

Historic Preservation Tools Workshop for San Luis Obispo and San Luis Obispo County and Cities

June 1, 2007

Community Room City-County Library

San Luis Obispo

Co-sponsored by the City of San Luis Obispo and the Office of
Historic Preservation

CEQA is a Process

And the 11th hour approach does not work....

CEQA Act

- Authority is codified in California Public Resources Code (PRC) Statute §§ 21000-21177
 - CEQA Guidelines 14 Cal. Code Regs. § 15000 et. seq
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Four General Principles

- ❑ 1. **Information** : Inform decision makers & public about significant environmental effects of proposed activities
 - ❑ 2. **Identification**: Identify ways that environmental damage can be avoided or significantly reduced
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- **3. Prevention:** Prevent significant, avoidable damage to the environment by requiring changes in projects through use of alternatives or mitigation measures when the agency finds changes to be feasible
 - **4. Disclosure:** Disclose to the public the reasons why an agency approved the project in the manner the agency chose if significant environmental effects are involved (Code § 21001 (d); Guidelines §15002)
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CEQA has a

- ❑ **Substantive** Mandate; it is not just procedural
- ❑ Public agencies **must** deny approval of projects with significant environmental effects if “there are feasible alternatives or mitigations measures” that can substantially lessen or avoid those effects

Enforcement of CEQA

CEQA is a self-executing statute.
What does that mean?

Self-Executing means

- Public agencies are entrusted with compliance of CEQA and its provisions are enforced, as necessary, **by the public** through **litigation** and the threat thereof.
 - Who can/who does sue: private citizens, organizations, and public agencies
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What role does OHP play under CEQA?

OHP is

- ❑ The State's recognized authority on Preservation and for Historical and Cultural Resources
 - ❑ And by definition, is a Commenting Agency
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- ❑ OHP comments under PRC 5024 & PRC 5024.5 on State Projects
 - ❑ OHP comments on Local Government projects: City, County, Special Districts
 - ❑ OHP receives in excess of 14,000 CEQA documents annually from SHC
 - ❑ Commenting Criteria
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- ❑ **BUT** OHP has no state mandate/authority; (only one paid position for CEQA review exists)
 - ❑ OHP does not participate in law suits, but our comment letters in the administrative record carry weight
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CEQA applies to **Discretionary** projects

- ❑ **Project:** any activity which may cause either a direct or indirect physical change in the environment
 - ❑ Whole of the action which has potential in resulting in either “direct” or reasonably foreseeable indirect physical change
 - ❑ Project segmenting is not permitted
(PRS Section 21065; Guidelines 15378(a))
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Brief Overview of CEQA Process

CEQA process begins:

Phase 1: Preliminary Review whether an
Exemption might apply

Phase 2: Initial Study

Phase 3: **EIR** or **ND** or **MND**

Completes CEQA process

CEQA Exemptions

Common Statutory Exemptions

- Ministerial or Emergency Projects

Categorical Exemptions

- 33 Classes created in the CEQA Guidelines

No public review/comment is required for adoption of exemption

Notice of Exemption

- Optional filing starts 35-day statute of limitations
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Categorical Exemption for Historical Resources

- ❑ Class 31, Exemption per **§ 15331**:
 - ❑ Projects must conform to the Secretary of Interior's Standards and are
 - ❑ Limited to repair, rehab, restoration, preservation, reconstruction, maintenance
 - ❑ Section **§ 15300.2**
 - ❑ **But** an Exception precludes use of Class 31 for:
 - ❑ Substantial adverse change in significance of historical resources
 - ❑ Reasonable probability the project will have a significant effect on the environment
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Purpose of Initial Study

- ❑ If Project is not Exempt, then an Initial Study (IS) must be prepared
- ❑ IS Purpose:
 - ❑ Facilitate early environmental assessments
 - ❑ Decide whether to prepare ND, MND, or EIR
 - ❑ IS becomes the supporting decision for ND or EIR
 - ❑ Avoid unnecessary EIRs by mitigating impacts
 - ❑ Focus an EIR on significant effects

Types of Environmental Impacts

- Direct Effects
- Reasonably foreseeable indirect effects
- Growth-inducing effects
- Cumulative effects

Threshold for Preparing EIRs: Fair Argument Standard

**An EIR must be prepared when it
can be:**

- Fairly argued,
- Based on substantial evidence,
- In light of the whole record,
- that a project may have a significant environmental effect.

What is Substantial Evidence?

