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OPINION NUMBER 2009-1

DATE: April 28, 2009

SUBJECT: Historical Designation of the Western Salt Company Salt Works Property

REQUESTED BY: Kelley Saunders, City Planning and Community Investment

PREPARED BY: City Attorney

INTRODUCTION

In March of 1999, the State Lands Commission, the San Diego Unified Port District [Port], and the Western Salt Company entered into a Settlement Agreement [Agreement]. Pursuant to the Agreement, Western Salt Company granted to the Port certain property described as the Salt Plant Parcel, the Pond 20 Parcel, and the Florence Street Parcel [the Salt Works Property or Property] to be held by the Port as public trust lands. In 2001, the California Legislature transferred the Salt Works Property from the Port to the San Diego County Regional Airport Authority [Authority]. Cal. Pub. Util. Code § 170056(a)(2)(A). The Property is located at 1470 Bay Boulevard in Council District 8 of the City of San Diego, Otay Mesa-Nestor Community.

On January 24, 2008, upon nomination by Save Our Heritage Organization [SOHO], a hearing was set for the City of San Diego Historical Resources Board [HRB] to consider designating the Salt Works Property for listing on the San Diego Register of Historical Resources. The nomination was predicated on the significant role the Western Salt Company Salt Works played in the solar salt industry from 1916 to 1949, the California State Historic Preservation Officer's [SHPO] listing of the Property in the California Register of Historical Resources, and the recognition by the SHPO that the Salt Works Property is eligible for listing on the National Register of Historic Properties. Report No. HRB-08-005, attached hereto.

The Authority opposed HRB designation of the Property as an historical resource and requested the hearing be continued. On April 9, 2008, the Authority issued a letter contending that designation by the HRB would not be enforceable. City HRB staff requested that the City

Attorney's Office opine on whether the HRB may designate the Salt Works Property in light of the Authority's objections. This opinion addresses whether or not the HRB has the authority to designate the Salt Works Property as a designated historical resource and issues raised by the Authority in the April 9, 2008 letter.

As more fully explained herein, the City, through California Government Code section 53091, has land use authority over state created local agencies including the Authority and its Salt Works Property because it is not located at the San Diego International Airport [SDIA]. Thus, the historical resources designation procedures and development regulations of the Land Development Code apply to the Salt Works Property. Designation by the HRB and the resulting imposition of historical resources regulations would be enforceable.

ANALYSIS

I. The City has land use authority over the Salt Works Property.

The California Government Code [Government Code] requires local agencies to "comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated." Cal. Gov't Code § 53091; *see also City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, 72 Cal. App. 4th 366, 376 (1999) (explaining that the Burbank-Glendale-Pasadena Airport Authority was required to obtain City of Burbank building permits, submit to City site plan review, and submit to City Building Official safety review). The Government Code defines local agency as "an agency of the state for the local performance of governmental or proprietary function within limited boundaries." Cal. Gov't Code § 53090. The Authority's enabling legislation defines the Authority as a "local governmental entity" that oversees airport facilities within the boundaries of San Diego County. Cal. Pub. Util. Code § 170002. The Authority is a local agency as defined in Government Code section 53091.

In the City of San Diego, property owners or applicants are required to submit "documentation and obtain a *construction permit*, a Neighborhood Development Permit, [or] a Site Development Permit ...before any *development* activity occurs on a *premises* that contains *historical resources*." San Diego Municipal Code § 143.0211 (italics in original). As explained by the Court in *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, City permit and plan review requirements (like the San Diego Municipal Code permit requirements for development that may impact historical resources) are building and zoning ordinances within the meaning of Government Code section 53091. *Id.* at 375. Thus, the historical designation and resulting imposition of permit requirements are enforceable as to the Authority's Salt Works Property.

Contrary to the Authority's assertions, the California Public Utilities Code does not result in a different conclusion with respect to the Salt Works Property. California Public Utilities Code section 170048(a) gives the Authority "exclusive responsibility to study, plan, and

implement any improvements, expansion, or enhancements at San Diego International Airport.” The Salt Works Property is not part of SDIA, so Section 170048(a) does not apply. Therefore, the Property is subject to the land use regulations of the City of San Diego.

II. The City’s HRB has the authority to designate the Salt Works Property as an historical resource.

The City of San Diego is a Certified Local Government [CLG] under the National Historic Preservation Act of 1996 [NHPA]¹ because it has been certified by the SHPO to administer historic preservation responsibilities under federal law.² The City administers its federal responsibilities through HRB designation of historical resources and City enforcement of historical resources regulations. Given the City’s CLG status, the City has the delegated authority to weigh in on the treatment of historical resources eligible for listing on the National Register that may be adversely affected by federal undertakings (using federal funds or requiring federal approval).

The SHPO determined that the Salt Works Property was eligible for inclusion in the National Register. Thus, it is squarely within the purview of the City’s HRB to designate the Salt Works Property as a local historical resource. It is also under the HRB’s purview to make recommendations pursuant to NHPA section 106 if the Authority’s proposed use of Federal Aviation Administration (or other federal) funds or permits could adversely affect the Western Salt Works Property.

III. The Salt Works Property is subject to the historical resources regulations of the Land Development Code.

The Authority objects to the associated land use regulations that apply to properties listed on the San Diego Register. However, as a practical matter, the San Diego Municipal Code [Municipal Code] regulations pertaining to designated historical resources already apply to the Salt Works Property, even without HRB designation. Section 113.0103 of the San Diego Municipal Code provides a broad definition for designated historical resource:

Designated historical resource means a historical building, historical district, historical landscape, historical object, or

¹ The NHPA “seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation...The goal of consultation is to identify historic properties potentially affected by the undertaking and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.” 36 CFR § 800.1. The section 106 process requires federal agencies to consult with local governments both directly and through the SHPO. 36 C.F.R. § 800.2.

