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**REPORT TO THE COMMITTEE  
ON LAND USE AND HOUSING**

**THE LEGAL REQUIREMENTS OF CEQA AND THE SAN DIEGO MUNICIPAL CODE  
FOR THE ISSUANCE OF DEMOLITION PERMITS FOR POTENTIALLY SIGNIFICANT  
HISTORICAL STRUCTURES 45 YEARS OR OLDER.**

**INTRODUCTION**

On January 23, 2008, the Land Use and Housing Committee [LU&H] considered the application of the California Environmental Quality Act [CEQA] and the San Diego Municipal Code [SDMC] to demolition permits. The discussion was about demolition permits issued as ministerial, construction permits, under San Diego Municipal Code section 129.0102, not demolition permits issued as discretionary permits for a development projects, under San Diego Municipal Code section 126.0101.

Public testimony emphasized the need to afford consistent protection across the board to structures 45 years or older<sup>1</sup> against inappropriate demolition. Shortcomings in the City of San Diego [City] review and approval process for demolition permits were frequently cited as causing the inadvertent loss of significant historical resources -- losses that are allegedly occurring without adequate environmental analysis, public review, or sufficient mitigation, as required by Public Resources Code section 21000 et seq. [CEQA] and San Diego Municipal Code section 128.0201. LU&H also discussed and considered testimony, and a written report, by the Deputy Chief Operating Officer and Development Services Department regarding the City review and approval process for demolition permits. City staff emphasized that the current review and approval process was originally intended to have built-in safeguards, in lieu of complete CEQA review, to accommodate the large numbers of annual demolition permits.

LU&H requested an analysis from the City Attorney on the legal framework and responsibilities of the City to determine whether to issue ministerial demolition permits, for

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<sup>1</sup> San Diego Municipal Code section 143.0212(a); Land Development Manual, Volume II, Historical Resources Guidelines, sections I (B), II (A)(1),(2):

Historical property . . . surveys are required for properties within a project's area of potential effect . . . which are 45 years of age or older and which have integrity of setting, location, design, materials, workmanship, feeling, and association.

structures 45 years or older, under the current review and approval process. This opinion also discusses how other comparable jurisdictions address this issue.

### **QUESTIONS PRESENTED**

1. Does the City project review and approval process for the issuance of ministerial demolition permits, provide adequate protection against the inappropriate demolition of potentially significant historical structures, as required by CEQA and San Diego Municipal Code section 128.0201?
2. Have other jurisdictions in California established review and approval procedures, ministerial or discretionary, for demolition permits for older structures, that are potentially significant historical resources, that afford the level of protection required by CEQA?

### **SHORT ANSWERS**

1. No. The City review and approval process, to issue ministerial demolition permits fails to provide adequate protection against the inappropriate demolition of potentially significant historical resources.
2. Yes. For example, the City of Sacramento has established an advanced ministerial review and approval program for demolition permits for structures 50 years or older. It features thorough and consistent review by a team of experts in historical resource management and historical architecture. This program has resulted in adequate protection of older structures that may be significant historical resources under CEQA section 21000. The state Office of Historic Preservation considers this to be a solid approach to the issue. Other cities have required demolition permits to be treated as discretionary thus requiring complete CEQA review.

## ANALYSIS

### I. The City Review and Approval Process for Demolition Permits, for Structures 45 Years or Older, Relative to CEQA and the San Diego Municipal Code.

#### A. The City Incorporates All CEQA Statutory Requirements and Applies City Significance Thresholds to Determine Environmental Impacts.

CEQA section 21000 et seq. prohibits local agencies from approving projects with *significant environmental effects*, absent certain overriding considerations, if there are feasible alternatives or mitigation measures that can substantially lessen or avoid such effects. *See Mountain Lion Foundation v. Fish and Game Commission*, 16 Cal. 4<sup>th</sup> 105, 134 (1977); CEQA § 21002. CEQA requires local agencies to prepare an *environmental impact report* [EIR] if approval of a project may cause a significant effect on the environment, and said effects cannot be fully mitigated below a level of significance. CEQA §§ 21002.1, 21080(d), 21100, 21151; State CEQA Guidelines §§ 15060-15096.

