ICOMOS Colombia
Consejo Internacional de Monumentos y Sitios

The ICOMOS International Committee on Legal, Administrative and Financial Issues

Cartagena, Colombia - November 2009

LIST OF ARTICLES

Page

Sociedad de Mejoras Publicas de Cartegena: Participation Ciudadana en la Conservation del Patrimonio Cultural de Cartagena de Indias by Breve Resena……1

Citizens Regarding the National Estate of South Africa with Specific Reference to Practice in the Northern Cape Province by Andrew Hall 16

Citizen Involvement: Legal Structures for Public Participation in Heritage Conservation by Alberto Martorell 23

Legal Structures for Social Participation in the Preservation of the Cultural Heritage of Chile by Amaya Irarrazaval Zegers.....28

Citizen Involvement: Legal Structures for Public Participation in Heritage Conservation. Belgium/ the Flemish Region by Prof. Dr. Anne Mie Dray……36

Cartagena's Public Improvement Partnership (Sociedad de Mejoras Publicas de Cartagena-S.M.P.C.): A Civic Partnership to Preserve Cartagena's Cultural Heritage……41

Sociedad de Mejoras Publicas de Cartagena Fundada en 1923: Actividades de Conservation en el Cordon Amurallado Ultimo Diez Anos……46

Public Participation in Heritage Planning at the National Level in the United States by John M. Fowler…….217

Public Participation in Heritage Management in the Netherlands by Leonard de Wit……..225

Legislative Mechanisms for Aboriginal Community Involvement in the Management of Australian Cultural Heritage by Dr. Andrew Sneddon……233

Citizen Involvement: Legal Structures for Public Participation in Heritage Conservation – a report from Japan……242

Public and Individual Participation in Planning, Building and Listing Procedures by Dr. Werner von Trutzschler……247

Citizen Involvement: Legal Structures for Public Participation in Heritage Conservation by Satu-Kaarina Virtala……251

Public Participation in Heritage Conservation in the United States of America by James Reap.....258

SOCIEDAD DE MEJORAS PÚBLICAS DE CARTAGENA: PARTICIPACIÓN CIUDADANA EN LA CONSERVACIÓN DEL PATRIMONIO CULTURAL DE CARTAGENA DE INDIAS

BREVE RESEÑA

La Sociedad de Mejoras Publicas de Cartagena creada en 1923, es una entidad privada, sin animo de lucro de naturaleza asociativa, con carácter cívico y cultural, que tiene como objetivo fundamental propender por el desarrollo de Cartagena de Indias, Colombia, de sus espacios urbanos, parques, avenidas, paseos, con especial interés en lo que constituye su riqueza histórica, razón por la cual, viene realizando desde su fundación actuaciones para la conservación, el mantenimiento y la administración de los Monumentos Históricos de la Ciudad, de conformidad con la disposiciones legales y contractuales vigentes. Asimismo, trabaja intensamente en la divulgación del Patrimonio Cultural. Esta Sociedad es pionera en Colombia en materia de participación activa del sector privado mancomunado con el sector público en favor de los intereses de la comunidad y en especial, en la recuperación del Patrimonio Tangible e intangible de las comunidades cercanas a nuestros monumentos.

Por medio de la ley 32 de 1924, el Gobierno Nacional delegó en la Sociedad de Mejoras Públicas de Cartagena la custodia, administración y restauración del Castillo San Felipe de Barajas. Para esa época éste era un bien convertido en cantera de donde extraían lodo y piedra. La Sociedad de Mejoras Públicas de Cartagena inició la recuperación y restauración hasta llevarlo a su condición actual. En las entrañas del Castillo San Felipe de Barajas y gracias a la gestión de la Sociedad de Mejoras Públicas de Cartagena, en la deleznable Batería de San Lázaro se proyectó y construyó el Centro Audiovisual y Cultural donde funciona un teatro, un salón de conferencia y la sede administrativa de nuestra institución.

De igual forma, procedió el Gobierno Nacional a entregar a la Sociedad de Mejoras Públicas de Cartagena, recuperándose a lo

largo de estos años, los once (11) kilómetros de Cordón Amurallado y sus baluartes que rodean el Centro Histórico de Cartagena de Indias y que recogen su cabida.|

Muchas han sido las tareas de la Sociedad, destacándose la relocalización de los asentimientos subnormales de Pekín, Pueblo Nuevo y Boquetillo, la construcción de la Avenida Santander, El Camellón de los Mártires y la retirada del embarcadero de ganado que funcionaba en el Fuerte de San Sebastián del Pastelillo.

Gracias a la labor cumplida en beneficio de estos inmuebles, el Gobierno Colombiano le entregó a esta institución los Fuertes San Fernando y San José de Bocachica.

En 1998, tras una restauración exitosa realizada por el Gobierno Nacional este le delegó a la Sociedad de Mejoras Públicas de Cartagena la administración y conservación de la Batería del Ángel San Rafael, ubicada en la población de Bocachica. Este Monumento, fue primer puesto en la Bienal Nacional de Arquitectura 1998 en la categoría Restauración.

En sus 86 años de existencia la entidad ha contribuido a sacar del olvido y la ruina muchos inmuebles de carácter histórico, la reconstrucción del Castillo San Felipe de Barajas y el mejoramiento de su entorno, el mantenimiento y conservación del Cordón Amurallado y sus baluartes, así como las zonas verdes aledañas, la recuperación del edificio del Cuartel de las Bóvedas adosados a este conjunto monumental de Murallas , al tiempo que ha adelantado un intenso trabajo social en las comunidades cercanas a los Monumentos, con especial énfasis en Bocachica, para que su gente sienta que estos inmuebles son eje y motivación de su propio desarrollo.

Creemos que su mayor gestión ha sido contribuir a crear conciencia en pro de la necesidad de proteger el Patrimonio Histórico de la Ciudad, como se impone por constituirse el Patrimonio Cultural como un derecho colectivo de su gente.

La Sociedad de Mejoras Públicas de Cartagena recibió inicialmente del Fondo de Inmuebles Nacionales los Monumentos antes mencionados mediante la Resolución No. 10495 de 1991 y el

Contrato No. 005 de 1992, señalándose en estos documentos que la entidad debe invertir y destinar íntegramente los dineros producidos por el ingreso y uso de los Monumentos en la administración, conservación y restauración de los mismos.

Los monumentos a nuestro cargo de acuerdo con el contrato referido son los siguientes: Castillo San Felipe de Barajas, todo el cordón amurallado y sus baluartes, Cuartel de las Bóvedas; Fuertes de San Fernando y San José y la Batería del Ángel de San Rafael en Bocachica.

MARCO JURIDICO DE LA GESTION DE LOS BIENES CULTURALES A NUESTRO CARGO

CONSTITUCIÓN POLITICA DE COLOMBIA

Artículo 70: El Estado tiene el deber de promover y fomentar el acceso a la cultura de todos los colombianos en igualdad de oportunidades, por medio de la educación permanente y la enseñanza científica, técnica, artística y profesional en todas las etapas del proceso de creación de la identidad nacional.
La Cultura en sus diversas manifestaciones es fundamento de la nacionalidad. El Estado reconoce la igualdad y dignidad de todas las que conviven en el país. El Estado promoverá la investigación, la ciencia, el desarrollo y la difusión de los valores culturales de la nación.

Artículo 71: La búsqueda del conocimiento y la expresión artística son libres. Los planes de desarrollo económico y social incluirán el fomento de las ciencias y , en general a la cultura. El Estado creará incentivos para personas, instituciones que desarrollen y fomenten la ciencia y la tecnología y las demás manifestaciones culturales y ofrecerá estímulos especiales a personas e instituciones que ejerzan éstas actividades.

Artículo 72: El patrimonio cultural de la nación está bajo la protección del Estado. El patrimonio arqueológico y otros

bienes culturales que conforman la identidad nacional, pertenecen a la nación y son inalienables, inembargables e imprescriptibles. La ley establecerá los mecanismos para readquirirlos cuando se encuentren en manos de particulares y reglamentará los derechos especiales que pudieran tener los grupos étnicos asentados en territorios de riqueza arqueológica.

Artículo 355: Ninguna de las ramas u órganos del poder público podrá decretar auxilios o donaciones en favor de personas naturales o jurídicas de derecho privado.

El Gobierno, en los niveles nacional, departamental, di+strital y municipal podrá, con recursos de los respectivos presupuestos, celebrar contratos con entidades privadas sin ánimo de lucro y de reconocida idoneidad con el fin de impulsar programas y actividades de interés público acordes con el Plan Nacional y los planes seccionales de Desarrollo. El Gobierno Nacional reglamentará la materia. **(Nota: Inciso reglamentado por el Decreto 842 de 1992).**

DECRETO 777 DE 1.992

Artículo 1º: CONTRATOS CON ENTIDADES PRIVADAS SIN ANIMO DE LUCRO PARA IMPULSAR PROGRAMAS Y ACTIVIDADES DE INTERES PÚBLICO.

Los contratos que en desarrollo de lo dispuesto en el segundo inciso del artículo 355 de la Constitución Política celebren la Nación, los Departamentos, Distritos y Municipios con entidades privadas sin ánimo de lucro y de reconocida idoneidad, con el propósito de impulsar programas y actividades de interés público, deberán constar por escrito y se sujetarán a los requisitos y formalidades que exige la ley para la contratación entre los particulares, salvo lo previsto en el presente decreto y sin perjuicio de que puedan

incluirse las cláusulas exorbitantes previstas por el decreto 222 de 1983.

LEY 80 DE 1993

Por la cual se expide el Estatuto General de Contratación de la Administración Pública.

Esta Ley regula los principios de transparencia, moralidad, selección objetiva, economía y responsabilidad aplicables a procesos de contratación y al principio de colaboración entre los particulares y el estado.

DECRETO REGLAMENTARIO 2474 DE 2.008

Por el cual se reglamenta la contratación con los particulares. Este decreto ratifica la primacía del interés general sobre el particular.

LEY GENERAL DE CULTURA - LEY 397 DE 1.997

Articulo 8°. Declaratoria y Manejo del Patrimonio Cultural de la Nación. El Gobierno Nacional, a través del Ministerio de Cultura y previo concepto del Consejo de Monumentos Nacionales, es el responsable de la declaratoria y manejo de los monumentos nacionales y de los bienes culturales de interés nacional.

A las entidades territoriales, con base en los principios de descentralización , autonomía y participación , les corresponde la declaratoria y el manejo del patrimonio cultural y de los bienes de interés cultural del ámbito municipal, distrital y departamental, a través de las alcaldías municipales y las gobernaciones respectivas, y de los territorios indígenas , previo concepto de los centros filiales del Consejo de Monumentos Nacionales allí donde existan, o en su defecto por la entidad delegada por el Ministerio de Cultura.

Lo anterior se entiende sin perjuicio de que los bienes antes mencionados puedan ser declarados bienes de interés cultural de carácter nacional.

Para la declaratoria y manejo de los bienes de interés cultural se aplicará el principio de coordinación entre los niveles nacional, departamental, distrital y municipal y de los territorios indígenas.

Los planes de desarrollo de las entidades territoriales tendrán en cuenta los recursos para la conservación y la recuperación del patrimonio Cultural.

De la Gestión Cultural

Artículo 57 : Inciso 2° : El Sistema Nacional de Cultura estará conformado por el Ministerio de Cultura, los Concejos Municipales, Distritales y Departamentales de Cultura , los Fondos Mixtos de Promoción de la Cultura y las artes y, en general, por las entidades públicas y privadas que desarrollen, financien, fomenten o ejecuten actividades culturales.

PLAN DE ORDENAMIENTO TERRITORIAL DE CARTAGENA

Adoptado por la Alcaldía Mayor de Cartagena mediante decreto 0977 de 2001 en el tema del Centro Histórico se refiere particularmente a los siguientes puntos:

- Área de influencia y la periferia histórica de la ciudad
- Áreas de protección del Patrimonio Histórico
- Normas relativas a las vías en el Centro Histórico
- Tratamientos urbanísticos: Conservación, consolidación, mejoramiento integral, renovación urbana, redesarrollo y desarrollo.

LEY DE MODERNIZACIÓN DE SOCIEDADES DE MEJORAS PÚBLICAS.

Por medio de la cual se dictan normas para la regularización y modernización de las Sociedades de Mejoras Públicas.

Artículo 10: Las Sociedades de Mejoras Públicas que hayan administrado bienes de interés cultural de carácter nacional, departamental, distrital o municipal y las sociedades que pretendan hacerlo por primera vez, serán tenidas en cuenta prioritariamente para la adjudicación de dicha administración, cuando, en el caso de

las primeras, demuestren que han cumplido con rigor dicha administración y en el caso de las segundas que demuestren un manejo eficiente, serio y responsable de sus recursos, certificado por la Federación Nacional de Sociedades de Mejoras Públicas.

Resolución N ° 10495 DE 1 DE OCTUBRE DE 1991

Por la cual el Ministerio de Obras Públicas y Transporte entrega para su administración, conservación y mantenimiento a la Sociedad de Mejoras Públicas de Cartagena, los inmuebles de propiedad de la Nación, denominados "Castillo San Felipe de Barajas, Fuerte de San Fernando de Bocachica, Fuente de San José de Bocachica, Edificio Cuartel de las Bóvedas, El Baluarte de Santo Domingo, El Reducto, El Baluarte San Francisco Javier y el Cordón Amurallado de Cartagena.

Contrato N ° 005 DE 1992

Celebrado entre el Fondo de Inmuebles Nacionales y la Sociedad de Mejoras Públicas de Cartagena para la Administración, conservación y Mantenimiento de los Inmuebles de propiedad de la Nación denominados Castillo San Felipe de Barajas, Fuerte de San José de Bocachica, Edificio Cuartel de las Bóvedas, El Baluarte de Santo Domingo, El Reducto, El Baluarte San Francisco Javier y el Cordón Amurallado de Cartagena.

Adición al Contrato No. 005-1-92 de 1998, de fecha 24 de Febrero de 1.998, suscrita por el Instituto Nacional de Vías y la Sociedad de Mejoras Públicas para la administración y Mantenimiento de los siguientes inmuebles:

a.- Predios del entorno del Castillo de San Felipe de Barajas.
b. Batería del Ángel de San Rafael, Túnel, Caminos Peatonales y respectivo muelle.
c.- Glacis del Fuerte de San Fernando de Bocachica, sus baterías colaterales de San Juan Francisco de Regis y de Santiago y su respectivo muelle.

Adicional No. 002 AL Contrato No. 005-92 de 30 de Abril de 1.999 y El Ministerio de Cultura de Colombia

Incluye las siguientes obligaciones:

- Velar porque el objeto del contrato y las obligaciones se cumplan a cabalidad.
- Remitir a la Oficina Jurídica del Ministerio copia del acta de entrega y recibo de los bienes.
- Expedir la certificación de cumplimiento en el objeto del contrato.
- Informar a la Oficina Jurídica del Ministerio, inmediatamente, cualquier irregularidad que se presente en desarrollo del contrato.
- Enviar con una antelación de quince (15) días hábiles, a la Secretaría General del Ministerio las solicitudes de prórroga o adición del contrato, en caso que se requiera.
- Dar el visto bueno al aumento de gasto de improviso en caso requerirse y previa justificación de este aumento.
- Aprobar o solicitar las correcciones, modificaciones y justificaciones necesarias en los informes semestrales presentados por el Administrador.
- Aprobar o solicitar las correcciones, modificaciones y justificaciones necesarias dentro del Programa de Inversión y el plan de obras de restauración, administración, conservación y mantenimiento de los Monumentos Históricos y de los bienes muebles, correspondientes a cada año.

OBLIGACIONES CONTRACTUALES

- Destinar todo el producido de la gestión en la administración y conservación de los bienes de interés cultural a nuestro cargo.
- Enviar al Ministerio de Cultura – Dirección de Patrimonio una vez esté aprobado por la Junta Directiva el Presupuesto de Gastos y de Inversiones para su posterior aprobación.
- Enviar informes periódicos sobre la gestión, contables y de ejecuciones presupuestales.

Interventoría del Contrato N ° 005

El Ministerio de Cultura de Colombia a través de la Dirección de Patrimonio tiene a su cargo la Interventoría del Contrato.

VENTAJAS DE LA ADMINISTRACIÓN DE LOS BIENES DE INTERÉS CULTURAL DESDE EL ÁMBITO CIVIL Y PRIVADO

- La Institución goza de una autoridad moral como consecuencia de los 86 años de servicio a la ciudad.

- No estamos sujetos a la normativa de contratación administrativa de Ley 80 de 1993
- Puede en ejercicio de sus atribuciones contractuales exigir a los contratistas que cumplan con rigor los términos del contrato que para cualquier caso hayamos suscrito.
- Las decisiones las toma la Junta Directiva de la Sociedad que es el máximo órgano de su administración.
- La Junta Directiva de acuerdo con el Estudio Patológico del Cordón Amurallado y demás fortificaciones y del Plan de Acción dispone sus inversiones conforme a las prioridades y a los recursos disponibles. En nuestro caso la prioridad siempre ha sido la estabilización de los monumentos. En este momento podríamos decir que no hay monumento alguno de los que se encuentran bajo nuestro cuidado que esté en riesgo.
- La Institución está resguardada de los manejos políticos y de los cambios que ello impone.
- La Sociedad establece su política de intervención y uso de los monumentos, observando la normativa vigente, nacional e Internacional.

DEBILIDADES

- La Institución no tiene poder coercitivo para imponer multas o sanciones a particulares que infrinjan o violenten el patrimonio. Para ello debe recurrir a la justicia ordinaria y a los entes competentes.

- La Institución debe solicitar ante las autoridades competentes los permisos reglamentarios para iniciar las restauraciones, las que deben observar todos los requisitos de ley, sin excepción.

LOS RETOS DE LA GESTIÓN

Cartagena de Indias, tiene una gran riqueza patrimonial tanto en sus aspectos históricos monumentales, dada por su arquitectura civil, militar y religiosa construida desde el siglo XVI hasta principio del siglo XX, como naturales, representadas por el entorno de sus cuerpos de agua, bahía, ciénaga y mar, por los cordones de mangle y por la belleza paisajística que la rodea.

Frente a ello, la ciudad enfrenta unas condiciones de pobreza, desempleo, subempleo, informalidad y miseria para un porcentaje muy significativo de su población, pobreza que se constituye en un delicado problema al momento de pensar la sustentabilidad de su patrimonio natural y cultural.

Los retos para enfrentar la problemática de la pobreza, garantizando la conservación y uso adecuado de esos recursos naturales y culturales, en un entorno cambiante, dado por la dinámica transformación de las actividades turísticas, la expansión de la frontera urbana por nuevos desarrollos residenciales y turísticos, por un crecimiento de las actividades portuarias, industriales, comerciales y logísticas que generan una enorme presión sobre el conjunto de toda la sociedad, especialmente sobre su patrimonio cultural protegido y reconocido como patrimonio de la humanidad, son de las mismas proporciones que su riqueza y exigen un trabajo solidario y mancomunado del Estado y de la Sociedad Civil.

Una de las causas que generan el marginamiento en nuestra ciudad es la deficiente información que la ciudadanía tiene sobre el efectivo acceso a las instancias del poder y la ausencia de conciencia que se tiene acerca de las posibilidades ofrecidas por nuestro marco jurídico en cuanto al reconocimiento formal de espacios de participación.

Por otra parte, es importante adelantar campañas de formación de tal manera que la ciudadanía efectivamente pueda participar, pues no sólo basta con desear hacerlo, sino que es indispensable saber cómo organizarse para ello, ya que la sociedad desorganizada en vez de participar lo que hace es obstaculizar.

Para tales efectos y con ánimo de contribuir a un efectivo proceso de cultura ciudadana nuestra Institución ha suscrito un contrato en éste mes con una empresa reconocida nacionalmente denominada corpovisionarios, con el objeto de que adelante una encuesta que permita conocer a fondo cuales son efectivamente los puntos en los que debemos intervenir desde las esferas público- privada para educar a nuestra ciudadanía y construir efectivamente el circulo virtuoso del conocimiento- amor- conservación , no sólo de los bienes culturales, sino de también de otros valores , como el respeto al derecho ajeno, a la vida , la tolerancia, etc.

CÓMO SE HACE LA GESTIÓN DE LOS MONUMENTOS

La gestión se adelantada de la siguiente forma:

1) **Sensibilización:** Dirigida a fortalecer la apropiación y fortalecimiento del conocimiento y valoración de los bienes de interés cultural.

- Recorridos libres en todo el cordón amurallado y entrada libre al Castillo de San Felipe de Barajas el último domingo de cada mes.
- Entradas libres a estudiantes de todos los colegios públicos y privados de la ciudad.
- Participando en actividades académicas, sociales, turísticas, así como de difusión en programas radiales, poniendo de manifiesto la importancia de los bienes los bienes culturales y llevando a cabo campañas de estimulo para el buen uso (Baños públicos).
- Izada de bandera para estimular los valores patrios.

2) **Culturales:** Dirigidas al Fortalecimiento de los derechos humanos culturales y al engrandecimiento espiritual de los Cartageneros y Colombianos.

- Castillo San Felipe de Barajas
- Baluarte de Santa Catalina - Museo de las Fortificaciones
- Recorrido por todo el Cordón Amurallado y sus Baluartes.
- Baluarte de San Lucas – Bóveda Teatreros de Cartagena.
- Casa del Castellano. Presentación de Teatro en el Castillo
- Programas de miércoles de video para fortalecer el conocimiento de la música clásica y presentación permanente en el teatro Carlos Crismatt de artistas locales, nacionales e internacionales, así como el programa denominado Circulo del Piano.

