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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT SALAMONE, as Trustee, etc., Plaintiff and Appellant, v. THE CITY OF WHITTIER Defendant and Respondent.	B280548 (Los Angeles County Super. Ct. No. VS024876)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian F. Gasdia, Judge. Affirmed.

The Gorman Law Firm and Matthew M. Gorman, for Plaintiff and Appellant.

Jones & Mayer, Gary S. Kranker, for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Robert Salamone, individually and as trustee of the Robert Salamone, Sr. Family Trust (collectively, Salamone), appeals a judgment after court trial in favor of defendant and respondent City of Whittier. Salamone contends the trial court erroneously found no violation of his due process rights after the city failed to issue a demolition permit authorizing him to demolish a house of potential historical significance. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Historic resources under the Whittier Municipal Code

Chapter 18.84 of the Whittier Municipal Code[1] governs historic resources in the city, and it was most recently amended in 2001. The city has a historic resources commission (HRC) with a designated secretary. Don Dooley is a city employee who has acted as the HRC's secretary since 2005. One of Dooley's job duties as HRC secretary is processing communications and applications under Chapter 18.84.

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[1] Further statutory references are to the Whittier Municipal Code unless otherwise specified.

The Nixon House

The building Salamone seeks to demolish (the Nixon House) was built in 1928. It was purchased by former President Richard M. Nixon's parents in 1945 and deeded to President Nixon in 1965. He sold the Nixon House to the Dashwood family in 1976.

The Dashwoods sought a permit to demolish the Nixon House in 2000, but eventually abandoned their efforts. The HRC voted in October 2000 to recommend that the city council place the Nixon House on the Local Official Register of Historic Resources (Local Register). However, in March 2001, the city council voted against placing the Nixon House on the Local Register, in part based on opposition from the Dashwoods.

In 2005, the Dashwoods sold the Nixon House to Salamone, who demolished a one-car garage on the property without first obtaining a permit. After communication from the city, Salamone applied for post-demolition approval, which the city granted. Because the demolition had already taken place, Salamone was not required to obtain an independent evaluation before the city issued a Certificate of Appropriateness under section 18.84.160. The city's approval specified that "Any future addition, modification, or demolition to the remaining [House] shall require the prior review and approval from the Planning Division."

Salamone's request for a demolition permit

In March 2012, Dooley and several city employees met with Salamone and his designer to discuss possible development of the Nixon House. Salamone had already commissioned an evaluation by Charles Fisher (the Fisher Report). The Fisher Report provides a detailed description and history of the property. The report concludes that the Nixon House "does not appear to be significant at the State or National level" but it was determined to be eligible for local listing by the HRC and still meets the requirements for local listing. Dooley informed Salamone that the Fisher report did not meet the city's requirements.

In November 2012, Salamone applied for a Certificate of Appropriateness, seeking to demolish the Nixon House and develop the property as a senior complex. Dooley sent Salamone a notice of incompleteness on December 5, 2012, noting that a historic resource evaluation[2] was necessary

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[2] The city's notice refers to an "independent cultural resource evaluation," but in this opinion, we will identify the required document as a "historic resource evaluation." The notice specified: "The [historic resource evaluation] must be completed by a qualified consultant that meets the *Secretary of the Interior's Professional Qualifications* in history/architectural history, as set forth in Title 36 of the Code of Federal Regulations (CFR), part 61, Appendix 'A.' The independent consultant shall be selected by the City of Whittier (based on three competitive bid requests) with the entire cost of the evaluation borne by the property owner

before the application would be considered complete. Salamone did not appeal the notice of incompleteness even though section 18.84.170 requires any appeal of the secretary's action to be taken within 10 days. (§ 18.84.170(D).)

In April 2013, Salamone filed a Demolition Review Application with a narrower project description, seeking only to demolish the Nixon House. The City acknowledged the permit application, noting that it was already on file as the earlier Certificate of Appropriateness application. In the acknowledgement letter sent June 13, 2013, Dooley informed Salamone that consistent with his obligation to determine whether the structure meets the definition of a "historic resource" under the Whittier Municipal Code and a "historical resource" under the California Environmental Quality Act (CEQA, Pub. Resources Code, § 21000 et seq.),[3] Dooley would need a historic resource evaluation. Salamone responded on June 18, 2013, refusing to provide a historic resource evaluation and insisting that the city issue the demolition permit ministerially.

