

2014

Rebuilding From Ruins: The Role of Historic Preservation in the Wake of Disaster

Elizabeth Turner

Follow this and additional works at: <https://scholarship.law.ufl.edu/jlpp>

Recommended Citation

Turner, Elizabeth (2014) "Rebuilding From Ruins: The Role of Historic Preservation in the Wake of Disaster," *University of Florida Journal of Law & Public Policy*. Vol. 25: Iss. 2, Article 1.
Available at: <https://scholarship.law.ufl.edu/jlpp/vol25/iss2/1>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in University of Florida Journal of Law & Public Policy by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

**REBUILDING FROM RUINS:
THE ROLE OF HISTORIC PRESERVATION
IN THE WAKE OF DISASTER**

*Elizabeth Turner**

INTRODUCTION	116
I. FEDERAL LAW	116
A. <i>NHPA & NEPA</i>	117
B. <i>The Stafford Act</i>	119
C. <i>Other Federal Regulations</i>	120
II. STATE AND LOCAL LAW	122
A. <i>State Law</i>	122
B. <i>Local Law</i>	123
C. <i>State-Specific: Florida</i>	124
III. CASE STUDIES	127
A. <i>Hurricane Hugo</i>	127
B. <i>Hurricane Katrina</i>	128
IV. WHERE DO WE GO FROM HERE?	131
A. <i>Maintain an Up-to-date Inventory of Historic Resources</i> ...	132
B. <i>Identify Appropriate Historic Preservation Professionals for a Response Network</i>	133
C. <i>Develop Expedited Review Process in the Event of a Disaster</i>	133
D. <i>Prepare Individual Emergency Response Plans</i>	134
E. <i>Establish Priorities</i>	135
CONCLUSION	136

* J.D. 2015, University of Florida Levin College of Law; 2013 A.B. in Environmental Sciences & Policy; 2010 A.B. in Earth & Ocean Sciences, Duke University. The Author would like to thank her family for their support, as well as Professor Timothy McLendon for his instruction and guidance on this Note.

INTRODUCTION

Natural disasters can strike anywhere and anytime, often without notice. In the wake of such catastrophe, amidst chaos and confusion, the question that is often on survivors' minds is: "how do we rebuild and move on?" While preliminary action focuses on ensuring the safety of human lives, the real challenges begin with the rubble. For some, disaster provides the chance to build with a blank canvas, while others attempt to rebuild from the ruins.

What about historic resources? In an attempt to "get back to normal," people often tend to focus on the quick fix; but in the world of historic preservation, the quick fix isn't always the most effective solution. Federal, state, and local laws all provide protection to historic resources, requiring special treatment of buildings in normal, non-emergency times. Following a natural disaster, some of these processes fall short. The result can be devastating as historic resources may suffer more harm post-disaster than from the actual disaster itself. Historic preservation is paramount to disaster recovery, as many communities' identities are closely linked to the special character and value of their historic resources.

This Note considers the role that historic preservation plays following natural disasters. Though the legal framework is generally applicable to most disasters, this Note focuses specifically on hurricanes. Part I examines the relevant federal law as it applies to historic preservation in non-emergency times, as well as laws applicable specifically to natural disasters. Part II discusses state and local laws from a broad perspective, and then focuses on the state of Florida's procedures specifically. Part III provides two case studies as examples of how historic preservation has been used following two large hurricanes, Hurricanes Hugo and Katrina. Finally, Part IV discusses various pre-disaster mitigation techniques and offers suggestions as to how historic preservation can be incorporated into emergency management planning.

I. FEDERAL LAW

Historic preservation in the United States began on the federal level with the Antiquities Act of 1906, authorizing the President to designate national monuments.¹ However, the act was limited in its scope and did not fully address the need for a comprehensive historic preservation program. In the wake of a changing nation, the federal government began to take an active role in preserving the country's treasures.² In 1965, a

1. 16 U.S.C. §§ 431–33 (2014).

2. See generally W. Brown Morton III, *What Do We Preserve and Why?*, in THE

Special Committee on Historic Preservation published *With Heritage So Rich*, which provided essays by preservation scholars, as well as findings and recommendations for congressional action.³ Shortly after, in 1966, Congress passed the National Historic Preservation Act.⁴

A. NHPA & NEPA

The National Historic Preservation Act (NHPA) of 1966⁵ is the main governing law that protects the historic resources of the United States.⁶ The NHPA has several functions. First, it authorizes the expansion of the National Register of Historic Places, which consists of “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.”⁷ Second, it imposes a duty on federal agencies, with the assistance of the states, to establish preservation programs for the “identification, evaluation, and nomination” of sites for the National Register of Historic Places,⁸ as well as the ongoing duty to protect federally owned historic properties⁹ and require that properties are “managed and maintained” in a way that gives “special consideration to the preservation of . . . values in the case of properties designated as having National significance.”¹⁰

Perhaps the most important tool provided by NHPA with respect to historic preservation is the section 106 review process,¹¹ which establishes the procedure agencies must follow for any federal “undertaking” that will adversely affect a site listed or eligible for listing on the National Register.¹² Section 106 mandates that an agency may not proceed with an action, including the disbursement of federal funds, until the agency considers the effects on the historic property.¹³ Additionally, the Advisory Council on Historic Preservation¹⁴ must be given the opportunity to comment on the undertaking.¹⁵ Though section 106 creates a burden for federal agencies to *consider* their effects, there is nothing

AMERICAN MOSAIC: PRESERVING A NATION’S HERITAGE 145, 145–78 (Robert E. Stipe & Antoinette J. Lee eds., US/ICOMOS 1987).

3. *Id.* at 168.

4. *Id.* at 169.

5. 16 U.S.C. § 470.

6. See Editor’s Note, *An Overview of Federal Historic Preservation Law and Related Legislation*, PRESERVATION L. REP., 10,003 (Ref.) (June 1994) [hereinafter Editor’s Note].

7. 16 U.S.C. § 470a(a)(1)(A).

8. 16 U.S.C. § 470h-2(a)(2)(A).