3) **Educativas:**

Escuela Libre Patrimonio Vivo, con jóvenes en el Museo de las Fortificaciones y en el Castillo San Felipe de Barajas y el programa de fortalecimiento de valores, a través de una Escuela de Formación Artística y Cultural en el fuerte de San Fernando en Bocachica.

4) **Espacios de Contemplación y esparcimiento.**

Los principales espacios públicos del centro histórico lo constituyen sus plazas, murallas y baluartes. Por ello la institución dentro de una política de manejo equilibrada entre lo público y lo privado, solamente ha accedido a dar en arriendo permanente tres de sus baluartes, para evitar que la mayoría de la gente de escasos recursos pueda verse afectada en sus derechos.

5) **Sostenibilidad económica- comercial y productiva**

- Ingresos por concepto de entradas a los Monumentos.
- Arriendo permanente de los Baluartes de San Francisco Javier, Santo Domingo y San Lorenzo de Reducto para Restaurantes y Cafés.

- Arriendo temporales y ocasionales del Cordón Amurallado y demás Baluartes para fiestas de matrimonio, reuniones, congresos, fiestas de fin de año, etc.-
- Arriendo permanente de los 23 locales del Cuartel de las Bóvedas, para ventas de artesanías
- Arriendo permanente de parte de la Casa del Castellano – Castillo San Felipe de Barajas para Tienda de Artesanías-
- Arriendo ocasional del Castillo San Felipe de Barajas para fiestas
- Arriendo ocasional del Teatro y Salón de conferencias del Centro de Audiovisuales Cavi, Castillo San Felipe de Barajas
- Arriendo ocasional de los Fuertes de San Fernando y San José.

6) ESPACIOS PARA LA PAZ

Estos monumentos que fueron construidos para la guerra tienen la primerísima misión de convertirse en espacios de convivencia y paz, en un país que ha sufrido los rigores de enfrentamientos armados, valor por el que los ciudadanos de bien estamos decididos a luchar incansablemente hasta alcanzarlo. Esto se fundamento en lo dispuesto en el numeral 9 de la Ley General de Cultura, que a la letra dice: "El respeto de los derechos humanos, la convivencia, la solidaridad, la interculturalidad, el pluralismo y la tolerancia, son valores culturales fundamentales y base esencial de una cultura de paz".

SITUACIÓN DEL MANEJO DEL CENTRO HISTÓRICO DE CARTAGENA DE INDIAS

Actualmente la ciudad de Cartagena de Indias no cuenta con instituciones fuertes y sólidas que le permitan atender directamente toda la problemática del Centro Histórico. Se han hecho algunos esfuerzos, sin embargo la debilidad administrativa, económica e Institucional del Distrito de Cartagena han dado al traste con los proyectos iniciados.

Es así que, para cumplir con las normas internacionales y nacionales sobre manejo de bienes de interés cultural declarados como Patrimonio Mundial, incursionó en la creación de una entidad en la que participaron actores públicos y privados denominada Corporación Centro Histórico, dirigida a manejar todo lo relacionado con el mismo. Para infortunio de los Cartageneros esa intención quedó plasmada en un papel, como suele ocurrir muy a menudo en nuestras sociedades tercermundistas.

Ahora bien, es importante destacar el crecimiento y desarrollo de la ciudad en los últimos diez años, que gracias a la inversión privada en su mayoría ha logrado posicionarla como una ciudad turística y económicamente con mucho futuro. Lo propio ocurrió con la recuperación de las casas del Centro Histórico, que también gracias a la inversión privada ha permitido que la ciudad antigua esté bastante recuperada y luzca muy hermosa a los ojos de visitantes y locales.

Frente a esa gran belleza hay una serie de problemas graves pendientes, tales como vendedores ambulantes, problema de desagües pluviales, de mareas, de movilidad, de manejo de residuos y de falta de autoridad y compromiso de la ciudadanía que no hayan aún soluciones definitivas. Debemos decir además que hemos avanzado en muchos temas, pero sigue habiendo una gran desproporción entre lo que se hace y lo que se necesita hacer.

Recientemente se ha elaborado un proyecto con la intervención del Banco Interamericano de Desarrollo que plantea propuestas en materia de desarrollo económico y social, de revitalización y de un componente interinstitucional para asumir el reto de su organización definitiva, que contempla e identifica después de muchas consultas ciudadanas dos alternativas para la creación del sujeto que puede hacerse cargo de la gestión de los recursos del programa: Una, la creación de una Unidad Ejecutora en la Oficina de Cooperación Internacional Distrital, que está en el ámbito de actuación a corto plazo, o en alternativa , la reformulación de la actual Corporación del Centro Histórico con intervenciones de fortalecimiento, de ampliación de sus miembros y de transparencia de sus organismos institucionales y mecanismos de decisión. La otra propuesta, a mediano y largo plazo identifica en la Alcaldía de Cartagena de Indias el nuevo nivel institucional, que pueda a futuro garantizar

una adecuada gestión de los procesos de revitalización y renovación del Centro Histórico. Esta última ha sido acogida y se está adelantando en éste momento.

Muchas gracias……

Citizens Rights Regarding the National Estate of South Africa with Specific Reference to Practice in the Northern Cape Province

Andrew Hall

South Africa has had a legal framework for heritage conservation since 1911[1], just a year after the country was formed by the union of four British colonies none of which had such laws. Since that time legislation has been amended or replaced on a regular basis, but until recently has provided relatively little room for public participation.

The first legislation to allow for some decision making by stakeholders outside of government was the Natural and Historical Monuments Act of 1923, which saw the appointment of the Historical Monuments Commission, which had powers to recommend declaration of sites as historical monuments by the relevant minister[2]. Apart from the fact that membership of the commission was by the practice of the times, albeit not *de jure*, limited to the white community, it was also a small body of 'experts' appointed by the minister who hand-picked members without a process of public nomination.

This system was perpetuated in the National Monuments Act of 1969 which remained in force until 1 April 2000 when the current legislation, the National Heritage Resources Act of 1999 came into effect. Whilst practice in the time of the commission is not known, the National Monuments Council (established by the National Monuments Act) and its organs did in their later years allow representations to be made by applicants if and when it suited. However, meetings remained closed to those not specifically invited to address a particular item on an agenda.

Given South Africa's experience under colonialism and apartheid and the way that culture and heritage was used by the apartheid regime to impose the dominance of a minority, it is not surprising that the National Heritage Resources Act (NHRA) goes to some lengths to ensure that management of heritage resources, or what the Act also terms 'the National Estate' is as far as possible managed in line with the determinations of those individuals or communities that own or have other interests in a particular aspect of the National Estate. It is these measures that this paper will analyse, where possible citing practice or case studies from the Northern Cape Province.

The NHRA provides for a national system for conservation of the National Estate and in so doing creates a national heritage conservation body, the South African Heritage Resources Agency (SAHRA) and requires each province to set up a Provincial Heritage Resources Authority (PHRA), either under its own legislation

---

[1] Van Riet Lowe C, 1941, The Monuments of South Africa, Pretoria: Government Printer, p12
[2] Ibid, p 13

or the NHRA. Seven of the nine provinces, including the Northern Cape, have elected to establish their PHRA under the provisions of the NHRA and it is hence systems applicable under the NHRA that will be discussed.

SAHRA and each PHRA is under the jurisdiction of a council which must be appointed 'in accordance with the principles of transparency and representivity' and should 'be representative of the relevant sectoral interests and the cultural and demographic characteristics of the population of the Republic'[3] or province and following a system set out in regulations published by the relevant national or provincial minister. In the Northern Cape these regulations make provision for a process of selection in which the minister invites public nominations to the council through province-wide advertising and then submits a short-list selected on the basis of gender, race, cultural and geographical equity to the provincial Executive Council (cabinet) for its approval[4]. This process hence not only ensures public participation in the process of appointment, but in a culturally diverse country, ensures that decision making around heritage resources reflects the diversity of citizens and their views pertaining to heritage.

Unlike previous legislation, the NHRA also gives the councils of heritage resources authorities far wider powers. National and Provincial Heritage Sites and the wide range of other formal protections that the Act provides for are implemented without reference to, let alone the consent of any political authority. The process of appeals against decisions of a heritage resources authority also only involve a political authority as a very last resort and even then the decision is made by tribunal of experts appointed by a minister.[5] Otherwise elected officials have very few powers other than specific rights to be consulted and ability to set certain minimum standards. The bulk of decision making around heritage matters in South Africa is hence left to the councils of heritage resources authorities which are nominees of and representative of the communities that inhabit the areas under their jurisdiction.

In addition to the above the section of the NHRA providing general principles of heritage conservation places very specific responsibilities on councils of heritage resources authorities, the permit committees, etc. they may appoint and appeals tribunals to make known to the public matters which are to be discussed at their meetings specifically concerning sites to be formally protected, consideration of permit applications and appeals and to inform them of the outcome of such deliberations. In this regard the Act requires that 'a meeting at which decisions are taken, must be open to the public and that agenda and minutes should be available for public scrutiny'[6]. However, it qualifies this in instances where there

---

[3] 'National Heritage Resources Act (Act 25 of 1999)', South African Government Gazette, Vol 406, No 19974, 28 April 1999, Cape Town: Government Printer, Secs. 14(2) & 23

[4] 'Official Notice 5 of 2003' Provincial Gazette of the Northern Cape, No 744, Pretoria: Government Printer 28 February 2003, Sec 2.3-6

[5] Op cit, National Heritage Resources Act, Sec. 49(3)

[6] Ibid, Sec. 10(2)(b)

is good reason to protect the confidentially of information, in which situations the decision making body may resolve that a matter be treated confidentially. Such decisions are usually related to protection of applicants in instances where release of information might compromise economic rights or opportunities. Such cases are few and far between and in over six years of operations the Northern Cape's heritage resources authority has not been requested to invoke this provision of the Act.

Further to the above, any individual who may be affected by a decision 'has a right of appearance'[7] at a meeting where that decision is to be made and in the Northern Cape Province this has generally also been interpreted as having a right to make representation at that meeting. Given that the province is very large and distances to be travelled are considerable representation may either be made orally or in writing.

In practice the implication of Section 10(2) is that the agendas of decision making meetings are provide to anyone who requests them and posted on notice boards prior to meetings and that minutes are similarly treated being posted well within the 30 day period permitted for appeals. In the Northern Cape the Provincial Heritage Resources Authority has recently approved regulations that will be published shortly requiring it to post agendas and minutes on its website.

To facilitate access to information and participation by heritage stakeholders in processes of decision making by heritage authorities the NHRA also sets our a process of formal registration of conservation bodies that have an ' interest in - (i) a geographical area; or (ii) a category of heritage resources'[8]. Generally regulations under the applicable section provide for registered conservation bodies to be provided with notices of meetings, agendas and minutes via e-mail, hence ensuring that key stakeholders are kept informed of process around heritage resources and are able to exercise rights of attendance at meetings of and appeal against decisions taken by heritage resources authorities.

The NHRA also requires that the inventory of the National Estate be accessible to the public other than in instances where it is necessary to protect an individual's privacy or economic interests and where it is not in the interests of conservation to have information concerning a heritage resource divulged to the public[9]. Other records of heritage authorities are similarly available for public consultation by the general public under the terms of legislation governing access to information.[10]

---

[7] Ibid, Sec. 10(2)(c)
[8] Ibid, Sec. 25(1)(b)
[9] Ibid, Sec. 39(6)
[10] 'Promotion of Access to Information Act (Act 2 of 2000)' South African Government Gazette, Vol 416, No 20852, 3 February 2000, Cape Town: Government Printer

In terms of appeals processes the NHRA gives very specific rights to individuals, in that it allows 'anybody'[11] to appeal decisions of a heritage resources authority. This is a departure from earlier practice in that not only the applicant for a permit or other form of consent to work on an aspect of the National Estate has right of appeal, but also those who feel they have a stake in the affected heritage resource. Apart from the influence it gives heritage stakeholders over processes around resources that they value, this particular aspect has changed the way heritage resources authorities operate during appeals processes. In the past the process tended to be one that placed the heritage authority in an adversarial situation relative to development, it generally being a developer as the applicant for a permit or other consent, who appealed to the heritage resources authority that had made a decision which was counter to his or her interests to reconsider its opinion.

Because of the provisions for both sides in the heritage conservation conundrum to make representations when decisions concerning heritage resources are made, the NHRA has begun to change perceptions about the role of heritage conservation authorities. They are increasingly seen as arbitrators in situations of conflict, rather than one of the adversaries as was the case in the past. Such a change is important to overcoming the view that heritage conservation is by its nature in opposition to development and authorities are now seen to be able to balance the needs of conservation and development, a distinction that is important in the context of a developing nation like South Africa.

In the cultural context of the majority of the citizens of Southern Africa ancestral graves have particular significance and in this regard the NHRA places specific responsibilities on those who wish to disturbed graves to consult with the descendants of those buried. However, these provision apply only to graves that are outside of formal cemeteries, mainly those on farms or communally owned lands where traditional practices are still strong. In this regard a heritage resources authority may not issue a permit for exhumation unless it is satisfied that the applicant 'has made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave' and, furthermore, has reached agreement with them regarding treatment of the grave.[12]

Similarly where a grave is accidentally disturbed the culprit is required to cease work immediately and, amongst other things, assist descendents of the buried person with regard to exhumation and re-interment.[13]

The general principles of the Act also require that heritage resources authorities promote appropriate use of and access to the National Estate[14] and goes further

---

[11] Op cit, National Heritage Resources Act, Sec. 49(2)
[12] Ibid, Sec. 36(5)
[13] Ibid, Sec. 36(6)
[14] Ibid, Sec. 10(7)(c)

in that the general powers of heritage resources authorities include a duty to 'endeavour to assist any community or body of persons with an established interest in any heritage resource to obtain reasonable access to such heritage resource, should they request it …..' [15]. Whilst in line with the Constitution of South Africa the NHRA respects individual property rights and does not require that there be right of public access to sites with heritage value, this particular provision recognises that due to the history of land dispossession that occurred in the country during the period of colonisation and under apartheid that many people have been deprived of access to heritage that they value, specifically graves and other sacred sites, and that heritage resources authorities have a duty to interact with land owners to negotiate reasonable access on behalf of communal interests.

In light of the same history, the NHRA also establishes a system for restitution of heritage objects that are held by public institutions. In this regard it requires that such institutions enter into negotiations with *bona fide* claimants of such artefacts. Should agreement not be reached the Minister of Arts & culture may be approached to mediate and ultimately resolve the matter, which he or she is required to do so in a spirit of compromise and with due consideration for the safety of the artefact and the needs of both the claimant and current owner. This particular clause has most commonly been used to secure the release of human remains from museological and other research collections for reburial by descendant communities, but can also be used for the restitution of or reasonable access to sacred and other objects.[16]

In the Northern Cape in September 2007, following a process initiated prior to the passing of the NHRA, the Medical School of the University of the Witwatersrand repatriated the remains of the early 19th Century Griqua Captain, Cornelis Kok, together more than 30 of his people. These descendants of the original KhoiKhoi occupants of the south-western part of Africa had been exhumed from a cemetery in the village of Campbell in the 1960s for purposes of anatomical study. The repatriation occurred after a protracted and on/off process of negotiation, but ultimately without need for the intervention of the Minister. The remains were buried in a communal grave following a ceremony organised by descendants of the Griqua.

Possibly with more fundamental impact than other area allowing for public involvement in heritage conservation, the NHRA integrates management of heritage resources into the national system for environmental impact assessment (EIA), requiring that the provisions of the National Environment Management Act (NEMA) that provide for EIA include the National Estate[17]. The system created via NEMA provides for several forms of community input and consultation,

---

[15] Ibid, Sec. 25(d)
[16] Ibid, Sec. 41
[17] 'National Environmental Management Act (Act 107 of 1998)' South African Government Gazette, Vol 401, No 19519, 27 November 2000, Cape Town: Government Printer, Chapter 5 & Ibid, Sec 38(8)

including public meetings and statutory periods for comment on draft reports. In addition the NHRA also prescribes a system of 'heritage impact assessment' (HIA) for the National Estate in situations where NEMA would not require and EIA[18]. This generally relates to issues of scale and in the NHRA is there is list of situations where developments that are smaller than those for which regulations under NEMA provide are subject to an HIA process. However, the system according to which such assessments are done is the same as that prescribed for EIAs and hence includes the same processes for public involvement.

The NHRA makes provision for a covenant type system whereby 'heritage agreements' may be entered into between a heritage authority and any stakeholder in an aspect of the National Estate[19]. A heritage agreement is a binding contract and may regulate any aspect of involvement of the parties to the agreement. In South Africa the World Heritage Convention is implemented through the World Heritage Act which amongst other things prescribes a system for recognition of management authorities for world heritage sites and the devolution of powers in terms of the Act to them[20]. In the case of the Richtersveld World Heritage Site the arrangements between a broad range of stakeholders in the management and other aspects of the site are governed by a heritage agreement parties to which include the communal landowner, a non-profit company established to run the site; the Provincial Heritage Resources Authority; the provincial ministers responsible for arts and culture and environment conservation; the local and district municipalities and South African National Parks. The heritage agreement governs issues such as funding and staffing of the site; the system for appointment of directors of the management authority; process of approval of policies governing the site; joint approval of the management plan, etc. etc. Heritage agreements have hence become an important tool for involving stakeholders in determining the way in which heritage conservation takes place on a day to day basis.

Finally, in the matter of proceedings against those who transgress the provisions of the NHRA, it provides that 'any person who believes that there has been an infringement of any provision of this Act, may lay a charge with the South African Police Services or notify a heritage resources authority.'[21]

The drafters of the NHRA, of whom the author of this paper was one, set out to ensure that in a country where heritage and culture was, as part of apartheid ideology, used as a tool to separate communities and to alienate the majority from process of government, the new heritage legislation would involve people as far as is practically possible. In a multi-cultural society where all citizens enjoy equal cultural rights to practice their culture it is very difficult for any individual or

---

[18] Op Cit, National Heritage Resources Act, Sec. 38(1)-(7)
[19] Ibid, Sec. 42
[20] 'World Heritage Act (Act 4 of 1999)', South African Government Gazette, Vol 414, No 20717, 9 December 1999, Cape Town: Government Printer, Chapter 2
[21] Op Cit, National Heritage Resources Act, Sec. 51(6)

small group of individuals, such as the council of a heritage resources authority to objectively judge matters that affect heritage that may be of value to a particular cultural group, but not necessarily to all South Africans. Over a period of almost ten years since its implementation the NHRA has through its systems for involvement of communities and individuals in process of management of the National Estate proven itself a useful tool in overcoming such difficulties and healing the wounds of the past.

Citizen Involvement: Legal Structures for Public Participation in Heritage Conservation.

Alberto Martorell
Doctor in Cultural Rights
University of San Martin de Porres
ICOMOS Peru

Heritage is a question of citizenship appropriation and awareness. Heritage without people identified with the values represented for it, is not heritage: is just art, creation, object. Maybe it is valuable, but it must not be qualified as heritage. The values of the cultural heritage are necessarily social values. Heritage, independently of the legal property regimen applied to the material manifestations containing its values, is linked to human groups, most of them characterized by their own cultural definition as a nation, or at least as a cultural group.

In the case of Peruvian legal system for heritage conservation, the State is not the owner of the public rights over the cultural heritage of the nation goods. The Peruvian Constitutional text states that, independently of private or public property regime, cultural heritage belongs to the Nation. Furthermore, it declares that the State promote private participation in the conservation, restoration, exhibition and diffusion of the cultural heritage; adding to it the restitution in case of illegal exportation.

This principle is ratified in the Preliminary Chapter of the Peruvian Law for the Protection of the Cultural Heritage, Law 28296 (July 24, 2004). Article V declares:

> *Those goods belonging to the Cultural Heritage of the Nation, either under public or private property regimen, are protected by the State and under the legal regimen enforced by the present Law.*
>
> *The State, people entitled with property rights affecting cultural goods belonging to the Cultural Heritage of the Nation and citizenship in general, share the responsibility to accomplish and control this law is being accomplished.*
>
> *The State will promote active private sector participation in the conservation, restoration, exhibition and diffusion of the cultural*

> *heritage of the nation; and its restitution in case of illegal exportation or failure of the mandate to return them to the national territory once expired the legal authorization to keep the concerned goods in other national territory.*

By this way, public participation is in principle considered of national interest and the State must promote citizenship participation in all the activities linked with the heritage conservation process.

The group of activities in which private citizenship participation is considered does not include archaeological excavations or other scientific investigation activities. We consider that this disposal is right. Archaeology and scientific study of the Peruvian Cultural Heritage must be limited to scientific criteria. It means that it is a matter of specialization. However, scientific private organizations such as private universities can lead archaeological excavations with the mandatory authorization of the Peruvian National Institute of Culture.

Art. 4 of the Supreme Decree 011-2006-ED, Regulatory regime for the application of the Law 28296, states:

> *Identification, register, inventory, declaration, protection, restoration, researching, conservation, enhancement and diffusion of the cultural goods, so as its restitution when necessary because of the social interest and public necessity state, involve all the citizenships, public authorities and both public and private organizations.*

Art. 6 of the same text adds:

> *The State recognizes and promotes private participation in the management of the cultural heritage within the legal framework. Competent Organizations promote the creation of Associations and Committees for the Management and Surveillance of the cultural heritage, following specialization and geographical criteria. The goals of such a kind of private organizations must be the promotion of one or*

more of the following activities: register, declaration, protection, identification, inventory, inscription, researching, conservation, diffusion, enhancement, promotion, restitution when applicable, and accomplishment of the legal system in force.

Associations and Committees created will invite to their board of directors representative agents from the regional governments, local governments, researchers, both public and private universities, NGOs, businessmen organizations, and native and rural communities.

