

**Friends of DeReef Park
65 Cannon Street
Charleston, SC 29403**

Gwen Smith, Recreation Programs Chief
National Park Service, Southeast Regional Office
1924 Building
100 Alabama Street, SW
Atlanta, GA 30303
Email: gwen_smith@nps.gov

Re: DeReef Park Conversion

Dear Ms. Smith:

This letter responds to June 2, 2015 communication concerning the National Park Service's (NPS) National Historic Preservation Act (NHPA) Section 106 Assessment of Adverse Effect regarding the conversion of DeReef Park, in Charleston, South Carolina.

We are concerned that this neighborhood park – named for African American businessmen and established with LWCF funds for an urban neighborhood with a proud African American history – is, once again, not receiving the respect and consideration required by law and impelled by fairness. We urge the Park Service to note the great public concern with this issue – as reflected in national and state media¹ – and exercise its independent duty to ensure that past unlawful activity with regard to DeReef Park's conversion is made right. Indeed, as a federal agency charged with upholding not just the letter of the law but one whose mission is to provide recreational access for all elements of society, we hope the Park Service can be counted on as an ally in seeing that justice is done.

As things currently stand, however NPS appears to take the view that the only area impacted by loss of this prized neighborhood park is the acreage *within* the footprint of the park itself – as though the important history of this area, including its key role in the Civil Rights Movement, did not matter. And, while NPS now agrees that the City of Charleston's proposed replacement park – located 1.2 miles away and already managed as a recreation resource – cannot legally suffice, NPS has not made clear what or where a replacement park would be assuming conversion were allowed. Keeping that proposal a mystery ensures that proper assessment of historic or environmental impacts is impossible.

We urge NPS to take a broader view and account for the full range of impacts that conversion, partial or full, would have on the legacy of this historic area. Restricting the boundaries of the area of potential effects (APE) to exclude multiple historic properties directly and indirectly affected by the undertaking is counterfactual and legally unsound; NPS must amend the APE and perform a 36 C.F.R. § 800.5 adverse effects analysis for those historic properties formerly excluded from the determination. NPS must also examine those historic properties surrounding DeReef Park not individually, but as

¹ "In Charleston, Historic Black Park Space is Losing to Luxury Homes," *The Atlantic Monthly Citylab*, (June 1, 2015) <http://www.citylab.com/housing/2015/06/in-charleston-historic-black-park-space-is-losing-to-luxury-homes/394508/>; "A Neighborhood that Needs a Park," Charleston Post and Courier (June 7, 2015) <http://www.postandcourier.com/article/20150607/PC1002/150609470>.

contributing to a historically significant African-American neighborhood within the Charleston Old and Historic District.

Further, because NPS failed to reasonably and in good faith carry out appropriate historic property identification efforts under 36 C.F.R. § 800.4(b)(1), NPS must revisit the determination and then communicate the findings of that determination such that reviewing parties could understand the basis of the determination. Finally, regardless of NPS's position on the boundaries of the APE, the partial conversion of DeReef Park has already had, and will continue to have, an adverse effect on the 9 DeReef Court Chapel. NPS must consider both direct and indirect effects of the DeReef Park conversion on the chapel, in addition to reasonably foreseeable effects caused by the conversion that may occur later in time, be farther removed in distance or be cumulative.

Because of these deficiencies in the NHPA Section 106 process as well as the prior procedural deficiencies in this matter, NPS must perform a Section 106 Assessment of Adverse Effect that conforms with the Advisory Council on Historic Preservation Act (ACHP) regulations and that accomplishes the purpose of the National Historic Preservation Act.²

I. NPS' Defined Area of Potential Effects Arbitrarily and Erroneously Excludes Historic Properties That Will Be Directly and Indirectly Affected by the Undertaking

The NHPA “prescribes the section 470f process, which requires federal agencies with the authority to license an undertaking ‘to take into account the effect of the undertaking on any . . . site . . . that is . . . eligible for inclusion in the National Register’ prior to issuing the license.” *Pye v. U.S.*, 269 F.3d 459, 470 (4th Cir. 2001). An eligible property is any historic district, site, building, structure, or object formally determined as eligible for inclusion for the National Register, and all other properties that meet the National Register criteria. 36 C.F.R. § 800.16(l). What is an eligible property for purposes of the NHPA “turns upon the inherent historical and cultural significance of the property,” and under the NHPA, “properties that are a part of the rich heritage of our nation are afforded the same guarantees of protection afforded properties already deemed eligible.” *Colo. River Indian Tribes*, 605 F. Supp. at 1437.

