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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

VALLEY ADVOCATES et al., Plaintiffs and Appellants, v. CITY OF FRESNO et al., Defendants and Respondents; PEREZ, WILLIAMS & MEDINA, Real Party in Interest and Respondent.	F050952 (Super. Ct. No. 05CECG01752) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary S. Austin, Judge.

Law Offices of Richard L. Harriman and Richard L. Harriman for Plaintiffs and Appellants.

James C. Sanchez, City Attorney, and Kathryn C. Phelan, Deputy City Attorney, for Defendants and Respondents.

Perez, Williams & Medina and Robert Gray Williams for Real Party in Interest and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts VII.-IX. of DISCUSSION.

This appeal concerns an application to demolish a building located in downtown Fresno and expand a parking lot onto the cleared land. The building is one of two nearly identical 90-year-old apartment buildings located next to one another. After receiving the site plans, the City of Fresno (City) (1) decided not to list either building in the local register of historic resources, (2) rejected an argument that the buildings were historic resources for purposes of the California Environmental Quality Act (CEQA),[1] (3) determined the proposed project was exempt from CEQA, and (4) approved the project.

A local organization and a local resident sought a writ of mandate alleging City violated various CEQA provisions in (1) rejecting the argument that the buildings were historical resources for purposes of CEQA and (2) deciding the project was exempt from CEQA. They contend City subverted the CEQA process, especially its public notice provisions, by treating City's earlier denial of an application to list the buildings in the local register of historical resources as resolving the question whether the buildings were an historic resource *for purposes of CEQA*. They also argue City's initiation and denial of a listing application before it began a formal CEQA review of the project was a devious way to avoid applying the fair argument standard to the question whether the buildings were historically significant.

We reach the following conclusions. First, at the meeting where City determined the project was exempt from CEQA, it was misinformed about its discretionary authority to determine the buildings were historic resources. As a result, City cut short its inquiry into the historic significance of the buildings and relied too heavily on its earlier decision not to list the buildings in the local register of historic resources. Second, the claim that City failed to exercise its discretion in accordance with CEQA requirements is not a collateral attack on City's decision not to list the buildings in the local register. Third, in

[1]Public Resources Code section 21000 et seq. All statutory references are to the Public Resources Code unless otherwise indicated.

the circumstances of this case, the fair argument standard does not apply to the question whether the buildings are historic resources for purposes of CEQA.

Based on these conclusions, the judgment will be reversed and the matter remanded for further proceedings.

FACTS

Appellant Valley Advocates alleged that it is a California nonprofit public benefit corporation that initiates and prosecutes legal actions in the public interest in the Central Valley of California. Appellant Dallas B. Debatin is an individual who resides in the City of Fresno, owns real property in the vicinity of the proposed project, and pays property taxes in the City and County of Fresno. For purposes of this opinion, we will refer to Valley Advocates and Mr. Debatin collectively as Valley Advocates.

The respondents in this appeal are City, its city council (City Council), and the law firm of Perez, Williams & Medina (Perez).

In September 2004, Perez submitted an application (Application S-04-399) for a minor amendment to the City planning and development department. Application S-04-399 proposed a 2,080 square foot addition to Perez's existing office building and the demolition of a two-story four-plex apartment building to expand available parking. The proposed project is located in downtown Fresno.

A nearly identical four-plex apartment building, or sister building, is located immediately to the south of the building Perez proposes to demolish. The two four-plex apartment buildings were constructed in 1913 or 1914 in the Craftsman style. W. P. Cutting, using a contractor named C. Samuelson, built the buildings and rented the apartments to working class tenants. As a result, the two buildings are sometimes referred to as the W. P. Cutting flats (Flats).

On October 8, 2004, Application S-04-399 was routed to various departments and agencies for review and comments. For example, the application was sent to the historic preservation project manager and the Fulton/Lowell Design Review Committee.

A meeting of the Fulton/Lowell Specific Plan Project Review Subcommittee was held on December 6, 2004. The subcommittee recommended denial of the demolition request. The record reflecting that recommendation is signed by Debatin, as chairperson of the Fulton/Lowell Design Review Committee.

Policy G-11-c. of the 2025 Fresno General Plan provides that, before the issuance of a formal demolition order by City involving a structure over 50 years old, the historic preservation staff shall review the potential listing of the structure in the local register and, if necessary, refer the listing to the Historic Preservation Commission. To comply with this policy, Application S-04-399 was referred to City's historic preservation project manager to determine if the Flats should be referred to the Historic Preservation Commission.

City's historic preservation project manager prepared a report for City's Historic Preservation Commission that stated the staff recommended (1) denying the request to demolish one of the Flats and (2) nominating the Flats to City's local register of historic resources. On December 13, 2004, at a noticed public hearing, the Historic Preservation Commission accepted the recommendation and voted four to zero to nominate the Flats for placement in the local register. As a result, the nomination was scheduled for hearing before the City Council.

On February 15, 2005, the City Council conducted a public hearing to consider the nomination of the Flats for listing in the local register. Various people testified at the hearing, including James Oakes, an architect hired by Perez. Oakes testified that he, "as a preservation specialist[,] had looked carefully at the building" and he could not agree that the buildings were eligible for listing in the local register of historic resources.

At the hearing, the City Council considered a motion to designate the southernmost of the Flats to the local register and deny the nomination as to the one that Perez proposed to demolish. The motion received three "yes" votes (Councilmembers Calhoun, Dages and Sterling) and four "no" votes (Councilmembers Boyajian, Duncan,

Perea and Westerlund). The City Council then considered a motion to deny the listing nomination as to both of the Flats. The motion carried by a vote of four to three, with Councilmembers Calhoun, Perea and Sterling voting "no." After these two votes, the following exchange occurred:

> "Calhoun   Can I just ask for a point of clarification. Does that mean that the other building, where does that leave the second building[?]
>
> "Dages   Both of them have been denied to the historical register.
>
> "Calhoun   So that means that both can be taken down at this point now right.
>
> "[City Attorney] Montoy   Not necessarily. They still have to go through a process because they're still 50 years old.
>
> "Dages   Yeah the only issue before us was whether to put them on the register.
>
> "Calhoun   I thought we just…
>
> "[City Attorney] Montoy   The only issue was whether to designate them but the site plan process must still be undertaken, the demolition…[2]
>
> "Calhoun   But one of them is going to come down now.
>
> "Dages   No that's not the case …
>
> "Calhoun   Sure it is.
>
> "Dages   … at all.
>
> "Calhoun   Well sure it is.
>
> "Dages   No it isn't. Item's over. Let's go on to the next item at 10:00.

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[2]This statement of the city attorney is consistent with her earlier statement at the hearing that "[t]he site plan, the demolition, all that is not before you today." Shortly after the city attorney mentioned the site plan and demolition, Councilmember Boyajian stated: "I would just [say] also that the only issue is whether it's historic, CEQA doesn't come into pla[y] at this point."

"Calhoun No, President I have the right to… [¶] … [¶] … I'm out of order Mr. President, trying to understand the implications of this vote?

"Dages The vote is already over with Mr. Calhoun."

