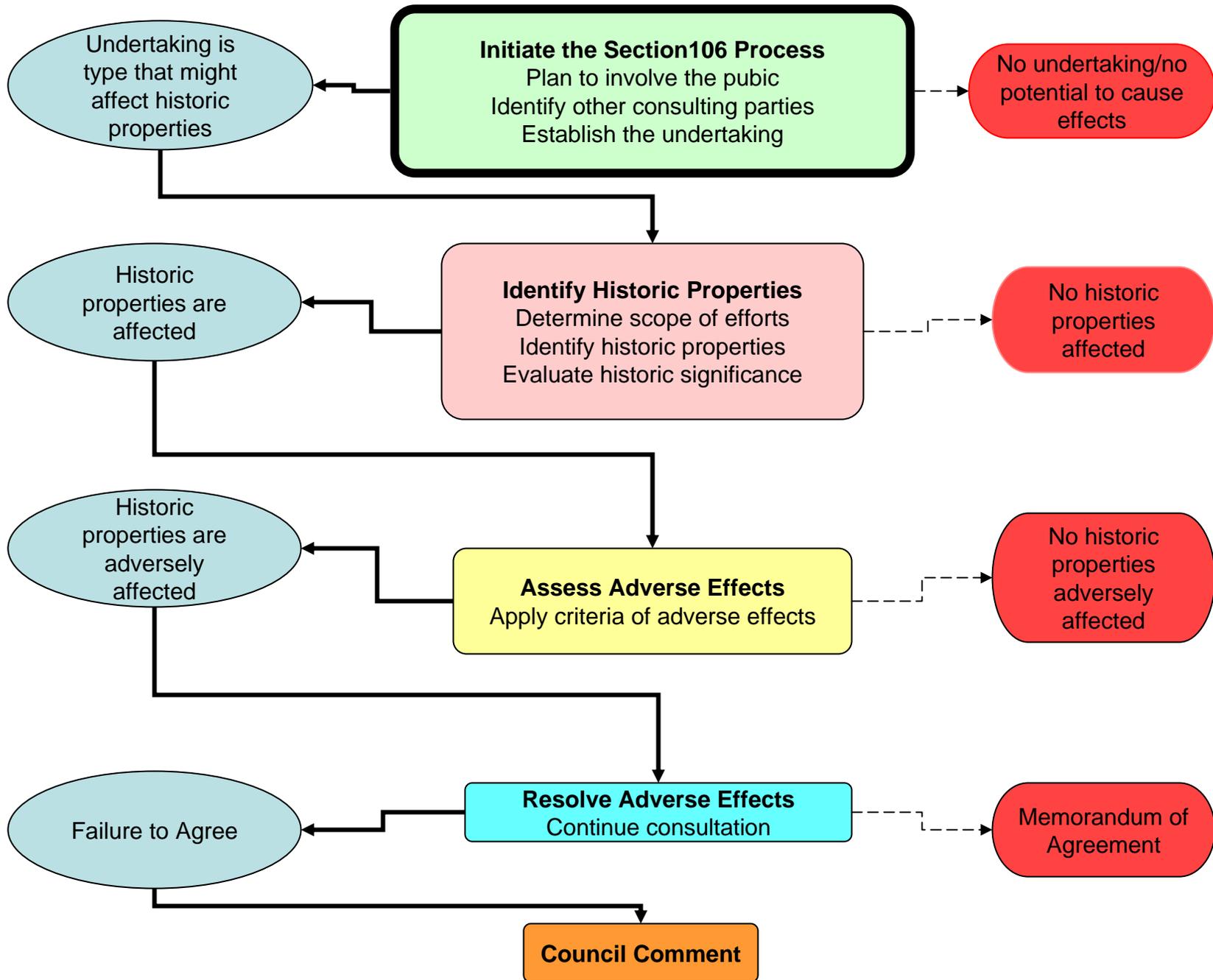




# Historic Preservation Review Section 106 of the National Historic Preservation Act

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# Initiate the Section 106 Process

- Purpose
  - Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. (36 CFR 800.1(a))

# Initiate the Section 106 Process

- Who are the participants?
  - Agency Official
    - Local government official under 24 CFR Part 58
    - Professional standards
    - Use of contractors
    - Responsible for consultation

## 10 Best Ways to Slow Down the Section 106 Process

Call the SHPO for assistance and then state that you've never seen, **much less read** the Section 106 regulations

Hire a consultant who hasn't got a clue about historic preservation

# Initiate the Section 106 Process

## Use of Contractors § 800.2(af)(3)

“. . . The agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.”

# Initiate the Section 106 Process

- Who are the participants?
  - Advisory Council on Historic Preservation
    - Responsible for Section 106 regulations
    - Responsible for advising federal agencies
      - Including local governments when they are the agency official

# Initiate the Section 106 Process

- Who are the participants?
  - Consulting Parties
    - State Historic Preservation Officer/Tribal Historic Preservation Officer
    - Indian Tribes/Native Hawaiians
    - Representatives of local governments
    - Applicants for federal assistance, permits, licenses and other approvals
    - Others
  - Public

# Initiate the Section 106 Process

- Timing
  - The agency official must complete the Section 106 process “prior to the approval of the expenditure of any Federal funds on the undertakings or prior to the issuance of any license.”

## Best Ways to Slow Down the Section 106 Process

Begin your project, **and then** contact the SHPO

Call or email that you must have the SHPO's response **Immediately**, otherwise the City will lose a million dollars

# Initiate the Section 106 Process

- Have a plan to involve the public
- Identify other consulting parties

# Initiate the Section 106 Process

- Establish the Undertaking
  - The determination of whether or not an undertaking exists is the Agency Official's decision.
  - If there is an undertaking, but it does not present a type of activity that has the potential to have an effect on an historic property, then the agency is finished with its Section 106 obligations.
  - **The agency official is in the driver's seat but make sure your action/decision is defensible**