The relevant authority can subscribe the necessary cooperation agreements with the Associations or Surveillance Committees to executing, controlling, supervising and monitoring the activities linked with cultural goods.

It can be appreciated that the Legal text (Law 28296) quoted in the first part of this article, does not include some of the activities that Art. 6 of the regulatory text does.

We sustain that some activities such as *declaration* (which means the official recognition that a cultural good does belong to the Heritage of the Nation category), are not a competency of the private sector. It is the State through they specialized offices the only one responsible for the formal declaration.

However, legal disposals on public participation in Peru are limited to execution actions, not including the planning processes or definition of policy measures. Contrarily, public participation should be considered as a basic factor during the whole planning process.

The National Institute of Culture is the public institution responsible for the implementation of the general management system of the Peruvian cultural heritage. The current organic structure of INC includes the **Sub-Direction on Citizenship Participation** specifically created to deal with public participation issues.

The main tasks of the Sub-direction include:

a) To develop programs for public awareness in the local, regional and national levels focused on the values enhancement and positive behavioral change in favor of the heritage.

b) Promote and bring advise to civil associations and other organizations focused on the protection and conservation of the cultural heritage.
c) To promote the inclusion of heritage preservation measures as part of the official local, regional and national development planning and programming processes
d) Preparedness measures against risk affecting to the heritage in case of natural disasters, armed conflict or other kind of risking situations.
e) To develop capacity building programs on heritage issues addressed to the authorities, public functionaries and citizenship.

This institution proposes the next policy framework for public participation in heritage issues in Peru:

The importance of public participation for heritage conservation is due to the fact that in many places it is only the local citizen who really knows the interest and problems affecting heritage goods. Therefore, they can help to address public action to better results.

Budget limitations, insufficient number of specialists working in the area, etc., limit the real capacity of INC to control, defense and promote all the Peruvian heritage resources.

By this reason, it is declared the necessity to create a participative process sharing efforts among the State and the community. Local population must be involved in the conservation of the heritage.

Peruvian INC proposal includes the next kind of actions that should be undertaken by the community:

a) Public awareness. Citizenship should be aware of the communitarian value of the cultural heritage. It must be appreciated as a key element serving to the national, regional and local identity. Furthermore, it must be appreciated that to acknowledge the historic roots of our past can help us to construct new ways to reach development goals.
b) Reporting illegal acts or negligence situations affecting the cultural heritage is a way to put in force public powers.
c) Consulting and submitting information requirements linked to the local community heritage to INC, on specific actions, state of conservation, legal regimen, etc. linked with cultural heritage goods.

d) Active participation in activities such as communitarian heritage area cleaning campaigns, caring museums and other cultural public institutions, etc.
e) “Mayordomias”, it is a traditional popular organization system consisting rooted on the Andean *ayni* and *minka* as social collaborative organizational social institutions. INC It is mainly linked to traditional local festivities. However, INC reports on different cases linked to “mayordomias” which have worked for heritage protection. As a case example, INC refers to the “mayordomia” for the Restoration of the Churg of “Buenas Memorias de San Juan Bautista”, Sarhua district on the province of Victor Fajardo, Department of Ayacucho.

Colombia’s program “Vígías del patrimonio” was assumed as a model for the program “Defensores del patrimonio cultural” (Heritage defenders groups) in Peru. Based on voluntary groups, some heritage defenders groups are currently working in Peru. As a case example, the “Lima Nord heritage defenders” is a social organization promoted by the Catholic *Sedes Sapienitae* University. In 2007 the group created a public awareness program working with 200 hundred school students. The program included workshops, conferences, archaeological site visits, and cleaning campaigns.

Public participation is a *sine qua non* for the Peruvian heritage protection. Unfortunately, looting and illegal traffic is in many cases executed by local people which strong economical necessities. However, in many areas archaeological programs are working with local population not only to improve public awareness but to generate business activities and development programs linked to heritage resources. It is the case of the Huacas del Sol y de la Luna archaeological project & El Brujo complex in Trujillo, the Royal Tombs of Sipan Museum and Sican project in Lambayeque.

Heritage is having in many cases the wider potentiality to promote poorest areas development. However, to generate development programs without involving citizenship is not sustainable. Cultural Heritage conservation is a key element for sustainable development programs.

LEGAL STRUCTURES FOR SOCIAL PARTICIPATION IN THE PRESERVATION OF THE CULTURAL HERITAGE OF CHILE

Amaya Irarrázaval Zegers

ICLAFI-CHILE

Cartagena de Indias, Colombia

November 23-26, 2009

CIVIC PARTICIPATION IN THE PROTECTION OF HERITAGE

1- State structures that convoke Civic Participation.
2 - Private Structures that convoke Civic Participation

3- Examples, cases

4- Deficiencies

5- Proposals by CCHC.

1. STATE STRUCTURES THAT CONVOKE CIVIC PARTICIPATION

1- POLITICAL CONSTITUTION OF THE NATION: refers to the rights of all Chilean people to participate in and to enjoy its property.

a) " It correspond to the State to foment…..the artistic creation and protection and increasing of cultural heritage of the nation"., and…...

b) "…the property ownership in its differents species, over all kind of material and inmaterial goods".

This means that the State is interested and defend the property owner right.

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

2- MINISTRY OF FINANCE The Chilean State spends 0.3% of the Nation´s budget in Culture.

3- MINISTRY OF EDUCATION : It has as its maximum Heritage Organization the CONSEJO DE MONUMENTOS NACIONALES (Council for National Monuments). This Council is a technical organism that cares for the Cultural Heritage, giving the status of National Monument, according to Law n°17,288. It is formed by 20 Council Members and 8 Advisers who are the representatives of various public and private institutions. It has been in operation since 1925, date in which the Statuary Decree Nº 651 was issued. It defined a structure similar to the current one, but more specified, both in authority as in the number of Advisers. Among its main functions it has the authority to declare national monuments in the categories of Historical Monuments, Typical Areas, Sanctuary of Nature, as well as to protect archeological goods, to control interventions in national monuments, to authorize the installation of public monuments, the archeological prospection and investigations and to evaluate the Environmental Impact of each project.

The Council of National Monuments has an Executive Secretariat and Advisory Commissions in regions, that manages the agreements of the entity, carries out the assignments demanded by it and facilitates the implementation of its functions.

On the Administrative field, it depends from DIBAM (Direction of Libraries , Archives and Museums). It financially depends directly from the Ministry of Education. Out of the 80 officials in existence now, only 3 or 4 have a contract with the Ministry, the rest of them are on retainer fees (which means that they have no access to health services, social insurance or compensation) and other work ad-honorem.

Civic Participation in the Council of National Monuments.

- If a person requests from the Council of National Monuments to make an evaluation of a piece of work (Art, Archeology, Building, etc.) to determine the heritage value it may have, the CMN, cannot refuse this request.

- The CMN consults the owner before making the decision to protect a privately owned work, before deciding on the final statement, but the decision is not mandatory, which means that the CMN avoids protecting the work, if the owner does not agree to it. This final statement or declaration is a sort of expropriation, which reveals that the mechanisms of heritage protection are unfair, or insufficient.

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

- For this final declaration, the Council demands that the person or persons involved should guarantee the said declaration with their signature. When there is a fair majority of opinions, the CMN declares the piece concerned as a National Heritage Monument.

- To design a project for a protected building and to propose a modification, the support of the users of the said building is also requested. There is a protocol of civic participation that demands that such projects and interventions be approved by the community.

4- **MINISTRY OF PUBLIC WORKS:** Its technical organism is the:

DIRECCIÓN DE ARQUITECTURA (Department of Architecture) **Area HERITAGE.** To promote and preserve the required public buildings in order to favor competitiveness and the improvement of life standards of the inhabitants, by means of actions carried out by the MOP or by mandate of other State institutions.

Among the Strategic Objectives that correspond to the protection of heritage, we find the incorporation of Art and the higher value given to Architectural and Urban Heritage in Public Buildings and the MOP infrastructure entrusted to or requested from the Architectural Department, with works of art and investment initiatives in Cultural Heritage.

The MOP issues public biddings for Heritage projects among private enterprises that would be the only private participants, but following the strict standards and guidelines established by this organism.

- | The MOP demands citizen participation along with the approval of intervention projects on public buildings.

5 - NATIONAL COUNCIL FOR CULTURE AND THE ARTS

This Council was created by Law 19, 891 in force in August 23, 2003. It is the organ of the State charged with implementing public policies for cultural development. Its mission is to promote a harmonic, pluralist and equitable cultural development among the inhabitants of the country, through the promotion and dissemination of national artistic creations, as well as the preservation, promotion and dissemination of the Chilean cultural heritage, by means of public initiatives that encourage the active participation of all citizens.

Among its objectives is that of promoting and implementing studies and research about the cultural and artistic activity in the country, as well as on its cultural heritage. These initiatives are intended to facilitate the access to cultural and artistic manifestations as well as the use of technologies concerning production, reproduction and dissemination of cultural objects.

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

Its executive organ is **FONDART**: (National Fund for Cultural and Art Development). Fondart is the **Contest tool** for the allocation of resources by the National Council for Culture and the Arts (CNCA) that finances projects for the promotion of research, creation, production and artistic dissemination of human capital, material and immaterial heritage, native cultures, local cultural development and cultural infrastructure, to contribute to the harmonic, plural and equitable development of our country, to guarantee freedom of creation and the cultural rights of citizens.

Unfortunately, the budget of CNCA is scarce, which means that it is almost exclusively addressed to manage the FONDART resources. There is a line of Fondart for the Heritage Protection and they cannot join forces, so there is a project to dismantle the Council of National Monuments.

The current idea is to create the Heritage Institute, an organism that could gather all the heritage entities, but it has been designed in such a deficient way that the current project is the subject of an intense debate since it does not solve the problems, but rather destroys what has been achieved in the country on this matter.

Formerly, the representatives of the heritage area, were professionals: today they are political SEREMIS (Ministerial Regional Secretaries).

The other means used by CNCA is the **COUNCIL OF CULTURAL DONATIONS,** an organism that uses the Law of Cultural Donations to protect only public or non-profit works. It does not protect private heritage.

Law of Cultural Donations (Art.8, Law Nº 18,985). This a legal mechanism that encourages private participation in the financing of artistic or cultural projects. This mechanism is established in Article 8 of Law Nº 18,985, of the Tax Reform, and was approved by Congress in June 1990. This legal body establishes for Chile a new way of financing culture, in which the State and the private sector participate under equal terms in the qualification and financing of projects that resort to this benefit. In this agreement, the State participates with 50% of financing, by means of a loan equivalent to half of the donation, which in practice means that the State renounces to collect that part of the taxes. Private enterprises or private individuals must provide, out of their own funds, the remaining 50% of the donation.

In March 2001, a legal amendment was introduced whereby new beneficiaries were introduced, such as community organisms, libraries and `private museums open to the public, provided they are managed by juridical persons with non-profit intention; non-profit Cultural Corporations and Foundations, universities, professional institutes recognized by the State and public libraries.

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

6 - MUNICIPALITIES.

Cities are divided in Districts, under the Municipalities whose members are democratically elected. Within their organisms there are Cultural Corporations which mostly act in the field of artistic creation and that often have access to the benefits of the Law of Cultural Donations.

7 - MINISTRY OF HOUSING

Among its operational mechanisms the Ministry of Housing has the **General Law on Urbanism and Construction** that rules in all the country. This General Law is divided into National and Local Levels, but there are no special rules for the Regions. The Law includes the **General Ordinance for Urbanism and Construction** which is the ruling of the law. The Ordinance contains the statutory provisions of the Law, regulates the administrative procedures, the urban planning process, land development, construction and technical standards for design and construction (Article Nº2, LGUC). But, only Nº. 458 of Article 60 mentions the protection of Heritage in only five lines.

6 - OTHER STATE ACTORS

National Corporation for Native Development (*Corporación Nacional de Desarrollo Indígena*): has local heritage bureaus.

National Forestry Corporation (*Corporación. Nacional Forestal*): refers to the Natural Heritage and has local heritage offices.

National Commission for the Environment (*Comisión Nacional del Medio Ambiente.* The National Environment Law Nr. 19,300 requires that all the projects involved in heritage areas must be evaluated by CONAMA, and the CMN must know them. In the last year more than seven-hundred projects were presented by the community and social organizations, foundations and universities, with initiatives to recover, mitigate, and protect the environment, or for environmental training.

II. PRIVATE STRUCTURES THAT CONVOKE CIVIC PARTICIPATION

Owing to the remarkable increase in the concern for the protection of heritage existing in Chile, during the last 40 years, and thanks to the Cultural Donations Law, many guild associations have been created throughout the country to protect their heritage, be it private heritage, of neighborhoods, typical zone, of the city, nature, movable or intangible goods. The associations created in Valparaiso should be highlighted precisely because the port has been declared Heritage of Mankind in 2003.

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

In Valparaiso, we can find more than ten associations that concern the heritage of the city.

The experience of one of the Members of the Regional National Monuments Council, *"El Libertador,"*. states that he has not met neighborhood groups that ever have opposed a declaration of National Monuments concerning any piece of work.

But others experiences, speak about the injustice of the law in front of owner right property, it is a kind of expropietion that reduce the value and freeze the action over the property.

PRIVATE ORGANIZATIONS, NON-PROFIT ORGANIZATIONS (NPO)

Cultural Foundations: are juridical persons, without corporate equity, of private right, non-profit organizations, composed of natural and juridical persons gathered for a cultural purpose.

Cultural Corporations: these are juridical persons, without corporate equity, of private right, non-profit organizations, composed by natural and juridical persons gathered by a cultural purpose.

Both of these associations have access to tax benefits under the Cultural Donations Law only if they act on public works or undertake non-profit actions.

Social Organizations: establish citizen participation networks seeking to protect neighborhoods, local equipments, infrastructure of neighborhoods and intangibles.

Universities: many universities have incorporated in their educational curriculum the appraisal and conservation of Cultural Heritage, both tangible and intangible. The participation of these universities is through studies and actions of professors and students in research projects and field work.

The following universities are noteworthy for their valuable contributions at urban, regional and private level:

Universidad Adolfo Ibáñez, Pontificia Universidad Católica de Chile, Universidad de Chile, Universidad Mayor, Universidad de Los Andes, Universidad Andrés Bello, Universidad Central, Universidad SEK, all of these in Santiago. Pontificia Universidad Católica de Valparaíso, Universidad de Valparaíso, Universidad del Bio-Bio (8th Region), Universidad de Los Lagos (10th Region), Universidad del Norte (1st Region), Universidad Católica de La Serena (4th Region).

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

III. Deficiencies

The following errors have been found:

- Citizen and private groups put the blame and responsibility on the Municipalities for the restoration, preservation, and fund-raising for the conservation of heritage. They tend not to assume any responsibility whatsoever. Although in general we are referring to public works which, in fact, are the responsibility of public entities.
- Additionally, there is a certain level of mistrust towards the Municipalities. People are delighted with the project, and expect – if possible - an immediate solution and action. They do not know how to wait. There is no motivation.
- But then a problem comes up: the Municipality itself is an entity that solves emergencies, more reactive than proactive, thus implying personnel with excessive work, with urgent priorities that come before the Heritage problem. Usually there is a lack of trained personnel ready to carry-out this type of project. Most of the officials are aware of the National Monument Law, but they are not able to distinguish what is historical and what is not.
- There is also a lack of concepts regarding the historical values that can be identified with the Distric. The public cannot make this distinction. They should have a minimum historical notion and they do not have it. That is, knowledge of how the District was formed and of their surroundings : a set of identities that form local identities, "oral narrations", etc. …. But they do not have that knowledge.
- Furthermore, there is no clear educational policy regarding the intangible heritage subject, as there is in the Natural Protected Areas.
- There are no incentives to protect the heritage that is in private hands. When an owner is informed that his work is declared national monument the economic value of the work, the possibility of intervention and preservation freezes, since there is no financial assistance mechanisms and the work cannot be used for any other purposes because the law prevents the "use for profit" in the case of a heritage work.

IV. Examples of Participation

However, an improvement in citizen participation in projects of heritage protection in small urban zones has been observed. Here the people attend workshops and talks on their heritage, how to preserve it, and how to identify possible damages. This was particularly noticeable in the "Seminar *Putaendo Workshop*" offered in April 2004, and in the 2004 Fondart Project "*Revaluation of the Typical Area of Lolol*". In both cases the people learned to become aware of the socio-cultural identity of their habitat. These projects ended with the preparation of a document between the community and the teachers under the title "Special Instructions for the Intervention of the Typical Zone of Lolol" ("*Instructivo Especial de Intervención para la zona Típica de Lolol")*

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

V. Proposals by the CCHC

CAMARA CHILENA DE LA CONSTRUCCION (CHILEAN CHAMBER OF CONSTRUCTION)

This organization has been closely linked with the creation of incentives to protect the private person who owns a heritage property, in order to promote its conservation and reuse. It has found that while the heritage property cannot be used "for profit" it will be extremely difficult in Chile for a private person to finance the conservation and restoration of his/her property. It has also participated in the discussion on the foundation of the Heritage Institute, giving a very clear opinion on the subject.

Executive Summary

"Last September 3rd, the Executive Power sent a bill to the Chamber of Deputies creating the Heritage Institute, which would absorb the Direction of Libraries, Archives and Museums (DIBAM), and the Council for National Monuments (CMN) which would depend from the Ministry of Education. The CCHC considers that this bill does not solve the fundamental problems of the conservation of heritage, such as the correct identification and the funding of their preservation. Moreover, the project does not approach the major deficiencies of the current Law on National Monuments such as the procedures to declare and disaffect the property, the participation of the community, the duplicity with other instruments, etc., all of which require an urgent attention to improve preservation of our heritage. **Therefore, it is considered inconvenient to legislate on this matter, since the current project needs to be revised and amended in depth in order to achieve an effective tool to rescue and preserve the heritage**. In its substitution the CChC proposes the generation of a new regulatory framework for the conservation of the heritage based on the following principles:

- The State is responsible for providing the resources for the conservation of the heritage, considering the social benefit that such heritage generates.

- The owners of a heritage property should be given incentives and compensations due to the economic damage that this declaration implies for them". The Chilean Chamber for Construction made a major contribution in this sense, with a study submitted to the Ministry of Education in 2007.

Tel/ Fax: (56-2) 2085319 . Celular (56) 9 9783111 . E- mail: amayaiz@vtr.net

Francisco de Aguirre 4155, depto 23, Vitacura, Santiago - Chile

CITIZEN INVOLVEMENT : LEGAL STRUCTURES FOR PUBLIC PARTICIPATION IN HERITAGE CONSERVATION.
BELGIUM/THE FLEMISH REGION

Prof.dr. Anne Mie Draye
Ph D in Law

Preliminary remark

This text will mainly deal with the situation in the Flemish Region. Belgium is indeed a federalized country, in which the competence for heritage preservation belongs to the regions, and due to a special agreement, to the German Community. Where relevant, specific references to, or comparisons with the other regions/community will be made.

Citizen involvement and international conventions

Like many other countries, Belgium ratified some important conventions on heritage protection.
Especially the conventions drawn up within the Council of Europe, stress the importance of citizen involvement[1] . Article 14 of the Convention for the Protection of the Architectural Heritage deals with public participation in protection, management and promotion of architectural heritage. According to this article, member states engage themselves "to establish in the various stages of the decision-making process, appropriate machinery for the supply of information , consultation and co-operation between the state, the regional and local authorities, cultural institutions and *associations,* and *the public*".
Article 15 stresses the importance of information and training: each party to the convention undertakes to develop public awareness of the value of conserving the architectural heritage, as from school-age.
In the European Convention on the Protection of the Archaeological Heritage[2] and in the European Landscape Convention[3] similar texts can be found.

Those texts inspired the various parliaments and governments in our country to work out a basic legal framework for public participation in the protection procedures. Moreover, especially in the Flemish Region, support for heritage associations is quite well developed.

Citizen involvement during the protection procedure

In none of the heritage decrees into force in the Belgian Regions or the German Community, a specific article dealing with public involvement was inscribed.
Within the Flemish Region, the protection of immovable heritage is organized by several decrees:
- the decree of March 3, 1976 on the protection of monuments and urban or rural sites, as amended;
- the decree of June 30, 1993 on the protection of archaeological heritage, as amended;

[1] The texts of these conventions and of the explanatory repaorts can be found on www.conventions.coe.int
[2] See article 9,Ppromotion of public awareness
[3] See article 6, Specific measures.

- the decree of April 16, 1996 on the protection of landscapes as amended.
About three years ago, the competent minister presented a proposal for a one and single decree on the protection of all categories of immovable heritage; this proposal however, was never approved[4].

The protection procedure is quite similar in all above mentioned decrees, certainly as far as citizen involvement is concerned.
Even if this is not explicitly written down in the text of the decrees, every citizen, every heritage association can address a demand to the competent minister or his administration to start the protection procedure for a specific building, an urban or rural site, an archaeological site or a landscape. This happens quite often: even if the competent administration disposes of inventories of valuable goods and uses them as a starting point for protection, many citizens and heritage associations seek for protection of valuable immovable goods located on the territory of their local community, even if they are not inscribed in the inventory. There is indeed no legal rule obliging the inscription of a good in an inventory before the protection procedure starts.

The protection procedures consist of two phases: the protection proposal and the definitive protection.
The protection proposal is communicated to many persons and institutions involved: owners, usufructuaries ..., local and provincial communities, urban development services are notified.
A public inquiry that lasts 30 days has to be organized by the local authorities. During this inquiry remarks, objections can be made by any interested person, association[5]. Remarks can be in favour or against protection: this part of the procedure offers strong possibilities for heritage associations to express their approval with planned protections.

