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Environment/Preservation

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July 11, 2006

Mayor Tom Bates and
Members of the City Council
City of Berkeley
2180 Milvia Street
Berkeley CA 94704

Re: Landmarks Preservation Ordinance

Dear Mayor Bates and Members of the City Council:

On behalf of the Berkeley Architectural Heritage Association, I have previously written to the Council with serious concerns about proposed changes to the Landmarks Preservation Ordinance that reduce protections to the City's historical resources and require study in an Environmental Impact Report. I incorporate my prior letters to you on this issue by reference.

While BAHA continues to believe that the current LPO works well and needs no overhaul, this office has been following the ongoing drafts and redrafts of the new LPO and acknowledges many improvements to return to the protections of the current LPO. However, working from the latest available [June 5th] Mayor's draft of the new LPO, it is apparent that very significant problems remain due to substantial changes to the current LPO that have potentially significant environmental impacts. These problems are explained below along with solutions that BAHA requests be considered and adopted:

***Permit Streamlining Act.*** The current LPO *already complies* with both the Permit Streamlining Act and the California Environmental Quality Act deadlines for determining that a development application is complete, determining the appropriate level of CEQA review, *and* acting on the application. It is truly puzzling why the spectre of the PSA continues to be claimed as the reason to put an unnecessary moratorium on the City's ability to consider protections to properties whose historic significance may not yet be recognized via landmark, historic district, or structure of merit designations.

Cities throughout California comply with the PSA *without* draconian restrictions on their ability to designate historic resources. One thing strikingly missing from the analysis provided to you by City staff is that while PSA approval timelines are to be respected, CEQA

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documents must be completed *before* PSA timelines are triggered. (*Eller Media Co. v. City of Los Angeles* (2001) 87 Cal.App.4th 1217, 1220.) Your current staff report notes timelines for actions "from the date the application is complete" without explaining that an application is not ripe for approval until CEQA documentation — an exemption, negative declaration, or EIR — is concluded. Further, while the City must initially determine what level of environmental review is appropriate within 30 days of a project application being "complete", the CEQA process is dynamic and may well uncover information that leads the City to change its determination of the appropriate level of environmental review. The adequacy of CEQA review may be challenged up until the time that the project is ultimately approved. (Pub. Resources Code § 21177.) This is an essential point missing from your staff's analysis.

Since I appreciate that a dispute in interpretation of the PSA between this office and your own staff and attorneys may create some confusion, I am attaching 9 pages from a new 2006 publication from the California State Bar's Continuing Education of the Bar (CEB) series entitled *California Land Use Practice*, "Permit Streamlining Act (PSA)" which explains the interaction between the PSA timelines and CEQA, and the "deemed approved" procedures applicable to PSA violations. I am not an author of this new publication; I just happened to receive it in the mail a few days ago and it occurred to me that third-party analysis could be helpful to the Council in sorting out these issues. One telling sentence from the new treatise declares: "*The timelines for approval or denial of a development project under the PSA do not begin to run until the CEQA documentation for the project has been prepared . . . The CEQA process thus serves to trigger the ultimate PSA deadlines*." (*Id*. at § 15.26, page 673, attached.)

Here, the proposed new LPO needlessly focuses on PSA issues in a manner that overshadows and defeats the very goals of its landmarks program. There is simply no reason to do so. If in some circumstance a project applicant may believe that the PSA has been violated, and thinks that a project should be automatically deemed approved, the City must conduct a hearing on the project approval. (Government Code § 65956(b).) The applicant has the right to provide his own public notice of hearing, including information about the project and a statement that the project will be deemed approved if the City has not acted within an additional 60 days. Adjacent landowners and concerned parties must have notice and an opportunity to be heard before a project can be deemed approved, even according to case law pre-dating current statutory language. (*Orsi v. City Council of Salinas* (1990) 219 Cal.App.3d 1576, 1584, n.5 and *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 272.) All of this information is confirmed in the attached CEB article on the PSA.

Finally, opponents of any demolition permit that might be deemed approved by operation of the PSA must have a right to appeal the permit approval to the City Council just as they would if it had been approved by the Commission. (Government Code § 65922; *Ciani v. San Diego Trust and Savings Bank* (1991) 233 Cal.App.3d 1604.) Again, this information is in the attached CEB article.

The new Request for Determination process remains objectionable to BAHA. The reasons why have been expressed by many of Berkeley's citizens (including Neal Blumenfeld

in the attached op-ed piece in today's *Daily Planet*) and spring from the fact that the *clear purpose of the developer-driven RFD process is to declare resources NOT to be historic, to facilitate demolitions.* Surely that is not an appropriate purpose for a Landmarks Preservation Ordinance. And even if the Council decides to allow a project applicant to seek an up-front determination by the Commission as to whether a project site contains an historic resource, it cannot justify denying the future ability of the public or the Commission to bring forth new information that may show that the original determination should be altered.[1]

Importantly, while the mere identification of an historic resource is normally not a CEQA "project" since it has no potentially significant environmental impacts, the new LPO's proposed provision of a 2-year + freeze on initiation or designation of properties following a completed determination *does* trigger CEQA review. That is because it creates the potential for significant environmental impacts by arbitrarily denying any opportunity for local designation and thus exempting a property from protections of the LPO even if new information surfaces demonstrating historic merit — during an extended time period when demolition is likely! For this reason, the new LPO as currently drafted needs EIR review *and* any decisions under the new LPO, if the exemption provision remains in place, would also be subject to CEQA review. As explained *post* at page 5, all of these decisions must also be appealable to the City Council.