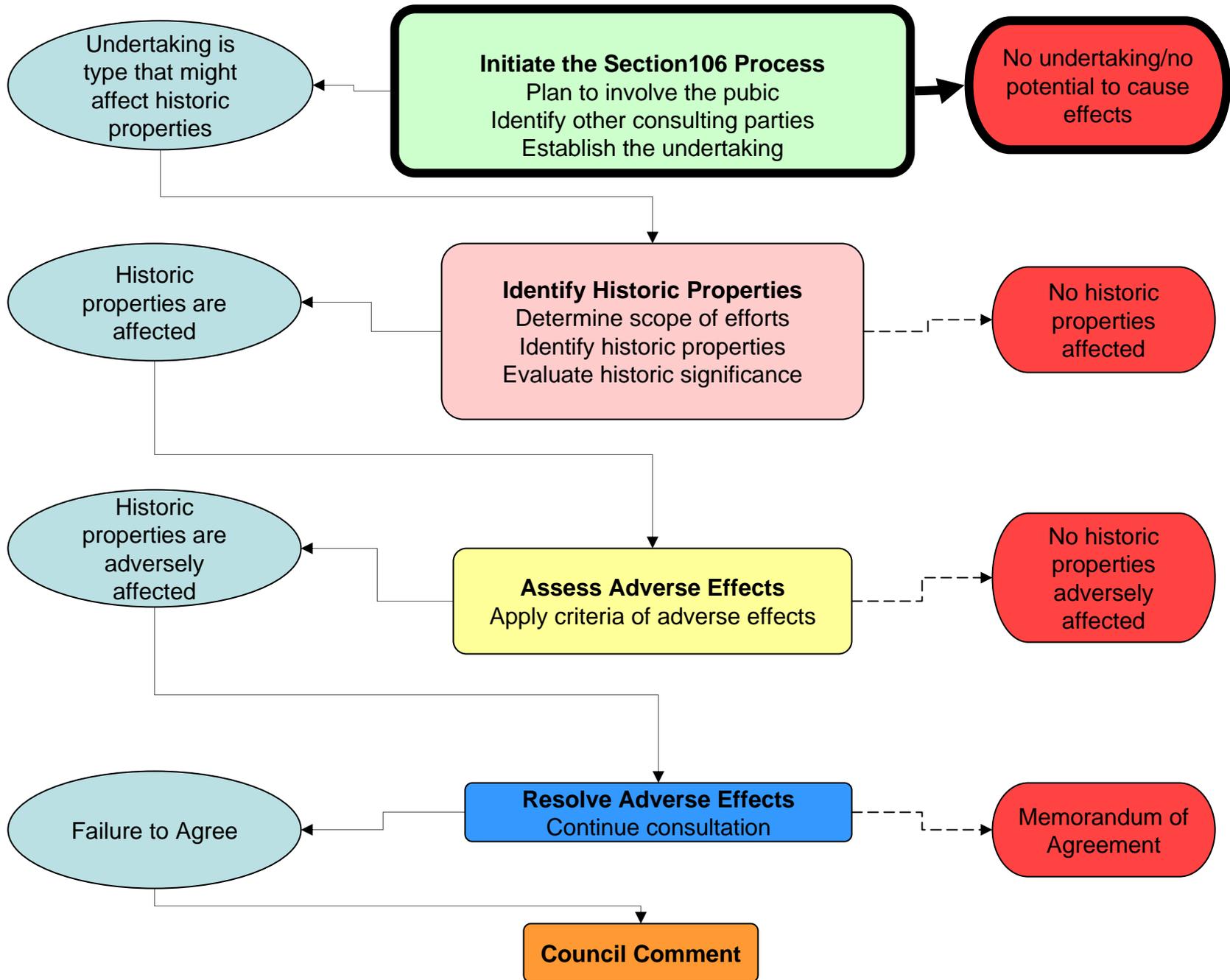
# Initiate the Section 106 Process

If the agency official determines there is no undertaking, or

If there is an undertaking but it is not the type of activity that has the potential to cause effects on historic properties, then