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and full payment submitted to the City of Whittier prior to the City commissioning the work."

[3] Further references to CEQA shall be to Public Resources Code section 21000 et seq.

Salamone's lawsuit

Salamone brought the instant action against the city in August 2013, alleging violation of his substantive and procedural due process rights on the theory that when the city voted against designating the Nixon House as a historic landmark in March 2001, it was thereafter prevented from applying the historic preservation regulations in Chapter 18.84 to his Demolition Review Application. On demurrer, the trial court dismissed Salamone's claims for administrative mandate, but permitted Salamone to continue with the remaining causes of action.

After a court trial, the court issued a statement of decision in favor of the city. Salamone filed a timely appeal.

DISCUSSION

Salamone contends the trial court erroneously interpreted the definition of a historic resource under the Whittier Municipal Code, and required him to seek a demolition permit under section 18.84.400 when in fact his request is governed by section 18.84.410. He contends the trial court's erroneous statutory construction led it to deny his due process claims. He also argues the trial court denied his due process claims based on an erroneous application of CEQA's definition of a historical resource. We reject each of Salamone's contentions.

Statutory construction

We first review the trial court's interpretation of the Whittier Municipal Code to determine whether Salamone's permit request is subject to section 18.84.400 or 18.84.410.

Questions of statutory construction are subject to a de novo standard of review. (*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 674.) "The construction of a municipal ordinance . . . is governed by the rules governing construction of statutes." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.) Those rules "are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) We consider the words of the ordinance itself, as they are the most reliable indicators of the drafters' purpose. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529.) "[W]hen a term has been expressly defined, we cannot rewrite that definition to mean something other than what has been prescribed." (*Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 269 (*Tower Lane*), citing *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) However, "we construe the language in the context of the regulatory framework as a whole, keeping in mind the nature and purpose of the ordinance in which the language appears, and harmonizing, where possible, separate provisions relating to the same subject. [Citations.] When the intent is unambiguous, the plain meaning controls and

there is no need for construction. [Citations.] Only if the language is unclear will we look to extrinsic aids to determine the drafter's intent. [Citation.]" (*Tower Lane, supra,* at p. 269.) We also keep in mind that "'an agency's view of the meaning and scope of its own [zoning] ordinance is entitled to great weight unless it is clearly erroneous or unauthorized.' [Citation.]" (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193.)

Under Chapter 18.84 of the code, when the owner of a building more than 50 years old seeks a demolition permit, one of two municipal code sections would apply. Section 18.84.400[4] applies to the demolition of a historic resource, and requires the property owner to obtain a certificate of appropriateness under sections 18.84.150 et seq. Section 18.84.410[5] applies to "non-listed, eligible or designated

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[4] The full text of section 18.84.400 reads: "Demolition, wholly or partially, of a historic resource without issuance of a certificate of appropriateness is prohibited unless it is determined that an unsafe or dangerous condition exists, in which case, the secretary shall, upon an assessment and recommendation of the director of building and safety, certify to the commission that such a condition exists and cannot be rectified through the use of the California State Historic Building Code. [¶] In such a case, a certificate of appropriateness shall not be required."

[5] The full text of section 18.84.410 reads: "For non-listed, eligible or designated structures at least fifty years old, the following procedure shall be completed prior to issuance of a demolition permit. [¶] A. The applicant shall

structures at least fifty years old," and it describes a process by which the secretary of the HRC determines whether the structure does or does not qualify for "designation eligibility" before a demolition permit may be issued.

The code defines "historic resource" as "any improvement, historic landmark or district, or other object of cultural, architectural or historical significance to the citizens of the city, the region, the state or the nation, which is designated or eligible for designation and determined to be appropriate for historic preservation by the commission, or by the council upon appeal, pursuant to the provisions of this chapter." (§ 18.84.040(I).)

Salamone argues the court erroneously construed the code's definition of a historic resource to include the Nixon House despite the fact the city had voted against designating it a historic landmark. The city argues that the evidence supported the court's conclusion that the Nixon House fell within the Code's definition of a historic resource.

