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NEWS & ANALYSIS

The Golden Hour: The Role of Historic Preservation Law in the Immediate Aftermath of Disaster

by Stephanie J. Talbert

Editor's Summary: Hurricane Hugo damaged approximately 80% of the 3,500 historic buildings located in Charleston, South Carolina. The terrorist attacks of September 11, 2001, caused considerable damage to landmark property in New York City. And no one can deny that New Orleans, one of America's oldest and most distinctive cities, suffered staggering damage after Hurricane Katrina. While each of these disasters brought about unique problems locally and nationally, all three raise a common question: What is the role of historic preservation law in the immediate aftermath of a large-scale disaster? In this Article, Stephanie Talbert looks at the role historic preservation law played in responding to Hugo, Katrina, and the terrorist attacks. Based on her examination, she concludes that the current framework is flexible enough to immediately respond to a disaster but that a program to support and utilize historic preservation laws immediately after disaster is still necessary. To that end, she proposes a national three-part program that could be used in any of the 50 states.

I. Introduction

On September 21, 1989, Hurricane Hugo battered the city of Charleston, South Carolina, with wind gusts in excess of 130 miles per hour and 20-foot tidal waves, followed by days of torrential rains and flooding.¹ Hurricane Hugo, called the worst hurricane of the 20th century,² caused "some of the worst cyclone damage . . . the South Carolina coast ever experienced."³

On September 11, 2001, terrorists hijacked commercial jetliners and used them to attack two World Trade Center buildings in New York, New York. At 8:46 a.m. eastern standard time (EST), American Airlines Flight 11 struck the north tower, and at 9:03 a.m. EST, United Airlines Flight 175 struck the south tower, causing both buildings to collapse. The collapses of these skyscrapers caused massive destruction to other buildings on the World Trade Center site

and to other buildings in the area. It is estimated that 2,749 people in and around the World Trade Center site at the time of the attacks lost their lives.⁴

In late August and early September 2005, Hurricane Katrina devastated several southern states, and most notably, the city of New Orleans, Louisiana. Katrina's high winds and heavy rains overwhelmed the levees surrounding the city, resulting in massive flooding.⁵ Hundreds of thousands of people were displaced, many were separated from family members, and over 1,000 lives were lost as a result of the destruction brought by Hurricane Katrina.⁶

Although each of these disasters brought about unique problems locally and nationally, each disaster raised—and continues to raise—a common question: What is the role of historic preservation law in the immediate aftermath of disaster? Hurricane Hugo damaged approximately 80% of Charleston's 3,500 historic buildings, costing an estimated \$250 million for restoration.⁷ Though not previously recognized as historic property, the World Trade Center site was

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1. H. Jane Lehman, *In Charleston, a Rebuilding Boom*, CHI. TRIB., Aug. 4, 1991, at N1.
2. Nancy L. Ross, *Rebuilding in Charleston; After the Hurricane*, WASH. POST, June 14, 1990, at T20.
3. Michael A. Grammatico, *Hurricane Hugo—September 22, 1989*, <http://www.geocities.com/hurricane/hurricanehugo.htm> (last visited June 8, 2006).

4. See AKRF, Inc. et al., *Coordinated Determination of National Register Eligibility*, 6-7 (Mar. 31, 2004) (on file with the Port Authority of New York & New Jersey) [hereinafter *Coordinated Determination*].

5. Michael Luo & Sewell Chan, *Water Lifts Its Awful Veil on a Landscape of Destruction*, N.Y. TIMES, Sept. 15, 2005, at A17.

6. Shaila Dewan, *Returning Home, a Handful of Bodies; New Orleans Mayor Presses Effort to Reopen City*, N.Y. TIMES, Sept. 28, 2005, at A28.

7. Ross, *supra* note 2, at T20.

deemed so “exceptionally significant in the history of the United States as the location of events that immediately and profoundly influenced the lives of millions of American citizens”⁸ that the site was determined to be eligible for listing on the National Register of Historic Places.⁹ Additionally, several buildings around the World Trade Center site, previously designated as landmarks, were severely damaged.¹⁰ Finally, Hurricane Katrina has been described as potentially “the greatest cultural catastrophe America has ever experienced”¹¹ because of the staggering and unprecedented damage it caused to one of America’s oldest and most distinctive cities.¹²

While discussing the possibility of saving some of the historically important buildings damaged by Hurricane Katrina and the subsequent flooding, one New Orleans architect stated: “My partner and I were talking about the “golden hour” that you sometimes hear trauma doctors use. If they are able to get the patient in the golden hour, they can save [him] . . . We don’t know whether or not our golden hour is 90 days or less or more.”¹³ Indeed, the window of time to salvage the region’s historic treasures is closing as the city of New Orleans moves from immediate response efforts to long-term restoration. Furthermore, although the National Oceanic and Atmospheric Administration forecasted a “very active” hurricane season for 2006—a season running from early June to late November—the magnitude, location, and impact of individual storms is unpredictable.¹⁴ Thus, it is important to continue to think about the role of historic preservation law in the wake of disaster, to critique what has been done to mitigate damage to historic resources after recent disasters, and to discuss ways in which to improve the nation’s response to disaster in the context of historic preservation.

This Article will comment on the ability of historic preservation law to respond to the damage caused by disaster by studying the role of historic preservation law after Hurricane Hugo, the terrorist attacks of September 11, 2001, and Hurricane Katrina. Part II provides a general framework of historic preservation law applicable to emergency situations. Part III provides an analysis of the role of historic preservation law in the response to the needs of Charleston, South Carolina, and of the World Trade Center site. Finally, Part IV provides a discussion of the current preservation climate in New Orleans and makes recommendations for im-

proved support and utilization of historic preservation law immediately after disaster.

II. Framework of Historic Preservation Law Applicable to Emergencies

A. Federal

Two of the most significant federal laws applicable to post-disaster historic preservation efforts are the National Historic Preservation Act (NHPA) of 1966¹⁵ and the National Environmental Policy Act (NEPA) of 1969.¹⁶ The NHPA has three main components.¹⁷ First, it establishes and authorizes the expansion of the National Register of Historic Places, the official listing of “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology engineering, and culture.”¹⁸ Second, the NHPA establishes the §106 review process, the procedural process federal agencies must follow whenever a federal undertaking affects an historic resource.¹⁹ Finally, the NHPA requires federal agencies to locate and nominate sites to the National Register and preserve and use historic properties.²⁰

Similarly, NEPA requires a review process, called an environmental review, when a major federal action significantly affects the quality of the human environment.²¹ Although NEPA was enacted to carry out the nation’s environmental policy,²² the environmental review process guides emergency response to historic resources because it is required when any environmental resources, including cultural and historic resources, are significantly affected by federal action.²³

The Federal Emergency Management Agency (FEMA)²⁴ is the primary federal agency to respond immediately to a

8. *Coordinated Determination*, *supra* note 4, at 1.

9. *Id.*

10. See, e.g., Glenn Collins, *A Sturdy Survivor Gets Back to Work; Herculean Effort to Restore a Landmark Battered on 9/11*, N.Y. TIMES, Jan. 6, 2003, at B1.