Substantial Evidence is:

- Facts
- Fact-related reasonable assumptions-predicated on facts
- Expert opinion supported by facts

Substantial Evidence is not:

- Argument
- Speculation
- Unsubstantiated opinion or narrative
- Clearly inaccurate or erroneous information
- Socioeconomic impact not linked to physical environmental impact

Negative Declaration (ND)

- Basis for “Neg. Dec.” (ND):
 - No substantial evidence that project may result in a significant effect
 - Initial study (IS)
 - Supporting reports/studies
 - Other evidence in record
 - Neg Dec is the agency’s finding; the IS supports that finding
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Basis for a Mitigated Negative Declaration (MND)

- Initial Study shows potentially significant impacts, BUT:**
- Revisions in project plans agreed to by applicant before public review would mitigate to below level of significance
- No substantial evidence in record of a significant effect of revised project
- No substantial evidence that mitigation will be inadequate

EIR

- Is required: if Project may have a significant impact on the environment
- EIR must disclose:
 - project description, environmental setting
 - impacts and mitigations
 - direct, indirect, cumulative, growth-inducing
 - Alternatives to project, including no-project

Legal Standard: Good-faith effort at full disclosure; perfection not required

Role of an agency under CEQA:

- Make determination who is lead agency for project
 - Adopt CEQA procedures
 - Adopt procedures which encourage both the public's formal and informal involvement and should be designed to receive and evaluate public comments on environmental issues related to an agency's activities
 - Requires lead agency to make an independent finding
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No approval if significant effect unless findings

- ❑ **Public agency** shall not approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur unless both of the following occur:
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(a)

1. Changes or alterations have been required or incorporated which mitigate or avoid significant effect
 2. Changes or alterations are within jurisdiction of another agency who will adopt them
 3. Specific economic, legal, social, technological or other considerations make mitigation or alternation infeasible
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b. Specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment

The Public's Role in CEQA Process

IS HUGE :

WHY? The law says so.....

CEQA's general principles

- Information : Inform decision makers & **public** about significant environmental effects of proposed activities
 - Disclosure: Disclose to the **public** the reasons why an agency approved the project in the manner the agency chose if significant environmental effects are involved (Code § 21001 (d); Guidelines §15002)
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Public Participation

- ❑ Public involvement essential feature of CEQA (§15201)
 - ❑ Public enjoys a “privileged position” in the CEQA process according to the California Supreme Court (Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Assn., 42 Cal. 3d 929, 936 (1986))
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More on the Public...

- “[A] paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision.” (Mountain Lion Coalition v. California Fish & Game Com., 214 Cal. App. 3d 1043, 1051 (1989))
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Fair Argument Standard & Substantial Evidence

- **Public** can raise at any time of the environmental review process; will become threshold for an EIR

Case law: (Architectural Heritage Association v. County of Monterey (2004) 122 Cal. App. 4th 1095) the Court made clear that the “fair argument “ standard of review applicable to the preparation of an EIR applies to the question of whether a resource is to be treated as historic for purposes of CEQA

In summary:

- ❑ Fair Argument standard applies to the question:
 - ❑ Whether a resource is historic
 - ❑ Whether a project will cause a significant impact to the resource
 - ❑ And also whether mitigation measures can mitigate the impact to a level of insignificance
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- But, a lead agency must make a determination about historical resources on the basis of factual information, but it does not get to **choose** what the historical resources are
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So, how does lead agency determine what is an Historical Resource?

- Historical Resources such as the built environment, historical landscapes, etc.
 - archeological resources
 - unique archeological resources

Two – Part Test

- Lead Agency has to determine whether there is a **significant impact** to an historic resource by a project

Question 1: is resource “historically significant” (§15064.5)

Question 2: would project cause a “substantial adverse change” in its significance

CEQA's definition of an Historical Resource:



- Very broad, very inclusive
 - CEQA Guidelines §15064.5 and PRC 21084.1
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(a) For purposes of this section, the term “historical resources” shall include the following:

- (1) A resource listed in, or determined to be eligible by the State Historical Resources Commission (SHRC), for listing in the California Register of Historical Resources.
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California Register

- Listed in the California Register includes:
 - direct listing by the SHRC;
 - properties listed in the National Register of Historic Places;
 - determined eligible for inclusion in the NR by the Keeper of the NR;
 - determined eligible for inclusion in the NR through the Section 106 process;
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California Register

- determined eligible for inclusion in the NR through the Part 1 of the federal historic preservation tax credit process;
 - California Historical Landmarks beginning with #770; and
 - California Points of Historical Interest and CHL prior to #770 may be on California Register upon action by State Historical Resources Commission
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(a) For purposes of this section, the term “historical resources” shall include the following:

- (2) A resource included in a **local register** of historical resources. . . . or identified as significant in an historical resources **survey**
. . . . 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.**
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Local Designation

- “Local register of historical resources” means a list of properties officially designated or recognized as historically significant by a local government pursuant to a local ordinance or resolution
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Surveys

- A resource identified as significant in an historical resources **survey** may be listed in the California Register if the survey meets all of the following criteria:
 - (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.
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Surveys

- What about surveys that are over 5 years of age?
 - The reference in the CEQA Guidelines is confusing.
 - If a survey is **nominated** to the California Register it must be updated if it is more than 5 years old.
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Surveys

- **However. . .**
 - This does **not** mean that resources identified in an older survey need not be considered “historical resources” for purposes of CEQA.
 - Unless a resource listed in a survey has been demolished, lost substantial integrity, or there is a preponderance of evidence indicating that it is otherwise not eligible for listing, a lead agency should consider the resource to be potentially eligible for the California Register.
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(a) For purposes of this section, the term “historical resources” shall include the following:

- (3) Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California 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. 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.
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(a) For purposes of this section, the term “historical resources” shall include the following:

- (4) 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 identified in an historical resources survey does not preclude a lead agency from determining that the resource may be an historical resource. . . .
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Where and how find information about Historical Resources?

- ❑ The Information Center records search (12 local ICs) for project area/APE
 - ❑ Archival research: any level
 - ❑ Local level: General Plans, City/County surveys, data bases
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So, you have a historical resource...

What then is CEQA's definition of Significant Effect?

- Significant effect on the environment means a **substantial**, or potentially substantial, **adverse change** in any of the **physical** conditions within the area affected by the project including. . . objects of historic or aesthetic significance. (Public Resources Code 21068; CEQA Guidelines §15382)
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CEQA defines adverse change as:

**Physical Demolition,
Destruction, Relocation, or
Alteration** of the resource or its
immediate surroundings such
that the **significance** of the
historical resource would be
materially impaired.

What is Integrity?

Integrity is the authenticity of an historical resource's physical identity evidenced by the survival of characteristics that existed during the resource's period of significance.

Seven aspects: Location, Design,
Setting, Materials, Feeling, Workmanship,
Association

The Significance of a historical resource is materially impaired when a project:

demolishes or materially alters in an adverse manner those physical characteristics of an historical resource that convey its historical significance and that justify its inclusion in, or eligibility for inclusion in the

California Register, Local Register, or its identification in a survey, or demolishes or materially alters in an adverse manner those physical characteristics of an historical resource that convey its historical significance and that justify its eligibility for inclusion in the California register as determined by a lead agency for purposes of CEQA

(§15064.5(b)(1-2)(A-C))

CEQA & Archeological Resources

- “the lead agency must determine whether the project may have a significant effect on archaeological resources”



Figure 8: 2216 Geary Street, Feature 8, upper portion cleared; note strata and surface.



Figure 9: 2216 Geary Street, Feature 8 exposed before interior excavation.

How does CEQA define archeological resources?

- CEQA discusses two types of archeological resources:
 - a “unique archaeological resource”
 - an archeological resource that qualifies as a “historical resource”



What is a “unique archaeological resource”?

An archeological resource that:

- 1) contains information needed to answer important scientific research questions
 - 2) has a special and particular quality such as being the oldest of its type
 - 3) is directly associated with a prehistoric or historic event or person
-

What is an archeological resource that is an “historical resource”?

An archeological resource that is:

- 1) listed or determined eligible for listing on the California Register of Historical Resources
 - 2) listed in a “local register of historical resources”
 - 3) listed in an “historical resource survey”
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How is an archeological resource determined to be an historical resource?

Generally an archeological resource is determined to be an historical resource due to its eligibility for listing to the California Register because of its scientific information value or Criterion D

“Has yielded, or may be likely to yield information important in prehistory and history”

Can an archeological resource be eligible to the CRHR under Criterion other than D?