Advisory Council on Historic Preservation (ACHP) regulations define the APE as scaled to “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” 36 C.F.R. § 800.16(d). The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. *Id.* NPS guidance states that the APE—

“ . . . is defined as the area in which eligible properties may be affected by the undertaking, including direct effects (such as destruction of the property) and indirect effects (such as visual, audible, and atmospheric changes which affect the character and setting of the property). *The area of potential effect may include historic properties that are well beyond the limits of the undertaking.*”

² “The responsibilities incumbent upon the federal agencies imposed by NHPA and its regulations aid in the preservation and maintenance of the historical and cultural integrity of all properties that meet National Register Criteria. The importance and significance of the property are a reflection of its interest to the general public and scientific community . . . Society's concern to preserve and maintain historic and cultural resources that enrich this nation and enhance our national heritage, which was the driving force behind the enactment of NHPA, should be extended to all significant cultural resources regardless of whether the property was ‘officially recognized.’” *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1438 (C.D. Cal. 1985).

National Register Bulletin, *Defining Boundaries for National Register Properties*, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, available at <http://www.nps.gov/nr/publications/bulletins/boundaries/bound1.htm> (last visited June 9, 2015) (emphasis added).

South Carolina's State Historic Preservation Office guidance provides that determining the APE is a hypothetical process that considers the interplay of the geographic area, scale and nature of the undertaking, and effects caused by the undertaking.³ The geographic area is an important factor in defining the APE because "varying combinations of geographical location, topography, soils, vegetation, and other environmental factors increase or decrease the likelihood of a project having physical, visual, and auditory effects on historic properties." *Id.* Additionally, determining the scale and nature of the undertaking should take into account factors such as new construction, extent of ground disturbance, and scale of new construction in relation to the surrounding setting. *Id.* Because the APE is defined before identification of historic properties actually begins, it may not be known whether any historic properties are within the APE. *Id.* However the APE should include "all alternative locations for all elements of the undertaking; all locations where the undertaking may result in ground disturbance; all locations from which elements of the undertaking (e.g. structures or land disturbance) may be visible or audible; and all locations where the activity may result in changes in traffic patterns, land use, public access, etc." *Id.* An APE may include areas that are not contiguous to the project tract, and may not be the same area of effect defined under NEPA. *Id.* Finally, federal agencies have expanded the APE of a project after additional studies and assessment that included consultation with the City, State, general public, and neighborhood groups and preservation agencies. *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 226 (5th Cir. 2006).

By limiting the APE to the original Land and Water Conservation Fund (LWCF) 6(f)(3) boundary of DeReef Park and not extending it to even directly adjacent properties, NPS does not appear to have scaled the APE to the geographic area within which the undertaking will directly and indirectly cause alterations in the character and use of historic properties. Instead, NPS defined the APE narrowly to preclude consideration of the impacts of the DeReef Park conversion on the following and other potentially unidentified historic properties surrounding the park:

The United Order of Tents, Francis P. Seignious House: 73 Cannon Street, Charleston, South Carolina 29403. The United Order of Tents, the oldest and only Christian fraternal organization comprised of and operated solely by African-American women, can trace its roots back to the operations of the Underground Railroad in the late 19th century.⁴ The Charleston chapter of the Order convened in 1913 and acquired its headquarters at 73 Cannon Street in 1956, almost 60 years ago.⁵ 73 Cannon Street, a nineteenth century wood framed single house, was constructed between 1854 and 1856, a century before the Order started utilizing it as their headquarters.⁶ In 2013, the South Carolina State Historic Preservation Office stated that the Francis P. Seignious House is in an area of Charleston that was determined eligible for the National Register in 1989 as an expansion to the already listed Charleston Historic District, and therefore the house would contribute to this district expansion if nominated and ultimately listed in the Register.⁷

³ *Section 106 Review of Federal Projects*, SC DEPARTMENT OF ARCHIVES & HISTORY, available at <http://shpo.sc.gov/programs/revcomp/Pages/106process.aspx#defining> (last visited June 10, 2015).

⁴ Mary Margaret Schley, *The United Order of Tents and 73 Cannon Street: A Study of Identity and Place 1-2* (2013), available at http://tigerprints.clemson.edu/all_theses/1667.

⁵ *Id.*

⁶ *Id.* at 244. See also *Seven to Save 2012*, Preservation Progress, Preservation Society of Charleston (Fall 2012), available at <http://www.preservationsociety.org/progress/Seven%20to%20Save%202012%20Issue%20final%201.13med.pdf>.

⁷ *Id.* at 246 (attached).

