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## The Administrative Procedure Act and How the “Final Rule” Designation Allows Agencies to Perpetuate Harm by Failing to Act

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# THE ADMINISTRATIVE PROCEDURE ACT AND HOW THE “FINAL RULE” DESIGNATION ALLOWS AGENCIES TO PERPETUATE HARM BY FAILING TO ACT

JULIA EATON\*

**Abstract:** In order to preserve the historic authenticity of Alexander Hamilton’s only home, concerned citizens, community groups, and the National Park Service (NPS) created a plan to move Hamilton’s Home. The Friends of Hamilton Grange (“Friends”) were created to assist the NPS in that process. The Friends never filed official paperwork to become an official “friends group” of the NPS. After years of planning, the NPS approved plans for Hamilton’s home that conflicted with the interests of the Friends. The Friends claimed that the NPS did not properly consult with them throughout the planning process and the undeveloped land where Hamilton’s home once stood would attract crime, inflicting injury on the local community. The Friend’s filed suit under the Administrative Procedures Act (APA) and the National Historic Preservation Act (“NHPA”) requesting injunctive relief, but the court ruled that the Friends lacked of standing under both the NHPA and the APA.

## INTRODUCTION

Alexander Hamilton was born in 1755 and was one of the founding fathers of the United States of America.<sup>1</sup> In *Federalist Paper Number 15*, Hamilton considered the creation of a federal government, and ultimately determined that individuals need constraint, which a strong, centralized federal government provides.<sup>2</sup> Hamilton’s belief in individual constraint by the government hints that he may have supported the decision by the United States District Court for the Southern District of New York’s finding in *Friends of Hamilton Grange v. Salazar*.<sup>3</sup>

Hamilton built his only home, Hamilton Grange, in 1802.<sup>4</sup> The home was originally located in Harlem Heights in northern Manhattan.<sup>5</sup> Harlem

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

<sup>1</sup> RON CHERNOW, ALEXANDER HAMILTON 17 (2004).

<sup>2</sup> THE FEDERALIST NO. 15 (Alexander Hamilton) (arguing that the Articles of Confederation were an improper tool of governance, creating a weak and inefficient federal government).

<sup>3</sup> See *id.*; see also *Friends of Hamilton Grange v. Salazar*, No. 08CIV5220(DLC), 2009 U.S. Dist. LEXIS 21855 \*63, \*67–68 (S.D.N.Y. Mar. 12, 2009) (concluding that the Friends of Hamilton Grange (“Friends”) lacked standing and therefore the judiciary could not hear the case).

<sup>4</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*4.

<sup>5</sup> *Id.*

Heights was a rural area when the house was built.<sup>6</sup> As more development occurred, Hamilton's home moved to Hamilton Heights in 1887.<sup>7</sup> Hamilton Grange eventually became one of the nation's forty-four National Memorials.<sup>8</sup>

As New York City grew, the street grid engulfed Hamilton's historic home.<sup>9</sup> To preserve the history of one of this nation's founding fathers, members of the community, later known as the Friends of Hamilton Grange ("Friends"), banded together to restore the home.<sup>10</sup> The National Park Service (NPS) responded to the Friends' concerns about the home with a proposal to move the home from its Convent Avenue location in Hamilton Heights to St. Nicholas Park and to build a community center at the original Convent Avenue space.<sup>11</sup> Much to the Friends' dismay, the NPS's precise plans for the home and original lot were not in accordance with their exact wishes.<sup>12</sup> Specifically, the NPS plans called for the home to face the opposite direction from the home's original orientation and the development of the original Convent Avenue property was abandoned.<sup>13</sup>

As a result, the Friends filed a claim in the United States District Court for the Southern District of New York under the Administrative Procedure Act (APA) and the National Historic Preservation Act ("NHPA").<sup>14</sup> The Friends claimed that the government went back on its promises to the community members, made decisions that degraded the historical and architectural character of Hamilton's home, and did not consult with the public and governmental bodies as required by law.<sup>15</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* Hamilton Grange was originally built on the ridge of Harlem Heights on the north end of Manhattan, but was moved to the Hamilton Heights neighborhood of Harlem in 1887. *Id.*

<sup>8</sup> *Id.* at \*5.

<sup>9</sup> *Id.* at \*4 (noting that Hamilton Grange was moved from its original location in Manhattan in 1887).

<sup>10</sup> *Id.* at \*5–6 (specifying that members of Community Board Nine, preservationists, and property owners formed the Friends).