On March 11, 2005, City's planning and development department filed a notice in the City clerk's office that the department found the proposed project to be exempt from the requirements of CEQA under California Code of Regulations, title 14, sections 15301 and 15332.[3] These exemptions concerned (1) additions to and demolition of certain residential structures and (2) infill projects.[4]

On March 14, 2005, City received a letter from Jeanette Jurkovich objecting to the proposed use of categorical exemptions in connection with Application S-04-399. Among other things, the letter argued the City Council was required to make an independent determination of historic significance of a resource by considering the criteria set forth in Guidelines section 15064.5, subdivision (a)(3). City treated the letter as an appeal of a CEQA finding to an elected decisionmaking body in accordance with section 21151, subdivision (c). Valley Advocates participated in the appeal by submitting letters and appearing through its attorney at the May 3, 2005, City Council meeting.

A staff report prepared for the City Council meeting addressed whether the project might cause a significant impact to an historic resource by stating that the "Subject Building is not a 'historic resource' under CEQA because … Council has not treated nor chosen to treat the building as historical." The staff report did not inform the City

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[3]Further references to California Code of Regulations, title 14, section 15000 et seq. shall be to the Guidelines.

[4]Guidelines section 15301 defines Class 1 exemptions to include certain additions of less than 2,500 square feet to existing structures and the demolition of certain residential structures that contain less than six dwelling units. (Guidelines, § 15301, subds. (e) & (*l*).) A Class 32 exemption applies to certain infill development projects. (Guidelines, § 15332.)

Council that it could, in an exercise of its discretion under CEQA, make a new inquiry into whether to treat the Flats as an historic resource. Instead, the staff report stated: "CEQA does not define historic resources as only those listed on a register. However, as discussed above, the Subject Building does not fall into any of the non-listed categories in the definition either."

At the May 3, 2005, meeting, the City Council considered the appeal of the environmental findings relating to the applicability of the exemptions. During the meeting, Darrell Unruh of City's planning and development department advised the City Council by reiterating the conclusions of the staff report and stating: "Once the action is taken by the City Council under our historic preservation ordinance, that is the, the answer to the question of whether a property is historic or not. So, from my perspective CEQA does not provide direction that once that action is taken, that action would be second guessed because that authority is placed in the City Council to make that determination."[5]

Subsequently, a councilmember stated his understanding of the advice received by the City Council: "[N]ow my understanding is in the analysis that we're going through

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[5]This advice misstates the law. There is no second-guessing because there are two separate choices. The prior choice of the City Council regarding listing does not prevent that City Council (or a subsequent council) from choosing differently when addressing whether the property is an historic resource for purposes of CEQA. The advice would have been legally accurate had it stated: "Once the City Council denies an application under our historic preservation ordinance, that only answers the question whether the property is presumed to be historic. So, from my perspective, once a listing application is denied, CEQA authorizes a lead agency to make a new determination regarding whether a property is historic or not. The CEQA determination might be the same as the listing determination, but it might be different because of the discretion CEQA gives to a lead agency."

The staff report and Unruh avoided the existence of discretionary authority to consider the issue of historicity further and, thus, the question of how the City Council might choose to exercise its discretion. As a result, the staff report and Unruh were not confronted with the need to discuss the criteria contained in Guidelines section 15064.5, subdivision (a)(3) and were able to avoid making a recommendation about the application of that criteria that contradicted the earlier staff recommendation to City's Historic Preservation Commission.

here today, is that in fact it has been determined from the very beginning of the analysis based on what the Council previously did, is that this is not an historic resource. Therefore it falls outside CEQA."

Later at that meeting, the Council voted four to one[6] to confirm the adoption of the categorical exemption and deny the appeal.

On June 17, 2005, City's planning and development department approved Application S-04-399.

PROCEEDINGS

On June 8, 2005, Valley Advocates filed a verified petition for writ of mandamus and complaint for declaratory and injunctive relief that challenged City's determinations that the Flats were not historical resources for purposes of CEQA and that the project was categorically exempt.

City and City Council filed their answer to the verified petition in December 2005, and Perez filed its answer on January 25, 2006.

On the day of the hearing, May 24, 2006, the superior court issued a minute order denying the petition for writ of mandate as well as the requests for declaratory and injunctive relief, and the superior court directed the City Attorney's office to prepare the written order.

On June 5, 2006, the superior court filed a 10-page written decision that denied Valley Advocate's petition and directed the entry of judgment in favor of City and Perez. Notice of entry of judgment was filed on June 9, 2006.

Valley Advocates filed its notice of appeal on August 3, 2006.

DISCUSSION

Valley Advocates contends that City's environmental review of the proposed project violated CEQA in a number of ways. The violations alleged include the claim

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[6]One councilmember abstained and another was absent.

that City improperly analyzed whether the Flats should be regarded as historical resources for purposes of CEQA. We agree that City committed reversible error in its analysis whether the Flats were historical resources for purposes of CEQA. Because the matter will be remanded for further proceedings, the existence of many of the procedural errors alleged by Valley Advocates need not be decided in this opinion.

I. Background on CEQA's Treatment of Historical Resources

CEQA and the Guidelines define the "environment" to include "objects of historic or aesthetic significance." (§ 21060.5; Guidelines, § 15360.) The fact that an object of historic significance was man-made does not preclude it from being part of the environment protected by CEQA. (Guidelines, § 15360.) "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." (§ 21084.1.) Such a project would require the preparation of an environmental impact report (EIR) or a mitigated negative declaration. (§§ 21151, 21100, 21080, subd. (c)(2), 21064; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904 (*League for Protection of Oakland*).) Further, "[a] categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a[n] historical resource." (Guidelines, § 15300.2, subd. (f).)

Section 21084.1 and its implementing Guidelines establish three analytical categories for use in determining whether an object is an historical resource for purposes of CEQA. (See *League for Protection of Oakland*, *supra*, 52 Cal.App.4th at pp. 906-907 [three categories of historical resources identified as mandatory, presumptive and discretionary].) In this opinion, we will adopt the labels given these three categories in 2 Kostka and Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2006) section 20.109, pages 1060 to 1061—namely, (1) mandatory historical resources, (2) presumptive historical resources and (3) discretionary historical resources.

Our analysis of the issues generated by the question whether City erred in determining that the Flats were not historical resources for purposes of CEQA will proceed category by category, starting with the mandatory historical resources and ending with discretionary historical resources.

II. Mandatory Historical Resources

A. Applicable Text of CEQA and Guidelines

The category of mandatory historical resources is based on the second sentence of section 21084.1, which states: "For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources."

The Guidelines define the scope of the category of mandatory historical resources by adding one limitation to the text of the second sentence of section 21084.1. Specifically, Guidelines section 15064.5, subdivision (a)(1) provides that "the term 'historical resources' shall include … [¶] … [a] resource listed in, or determined to be eligible *by the State Historical Resources Commission*[] for listing in[,] the California Register of Historical Resources (Pub. Res. Code §5024.1, Title 14 CCR, Section 4850 et seq.)." (Italics added.)

B. Contentions of the Parties

Valley Advocates argues that the Flats are mandatory historical resources. Specifically, Valley Advocates contends that "City must consider [the Flats] as an historic resource, pursuant to … section 21084.1 and CEQA Guidelines, section 15064.5, subd. (a)(1)." To support this position, Valley Advocates relies on the following quote taken from page 12 of City's respondent's brief as a complete and accurate statement of law: "'Based upon the above, if substantial evidence demonstrates that a building is on the State Register or ***eligible to be included in the State Register***, the lead agency ***must*** consider the building to be a historic resource.' ([E]mphasis added [by Valley Advocates.])"