9. 16 U.S.C. § 470h-2(a)(1).

10. 16 U.S.C. § 470h-2(a)(2)(B).

11. 16 U.S.C. § 470f.

12. *Id.*

13. *Id.*

14. The Advisory Council on Historic Preservation was established by 16 U.S.C. § 470i.

15. 16 U.S.C. § 470f.

within the statute that *requires* agencies from ultimately proceeding with an action that harms historic properties.¹⁶ Additionally, section 106 only offers procedural requirements for federal agencies; there is nothing in the NHPA to regulate public or private owners.¹⁷

The National Environmental Policy Act (NEPA) of 1969¹⁸ implements similar review procedures for all “major Federal actions significantly affecting the quality of the human environment,”¹⁹ which includes “important historic, cultural, and natural aspects of our national heritage.”²⁰ Though NEPA was initially passed to regulate national environmental policy, its procedural limits provide valuable application within the historic preservation field. NEPA provides a broader scope than the NHPA in terms of the affected properties because, unlike NHPA, there is no language in NEPA that restricts its use to federally owned properties.²¹ However, NEPA’s triggering language is more limiting. NHPA’s section 106 review is automatically triggered *whenever* there is a federal undertaking, without any restrictions as to the magnitude of the action.²² However, NEPA is only automatically triggered by any “*major* federal action *significantly* affecting the human environment.”²³

Though both the NHPA and NEPA have similar requirements, compliance with one does not excuse compliance with the other. In *Lemon v. McHugh*,²⁴ when plaintiffs brought suit against the Army for NEPA violations for the failure to supplement a pre-existing environmental impact statement,²⁵ the Army argued that the satisfaction of the NHPA requirements was sufficient to fulfill compliance with NEPA.²⁶ The district court disagreed and found that “although the NHPA and NEPA resemble each other in certain respects, compliance with the NHPA ‘does not relieve a federal agency of the duty of complying with the impact statement requirement ‘to the fullest extent possible.’”²⁷ This

16. See Editor’s Note, *supra* note 6, at 10,010–11 (Ref).

17. Though NHPA does not contain any restrictions, other governing laws, such as local ordinances, may still apply.

18. 42 U.S.C. §§ 4321–4370f.

19. 42 U.S.C. § 4332(C). NEPA requires that agencies prepare environmental impact statements for major federal actions, which are defined as “actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18.

20. 42 U.S.C. § 4331(b)(4).

21. The triggering actions must still be federal actions (like NHPA), but NEPA applies to all historic resources, including those on private or publically owned lands. See Editors Note, *supra* note 6, at 10,012–3.

22. 16 U.S.C. § 470f.

23. See *supra* text accompanying note 19 (emphasis added).

24. 668 F. Supp. 2d 133 (D.D.C. 2009).

25. *Id.* at 136.

26. *Id.* at 144.

27. *Id.* (quoting *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) (quoting 42 U.S.C. § 4332)).

ruling demonstrates the duality of power held by the NHPA and NEPA.

B. *The Stafford Act*

The Federal Emergency Management Agency (FEMA) is the federal agency tasked with emergency response following natural disasters.²⁸ The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),²⁹ passed in 1988, is the statutory authority for most federal disaster response.³⁰ Due to the often widespread excessive damage and disruption caused by natural disasters,³¹ Congress passed the Stafford Act “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.”³²

To qualify for assistance, a state governor must first request that the President declare a major disaster has occurred within the state,³³ “finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State . . . and that Federal assistance is necessary.”³⁴ FEMA then provides a range of immediate disaster response services,³⁵ as well as long-term services, such as financial support through disaster survivor assistance³⁶ and federal grants.³⁷

Because FEMA is a federal agency, its actions would seem to qualify as “undertakings” or “federal actions” under NHPA or NEPA. If the agency’s actions were deemed to affect historic or cultural properties or to significantly affect the quality of the human environment, then traditionally NHPA and NEPA would require review before action.³⁸

28. FEMA, *About the Agency*, <http://www.fema.gov/about-agency> (last visited Mar. 31, 2014). FEMA’s mission is to “support our citizens and first responders to ensure that as a nation we work together to build, sustain and improve our capability to prepare for, protect against, respond to, recover from and mitigate all hazards.” *Id.*

29. 42 U.S.C. §§ 5121–5207.

30. FEMA, *About the Agency*, *supra* note 28.

31. 42 U.S.C. § 5121(a). Congress recognized that disasters often have great human impacts, including loss of life, loss of income, and loss of property. Additionally, Congress found that disasters “often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity.” *Id.*

32. 42 U.S.C. § 5121(b).

33. 42 U.S.C. § 5170.

34. *Id.*

35. See 42 U.S.C. § 5170a. Some services include the distribution of food and medical services and performance of essential community functions. *Id.*

36. See FEMA, *Disaster Survivor Assistance*, <http://www.fema.gov/disaster-survivor-assistance> (last visited Mar. 31, 2014).

37. A range of grants is available for pre-disaster mitigation and post-disaster response. See FEMA, *Grants*, <http://www.fema.gov/grants> (last visited Mar. 31, 2014).

38. 16 U.S.C. § 470f; 42 U.S.C. § 4332(C).

However, FEMA has been granted leeway for its post-disaster response actions so that it may execute its mission while still complying with statutory requirements.

The Stafford Act completely exempts certain actions from the traditional NEPA review. The Act states that,

an action which is taken or assistance which is provided . . . which has the effect of restoring a facility substantially to its condition prior to the disaster or emergency, shall not be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.³⁹

Though the Stafford Act removes the procedural requirements for emergency agency actions, this does not completely excuse FEMA from considering its impacts before taking those actions. The Council on Environmental Quality (CEQ) was established by NEPA as a coordinating group to promulgate rules and procedures to implement the Act.⁴⁰ The CEQ's regulations mandate that when emergencies "make it necessary to take an action with significant environmental impact" without complying with regulations, the federal agency should consult with the CEQ about alternative arrangements.⁴¹ As the Supreme Court has granted the CEQ "substantial deference" for its NEPA interpretations,⁴² federal agencies should comply with the CEQ's consultation requirements, even despite the seemingly plain intent of an exception granted by the Stafford Act.⁴³

C. Other Federal Regulations

The Advisory Council on Historic Preservation (ACHP) promulgated rules that encourage agencies to "develop procedures for taking historic properties into account during operations which respond to a disaster or

39. 42 U.S.C. § 5159.