That concludes the Section 106 review

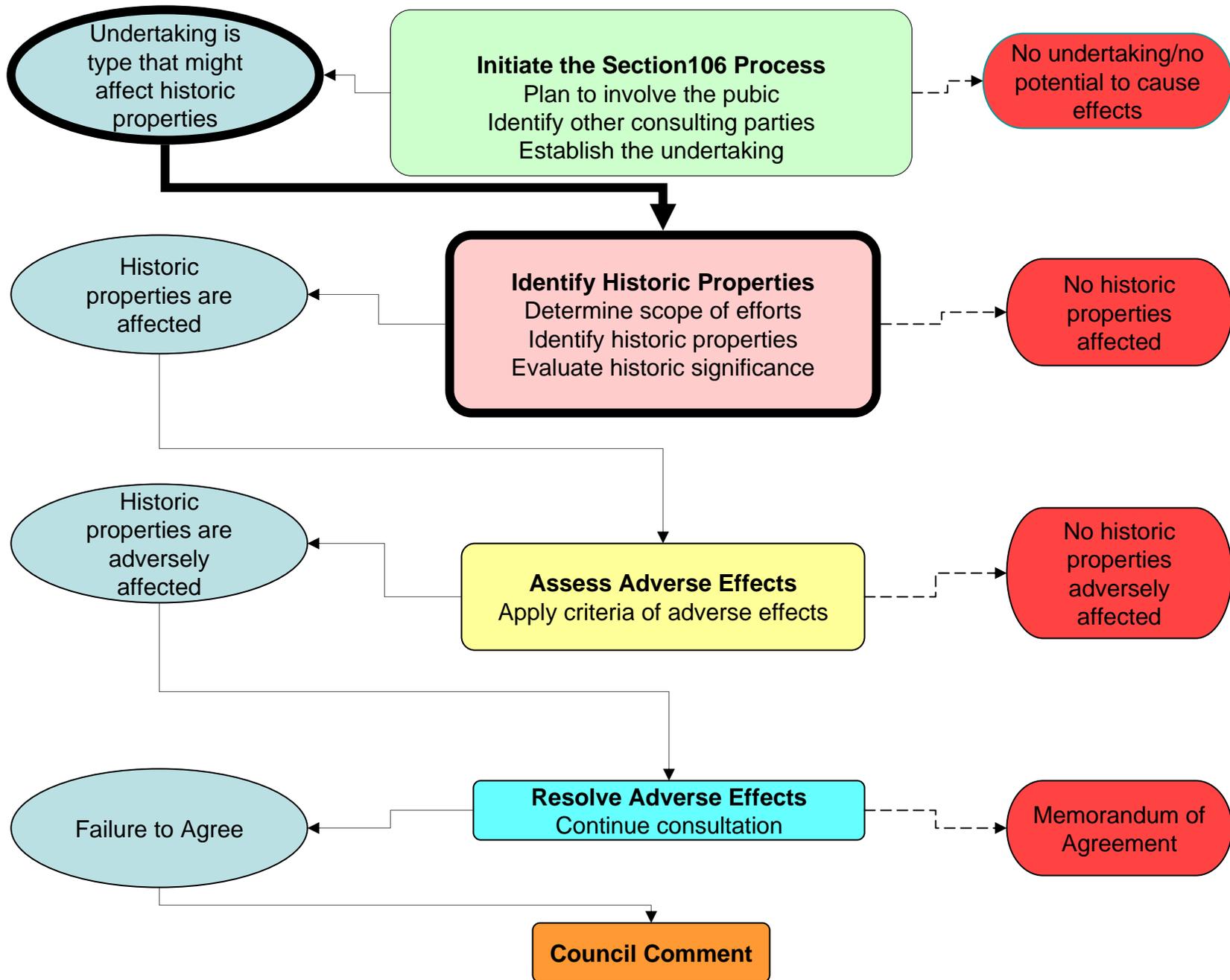
Advise: Keep appropriate records



# Initiate the Section 106 Process

If the Agency official has determined that the undertaking is the type of activity that has the potential to cause effects on historic properties, then

The agency proceeds to identify historic properties that might be affected



# Identify Historic Properties

The step known as “identification” includes

- Preliminary work
- Actual efforts to identify historic properties
- Evaluation of identified properties to determine if they are “historic”

## **Best Ways to Slow Down the Section 106 Process**

Write the SHPO and ask “Please provide comments about our project.”

# Identify Historic Properties

- In consultation with the SHPO, determine the scope of efforts to
  - Determine and document the **area of potential effects (APE)**

# Identify Historic Properties

- In consultation with the SHPO, determine the scope of efforts to
  - Review existing information about historic properties within the APE, including any data concerning possible historic properties not yet identified.

## **Best Ways to Slow Down the Section 106 Process**

Refuse to consider archeological properties because this is a urban area, or because the area has been under cultivation, or you can't see any archeological properties

(Of course you can't see them, that's why we rely on our regional Information Centers to provide professional advice.)

# Identify Historic Properties

- In consultation with the SHPO, determine the scope of efforts to
  - Seek information from parties likely to have knowledge or for concerns about the area

## **Best Ways to Slow Down the Section 106 Process**

Fail to contact staff in your own local government that are responsible for planning and/or historic preservation

# Identify Historic Properties

- In consultation with the SHPO, determine the scope of efforts to
  - Gather information from Indian tribes and Native Hawaii organizations about properties to which they attach religious and cultural significance, while remaining sensitive to any concerns they may have about the confidentiality of this information

# Identify Historic Properties

- The standard for identification is a “reasonable and good faith effort” to identify history properties.
  - What previous identification work has already taken place?
  - Background research
  - Consultation
  - Oral history interviews
  - Field survey

# Identify Historic Properties

- Phased identification
  - Large land areas
  - Access to properties is restricted
  - Nature of the undertaking and its potential scope and effect have not yet been completely defined
- Agency official required to follow up once project has been refined or access to property has been gained.

# Identify Historic Properties

- Evaluate Historical Significance
  - Apply the National Register criteria to properties identified within the APE

**Best Way to Slow Down the Section 106 Process**

The property is not on your local register, therefore, it is not a historic property.

Ask the SHPO to determine for you if the property is eligible for the National Register.

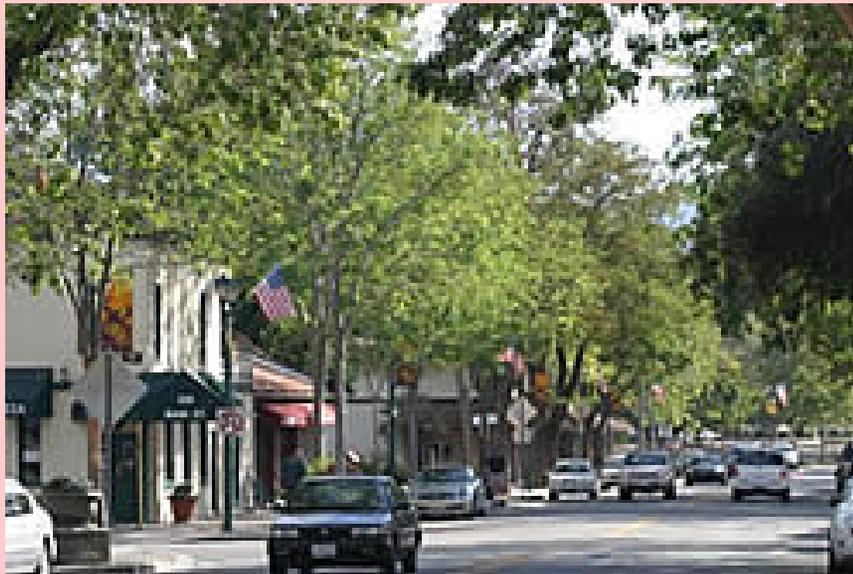
- Old determinations of eligibility may need to be re-evaluated due to passage of time or other factors

# Identify Historic Properties

- The National Register of Historic Places documents properties significant in our nation's history and prehistory
- Levels of significance
  - Local, state, or national level of significance

# Identify Historic Properties

- National Register of Historic Places
  - a. Associated with events that have made a significant contribution to the broad patterns of our history



# Identify Historic Properties

- National Register of Historic Places
  - b. Associated with the lives of persons significant in our past



# Identify Historic Properties

- National Register of Historic Places
  - c. Embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction



# Identify Historic Properties

- National Register of Historic Places
  - d. Have yielded or may be likely to yield, information important in history or prehistory



# Identify Historic Properties

- Properties must be significant
- Properties must have the integrity necessary to convey their historical significance
  - Integrity depends on why it is significant