Perez, on the other hand, argues that the Flats are not historical resources because "[t]he determination of eligibility rests solely with the California Historical Resources [C]ommission" and no such determination has been made regarding the Flats.

C. Issues

The parties' contentions and Valley Advocates' reliance on the quote from City's brief present two related questions. First, for purposes of the mandatory historical resources category, who determines whether a building is eligible to be included in the state register?[7] Second, what is the role of an appellate court in reviewing that determination?

D. Interpretation of the Guidelines

1. Plain meaning

The plain language of Guidelines section 15064.5, subdivision (a)(1) identifies the entity that makes the determination of eligibility for purposes of the mandatory historical resources category. It refers to a resource "determined to be eligible by the State Historical Resources Commission[] for listing in the California Register of Historical Resources." Valley Advocates provides no analysis of this language and, instead, avoids mentioning it. Nonetheless, the language in the Guidelines is clear and unambiguous. Only the State Historical Resources Commission's determinations of eligibility trigger the mandatory historical resources provision.

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[7] A closely related question was identified but not answered by the court in *League for Protection of Oakland*. In its opinion, the First Appellate District stated that "[w]e do not resolve … whether the mandatory provisions of section 21084.1 may be triggered by a determination of eligibility by local action or must come from the State Historical Resources Commission." (*League for Protection of Oakland*, *supra*, 52 Cal.App.4th at p. 908, fn. 6.) Here we consider the mandatory category as defined by the Guidelines, not the statute alone. The court in *League for Protection of Oakland* did not consider Guidelines section 15064.5 because it was adopted after that decision.

2. Validity of the Guidelines' interpretation

Courts are not required to accept automatically statutory interpretations contained in the Guidelines. Except where the Guidelines are clearly unauthorized or erroneous, however, courts do accord the Guidelines great weight when interpreting CEQA. (*Vineyard Area Citizens for Responsible Growth*, *Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5.)

Just as Valley Advocates' appellate briefing avoids a direct reference to the interpretation of the mandatory historical resource provision set forth in Guidelines section 15064.5, subdivision (a)(1), it also fails to address the more specific question whether that regulatory provision is clearly unauthorized or erroneous.

Based on the lack of any argument to the contrary, we do not reach the questions whether the interpretation of section 21084.1's mandatory historical resource provision set forth in Guidelines section 15064.5, subdivision (a)(1) is inconsistent with the statute (i.e., is unauthorized) or is arbitrary, capricious, irrational or unreasonable (i.e., is clearly erroneous). We explicitly note these questions were not raised and are not decided so that this opinion is not mistaken as precedent on those points. (*DCM Partners v. Smith* (1991) 228 Cal.App.3d 729, 739 ["a case does not stand for a proposition neither discussed nor analyzed"].)

E. Application of Interpretation in Guidelines

Whether the Flats have been "determined to be eligible for listing in[] the California Register of Historical Resources" (§ 21084.1) by the State Historical Resources Commission is a factual question.

The record on appeal contains no evidence that the State Historical Resources Commission listed the Flats or determined that the Flats were eligible for listing on the state register. The record does contain evidence to the contrary. Darrell Unruh of City's planning and development department testified at the May 3, 2005, meeting of the City

Council that "the subject building is not on a state register [and] has not been found to be eligible for a state register by the State Historic Preservation Commission .…"

Based on the contents of the record and our role as a court of review, we must conclude that the evidence contained in the record is insufficient to support a determination that the Flats are mandatory historical resources for purposes of CEQA. This conclusion stands regardless of the standard of review applied. Therefore, we do not decide the question of the standard of review applicable to City's finding that the State Historical Resources Commission made no determination of eligibility regarding the Flats. (See *DCM Partners v. Smith*, *supra*, 228 Cal.App.3d at p. 739.)

III. Presumptive Historical Resources

A. Applicable Text of CEQA and Guidelines

The category of presumptive historical resources is created by the third sentence of section 21084.1, which states:

> "Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1, or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1, are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant."

The Guidelines reiterate this definition by stating that "the term 'historical resources' shall include … [¶] … [a] resource included in a local register of historical resources, as defined in section 5020.1(k) of the Public Resources Code or identified as significant in an historical resource survey meeting the requirements of section 5024.1(g) of the Public Resources Code, shall be presumed to be historically or culturally significant. Public agencies must treat any such resource as significant unless the preponderance of evidence demonstrates that it is not historically or culturally significant." (Guidelines, § 15064.5, subd. (a)(2).)

Under these provisions, there are two types of presumptive historical resources. The first type is a resource included in a local register of historic resources. A "local

register of historic resources" is defined as a "list of properties officially designated or recognized as historically significant by a local government pursuant to a local ordinance or resolution." (§ 5020.1, subd. (k).) The second type of presumptive historical resource is a resource identified as significant in certain surveys of historical resources. (§ 5024.1, subd. (g).) The historical resource survey must meet all four of the criteria set forth in section 5024.1, subdivision (g).[8]

B. Application to Facts of this Case

We first note that Valley Advocates has not argued explicitly that the presumptive historical resource category applies to the Flats. We address this category to place our discussion of the first and third categories in their proper context and because of some ambiguity in the way Valley Advocates has presented certain of its arguments.

1. Local register

First, it is undisputed that the Flats have not been included in a local register of historical resources. Therefore, regardless of the standard of review, we can reach only one conclusion—the Flats do not qualify as the first type of presumptive historical resource.

2. Historical resource survey

Second, Valley Advocates does not argue that the Flats are identified as significant in a survey that meets the statutory criteria set forth in paragraphs (1) through (4) of section 5024.1, subdivision (g). Nonetheless, Valley Advocates has made certain

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[8]The statutory criteria are as follows: "(1) The survey has been or will be included in the State Historic Resources Inventory. [¶] (2) The survey and the survey documentation were prepared in accordance with office procedures and requirements. [¶] (3) The resource is evaluated and determined by the office to have a significance rating of Category 1 to 5 on DPR Form 523. [¶] (4) If the survey is five or more years old at the time of its nomination for inclusion in the California Register, the survey is updated to identify historical resources which have become eligible or ineligible due to changed circumstances or further documentation and those which have been demolished or altered in a manner that substantially diminishes the significance of the resource." (§ 5024.1, subd. (g).)

arguments that reference the 1994 Powell Historic Building Survey, Historic Resources Survey.[9]

We have located, and Valley Advocates has cited, no evidence that establishes or supports a reasonable inference that the Flats were identified as significant in a survey meeting all four of the statutory criteria. For instance, the 1994 survey is more than five years old, and there is no evidence that it has been updated in accordance with section 5024.1, subdivision (g)(4).

Based on the foregoing and regardless of the standard of review, the only conclusion that can be reached under the record presented is that the Flats do not qualify as the second type of presumptive historical resource.

IV. Discretionary Historical Resources

A. Text of CEQA

The category of discretionary historical resources is derived from a combination of the second sentence and the last sentence of section 21084.1.

The text of the second sentence of section 21084.1 states: "For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources."[10]

The last sentence of section 21084.1 states:

> "The fact that a resource 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 historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section."

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[9]Valley Advocates also refers to this survey as the Ratkovich Plan survey.

[10]This sentence was discussed in part II.A, *ante*, in connection with the mandatory historical resources category.

