

**MEMORANDUM**

Subject: Section 106 Policy Guidance  
Interpretation of Setting

From: Director, Office of Environmental Policy  
Washington, D.C. 20590

To: Mr. Edwin M. Wood  
Regional Federal Highway Administrator (HRA-09)  
San Francisco, California

Date: December 5, 1989

Reply to  
Attn. of: HEV-20

This memorandum supplements our August 30 response to your request dated August 10 on this subject. We held a meeting with the Advisory Council for Historic Preservation (ACHP) staff on Friday, September 8, to initiate a discussion as requested by the California Division office regarding the effect determination when issues of setting arise. Their written response to that meeting, dated October 26, is attached.

Your August 10 memorandum requested policy guidance on the applicability of Section 4(f) to historic sites because of proximity impacts. Our memorandum dated August 30 addressed this issue. In addition, your memorandum also requested policy guidance on the consideration of setting on eligibility determinations, the introduction of visual elements that are out of character with a property; and the determination of boundaries.

The ACHP states that if setting is linked to the character which contributes to the property's eligibility for the National Register of Historic Places (National Register), then alteration of the setting may cause an effect. The ACHP also states that if setting is a non-contributing factor, an alteration of the setting might reach such proportions that it directly intrudes upon the historic property itself or impairs its integrity and may constitute an effect. (underlining for emphasis) The ACHP does not offer specific thresholds for when an alteration might become an intrusion nor how to evaluate diminishment of integrity. The ACHP recommends that such determinations be made on a case-by-case basis with the Keeper of the National Register. The National Register is the final arbitrator on determining the physical boundary of historic resources.

We believe that most determinations of eligibility or nominations prepared over a year ago may not adequately address the issue of setting. As a first consideration, we suggest that the property should be informally reevaluated by the State highway agency and

Division Office to determine if setting ought to be a legitimate contributing factor in a property's qualification to the National Register. If it should, then the boundary needs to be justified and coordinated with the State Historic Preservation Officer (SHPO) prior to involving the National Register. If not, intrusions such as visual, audible, or atmospheric should be considered as effects only when they directly impair the integrity of the historic property.

We request that you keep this office (HEV-20) informed of any interpretations of setting by the SHPO that differ from that provided by the ACHP.

/ Original Signed By /

Ali F. Sevin

Attachment

Advisory  
Council On  
Historic  
Preservation

The Old Post Office Building  
1100 Pennsylvania Avenue, NW, #809  
Washington, DC 20004

October 26, 1989

Mr. Bruce Eberle  
Archeologist  
Federal Highway Administration  
Environmental Analysis Division, HEV-20  
Washington, DC 20590

Dear Bruce:

As a follow up to our meeting of September 8, I have had an opportunity to discuss the issue more fully with our office directors and Rob Jackson of the California SHPO office. As you know, the question involves the relation of alterations to the setting of a historic property and effects on properties where the setting has not been identified as contributing to the significance of the property.

Let me attempt to state the application of the Council's regulations as I see it. Section 800.9 establishes the criteria of effect and adverse effect. Section 800.9(a) states:

An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of the property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered. (Emphasis added)

Thus the regulations clearly state that the relevancy of alteration of features of a historic property's setting is dependent upon the significant characteristics of the historic property itself. That is, if the setting contributes to the significance of the historic property, then alteration of the features may cause an effect on the historic property.

For example, a county courthouse is determined eligible for the National Register and the boundaries are drawn along the property lines. At the same time, the determination of eligibility acknowledges that the setting of the property, outside its property lines, contributes to the significance of the property because it provides the traditional urban setting for the building and retains a high degree of integrity from the era of the courthouse's

construction. Under these circumstances, alteration of the setting could have an effect on the recognized historic property.

The Council's criteria of adverse effect further define that kind of impact to have an adverse effect on the historic property itself. Section 800.9(b) states:

Adverse effects on historic properties include, but are not limited to:

(2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's Qualification for the National Register. (Emphasis added)

Therefore, it is clear under this criterion that alteration of the setting of a historic property produces an adverse effect when the setting has been recognized through the significance evaluation process as contributing to the qualification of the property for the National Register.