# Identify Historic Properties

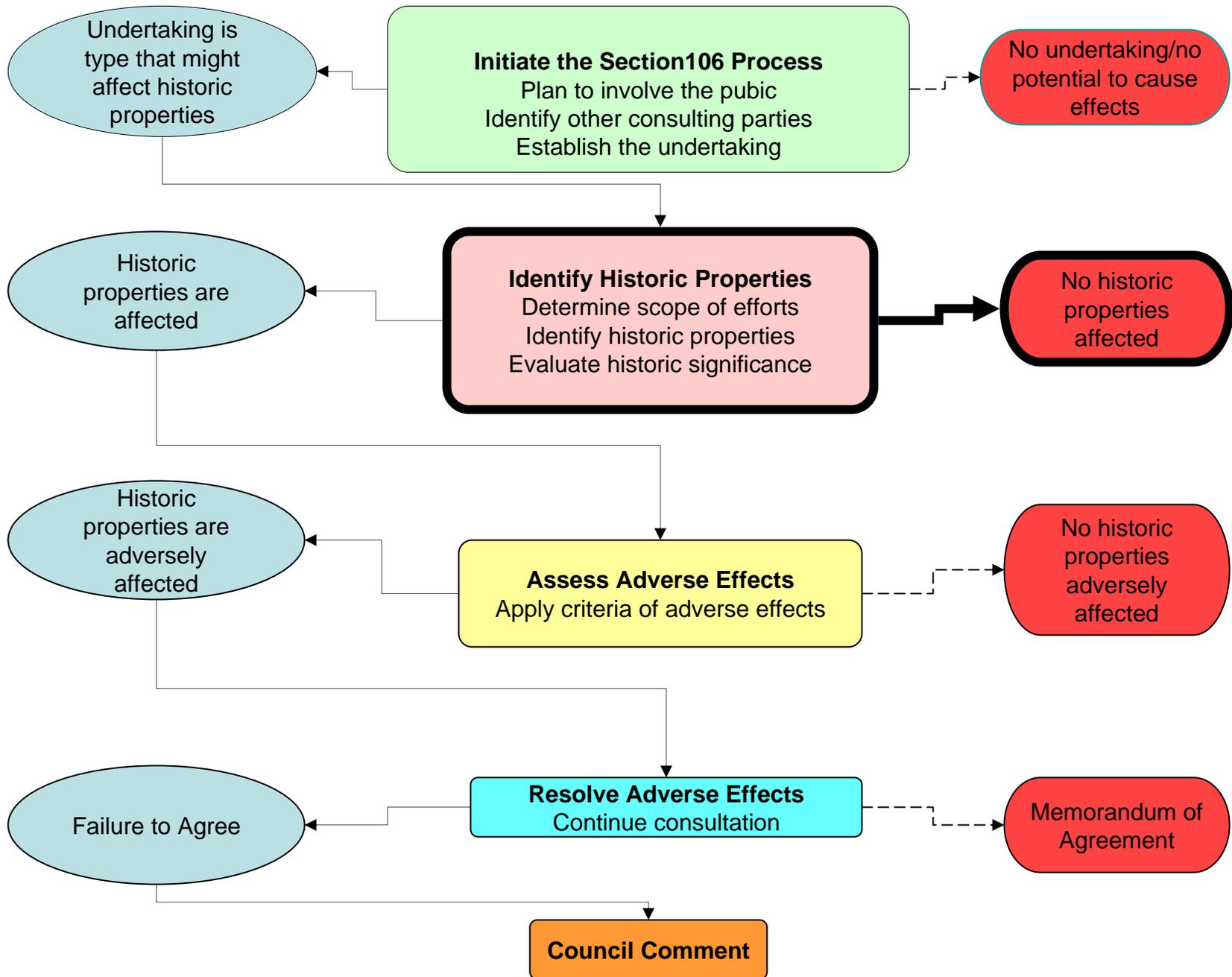
- Evaluate Historical Significance
  - Acknowledge the expertise of Indian Tribes and Native Hawaii organizations when assessing the eligibility of a property to which they attach religious or cultural significance

# Identify Historic Properties

- Agency official makes determinations of eligibility in consultation with the SHPO
  - Disagreements referred to Keeper of the National Register

