National Historic Preservation Act, which deals with federal agency historic preservation programs.⁴⁴ These guidelines, last updated in 1998, require agencies to manage and maintain historic properties they own or control “in a manner that considers the preservation of their historic, architectural, archaeological, and cultural values,” and to modify and maintain such properties in accordance with the Standards.⁴⁵ Note, however, the regulations for Section 110 also allow for federal agencies to deviate from the Standards “[w]here it is not feasible to maintain a historic property, or to rehabilitate it for contemporary use.”⁴⁶

D. FEDERAL AND STATE TAX CREDITS

The Tax-Related Rehabilitation Standards also have significant reach. Taxpayers seeking a federal rehabilitation tax credit must undertake a proposed rehabilitation in accordance with the Tax-Related Rehabilitation Standards to qualify for the credit. To obtain the credit, a taxpayer must submit an application to the state historic preservation office that proceeds in three parts: first, a determination that the property is listed on the National Register; second, a review confirming that the proposed work complies with the standards; and third, a certification that the work was completed in accordance with the standards. (The names of these steps are, perhaps predictably, called Part 1, Part 2, and Part 3 by preservation practitioners.)

At any stage in the review process, the taxpayer may have to resolve issues raised by the state historic preservation office or the Park Service, which also reviews applications. If officials find the project

⁴³ 36 C.F.R. § 800.5(a)(2)(ii).

⁴⁴ The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,499-20,508 (April 24, 1998). See also 54 U.S.C. §§ 306101(a) and 306102.

⁴⁵ 63 Fed. Reg. 20,505.

⁴⁶ The Secretary of the Interior’s Standards for Historic Preservation Projects, 63 Fed. Reg. 20,505 (April 24, 1998).

proposal will fail, or the finished project fails, to comply with the Tax-Related Rehabilitation Standards, the taxpayer will be denied the credit.

Moreover, conformance with the Tax-Related Rehabilitation Standards is often a requirement for *state* historic preservation tax credit programs. Thirty-nine states have historic tax credit programs.⁴⁷

E. LOCAL HISTORIC PRESERVATION ORDINANCES

Finally, many local historic preservation commissions use the Standards (especially the rehabilitation treatment) or the Tax-Related Rehabilitation Standards to either guide implementation of local historic preservation ordinances or serve as the basis for tailored local standards. The Park Service has acknowledged that while the Tax-Related Rehabilitation Standards have been used to determine the appropriateness of projects receiving the federal historic tax credit, they “have been widely used over the years... [and] have guided... both Federal and nonfederal rehabilitation proposals. They have also been adopted by historic district and planning commissions across the country.”⁴⁸ A recent survey of the historic preservation ordinances of local governments found that just over half of such ordinances explicitly reference some version of the Standards or the Tax-Related Rehabilitation Standards.⁴⁹

⁴⁷ National Trust for Historic Preservation, “State Historic Tax Credits,” at <https://savingplaces.org/state-historic-tax-credits>.

⁴⁸ The 1992 Tax-Related Guidelines, at v-vi.

⁴⁹ Sara C. Bronin & Leslie R. Irwin, “Regulating History,” 108 MINN. L. REV. 241 (2023).

III. Prior Analyses of Federal Historic Preservation Standards

As Part I explained, federal historic preservation standards were developed nearly fifty years ago and have been only modestly revised during that period. Over the last two decades, various individuals and institutions have reviewed the interpretation and application of these standards. This Part documents, in chronological order, the following published analyses, two initiated by the Department of the Interior, and three initiated by external groups:

- NCSHPO Task Force Report (2003)
- Historic Preservation Development Council Working Group Report (2003)
- Department of the Interior Park Service Advisory Board Committee Report (2006)
- Federal Historic Preservation Program Task Force Report (2011)
- Department of the Interior Secretary-Commissioned Internal Review (2013)

These analyses, a full copy of which is found in Appendix D, have generally found that the application and interpretation of the Standards and the Tax-Related Rehabilitation Standards at various levels of government sometimes fails to balance the goal of historic preservation with other public policy goals, including economic growth, environmental sustainability, and equity, and at times may thwart preservation activity itself. These analyses have also offered various suggestions for the federal government to improve the process by which it applies and interprets the Standards and the Tax-Related Rehabilitation Standards.

In response to these analyses, some official interpretations of federal historic preservation standards have been amended or augmented. The openness to critique and evolution in these instances is worth applauding.

A. NCSHPO TASK FORCE REPORT (2003)

The National Conference of State Historic Preservation Officers (NCSHPO), a nonprofit organization bringing together state historic preservation officers and their staff and an organizational member of the Advisory Council on Historic Preservation, published the first external critique of the Tax-Related Rehabilitation Standards. By way of brief background, state historic preservation officers play a role in administering the federal rehabilitation tax credit, as they review applications for proposed projects and their compliance with the Tax-Related Rehabilitation Standards, and they liaise with Park Service reviewers providing final approval. Thus they have unique insights into administration of such tax credit reviews.

In 2003, NCSHPO convened and charged a Tax Act Review Task Force to “research and articulate concerns and issues in relationship to the NPS/State interface on Tax act projects; and to make

recommendations on potential ways to reform the review process and application of the Secretary of the Interior's Standards for Rehabilitation."⁵⁰ The task force distributed a questionnaire to its members (i.e., state historic preservation officers) on relevant topics. After reviewing responses, the task force issued its report suggesting that the Park Service should improve the administration of the tax credit in several ways.

As preface to its recommendations, NCSHPO indicated that the application and interpretation of the Tax-Related Rehabilitation Standards was hindering economic growth and environmental sustainability.

With regard to economic growth, the report tied strict interpretations of the Tax-Related Rehabilitation Standards to a reduction in the number of rehabilitation projects, stating: "No credit [being issued] translates into no project and ends up leading to certain demolition or radical alteration."⁵¹ Explaining this point, the report said: "Insisting on the preservation of elements or fabrics that do not define the historic character and/or insisting on the restoration of missing elements may unnecessarily burden the overall economic feasibility of the project. *After all, this is the 'historic preservation' movement not the 'aesthetic restoration' movement.*"⁵²

With regard to environmental sustainability, the report suggested that the interpretations of the Tax-Related Rehabilitation Standards should be made "in light of changing environmental issues such as lead paint management, energy conservation and smart growth."⁵³ It went on to say: "Historic preservation efforts must be in tune with other progressive environmental movements...[including] local density increases, smart growth policies, energy conservation programs...The application of the Rehabilitation Standards needs to be within a framework that recognizes local or state policies."⁵⁴

To address these issues, the NCSHPO report suggested that the Park Service loosen its strict interpretations of the Tax-Related Rehabilitation Standards in the following ways:

- Identify the character-defining elements that must be preserved in Part 1 of the application form,⁵⁵ and require the preservation and protection of only such specified elements.
- "Eliminate any mandatory use of the restoration standard for a rehabilitation project."⁵⁶
- Avoid applying the reconstruction standard to deteriorated or missing elements.⁵⁷

In addition, the report observed that "NPS concerns on a project appear to relate to application of a *personal design philosophy*," noting that some Park Service reviewers may have treated similar projects differently, or even arbitrarily.⁵⁸

⁵⁰ National Council of State Historic Preservation Officers, "Tax Act Review Reform Policy Paper," June 2003, at 1.

⁵¹ Id. at 5.

⁵² Id. (emphasis added).

⁵³ Id.

⁵⁴ Id. at 4.

⁵⁵ For an explanation of the three parts of the federal rehabilitation tax credit application, see Part II.D.

⁵⁶ National Council of State Historic Preservation Officers, "Tax Act Review Reform Policy Paper," at 4.

⁵⁷ Id. at 6.

⁵⁸ Id. at 4 (emphasis added).

From a procedural perspective, the report suggested that the Park Service clarify its tax-credit appeals process and allow the state to play a role in appeals. The appeals process is typically invoked when an applicant for the tax credit is denied it by the Park Service for failure to comply with the Tax-Related Rehabilitation Standards. The structure of the appeals process, and the manner in which appeals will be substantively reviewed, is thus relevant to the interpretation of the Tax-Related Rehabilitation Standards.

B. HISTORIC PRESERVATION DEVELOPMENT COUNCIL WORKING GROUP REPORT (2003)

In 2003, two national nonprofit organizations – the National Housing & Rehabilitation Association and the Congressionally-chartered National Trust for Historic Preservation – convened a working group of their joint Historic Preservation Development Council to develop recommendations for improving the administration of the tax-credit program. The group consisted of representatives of both nonprofit organizations and their affiliates, as well as historic preservation consultants and attorneys, the president of NCSHPO, and at least one state historic preservation officer. Additionally, representatives from the Park Service participated in several meetings. The participants thus have a multi-faceted perspective on the regulatory and practical aspects of the administration of the tax-credit program.

Over the course of the year, the working group met to identify key issues. In a report issued in December 2003, the working group issued several key recommendations relevant specifically to the Tax-Related Rehabilitation Standards.⁵⁹

As preface for its recommendations, the working group recognized that the application and interpretation of the Tax-Related Rehabilitation Standards affected economic growth, environmental sustainability, and equity.

With regard to economic growth, the working group report indicated that “developers are less likely to utilize the historic tax credit if they believe the design review process is too lengthy, expensive, and unpredictable.”⁶⁰ It added that developers might abandon or choose not to pursue projects because some tax-credit reviewers held a “bias favoring restoration over rehabilitation,” contrary to the “primary purpose of the historic tax credit to foster *rehabilitation*.”⁶¹

With regard to environmental sustainability, the working group report said that “[t]he ‘end use’ of the property, building and energy code requirements, the existence of hazardous materials such as lead paint or sash with asbestos in the glazing compound, and other similarly pertinent factors, should be taken into consideration” when applying the Tax-Related Rehabilitation Standards, particularly in regard to replacement materials.⁶² The report called “problematic” the failure to flexibly allow replacement

⁵⁹ Historic Preservation Development Council, “Recommendations for Improving Administration of the Certified Historic Rehabilitation Tax Program,” December 2003.

⁶⁰ Id. at 3.

⁶¹ Id. at 2 (emphasis added).

⁶² Id. at 6.

materials to enable the tax-credit program to allow for “revitalization and adaptive reuse of buildings, not simply as a vehicle for architectural restoration.”⁶³

With regard to equity, the report went on to imply that inequities may be embedded in the process itself, with outcomes dependent on the biases of independent reviewers. In particular, the report noted that the chief appeals officer overturned two-thirds of decisions for which applicant-taxpayers had appealed.⁶⁴ Nonetheless, the report argued that the appeals process “can create an unfair bias against the developer and the project” because the chief appeals officer was (and is) an employee of the Park Service who primarily consults with those who denied the application.⁶⁵ Moreover, prior appeals decisions could not be relied upon by other later applicants, meaning that differential treatment over time may be possible.

To address these issues, the Historic Preservation Development Council report suggested that the Park Service loosen its strict interpretations of the Tax-Related Rehabilitation Standards⁶⁶ in the following ways:

- Identify the character-defining elements that must be preserved in Part 1 of the application form,⁶⁷ and require the preservation and protection of only such specified elements.⁶⁸
- Eliminate any mandatory use of the restoration standard for a rehabilitation project and revise all internal and public interpretation materials accordingly.⁶⁹
- Interpret the Standards “flexibility... based on building significance” through the introduction of a graduated application scale.⁷⁰

Additionally, the working group included an appendix of 13 “*illustrative* examples of areas where developers might be given greater latitude” in the interpretation of the Tax-Related Rehabilitation Standards. They are (verbatim from the report):

- Allow for the creation of new floor plans – particularly on upper floors – including removal of most demising walls outside of significant corridor areas.
- Where upper floor corridors are not significant, allow for their removal.
- Provide more flexibility in meeting fire, lead paint, accessibility, building and house code requirements. An example would include replacement of interior doors and transom windows to meet fire codes – especially in residential and hotel rehabilitations.
- On stairway retention, focus review on ornamented, centrally-located, highly visible stairs. Allow flexibility for compliance with secondary egress requirements under the fire code.
- Allow for more filling of existing light courts, particularly purely functional, utilitarian light courts.

⁶³ Id.

⁶⁴ Id. at 4.

⁶⁵ Id. at 5.

⁶⁶ The report noted that the interpretation of the Tax-Related Rehabilitation Standards “tends to be uniformly strict and does not reflect differing levels of significance for each property.” Id. at 6.

⁶⁷ For an explanation of the three parts of the federal rehabilitation tax credit application, see Part II.D.

⁶⁸ Historic Preservation Development Council, “Recommendations for Improving Administration of the Certified Historic Rehabilitation Tax Program,” at 7.

⁶⁹ Id. at 2.

⁷⁰ Id. at 6-7.

- Allow for creation of new light courts in large floor-plate buildings without regard to whether the new court is covered or uncovered.
- Allow for more flexible adaptive reuse of large-volume spaces such as gymnasiums, church sanctuaries and meeting rooms into office, residential, or retail space.
- Allow for exposed mechanical systems where no architectural significance is present.
- Allow for replacement of plaster with drywall where insulation, or new electrical or plumbing is required.
- Allow replacement of windows, with a “design-sensitive” replacement production where maintenance, energy efficiency or operability by seniors and the handicapped are an issue.
- Allow for the addition of appropriate new window openings and sashes on non-primary facades to provide light for office and residential uses.
- Allow more flexibility on rooftop additions and placement of rooftop utilities on buildings of lesser architectural significance.
- In general, return to the 1983 language regarding retention of original materials. Allow for replacement solutions when functionality, cost feasibility, energy efficiency or local codes make repair a less desirable option.⁷¹

From a procedural perspective, the report suggested that the Park Service improve its tax-credit appeals process by⁷²:

- Publishing the full text of appeal decisions to improve public and state reviewer understanding of Park Service review principles.
- Allowing appeals of denials of preliminary certification for buildings not on the National Register, which are non-appealable.
- Replacing the one-person appeals board (i.e., the Chief Appeals Officer) with an independent appeals board including Park Service, state historic preservation office, developer, and other professionals.

In addition, the Historic Preservation Development Council suggested that the Park Service allow for state historic preservation offices to directly approve (without a separate Park Service approval) projects generating \$500,000 or less in tax credits (projects with total development costs of \$2.5 million or less) and to be primarily responsible for assessing existing conditions.

C. DEPARTMENT OF THE INTERIOR PARK SERVICE ADVISORY BOARD COMMITTEE REPORT (2006)

In 2004, the Park Service published a 36-page response to the NCSHPO report and the Historic Preservation Development Council working group report, addressing certain recommendations of the report.⁷³ The Park Service noted that it did not view its interpretation of the Tax-Related Rehabilitation Standards as increasingly conservative, emphasizing that its interpretation did not require the restoration

⁷¹ Id. at 8.

⁷² Id. at 4-5.

⁷³ National Park Service, “Improving the Administration of the Federal Historic Rehabilitation Tax Credit Program: The National Park Service Response to Recommendations for Improvement,” August 2004.

of missing features, excessive improvements, or retention of features that are not “character-defining.” As to appeals, the Park Service explained its decision not to publish full appeals decisions online, suggesting that the public needed more context to understand them. Most relevant to this discussion, the Park Service pledged in the report to establish a committee that would consider whether: the Tax-Related Rehabilitation Standards appropriately met modern challenges, the guidelines were clear and consistent, the Park Service was overly conservative, the Park Service should be more lenient on interiors and other additions, and the Park Service should substitute a Section 106-like “mitigation of adverse effects” test in place of the Tax-Related Rehabilitation Standards.

In 2005, Park Service director Fran Mainella established a committee of the Park System Advisory Board (the “NPS Committee”) to examine the Park Service’s administration of the tax-credit program. The NPS Committee included two Park System Advisory Board members, along with leaders from the two nonprofits that created the Historic Preservation Council, a member of the Advisory Council on Historic Preservation, and private parties.⁷⁴

Over the course of a year, the NPS Committee met and heard presentations from a variety of individuals, including a representative of the Internal Revenue Service, two state historic preservation officers, representatives of nonprofit organizations, and private developers. Both the participants and the presenters had significant expertise with all aspects of the federal tax-credit program.

In 2006, the NPS Committee issued its report, offering several recommendations about the application and interpretation of the Tax-Related Rehabilitation Standards.

As preface to its recommendations, the NPS Committee indicated that the application and interpretation of the Tax-Related Rehabilitation Standards was hindering economic growth and environmental sustainability. With regard to both, the report indicated that “in some cases reconciling interpretation of the [Tax-Related Rehabilitation] Standards with other public policy goals, such as smart growth, energy efficiency, and affordable housing, can be problematic.”⁷⁵ The NPS Committee recognized that “[s]ome potential applicants may find the process confusing and burdensome to the point that they are discouraged from applying.”⁷⁶ In addition, the report stated, “NPS policy guidance does not sufficiently address how rehabilitation projects could accommodate more environmentally sensitive treatments and make use of more new building products and materials.”⁷⁷

To address these issues, the NPS Committee report suggested that the Park Service loosen its strict interpretations of the Tax-Related Rehabilitation Standards in the following ways:

- Identify the character-defining elements of the interior of a building and “permit more change to less significant secondary spaces.”⁷⁸

⁷⁴ National Park Service Advisory Board, “Federal Historic Rehabilitation Tax Credit Program: Recommendations for Making a Good Program Better,” September 2006.