The State CEQA Guidelines [CEQA Guidelines] [14 CCR § 15000 et seq.] include CEQA statutory requirements and judicial interpretations of those requirements. The procedures local agencies adopt to implement CEQA must be consistent with the CEQA Guidelines. CEQA § 21082. The courts afford the guidelines “great weight “ and have almost uniformly ruled on the extent to which local agencies must comply with them. *See Laurel Heights Improvement Assn. v. Regents of the University of California*, 47 Cal. 3d 376, 391, fn. 2 (1988); *Benton v. Board of Supervisors*, 226 Cal. App. 3d 1467, 1478-1479 (1st Dist. 1991). Accordingly, the City has drafted CEQA Significance Determination Thresholds [City Significance Thresholds] to comply with these state standards. The City Significance Thresholds assist the City *and the public* to better understand whether a project may have a significant effect on the environment. CEQA § 21003.1; City Significance Thresholds, 2007, p. 1.

San Diego Municipal Code section 128.0101 requires the City to implement CEQA and “. . . provide *additional specific procedures* for accurate, objective, timely, and *orderly evaluation disclosure of potential environmental effects* of proposed projects in the City.” *Emphasis added*. San Diego Municipal Code section 128.0102(a) not only incorporates CEQA and the State CEQA Guidelines by reference, but it also explicitly requires every City officer and employee to comply with them.

CEQA and the State CEQA Guidelines, as applicable, are incorporated and made a part of this article . . . and *all officers and employees of the City of San Diego* are hereby authorized and directed to enforce and comply with each and every applicable provision of CEQA and the State CEQA Guidelines.

*Emphasis added. Id.* Therefore all City staff that participate in the review and approval of demolition permits are expected to comply with CEQA per San Diego Municipal Code section

128.0102(a). San Diego Municipal Code section 128.0102(b) demonstrates a policy enunciated in the landmark CEQA case, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259 (1972), that held CEQA shall be interpreted broadly to, “. . . afford the *fullest possible protection* to the environment within the *reasonable scope of the statutory language*.” *Emphasis added*. San Diego Municipal Code section 128.0103 enumerates the specific duties of the City to implement CEQA review. It requires the City to conduct environmental reviews, determine environmental significance, decide the type of environmental document required, and, before public review, ensure that environmental documents rely on accurate facts and current technical information. SDMC § 128.0103(a).

In sum, the City fully incorporates CEQA statutory and administrative requirements, and has drafted its own specific significance thresholds, which determine when an environmental effect may be significant, and consequently when a project requires CEQA review.

**B. Under the City Significance Thresholds, Demolition of Structures 45 Years or Older May Cause Substantial Adverse Impacts to Significant Historical Resources and Therefore May Constitute a Significant Effect on the Environment.**

As stated, CEQA requires local agencies to conduct CEQA review if a project may cause a significant effect on the environment. Impacts to historical resources may be significant enough to trigger this requirement because CEQA defines *environment* to include, “. . . . *objects of historic or aesthetic significance* . . .” *Emphasis added*. CEQA § 21060.5. *See League for Protection of Oakland’s Architectural and Historic Resources v. City of Oakland*, 52 Cal. App. 4<sup>th</sup> 896, 905 (1st Dist. 1997). More specifically, CEQA establishes that if a project may cause a *substantial adverse change* in the significance of an *historical resource*, then it may have a significant effect on the environment.<sup>2</sup> CEQA § 21084.1. Demolition can cause a substantial adverse change to an historical resource thus requiring CEQA review.

[A] substantial adverse change in the significance of an historical resource means *physical demolition*, destruction, relocation, or alteration of the resource or its immediate surroundings *such that the significance of an historical resource would be materially impaired*.