The Cannon Street YMCA: 61 Cannon Street, Charleston, South Carolina 29403. The Cannon Street YMCA, the oldest continuously operating YMCA developed for African Americans, was established just after the Civil War in 1866.⁸ In 1953, the Cannon Street YMCA organized a Little League baseball program, which became the only chartered African American Little League in the State of South Carolina.⁹ Two years later, the league formed the 1955 Cannon Street All-Star baseball team, which advanced to the World Series after all of the South Carolina white Little Leagues refused to play the Cannon Street team.¹⁰ Team historian Augustus Holt stated the historical significance of the 1955 Cannon Street Team: “To understand the struggle of African Americans to gain their equality in the twentieth century, you have to understand the story of the Cannon Street Y All Stars. It’s not just a Charleston story, but it has national significance as well.”¹¹ Dr. Creighton Hale, the former CEO of Little League Baseball, stated that the 1955 Cannon Street YMCA All-Stars remain the most significant amateur team in baseball history.¹² As of 2003, the Cannon Street YMCA was one of only seven historically independent YMCAs serving predominantly African-American communities.¹³ The physical YMCA building was built in 1950, approximately 65 years ago, and bears a historical marker commemorating the 1955 Cannon Street All-Stars and lists the original team roster.¹⁴

Morris Street Baptist Church: 25 Morris Street, Charleston, South Carolina 29403. On May 9, 1865, seventy-three African Americans organized the Morris Street Baptist Church, one of the first African American churches created in South Carolina following the Civil War.¹⁵ The original building, in use starting in the mid-19th century, was tragically destroyed by a fire in 1964.¹⁶ Five years later, the Church moved into their new building, making the current Morris Street Baptist Church building almost 50 years old.¹⁷ In 1990, the Church celebrated its 125th anniversary by publishing a complete history of the Church that serves as a permanent record of its Civil Rights era history.¹⁸ The South Carolina Senate recently commended the congregation for 150 years of service to the community.¹⁹

Morris Brown AME Church: 13 Morris Street, Charleston, South Carolina 29403. The Morris Brown AME Church, named after the pastor of the first AME congregation established in Charleston in 1818, is one of the first established and most prestigious AME churches in its district.²⁰ The Church was one of the first African American churches in South Carolina to operate a Senior Citizen’s home, and in

⁸ About Us Cannon Street, YMCA of Greater Charleston, *available at* <http://www.ymcage.org/index.php/about> (last visited June 11, 2015).

⁹ Cannon Street YMCA All-Stars To Be Honored, *The Chronicle*, *available at* <http://charlestonchronicle.net/50259/2152/cannon-street-ymca-allstars-to-be-honored> (last visited June 11, 2015).

¹⁰ *Id.*

¹¹ *Id.*

¹² Gene Sapakoff, *Little League’s Civil War in ’55: A Black All-Star Team Was Sidelined by a Racial Boycott in South Carolina*, *SPORTS ILLUSTRATED* (October 30, 1995), <http://www.si.com/vault/1995/10/30/207729/swim-daily>.

¹³ *A Brief History of the YMCA and African American Communities*, UNIVERSITY OF MINNESOTA UNIVERSITY LIBRARIES, *available at* <https://www.lib.umn.edu/ymca/guide-afam-history> (last visited June 11, 2015).

¹⁴ *Cannon Street Y*, HISTORICAL MARKER PROJECT (March 8, 2015),

http://www.historicalmarkerproject.com/markers/HM1JGX_cannon-street-y_Charleston-SC.html.

¹⁵ S. 756 To Commend Morris Street Baptist Church in Charleston for One Hundred Fifty Years of Service to the Community and to Extend warmest Congratulations on the Occasion of the Church’s One Hundred Fiftieth Anniversary, http://www.scstatehouse.gov/sess121_2015-2016/bills/756.htm (adopted by the Senate on May 12, 2015).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jennifer Berry Hawes, *The Rev. Charles Watkins takes helm of historic Morris Brown AME*, *THE POST AND COURIER* (April 7, 2013), <http://www.postandcourier.com/article/20130407/PC12/130409536>.

1969 was the headquarters for the Revered Ralph D. Abernathy and the Southern Christian Leadership Conference during a strike by the service workers of Charleston’s hospitals.²¹ The physical building was purchased from a Lutheran congregation in 1867 in order to provide services for a congregation of 2,000 members at the time.²²

James Sparrow House: 65 Cannon Street, Charleston, South Carolina 29403. The James Sparrow House was built circa 1818, before the surrounding area was annexed to the city in 1849.²³ The Cannonborough-Elliottborough Area Character Appraisal lists the building as standing out as a significant work of architecture in the neighborhood.²⁴ The house “is a two and one half story single house of stucco on brick, with stucco quoining at the corners and a full-returning dog-tooth cornice. A stucco belt course delineates the first and second floors. Its original 9-over-9 lite windows and surviving interiors convey a late-Federal style unique to the area. The one story piazza was restored on its original footprint.”²⁵ The James Sparrow House is currently listed individually on the National Register of Historic Places.²⁶