⁷⁵ Id. at 4.

⁷⁶ Id. at 16.

⁷⁷ Id. at 11.

⁷⁸ Id. at 10-11.

- Eliminate any mandatory use of the restoration standard for a rehabilitation project and revise guidance accordingly.⁷⁹
- Allow most windows in historic buildings to be replaced, “even if the windows are repairable,” including in hurricane-prone areas where building codes do not accommodate historic repairs.⁸⁰
- Address the Americans with Disabilities Act, life-safety requirements, seismic standards, energy efficiency, and LEED certification.⁸¹
- Allow for functionally-related multiple-building complexes in single ownership to be more flexibly treated during phased projects.⁸²

The Park Service issued about a dozen guidance documents in response to the 2006 NPS Committee report.⁸³ Most of these are included in their entirety in Appendix C.

D. FEDERAL HISTORIC PRESERVATION PROGRAM TASK FORCE REPORT (2011)

In 2010, the national advocacy group Preservation Action convened the Federal Historic Preservation Program Task Force to review the federal historic preservation program as a whole. The task force consisted of representatives from NCSHPO, the National Trust for Historic Preservation, state historic preservation officers, a tribal historic preservation officer, one Advisory Council on Historic Preservation member, and many preservation professionals.⁸⁴

Over the course of a year, the task force met and heard presentations and conducted interviews with fifty-three individuals, including the chairman and executive director of the Advisory Council on Historic Preservation, tribal and state historic preservation officers, retired Park Service and Department of the Interior staff, representatives of nonprofit organizations, and private developers, among others. Thus both the participants and the presenters had significant expertise with all aspects of the federal historic preservation program.

As preface to its recommendations, the task force emphasized the links between historic preservation and environmental sustainability, arguing that adaptive reuse “conserve[s] not only materials, but their embodied energy,” while “the oldest buildings can perform at the most demanding standards of energy

⁷⁹ Id. at 12 (“Guidance should focus on and explain the thought process [in providing]... an incentive to ‘rehabilitate’ and not to ‘restore’ historic properties”).

⁸⁰ Id. at 9-10.

⁸¹ Id. at 11.

⁸² Id. at 19.

⁸³ National Park Service Advisory Board, “Making a Good Program Better: Final Guidance and Implementation of National Park System Advisory Board Recommendations for the Federal Historic Rehabilitation Tax Credit Program,” 2007.

⁸⁴ The task force included representation and/or input from eleven organizations: Alliance of National Heritage Areas, American Cultural Resources Association, Historic Tax Credit Coalition, National Alliance of Preservation Commissions, National Conference of State Historic Preservation Officers, National Trust for Historic Preservation, National Trust Community Investment Corporation, Preservation Action, Preservation Action Foundation, Society for Historical Archaeology, and the U.S. National Committee of the International Council on Monuments and Sites.

efficiency.”⁸⁵ Its report went on to say that “retrofitting of historic buildings [can] meet national building performance objectives,”⁸⁶ and that “[s]ustainability issues have come to play a much more significant role in recent years.”⁸⁷ The report argued that because the Park Service took a “curatorial’ approach”⁸⁸ to historic preservation, property owners were wrongly denied historic tax credits.

Much of the task force report related to structural issues in the federal historic preservation program, and not federal historic preservation standards specifically. However, the report underscored the importance of the Park Service more explicitly addressing sustainability concerns, particularly when it came to solar energy and historic window repairs.⁸⁹ It noted that the Park Service’s issuance of guidelines on sustainability in 2011 were a good “first step,” but that more was needed.⁹⁰ The task force report also emphasized the importance of clear explanations and guidelines related to the Standards generally, and the Tax-Related Rehabilitation Standards more specifically.

E. DEPARTMENT OF THE INTERIOR SECRETARY-COMMISSIONED INTERNAL REVIEW (2013-2016)

In January 2013, former Secretary of the Interior Ken Salazar announced that the Park Service would conduct an internal review of its tax-incentive program. The Secretary solicited and received public comment from real estate developers, preservation professionals, nonprofit organizations, and other stakeholders.

Two months later, the Park Service released a report containing various recommendations related to the program, including a call to clarify guidance related to applying and interpreting the Tax-Related Rehabilitation Standards.⁹¹ To implement this recommendation, the report recommended that the Park Service issue new guidelines on five topics (verbatim from the report):

- Differentiating between levels of significance in interior spaces and making changes to secondary spaces.
- Making changes to certain types of assembly spaces as part of adaptive reuse projects.
- Applying Standard 1 in cases of continuing historic use, where modern needs may necessitate specific interior changes.
- Identifying changes to a historic building that have occurred over time and have acquired historic significance in their own right [related to Standard 4].
- Applying Standard 2 to highly deteriorated interior spaces.⁹²

⁸⁵ Federal Historic Preservation Program Task Force, “Aligned for Success: Recommendations to Increase the Effectiveness of the Federal Historic Preservation Program,” Summer 2011, at 2.

⁸⁶ Id. at 3.

⁸⁷ Id. at 18.

⁸⁸ Id. at 18.

⁸⁹ Id. at 19.

⁹⁰ Id.

⁹¹ National Park Service, “Results of Program Review – Recommendations and Action Plan,” March 2013.

⁹² Id. at 5. For reference, the Tax-Related Rehabilitation Standards 1, 2, and 4 are: “(1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment. (2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided. ... (4) Most properties change

From a procedural perspective, the report urged the Park Service to reexamine its early consultation protocols and to reduce review times for project amendments. The year after these recommendations were issued, W. Brown Morton III, one of the original authors of the federal historic preservation standards and related guidance, lamented changes that made interpretations of them increasingly strict, noting that “much of that flexibility [in the original Standards] has been lost in subsequent revisions.”⁹³

The Park Service largely followed through on the recommendations to issue guidance, issuing tax-incentive guidance on four of the five topics in 2016.⁹⁴ These are all included in Appendix C. It did not issue guidance related to making changes to assembly spaces.

Worth noting, between the 2013 report and the 2016 publication of new tax-incentive guidance, the Park Service issued a long-term planning document (“A Call to Action”) for its centennial in 2015.⁹⁵ In that document, the Park Service reiterated its commitment to updating its own federal historic preservation standards, identifying the Standards (and not just the Tax-Related Rehabilitation Standards) as needing modernization “in consultation with historic preservation partners.”⁹⁶ It also called for the Park Service to “show how historic structures can be made sustainable.”⁹⁷

F. SUMMARY COMMENTS

The various documents summarized in this Part show a consistency in their analyses of the Standards and the Tax-Related Rehabilitation Standards. Most express concern about the possibility that the application and interpretation of such standards hinders economic growth and environmental sustainability. Most direct recommendations to the Park Service, which is viewed by private, local-government, and state-government actors as the primary interpretative authority for federal historic preservation standards. And several (including analyses from the Park Service itself) offer specific substantive suggestions about interpretations of federal historic preservation standards, while others offer procedural suggestions, particularly with regard to the appeals process. In response to these analyses, the Park Service laudably adjusted its official interpretations by issuing formal guidance, positively impacting the preservation field. Some issues, however, remain. Part V will pick up on some of the suggestions that appear to have persisted to today.

The documents described in this Part do not exhaust analyses of federal historic preservation standards. Omitted are scholars’ critiques, critiques by individuals unaffiliated with institutions or task forces, and critiques that have been shared “live” and not transcribed. As one example of the latter, the leading

over time; those changes that have acquired historic significance in their own right shall be retained and preserved.” 36 C.F.R. § 67.7(b).

⁹³ “National Historic Preservation Act,” C-SPAN, May 20, 2014, www.c-span.org/video/?319404-1/national-historic-preservation-act.

⁹⁴ National Park Service, “Final Report on the Implementation of Program Review Recommendations and Action Plan,” December 2016.

⁹⁵ National Park Service, “A Call to Action: Preparing for a Second Century of Stewardship and Engagement,” August 2015.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.*

national organization of architects in 2023 convened a colloquium at Frank Lloyd Wright’s Taliesin West on federal historic preservation standards. The colloquium included attendance and participation by historic preservation practitioners, academics, and an original drafter of the Standards (W. Brown Morton III), as well as Park Service and state historic preservation office staff. The colloquium considered “the need for historic preservation to take on a more holistic view of sustainability including social, cultural and economic equity...and to look closely as to whether current standards are inclusive or exclusive.”⁹⁸ The Standards were described as “static” despite operating “within highly dynamic political, social, cultural, environmental, and economic systems.”⁹⁹ There was also significant discussion of Native American, Alaska Native, and indigenous perspectives on issues raised by the application and interpretation of the Standards. The proceedings and commentary were not transcribed, but the very existence of the colloquium suggests that analyses related to federal historic preservation standards still continue, long past the publication of many of the documents discussed in this Part.

To further understand the contemporary opinions about federal historic preservation standards, Part IV, next, summarizes public comments submitted to the Advisory Council on Historic Preservation in response to its broadly-cast call for such comments.

⁹⁸ American Institute of Architects, “Taliesin Colloquium 2023: The Evolution of Preservation Standards and Guidelines,” at www.aiadc.com/event/taliesin-colloquium-2023-evolution-preservation-standards-and-guidelines#:~:text=This%20event%20will%20inform%20dialogue,and%20to%20foster%20community%20equity.

⁹⁹ American Institute of Architects, “Taliesin Colloquium 2023: The Evolution of Preservation Standards and Guidelines Schedule” (November 2022) at <https://content.aia.org/sites/default/files/2022-11/2023%20Taliesin%20schedule%20v4.pdf>

IV. Public Comments About Federal Historic Preservation Standards

Aware of the prior analyses of federal historic preservation standards, including those documented in Part III, the Advisory Council on Historic Preservation sought in 2023 to assess the status of such standards in the field. It issued a call for comments asking whether and how the application and interpretation of these standards accommodate twenty-first century policy issues, including concerns around cost, housing supply, energy efficiency, renewable energy, climate change, and equity.¹⁰⁰

In response to the call for comments, members of the public provided a snapshot of current views about these standards. Several large national organizations and state historic preservation offices, including a few that participated in the analyses in Part III, provided comment. But most comments submitted in 2023 came from private individuals – including preservation practitioners, developers, architects, neighbors, and religious congregants – with relevant professional or personal expertise. The majority of comments received dealt with the rehabilitation standard, primarily as articulated in the Tax-Related Rehabilitation Standards and administered by the state historic preservation offices and the Park Service. The comments also addressed the ways in which federal historic preservation standards have been administered by local historic commissions.

Overall, the snapshot – consisting of over three hundred pages of comments – confirms that many of the issues identified by the organizations, institutions, and task forces described in Part III remain relevant today.¹⁰¹ Many felt that federal historic preservation standards must be reviewed with a fresh eye to ensure they better accommodate the issues residents, occupants, developers, and policymakers are facing in today's world – alongside historic preservation values. Commenters expressed views that the application and interpretation of federal historic preservation standards is too often stricter than the standards themselves require, and may in fact hinder preservation itself.

The following summary comments and illustrative examples are organized by the three public policy goals commenters viewed as most challenged by outdated applications and interpretations of the federal historic preservation standards: economic growth, environmental sustainability, and equity.

¹⁰⁰ See Appendix E for the text of the prompt issued by the Advisory Council on Historic Preservation.

¹⁰¹ See Appendix F for a copy of the public comments received.

A. COMMENTS REGARDING ECONOMIC GROWTH

Historic preservation can fuel economic growth through construction activity, housing creation, downtown and main-street revitalization, and heritage tourism, among other things.¹⁰² In 2016, the Advisory Council on Historic Preservation recognized the relationship between federal historic preservation standards and economic vitality, issuing a formal policy statement urging greater flexibility in interpreting the Standards to new infill construction, substitute materials, and even strategic demolition “when there is concurrence that such an approach is the best approach to achieving broader community revitalization and preservation goals.”¹⁰³ Comments submitted to the Advisory Council in 2023 underscored several ways in which the application and interpretation of federal historic preservation standards has hindered economic growth. Many commenters cited inconsistencies and uncertainties in the administration of these standards, which in turn contributed to long delays and increased the cost of completing projects. These inconsistencies and uncertainties undermined the confidence of private parties in undertaking rehabilitation projects, and even compelled some commenters to state they would avoid commencing projects triggering compliance with federal historic preservation standards in the future.¹⁰⁴ With regard to the federal rehabilitation tax credit projects in particular, fully 83% of respondents to a survey of tax credit professionals indicated that “some of their clients had decided not to go forward with a [rehabilitation] project due to issues with the program.”¹⁰⁵

The following illustrative comments concern the impact of the application and interpretation of federal historic preservation standards on economic growth. Comments are grouped, for convenience’s sake, in four categories expressing views that current application and interpretation of the Standards and the Tax-Related Standards have reduced the effectiveness of the federal rehabilitation tax credit, thwarted the creation of housing, hindered the conversion of institutional buildings, and deterred people from listing properties on the National Register.

I. EFFECTIVENESS OF THE FEDERAL REHABILITATION TAX CREDIT

Many commenters opined about that the applications and interpretations of the Tax-Related Rehabilitation Standards have reduced the effectiveness of the federal rehabilitation tax credit. This federal program, offering a 20% income tax credit for qualifying rehabilitation expenditures, has led to the rehabilitation of over 49,000 projects since 1976, leveraging over \$131 billion in private investment.¹⁰⁶ The tax credit’s impact on the real estate industry from the standpoint of job creation

¹⁰² See, e.g., Place Economics, “Measuring Economic Impacts of Historic Preservation: A Report to the Advisory Council on Historic Preservation,” 2d ed. 2013.

¹⁰³ Advisory Council on Historic Preservation, Notice of Adoption of Policy Statement on Historic Preservation and Community Revitalization, 81 Fed. Reg. 80,674 (November 16, 2016).

¹⁰⁴ See Part IV.C. for more detailed discussion of these inconsistencies.

¹⁰⁵ Historic Tax Credit Coalition, “Historic Preservation and the Federal Tax Credit: Addressing Challenges of the 21st Century,” Sept. 2023, at 18, at <https://www.historiccredit.com/resources> (hereinafter “Historic Tax Credit Coalition Report”).

¹⁰⁶ National Park Service, “Federal Tax Incentives for Rehabilitating Historic Buildings: Annual Report for Fiscal Year 2023,” February 2024 (hereinafter the “2023 NPS Tax Credit Report”).

(over three million¹⁰⁷), tax base expansion, property-value increases, Main Street revitalization, and other economic activity has been tremendous.

Unfortunately, there seems to be a clear sense among commenters that the program is not currently working as Congress intended. Echoing comments from the prior analyses described in Part III, commenters suggested that reviewers within state historic preservation offices and the Park Service too strictly interpret the Tax-Related Rehabilitation Standards and related guidance, particular for interiors, and that reviewers apply principles more appropriate to a “preservation” or even “restoration” treatment, rather than rehabilitation treatment.

A 93-page report from the Historic Tax Credit Coalition, representing 75 organizations involved in the real estate industry and policy advocacy related to the tax credit, identified several key issues. Members surveyed as to the top three issues with the tax credit program reported that at the very top was the “conservative interpretation of the Secretary Standards,” cited by 69% of respondents, with 87% of respondents reporting a change in the interpretation of the Tax-Related Rehabilitation Standards over the last five years, and 69% feeling that more amendments had been requested by reviewers than before.¹⁰⁸ The coalition summarized additional feedback as conveying increased stringency in the process, inconsistent reviews across time and across project types.¹⁰⁹ It bears noting that 85% of respondents to the survey had more than a decade experience with the tax credit program, and collectively worked on more than 1,300 historic preservation certification applications.¹¹⁰

The coalition reported dozens of examples from specific projects, noting tax-credit approvals being held up or denied for reasons, related to the Tax-Related Rehabilitation Standards, as minor as the:

- Choice of stain within interior closets (denied but successfully appealed).
- Choice of stain for a patch of masonry 1’x2’ large (approved after a monthlong delay and applicant queries).
- Choice of exterior paint color (requiring the applicant to repaint).
- Choice of paint on a stucco wall that was not historic and on a rear façade (approved after significant delays and cost).
- Installation of nine exterior light fixtures (approved after a seven-month review process costing tens of thousands of dollars).
- Requirement that the applicant prove mitigation for a historic stairwell (delaying approval).¹¹¹

To address these issues, the coalition suggested several program changes. With respect to the Tax-Related Rehabilitation Standards, it encouraged “new and predictable guidance” to address a range of issues, including “modern movement buildings with fewer character-defining features” and the installation of energy-efficiency features.¹¹²

¹⁰⁷ National Park Service, “Annual Report on the Economic Impact of the Federal Historic Tax Credits for Fiscal Year 2021,” September 2022.

¹⁰⁸ Historic Tax Coalition Report, at 18.

¹⁰⁹ Id. at 20-21.

¹¹⁰ Id. at 18.

¹¹¹ Id. at 40-41, 44, 59.

¹¹² Id. at 22 & 24.