40. See Council on Environmental Quality, *About CEQ*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/administration/eop/ceq/about> (last visited Mar. 31, 2014).

41. 40 C.F.R. § 1506.11 (1978). This regulation only applies to the actions that are necessary for immediate control of the emergency; all other actions still remain subject to NEPA. *Id.*

42. See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

43. In 2010, the CEQ distributed a memo to the heads of all federal departments and agencies with the intent of providing guidance for emergencies and NEPA application. A copy can be found on the Department of Energy's website. Nancy H. Sutley, *Emergencies and the National Environmental Policy Act*, COUNCIL ON ENVIRONMENTAL QUALITY (May 12, 2010), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-Emergencies.pdf.

emergency.”⁴⁴ In such a situation, ACHP has the authority to approve the procedures, which would then govern in place of the traditional section 106 guidelines.⁴⁵ In the event that agencies have not implemented mitigation strategies before disasters strike, regulatory instruments may exempt some agency actions from section 106 if such actions are essential to prevent “immediate threat[s] to life or property.”⁴⁶

To substitute for section 106 procedures, agencies may utilize Programmatic Agreements, which “contain specific provisions for dealing with historic properties in emergency situations.”⁴⁷ Programmatic Agreements may be used for several purposes, including:

- (i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;
- (ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) When nonfederal parties are delegated major decisionmaking [*sic*] responsibilities.⁴⁸

Programmatic Agreements are currently the preferred method for FEMA’s section 106 responsibilities as they “establish a coordination and scoping process at the beginning of the disaster” and decrease the timeframes for action review by the State Historic Preservation Office (SHPO).⁴⁹

Programmatic Agreements are state-specific, allowing FEMA and state agencies to tailor the agreements to that particular state’s needs and in-state agency infrastructure.⁵⁰ They also facilitate early communication between FEMA, the SHPO, and state emergency response agencies.⁵¹ Additionally, Programmatic Agreements assist in the early coordination efforts and free-flowing exchange of information, including “points of contact and interested parties; the list of counties designated within the

44. 36 C.F.R. § 800.12(a) (2000).

45. *Id.*

46. 36 C.F.R. § 800.12(b).

47. 36 C.F.R. § 800.12(b)(1). A sample Programmatic Agreement may be downloaded from FEMA’s website. FEMA, *Programmatic Agreement Among the Federal Emergency Management Agency, The Washington State Historic Preservation Officer, The Washington State Emergency Management Division, and the Advisory Council on Historic Preservation*, FEMA.GOV (May 2002), http://www.fema.gov/pdf/government/grant/pa/9560_3a.pdf.

48. 36 C.F.R. § 800.14(b)(1).

49. FEMA, *Programmatic Agreements*, FEMA.GOV, <http://www.fema.gov/environmental-planning-and-historic-preservation-program/programmatic-agreements> (last visited Mar. 31, 2014).

50. ACHP, *Federal Emergency Management Agency Model Statewide Programmatic Agreement*, ACHP.GOV, <http://www.achp.gov/fema-pa.html> (last visited Mar. 31, 2014).

51. *Id.*

disaster declaration; historic properties on or eligible for the National Register in the disaster area; and the identification and approval of mitigation initiatives to reduce the future impacts of disaster.”⁵²

II. STATE AND LOCAL LAW

A. State Law

While federal law imposes mandates on all states, individual state and local governments are often the “front lines” when it comes to historic preservation. All fifty states have enacted laws that create state agencies tasked with preservation responsibilities and designation of properties for a state register of historic places.⁵³ There are three main ways in which a state government aids in the historic preservation process. First, it assists federal agencies and participates in the NHPA and NEPA review processes.⁵⁴ State agencies participate in coordinated efforts with federal agencies to determine resources that are eligible for the National Historic Register.⁵⁵

Second, states often pass their own laws that mirror federal preservation laws.⁵⁶ These state laws do not replace federal laws, but rather supplement or strengthen their requirements.⁵⁷ Because federal laws only apply to federal agencies and their actions, state laws allow the same principle to be applied to a state or local agency should the state choose to implement such a law. For example, Minnesota’s Environmental Rights Act prohibits state agencies from demolishing a historical resource unless there is no prudent and feasible alternative site.⁵⁸ This law successfully prevented destruction of a historic resource in the case of *Stansell v. City of Northfield*.⁵⁹

Finally, states focus on private rights of action regarding historic

52. *Id.*

53. Leonard A. Zax, *Protection of the Built Environment: A Washington, D.C. Case Study in Historic Preservation*, 19 B.C. ENVTL. AFF. L. REV. 651, 652 (1992), available at <http://law.digitalcommons.bc.edu/ealr/vol19/iss3/20>.

54. *See supra* Parts I & I.A.

55. *Id.*

56. JULIA H. MILLER, A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 9 (National Trust for Historic Preservation 2004).

57. AMERICAN PLANNING ASSOCIATION, PLANNING AND URBAN DESIGN STANDARDS 590 (John Wiley & Sons, Inc. 10th ed. 2006). For examples of state acts, *see* California Environmental Quality Act, CAL. PUB. RES. §§ 21000–21189.3 (2007); New Mexico Prehistoric and Historic Sites Preservation Act, N.M. STAT. ANN. §§ 18-8-1–18-8-8 (1978).