<sup>11</sup> *Id.* The Hamilton Heights Homeowners Association petitioned the National Park Service to restore the home in 1987, in tandem with the nation's celebration of the Constitution's bicentennial. *Id.* at \*5. St. Nicholas Park is roughly half a mile, or five blocks, from the original Convent Avenue location. Walking Directions from Hamilton Heights, Convent Avenue N.Y.C. to St. Nicholas Park, N.Y.C., GOOGLE MAPS, <http://maps.google.com> (follow "Directions" hyperlink; then search starting point field for "Hamilton Heights, NY" and search destination field for "St. Nicholas Park, NY").

<sup>12</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*12, \*29.

<sup>13</sup> *Id.* at \*29.

<sup>14</sup> *Id.* at \*28–29.

<sup>15</sup> *Id.* at \*29.

Ultimately, the trial court granted the NPS's motion to dismiss, citing a lack of standing.<sup>16</sup> This Comment argues that, although the court accurately interpreted the law, it failed to account for policy issues caused by agency stagnation.<sup>17</sup> Specifically, such inaction allows federal agencies to avoid making a decision and to do so without penalty.<sup>18</sup> Additionally, this Comment establishes that agency inaction can often lead to the same results as a final agency action.<sup>19</sup>

## I. FACTS AND PROCEDURAL HISTORY

Prior to its move in 2008, Hamilton Grange was located in the New York City neighborhood now known as Hamilton Heights.<sup>20</sup> In 1962, Congress declared Hamilton Grange a National Memorial.<sup>21</sup> Hamilton Grange was simultaneously listed in the National Register of Historic places as a National Memorial, a list administered by the NPS.<sup>22</sup> Since its designation as a National Memorial, the NPS has maintained Hamilton Grange.<sup>23</sup>

Community Board Nine ("CB Nine") represents the Harlem Heights neighborhood.<sup>24</sup> Under the New York City Charter, CB Nine operates as a local group that ensures that its constituents are aware of issues concerning their community, and have access to services.<sup>25</sup> Although Hamilton Grange is a National Memorial and therefore operated by the NPS, the home remains in CB Nine's geographical territory.<sup>26</sup>

More than two centuries after Hamilton's home was completed and moved, the once rural land it occupied was gradually engulfed by New York

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<sup>16</sup> *Id.* at \*63, \*67. The National Historic Preservation Act does not confer a private right of action, and the Administrative Procedures Act requires a final agency action for an issue to be justiciable. *Id.*

<sup>17</sup> See *infra* notes 136–139 and accompanying text.

<sup>18</sup> See *infra* notes 136–139 and accompanying text.

<sup>19</sup> See *infra* notes 115–126 and accompanying text.

<sup>20</sup> *Alexander Hamilton in NYC: A Legacy and History Tour*, N.Y.C. DEP'T OF PARKS & RECREATION, <https://www.nycgovparks.org/about/history/alexander-hamilton-in-nyc-parks>. [https://perma.cc/RNX5-5DND].

<sup>21</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*5. A National Memorial is a structure designated to commemorate a former President of the United States. 54 U.S.C. § 309101 (2012).

<sup>22</sup> 36 C.F.R. § 60.1 (2016); National Register of Historic Places, 34 Fed. Reg. 2580, 2591 (Feb. 25, 1969) (establishing Hamilton Grange as National Memorial).

<sup>23</sup> See National Register of Historic Places, 34 Fed. Reg. at 2591 (explaining that the National Register of Historic Places is administered by the National Park Service (NPS)).

<sup>24</sup> *Id.*

<sup>25</sup> *Home Page*, CITY OF N.Y. CMTY. BD. 9 MANHATTAN, <http://www.cb9m.org>. [https://perma.cc/U6M8-2KS5].

<sup>26</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*4 (noting that the Convent Avenue location of Hamilton Grange in Hamilton Heights was in Community Board Nine's territory).

City's urban sprawl.<sup>27</sup> By 1962, the home was in disrepair.<sup>28</sup> Hamilton's home had been moved twice, with several different owners.<sup>29</sup> In 1987, around the time of the bicentennial anniversary of the signing of the United States Constitution, the Hamilton Heights Homeowners Association ("HHHA") attempted to persuade the NPS to restore Hamilton Grange—the group even raised \$8500 towards restoration of the home.<sup>30</sup> The HHHA agreed to raise additional money for the home's restoration and in exchange NPS agreed to restore Hamilton Grange based on plans developed through public participation.<sup>31</sup>