Other illustrative comments include:

- Main Street America, a network of more than 1,600 neighborhoods and communities and a subsidiary of the National Trust for Historic Preservation (a member of the Advisory Council on Historic Preservation), noted that: “Developers may be reticent to approach rehabilitation projects utilizing HTC [federal rehabilitation tax credits] because of fears about design review and control, especially with the subdivision of interior spaces for new uses...the lack of flexibility in the application of the Secretary’s Standards can increase review timelines during the HTC process, leading to financing issues and failed projects. Prioritizing the Secretary’s Standards without consideration for the project’s economic viability may lead to developers abandoning use of the HTC or the project completely.” The network cited a recent survey of their members that underscored the need to streamline rehabilitations, reporting that 70% of member respondents communicated that vacant buildings and non-rehabilitated spaces constrain economic development in their districts. The network suggested that decisions regarding new additions, “slipcovers,” fire separation (including utilizing intumescent paint on interiors), and storefront windows were among the recurring and problematic issues needing more guidance.
- A nonprofit organization in Illinois wrote that affordable housing conversions for historic buildings are hindered by the higher costs associated with complying with the Standards. It commented that when “affordable housing developers pair the federal Low-Income Housing Tax Credit (LIHTC) with the Federal Historic Rehabilitation Tax Credit to finance projects,” meeting the Standards “is reported to increase the per-unit cost.” They added that the Illinois agency responsible for administering LIHTC “sees new construction, not historic building rehabilitation, as the best way to build more housing units” and has “removed the extra point that projects received for reusing a historic building from the state’s qualified allocation plan for the use of LIHTC credits.
- The statewide preservation organization in Maine described how “local developers [who] have successfully rehabilitated buildings using federal and state Historic Rehabilitation Tax Credits]” were “unable to find an economically feasible pathway for reusing...[a National Register-eligible Church] without repurposing the sanctuary space in a way that would be [impermissible] using the current interpretation of the Standards.” The organization noted when there is not an economically viable path for rehabilitation due to strict interpretations of the Standards, “the alternative is that these buildings continue to lay fallow and are eventually lost.”
- A representative of a housing nonprofit explained: “[O]ver the past few years, the [historic tax credit program] has slowly moved from a broad rehabilitation program toward one with an emphasis on restoration and with a much stricter interpretation of the Standards. We note that a conservative interpretation of the Secretary’s Standards is slowing our current projects down with many more requirements, more expensive rehabilitation and more burdensome requests for information.” Due to these difficulties related to the interpretation of the Standards, the nonprofit’s “real estate team is reluctant to pursue any further projects using historic tax credits. The additional costs and time are making the projects too expensive to complete. Further we know of other developers that are making similar decisions.”
- The developer of seven large high-profile tax-credit rehabilitation projects in New York and Connecticut, including various commercial, retail, service, and residential uses, posited that as a result of overly strict interpretations of the Standards “every year dozens of rehabilitation projects are not pursued or they are delayed, tens of millions of dollars are wasted, and many

impactful economic development opportunities and job creation initiatives are thwarted and urban centers and communities in need of investment continue to be depressed and neglected.” Despite the success of the seven prior projects, the commenter noted that “[g]iven the risks and uncertainty I encountered with recent [Technical Preservation Services (TPS)] interpretations and decisions, it would not be rational for me to pursue another HTC project, or recommend that anyone else does, until the changes made by current TPS leadership in the administration of the program are reversed.”

2. HOUSING CREATION AND RETENTION

Of all of the project types mentioned by commenters referencing economic growth, housing projects were most common. That may reflect the fact that much preservation activity has been devoted to housing creation and retention – and much of that activity triggers application of federal historic preservation standards. Collectively federal agencies – including the Department of Housing and Urban Development, the Department of Defense, the Department of Veterans Affairs, the Department of the Interior, and the Department of Agriculture, among others – and their permittees and funding recipients renovate thousands or tens of thousands of historic homes annually, triggering the need to comply with the Standards during the Section 106 review process. Private developers awarded the federal rehabilitation tax credit, which requires application of the Tax-Related Rehabilitation Standards, have created or rehabilitated over 670,000 housing units since 1977.¹¹³ In fact, over half of tax-credit transactions have involved housing.¹¹⁴ Housing projects are also reviewed by local historic commissions who apply the Standards to renovations and to new infill development within historic districts.¹¹⁵ Interpretations by these public and private actors can influence the time and cost it takes to provide housing.

Recognizing these issues, the Advisory Council on Historic Preservation said in its recently-adopted Housing and Historic Preservation Policy Statement that “[t]he federal government should add to and flexibly apply its guidance on the treatment of historic properties in ways that will incentivize housing development, particularly of affordable housing, and facilitate adapting nonresidential buildings to housing. Likewise, additional guidance is needed on remediating environmental, health, and safety hazards when rehabilitating historic buildings and providing access for persons with disabilities.”¹¹⁶ Implied in these statements – which represent official federal policy – is a critique of the manner in which preservation standards have been interpreted and applied.

Commenters, too, described how federal, state, and local applications and interpretations of federal historic preservation standards have deterred housing conversions of historic buildings, reduced the number of units created in specific projects, raised the costs of housing-related rehabilitations, and complicated the construction of new infill housing.

¹¹³ 2023 NPS Tax Credit Report.

¹¹⁴ Historic Tax Credit Coalition Report, at 13.

¹¹⁵ Preservation Priorities Task Force, “Affordable Housing and Density,” 2021.

¹¹⁶ Advisory Council on Historic Preservation, Housing and Historic Preservation Policy Statement 6, December 2023.

Comments illustrating these challenges include:

- The country's largest municipal preservation agency, the New York Landmarks Preservation Commission, commented on the city's critical housing need by stating: "[T]he application of the Standards has not always provided the flexibility that is so critical to a successful project. In particular, we see room for improvement in the conversion of commercial office space for residential uses, which is a major opportunity for housing growth utilizing historic buildings in New York City." The agency also commented on the need for greater flexibility in new construction adjacent to historic buildings, noting in particular that it has "approved many... projects for houses of worship [that include] new housing developments on campus properties, which provide sustainable funding for building maintenance, restoration, and mission, while also delivering critical housing units." It adds "to address the special needs of religious institutions, we suggest re-evaluating how the Standards are interpreted...to allow for greater flexibility in the development of adjacent structures."
- The Big Cities Preservation Network, convening the historic preservation offices of the country's largest cities, explained that Park Service reviewers of federal historic rehabilitation tax credit applications "have been stricter in insisting upon the preservation of interior corridor configurations, even when these are typically the same from floor to floor." In order to facilitate additional housing projects, the network advised that the Park Service "consider additional flexibility when updating guidelines or guidance documents on the review of interiors for adaptive reuse housing project." The network went on to comment on new construction: "The Secretary's Standards often prove most pertinent to our local design reviews in addressing the compatibility of new additions to an individual historic resource, rather than in assessing a larger-scale infill project within a historic district or a complex urban setting." While "new infill housing development represents a central challenge in many of our cities, the Standards are inadequate for infill housing in historic districts" and as such the network called for "the Standards or Guidelines [to] provide more nuanced guidance on how to address the relationships between buildings of varying heights and densities as our cities continue to grow and evolve."
- The Historic Tax Credit Coalition provided several examples of interpretations of the Tax-Related Rehabilitation Standards impacting housing-related rehabilitations, including:
 - A developer converting a schoolhouse to affordable housing will likely decide to forgo tax credits in a schoolhouse conversion due to "the stricter interpretation of the Standards" on flooring replacements, tin ceilings and mechanicals, windows, wood trim, removal of stairs, insulation, and roofing.
 - A developer converting an office building to affordable housing waited seven months for final approval of the location, size, and color of nine exterior light fixtures, which was granted only after the applicant demonstrated the minimal visual impact of the fixtures given the applicant's other activities ("retention and restoration of all exterior windows; full reinstatement of the historic cornice, nearly all of which was missing pre-rehabilitation; restoration of the heavily modified base levels of the building, exposing and preserving remaining historic fabric and restoring missing elements consistent with their historic appearance; preservation of 100% of remaining historic corridors; reinstatement of historic corridor patterns where previously modified, including

uncovering and preserving historic mosaic tile flooring; and substantial preservation and repair of historic wood flooring”).

- A developer converting a factory to apartments waited months and was required to produce a detailed flooring survey and install mock-ups of various replacement products before receiving approval for the proposed flooring.
- Tenants of several three-unit apartment buildings were delayed in moving in for seven weeks after the developer had to wait months for the approval of an amendment that would allow them to use prefinished pine flooring rather than the rare southern pine originally used on the site.

Additional examples provided by the coalition and enumerated in Part IV.C. illustrate inconsistencies in the treatment of tax-credit projects, including housing. In general, the coalition urged that “the rehabilitation of existing affordable housing or buildings into affordable housing should be better established, and not hindered by impositions of overly difficult rehabilitation standards.”

- An architecture, planning, and conservation firm discussed its concern for affordable housing projects that rely on the ability to add square footage to a current building, in order to make the project financially feasible. They commented that, “we have found SHPO’s and NPS’ application of the Standards to be somewhat inflexible when evaluating the compatibility of new construction on a site.”
- An Ohio-based historic preservation development firm recounted that the Park Service prevented the firm from rehabilitating a building for low-income workforce housing intended for families, because the Park Service’s requirements on interior configuration “limited the number of units we could fit into the building. ... Overly strict interior interpretation makes the housing conversion difficult or even impossible given policy requirements.” It added that at another project, they lost “7-10 units of housing due to a requirement to maintain more of a large interior space. However, some of the earlier YMCA-type projects [with ballrooms, gymnasiums, swimming pools, bowling alleys, and other large spaces] we have seen kept less of the interior space preserved... It is difficult to see the consistency.” At yet another project, the firm “lost about 10 units of market rate housing due to a denial to add window openings to a blind wall on a facade,” harming the overall project feasibility.
- Main Street America cited its survey indicating that Main Street practitioners view the development of housing within and near their districts as necessary to support the districts themselves, with 87% concerned about housing, and 75% indicating their districts lack sufficient housing. The organization said: “a narrow interpretation of the Secretary’s Standards [sometimes] conflicts with the need to adapt spaces for modern uses. Examples of this often deal with the subdivision of interior spaces, such as upper floors that previously served as meeting spaces into apartment units, large interior spaces of historic churches, or the treatment of interior corridors. In smaller-scale projects specifically, one element of the building – such as a tin ceiling or storefront window – can stall the entire project and/or make the project no longer viable. An inability to proceed with a project that would add valuable housing or other income producing space leaves the community without an asset and heightens the risk of demolition by neglect.”
- A staff member at a state historic preservation office pointed to the need to consider how strict application of the Standards affects homeowners in disadvantaged and underrepresented

communities. She said: “Hamlin Park Historic District is a large historic district in Buffalo, New York that has strong associations with black history in Buffalo and has predominantly low- and middle-income black residents today. It is difficult for the owners to invest in their buildings beyond basic needs such as roofs and heating. Asking them to restore windows, replace with matching windows or follow the Standards in other ways often creates an economic hardship.”

Expressing the perspective of a state historic preservation office with experience considering these questions, the North Carolina state historic preservation office outlined the balanced manner in which it conducts Section 106 reviews and tax-credit reviews for rehabilitations involving housing. It noted that it primarily evaluates proposed alterations to interiors primarily to the extent that such alterations affect the building outward appearance. The North Carolina office also identified the need to consider and accept replacement materials for materials with lead-based paint and asbestos, even if the replacement materials do not technically meet the Standards.

3. CONVERSIONS OF INSTITUTIONAL BUILDINGS

Commenters offered a perhaps-surprising number of comments about the challenges faced by those seeking to convert religious, school, and other institutional buildings to new uses. As for religious buildings, the demand for repurposing such buildings may stem from the fact that less than half of Americans are affiliated with a congregation,¹¹⁷ and only a third attend services every month.¹¹⁸ As these numbers continue to diminish, the buildings in which worship historically took place have fallen into disrepair and disuse. As for school buildings, anecdotal accounts abound of mothballing and even demolishing early twentieth-century buildings, in communities large and small. While statistics on this trend are hard to come by, more than two decades ago, the National Trust for Historic Preservation cited the demolition of 90% of the 5,000 Rosenwald Schools built to educate Black students in the South, between 1917 and 1932. Common to religious buildings, schools, and other large community and institutional buildings are the challenge of deferred maintenance and large interior volumes requiring the installation of mezzanine floors and the overhaul of all building systems to be readied for new use.

Commenters noted the difficulty in understanding how federal historic preservation standards apply to additions to such buildings, the division of large assembly spaces, and the provision of modern mechanical, electrical, and plumbing services. For campuses with the potential for new construction, commenters explained that interpretations of the standards do not provide sufficient flexibility for the addition of adjacent structures. Reuse options also may be overly constrained by strict interpretations requiring retention of interior decorations, corridors, partitions, and other features.

The following comments provide more nuance to these views:

- An award-winning planner who founded Main Street America diagnosed the issue as follows: “Over the next decade, tens of thousands of houses of worship will close, as the mismatch between small, aging congregations and large, aging buildings becomes even more untenable. The closings will result in a plethora of vacant buildings. Most are not on the National Register,

¹¹⁷ Gallup, at <https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx>.

¹¹⁸ Pew Research, at <https://www.pewresearch.org/religion/religious-landscape-study/attendance-at-religious-services/>.

but many are eligible for listing. The current Secretary's Standards require that large church spaces like sanctuaries and social halls must remain pristine and intact in order to qualify for historic preservation tax credits. ... Keeping them intact – as the Secretary's Standards recommend – is a potential showstopper for reuse." She went on to add that private developers of religious buildings "need every incentive possible. The obstacles are daunting, among them years of disinvestment and deteriorated conditions, ownership issues (reversionary clauses, adjoining graveyards), outdated zoning and buildings codes, and community acceptance (NIMBYs and resistance to change). Add all of these to the usual pre-development costs, and most developers and investors find it too easy to walk away." She suggested "[a] system to rank a church building's significance and to establish levels of allowable intervention or alteration. Regarding 'significance' in terms of its eligibility for tax credits, I would recommend that the focus be on its architectural quality."

- The New York State Historic Preservation Office suggested: "White elephants, churches and special categories of endangered building types could warrant exemptions to the strict interpretation of the Standards. These modifications could permit the buildings to remain in their communities and tell the story of their history."
- A developer seeking to convert a small schoolhouse into up to eight units of affordable housing heard from the Park Service that it will likely require retention of inoperable single-glazed windows and all wood trim, while prohibiting removal of a staircase that would facilitate an additional studio apartment. That developer is considering withdrawing from the tax credit program.
- The redevelopment of a chapel for affordable housing units was denied where the state historic preservation officer found the proposed subdivision of the chapel inconsistent with the Tax-Related Rehabilitation Standards. While that decision was overturned by the Park Service, the submitter cited this as an example of inconsistencies in project administration.
- A community development corporation in Ohio commented that additional flexibility is needed for building types that are particularly difficult to adapt, such as schools and churches, especially as these buildings are usually in "areas in need of affordable housing."
- A regional nonprofit historic preservation organization in western New York commented on dwindling religious congregations, which has resulted in vacant, large campuses. The organization commented that it has placed a high priority on creative adaptive reuse solutions and argued that federal historic preservation standards "make it exceedingly difficult to adapt historic houses of worship (especially those with large volumes of space in the sanctuary) to new, economically viable uses." It added that religious buildings are being abandoned and vacated in rural and urban areas, and that in Rochester, these buildings are clustered in neighborhoods "which have extremely high concentrations of poverty and are predominantly Black and Latinx. If the Standards do not evolve to make it easier to adapt these buildings to new uses that serve the communities in which they are located, not only do we face the loss of important historic resources, those losses will be disproportionately felt by poor, BIPOC communities."
- A statewide preservation organization said that "the rehabilitation and adaptive reuse of... houses of worship can be difficult due to the limitations set by the Standards...The primary challenge is the large, singular assembly space comprising a majority of the building's footprint that cannot be substantially divided without impacting the architectural integrity of the

building... These landmarks present a prime opportunity for conversion to much-needed housing if the full footprint of the building could be utilized.”

- A heritage organization in Ohio explained that “[i]nterpretations of the Standards are failing to adequately consider the significant challenges of adapting certain building types. Many communities are facing vacant schools and churches abandoned by their traditional occupants, with no viable option to maintain their current use. Repurposing such buildings in an efficient manner is particularly challenging given their use-specific designs and large common areas. Strict requirements to preserve large open volumes like gymnasiums, auditoriums, and sanctuaries can make adaptive reuse commercially and technically infeasible using HTCs, but economically infeasible without the benefit HTCs, resulting in long-term neglect and demolition.”

4. NATIONAL REGISTER LISTINGS

Commenters drew out the relationship between federal historic preservation standards and private decisions to pursue listing on the National Register of Historic Places in several ways. While this report does not purport to comprehensively address issues related to the National Register, these comments nonetheless deserve mention.

Specifically, commenters indicated that current interpretation of the Standards and the Tax-Related Rehabilitation Standards is decreasing the willingness of property owners to list properties on the National Register. For example, a planning consultant who works with religious organizations commented that despite interest in converting religious properties to housing, “the requirement of the Secretary’s Standards that large open spaces in houses of worship, such as sanctuaries and social halls be kept pristine, discourages property owners from proposing properties for the National Register” as it would complicate conversion. As another example, a Maryland planner explained that because of the strict requirements of the Standards, “most property owners and developers wishing to undertake adaptive reuse may gain no advantage from proposing church properties for the National Register.” As such, she explained, “restrictive, inflexible standards serve as a showstopper for most creative reuse and redevelopment projects, especially those involving housing.”

