

M E M O R A N D U M

TO: Mayor and Council, Borough of Emerson

FROM: DeCotiis, FitzPatrick, Cole & Giblin, LLP

DATE: May 3, 2018

SUBJECT: Process and Procedures for Listing in the National and New Jersey Registers of Historic Places

I. BACKGROUND

Respectively, the National and New Jersey Registers of Historic Places are lists of the nation's and state's historic entities deemed worthy of future preservation. The current form of the National Register of Historic Places was created pursuant to the "National Historic Preservation Act." 16 USCS § 470 et seq. Originally created in 1966 and amended in 1980, the aforementioned Act served as the model for the creation of the New Jersey Register of Historic Places, which became effective in 1970. In nearly every respect the two Registers mirror one another. Important to note, while nearly anyone can initiate the process of nomination, only the State Historic Preservation Officer [the Commissioner of the DEP in New Jersey] can formally nominate an entity to the National Register and thus list the same on the New Jersey Register.

II. CRITERIA & PROCESS

As initially noted *supra*, the criteria and process of nominating a property or entity for the National Register is integrated with nominating the property or entity for the New Jersey Register. As explained in N.J.A.C. 7:4-2.1(a):

The New Jersey and National Registers both use the same nomination criteria, nomination forms, State administrative agency (Historic Preservation Office), and State Review Board. Both require that the Commissioner sign the nomination; in the case of the National Register, as the State Historic Preservation Officer. This integrated process is designed to avoid duplication of steps since the two programs parallel and complement each other. The dual process ends after the

Commissioner signs a historic property's nomination form, which action lists the historic property in the New Jersey Register. The property is then registered and protected by the Act ["New Jersey Register of Historic Places Act," N.J.S.A. 13:1B-15.128 et seq.] Once signed by the State Historic Preservation Officer, the historic property's nomination form is then forwarded to the National Park Service in care of the Keeper of the National Register for consideration for inclusion in the National Register.

Thus, the processes by which the application goes up the ladder must essentially be read together. The following will provide an overview of the process under the National and New Jersey Register, as well as the criteria for evaluating nominations. The discussion will begin with the National Register as the criteria will mirror that of the state's, and the process discussion will serve as more of an overview, while the New Jersey Register of Historic Places Act Rules provides a more detailed review of the entire process.

A. NATIONAL REGISTER

Criteria

The criteria for evaluation of properties nominated for a National Register listing are governed by 36 CFR 60.4, which reads, in pertinent part:

National Register criteria for evaluation. The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

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

As can be seen by the initial remarks of the excerpted regulation, the properties or entities sought for inclusion in the National Register must either be districts, sites, buildings, structures, and

objects; all, except “structure,” defined by the regulation. Most relevant, “A building is a structure created to shelter any form of human activity, such as a house, barn, church, hotel or similar structure.” 36 CFR 60.3(a) (emphasis added). “An object is a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.” 36 CFR 60.3(j) (emphasis added). “A site is the location of a significant event, a prehistoric occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archaeological value regardless of the value of any existing structure.” 36 CFR 60.3(l) (emphasis added). “A district is a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.” 36 CFR 60.3(d) (emphasis added).

Process

As authorized by the National Historic Preservation Act, the Secretary of the Interior has set forth regulations for governing the review process of nominations for listing properties on the National Register in 36 CFR 60.1 et seq. Specifically, the regulation allows for the adding of properties to the National Register by way of, *inter alia*, “[n]ominations prepared under approved State Historic Preservation Programs, submitted by the State Historic Preservation Officer [hereinafter SHPO] and approved by the NPS [National Park Service].” 36 CFR 60.1(b)(3).

As to the National Register, the SHPO is to be responsible for the collection (according to state made regulations, *infra*), preparation, and nomination of eligible properties to the National Register. See, 36 CFR 60.6(a). In doing so, the State will consult with local authorities throughout the nomination process, providing notice of intent to nominate a property and will solicit written comments on the significance of the property and whether or not it meets the National Register criteria for evaluation. See, 36 CFR 60.6(b). Additionally, as per 36 CFR 60.6(c-f), the State will comply with notice requirements in regard to owner of private property, giving those owners an opportunity to concur or object to listing the property. See, Id. In the event that an owner wishes to object to their private property being listed on the Register, the owner is to submit a notarized statement certifying that the party is the sole or partial owner of

the private property and objects to the listing. See, 36 CFR 60.6(g). In the event that an objection has been received by a partial owner, it then becomes the responsibility of the SHPO to determine whether a majority of owners object. See, Id.