It appears that NPS has avoided a Section 106 adverse effects analysis for multiple properties that are currently listed individually on the National Register or that would otherwise be eligible for inclusion on the National Register as part of a Historic District. Since several of these properties are immediately adjacent to the DeReef Park, the loss of 1.3 acres of greenspace featuring a historically located historic church chapel, and its replacement by three-story densely located luxury homes – every one of them significantly taller than the church chapel— that encircle a relocated chapel, the conversion would at a minimum have visual impacts on those structures and significantly alter the fabric of the area and its context. Moreover, the loss of a large park named for African-Americans and used traditionally by children from the YMCA and for church and family picnics and gatherings would impact the YMCA and area churches, as well as the historic area they comprise. By ignoring these impacts, NPS’ defined APE contradicts guidance which prescribes that “the area of potential effect may include historic properties that are well beyond the limits of the undertaking.”²⁷ NPS did not consider that an APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. The scale and nature of the DeReef Park conversion will have wide-ranging effects including diminishing the feeling and association of historic resources surrounding the park. NPS must reconsider the scale and nature of the DeReef Park conversion and establish the boundaries of the APE accordingly.

II. NPS Must Complete an Intensive Survey of the Historic Resources Surrounding DeReef Park and Evaluate Eligible Properties’ Significance Within the Already Established Historic District

A historic district is defined as groups of buildings that physically and spatially comprise a specific environment, and those groups of related buildings can be representative of a particular social,

²¹ *Who We Are*, MORRIS BROWN AME CHURCH, available at <http://morrisbrownamechurch.org/who-we-are/> (last visited June 12, 2015).

²² Timothy John Hyder, *Charleston’s Magnolia Umbra Cemetery District: A Necrogeographic History*, UNIVERSITY OF SOUTH CAROLINA – COLUMBIA at 72 (2014), <http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=3841&context=etd>.

²³ *Area Character Appraisal prepared for the City of Charleston, South Carolina: Cannonborough-Elliottborough*, ROBERT AND COMPANY at 54 (2009), <http://www.charleston-sc.gov/DocumentCenter/View/1639>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 108.

²⁷ National Register Bulletin, *Defining Boundaries for National Register Properties*, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, available at <http://www.nps.gov/nr/publications/bulletins/boundaries/bound1.htm> (last visited June 9, 2015) (emphasis added).

ethnic, or economic group during a particular period.²⁸ Common practice dictates that reconnaissance and intensive surveys be used to complete background documentary research into a community's history and determine eligible historic properties within that community.²⁹ If a particular part of a community is "subject to substantial development in the near future, or is the target of Federal assistance, triggering the need for historic preservation review," it may be appropriate to concentrate a survey in that part of the community.³⁰ A survey effort within a historic district can be structured around a "historic context" – a broad pattern of historical development in a community or its region that may be represented by historic resources.³¹ Failure to take into account historic contexts "can lead to the application of survey methods that are not cost-effective, that fail to identify significant resources, or that contain uncontrolled biases."³²

A. The Only Cultural Resources Document Prepared for the DeReef Park Conversion is an Incomplete Prior Assessment That Excludes Eligible Historic Properties

When a property that may qualify for inclusion in the National Register is within the area of undertaking's APE, the agency official "shall apply the National Register criteria to all properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or *incomplete prior evaluations* may require the agency official to reevaluate properties previously determined eligible or ineligible." 36 C.F.R. § 800.4(c)(1) (emphasis added).

The only cultural resources assessment that was prepared for the proposed conversion from DeReef Park from recreational to non-recreational use was clearly identified by the authors as a reconnaissance. Letter from Michael Trinkley, Ph.D, RPA to Gwen Smith, April 6, 2015. A reconnaissance is a "once over lightly" inspection of an area that is used for developing a basis for deciding how to organize more detailed survey efforts.³³ In contrast, an intensive survey is designed to identify "precisely and completely all historic resources in an area. It generally involves detailed background research, and a thorough inspection and documentation of all historic properties in the field. It should produce all the information needed to evaluate historic properties and prepare an inventory." *Id.* A reconnaissance cannot be used to fulfill Section 106 requirements where performing an intensive survey is the next step in identifying historic properties in an area. Letter from Michael Trinkley, Ph.D, RPA to Gwen Smith, April 6, 2015.