Despite the complications, some property owners may choose to pursue listing on the National Register in order to ensure their building qualifies for the federal historic preservation tax credits. Owners of as many as two hundred buildings annually may successfully pursue listing in this manner; in its most recent annual report, the National Park Service noted that 19% of tax credit applications involved buildings not previously listed on the National Register of Historic Places.¹¹⁹ One might read that statistic as an entirely positive development, promoting stewardship of these buildings. But according to a 2023 Historic Tax Credit Coalition survey of industry professionals, submitted as part of public comment, the statistic is lowered by strict reviews of National Register eligibility criteria, preventing buildings from being listed or making it harder for them to be listed. The survey found that 79% of respondents experienced an increase in the level of documentation required for determinations of individual listings, and 75% noted that there has been increase in the rigor of reviewing National Register

¹¹⁹ 2023 NPS Tax Credit Report.

nominations.¹²⁰ Potential tax credit applicants deterred by these increasingly rigorous reviews, or even denied a determination of eligibility, are unlikely to complete rehabilitations to the same standard as projects receiving the tax credits. They may even decline to pursue a rehabilitation in the first place, which may result in a building being neglected or even demolished.

To address these issues, several commenters suggested that the National Register criteria – and, in parallel, federal historic preservation standards – be more flexibly applied to buildings whose significance relates more to their importance to a community than to their architecture. A preservation professional engaged in projects seeking the federal rehabilitation tax credit, for example, wrote: “In a tiered system, the Part 1 of the tax credit application¹²¹ could establish a kind of graded system similar to the one used in England. Acknowledging the varying degrees of integrity seen in potential projects makes the process more equitable since the Part 1 review and subsequent tax credit review would be different for the rehab of a gutted box vs. an intact school. Allowing for variable levels of integrity in a structured way will hopefully remove the idea that arbitrary decisions are made as a result of the flexibility found in the interpretation of the current standards.” She went on to use an example from the application of National Register standards to reject designation of “several contiguous buildings prominently located in the center of an urban community”: “Two of the buildings are contributing resources to the district, but one was remodeled after the 1983 listing and all that remains is the façade, and doubt was cast on its eligibility for tax credits. Two other buildings were considered non-contributing in 1983 as they had by then a new skin with some architectural interest, and the threshold for listing required a compelling urban renewal argument. The uncertainty led the developer to walk away, and the buildings are likely to flounder without access to historic incentives.” These suggestions are consistent with those contained in several prior analyses referenced in Part III.

B. COMMENTS REGARDING ENVIRONMENTAL SUSTAINABILITY

Preservationists across the country have identified climate change as a matter of significant concern. Unfortunately, commenters felt that the application and interpretation of the Standards and the Tax-Related Rehabilitation Standards thwart the integration of sustainable materials and approaches (including renewable energy) and hinder adaptation of historic places to climate change. The Advisory Council on Historic Preservation recognized these sentiments in its recently-adopted Climate Change and Historic Preservation Policy Statement, where it urged that government standards “be assessed to ensure that they align with climate mitigation and adaptation goals; that they facilitate a variety of modern uses; and that they encourage implementation of energy efficiency measures as integral to thoughtful preservation of historic buildings.”¹²² To further this assessment, the Advisory Council requested respondents to its July 2023 call for comments to evaluate the application and interpretation of federal historic preservation standards on “energy efficiency, renewable energy, or climate-change-related (e.g. adaptation or mitigation) concerns.”¹²³ In addition to these topics, this section documents

¹²⁰ Historic Tax Credit Coalition Report, at 19.

¹²¹ For an explanation of the three parts of the federal rehabilitation tax credit application, see Part II.D.

¹²² Advisory Council on Historic Preservation, Climate Change and Historic Preservation Policy Statement 4-5, July 2023 (hereinafter “ACHP Climate Policy”).

¹²³ See Appendix E.

a few comments regarding a related topic: the way federal historic preservation standards are applied to environmental hazards that affect human health, such as lead paint and asbestos.

The following illustrative comments concern the impact of the application and interpretation of federal historic preservation standards on environmental sustainability. Comments are grouped, for convenience's sake, in three categories, expressing views that current application and interpretation of the Standards and the Tax-Related Standards have thwarted renewable energy installations, hindered integration of energy efficiency features, and increased the climate-change-related vulnerability of our historic places. In addition, comments regarding the difficulty of applying federal historic preservation standards to materials containing environmental hazards are included in this section.

I. RENEWABLE ENERGY INSTALLATIONS

Clean energy projects can occur at several scales, from projects with landscape-scale impacts, which may affect archaeological sites or sacred sites and properties of religious and cultural significance to Indian Tribes and Native Hawaiian Organization, to projects with minimal impact, which transmit energy on-site. The Advisory Council's Climate Change and Historic Preservation Policy Statement calls for expedited permitting and reviews of clean energy projects with "minimal and small-scale" impacts, including rooftop solar panels.¹²⁴ It is these smaller-scale projects, primarily solar, on which comments focused.

The following comments raised specific issues regarding renewable energy:

- A nonprofit preservation organization in Illinois reviewed the recent rehabilitation of a property in Chicago, where the Chicago Housing Authority installed rooftop solar panels on a one-story historic building. The Illinois State Historic Preservation found that the solar panel installation did not meet the Standards and would require mitigation. The nonprofit organization commented that "The mitigation requested – a historic inventory process for Dearborn Homes and other CHA properties – will be beneficial, but casting solar panel installation as an adverse effect and requiring mitigation discourages the implementation of renewable energy solutions." It added, "the ability of historic buildings to be part of climate change solutions is limited by the common interpretation of the Secretary's Standards that interventions that are visible to the public constitute an adverse effect."
- Main Street America, a network of more than 1,600 neighborhoods and communities, observed that rooftop additions to multi-story buildings that include the use of solar panels can be essential to the economic viability of projects. However, "there is sometimes tension between preservation requirements [including the Standards] and the need to improve the energy efficiency of buildings and integrate renewable technology such as solar panels." The network recommended that "every reasonable accommodation should be made through the Secretary's Standards for the integration of renewables, even when the visual impact of such technology cannot be mitigated. Renewables reduce reliance on fossil fuels, make building operations more affordable in the context of increasingly unstable energy markets, and are almost always reversible."

¹²⁴ ACHP Climate Policy, at 5.

- The Historic Tax Credit Coalition urged the Park Service to issue “new and predictable guidance... to address today’s challenges, such as... meeting the requirements [for] qualifying for funding sources associated with renewable energy and energy conservation.” The coalition has urged other technical changes to ensure project proponents may successfully utilize both the federal rehabilitation tax credit and the federal renewable energy tax credit.
- A statewide preservation organization observed that reviewers of projects receiving federal rehabilitation tax credits approve proposed solar panels as consistent with the Tax-Related Rehabilitation Standards only if the solar arrays are located on flat roofs and shielded by secondary elevations. The organization commented that “application of regulations and guidelines must advance to integrate modern technologies that shrink the carbon footprint of historic buildings and permit the generation of renewable energy on site. Minor and reversible alterations to historic buildings (already permitted via Standard #10), whether they are out of public view or not, should be permitted to enhance our ability to address the climate crisis... Solar panels are removable and increasingly affordable, and thus should be permitted on more areas of historic buildings if historic fabric is not being destroyed. The same can be said for the installation of newer, more efficient HVAC systems, which require small punch holes in walls and an increased presence on the exteriors of buildings.”
- A planner in Glendale, California, mentioned that solar panel review is becoming more frequent, and while there is guidance about putting solar panels on flat roofs, at times this is not possible due to the nature of the building. The planner offered: “Guidance on how to approach solar panel placement on homes with steeply pitched roofs, tile roofs, or roofs adjacent to the street due to topography as it relates to Standard No. 2 and 9 would be helpful.” This planner appeared to wish to find ways to allow the solar to be installed, not always clear from the guidance offered.

Not included in the solicited comments but relevant to this discussion is a letter to the Advisory Council from the Department of Housing and Urban Development, a member of the Advisory Council on Historic Preservation, highlighting the need for more flexible treatment in the Standards and the Tax-Related Rehabilitation Standards of solar energy and energy efficiency features. In commenting the then-pending Policy Statement on Housing and Historic Preservation, the Department stated: “the Secretary of the Interior’s Standards and application should be reviewed to determine how energy efficiency-related undertakings can be addressed in a way that improves existing housing and reduces NHPA Section 106 reviews. Assessing the implementation of the Secretary of the Interior’s Standards for historic preservation as they relate to Historic Preservation Tax Credits and energy efficiency and renewable energy upgrades is a good example. Installation of photovoltaic cells (commonly known as solar panels) may render a project ineligible to receive a historic preservation tax credit.... HUD urges ACHP to work with the Secretary of the Interior to consider more flexible approaches to incorporating energy efficiency and renewable energy upgrades at historic properties, such as installation of photovoltaic cells on historic properties.”

2. INTEGRATION OF ENERGY EFFICIENCY FEATURES

Recognizing that the built environment is responsible for about 39 percent of global carbon emissions,¹²⁵ commenters identified the need to make buildings more energy efficient. Interest in this topic is not new for preservationists. Indeed, the Advisory Council on Historic Preservation, in the 1970s conducted research underscoring the importance of building-related energy analysis. And at the federal level, two major pieces of legislation that influenced the evolution of historic preservation standards resulted from concerns about the energy crisis of the 1970s. Congress discussed embodied energy and the energy efficiency when debating and eventually adopting the Housing and Community Development Act of 1974, which created grant programs that resulted in the creation of guidance related to the Grant-Related Standards, and the Tax Reform Act of 1976, which created the federal rehabilitation tax credit program that resulted in the creation of the Tax-Related Rehabilitation Standards.

Adapting historic buildings to improve their energy efficiency or satisfy modern energy codes will often require adherence to the Standards or the Tax-Related Rehabilitation Standards.¹²⁶ Common adaptations affecting building envelopes and interior configurations include new insulation and wall materials, energy-efficient mechanical and electrical systems, light wells and other daylighting strategies, and window replacements. Where these adaptations trigger compliance with federal historic preservation standards, commenters noted difficulties meeting the standards as applied.

Comments illustrating both general and specific issues related to energy efficiency and historic preservation include:

- The National Trust for Historic Preservation, a Congressionally chartered historic preservation nonprofit that serves as a member of the Advisory Council on Historic Preservation, included in its comment reference to a report summarizing conversations with 30 preservation practitioners, who recommended addressing conflicts between energy efficiency requirements and the interpretation of the Standards and Tax-Related Rehabilitation Standards, particularly “[g]iven advancements in building technologies and the adoption of increasingly rigorous building codes, electrification requirements, building performance standards, and other climate policies in a growing number of communities.”¹²⁷ The National Trust warned that failure to do so could hinder the economic feasibility of projects seeking the federal historic preservation tax credit, which benefit financially from long-term operational savings resulting from energy efficiency features. The National Trust also noted that state government plans for allocating the federal Low Income Housing Tax Credit are increasingly requiring energy efficiency features, which can be difficult to integrate in historic buildings given “design review [issues] related to...solar panels, wall insulation, and windows.”
- The Department of Defense called for the Park Service to revise the Standards to “make sensible energy efficiency standards that take into account best practices and national climate change

¹²⁵ See: Advisory Council on Historic Preservation, *Assessing the Energy Conservation Benefits of Historic Preservation: Methods and Examples*, 1979. See also: Advisory Council on Historic Preservation, *Preservation and Energy Conservation*, 1979.

¹²⁶ Erica Avrami et. al, “Energy and Historic Buildings: Toward Evidence-Based Policy Reform,” 2023.

¹²⁷ See National Trust for Historic Preservation, “State Historic Tax Credits: Opportunities for Affordable Housing and Sustainability,” June 2023.

policies requiring the Federal agencies to meet the requirements of EO 14057” (entitled “Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability”).

- A principal at a historic preservation consultancy observed that “Adding insulation to exterior walls is generally not approved” and as such “energy efficiency and user comfort are almost always sacrificed to meet the Standards.”
- A Vermont-based nonprofit development company recounted an application to the Park Service for a tax-credit project involving the rehabilitation of a school. The school was originally built with one wythe of brick and plaster, with little insulation, and the Park Service insisted on retaining the wainscoting, which was “completely untenable not only in terms of operating costs, but also in terms of greenhouse gas emissions.” While the company ultimately prevailed after “a long process to get to a” highly-rated wall, it urged broader-scale change that “baseline R values [insulation metrics] for walls and roofs are established by climate zone. ... If energy efficiency and climate change considerations do not become integrated into the standards, the result may be that more historic buildings are left vacant.”
- The Historic Tax Credit Coalition suggested clearer criteria for applying the Tax-Related Rehabilitation Standards to “energy-saving solutions in materials and construction,” including numerical or percentage standards, and ready approvals “[w]here a significant reduction in energy usage can be accomplished or is required by local building codes with minimal loss of historic character.”
- Main Street America who polled local leaders indicated that these leaders felt “tension between preservation requirements and the need to improve the energy efficiency of buildings and integrate renewable technology such as solar panels. Project sponsors may encounter conflicts between the application of the Secretary’s Standards and energy efficiency upgrades or renewables, whether through local commission review or in pursuit of [federal rehabilitation tax credits] for a project. Building owners must be allowed to make needed improvements to building envelopes and systems to minimize or eliminate reliance on fossil fuels.”
- The Georgia state historic preservation office suggested additional guidance and case studies on “the areas of materials cost, longevity of replacement materials, and energy efficiency,” as well as “[t]he removal of historic exterior character-defining features (i.e., windows and doors, etc.) to accomplish energy efficiency goals,” particularly for housing projects.
- A Connecticut developer recounted an inconsistent and frustrating exchange with Park Service reviewers about operable windows, which delayed by six months the delivery of a 66,000 square foot factory building into 48 apartments. After a state historic preservation office approval of window shop drawings, the Park Service rejected details already approved. Ultimately, the developer at significant cost used the Park Service-preferred windows, which were not operable – contrary to their historic condition. The developer documented: “To the detriment of the building, we made the changes. Historic photos show the use of the center pivot windows for efficient ventilation and cooling – this iconic look is now gone making the North Armory look more like an office building than an iconic factory.” This particular example illustrates the interconnectedness of the issues discussed in this report, including how the application of the Tax-Related Rehabilitation Standards in a manner that thwarted energy efficiency also had the effect of delaying necessary housing.
- A former local energy policymaker from Massachusetts offered the example of the rehabilitation of a state hospital into housing (including 25% affordable units), which was proposed to be

minimally insulated because “their historic preservation consultant said the NPS has a rule that interior walls can be no more than 4 inches thick. I consulted with an energy efficiency expert in the Boston area who is a retired historic rehab developer and he confirmed this appears to be a standing rule; he also stated that it doesn’t seem to be grounded in preserving the historic character of the building.” He noted that “this minimal level of insulation is likely to result in poor energy performance that will impose a financial burden on future residents, especially the 25% of units that are designated to be affordable.”

- A materials manufacturer encouraged revisions to the Park Service brief regarding substitute materials, and that life-cycle embodied carbon considerations relevant to durability and replacement be considered.¹²⁸
- At least two state historic preservation offices wrote in to applaud the flexibility of the Standards and Park Service guidance in addressing energy efficiency issues, but those views differed from the majority of the comments received on point.

Also worth noting were several comments promoting the notion of the deconstruction of historic structures as a means of recapturing embodied energy benefits, including:

- An architectural historian and construction manager from Portland, Oregon, suggested “a standard be added or adjusted to reflect a preference for salvage and reuse of existing material,” citing the benefits to promoting salvage shops, employing skilled trades workers, developing a pipeline for materials, and retain materials.
- The Big Cities Preservation Network called for more guidance addressing the way federal historic preservation standards are applied to “climate heritage,” noting that in the absence of federal guidance, cities are “seeking to accommodate energy-efficient retrofits in ways that preserve buildings’ significant historic features. Cities are also identifying ways to enhance the circular economy while maintaining embodied cultural value through deconstruction and the reuse of existing material to extend the life of other historic resources.”
- A preservation project manager in Savannah commented that “the growing deconstruction movement supplies exact in kind replacements, without removing materials from extant historic buildings,” and suggested that “the greenest material is the material that has already been used.”

3. CLIMATE RESILIENCE

Today, hundreds of thousands of historic resources are at threat from worsening climate-change related natural hazards including wildfires, sea-level rise, hurricanes, and flooding. Building resilience in these historic structures requires the potential use of new materials that are water or fire resistant or even the elevation of structures. Despite updated guidance on substitute materials¹²⁹ and flood adaptation,¹³⁰ commenters opined that the best solutions continue to be challenging under federal historic preservation standards.

¹²⁸ Since the submission of those comments, the Park Service did issue an update to “Preservation Brief 16: The Use of Substitute Materials on Historic Building Materials.”

¹²⁹ Department of the Interior, “Preservation Brief 16: The Use of Substitute Materials on Historic Building Materials,” 2023.

¹³⁰ Department of the Interior, “The Secretary of the Interior’s Standards for Rehabilitation & Guidelines on Flood Adaptation for Rehabilitating Historic Buildings,” 2021.