Thus, the RFD process outlined in section 3.24.127, if adopted at all, should *end* with the first sentence in section D, and the rest should be excised:

> D. Any of the timelines specified in this section may be extended at the request of the applicant. ~~Failure to act within any of the timelines set forth in this section, as they may be extended, shall constitute a decision to take no action to initiate or designate.~~
>
> ~~E. If a property that is the subject of a RFD is not initiated or designated within the time limitations set forth in this section, this chapter, with the exception of section 3.24.220 shall be inapplicable to that property unless and until the earliest of any of the following occurs:~~
>
> ~~1. the expiration of 2 years from the date of any final decision under this section not to initiate or designate the property; or~~
>
> ~~2. if an Application is submitted within that period, (i) the Application is withdrawn or~~

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[1] The LPO draft of just a few weeks ago on June 15th recognized the importance of leaving the process open, in section 3.24.130:

> G. Except as set forth in the preceding paragraphs of this section, if a designation proposal initiated by petition has been disapproved by the Commission or by the City Council on appeal as more fully set forth in Section 3.24.300 below, no subsequent petition for the same proposal may be submitted or reconsidered for at least two years from the effective date of final action by the Commission or by the City Council on the original proposal *unless significant new information is presented*.

~~denied or (ii) any Permit, if issued, expires, is cancelled or revoked, or for any other reason ceases to have effect.~~

Similarly, the last few sections of section 3.24.128 should also be stricken:

~~F. Failure to act within any of the timelines set forth in this section shall constitute a decision to take no action to initiate or designate.~~
~~G. If a property that is the subject of an Application is not initiated or designated within the time limitations set forth in this section, this chapter, except for section 3.24.220, shall be inapplicable to that property unless and until the earliest of any of the following occurs:~~
~~1. the Application is withdrawn or denied;~~
~~2. the Permit, if issued, expires, is cancelled or revoked, or for any other reason ceases to have effect; or~~
~~3. the expiration of 2 years from the date the Permit was issued.~~

Under the RFD process, assuming the above strike-outs are adopted, if a property is found *not* to be historic, but an initiation subsequently occurs well into the application process — surely, a very unusual circumstance — that initiation information can be evaluated by the Commission to see if it affects the adequacy of the prior CEQA analysis and the applicability of the LPO's protections. Just as in other jurisdictions around the state, if a local designation process is undertaken while a development project is pending, *it may or may not* provide relevant evidence affecting the City's decisions regarding the adequacy of environmental review and mitigation or the application of local historic resource protections. The relevancy and significance would depend on the circumstances.

Thus, for the City to adopt a new LPO that limits the ability of the Commission and the public to initiate historic designations, using the mandates of the PSA as an excuse, is indefensible. The RFD process is being requested by the development community to facilitate demolitions; there can be no real question about that. An RFD process that allows the opportunity for initiation or designation to be frozen and the property exempted from the LPO for two years — or more, if a development application is proceeding — would force the City to ignore new information about the historic importance of a threatened resource that it could otherwise consider in making discretionary decisions. The City does not place short time limits on public or agency consideration of other environmental impacts (*e.g*., impacts to traffic, water, air, biological resources, etc.), and it has no compelling reason to limit public or Landmarks Preservation Commission initiation of historic resources.

If the City now proceeds to adopt the new LPO with the lengthy exemption period in place, as currently drafted, there *will be* potentially significant impacts on unique City resources that might appropriately qualify as historic, and so an EIR is required by law before the Council may consider adoption of the new LPO. Serious consideration should be given to the strike-outs noted above and other changes to the LPO that may be needed for consistency.

***Appeal to City Council.*** The Public Resources Code *mandates* that any decision regarding CEQA compliance must be appealable to an elected decisionmaking body. In Berkeley, that is the City Council. The new LPO generally provides for an appeal of historic resources decisions but then renders the appeal meaningless. LPO section 3.24.300 provides in section F that by appeal to the City Council, the Council may affirm or deny a Commission decision, with or without further hearing, and may or may not remand the matter to the Commission, BUT:

> 4. If none of the three actions described above has been taken by the Council within 30 days from the date the appeal first appears on the Council agenda, then the decision of the Commission shall be deemed affirmed and the appeal shall be deemed denied.

There is no justification for a provision in the City's code that allows an appeal to be "deemed denied" by the Council's failure to take action, and this provision violates CEQA unless section 4 is excised because the appeal is meaningless. Further, as noted earlier, any determination of non-historic status under the new RFD would also be subject to CEQA review, and appealable to the City Council, in light of the 2-year+ freeze in historic status that could lead to inappropriate demolitions and significant environmental impacts.

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In sum, the PSA *does not require* the RFD process to include frozen status of potentially historic properties, exempting them from LPO protections, and it is disturbing that the PSA is being touted as an excuse to adopt this new LPO in the form currently proposed. Amendments to the new LPO as explained above can accomplish what the City has stated it wants to do, without compromising either PSA obligations or the City's unique resources. Otherwise, the City must prepare an EIR before considering adoption of the LPO because it has potentially significant impacts on historic resources that may not be identified early enough in the process, especially when floods of RFD applications arrive after adoption of the LPO. A remaining, still-excellent alternative is to keep the current LPO as-is.

Thank you for your consideration.

Sincerely yours,

Susan Brandt-Hawley

cc: Zach Cowan
California Office of Historic Preservation