The aforementioned cultural resources assessment stated that the praise chapel "lacks architectural significance or historical significance," and the assessor recommended the praise chapel as not eligible for National Register listing. *Id.* However NPS came to the opposite determination of National Register eligibility for the site. Additionally, the cultural resources assessment notes that the tract was formerly home to the "first public school for African Americans established in the City of Charleston." *Id.* However neither the City of Charleston nor NPS has looked into the history of this surrounding structure, despite the fact that removal of a building does not preclude significant archeological remains.³⁴ Therefore NPS agency officials must reevaluate the properties surrounding

²⁸ National Register Bulletin, *Guidelines for Local Surveys: A Basis for Preservation Planning*, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, available at <http://www.nps.gov/nr/publications/bulletins/nrb24/chapter1.htm> (last visited June 15, 2015).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Dr. Michael Trinkley, Director of the Chicora Foundation, noted that an early structure on the site that was the "first public school for African Americans established in the City of Charleston" is a "rather big deal." Letter from Michael Trinkley, Ph.D, RPA to Gwen Smith, April 6, 2015. Dr. Trinkley is a registered consultant with numerous

DeReef Park to determine their National Register and Historic District eligibility because the 2003 cultural resources assessment produced by Brockington and Associates is an incomplete prior evaluation that arbitrarily excludes eligible historic properties.

B. NPS Must Evaluate Historic Sites Surrounding DeReef Park as Eligible for Contributing to the Proposed Expansion of the Charleston Old and Historic District

National Register Criteria for Evaluation include those “districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and . . . that are associated with events that have made a significant contribution to the broad patterns of our history. 36 C.F.R. § 60.4(a). While structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years are generally not eligible for the National Register, “such properties *will qualify* if they are *integral parts of districts that do meet the criteria.*” 36 C.F.R. §60.4 (emphasis added). ACHP regulations define district as a “geographically definable area, urban or rural, a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.” 36 C.F.R. § 60.3(d). Properties significant for their association or linkage to events or persons important in the past—i.e. their associative value—are considered when examining a property’s relation to a historic district as a whole.³⁵

NPS stated in its March 6, 2015 email that the praise chapel “is not recommended as individually eligible for the Register, but is considered eligible for contributing to the proposed expansion of the Charleston Old and Historic District.” However NPS did not provide a description of the chapel’s contribution to the proposed expansion of the Charleston Old and Historic District in its NHPA Section 106 Assessment of Adverse Effect (for further discussion of the Section 106 Assessment of Adverse Effect report see below). Further, NPS did not examine the adverse effects of the conversion of DeReef Park on the historic district as a whole. All properties proposed by consulting parties as having historic significance connected to DeReef Park are located within the boundaries of the Charleston Old and Historic District.³⁶ According to the NPS’ own guidance, the chapel is connected more directly in a “local historic context” to these other historically African American sites surrounding DeReef Park than it is to the other primarily residential buildings that make up the Charleston Old and Historic District.³⁷ The physical properties of the Cannon Street YMCA, Morris Street Baptist Church, Francis P. Seignious House, and Morris Brown AME Church are either older than the 50-year threshold required for a property’s historic eligibility by NHPA/NPS regulations or are fast approaching that benchmark. Letter from Damon L. Fordham, MA to Gwen Smith, April 26, 2015. However because these buildings are integral parts of an already established historic district that meets the criteria for the National Register,

state and international agencies and has served as an expert witness for cemetery and archaeology issues in both South Carolina Circuit Courts and US Federal Court. He has been accepted for membership in the Register of Professional Archaeologists and is also a member of the American Institute for Conservation of Historic and Artistic Works.

³⁵ National Register Bulletin, *How to Apply the National Register Criteria for Evaluation*, U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE at 12 (1995), <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>.

³⁶ *Map, Charleston Old and Historic District*, PALMETTO HISTORY, http://www.palmettohistory.org/hpdistricts/charleston_700_test_2.html (last visited June 9, 2015).

³⁷ NPS guidelines define the geographic scale of “local historic contexts” as being distinguished by the importance of the property, and not necessarily the physical location of a property. National Register Bulletin, *How to Apply the National Register Criteria for Evaluation*, U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE at 9 (1995), <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>; Charleston Historic District, National Register Properties in South Carolina, South Carolina Department of Archives and History, <http://www.nationalregister.sc.gov/charleston/S10817710004/> (last visited June 9, 2015).

these properties will qualify for eligibility regardless of the fact that they may be reconstructed or have achieved significance within the past 50 years.

NPS has established African American ethnic heritage as a significant historic theme that would compromise an Area of Significance eligible for National Register listing.³⁸ NPS in fact has recognized the importance of the area surrounding DeReef Park as a “historically significant, Civil Rights era, African-American neighborhood” and has noted the environmental justice implications that the undertaking might have.³⁹ The South Carolina Historic Preservation Office has also recognized the importance of African American related historic contexts.⁴⁰ There are currently a number of African American-related historic contexts acknowledged by the South Carolina Historic Preservation Office through NPS Multiple Property Documentation Forms;⁴¹ however a survey of post-Civil War to mid-20th century Civil Rights era historic and architectural resources in Charleston is not one of them. Therefore NPS must complete an intensive survey of those properties surrounding DeReef Park that have not been thoroughly evaluated for National Register eligibility and assess impacts of the undertaking on those properties in regards to their associative value to the Old and Historic District and their importance within a “local historic context.”