11. Press Release, National Trust for Historic Preservation, World Monuments Fund and National Trust Team Up to Preserve Gulf Coast Landmarks (Oct. 6, 2005), available at http://www.wmf.org/pdf/Gulf_Coast_NTTHP_WMF_release.pdf.

12. Robert Behre, *Preservationists Assessing Their Role in Recovery*, POST & COURIER (Charleston, S.C.), Sept. 6, 2005, at 1B.

13. Sue Kirchhoff, *Rebuilding After Katrina to Take Monumental Effort*, USA TODAY.COM, Oct. 5, 2005, http://usatoday.com/money/economy/housing/2005-10-05-katrina-housing-usat_x.htm?POE=NEWISVA.

14. Press Release, National Oceanic & Atmospheric Administration, NOAA Predicts Very Active 2006 North Atlantic Hurricane Season: Residents in Hurricane Prone Areas Urged to Make Preparations (May 22, 2006), available at <http://www.noaanews.noaa.gov/stories/2006/s2634.htm>.

15. 16 U.S.C. §§470-470x.

16. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

17. JULIA H. MILLER, A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 5 (2004).

18. 16 U.S.C. §470a(a)(1)(A).

19. The NHPA §106 process is triggered by a federal “undertaking” that has an effect on historic resources listed or eligible for listing on the National Register. *Id.* §470f.

20. *Id.* §§470a(g), 470h-2.

21. Environmental impact statements must be prepared for any major federal action significantly affecting the environment, including historic resources. See 42 U.S.C. §4332. Major federal actions include “actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. §1508.18 (2005). Significantly, the §106 process offers greater protection to historic resources than NEPA’s environmental review process because it is triggered *whenever* a historic resource is affected by a federal undertaking, while NEPA’s process is triggered only when a *major* federal action *significantly* affects the environment. However, in the context of responding to large-scale disaster, both processes would clearly be triggered.

22. 42 U.S.C. §4331(a), (b).

23. *Id.* §4331(b)(4).

24. FEMA was originally established by Executive Order; however, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), the U.S. Congress has also authorized FEMA to act and has appropriated funding to FEMA. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§5121-5195 (2000). See also David G. Tucker & Alfred O. Bragg III, *Florida’s Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 861 (2001). In March 2003, FEMA became part of the Department of Homeland Security and is now one of the four major branches of the department. FEMA’s responsibility is to bring about a coordinated

declared disaster. Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), FEMA “provide[s] an orderly and continuing means of assistance . . . to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from . . . disasters.”²⁵ Federal assistance programs are triggered when the governor of a state requests that the president declare a major disaster in the state.²⁶ This request signifies that the disaster has exceeded the capacity of the state to respond to the disaster using its own resources.²⁷ Once the president has declared a major disaster in a state, FEMA coordinates the federal response in a number of ways, including providing financial assistance to individuals and households, helping local governments assess health and safety issues, and repairing destroyed or damaged buildings.²⁸

Because FEMA is a federal agency, its assistance or proposed actions in disaster areas may be considered federal actions or undertakings under the NHPA and NEPA. If FEMA’s action is determined to affect historic resources or significantly affect the quality of the human environment, the NHPA and NEPA would require review prior to action.²⁹ Originally, FEMA had no staff with historic preservation expertise and had a difficult time complying with the NHPA and NEPA given the magnitude of damage caused by some disasters.³⁰ Gradually, however, the Advisory Council on Historic Preservation (ACHP) and FEMA have worked together to help FEMA comply with the historic preservation review requirements of the NHPA and NEPA immediately following a disaster.³¹

There are several statutory and regulatory provisions that provide FEMA with flexibility in taking action in the wake of a disaster while still complying with federal review requirements. First, some actions are totally exempted from review under various provisions. For example, under the Stafford Act,

[a]n 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 1969.³²

Similarly, FEMA regulations, promulgated in 1980, statutorily exclude actions taken under the Stafford Act from NEPA review.³³ However, pursuant to NEPA, the Council on Envi-

ronmental Quality has issued regulations requiring federal agencies to make alternative arrangements in consultation with the Council for environmental review of actions taken to control the immediate impacts of the emergency.³⁴

Furthermore, the ACHP’s regulations, issued pursuant to the NHPA in 2000, exempt immediate rescue and salvage operations from §106 review,³⁵ but encourage federal agencies to “develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President.”³⁶ If approved by the ACHP, these procedures govern the agency’s historic preservation responsibilities during any disaster or emergency in lieu of the otherwise required §106 process.³⁷ However, these regulatory emergency provisions are only applicable to actions taken within 30 days of the declaration of disaster or emergency, unless the ACHP grants an extension.³⁸

ACHP regulations also allow an agency that has not adopted emergency procedures prior to a disaster to comply with §106 by “(1) [f]ollowing a programmatic agreement . . . that contains specific provisions for dealing with historic properties in emergency situations; or (2) [n]otifying the [ACHP] . . . and affording [it] an opportunity to comment within seven days of notification.”³⁹ More specifically, programmatic agreements may be used

- (i) [w]hen effects on historic properties are similar and repetitive or are multi-State or regional in scope;
- (ii) [w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) [w]hen nonfederal parties are delegated major decisionmaking responsibilities;
- (iv) [w]here routine management activities are undertaken at Federal installations, facilities, or other land-management units; or
- (v) [w]here other circumstances warrant a departure from the normal section 106 process.⁴⁰

Programmatic agreements are especially useful in situations of large-scale disaster after which FEMA must coordinate complex projects and multiple undertakings because they allow FEMA to delegate responsibilities among other federal, state, and local agencies involved in response and recovery. Instead of struggling to determine who is responsible for complying with which historic preservation laws and regulations during recovery, FEMA can use the programmatic agreements to specify review procedures and delegate authority and responsibility. Thus, programmatic agreements give FEMA the tools it needs to manage complex disaster response and recovery.⁴¹

approach to national security for emergencies and disasters—both natural and man-made. FEMA, *FEMA History*, <http://www.fema.gov/about/history.shtm> (last visited May 25, 2006).

25. 42 U.S.C. §5121(b).

26. *Id.* §5170.

27. *Id.*

28. See generally FEMA, *About FEMA*, <http://www.fema.gov/about/what.shtm> (last visited May 25, 2006).

29. Similarly, the NHPA’s §106 process is triggered by a federal “undertaking” that affects historic resources listed or eligible for listing on the National Register. 16 U.S.C. §470f (2000).

30. *Oversight Hearing on Historic Preservation and Hurricane Katrina: Hearing Before the Subcomm. on Federalism and the Census, H. Comm. on Government Reform*, 109th Cong. (2005) (statement of John L. Nau III, Chairman, Advisory Council on Historic Preservation) [hereinafter *ACHP Testimony*].

31. *Id.*

32. 42 U.S.C. §5159.

33. 44 C.F.R. §10.8(c) (2005).

34. 40 C.F.R. §1506.11 (2005).

35. 36 C.F.R. §800.12(d) (2005).

36. *Id.* §800.12(a).