The last sentence of section 21084.1 is phrased in terms of what a lead agency is not precluded from doing. This phrasing, as well as the lack of a reference to the lead agency in the second sentence of section 21084.1, creates ambiguity as to (1) what, if anything, a lead agency is required to do (i.e., its affirmative obligations)[11] and (2) the extent of its discretionary authority. The provisions of CEQA do not address these ambiguities either in section 21084.1 or elsewhere.

B. Provisions in the Guidelines

The Guidelines do address some aspects of these ambiguities, but do not resolve them fully.

1. Guidelines section 15064.5, subdivision (a)(4)

Guidelines section 15064.5, subdivision (a)(4) tracks the language in the last sentence of section 21084.1 with only a few specific differences.[12] The differences between the statutory language and Guidelines section 15064.5, subdivision (a)(4) do not resolve the ambiguities in section 21084.1 regarding the discretionary historical resources category that are relevant to this appeal. Consequently, we need not discuss those differences further.

For purposes of this opinion, it is enough to note that these provisions are consistent with the conclusion that a lead agency has some discretionary authority when determining whether a building is an historical resource.

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[11]When an agency does not fulfill an affirmative obligation, it fails to lawfully exercise its discretion. In other words, “the agency has not proceeded in a manner required by law.” (§ 21168.5.)

[12]Guidelines section 15064.5, subdivision (a)(4) provides: “The fact that a resource is not [a mandatory historical resource or a presumptive historical resource] *does* not preclude a lead agency from determining *that* the resource may be an historical resource *as defined in Public Resources Code sections 5020.1(j) or 5024.1*.” (Italics added.) The italicized words indicate changes from the statutory text. “Does” replaced “shall,” “that” replaced “whether” and “as defined in … section 5020.1(j) or 5024.1” replaced “for purposes of this section.”

2. Guidelines section 15064.5, subdivision (a)(3)

Guidelines section 15064.5, subdivision (a)(3)[13] addresses aspects of a lead agency's discretionary authority in two ways. First, it limits what the lead agency is allowed to do. Second, it appears to impose an affirmative obligation on the lead agency.

The limitation is stated at the beginning of Guidelines section 15064.5, subdivision (a)(3): "Any object [or] building … which a lead agency determines to be historically significant … may be considered to be an historical resource, provided the lead agency's determination is supported by substantial evidence in light of the whole record." The Guidelines use the word "may" to identify discretionary authority. (Guidelines, § 15005, subd. (c); see § 15 ["may" defined].) Thus, Guidelines section 15064.5, subdivision (a)(3) confirms the lead agency's discretion to treat an object or building as an historical resource for purposes of CEQA and limits that discretion to situations where substantial evidence supports the lead agency's determination of historical significance.[14]

The second sentence of Guidelines section 15064.5, subdivision (a)(3) contains the following mandatory language: "Generally, a resource *shall* be considered by the lead agency to be 'historically significant' if the resource meets the criteria for listing on the California Register of Historical Resources …."[15] (Italics added.) The word "shall"

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[13]City has not discussed how the provisions in Guidelines section 15064.5, subdivision (a)(3) affect a lead agency's consideration of the discretionary historical resources category. Instead, City adopted a four-category approach to historic resources and treated Guidelines section 15064.5, subdivision (a)(3) as pertaining to the first category. (See generally Remy et al., Guide CEQA (11th ed. 2006) pp. 223-226 [four categories of historical resources].)

[14]In contrast to this explicit limitation, the Guidelines do not address the level of evidence, if any, that must support the opposite determination—namely, that the object or building is *not* historically significant.

[15]This mandatory language appears to be derived from the second sentence of section 21084.1.

is used in the Guidelines to identify "a mandatory element which all public agencies are required to follow." (Guidelines, § 15005, subd. (a).)

3. Discretionary authority

The provisions in section 21084.1 and Guidelines section 15064.5 make clear that lead agencies have discretionary authority to determine that buildings that have been denied listing or simply have not been listed on a local register are nonetheless historical resources for purposes of CEQA.

The exact scope of that discretion is not clear. City contends that a lead agency may elect, in an exercise of discretion, to either consider the question of a building's historicity for purposes of CEQA or avoid the question entirely. In contrast, the statute and regulations also could be interpreted to mean a lead agency has a legal duty to (1) consider the question of a building's historicity for purposes of CEQA and (2) apply the criteria in Guidelines section 15064.5, subdivision (a)(3)(A) through (D) when making its determination (see 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 20.109, p. 1063). Under this interpretation, so long as these two duties are fulfilled, the ultimate determination is committed to the lead agency's discretion.

For reasons stated later in this opinion (see part IV.E., *post*), we do not address the scope of the discretion granted to lead agencies. We go only so far as to interpret Guidelines section 15064.5 to mean that, at a minimum, a lead agency has the discretion to address separately whether an object or building is an historical resource for purposes of CEQA's discretionary historical resources category. This discretion exists notwithstanding previous decisions not to list the object or building on the local register of historical resources.

C. Application of Interpretation to Facts of this Case

The May 3, 2005, staff report that recommended the City Council affirm the issuance of the categorical exemption for the project addressed whether the

administrative record contained substantial evidence that the Flats were an historic resource:

> "The Subject Building is not a 'historic resource' under CEQA because it does not fall into any of the categories within the definition of 'historic resource' in CEQA. That is, the Subject Building is not on a State register, it has not been found to be eligible for a State register by the State Historic Preservation Commission, it is not on a local register, *and Council has not treated nor chosen to treat the building as historical*." (Italics added.)

Darrell Unruh of City's planning and development department advised the City Council at its May 3, 2005, meeting that "[o]nce the action is taken by the City Council under our historic preservation ordinance, that is the, the answer to the question of whether a property is historic or not. So, from my perspective CEQA does not provide direction that once that action is taken, that action would be second guessed because that authority is placed in the City Council to make that determination."

The staff report, Unruh's advice, and a statement made by an attorney from the city attorney's office misinformed the City Council about its discretion. The City Council was not told that it had a choice to make at the May 3, 2005, hearing. It was told that it already had determined the Flats were not historical resources and that the previous determination answered whether the Flats were historic resources or not.

Instead, the City Council should have been informed of the following. First, its prior determination to deny the listing application meant that the Flats did not qualify for CEQA's presumptive historical resource category.[16] Second, a listing determination and a CEQA determination are not the same thing. Third, at a minimum, the City Council had a discretionary election to make at the May 3, 2005, hearing. Specifically, it could

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[16]The prior determination not to list cannot be interpreted as both a listing determination and a CEQA determination. Statements made by the city attorney and members of the City Council at the February 15, 2005, meeting establish that, at that meeting, the City Council only considered the listing determination and excluded resolving any CEQA issues. (See fn. 2, ante.).

elect to separately consider whether the Flats were an historical resource for purposes of CEQA's discretionary historical resources category.

Because the City Council was misinformed about its discretion to make such an election, it follows that the City Council did not, in fact, exercise its discretion and make such an election. Further, the transcript of the May 3, 2005, City Council meeting shows that City did not in fact perform a separate analysis under the discretionary historical resource category to determine whether the Flats qualified as historical resources. Instead, City ended its inquiry once it determined that the Flats did not qualify as either mandatory historical resources or presumptive historical resources.

Next, we must decide whether this informational error resulted in a prejudicial abuse of discretion.