Upon the state's receipt of a nomination, the SHPO will have 60 days to respond in writing to any person or organization that has submitted a completed nomination form providing a technical opinion concerning whether or not the property appears to meet the National Register criteria. See, 36 CFR 60.11(a). During these 60 days, the nomination materials submitted to the state will be submitted to the State Review Board ("a body whose members represent the professional fields of American history, architectural history, historic architecture, prehistoric and historic archaeology, and other professional disciplines and may include citizen members" 36 CFR 60.3(o)) for a determination of whether or not the property meets the National Register criteria. 36 CFR 60.6(j). Upon a determination, the Board will then make a recommendation to the SHPO to approve or disapprove the nomination. See, Id. The SHPO will then undertake his or her own review of the nomination and the Board's opinion and will, if found that the nominations are in conformance with the National Register evaluation criteria, submit to the Keeper of the National Register of Historic Places the completed nomination. See, 36 CFR 60.6(k) (A separate procedure exists if there is a difference of opinion between the Board and the SHPO, 36 CFR 60.6(l)). The submission of the nomination to the National Park Service is to take place within 90 days of the Review Board's recommendation. See, 36 CFR 60.11(e). If either the owner or a majority of partial owners of the property have previously objected to the listing, the SHPO will submit the nomination only for a determination of eligibility for listing, not a formal listing. See, 36 CFR 60.6(n).¹ "Nominations will be included in the National Register within 45 days of receipt by the Keeper or designee unless the Keeper disapproves a nomination, an appeal is filed, or the owner of private property (or the majority of such owners for a district or single property with multiple owners) objects by notarized statements received by the Keeper prior to listing." 36 CFR 60.6(r). During this process, any person or organization may petition the Keeper to accept or reject the nomination. See, 36 CFR 60.6(s). Additionally, any person or local government may appeal to the Keeper the failure or refusal of a nominating authority to nominate a property the person or local government considers meeting the criteria for evaluation. See, 36 CFR 60.12.

¹ See N.J.A.C. 7:4-2.2(c)17 *infra*.

B. NEW JERSEY REGISTER

Criteria

The criteria to be used are exactly the same as those detailed above and used in considering whether a property is eligible for the National Register. See N.J.A.C. 7:4-2.3. The Emerson Borough Hall may be eligible for listing in the New Jersey and National Registers of Historic Places under Criterion A and Criterion C.

Process

While the above process essentially provides an overview of the manner which a property gains National Register status, New Jersey, N.J.A.C. 7:4-2.2 provides an exhaustive review of the entire process. Notably, an application for nomination to the New Jersey Register does not need to be made by a property owner; rather, the application may be initiated by “private individuals, any organization, or government agency” under the supervision of the Department of Environmental Protection, Division of Parks and Forestry, Historic Preservation Office (hereinafter Department). N.J.A.C. 7:4-2.2(a) and (b).

The following is an entire excerpt of N.J.A.C. 7:4-2.2(c) in order to provide all possible information about the process; the bolded provisions are those that are most relevant in the current situation regarding the Emerson Borough Hall:

- 1. The applicant obtains a preliminary questionnaire and an individual building or district survey form from the Department**
- 2. The applicant submits the following to the Department for a preliminary determination by the Department whether the property is potentially eligible for listing in the New Jersey and National Registers under the criteria for evaluation set forth in N.J.A.C. 7:4-2.3:**
 - i. The completed preliminary questionnaire and the individual or district survey form obtained under (c)1 above; and
 - ii. Clear photographs that show the property in complete exterior and interior views. In the case of a district, the photographs shall show representative views of the district;
 - iii. A location map;
- 3. Within 45 days of receiving a complete submittal for preliminary determination under (c)2 above, the Department shall:**
 - i. Make a preliminary determination of the property's potential eligibility for the New Jersey and National Registers; and**
 - ii. Notify the applicant in writing whether or not the Department**

determines that the property is potentially eligible for the New Jersey and National Registers.

(1) If the Department determines that the property potentially is eligible for the New Jersey and National Registers, the Department shall send a National Register Nomination Form to the applicant.