III. NPS Must Make A Reasonable And Good Faith Effort To Carry Out Appropriate Identification Efforts Under 36 C.F.R. § 800.4(b)(1) and Appropriately Communicate the Findings of Their Determination to the Public

NPS failed to make a reasonable and good faith effort to carry out appropriate identification efforts for historic properties under NHPA regulations and did not communicate the findings of the determinations that they did make to the public. An agency official’s reasonable and good faith efforts to identify historic properties may include “background research, consultation, oral history interviews, sample field investigation, and field survey.” 36 C.F.R. § 800.4(b)(1). Further, “the agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.” *Id.*

Procedural requirements of 36 C.F.R. § 800.11(a), the regulations that govern documentation under the Section 106 process, state that an “agency official shall ensure that a determination, finding, or agreement under the procedures in [the NHPA regulations] is supported by *sufficient documentation to enable any reviewing parties to understand its basis.*” 36 C.F.R. § 800.11(a) (emphasis added). Documentation required for a finding of no adverse effect shall include:

A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary; (2)

³⁸ National Register Bulletin, *How to Apply the National Register Criteria for Evaluation*, U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE at 8 (1995), <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>.

³⁹ *2014 Implementation Progress Report on Environmental Justice*, UNITED STATES DEPARTMENT OF JUSTICE at 29 (2014), <http://www.justice.gov/sites/default/files/ej/pages/attachments/2015/02/11/2014-implementation-progress-report.pdf>.

⁴⁰ *Historic Contexts, Survey Reports and Other Historical Background Studies*, SC DEPARTMENT OF ARCHIVES AND HISTORY STATE HISTORIC PRESERVATION OFFICE, available at <http://shpo.sc.gov/research/Pages/conreps.aspx> (last visited June 12, 2015).

⁴¹ *Id.* African American related historical contexts that include a number of historic sites recognized via NRHP Multiple Property Identification Forms include African American Primary and Secondary Public School Buildings; Civil Rights Movement in Orangeburg County; Equalization Schools in South Carolina, 1951-1960; Rosenwald School Building Program in SC, 1917-1932; and Resources Associated with Segregation in Columbia, South Carolina, 1880-1960.

A description of the steps taken to identify historic properties; (3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register; (4) A description of the undertaking's effects on historic properties; (5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and (6) Copies or summaries of any views provided by consulting parties and the public.

36 C.F.R. § 800.11(e).

Finally, at the request of any of the consulting parties, “the [Advisory Council on Historic Preservation] shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.” 36 C.F.R. § 800.11(a).

NPS did not provide evidence of reasonable and good faith efforts to identify historic properties including sample field investigations, field surveys, or oral history interviews. NPS performed background research and consulted with members of the public only after a motion for voluntary remand and subsequent court ordered reconsideration deadline of April 30, 2015. *Friends of DeReef Park v. Nat'l Park Serv.*, 2014 U.S. Dist. LEXIS 169843, *11 (D.S.C. Dec. 9, 2014). At the Section 106 consultation meeting, NPS received requests from several consulting parties and their partners that NPS further research the important historic African American connection to the land that became DeReef Park and surrounding area. *Id.* NPS did not explain how the information provided by consulting parties at the April 27th meeting was evaluated between the meeting and the court ordered deadline beyond stating that they did additional research. *Id.*

Adequate documentation of NPS' no adverse effect finding, at the very least, would include copies of photographs of the property, maps, a copy of the notice utilized to solicit public views, and copies of public comments. *Lesser v. City of Cape May*, 110 F. Supp.2d 303, 327 (D.N.J. 2000). Sufficient documentation from NPS to enable any reviewing parties to understand its basis would also include any documentation on which NPS relied to make its determination. *Id.* at 328. NPS provided reviewing parties with a total of less than ten pages between its March 6, 2015 and June 2, 2015 emails that did not include recent photographs of the property, a copy of the notice utilized to solicit public views, or copies of public comments. DeReef Park – NHPA Section 106 Assessment of Adverse Effect; Email from Gwen Smith, March 6, 2015. In fact, NPS recognized in its June 2, 2015 email to consulting parties that it received submitted written materials. However NPS did not include those written materials in the Section 106 Assessment of Adverse Effect documentation as required under 36 C.F.R. § 800.11(e). NPS did not provide copies or summaries of any views provided by consulting parties and the public beyond stating general themes that came up during the Section 106 consultation meeting. DeReef Park – NHPA Section 106 Assessment of Adverse Effect.