D. Prejudice

1. Contentions of the parties

Perez contends, among other things, that Valley Advocates has "shown no prejudice to their interests or the interests of the public by the manner in which this project was approved."

City appears to argue that the criteria for listing in the local register includes the same criteria for listing on the state register and, therefore, remanding this matter for consideration of the same criteria in a slightly different context will not change the decision to allow the proposed project to go forward without a negative declaration or EIR.

Valley Advocates addresses the issue of prejudice with various arguments. First, Valley Advocates contends "that the 'harmless error' standard is not applied to the environmental review of projects on appeal under CEQA." Second, Valley Advocates contends that the results of the environmental evaluation would have been different had City (1) fulfilled its obligation to consider whether the Flats qualified as historic resources under the discretionary historical resources category and (2) applied the fair

argument standard to the evidence. Third, Valley Advocates contends that substantial evidence does not support the City Council's determination that the Flats should not be listed in the local register.

2. Informational errors

In some contexts presented under CEQA, a prejudicial abuse of discretion occurs when the absence of relevant information precludes informed decisionmaking by the public agency. (E.g., *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 653.)

This case involves something more than the simple absence of relevant information. Here, the relevant information was absent and incorrect information was provided in its place. Specifically, the City Council was misinformed about the legal effect of its prior denial of the listing application. As a result, the City Council did not have the correct information regarding its authority under CEQA to make a new, discretionary determination concerning whether the Flats were historic resources.

In other contexts involving the exercise of discretion, this court has applied the general principle that a lawful exercise of discretion is predicated upon the decisionmaker's knowledge and consideration of the applicable legal principles. (*Oldham v. California Capital Fund, Inc.* (2003) 109 Cal.App.4th 421, 430.) This general principle and CEQA's policy of promoting informed decisionmaking lead to the conclusion that a prejudicial abuse of discretion occurs when a public agency is misinformed regarding its discretionary authority and, as a result, does not actually choose whether to exercise that discretionary authority.

Accordingly, we conclude that the City Council prejudicially abused its discretion by failing to proceed in a manner required by law.

E. Scope of Discretion

As observed in part IV.B.3, *ante*, the exact scope of the discretionary authority granted to lead agencies under section 21084.1 and Guidelines section 15064.5 is not clear.

We will not attempt to define the parameters of that which must be done for the lawful exercise of this discretionary authority. In particular, we will not decide if this discretion is best characterized as (1) a discretionary election to consider whether a building is an historic resource or (2) a mandatory duty to address and answer that question by determining, in the exercise of discretion, whether the building meets one of the definitions of historic resource acknowledged in the Guidelines.

The reason we do not address this legal issue is because we will not presume that the City Council will proceed in a manner that raises the issue. Nor will we presume that the project proponent will urge that such a course be taken. Rather, the more likely result is that on remand the City Council will hold another hearing at which it (1) acknowledges its discretion to consider whether the Flats are an historic resource for purposes of CEQA, (2) expressly elects to exercise that discretion by considering the issue, (3) evaluates the issue by, among other things, applying the criteria set forth in subdivision (a)(3) of Guidelines section 15064.5, and (4) reaches a discretionary determination that the Flats are, or are not, an historic resource.

Furthermore, the issue of the scope of the discretion has not been briefed in the detail given to other issues raised in this appeal. For instance, the fundamental question whether the Guidelines comport with section 21084.1 was not addressed. Also, the existence and resolution of ambiguities in the following regulatory language were not analyzed: "Generally, a resource shall be considered by the lead agency to be 'historically significant' if the resource meets the criteria for listing on the California Register of Historical Resources …." (Guidelines, § 15064.5, subd. (a)(3).) For example, the modification of the word "shall" with the word "generally" creates

ambiguity. Does this combination create a more stringent standard, or more lenient standard, than that created by the word "should"? (See Guidelines, § 15005, subd. (b) [definition of "should"].) Does the word "generally" imply the existence of exceptions that apply only in particular circumstances and, if so, what are those circumstances?

F. Relief Granted

City's noncompliance with CEQA will result in this case being remanded to the superior court with directions to issue a writ of mandate that directs City and the City Council to (1) set aside the approval of the site plan review Application S-04-399, (2) set aside the findings that the proposed project is categorically exempt, and (3) conduct a preliminary review that considers the application of the discretionary historical resources category to the Flats in accordance with the views expressed in this opinion. (See § 21168.9 [orders for noncompliance].)

V. Collateral Attack on Listing Determination

Both City and Perez argue that Valley Advocates should be barred from attacking City Council's decision not to list the Flats in the local register. They cite a case in which the court stated a determination by a city not to designate certain buildings to its local register was immune from collateral attack. (*Citizens for Responsible Development v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 505-506 (*West Hollywood*).) In that case, the designation decision was never challenged and, as a result, had become a final administrative decision by the time the CEQA proceedings were initiated. (*Ibid*.)

We conclude that a proper analysis of this argument regarding immunity from collateral attack must be addressed on a category-by-category basis. Furthermore, when considering the *West Hollywood* decision, one should be aware that it predates the 1998 adoption of Guidelines section 15064.5, which is the regulation that gives further definition to the three categories of historical resources.

Based on our earlier discussion of the mandatory historical resources category, we conclude that the City Council's February 15, 2005, decision to deny the nomination to

list the Flats in the local register is irrelevant to the application of that category to the Flats. Therefore, the argument regarding immunity from collateral attack generates controversy only in its application to the presumptive historical resources category and the discretionary historical resources category.

A. Presumptive Historical Resources

First, we will assume that, for purposes of applying the presumptive historical resources category in this case, Valley Advocates' petition and this appeal attack the City Council's determination not to list the Flats in the local register.

Second, we need not address whether the attack should be characterized as collateral or direct. Regardless of its characterization, we will address the merits of the attack as it relates to the presumptive historical resources category. In short, we will consider whether the City Council erred in failing to list the Flats in the local register.

Third, in addressing this potential error, we will use the substantial evidence test to review the City Council's administrative decision to not list the Flats in the local register. (See *Valenzuela v. State Personnel Bd.* (2007) 153 Cal.App.4th 1179, 1184 [non-CEQA administrative decision reviewed by appellate court applying the substantial evidence test].)

City's historic preservation project manager and City's Historic Preservation Commission took the position that the Flats should be listed in the local register. The contrary position was presented by James Oakes, Perez's architect. Consequently, the question presented is whether the oral and written statements of Oakes regarding the historical significance of the Flats constitute substantial evidence.

Valley Advocates contends that Oakes's statements and opinions that the Flats are not historically significant are not substantial evidence in support of the City Council's denial of the nomination to list the Flats in the local register.

Section 21080, subdivision (e)(2) provides that "[s]ubstantial evidence is not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly

inaccurate or erroneous …." (See Guidelines, § 15384, subd. (a) [definition of "substantial evidence"].) Valley Advocates contends that the testimony of Oakes "constitutes nothing more that unsubstantiated opinion or 'evidence' that is clearly inaccurate or erroneous."