CEQA Guidelines § 15064.5(b)(1).<sup>3</sup> *Emphasis added*.

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<sup>2</sup> Indeed, their protection is so important that CEQA prohibits exempting historical resources from environmental review. “No project that may cause a *substantial adverse change* in the significance of an *historical resource*, . . . shall be exempted from this division . . .” *Emphasis added*. CEQA § 21084(e).

<sup>3</sup> *See also* Public Resources Code § 5020.1(q); *League for Protection of Oakland’s Architectural and Historic Resources v. City of Oakland*, 52 Cal. App. 4<sup>th</sup> 896, 909 (1st Dist. 1997)(demolition is per se a substantial adverse change to an historical resource)

CEQA requires the City to decide first, whether the structure at issue is an historical resource, and second, whether the proposed activity will cause a substantial adverse change to it. CEQA § 21084.1. On the first issue, the City defines historical resources to include, “. . . buildings, structures, objects, . . . that *are typically over 45 years old*, regardless of whether they have been altered or continue to be used.” *Emphasis added.* City Significance Thresholds, 2007, Section G, p. 37. Whether such historical resource is significant is explained at City Significance Thresholds, 2007, Section G, p. 41.

[A] *significant historic resource* is one which qualifies for the California Register of Historical Resources *or* is listed in a local historic register *or* deemed significant in an historical resource survey . . . A *resource that 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 historic resources, or not deemed significant in an historical resource survey may nonetheless be historically significant for purposes of CEQA.*

*Emphasis added.* See also City Significance Thresholds, 2007, section G, p. 42. The core issue here is how to adequately review structures 45 years or older, that have not been listed or surveyed, but merit further consideration to determine whether they may, “nonetheless be historically significant for purposes of CEQA.” On the second issue, whether demolition may cause a substantial adverse change, the City Significance Thresholds classify demolition as a direct environmental impact that may have an *adverse affect* on an historical resource. City Significance Thresholds, 2007, section G, p. 39. Also, the City CEQA Initial Study Checklist asks if the project will in fact destroy an historical building. City Significance Thresholds, 2007, Section G, p. 40. (This checklist is the standard set of questions the City requires planners to use to systematically analyze project impacts for discretionary permits, issued pursuant to San Diego Municipal Code § 126.0101.)

In other words, CEQA, the San Diego Municipal Code, and the City Significance Thresholds, read together, clearly establish that a structure 45 years or older, anywhere in the City, is a potentially significant historical resource, and when demolition is proposed, it may constitute a significant effect on the environment, which requires CEQA review.

**C. For Structures 45 Years or Older, if the City Determines that a Site-Specific Survey is Unnecessary, it Issues a Demolition Permit Without CEQA Review.**

1. Demolition Permits are Characterized as Ministerial and Thus Decided by City Staff.

San Diego Municipal Code section 113.0103 defines *construction permit* as a permit issued for activities such as building, electrical, plumbing, and grading, as well as for demolition. San Diego Municipal Code section 129.0102 instructs that *construction permit* review procedures shall apply to demolition permits. The Municipal Code characterizes the issuance of a

demolition permit as ministerial and treats it as a Process One, which means it is decided by City staff.

A decision on . . . a [demolition permit] shall be made by the *Building Official* in accordance with Process One. The [demolition permit] shall be approved *if the Building Official finds* that the work described in the permit application, plans, specifications, and other data, complies with the requirements of the Land Development Code, *other* applicable laws and ordinances and any applicable development permit.”

