

## **The Gateway Arch, Not the Grounds of the Expansion Memorial, Is Designated a National Historic Landmark.**

The National Historic Preservation Act of 1966, 16 U.S.C. § 470 et seq., requires that:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

Section 110(f) of the Preservation Act, 16 U.S.C. § 470h-2(f). The entirety of the Expansion Memorial, however, is not a National Historic Landmark. Only the "structure" of the Gateway Arch is.

The "Gateway Arch" was designated a National Historic Landmark on May 28, 1987. The listing in the Federal Register, which "apprise[d] the public" of the listing in the National Register, described the designation as follows: "St. Louis (Independent City), Gateway Arch, Memorial Dr. between Poplar St. and Eads bridges [5/28/87]." 53 Fed. Reg. 18658, 18723. The official National Historic Landmarks Program website shows the listing as the "Gateway Arch" and describes the "Resource type" as "Structure." See <http://tps.cr.nps.gov/nhl> (search for "Gateway Arch").

A July 24, 1987 letter, attached at tab 4, from the Department of the Interior described the designated National Historic Landmark as "Gateway Arch, Jefferson National Expansion Memorial, St. Louis, Missouri. The 1985 application, attached at tab 5, that led to the designation listed the name of the property as "Jefferson National Expansion Memorial Gateway Arch" or "Gateway Arch" or "The Arch." The location is listed as "Memorial Drive between Poplar Street and Eads Bridges." The classification is listed as "Building." The "category of significance" is listed as "architecture," "community planning," and "engineering." The statement of significance is almost exclusively about the Arch itself.[1]

The regulations promulgated by NPS state that a National Historic Landmark is "a district, site, building, structure or object." 36 C.F.R. § 65.3(h). "Structure" is defined as "a work made by human beings and composed of interdependent and interrelated parts in a definite pattern of organization," while "site" is defined as a "location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structure." § 65.3(n), (p).

The entire grounds of the Expansion Memorial are clearly not a structure, and the designation of the Gateway Arch does not extend so far as to the entire site of the Expansion Memorial. Accordingly, the requirements of section 110(f) of the Preservation Act to "minimize harm" of any "direct and adverse affect" to the "maximum extent possible" does not apply to development of the grounds of the Expansion Memorial.

While the entire site of the Expansion Memorial is not subject to section 110(f), it is subject to the requirements of section 106 because it is listed on National Register. Section 106 requires that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f. Section 106 is only "procedural in nature." *Colliseum Square Ass'n*, 465 F.3d at 225. As the Second Circuit stated:

"It does not require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places. As such, courts have sometimes referred to Section 106 as a 'stop, look, and listen' provision."

*Business & Residents Alliance of East Harlem v. HUD*, 430 F.3d 584, 591 (2d Cir. 2005).

Section 106 upholds the Preservation Act's objectives "neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them." *U.S. v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981).

The requirements of section 106, however, are significantly different than those of section 110(f). The Fifth Circuit emphasized the "more stringent requirements" of the Preservation Act with respect to National Historic Landmarks in *Colliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215 (5th Cir. 2006). There, the court noted that - with respect to undertakings that may have an adverse effect on properties listed in the National Register - "an agency has no duty to abandon or modify a project if the project is found to have an adverse effect that is not avoided or mitigated, but only to follow the mandated [Preservation Act] procedures." *Id.* at 242. In contrast, when "an agency action will cause a direct adverse effect to a National Historic Landmark, the agency has an affirmative duty under [the Preservation Act] § 110f to minimize the harm done." *Id.*

---

[1] While the boundary of the Gateway Arch shown in the application outlines the grounds of the Expansion Memorial with the exception of the Old Cathedral, the Old Courthouse, and Ely Square, we believe that is due to the fact that the Arch does not have a street address and spans a large amount of geographic space.