

June 22, 2006

To: The Berkeley Landmarks Preservation Commission

From Laurie Bright, Co-sponsor, LPO update 2006

Question: Could an Assessment of Historic Significance (AHS) be a “project” under the CEQA Definition and itself require CEQA review?

Analysis:

The first question to consider is whether simply determining the historic significance of a property is a project under CEQA. Since the simple determination of significance cannot cause a physical change in the environment, this could not be construed to be a project even though it would be a discretionary decision. However, adding an entitlement in the form of an exemption from a regulatory process does change the situation. An AHS is actually two actions. One is the determination of historic significance of the subject property, and the other is the **exemption** of development applications that may have historic impacts **from further review** by the commission **for a period of time**. This exemption for a specified period of time is arguably an “entitlement for use” under any common-sense definition.

The question that follows is: if an AHS is a discretionary decision, an entitlement for use, and is “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment”—i.e., has the potential to reduce the significance of a historic resource—is it itself a project?

Is it categorically exempt?

There appears to be no categorical exemption that fits this particular activity.

How could an AHS cause a significant impact on a historic resource?

A determination that a property is not a resource simply because a statutory deadline has been missed should not define it as non-historic for purposes of CEQA. The definition of a historic resource includes criteria that are found in state and federal law that trumps local ordinances.

Recent case law suggests that even if a city council overturns a designation on appeal, and a fair argument based on substantial evidence and expert testimony has been made in the record that the site is historic and an alteration or demolition could have a significant impact, an EIR would be required before approval of such a project application.

It would follow, then, that a determination of exemption (AHS) that was obtained by operation of a statute of limitation would in practice be somewhat arbitrary, and if a fair argument were to be placed in the record that the subject property was historic and the proposed development could cause a reduction in the significance of the property, an EIR would still be required.

In addition, impacts on historic resources can occur from development projects that are near other historic sites. The integrity of an existing resource must be viewed in part in its historic context. If the property that has an AHS exemption is developed but exempt from commission review, significant impacts on other resources may occur. Projects that may impact historic resources can occur on sites that are not themselves historic but are simply in close proximity to historic sites.

The same is true under our ordinance in the case of a historic district. If, for instance, a property that is the recipient of an exemption under an AHS—or is simply determined to be non-historic by operation of a statute of limitations as is the case under the strict timelines in the proposed ordinance—were to become part of a historic district, it is reasonably foreseeable that demolition or alteration of the property could potentially have significant impacts on the other designated properties or on the validity of the district designation.

While the new ordinance gives the commission authority and notice to participate in any CEQA process that would occur on a project with an AHS exemption, it would be unable to use the provisions in the ordinance to protect the impacted resources. If the commission were unable to consider impacts such as these in a commission review process, the purposes of CEQA review would be thwarted, and it is reasonably foreseeable that the significance of a historic resource could be reduced, or the integrity of the resource could be lost. This is particularly true in downtown Berkeley, where designated sites dot the landscape and are interspersed with non-designated sites.

In these cases and others, the LPC would be the appropriate body to make such decisions

Conclusion

It could be fairly argued that under the CEQA definition of project, it is reasonably foreseeable that significant historic impacts from a project—direct or indirect—could occur from granting such an exemption from review under chapter 3.24 (LPO). Therefore, an AHS could reduce the significance of a historic resource, and an AHS in its present form would constitute a project and would require CEQA review.

15378. Project

[a] “Project” means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

- (1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment

of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700.

- (2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
- (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(b) Project does not include:

- (1) Proposals for legislation to be enacted by the State Legislature
- (2) Continuing administrative or maintenance activities, such as purchases for supplies, personnel-related actions, general policy and procedure making (except as they are applied to specific instances covered above);
- (3) The submittal of proposals to a vote of the people of the state or of a particular community that does not involve a public agency sponsored initiative. (*Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458; *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165);
- (4) The creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment.
- (5) Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment.

(c) The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval.

(d) Where the Lead Agency could describe the project as either the adoption of a particular regulation under subdivision (a)(1) or as a development proposal which will be subject to several governmental approvals under subdivisions (a)(2) or (a)(3), the Lead Agency shall describe the project as the development proposal for the purpose of environmental analysis. This approach will implement the Lead Agency principle as described in Article 4.

Authority cited: Section 21083, Public Resources Code. Reference: Section 21065, Public Resources Code; *Kaufman and Broad-South Bay, Inc. v. Morgan Hill Unified School District* (1992) 9 Cal.App.4th 464; *Fullerton Joint Union High School District v. State Board of Education* (1982) 32 Cal.3d 779; *Simi Valley Recreation and Park District v. Local Agency Formation Commission of Ventura County* (1975) 51 Cal.App.3d 648; and *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th