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MEMORANDUM OF LAW

DATE: April 18, 2007

TO: Historical Resources Board

FROM: City Attorney

SUBJECT: When the Physical Condition of a Nominated Historical Resource Must Be Evaluated by the Historical Resources Board for Purposes of Designation.

INTRODUCTION

This memorandum arose following the unauthorized, partial demolition of a private property, *after* a construction permit had been applied for, *after* the applicant was told by the City that the property may be historically significant, *but before* the City or the Historical Resources Board had had an opportunity to review the property, as required, in conjunction with the permit review process prescribed by the local Land Development Code. This matter caused the Historical Resources Board to question when a potential historical resource, in terms of its physical condition, must be evaluated for purposes of designation. The memorandum resolves this issue for historical resources whether nominated by the Historical Resources Board, the City Manager or, the City Council, or any member of the public.

QUESTION PRESENTED

What is meant by “current condition” for purposes of the Historical Resources Board designating an historic resource pursuant to its duties under the San Diego Municipal Code [SDMC] section 111.0206(d)?

SHORT ANSWER

When the Historical Resources Board evaluates a historical resource, where the nomination arises from SDMC section 143.0212, the “current condition” of the resource refers to when a project application is submitted to the City. The Board evaluates and designates historic properties, as part of the land development review process, in reliance on the information provided to the City at the time of project submittal. Where nominations arise outside SDMC

section 143.0212, the “current condition” of the resource refers to when a research report or similar documentation, prepared pursuant to the Historical Resources Guidelines, is submitted to the Board, as such submission, like a project application submitted to the City for a permit, triggers review for designation.

BACKGROUND

On September 5, 2006, the owner of a single-family home located at 4004 Lark Street applied for a construction permit with the City. On October 5, 2006, pursuant to SDMC section 143.0212, because the project application indicated the home was over 45 years old, the City required a site-specific historic research report to assess the historical significance of the property. On November 15, 2006, neighbors notified the Historical Resources Board staff and Neighborhood Code Compliance that partial demolition had begun on the property. On or about November 22, 2006, the City issued the owner a Notice of Violation, for failure to obtain a permit before starting work. The non-permitted work included removal of two windows, part of the roof, a brick chimney, the entry door, concrete stairs, and original clapboard siding. These modifications are considered an “adverse impact to an historical resource,”¹ according to a January 11, 2007 staff report, recommending designation of the subject property. January 11, 2007 Historical Resources Board Staff Report No. HRB-07-004, Item #9 – August and Mabel Blaisdell Spec House #1, p. 3. On November 28, 2006, the owner submitted a site-specific historical research report which concluded the property is not significant based on its demolished condition. At the January 25, 2007 meeting of the Historical Resources Board, a motion was made to designate the property as an historical resource, as a good example of a Craftsman bungalow structure, pursuant to the local designation criterion C in the Draft Guidelines for the Application of Historical Resources Board Designation Criteria," November 2006, p. 11-13. The property owner countered that the property could not be designated because the property no longer possessed sufficient integrity in its current condition meaning at the time of the vote. Board members then questioned whether the property should be evaluated based on its condition at the time of the hearing or at the time the project was submitted for permit review. Pursuant to SDMC section 123.0202 (d) the item was continued at the request of the property owner.

¹A substantial adverse change to an historical resource under the California Environmental Quality Act (Pub. Res. Code § 21000 et. seq.) “. . . includes demolition, destruction, relocation or alteration such that the significant of an historical resource would be impaired Pub. Res. Code § 5020.1(q). While demolition and destruction are fairly obvious significant impacts, it is more difficult to assess when change, alteration, or relocation crosses the threshold of substantial adverse change. The CEQA Guidelines provide that a project that demolishes or alters those physical characteristics of an historical resource that convey its historical significance (i.e., its character-defining features) can be considered to materially impair the resource's significance." See “California Environmental Quality Act (CEQA) and Historical Resources,” California Office of Historic Preservation, Technical Assistance Series # 1, at p. 9.

ANALYSIS

I. Fair and Effective Decision Making Can Only be Facilitated by Using a Consistent Point of Review for Designation Depending on the Origination of the Designation.

An essential ingredient of the Land Development Code is to “facilitate fair and effective decision making” by establishing uniform procedures to apply land use regulations. SDMC § 111.0102 The Historical Resources Board operates under the Land Development Code. In exercising its duties pursuant to SDMC section 111.0206 (d), the Board plays an integral role in resource protection. For example, upon nomination by City staff during the permit review process, the Board advises the City as to whether such projects will potentially impact significant historic resources. Nominations may also originate from other sources as enumerated in SDMC section 123.0202 as follows:

Nominations of a historical resource to become a designated historical resource may originate from the Historical Resources Board, the City Manager, the City Council, or any member of the public including the property owner by submitting a research report or similar documentation, as identified in the Historical Resources Guidelines of the Land Development Manual, to the Board's administrative staff for consideration by the Board. Nominations from the City Manager may originate as a result of a site-specific survey required for the purpose of obtaining a construction or development permit consistent with Section 143.0212.