37. *Id.*

38. *Id.* §800.12(d).

39. *Id.* §800.12(b).

40. *Id.* §800.14(b).

41. Although the current programmatic agreement model later became the core of FEMA’s historic preservation program, the magnitude of Hurricane Hugo’s impact on historic resources brought historic preservation concerns to FEMA’s attention as an important component of FEMA’s environmental compliance program. E-mail from John Sprinkle, Supervisory Historian, National Park Service, to Stephanie J. Talbert, student, Pace University School of Law (Dec. 7, 2005, 9:34 AM) (on file with author) [hereinafter E-mail from John Sprinkle].

Since the fall of 1989, following Hurricane Hugo, FEMA has developed an historic preservation program that focuses on the development of programmatic agreements with individual states.⁴² Initially, programmatic agreements were made after disasters to coordinate federal, state, and local responses. These programmatic agreements were used to respond to the midwestern floods in 1993 and the Northridge earthquake in 1994.⁴³ Over time, however, FEMA has “developed an innovative model Programmatic Agreement” that states can use to create state-tailored programmatic agreements with FEMA prior to disaster, or as a means of preparation for a disaster.⁴⁴ Ideally, these programmatic agreements are created prior to disaster and are generally active for five years.⁴⁵ Since the creation of the model programmatic agreement, 35 states, including Louisiana⁴⁶ and South Carolina,⁴⁷ have implemented a state-specific programmatic agreement with FEMA.⁴⁸

These state-specific programmatic agreements enable FEMA to promote a coordinated and expedited historic preservation review process while administering its assistance programs.⁴⁹ They also act as vehicles for early coordination between the state and federal levels of government by facilitating the sharing of important information such as “points of contact and interested parties; a list of counties within the 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.”⁵⁰

Programmatic agreements streamline the review of stabilization, demolition, and repair activities required by the NHPA and NEPA, as well as state mandated review processes, during disaster recovery, and also give FEMA authority to take action without any review in situations of immediate threat to human life or property.⁵¹ Significantly, the programmatic agreements waive all ACHP review of FEMA activities considered to be routine, regardless of whether or not the activity falls within the immediate response period.⁵² Finally, the programmatic agreements also contain guidance for consideration of public opinion throughout the expedited review processes as required to satisfy NEPA and §106 documentation requirements.⁵³ In

sum, “[p]rogrammatic [a]greements have been extremely useful tools in the aftermath of a disaster” because they provide for expedited and emergency review of historic preservation issues by detailing the roles of FEMA, state historic preservation offices (SHPOs), and other parties prior to disaster.⁵⁴ “In effect, they chart the course for FEMA and SHPO[s] to work together to identify and resolve issues.”⁵⁵

FEMA also encourages state and local governments to develop hazard mitigation plans that address, among other things, historic preservation planning. Recognizing the cost-effectiveness and efficiency of preparation and planning in advance of disaster, FEMA has published a series of how-to guides to help states and communities implement hazard mitigations plans.⁵⁶ One of the guides focuses solely on “integrating historic property and cultural resource considerations into hazard mitigation planning.”⁵⁷ However, published only in May 2005, this guide has been used very little.⁵⁸

B. States

Generally, there are three ways states contribute to historic preservation. First, they play a role in the environmental review processes required under the NHPA and NEPA.⁵⁹ In fact, state involvement in historic preservation has often focused on the administration of federal historic preservation laws.⁶⁰ For example, SHPOs and officers help federal agencies identify historic resources, nominate properties to the National Register of Historic Places, assess potential impacts to historic resources, and develop alternatives to avoid or mitigate adverse effects.⁶¹ Second, many states have enacted their own “little NEPAs” or “little §106 laws.”⁶² These laws mirror the NHPA and NEPA by requiring state agencies to undergo review processes for any major action that impacts historic resources.⁶³ Some of these laws even require

42. *ACHP Testimony*, *supra* note 30, at 3-4.

43. *Id.*

44. ACHP, FEDERAL EMERGENCY MANAGEMENT AGENCY MODEL STATEWIDE PROGRAMMATIC AGREEMENT (2002), *available at* <http://www.achp.gov/fema-pa.html> [hereinafter MODEL STATEWIDE PROGRAMMATIC AGREEMENT]. *See also* FEMA, Programmatic Agreement, <http://www.fema.gov/plan/ehp/hp/programmatic.shtm> (last visited June 3, 2006).

45. E-mail from John Sprinkle, *supra* note 41.

46. FEDERAL EMERGENCY MANAGEMENT AGENCY ET AL., SECTION 106 PROGRAMMATIC AGREEMENT FOR SOUTH CAROLINA (2004), *available at* <http://www.fema.gov/pdf/plan/ehp/noma/fema-la-hp-pa.pdf>.

47. FEDERAL EMERGENCY MANAGEMENT AGENCY ET AL., SECTION 106 PROGRAMMATIC AGREEMENT FOR SOUTH CAROLINA (1998) (on file with author and Advisory Council on Historic Preservation).

48. *ACHP Testimony*, *supra* note 30, at 4.

49. MODEL STATEWIDE PROGRAMMATIC AGREEMENT, *supra* note 44. *See also* FEMA, Programmatic Agreement, *supra* note 44.

50. MODEL STATEWIDE PROGRAMMATIC AGREEMENT, *supra* note 44.

51. *Id.*

52. *Id.*

53. *Id.*

54. E-mail from John Sprinkle, *supra* note 41.

55. *Id.*

56. FEMA, Mitigation Planning Resources, http://www.fema.gov/plan/mitplanning/planning_resources.shtm#1 (last visited June 6, 2006).

57. FEMA, INTEGRATING HISTORIC PROPERTY AND CULTURAL RESOURCE CONSIDERATIONS INTO HAZARD MITIGATION PLANNING: STATE AND LOCAL MITIGATION PLANNING HOW-TO GUIDE (2005) [hereinafter HOW-TO GUIDE #6], *available at* http://www.fema.gov/pdf/fima/386-6_Book.pdf.

58. E-mail from Angela R. Gladwell, Team Administrator, Environmental/Historic Preservation, FEMA, Department of Homeland Security, to Stephanie J. Talbert, student, Pace University School of Law (Mar. 20, 2006) (on file with author):

This guide was first published last summer shortly before Katrina, so there has been limited use by state and local governments at this time. We had planned to offer workshops in select communities to introduce the concepts of this planning guide but our current focus is to see whether communities impacted by Katrina wish to integrate these considerations as they modify or update their mitigation plans.

59. MILLER, *supra* note 17, at 8.

60. *Id.*

61. *Id.*

62. *See, e.g.*, California Environmental Quality Act, CAL. PUB. RES. CODE §§21000-21177 (West 2001); New York State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§8-0101 to -0117 (West 2005); New Mexico Prehistoric and Historic Sites Preservation Act, N.M. STAT. ANN. §§18-8-1 to -8-8 (1978).