In the ordinance governing heritage protection in the Region of Brussels Capital, the right of initiative for citizens to ask for protection of a valuable immovable good, is explicitly inscribed but in the same time subject to certain limits.
The right to initiate safeguarding or protection procedures, is in the first place given to the government, eventually after a proposal made by the Royal Commission on Monuments and Sites. Protection can also be asked for by local authorities, owners and non governmental organisations. For those organisations: several conditions were inscribed in the text of the ordinance: they must gather at least 150 signatures in favour of protection, given by habitants of the Region and at least 18 years old. Moreover, the association must aim at heritage protection and exist already for minimum threes years.

The decree into force in the Walloon Region contains the following possibilities: inhabitants of a local community can ask for protection of a valuable good located on the own territory. For local communities with no more than 5000 inhabitants, 300 signatures are needed, for larger communities with no more than 30.000 inhabitants, 600 signatures are needed, 1000 signatures in favour of protection must be gathered for communities with more than 30.000 inhabitants.
In both Regions, a public enquiry is part of the protection procedure.

Citizen involvement by supporting associations

In this part of the text, the aim and function of four major heritage associations ("umbrella" organisations), active in the Flemish Region, is described. All those associations are largely

[4] In the Walloon Region a unique decree was already adopted in 1991, in the Region of Brussels Capital such a decree was voted in 1993.
[5] Owners address their remarks or objections directly to the competent administration.

supported by public authorities. Financial support mostly consists of subsidies, but also in the organisation of a system of tax relief for gifts.
All together, the creation of this associations and the way in which they fulfilled their tasks, changed the involvement of the citizen in heritage preservation in a considerable way.

1. Forum for (non governmental) Heritage Associations

Already since the 19th century, local associations aiming at monument and landscape protection within their own community, play an important role in Belgian society. Several specialized associations, so for instance involved in protection of windmills, archaeological sites… work for many years all over the regions.

Forum voor Erfgoedverenigingen (Forum for - non governmental- Heritage Associations) was founded in 1993 and supports a network of 265 heritage associations in Flanders and Brussels, aiming at preservation of monuments, landscapes, archaeology and also mobile heritage.
Granting all kinds of services and forming a negotiator between the heritage associations and the different government institutions are two of the central issues of this forum.
The association tries to support actively all its members.
Exchange of information is one of the main goals: seminars are being organised, newsletters and quarterly magazines are sent to all members. Advice is given about technical aspects but also about the legal rules on voluntary work, tax matters; questions on very diverse matters can be submitted to the organisation.
Practical support is also based on training activities and exchange of experiences.
The community service which the forum provides is in general free for all heritage associations, some of the services are reserved to members.
The Forum has two types of members: effective members working all over Flanders/Brussels and member-users who work on a local or regional level. As far as possible, the association gives a custom made community service: advice will be provided preferably after an on-site visit.
This association addresses quite often the competent minister and his administration with problems and questions common to all associations as has a far stronger impact on heritage policy than an individual association would have.

2. Heritage Flanders

Some monuments are threatened by lack of proper management and/of insufficient maintenance. Erfgoed Vlaanderen (Heritage Flanders) was created in 1994 in order to preserve and protect such monuments, presenting an important value for society. At the moment, this non governmental organisation manages 13 protected monuments, of various kinds: castles, an abbey, a fortification, a few small chapels. Some monuments are owned by the association, for some others a long lease was granted. In many cases the monuments got new, appropriated destinations; all of them are accessible to the public.
Preservation and protection of monuments is a first aim of the association, create public awareness about their value is a second one. Besides an important subsidy from the regional authorities, membership fees form an important revenue for this association. For a yearly contribution of 25 euro, every citizen can become a member and enjoy several advantages: a quarterly magazine, free entrance to all monuments managed by the association, guided visits and walks, reduction in heritage shops…

In a certain regard this association was inspired by and can be compared to the national trusts like they exist for instance in Great Britain and Scotland.

3. Open Heritage Days

Open Monumentendag (Open Heritage Days) is a joint action of the Council of Europe and the European Commission involving all 49 signatory states of the European Cultural Convention under the motto, *Europe: a common heritage*. The annual programme offers free access to properties that are usually closed or normally charge for admission. It aims to widen access and foster care for architectural and environmental heritage.
In Flanders a non profit organization bearing the same name, is coordinating all activities taking place every year during the second weekend of September. Belgium (its regions) is participating in this very popular initiative since 1991. Local authorities get an important place in open heritages days.
This initiative and the association are largely supported by the regional authorities, but also by the provinces and by the several private and public sponsors.
The theme of Open Heritage Days 2009 was "Care", about half a million people visited one or more monuments in the Flemish region.

4. Monument Watch

Monumentenwacht [6] (Monument Watch) was set up in 1991 as a joint initiative of the King Baudouin Foundation, the Foundation for the Conservation of Monuments and Landscapes and the Flemish Association of Provinces. This non profit organization starts from the basic idea already inscribed in the Venice Charter: the significance of built heritage can only be sustained if the physical assets are maintained appropriately and systematically. The motto of Monument Watch is: "prevention is better than cure".
Monument Watch operates simultaneously on two levels: through immediate action on specific buildings (the short term) it tries to operate a gradual change in mentality (medium or long term) with regard to the conservation of the built cultural heritage.
The association raises the awareness of many owners, both of listed and not listed buildings. The idea 'from knowledge comes care' is successfully implemented by inspections on the one hand, workshops, seminars and publications on the other hand .
The basic assumption is that, with the exception of calamities (such as fire, earthquakes, war, ...) buildings decay in a gradual process and very often major damage is the result of minor damage that hasn't been taken care of in due time. Regular attention and maintenance can slow down the process of decay. Monument Watch sets out from the idea that within certain limits, financial or other, most owners are rather willing to take care of their buildings. To them the association offers its services as an independent advisory body.
Monument Watch not only offers architectural inspections but it also has interior specialist. The condition survey results in a complete status report of the building, together with indications concerning the needs of works to be carried out in the immediate future or to be planned on medium term ... Thus the owner or administrator, informed in due time, can turn to the architect, building contractor and/ or (art)restorer of his own choice.
Monument Watch attended a voluntary membership of approximately 4 400 buildings. Every year around 300 new buildings are subscribing. Since the start of the operation, 41 specialised

[6] This part of the text is largely based on: VERPOEST.L.STULENS.A., Monumentenwacht, a monitoring and maintenance system for the cultural (built) heritage in the Flemish Region (Belgium), Antwerp, 2009, 6 p.

monument watchers have carried out almost 10 000 architectural inspections and 1 000 interior inspections.

As far as finances are concerned, Monument Watch generates approximately 9 % of the income through subscription and inspection fees.
Since Monument Watch renders services to the individual owner or administrator, it is generally accepted that he should pay for them; However, it has been decided from the start that the prices charged should remain below the real cost: an annual subscription fee of 40 euro per object plus inspection fees of 24,32 euro (incl. VAT) per person per hour actually spent on the building.
The remaining funds are raised through subsidies from both the provincial (68%) and Flemish authorities (21%). The reasoning behind this is basically twofold. On the one hand, chances are that at full cost virtually no one will call upon the services of Monument Watch.
On the other hand the authorities have taken into account the long term effect of this short time investment. Through good maintenance a wider spacing in time of the consecutive major restoration campaigns may be expected.

CARTAGENA´S PUBLIC IMPROVEMENT PARTNERSHIP (SOCIEDAD DE MEJORAS PÚBLICAS DE CARTAGENA-S.M.P.C): A CIVIC PARTNERSHIP TO PRESERVE CARTAGENA'S CULTURAL HERITAGE

BRIEF REVIEW

The Sociedad de Mejoras Públicas de Cartagena de Indias (S.M.P.C.) founded in 1923 is a prívate, non-profit organization with civic and cultural purposes. Its main objective is to promote Cartagena's development, as well as that of its public spaces and urban infrastructure, namely parks, plazas, old buildings, walkways and streets, constituting it´s historical heritage. For this reason it has been actively preserving, maintaining and administering these Historical Landmarks. With similar enthusiasm promotes it´s Cultural Heritage. All this activism follows a clear mandate by laws and decrees that constitute it´s legal framework. This Society pioneered in Colombia, civic and private partnership in conjunction with Public Government, favoring public interests and historical heritage.

According to Law#32 of 1924, National Government delegated to the S.M.P.C. the custody, administration and restoration of the Castle of San Felipe de Barajas. By that time the castle was in ruins, subject to stone and material extraction by construction workers. The S.M.P.C. started its reconstruction and restoration, bringing the castle to its actual monumental stature. Within its structure, in San Lazaro´s Battery they built the Cultural Center, home to the Audiovisual Center (CAVI) with a Theater, a Conference Hall and the S.M.P.C. offices.

In accordance with this mandate, our National Government also put in S.M.P.C. hands the City Wall, an 11 kilometers structure with all its Bastions and defense infrastructure surrounding the Old Town.

Many had been the S.M.P.C. achievements in this endeavor, like relocating shanty towns by the names of Pekin, Pueblo Nuevo and Boquetillo, as well as the cattle dock at the Fort of San Sebastian de Boquetillo. With the freed territory the S.M.P.C. built the Santander Avenue and the Camellón de los Mártires. Due to its successful accomplishments, the government decided to hand over to it the Forts of San Fernando and San José de Bocachica.

In 1998, after an excellent restoration of the Battery of Angel de San Rafael, the government again put the S.M.P.C. in charge of its administration and preservation. This monument earned the first prize in the National Architectural Contest in 1998, in the category of Restoration.

During its 86 years of existence the S.M.P.C. has rescued from oblivion a bounty of Historical Landmarks, as well as its surrounding open spaces, and has also developed an intense social work with its neighbors . This endeavor has been especially important in the town of Bocachica, helping people understand that their own development is linked to the preservation of the monuments in their neighborhood.

We think that the biggest achievement has been creating awareness of the need to protect the Historical Legacy of the city as a mean to exert Commons Rights.

The S.M.P.C. originally received the above mentioned monuments from the National Buildings Trust in 1991 by means of Resolution #10495/91 and the Contract #005 of 1992, where the S.M.P.C. was empowered to dedicate all income from their use, to administer, maintain and restore them.

The monuments referred in these mandates where: The Castle of San Felipe de Barajas, the City Wall with all its constructions, the Garrison of the Crypts, the San Fernando and San José Forts and the Battery of El Angel de San Rafael in Bocachica.

The paper “Sociedad de Mejoras Publicas de Cartagena Fundada en 1923: Actividades de Conservation en el Cordon Amurallado Ultimo Diez Anos” is in separate files due to its size

Public Participation in Heritage Planning at the National Level in the United States

John M. Fowler
Executive Director, Advisory Council on Historic Preservation
Washington, DC

November 22, 2009

Introduction. While U.S. historic preservation law has significant limitations when measured against the systems of other developed nations, the core protective process in federal law stands as a shining example for engaging citizens in government decisions affecting historic properties. Found in Section 106 of the National Historic Preservation Act[1], the process requires federal agencies to obtain the input of stakeholders and the public at large and disclose relevant information on the impacts on historic properties during project planning. This specialized process operates within the broader framework of national environmental legislation, but applies a focused lens on heritage issues.

The Legal Underpinnings. Enacted in 1966, the National Historic Preservation Act[2] provides the foundation for federal preservation law. It set up the fundamental elements of the national historic program that exists in the U.S. today:

- The National Register of Historic Places provides a comprehensive listing of properties significant in history, architecture, archaeology, culture, and engineering at the national, state, and local level;
- A federal funding process supports the participation of State, tribal, and local governments in the national program;
- An administrative structure with federal leadership from the National Park Service (NPS) and the Advisory Council on Historic Preservation (ACHP) partners with State and Tribal Historic Preservation Officers (SHPO/THPO) and Certified Local Governments (CLG) to provide the professional expertise to carry out the national program and
- A protective process requires federal agencies to take into account the effects of their actions on properties listed in or eligible for the National Register and "afford the ACHP a reasonable opportunity to comment," popularly know as the Section 106 process.

Since 1966, the U.S. program has evolved and expanded, but these basic components have remained essentially unchanged. The National Register has grown to over 80,000 listings, embracing over 1.4 million individual properties across the nation, although it is thought to be only about 25% complete. Federal funds in the range of $75 million annually support SHPOs, THPOs, and CLGs as well as providing "bricks and mortar" grants for the preservation of historic properties. All 50 states and seven territories have functioning state historic preservation programs and 87 of the 580 federally-recognized

[1] 16 U.S.C. §470f
[2] 16 U.S.C. §470

Indian tribes have THPOs. There are 1717 CLGs nationwide. Lastly, the Section 106 process, the focus of this paper, brings over 100,000 proposed federal actions within its purview annually.

The fundamentals of Section 106. The Section 106 process operates within the unique constitutional and political constraints of U.S. law and political tradition. These assign the legal authority to regulate the actions of private property owners affecting their property to state governments, which in turn delegate the authority to local governments. In practice, because the vast majority of historic properties in the U.S. are in private ownership, this means that direct regulation of demolition or alteration of historic properties is exercised by local government. It leaves the national government in the anomalous position of having virtually no legal authority to bar private threats to even the most significant historic properties that are outside of federal ownership. Only through the exercise of the power of eminent domain can the federal government unilaterally act to protect such properties, placing the property into federal ownership.

Federal law for the most part limits its legal protections for preservation to regulating the actions of the federal government. Accordingly, the Section 106 process applies only in those cases where there is some federal involvement in the action that may affect a historic property. However, the threshold of federal involvement is quite low. Any project or action that is carried out directly by a federal agency, is funded by a federal agency, or requires a federal permit or license falls within the purview of Section 106. As a result, federal office building construction, a federally-funded highway project, energy development on federal lands, or a privately-funded housing development needing a federal permit to fill a wetland each require the responsible federal agency to follow the Section 106 process.

When Section 106 is applicable, it is important to note that in the end it is an advisory process. An agency must follow the steps of the review process, but in the end the federal agency determines what actions will be taken to address historic property impacts.[3] No preservation authority-an SHPO or THPO, the ACHP, or the NPS-can dictate an outcome to the sponsoring agency. It is the province of the agency decision maker to conclude that other public values or needs outweigh heritage and move forward in a manner that may result in the impairment or even loss of a protected historic property.

Despite these fundamental limitations, the Section 106 process has functioned for over 40 years to fashion positive preservation solutions to thousands of federally-sponsored projects across the nation. Its success can be attributed to the well-developed

[3] Injunctive relief is available in federal courts against an federal agency that fails to complete the procedural steps of the Section 106 process, but the courts have no power to review the final decision of the agency if the process leading up to it has followed the prescribed procedural steps.

administrative procedure that is premised on the active involvement of stakeholders and the general public in federal project planning.[4]

Section 106 in operation. The steps of Section 106 review are simple and straightforward, embodying a universal logic for conflict resolution:

- The responsible federal agency determines the area likely to be affected by the proposed action-the "area of potential effect."
- After evaluating available information, the agency makes a "reasonable and good faith effort" to identify properties listed on or eligible for the National Register within the area of potential effects.
- The agency then evaluates the potential affects of the proposed action on identified historic properties, using criteria established by the ACHP that embrace a full range of impacts from demolition to visual and audible effects.
- For those properties that are found to be adversely affected, the agency engages in a consultation process with stakeholders to evaluate alternatives or project modifications that can "avoid, minimize, or mitigate" adverse effects.
- If agreement is reached on avoidance or mitigation measures, the agency executes a memorandum of agreement (MOA) with consulting parties, which sets forth steps the agency will take to address historic preservation issues.
- In those rare instances where an MOA is not executed, the ACHP issues advisory comments to the head of the federal agency, who must consider the comments and personally make the final decision on the project.

Central to the effectiveness of the Section 106 process is the requirement that federal agency project sponsors consult directly with state, tribal, and local government officials and engage the public in the various steps of the process. It is through this mandatory interaction that public officials ascertain the concerns of citizens for their heritage resources and explore jointly solutions that permit the federal project to move forward in a manner that is most compatible with the historic values at stake.

There are essentially two levels of engagement with external parties that inform federal agencies as to the views of the citizenry on a specific Section 106 case. The regulations specify that the responsible agency official at the commencement of the process identify those parties that may have an interest in the effects of the proposed project on historic properties[5]. A first step is identifying and engaging those official preservation bodies that have a legal role to play in the process. This usually includes the SHPO of the state (or states) where the project will be located. It may also include a THPO if the lands or interests of an Indian tribe are affected. Where there is no officially recognized THPO, a representative of tribal government may participate. Next, the agency is obliged to identify local governments that may be affected.

---

[4] The ACHP has issued regulations that guide the Section 106 process, found at 36 C.F.R. Part 800 (2009).

[5] See generally 36 C.F.R. §800.1(c).

The regular interaction among the agency and these public authorities, including the SHPO, the THPO, and frequently the ACHP, brings not only the professional perspective of these officials into the process but also their knowledge of the interests of their constituencies. The regulations note that the SHPO "reflects the interests of the State and its citizens in the preservation of their cultural heritage and helps the Agency Official identify those persons interested in an undertaking and its effects upon historic properties."[6] Likewise, the THPO or participating Indian tribe and local government representatives bring to the table voices for their constituent populations. This carries through the entire Section 106 process.

Equally important to giving citizens a voice in the planning process are the specific directives for the federal agency to reach out to and engage the public. In unequivocal terms, the Section 106 regulations state:

> The Council values the views of the public on historic preservation questions and encourages maximum public participation in the section 106 process. The Agency Official, in the manner described below, and the State Historic Preservation Officer should seek and consider the views of the public when taking steps to identify historic properties, evaluate effects, and develop alternatives.[7]

They go on to specify that agencies may use their established public involvement procedures, especially those developed to engage the public in broader environmental reviews of proposed federal actions required under the National Environmental Policy Act,[8] but require that historic preservation issues be clearly called out to ensure that they are not lost in the broader panoply of environmental issues.[9] The ACHP summed up the goal of effective outreach to and inclusion of the public in the following sentence: "Members of the public with interests in an undertaking and its effects on historic properties should be given reasonable opportunity to have an active role in the section 106 process."[10]

Engaging the public step by step. Beyond the general exhortations of the preceding regulatory provisions, the Section 106 regulations specify a role for the public and their representatives. In the initial stage of identifying potentially affected historic properties, the federal agency must:

> Request the views of the State Historic Preservation Officer on further actions to identify historic properties that may be affected; and… Seek information in accordance with agency planning processes from local governments, Indian

---

[6] 36 C.F.R. §800.1(c)(1)(ii).
[7] 36 C.F.R. §800.1(c)(2)(iv).
[8] 42 U.S.C. §4231 et seq.
[9] 36 C.F.R. §800.1(c)(2)(iv).
[10] Id.

> tribes, public and private organizations, and other parties likely to have knowledge of or concerns with historic properties in the area.[11]

This directive ensures that the agency will not rely exclusively upon existing documentary sources or the views of preservation professionals, but will seek out information from concerned citizens who may offer oral histories, traditional knowledge, or local lore as a guide to the further identification of historic properties. It must be stressed that few places in the U.S. have complete and up to date historic resource inventories and, as noted previously, the National Register listings are viewed as far from complete. This element of seeking input from the local populace, which often brings to light useful information from amateur historians, historical societies, traditional and ethnic groups, and other non-professional sources, frequently augments the historical record compiled through the work of professionals engaged by the agency. As importantly, the process early on flags those heritage resources that members of the community hold particularly dear, alerting the agency to potential conflicts when there is still enough flexibility in the planning process to work around them.

When the agency has gathered the requisite information about the historic significance of potentially affected properties, it is obligated to consult with the SHPO and, if appropriate, the THPO or Indian tribe, to determine whether those properties not yet listed on the National Register meet the criteria for listing.[12] The result is the final definition of the universe of historic properties that, by being determined eligible for the National Register, become the subject of the Section 106 review process.[13] If no historic properties are found, the agency must make the documentation of that finding available to the public.[14]

The next step in the process continues to engage the public and its official representatives. The agency, in consultation with the SHPO (and THPO or Indian tribe depending on the circumstances), applies the regulatory criteria to evaluate the effects of the proposed project on the identified historic properties, "giving consideration to the views, if any, of interested persons."[15] "Interested persons" are defined as "those organizations and individuals that are concerned with the effects of an undertaking on historic properties."[16] In practice, this includes those individual members of the public and public organizations, such as a local historic preservation group or a community organization, that have come forward and identified themselves as having a particular interest in the historic preservation issues associated with the proposed project. In doing so, they can assume a more active role in the Section 106 process.

---

[11] 36 C.F.R. §800.4(a)(1)
[12] See 36 C.F.R. §800.4(c).
[13] The regulations specify a detailed review process when the agency and the SHPO/THPO fail to agree on a property's eligibility, with ultimate resolution by the NPS. See 36 C.F.R. §800.4(c)(2)-(5).
[14] 36 C.F.R. §800.4(d).
[15] 36 C.F.R. §800.5(a).
[16] 36 C.F.R. §800.2(h).

The assessment of effects can result in findings that there are no effects to historic properties or that the effects are not adverse. In such cases, the agency is still obligated to notify the SHPO and interested persons and to make the documentation supporting the findings available for public inspection.[17] If the outcome is that there are adverse effects found on historic properties, then the next and most crucial phase of public participation commences.