- Yes. An archeological resource can be eligible to the CRHR under Criterion
 - A association with events that have made a significant contribution to the broad patterns of history
 - B association with the lives of historically important persons
 - C association with the characteristics of type, period, region, or method of construction
-

How to assess whether an archeological resource can yield information important in prehistory and history

- ❑ Archaeological Resource Management Reports. OHP. 1989
 - ❑ Guidelines for Archaeological Research Designs. OHP. 1991

 - ❑ Reports components should include:
 - Objectives
 - Study area or Area of Potential Effect (APE)
 - Prehistoric & historic setting
 - Research design
 - Description of methodology for field investigation
 - Curation arrangements
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Integrity

Integrity = "retains physical characteristics that convey its historical significance" (§ 15064.5 (b))

integrity for archeological resource = (generally) resource sufficiently intact to yield the expected important information

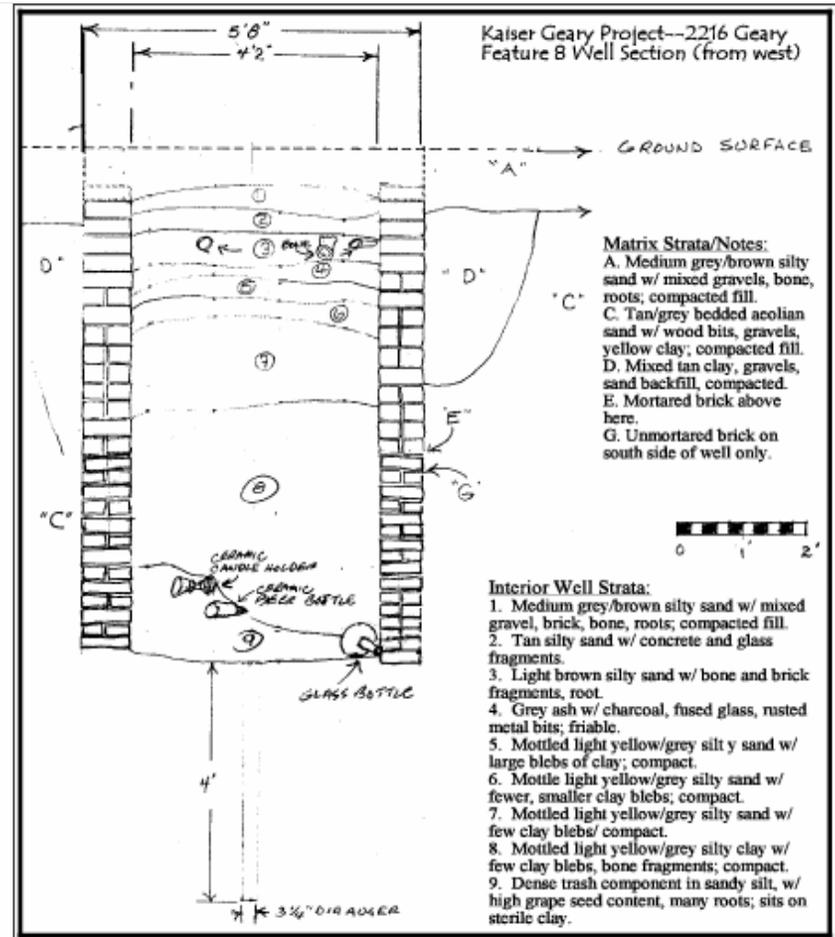


Figure 14: 2216 Geary Street, Feature 8, portion of field drawing, 15 August 1997.

What is the relationship between a unique and historical resource?

“When a project will impact an archaeological site, a lead agency shall first determine whether the site is an historical resource”

(§ 15064.5 (c)(1))



What are adequate efforts to identify an archeological resource?

- ❑ Record search at Information Center
 - ❑ Archival research (historic maps, building, assessor & water connection records, city directories, U.S. Census population, industrial, institutional, agricultural schedules, historic photographs)
 - ❑ Sacred lands search at NAHC, Native American and descendent group contacts
 - ❑ Geotechnical & soil characterization studies
 - ❑ Archeological field survey
 - ❑ Archeological testing program (presence/absence, identification, evaluation)
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What is a significant adverse effect to an archeological resource?

- ❑ The “significance” of the resource must be “materially impaired”
- ❑ “materially impaired” = “demolishes or materially alters in an adverse manner those physical characteristics ...that convey its historical significance that justify its inclusion in” the CRHR or local register of historical resources
- ❑ Generally, for archeological resources,

Significant adverse effect = destruction of scientific data

The 11th hour does not work under CEQA:

- For the public: 7:00 pm city council meeting to vote on project to demolish the adobe to put up a Home Depot and there was no public participation, no record has been established and they call OHP to ask us what we will do.....
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- For the agency: has no legally defensible CEQA document (Cat. Ex. or Archeological report saying we mitigate when we find something as basis for an MND) and is plowing through a major archeological village site with burials; archeologist and/or Native Americans are filing an injunction and are taking agency to court for inadequate CEQA compliance.....
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