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submit a request for review to the secretary. [¶] B. The secretary shall determine the potential significance of the structures and make one of the following determinations: [¶] 1. The structure does not qualify for designation eligibility in accordance with the provisions of this chapter; or [¶] 2. The structure does qualify for designation eligibility and the request is forwarded to the commission for majority consent, a determination of eligibility, or nomination, in accordance with the provisions of this chapter."

We conclude the trial court correctly construed the definition of "historic resource" under section 18.84.040(I) to include the Nixon House. The plain language of section 18.84.070 states that historic resources are not just structures that have been designated as historic landmarks, but also those structures that are "eligible for designation."

Salamone argues that the Nixon House is not a historic resource because the city voted in 2001 against placing the Nixon House on the Local Register. This argument is misguided. The city's 2001 vote concerned the structure's placement on a list of historic structures by virtue of its status as a historic *landmark*, not its status as a historic *resource*.[6]

Applying the tenets of statutory construction, the trial court's construction also harmonizes the definition of a historic resource with other sections in the same chapter of the code. The category of structures designated and listed as historic landmarks is a preferred subset of a larger category of historic resources, and the terms "designated" and "eligible for designation" have specific meanings in the overall context of this chapter of the municipal code. Under section 18.84.040(H), a historic landmark is defined as "any singular historic resource that has been designated as such pursuant to this chapter." Section 18.84.070 describes the process by which "[a]ny person or group, including the city,

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[6] The city's vote preceded adoption of the current code, but neither party has argued that the former code provisions were different.

may nominate a historic resource(s) for designation as a historic landmark or district," and section 18.84.050 sets out the criteria under which "[a] historic resource shall be designated a historic landmark." While the city council's vote in 2001 might be determinative on the question of whether the Nixon House is a historic landmark as defined in section 18.84.040(H), it has no impact on the question of whether the Nixon House is a historic resource, as defined in section 18.84.040(I).

Salamone also argues that defining "historic resource" so broadly renders section 18.84.410 superfluous, because almost every structure over 50 years old could be described as "eligible for designation." Not so. Section 18.84.410 expressly applies to "non-listed, eligible, or designated structures at least fifty years old," providing a mechanism for either the secretary or the HRC to determine whether a structure has "designation eligibility" before issuing a demolition permit. A structure of no historic interest or value would not be considered "eligible for designation," and the demolition permit could be issued.

Salamone also argues that under section 18.84.410(B), a demolition permit must be issued ministerially unless the HRC votes to determine the structure's eligibility. Salamone argues that his due process rights were violated when Dooley insisted a certificate of appropriateness was required before the request for a demolition permit could be forwarded to the HRC. Because we conclude that the Nixon House falls within the definition of a historic resource and

therefore section 18.84.400 applies, we do not consider whether a demolition permit must be issued ministerially under section 18.84.410.

Salamone's due process claims

Salamone's arguments on appeal do not distinguish between his procedural and substantive due process claims, but he has not demonstrated the trial court erroneously dismissed either claim.[7] Salamone's due process arguments center around the trial court's determination that his application for a demolition permit would not be complete until he provided a satisfactory historic resource evaluation. Salamone claims that the city's refusal to consider his permit application without a historic resource evaluation is arbitrary and capricious and a violation of his right to due process. We disagree.

"A procedural due process claim possesses two components: first, that an individual has been deprived of a

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[7] We agree with the city that Salamone has waived any error relating to the denial of his claims for injunctive and declaratory relief. (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 746 [appellant waives contentions not raised in the opening brief].) In addition, we reject as forfeited Salamone's attempt to challenge the court's rejection of his original mandamus claims. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179 [issues discussed in the brief but not identified by proper headings are forfeited].)

constitutionally protected liberty or property interest; and second, that this deprivation, while not necessarily unconstitutional in and of itself, was rendered unconstitutional because it was undertaken without according the individual the appropriate hearing." (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1030 (*Galland*), citing *Zinermon v. Burch* (1990) 494 U.S. 113, 133–134). "Due process principles, under both the state and federal Constitutions, require reasonable notice and an opportunity to be heard before the government deprives a citizen of a significant property interest." (*Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 458.)