At the February 15, 2005, City Council meeting, Oakes described his experience and credentials and presented his opinion that the Flats were not eligible for listing in the local register. His work as an architect on the proposed project established that he was familiar with the Flats. His credentials and experience demonstrated that he was familiar with the standards for preservation of historical resources in the Fresno area. Thus, we conclude that the evidence is sufficient to establish that Oakes was an expert on the preservation of historic resources and was familiar with the buildings in question. Accordingly, his expert opinion on the application of the subjective criteria in the listing ordinance[17] constitutes substantial evidence supporting the decision not to list the Flats in

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[17]Fresno Municipal Code former section 13-406(a) provides that a building may be designated as an historic resource if the local Historic Preservation Commission and City Council find it meets the following criteria:

"(1) It has been in existence more than fifty years and it possesses integrity of location, design, setting, materials, workmanship, feeling and association, and: [¶] (i) It is associated with events that have made a significant contribution to the broad patterns of our history; or [¶] (ii) It is associated with the lives of persons significant in our past; or [¶] (iii) It embodies the distinctive characteristics of a type, period or method of construction, or represents the work of a master, or possesses high artistic values; or [¶] (iv) It has yielded or may be likely to yield, information important in prehistory or history.

"(2) It has been in existence less than fifty years, it meets the criteria of subdivision (1) of subsection (a) of this section and is of exceptional importance within the appropriate historical context, local, state or national."

Similarly, subdivision (c) of section 5024.1 provides: "A resource may be listed as an historical resource in the California Register if it meets any of the following National Register of Historic Places criteria: [¶] (1) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage. [¶] (2) Is associated with the lives of persons important in our past. [¶] (3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values. [¶] (4) Has yielded, or may be likely to yield, information important in prehistory or history."

the local register. (§ 21080, subd. (e)(1) [substantial evidence includes expert opinion supported by fact].)

In summary, to the extent Valley Advocates' petition and appeal are construed to present a challenge to City Council's administrative decision not to list the Flats in the local register, the challenge must fail because the administrative decision is supported by substantial evidence. It follows that City Council did not err in deciding the Flats were not presumptive historical resources for purposes of CEQA.

B. Discretionary Historical Resources

Prior determinations regarding the listing of a building on a local register are relevant to the presumptive historical resource category, but prior determinations not to list a building or include it in a survey do not control whether the object or building may be treated as an historical resource under CEQA's discretionary historical resource category. (See Guidelines, § 15064.5, subd. (a)(3) & (4).)

Under Fresno Municipal Code former section 13-406, a "building, structure, object or site may be designated as an Historic Resource if it is found by the Commission and Council to meet [certain] criteria ...." The ordinance's use of the words "may be" indicates that, if the building meets the specified criteria, listing is discretionary, not automatic. Thus, a building can qualify for treatment as an historic resource based on the stated criteria and the City Council, in its discretion, may still choose not to list it in the local register.

Accordingly, the decision not to list a building on a local register does not necessarily resolve all factual questions and discretionary aspects of the City Council's inquiry into whether the building is an historical resource for purposes of CEQA's discretionary historical resource category. While overlap between the criteria used to determine historicity in each context exists, the discretionary listing decision is not the same as the decision to treat a building as a discretionary historical resource for purposes of CEQA.

Therefore, a claim that a lead agency erred in applying CEQA's discretionary historical resource category is not a collateral attack on a prior determination not to list an object or building on a local register. As a result, it is possible that an object or building excluded from the presumptive historical resources category by local administrative decisions will be considered an historical resource for purposes of CEQA's discretionary historical resources category.

We conclude that Valley Advocates' CEQA challenges concerning the application of the discretionary historical resources category to the Flats is not the equivalent of a challenge to the City Council's decision not to list the Flats in the local register. Therefore the prior decision not to list the Flats does not operate as a bar to Valley Advocates' claim City Council erred in its application of CEQA's discretionary historical resources category.[18]

VI. Fair Argument Standard

The parties do not agree on the role the fair argument standard plays in determining (1) whether a building is an historical resource or (2) whether an exception to a categorical exemption applies. We address these issues because the parties have raised and briefed them, and the answers will affect the further proceedings conducted by City on remand. (§ 21005, subd. (c).)

The fair argument standard establishes a low threshold that is met when there is substantial evidence in the record supporting a fair argument on the matter in controversy. (*Architectural Heritage Assn. v. County of Monterey* (2004) 122

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[18] We recognize that our analysis of the collateral attack issue differs from the court's analysis in *West Hollywood*, *supra*, 39 Cal.App.4th at pages 505 to 506. One reason for this difference is that Guidelines section 15064.5 had not been adopted at the time of that decision. Consequently, the court did not consider how the collateral attack argument related to the discretionary historical resources category, as it is defined by Guidelines section 15064.5, and its decision cannot be regarded as precedent on that specific point.

Cal.App.4th 1095, 1109-1110 (*County of Monterey*).) Whether the record contains sufficient evidence to support a fair argument is a question of law. (*Ibid*.)

A. Discretionary Historical Resources

Valley Advocates contends that, in accordance with *County of Monterey*, the fair argument standard should govern the determinations made in applying the discretionary historical resources category. City argues the court's approach to the fair argument standard in *County of Monterey* is not good law and the fair argument standard does not apply here because it is inconsistent with the language in section 21084.1 and legislative intent.

We conclude that (1) the circumstances in *County of Monterey* are distinguishable from the circumstances of this appeal, and (2) the fair argument standard is not applicable to the determination whether the Flats qualify as historical resources under the discretionary historical resource category.

In *County of Monterey* the court stated: "In this case, the fair argument standard applies to all three substantive issues—historicity, impact and mitigation—since they all bear on the question of whether an EIR is required." (*County of Monterey*, *supra*, 122 Cal.App.4th at p. 1109, citing *League for Protection of Oakland*, *supra*, 52 Cal.App.4th at p. 905.)

We conclude that the court introduced its statement that the fair argument standard applied with the phrase "[i]n this case" because the facts and circumstances of that case were unusual and critical to its decision to apply the fair argument standard. In other words, the court's statement should not be read to mean that the fair argument standard always, or even generally, applies to the question whether a building or object is an historic resource under the discretionary historical resource category.

The court's statement in *County of Monterey* must be viewed in context. Part of that context is created by the arguments actually presented by the parties. Because both parties adopted the fair argument standard in presenting their positions to the court, the

court was not asked to decide whether a different standard applied. For example, the county took the position that "the record does not contain substantial evidence supporting a fair argument that the Old Jail is historic …." (*County of Monterey*, *supra*, 122 Cal.App.4th at p. 1108.)

In contrast, the parties in this case clearly dispute whether the fair argument standard should apply. Unlike the lead agency in *County of Monterey*, City is not contending that an earlier determination *lacks* sufficient evidentiary support. Instead, City argues that the evidence, viewed under the substantial evidence test, adequately supports its determination that the Flats did not meet the criteria for being an historic resource.

As a result, the statement in *County of Monterey* regarding the application of the fair argument standard to the question of historicity is not controlling in this case.

Furthermore, we conclude that a lead agency is not required to employ the fair argument standard when determining whether a building qualifies as an historical resource under CEQA's discretionary historical resources category.

First, use of the fair argument standard would be inconsistent with the concept of a discretionary historical resources category because the fair argument standard presents a question of law. As a question of law, the presentation of substantial evidence supporting a fair argument would decide the matter and there would be no need to exercise discretion by weighing evidence or competing interests or values.

Second, if the fair argument standard were applied under the discretionary historical resources category, the exception to the presumptive historical resources category would be negated and the presumptive historical category would be swallowed by the discretionary historical resources category. Under the presumptive historical resources category, objects or buildings listed on a local register or included in a qualifying survey are presumed to be historical resources "unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant."