Comments concerning the adaptation of historic properties to ensure against present and future climate-related threats include:

- The Big Cities Preservation Network called for more guidance addressing the way federal historic preservation standards are applied to “climate heritage,” noting that in the absence of federal guidance, cities are “adopting guidelines allowing for flexibility on rooftop additions to accommodate the relocation from lower levels of significant features or mechanical equipment at risk of inundation.”
- The New York City Landmarks Preservation Commission urged flexibility in standards and their interpretations. It explained: “Interpretations are sometimes unclear in explaining when treatments cross the threshold from recommended to not recommended,” and it requested more guidance on wet and dry floodproofing techniques in urban settings, new openings for water movement, alterations to visible foundations, and relocation of critical electrical and mechanical systems (particularly where visible areas on roofs may be the only option).
- An architectural historian and construction manager in Portland, Oregon, discussed how communities across the nation’s coastlines are already lifting existing buildings to prepare for sea level rise, which impacts a building’s “spatial relationship within its site.” She commented that as sea level rise “ceases to be incremental, the possibility of relocating buildings further inland entirely may become a reality.” As a result, she suggests that “spatial relationships between properties should become less of a priority” within the Standards.
- The local preservation society in Charleston described how it “grappled with allowing sustainability retrofits of historic buildings, like elevating flood-prone buildings or installing solar panels, and ultimately came to a position of support for making historic properties more resilient to climate change.” To thwart inappropriate changes to historic buildings in the name of sustainability, the group encouraged more understanding of the meaning of the “historic character” of a property.
- A preservation project manager in Savannah recalled a property owner receiving an approval for federal rehabilitation tax credits conditioned on the replacement of a new asphalt roof – erected four years after fire destroyed the historic tin roof, with the new roof credited with saving the structure – for a metal one. The project manager suggested more flexible guidance related to severe and unexpected damage, generally relevant to post-disaster recovery from climate events.
- The port authority of San Francisco, which is currently preparing a waterfront resilience plan, noted that “there’s a need to reconcile NPS Climate Change policy guidance with the application of the Secretary of the Interior’s Standards in regulatory contexts including NEPA, Section 106 consultation, and review of projects” receiving federal rehabilitation tax credits. In particular, the authority noted that guidance related to the Standards’ applicability to pier and marine structures, including the appropriate treatment of “minimally-visible character defining features... and where historic resources are failing and interventions are necessary to maintain safety and functionality of infrastructure” would be beneficial.
- The Minnesota state transportation department welcomed additional guidance from the Park Service on adaptation strategies for transportation resources: “Recent guidance for flood adaptation of historic buildings is helpful in the context of historic buildings, but not in the context of transportation resources (e.g., bridges, historic roadways, and railroad corridors).”

4. ENVIRONMENTAL HAZARDS AFFECTING PUBLIC HEALTH

Often by virtue of their age, historic buildings may contain environmentally hazardous materials, such as lead paint, asbestos, radon, and mold, with potential to significantly harm human health. In the case of lead paint, the Environmental Protection Agency reports that approximately 87% of homes built before 1940 – and potentially eligible for historic status – have lead paint. And any building built before the 1970s – by their age, again, potentially eligible for historic status – may have asbestos. Professionals engaged in abatement (permanently removing hazardous material) and remediation (usually including abatement and steps to ensure that the problem does not recur) may seek to deploy a variety of strategies, including containment, encapsulation, removal, chemical treatments, or some combination of these. Where these activities are subject to federal historic preservation standards, there have been tensions, stemming in part because to properly treat environmental hazards affecting public health, changes to historic building materials may be required. Commenters urged clarity with regard to the way federal historic preservation standards would weigh preservation concerns in relation to public health concerns.

Some comments on this topic include:

- A nonprofit development company based in Vermont said, “In our experience, it is very difficult, and in some cases impossible, to abate the lead paint on the historic windows to a level that is considered safe by HUD. Where the renovation of historic buildings is for the purpose of family housing, the consideration for original windows needs to be weighed against the consideration for creating a lead safe environment.”
- The North Carolina state historic preservation office offered its approach of “agreeing to the abatement of the affected materials as safe and ‘practicable’ and to replacement materials that may not meet the Standards but come as close as possible to matching what remains of original materials such as windows and doors.”
- A local planner cited the difficulties faced by the local historic preservation commission given lack of guidance on lead paint. She said: “The problem is the Standards recommend against window replacement and if windows are replaced, against vinyl.” Especially for housing projects involving HUD funding, she noted, “HUD also has strict budgets for each building which get exceeded quickly when wood replacement windows are necessary and finding contractors to strip and repair is challenging... These types of conflicts make it challenging to proceed with worthy programs like lead abatement and still attempt to meet the Standards.”
- A statewide nonprofit organization in Hawaii recalled its experience with abatement procedures and developer abandonment of projects due to lack of guidance about remediation: “Abatement procedures and solutions have been overly destructive and need to have better solutions, particularly based on current condition and proposed use. We have seen numerous cases where a proponent will not consider rehabilitation or reuse due to concerns about abatement costs or outcomes.”
- A local historic preservation nonprofit in Richmond, Virginia, stated: “Some historic materials are hazardous, such as lead paint and asbestos, and may require abatement to adequately reactivate the building. Such abatement should be accommodated, and flexibility should be granted in the use of substitute materials.”

Not included in the solicited comments but relevant to this discussion is a letter to the Advisory Council from the Department of Housing and Urban Development, a member of the Advisory Council on

Historic Preservation, highlighting the need for more flexible interpretations of the Standards of remediation of radon, lead paint, and asbestos, citing human health, particularly for low-income residents, as a primary concern. The Department stated: “the federal government should add to and flexibly apply its guidance on the treatment of historic properties in ways that will incentivize housing development, particularly considering interior repairs and renovations, access for persons with disabilities, and mitigation of environmental hazards that affect the immediate safety of residents.”

C. COMMENTS REGARDING EQUITY

Equity in this day and age means many things, but for the purposes of this report, equity is defined as both fair and consistent treatment in general, and equitable consideration of disadvantaged groups more specifically. Unfortunately, commenters highlighted many applications and interpretations of federal historic preservation standards that failed to advance both general and specific definitions of equity. Perceptions of inconsistencies and bias have led to negative views of historic preservation regulators and, in some cases, even to abandonment of historic preservation projects. Overall, the comments highlighted how process affects – even dictates – substantive outcomes.

While the comments echo the very same sentiments expressed over a period of twenty years in virtually all of the prior analyses described in Part III, the sense of urgency they conveyed was striking.

The following illustrative comments concern the impact of the application and interpretation of federal historic preservation standards on equity. Comments are grouped, for convenience’s sake, in four categories, illustrating views on the inconsistent, punitive, and inequitable application and interpretation of the Standards and the Tax-Related Standards on federal rehabilitation tax credit applications, inconsistencies in the Section 106 review process, inconsistencies in local preservation commission decisions, and inconsistent and inequitable harmonization of the Standards and other statutory requirements.

I. APPLICATION OF THE TAX-RELATED REHABILITATION STANDARDS

Comments about the application of the Tax-Related Rehabilitation Standards to tax credit project proposals provided an eye-opening perspective on the importance of consistency, freedom from bias, and the prevention of inequitable (discriminatory) outcomes. As previously noted, these standards are applied to proposed rehabilitations of buildings by two governmental entities: the Park Service and the relevant state historic preservation office. While the Park Service takes into account the analysis of the state historic preservation office, the Park Service has the final say about whether a proposed rehabilitation satisfies the Tax-Related Rehabilitation Standards. In reflecting on the review process for tax credit applications, commenters noted three types of inconsistency:

- Organizational inconsistencies: state and federal entities disagreeing about how the standards apply to elements of specific projects.
- Project-material-technique inconsistencies: arbitrary application of the standards to the same type of project, material, or technique differently from one project to the next, even within the same state.

- Strictness inconsistencies: stricter application of the standards than previously (a temporal inconsistency).

Comments regarding these three types of inconsistencies include:

Organizational inconsistencies:

- As noted above, a developer recounted a disagreement between the Park Service and the state historic preservation office related to operable windows. After the state’s approval of window shop drawings, the Park Service rejected details already approved. Ultimately, the developer at significant cost used the Park Service-preferred windows, which were not operable.
- An architect described a recent situation where preliminary review of a tax-credit project was sought and received, but new personnel at the state historic preservation office made an adverse effect determination and final approval was denied. He commented, “inconsistent implementation and application of the Standards has been problematic at the SHPO and NPS levels.”
- An architecture, planning, and conservation firm said that its employees repeatedly receive inconsistent feedback from state historic preservation offices and the Park Service on tax credit projects. They stated: “while we understand that approval of proposed work by SHPO does not guarantee NPS consent, we feel that reviews at the state and federal level could better align, principally when related to more significant proposed work, such as new interior floor plans and adjacent new construction.”
- The Historic Tax Credit Coalition recounted an issue where owner of a storefront commercial building was required, arbitrarily, to retain a later-added façade within the period of significance, even though the owner wished to restore the original recessed wood storefront. In another example within the coalition’s report, another state historic preservation rejected the proposal for a new aluminum storefront matching the configuration in the historic photos because aluminum was deemed an unacceptable replacement material. In that case, the Park Service overruled the state interpretation. These two examples highlight both inconsistencies between decision-makers at the state and federal levels and project-material-technique inconsistencies in the treatment of the same type of feature (i.e., storefront windows).

Project-material-technique inconsistencies:

- A statewide nonprofit organization discussed its observations of inconsistent application across project types, stating: “the most common inconsistencies revolve around Standard #6,” as “larger redevelopment projects using federal and state Historic Rehabilitation Tax Credits, such as the adaptive reuse of mills, warehouses and schools are given the latitude to use modern replacement windows while physically and financially smaller projects are held to a higher standard for retention and repair of existing windows.”
- A principal of a Minneapolis development organization commented on recent tax credit projects subjected to paint-color review. She further commented, “there is no guidance in the Standards” when it comes to this type of review, “leading to an arbitrary and aesthetic-based review” with no consistency from one project to another.
- An owner of a Main Street restaurant was required by the Park Service to cover over exposed brick walls that were exposed by prior owners. The owner conducted historical research proving the brick in that space was covered by metal panels and proposed metal panel coverings, but was

denied. The owner also argued that covering brick walls was inconsistent with the Park Service's own written guidance. The owner decided to forgo the tax credits.

- A developer proposed to replace non-historic windows with windows having the same profile as the historic windows (removed by a prior property owner), believing the restoration of the historic profile to be consistent with existing Park Service guidance. The developer waited two months and purchased thirty temporary windows at a cost of \$45,000, while awaiting approval.

Strictness inconsistencies:

- The Historic Tax Credit Coalition, which as noted above represents 75 organizations, surveyed professionals familiar with the tax credit and collectively a part of over 1,300 reviews. Fully 59% of individuals surveyed in 2023 cited “inconsistent review as compared to previous projects” as one of the top three pressing issues facing tax credit projects. The coalition cited increased incidence of:
 - Requests for window shop drawings, some exceeding fifty pages, including an example that took a year to resolve
 - Requests for flooring surveys detailing the dimensions, species, and direction of the floorboards, including an example that took a year to resolve
 - Prohibiting the addition of balconies to secondary and tertiary elevations, including an example rejecting balconies in alley-facing housing units at a converted social club
 - Prohibiting lowered ceilings in corridors, which had been previously allowed to accommodate mechanical, electrical, and plumbing equipment
 - Requiring mechanical equipment to be inside units, despite previously allowing such equipment to be placed outside of units
 - Requiring wood flooring instead of wood-like flooring, including an example of the same applicant with applications in the same state for mid-century office tower conversions to housing, where wood-like flooring was allowed in one project but not the other
- A mill complex owner with an approved Part 2 application¹³¹ from 2012 resubmitted the same application for the same project more recently, but the Park Service rejected previously approved treatment of insulation and flooring.
- A Connecticut developer discussed a recent federal rehabilitation tax credit project initially denied on grounds the developer believed were overly strict interpretations of the Tax-Related Rehabilitation Standards. The decision was overturned on appeal, and the developer commented that the appeals officer “had deeper experience with interpretation of the Standards” and as a result his “well researched rationale for reversing the staff’s decision on all counts...illustrate[s] how arbitrary [NPS] interpretations have become.”
- A Missouri historic preservation consultant observed that after her two decades in working with tax credit projects, she has recently observed more requirements for “detailed drawings that can only be done by an architect – section drawings, elevations etc. – all of which drive up project costs and make it harder for individuals to take advantage of the tax credits,” greater insistence on “exactly matching materials and refurbishing existing features,” a higher “threshold for what constitutes deterioration beyond repair” for windows, and new prohibitions on carpet, which was previously allowed. She also recounted a specific example of building without known historic photos being treated inconsistently by a Park Service reviewer who prohibited the

¹³¹ For an explanation of the three parts of the federal rehabilitation tax credit application, see Part II.D.

reconstruction of a corbel on the front façade, modeled after neighboring buildings, while at the same time requiring that a rear addition be rebuilt like the historic porch structures of neighboring buildings. She concluded: “I’m increasingly concerned about the push for perfection... If we continue to set the standard for a good project so high as to be crippling we will lose more than we gain.”

- A statewide preservation nonprofit commented that tax credit projects facing comparable issues receive different guidance and review decision without justification. They commented, “interpretations of the [Tax-Related Rehabilitation] Standards can seem arbitrary and capricious, shaped by personal attitudes and opinions without a clear, defensible basis.”

Commenters felt that these structural and technical inconsistencies led to a broader inconsistency, namely that the application of the Tax-Related Rehabilitation Standards runs contrary to: the spirit of the program, which aims to encourage reuse and modernization; the rehabilitation treatment, which does not require strict preservation; and the regulatory requirement that the standards be applied “in a reasonable manner, taking into consideration economic and technical feasibility.”¹³²

Finally, in addition to comments highlighting instances of inconsistencies, there was a theme related to the impact of the application on the Tax-Related Rehabilitation Standards on disadvantaged communities. The Historic Tax Credit Coalition reviewed Park Service data over a recent fifteen-year period (2002-2017) and found that 80% of federal rehabilitation tax credit projects were located in census tracts with incomes of 80% or less of area median income or poverty rates greater than 20%.¹³³ Applications and interpretations that deter additional private investment in the rehabilitation of historic assets in these disadvantaged neighborhoods should thus be given careful scrutiny.

Comments related to inequitable impacts of interpretations of Tax-Related Rehabilitation Standards include:

- Main Street America, a network of more than 1,600 neighborhoods and communities, observed “major barriers to the equitable implementation of the Secretary’s Standards in capacity-limited communities, especially historically disinvested communities, who often lack access to preservation processes. The application of the Secretary’s Standards – through unevenly applied discretion, time constraints, and cost of participation – limits the utilization and impact of preservation incentives such as the [federal rehabilitation tax credit] in these communities. Additionally, a lack of organizational capacity, training, and expertise accentuates these limitations.” The network recommended that the federal government engage with disinvested communities and undertake “more research into the application of the Standards within those communities,” possibly under the Justice40 Initiative, established by President Biden in Executive Order 14008.”
- A preservation professional from New England explained that there are “equity issue [which arise] regarding who can undertake such [tax credit] projects to begin with. The process and costs inherent in meeting the Standards for rehab[ilitation] can preclude entities in

¹³² 36 C.F.R. § 67.7.

¹³³ Historic Tax Credit Coalition Report, at 13. Financing for many of these projects often involves other tax credits, including the Low-Income Housing Tax Credit and the New Markets Tax Credit, which amplify the positive impact on the area.

economically challenged, typically urban, neighborhoods from applying for federal rehabilitation tax credits. Already burdened by limited financial resources, historic building owners in those neighborhoods struggle to maintain them and over time face increasingly insurmountable costs to rehabbing them.” She went on to state that developers with resources are most likely to have up-front project costs and access to financing, and sometimes build projects that “don’t necessarily represent the interest of community residents.”

- A statewide nonprofit organization, as noted above, articulated its view that larger and better-funded projects received preferential, and more lenient, treatment than smaller projects. Improved access to flexible interpretations of the Tax-Related Rehabilitation Standards on the basis of project budget would be problematic, if true.

Related comments not specific to the Tax-Related Rehabilitation Standards (meaning, comments also applicable to the Standards) include comments urging that the strictness with which these standards are applied and interpreted be tied to the property’s significance, and that properties significant for reasons other than their architecture be given more flexible treatment to reduce discriminatory outcomes:

- A Virginia preservation nonprofit described how “[t]he buildings of underrepresented communities were often built of lesser quality materials that were less durable” and as such “a more flexible approach to the application and interpretation of the Secretary’s Standards will more assuredly facilitate the survival and stewardship of more diverse historic resources for the future use and enjoyment of our community as a whole.”
- The Washington state historic preservation office stated that “[t]he Standards work well when age and architecture convey its significance; but applying the standards to resources determined eligible for association to historic events, patterns or significant individuals is problematic in the Standards’ tailoring to architectural significance. This is a persistent problem with historic resources relating to social justice and equality, including minority neighborhood identity and the Civil Rights and LGBTQ+ movements, as many such resources are not eligible under criterion C. Having one-size-fits-all Treatment Standards does not work in achieving a more inclusive, representative [National Register of Historic Places]. The treatment of such historic resources should be tailored to preserving and conveying the story of what happened there with clarity and intention.”
- A California planner discussed how “[h]istoric properties that are associated with significant events and people don’t always hold significance related to its architectural features or design and may not retain a high level of integrity when it comes to materials, workmanship, or design. Guidance on how to apply the rehabilitation standards when referencing a resource associated with intangible heritage or for an association with events or people would be useful.”