63. MILLER, *supra* note 17, at 8.

review for actions taken by local government agencies.⁶⁴ Finally, states play a role in historic preservation by granting local governments the authority to regulate private actions that impact historic resources.⁶⁵ Through these enabling laws, local governments pass ordinances to protect and preserve historic resources.⁶⁶

In situations of emergency, some states grant the governor authority to temporarily suspend “specific provisions of any statute, local law, ordinance, or orders, rules or regulations . . . if compliance would prevent, hinder, or delay action necessary to cope with the disaster.”⁶⁷ In addition, little NEPAs and state historic preservation laws, or regulations promulgated under them, may contain emergency provisions similar to those contained in NEPA, the NHPA, and regulations passed pursuant to them.⁶⁸

C. Local Governments

Despite the broad federal and state authority requiring review of undertakings or federal actions that affect historic resources, many preservationists believe local governments are in the best position to influence historic preservation.⁶⁹ As noted above, local governments are often enabled by state governments to pass ordinances to protect historic resources by designating buildings and districts, and regulating proposed changes to them through permitting processes.⁷⁰ For example, in 1931, Charleston, South Carolina, was the first municipality to create an historic district through a municipal zoning ordinance.⁷¹ Only a few years later, in 1936, New Orleans was given the authority, pursuant to an amendment to the state constitution, to establish the Vieux Carré as an historic district and to establish a commission to protect the district.⁷² In 1956, New York became the first state to enable municipalities to enact ordinances to protect buildings as landmarks. New York City exercised this authority in 1965 and, in doing so, became one of the first major cities “to pass a landmarks ordinance with . . . significant protection for designated individual buildings—the

New York City Landmarks Law.”⁷³ After the U.S. Supreme Court upheld this law as constitutional in *Penn Central Transportation Co. v. New York City*,⁷⁴ many municipalities became more confident in passing new, and strengthening existing, historic preservation ordinances.⁷⁵

New York’s ordinance provides an example of the authority and capability of local governments to respond to emergency situations. Significantly, the ordinance states that the only time owners do not need to seek the Landmarks Preservation Commission’s approval in order to change a landmark is when

the department of buildings, the fire department or the department of health and mental hygiene, or any officer or agency thereof, or any court . . . shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district . . . for the purpose of remedying conditions determined to be dangerous to life, health or property.⁷⁶

New York’s ordinance makes clear that only when the condition of the property is dangerous to life, health, or property, and a specified municipal department has ordered some kind of alteration to remedy the danger, a property owner may act to remedy the conditions without first obtaining approval from the Landmarks Preservation Commission.⁷⁷ Although this ordinance was probably not written to address situations of large-scale disasters like Hurricane Hugo, September 11, 2001, and Hurricane Katrina, it appears that, even in situations of emergency, a municipal preservation commission can retain significant power to authorize or refuse alterations to historic properties by requiring that property owners adhere to the application process

64. *Id.* at 9. See also SEQRA §§8-0103(6), -0105(2), -0111(3).

65. MILLER, *supra* note 17, at 10.

66. *Id.*

67. N.Y. EXEC. LAW §29-a(1) (West 2002). See, e.g., N.Y. Exec. Order No. 11329, Suspension of Regulations Regarding Transportation and Handling of Certain Solid Waste Resulting From the World Trade Center Disaster (Oct. 9, 2001) (cited by Michael B. Gerrard & Katrina Task Force, Emergency Exemptions, Suspensions, Modifications, and Waivers Under Federal and New York Environmental Laws (pamphlet handed out at a seminar held by the Environmental Law Institute et al., Lessons from 9/11: Environmental and Land Use Issues Raised in Response to Catastrophe, Washington, D.C., Oct. 27, 2005) (on file with author)).

68. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 6, §617.5(c)(33) (2005) (SEQRA regulations exempt emergency state actions from environmental review requirements if they are immediately necessary for the preservation of life, health, property or natural resources); N.Y. COMP. CODES R. & REGS. tit. 9, §428.11(b) (does not apply to a state project that is necessary to prevent an immediate and imminent threat to life or property).

69. MILLER, *supra* note 17, at 9; Christopher J. Duerksen, *Local Preservation Law*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 29, 29 (Christopher J. Duerksen ed., 1983).

70. MILLER, *supra* note 17, at 12.

71. NATHAN WEINBERG, PRESERVATION IN AMERICAN TOWNS AND CITIES 38-39 (1979).

72. *Id.* at 42-44. See also *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975).

73. Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It's Been, Where It's Going*, in A HANDBOOK ON HISTORIC PRESERVATION LAW, *supra* note 69, at 1, 12. Like many other local historic preservation ordinances, the Landmarks Law includes provisions establishing a commission, called the Landmarks Preservation Commission. See NEW YORK, N.Y., NEW YORK CITY CHARTER §3020. The commission is tasked with identifying properties and areas of “special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state, or nation.” NEW YORK, N.Y. ADMIN. CODE §§25-302(n), -303. After identifying these properties or areas, the commission gives all interested parties an opportunity to be heard. *Id.* §25-313(a), (b). Upon deciding that the property qualifies as a “landmark,” a “landmark site,” or an “historic district,” the commission will designate the property. *Id.* §25-301(a).

After a property has been designated, the designation imposes some restrictions and duties on property owners. *Id.* §§25-305 to -311. First, property owners must keep the properties in “good repair.” *Id.* §25-311(a). Second, if property owners want to make any changes to the landmark, landmark site, or historic district, the property owners must seek the commission’s approval. *Id.* §25-305(a). Property owners can do this in two ways. The property owners can seek a “certificate of no effect” by showing that the alteration will not change or affect any feature of the landmark. *Id.* §§25-306. The property owners can also apply to the commission for a “certificate of appropriateness” by showing that the proposed changes would “be appropriate for and consistent with the effectuation of the purposes of [the landmark law].” *Id.* §25-307(a). Any changes, alterations, or improvements to a designated property without a grant of a certificate from the commission are prohibited and owners who make such changes may be subject to criminal punishments, fines, or civil penalties. *Id.* §§25-317 to -317.1.

74. 438 U.S. 104, 8 ELR 20528 (1978).

75. Telephone Interview with Dorothy M. Miner, Professor, Columbia University & Pace University School of Law, in White Plains, N.Y. (Mar. 2006).

76. NEW YORK, N.Y. ADMIN. CODE §25-312(a).

77. *Id.*

before making any changes to historic properties. Indeed, as discussed further in Part III below, the authority of local preservation commissions and the effectiveness of local preservation ordinances were vital to the recovery of historic resources after Hurricane Hugo and September 11, 2001.