(§ 21084.1.) Even where a preponderance of the evidence demonstrates the resource is not historically significant, the mere listing in the local register or inclusion in a qualified survey would be substantial evidence that meets the low threshold inherent in the fair argument standard. Consequently, we cannot interpret section 21084.1 to require the use of the fair argument standard in connection with the discretionary historical resources category because that interpretation would negate another provision in section 21084.1. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [statutory interpretation that renders related provision nugatory must be avoided].)

Accordingly, on remand, when City is determining whether one or both of the Flats is an historical resource for purposes of CEQA's discretionary historical resources category, it need not apply the fair argument standard when making its determinations.

B. Exceptions to CEQA Exemptions

Valley Advocates also contends that the fair argument standard applies to the question whether the Flats are historic resources for purposes of applying exceptions to the categorical exemptions.

In *Banker's Hill*, *Hillcrest*, *Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249 (*Banker's Hill*), the court concluded "that an agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances." (*Id*. at p. 264.) Guidelines section 15300.2, subdivision (c) states a blanket exception to CEQA's categorical exemptions. (*Banker's Hill*, at p. 260.)

In *Banker's Hill*, the court did not address whether any objects or buildings should be considered to be within the scope of protected environment because they were historic resources. That case is not authority for the proposition that, when considering the exception contained in Guidelines section 15300.2, subdivision (c), the fair argument standard is applied to determine the scope of the protected environment. Furthermore,

we have not located or been directed by the parties to any authority adopting or rejecting the view that a project opponent need only present a fair argument that a building is an historic resource when applying Guidelines section 15300.2, subdivision (c).

We conclude that the fair argument standard does not apply to the question whether a building is an historical resource when that question is raised in the context of exceptions to the categorical exemptions. Adopting the fair argument standard in this context would be inconsistent with our earlier conclusion that the fair argument standard does not apply when determining whether to consider a building an historical resource for purposes of the discretionary historical resources category.

With respect to other aspects of determining whether an exception to an exemption applies, we confirm our statement in an earlier published decision that the project opponent, not the lead agency, has "the burden of producing substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the [project] from the categorically exempt class. (See *Davidon Homes v. City of San Jose* [(1997)] 54 Cal.App.4th [106,] 115; see also Guidelines, § 15300.2, subd. (c).)" (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 476.) In other words, the fair argument standard applies to the other determinations that are necessary to apply Guidelines section 15300.2, subdivision (c). This also is the view taken by the court in *Banker's Hill* when it addressed whether there was a reasonable possibility of a significant effect on the environment due to any of the purported unusual circumstances. (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278.)

VII. Procedural Violations of CEQA[*]

Valley Advocates has alleged City committed a number of procedural errors in its handling of Application S-04-399 and its reliance on the categorical exemptions. Because this matter will be remanded for City to conduct a further preliminary review,

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[*]See footnote, *ante*, page 1.

some of the procedural errors are no longer relevant—that is, they will not be a source of controversy on remand. We will decide those procedural errors that may create disputes on remand.

A. Contentions of the Parties Regarding Time Limits

Valley Advocates contends that City violated the requirements of CEQA by accepting Application S-04-399 and failing to timely complete an environmental analysis *before* the listing nomination was presented to the City Council. Also, Valley Advocates contends that City failed to finish its preliminary review within the required 30-day period.

On remand, City will undertake another preliminary review. Therefore, it is not necessary for this court to address whether the earlier preliminary review violated any time limits, whether those time limits were mandatory or advisory, or whether the violation of a mandatory time limit was prejudicial.

B. Fresno Municipal Code Former Section 13-412

Valley Advocates contends that City violated Fresno Municipal Code former section 13-412 by not performing an environmental review and presenting it to the Historic Preservation Commission before its December 13, 2004, meeting or to the City Council before its consideration of the designation of the Flats. In particular, Valley Advocates relies on subdivisions (c) and (f) of Fresno Municipal Code former section 13-412, which provide:

> "(c) Any application or proposal which proposes the substantial alteration of an Historic Resource shall also be referred to the Director of the Development Department for environmental review. No hearing shall be held by the Commission for applications or proposals to demolish, grade, remove or substantially alter the Historic Resource until such application or proposal has undergone environmental review in accordance with [CEQA]. [¶] … [¶]
>
> "(f) Upon completion of any required environmental review and thirty (30) calendar days prior to a scheduled hearing, the owner or applicant shall provide whatever detailed information (plans, drawings,

> agreements, etc.) is required or necessary to describe the intended work. The Specialist may require additional information determined to be necessary for the Commission to act on the matter. The Specialist shall refer the matter to the Commission with a report and recommendation which is accompanied by the final environmental document."

Fresno Municipal Code former section 13-402, subdivision (*o*) defines "Historic Resource" to include any building or structure that meets certain criteria "and has been designated as such by the Council pursuant to the provisions of this article."

The Flats do not meet this definition of historic resource because they have not been designated as historic resources by the City Council. Therefore, the provisions in Fresno Municipal Code former section 13-412 will not apply to the preliminary review conducted by City on remand.

C. Local Implementation of CEQA Required by Guidelines Section 15022

1. Alleged failures to comply

Valley Advocates contends that City violated the implementation provisions of Guidelines section 15022, subdivision (a), which states:

> "Each public agency shall adopt objectives, criteria, and specific procedures consistent with CEQA and these Guidelines for administering its responsibilities under CEQA, including the orderly evaluation of projects and preparation of environmental documents.…"[19]

Valley Advocates contends that City failed to adopt "specific procedures" required by Guidelines section 15022, subdivision (a) because the ordinance does not address procedures regarding (1) the suspension, termination, or abandonment of the environmental review of a project application, (2) the review of environmental effects to

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[19]Guidelines section 15022 is derived from Public Resources Code section 21082, the first sentence of which provides: "All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports and negative declarations pursuant to [CEQA]."

historic resources, and (3) notice to the public regarding how to proceed following the refusal to list or designate historic resources in the local register of historic resources.

2. City's implementing ordinances

The Environmental Quality Ordinance of the City of Fresno is set forth in former sections 12-501 through 12-506, inclusive, of the Fresno Municipal Code. The text of these sections fills about one full page of the administrative record.

Fresno Municipal Code former section 12-503, which is titled "Review of Projects," states in full: "Review and appeals under [CEQA] shall be integrated with the planning and environmental review procedures otherwise required by law or City ordinance. All procedures shall, to the maximum feasible extent, run concurrently, rather than consecutively."

Fresno Municipal Code former section 12-502 states in full: "**INCORPORATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**. The California Environmental Quality Act, … Section 21000 et seq., as amended, applies to all discretionary actions of the City of Fresno." City's environmental quality ordinance contains no provision that, in accordance with Guidelines section 15022, subdivision (d), expressly adopts *the Guidelines* through incorporation by reference.

Fresno Municipal Code former section 13-412, which is quoted *ante*, demonstrates how City has integrated environmental review into the review process for permits affecting a resource designated as historic by City.

3. Analysis of alleged failures to comply

First, Valley Advocates argues that City has failed to adopt implementing procedures regarding the review of environmental effects to historic resources. In making this argument, Valley Advocates has not addressed Fresno Municipal Code former section 13-412 and explained why the procedures contained in that section are insufficient to comply with Guidelines section 15022. Thus, in the absence of such an

explanation, we cannot conclude that City violated Guidelines section 15022 in this regard.