The heart of the Section 106 process is the interaction among the agency, the SHPO, THPO, affected Indian tribes, and those interested persons who have obtained formal status as "consulting parties" to explore and evaluate project alternatives that can reduce harm to historic properties. Consulting party status comes about by request of an interested person or member of the public to the agency. The regulations convey consulting party status to certain classes of interested persons as a matter of right: the head of a local government within whose jurisdiction the project is located; Indian tribes that have an interest in affected traditional cultural properties; applicants for federal grants or licenses; and owners of affected lands. Other parties can seek consulting party status, but it requires the concurrence of the agency and the SHPO (and the ACHP, if participating).[18] This provision allows members of the public with a legitimate interest in the historic preservation aspects of the project to gain a seat at the table in the crucial negotiations that will determine the ultimate impact of the project on the affected historic properties.

The negotiations are based on documentation that is made available to all consulting parties and the public. The actual form of interaction is largely determined by the complexity of the project, the level of public interest and public controversy, the nature and degree of impacts to historic properties, and the overall planning schedule for the project. Simple adverse effects that attract the concern of only a few parties, such as the potential destruction of a few marginal archaeological sites or rural vernacular buildings, may involve only the SHPO, the agency, and one or two other consulting parties, Agreement on mitigation may be reached in one or two meetings.

By comparison, highly complex and controversial projects, such as the proposed construction of a major Interstate highway in an area of Los Angeles densely populated with historic districts and individual historic structures or a federal courthouse in New York City that unearths a pre-Revolutionary War African burial ground, may drag on for years, with numerous consulting party meetings. An important aspect of these more complex cases (including many that fall between the extremes) is the regulatory requirement that the general public be given meaningful access to the process:

> The Agency Official shall provide an adequate opportunity for members of the public to receive information and express their views. The Agency Official is encouraged to use existing agency public involvement procedures to provide this

[17] 36 C.F.R. §800.5(b) and (d). An informal appeal process to the ACHP is provided, but the agency's final decision as to effects is determinative.
[18] 36 C.F.R. §800.5(e).

> opportunity. The Agency Official, State Historic Preservation Officer, or the Council may meet with interested members of the public or conduct a public information meeting for this purpose.[19]

While not rising to the level of formal administrative hearings, this provision often leads to one or more public meetings that not only allow the agency to present its views on the project but also enable other preservation interests, such as the SHPO, the THPO, and the ACHP, to air their positions in a public forum. More importantly, the venues provide the opportunity for members of the public, without the status of a formal consulting party, to learn about the project, its impacts on historic properties, and alternatives to deal with those impacts, state their opinions on the issues, and question the project sponsors and the consulting parties. This "town meeting" format offers a flexible and often freewheeling forum for interaction between government and the people it serves.

The consultation process, whether abbreviated or protracted, is designed to produce an agree-upon outcome, embodied in the MOA. The process of its creation is again proportionate to the public interest in the preservation issues, but inevitably allows a range of consulting parties a seat at the table in drafting what will determine the final treatment of historic properties as the project proceeds. While the MOA is formally concluded among the agency, the SHPO, and the ACHP, if it is participating in the particular case, other consulting parties are regularly invited to concur in the MOA, indicating their satisfaction with the MOA's terms. This is the culmination of their consultative role, one that gives them access to the decision making process, but does not allow them to impose their will on the agency that is responsible for conducting the project.

In rare instances, participants in the Section 106 process fail to reach agreement and consultation is terminated. In that event, the members of the ACHP, who are presidential appointees for the most part, usually conduct an onsite public meeting, taking testimony from those who have been participating in the process as well as members of the general public and using that input to fashion formal comments to the head of the federal agency that is sponsoring the project.[20] The agency head is then obligated to consider those comments in reaching a final decision.[21]

A closing assessment. Despite its apparent lack of "teeth," the Section 106 process has proved itself to be a remarkably effective tool for preservation in the U.S., largely because of its reliance on the involvement of stakeholders and the public to influence government decisionmaking. In innumerable cases, initial plans calling for the destruction or impairment of heritage resources have been debated in the public forum provided by the Section 106 process and alterations to plans made that minimize the harm or, in many cases, turn the project into one that actually benefits preservation while allowing the original goals of the project to be met.

---

[19] 36 C.F.R. §800.5(e)(3).
[20] 36 C.F.R. §800.6(b).
[21] 36 C.F.R. §800.6(e).

Preservation under Section 106 occurs through persuasion, not coercion. New ideas are brought to the negotiating table from stakeholders and the public at large, often sowing the seeds of a successful resolution of the initial conflict between development and preservation. Government decision makers, while driven by agency mission goals, are not hostile to historic preservation. Most often, they just need to be educated as to how they can meet their program needs in a manner that is not inimical to historic preservation values. The public involvement process of Section 106 brings informed community views on the importance of preserving heritage and quite often innovative solutions that strike a workable balance between preservation and progress. Public participation as embodied in the Section 106 process can serve as a model for government planning procedures.

Public participation in heritage management in the Netherlands

by Leonard de Wit

I hope the organisers will forgive me for my broad interpretation of the subject of this meeting. I do not intend to focus exclusively on statutory instruments for public participation, as this would not fully reflect the current debate in the Netherlands.

Participation by the public and by interest groups in management of the cultural heritage is a great thing. This has been acknowledged time and again at international level. It is, for example, one of the criteria for granting world heritage status. The four Council of Europe cultural heritage conventions (on the architectural, archaeological and landscape heritage) also mention it. The most recent of these (the Faro Convention) is regarded as an umbrella convention, and is largely about this subject. Our task is clear: involve the people, create support!

Statutory instruments

The Netherlands has a fairly good statutory basis for stakeholders representing cultural heritage interests. It comprises both the statutory framework based on the Monuments and Historic Buildings Act, and the rules laid down under the Spatial Planning Act.

Stakeholders may apply to the Minister of Education, Culture and Science or the local authority for a historic feature to be designated a national scheduled monument or municipal monument. They get an opportunity to have their say in the designation procedure, and if they disagree with the final decision, they can appeal to an administrative court. Interest groups have made full use of these options in the past, though they have made less use of the opportunities available under spatial planning law.

When local authorities draw up zoning plans stakeholders have an opportunity to put forward their views. They can also go to court if they are not happy with the final result. The same applies to the granting of demolition permits and building permits, applications for which are assessed in the framework of the zoning plan.

At first glance, therefore, the Netherlands seems to have all the necessary arrangements in place.

Brief outline of developments

Like many other countries in Europe, in the period immediately after the Second World War the Netherlands concentrated on reconstruction. The country had to come to terms with what had happened in the war, the shortage of housing had to be dealt with, and the country was keen to look to the future and to modernise. To shake off the burden of the past. This caused the loss of many old buildings, sometimes entire historic centres. Old buildings were demolished on a huge scale. Every day, container-loads of historical material were removed from Dutch towns and villages. Canals were filled in, and the traditional cultural landscape was transformed into one designed to maximise food production.

We can look back now and think what a shame this all was, but there is little point. And indeed the legacy of the reconstruction period has now also become part of our cultural heritage.

The statutory framework I outlined just now was created in the 1960s, and has played a key role in the turnaround that has occurred since. Local and national groups have been formed with the aim of curbing the irresistible urge to modernise. They have made full use of the statutory instruments available to them, and their activism has turned the tide.

Times have now changed. The government, and also property developers, have come to realise more and more that the cultural heritage must not be seen as an obstacle to new developments, but as a key factor in the further development of the country. Research has shown that property prices are higher in attractive historic settings. This attracts business. History and the heritage are hot!

Ten years ago, the government introduced a highly successful programme (known as the Belvedere programme) to bring together the world of heritage management and the world of planning and property development. Preservation and development are not mutually exclusive, after all. Static preservation of the cultural heritage is inherently impossible. There will always be some degree of degradation, changes in the environment, and changes in function. All post offices in the Netherlands are currently in the process of losing their existing function. Hundreds of beautiful historic buildings face transformation. This is inevitable. We might be able to preserve one as a museum, but careful redevelopment is the only option for the rest. There is no point in heritage campaigners resisting such developments.

Development does not preclude preservation of the heritage. In many cases, the most fabulous solutions inspired by the history of a site or feature, and what it means to people. The motto of the Belvedere programme is therefore: preservation by development.

These kinds of mechanisms can go too far, however. At the moment, new developments that appear old are springing up all over the place. New castles, country estates, canalside houses – even an entirely new historic village of holiday homes. Heritage might be getting a little too hot.

Current debate

On 28 September the Dutch Minister of Education, Culture and Science submitted to parliament a policy letter on a new form of heritage management for the Netherlands, involving a key role for the public. An interesting debate is currently underway about what precise form this public participation should take. I should now like to turn to a number of aspects of this debate.

The power of statutory instruments

As paradoxical as it might sound, we have now reached a situation where giving interest groups access to powerful statutory instruments sometimes presents obstacles to meaningful participation. The government and interest groups become opponents, and this can hamper cooperation. The possibility of applying for scheduled monument status is a particularly powerful instrument, with considerable drawbacks. In practice, it is used too often by people opposing a particular development in their backyard, and by interest groups that are sometimes very dogmatic. As a result, the heritage is being stigmatised again as an obstacle, a burden.

It is therefore proposed that this option be abolished. It may have proved its worth in the past, but it is now time for a change. Stakeholders should be involved in the planning process at a much earlier stage. Not under the Monuments and Historic Buildings Act, but in a spatial planning context.

The main advantage of this is that it will give cultural heritage interests a role early in the process, allowing difficult choices to be made at the outset. It is not good for society for legal disputes to continue into the implementation phase.

Example

In Kerkrade, near Maastricht, the local council has come up with a plan to redevelop an area and build a new care centre for the elderly. A beautiful church from the reconstruction period, built in 1953, stands in the middle of the site. The decline in church attendance has meant that it is no longer used for its original purpose. The council explored whether the church could be incorporated into the new plan, but decided against. The costs would have put the entire project at risk, and the cultural heritage value of the church was not felt to be very great. In September 2009, after demolition work had begun, an interest group applied for the church to be scheduled. The project cannot progress any further until a decision has been taken on the application.

Maria Gorettikerk, Kerkrade

Even more important than statutory instruments is the attitude of the authority responsible. An authority that actively seeks debate with and involves the public in its deliberations and decisions will get much further than one that assumes it is operating in a hostile environment.

One problem, however, is that the rather conservative heritage community is still very attached to its beloved Monuments and Historic Buildings Act. There will have to be a culture shift in the world of heritage.

Public versus experts

The new heritage management policy will aim to bring about such a shift, giving the feelings of the public a more prominent role.

Decisions about cultural heritage value have traditionally been left to the experts – art historians, architects, architectural historians, archaeologists – who advise the government as to the value of a feature or object, and how it should be dealt with. This could conflict with the desire for more public participation. After all, the public might be very fond of heritage features or objects that the experts do not regard as especially interesting.

Example

The *Wagenwerkplaats* in Amersfoort is where Dutch Railways used to maintain and repair its rolling stock. An art historian would not think its typical industrial roof anything special. Many roofs of this type exist, both in the Netherlands and in other countries.

Wagenwerkplaats, Amersfoort

The residents of the nearby Soesterkwartier district are not interested in what the art historians think, however. To them, this is a very special building. Their neighbourhood was more or less built to house the people who worked there. Generations of Soesterkwartier residents were employed by Dutch Railways. The residents took the initiative to apply for scheduled historic building status, and to try and find a suitable new use for the old railway engineering workshop.

This is all fine until the government is asked to intervene in planning processes and to spend money on conserving the heritage. Is the government under any obligation to do so if the experts do not think the heritage feature or object in question is particularly special? Resources are scarce, after all, and money can only be spent once. The outcome of such debates often depends on politics. Democracy has to be allowed to work. And that is just what happened with the *Wagenwerkplaats*. The local council got together with the residents campaigning to preserve this piece of our industrial heritage, and came up with the idea of redeveloping it for the creative industries.

The reverse can also happen: that the experts think something is special, while the public are not particularly keen on it.

One such example is Jachinsschool in Elspeet. No one in the village regarded the primary school as anything special, but the experts from the Cultural Heritage

Agency thought differently. With its innovative architecture and use of materials, it has been designated one of the Top 100 examples of the post-war heritage. The Minister of Education, Culture and Science has now designated it a scheduled monument.

Joachinschool, Elspeet

Actually, this has prompted a strange reverse effect, too. The village residents were proud that the experts and the Minister were so full of praise about the architecture of their school. A photograph of the headmaster and all the pupils appeared in the regional newspaper, and elderly people recalled when the school was built. A plan for a modern extension was scrapped.

Authenticity

The last subject I should like to discuss is authenticity.

Genuine or not? Authentic or fake? This is a question that we often face in heritage management. We have traditionally defined authenticity in terms of the scientifically proven age of cultural heritage remains, often in combination with their intactness and state of preservation. However, on closer consideration, the term ‘authenticity’ is not so easy to translate into objective criteria. The ‘public’ perceive something as ‘authentic’ or ‘inauthentic’ on the basis of a complex interaction of expectations, experience, suggestion, trust and persuasion. So authenticity is not a permanent, original feature, but something ‘created’, or constantly ‘recreated’. This view of authenticity has major implications for the knowledge, expertise and skills of heritage managers. They have to consider what the public – in all their variety – are interested in and value, and find ways of ensuring that the science – which always remains valuable – continues to play a role in the dialogue with the public.

A fairly heated debate is currently underway in the Netherlands over our national symbol: the windmill. The great public popularity of this category of public buildings has given rise to many initiatives for their restoration or reconstruction. As a result, there are quite a lot of windmills in the Netherlands that contain very little historical material. There is nothing wrong with this, essentially, but the public at large draws very few distinctions when it comes to their appreciation of windmills.

And then there is the whole debate about the intangible heritage associated with them. The job of the miller and mill construction are also inextricably linked with windmills. The latter can just as easily take place in a reconstructed mill.

Finally

Public participation in cultural heritage management is an extremely interesting subject. It is good to make statutory regulations, but that is not enough. Participation also requires the right attitude on the part of the authorities (and interest groups). And I hope I have also made it clear that dealing with public attitudes to the heritage can be pretty complicated. The authorities have to be prepared to engage in this debate.

Legislative Mechanisms for Aboriginal Community Involvement in the Management of Australian Cultural Heritage

By Dr Andrew Sneddon, Director – UQ Culture & Heritage Unit, University of Queensland

Introduction

In the early months of 1967, clause 127 of the Australian Constitution stated baldly:

> *In reckoning the numbers of the people of the Commonwealth, or of a state or other part of the Commonwealth, aboriginal natives shall not be counted*.

In other words, although Aboriginal Australians had co-existed with non-Aboriginal Australians for 180 years, they could not be counted as part of an electorate and could not, therefore, exercise their democratic right to vote. In May 1967 a nationwide referendum was held and Australia overwhelmingly voted to amend clause 127 and to give Aboriginal Australians the rights of full democratic citizens.

Since 1967, the state and national governments of Australia have passed a range of legislative instruments to protect Aboriginal cultural heritage.[i] It has been the aim of many of these laws to not only provide legislative injunctions against the disturbance or destruction of Aboriginal cultural heritage places, but also to empower local Aboriginal communities in the management of those cultural heritage resources. In particular, the legislation in most Australian jurisdictions requires proponents that wish to engage in activities impacting on Aboriginal heritage places to consult with Aboriginal communities, and to involve them directly in the preparation of the heritage management frameworks within which that industry must operate. This paper may therefore be somewhat unusual in that it does not just consider legislative processes that *encourage* effective citizen involvement in heritage conservation; rather, it considers legislation that statutorily *compels* it, at least in the case of Aboriginal Australians. It does so by considering the legislation of two Australian states that are representative of Australia generally (New South Wales and Queensland). These two states have adopted legislation with similar objectives (to compel developers and industry to involve Aboriginal communities in the conservation of Aboriginal cultural resources), but they have attempted to do so in slightly different ways. Although the legislation has typically resulted in the empowerment of Aboriginal communities, and a consultative approach to the conservation of their cultural heritage places, the results have not always been an unqualified success for either Aboriginal communities or the nation's cultural heritage.

What is 'Aboriginal Cultural Heritage'

When Australian parliaments pass laws for the effective participation of Aboriginal people in heritage conservation, they are legislating to protect something that is not always easy to define. The New South Wales *National Parks and Wildlife Act 1974* protects 'Aboriginal objects' and 'Aboriginal places'. Section 5 of the Act defines an Aboriginal object to mean:

> *any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or*

concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.

An Aboriginal place is defined to mean (Section 5 read with Section 84):

> *a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture.*

Similarly, the Queensland *Aboriginal Cultural Heritage Act 2003* protects 'Aboriginal cultural heritage' which is defined to mean (Sections 8-10):

- Evidence of Aboriginal occupation of archaeological or historic significance; or
- An area or object significant to Aboriginal people because of Aboriginal tradition or history.

These definitions reflect the ways in which Australia's parliaments have wrestled with two aspects of Aboriginal cultural heritage: the sacred and the 'scientific'. Some Aboriginal heritage places are significant to Aboriginal communities for their largely intangible sacred or spiritual associations. These places may be outwardly non-descript but they may have deep and highly significant meaning to communities for their associations with mythological stories, beings and events (sometimes termed 'dreaming places'). On the other hand, Aboriginal cultural heritage also includes thoroughly physical things – archaeological remains, rock art sites etc – that archaeologists, anthropologists and lay people of all backgrounds value for their 'scientific' significance. Unfortunately, the legislation tends to create a mutual exclusivity between the two kinds of heritage value, where they can and should co-exist.

Both New South Wales and Queensland maintain registers of places previously identified as being Aboriginal cultural heritage places. These places are usually listed for their archaeological values. But landowners cannot assume that the absence of their place from the list means that it (the place) does not have Aboriginal cultural heritage values. Owners must make further appropriate investigations.

Legislative Requirements for Aboriginal Community Involvement in Cultural Heritage Management

New South Wales

Aboriginal cultural heritage in New South Wales is chiefly protected by the *National Parks and Wildlife Act 1974*. The legislation is now 35 years old and shows its age in some of its paternalistic language and the vesting of responsibility for Aboriginal cultural heritage in the office of the Director-General of the Department of the Environment, Climate Change and Water (DECCW).

The National Parks and Wildlife Act creates a permit-based system for the protection of Aboriginal cultural heritage. Section 90 of the Act states:

> *A person who, without first obtaining the consent of the Director-General, knowingly destroys, defaces or damages, or knowingly causes or permits the destruction or defacement of or damage to, an Aboriginal object or Aboriginal place is guilty of an offence against this Act.*

A permit is also required where a person or corporation (for example, a university) wishes to undertake excavation for the purposes of looking for and then archaeologically investigating Aboriginal objects (Section 87).

In other words, if a person intends to engage in any activity in New South Wales that may impact on Aboriginal cultural heritage (including archaeological sites and sacred sites) a permit must first be obtained from DECCW. Importantly, in order to obtain such a permit, the applicant is required to involve Aboriginal stakeholders in the process. This requirement is not directly established by the legislation, but recognising the limitations of the legislation itself, DECCW has prepared a number of guidelines which are binding on the department and its personnel. Further, and most importantly for Aboriginal community involvement, all permit applications are assessed against these guidelines (the Interim Community Consultation Requirements). They state (at page 3):

> *Aboriginal people are the primary determinants of the significance of their heritage…Information arising out of consultation allows the consideration of Aboriginal community views about significance and impact, as well as the merits of management or mitigation measures...*

The Interim Requirements are presently under review and are likely to soon be replaced by an updated document ('Aboriginal Cultural Heritage Draft Community Consultation Requirements for Proponents', May 2009). The draft has been on public exhibition for a number of months and retains the fundamental principles contained in the interim document. For example, it states (page 1):

> *Consultation with Aboriginal people is important and needs to be sustained throughout the heritage assessment process to ensure cultural perspectives, views and concerns are taken into full account.*

Aboriginal involvement in the process of heritage conservation is explicitly guaranteed by the requirement that the applicant must:

- Advertise in the local print media, inviting Aboriginal stakeholders to register their interest in the project.
- Contact all relevant Local Aboriginal Land Councils and the Registrar of Aboriginal Owners in order to identify potential Aboriginal stakeholders.
- Contact relevant local, state and government departments to identify potential Aboriginal stakeholders.

Once Aboriginal stakeholders have been identified the consultation guidelines require Aboriginal involvement in:

- The identification of Aboriginal archaeological sites and sites of other significance.
- The assessment of heritage values.
- The preparation of Environmental Impact Assessments as part of the development consent process.

- The drafting of management recommendations with respect to activities that may adversely impact on Aboriginal cultural heritage. This often includes the preparation of Cultural Heritage Management Plans that provide a management regime within which all activities must be undertaken.

These objectives are achieved by requiring that applicants (in practice, it is usually the applicant's heritage consultants) actively seek the views of Aboriginal people in preparing heritage assessments and Environmental Impact Assessments. This includes the requirement that applicants/heritage consultants seek feedback from relevant Aboriginal stakeholders on all relevant written outputs. Where an applicant/heritage consultant prepares a report that includes conclusions or recommendations at odds with the input of Aboriginal stakeholders, this must be noted and explained. All such reports must explain how the views of Aboriginal parties were obtained and incorporated. The government department is the ultimate consent agency, and it may choose to disagree with the recommendations of Aboriginal communities, but generally the recommendations of Aboriginal stakeholders are given the highest respect.

In practice, the applicants usually engage the services of a heritage professional (usually an archaeologist or anthropologist) to prepare the heritage assessments in close liaison with the identified Aboriginal parties. The applicant pays the heritage professional for their work. There is no requirement that Aboriginal people be paid for their consultation input but invoices are commonly tendered by Aboriginal stakeholders and paid by applicants. Of course, it is also open to Aboriginal people to set up their own consultancies for assessment of cultural heritage (the value of their work in relation to archaeological assessments would be measured against professional standards in such a circumstance).