NPS must provide consulting parties with an adequate description of steps taken to identify historic properties potentially affected by the federal undertaking. In its communications with the public, NPS simply stated that “NPS undertook additional research to determine whether any of the resources discussed at the April 27, 2015 (and associated written materials submitted to NPS) meeting could be determined eligible for the National Register.” DeReef Park – NHPA Section 106 Assessment of Adverse Effect. Then, NPS provided that “[t]o be eligible, properties must be fifty years old, meet specific criteria for historic significance, and retain historic integrity,” and then included a link to the National Register Bulletin, How to Apply the National Register Criteria for Evaluation. *Id.* The National Register Bulletin describing How to Apply the National Register Criteria for Evaluation is 60 pages long and requires a detailed analysis of eligible sites that includes evaluation of a property within a specific category, evaluation within its historic context, evaluation of its type of significance, how to apply criteria

considerations, and how to evaluate the integrity of a property.⁴² Without a detailed analysis of how the agency official utilized the Bulletin, providing the entire text of the Bulletin does not fulfill the requirement that the agency official provide sufficient documentation to enable reviewing parties to understand its basis. NPS providing the text of ‘How to Apply the National Register Criteria for Evaluation’ without a description of the analysis by agency officials leads reviewing parties to conclude the opposite of what NPS concluded; that there are multiple historic sites eligible for inclusion on the National Register that NPS arbitrarily left out in this case. NPS at the very least needs to provide an analysis of how the sites identified by consulting parties as being affected by the undertaking did not comport with eligibility requirements set forth by the National Register Bulletin.

Next, NPS must provide an adequate description of the affected historic properties they did identify, including information on the characteristics that qualify them for the National Register. 36 C.F.R. § 800.11(e)(3). The only description of the affected historic properties that NPS provided is a two page assessment of the property that is over thirty years old. Email from Gwen Smith, March 6, 2015. NPS did not explain in its Section 106 Assessment of Adverse Effect the initial March 6, 2015 determination that the praise chapel would not be recommended as individually eligible for the Register, but would be eligible for contributing to the proposed expansion of the Charleston Old and Historic District. *Id.* Further, NPS did not include an analysis of the characteristics that qualify the praise chapel for inclusion in the Historic District. Because NPS did not include an analysis of the characteristics that qualify the chapel for inclusion in the Historic District, did not include a description of the undertaking’s effects on the historic properties, and did not include an explanation of why the criteria of adverse effect were found inapplicable, reviewing parties cannot understand how the conversion of DeReef Park will not alter the characteristics that qualify the chapel for inclusion on the National Register. Therefore consulting parties cannot understand the determination that “the previous relocation and planned rehabilitation [of the chapel] will benefit the condition and use of this resource.” *Id.* Consulting parties maintain that the partial conversion of DeReef Park will both adversely affect the praise chapel and diminish its integrity, even in its new location (discussed in greater detail below).

NPS states that it will incorporate provisions into any executed grant contract amendment related to DeReef Park to ensure the restoration of the chapel as planned. DeReef Park – NHPA Section 106 Assessment of Adverse Effect. However NPS must consider the procedural history of this case when assigning conditions and future actions to avoid, minimize or mitigate adverse effects. After receiving federal funding in 1981 and 1991 under the LWCF to assist with improvements to DeReef Park, the city did virtually nothing to improve the park. *Friends of DeReef Park v. National Park Serv.*, 2015 U.S. Dist. LEXIS 70789, *2-3 (D.S.C. May 27, 2015). After receiving \$10,000 in funding from the South Carolina Department of Archives and History to rehabilitate the praise church, in addition to a budgeted \$20,624 of federal funding to renovate the praise church with a completion date of June 1, 1992, the praise church also remained unimproved. Pl’s Compl. 9, *Friends of DeReef Park v. National Park Serv.*, No. 2:13-cv-03453-DCN (filed Dec. 11, 2013). NPS has not provided adequate assurances that the praise chapel will be rehabilitated as planned.⁴³

Finally, consulting parties request that the Advisory Council on Historic Preservation review NPS’ documentation of this matter under 36 C.F.R. § 800.11(a) and provide adequate assurances that the conversion of DeReef Park will not impact historic properties. Because NPS’ current Section 106

⁴² National Register Bulletin, *How to Apply the National Register Criteria for Evaluation*, U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE (1995), <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>.