In the instant matter, 4004 Lark Street was nominated by the staff as a result of a site-specific survey pursuant to SDMC section 143.0212, which states (emphasis added):

The City Manager shall determine the need for a site-specific survey for the purposes of obtaining a construction permit or development permit for development proposed for any parcel containing a structure that is 45 or more years old and not located within any area identified as exempt in the Historical Resources Guidelines of the Land Development Manual or for any parcel identified as sensitive on the Historical Resource Sensitivity Maps.

It would promote unfair decisions and eviscerate a core function of the Board if a permit applicant could avoid historic designation by altering or demolishing evidence supporting designation before the Board has had an opportunity to evaluate the property. To promote decisions that do not give unfair advantage to some applicants (and not to others) the Historical Resources Board must evaluate potential designations in a consistent manner. As the Land Development Manual, Historical Resources Guidelines, p. 1) (emphasis applied) states:

The intent of the guidelines is to ensure consistency in the management of the City's historical resources, including identification, evaluation, preservation/mitigation and development.

Accomplishing consistent evaluation of nominations will depend on the origin of the designation since not all designations originate with the City staff upon submission of an application for a permit under the Land Development Code (SDMC Chapters 11-14).

II. When a Historical Designation Originates Under SDMC section 143.0212, Then “Current Condition” Means When an Application is Submitted Because That is When the Historical Designation Review Process Begins.

When the Historical Resource Board evaluates a potential historic resource based on its “current condition,” when that evaluation originates from the specific-survey requirement under SDMC section 143.0212, it refers to when a project application is submitted to the City. The Board evaluates and designates historic properties, as part of the land development review process, in reliance on the information provided to the City at the time of project submittal. The permit application process is built on the condition of potentially significant resources at the time an application is submitted. To wit, the Land Development Code at SDMC section 143.0211 requires an applicant, as a prerequisite, to submit certain documentation to obtain a project permit. The Land Development Manual, which spells out the “submittal requirements, review procedures, standards and guidelines” (SDMC section 111.0106 (a)) that implement the Land Development Code, explains to permit applicants, at Volume 1, Chapter 1, at page 3 (emphasis added):

City staff must determine if your proposed site contains one or more elements of a historical resource and then further, if a site-specific survey is required to properly evaluate the resource . . . If your project site . . . proposes demolition or external alteration of a structure that is 45 or more years old, then your project is subject to this review and additional submittal information will be requested . . . Determination of the need for a site-specific survey is made by staff based upon the Parcel Information Checklist submitted as part of the General Application Package.

At Volume 1, Chapter 1, at page 4, the Manual adds:

If potential historic resources are identified, then the proposed project is referred to the Historical Resources Board for possible designation.

The Historical Resources Board functions as an extension of the permit review process. So when evaluating a property undergoing City regulatory assessment, the Board must make the date of its examination congruent with the same date the City starts its review, which is the day an application is submitted.

On September 5, 2006, the owner of 4004 Lark Street submitted an application to the City for a construction permit. On October 5, 2006, City staff required a site-specific historic research report. This was because the application showed the property was over 45 years old. On November 28, 2006, the owner submitted such report. It concluded the property was not significant. This was based on the condition of the property after the non-permitted demolition work started but before the Historical Resources Board was able to review the property. On January 25, 2007, City staff recommended to the Board the property be designated consistent with the local Draft Guidelines for the Application of Historical Resources Board Designation Criteria," November 2006, p.11-13, under Criterion C, as a good example of Craftsman bungalow. ² Staff properly made its determination based on the condition of the property at the time the project permit application was submitted.³

The San Diego Municipal Code does not define the term "current condition." Yet the property owner relies on a January 11, 2006, Historical Resources Board staff report, prepared for an entirely different property, to assert that this term refers to the condition of the property the day of the Board vote. In a power point presentation the owner cites the staff report:

The Board, as it is aware, may not condition designations to require restorations or modifications. All properties considered for designation must meet the criteria and be eligible for designation in

² Criterion C of the local draft guidelines is analogous to and modeled on both federal Criteria C for design/construction, as set forth in, "How to Apply the National Register Criteria for Evaluation," U.S. Department of Interior, National Register Bulletin #15, at pp. 2, 17-20, as follows:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and . . . C. That 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 . . . "

and, on state criteria at Title 14 CCR 4852 (b)(3):

An historical resource must be significant at the local, state, or national level under one or more of the following four criterion . . . (3) It embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of a master or possesses high artistic values . . .