58. MINN. STAT. § 116B.04 (1971).

59. *Stansell v. City of Northfield*, 618 N.W.2d 814 (Minn. Ct. App. 2000).

resources through enabling laws, which delegate the state's police power to enforce laws to local governments.⁶⁰ In doing so, local governments gain the authority to pass local ordinances for the protection and preservation of historic resources.⁶¹ These enabling acts vary in scope and authority, yet most authorize their local governments to "regulate private actions affecting historic properties through a permitting process."⁶² Because enabling acts typically authorize local governments to designate historic properties and historic districts, as well as prevent exterior modifications or demolitions, this may be the state's most important function with respect to historic preservation.⁶³

B. *Local Law*

Despite being subject to federal and state law, local governments perhaps hold the real power when it comes to historic preservation. There is no correct model for local historic preservation law as ordinances vary from location to location.⁶⁴ Even within a single state, variations may occur due to different community needs, resources, and culture.⁶⁵ For example, some cities may place a high value on their historic resources and thus will be motivated to protect them; whereas other cities may suffer from political pressure that makes it difficult to enact protective ordinances.⁶⁶ Regardless of a local government's approach, it must follow the enabling statute and enact rules pursuant to its delegated authority.⁶⁷

The designation of power to local governments should not be overlooked. For over eighty years, local governments have utilized the power to create protections in the form of historic districts, historic landmarks, and other historic and cultural resources.⁶⁸ In 1931, Charleston, South Carolina became the first city to create a historic district through zoning ordinances.⁶⁹ Shortly thereafter, Louisiana amended its state constitution to increase the power of the Vieux Carre Commission, which then authorized the designation of the Vieux Carre historic district.⁷⁰

60. MILLER, *supra* note 56, at 11.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.*

67. 36 C.F.R. § 800.14 (b)(1) (2000).

68. *See generally* Morton, *supra* note 2.

69. *Id.* at 159.

70. *Id.* at 160.

In 1965, New York City adopted its Landmarks Preservation Law⁷¹ pursuant to the state-enabling act.⁷² The constitutionality of the city ordinance was challenged in *Penn Central Transportation Co. v. New York City*.⁷³ The Supreme Court upheld the law, noting that historic preservation “is an entirely permissible governmental goal.”⁷⁴ Considering whether the city’s law could restrict development of a historic landmark without amounting to a constitutional “taking,”⁷⁵ the Court found that “[s]tates and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”⁷⁶ The ruling in *Penn Central* opened the door for local governments to pass historic preservation ordinances without fear of constitutional claims, and some states later explicitly designated historic preservation as a legitimate government interest in their state constitutions.⁷⁷

C. State-Specific: Florida

Florida is well known for its vulnerability to hurricanes. Seven of the top ten most expensive hurricanes in U.S. history directly affected Florida.⁷⁸ Additionally, Florida contains many of our nation’s historical resources, including the nation’s oldest masonry fort⁷⁹ in the city of Saint Augustine, the oldest continually occupied European settlement in the continental United States.⁸⁰ A recent survey on the economic impacts of historic preservation in Florida revealed that the state economy benefits from historic preservation, on average, by \$4.2 billion.⁸¹ Accordingly, Florida has implemented a variety of programs to protect its resources.

Recognizing that Florida has a unique cultural heritage and history,

71. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108–09 (1978).

72. *Id.* at 109 n.5.

73. *Id.* at 104.

74. *Id.* at 129.

75. *Id.* at 107.

76. *Id.* at 129.

77. MILLER, *supra* note 56, at 12.

78. Brian Beers, *The 10 Most Expensive Hurricanes in US History*, CNBC (Oct. 3, 2013), <http://www.cnbc.com/id/26426796>.

79. Castillo de San Marcos is a National Monument and listed on the National Register. NPS, *Castillo De San Marcos*, <http://www.nps.gov/casa/index.htm> (last visited Mar. 31, 2014).

80. NPS, *St. Augustine Town Plan Historic District*, NATIONAL PARK SERVICE NATIONAL HISTORIC LANDMARKS PROGRAM, <http://tps.cr.nps.gov/nhl/detail.cfm?ResourceId=1028&ResourceType=District> (last visited Mar. 31, 2014).

81. 1000 Friends of Florida, *Disaster Planning for Florida’s Historic Resources*, FLA. DEP’T OF STATE DIV. OF HISTORICAL RES., 3 (Sept. 2003), http://www.floridadisaster.org/Mitigation/Documents/Disaster_Planning_for_Historic_Resources.pdf [hereinafter FL Disaster Planning].

the legislature implemented the Florida Historical Resources Act⁸² to “provide leadership in the preservation of the state’s historic resources” as well to “administer state-owned or state-controlled historic resources in a spirit of stewardship and trusteeship.”⁸³ Additionally, the Act declares it to be state policy to encourage “preservation by private means” and to create conditions to help harmonize society with its historic resources, even via financial assistance if needed.⁸⁴

Section 267.031 authorizes the creation of the Division of Historical Resources within the Department of State⁸⁵ and designates the Director of the Division of Historical Resources as the SHPO, authorizing the division to “maintain an inventory of such resources” and to “develop a comprehensive statewide historic preservation plan.”⁸⁶ Part of those duties are also satisfied by a continuing requirement to “establish, maintain, and administer a state historic preservation program” pursuant to NHPA.⁸⁷ Consistent with this duty, the SHPO surveys historic resources and maintains the Florida Master Site File⁸⁸ and evaluates all federal and state undertakings to ensure compliance under both Section 106 of NHPA and Chapter 267 of Florida Statutes.⁸⁹

Though Florida does not mandate preservation on a local level,⁹⁰ through the use of city ordinances, many community resources are subject to local laws that usually limit or prohibit owners of historic properties from altering or demolishing their property without pre-approval from the government.⁹¹ The City of Gainesville, for example, established historic preservation districts within the city⁹² and even has its own local register of historic places.⁹³

In terms of disaster management and response, Florida’s Division of Emergency Management (the state-equivalent of FEMA) runs the State Emergency Operations Center, which provides an immediate response and recovery framework following disaster.⁹⁴ The division is also responsible for long-term recovery, including repair to infrastructure, as well as preventative measures, such as pre-disaster hazard mitigation

82. Florida Historical Resources Act, FLA. STAT. § 267.

83. FLA. STAT. § 267.061 (2002).

84. *Id.*

85. FLA. STAT. § 267.031 (2008).

86. *Id.*

87. *Id.*

88. FL Disaster Planning, *supra* note 81, at 6.

89. *Id.*

90. *Id.* at 17.