While this seems perfectly straightforward, the following criterion of-adverse effect appears to be broader and possibly inconsistent with criterion (2). Criterion (3) defines adverse effects to include "introduction of visual, audible, or atmospheric effects that are out of-character with the property or alter its setting." Unlike (2), there is no qualifying language that the setting contribute to the property's significance.

Does this mean that alteration of any setting of a historic property constitutes an adverse effect? I do not believe so, because this criterion must be interpreted in manner consistent with the more specific one preceding it and must also be read in the context of the initial criteria of effect.

The careful attention given to the relation of setting to significance in the criteria of effect and criterion (2) of the adverse effect criteria becomes meaningless if criterion (3) is read to include any alteration of any setting of a historic property, whether or not that setting contributes to the significance of the property. One must conclude that criterion (3) implicitly continues the notion of alterations to setting being adverse effects on a historic property only when the setting contributes to the significance of the property.

Criterion (3) does introduce the one exception to this general rule. This would be when an alteration to a non-contributing setting reaches the level of causing an adverse effect on the historic property by introducing visual, audible or atmospheric elements that are out of character with the recognized historic property. In other words, an alteration to a non-contributing setting could reach such proportions that it directly intruded Upon the historic property itself and diminished its integrity. The concern then would be not for the impact on the setting, but the

extent of impact on the recognized historic property.

Assume that the courthouse mentioned earlier has been determined eligible solely for its architectural significance. No mention is made of the setting being a contributing element, due to its loss of integrity through redevelopment and change through the years since the courthouse was built. In that case, an alteration to the setting would only affect the courthouse when it directly intruded on the property itself visually, audibly or atmospherically. An example might be the introduction of a shadow effect from nearby high-rise construction or noise and vibration from an expressway.

I think the theoretical analysis is quite straightforward. In reality, though, two problems arise. First, the National Register listing or eligibility determination is rarely specific; and most often silent, on the relation of the setting to the significance of the historic property. In my example, it would be doubtful that the courthouses setting was considered, had it been nominated to the Register or determined eligible well before the undertaking was proposed. This means that the matter must be resolved through further consultation with the SHPO when the agency is evaluating the significance of historic properties in order to consider effects of the undertaking. A disagreement between the agency and the SHPO would then be resolved by the Keeper of the National Register, in accordance with the Council's regulations.

A second practical problem is that the distinction between visual, audible and atmospheric intrusions that affect a historic property and more limited alterations of the non-contributing setting may be difficult to draw. At what point does a nearby high-rise building cease being simply an alteration of setting and become a visual intrusion on the courthouse? How does that intrusion diminish the integrity of the characteristics that qualified the courthouse for the National Register? This must be determined on a case by case basis. The analysis of those impacts must respect the principles set forth previously.

Applying this analysis to the proposed realignment of State Route 238 in Hayward, California, the question seems to revolve quite simply around whether the setting contributes to the significance of certain buildings near the project. The determination of this issue should be undertaken through the procedures of the Council's regulations that govern the identification and evaluation of historic significance by application of the National Register criteria. Those procedures make it clear that when there is a disagreement between the SHPO and the Federal agency regarding elements of significance, the matter is resolved by the Keeper of the National Register. It would seem to me that would be the appropriate course of action.

Should the Keeper find that the setting contributes to the significance of the historic properties, then, by the foregoing analysis, alteration of that setting is an effect, possibly adverse. If not, then alteration has no effect, unless the level

of visuals audible or atmospheric intrusion affects the integrity of the historic properties. The former question of fact regarding the significance of the properties and their setting is properly resolved by the National Park Service. If that is resolved in the negative and concerns remain about the extent of intrusion, then that is a question of interpretation of the effect criteria properly posed to the Council.

Sincerely yours,

/Original Signed by/

John M. Fowler  
Deputy Executive Director and General Counsel