*Emphasis added.* SDMC § 129.0505; *See also* SDMC § 129.0107. As indicated above, these Process One review procedures do not circumvent or override other applicable laws and ordinances. This includes local, state and federal requirements for the protection and preservation of historical resources, and necessarily, also includes CEQA and San Diego Municipal Code section 128.0102. Recognizing this, the City undertakes additional review for structures 45 years or older to determine whether they may be significant historical resources before issuing demolition permits. However, review at this stage is *an early screening not a CEQA level review.*

2. The Decision to Require a Site-Specific Survey or Not is Crucial Because This Summarily Determines CEQA Significance.

City staff makes a crucial decision during the early screening stage for demolition permits, for structures 45 years or older, by determining whether or not to require a site-specific survey.<sup>4</sup>

For structures 45 years or older . . . the *City must determine* if a *site-specific historical resources survey* is required. Based on *photographs* of the site and each building facade, records of *building permits* or sewer and water permits, and the Building Record from the County of San Diego Assessor’s Office, provided by the applicant, *City staff will determine if a site-specific survey* is required . . .

*Emphasis added.* City of San Diego Information Bulletin 710, Section IV (F). Further, San Diego Municipal Code subsections 143.0212 (a) and (c) require the City to determine the need for a site-specific survey, for structures 45 years or older, within ten (10) days<sup>5</sup> of submitting a demolition permit application.<sup>6</sup> So not requiring a site-specific survey is an implicit determination, made relatively quickly, based on a few photos and a few building records, that a

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<sup>4</sup> Note that this requirement for a site-specific survey is distinct, and in addition to any other requirements for studies or analyses under CEQA.

<sup>5</sup> Note that this ten (10) day review period does not and cannot override other timelines required to comply CEQA § 21000 and SDMC § 128.0102, and other applicable federal, state, and local laws and regulations.

structure 45 years or older, is not a significant historical resource. At the LU&H hearing on January 23, 2008, public testimony was almost unanimous in assessing this as the critical juncture where potentially significant historical resources, particularly structures 45 years or older, too often fall through the cracks because the City issues a demolition permit instead of requiring a site-specific survey.

The documentation required to issue a demolition permit is minimal compared to the documentation required to support the conclusion of a site-specific survey. San Diego Municipal Code section 143.0212(d) requires site-specific surveys to meet the standards contained in the City Historical Resources Guidelines. These guidelines are contained in the Land Development Manual, and implement the City Historical Resources Regulations [SDMC 143.0201 et seq.], provide consistent evaluation of historical resources, and ensure compliance with federal, state, and local laws and regulations to protect historical resources. Historical Resource Guidelines, Section I (A).

Historic resource reports shall be prepared by *qualified professionals . . . to determine the presence or absence of historical resources; to identify the potential impacts from proposed development and evaluate the significance of any identified historical resources . . . in the case of potentially significant impacts to historical resources, to recommend appropriate mitigation measures that would reduce the impacts to below a level of significance . . .*

Historical Resource Guidelines, section II (F)(1). Site-specific surveys require conducting extensive literature and record searches, contacting local historical societies, interviewing

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<sup>6</sup> When a site-specific survey is required, then pursuant to San Diego Municipal Code section 143.0212(d), the City reviews the survey and determines if the property is eligible for historic designation. This determination is based on the Land Development Manual, Vol. II, Historical Resources Guidelines, Revised September 2004. The Land Development Manual augments the Land Development Code. Volume II contains the baseline scientific and technical information required for the City to analyze various potential environmental impacts, including proposed changes to historical resources. It ensures thorough and consistent review, and compliance with federal, state, and local laws and regulations protecting the environment. SDMC § 111.0106.

Once surveyed, if a property is eligible for historical designation, then the City forwards it to the Historical Resources Board [HRB]. If the HRB designates the property, then, unless the property qualifies for one of the narrow exemptions at San Diego Municipal Code § 143.0220, the general development regulations for historical resources at San Diego Municipal Code section 143.0250 are applied. This means no demolition may occur without obtaining a Site Development Permit [SDMC § 143.0210(e)(2)] under a Process Four review [SDMC § 126.0502(d)], and that is decided, not by City staff, but by Planning Commission and is appealable to Council [SDMC § 112.0508]. Further, if a Site Development Permit is required, then after the permit application is deemed complete, the City determines whether the project is exempt from CEQA, and if not, it conducts an Environmental Initial Study to determine what type of environmental document is needed, or in obvious cases, it proceeds directly to prepare an EIR. SDMC § 128.0208.