"A person seeking a benefit provided by the government has a property interest in the benefit for purposes of procedural due process only if the person has 'a legitimate claim of entitlement to it.' [Citation and footnote omitted.]" (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 853 (*Las Lomas*), quoting *Board of Regents v. Roth* (1972) 408 U.S. 564, 569, 577.) An approval that may be granted or denied at an administrative agency's discretion—as determined by reference to state and local law—is *not* a protected property interest under the due process clause unless a plaintiff shows a legitimate claim of entitlement to the approval in question. (*Las Lomas, supra,* at p. 853; *Castle Rock v. Gonzales* (2005) 545 U.S. 748, 756.)

For the actions of an administrative body to trigger a substantive due process violation in the context of a land use determination, the circumstances must be shown to be

particularly egregious. There must be a "deliberate flouting of the law" and the body's demands must be "so excessive and irrelevant to the regulatory task at hand as to lead a court to conclude that such demands were imposed not in order to obtain more information or increase the reliability of the eventual decision, but rather to obstruct or discourage" the applicant. (*Galland, supra,* 24 Cal.4th at p. 1036.) In *Galland,* the California Supreme Court reviewed various cases involving substantive due process claims and initially observed that the case law has "affirmed in a variety of contexts, using a variety of verbal formulations, the principle that the arbitrary government conduct that triggers a substantive due process violation is not ordinary government error but conduct that is in some sense outrageous or egregious—a true abuse of power." (*Id*. at p. 1032.) Recognizing the challenges of applying such a standard to an administrative body charged with implementing a rent control ordinance, it sought a more tailored definition, citing favorably to a federal case in which a series of administrative delays prevented a plaintiff from converting his rental property to a condominium. To show a substantive due process violation, the federal court had reasoned: "'. . . a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities. Only a substantial infringement of state law prompted by personal or group animus, or *a deliberate flouting of the law that trammels significant personal or property rights*, qualifies for relief . . . .

Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress . . . .'" (*Id.* at p. 1034, quoting *Silverman v. Barry* (D.C. Cir. 1988) 845 F.2d 1072, 1080.) The *Galland* court rejected the argument that merely arbitrary or capricious conduct by an administrative body would amount to a denial of substantive due process, but recognized that conduct that could be "characterized as a deliberate flouting of the law" such as a refusal to issue a clearly nondiscretionary permit would suffice. (*Galland, supra*, at pp. 1035–1036.)

Here, the trial court correctly concluded that the evidence presented at trial was not sufficient to prove Salamone's claims for procedural or substantive due process. As discussed earlier, because the Nixon House falls under the definition of a historic resource under section 18.84.040(I), the trial court correctly concluded that the requirements of section 18.84.400 applied. Under that section, Salamone was prohibited from demolishing the Nixon House without obtaining a certificate of appropriateness as outlined in sections 18.84.150, et seq. "No permit shall be issued for work on a historic resource until a certificate of appropriateness or waiver has been issued . . . ." (§ 18.84.150.) Salamone takes issue with the city's policy and practice of requiring a historic resource evaluation as part of a complete application, but the sections governing the processing and issuance of a certificate of appropriateness list the required documents and gives the

HRC secretary authority to determine whether an application is complete. (See §§ 18.84.160 & 18.84.190(B).) The list of required documents includes "[a]ny other information determined to be necessary for review of the proposed work," and Dooley notified Salamone at least twice in writing that his application would not be complete until he provided a historic resource evaluation that met the city's requirements. The city's requirement is reasonably related to its valid interest in preserving historic resources within city boundaries, and we see no basis for Salamone to complain that his due process rights were violated by the requirement.

Salamone relies on *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012 (*Woody's*) to argue that a city's policy and practice can form the basis for a due process violation. *Woody's* is easily distinguishable. In *Woody's*, the city council reversed the planning commission's decision to grant a permit to a local restaurant for dancing and extended hours after a city councilmember appealed the commission's decision. (*Id.* at p. 1017.) The municipal code did not authorize council members to file an appeal, but the city claimed it was permissible under the city's long-standing policy and practice of permitting such appeals. The appellate court held that the restaurant could show a due process violation based on potentially biased decisionmakers on the city council and the absence of express authority for the appeal to the city council. (*Id.* at pp. 1021–1029.) In contrast, the Whittier Municipal Code

expressly permits the secretary to require additional information, and the secretary has authority to determine whether the application is complete. (§§ 18.84.160 & 18.84.190(B).)