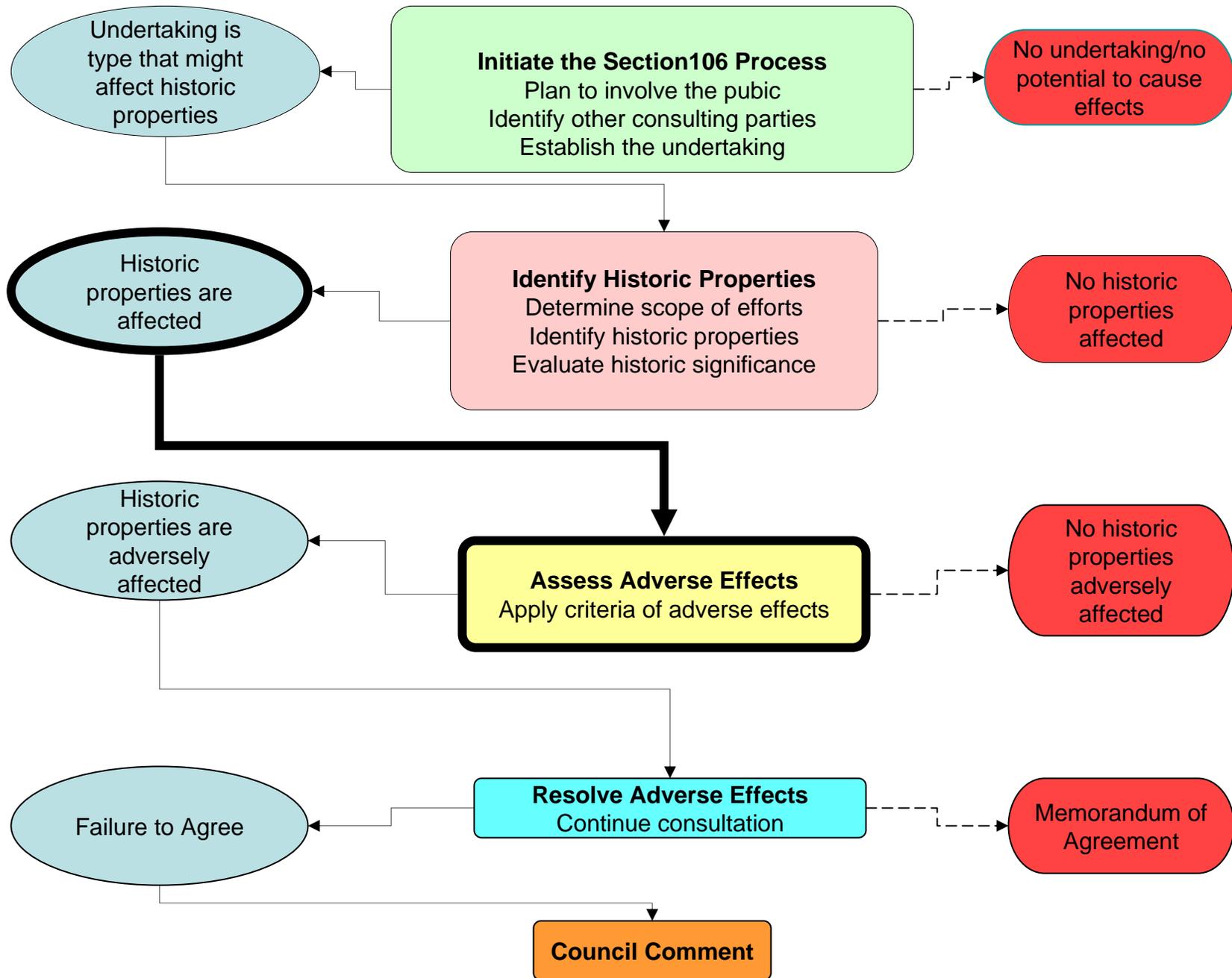
# Identify Historic Properties

- If no historic properties are found, or
- If no effects on known historic properties are found,
- Agency official makes determination that no historic properties are affected
  - Agency official must place documentation in a public file prior to approving the undertaking
  - SHPO has 30 days to object



# Identify Historic Properties

- When the agency official finds that historic properties may be affected, or
- The SHPO or ACHP objects to a find of no historic properties affected, then
- The agency official proceeds to the assessment of adverse effects
  - Agency official must notify all consulting parties and invite their views



# Assess Adverse Effects

- The SHPO and Indian tribes/Native Hawaii organizations attaching religious and cultural significance to identified properties, must be consulted when agencies apply the criteria of adverse effect.
- The agency official needs to consider the views of consulting parties and the public.

# Assess Adverse Effects

- Apply criteria of adverse effects
  - When an undertaking may directly or indirectly alter characteristics of a historic property that qualify it for inclusion in the National Register
  - Reasonable foreseeable effects caused by the undertaking that may occur later in time, be farther removed, or be cumulative also need to be considered.

# Assess Adverse Effects

- Examples of adverse effects
  - Physical destruction or damage
  - Alteration not consistent with the Secretary of the Interior's *Standards*
  - Relocation of a property
  - Change of use or physical features of a property's setting

# Assess Adverse Effects

- Examples
  - Visual, atmospheric, or audible intrusions
  - Neglect resulting in deterioration
  - Transfer, lease, or sale of a property out of federal ownership or control without adequate protections
  - Alteration or destruction of an archeological site is an adverse effect, whether or not recovery of archeological data from the site is proposed. ACHP has issued guidance.

# Assess Adverse Effects



Inappropriate alterations

# Assess Adverse Effects

New construction that is out of character with adjacent historic properties



# Assess Adverse Effects

- No Adverse Effects
  - A property that is restored, rehabilitated, repaired, maintained, stabilized, premeditated, or other changed in accordance with the *Secretary's Standards*
  - A property transferred out of federal ownership with preservation restrictions

# Assess Adverse Effects

No Adverse Effects



# Assess Adverse Effects

## No Adverse Effects

Appropriate street furniture at Locke, a National Historic Landmark District



# Assessing Adverse Effects

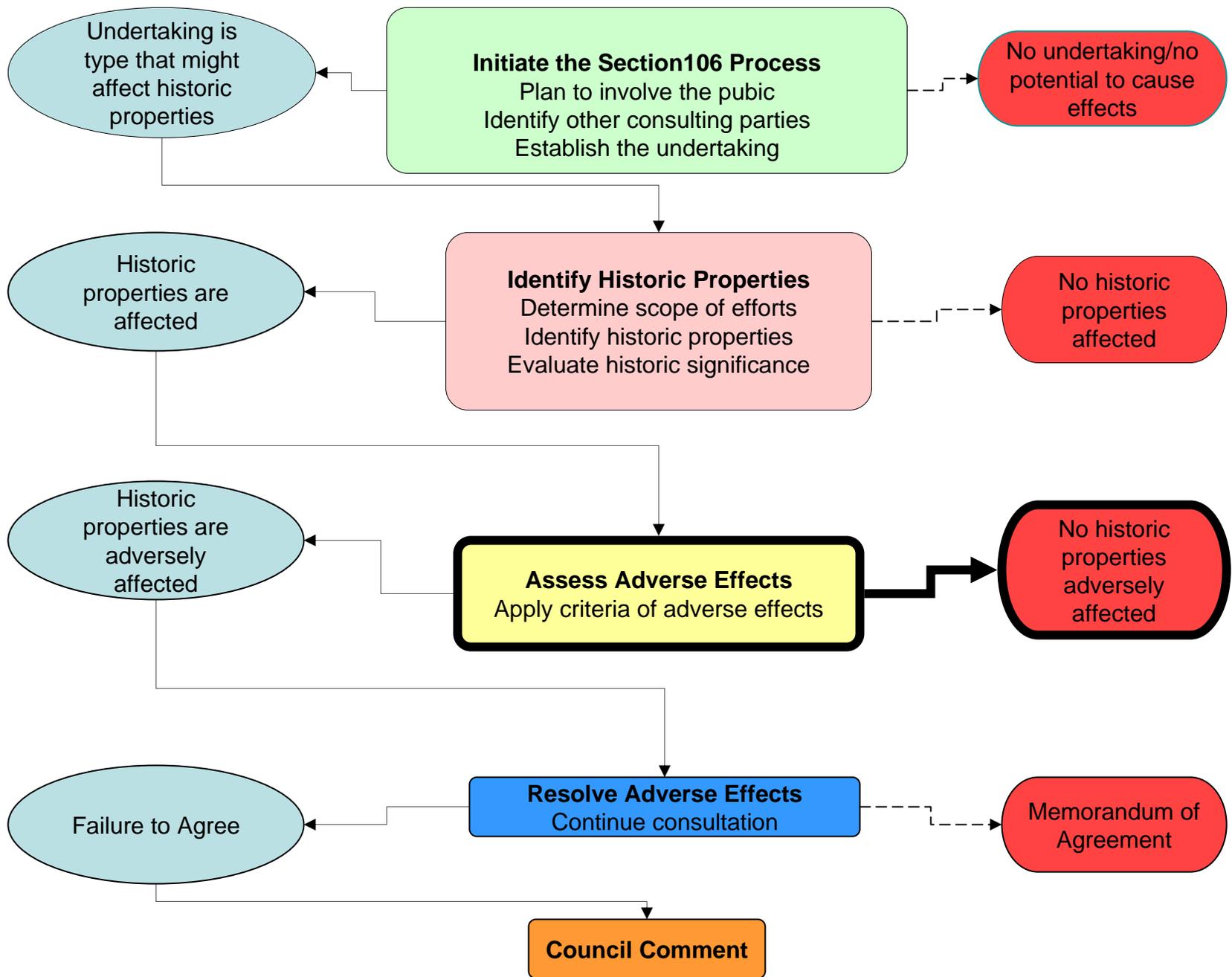
- SHPO may suggest changes in a project or impose conditions so that adverse effects can be avoided and thus result in a no adverse effect determination
  - Conditional no adverse effect