This three-tiered process for determining how to proceed under CEQA mirrors the State CEQA Guidelines §§ 15002(k), 15061, 15063-15065, 15070, 15081. See *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1371-1372 (4th Dist. 1995).

knowledgeable individuals, and performing field reconnaissance. For these reasons, site-specific surveys meet the CEQA standard required to proficiently determine environmental significance, for example, whether a structure 45 years or older, is or is not a significant historical resource. And because site-specific surveys are methodical, the results are consistent enough from one resource to the next to prevent the inadvertent demolition of historical resources under CEQA section 21002.1 and San Diego Municipal Code section 128.0201, as is alleged to be occurring now because of weaknesses in the current City review and approval process.

3. The Decision Process to Require a Site-Specific Survey Lacks Thorough and Consistent Review, and Also Lacks a Reliable Mechanism for Public Comment.

CEQA encourages local governments to standardize environmental assessments using accepted professional and technical standards. CEQA § 21083(a); CEQA Guidelines § 15064.7. At the January 23, 2008 LU&H hearing, City staff described how it decides whether to require a site-specific survey. Most decisions are made by general planners, in the Building, Safety and Construction section of Development Services Department. These planners are reported to have some generalized knowledge of historical resources, but in some situations, they refer permit applications to senior planners in the Environmental Analysis section. The senior planners there refer some of these on to their management team, who may further consult with the Historical Resources section of the Planning Department, whose planners exclusively support the work of the Historical Resources Board. City staff offered no consistent decision-making matrix or standard for how it elevates the environmental analysis from general to senior planners, or for when it consults laterally with the Planning Department. However, it is clear the bulk of the determinations are made by the general planners in the Building, Safety and Construction section while a few make their way to the Historical Resources section.

Note that at this early screening stage, the City still treats the decision to issue demolition permits as Process One ministerial permits, and thus is proceeding outside its established CEQA review process, and without public notice and opportunity to comment, contrary to the Historical Resources Guidelines.

In determining the need for a site-specific survey, the City Manager *should consult with and consider input from local individuals and groups with expertise in the Historical Resources of the San Diego area.* These experts may include the University of California, San Diego State University, San Diego Museum of Man, local historical and archaeological groups, and *designated community planning groups.* Consultation with these or other individuals and groups *should occur as early as possible* so that their input can be considered during the [ten (10) days] allotted to determine the need for a site-specific survey.

*Emphasis added.* Historical Resource Guidelines, Section II (A)(1). However, public input is not mandatory and City staff indicates that soliciting public input has always been relatively limited, but even more so in recent years for various reasons.

In summary, before the City issues a demolition permit, for a structure 45 years or older, it conducts a Process One ministerial review. This review determines whether a structure is a potentially significant historical resource under CEQA and San Diego Municipal Code section 128.0201. It occurs within a ten (10) day window and is generally based on a few photographs and a few building records. Who decides can vary from permit to permit, and can range from general planners, to senior historical resource planners, to management, and can span across three sections in two different City departments. If the City decides a structure is a potentially significant historical resource, then a site-specific survey, conforming to rigorous professional standards, is required. But public comment while advised, is not mandatory, and in practice is limited. As a consequence, under the current review and approval process, some older structures are incorrectly determined to be unworthy of further historical consideration and demolition permits are issued.

This early screening process was originally intended to provide the equivalent of CEQA review in an abbreviated format. Experience has shown, however, that neither CEQA, nor the City Significance Thresholds, nor the Historical Resource Guidelines, are consistently applied. This has increased the risk of inadvertently demolishing significant historical structures, in violation CEQA and San Diego Municipal Code section 128.0201.