Over the next ten years, plans to move Hamilton Grange out of the now urban neighborhood commenced—the plans included an NPS public consultation project, Draft General Management Plan ("Draft GMP"), and Environmental Impact Statement.<sup>32</sup> The Draft GMP proposed that Hamilton Grange be moved to St. Nicholas Park and a community center or park be constructed on the vacated property.<sup>33</sup> This initially incited opposition from community members, who worried that once Hamilton Grange was moved, the vacated lot would attract crime.<sup>34</sup>

In 1994, a year before the Final General Management Plan ("Final GMP") was issued, concerned members of the community formed The Friends of Hamilton Grange ("Friends").<sup>35</sup> The Friends believed themselves to be NPS consultants, though the NPS never listed the Friends as consultants in any of its documentation.<sup>36</sup> The Friends wanted to be involved in the decision-making processes surrounding the restoration of Hamilton

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Edward Rothstein, *A Founder's at Home*, N.Y. TIMES, Sept. 15, 2011, <http://www.nytimes.com/2011/09/16/arts/design/alexander-hamiltons-renovated-grange-review.html> [<https://perma.cc/935H-4SW6>].

<sup>30</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*5. The goals of the HHHA are similar to that of CB Nine—namely, to bring awareness to community issues and resolve community problems. *Mission*, HAMILTON HEIGHTS HOMEOWNERS ASS'N, <http://hamiltonheights homeowners.org> [<https://perma.cc/V2MK-X8SW>].

<sup>31</sup> *Id.*; see 54 U.S.C. § 101101 (2012) (giving the NPS authority to accept land and donated money).

<sup>32</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*5–6. The Draft General Management Plan ("Draft GMP"), Environmental Impact Statement, and NPS consultation with the public were performed pursuant to the National Historical Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA"). *Id.*

<sup>33</sup> *Id.* at \*6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at \*7. A consultant is an official designation under the Code of Federal Regulations, though the Friends of Hamilton Grange ("Friends") are not listed as such. 36 C.F.R. § 800.2(c) (2016).

Grange.<sup>37</sup> Despite the Friends desire to be included, no formal meetings of the Friends occurred between 1995 and 2006.<sup>38</sup>

The Final GMP released by the NPS in 1995 changed the orientation of Hamilton's home and did not include any plans to begin development at the Convent Avenue site.<sup>39</sup> In contrast, the NPS's Draft GMP provided four different proposals for Hamilton Grange's placement in St. Nicholas Park—notably, in the fourth proposal the house was oriented towards the northeast.<sup>40</sup> In its original historic location, Hamilton Grange was oriented to the southwest.<sup>41</sup> If Hamilton Grange were oriented to the northeast in St. Nicholas Park, the entrance would face the street and not the park, which concerned the Friends.<sup>42</sup> CB Nine, some of whom were members of the Friends, approved the Draft GMP relocating the house in 1994.<sup>43</sup> CB Nine believed that the proposed plan would restore Hamilton Grange in a historically accurate manner.<sup>44</sup> The plan also proposed the construction of a NPS Ranger residence, a community reception center, and an exhibition space placed on the Convent Avenue site.<sup>45</sup>

The NPS released the Final GMP along with the required Environmental Impact Statement.<sup>46</sup> The Final GMP followed the fourth proposal from the Draft GMP but altered it to orient Hamilton Grange toward the southwest for the historical authenticity and to restore it to its original appearance as a freestanding country home.<sup>47</sup> The Final GMP also scheduled simultaneous development of the Convent Avenue site that had been vacated by Hamilton's home.<sup>48</sup> Despite its name, the NPS was not bound to the Final GMP.<sup>49</sup> In fact, the plan was a conceptual one, omitting specific details such as landscaping.<sup>50</sup>

At CB Nine's request, the NPS granted the Friends active oversight of the project.<sup>51</sup> The Friends were never actually an official "Friends Group"

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<sup>37</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*10, \*11.

<sup>38</sup> *Id.* at \*11.

<sup>39</sup> *Id.* at \*28–29.

<sup>40</sup> *Id.* at \*7–8.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*9.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 42 U.S.C. § 4332 (2012) (defining an Environmental Impact Statement as a detailed report on how a proposed action will impact the environment); *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*9.

<sup>47</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*9–10 (noting that the Draft GMP's orientation designated that Hamilton Grange would face the Northeast).

<sup>48</sup> *Id.* at \*10.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*10–11.