# Assessing Adverse Effects

- Advisory Council on Historic Preservation rarely reviews no adverse effect determinations, unless
  - Disagreements by the SHPO or another consulting party

# Assessing Adverse Effects

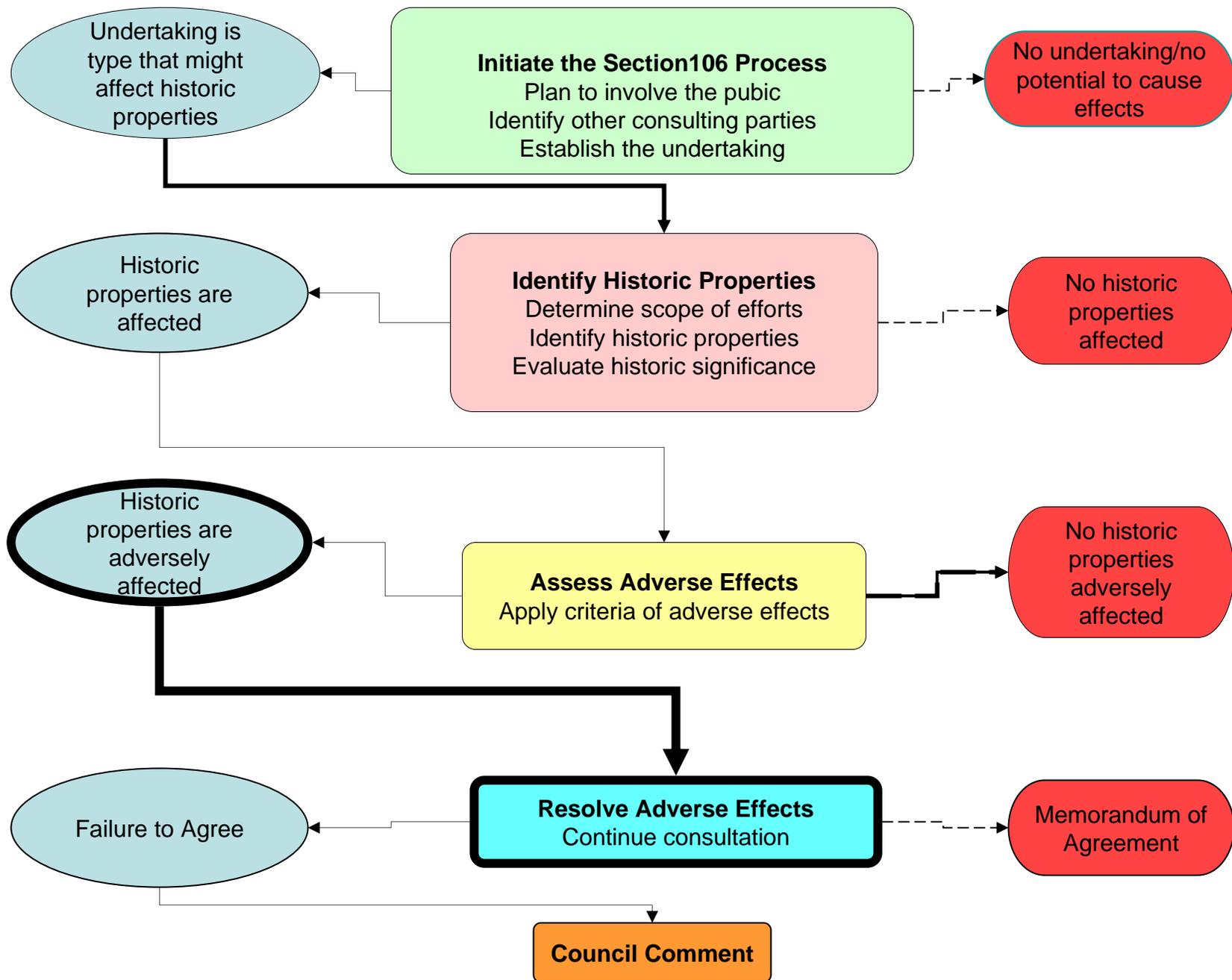
- Agency must retain records of no adverse effect findings and make them available to public
- Failure of an agency to carry out the undertaking in accordance with the finding requires the agency official to reopen the Section 106 process and determine whether the altered course of action constitutes an adverse effect.



# Assessing Adverse Effects

- A finding of adverse effect requires further consultation on ways to resolve it.