Second, Valley Advocates argues that City did not adopt procedures regarding the suspension, termination or abandonment of the environmental review of a project application. It is unlikely that the preliminary review conducted on remand will be suspended, terminated or abandoned.[20] Therefore, we need not address this specific issue in this appeal.

Third, Valley Advocates argues that City failed to adopt procedures for notifying the public regarding how to proceed following the denial of a nomination to designate or list a resource in the local register of historic resources. This type of public notice is not among the 13 topics listed in Guidelines section 15022, subdivision (a). Nor has Valley Advocates cited any authority that has interpreted the Guidelines to require public agencies to adopt such a notice provision. Finally, the Legislature has stated clearly that courts shall not add to the explicit requirements of CEQA and the Guidelines by determining implicit requirements exist. Section 21083.1, provides:

> "It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA] or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the state guidelines."

Consequently, we cannot interpret Guidelines section 15022 as implicitly requiring City to (1) adopt a resolution or ordinance providing for notice of the type urged by Valley Advocates or (2) give such a notice in connection with the preliminary review that it conducts on remand.

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[20]We note that subdivision (a) of Guidelines section 15022 states that the "implementing procedures should contain at least provisions for" 13 separately listed topics. These 13 topics do not include provisions for the suspension, termination or abandonment of the environmental review of a project application.

In summary, the alleged failures to comply with Guidelines section 15022 do not merit this court imposing specific procedures on how City conducts the preliminary review on remand.

D. Duty to Notify Under Guidelines Section 15201

1. Valley Advocates' contentions

Valley Advocates contends that City was required to publicly disclose the affect the denial of the listing nomination would have on the environmental review it conducted under CEQA. According to Valley Advocates, Guidelines section 15201 is the source of this duty to publicly disclose, which is essential for meaningful public participation. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 [informed self-government is a purpose of CEQA, which requires the public and officials to be informed *before* decisions with environmental consequences are made].) Guidelines section 15201 provides in full:

> "Public participation is an essential part of the CEQA process. Each public agency *should* include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities. Such procedures *should* include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency." (Italics added.)

In effect, Valley Advocates requests this court to determine that the provisions of Guidelines section 15201 contain, by implication, a specific duty of public disclosure relating to listing nominations.

2. Analysis

Our analysis of Valley Advocates' interpretation of Guidelines section 15201 requires the consideration of Guidelines section 15005, subdivision (b), which defines the

meaning of the term "should" and section 21083.1, which was adopted by the Legislature in 1993.[21]

First, the Guidelines indicate that the word "should" is advisory, not mandatory.[22] Consequently, the use of the word "should" in Guidelines section 15201 weakens the argument that its language must be interpreted to create a *mandatory* duty to disclose in this specific situation.

Second, as discussed earlier, section 21083.1 prohibits courts from creating procedural requirements, such as a notice requirement, that is not specified in CEQA or the Guidelines.

Therefore, we conclude that CEQA and the Guidelines do not require, either expressly or by implication, City to notify the public that its consideration of a listing nomination concerning a potential historic resource may have consequences that affect the application of CEQA to that potential historic resource.

E. Subdivision (e) of Section 21177

1. Valley Advocates' contention

Valley Advocates also contends that section 21177, subdivision (e) required notice to the public during the administrative review conducted by the Historic Preservation Commission and the City Council.

2. Analysis of section 21177

Section 21177 limits what issues may be raised in a CEQA petition and who has standing to pursue those issues in court. Subdivision (a) of section 21177 sets forth the

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[21]Statutes 1993, chapter 1070, section 2. We note the timing of the enactment of section 21083.1 because it was adopted after section 21084.1 was added to CEQA.

[22]Guidelines section 15005 provides: "(b) 'Should' identifies guidance provided by the Secretary for Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are advised to follow this guidance in the absence of compelling, countervailing considerations."

general rule that a violation of CEQA may be raised in court only if the plaintiff or someone else raised the same issue before the agency in the administrative proceedings. (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 711.) Subdivision (b) of section 21177 sets forth the general rule that a CEQA plaintiff must have raised *some* objection before the agency. If a plaintiff has, then it may litigate any issue raised before the agency by anyone. (*Woodward Park Homeowners Assn., Inc. v. City of Fresno*, *supra*, at p. 711.)

Subdivision (e) of section 21177 contains an exception to the foregoing requirements: "This section does not apply to any alleged grounds for noncompliance with [CEQA] … if the public agency failed to give the notice required by law."

The plain language of subdivision (e) of section 21177 indicates that it is not, by itself, the source of a notice requirement. It only refers to "notice required by law." Thus, section 21177 cannot be construed to require City to notify the public that (1) City is considering a listing nomination for a potential historic resource or (2) City's decision on the listing application might have consequences for purposes of CEQA and what those consequences might be.

F. Conclusion Regarding Notice Requirement

In summary, neither CEQA nor the Guidelines require City to notify the public that it is considering a historic resource listing nomination in connection with its preliminary environmental review of a permit application. Furthermore, the judiciary cannot create such a notice requirement where the statute and regulation are silence. (§ 21083.1.)

In short, to the extent that Valley Advocates believes the procedures followed by City confused or deceived the public, its arguments should be directed to the Legislature. (See *Magan v. County of Kings*, *supra*, 105 Cal.App.4th at p. 477 [the task of rewriting CEQA is for the Legislature, not the judiciary].)

VIII. Segmentation*

Valley Advocates argues that City abused its discretion by improperly segmenting or piecemealing its environmental review of Perez's proposed project. This argument apparently is based on the assertion that City considered the demolition of one of the Flats separately from the addition to Perez's existing office building and the expansion of its parking lot.

Valley Advocates has not developed this argument in its briefs, and the purported segmentation is not readily apparent. For purposes of this appeal, we need not discuss the purported segmentation any further than to note that segmentation should not occur on remand. In short, when City performs a CEQA evaluation of the project on remand, it should consider the demolition of one of the Flats, the construction of an addition to Perez's existing office building, and the expansion of the parking lot as a single CEQA project. (See *Plan for Arcadia*, *Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712 [construction of a shopping center, a parking lot, and improvements to an adjacent street were all part of a single CEQA project].)

IX. Judicial Notice*

City's July 26, 2007, motion to take judicial notice of the legislative history for Assembly Bill No. 2881 (1991-1992 Reg. Sess.) has not been opposed by Valley Advocates or Perez. We conclude the legislative history is relevant to interpreting section 21084.1 and, therefore, grant the motion to take judicial notice. (Evid. Code, §§ 452, subd. (c) & 459.)

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to vacate its order denying the petition for writ of mandate and to enter a new

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*See footnote, *ante*, page 1.

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order that grants the petition for writ of mandate and directs City to (1) set aside its approval of the site plan review Application S-04-399, (2) set aside its findings that the proposed project is categorically exempt, and (3) conduct a preliminary review that properly considers the discretionary historical resources category.

The superior court shall retain jurisdiction over the proceedings by way of a return to the writ.[23] Appellants shall recover their costs on appeal.

DAWSON, J.

WE CONCUR:

GOMES, Acting P.J.

KANE, J.

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[23]This statutory requirement is set forth in section 21168.9, subdivision (b). (E.g., *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1637 [superior court directed to require public agency to respond to writ by filing a return].)