Relatedly, the Historic Tax Credit Coalition noted that initial determinations of eligibility for the National Register for tax-credit projects tends to be “more difficult than in prior decades and requires a higher level of scholarship and details and the process does not consider the importance of the building to the community,” noting that this is especially “impactful in underserved communities of color or with buildings that have a stronger cultural than architectural history.”¹³⁴ This comment raises a different concern than Part IV.A.4., which described how the strict application of federal historic preservation

¹³⁴ Id. at 25.

standards deterred applications for listing on the National Register, as property owners sought to avoid potentially expensive compliance obligations. Here, the coalition’s comment referred to property owners actively seeking a determination that an unlisted property be listed on the National Register of Historic Places, in order to take advantage of federal rehabilitation tax credits. Owners in disadvantaged communities may feel the burden of heightened costs and preparation to achieve listing on the National Register more acutely than others. They may therefore not pursue, or not have the resources to pursue, tax credit incentives. (A full critique of National Register standards falls outside of the scope of this memo, but the critiques also apply to property owners seeking designations for reasons other than the tax credit.)

To address all of these concerns, many commenters offered ideas. More specific, prescribed guidance and the greater use of case studies to illustrate approved materials and techniques for particular project types was a common refrain, as was a request to allow applicants to rely on precedent in similar projects. In addition, the National Conference of State Historic Preservation Officers and the National Trust for Historic Preservation – both members of the Advisory Council on Historic Preservation – called for greater guidance about the regulatory requirement that the Tax-Related Rehabilitation Standards be applied “in a reasonable manner, taking into consideration economic and technical feasibility.”¹³⁵ The former organization suggested that the phrase may create a “source of conflict and may further complicate a process that by design relies on individual interpretation”; the latter suggested that guidance “explain the project review analysis that allows a finding that the project as a whole meets the Secretary’s Standards, even where satisfying a specific standard in isolation may prove problematic.”

Other commenters proposed changes to the administrative process, including urging release of records regarding previous interpretations of the Tax-Related Rehabilitation Standards, and improvements to the appeals process itself. Currently, the Park Service makes publicly available online only the last five years of Park Service appeals, and does not systematically publish either approved or rejected applications and decisions. Commenters urged opening up public records for both application and appeals decisions to better equip applicants to submit well-reasoned and successful applications and appeals, and to ensure fairer and more consistent treatment. For example, an urban community development firm expressed the need for “an improved appeals process, allowing applicants timely access to an impartial third-party review, [and] ensuring that interpretations of the [Tax-Related Rehabilitation] Standards remain consistent with existing precedents.” Supporting this comment is an analysis of the last five years of tax credit appeals, which showed that 29% of appeals reversed Park Service denials.¹³⁶ Clearer guidance and greater understanding of precedents may reduce this large percentage of successful appeals, benefiting all parties.

2. APPLICATION OF THE STANDARDS IN SECTION 106 PROCESSES

Comments about the application and interpretation of the Standards in Section 106 review processes also highlighted inconsistencies, largely resulting from the lack of clear guidance and publicly available

¹³⁵ 36 C.F.R. § 67.7.

¹³⁶ “A Survey of Federal HP Tax Credit Appeals” prepared for the Chair of the Advisory Council on Historic Preservation, Laurel Grace Margerum, 2023.

precedents that project proponents can easily follow. As noted in Part II.B., Section 106 of the National Historic Preservation Act requires federal agencies to identify and assess the effects that a covered undertaking may have on historic properties. Federal agencies (and their permittees, licensees, and funding recipients) strive to manage their undertakings in a manner that complies with the Standards, given that Advisory Council on Historic Preservation regulations regarding Section 106 state that a failure to comply with the Standards warrants a finding of an adverse effect.

Commenters suggested that the Standards are not consistently applied and interpreted during Section 106 review processes. Several pointed to the lack of sufficient personnel highly trained in design, materials, and construction decisions, necessitating clearer guidance about the Standards' application and interpretation in specific circumstances.

Illustrative comments include:

- The General Services Administration, a member of the Advisory Council on Historic Preservation and the manager of nearly 10,000 federal properties, stated that the agency encounters challenges with differences in the interpretation of the Standards with regard to the determination of effects under the Section 106 process. The agency noted that Standard 1 and Standard 9 pose the most variable interpretations. The agency also pressed upon the importance, as two fellow Advisory Council members did, of clarity around the first paragraph in the Park Service regulations on the Standards, offering: "Guidance on application of the Standards and the accompanying guidelines state that they will be applied taking into consideration the economic and technical feasibility of each project, and this sometimes gets overrun in Section 106 negotiations."
- The National Alliance of Preservation Commissions, whose chair serves as an observer to the Advisory Council on Historic Preservation, noted that interpretation of the Tax-Related Rehabilitation Standards "should authorize professionals and staff to find the best path forward...[to] support consensus decisions in Section 106 and historic tax credit reviews. However, hierarchy in government roles and inflexible interpretation of standards often preclude opportunities for interpretation, negotiation, and consensus."
- The Department of Defense, a member of the Advisory Council on Historic Preservation, explained that "State Historic Preservation Officer (SHPO) and Regional National Park Service (NPS) staff have inconsistent interpretations and applications of SOI Standards [to Section 106 projects]. These inconsistencies create additional work and complicate DoD's ability to effectively manage and plan for renovations of historic properties, including housing, located in different states and regions." These concerns echo the concerns, relayed in Part IV.C.1., from private parties seeing differences between state and federal decision-makers in the context of federal rehabilitation tax credit reviews.
- The National Conference of State Historic Preservation Officers, a member of the Advisory Council on Historic Preservation, underscored conflicts between Advisory Council regulations, which cover Section 106, and Park Service guidance. As one example, the organization noted: "the ACHP specifically calls out "removal" of a property from its original location as an adverse effect, regardless of circumstances. This principle does conflict with the NPS Guidelines on Flood Adaptation for Rehabilitating Historic Buildings – which acknowledges, due to sea-level rise and other climate hazards, that relocation may be necessary and can be achieved while

meeting the Standards.” The organization proposed review and coordination across both bodies of regulation.

- The Virginia state historic preservation office observed that in its experience in Section 106 reviews, numerous delays occur on these projects due to confusion and lack of coordination. The office urged: “Targeted training to federal agencies on the application of the Standards and coordination of Section 106 with the NEPA process may alleviate much of this misunderstanding and concern.”
- The Minnesota state department of transportation said that applying the Standards during the Section 106 process was difficult for transportation projects, including road widenings, pavement replacements, and bridge reinforcements. While buildings have many character-defining features to consider, bridges “often have one or two character-defining features – masonry cladding, concrete with applied ornament, the organization of a truss – which doesn’t allow for great flexibility.”
- An Illinois statewide preservation organization commented on Section 106 interpretations of adverse effects and the ability to satisfy other goals: “Many of the changes that enable historic buildings to respond to equity, housing-supply, energy-efficiency, renewable energy and climate change-related concerns are made in opposition to the Secretary’s Standards, not because of, or in harmony with, them. When assessed as part of the Section 106 process under the National Historic Preservation Act, it is common for these changes to be labelled adverse effects and to be allowed to go forward only with accompanying mitigation. These processes set historic preservation up as an impediment rather than as part of the solution to many of the most pressing concerns currently facing people and the built environment.”
- The chief archaeologist for the state of Nevada asked for clarify about the treatment of “traditional cultural properties” and resources significant to Indian Tribes. He suggested that “the regs broaden ‘the net’ by making it clear that ‘tribal’ resources and TCPs apply to ethnic groups not Native American.”
- The Iowa state historic preservation officer similarly urged efforts “to involve tribal members or appropriate members of a traditional cultural property when evaluated whether work proposed/performed meets the Standards,” citing levels of understanding that vary greatly across project proponents.

3. APPLICATION OF THE STANDARDS AT THE LOCAL LEVEL

Some comments involved the interpretations of the Standards by local historic commissions reviewing applications of property owners to modify their historic buildings. Most of these related to a commission’s application of the Standards to a particular project. In other words, they were not about inconsistencies *across commissions*.

However, four state historic preservation offices submitted comments about the challenges local commissions in their jurisdictions face in applying and interpreting the Standards:

- The Georgia state historic preservation office observed that “there appears to be a great deal of inconsistency with local historic preservation commissions [applying] the current Standards to projects under their purview to review.”
- The North Carolina state historic preservation office noted that many local commissions have developed tailored review standards similar to, but not necessarily exactly like, the Standards.

For local historic commissioners, the office noted a particular difficult understanding how to review new construction on vacant lots: “the Standards alone may be inadequate as to how to assess stand-alone new construction on a vacant lot within a local historic district as the Standards largely address existing buildings. An alternative to be considered for infill might be the FRESH approach” covering footprints, roofs, envelopes, skin, and holes (fenestration).

- The Pennsylvania state historic preservation office provided its observation about the use of the Standards at the local level: “The Standards are sometimes used at the local level as a reason to deny alternative energy solutions (mostly solar panels on roofs) and other NIMBYs and are perceived to contribute to an elitist approach to preservation.”
- The Virginia state historic preservation office commented about inconsistent application of the Standards by local historic preservation boards and commissions, stating: “[W]e find that the application of the Standards is inconsistent at the local level in large measure because volunteer members of the review boards lack the academic background, training, or experience to apply the Standards.”

A more positive approach to inconsistent treatment was presented by the National Conference of State Historic Preservation Officers, who lauded the decentralized nature of American preservation regulation, noting: “Early on there was a recognition that the Federal government could not be present in every state and community to the extent necessary to evaluate solely every historic property and that state and local significance, in particular, could be best evaluated by states and local governments. The delegation of certain functions to state and local governments combined with the many calls in the NHPA for consultation, advice, and cooperation, pretty clearly suggests a program that is meant to be variable depending upon a variety of circumstances and including the input of multiple stakeholders, and without doubt, with a strong vein of accountability. Rather than viewing this structure as a weakness or shortcoming, we view this as a strength.”

4. HARMONIZATION OF THE STANDARDS AND TAX-RELATED REHABILITATION STANDARDS WITH BUILDING CODES AND ACCESSIBILITY REQUIREMENTS

The Advisory Council on Historic Preservation did not explicitly call for public comment on the manner in which federal historic preservation standards were applied and interpreted vis a vis building codes and accessibility requirements.¹³⁷ However, it received many comments about these topics. Commenters vocalized concerns about the difficulties harmonizing the standards with building codes (including energy codes) and with the requirements of the Americans with Disabilities Act (ADA). In some cases, particularly cases relating to the ADA, commenters said that federal historic preservation standards were applied and interpreted in ways that hindered life safety and accessibility.

Comments concerning difficulties in harmonizing federal historic preservation standards with building codes included:

- A statewide preservation organization discussed the recent rehabilitation of a long-vacant 1870 building, which was delayed for almost a decade while several developers attempted to ensure the existing historic stairs satisfied both the building code and the Standards. The organization

¹³⁷ See Appendix E for the text of the prompt issued by the Advisory Council on Historic Preservation.

commented that “historic preservation standards and their application have long been in conflict with building codes that address essential life safety and accessibility needs.”

- A statewide nonprofit historic preservation organization commented that building codes, which are essential for health and safety of the public, are non-negotiable. Therefore, the organization asserted that, “when there is a conflict between the building code and the interpretation of the [Standards] by the reviewer, developers/property owners face limited options.”
- The Historic Tax Credit Coalition recounted a conversion of a building to its original use, a hotel, which required the addition of a “gurney sized elevator” for life safety purposes. The local government had approved the location of a new elevator tower, but state and federal reviewers of the owner’s tax credit application nonetheless required extensive documentation and ultimately denied the project, citing the proposed tower as a part of the reason.
- A former local energy policymaker from Massachusetts described a catch-22 between the widely-used International Energy Conservation Code and historic structures, in which the energy code requires compliance by historic buildings except where the energy efficiency measure would “damage the historic character of the building,” meaning that compliance with the energy code would likely result in a finding by a local historic commission that the property owner violated the Standards and could not proceed. He observed that the Park Service has declined to incorporate this into explicit guidance, and meanwhile “the NPS guidelines are so inflexible, and the judgment of what affects the historic character of a building are based on very minute differences that it discourages developers from even proposing new solutions.”
- An experienced architect said that throughout his involvement with historic properties, he has experienced significant difficulty in accommodating local building code requirements and the Standards. He stated: “[T]hese are building codes we are talking about – health, safety and welfare of the building occupants must be accommodated or we are not doing our primary duties as architects.” With regard to energy codes in particular, he recalled a project for which the code mandated additional wall insulation; the Park Service repeatedly rejected the additional wall insulation because of the increase in wall thickness.
- A Boston architecture firm submitted extensive comments about the ways in which the application of the Standards to windows and wall insulation have hindered compliance with Massachusetts’ mandatory energy code. The firm noted that the “historic building requirement limit[ing] the insulation applied to the interior face of the existing walls to 4” maximum from the inside face of the existing wall to the face of the interior finish... is very limiting” and may result in noncompliance with the energy code.
- Part IV.B.2. offers other comments regarding the difficulties complying with energy codes, particularly energy efficiency requirements.

Comments concerning difficulties in incorporating equitable access by the disabled into projects subject to federal historic preservation standards included:

- An Illinois preservation nonprofit organization discussed a current project to rehabilitate the Van Buren Metra station in Chicago, where developers have proposed alterations to an adjacent pedestrian bridge to add a ramp improving access for the disabled. The ramp was determined to be an “adverse impact to the historic bridge, and potentially grounds to consider it no longer a contributing resource to the Grant Park National Register Historic District.” The organization used this unfortunate determination to make a broader point that the Standards

“currently discourage equity in the form of accessibility, by deterring interventions that make historic places ADA-compliant.” The organization raised the question: “If preservation is a public benefit, how can it be an adverse effect to make access to a historic resource more broadly available to the public?”

- A historic preservation consulting business in Virginia commented on the Standards not being flexible enough to reasonably incorporate ADA accommodations, particularly not allowing door openings to be widened to fit wheelchairs. They further opined that “the Standards are written in a way that prioritizes buildings over people.”
- A national historic properties development firm discussed a project where the local authority required the installation of a concrete ramp at the main entrance of the building, and although the ramp was required by code and ADA requirements, it was subject to strict scrutiny from state historic preservation office and the Park Service, making it “very hard to reach consensus.” The firm further commented that building codes and ADA requirements “are going to continue to become more strict and difficult to meet and it would be helpful to have more guidance on how to achieve these while still maintaining historic fabric.”
- A statewide nonprofit preservation organization in Hawaii provided two examples highlighting confusion balancing accessibility and preservation concerns. First, “[a] proposed new pedestrian and bicycle bridge over a historic canal has been over-engineered to accommodate a projected three-meter sea level rise, which also requires massive ramps for ADA and bicycle access to move from street level to the deck, increasing the mass and footprint,” and alternatives that would have reduced the mass were rejected because water may have periodically overtopped the bridge. Second, to ensure accessibility in another project, “historic French double doors would have to be converted to single wide door with side panel to meet exiting requirements but destroying a key historic feature.”

V. Recommendations

Current applications and interpretations of the federal historic preservation standards – which govern virtually all preservation activities occurring in the United States – may not fully benefit historic places and the people who care about them. Fortunately, many people who work in the preservation field – people who have devoted their lives to reinvigorating historic places – believe that we can do better. Preservationists can collaborate on necessary change, benefiting so many others who may never realize that the Standards and the Tax-Related Rehabilitation Standards even exist. Those benefits include historic churches saved from demolition, schoolhouses converted to senior housing, new solar panels delivering clean energy, Main Streets bustling with shoppers, and factories becoming innovation centers again. Adjustments to the “rules of the game” can especially benefit low-income and minority communities, who may lack access to capital and professional assistance, who may experience entrenched disinvestment, and whose cultural and social practices may challenge preservation’s formalities.

This Part offers recommendations for clarifying and modernizing the way that public and private parties access, apply, and interpret the Standards and the Tax-Related Rehabilitation Standards. It takes into account the original impetus for these standards, prior analyses dating back over two decades and described in Part III, and public comments provided to the Advisory Council on Historic Preservation in 2023 and summarized in Part IV. In addition, these recommendations rely on two policy statements recently adopted by the Advisory Council – the Policy Statement on Climate Change and Historic Preservation and the Policy Statement on Housing and Historic Preservation – which both call for greater flexibility in interpreting federal historic preservation standards, balancing other pressing social needs.¹³⁸ And it relies upon the views of members of the Advisory Council on Historic Preservation and its committees, including the Experts Advisory Committee, as expressed to or before the author during meetings and discussions, and through written correspondence.

Addressing the challenges and issues raised in this memo could inspire actions to be taken both by the Advisory Council and the Park Service. To the extent that these recommendations relate to the Park Service, they are meant to answer – with specific ideas – the Park Service’s centennial “Call to Action,” calling for modernization of the Standards and the Tax-Related Rehabilitation Standards.