# Resolve Adverse Effects

- Continue consultation among the agency official, SHPO and consulting parties
- Agency official must notify ACHP when adverse effects are found and invite them to participate
  - ACHP will let agency official know within 15 days

## Best Ways to Slow Down the Section 106 Process

Replacement windows are the only solution or, **we already have our minds made up!**

Section 106 consultation is part of the planning process—it is not a mitigation program

# Resolve Adverse Effects

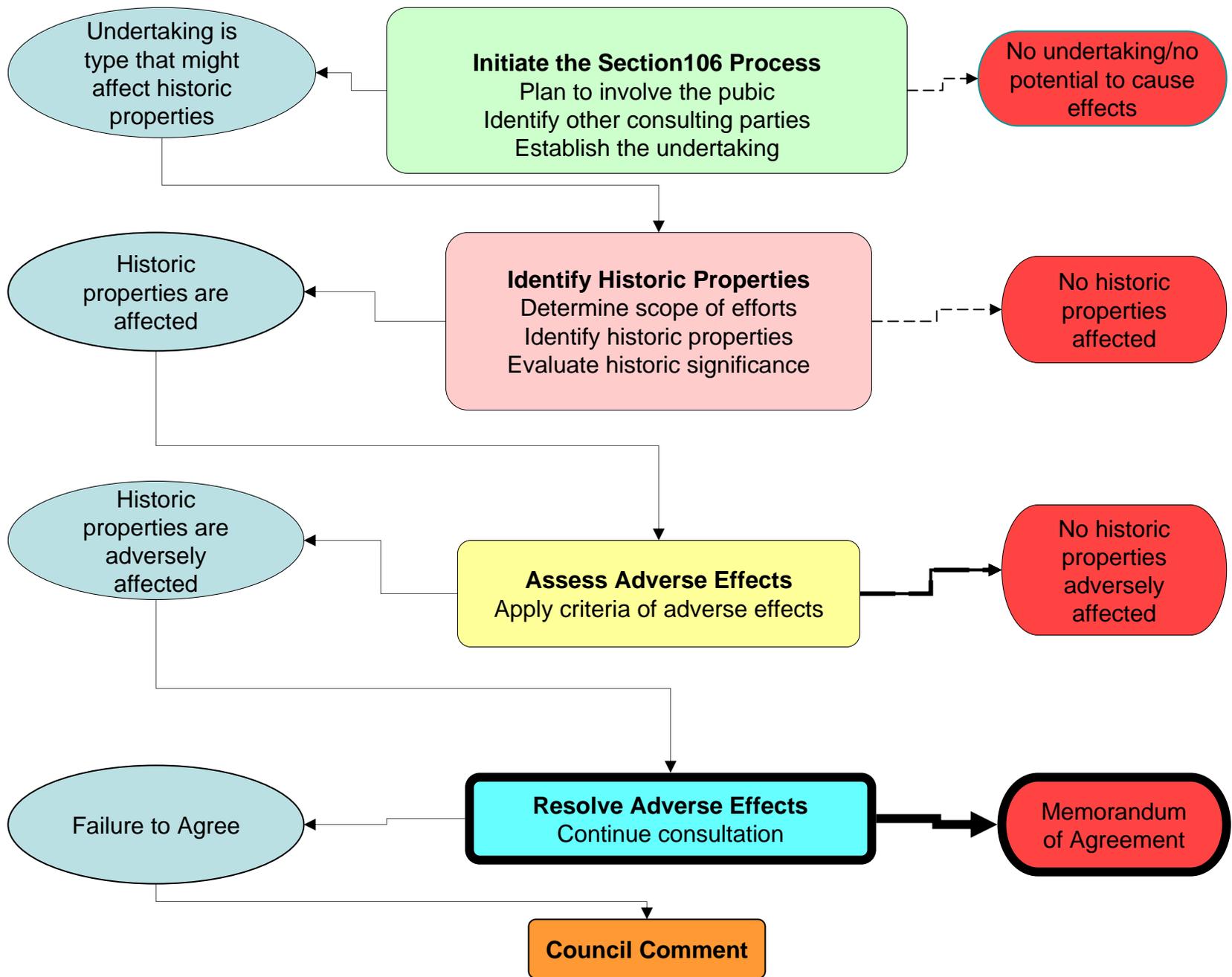
- Agency official is obligated to provide project documentation to all consulting parties at the beginning of the consultation to resolve adverse effects.
- Agency official must provide an opportunity for members of the public to express views

# Resolve Adverse Effects

- Memorandum of Agreement
  - Agency official consults with SHPO and other consulting parties. ACHP may or may not participate
  - MOA stipulates what the parties have agreed to
    - Documentation
    - Continued review of plans by SHPO
  - MOA does not reduce the adverse effects to a no adverse effect determination
  - Formal conclusion of the Section 106 process