91. See generally CONSTANCE BEAUMONT, A CITIZEN’S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES (Nat’l Trust, 1992).

92. GAINESVILLE, FLA., CODE § 30-79.

93. *Id.* § 30-112.

94. FL Disaster Planning, *supra* note 81, at 10–11.

programs.⁹⁵ On the local level, each county has an Emergency Management Office responsible for the development of a Comprehensive Emergency Management Plan.⁹⁶ Mitigation also occurs on the local level as individual communities plan for threats that are specific or unique to that area.⁹⁷

Currently, most of the communication between emergency management responders and members of the historic preservation community occurs after a storm. Following disasters, federal funding is disbursed subject to Section 106 requirements for federal undertakings,⁹⁸ which includes physical acts, such as the construction, rehabilitation, or demolition of structures, as well as the issuance of federal grants.⁹⁹ The impacts from a disaster do not themselves count as “adverse effects” under Section 106,¹⁰⁰ but attempts to rectify damage from the storm will count for NHPA purposes.

Though most decisions are made after a disaster strikes, there are some local communities that are incorporating procedures for emergency response with respect to historic properties into local ordinances. For example, the City of Coral Gables contains a provision in its zoning ordinances that only allows repairs that are “reasonably necessary to correct the hazardous condition” following disaster on a historic building or within a historic district.¹⁰¹ As such, only actions that will stabilize the building are permitted; all other actions still require the city’s regular review process.¹⁰²

Florida is also taking steps to improve statewide disaster planning for historic resources, focusing on ways to reduce the impacts of disaster from a prospective lens. In 2001, the Florida Department of State and the nonprofit 1000 Friends of Florida identified many recurring problems, including the lack of coordination between officials in the emergency management, historic preservation, and governmental fields; a lack of local processes to identify historic sites before disaster strikes; inadequate training to deal with on-site historic resource issues; and a lack of expertise available in the wake of disaster.¹⁰³ Implementing pre-disaster mitigation strategies can easily combat many of these problems. For more on the subject, see Part IV.

95. *Id.* at 11.

96. *Id.*

97. *Id.*

98. *Supra* Part I.A.

99. FL Disaster Planning, *supra* note 81, at 12.

100. *Id.* at 16.

101. CORAL GABLES, FLA., ZONING CODE § 3-1117.

102. *Id.*

103. FL Disaster Planning, *supra* note 81, at 17–18.

III. CASE STUDIES

A. Hurricane Hugo

On September 21, 1989, Hurricane Hugo, a category four storm, struck the coast of South Carolina near the historic city of Charleston, delivering torrential rain, wind gusts of up to 135 miles per hour, and tidal surge close to twenty feet high.¹⁰⁴ After the storm, it was determined that Hurricane Hugo had damaged approximately eighty percent of Charleston's 3,500 historic buildings, amounting to approximately \$250 million in restoration costs.¹⁰⁵

At the time, FEMA did not have a staff with historic preservation knowledge, nor did the agency know how to comply with Section 106 requirements in the wake of a disaster.¹⁰⁶ As such, immediately following the storm, local preservation organizations rose to the occasion.¹⁰⁷ The consortium of groups initially assessed damage within the historic district, noting elements that were salvageable, and established protocol for stabilization for those compromised structures.¹⁰⁸ The consortium distributed relevant information to affected property owners, worked with the National Park Service to organize volunteer efforts, and coordinated with providers of building supplies for the recovery stage.¹⁰⁹

Despite the fact that over 200 homes suffered severe damage,¹¹⁰ the city resisted relaxing its preservation standards.¹¹¹ Instead, the city instituted several efforts to ensure that restoration was properly achieved without compromise. When contractors flooded the city looking for work, the city police responded to the threat of questionable workers by creating a permitting process, requiring registration, a nominal license fee, and fingerprinting.¹¹² The city's architectural review board met

104. Laura Parker & William Booth, *Hurricane Hugo Rips Through South Carolina*, WASH. POST, Sept. 22, 1989, <http://www.washingtonpost.com/wp-srv/weather/hurricane/poststories/hugo-sc.htm>.

105. Nancy Ross, *Historic Homes Recover*, WASH. POST, July 14, 1990, http://articles.orlandosentinel.com/1990-07-14/business/9007120197_1_charleston-historic-buildings-hurricane-hugo.

106. Stephanie J. Talbert, *The Golden Hour: The Role of Historic Preservation Law in the Immediate Aftermath of Disaster*, 36 ELR 10634, 10638 (2006).

107. Charleston & Preservation, NATIONAL PARK SERVICE U.S DEPARTMENT OF THE INTERIOR, <http://www.nps.gov/history/nr/travel/charleston/preservation.htm> (last visited Mar. 31, 2014) [hereinafter NPS].

108. *Id.*

109. *Id.*

110. H. Jane Lehman, *In Charleston, A Rebuilding Boom*, CHI. TRIB., Aug. 4, 1991, http://articles.chicagotribune.com/1991-08-04/business/9103250586_1_historic-preservation-historic-charleston-foundation-buildings.

111. NPS, *supra* note 107.

112. Lehman, *supra* note 110.

weekly to study every proposed roof and window repair and refused proposals when contractors tried to take shortcuts with twentieth century substitute materials.¹¹³

The city's persistence paid off in unexpected ways as well. The Historic Charleston Foundation sponsored an inventory within the historic district, surveying the damage on a house-by-house basis.¹¹⁴ Additionally, the destruction allowed architects the rare opportunity to study the structural integrity of some of the city's oldest buildings.¹¹⁵ Engineering departments at several universities have since used the data gathered from this survey to study the effects on unreinforced masonry buildings during storms or earthquakes.¹¹⁶

Carroll Campbell, the Governor of South Carolina during Hurricane Hugo and its recovery period, commented that the state is "in better shape tomorrow to take this type of blow" than they were before the storm.¹¹⁷ The efforts of local government, organizations, and the citizens in the historic district make Charleston's recovery from Hurricane Hugo a success story and perhaps a model for other cities to use pre-existing preservation standards in the wake of disaster.