With that in mind, the recommendations are as follows. In the immediate term, both the Advisory Council and the Park Service should issue new, detailed, and updated guidance on several specific topics,

¹³⁸ See Advisory Council on Historic Preservation, Climate Change and Historic Preservation Policy Statement 6, July 2023 (“The federal government should expand and more flexibly apply its guidance on the treatment of historic properties threatened by climate change.”); Advisory Council on Historic Preservation, Housing and Historic Preservation Policy Statement 5-6, December 2023 (“The federal government should expand upon its guidance regarding reuse and rehabilitation of historic properties for housing and should encourage flexible yet consistent application of such guidance.”).

and the Park Service should launch a robust process to overhaul the guidelines with economic growth, environmental sustainability, and equity in mind. In addition, it would be helpful for the Park Service to commit to expanding training and facilitating the use of precedent, particularly in applications for the federal rehabilitation tax credit. And the Advisory Council should undertake a review of the institutional frameworks through which the federal historic preservation program is administered to ensure alignment between those institutions and the achievement of a balanced view of historic preservation.

In the medium term, the Park Service could initiate rulemaking to: amend the Standards to restore previous or add new treatments; and improve the appeals process for decisions related to Tax-Related Rehabilitation Standards. In addition, the Park Service could consider initiating rule-making to introduce a graduated approach to the National Register of Historic Places, whose administration is intertwined with the administration of federal historic preservation standards.

These recommendations focus on federal decision-makers, recognizing that while the current structure of American historic preservation is highly decentralized, the federal government plays a critical role in influencing the application and interpretation of historic preservation standards. However, state officials and local historic preservation commissions could also consider some of these recommendations in light of their own decentralized regulatory frameworks.

A. RECOMMENDATIONS FOR IMMEDIATE ACTION

This section covers suggestions for immediate action not requiring regulatory or legislative changes, including the issuance of additional guidance, the launch of a review of current guidance, the expansion of training opportunities, and the facilitation of precedential interpretations of the Tax-Related Rehabilitation Standards. In addition, it suggests that the Advisory Council undertake an effort to better understand and make suggestions regarding the alignment of the structure of federal preservation governance, to ensure that these issues continue to receive regular attention and priority.

Before explaining each of suggested items further, it bears noting that achieving an “immediate” timeline requires sufficient and timely resources to be devoted to these tasks. Relevant budget offices and even Congress should consider what is required to ensure that these suggestions can be realized.

I. ISSUE ADDITIONAL GUIDANCE

Before proceeding further, it is important to clarify what “guidance” means and why this report calls for more of it. To a lay reader, there may seem to be a tension between the flexibility the drafters of federal historic preservation standards originally envisioned and the current call for more specific guidance. But at the core of many critiques of these standards is a lack of clarity on the extent to which flexibility is warranted. Such clarity could ensure consistency and predictability that would benefit the many different groups that engage in historic preservation activities, including practitioners, developers, investors, and property owners. Examples, case studies, and bright-line rules could also benefit those individuals of varying background and expertise who are often tasked with applying and interpreting these standards, including members of local historic preservation commissions, whose experience with

the technical aspects of historic preservation varies widely. So to be useful, guidance called for herein must be written down, informative, illustrative, and accessible to a wide range of users.

Both the National Park Service and to a lesser extent the Advisory Council on Historic Preservation, play a role in guiding others, both within and outside the federal government, to apply and interpret federal historic preservation standards. As noted in Part I.D., the Park Service issues four kinds of supplemental guidance (guidelines, *Preservation Briefs*, *Interpreting the Standards* bulletins, and tax-incentive guidance) about the interpretation of the Standards and the Tax-Related Rehabilitation Standards. In addition, the Advisory Council provides a limited amount of guidance related to the Standards for federal agencies and related public and private parties to follow when carrying out the Section 106 review process of the National Historic Preservation Act.

With that background in mind, both the Park Service and the Advisory Council should jointly or separately consider issuing additional guidance for several specific topics. This guidance would be most useful for the rehabilitation treatment of the Standards and the Tax-Related Rehabilitation Standards, because those two sets of standards are used the most and have the most impact on preservation practice.

The following topics were consistently mentioned as problematic to the degree that they potentially jeopardize the practical or financial feasibility of rehabilitation projects¹³⁹:

- Changes to interior circulation patterns, floorplans, ceiling heights, lightwells, and courtyards. *Prohibition on such changes can thwart conversions of commercial and institutional buildings for residential uses, particularly those with large floorplates, and installations of energy-efficient HVAC equipment and other utility ducts and lines; they can also diminish capacity to use natural lighting or meet energy codes.*
- The subdivision of large assembly spaces. *Prohibition on such subdivision can thwart conversions of religious, school, and other institutional buildings to residential uses.*
- New additions to historic buildings or campuses. *Confusion about the meaning of Standard 9 can lead to costly design review processes and, in some cases, buildings or campuses less useful to, or beautiful for, occupants.*
- The installation of solar energy. *Limitations on solar installations has reduced the environmental sustainability of projects and increased owner energy costs.*
- The installation of energy-efficient features, such as windows and insulation. *Limitations on energy-efficient window and insulation installations has reduced the environmental sustainability of projects and increased owner energy costs; in addition, such limitations may hinder addressing environmental health hazards such as lead paint.*

To address the issues raised in this report, such guidance could promote the following clarifications for rehabilitation projects:

- Allowing greater flexibility in changing floor plans, circulation patterns, and ceiling heights, particularly in the upper floors of multi-story buildings; and rescinding existing guidance from

¹³⁹ Considerations about substitute materials also figured prominently in recent comments received, but the Park Service has recently issued guidance on substitute materials.

2004 on interior atria, lightwells, and courtyards, and allowing them on upper stories, especially where needed to facilitate housing conversions or satisfy lighting needs or energy codes.

- Allowing full reconfiguration of large assembly spaces with full-height walls and mezzanine floors, at a minimum where housing is anticipated.
- Identifying what being “differentiated from the old” requires, including through extensive cases studies showing a broad range of compatible additions.
- Allowing solar panels to be affixed to roofs of historic buildings and structures, including portions of roofs visible from the street, where their physical connection to the historic building or structure has minimal impacts on significant historic fabric or can be repaired once removed, and where their profile matches the pitch of the roof upon which it is installed.
- Allowing in most cases replacement energy efficient, low emissivity windows, and operable windows to be installed (or replacement windows addressing environmental hazards), as long as such windows share the general profile of the historic windows, are truly divided, and are not framed in vinyl or plastic; and allowing interior building insulation of any thickness, where such insulation may be removed without damaging historic fabric; all with consideration of building codes, energy codes, and climate risks (such as hurricanes).

New and updated guidance on these issues will dramatically increase the effectiveness of the historic tax-credit program by increasing the number of potential projects and providing certainty for people considering undertaking them. They will also position preservation to meet the climate challenge.

2. LAUNCH A REVIEW OF CURRENT GUIDANCE

Beyond issuing immediate guidance on the five key topics identified above, the Park Service and the Advisory Council could, together or separately, launch a full review of current guidance for its consistency with the values of economic growth, environmental sustainability, and equity. The guiding language for this review could include the general flexibility principles embedded in the Standards (“taking into consideration the economic and technical feasibility of each project”¹⁴⁰) and the Tax-Related Rehabilitation Standards (“in a reasonable manner, taking into consideration economic and technical feasibility”).¹⁴¹

The summary of comments in Part IV and the comments included in Appendix F present a strong fact base from which a review can build. At a minimum, the review should cover: paint color; storefront windows; mechanical equipment on rooftops; lead, asbestos, radon, and mold abatement and remediation; and ramps, door openings, and other accessibility features. In addition, the review should cover energy codes, with the support of the Department of Energy, which is currently overseeing a renewed federal commitment to and involvement in this issue.

In tandem with launching this global review, the Park Service could initiate three additional administrative measures to smooth access to and understanding of federal historic preservation standards:

¹⁴⁰ Id. § 68.3.

¹⁴¹ 36 C.F.R. § 67.7.

- Development of an online, searchable repository consolidating all past and future guidance documents and organized by subject matter (such as building type, material type, interior space, and time period).
- Development of a regular schedule for updates to Park Service guidance.¹⁴²
- Creation of a standing advisory body (or utilization of a body convened by the Advisory Council¹⁴³) to support the development of guidance that incorporates key issues raised by public and private parties most likely to be involved in the application and interpretation of the guidance.¹⁴⁴

Budgeting for immediate and ongoing expenditures in this vein will be an important collective priority.

3. EXPAND TRAINING

In both prior analyses and recent comments, commenters have urged more virtual and in-person trainings for federal agency representatives, state and local officials, and practitioners, on the application and interpretation of the Standards and the Tax-Related Rehabilitation Standards. The Park Service already offers many training programs for preservation practitioners, tax credit seekers, and others through its Technical Preservation Services division. Additional trainings could focus on new guidance issued or on case studies addressing sustainability, housing, religious and institutional uses, and compatibility with building codes and the Americans with Disabilities Act, among other specific topics.

For its part, the Advisory Council on Historic Preservation, which organizes trainings on Section 106 (including more than 4,000 participants in fiscal year 2023), could supplement these efforts for parties involved in the Section 106 review process. The Advisory Council continues to include a budget for training in its fiscal year 2025 budget request and will continue to do so in future years.

4. FACILITATE PRECEDENTIAL INTERPRETATIONS

The first three recommendations in this section addressed people’s ability to understand, both through substantive guidance and through trainings, the appropriate application and interpretation of federal historic preservation standards. This fourth recommendation relates to the ability of people to rely on

¹⁴² In its comment to the Advisory Council in 2023, NCSHPO recognized the lack of resources devoted to the issuance of guidance and stated: “With additional funding and more staff capacity, the NPS would be able to dedicate the resources necessary for us to simply recommend that Preservation Briefs and Bulletins are always current and feature the most up-to-date scholarship. Short of that eventuality, we would recommend the development of a regular publishing schedule so that there can be consistent and regular updates at appropriate intervals.”

¹⁴³ NCSHPO acknowledged that the Park Service may have difficulty convening such an advisory committee within its existing structures, so it may be worth noting that all but two of those recommended organizations are members of the Advisory Council on Historic Preservation, which might be able to provide a convening function on behalf of the Park Service.

¹⁴⁴ In its comment to the Advisory Council in 2023, NCSHPO recommended the “creation of an Advisory Committee comprised of representatives of NPS (including their internal competing preservation divisions), ACHP, the National Trust, NATHPO, NCSHPO, Federal Agencies, The American Institute of Architects, and the Association for Preservation Technology that can convene regularly to provide input into changing trends, materials and approaches relative to the treatment of historic properties.” Additional representative parties could include preservation practitioners and developers.

past interpretations of the Tax-Related Rehabilitation Standards, in order to inform the decisions of applicants for the federal rehabilitation tax credit, and to facilitate the Park Service's efficient review.

Current applicants lack access to prior decisions that could guide them about materials, techniques, and configurations that in the past have been successfully deemed compliant with the Tax-Related Rehabilitation Standards, and thus deserving of a tax credit. With access to decisions, an applicant could refer to a prior approval to try to argue that their proposed rehabilitation is similar to the project at issue in that decision, or distinguish their proposed rehabilitation from a previously disapproved project.¹⁴⁵

Of course, making these documents available and searchable presents a technical and budgetary challenge, given the volume of applications, the volume of supplemental submissions, the piecemeal nature of relevant email correspondence between the Park Service and applicants, and the number of years for which the tax credits have been offered. The recent move to electronic applications should facilitate digitization and access going forward, but the digitization of and access to past documents should also be a priority. In a world of limited resources and time, perhaps a budget that would enable the digitization of the most recent three to five years of applications and certifications would be an appropriate starting point.

To date, there has been reluctance to allow applicants to rely on prior decisions, perhaps on the grounds that each building is unique. On the other hand, many historic buildings were constructed using similar techniques and materials, were constructed in similar settings and locations, or were constructed with similar original uses. For example, industrial brick mill buildings, urban mid-century concrete office towers, stone-clad religious buildings, and early-twentieth-century schoolhouses often share similar materials, configurations, and conversion challenges. In some cases, identifying suitable treatments and products that satisfy the Tax-Related Rehabilitation Standards can be akin to finding a needle in haystack. The ability to budget for and rely upon previously approved treatments and products could save an applicant both time and money, and reduce the time needed for Park Service staff to conduct their reviews. If precedential weight were given to prior decisions, there may well be greater consistency across projects reviewed by different state historic preservation officers, at different times, and reviewed by different Park Service reviewers.

The reluctance to allow applicants to rely on prior decisions may also come from a feeling that decisions made in the distant past about prior projects do not reflect best contemporary preservation practices. Establishing a time period – say, five years – for which prior decisions could count as precedent would potentially assuage this concern.

It bears noting that while making public information about tax credit applicants would help applicants, the information could also help external researchers and the federal government study the tax credit program. Better data would enable more accurate analyses of the economic impact of the tax credit, the types of projects the tax credit facilitates, and the possibilities for improving the tax credit. If data also

¹⁴⁵ The ability to rely on precedent has parallels in our legal system, which, based on the English common law approach, allows contemporary litigants to point to prior judicial decisions to argue that the facts at issue in their cases are similar to (or differ from) the facts of prior cases, thus meriting the same (or different) outcome.

included applications and decisions related to the recently-eliminated 10% rehabilitation tax credit related to buildings built prior to 1936, new research could assess the effectiveness of that credit –which did not require compliance with the Tax-Related Rehabilitation Standards – on preservation activity and development.

5. EVALUATE THE STRUCTURE OF FEDERAL PRESERVATION GOVERNANCE

One possible explanation for the challenges outlined in this report is that there may be a structural issue that prevents federal historic preservation values from being fully considered in light of other economic, social, and cultural values. As the entity charged with evaluating the manner in which the federal government manages historic preservation policy and activities, the Advisory Council could conduct an inquiry into the current structure of federal preservation governance and make recommendations. The Advisory Council will discuss this option in the near future.

B. RECOMMENDATIONS FOR MEDIUM-TERM ACTION

In the medium term, the Department of the Interior may consider initiating rulemaking (or at least issuing an advance notice of a proposed rulemaking) to amend the Standards by restoring previously-allowed (now deleted) standards on protection and stabilization and adding new standards for relocation, intentional release, and deconstruction; and to improve the appeals process for decisions related to the Tax-Related Rehabilitation Standards. In addition, the Department may wish to consider a graduated approach to federal historic preservation standards that ties to different aspects of significance of properties on the National Register of Historic Places.

I. EXPAND AVAILABLE TREATMENTS

To expand the available treatments contained in the Standards, the Department of the Interior would have to change its own regulations. Doing so is a time-consuming and potentially fraught task, and one that cannot be entered into lightly. However, enough public commenters have opined on the need for additional treatments that the Department should consider expanding the Standards through rulemaking. Additional treatments were primarily requested to enable the owners of historic properties to address the growing threat of climate change, though new treatments may have other benefits. Five treatments worth considering are: protection, stabilization, relocation, intentional release, and deconstruction.

A protection treatment could restore a previously-allowed treatment and enable historic properties to be fortified through structural and chemical means not currently recommended by the Standards. It could also allow for landscapes around historic properties to be altered – even if doing so changes the integrity of the setting of the property – to protect more significant features. A firebreak created to thwart wildfire around a historic rural home, for example, may not be seen as consistent with the current Standards, but may be necessary to protect the home.

A stabilization treatment could restore a previously-allowed treatment and open up possibilities for more robust engineering and material alteration of structures suffering from erosion, increased precipitation, or other destabilizing forces. Currently under the Standards, whether new reinforcing materials may be added to stabilize a structure depends on a variety of interpretations and will not necessarily receive approval, even if changing environmental conditions require it. A stabilization treatment could establish the circumstances under which reinforcements may be left visible, new materials may be used, and visual impacts that may have previously been considered to be adverse may be disregarded. Another form of stabilization might be what some call mothballing: keeping a property stable and secure, even when it is not currently used, to enable it to be put to active use later. This concept is already referenced in a *Preservation Brief* called “Mothballing Historic Buildings.”¹⁴⁶

A relocation treatment could enable historic buildings and structures to be moved to new locations under certain circumstances. For example, relocation may be authorized where climate-change-related damage could imminently cause harm to a historic building or structure left in its current location. As another example, relocation of a historic building may be authorized where its relocation would facilitate housing creation (such as relocating the building to town-owned land and selling or renting it at affordable rates).

An intentional release treatment could recognize naturally-occurring transformation as an acceptable means of treating properties facing certain loss as a result of natural forces. The principle of “non-intervention” has been embraced by the National Trust in England and in other practical contexts, and may also be an acceptable practice among Tribal and Indigenous communities. In some ways, this concept is referenced in Department of the Interior regulations governing federal agency historic preservation programs under Section 110 of the National Historic Preservation Act. Those regulations state: “Where it is not feasible to maintain a historic property, or to rehabilitate it for contemporary use, the agency may elect to modify it in ways that are inconsistent with the Secretary’s ‘Standards for Rehabilitation,’ allow it to deteriorate, or demolish it.”¹⁴⁷

A deconstruction treatment could offer best practices for dismantling a building to ensure that its parts become usable in other buildings or applications. To be sure, this treatment should expressly be considered a last resort, and generally discouraged. However, where there is no choice beyond demolition, deconstruction has a very strong environmental justification in that it diverts construction waste from landfills and recaptures the embodied carbon contained in existing buildings. Significant academic work on the benefits of deconstruction and cities adopting deconstruction ordinances could be a starting point for a fuller articulation of this treatment.