**D. CEQA Statutorily Exempts Demolition Projects as Ministerial Unless Approval Requires Subjective Judgment and Deliberation.**

1. Ministerial Means No Use of Special Discretion in Reaching a Decision.

The California Environmental Quality Act section 21080(b)(1) statutorily exempts ministerial decisions. *See Day v. City of Glendale*, 51 Cal. App. 3d 817, 820, 821 (2d Dist. 1975); *Johnson v. State of California*, 69 Cal. 2d 782, 788 (1968). State CEQA Guidelines § 15369 defines *ministerial* as follows:

*'Ministerial' describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee.*

*Emphasis added.* San Diego Municipal Code section 112.0501 assigns five different decision processes to project applications primarily depending on the nature of the proposed activity. Development Services Department explains the difference between ministerial and discretionary decisions in the context of these processes:

The five decision processes . . . fall into two primary categories, *ministerial decisions* or *discretionary decisions*. Projects reviewed and decided by *Process 1* are *ministerial decisions*. These decisions are based solely on whether a project complies with regulations of the Municipal Code and, where applicable, any prior approved discretionary decision. *If a project complies, the City must, by law, issue a permit. Process 2-5 decisions are discretionary decisions.* While these projects are also subject to regulations, there is *some level of discretion given to the assigned decision maker* to approve or deny these projects.

([www.sandiego.gov/planning/overview/steps.shtml](http://www.sandiego.gov/planning/overview/steps.shtml)) *Emphasis added.* Yet, while it characterizes demolition permits as Process One ministerial, the City in fact exercises special discretion and judgment in reaching a decision on whether to require a site-specific survey, and, as stated earlier, therefore, in reaching a decision on whether a structure 45 years or older is a potentially significant historical resource. This decision, more often than not, relies on the sole, subjective judgment of general planners in the Building, Safety and Construction Building section, and unlike the decisions made pursuant to Processes Two through Five, is not appealable.

In other words, the City treats the determination to issue a construction-type demolition permit as ministerial in name only, for structures 45 years or older.

## 2. Decisions Mixing Ministerial and Discretionary Elements are Not Exempt from CEQA.

Deciding whether a structure 45 years or older is a potentially significant historical resource is not like issuing an automobile registration, a dog license, or a marriage license, each of which merely requires the applicant to show objective proof of ownership or age or status. It is not merely determining whether the “zoning allows the structure to be demolished in the requested location, or whether the structure would meet the strength requirements in the Uniform Building Code,” (State CEQA Guidelines § 15369), both of which merely require checking plans against charts and tables that do not require subjective interpretation.

The case of *Day v. City of Glendale*, 51 Cal. App. 3d 817, 823 (2d. Dist. 1975) says as much. There, the City of Glendale classified grading permits as ministerial even though the city engineer used subjective analysis to impose project-specific conditions. *Id.* p. 823. The court disagreed with the City’s classification. “The applicability of CEQA cannot be made to depend on the unfettered discretion of local agencies.” *Id.* p. 822. In other words, saying a decision is ministerial does not make it so. The court ruled that the grading permit while having ministerial components was “of mixed ministerial-

discretionary character,” and citing to *People v. Department of Housing and Community Development*, 45 Cal. App. 3d 185, 194, should be treated as discretionary to uphold the statutory policy of CEQA, “to afford the fullest possible protection of the environment within the reasonable scope of the statutory language.” *Id.* pp. 823-824. *See also* CEQA State Guideline § 15268(b) (where project approval is part ministerial and part discretionary, the project is discretionary, and subject to CEQA review).

The decision to issue a demolition permit for a structure 45 years or older clearly involves a mixture of ministerial and discretionary actions. Although classified as ministerial at San Diego Municipal Code sections 129.0505 and 128.0203(b)(1)), the City’s review and approval process, for structures 45 years or older, already involves the considerable exercise of discretion. As born out by the testimony of City staff, to accurately determine historical significance, even at the Process One level of review, decisions are not infrequently referred to senior historical resources planners, who must apply their subjective judgment, based on expertise in historical resources management, as to whether structures 45 years or older require further professional analysis through a site-specific survey.