III. The Role of Historic Preservation Law Immediately Following Disaster: Case Studies

A. Charleston, South Carolina

As discussed above, many of the historic properties located in Charleston, South Carolina, suffered significant damage as a result of the high winds and flooding caused by Hurricane Hugo.⁷⁸ However, prior to Hurricane Hugo, FEMA had no staff with historic preservation expertise and had difficulty complying with §106 review requirements when responding to disaster.⁷⁹ Hurricane Hugo highlighted this deficiency and prompted the preservation community to call for change.⁸⁰

Instead of a strong federal response to preserve Charleston's historic resources, Charleston's citizenry and local government were largely responsible for the successful preservation efforts after Hurricane Hugo. In response to the damage caused by the hurricane, interest groups had differing ideas about how to rebuild the city⁸¹ and there was significant pressure "to relax [Charleston's] historic preservation standards, to take the short cut, to do what's cheap and fast."⁸² However, these suggestions were met with fierce resistance from local citizens and the preservation community. Remembering the city's response, Charleston's mayor, Joe Riley, recalled that the city refused to "lower [its] standards."⁸³ The National Trust for Historic Preservation praised Mayor Riley for his "city leadership," calling it "instantly and strongly aligned toward restoration and conservation."⁸⁴ Since Hurricane Katrina, Mayor Riley has been asked for advice on how New Orleans might be rebuilt.⁸⁵ In one interview, Mayor Riley responded, "Charleston came out better and stronger. We didn't compromise our standards. We adhered to our historic preservation requirements. And I think that a city need not be a changed city after a natural disaster in terms of changing its style or its character."⁸⁶

Indeed, the citizens and local government of Charleston made a concerted effort to maintain the style and character of Charleston.⁸⁷ The Historic Charleston Foundation recruited a group of qualified volunteers from students and faculty at several university architectural and historic preservation programs to collect significant building components from the debris that littered the streets immediately after the hurricane.⁸⁸ These volunteers then tried to return the components to the owners; if the owners could not be found, the components were placed in warehouses for later restoration efforts.⁸⁹ The Historic Charleston Foundation also coordinated several well-attended seminars for homeowners on how to restore certain building materials.⁹⁰ In addition, the National Park Service dispatched people with technical knowledge to answer property owners' questions about repairs.⁹¹

Many citizens resisted the urge to make repairs quickly, choosing instead to wait for specialists skilled in the building methods used for the original 18th- and 19th-century buildings, despite the difficulty of finding such qualified craftspeople.⁹² For example, Phillip and Judy Middleton, owners of one of the homes most severely hit by the storm, contacted domestic and foreign suppliers of slate, sent samples of fallen slate from their roof to England, contacted the British Embassy and the British National Trust, and collected about 200 samples of slate, all in the search for authentic slate to restore their roof.⁹³ The Middletons finally settled on bluish-grey slate from the Blaenau Ffestiniog quarry in North Wales and imported not only enough slate for their own house and other houses in Charleston, but also imported workers to lay the slate.⁹⁴

The city of Charleston itself also responded to a need for special materials by bringing in truckloads of seamed metal used on many of the roofs of the 150- to 200-year-old houses.⁹⁵ The city's architectural review board (the local preservation commission) also resisted the feeling of urgency by meeting weekly to "study every proposed roof repair and window replacement" and, in doing so, "stood firm against allowing any 20th Century substitutes."⁹⁶ Thus, the strong local preservation community was able to use standards already in place (the local preservation ordinance and architectural review board) to ensure that the style and character of Charleston was maintained.

B. The World Trade Center Site, New York, New York

After the terrorist attacks of September 11, 2001, the World Trade Center site was deemed so "exceptionally significant in the history of the United States as the location of events that immediately and profoundly influenced the lives of

78. Ross, *supra* note 2. See also Norbert S. Baer & Jane Slate Siena, *Damage to Cultural Property, in HURRICANE HUGO: PUERTO RICO, THE VIRGIN ISLANDS, AND CHARLESTON, SOUTH CAROLINA* 270, 270-71 (1994).

79. ACHP *Testimony*, *supra* note 30, at 3.

80. *Id.* See also E-mail from John Sprinkle, *supra* note 41 ("Hurricane Hugo was an important event in FEMA's historic preservation program. The magnitude of the disaster's impact on historic resources caused the agency to identify historic preservation as an important component of its environmental compliance program.").

81. Tom McGhee, *Smaller, Stronger City May Rise From the Muck*, DENVER POST, Sept. 15, 2005, at A-27.

82. Larry Copeland, *The Town That Vanished*, USA TODAY, Sept. 15, 2005, at A1.

83. McGhee, *supra* note 81.

84. Ronald Smothers, *Genteel Charleston Shakes Off Hugo and Starts Hurrying Toward Spring*, N.Y. TIMES, Feb. 9, 1990, at A16.

85. Joe Riley Discusses How Leaders Handle Local Catastrophe (National Public Radio broadcast Sept. 1, 2005).

86. *Id.*

87. Smothers, *supra* note 84. ("J. Jackson Walter, president of the National Trust for Historic Preservation, praised Charlestonians and particularly Mayor Riley for 'having correct values when it comes to preservation.'").

88. Lehman, *supra* note 1.

89. *Id.*

90. *Id.*

91. *Id.*

92. Ross, *supra* note 2.

93. *Id.*

94. *Id.*

95. Lehman, *supra* note 1.

96. *Id.*

millions of American citizens”⁹⁷ that the site was determined to be eligible for listing on the National Register of Historic Places.⁹⁸ However, although emergency provisions were used sparingly in the immediate response to the attacks, historic preservation laws and environmental review processes were suspended briefly, for about two weeks.⁹⁹ FEMA and the state of New York developed a comprehensive programmatic agreement to coordinate consideration of the historic resources during recovery.¹⁰⁰ Due to its efforts under this agreement, FEMA received the Chairman’s Award for Federal Achievement in Historic Preservation from the ACHP. The chairman of the ACHP stated, “In the aftermath of the most horrific terrorist attack of our times, FEMA admirably accomplished its essential core mission and was sensitive to Manhattan’s historic integrity while doing so. It was a magnificent and greatly appreciated conscious effort to protect America’s heritage.”¹⁰¹

No buildings on the World Trade Center site had been locally designated as landmarks prior to the attacks.¹⁰² Thus, while federal historic preservation statutes applied to the redevelopment of the actual site, the New York City landmarks law only applied to buildings surrounding the site that had been designated as landmarks prior to the attacks. For example, two landmark buildings, the Verizon Building, located at 140 West Street, and a building located at 90 West Street, survived the attacks, although they were severely damaged.¹⁰³

As noted above, the New York City landmarks law allows only limited deviations from the permitting process—when the applicable fire, health, or building department orders the construction, reconstruction, alteration, or demolition of a landmark site for safety purposes.¹⁰⁴ Thus, because both the Verizon Building and the 90 West Street building had been designated as landmarks, restoration of both buildings required careful consideration of the original style of the buildings under the New York City landmarks law.¹⁰⁵

As in Charleston, although on a smaller scale, the enthusiasm of the owners of these two buildings was essential to their restoration. For example, Verizon spent an approximated \$2 million to reconstruct the unique features of the Verizon Building.¹⁰⁶ This reconstruction included the work of a century-old tin-ceiling plant in Brooklyn, New York, to

painstakingly restore the building’s intricate bronze detailing; the work of a stoneworking shed in Mount Vernon, New York, to carve the limestone and granite cinder blocks used for the 1926 Art Deco building; and the work of a painting studio to carefully clean and restore murals located in the building’s lobby.¹⁰⁷

In sum, the case studies of Charleston, South Carolina, and the World Trade Center site demonstrate that historic preservation law has a role to play on the federal, state, and local levels. The case studies also show that adhering to local historic preservation laws established prior to disaster is not only possible, but can also yield significant gains for the protection of historic resources. In light of this determination, it is necessary to understand not only what responsibilities FEMA and state agencies bear under federal and state historic preservation laws, but also what local historic preservation laws are in place in the city of New Orleans, to determine what role historic preservation law can play in response to Hurricane Katrina.

