

THE NATIONAL REGISTER OF HISTORIC PLACES AND DUE PROCESS

This is a companion piece to "Recommendations for Improving the Consideration of Property Owners Rights in the National Register of Historic Places Nomination Process".

CONSTITUTIONAL FOUNDATION

"No person shall be. . .deprived of life, liberty, or property without due process of law."

U.S. Constitution Amendment V

"(N)or shall any state deprive any person of life, liberty, or property, without due process of law."

U.S. Constitution Amendment XIV

These due process clauses necessitate that government, at all levels, must act fairly when making decisions that affect an individual's rights. When trying to discern if due process has been circumvented, there are two questions to ask:

1. What is **due process**?
2. What is the **deprivation of property**?

Due process can be summed up as having three components:

1. Notice of the action;
2. The opportunity for a person to express their opinion about the action; and
3. Fair and informed decision-making about the action.

In the context of historic preservation, **deprivation of property** is considered to be a regulation that affects the use and enjoyment of property – a constitutionally-protected property interest.

Therefore, due process is required if there is any government action that may affect this.

PRACTICAL FOUNDATION

Historic preservation in the United States depends on the involvement of private property owners - they care for the historic places they own. For State Historic Preservation Offices (SHPOs) to succeed in preserving their States' historic resources, they must build popular support for preservation which includes establishing positive relationships with private property owners. The National Register of Historic Places is the gateway to the national historic preservation program. Therefore, it is beneficial for the SHPOs to build widespread understanding of the National Register. Historic preservation language - especially when being heard for the first time - can be confusing. Consequently, it is to the SHPOs', and historic preservation's, advantage to do the best job possible explaining the National Register to private property owners.

THE NATIONAL REGISTER OF HISTORIC PLACES AND DUE PROCESS

Does listing in the National Register of Historic Places, or a determination of eligibility, implicate due process?

Listing in the National Register is recognized as a planning tool without any direct impact on property rights. If due process is to be invoked, a constitutionally-protected property interest must be at stake. Because listing in the National Register does not affect property rights, it is not considered a due process matter. This may not be obvious, however, to property owners hearing about the National Register for the first time. Therefore, legally, a property may be listed, or determined eligible for listing, in the National Register because that decision has no effect on what an individual may do with his or her property – the listing, or determination, is merely honorific. This issue was decided in Moody Hill Farms Ltd. Partnership v. U.S. Department of the Interior (1999), which determined that:

Listing in the National Register Historic District does not give rise to a ‘constitutionally protected property interest’ since it does not impose any burdens on a property owner’s use of his or her property. While National Register listing may trigger requirements under a state or local law, the burdens are imposed by state law and thus do not give rise to a due process claim against the National Park Service.¹

Listing in the National Register, or a determination of eligibility, does not implicate due process.

However, regardless of whether due process is a constitutional matter, there is a more practical reason for following due process – fairness and acceptance. If a property owner does not believe that due process has been followed, they will not consider listing, or a determination of eligibility, to be fair and it will not be accepted. In addition, although due process is not a constitutional matter in regards to the National Register, there are requirements imposed by statute, specifically the National Historic Preservation Act (NHPA), that mandate due process. Section 101, paragraph 6 of the NHPA states:

The Secretary shall promulgate regulations requiring that before any property or district may be included on the National Register or designated as a National Historic Landmark, the owner or owners of such property, or a majority of the owners of the properties within the district in the case of an historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property or district for such inclusion or designation. If the owner or owners of any privately owned property, or a majority of the owners of such properties within the district in the case of an historic district, object to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn. The Secretary shall review the nomination of the property or district where any such objection has been made and shall determine whether or not the property or district is eligible for such inclusion or designation, and if the Secretary determines that such property or district is eligible for such inclusion or designation, he shall inform the Advisory Council on Historic Preservation, the appropriate State Historic Preservation Officer, the appropriate chief elected local official and the owner or owners of such property, of his determination. The regulations under this paragraph shall include provisions to carry out the purposes of this paragraph in the case of multiple ownership of a single property.²

The “regulations” regarding owner participation in the National Register nomination process are set forth in 36 CFR § 60. These regulations can be found online at: <http://archnet.asu.edu/archnet/topical/crm/usdocs/36cfr60.html>.

REGULATION BY REFERENCE

Although listing in the National Register, or a determination of eligibility, does not implicate constitutional due process, regulation by state or local governments may be triggered by a reference to the National Register – this is known as “regulation by reference”. For example, in BSW v. City of Dayton (1991), the Dayton historic preservation ordinance included a property that had been referenced by the National Register. The Court determined that the property owner had been denied due process because they were not notified of the property’s eligibility for listing in the National Register, and, therefore did not have notice or a hearing before the local historic preservation commission regarding the historic character of the property. The historic preservation ordinance was determined to be unconstitutional because it, “regulates property listed or determined eligible for listing in the National Register of Historic Places, but does not require that the city notify a property owner that his or her property has been determined eligible.”³ It should be noted, however, that instances such as these are not common.

CONCLUSIONS AND RECOMMENDATIONS

As was established previously, listing in the National Register, or a determination of eligibility, does not implicate constitutional due process. However, in the interest of upholding National Register listing, or a determination of eligibility, as fair thus enabling public acceptance, the following recommendations are offered.

Recommendation 1: SHPOs **must, at minimum,** follow the regulations set forth in 36 CFR § 60 that require that property owner(s) be notified of impending National Register nomination.

Recommendation 2: In their August 13, 2003 recommendations to Congress, the Advisory Council on Historic Preservation offered the following solution to the concerns raised by Representative George Radanovich. “NCSHPO should make its members aware of the potential notice and due process problems for property owners when National Register nomination, listing, or eligibility processes are linked to state or local preservation law and encourage them to work with state and local governments to ensure that any linkages are accompanied by adequate provision of due process in the state or local preservation law.” Although “regulation by reference” is not common, SHPOs **should** work with their local units of government that currently have local historic districts, as well as those who propose the creation of future historic districts, to ensure that due process is built in – prior to the creation of a local historic district, each affected property owner should be provided with notice and hearing, or a similar opportunity to express their opinion – and that listing in the National Register, or a determination of eligibility, does not automatically result in local historic designation.

In addition, SHPOs **should** review any State or local government regulations, especially those of Certified Local Governments, (CLGs) to insure that the regulations are in conformity with federal law, specifically 36 CFR § 60, and due process procedures.

Recommendation 3: SHPOs **should** ensure that the regulations set forth in 36 CFR § 60 are well-articulated and explained to the public in plain English and in a patient manner. Following the recommendations established in “Recommendations for Improving the Consideration of Property Owners Rights in the National Register of Historic Places Nomination Process” (the companion piece to this) should facilitate this.

¹ (Bradford J. White and Paul W. Edmondson, *Procedural Due Process in Plain English: A Guide for Preservation Commissions* (Washington, D.C.: National Trust for Historic Preservation, 2004), 20.

² Available from the World Wide Web: (<http://www2.cr.nps.gov/laws/NHPA1966.htm>)

³ White and Edmondson, 22.