B. Hurricane Katrina

Hurricane Katrina struck the Gulf Coast as a category three hurricane in the early hours of August 29, 2005.¹¹⁸ Though over 1.2 million people along the Gulf Coast were under either voluntary or mandatory evacuation orders,¹¹⁹ not all residents chose to heed the warnings. Winds and rains produced damage standard to hurricanes, but storm surge was the real cause of the catastrophic damage suffered by the region.¹²⁰ With over 1500 lives lost¹²¹ and \$108 billion in damage,¹²² Hurricane Katrina

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Hurricanes in History*, NATIONAL WEATHER SERVICE, <http://www.nhc.noaa.gov/outreach/history/#katrina> (last visited Mar. 31, 2014).

119. Richard D. Knabb et al., *Tropical Cyclone Report Hurricane Katrina*, National Hurricane Center 13 (2005), http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf (last visited Aug. 6, 2014).

120. *Id.* at 11

121. John L. Bevin, II et al., *Annual Summary: Atlantic Hurricane Season 2005*, National Oceanic and Atmospheric Administration, <http://www.aoml.noaa.gov/general/lib/lib1/nhclib/mwreviews/2005.pdf> (last visited Mar. 31, 2014).

122. Eric S. Blake et al., *The Deadliest, Costliest, and Most Intense United States Tropical Cyclones from 1851 to 2010 (And Other Frequently Requested Hurricane Facts)*, National Hurricane Center (Aug. 2011). <http://www.nhc.noaa.gov/pdf/wns-nhc-6.pdf> (last visited Mar. 31, 2014).

remains one of the most catastrophic storms in history.

Many articles focus on the damage to New Orleans, but Hurricane Katrina equally ravaged many other states. Mississippi in particular faced many challenges, as Hurricane Katrina battered over 70 miles of the state's Gulf Coast as it made landfall.¹²³ Effects were even felt 180 miles inland in Jackson, Mississippi, where winds ripped the roof off of the Old Capitol and damaged artifacts in the State Historical Museum.¹²⁴ Within a week of the storm, the Mississippi Heritage Trust (MHT) and the Mississippi Department of Archives and History (the SHPO for Mississippi) worked together to assess the damage to the state's 14 historic districts on the Gulf Coast.¹²⁵ Within 2 months, the group determined that over 1000 historic structures were damaged, and at least 250 properties listed on the National Register were completely destroyed.¹²⁶ Volunteers from organizations across the country, including the National Trust for Historic Preservation and Colonial Williamsburg, assisted by providing architects, engineers, and historians to help assess damaged buildings (with the goal of preventing unnecessary demolition) and to advise homeowners on potential repairs.¹²⁷

Additionally, the MHT established a recovery fund for work relating to historic preservation in hard-hit areas.¹²⁸ Over \$250,000 was raised to fund public meetings, volunteer support, and primarily, the Pilot Stabilization Program, which worked to stabilize damaged buildings to prevent demolition where possible.¹²⁹ Seven homes, a Masonic lodge, and a historic school were beneficiaries of this program.¹³⁰ The MHT also participated with the National Trust for Historic Preservation in many advocacy projects to highlight the need for preservation following the hurricane.¹³¹ Their efforts, which included testimony to congressional subcommittees and tours for Congressmen to view the damage of historic properties, helped validate the \$26 million grant of federal funding that Mississippi received for stabilization and repair of damaged historic properties.¹³²

123. Preservation in Mississippi, *Hurricane Katrina/Gulf Coast Recovery*, <http://misspreservation.com/backstories/hurricane-katrinagulf-coast-recovery/> (last visited Mar. 31, 2014).

124. *Id.* The museum was closed for three years following the damage from Hurricane Katrina.

125. *Id.*

126. *Id.*

127. *Id.*

128. Mississippi Historic Trust, *Hurricane Katrina: Impact on Mississippi's Historic Structures*, <http://www.mississippiheritage.com/HurricaneKatrina.html> (last visited Mar. 31, 2014).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* To receive such a grant, structures must be listed or eligible for listing on the

In Biloxi, recovery efforts included rehabilitation of one of the city's most famous historic structures. Built in 1852, Beauvoir was the last home of Confederate President Jefferson Davis.¹³³ During Katrina, the main home's living area was flooded by eight inches of water, leaving behind mold and peeling paint.¹³⁴ Thirty percent of the home was destroyed,¹³⁵ while other structures, including the library where Davis penned "The Rise and Fall of the Confederate Government," were completely lost.¹³⁶ Additionally, at least one-third of the artifacts at Beauvoir were ruined, including many manuscripts and \$250,000 worth of Confederate currency.¹³⁷

As a National Historic Landmark,¹³⁸ Beauvoir was entitled to federal funding from FEMA. Coupled with private and state funds,¹³⁹ the estate underwent an exhaustive \$4 million restoration.¹⁴⁰ Much like the restoration efforts in Charleston following Hurricane Hugo,¹⁴¹ Beauvoir's transformation yielded surprisingly positive results that perhaps would never have been discovered otherwise. Winterthur Museum of Delaware provided a historian to survey the damage Katrina caused to the interior of the home to guarantee that restoration would be as historically accurate as possible.¹⁴² While utilizing Q-tips, microscopes, and other restoration tools, the historian discovered unknown details as to the original construction of the home.¹⁴³ The doors, which were white when Katrina hit, were once painted with an oak finish.¹⁴⁴ The original owner wanted real oak, but the grand size of the doors made that impossible; instead, cypress doors were stained with "the

National Register, with owner-occupied homes receiving priority. See Preservation in Mississippi, *supra* note 123.

133. April Williams, *Katrina Uncovers a Little History in Mississippi*, CNN, Aug. 28, 2010, <http://www.cnn.com/2010/LIVING/08/28/katrina.beauvoir/>.