<sup>51</sup> *Id.*

of the NPS, such a designation required the Friends to make a formal request to become one of these group, but they made no such request.<sup>52</sup> In fact, the Friends did not communicate with the NPS between 1995 and 2008, when the Friends filed their lawsuit.<sup>53</sup>

The process of beginning the restoration and relocation of Hamilton Grange to St. Nicholas Park was a slow one, and many members of the community were discontent with the progress.<sup>54</sup> In 2001, contrary to the Final GMP, the orientation of Hamilton Grange was changed again to the northeast.<sup>55</sup> CB Nine approved of these alternations, and the NPS acquired the easement to the property in 2002.<sup>56</sup> By 2007, it became apparent to community members that development of the original Hamilton Grange property on Convent Avenue had stagnated, and possibly even halted completely.<sup>57</sup>

In addition to the problems with the Convent Avenue site, the Nicholas Park location created problems of its own.<sup>58</sup> In 2007, community members and the Friends expressed concern over the planned northeast orientation of the home, which was historically inauthentic.<sup>59</sup> The Friends also argued that the new orientation would eliminate the views from the dining room and obscure lighting in that room.<sup>60</sup> Public meeting minutes show that many believed this new orientation was a breach of trust by the NPS.<sup>61</sup> In April of 2007, the New York City Landmarks Preservation Commission (“NYCLPC”) approved the proposed plans for Hamilton Grange.<sup>62</sup>

After much deliberation and research by the NPS, the NYCLPC decided to orient Hamilton’s home to the northeast toward the street, citing consideration of the community members’ opinions as well as in-depth deliberation and consideration by Maria Burks, the Commissioner of National

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<sup>52</sup> *Id.* at \*11. In general, friend groups assist park programs and projects. *Friends Group Directory*, NAT’L PARK SERV., [https://home.nps.gov/applications/partnerships/friends\\_groups\\_directory.cfm](https://home.nps.gov/applications/partnerships/friends_groups_directory.cfm). [<https://perma.cc/XJ8B-X4ZU>].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at \*12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* The city of New York gave the NPS an easement, which in this case is the right to use the land for the restoration of Hamilton Grange. *Id.*

<sup>57</sup> *Id.* at \*13 (noting that community members believed that the final funding for Hamilton Grange did not include any money to develop the original property).

<sup>58</sup> *Id.* at \*16.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at \*17. The New York City Landmark Preservation Commission protects and preserves important historical, architectural, and cultural properties throughout the city. *About LPC*, N.Y.C. LANDMARK PRES. COMM’N, <http://www1.nyc.gov/site/lpc/about/about-lpc.page> [<https://perma.cc/4VFX-APWX>].

Parks of New York Harbor and Superintendent of Manhattan sites.<sup>63</sup> Commissioner Burks concluded that the northeast orientation kept the historical authenticity of the home intact, and complied with the Americans with Disabilities Act (ADA).<sup>64</sup> Although the dining room would now face a wall of another building, the NPS compensated by suggesting planting thirteen sweet gum trees in an effort to mirror the home's original view.<sup>65</sup> The NPS also decided to cancel its plans to install an elevator in the home because the top floor would not be open to the public as originally planned.<sup>66</sup> Ultimately, the New York State Preservation Office approved these plans.<sup>67</sup>

The second issue of importance to the Friends was the lack of development to the original Convent Avenue property.<sup>68</sup> The Friends believed that the NPS had abandoned its plans to develop the original site, which would likely result in higher crime rates in the Hamilton Heights Community.<sup>69</sup> With no concrete plans to develop the original Convent Avenue property, the NPS commenced the move of Hamilton Grange to St. Nicholas Park, and installed a foundation for a northeastern orientation.<sup>70</sup> Hamilton's home was completely uprooted from its foundation at the end of May 2008, and the Friends commenced their lawsuit on June 6, 2008.<sup>71</sup>

The Friends filed a claim seeking a temporary restraining order and a preliminary injunction to prevent the NPS from placing the home on its new foundation in St. Nicholas Park.<sup>72</sup> The Friends later amended their complaint, as it did not clearly show concrete injury required to bring the action in federal court.<sup>73</sup> The amended complaint was filed on August 8, 2008 after Hamilton Grange had already been moved to St. Nicholas Park.<sup>74</sup>

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<sup>63</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*19–20.

<sup>64</sup> *Id.* at \*20, \*22. The more historically accurate southwestern orientation would obscure the façade and the NPS would have to remove three of the historic front steps and carve more deeply into the hill in order to accommodate this orientation. *Id.* at \*20–21. Visitors to the home would approach from below, much like guests did when Hamilton was alive, but additional features such as a retaining wall and landscaping would be required to comply with the Americans with Disabilities Act. *Id.* at \*20.