Incorporating a CEQA level analysis into the demolition permit review and approval process, for structures 45 years or older, however, is possible. San Diego Municipal Code section 128.0205 provides for a CEQA Environmental Initial Study to be performed for discretionary actions *not* requiring a development permit, and since demolition permits do not require a development permit, but do require specialized, discretionary judgment, this section may provide a starting point for reforming the current review and approval process.

An application for a *development permit* made in accordance with section 112.0102 also serves as the application for environmental review. A separate application for an Environmental Initial Study may be required *for a discretionary action that does not require a development permit.*

In general, LU&H may consider multiple measures to strengthen and standardize the current review and approval processes, to eliminate the risk of incurring significant environmental impacts to potentially significant historical resources, without CEQA review, in violation of CEQA section 21002.1 and San Diego Municipal Code section 128.0201. Measures to bolster the early screening process may include the following:

- Review by planners who specialize in historical resources and architecture.
- Verification of photographs and building records provided by permit applicants.
- Providing more than ten (10) days to decide on a site-specific survey.
- Developing a efficient, reliable mechanism for public notice and comment.

Examining how other California jurisdictions address demolition permits may be useful, if the City is to successfully reform its review and approval process for demolition permits, for older structures that are not yet listed or surveyed but that, “may nonetheless be historically significant for purposes of CEQA.”

## **II. Comparison of the Review and Approval Processes for the Demolition of Older Structures in Other California Cities.**

San Diego is not alone in its attempt to balance a high demand for demolition permits against the legal imperatives for CEQA review, and compliance with other applicable state and federal laws and regulations to protect historical resources. This office reviewed the approach of jurisdictions recommended for comparison by the Historical Resources program staff. This included reviewing municipal codes, and interviewing historical resources planners, for Los Angeles, Ontario, Riverside, San Jose, Sacramento, and San Francisco. Two alternative approaches emerged from this review: advanced ministerial review and mandatory discretionary review.

The City of Sacramento exemplifies the first approach. It has a mandatory investigation and review process for the demolition of structures 50 years or older that may be historically significant for purposes of CEQA but are not otherwise yet recognized as historically significant. It has codified this procedure. Sacramento City Code section 17.134.430(A) first requires referral of demolitions for any structure 50 years or older to their Office of Preservation for a preliminary determination:

If a permit is sought to demolish or relocate a building or structure that was constructed at least fifty (50) years . . . the permit *application shall be referred to the preservation director* to allow the director to make a *preliminary determination* whether the structure should be nominated for listing on the official register . . .

*Emphasis added.* Sacramento City Code section 17.134.430(B)(1) allows the Preservation Director forty-five (45) days to make a preliminary determination whether there would be a *reasonable likelihood* the structure will be eligible for consideration for listing on the City of Sacramento historical register. According to their Preservation Office, the preliminary review is performed by a two person team, a senior historic resources planner and an architectural historian. They review the demolition submittal which requires photographs of all sides of the structure proposed for demolition, as well as contextual photos showing the surrounding properties. If additional research is required for the review, either interns, staff, or an on-call architectural historian consultant undertakes the research.

Sacramento City Code section 17.134.430(B)(3) requires that if the Preservation Director determines the structure is eligible for local listing, then the Preservation Office takes the structure through the historic nomination process. If the Preservation Director determines the structure is not potentially eligible for local listing, then the applicant may apply for a demolition permit. There is no right of appeal. Sacramento City Code section 17.134.430 (B)(3)(b).

In other words, the Sacramento mandatory investigation and review process decision is treated as ministerial but it differs from the City of San Diego in that the review is consistently

conducted by a team of historical resource experts and the review time is 45 days rather than 10 days. According to their Preservation Office, every year approximately 250 proposed Demolitions undergo this mandatory preliminary review and of those on average of two to four are submitted to the City of Sacramento Preservation Commission for potential local listing. The State Office of Historic Preservation thinks the City of Sacramento demolition investigation and review process is one of the best approaches used in the state. (Lucinda Woodward, State Historian III, SHPO, personal communication, May 21, 2008.)