134. Michael Kunzelman, *Jefferson Davis' Biloxi Home Reopens After \$4 Million Renovation*, USA TODAY, June 6, 2008, http://usatoday30.usatoday.com/travel/destinations/2008-06-06-beauvoir-restoration_n.htm.

135. *Id.*

136. Deborah Fitts, *Jefferson Davis' Beauvoir Faces Long Recovery After Katrina*, Civil War News, Nov. 2005, <http://www.civilwarnews.com/archive/articles/BeauKat.htm>.

137. Kunzelman, *supra* note 134. Some figures have estimated as high as 70% of artifacts were destroyed by the storm. See Fitts, *supra* note 136.

138. See NPS, <http://tps.cr.nps.gov/nhl/detail.cfm?ResourceId=1112&ResourceType=Building> (last visited Mar. 31, 2014).

139. There was initially litigation regarding contested insurance claims over the property, but claims were resolved and restoration soon proceeded. See *Miss. Div. of the United Sons of Confederate Veterans & Presidential Library v. Charter Oak Fire Ins. Co.*, 2006 U.S. Dist. LEXIS 89474 (S.D. Miss. Dec. 11, 2006).

140. Kunzelman, *supra* note 134.

141. *Supra* Part III.A.

142. Williams, *supra* note 133.

143. *Id.*

144. *Id.*

king of wood oak finish.”¹⁴⁵

Other aspects of the restoration also included painstaking attention to details. For example, slate was imported from the same quarry in Wales that supplied the original home’s building materials.¹⁴⁶ Rare heart pine was used for the replacement of several large wooden beams, constructed using nineteenth-century techniques for interlocking joints.¹⁴⁷ Murals were hand-painted using old photographs and color charts to mirror their 1856 designs.¹⁴⁸ Other changes that were less visible, but perhaps equally important, included techniques such as the installation of stainless steel braces and reinforcing rods to ensure that the building remains stable for storms to come.¹⁴⁹ The property’s official reopening on June 3, 2008 attracted over 4000 visitors,¹⁵⁰ making the restoration a symbol for recovery on the Gulf Coast. Bertram Hayes-Davis, the great-great grandson of Jefferson Davis, noted, “[Beauvoir] is one of those icons that has risen back to be better than it was before Katrina.”¹⁵¹

IV. WHERE DO WE GO FROM HERE?

As the case studies illustrate, disasters can cause a variety of problems within the realm of historic preservation. Though recovery is possible, great loss is certainly a reality. To remove some of the uncertainty and confusion generally associated with emergency response, states or communities prone to natural disasters should engage in pre-disaster mitigation planning. Mitigation planning has certain aspects that are generally applicable to most disasters. However, pre-disaster mitigation plans offer elements that are customizable to meet a specific community’s needs, even for similar types of disasters. A pre-hurricane mitigation plan for the coastal, yet developed island of Miami Beach, Florida will differ considerably from the pre-hurricane plan for the marshy, coastal towns of the Louisiana delta. Additionally, mitigation is cost-effective; a 2005 study found that “on average, every dollar spent on mitigation yields \$4 in future benefits.”¹⁵² Outlined below are just some of the precautionary measures that communities can take to better integrate historic preservation into emergency management plans.

145. *Id.*

146. Kunzelman, *supra* note 134.

147. *Id.*

148. *Id.*

149. *Id.*

150. Williams, *supra* note 133.

151. Kunzelman, *supra* note 134.

152. Florida Division of Emergency Management, *Mitigation*, <http://www.floridadisaster.org/Mitigation/Index.htm> (last visited Mar. 31, 2014).

A. Maintain an Up-to-date Inventory of Historic Resources

A regularly maintained and comprehensive inventory of a community's historic resources may be invaluable after a storm to provide vital information to emergency responders for disaster recovery.¹⁵³ Information that should be incorporated in the inventory includes (but is not limited to): geographic location (including street address and GPS coordinates if possible); name of the resource; type of resource; pre-disaster condition of resource; owner or party with maintenance responsibilities (if they are not the same party); and the tax identification number.¹⁵⁴ Digital photographs, if available, may also be useful. Knowing who has ownership or maintenance responsibility of a property before a disaster can help determine what resources will be used or may become available for rebuilding purposes.¹⁵⁵

Inventories may already exist in some states. Florida, for example, has the Florida Master Site File, which contains information about known historic resources in the state.¹⁵⁶ Though not comprehensive,¹⁵⁷ it can be a good place for local planners to begin. If capable, Geographic Information System (GIS) should be used. Because many communities already have GIS databases, a historic resource inventory formatted in GIS would provide another layer of information that all decision makers can access.¹⁵⁸ GIS is also helpful because it is electronic, making it easily accessible remotely and capable of physically surviving the disaster.¹⁵⁹

Maintaining the inventory is critical to ensure all the relevant information is up to date. Properties that are torn down should be removed from the inventory, while resources that are newly identified should be added. Creating an inventory that is complementary to other resources already in use within a community makes this process easier. Linking the inventory to other databases, such as the property appraiser's database, can quickly automatically update new ownership information. No matter how the process occurs, maintaining the inventory is critical.

153. FL Disaster Planning, *supra* note 81, at 21.

154. *Id.*

155. *Id.* at 22. For example, properties owned by the federal government qualify more easily for federal FEMA funding. Knowing ahead of time who has ownership can help expedite this process.

156. *Id.*

157. As of 2003, only 40% of the state had been surveyed. *Id.*

158. *Id.* at 24.

159. *Id.* Electronic resources, if stored on a remote server, can survive disasters perhaps more easily than paper documents.