<sup>65</sup> *Id.* at \*21–22.

<sup>66</sup> *Id.* at \*23. If the top floor was accessible to the public, the ADA would require inclusion of the elevator, which would have jeopardized the historical integrity of the home by including such a large, historically non-existent piece of equipment. *Id.* at \*23–24.

<sup>67</sup> *Id.* at \*22. The New York State Preservation office had the power to approve these plans through National Historic Preservation Act (“NHPA”). *Id.*; see 54 U.S.C. § 306106.

<sup>68</sup> *Id.* at \*29.

<sup>69</sup> *Id.* at \*46, \*52.

<sup>70</sup> *Id.* at \*27–28.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*28.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*; Press Release, Nat'l Park Serv., Moving a National Memorial—Hamilton Grange Finds a New Home (June 7, 2008), <https://www.nps.gov/hagr/learn/management/hamilton-grange-national-memorial-move-updates.htm> [<https://perma.cc/LA4K-ENCK>].



The Friends believed they had a cause of action under both the APA and §§ 106 and 110 of the National Historic Preservation Act (“NHPA”).<sup>75</sup> The Friends argued that §§ 106 and 110 of the NHPA require federal agencies to consider effects on the community or structure when changing the location of a structure that is listed on the National Register.<sup>76</sup> In addition, the Friends also argued that agencies must do everything in their power to minimize harm to the National Landmark, respectively.<sup>77</sup> The Friends also claimed that under the APA, the actions of the NPS should be stopped because they were undertaken in neglect of required planning procedures.<sup>78</sup> The Friends claimed that the defendants’ decisions regarding Hamilton’s home and the abandoned Convent Avenue site would harm Hamilton Grange and the Hamilton Heights neighborhood, and that the defendants did not follow required procedures for the development of both properties.<sup>79</sup>

## II. LEGAL BACKGROUND

In order to bring a case in federal court, the plaintiff must have standing.<sup>80</sup> In 1992, in *Lujan v. Defenders of Wildlife*, the United States Supreme Court developed a three-part test to determine minimum requirements to meet the case-or-controversy requirement under Article III of the Constitution.<sup>81</sup> In *Lujan*, the question before the Court was whether certain environmental groups had standing to challenge a rule promulgated by the Secretary of the Interior.<sup>82</sup> The Court held that a plaintiff must suffer a specific injury, which is either existing or impending.<sup>83</sup> There must be a traceable connection between that injury and the agency’s actions.<sup>84</sup> The injury must be likely to occur, and that injury must be correctable by a court decision in the plaintiff’s favor.<sup>85</sup> With these factors in mind, courts must apply them to the specific statutes to determine whether or not a party has standing to bring suit in federal court.<sup>86</sup>

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<sup>75</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855. at \*28–29.

<sup>76</sup> *Id.* at \*29.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at \*29–30.

<sup>79</sup> *Id.* at \*29.

<sup>80</sup> U.S. CONST. art. III § 2, cl.1; *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1098 (9th Cir. 2005); *Leibovitz v. N.Y.C. Transit Auth.*, 252 F.3d 179, 184 (2d. Cir. 2001).

<sup>81</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>82</sup> *Id.* at 558.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See Ross v. Bank of Am.*, 524 F.3d 217, 223–24 (2nd Cir. 2008).

When cases involve federal agencies, plaintiffs must also have standing under the APA.<sup>87</sup> The APA was enacted to regulate and to govern administrative agencies and to oversee the implementation of administrative rules and regulations.<sup>88</sup> Under the APA, administrative agencies conduct rulemaking and agency adjudication before adopting a final rule.<sup>89</sup> By design, the APA protects individual rights from an overbearing agency system, maintaining a balance of powers between the three branches of government.<sup>90</sup>

Under the APA, a person suffering a legal wrong, or adversely affected by an agency action, is entitled to judicial review.<sup>91</sup> An agency must have adopted a final action before a private party can bring suit.<sup>92</sup> For an action to be final, it must not be tentative or uncertain.<sup>93</sup> The Court provided a test in *Bennett v. Spear* to determine when an agency action constitutes a final rule.<sup>94</sup> The test has two parts: the action must end the agency's decision making process and it must determine rights and obligations or have legal consequences.<sup>95</sup>

In 2004, the Court held in *Norton v. Southern Utah Wilderness Alliance* that federal courts could only compel agency action, and did not have jurisdiction to review agency inaction.<sup>96</sup> The Court concluded that a claim predicated on a failure to act is only final if an agency fails to take a discrete action that it is required by law or to take action within a certain time period.<sup>97</sup> Further, § 706 of the APA states that courts can only compel agency action that is illegal or delayed for an unreasonable time.<sup>98</sup> In 1990, the United States Court of Appeals for the D.C. Circuit concluded that judicial review is permitted when agency inaction leads to the same result as an express denial of relief.<sup>99</sup>

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<sup>87</sup> See 5 U.S.C. § 702 (2012).