(2) If the Department determines that the property does not appear to be potentially eligible for the New Jersey and National Registers, the Department shall give the applicant a written explanation of the Department's preliminary determination that the property does not appear to meet the criteria for evaluation in N.J.A.C. 7:4-2.3. If the applicant resubmits a request for preliminary determination, it shall be treated as a new preliminary submittal.

4. The applicant shall, as part of an adequately documented and technically and professionally correct and sufficient National Register Nomination Form, submit to the Department

i. A complete list of all owners of the nominated property as of the date of the National Register Nomination Form's submission. The list of property owners shall be the list of private and public property owners (including right-of-way owners) named in official municipal tax records and maps and shall be notarized by the appropriate municipal official. If the property is not scheduled for consideration by the State Review Board under this subchapter within 90 days after the Department receives an adequately documented and technically and professionally correct and sufficient National Register Nomination Form, the Department may require that the applicant submit an updated list of property owners (notarized by the appropriate municipal official) which the applicant shall provide to the Department within 30 days of the issuance of the Department's written request.

ii. A map that meets the standards specified in N.J.A.C. 7:4-8.9(a)1.

5. Within 60 days of receiving a completed National Register Nomination Form, the Department shall notify the applicant in writing as to:

i. Whether or not the National Register Nomination Form is adequately documented and technically and professionally correct and sufficient;

ii. Whether or not the property appears to meet the criteria for evaluation in N.J.A.C. 7:4-2.3; and

iii. If the Department determines that the National Register Nomination Form is adequately documented and technically and

professionally correct and sufficient and that the property appears to meet the criteria for evaluation in N.J.A.C. 7:4-2.3, the Department shall schedule the nomination for consideration at the earliest possible State Review Board meeting, consistent with the Department's established priorities for processing nominations. These priorities shall be consistent with implementation of the State Historic Preservation Plan and shall be established by the Department in consultation with the State Review Board. The Department shall notify the applicant in writing of the property's position in accordance with the Department's priorities for processing nominations under the State Historic Preservation Plan and of the date the applicant can expect the nomination of the property to be considered by the State Review Board under this subchapter; or

iv. If the Department determines that the National Register Nomination Form is not adequately documented and technically and professionally correct and sufficient or that the property does not appear to meet the criteria for evaluation in N.J.A.C. 7:4-2.3, the Department shall provide the applicant with a written explanation of the reasons for that determination.

6. If the Department determines that the National Register Nomination Form is adequately documented and technically and professionally correct and sufficient, but that the property does not appear to meet the criteria for evaluation in N.J.A.C. 7:4-2.3, the Department need not process the nomination further unless the Department receives a written request to do so from the Keeper of the National Register under 36 CFR Part 60, Section 60.12 referenced in N.J.A.C. 7:4-2.2(c)21 below, in which case the Department shall proceed with processing the nomination for the National Register but shall not be required to process the nomination for the New Jersey Register.

7. When a National Register Nomination Form for a property within the jurisdiction of a Certified Local Government [certified by the DEP & the NPS to participate in State and Federal historic preservation programs, N.J.A.C. 7:4-1.3] is received by the Department, the Department shall:

i. Forward a copy of the nomination to the Certified Local Government's historic preservation commission for the commission's review and comment;

ii. Within 30 days of its receipt of the nomination, forward to the Certified Local Government's historic preservation commission a written determination on whether or not the nomination is adequately documented and technically and professionally correct and sufficient and whether the

nominated property appears to meet the criteria for evaluation under N.J.A.C. 7:4-2.3;

iii. Allow the Certified Local Government 60 days from the date of issuance of the notice of adequate documentation and eligibility for the Chief Elected Local Official of the Certified Local Government to transmit to the Department a report by the historic preservation commission as to whether or not in its opinion the nominated property meets the criteria for evaluation in N.J.A.C. 7:4-2.3 and the recommendation of the chief elected local official;

iv. If the report by the Certified Local Government's historic preservation commission and the recommendations of its chief elected local official are not received by the Department within 60 days as provided in (c)8ii above, the Department shall proceed with processing the nomination pursuant to this chapter; and

v. If both the Certified Local Government's historic preservation commission and its chief elected local official recommend under (c)8ii above that a property not be listed in the National Register, the Department shall not proceed with processing the nomination for the National Register pursuant to this chapter unless, within 30 days of the receipt of the recommendation by the Department, the State Historic Preservation Officer receives a written request from any citizen or organization to proceed with the nomination. The report by the Certified Local Government's historic preservation commission and the recommendations of its chief elected local official shall be included by the Department with any nomination processed by the Department under this chapter and submitted by the State Historic Preservation Officer to the Keeper of the National Register.