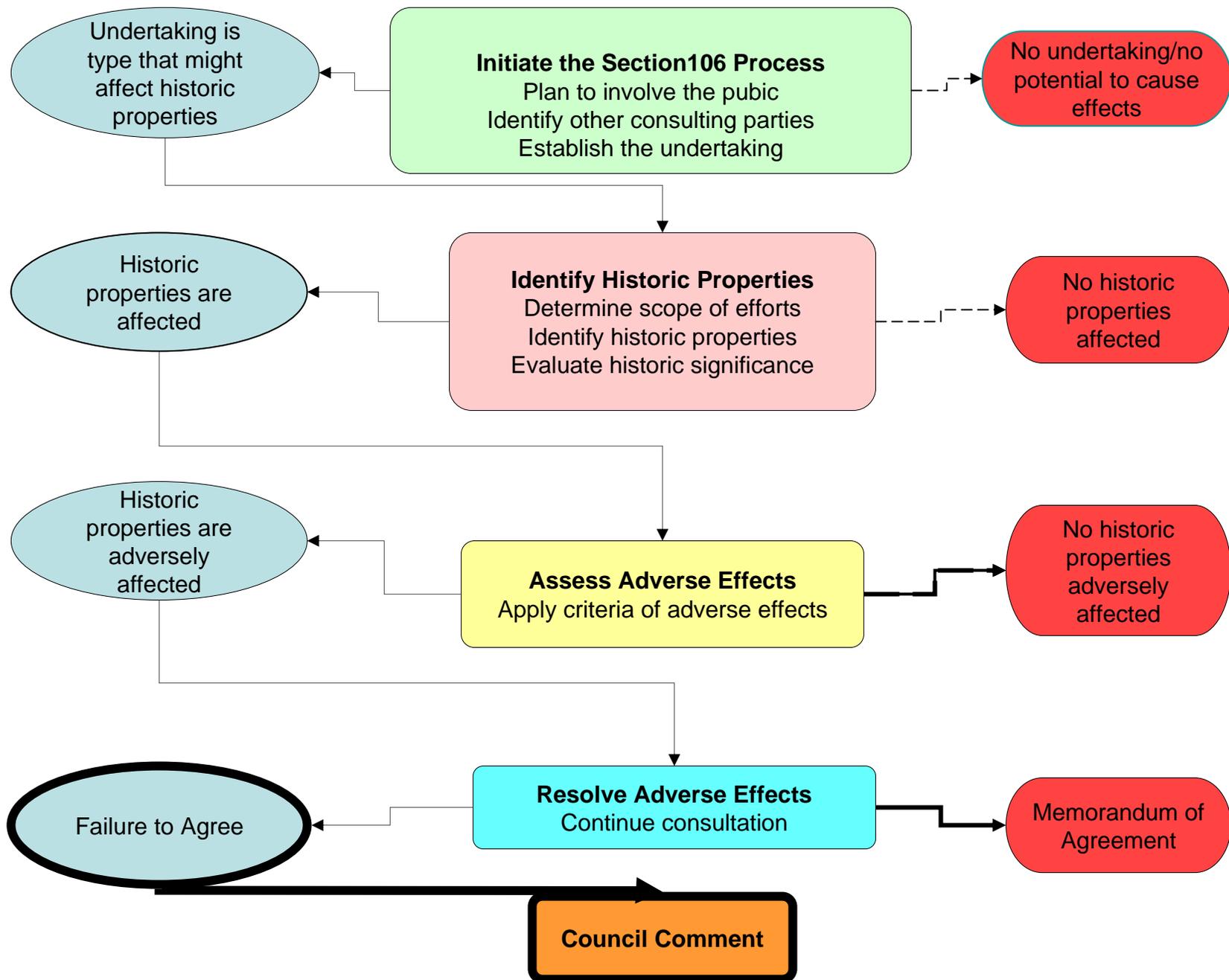
# Resolve Adverse Effects

- **MEMORANDUM OF AGREEMENT**
  - **BETWEEN**
    - **THE SACRAMENTO HOUSING AND REDEVELOPMENT AGENCY,**
    - **AND THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER**
    - **REGARDING THE LOCKE FIRE SUPPRESSION SYSTEM PROJECT,**
      - **TOWN OF LOCKE, SACRAMENTO COUNTY,**
      - **CALIFORNIA**
- WHEREAS, the Sacramento Housing and Redevelopment Agency (SHRA) has determined that the Locke Fire Suppression System Project (Undertaking) will have an effect on the Locke Historic District, a National Historic Landmark (Locke) or on properties listed in or eligible for listing in the National Register of Historic Places (NRHP) (Historic Properties) and has consulted with the California State Historic Preservation Officer (SHPO), and has notified the Advisory Council on Historic Preservation (Council), pursuant to 36 CFR 800 regulations effective January 11, 2001 implementing Section 106 of the National Historic Preservation Act (Act) of 1966, as amended (16 U.S.C. 470f) ; and



# Resolve Adverse Effects

- Failure to resolve adverse effects
  - What happens when the consulting parties cannot reach agreement?
  - ACHP provides advisory comments to the head of the agency which must be considered when the final agency decision on the undertaking is made.



# Programmatic Agreements

The ACHP and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from complex project situations or multiple undertakings

# Programmatic Agreements

- A programmatic agreement may be used when effects on historic properties are similar and repetitive
  - Housing rehabilitation program
  - Lead remediation program
  - Façade improvement program

# Programmatic Agreements

- PROGRAMMATIC AGREEMENT (PA)
  - BY AND AMONG
    - THE CITY AND COUNTY OF SAN FRANCISCO,
- THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER,
- AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
- REGARDING HISTORIC PROPERTIES AFFECTED BY USE OF REVENUE FROM THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT PART 58 PROGRAMS
- WHEREAS, the City and County of San Francisco (“City”), a “Responsible Entity” under 24 C.F.R. Part 58, proposes to administer and fund projects and programs (hereinafter referred to as “Undertakings,” as defined in 36 C.F.R. 800.16y) in the City and County of San Francisco with monies from the U.S. Department of Housing and Urban Development (“HUD”) programs (“Programs”) delegated to the City pursuant to 24 C.F.R. Part 58 or any other pertinent HUD regulations; and

# Programmatic Agreements

- Stipulations for this kind of PA may include
  - Applicability of agreement
  - Undertakings not requiring further review
  - Agreed upon APEs
  - Identification of Historic Properties
  - Assessment of Effects
  - Post-review discoveries
  - Administrative/boiler plate

# Programmatic Agreement/Memorandum of Agreement

- A PA/MOA may be used when effects on historic properties cannot be fully determined prior to approval of an undertaking
  - You have CDBG \$\$ to develop plans for the rehabilitation of a building
  - You can't assess what effects the work will have on the building because the plans haven't been developed

# PA/MOA

- Stipulations for this PA/MOA may include
  - Procedures that the agency official agrees to follow
    - Often submittal of plans at certain stages
  - Executed agreement document is evidence that the agency has complied with Section 106, even though the work hasn't been completed.

# PA/MOA

- A PA/MOA may be used when
  - Other circumstances warrant a departure from the normal Section 106 process
    - Used when a property is receiving CDBG funds and is undergoing Section 106 review (ACHP) **and** property owner is applying for federal preservation tax credits (NPS)
    - Two federal review processes, two federal agencies, both go through SHPO, both use Secretary's Standards for Rehabilitation

# PA/MOA

- In this situation stipulations in the agreement document may include
  - Provisions for the project to be reviewed under the federal tax credit process (NPS)
  - If owner cannot develop a design that is compatible with the Standards or the owner drops out of the federal tax credit process, the City resumes the driver's seat and initiates consultation under 36 CFR §§ 800.5-6 (Assessment and resolution of adverse effects).

# More Information

- Advisory Council on Historic Preservation
  - [www.achp.gov](http://www.achp.gov)
- State Historic Preservation Officer (California)
  - [www.ohp.parks.ca.gov](http://www.ohp.parks.ca.gov)
- California Historical Resources Information System
  - [www.ohp.parks.ca.gov/default.asp?page\\_id=1068](http://www.ohp.parks.ca.gov/default.asp?page_id=1068)
- Native American Heritage Council
  - [www.ceres.ca.gov/nahc/default.htm](http://www.ceres.ca.gov/nahc/default.htm)
- Lucinda Woodward, Supervisor of Local Government Unit, California Office of Historic Preservation
  - [Lwoodward@parks.ca.gov](mailto:Lwoodward@parks.ca.gov)
  - (916) 653-9116