<sup>88</sup> *Id.* § 561.

<sup>89</sup> *Id.* §§ 553, 554 (outlining the rulemaking and adjudication procedures required under the APA).

<sup>90</sup> See *id.* §§ 553–559. Administrative agencies fall under the executive branch of the federal government. See *id.*

<sup>91</sup> *Id.* § 702.

<sup>92</sup> *Id.* § 704; see *West Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d Cir. 2008) (Finality is determined when an agency has come to a decision that “directly affect[s] the parties.” *West Sharkey*, 541 F.3d at 88 (quoting *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003)).

<sup>93</sup> *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

<sup>94</sup> *Id.* at 177–78.

<sup>95</sup> *Id.*

<sup>96</sup> *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004).

<sup>97</sup> *Id.* at 64–65.

<sup>98</sup> 5 U.S.C. § 706(1) (2012).

<sup>99</sup> *Her Majesty the Queen in Right of Ont. v. Env'tl. Prot. Agency*, 912 F.2d 1525, 1531 (D.C. Cir. 1990).

In *Ross v. Bank of America*, the United States Court of Appeals for the Second Circuit held that under Article III of the Constitution, plaintiffs establish standing when they have suffered a clear and concrete injury that is causally related to the plaintiff's action and is redressable.<sup>100</sup> Further, in *Coalition of Watershed Towns v. Environmental Protection Agency*, the Second Circuit elaborated that plaintiffs must prove that the injury was likely, not speculative, and seek relief to remedy the specific harm.<sup>101</sup>

The Second Circuit also explained in *Ross* that the issue at hand must be ripe, or imminent rather than hypothetical to prevent parties from seeking judicial review prematurely.<sup>102</sup> In addition, the Second Circuit held in *New York Civil Liberties Union v. Grandeau* that issues are not ripe when further factual development or delay would benefit the court's ability to review the question.<sup>103</sup>

For an individual to bring suit, the statute must express Congress' intent to create a private right of action.<sup>104</sup> Sections 106 and 110 of the NHPA do not suggest that Congress intended to give a private right of action to individuals through these statutes.<sup>105</sup> Although the National Park Service (NPS), through its regulations, has developed a process for private parties to act as consultants to the NPS, such status does not confer a private right action in court.<sup>106</sup>

Section 106 of the NHPA provides that, before an agency undertakes an action, it must consider the effects on the relevant property and its historical

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<sup>100</sup> *Ross*, 524 F.3d at 222 (citing *Lujan* 504 U.S. at 560–61).

<sup>101</sup> *Coal. of Watershed Towns v. Envtl. Prot. Agency*, 552 F.3d 216, 218 (2d Cir. 2008) (explaining that such a rule would prevent unnecessary claims from entering federal courts). In this case, three towns in New York negotiated with New York City, New York State, and the Environmental Protection Agency (EPA) regarding the Safe Drinking Water Act. *Id.* at 217. The three towns petitioned the court to review what they believed to be two final agency actions, specifically an EPA determination of non-compliance with the Safe Drinking Water Act. *Id.*

<sup>102</sup> *Ross*, 524 F.2d at 226.

<sup>103</sup> *N.Y. Civil Liberties Union v. Grandeau*, 528 F. 3d 122, 132 (2d Cir. 2008). The New York Temporary State Commission determined that the New York Civil Liberties Union incurred lobbying expenses from a billboard it had put up. *Id.* at 124. The New York Temporary State Commission eventually abandoned the case, and the court determined that the case was not ripe for review. *Id.*

<sup>104</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001) (noting that courts must look to congressional intent to determine whether or not there should be a private right of action under specific statutes).

<sup>105</sup> See National Historic Preservation Act Amendments of 1980, tit II, § 206, 94 Stat. 2987, 2996 (1980) (amending the NHPA to include § 110) (codified at 54 U.S.C. § 306106 (2012)); National Historic Preservation Act, tit. I, § 106, 80 Stat. 915, 917 (1966) (codified at 54 U.S.C. § 306108).