8. As part of the nomination process, the Department shall notify the applicant and the owner(s) of the nominated property or the owner(s) of property within a nominated historic district in writing of the Department's intent to bring the nomination before the State Review Board on a specific date, time and place. The Department shall be responsible for notifying only those property owners named in the National Register Nomination Form in accordance with (c)4 above. Where more than one owner is named, each separate owner shall be notified.

i. The Department shall send the written notification via certified mail at least 60 but not more than 75 days before the State Review Board meeting during which the nomination is scheduled to be considered. The property owner(s) shall be notified via certified mail. **In addition to informing the applicant and owner(s) that the property is being considered for**

nomination to the New Jersey Register, the notice shall solicit written comments on the significance of the property and whether or not it meets the criteria for evaluation set forth in N.J.A.C. 7:4-2.3, inform the owners what registration of the property will mean to the owner, and explain the benefits and responsibilities of property registration. The property owner(s) shall have at least 60 days but not more than 75 days from the date of issuance of written notification to submit written comments to the Department and to concur in or object to the nomination of such property.

ii. For a nomination with more than 50 property owners, the Department may publish a public notice to property owners concerning the Department's intent to nominate instead of individually notifying all property owners. Such public notice shall be published at least 60 days but not more than 75 days before the State Review Board meeting during which the nomination is scheduled to be considered. Such public notice must be published in one or more local newspapers of general circulation in the area of the nomination.

9. At least 60 but not more than 75 days before the State Review Board meeting during which the nomination is scheduled to be considered, the Department shall send, via certified mail, to the applicable chief elected local official of the county and municipality in which the property is located² written notice of the Department's intent to bring the nomination before the State Review Board on a specific date, time and place. Notifications of a proposed district shall include a map showing the district boundaries. In addition to informing the chief elected local official that the property is being considered for nomination to the New Jersey Register, the notice shall solicit written comments on the significance of the property and whether or not it meets the criteria for evaluation in N.J.A.C. 7:4-2.3. **The chief elected local official shall have 60 but not more than 75 days from the date of issuance of written notification to submit written comments on the nomination to the Department.**

10. The complete National Register Nomination Form shall be on file with the Department during the comment period in (c)9 and 10 above and a copy shall be made available by mail when requested by the public or made available at a location to which all affected property owners have reasonable access, such as a local library, municipal building, courthouse, or other public place so that written comments regarding the nomination can be prepared.

² "Chief elected local official" is defined as "the mayor, county executive or other titled chief elected administrative official who is elected head of the local political jurisdiction in which the property is located" N.J.A.C. 7:4-1.3

11. In the case of a nomination of an historic district including 50 or more property owners, the Department shall conduct a public meeting in the municipality in which the property is located prior to consideration of the application by the State Review Board. In the event of an archaeological nomination, the public meeting may be waived by the Department. The Department shall publish notice of the meeting to property owners in accordance with provisions of (c)8ii above. The notification shall provide the following: a description of the proposed historic district, the benefits and responsibilities of historic district registration, the place that the nomination document can be examined prior to the meeting, and the date, time and place that the meeting will be held. Alternative methods of notification for the meeting such as publication in the official newspaper of the municipality, or in a newspaper circulating in the municipality may be used when the number of property owners in a proposed historic district exceeds 50.

12. Upon notification under (c)8 above, any owner or owners of a private property who objects to the nomination to the National Register shall submit to the Department a notarized statement certifying that the objector is the sole or partial owner of the private property and objects to the nomination. Upon receipt of notarized objections respecting a district or single private property with multiple owners, the Department shall ascertain how many owners have objected. If an owner whose name did not appear on the ownership list submits a written notarized statement from the municipality that the party is the sole or partial owner of a nominated private property, such owner shall be counted by the Department in determining how many owners have objected. Each owner of private property in a district shall be considered only once regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of district. Owner objections shall be considered by the State Historic Preservation Officer only with regard to submission of the nomination to the Keeper of the National Register of Historic Places.

