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March 1, 2012

Ronald W. Marshall
Palm Springs Preservation Foundation
1775 East Palm Canyon Drive
Suite 110-195
Palm Springs, CA 92264
Email: modpod_one@yahoo.com

Re: Use of Categorical Exemptions for Projects Impacting Historic Resources

Dear Mr. Marshall,

The Palm Springs Preservation Foundation has requested Chatten-Brown & Carstens prepare this legal opinion regarding the City of Palm Spring's use of categorical exemptions to the California Environmental Quality Act (CEQA) for development projects that could impact historic resources. Based on our review of CEQA, the CEQA Guidelines, and relevant case law, we conclude that it is a violation of CEQA to categorically exempt a project from environmental review if that project may have an impact on an historic resource.

CEQA establishes California's policy to "take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Public Resources Code § 21001.) To ensure all aspects of the environment are protected, CEQA requires agencies that will be approving discretionary projects to analyze a project's potentially significant environmental impacts in a negative declaration or environmental impact report. CEQA specifically finds that adverse impacts to historic resources are significant environmental impacts: "A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." (Public Resources Code § 21084.1.)

Buildings, structures, and other resources listed on a local register of historic resources are presumed to be historically significant. (Public Resources Code § 21084.1.) "Public agencies must treat any such resource as significant unless the preponderance of

evidence demonstrates that it is not historically or culturally significant.” (CEQA Guidelines § 15064.5(a)(2).) The City of Palm Springs has a local register of historic resources, providing for designation of three classes of historic sites and historic districts. All resources designated by the City as an historic site or district are presumed to be historically significant under CEQA.

While CEQA seeks to ensure the protection of the environment through the preparation of environmental review documents and inclusion of mitigation measures, the Act does not require environmental review of classes of projects the Secretary of the California Natural Resources Agency has determined would not have a significant effect on the environment. (Public Resources Code § 21084(a).) The CEQA Guidelines set out 33 classes of these categorically exempt projects. Public agencies are generally not required to prepare an environmental review document for activities that fall under one of the categorically exempt classes of projects because the Resources Agency has already found these types of projects do not typically have any adverse environmental impacts. (CEQA Guidelines § 15354.)

However, CEQA contains several exceptions to the categorical exemptions. If a project that would otherwise fit within a class of categorical exemption falls within one of the exceptions, preparation of an environmental review document is required. (CEQA Guidelines § 15300.2.) One of the exceptions to the use of a categorical exemption provided by CEQA is for any project that may impact an historic resource: “A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.” (CEQA Guidelines § 15300.2(f); *see also* Public Resources Code § 21084(f).) “Substantial adverse change” includes physical demolition, destruction, relocation, or alteration of a resource or its immediate surroundings such that the significance of an historical resource would be materially impaired. (CEQA Guideline § 15064.5(b)(1).) Material impairment occurs when a project demolishes or materially alters the resource’s physical characteristics that convey its historical significance and that justify its inclusion in a state or local register of historic resources or its identification in an historic resources survey. (CEQA Guideline § 15064.5(b)(2).)

The California Court of Appeal has applied this exception to prohibit the use of a categorical exemption when a project could impact an historic resource. In *Comm. to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, the City of Los Angeles had approved the construction of a wooden fence on top of one of the historic Hollywoodland granite walls pursuant to a Class 5 categorical exemption for projects consisting of minor alternations in land use limitations. These granite walls

had been designated as an historic monument by the City of Los Angeles, making them an historic resource pursuant to Public Resources Code section 21084.1. The Court found the City's use of a categorical exemption was improper because the construction of a wooden fence on top of the historic wall could "significantly impact the environment by altering the historic resource, both as to its physical integrity and its aesthetic appeal from the neighboring streets." (*Id.* at 1187.) The City was required to vacate its issuance of an exemption under CEQA. (*Id.* at 1188.)

Courts have set a low threshold for showing that an exception to use of a categorical exemption applies. Whenever there is substantial evidence in the record to support a fair argument that the proposed construction will have a significant effect on the environment, the application of a categorical exemption is inappropriate. (*Berkeley Hillside Preservation v. City of Berkeley* A131254, 2012 WL 489195 (Cal. Ct. App. Feb. 15, 2012.)) This means that if there is substantial evidence an exception is applicable to a project, the project is not categorically exempt from preparing environmental review even if there is contrary evidence in the record or a disagreement among experts regarding the applicability of the exception. (*Ibid.*) For example, if an historic resource expert submits his or her opinion that a project would adversely impact the historicity of a structure the City has designated as an historic site, the City could not rely on a categorical exemption to CEQA to approve the project, even if another historic resource expert determined the project would not adversely impact the historic resource. In this instance, the City is required to prepare an environmental review document that analyzes whether the project would or would not impact the historic resource. If the project would impact the historic resource, the City must find measures to mitigate the significance of that impact.

"Generally, a project that follows the Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings or the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (1995), Weeks and Grimmer, shall be considered as mitigated to a level of less than a significant impact on the historical resource." (CEQA Guidelines § 15064.5(b)(3).) However, mitigation measures such as compliance with the Secretary of Interior's Standards cannot be a basis for refraining from applying one of the exceptions to categorical exemptions. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1200.) If a project may have a significant effect requiring mitigation, use of a categorical exemption is improper and an environmental review document should be prepared to assess the effectiveness of the mitigation measure. (*Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102.)

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Thus, it is our conclusion that it would be a violation of CEQA to apply a categorical exemption to any project that may significantly and adversely impact an historic resource, even if mitigation is included in the project.

We have enjoyed working with the Palm Springs Preservation Foundation on this matter. Please feel free to contact us if you have any questions regarding this legal opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Minter". The signature is fluid and cursive, with a large initial "A" and "M".

Amy Minter
Chatten-Brown & Carstens