IV. The Role of Historic Preservation Law in the Response to Hurricane Katrina

A. Local Government Framework

The city of New Orleans contains many historic districts, from its oldest and most famous district, the Vieux Carré,¹⁰⁸ to Tremé, the home of New Orleans’ historic shotgun houses.¹⁰⁹ In fact, the 20 historic districts in New Orleans encompass fully one-half of the city and include 37,000 buildings.¹¹⁰ Over time, these historic districts have come to be regulated by two separate commissions. Thus, unlike other cities that only have one historic preservation commission, New Orleans has both a Vieux Carré Commission and an Historic District/Landmarks Commission.¹¹¹

In 1936, an amendment was added to the Louisiana constitution, giving the city of New Orleans the authority to establish the Vieux Carré as an historic district and a commission to protect and preserve the district.¹¹² The amendment described the required composition of the commission to be established and the area that the historic district would include.¹¹³ The district now encompasses 260 acres and over 3,000 structures.¹¹⁴ The Vieux Carré Commission is authorized to regulate the exterior of these structures by requiring the owners of the buildings to apply for permits before making any changes to the exterior of the buildings.¹¹⁵ In 1941, the Supreme Court of Louisiana held that the ordinance giving the Commission the authority to regulate changes to the buildings was intended not only to protect the individual buildings, but also to preserve the “antiquity of the whole

97. *Coordinated Determination*, *supra* note 4, at 1.

98. *Id.*

99. Environmental Law Institute et al., *Lessons From 9/11: Environmental and Land Use Issues Raised in Response to Catastrophe*, Washington, D.C., Oct. 27, 2005 (author’s notes from seminar).

100. *ACHP Testimony*, *supra* note 30, at 4.

101. ACHP, *Federal Emergency Management Agency and Its New York Partners Honored for Historic Preservation Efforts in Aftermath of World Trade Center Attack*, <http://www.achp.gov/news-femaaward.html> (last visited June 6, 2006).

102. Interview with Dorothy M. Miner, Professor, Columbia University & Pace University School of Law, in White Plains, N.Y. (Jan. 6, 2006).

103. See Glenn Collins, *A Landmark Under the Knife (Actually, the Chisel): Artisans in Stone and Bronze Remake a Building Scarred on 9/11*, N.Y. TIMES, Apr. 14, 2003, at F1; James Glanz, *Wounded Buildings Offer Survival Lessons*, N.Y. TIMES, Dec. 4, 2001, at F1.

104. NEW YORK, N.Y. ADMIN. CODE §25-312(a).

105. See Jamie Herzlich, *Honored for His Restorative Power, Designer Who Fixed Verizon Building After 9/11 Is One of Nine to Receive Awards for Work Over Past Year*, NEWSDAY, Dec. 20, 2004, at A38.

106. Glenn Collins, *Ceiling’s Cleaning Grows Into a Tale of Recreation*, N.Y. TIMES, Oct. 30, 2003, at B7.

107. *See id.*

108. Behre, *supra* note 12.

109. David Carr, *Trying to Resurrect the Body of a City Buried in Sludge and History*, N.Y. TIMES, Sept. 20, 2005, at E7.

110. *Id.* (citing Richard Moe, president of the National Trust for Historic Preservation).

111. WEINBERG, *supra* note 71, at 90.

112. *Id.* at 44.

113. LA. CONST. of 1921, §22, subsec. A.

114. WEINBERG, *supra* note 71, at 44.

115. NEW ORLEANS, LA. MUNICIPAL CODE, art. IV, §166-35. *See also* WEINBERG, *supra* note 71, at 44-45.

French and Spanish quarter, the *tout ensemble*, so to speak. . . .¹¹⁶ Through this concept of the *tout ensemble*, the court broadened the power of the Vieux Carré Commission to protect and preserve the entire area, allowing the Commission to control both major and minor aspects of the Vieux Carré district.¹¹⁷

The work and composition of the Historic District/Landmarks Commission is very different than that of the Vieux Carré Commission. As its name implies, the Historic District/Landmarks Commission has jurisdiction over many historic districts, not just one.¹¹⁸ In fact, the Historic District/Landmarks Commission handles every district in New Orleans except the Vieux Carré.¹¹⁹ Under municipal law, the Historic District/Landmarks Commission must include “not less than one member . . . who shall be a resident or property owner” within each historic district.¹²⁰ Thus, each historic district is represented on the Historic District/Landmarks Commission by at least one member.

Like the Vieux Carré Commission, the Historic District/Landmarks Commission regulates buildings, sites, and structures within the districts by requiring owners to apply for certificates of appropriateness before making any changes to the exterior of their property.¹²¹ Similarly, the concept of *tout ensemble* is also integrated into the authority of the Historic District/Landmarks Commission in order to give it maximum control over changes within the districts.¹²² And, like New York City’s landmarks law, no certificate of appropriateness is necessary for “the making of any temporary construction, reconstruction, demolition or other repairs on a landmark . . . pursuant to the order of any government agency or court for the purpose of remedying emergency conditions determined to be dangerous to life, health, or property.”¹²³

B. Outlook for New Orleans

Despite the fact that districts higher in elevation, like the Vieux Carré and the Garden District, suffered very little damage from Hurricane Katrina and the subsequent flooding, many districts lying within the 80% of the city located below sea level suffered extreme devastation.¹²⁴ In response, many lawmakers, developers, and engineers initially proposed bulldozing much of New Orleans, engaging in massive land filling to raise areas of the city to sea level and rebuilding the area from scratch in order to protect the

city against flooding.¹²⁵ However, these suggestions were met with strong criticism and even anger¹²⁶ given that the low-lying districts are home to approximately 19,000 historically protected buildings.¹²⁷ Although preservationists acknowledged the importance of human safety, many quietly urged officials to save as much of New Orleans’ architecture as possible because of the importance of New Orleans’ unique building stock to true New Orleans culture.¹²⁸ Thus, both national and local preservationists were, and still are, working diligently to “document buildings affected by Katrina; assess them; and make a case to government officials, insurance companies and homeowners” for saving as many historic resources as possible.¹²⁹

Although federal, state, and local preservationists are working together, they are working in different spheres.¹³⁰ On the federal level, FEMA has been working with the Louisiana SHPO and the ACHP pursuant to the Louisiana Programmatic Agreement passed in 2004.¹³¹ Although this agreement has been very helpful,¹³² the magnitude of the damage caused by Hurricane Katrina has overwhelmed its terms and the ability of the SHPO and the ACHP to meet their responsibilities.¹³³ The programmatic agreement will need to be amended to deal with long-term recovery issues.¹³⁴

The National Trust for Historic Preservation, in cooperation with the World Monuments Fund and local nonprofits, has developed a four-part program to address the damage caused by Hurricane Katrina.¹³⁵ The first part of the program provides emergency assessment and technical assistance by coordinating “volunteer experts to assist local and state preservation groups and public agencies, including FEMA, in assessing historic properties and developing preliminary stabilization efforts.”¹³⁶ The second part of the program includes gathering information on preservation treatments and guidelines from other major disasters in order to better understand the alternatives to demolition in devastated areas of the Gulf Coast.¹³⁷ The third part of the program is designed to “garner consensus on reconstruction, and propose a set of illustrated guidelines for new construction in historic districts” by coordinating meetings of local stakeholders.¹³⁸ Finally, the fourth part of the program provides grants to “assist community and preservation groups, as well as individual property owners to carry out professional assessment and reports on their historic properties.”

