




MEMORANDUM

Date: June 7, 2018

To: Members of the Historic Preservation Ordinance Task Force
CITY OF LAGUNA BEACH

From: Laurence P. Nokes, Esq. 

Ladies and Gentlemen:

Council Member Dictorow requested that I provide a memorandum regarding baseline CEQA requirements relating to historical resources. These requirements are set forth in the Public Resources Code (the applicable "Text of CEQA"), the California Code of Regulations (the "CEQA Guidelines") and the cases interpreting them.

The question is: Starting from "zero," what does CEQA say about historical resources and how are they to be treated by a lead agency, such as the City? The answer is derived from the Text of CEQA, the CEQA Guidelines, and the cases, and is summarized as follows:

1. Properties determined by the State Historical Resources Commission to be eligible for listing in the California Register of Historical Resources *must* be treated as historical resources.
2. Properties listed in a valid local register are *presumed* to be historical resources, but the presumption can be rebutted at a hearing based on a preponderance of the evidence.
3. The City is "*not precluded*" from determining whether an unlisted property is historical. The City has discretion to consider the issue. A determination of historicity must be supported by substantial evidence.

THE TEXT OF CEQA

Analysis begins with the Text of CEQA set forth in California Public Resources Code § 21084.1:

“A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment. For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources. Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1, or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1, are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. The fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section.”

THE CEQA GUIDELINES

Title 14 of the California Code of Regulations (“CCR”) contains the CEQA Guidelines that are used to interpret the Text of CEQA. How do the CEQA Guidelines relate to the Text of CEQA set forth in the statutes? The courts state the relationship as follows:

“Courts are not required to accept automatically statutory interpretations contained in the Guidelines. Except where the Guidelines are clearly unauthorized or erroneous, however, courts do accord the Guidelines great weight when interpreting CEQA.”¹

This is important, because the Text of CEQA and the CEQA Guidelines are a departure from the Text of CEQA set forth in PRC § 21084.1, as pointed out in the discussion of the cases.

14 CCR § 15064.5 is the section of the CEQA Guidelines that interprets PRC § 21084.1:

“(a) For purposes of this section, the term “historical resources” shall include the following:

(1) A resource listed in, or determined to be eligible by the State Historical Resources Commission, for listing in the California Register of Historical Resources (Pub. Res. Code §5024.1, Title 14 CCR, Section 4850 et seq.).

(Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 428, fn. 5, 53 Cal.Rptr.3d 821, 150P.3d 709.)

(2) A resource included in a local register of historical resources, as defined in section 5020.1(k) of the Public Resources Code or identified as significant in an historical resource survey meeting the requirements section 5024.1(g) of the Public Resources Code, shall be presumed to be historically or culturally significant. Public agencies must treat any such resource as significant unless the preponderance of evidence demonstrates that it is not historically or culturally significant.

(3) Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California may be considered to be an historical resource, provided the lead agency's determination is supported by substantial evidence in light of the whole record. Generally, a resource shall be considered by the lead agency to be "historically significant" if the resource meets the criteria for listing on the California Register of Historical Resources (Pub. Res. Code, § 5024.1, Title 14 CCR, Section 4852) including the following:

(A) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;

(B) Is associated with the lives of persons important in our past;

(C) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or

(D) Has yielded, or may be likely to yield, information important in prehistory or history.

(4) The fact that a resource is not listed in, or determined to be eligible for listing in the California Register of Historical Resources, not included in a local register of historical resources (pursuant to section 5020.1(k) of the Public Resources Code), or identified in an historical resources survey (meeting the criteria in section 5024.1(g) of the Public Resources Code) does not preclude a lead agency from determining that the resource may be an historical resource as defined in Public Resources Code sections 5020.1(j) or 5024.1."

THE CASES

There are three major cases that deal with the Text of CEQA and the CEQA Guidelines; they are *Valley Advocates v. City of Fresno*² (“*Valley Advocates*”), *Citizens for Restoration of L Street v. City of Fresno*³ (“*L Street*”) and *Friends of the Willow Glen Trestle v. City of San Jose*⁴ (“*Willow Glen Trestle*”).

Valley Advocates

This case analyzed the Text of CEQA and the CEQA Guidelines and determined that the Text of CEQA created three categories of historical resources:

1. Mandatory Historical Resources

A resource that has been formally listed in, or determined to be eligible for listing in, the California Register of Historical Resources must be treated as an “historical resource.” A resource becomes “listed” on the California Register if it is nominated for listing and the State Historical Resources Commission determines that it is “significant” and that it meets one of the four statutory listing criteria for listing as set forth in PRC section 5024.1(b). (These are the same criteria listed in 14 CCR §15064.5 above.)

It is important to note that an opinion by a consultant that a resource would meet the criteria for listing should not be confused with a formal determination by the State Historical Resources Commission that a resource is “eligible” for listing. That determination must be made by the Commission in accordance with the procedures set forth in the Public Resources Code.