<sup>106</sup> 36 C.F.R. § 800.3(f)(3) (2016). A party like the Friends of Hamilton Grange may be a consulting party if there is a legal or economic relation to the undertaking, or they have a concern that the undertaking will have negative effects on the historic property. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 553 (8th Cir. 2003).

value.<sup>107</sup> In *Business and Residents Alliance of East Harlem v. Jackson*, the Second Circuit found that Congress created the New York City Empowerment Zone to stimulate economic growth in low-income areas.<sup>108</sup> The crux of the issue was whether building a shopping complex triggered NHPA review.<sup>109</sup> The Second Circuit commented that courts view § 106 as the “stop, look, and listen” provision of the NHPA.<sup>110</sup> At the time *Friends of Hamilton Grange v. Salazar* was decided, § 110 was stricter, but still procedural in nature.<sup>111</sup> Section 110 provided that undertakings involving National Historic Landmarks must minimize the harm to that landmark as much as possible.<sup>112</sup>

### III. ANALYSIS

In *Friends of Hamilton Grange v. Salazar*, the District Court for the Southern District of New York concluded that the Friends of Hamilton Grange (“Friends”) did not have standing to bring suit in federal court under the Administrative Procedure Act (APA) or under the National Historic Preservation Act (“NHPA”).<sup>113</sup>

In *Friends of Hamilton Grange*, the court noted that the United States Court of Appeals for the Second Circuit had never considered the issue of constitutional standing as applied to the NHPA.<sup>114</sup> The court, though, went on to analogize the issues presented by the NHPA to the Second Circuit’s prior opinions under the National Environmental Policy Act (“NEPA”).<sup>115</sup> Both the NHPA and NEPA are procedural in nature, and require public officials to consider environmental consequences when making decisions.<sup>116</sup> The Friends, therefore had to show that they had suffered an injury in fact that was caused by the National Park Service’s (NPS) failure to abide by the

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<sup>107</sup> 54 U.S.C. § 306108.

<sup>108</sup> 430 F.3d 584, 585 (2d Cir. 2005).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 591. Section 106 of the NHPA requires agencies to consider the effects an undertaking will have on a historic property. 54 U.S.C. § 306108; *Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005).

<sup>111</sup> See *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*59–60. After *Friends of Hamilton Grange v. Salazar* was decided, Congress amended § 110 of the NHPA to include much broader language, not specifying a goal of minimizing harm to historic landmarks to the maximum extent possible. 16 U.S.C. § 470 (2012); *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*59–60.

<sup>112</sup> 54 U.S.C. § 306106 (2012).

<sup>113</sup> *Friends of Hamilton Grange v. Salazar*, No. 08CIV5220(DLC), 2009 U.S. Dist. LEXIS 21855 at \*63, \*67–68. (S.D.N.Y. Mar. 12, 2009).

<sup>114</sup> *Id.* at \*39.

<sup>115</sup> *Id.*; see *Fund for Animals v. Babbit*, 89 F.3d 128, 130 (1996).

<sup>116</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*39.

NHPA, and that a favorable ruling by the court would remedy the injury.<sup>117</sup> The Friends failed to do so.<sup>118</sup>

The Friends did not establish injury-in-fact under the NHPA because, other than the change in elevator access in Hamilton Grange, the Friends failed to specify anything about the plans that would hurt the Friends and Hamilton Grange.<sup>119</sup> Therefore, the abstractness of the Friends' claim led the court to conclude that the Friends failed to show how exactly the restoration plans for Hamilton Grange would adversely affect them.<sup>120</sup>

The Friends also asserted a procedural right, but standing under Article III of the Constitution requires that the deprivation of that procedural right implicate a concrete interest.<sup>121</sup> The Friends did not establish that a concrete interest was affected because, other than the decision to exclude the elevator, the Friends did not point to anything specific that would harm them.<sup>122</sup> Although the District Court recognized that there could be cases where concrete injuries stemmed from restoration of historical sites, the Friends were not able to show a causal connection between the agency action and the injury claimed.<sup>123</sup>

Another challenge the Friends faced was the less than one-year time period between the commencement of the move of Hamilton Grange and the dismissal of the lawsuit.<sup>124</sup> The short time period made it difficult, without more specific facts, for the Friends to properly support the allegation that the NPS intended to neglect the Convent Avenue site, nor did it suggest any final action.<sup>125</sup>

Because the NHPA does not provide a private right of action, the Friends had to establish standing under the APA.<sup>126</sup> Under the APA, a final agency ruling is required before a party may bring suit claiming injury in

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<sup>117</sup> *Id.* at \*40; *see Lujan*, 504 U.S. at 560–61.