13. Completed National Register Nomination Forms, Department recommendations, and public comments concerning the significance of a property and its eligibility for the New Jersey and National Registers shall be submitted by the Department to the State Review Board. The State Review Board shall review the nomination forms and comments concerning the property's significance and eligibility for the New Jersey Register. The State Review Board shall evaluate whether or not the property meets the criteria for evaluation set forth in N.J.A.C. 7:4-2.3 and make a recommendation to the State Historic Preservation Officer to approve or disapprove the nomination. The State Review Board may request that the applicant submit

additional information before making a recommendation to the State Historic Preservation Officer. If a nomination is not recommended for approval by the State Review Board, the Board shall explain at the meeting the reasons for its determination that the property does not satisfy the criteria for evaluation set forth in N.J.A.C. 7:4-2.3. The Board's explanation shall be made a part of the minutes of the meeting.

14. Nominations approved by the State Review Board, along with any comments received, shall be reviewed by the State Historic Preservation Officer. If the State Historic Preservation Officer determines that a nomination is adequately documented and technically, professionally, and procedurally correct and sufficient and in conformance with the criteria for evaluation set forth in N.J.A.C. 7:4-2.3, the State Historic Preservation Officer shall, within 90 days of the State Review Board meeting, sign the National Register Nomination Form and thereby place the property on the New Jersey Register and simultaneously recommend the nomination to the Keeper of the National Register of Historic Places, National Park Service, United States Department of the Interior, Washington, D.C. 20240. All comments received by the Department and notarized statements of objection to listing received by the Department shall be submitted to the National Park Service along with the nomination. Historic properties placed on the New Jersey Register shall remain on the New Jersey Register regardless of the response of the National Park Service to the nomination to the National Register. The State Historic Preservation Officer's signature certifies that:

- i. All procedural requirements set forth in this section have been met;
- ii. The National Register Nomination Form is adequately documented;
- iii. The National Register Nomination Form is technically and professionally correct and sufficient; and
- iv. In the opinion of the State Historic Preservation Officer, the property meets the criteria for evaluation set forth in N.J.A.C. 7:4-2.3.

15. If the State Historic Preservation Officer determines that the nominated property does not meet the criteria for evaluation set forth in N.J.A.C. 7:4-2.3, the State Historic Preservation Officer shall, within 45 days of the State Review Board meeting, advise the applicant in writing of the reasons for the determination. In the event that the State Historic Preservation Officer determines that the nominated property does not meet the criteria for evaluation, the State Historic Preservation Officer need not sign the National Register Nomination Form.

16. If the State Historic Preservation Officer and the State Review Board disagree on whether a property meets the criteria for evaluation set forth in N.J.A.C. 7:4-2.3, the State Historic Preservation Officer, if he or she chooses, may submit the

nomination, with an opinion concerning whether or not the property meets the criteria for evaluation and the opinion of the State Review Board, to the Keeper of the National Register for a final decision on the listing of the property in the National Register. The State Historic Preservation Officer shall submit such disputed nominations to the Keeper within 45 days after the recommendation by the State Review Board if so requested by the State Review Board, the chief elected official of the municipality in which the property is located, or by the Keeper of the National Register pursuant to federal rules for appeals under the National Register Program set forth in 36 CFR Part 60, Section 60.12 or subsequent amendments thereto.

17. If the owner of a nominated private property or the majority of such owners of a nominated historic district or single property with multiple owners has objected to the nomination to the National Register by notarized statements before the State Historic Preservation Officer submits the nomination to the Keeper, the State Historic Preservation Officer shall sign the National Register Nomination Form, but shall submit the nomination to the Keeper only for a determination of whether the property or historic district is eligible for the National Register pursuant to the federal rules for the National Register Program set forth in 36 CFR Part 60, section 60.6(n) and (s) or subsequent amendments thereto.