2. Presumptive Historical Resources

Properties officially designated in a local register of historic resources as defined by the Public Resources Code are presumed to be historically significant. These properties are defined to include a resource recognized as historically significant by local ordinance or resolution. Resources identified as significant in an historical resources survey prepared in accordance with the standards of PRC section 5024.1(g) are also presumed to be historically significant. However, all four independent criteria must be met in order to find a significant historical resource based on such a survey:

- The survey must be included in the State Historic Resources inventory;

² *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 74 Cal.Rptr.3d 151

³ *Citizens for Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 177 Cal.Rptr.3d 96

⁴ *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457 205 Cal.Rptr.3d 909

- The survey and its documentation must be prepared in compliance with the Office of Historic Preservation procedures and requirements;
- The resource must be evaluated by the Office of Historic Preservation and determined to have a significance rating of category 1–5 on DPR 4 523; and
- The survey must be updated to include specific information if it is more than five years old at the time the resources nominated for inclusion in the California Register of Historic Resources.

If such a survey has been prepared but it does not meet all four of the criteria listed above, the survey does not create a presumption of historicity.

The presumption that a site is an historic resource because of a designation in a local register or historic resources survey may be overcome if the agency concludes, based on a preponderance of the evidence, that the site is not historically or culturally significant. Judicial review of the determination is governed by the “substantial evidence” standard, and not the often-used “fair argument” standard under CEQA.

3. Discretionary Historical Resources

When a site (i) has not been listed or determined eligible for listing on the State Register of Historical Resources, (ii) has not been listed on a local register, or (iii) has not been found to be significant on a valid local inventory, the lead agency may independently determine whether the property should be treated as an historical resource.

CEQA does not limit a lead agency’s discretion in making such a determination. The agency’s discretionary determination that a structure or object is or is not an historical resource need only be supported by substantial evidence. However, as stated by the Court in *Valley Advocates*:

“The exact scope of that discretion is not clear. City contends that a lead agency may elect, in an exercise of discretion, to either consider the question of a building’s historicity for purposes of CEQA or avoid the question entirely. In contrast, the statute and regulations also could be interpreted to mean a lead agency has a legal duty to (1) consider the question of a building’s historicity for purposes of CEQA and (2) apply the criteria in Guidelines § 15064.5, subdivision (a)(3)(A) through (D) when making its determination (see 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 20.109, p. 1063). Under this interpretation, so long as these two duties are fulfilled, the ultimate determination is committed to the lead agency’s discretion.”

“For reasons stated later in this opinion (see part IV.E., post), we do not address the scope of the discretion granted to lead agencies. We go only so far as to interpret Guidelines section 15064.5 to mean that, at a minimum, a lead agency has the discretion to address separately whether an object or building is an historical resource for purposes of CEQA’s discretionary historical resources category. This discretion exists notwithstanding previous decisions not to list the object or building on the local register of historical resources.”

In part IV.E of the opinion, the Court went on to state:

“ . . . , the exact scope of the discretionary authority granted to lead agencies under section 21084.1 and Guidelines section 15064.5 is not clear.

We will not attempt to define the parameters of that which must be done for the lawful exercise of this discretionary authority. In particular, we will not decide if this discretion is best characterized as (1) a discretionary election to consider whether a building is an historic resource or (2) a mandatory duty to address and answer that question by determining, in the exercise of discretion, whether the building meets one of the definitions of historic resource acknowledged in the Guidelines.”

L Street and Willow Glen Trestle

This standard was quoted and reiterated by the *L Street* and the *Willow Glen Trestle* courts. The *Willow Glen Trestle* court observed:

“In contrast to this explicit limitation, the Guidelines do not address the level of evidence, if any, that must support the opposite determination—namely, that the object or building is not historically significant.”

A leading commentator on CEQA classified the obligation as follows:

“Although lead agencies necessarily have authority under PRC §21084.1 to apply the criteria for listing on the California Register of Historical Resources when determining whether a resource should be treated as historically significant, the statute does not require that they do so. The provision in 14 CCR §15064.5 (a) (3) that purports to require that lead agencies apply those criteria when determining whether a resource should be considered historically significant is a departure from the statute. Nevertheless, when a question is raised about the historical significance of

a site, a cautious agency may want to ensure that the record reflects full consideration of the statutory criteria for listing on the State register.”
[2 Kostka and Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar March, 2018)]

CONCLUSION

The issue regarding mandatory and presumptive historical resources is clear. Even with presumptive historical resources, a party may defeat the “presumption” of historicity upon showing by a preponderance of the evidence (“more likely than not”) that the property is not historic.

In evaluating so-called “Discretionary Historical Resources,” the Text of CEQA does not speak in terms of what a lead agency *is required to do*. It merely states that a lead agency *is not “precluded”* from determining whether the resource may be an historical resource for purposes of CEQA.

Courts have refused to impose a mandatory set of rules on the lead agency, characterizing the discretion only as:

“(1) a discretionary election to consider whether a building is an historic resource; OR,

(2) a mandatory duty to address and answer that question by determining, in the exercise of discretion, whether the building meets one of the definitions of historic resource acknowledged in the Guidelines.”

Commentators suggest that “*when the issue is raised*,” the record should reflect full consideration of the question. *Valley Advocates* also makes clear that “. . . the Legislature intended that the definition of “historical resources” contained in section 21084.1 apply at the stage of environmental review where exemptions are considered by the lead agency.”

Thank you for the opportunity to address this issue.

LPN/dkc
cc: Greg Pfof, Director of Community Development
Martina Caron, Senior Planner
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