³ As stated earlier, under SDMC section 123.0202, nominations may also originate, not from a permit application under the Land Development Code SDMC Chapters 11-14 but from City Council, a member of the public, or the Board itself. Such nomination is, as the ordinance states, triggered by, ". . . submitting a research report or similar documentation, as identified in the Historical Resources Guidelines of the Land Development Manual, to the Board's administrative staff for consideration by the Board . . ." (SDMC section 123.0202(a)). When such research report is submitted to the Board, just like a project application submitted to the City for a construction or other type of permit, it is the submission of the report that triggers review by Board staff, for designation. Thus "current condition" refers to the date the research report is submitted to the Board.

their current condition.” (Slide 12, January 25, 2007, power point presentation by Scott Moomjian, entitled “4004 Lark Street,” citing to an October 12, 2006 Historical Resources Board Staff Report No. 06-046, Item # 7- 4374 Cleveland Avenue, p. 3) (emphasis applied by Moomjian not in original)

The property owner takes the meaning of the term “current condition” out of context. The October 12, 2006 staff report was to remind the Historical Resources Board that it may not designate a resource based on the potential or future promises to restore a property to the level of integrity required for designation. The property at 4374 Cleveland Avenue, at the time the project was submitted to the City for a project permit, had already been so modified it had lost its historical integrity. Pers. Comm., April 3, 2007, Kelly Saunders, Senior Planner, City of San Diego, Planning Department, Historical Resources Board.

. . . [T]he cumulative effects of multiple modifications to the house has substantially and adversely impacted the historical integrity of the property. . . Furthermore, despite the [historical survey] report’s contention that the modifications are ‘minimal alterations, which ‘can easily be changed to restore the home to its original appearance, the Board as it is aware, may not condition designations to require restorations or modifications. All properties must be considered in their current condition.” (October 12, 2006 Historical Resources Board Staff Report No. 06-046, Item # 7- 4374 Cleveland Avenue, p. 3) (emphasis applied)

By contrast, the property owner of 4004 Lark Street caused a substantial adverse change to the property *after* the project application was submitted and, significantly, *after* being notified by City staff that the house would be evaluated for historical significance. The San Diego Municipal Code nowhere specifies that the concept of integrity is restricted to the physical condition of a resource when the Historical Resources Board votes on a proposed designation. Thus the property owner’s reliance on the October 12, 2006, Historical Resources Board Staff Report No. 06-046, Item # 7- 4374 Cleveland Avenue is misplaced.

Indeed, the property owner not only misplaces reliance on a staff report irrelevant to 4004 Lark Street but also incorrectly equates “current condition” with the concept of “integrity” as it is applied under state law to the designation of historical resources:

Integrity is the authenticity of an historical resource's physical identity evidenced by the survival of characteristics that existed during the resource's period of significance. Historical resources eligible for listing in the California Register must meet one of the criteria of significance . . . and retain enough of their historic character or appearance to be recognizable as historical resources and to convey the reasons for their significance. Historical resources that have been rehabilitated or restored may be evaluated for listing. Integrity is evaluated with regard to the retention of

location, design, setting, materials, workmanship, feeling, and association. It must also be judged with reference to the particular criteria under which a resource is proposed for eligibility. Alterations over time to a resource or historic changes in its use may themselves have historical, cultural, or architectural significance. It is possible that historical resources may not retain sufficient integrity to meet the criteria for listing in the National Register, but they may still be eligible for listing in the California Register. A resource that has lost its historic character or appearance may still have sufficient integrity for the California Register if it maintains the potential to yield significant scientific or historical information or specific data. See "California Environmental Quality Act (CEQA) and Historical Resources," California Office of Historic Preservation, Technical Assistance Series # 1, Appendix C, at p. 31. See also Title 14 CCR 4852 (c). (emphasis added)

CONCLUSION

The "current condition" of a potential historic resource, where its nomination arises from SDMC section 143.0212, refers to the date a project application is submitted to the City. The local permit review process is predicated on the information provided by an applicant when it submits a project to the City. The application submittal date, in essence, tolls and locks the condition of a property, for purposes of fair and equitable review, thus avoiding the situation, as in the instant case of 4004 Lark Street, whereby an applicant could avoid designation by demolishing a resource before it can be evaluated by the Historical Resources Board pursuant to SDMC section 111.0206 (d).

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By

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