18. Nominations will be included in the National Register within 45 days of receipt by the Keeper of a completed National Register Nomination Form from the State Historic Preservation Officer unless:

- i. The Keeper returns the nomination to the State Historic Preservation Officer because the National Register Nomination Form is not adequately documented and technically and professionally correct and sufficient;**
- ii. The Keeper returns the nomination to the State Historic Preservation Officer because the Keeper has determined that the nominated property or historic district does not meet the criteria for listing in the National Register set forth in 36 CFR Part 60, section 60.4 or subsequent amendments thereto;**
- iii. An appeal is filed with the Keeper as provided in (c)22 below; or**
- iv. The owner of the nominated private property or the majority of the owners of property in a nominated historic district or single property with multiple owners objects by notarized statements received by the Keeper before the property or historic area is listed on the National Register.**

19. When a nomination is returned to the State Historic Preservation Officer as provided in (c)18i and ii above, the State Historic Preservation Officer shall notify the applicant that the nomination has been returned. The notification shall include

an explanation of the reasons for the return of the nomination. Upon receipt by the State Historic Preservation Officer of sufficient additional information from the applicant addressing the reasons for the return of the nomination, the State Historic Preservation Officer shall resubmit the nomination to the Keeper.

20. Any person or organization which supports or opposes the nomination of a property by the State Historic Preservation Officer for listing in the National Register may, during the review of the nomination by the National Park Service, petition the Keeper to accept or reject a nomination pursuant to the federal rules for appeals under the National Register Program, 36 CFR Part 60, Section 60.6(t) or subsequent amendments thereto. The petitioner must state the grounds of the petition and request in writing that the Keeper substantively review the nomination. Such petitions received by the Keeper prior to the listing of the property in the National Register or a determination of its eligibility where the private owners object to listing will be considered by the Keeper and the nomination will be substantively reviewed. Decisions by the Keeper on such petitions shall not affect a property's listing in the New Jersey Register. (Emphasis Added)

21. If the Department determines not to nominate a property for inclusion in the National Register or the State Historic Preservation Officer does not nominate a property recommended by the State Review Board for inclusion in the National Register, any person or local government may appeal to the Keeper the failure or refusal of the State Historic Preservation Officer to nominate a property to the National Register that the person or local government considers to meet the criteria for listing in the National Register set forth in 36 C.F.R. 60.4 or subsequent amendments thereto. Such appeals shall be made in accordance with Federal rules for appeals under the National Register Program (36 C.F.R. 60.12) or subsequent amendments thereto. Regardless of the decision by the Keeper, the State Historic Preservation Officer is not obligated to place the property on the New Jersey Register.

22. If subsequent to nomination of a property for listing in the New Jersey Register and National Registers, major revisions are made to the nomination or a property previously rejected by the Department or Keeper is renominated, the State Historic Preservation Officer shall notify the affected property owner(s) and the chief elected local official of the county and municipality in which the property is located of the revisions or renomination in the same manner as the original notification for the nomination under (c)8 and 9 above. In the case of major revisions, the Department may resubmit the nomination to the State Review Board or treat it as a new nomination to be processed in accordance with this section. Comments received and notarized statements of objection shall be forwarded to the Keeper along with the revisions or renomination. The State

Historic Preservation Officer shall also certify by the resubmittal that the affected property owner(s) and the chief elected local officials have been renotified.

III. RESULTS OF A LISTING

A. NATIONAL REGISTER of HISTORIC PLACES

Pursuant to 36 CFR 60.2, there are four major effects associated with a listing in the National Register under Federal law. Importantly, however, it does not seem that a listing explicitly bars any and all action on the property. In fact, the cited provision states “[t]he National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation’s cultural resources and to indicate what properties should be considered from destruction or impairment.” The regulation then goes on to state that “[t]he National Register was designed to be and is administered as a planning tool.” 36 CFR 60.2(a).

The first effect of being listed in the National Register is a requirement, pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended, that federal agencies undertaking a project that would affect a listed or eligible property must provide the Advisory Council on Historic Preservation a reasonable opportunity to comment. See, 36 CFR 60.2(a). However, “[w]hile the Advisory Council comments must be taken into account and integrated into the decisionmaking process, program decisions rest with the agency implementing the undertaking.” Id.

The final three effects of a listing would be making certain property owners eligible to be considered for Federal grants-in-aid for historic preservation, the possibility of an investment tax credit, and special considerations taken in the event that a property owner seeks the issuance of a surface coal mining permit. See, 36 CFR 60.2(b-d).

B. NEW JERSEY REGISTER OF HISTORIC PLACES

Pursuant to New Jersey law, the effects of a listing in the New Jersey Register are much more onerous upon a public entity seeking to undertake any action which may adversely impact a property listed on the New Jersey Register of Historic Places, while strictly private undertakings are not reviewable under the law. Pursuant to N.J.S.A. 13:1B-15.131,

[t]he State, a county, municipality or an agency or instrumentality of any thereof shall not undertake any project which will encroach upon, damage or destroy any

area, site, structure or object included in the Register of Historic Places without application to, and the prior written authorization or consent of, the Commissioner of Environmental Protection.