<sup>118</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*42–43.

<sup>119</sup> *Lujan*, 504 U.S. at 560–61; *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*42–43.

<sup>120</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*42; *see Lujan*, 504 U.S. at 583.

<sup>121</sup> U.S. CONST. art. III § 2, cl.1; *Lujan*, 504 U.S. at 560–61; *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*42. A procedural right is the right to certain processes. Devin McDougall, *Reconciling Lujan v. Defenders of Wildlife and Massachusetts v. EPA on the Set of Procedural Rights Eligible for Relaxed Article III Standing*, 37 COLUM. J. ENVTL. L. 151, 156 (2012).

<sup>122</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*41.

<sup>123</sup> *Id.* at \*43–45.

<sup>124</sup> *Id.* at \*27–28.

<sup>125</sup> *Id.* at \*27–28, \*54; *see Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001) (holding that judicial review is appropriate in the case of agency inaction only when the harm caused by inaction is the same as harm caused by action).

<sup>126</sup> *Id.* at \*54; *see Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001).

fact based on the agency action.<sup>127</sup> The Friends failed to show injury in fact because they did not point to specific harm regarding both the plans for Hamilton Grange and the empty Convent Avenue site.<sup>128</sup>

The final rule requirement poses significant problems to private individuals affected by agency stagnation.<sup>129</sup> As noted in *Friends of Hamilton Grange*, the Second Circuit has yet to define final agency action with regard to the NHPA.<sup>130</sup> Final agency action has been generally understood to be the time when legal consequences are attached to the agency's action and is the time when judicial review is proper.<sup>131</sup> The Friends claimed that agency stagnation would cause crime rates to increase in their neighborhood if the Convent Avenue site remained undeveloped.<sup>132</sup> The District Court held that, because the NPS had not made a final decision regarding what to do with the lot, there could be no injury.<sup>133</sup> This decision demonstrates a crucial problem with the final action requirement because that requirement poses a challenge for parties trying to determine how long agencies may put off making a decision—which would count as final agency action—before private individuals are adversely affected by the inaction.<sup>134</sup>

The District Court for the Southern District of New York correctly followed existing precedent requiring final agency action in holding that the Friends lacked standing under the NHPA and the APA.<sup>135</sup> Standing is important because it ensures that cases have a legitimate basis for adjudication and are not frivolous.<sup>136</sup> Procedural standing requirements meant to promote efficiency, however, risk limiting or preventing private individuals' ability to seek redress in court.<sup>137</sup> The fact that inaction is not subject to judicial review compounds this risk.<sup>138</sup> Although the Friends' complaint does not

<sup>127</sup> 5 U.S.C. § 704 (2012); *West Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d Cir. 2008).

<sup>128</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*63, \*67–68.

<sup>129</sup> *See* 5 U.S.C. § 704; *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*67–68 (concluding that the National Park Service made no final decision to abandon the development of the Convent Avenue site, giving the Friends no cause of action).

<sup>130</sup> *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*65.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*46.

<sup>133</sup> *Id.* at \*67–68.

<sup>134</sup> *See Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*67–68 (concluding that this is an example of a case where plaintiffs did not have recourse because there was no final agency action).

<sup>135</sup> *See Bennett*, 520 U.S. 154 at 178; *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*67–68.

<sup>136</sup> *See* 54 U.S.C. §§ 306106, 306108 (2012); *Lujan*, 504 U.S. at 560–61.

<sup>137</sup> *See Lujan*, 504 U.S. at 583.

<sup>138</sup> *See id.* at 560–61; *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*67–68 (resulting in a case where private citizens had no judicial recourse).

<sup>139</sup> *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) (determining that the court can only compel agency action).

best portray the harm that agency inaction can cause, the case highlights this broader policy concern.<sup>139</sup>

#### CONCLUSION

The Friends of Hamilton Grange brought suit under the Administrative Procedures Act and National Historic Preservation Act in hopes of rectifying their alleged injury stemming from the restoration plans of Hamilton Grange and the lack of development of the Convent Avenue site by the National Park Service. The District Court for the Southern District of New York determined that the Friends did not have a private right of action under the NHPA, and could not establish constitutional standing under the APA, as there had been no final agency action by the NPS. Although the District Court applied the law correctly to the facts of the case, the final rule requirement creates a grey area that allows the government to avoid adjudication caused by lack of action.

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<sup>139</sup> See *Friends of Hamilton Grange*, 2009 U.S. Dist. LEXIS 21855 at \*41–42.