The above observations relate to the preparation of written deliverables, especially heritage assessments, impact assessments and management plans as part of the development process. Where development, for example, would have an adverse impact on Aboriginal cultural heritage it is commonly a requirement that those impacts be mitigated by field work (especially archaeological investigation). The policies and guidelines recognize that archaeological investigation requires training and skill but also provides considerable encouragement for Aboriginal community involvement in such work. The 'Standards for Archaeological Practice in Aboriginal Heritage Management' (1998) state:

> *The participation of Aboriginal communities and Aboriginal owners in archaeological field assessments is based on the principle of Aboriginal partnership in all facets of Aboriginal heritage management. Since in carrying out field assessments archaeologists are acting upon Aboriginal heritage it is only proper for Aboriginal people to be involved (Chapter 2, 'Partnership With Aboriginal Communities', Section 4).*

'Field assessments' in the above quote include archaeological excavation. Similarly, the policy documents state:

> *Aboriginal people should be given the opportunity to participate in the analysis of stone artefact assemblages and in other substantial post-field tasks.*

As a result of the above policy direction, Aboriginal communities are active participants in the majority of archaeological excavations of Indigenous sites in New South Wales. They are paid for their involvement at commercial rates. This has resulted in a number of positive outcomes including a significant increase in the technical knowledge of Aboriginal participants, enhanced awareness of the significance of their cultural heritage in scientific terms, increased enrolment of Aboriginal Australians in cultural heritage courses at tertiary level, and in some cases, the establishment of heritage consultancies run by and employing Aboriginal staff.

The Queensland Aboriginal Cultural Heritage Act 2003

In Queensland, the State government has not opted for a permit system. Rather, the legislation imposes a 'duty of care' on developers and others who wish to engage in activities that may impact on Aboriginal cultural heritage. Aboriginal involvement in the processes arises directly out of this duty of care. The principal piece of legislation governing Aboriginal community involvement in heritage conservation is the Queensland *Aboriginal Cultural Heritage Act 2003* (augmented by a set of 'Duty of Care Guidelines'). Section 23(1) of the Act states:

> *A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the **"cultural heritage duty of care"**).*

Section 23(2) states that in determining whether a proponent of an action has met his or her duty of care, a court may have regard to, among other things:

> *the extent to which the person consulted with Aboriginal parties about the carrying out of the activity, and the results of the consultation.*

Section 24 requires an 'ought to know' level of due diligence on the part of developers and others stating:

> *A person must not harm Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal cultural heritage.*

In other words, a person or corporation (such as a developer or mining company) must not carry out an activity where they have reasonable cause to believe that the activity will adversely impact on Aboriginal cultural heritage. Significant fines apply for failing to satisfy the duty of care. The Aboriginal community is expressly identified as the principal holder of the relevant knowledge, thereby compelling the developer or mining company to consult, and to have sensible regard to the results of that consultation. Aboriginal communities are identified as key to any significance assessments, although Section 12(5) of the Act states:

> *For identifying a significant Aboriginal area, regard may be had to authoritative anthropological, biogeographical, historical and archaeological information.*

The use of the word 'may' has caused consternation in some quarters of the heritage profession. Some archaeologists in particular have expressed concern that this excludes them from the process unless

they are accepted into it by (they have argued) under-qualified Aboriginal communities (this will be discussed further below).

The requirement for Aboriginal community involvement is made stronger by Section 87 of the Act which states that any development requiring the preparation of an Environmental Impact Statement (effectively, all but the smaller development activities) requires the preparation of a Cultural Heritage Management Plan. Such management plans must provide a rigorous assessment of the cultural heritage values being managed, and the policy and practical regime that will guide the activities. Again, the legislation compels Aboriginal community involvement in the preparation of these management plans and the management regimes that they impose usually include a requirement that the Aboriginal community be involved in any archaeological investigation of the area it covers. As a result, Aboriginal community involvement in research and salvage excavations has become the norm in Queensland. There are also provisions within the legislation allowing for the voluntary preparation of management plans. There are considerable advantages in a proponent doing this. In particular, any action consistent with a management plan (whether it was required by law or voluntarily entered into) is presumed to be consistent with the conservation requirements of the Aboriginal cultural heritage it covers.

The system provides that a 'sponsor' may commission and pay for all those activities underpinning the duty of care provisions: community consultation, archaeological field work and survey, preparation of management plans. The sponsor is almost always the developer, mining company etc that wishes to carry out the action that may impact on the cultural heritage. Thus, archaeologists and anthropologists who undertake the work are paid by the sponsor, but any heritage professional proposed by the sponsor must be approved by the relevant Aboriginal parties before they can undertake the work. This greatly empowers the Aboriginal community. Many Aboriginal groups that have worked closely with heritage consultants in the past have now set up their own consultancies in Queensland and have done away with the need for non-Aboriginal archaeologists entirely, preparing all the written inputs themselves (such as management plans, heritage assessments etc). Naturally, their work must still meet appropriate standards, being reviewed by consent authorities in the same way that a non-Aboriginal archaeologist's report would be.

Some Comments on the Operation of the Legislation in New South Wales and Queensland

The legislation in both New South Wales and Queensland is imperfect, which is perhaps understandable given the complexity of the matters it must govern. Notwithstanding the imperfections, the legislation has clearly increased Aboriginal community involvement in cultural heritage management. The benefits far outweigh the few problems. Aboriginal heritage consultancies have increased in number. Aboriginal people are enrolling in cultural heritage management courses at the tertiary education level in greater numbers. Aboriginal community awareness of the antiquity and scientific significance of their culture has been enhanced. Further, the legislation has forced many developers, industrialists, mining companies etc to take serious notice of Aboriginal cultural heritage in a country that has historically undervalued this aspect of its culture. As a result, many such companies now employ Aboriginal people in-house to provide advice and to coordinate community consultation.

Unfortunately, there have also been some unexpected problems. Firstly, it is not always clear what Aboriginal parties should be consulted. In New South Wales the proponent of an action must cast a wide net to identify relevant Aboriginal stakeholders (through media advertisements, among other things). Some have claimed that a number of Aboriginal groups, aware that Aboriginal stakeholders are often paid for their work, declare an interest in an area even though they have no historical or social ties to it. The proponent is therefore forced to engage with those Aboriginal groups even though they may suspect that they have no authentic connection to the process.

This has also led to another unfortunate result. Where the legislation should be a cause for unity between Aboriginal groups, the above situation has sometimes created tensions and animosity between Aboriginal communities that both lay claim to being the relevant Aboriginal stakeholders. In Queensland the legislation identifies the relevant Aboriginal groups by reference to whether they have made claims to Native Title (a form of land tenure) through the national legal system. This too has its draw backs as some Aboriginal communities have lacked the resources or legal savvy to register such an interest, with the result that legitimate parties must sometimes struggle to gain appropriate recognition from non-Aboriginal developers as well as from competing Aboriginal communities.

Another cause for concern in some quarters is that in Queensland the relevant Aboriginal groups have the power to object to a sponsor appointing a particular heritage consultant. They may insist that their own preferred candidate be used (for example, those with whom they have an existing relationship). Some have argued that this has resulted in consulting monopolies in some regions with one favoured consultancy obtaining all of the work. This in turn has given rise to accusations of outright corruption, with some consultants alleging that the favoured consultants have secured their privileged position through kick-backs and other enticements. It is difficult to know how much of this is true and how much of it is 'sour grapes' on the part of those consultants that have simply failed to obtain work through inexperience or poor quality outputs.

Some non-Aboriginal archaeologists have also expressed concern that the system risks privileging Aboriginal 'knowledge' over non-Aboriginal 'science' in the assessment process. In a similar vein, they react against observations such as the following 'Editorial Comment' in the New South Wales 'Standards for Archaeological Practice in Aboriginal Heritage Management' (1998) states:

> *Some archaeologists .. . may have difficulty accepting the idea that Aboriginal people without university degrees or diplomas in archaeology may carry out heritage assessments of areas of land, for instance in an EIA (environmental impact assessment) context. It may be helpful here to consider a point made repeatedly by Aboriginal people in relation to their struggle for land rights. This is that what Aboriginal people have in mind is a concept of land ownership radically different from the Western model … This allows the proposition that in carrying out 'site surveys' or EIS assessments Aboriginal people are operating inside their heritage and their assessments are an expression of this heritage. What an archaeologist may perceive as a lack of scientific detail or rigour in an assessment carried out by Aboriginal people may, from the Aboriginal point of view, be the elements of an alternative and culturally appropriate assessment strategy. Aboriginal people, for their part, may perceive there to be too much emphasis on measurement*

and quantification in the archaeological approach, too much science and not enough culture ('Partnerships With Aboriginal Communities', Section 8).

This paragraph dangerously assumes that Aboriginal Australians are a homogenous group whose complex belief systems can be encapsulated in bland generalizations. Further, it adopts a patronising line with regard to archaeologists, who very commonly work extremely closely with Aboriginal groups, respecting their beliefs and values, and sensitively responding to their requirements in relation to cultural heritage. No doubt the above observation is well-motivated. However, it is an extremely broad generalization that although accurate for many Aboriginal communities and their world view, is sometimes inaccurate for others, particularly some of those communities that are deeply rooted in an urban environment. As a result, heritage professionals must occasionally seek input from Aboriginal stakeholders who actually hold the same world view as the heritage professionals themselves, only they aren't educated in the principles of heritage conservation or archaeological science. Fortunately, this problem does not arise often.

Other difficulties have arisen out of the stark cultural differences between some Aboriginal communities and non-Aboriginal Australians, especially those developers and mining companies driven by an overwhelming financial imperative. The legislation has inadvertently thrust Aboriginal communities (often ones where English is spoken as a second language) into 'business management paradigms' that are completely alien to their traditional ways of life. As a result, Aboriginal communities can be placed under extraordinary pressure to meet business deadlines and provide written outputs that are common to a city-based consortium but foreign to a small community in remote central Queensland.

Finally, the legislation assumes that Aboriginal knowledge should be and will be shared. However, Aboriginal culture is commonly characterised by 'secret business' – knowledge shared only amongst the initiated – and therefore some communities are extremely reluctant to share culturally sensitive information with a proponent who may use it simply to obtain consent to undertake development or mining activity. This has prompted some anthropologists to warn against the risk of the legislation merely resulting in a second wave of Aboriginal cultural appropriation, this time in the form of knowledge appropriation (Ross and Pickering 2002:188).

In spite of the problems noted above, the legislation's defects are far outweighed by the positive heritage outcomes it achieves. Most importantly, the legislation has ensured ongoing Aboriginal community involvement in the management of their own cultural heritage, and it has compelled non-Aboriginal Australians to understand, accept and respond to that. The results for Aboriginal Australians have been on the whole extremely positive.

Sources

Ross, A and K Pickering 2002 'The Politics of Reintegrating Australian Aboriginal and American Indian Indigenous Knowledge into Resource Management: The Dynamics of Resource Appropriation and Cultural Revival', *Human Ecology* 30.2, pp187-214.

[i] Australia is a federation similar in legislative, executive and judicial structure to the United States of America. There are three tiers of government: local, State and national. Laws governing Aboriginal cultural heritage are principally the responsibility of the State parliaments, although the more significant sites are commonly a matter for national legislation also.

Citizen Involvement: Legal Structures for Public Participation in Heritage Conservation – a report from Japan

Toshiyuki KONO (Kyushu University, Japan)

1. Japan is a highly centralized country. Only legislation adopted by the Parliament can regulate rights and obligations nationwide. Within the framework set up by legislation, municipalities are entitled to adopt their own local rules as ordinances. In other words, ordinances can become binding and enforceable only with the back-up of legislation.

Japan has been centralized since the 17th century and was never decentralized in the sense of empowering local entities to promulgate their own rules despite changes to the governance system in the 19th and 20th centuries. Perhaps, therefore, the coverage of legislation is large and the room of self-regulation for local entities has been very small. Local entities have been frustrated for many years. This is why "decentralization" became a keyword in the victory of the Democratic Party at the last election in September.

Taking into consideration the fact that public participation can be better-accommodated by local rules because they are closer to the needs and demands of people, some important changes may occur as a result of the change in government. Today's presentation is however limited to the existing system.

2. Law for the Protection of Cultural Property

Designation

Conservation of heritage is closely related to three major fields of law, i.e. the Town Planning Law, the Construction Standards Law, and the Law for the Protection of Cultural Property. Needless to say, the Law for the Protection of Cultural Property is the most significant legal instrument for conservation. This law's main scheme however is not designed to invite public participation: "designation" has been the means to identify objectives of the protection as cultural property, since the beginning of the 20th century. Also, under the current Law for the Protection of Cultural Property, the Minister of Education, Culture, Sport, Science and Technology (hereafter "the Minister") designates certain movable and immovable objects as "Important cultural property". Designation is in strict sense a unilateral act of the authority. Hence, theoretically speaking, it does not require hearing the owner's opinion. In practice,

however, designation takes place, only when the owner of the object agrees. This practice is a technical compromise to reflect the constitutional guarantee of property rights in the Japanese Constitution, Article 29.
Since 1950, when the Law for the Protection of Cultural Property was promulgated, only items with very high value have been designated. In other words, old buildings with less artistic and/or historic value were not covered by this law.

Selection
Besides the designation system as "top-down" scheme, in 1975 the Law for the Protection of Cultural Property introduced the "selection" system for important groups of historic buildings. Selection shall be made by the Minister, based on applications made by municipalities, in which such historic buildings are located. This selection system has a kind of "bottom-up" character: when a municipality prepares its application, it communicates to the residents of the area, which should be selected. It might be characterized as "public participation", but outside parties have no chance to express their views. This selection system for important groups of historic buildings is the only scheme, which directly links conservation to the zoning system under the Town Planning Law and conservation of heritage. It means that specific regulations may be introduced in the area selected as important groups of historic buildings.

Registration
While these two schemes are designed to protect individual buildings with high value (important cultural property) or groups of buildings with value (important groups of historic buildings), old buildings with less value can be put under the conservation system through "registration". This registration scheme aims at conservation with less control over the items, so that owners of registered buildings may fully change the interior and up to one third of the exterior. Conservation under this scheme is not so effective. Recently, the owner of the Kabuki Theater in Tokyo, a registered cultural property, which was built in the early 20th century and reconstructed after the World War 2, announced that the theater will be demolished and a new theater will be built. Many people protested, but the company did not change its plan and the theater will disappear in April 2010. Because of the economic value of prime locations, similar cases have been often observed in big cities. It is not rare that owners do not want to register their old buildings as cultural property.
As this suggests, the main concern under the Law for the Protection of Cultural Property has been how to harmonize conservation and property rights. Public

participation was not its concern.

3. Town Planning Law

The Town Planning Law regulates certain aspects related to construction, such as floor ratio. It is permitted to transfer floor ratio from one location to neighboring locations. This may indirectly contribute to the conservation of old buildings, especially in central areas in big cities. Residents can make a proposal for town planning in a particular area to the municipality of the area. This bottom-up system hardly works, since residents have to reach an agreement first. If a few owners in the area oppose the idea to introduce regulations for the purpose of conservation in order to secure their economic freedom, the initiative can be easily be frozen.

4. Construction Standards Law

The Construction Standards Law requires each single construction project to be "confirmed" by the authority or designated private entities. Confirmation is different from permission. Confirmation means to check if a construction project satisfies all technical requirements set up by the law for the purpose of security and safety. After the project is confirmed, the applicant, residents and land-owner may request the examination committee set up in each municipality to examine the decision. At this stage, there is an element of public participation. In some cases, confirmation has been cancelled based upon the residents' application. Only after the decision of the committee, a suit may be filed. It is however very difficult for residents as the non-owner of the property to get standing to bring a suit.

5. Preservation of Landscape

During the economic boom in 1970's and 80's, many old buildings were lost. An ugly urban landscape was left as a result of uncontrolled development projects in many towns. During this period, ca.500 municipalities introduced ordinances to protect the landscape, but these rules were not binding, since there was no legislation that empowered municipalities to do so.

In 1990's, the landscape started to be valued and gain more attention. In 2004 the Law concerning Landscape was promulgated and entered into force in 2005. I mention this law in my paper, because it has some interesting aspects of conservation and public participation. This law does not regulate the preservation of landscape directly. It aims rather at empowering municipalities to introduce rules for the preservation of landscape and to give binding powers to local rules, regulations and agreements

concluded among residents for the purpose of preserving landscape.
Interested municipalities, in consultation with the prefectural office where they are located, can be named as a "Landscape Administration Entity". So far there are 418 municipalities with this title. These municipalities may determine a "Landscape Planning Zone" and introduce their own regulations on construction in the zone by registration or recommendation. This zone can be proposed by local residents. If necessary, such municipalities may issue an order to change the form, color or design of the building.
This law offers an interesting possibility for the purpose of conservation: Landscape Administration Entity may designate buildings as "Important Building for Landscape". Designation under this law is based on a different stance from that in the Law for the Protection of Cultural Property. Under the Law for the Protection of Cultural Property, only buildings with high value from an artistic and/or historic viewpoint can be designated as important cultural property. Under the Law concerning Landscape, on the other hand, any building can be designated as an "Important Building for Landscape" as long as such buildings are considered as important for the landscape in the area. The value of the building itself is not decisive. The owner's consent is necessary to designate, however. So far 59 buildings have been designated as an "Important Building for Landscape". Once designated, the owner of the building has to obtain permission to change the exterior, but may freely change the interior. Owners may receive financial support to maintain the exterior from the municipality. To a certain extent, inheritance tax can be waived. The regulations imposed by the Construction Standards Law may also be waived or relaxed. This is quite important for the conservation of old Japanese buildings, to which standards for modern construction are not necessarily suitable.

Summary
As a summary, the following can be pointed out:
First, the main concern in Japanese law has been how to harmonize conservation and property rights. This is still the case. Therefore a permission scheme was never adopted as the means of control. Since permission implies a "prohibition in principle" under Japanese administrative law and would cause tensions in relation to property rights as a human right. A "top-down" approach was not favored by the authority. Thus even in the case of designation under the Law for the Protection of Cultural Property, the owner's consent has been obtained. In this context, public participation would mean intervention by third parties in someone's property rights. It is not easy to set up a

mechanism for conservation through third parties' intervention.

However, the Law concerning Landscape opened interesting possibilities through changing a basic stance from the conservation of valued buildings to maintenance of traditional appearance. Specific zoning may be proposed by residents. Municipalities are empowered to adopt binding rules. This scheme is more advanced to invite more public participation and make their decisions more effective. The only potential hurdle to be overcome is the owner's consent. We have to observe some advantages offered by the law are attractive enough to invite more owners to agree. Last, but not least, the key to this matter is the property right understood as a human right. More academic debate on this constitutional issue is needed.

Dr. Werner von Trützschler

Public and individual participation in planning, building and listing procedures

Germany is a federal state. Legislative authority is therefore divided between the Federation and the federal states, the Länder. We do not need to enter into details in this context, but suffice it to say that the regulation of building law is predominantly federal law whereas for heritage law regulation lies exclusively in the different individual laws of the 16 Länder. Furthermore there are local authority provisions pertaining to construction and monument law in the form of local authority statutes on the basis of legal authorisations laid down in federal or state law. They have the same legal validity as federal laws or the laws of the Länder. The implementation of all laws, including the federal laws, rests with the Länder. The administrative structures in the Länder are similar, with the administrative departments being organised generally on three levels (lower authority = town/ county, middle authority = district or similar subdivision, upper authority = regional state or "Land" ministry). Alongside these authorities which are authorised to take decisions, in almost all the Länder there also exist consultative specialized bodies which are the State Offices for the Preservation of Monuments. Their principal role consists in representing the interests of conservation and protection of monuments in the tug-of-war of conflicting interests.

Within this broad outline the relevant legislation for the preservation and protection of monuments is the following. Town planning is regulated in the Federal Building Act. Essentially there are two levels of planning: the land-use or master plan as the preparatory plan and the building plan as the binding development plan.

The land-use plan is valid for the whole municipality. It contains the basics of the urban development and of the resulting type of land use, e.g. building plots, green belt, etc. The building plans set the building suitability of the land in detail. They are devised from the land-use plans. Building project approval is also regulated in the Federal Building Act, not only in the purview of a building plan but also in areas for which no building plan exists, with different provisions for those areas situated within and those situated outside built-up areas. Furthermore the Federal Building Act contains regulations for regeneration measures for the rectification of town planning failures and for town planning development measures. Additionally, requirements for the nature of the construction of buildings, principally in terms of structural aspects, and details of the planning permission procedure are regulated in the building laws of the Länder.

Alongside the definition of the term "monument" inculding archaeological and non-fixed monuments, the laws of the Länder for the protection of monuments (heritage laws) contain provisions safeguarding monument areas (ensembles) and protecting monument surroundings. Depending on which of the Länder the monument in question is situated in, monument status is founded on two different legal bases: it is either rooted directly in law and the registration in a list of monuments is purely for information, or otherwise registration on a list of monuments has a constitutive effect, i.e. a building attains the status of a protected historic building or site only upon being entered on the list. Alterations to a monument require an authorisation unless such alterations also require a planning permission according to building law.

Planning decisions regarding building plans as well as individual decisions on individual applications according to building or heritage law can be decisive for the undisturbed survival of for instance an historic building or archaeological site. If for example a building plan foresees for a property on which a listed residence from the last century is situated the possibility of building a high-rise block of ten times the floor space of the existing protected villa, then a subsequent appropriate demolition application for the listed building, together with a building application for the high-rise building included in the plan, cannot be refused without compensation being paid by the state. Since money for compensation is usually not available, the demolition will probably be approved and the historic villa will disappear. Thus in this example a stipulation in the building plan leads indirectly to the destruction of an historic building. For individual decisions regarding a monument, the effect of the decision on the monument is obviously more evident. So for example, the approval of a renovation application which requires the gutting of a building, can lead to the almost total removal of the historical character of a building and an essential part of what made it a listed monument.

