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Historic Resources and CEQA: New Hurdles for Development Projects

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Over the past few years, an inordinate number of CEQA cases have addressed impacts on historic resources.[1] An entire practice area has emerged utilizing historic resource designations as a means of impeding development. Since these designations can occur without the approval, or sometimes even the knowledge, of the property owner, unexpected CEQA scrutiny may effectively derail the development of these properties.

Now for some good news: The most recent such case, *Friends of the Juana Briones House v. City of Palo Alto*[2], which just became final as a result of the denial of a petition for review by the California Supreme Court, provides some measure of relief for property owners seeking to demolish structures that have received a historic designation.

What You Need to Know In the *Friends of the Juana Briones House* case, the Court of Appeal found that the demolition of a locally designated historic structure is not a discretionary act subject to CEQA if the applicable ordinance does not vest the agency with the ability to deny the demolition permit application. The key in future cases will be the language in the applicable ordinance. What powers, if any, does the agency have to condition or deny (and not simply delay) the issuance of a demolition permit for a historic structure?

Summary of the Case On February 23, 2011, the California Supreme Court denied the petition for review in *Friends of the Juana Briones House v. City of Palo Alto,* making the November 22, 2010, decision final. Under that Court

of Appeal decision, the City of Palo Alto's ("City") issuance of a demolition permit for a locally designated historic residence was found to be a ministerial action that was exempt from the California Environmental Quality Act ("CEQA").

In 1998, the homeowners applied for a permit from the City to demolish their residence, known as the Juana Briones House, which the City had designated as a historic landmark. The old adobe house had been damaged by the Loma Prieta earthquake in 1989, and in 1996 the City's building inspector declared it a nuisance and ordered abatement by repair or demolition. Unable to reach agreement with the City on restoring the house, the new owners applied for a demolition permit. The City denied the permit request, and litigation ensued. The City ultimately approved the application and issued the demolition permit in 2007. Issuance of the permit was treated as a ministerial act by the City – and therefore statutorily exempt from CEQA. An ad hoc organization, Friends of the Juana Briones House ("Friends"), then sued the City, claiming, among other things, that the issuance of the demolition permit constituted a discretionary act subject to CEQA.

In August 2008, the trial court granted Friends' petition for a writ of mandate, finding that the permit was not wholly ministerial but had discretionary elements. The City was directed to set aside its approval of the demolition permit application and to refrain from consideration of that permit application until it complied with CEQA.

In November 2010, the Court of Appeal reversed the trial court's decision and held that the City's issuance of a demolition permit was a ministerial action that was not subject to CEQA. The Court of Appeal's decision rested on the following key findings:

- The ordinance under which demolition was proposed (Palo Alto Municipal Code § 16.49.070, the "Ordinance") involved the use of fixed standards and objective measurements, which qualified it for ministerial status under Section 15369 of the CEQA Guidelines. Both parties focused on a provision in the Ordinance that allowed the City to delay issuance of a demolition permit for up to one year. Friends argued that such delay was tantamount to discretion and that CEQA should therefore apply. The Court of Appeal disagreed, concluding that

the City's ability to impose delay did not make its decision discretionary.

% The fact that the City conditioned the demolition permit did not automatically vest the City with discretion. In finding that "conditions alone do not render a project discretionary," the Court of Appeal focused on the "functional test" of whether the property owners could *legally compel* project approval without design changes that might alleviate environmental impacts. Since the homeowners could have compelled issuance of the demolition permit without making the concessions, the fact that the project was conditioned to require those concessions did not make it discretionary. This holding is consistent with *Friends of Westwood Inc. v. City of Los Angeles,*[3] where the Court of Appeal determined that the City of Los Angeles' issuance of a building permit *was* a discretionary action because the City had the authority to eliminate or mitigate the project's adverse environmental consequences through conditions of approval. Under *Friends of Westwood*, ministerial actions were defined as those that "can be legally compelled without substantial modification or change." (*Id.* at 269.) The *Friends of the Juana Briones House* court held that the City's approval of the demolition permit was ministerial because the homeowners' right to the demolition permit was not dependent on their compliance with the City's conditions.

% There was no basis to support Friends' argument that the Court of Appeal must consider both the demolition permit and a hypothetical future building permit together, or run the risk of violating CEQA's segmenting prohibition. First, no evidence existed that a building permit actually preceded, followed, or accompanied the demolition permit, or that such a requirement existed. Friends' argument was therefore based on a hypothetical future building permit not an actual building permit requested by the homeowners. Second, even if the homeowner's project included a building permit, that building permit would, like the demolition permit, be a ministerial approval that was statutorily exempt from CEQA. As a result, the *Friends of the Juana Briones House* court rejected Friends' claims that the City violated

CEQA's segmenting prohibition by failing to consider the "whole of the action."

[1]For instance, a local agency's ability to find that a historical resource may be significant even if it was not listed in either state or local historical resource registers was at issue in *Valley Advocates v. City of Fresno*. *See Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039 (Cal. App. 5th Dist. 2008). In *Citizens for a Megaplex-Free Alameda v. City of Alameda*, petitioners argued that an Environmental Impact Report should have been prepared because the approved Mitigated Negative Declaration failed to address new information from a local historian's report. *See Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039 (Cal. App. 5th Dist. 2008). The 2008 landmark *Save Tara v. City of West Hollywood* case and 2007's *Uphold Our Heritage v. Town of Woodside* case both centered around historic residences. *See Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039 (Cal. App. 5th Dist. 2008); *Uphold Our Heritage v. Town of Woodside*, 147 Cal. App. 4th 587 (Cal. App. 1st Dist. 2007). Finally, in *Preservation Action Council v. City of San Jose*, historic preservationists successfully challenged the adequacy of an Environmental Impact Report analyzing the construction of a Lowe's Home Improvement. *Preservation Action Council v. City of San Jose*, 141 Cal. App. 4th 1336 (Cal. App. 6th Dist. 2006).

[2] *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App. 4th 286 (Cal. App. 6th Dist. 2010).

[3] *Friends of Westwood Inc. v. City of Los Angeles*, 191 Cal. App. 3d 259 (Cal. App. 2nd Dist. 1987).