B. *Identify Appropriate Historic Preservation Professionals for a Response Network*

Following a disaster, a variety of experts are often needed to identify historic properties, assess the damage, and determine stabilization and repair procedures.¹⁶⁰ Communities should compile a database of professionals who possess the requisite knowledge to respond to disasters.¹⁶¹ Experts that should be listed on the database include historians, city planners, archaeologists, architects, contractors, and engineers.¹⁶² A response network can be created at either the local or state level and may be formed utilizing pre-existing databases. For example, the Heritage Emergency National Task Force maintains a Cultural Heritage Roster, containing names of conservation and preservation specialists who work with FEMA post-disasters.¹⁶³

All response networks should include current contact information for all identified persons.¹⁶⁴ Additionally, a response network should have an explicit activation process to alert members when their services are needed.¹⁶⁵ Finally, planning for travel and living accommodations ahead of a disaster will also alleviate pressure for the response network and will expedite the entire process, allowing for recovery efforts to begin shortly after disasters occur.¹⁶⁶

C. *Develop Expedited Review Process in the Event of a Disaster*

During normal operational times, most communities have ordinances or other legal review processes that govern how historic resources are treated when physical work must be done.¹⁶⁷ However, as the case studies demonstrate, in the chaos following a disaster, those valuable processes sometimes fall through the cracks. In the rush to rebuild, historic properties are sometimes mistakenly overlooked. Alternatively, immediate response needs, such as stabilization of structures to prevent further damage or destruction to the property itself or human life, receive all focus under pre-existing law.¹⁶⁸

To combat shortcomings and to ensure that resources are protected, expedited review processes should be created before disasters strike.

160. *Id.* at 27.

161. *Id.*

162. *Id.* at 28.

163. *Id.* The task force helps libraries, museums, and other cultural resources protect property from disasters.

164. *Id.*

165. *Id.* at 29.

166. *Id.*

167. *Id.* at 30.

168. *Supra* Part II.C.

Certain review processes can be created to be autonomous, triggering only when certain criteria are met without requiring any further review. For example, anticipating specific stabilization and minor repair scenarios, communities can establish protocols that are pre-approved by local boards and in compliance with any relevant laws (including local ordinances, state, and federal laws).¹⁶⁹ Linking this process to the local emergency management plan would help ensure compliance.¹⁷⁰ This process can be highly customized at the local level, accounting for individual community values. As the case study demonstrated, the city of Charleston, South Carolina placed a high cultural value on its historic district and refused to compromise the review process even after Hurricane Hugo.¹⁷¹ Though the city managed to create processes in the wake of the disaster, pre-disaster mitigation planning could have expedited the process even further.

D. Prepare Individual Emergency Response Plans

Though integrating historic preservation into the community-wide emergency response plan is important, it is equally important to make an individual site-specific plan. The complexity of a site plan will vary based on the resource, as well as the anticipated type of natural disaster.¹⁷² For example, a historic home open to visitors that houses historical artifacts, like Beauvoir, will require a plan that will protect both the exterior and physical integrity of the home itself as well as the artifacts it contains.¹⁷³

To begin, planners should consider the risks associated with the anticipated disaster itself.¹⁷⁴ Next, this information should be incorporated into the plan with the proper strategies to address the identified risks. Communication between local emergency officials, utility companies, local government, and professionals (who may be part of the emergency response network discussed above) will assure that all risks are addressed in compliance with all applicable law and emergency protocols.

Next, all personnel associated with the site who would have responsibilities following a disaster should undergo extensive emergency management and response training.¹⁷⁵ All staff, from the manager of the site down to the gift shop workers, should all be aware of the proper chain

169. FL Disaster Planning, *supra* note 81, at 30.

170. *Id.*

171. *Supra* Part III.A.

172. FL Disaster Planning, *supra* note 81, at 32.

173. Contrast this to a museum, which must prepare a plan to protect the artifacts themselves, but not necessarily the building (unless the museum itself is a historic property).

174. FL Disaster Planning, *supra* note 81, at 32.

175. *Id.* at 32–34.

of command and protocols that are triggered by an emergency, and should receive basic training as to some of the more immediate responses, such as how to shut off gas, water, and electricity.¹⁷⁶ Though the emergency plan, as well as an inventory of assets and key financial information, should be kept off the premises, all employees should be aware as to the location of the copy of the plan that is on-site.¹⁷⁷

While regular maintenance of the property is likely already a priority, it is an integral component to best prepare a resource for a disaster. Removing loose tree branches or other debris will decrease potential hazards associated with high winds. Maintaining structural integrity of historic buildings will also reduce the potential damage from disasters as well as continue to preserve the structure itself. Additionally, individual sites should have emergency supplies on hand, such as pre-cut panels for all windows and doors that can quickly be installed as hurricane shutters.¹⁷⁸

E. Establish Priorities

Planners should consider prioritizing resources at every step in the planning process. Communities place value in their historic resources in many different ways. Some communities, like Charleston, South Carolina, have demonstrated a deep commitment toward preserving their historic sites. In such places, preservation will likely rank higher on a prioritized list compared to other factors. Additionally, society as a whole essentially designates some historic resources as “more important” than others through listing criteria, such as the National Register. In other places, economics may play a larger role, requiring compromise (or perhaps even sacrifice) with respect to historic preservation.¹⁷⁹ Vulnerability is also a key component at this stage, as resources that are more prone to disaster should generally have higher priority than those that are seldom affected.¹⁸⁰

176. *Id.* at 34.

177. *Id.* If it is difficult or impossible to keep the records off-site, then planners should make sure that they exist in a cohesive manner so that they may be moved in advance of disasters that provide adequate warnings (such as hurricanes).

178. *Id.* Though often suggested as an obvious mitigation strategy, it is unclear if these activities, such as installing shutters, would count as the type of activity that would require pre-approval from a preservation board. Regardless, planners must consider strategies that will not compromise the integrity of the building.

179. For example, when economics are a priority, certain building requirements may be relaxed to allow cheaper and more modern building materials to be used (in contrast to sometimes stringent requirements for old, original materials).

180. FL Disaster Planning, *supra* note 81, at 50.

CONCLUSION

The current historic preservation legal framework provides a good basis for preservationists to operate during normal, non-emergency conditions. Even though members of the historic preservation and emergency response communities currently coordinate on some level, more steps can be taken to ensure that historic resources are properly accounted for following natural disasters. Incorporating what worked, and perhaps more importantly, what didn't work, following large storms like Hurricane Hugo and Hurricane Katrina, planners can make smart choices in the pre-disaster mitigation phase to prevent a loss of our nation's historic resources.