How then can such a regulation be prevented in a building plan? And how can a citizen with opposed interests present his interests in the procedures and do so successfully? Two different questions which both can be answered under the heading "participation".

First public participation i. e. consultation of the public and of the individual citizen in the planing procedures, i.e. during the drawing up of land-use plans and of building plans. The Federal Building law provides for the public notification of the public as early as possible i.e. as soon as the local authority has decided to draw up a plan. It has to inform the public about

- the general aims and purposes of the plan;
- the foreseeable effects of the plan and;
- other possible solutions under consideration for the renovation and development of the planning areas.

The first public consultation is therefore performed before the draft of the plan is finalized. The local authorities can decide themselves on the means and ways of information. For non-problematic planning procedures, the local authorities provide, usually through advertising in the press, the opportunity for a single discussion forum in the rooms of the administration. For extensive and significant or controversial planning procedures, civil assemblies are often convened, in which the planning is presented and discussed. Citizens´ arguments in this consultation procedure are to be included in further planning considerations.

When drafting the plan the arguments put forward bay the public have to taken into consideration. As soon as the draft of the plan is finalized, a second formal public participation follows. The topic of this consultation is the draft plan, which must be publicly displayed. The display must be announced in advance. The draft plan must then be displayed for one month for public inspection together with an explanatory report or statement of reasons. The local authority must deal with the content of the comments and communicate the result of this review to the public. Should the local authority not follow the arguments of the public, it must submit these arguments to the next highest (middle) administrative authority which has to approve the plan.

In practice these significant possibilities of public participation are often intensively used. Thus, for controversial plans, citizens´ initiatives may be undertaken and/or petitions started.

The more citizens that participate therein, the more weight is added to the demand and the more difficult it becomes for a municipal or district council, which must pass a planning resolution, to ignore relevant suggestions. In exceptional cases this has fully benefited the preservation of monuments. Should a building plan be altered due to arguments presented by the public, the altered draft plan must be resubmitted, i.e. the consultation procedure starts once again.

Other than for the building plan, with regard to which everyone can express themselves in the framework of public participation, civil consultation in town planning reconstruction measures is restricted to those concerned, especially to the owners, tenants and lease-holders. Of course also in this context citizens have the opportunity of not only stating their ideas, desires and objections but also of discussing them.

For all individual decisions and rulings by an authority which intervenes in the rights of a person concerned, the latter must be consulted. This obligation results from the federal administrative procedure law and similar laws of the Länder and is also, to a certain extent, specially regulated in building and in heritage law. However even when no explicit regulation is standardised there, the provisions of the administrative procedure laws take effect. Thus, for the decision about applications for a building contract or for a permission in heritage law, for example, each neighbour of the property must be granted a hearing prior to the decision. For the registration of historic buildings or sites in a list of historic buildings or sites, the owner of the property must be granted a hearing if this registration has a constitutive effect.

Both planning and individual decisions are subject to legal control by the administrative courts. Citizens affected in their rights can have building plans inspected by means of a direct judical review of the norm or they can wait and see if an individual decision is taken against them or if an adverse ruling is issued on the strength of a building plan, before having these underlying statutes and plans inspected in a trial on the legitimacy of the individual decision ("incident-review"). Individual decisions which affect a citizen's rights (this can also be a neighbour for example), are examined by an administrative court after entering into legal action. Such legal action is conditional on the performance of administrative proceedings reviewing the objection, i.e. the citizen must always initially turn to the administrative authority which issued the decision objected to.

Besides participation of the public a consultation of the bodies responsible for matters of public interest is performed in the administrative proceedings. Bodies representing public interests as a rule are statutory authorities, to which tasks specified by law (i.e. publicly) and the representation of specific concerns are conferred. Therefore, for example, nature preservation authorities, water boards, surveying departments, road construction departments, health authorities, forestry commissions, agricultural authorities, mining authorities, chambers of industry and commerce, to name but a few, are all public interest bodies. Such bodies also include the State Offices for the preservation of Monuments, which in their capacity as specialist authorities are required to represent the interests of the protection and preservation of monuments. Those persons who preserve local heritage in an honorary capacity belong to this group too. Obviously in each procedure in each area not all possible public bodies participate, but only those whose tasks and interests might be affected. In building and heritage law the interests of the protection and preservation of monuments are affected as a rule. The State Offices for the protection and preservation of monuments are therefore always required to take part in these procedures. In building planning proceedings this is to be performed, according to federal building regulations, as early as possible, i.e. parallel to the

first public consultation. For town planning reconstruction measures a consultation is also prescribed. The same applies for the building permit proceedings and heritage law authorisation proceedings.

For the preparation of a decision in planning proceedings as well as in the individual proceedings, the public and private interests brought up in the course of the consultations and hearings are to be considered against each other. In the light of this judgement the decision is to be taken. Article 1, Paragraph 5 of the Federal Building Act (abridged) illustrates which interests and goods are to be weighed up against each other. According to this provision the following should especially be taken into consideration for the preparation of building plans:

- healthy living and employment conditions and the safety of the inhabitants or the work force;
- the residential needs of the population;
- the social and cultural needs of the population;
- the formation, renewal and further development of urban areas and the shaping of the town and landscape;
- the interests of the protection and preservation of historic buildings and sites;
- the interests of churches and religious organisations regarding the public right to worship and pastoral care;
- the interests of the protection of the environment and nature and the preservation of the countryside;
- the interests of the economy including the protection and creation of jobs, etc.;
- the interests of defence and civil protection.

In summary it should be noted that distinct participation procedures in the legal spheres treated here (just as in all other legal spheres) ensure that not only the interests of the public and the individual, but also the interests of the protection and preservation of monuments are covered under all proceedings. It is true that there are a great number of other interests opposing these interests, which are also to be taken into consideration in the proceedings. The broad consultation possibilities therefore do not ensure, the enforcement of interests. The decisive issue remains the quality of the arguments, i.e. the contents brought forward in the consultations.

Adress of the author:
Dr.Werner von Trützschler,Thüringer Ministerium für Bildung, Wissenschaft und Kultur, Postfach 900463, D-99107 Erfurt, e-mail: w.true@web.de

Satu-Kaarina Virtala
Finland

ICLAFI MEETING 23.-26.11.2009
CARTAGENA DES INDIAS, COLOMBIA

CITIZEN INVOLVEMENT: LEGAL STRUCTURES FOR PUBLIC PARTICIPATION IN HERITAGE CONSERVATION

GENERAL NOTES

Heritage conservation is implemented in Finland by two laws, namely, the Land Use and Building Act and a special enactment, the Act on the Protection of Buildings. In the context of the built heritage, the Land Use and Building Act is more relevant, because it is applied at all levels of land use planning. In rural areas heritage conservation is carried out, if need be, by means of the Act on the Protection of Buildings.

It is estimated that in areas covered by land use plans there are about 15 000–20 000 buildings with special architectural, historical or cultural values. For these buildings, regulations are issued in the plans for the preservation of those values. Only a little more than 1 000 buildings are protected by the special enactment.

Because of the different nature of the two laws, public participation is also arranged in different ways and it is more dominant in land use planning. As the local authorities are required to monitor local detailed plans to ensure that they are kept up-to-date, the general requirements for participation also apply to decisions concerning the built heritage.

PUBLIC PARTICIPATION IN PLANNING PROCESSES

Individual citizens and non-governmental organisations are fully entitled to participate in planning processes, particularly in the early stages of planning. The process to alter a plan follows the same procedures as drawing up a new plan. The Land Use and Building Act, which came into effect in 2 000, has been specially designed to facilitate participation in planning processes. The Ministry of the Environment has published guidance on participation and interaction in planning, for the general public, as well as for experts.

The following groups have the right to participate in planning procedures:

- property owners
- people whose homes and workplaces are affected by plans
- private firms and public authorities whose work is affected by plans
- local, regional and national non-governmental organisations, including landowners' and residents' associations

Participation and assessment schemes are drawn up at the start of the planning process to define how citizens, organisations and other interest groups can contribute to the whole process. Such cooperation begins during the initial phase

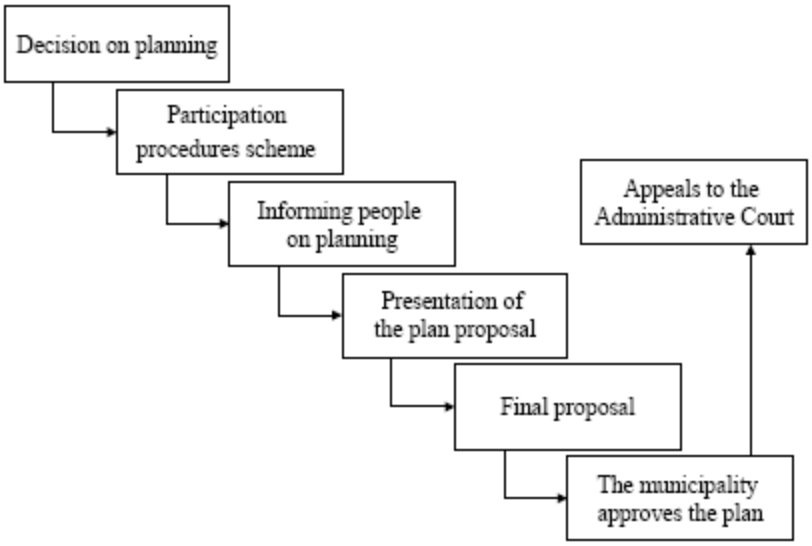
of the planning process, while alternatives are still open, to allow participants to genuinely influence the plans.

Public meetings are then organised for local residents and other interested parties at the key stages of the planning process.

Planning objectives are set through detailed consultation with interest groups. During the drafting of planning proposals, interested parties can participate in impact assessments for alternative planning options, and express their opinions on planning proposals.

Draft planning proposals are exhibited in public places to allow all citizens and interest groups to examine them and officially submit any comments and objections.

Main stages of the Finnish planning process



PARTICIPATION IN PERMIT PROCEDURES FOR BUILDING ACTIVITIES

Permit procedures for development of building sites or changes to buildings are subject to hearings involving the property owners and tenants of neighbouring properties. Neighbours must be duly notified of applications for permits and the timing of official surveys of sites to be developed.

The owner of a real property must take his neighbours into consideration and also other activities. He cannot use his real property in a way which causes harm to the people living nearby.

PUBLIC PARTICIPATION IN HERITAGE CONSERVATION

The procedures in land use planning are different from those of heritage conservation. Heritage conservation focuses primarily on an individual building when applying the special enactment. The public interest in an individual building is considered minor under the law. Besides the owner, the interested

parties mentioned in the heritage law are municipal and state authorities, specialists in heritage conservation and registered associations. All of these parties can make a submission concerning the protection of a building. In addition, protection orders should, if possible, be drawn up with the consent of the owner of the building and the owners of buildings in the surrounding area.

Especially nowadays the public is taking an increasing interest in heritage issues. There is growing expectation and demands for better information on the built heritage. In the last few years regional and local authorities have cooperated with non-governmental organisations to prepare publications on preservation and maintenance programmes for cultural environments. The publications have increased noticeably the awareness of heritage issues.

The present Act on the Protection of Buildings is rather out of date, as it came into force in 1985 and it has been amended only once, in 1993. Currently, the Finnish Parliament is in the process of considering a proposition for a new built heritage protection act. The proposition includes special provisions for public participation.

local or state authorities, and by a registered association. These parties also have the right t As in the present legislation, a submission for protection of a building can be made by the owner, by o be heard on the issue, as do the owners of the neighbouring real properties. Before a decision is made on a heritage issue, it is now proposed that the decision-making authority can organise a meeting where all those whose conditions or interest can be considerably influenced by the issue have the opportunity to present those aspects concerning their particular requirements, objectives and means.

The invitation to the meeting is to be issued by mail, or, if the number of the interested parties is unknown, by placing an announcement in at least one local newspaper.

CONCLUSIONS

The possibilities for public participation are fairly good according to the Land Use and Building Act. The extent of and procedures for public participation are defined for each land use plan in a participation and assessment scheme, which is prepared whenever a new planning process is initiated and publicly announced. These participation schemes also describe how the impacts of land use plans will be assessed.

Participation in planning procedures is open to all parties with an interest in the plans. It also encompasses other public authorities, enterprises or organisations whose activities may be affected, even if they are located in other municipalities.

The possibility for public participation is not as well organised under the present special enactment on the built heritage or in the one under consideration by Parliament. The new proposition concerning the built heritage still focuses mainly on individual buildings, even though there is movement towards

protecting special built areas or groups of buildings. Therefore, it is deemed proper to maintain a limited approach to public participation.

However, as the majority of the Finnish built heritage is protected under the Land Use and Building Act, the shortcomings of the public participation issues in the Act on the Protection of Buildings are a little less significant.

Public Participation in Heritage Conservation in the United States of America

A paper presented to
The ICOMOS International Committee on Legal, Administrative and Financial Issues
Cartagena, Colombia - November 2009
By
James K. Reap
College of Environment and Design, University of Georgia, Athens, Georgia USA

In this paper, I will attempt to provide a brief overview of public participation in Heritage Conservation in the United States. I will focus on both the legal and practical aspects of this participation from a statewide, regional and local perspective, utilizing examples from the State of Georgia. [1]

Public participation is difficult to define because of the many forms it takes. Viewed broadly, it can involve such activities as political party participation, lobbying and protest, public advocacy, solicitation of comments, review and reaction, interest group involvement, and service on advisory or review boards. Even litigation has been suggested as an example of public participation.[2] We will primarily examine administrative agency decision making here, but also look briefly at some other types of participation.

Direct public participation in administrative agency decision making seems to reflect the strains of individualism and political egalitarianism that run deep in the American character.[3] During the past 40 years, public participation has achieved something of a venerated status in the United States.[4] This was not always so. At the turn of the twentieth century, when public administration began to develop into a distinct field, its theorists suggested that administration be left to professional administrators. The public's role, in this view, should be confined to voting in elections and lobbying elected policy makers. Under this scenario, the public would elect officials who would set policy through legislation and provide only general oversight of professional administrators. This would enable administrators to exercise "neutral competence" insulated from the direct

[1] The State of Georgia was established in 1733 as a colony of Great Britain. It achieved its independence during the American Revolution and was one of the 13 original states to become part of the United States of America. Its landmass comprises 59,441 square miles, making it the largest state east of the Mississippi River. Its population of 9,685,744 makes it the tenth largest US state. The state is subdivided into 159 counties, each with its own local government.
[2] Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 ENVIRONMENTAL AFFAIRS 263, 267 (1999).
[3] JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 23 (1985). These concepts are not unique to the United States. The International Council on Monuments and Sites (ICOMOS) has asserted that the right to cultural heritage includes the right to participate in decisions affecting heritage and the cultural values it embodies. *Declaration of ICOMOS Marking the 50th Anniversary of the Universal Declaration of Human Rights* (Stockholm, 1998).
[4] Jim Rossi, *Participation Run Amok*, 92 Northwestern University LR 174 (1997).

interference of party politics. The oversight role was not to be shared with the general public.[5]

By the 1960s public administrators were viewed as servants of the "elite", neither neutral nor competent, and out of touch with the public. As the federal government tried to grapple with the increasing complexity of modern life, a proliferation of new programs came into being. The line between policymaking and administration became difficult to draw. Congress sought the advice of administrators in developing policy, which was then filtered through federal, state and local bureaucracies before being implemented in the community. Problems were so complex that Congress could not anticipate all of the policy implications, and administrators were left to fill in the blanks. That complexity, along with the power of technical expertise and specialized knowledge, tended to prevent effective oversight of administrators by elected officials. Increased public participation in both the planning and implementation of public programs was seen as a solution to this problem by enabling citizens to influence policies as they were being developed and implemented. This approach had the additional benefit of giving voice to previously neglected constituencies.[6] In addition to informing decision makers, public participation was seen as a way to educate citizens on policy issues and contribute to the understanding of different viewpoints by different segments of the public. Ideally it also could help form consensus on issues and even produce better citizens by inspiring civic responsibility.[7]

There are also a number of drawbacks to increased public participation. It is often non-representative. Those who choose to participate are frequently not a cross section of the public in terms of income or education and generally represent pre-existing organized groups that advocate special interests. Their involvement may not serve the broader public interest. Citizens who do not understand scientific or professional quality standards also may challenge them. Public participation can increase the cost of programs and the time necessary to implement them as more individuals and groups try for a piece of the action. Innovation, too, can become a casualty to veto or compromise when many parties with divergent interests are involved. [8]

Whatever the positives and negatives of public participation, it has become a regular part of the planning and designation processes in the preservation field and appears to be here to stay. The extent to which it is used depends upon the legal and regulatory requirements of each program and the administrator's determination of its usefulness in a particular case.[9] There are different approaches to the use of public participation in formal agency decision making, including those where the administrator

---

[5] John Clayton Thomas, PUBLIC PARTICIPATION IN PUBLIC DECISIONS, 16 (1995). President Woodrow Wilson asserted, "Directly exercised in the oversight of the daily details and in the choice of the daily means of government, public criticism is, of course, a clumsy nuisance." *The Study of Administration*, 2 POLITICAL SCIENCE QUARTERLY 210 (1887).

[6] *See* Thomas, *supra,* note 5, at 16. *See* Spyke, *supra* note 2, at 269.

[7] *See* Rossi, *supra*, note 4, at 187-188.

[8] *See* Thomas, *supra* note 5, at 25-29. *See* Spyke*, supra* note 2, at 273.

[9] Thomas suggests that where the need for high quality decisions is greater (e.g. consistency with standards, legislative mandates), there is less reason to involve the public. Where the need for public acceptance of a

1. makes the decision alone (no participation);
2. solicits ideas and suggestions from different segments or groups of the public and makes a decision that may or may not reflect group influence;[10]
3. solicits ideas and suggestions from the public assembled as a single group (e.g. public hearing[11]) and makes a decision reflecting group influence; or
4. attempts to reach an agreement on an issue with an assembled public.[12]

Assuming one accepts that public participation on a particular issue is desirable (or required), securing an acceptable level of participation or an adequate cross-section of the public can be a challenge. Most citizens choose not to become involved on most issues. Individuals tend to be involved only when they are affected directly, either financially or in an area where they have strong feelings.[13] Even where they are directly affected, many individuals prefer that their interests be represented by groups such as, in the preservation context, business groups, neighborhood associations, churches, non-profits, and professional groups. Administrators are put in the position of brokers or harmonizers among the different interests while seeking to include input from underrepresented groups and furthering the general public interest. This interest group model is probably the dominant model of administrative action in the United States today.[14]

I cannot leave this general topic without mentioning briefly the implications of new technologies, like the Internet. With these tools available, we have seen calls for even greater access to government information and public participation.[15] There are a number of promising techniques such as electronic town meetings, but they are not the subject of this paper.

In the balance of this paper I will explore the issue of public participation in the State of Georgia. To a large extent, Georgia is typical of other states, although there are differences

---

decision is high, there is an increased need for public involvement. Where both are significant, a balance must be struck. See id, at 36.

[10] An example of the second approach is the review and comment mechanism used by many public agencies. It involves developing a proposal internally, presenting it to the public and soliciting comments, revising the proposal (or not), and publishing the final version. While capable of producing meaningful public input, the process is often characterized as "decide, announce, and defend", a cliché for the failure of administrators to truly take into account the public's views. John S. Applegate, *Beyond the Usual Suspects: the Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 Indiana L.J. 906-908 (1998). A number of techniques can be employed to improve the effectiveness of this approach in achieving broad-based participation, including public surveys, workshops and advisory boards or review panels.

[11] Applegate asserts an inverse relationship between the hearing's size and its communicative effectiveness. Well-attended meetings occur in response to controversial issues and are subject to "venting" and defensiveness. Smaller hearings, where real dialog can occur, are generally routine meetings attended by "regulars". *See id*. at 910.

[12] *See* Thomas, *supra* note 5, at 40-41.

[13] *See* Thomas, *supra* note 5, at 56.

[14] *See* Applegate, *supra* note 10, at 904.

[15] *See* Rossi, *supra* note 4, at 189. In Georgia, the General Assembly enacted an amendment to the state's open records law to which calls on public agencies to make available through electronic means, including the Internet, records maintained by computer. O.C.G.A. § 50-18-70 (g).

among states in the federal system. Even in programs such as the National Register of Historic Places, there is some flexibility in how states involve the public.

One way governments can enable public participation is "passive" – ensuring that its records and meetings of its officials, both elected representatives and administrators, are open to the public. On the federal level the Freedom of Information Act[16] and the later Sunshine Act[17], passed following the Watergate scandal in the Nixon Administration, guarantee access to government documents and processes.

Georgia has two significant pieces of legislation that reflect the "passive" approach to public participation, the Open Meetings Act[18] and Open Records Act[19]. The Open Meetings Act is designed to ensure the people's business is not conducted behind closed doors, and the public has a written a record of actions taken at the meeting.[20] The law was strengthened this year by adding the requirement that the agenda of public meetings be published up to two weeks in advance to let citizens know what will be discussed or acted upon.[21] Violations of the law are grounds for a court to void any actions taken at the meeting and award costs and attorney fees to the complaining parties. Officials shown to have willfully violated the law face more than a lawsuit, they can be criminally charged and forced to answer for their action in court.[22] Georgia's public administrators must also be as open with their records as they are with their meetings. The Open Records Act requires public officials to produce records or documents within three business days of receiving a request to review or copy them. If a technical problem prevents meeting this deadline, they must state in writing when they will be produced or spell out why the particular records are exempt. (In fact, very few documents, such as medical records, are protected from disclosure.) While these legislative provisions do not guarantee citizens input into governmental decision making, they do provide the public access to information on what their government is doing.