⁴³ For example, the no adverse effect determination for a historic hotel in *Lesser v. City of Cape May* included the specific rehabilitation plans, a copy of the application for rehabilitation tax credits submitted by the developer, and comments made on the rehabilitation tax credit application by the State Historic Preservation Officer. *Lesser*, 110 F. Supp. 2d at 327.

Assessment of Adverse Effect does not accomplish the purpose and goal of the Section 106 process under 36 C.F.R. § 800.1(a), the ACHP must step in and comment on both the proposed undertaking and NPS' proposed avoidance, mitigation, and minimization efforts for the undertaking's effect on historic properties.

IV. The Partial Conversion of DeReef Park Will Adversely Affect the Praise Chapel and Will Diminish Its Integrity

An adverse effect is found when “an undertaking may alter, directly or indirectly, any of the characteristics of a historic property for inclusion in the National Register in a manner that would diminish the integrity of the property’s . . . feeling, [and] association.” 36 C.F.R. § 800.5(a)(1). Further, adverse effects may include “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” *Id.* Cumulative effects “result from individually minor but collectively significant actions in the past, present, and reasonably foreseeable future. They may occur due to Federal or non-Federal undertakings. Several no adverse effect findings may add up to an adverse effect if the historic character of a property is eroded or occluded over time.”⁴⁴ The 36 C.F.R. § 800.5(a) criteria of adverse effect also lists examples of adverse effects including, but not limited to “change of the character of the property’s use or physical features within the property’s setting that contribute to its historic significance,” and “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” 36 C.F.R. § 800.5(a)(2)(iv)-(v). Finally, the 2008 NPS Nationwide Programmatic Agreement for Compliance with Section 106 of the National Historic Preservation Act Checklist for Cumulative Effects requires an analysis of information on “past, present and future projects that have or may have cumulative effects on historic properties in or near the APE of the current project under review.”⁴⁵

Even if NPS declines to extend the boundary of the APE, NPS' determination that the undertaking will have no adverse effect on the DeReef Court Chapel is arbitrary and should be reviewed pursuant to the 36 C.F.R. § 800.5(a) criteria of adverse effect. NPS improperly concluded that the partial conversion of DeReef Park will have no adverse effect on the Praise Chapel, nor diminish its integrity. Although NPS assumes its relocation and rehabilitation will benefit the condition and use of the Praise Chapel, NPS fails to consider the effects of the undertaking, both directly and indirectly, as a whole. NPS must consider the conversion of DeReef Park to residential use prior to any official federal undertaking on the land. Further, NPS must consider the residential development's cumulative effects on the praise chapel including the cumulative impacts of multiple phases of development should such development be allowed to continue.

Reducing the size of DeReef Park from 1.61 acres to .23 acres changes physical features within the praise chapel's setting that contribute to its historic significance, in addition to diminishing the integrity of the property's feeling and association. NPS does not provide an explanation of how the previous relocation will benefit the condition and use of the praise chapel. The praise chapel, a historically African American house of worship in a historically African American park in a historically African American neighborhood, both gained historic significance from its location and contributed to the historic significance of the DeReef Park itself. Pl's Compl., *Friends of DeReef Park v. National Park Serv.*, No. 2:13-cv-03453-DCN (filed Dec. 11, 2013). Moving the praise chapel from the center of DeReef Park into the southeast corner of the park has already both damaged the building and changed the physical settings that contribute to its historic significance. *Id.* At its original location in the center of

⁴⁴ Review Processes, NPS Preservation Programmatic Agreement Toolkit, available at <http://www.nps.gov/history/howto/PAToolkit/process.htm> (last visited June 9, 2015).

⁴⁵ Review Processes, NPS Preservation Programmatic Agreement Toolkit (Cumulative Effects checklist (link to Word doc)).

DeReef Park, the praise chapel served as a historically significant centerpiece for the historically African American houses, churches, and meeting places that surrounded it. Currently, the integrity of the praise chapel is diminished by surrounding the chapel with newly constructed three-story tall luxury residences that tower over both the chapel and other structures that predate the park. The relocation of a modest praise chapel, which served as a house of worship for those who lived in this historic neighborhood, from the middle of a park to a corner surrounded by large, luxury homes has introduced and will continue to introduce atmospheric and audible elements, including increased noise and pollution from car traffic.

For these reasons, the consulting party Friends of DeReef Park formally objects to NPS's determinations that the only extant historic property potentially affected by the LWCF conversion of DeReef Park is the 9 DeReef Court Chapel, and that the undertaking will have no adverse effect on the chapel nor diminish its integrity. NPS must conduct a Section 106 Assessment of Adverse Effect that considers all historic properties in the geographic area in which NPS' undertaking will have potential affects, and that comports with the purposes of the National Historic Preservation Act.

Sincerely,

/s/

Heather Templeton
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