The City of San Diego Municipal Code does not mandate referral of demolition permits to the Historical Resources program for review. However, the City of San Diego does offer a fee-based, preliminary review for all project applicants. This is currently an optional service provided prior to formal project submittal. It allows single disciplinary review, for example, for historical resources, to get *early input from Historical Resources Board staff*, before formal project submittal, and to determine, *whether the site has potential historic resources*. Development Services Bulletin 513, Preliminary Review, pp. 6- 7. Determinations made during preliminary review may be appealed. SDMC § 128.0207(b). As stated, the City preliminary review is currently optional only, but if made mandatory, for ministerial, demolition permits, for structures 45 years or older, compliance with CEQA and San Diego Municipal Code section 128.0201 would be better achieved.

Two other cities require complete CEQA review. In the City of San Jose, demolition permits are with few exceptions are treated as discretionary.

Except as specifically exempted . . . no demolition permit or removal permit shall be issued *unless and until a development permit which specifically approves such demolition or removal has been issued* . . .

*Emphasis added.* San Jose Municipal Code § 20.80.440 (A). This prevents the inadvertent loss of significant historic resources because discretionary review automatically incorporates CEQA level examination of historic resources.

In 2003, the City Planning Commission of the City and County of San Francisco adopted a similar approach, called the temporary residential demolition policy. *San Francisco City Planning Commission Resolution 16700*. Still in effect, the policy mandates discretionary review of all residential demolitions not otherwise subject to discretionary permit review. In addition, under the policy, for buildings 50 years or older, the applicant must complete a “Historic Resource Evaluation Request.” This review is then incorporated into their established CEQA review process for historical resources. Potentially historical resources, while mitigated under CEQA under the San Francisco policy, are not ordinarily referred to the Landmarks Preservation Advisory Board for designation.

In sum, there are alternative approaches to the current City demolition permit review and approval process for structures 45 years or older. Whatever the approach, it should result in a more rigorous process than is currently practiced, and should result in consistent application of

state and local CEQA thresholds for significance, thus preventing the inadvertent loss of significant historical resources without CEQA review.

### CONCLUSION

The current review and approval process for demolition permits does not strictly meet the legal requirement for CEQA review for mixed ministerial and discretionary projects. As stated in the seminal CEQA case, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259 (1972), CEQA shall be interpreted broadly to, “. . . afford the *fullest possible* protection to the environment *within the reasonable scope* of the statutory language.” *Emphasis added.*

Hence reforming the current review and approval process for demolition permits for older structures offers a choice between strengthening the current ministerial process or mandating discretionary review. The latter would clearly ensure that all potentially historically significant structures undergo complete CEQA review and public participation. With sufficient safeguards, as reviewed in this legal opinion, however, the former could also adequately prevent the inadvertent demolition of potentially significant historic structures, 45 years or older, and reduce the risk of violating CEQA section 21000 and San Diego Municipal Code section 128.0201.

In other words, advanced ministerial review could afford sufficient consideration of the protection of older structures, especially if codified, and may still be considered within the reasonable scope of the statutory requirements of CEQA section 21000 and the San Diego Municipal Code.

Respectfully submitted,

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City Attorney

MG:ca  
RC-2008-12

REPORT TO THE COMMITTEE  
ON LAND USE AND HOUSING

-15-

May 21, 2008

bc: Honorable Mayor Jerry Sanders  
Council President Scott Peters  
Councilmember Kevin Faulconer  
Councilmember Toni Atkins  
Council President Pro Tem Tony Young  
Councilmember Brian Maienschein  
Councilmember Donna Frye  
Councilmember Jim Madaffer  
Councilmember Ben Hueso