Another "passive" approach provided by government is the protection afforded those individuals who do actively participate from being targets of "strategic lawsuits against public participation" (SLAPPs"). These suits are brought for the purpose of silencing citizens who are exercising their constitutional rights to participate in public discussion, such as by opposing the plans of a land developer or urging the designation of a property as a landmark. The suit may lack merit, but can succeed in eliminating the opposition of

---

[16] 5 U.S.C. § 552 (1994) (enacted 1972).

[17] The declared purpose of the act is to increase public oversight of federal agencies, improving the decision making processes "while protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976).

[18] O.C.G.A. § 50-14-1 *et seq*.

[19] O.C.G.A. § 50-18-70 *et seq*.

[20] The law provides that meetings of every public agency (or any special or standing committees thereof) must be open whenever there is a gathering of a quorum of members pursuant to a schedule, call or notice, at a designated time and place, at which official business or policy is discussed or presented or action taken. O.C.G.A. § 15-14-1 (a)(2). Meetings can be closed only under very limited circumstances. Those that might be encountered by preservationists include discussions of future real estate acquisitions or considering personnel actions involving a public employee. § 50-14-3 (4) and (6).

[21] O.C.G.A. § 50-14-1(e) (1998).

[22] O.C.G.A. § § 50-14-1 (b), 15-14-5 (b), and 15-14-6.

individuals who cannot afford to defend themselves in court.[23] Georgia is among a small group of states that have enacted legislation to discourage SLAPP suits.[24] If it determines that a lawsuit has been filed for an improper purpose, such as to suppress the right to free speech or petition government, to harass, to cause unnecessary delay or increased costs, a court can dismiss the suit and award the injured party costs, including attorney's fees.[25]

Turning to more "active" means of facilitating public participation, I will examine first the opportunities offered in the planning arena. This is the area in which citizens can have a substantial and long-range impact on preservation programs.

The National Historic Preservation Act of 1966 (NHPA) is the nation's central historic preservation law. As one of the conditions for state participation in the federal preservation program, NHPA mandates the provision of "adequate public participation".[26] The State Historic Preservation Officer (SHPO), the state official who administers the national historic program in each state, is required to "prepare and implement a comprehensive statewide historic preservation plan."[27] Regulations issued by the National Park Service pursuant to NHPA clarify what the planning process entails.[28] The Park Service has also promulgated the *Secretary of the Interior's Standards for Preservation Planning,* which includes specific guidance for public participation. The preamble to the Standards asserts, "Early and continuing public participation is essential to the broad acceptance of preservation planning decisions."[29] To provide further assistance, the Department of the

---

[23] The U.S. Supreme court has stated, "A lawsuit no doubt may be used . . . as a powerful instrument of coercion or retaliation. . . . Regardless of how unmeritorious the . . . suit is, the [target] will most likely have to retain counsel and incur substantial legal expenses to defend against it.", Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 640-41 (1983).

[24] Daniel A. Kent and Douglas M. Isenberg, *Georgia's New Anti-SLAPP Statute: Protecting the Right of Free Speech Against Meritless Claims*, 2 Georgia Bar Journal 26-28 (June, 1997)

[25] O.C.G.A. § 9-11-11.1.

[26] 16 U.S.C. § 470a(b)(1).

[27] 16 U.S.C. § 470a(b)(3). Information on the Historic Preservation Planning Program of the National Park Service can be found on the Internet at http://www.nps.gov/hps/pad/index.htm, accessed December 12, 2009. Electronic copies of full plans or plan profiles for all states and territories can be found on this site. For the early history of comprehensive state preservation planning under NHPA, *see* Elizabeth A. Lyon, *The States: Preservation in the Middle*, in THE AMERICAN MOSAIC 105-106 (Robert Stipe ed., 1987), published by US/ICOMOS. In addition to developing a statewide preservation plan, the SHPO is responsible for nominating properties to the national Register of Historic Places, providing technical assistance to federal, state and local agencies and the public, participating in the review of federal undertakings that affect historic properties, and helping local governments become certified to participate in the program.

[28] "Prepare and implement a comprehensive statewide historic preservation planning process; this high priority responsibility entails the organization of preservation activities (identification, evaluation, registration, and treatment of historic properties) into a logical interrelated sequence so that effective and efficient decisions and/or recommendations can be made concerning preservation in the State;" 60 C.F.R. § 61.4(b)(3).

[29] http://www.nps.gov/history/local-law/arch_stnds_1.htm, accessed December 12, 2009. These standards are a component of the *Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation*, the nationally accepted norms for undertaking the various activities of historic preservation. They are available through the National Park Service. The guidelines suggest involving the following: historians, architectural historians, archaeologists, historical architects, folklorists and persons from related disciplines; interested individuals, organizations and communities; and prospective users of the

Interior published *Reaching Out, Reaching In*, a guide to crafting effective public participation for state historic preservation programs.[30] The Park Service also provides for a "rigorous" periodic evaluation of the state program focusing on a wide range of activities under NHPA, including comprehensive preservation planning and public participation.[31]

In fulfilling its requirements under this federal legislation, the SHPO and staff in the Historic Preservation Division (HPD) of the Georgia Department of Natural Resources prepared *Building a Preservation Ethic.*[32] The SHPO sought public participation in two phases: during a period of information gathering prior to developing a draft plan and, to a more limited extent, during a review of the draft. The HPD held two planning forums in October 2005, one in Athens in the northern part of the state and one in Tifton in the southern part of the state. The forums were advertised through electronic newsletters, press releases and local cable television. Each was organized in cooperation with local government and regional development offices. Information on proposed vision, goals and priorities were presented to the attendees of the forums and their views were solicited. Forum participants included owners of historic properties, members of local non-profit organizations and local historic preservation commissions, members of city councils and regional development office staff. The suggestions of the participants focused on rural resources, promotion of preservation successes, local advocacy, public awareness and education, and documentation of preservation's economic benefits. Their input was included in the plan. HPD also distributed a questionnaire during a two-month period through its website as well as mailings, site visits, meetings and public forums. Responses focused on grant programs, development of partnerships with local organizations, heritage tourism, survey of historic properties, and tax incentives. From these public responses, the HPD concluded that the importance of historic preservation is clear to the public and that there is a desire for expanding existing resources and identifying new ones. Public input was included in the draft plan which was posted on the HPD website. Peer reviewers selected to represent a cross-section of constituents were asked for their reaction and comments. Many of the comments provided by the reviewers were incorporated into the plan. HPD concluded that "Georgians have a strong sense and feel for why preservation is important to them and have definite opinions on what needs to be done to protect the state's heritage." [33] The public contributions informed the content of the completed plan.

One source of information for development of the state plan was the preservation plans developed by local communities.[34] Many communities throughout the United States have

---

preservation plan. The Standards recommend coordination with other planning efforts at local, state, regional and national levels.

[30] Susan L. Henry, editor, National Park Service, Interagency Resources Division, (1993).

[31] 60 C.F.R. § 61.4(d), http://law.justia.com/us/cfr/title36/36-1.0.1.1.27.0.1.4.html, accessed December 12, 2009. .

[32] Published by the Historic Preservation Division, Georgia Department of Natural Resources, 2007. The plan is available electronically on the Internet at http://gashpo.org/Assets/Documents/HPD_2007_2011_Plan_low_res.pdf , accessed December 12, 2009.

[33] *See id*., 74.

[34] Since 1983, the state has made grants available to Area Planning and Development Commissions (now Regional Commissions) to employ preservation planners to assist local communities in developing and implementing preservation plans and programs.

developed formal written preservation plans, reconciling in one document all of the policies and procedures regarding the community's historic resources.[35] One segment of the public, the residents of historic towns and areas, warrants particular consideration. The US/ICOMOS Preservation Charter on Historic Towns has stated that "residents … should be actively and continuously involved in the planning process. … Their reactions and comments to all public and private proposals for the area should be actively sought.[36] While it is important to have a stand-alone local preservation plan to articulate the preservation goals and objectives of the community, it is even more important that those goals and objectives are incorporated in broader community planning. This helps ensure consideration by other programs such as land use, transportation, and development. The US/ICOMOS Preservation Charter supports this approach, declaring that the preservation of historic towns and historic districts or areas must be an integral part of every community's comprehensive planning process.[37]

Georgia was one of the first states to adopt growth management legislation with the passage of the Georgia Planning Act of 1989.[38] This law requires each local government in the state to prepare a long-range comprehensive plan. The plan is intended to identify community goals and objectives as well as determine how the local government proposes to achieve them. Ideally it is to be used in government decision-making on a daily basis. Failure to have an approved plan can result in the loss of state funding for a range of activities. While the scope of growth management is much broader than historic preservation, almost all such legislation includes historic preservation as a goal and/or a required planning element.[39] By including preservation with other key elements, comprehensive planning fosters better coordination between preservation and other land use controls such as zoning.[40] The Georgia law requires that historic resources be considered along with land use, economic development, community facilities, population, housing, and natural resources. [41]

The Georgia Department of Community Affairs, which oversees compliance with the Georgia Planning Act, has established rules and regulations requiring local governments to hold at least two public hearings prior to submitting the plan for review. At least one hearing must be held prior to developing the plan to inform the public of the purpose and process and elicit community input on needs and goals. A second hearing is held after a

---

[35] Bradford J. White and Richard J. Roddewig, PREPARING A HISTORIC PRESERVATION PLAN, 4 (American Planning Association, 1994).
[36] *US/* USICOMOS *A Preservation Charter for the Historic Towns and Areas of the United States* (1992). One of the four basic objectives for the preservation of historic towns and areas reads, in part: "Property owners and residents are central to the process of protection and must have every opportunity to become democratically and actively involved in decisions affecting each historic town and district."
[37] *See id.*
[38] O.C.G.A. 50-8-1 et seq.
[39] David Listokin, *Growth Management and Historic Preservation: Best Practices for Synthesis*, 29 THE URBAN LAWYER 202 (1997). Other states with comprehensive planning acts include Delaware, Florida, Hawaii, Maine, Maryland, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont and Washington.
[40] Such coordination, while dictated by logic, is frequently absent. There are other advantages. By being part of a comprehensive community plan, preservation can blunt criticism that it is part of the NIMBY ["Not in My Back Yard"] process to stop growth. *See id*, at 206 and 210.
[41] O.C.G.A. , § 50-8-1, et seq.

draft plan is prepared to allow residents to make suggestions, additions or revisions. Finally, the local governing body must take official action to approve the draft plan and certify that public participation requirements have been met before submitting it for regional and state review.[42]

Another area in which there are opportunities for public participation is in the listing of historic properties in an official register or their designation as landmarks or historic districts by government authorities. The nation's basic inventory of significant historic properties is the National Register of Historic Places, a listing of properties that have been nominated and accepted as having historic, architectural, archaeological, engineering or cultural significance, at the national, state or local level. The criteria for inclusion and process for listing are provided by the National Historic Preservation Act of 1966 and regulations adopted by the National Park Service for its implementation. [43] One of the most significant aspects of this program is that any individual citizen or group may initiate, draft and present a nomination to the National Register. If the nomination is adequately documented and appears to meet the criteria for evaluation, it is considered in the same manner as a nomination developed by a public agency. Although it is a federal program, it depends heavily on its state and local partners. The National Register is one of the most popular preservation programs among Georgia citizens. There are some 1,900 listings representing more than 65,000 historic properties, ranking Georgia high in the nation, and new nominations are requested in record numbers.[44] Public participation has been a hallmark of the Georgia program.[45]

All nominations must be consistent with the approved state historic preservation plan (which is developed with public participation), and the state is required to consult with local authorities in the nomination process. The state must specifically notify affected property owners and elected officials in the jurisdiction where the property is located at least 30 days before the State Review Board considers a nomination. Copies of the nomination must be provided to anyone requesting it or made available at public places such as libraries or courthouses so that comments may be prepared prior to its review. For nominations containing more than 50 properties, notice may published in the newspaper and it is suggested that a public information meeting be held in the immediate area. After approval by the Review Board, all comments received by the state and any objections from property owners[46] must be submitted to the Park Service with the nomination. The rules

---

[42] Rules and Regulations of the State of Georgia, Chapter 110-3-2(4).

[43] 16 U.S.C. §470a (1994); 36 C.F.R. Part 60 http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title36/36cfr60_main_02.tpl, accessed December 12, 2009

[44] BUILDING A PRESERVATION ETHIC, 3.

[45] The Historic Preservation Division also has responsibilities under the Georgia Register of Historic Places. All properties listed in the National Register are automatically listed in the Georgia Register, which was created primarily to facilitate the provision of state grants and tax incentives and ensure that historical resources affected by state projects are considered under the Georgia Environmental Policy Act. Public involvement requirements for the National Register satisfy requirements for Georgia Register listing.

[46] Properties will not be included in the Register if a private property owner or a majority of owners of private properties within a district object to inclusion or designation. Environmental protections afforded by the act do extend to properties *eligible* for the Register as well as those actually listed. 16 U.S.C. § 470a. (1994). Those owner-consent requirements set an unfortunate precedent, however, leading some state and

provide for additional publication in the *Federal Register* and final opportunity for any person or organization to petition the Keeper of the National Register to accept or reject a nomination.[47] In communities that have been designated as Certified Local Governments (CLGs) under NHPA, there are additional opportunities for public participation. The state may delegate some of its responsibilities for the National Register process to CLGs.[48] Among other requirements, Certified Local Governments are required to provide for adequate public participation, including recommending properties for the Register.[49] There are 75CLGs in Georgia, among the highest number in the nation, which provide increased opportunity for local citizens to become a part of the National Register as well as other planning and protection programs.[50]

An area in which public participation is even more crucial is the designation of historic properties and districts by local historic preservation commissions. There are over 2,500 local commissions in the United States, many with the power to regulate changes in the appearance of historic properties and delay or deny requests for demolition permits. The former Executive Director of the National Alliance of Preservation Commissions, has observed that the local aspect of American's preservation program is "the one with the teeth!"[51] The implications of designation can be significant for property owners. While their rights in this area are protected by provisions of the federal Constitution as well as the constitutions and laws of every state, they are nonetheless subject to legitimate restrictions on their use of designated historic properties.[52] One concept that underlies these legal protections is that every citizen is entitled to "due process" -- basic fairness in making, administering and enforcing laws. A key due process principle is that individuals affected by government action have a right to notice and an opportunity to be heard.[53] Among the most common challenges to government action in the context of local preservation ordinances are situations where owners are not given adequate notice of a proposed designation or hearing procedures that do not provide adequate opportunity to present testimony or evidence or rebut the testimony of others. [54]

---

local governments to require owner consent for local designation even though the U.S. Supreme Court has clearly not held it to be a requirement. See J. Myrick Howard, Where the Action Is: Preservation and Local Governments, in , in THE AMERICAN MOSAIC 138 (Robert Stipe ed., 1987).

[47] 36 C.F.R. § 60.6.

[48] At a minimum, CLGs in Georgia review local nominations prior to their presentation to the Georgia National Register Review Board. CLGs are also eligible to apply for federal preservation grants set aside for them and participate in additional training opportunities.

[49] 36 C.F.R. § 61.5. Requirements may include open meetings, published minutes, and published procedures.

[50] http://www.gashpo.org/content/displaycontent.asp?txtDocument=53, accessed December 12, 2009

[51] Pratt Cassity, *Still Local After All These Years . . .*", 19 CRM No. 6 (1996).

[52] The U.S. and Georgia Constitutions provide that no person shall be deprived of life, liberty, or property except by due process of law. U.S. Const., Amends. 5 and 14; Ga. Const, 1983, Art. I, Sec. 1, Para. II. And § 1-2-6. *See also* Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

[53] A full treatment of due process if far beyond the scope of this paper. However, a useful discussion for preservationists may be found in Bradford J. White and Paul W. Edmondson, *Procedural Due Process in Plain English* (National Trust for Historic Preservation, 2004).

[54] *See id.*

The Georgia Historic Preservation Act established a framework for local governments to create historic preservation ordinances and institute a process to designate historic properties and districts. Public participation is specifically mandated at two different points: when specific properties or districts are being designated, and when a property owner of a designated property or a property in a designated district applies for a permit to make a "material change" in the exterior appearance of a property. In the first instance, the historic preservation commission and local governing body are required to hold a public hearing on the proposed ordinance. Notice of the hearing must be published at least three times in the principal newspaper of general circulation within the jurisdiction and written notice mailed to all owners and occupants of properties within the area nominated.[55] Some local ordinances provide for more public notice than required by state law. The DeKalb County preservation ordinance mandates written notice to owners and occupants of properties adjoining nominated properties or districts and posting signs on individually nominated properties or on public streets wherever they intersect the boundaries of historic districts.[56] These measures are clearly designed to maximize public participation. At the public hearing, those in attendance are afforded an opportunity to comment orally on the proposed designation and allowed to submit written comments to be incorporated in the record. Following the public hearing, the local governing body must adopt a formal ordinance of designation, -- also at a public meeting. Local governments routinely provide additional opportunity for citizens to address these and other issues at their meetings.[57]

Before closing, three other opportunities for public participation in planning are worth mentioning. The Georgia General Assembly authorized special Joint Study Committees on Historic Preservation during both their 1997 and 1998 legislative sessions. The committees, made up of members of both houses of the legislature and other appointees representing a variety of preservation interests, held hearings around the state to give citizens opportunities to provide input. Based on this participation, the committees' recommendations were targeted toward a stewardship program for state-owned properties, tax credits, growth strategies, tourism, archaeology, local preservation commissions, and grants/financial assistance. Several pieces of legislation based on their recommendation have already been enacted.[58]

Another initiative, which focuses on a long under-represented group in preservation, is the Georgia African-American Historic Preservation Network (GAAHPN). Established in 1989, the first one of its kind in the country, the network has become a means of garnering input from this segment of the community as well as connecting persons who are working to preserve the significant physical and cultural legacy of the black community throughout Georgia. This effort has resulted in the inclusion of African-American preservation initiatives in the state preservation plan and an increase in both National Register listings and local designations for sites related to African-American heritage.[59]

---

[55] Notices must be published or mailed not less than 10 nor more than 20 days before the public hearing.
[56] Code of DeKalb County, Chapter 13.5 (Rev. 1988).
[57] O.C.G.A. § 44-10-26 (1998). For further commentary on the Georgia Historic Preservation Act, *see* John C. Waters, MAINTAINING A SENSE OF PLACE, A CITIZEN'S GUIDE TO COMMUNITY PRESERVATION (1983).
[58] Georgia Department of Natural Resources, Historic Preservation Division, *1998 Annual Report* (March, 1999).
[59] *See New Vision*, *supra* note 32, at Chapters 4 and 5.

Finally, in discussing public participation in Georgia, one must consider the role of non-profit preservation organizations. It is through these organizations that many individual citizens join together to increase the effectiveness of public participation in historic preservation. The Georgia Trust for Historic Preservation, founded in 1973, is one of the largest statewide nonprofits in the United States with nearly 10,000 members and serves as a model for similar organizations around the country.[60] With a paid professional staff and numerous volunteers drawn from its membership, the Trust serves as an advocate for the interests of its members. It has played key roles in developing the state's preservation plan, the work of the Joint Legislative Committees and other public planning efforts. The Georgia Trust also coordinates Georgians for Preservation Action, a statewide council that mobilizes grassroots preservationists across the state to advocate for preservation laws, programs and policies.[61] Many communities in Georgia, and in other states, have local community preservation organizations which advocate for the preservation of the local heritage and operate a wide variety of programs.[62] The majority of the statewide and local organizations are chartered by their states as non-profit corporations which provides state and federal tax exemptions. Many qualify under section 501(c)(3) of the Internal Revenue Code. This section allows donors to deduct the value of their contributions to these organizations from their federal, and some state, income taxes. The federal law, however, limits how much lobbying (their attempts to influence legislation) that these organizations can do. [63] Since the attempt to influence legislation is only one type of advocacy preservation organizations can undertake, there remains many opportunities for these organizations to participate in the heritage conservation issues of their states and communities.

This paper will not address public participation at the national level in the administration of Section 106 of the National Historic Preservation Act.[64] This topic has been covered extensively in this forum by John Fowler.

While I have not covered all opportunities for public participation in the planning and listing processes in the United States and the State of Georgia, I hope I have given an indication of some of the many opportunities available to members of the general public

---

[60] Today there are statewide preservation non-profits in most states. The combined membership exceeds 55,000 and there are more than 136 staff members working full time for these organizations. David J. Brown, *Statewide Preservation Organizations and NHPA*, CRM, *supra* note 53. In 1998, the Georgia Trust received the Trustees' Award for Organizational Excellence from the National Trust for Historic Preservation. 24 *The Rambler* (Georgia Trust for Historic Preservation) No. 14 at 2 (November/December 1998). The Georgia Trust maintains a site on the World Wide Web at www.georgiatrust.org, accessed December 12, 2009.

[61] GAPA has played a role in many hard-won advances for preservation including creation of the Heritage 2000 grant program, the historic preservation license tag, property and income tax incentives for historic buildings, the Georgia Register of Historic Places, an inclusion of preservation concerns in the Georgia Comprehensive Planning Act and the Georgia Environmental Policy Act.

[62] The Athens-Clarke Heritage Foundation is a typical local preservation organization in Georgia. http://achfonline.org/, accessed December 12, 2009.

[63] http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html, accessed December 12, 2009.

[64] 16 U.S.C. §470f

and interested members of the historic preservation community to contribute to these programs.