116. City of New Orleans v. Pergament, 5 So. 2d 129 (La. 1941).

117. WEINBERG, *supra* note 71, at 45.

118. See Telephone Interview with Lisa Kersavage, Historic Preservation Fellow, Municipal Arts Society, in White Plains, N.Y. (Nov. 8, 2005) [hereinafter Telephone Interview with Lisa Kersavage] (Kersavage spent two weeks volunteering for New Orleans’ Historic District/Landmarks Commission after Hurricane Katrina).

119. *Id.*

120. NEW ORLEANS, LA. MUNICIPAL CODE, art. IV, §84-47.

121. *Id.* §84-76.

122. *Id.* §84-49. (“The regulatory powers conferred upon the commission shall apply to all private property in the area controlled by the commission, including all buildings, structures, areas, sites, and their adjuncts and appurtenances, insofar as they constitute part of the entirety or *tout ensemble* of the district. . . .”).

123. NEW ORLEANS, LA. MUNICIPAL CODE, art. IV, §84-76(b).

124. Alan D. Miller, *With Life Safe, Attention Turns to Salvaging Swamped Homes*, COLUMBUS DISPATCH, Sept. 18, 2005, at 11.

125. Bill Walsh & Jim Barnett, “In a Very Perverse Way, . . . a Significant Opportunity for New Orleans,” NEWHOUSE NEWS SERVICE, Sept. 3, 2005.

126. *Id.*

127. Telephone Interview with Lisa Kersavage, *supra* note 118.

128. Miller, *supra* note 124; see also S. Frederick Starr, *The New Orleans Shotgun: Down But Not Out*, N.Y. TIMES, Sept. 22, 2005, at F7.

129. Miller, *supra* note 124.

130. Telephone Interview with Lisa Kersavage, *supra* note 118.

131. ACHP Testimony, *supra* note 30.

132. E-mail from John Sprinkle, *supra* note 41.

133. ACHP Testimony, *supra* note 30. See also E-mail from John Sprinkle, *supra* note 41.

134. E-mail from John Sprinkle, *supra* note 41.

135. Press Release, National Trust for Historic Preservation, *supra* note 11.

136. *Id.*

137. *Id.*

138. *Id.*

This part of the program recognizes that these assessments and reports are the key to securing insurance payments and government funding for preservation efforts.¹³⁹

Additionally, Louisiana senators have proposed legislation that would allocate \$150 million to the National Park Service for historic preservation grants.¹⁴⁰ The Louisiana SHPO and the National Center for Preservation Technology and Training would administer these grants.¹⁴¹ In addition, the legislation would provide \$30 million to the National Park Service for preservation grants for national historic landmarks, \$8 million for the training of volunteers to offer technical assistance, and \$20 million to pay for the services of the National Trust for Historic Preservation.¹⁴²

Finally, on the local level, the Vieux Carré Commission and the Historic Districts/Landmarks Commission are doing everything they can to assess the 19,000 locally protected historic buildings located in the low-lying districts under their jurisdiction.¹⁴³ Although New Orleans mayor Ray Nagin initially threatened to temporarily suspend the authority of the commissions after Hurricane Katrina, none of the laws granting the commissions authority to review applications for certificates of appropriateness have changed.¹⁴⁴ Thus, owners of property located within every historic district must still obtain a certificate of appropriateness before undertaking any recovery efforts that affect the exterior of their property in order to avoid being in violation of city code requirements.¹⁴⁵ Because the Vieux Carré Historic District suffered little damage, owners may proceed as they normally would in order to make required repairs—by making an application and obtaining a certificate of appropriateness from the Vieux Carré Commission.¹⁴⁶

However, as discussed above, other districts in New Orleans suffered significant damage. Thus, the Historic District/Landmarks Commission has had to improvise in order to save as many buildings as possible while still following the requirements of the city code.¹⁴⁷ As soon as people were allowed to return to New Orleans after Hurricane Katrina, members of the Historic District/Landmarks Commission instituted an expedited process for issuing certificates of appropriateness.¹⁴⁸ In the weeks that followed, the commission operated a mobile permit unit that went from neighborhood to neighborhood, stopping at any house where an

owner appeared to be making repairs.¹⁴⁹ The commission issued certificates of appropriateness on the spot if the owners would agree to use specified materials to repair the property.¹⁵⁰ The commission also gave property owners information listing the materials that should be used so that they could tell the insurance companies what they would need to make the appropriate repairs.¹⁵¹ The purpose of this unit was not only to preserve the integrity of historic resources and ensure that the owners could repair their property without being in violation of the code, but also to make residents aware of the presence and work of the commission—to assure citizens that the commission was still active.¹⁵² In this way, the commission, along with city building inspectors, addressed approximately 1,000 buildings per day.¹⁵³

Despite the commission's diligent efforts, the city of New Orleans has suffered approximately 3,000 layoffs and the commission no longer has the support staff to keep up with the daunting work of ensuring compliance.¹⁵⁴ Thus, efforts to preserve the integrity of New Orleans' treasured architecture lies in the hands of the individual owners.¹⁵⁵ Indeed, although New Orleans has instituted "FastTrack Permitting Online," the system holds individual owners responsible for researching the codes and determining how to "comply with all applicable ordinances and codes adopted by the City and the State" themselves.¹⁵⁶

C. Lessons Learned

As the study of each of the three disasters—Hurricane Hugo, the September 11 attacks, and Hurricane Katrina—reveals, historic preservation law has a role to play immediately after disaster on the federal, state, and local level. On the federal and state level, programmatic agreements can be developed in advance of disaster to make immediate response more efficient and effective. On the local level, local governments can adhere to local historic preservation ordinances while improvising in order to implement them. Thus, the already-established historic preservation law framework is flexible enough to play a role in the immediate response to large-scale disaster.

However, as Hurricane Katrina has revealed, problems arise due to a lack of human resources to implement the laws and ensure compliance, and a lack of financial resources to pay for the food and shelter of city employees and volunteers, particularly at the local level. Indeed, the ACHP has stated that local governments "have the local knowledge and expertise, but are lacking funding and other resources,

139. *Id.*

140. Louisiana Reconstruction Act, S. 1765, 109th Cong. §661 (2005). *See also After Katrina, a Flood of Gold?*, BUSINESS WEEK ONLINE, Sept. 26, 2005, http://www.businessweek.com/innovate/content/sep2005/id20050926_086579.htm?campaign_id=search.