With each of these five potential Standards, the Park Service could consider whether some of them may be used in tax-credit applications, or otherwise incorporated into the Tax-Related Rehabilitation Standards. For example:

¹⁴⁶ U.S. Department of the Interior, “Preservation Brief 31: Mothballing Historic Buildings,” with Sharon C. Park, 1993.

¹⁴⁷ The Secretary of the Interior’s Standards for Historic Preservation Projects, 63 Fed. Reg. 20,505 (April 24, 1998).

- If a protection Standard existed, the Tax-Related Rehabilitation Standards could allow for radical changes to landscaping that would protect the site from wildfire, flooding, and other climate risks relevant to topography.¹⁴⁸
- If a stabilization Standard existed, tax credits might be issued at a lesser amount for stabilization projects that enable continued active use to avoid demolition, even if the measures used for stabilization would not satisfy the Tax-Related Rehabilitation Standards.
- If relocation were adopted as a Standard, the Tax-Related Rehabilitation Standards could be clarified to apply to buildings that have been relocated pursuant to the Standards. Currently, relocated buildings are generally not eligible for the federal rehabilitation tax credit.¹⁴⁹
- If deconstruction became a Standard, reference to it in the Tax-Related Rehabilitation Standards may help guide applicants that include demolition as part of tax-credit projects.

Existing regulations may also merit review. For example, Standard 1 of the Standards for Rehabilitation, which requires that a property with a new use only “require[] minimal change to its distinctive materials, features, spaces and spatial relationships” may leave too much to interpretation, and possibly serve as the root of some of the issues discussed in this report. As another example, Standard 9 of the Tax-Related Rehabilitation Standards, which requires new additions be “differentiated from the old” may be a dated theory that ends up producing less than optimal outcomes, particularly for property owners seeking to rehabilitate smaller structures.

2. IMPROVE THE APPEALS PROCESS

Separate from expansion of the substantive Standards, the Department of the Interior could consider improvements to the appeals process for applicants who have been denied the federal rehabilitation tax credit. The appeals process is laid out in regulations that identify a single individual, the Chief Appeals Officer, to review written appeals and make a determination on their merits.¹⁵⁰ While on the surface these regulations are merely procedural, they have substantive bearing on the application and interpretation of the Tax-Related Rehabilitation Standards. That is because these appeals are typically lodged by a property owner who was denied tax credits for a project because the Park Service determined that the project did not satisfy the Tax-Related Rehabilitation Standards. Appeals are thus, by their nature, discussions about the interpretation of these standards. However, while the outcomes of recent appeals have been made public, appeals decisions do not have precedential value, meaning that later applicants cannot use them to understand how to apply the Tax-Related Rehabilitation Standards to their projects, negotiate with the Park Service or state historic preservation officer, or buttress their own appeals, if any.

Various suggestions have been made to address these issues and improve the process. These include the question of whether the decision-making structure, currently a single individual, is appropriate given the often large sums – sometimes millions of dollars – on the line. Some have suggested a panel

¹⁴⁸ Currently, the 1992 Tax-Related Guidelines say that “[r]adically changing the grade level of the site” is “not recommended.” The 1992 Tax-Related Guidelines, at 69.

¹⁴⁹ Currently, the 1992 Tax-Related Guidelines say that “[r]emoving or relocating buildings or landscape features” is “not recommended.” *Id.*

¹⁵⁰ 36 C.F.R. § 67.10.

comprised of individuals with experience working on historic rehabilitation projects. Another relevant question is whether these appeals decisions, essentially the highest level of administrative interpretation of the Tax-Related Rehabilitation Standards, might be granted precedential value, and the conditions under which appeals would have that value. The benefits for both applicants and the Park Service of assigning precedential value are described in Part V.A.3.

On a related note, the Department of the Interior might consider public reporting about, and periodic reviews of, the appeals process to ensure it works for applicants and facilitates the aims of the program. Such reviews may encompass analysis of whether similar projects and applications are consistently treated.

3. GRADUATE THE NATIONAL REGISTER OF HISTORIC PLACES

As discussed in Part IV.A.4., the criteria for the National Register of Historic Places determines how properties will be officially designated historic, and this designation has impacts on the application of the Standards and the Tax-Related Rehabilitation Standards. That is because designation, or determinations of eligibility for designation in the case of Section 106-related matters, often serves as the trigger for the application of these standards. If a property is listed or eligible for listing, proposed changes to it may be reviewed for compliance with these standards.

Generally, the Standards and the Tax-Related Rehabilitation Standards are applied in the same manner for all properties listed in the National Register.¹⁵¹ Over the years, some have questioned whether a uniform application of these standards may be overly stringent in certain circumstances. These people feel that a system by which the National Register is graduated based on the significance of the property would help property owners more appropriately apply the standards: the more significant the property, the stricter the application of the standards. In the case of a very highly recognizable community asset, like a city hall, the standards may be strictly applied. In the case of a townhome which is one of many in a historic district, the standards may be less strictly applied.

Not everyone agrees that this concept should be pursued. NCSHPO, for example, says that “[f]or everything on the National Register, however, no such gradation exists, and for good reason.” It shares the concern that some properties of a “lower” grade could be considered “expendable,” and that changing preferences may devalue properties on a cyclical basis.

Through an open dialogue about the possibility of a graduated National Register, which could be triggered through prefatory action, all opinions about this topic could be surfaced, and possibly resolved in a manner that advances a variety of goals.

¹⁵¹ The only exception to this general principle is National Historic Landmarks, which number 2,600 listings on the National Register, and which are given elevated protection across an array of statutes and programs. For comparison purposes, the whole National Register has 95,000 listings, but many of these are historic districts containing multiple historic properties.

VI. Conclusion

The American preservation system protects historic places by requiring decision-makers at all levels of government to evaluate certain changes before they can be made. The way government actors conduct these evaluations matters to the economy, the environment, and people and communities – and it matters to the places themselves.

The federal government strongly influences these evaluations, because it creates and interprets the standards that undergird virtually all American historic preservation activity. For two decades, preservationists have urged bold action to improve the application and interpretation of these standards. Unfortunately, too many people involved in preservation currently feel that the application and interpretation of federal historic preservation standards hinders economic growth, economic development, and equity.

The recommendations contained in this lengthy report require urgent attention, even if – and perhaps because – they repeat recommendations made many times before. For its part, the Advisory Council on Historic Preservation has committed to, and will continue to, issue guidance and offer trainings to improve consistency in applying the Standards to Section 106 reviews. The Park Service, too, has previously responded by issuing new guidance, and no doubt will seriously consider the calls here to do the same. Additional changes to the administration of the Standards and the Tax-Related Rehabilitation Standards will also help to address concerns raised. But regulatory reform in the medium term that expands available treatments, improves the appeals process, and graduates the National Register of Historic Places, may most effectively facilitate structural solutions to the interpretive challenges that people have raised. In the meantime, the Advisory Council can and should evaluate the way the federal government addresses historic preservation.

As this report closes, one phrase that comes to mind is this: maybe we've made the perfect the enemy of the good. A formalistic and inflexible approach to our historic places may elevate material integrity over preservation itself. Decisive federal action to change this approach will influence state and local regulators as well as private parties, and – if done right – prompt an uptick in economic activity that is both sustainable and equitable. Accepting the imperfect, and promoting the balanced approach to preservation conceived of in the National Historic Preservation Act, can help us retain the places – the schools, religious buildings, factories, and homes – that form the soul of our communities, and have the potential to provide us with housing, gathering spaces, climate solutions, and memories. Loosening our grip on their evolution can free our places to reach their potential.

Appendices

APPENDIX A

DEPARTMENT OF THE INTERIOR REGULATIONS ON THE SECRETARY'S STANDARDS FOR REHABILITATION (THE "TAX-RELATED REHABILITATION STANDARDS"), 36 C.F.R. § 67.7

(a) The following Standards for Rehabilitation are the criteria used to determine if a rehabilitation project qualifies as a certified rehabilitation. The intent of the Standards is to assist the long-term preservation of a property's significance through the preservation of historic materials and features. The Standards pertain to historic buildings of all materials, construction types, sizes, and occupancy and encompass the exterior and the interior of historic buildings. The Standards also encompass related landscape features and the building's site and environment, as well as attached, adjacent, or related new construction. To be certified, a rehabilitation project must be determined by the Secretary to be consistent with the historic character of the structure(s) and, where applicable, the district in which it is located.

(b) The following Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. (The application of these Standards to rehabilitation projects is to be the same as under the previous version so that a project previously acceptable would continue to be acceptable under these Standards.)

- (1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
- (2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
- (3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.
- (4) Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.
- (5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.
- (6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.
- (7) Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.
- (8) Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.
- (9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be

compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

- (10) New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

APPENDIX B

DEPARTMENT OF THE INTERIOR REGULATIONS ON THE SECRETARY'S STANDARDS FOR THE TREATMENT OF HISTORIC PROPERTIES (THE "STANDARDS"), 36 C.F.R. § 68.3

One set of standards – preservation, rehabilitation, restoration or reconstruction – will apply to a property undergoing treatment, depending upon the property's significance, existing physical condition, the extent of documentation available and interpretive goals, when applicable. The standards will be applied taking into consideration the economic and technical feasibility of each project.

(A) PRESERVATION.

- (1) A property will be used as it was historically, or be given a new use that maximizes the retention of distinctive materials, features, spaces and spatial relationships. Where a treatment and use have not been identified, a property will be protected and, if necessary, stabilized until additional work may be undertaken.
- (2) The historic character of a property will be retained and preserved. The replacement of intact or repairable historic materials or alteration of features, spaces and spatial relationships that characterize a property will be avoided.
- (3) Each property will be recognized as a physical record of its time, place and use. Work needed to stabilize, consolidate and conserve existing historic materials and features will be physically and visually compatible, identifiable upon close inspection and properly documented for future research.
- (4) Changes to a property that have acquired historic significance in their own right will be retained and preserved.
- (5) Distinctive materials, features, finishes and construction techniques or examples of craftsmanship that characterize a property will be preserved.
- (6) The existing condition of historic features will be evaluated to determine the appropriate level of intervention needed. Where the severity of deterioration requires repair or limited replacement of a distinctive feature, the new material will match the old in composition, design, color and texture.
- (7) Chemical or physical treatments, if appropriate, will be undertaken using the gentlest means possible. Treatments that cause damage to historic materials will not be used.
- (8) Archeological resources will be protected and preserved in place. If such resources must be disturbed, mitigation measures will be undertaken.

(B) REHABILITATION.

- (1) A property will be used as it was historically or be given a new use that requires minimal change to its distinctive materials, features, spaces and spatial relationships.
- (2) The historic character of a property will be retained and preserved. The removal of distinctive materials or alteration of features, spaces and spatial relationships that characterize a property will be avoided.

- (3) Each property will be recognized as a physical record of its time, place and use. Changes that create a false sense of historical development, such as adding conjectural features or elements from other historic properties, will not be undertaken.
- (4) Changes to a property that have acquired historic significance in their own right will be retained and preserved.
- (5) Distinctive materials, features, finishes and construction techniques or examples of craftsmanship that characterize a property will be preserved.
- (6) Deteriorated historic features will be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture and, where possible, materials. Replacement of missing features will be substantiated by documentary and physical evidence.
- (7) Chemical or physical treatments, if appropriate, will be undertaken using the gentlest means possible. Treatments that cause damage to historic materials will not be used.
- (8) Archeological resources will be protected and preserved in place. If such resources must be disturbed, mitigation measures will be undertaken.
- (9) New additions, exterior alterations or related new construction will not destroy historic materials, features and spatial relationships that characterize the property. The new work will be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment.
- (10) New additions and adjacent or related new construction will be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

(C) RESTORATION.

- (1) A property will be used as it was historically or be given a new use that interprets the property and its restoration period.
- (2) Materials and features from the restoration period will be retained and preserved. The removal of materials or alteration of features, spaces and spatial relationships that characterize the period will not be undertaken.
- (3) Each property will be recognized as a physical record of its time, place and use. Work needed to stabilize, consolidate and conserve materials and features from the restoration period will be physically and visually compatible, identifiable upon close inspection and properly documented for future research.
- (4) Materials, features, spaces and finishes that characterize other historical periods will be documented prior to their alteration or removal.
- (5) Distinctive materials, features, finishes and construction techniques or examples of craftsmanship that characterize the restoration period will be preserved.
- (6) Deteriorated features from the restoration period will be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture and, where possible, materials.
- (7) Replacement of missing features from the restoration period will be substantiated by documentary and physical evidence. A false sense of history will not be created by adding conjectural features, features from other properties, or by combining features that never existed together historically.

- (8) Chemical or physical treatments, if appropriate, will be undertaken using the gentlest means possible. Treatments that cause damage to historic materials will not be used.
- (9) Archeological resources affected by a project will be protected and preserved in place. If such resources must be disturbed, mitigation measures will be undertaken.
- (10) Designs that were never executed historically will not be constructed.

(D) RECONSTRUCTION.

- (1) Reconstruction will be used to depict vanished or non-surviving portions of a property when documentary and physical evidence is available to permit accurate reconstruction with minimal conjecture and such reconstruction is essential to the public understanding of the property.
- (2) Reconstruction of a landscape, building, structure or object in its historic location will be preceded by a thorough archeological investigation to identify and evaluate those features and artifacts that are essential to an accurate reconstruction. If such resources must be disturbed, mitigation measures will be undertaken.
- (3) Reconstruction will include measures to preserve any remaining historic materials, features, and spatial relationships.
- (4) Reconstruction will be based on the accurate duplication of historic features and elements substantiated by documentary or physical evidence rather than on conjectural designs or the availability of different features from other historic properties. A reconstructed property will re-create the appearance of the non-surviving historic property in materials, design, color and texture.
- (5) A reconstruction will be clearly identified as a contemporary re-creation.
- (6) Designs that were never executed historically will not be constructed.

APPENDIX C

NATIONAL PARK SERVICE TAX-INCENTIVE GUIDANCE

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- Evaluating Substitute Materials in Historic Buildings, 2023

APPENDIX D

PRIOR ANALYSES OF FEDERAL HISTORIC PRESERVATION STANDARDS

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- National Council of State Historic Preservation Officers, “Tax Act Review Reform Policy Paper,” June 2003.
- Historic Preservation Development Council, “Recommendations for Improving Administration of the Certified Historic Rehabilitation Tax Program,” December 2003.
- National Park Service Advisory Board, “Federal Historic Rehabilitation Tax Credit Program: Recommendations for Making a Good Program Better,” September 2006.
- National Park Service Advisory Board, “Making a Good Program Better: Final Guidance and Implementation of National Park System Advisory Board Recommendations for the Federal Historic Rehabilitation Tax Credit Program,” 2007.
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- National Park Service, “Results of Program Review – Recommendations and Action Plan,” March 2013.
- National Park Service, “Final Report on the Implementation of Program Review Recommendations and Action Plan,” December 2016.
- National Park Service, “A Call to Action: Preparing for a Second Century of Stewardship and Engagement,” August 2015.

APPENDIX E

ADVISORY COUNCIL ON HISTORIC PRESERVATION CALL FOR COMMENTS

The Advisory Council on Historic Preservation used the following language in July 2023 in its call for comments on the application and interpretation of federal historic preservation standards:

(1) Are you aware of any substantive or procedural issues (e.g. uncertainties, discrepancies, or conflicts) related to the application and interpretation of the Secretary’s Standards and associated guidelines in the following contexts? Are you aware of cost, equity, housing-supply, energy efficiency, renewable energy, or climate-change-related (e.g. adaptation or mitigation) concerns related to the application and interpretation of the Secretary’s Standards and associated guidelines in the following contexts?

- Review of “undertakings” (such as renovations of federal buildings) covered by Section 106 of the National Historic Preservation Act
- Review of activities involving or affecting tribal resources or traditional cultural properties
- Review of private development projects seeking federal or state historic preservation tax credits
- Review of private development projects by local historic preservation boards or commissions
- Identification by any reviewing authority of substitute materials (i.e., specific materials that may be substituted for historic materials) deemed to be consistent with the Secretary’s Standards

If you are aware of such issues at a particular site, please identify the city and state, the type of historic property, the specific Standard (of preservation, rehabilitation, restoration, or reconstruction) applied to the property, the entity applying such Standard, and the issue or issues presented. Please try to keep site-specific descriptions to half of a page; large sets of documents or lengthy case studies will not be reviewed.

(2) How might guidance, training, or other actions relating to application and interpretation of the Secretary’s Standards improve the federal response to equity, housing-supply, energy efficiency, renewable energy, or climate-change related (e.g. adaptation or mitigation) concerns?

APPENDIX F

COMMENTS RECEIVED BY THE ADVISORY COUNCIL ON HISTORIC PRESERVATION IN 2023

The following comments were received by the Advisory Council on Historic Preservation in response to its July 2023 call for comments.



An independent federal agency, the Advisory Council on Historic Preservation promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources and advises the President and Congress on national historic preservation policy. It also provides a forum for influencing federal activities, programs, and policies that affect historic properties.

The Advisory Council promotes historic preservation to foster the understanding of the nation's heritage and the contribution that historic preservation can make to contemporary communities and their economic and social well-being.

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