² To certify the local government, the SHPO must, among other things, ensure that the local government “has established an adequate and qualified historic preservation review commission by State or local legislation.” 16 U.S.C. § 470a(c). The SHPO must also ensure that the local government provides a process for designation of historical resources and the enforcement of laws that protect historic properties. *Id.*

historical structure, important archaeological site or traditional cultural property which has been designated by the Historical Resources Board pursuant to Land Development Code Chapter 12, Article 3, Division 2, is included in the City of San Diego Historical Resources Board Register, **or has been listed in or determined to be eligible for listing in the California Register of Historic Resources or the National Register of Historic Places.**

(emphasis added).

The Salt Works Property “has been determined eligible for listing on the National Register and has been listed on the California State Register.” Report No. HRB-08-005. Thus, the Property is a designated historical resource under the Municipal Code by reason of its listing on the California State Register, and the City’s regulations pertaining to designated historical resources apply. While the HRB has the authority to list the Property on the local register, it cannot impose additional development regulations on the Salt Works Property than already exist.

IV. Designation by the City’s HRB would not conflict with the Agreement or Conservation Plan.

The Agreement entered into between the State Lands Commission,³ the Port, and the Western Salt Company conveyed the Salt Works Property to the Port subject to public trust purposes. Agreement § II.B.4. The Port was made a trustee of the lands conveyed. *Id.* at Recital M. The Agreement specifies that it “does not exempt the parties from the regulatory, environmental, land use, or other jurisdiction of any federal, state, local, or other governmental entity.” *Id.* at § III.K.

When, pursuant to the California Public Utilities Code, the Port transferred the Salt Works Property to the Authority, the Property was transferred subject to public trust obligations. *See National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 438 (1983) (explaining that abandonment of public use or trust obligations “will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation”).

The California Public Resources Code requires trustees of public trust lands to protect “environmental values, including scenic, **historic**, natural, or aesthetic values of statewide interest.” Cal. Pub. Res. Code § 6370 (emphasis added). As the Salt Works Property has been

³ The State Lands Commission has primary jurisdiction to act as trustee for California public trust lands. Cal. Pub. Res. Code § 6370; *See also* 1-2 *California Environmental Law and Practice* § 2.06.

determined eligible for listing on the National Register and has been listed on the California Register, it is of statewide (and national) importance. Report No. HRB-08-005.

The environmental and historic values of the Property must be preserved for the people of California. Cal. Pub. Res. Code § 6370. While the Authority has indicated there is a conflict between historical preservation and the conservation plan relating to the Property, no such conflict has been demonstrated. Often management of public trust lands must accommodate multiple trust purposes. Generally, courts will attempt to reconcile competing trust uses and will not infer a conflict where multiple trust purposes may be accommodated. *See California v. San Luis Obispo Sportsman's Association*, 22 Cal. 3d 440, 450-451 (1978).

V. Commemorating markers may be inadequate mitigation for demolition of historical resources under the California Environmental Quality Act [CEQA].

The Authority has suggested that demolition of the Salt Works Property should be permitted and that a plaque or directional marker would mitigate for impacts to the historical Property. California courts have not adopted that view.

CEQA “defines the ‘environment’ to include ‘historic’ conditions within an area which will be affected by a proposed project.” *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland*, 52 Cal. App. 4th 896, 905 (1997). California courts have explained that the demolition of an historical resource “can hardly be considered anything less than a significant effect” on the environment regardless of whether the resource to be demolished is officially designated. *Id.* at 909; *see also, Architectural Heritage Association v. County of Monterey*, 122 Cal. App. 4th 1095, 1103-1104, 1118-1120 (2004).⁴ Notably, the *Architectural Heritage Association* court held that photographic documentation and commemorating plaques were inadequate to mitigate the impacts of demolition and “an ‘EIR is required to identify and examine the full range of feasible mitigation measures and alternatives to demolition.’” *Architectural Heritage Association*, 122 Cal. App. 4th at 1122.

Under CEQA, it would not be prudent to go forward with demolition of the Property only mitigated by a plaque or marker without analyzing the feasibility of alternatives and further mitigation measures. Generally, to mitigate impacts to historical resources to below a level of significance under CEQA and avoid the preparation of an EIR, a project must comply with the Secretary of the Interior's Standards for the Treatment of Historic Properties and associated guidelines. 14 Cal. Code Regs. § 15126.4.

⁴ The Authority also contends that HRB “designation could cause ‘potentially significant impacts’” under CEQA due to the creation of a conflict with applicable land use plans relating to Airport uses and habitat conservation. This argument fails. The Salt Works property is already considered an historical resource within the meaning of CEQA (because of National Register eligibility and California Register listing), therefore HRB designation would not create any conflicts. CEQA already requires environmental analysis of all potentially significant impacts to the environment (including historical, biological, hydrological, etc.) that may result from a discretionary action or approval.

CONCLUSION

The City, through Government Code section 53091, has land use authority over state created local agencies including the Airport Authority and its Salt Works Property. Thus, the historical resources designation procedures and development regulations of the Land Development Code apply to the Salt Works Property, and designation by the HRB and the resulting imposition of historical resources regulations would be enforceable.

Respectfully submitted,

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By

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NMF:pev
Attachment

cc: Amy Gonzalez, Senior Assistant General Counsel, San Diego County Regional
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