141. S. 1765, §661(b)(3)(A).

142. *Id.*

143. Telephone Interview with Lisa Kersavage, *supra* note 118.

144. Telephone Interview with Lisa Kersavage, *supra* note 118. *See also* Margaret Foster, *In Sudden Demolition, New Orleans Loses First Historic Building Since Katrina*, PRESERVATION ONLINE, Oct. 13, 2005, http://www.nationaltrust.org/Magazine/archives/arc_news_2005/101305.htm.

145. *Id.* *See also* City of New Orleans, Welcome to the City of New Orleans FastTrack Permitting System, <https://secure.cityofno.com/portal.aspx?portal=37&tabid=15> (last visited May 25, 2006) [hereinafter FastTrack Permitting System]; City of New Orleans, City of New Orleans Expedited Permitting Process, <http://www.cityofno.com/portal.aspx?portal=1&tabid=57> (last visited May 25, 2006).

146. Telephone Interview with Lisa Kersavage, *supra* note 118.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* (Kersavage stated that as a result of the layoffs, the Historic Districts/Landmarks Commission had only four staff people immediately after Hurricane Katrina.).

155. *Id.* (Kersavage stated that compliance depends on the participation of the owners of the historic properties in contacting the Historic District/Landmarks Commission for certificates of appropriateness and telling insurance companies which materials they need to rebuild their properties properly.).

156. *See* FastTrack Permitting System, *supra* note 145. ("The applicant must take the time to research [all applicable ordinances and codes].").

and currently have insufficient personnel.”¹⁵⁷ Therefore, in addition to the historic preservation law framework already in place, a program to support and utilize these laws immediately after disaster is necessary.

This kind of support could be derived from a national three-part program maintained in order to respond immediately to a disaster in any one of the 50 states. The first part of the program should include a national contingency plan (NCP)—a national plan that would organize teams of experts to lend mutual assistance among the states.¹⁵⁸ Under this plan, teams of experts would be trained regionally and would be deployed to the disaster region as soon as a disaster is declared to help federal, state, and local governments make decisions about damaged historic resources.

Next, the program should also include a state emergency expertise team. This team would attend training and workshops conducted by each state’s SHPO to develop the specialized expertise necessary to assist in the recovery of that state’s unique historic resources. States could follow FEMA’s hazard mitigation how-to guide to build a team of experts and develop a mitigation plan.¹⁵⁹ The team could be used to implement the plan and could be deployed by the SHPO in situations of emergency to lend assistance to local governments.

As the response to Hurricane Katrina has shown, volunteers already exist to support an NCP and state expertise teams. In fact, in a letter urging Mayor Nagin to wait for assistance from the National Trust of Historic Preservation before making decisions about historic properties, Richard Moe, the president of the Trust, stated:

As soon as conditions permit, the National Trust, with the assistance of the Getty Foundation, is prepared to send survey teams of architects and engineers to New Orleans to work with building inspectors to undertake hard-headed structural assessments neighborhood by neighborhood, structure by structure. Several hundred qualified individuals have already volunteered for the task . . . It would be a disaster of enormous proportions if major demolition decisions were made before this help arrives.¹⁶⁰

Thus, in order to formulate an NCP, these volunteers could be organized by state and deployed from each state depending on the need of the state where the disaster occurred. Volunteers could also be recruited from within states to form state emergency expertise teams.

Although volunteers are plentiful, coordination of efforts necessary for an efficient response to disaster is lacking. In

New Orleans, for example, although volunteers were ready to be deployed, they were required to wait until after rescuers and coroners had finished their work.¹⁶¹ Although human health and safety are of utmost importance, rescuers and historic preservation volunteers could work side-by-side provided the availability of an infrastructure—food, shelter, and transportation—to support both types of workers in the disaster area.

One way to provide this infrastructure is through a national emergency fund—the third part of the three-part program. A national emergency fund should be developed exclusively for delegating funds to historic preservation efforts after disasters. Instead of waiting for funds to be allocated by the U.S. Congress—a process that has been highly criticized as slow and ineffective¹⁶²—this fund, operating as a kind of insurance policy, could ensure that financial resources are always available for immediate dispersal. By contributing annually to the fund, states and municipalities could benefit equally in the assurance of immediate financial assistance in the event of a disaster.

In addition to directly funding recovery efforts for specific historic properties, the fund could provide for food and shelter for the volunteers sent to the area through the NCP and the state emergency expertise teams, as if these volunteers were relief workers. The fund could also be used to keep local governments running, to keep government employees employed, and to provide local employees with food and shelter in the wake of disaster.¹⁶³ This would ensure that the people with the most expertise to make decisions about historic resources would be present during the critical decisionmaking stage of recovery.

V. Conclusion

In conclusion, the current historic preservation law framework provides ample flexibility to allow historic preservation law to play a role in the response to large-scale disasters like Hurricane Hugo, the September 11, 2001, terrorist attacks, and Hurricane Katrina. However, as evidenced by the existing struggles of responding to Hurricane Katrina, further development of sources of support to implement historic preservation laws on the federal, state, and most importantly, local levels is needed. The three-part national plan suggested in this Article is one way to build the necessary sources of support.

157. *ACHP Testimony*, *supra* note 30, at 5.

158. The NCP could be developed to mirror mutual aid agreements formed among states in the United States and provinces in Canada to assist individual states or provinces during forest fires. See Nicholas A. Robinson, *Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law*, 18 *PACE ENVTL. L. REV.* 459, 492-95 (2001) (“When a state or province calls on the other Members of the Compact for mutual aid, the fire fighting teams or equipment requested are deployed. After the fire is contained, the [Member] requesting the aid pays the Member[s] that contributed the assistance for the costs of the services.”).

159. See *How-To GUIDE #6*, *supra* note 57.

160. Letter from Richard Moe, President, National Trust for Historic Preservation, to Ray Nagin, Mayor, City of New Orleans (Sept. 14, 2005). See also Behre, *supra* note 12.

161. Behre, *supra* note 12.

162. See Robert Pear, *Bush Urges Faster Cleanup; Officials Wrestle Over Katrina Effort*, *INT’L HERALD TRIB.*, Mar. 9, 2006, at 4 (Senators of Gulf Coast states fight over federal funds). Significantly, although approved by the Senate appropriations committee, the authorization of grants totaling \$80 million to stabilize and repair historic properties is still pending in the House of Representatives. Press Release, National Trust for Historic Preservation, Historic Preservation Wins Major Victory in Senate Today for Katrina Grants (Apr. 4, 2006), available at http://www.nationaltrust.org/news/2006/20060404_katrina.html.

163. Indeed, the ACHP stated: “The Federal government should provide direct assistance to ensure the State Historic Preservation Offices and local landmarks organizations have sufficient human resources, housing, transportation, and other support to address their respective responsibilities. . . . Sufficient capacity for SHPOs and local preservation agencies is essential for efficient recovery and reconstruction.” *ACHP Testimony*, *supra* note 30, at 5.