The process for obtaining authorization and the criteria upon which such authorization is based is found in N.J.A.C. 7:4-7.1 through N.J.A.C. 7:4-7.4.³

More specifically, N.J.A.C. 7.4-7.4 states the criteria for determining whether an undertaking constitutes an encroachment:

(a) An undertaking will have an adverse effect and therefore constitute an encroachment when the effect of the undertaking on a property listed in the New Jersey Register may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Encroachments include, but are not limited to:

1. Physical destruction, damage, or alteration of all or part of the registered property;
2. Isolation of the registered property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the New Jersey Register;
3. Introduction of visual, audible, or atmospheric elements that are out of character with the registered property or alter its setting; and
4. Acquisition, transfer, sale, lease, easement on, or an agreement or other permission allowing use of a registered property.

There are exemptions for certain undertakings that would otherwise be found to constitute an encroachment pursuant to (a) above. One such exemption includes situations in which the undertaking is "limited to the preservation, rehabilitation, restoration, or reconstruction of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic property". Id.

In conducting a review as to whether authorizing an undertaking that would constitute an encroachment would be proper, the Commissioner of the New Jersey Department of Environmental Protection will consult with the Historic Sites Council. See, N.J.A.C. 7:4-7.2. In analyzing whether an authorization should be granted for such encroachment, "[t]he Council shall also consider the following [in addition to criteria stated in N.J.A.C. 7.4-7.4]: i. [t]he public benefit of the proposed undertaking; ii. [w]hether or not feasible and prudent alternatives to the

³ The process for obtaining authorization for an encroachment can be found in full at N.J.A.C. 7:4-7.2.

encroachment exist; and iii. [w]hether or not sufficient measures could be taken to avoid, reduce or mitigate the encroachment.” N.J.A.C. 7.4-7.2(b)(4). It is incumbent upon the public entity taking the action to provide the alternatives analysis, reports, documentation required for the Historic Sites Council and Commissioner review.

Important to note are the time frames associated with the Department’s review process. First, the Department is given 30 days from receipt of an application for project authorization, to “review the application for technical and professional completeness and sufficiency”. N.J.A.C. 7:4-7.2(a). Once the application is deemed complete for review, the Department will then have up to 120 days from the date of receipt of the complete application, to review the application and determine whether the undertaking is an encroachment; and if so, to either authorize or consent to the encroachment (with or without conditions), or deny the application. See, N.J.A.C. 7:4.7.2. If the initial review by the Department’s staff review determines that the proposed undertaking is does not constitute an encroachment, the applicant must be notified of such within 45 days, and the undertaking will be allowed to proceed upon the written notice. See, N.J.A.C. 7:4-7.2(c)2.

***C. CERTIFICATION OF ELIGIBILITY FOR LISTING IN THE NEW
JERSEY REGISTER***

In addition to having review jurisdiction over “undertakings”, the New Jersey Historic Preservation Office also has authority to consult on “projects”. The term "project" includes - any planned action, whether private or public, which has the potential to result in direct or indirect effects on any district, site, building, structure or object listed in or eligible for listing in the New Jersey and National Registers of Historic Places. N.J.A.C. 7:4-8.1. Specifically, SHPO is authorized to:

- . . . provide consultation to any [New Jersey Department of Environmental Protection] program and may provide consultation to any non-Federal governmental agency in the following areas:
- Determining the area of potential effect of a proposed project;
- Assessing a potential project’s impact upon any property eligible for listing in the New Jersey Register;
- Assessing alternatives to avoid or minimize and/or mitigate the impacts of

a project on listed property or a property eligible for listing;

- Formulating recommendations arising from assessments;
- Provide technical assistance in the identification, evaluation and protection of historic property. N.J.A.C. 7:4-8.2.

Reviews under this section of the New Jersey Register of Historic Places Act Rules are generally triggered by the application to the New Jersey Department of Environmental Protection Division of Land Use Regulation for certain land use permits such as Freshwater Wetlands, Stream Encroachment, and Waterfront Development to name a few.