The city argues the trial court correctly determined Salamone's due process rights were not violated because the municipal code as written and implemented provided Salamone with the right to a hearing once he had submitted a complete application. There was conflicting evidence on whether Salamone was advised that he had the right to request a hearing before the HRC without a historic resource evaluation (i.e., an incomplete application), but since he never made the request, the court correctly determined his right to a hearing had not been denied.[8]

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[8] There is a plausible argument that Salamone's due process claims are also barred by his failure to exhaust his administrative remedies. (See *Los Globos Corporation v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 632–635 [a plaintiff must seek relief from the relevant administrative body and exhaust his administrative remedies before the courts will act].) The challenge on our facts is that Salamone appears to be caught in administrative limbo. He refused to provide the necessary documentation for a certificate of appropriateness, but the city also refused to formally reject or deny his application. Because we have found that the court correctly denied Salamone's claims, we decline to affirmatively rule on whether he can pursue his claims without exhausting his administrative remedies.

CEQA and historical resources

Salamone also contends the trial court erroneously interpreted and applied CEQA and its implementing Guidelines.[9] He argues that the Nixon House is a discretionary historical resource under CEQA, not a mandatory or presumptive historical resource. Even assuming the court erred in referring to the Nixon House as a presumptive historical resource, Salamone has not persuaded us that the error was prejudicial to his due process claims.

"CEQA and the Guidelines define the 'environment' to include 'objects of historic or aesthetic significance.' ([Pub. Resources Code,] § 21060.5; Guidelines, § 15360.) The fact that an object of historic significance was manmade 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.' ([Pub. Resources Code,] § 21084.1.)" (*Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1051.) A structure's status as a historical resource for purposes of CEQA is either mandatory, presumptive, or discretionary, depending on whether it has been listed in various historical registers. (Pub. Resources Code, § 21084.1; Guidelines, § 15064.5; *Valley Advocates,*

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

supra, at p. 1051.) If a building is included in a local register of historical resources, it is a presumptive historical resource. (*Valley Advocates*, *supra,* at pp. 1054–1058.) If a building of some historical significance has not been included in any list, or even if it has been denied a place on a list, it is still a discretionary historical resource under CEQA. (*Id*. at p. 1060 ["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"].) If a building is a discretionary historical resource, the lead agency has discretion to determine whether to treat the building as a historical resource subject to CEQA or not. The decision must be made at the preliminary review stage, when the agency determines whether a project falls under CEQA and whether a categorical exemption to CEQA applies. (See *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 371.)

Salamone argues that the trial court's erroneous characterization of the Nixon House as a presumptive historical resource, rather than a discretionary historical resource, infringed upon his right to advocate to the HRC that the Nixon House should not be deemed a historical resource under CEQA. We decline to examine whether the court erroneously found the Nixon House to be a presumptive historical resource under CEQA, rather than a discretionary historical resource, because Salamone has not demonstrated that such an error is prejudicial. Absent a

showing that the court's error resulted in a miscarriage of justice, we cannot reverse. (Cal. Const., art. VI, § 13; *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1245 [requiring affirmance even in the face of substantial error, if the judgment is clearly right].)

The only way to view Salamone's complaint as raising a procedural due process claim under CEQA is to consider whether he was entitled to notice and a hearing on whether the Nixon House fell within the CEQA definition of "historical resource." (Pub. Resources Code, § 21084.1.) Salamone does *not* claim that if the Nixon House is a historical resource under CEQA, the proposed demolition is not "a project that may have a significant effect on the environment." (Guidelines, § 15064.5(b).) Salamone's own arguments underscore that the decision of whether the Nixon House was a historical resource under CEQA is a discretionary one. Salamone claims he has a due process right to a hearing before the HRC determines whether the Nixon House is a historical resource under CEQA, insisting that he should be given the chance to argue against such a classification. As we explained earlier in this opinion, when the property interest at stake depends on a discretionary decision, a claim for violation of due process cannot succeed unless the claimant can show legal entitlement to the sought-after decision. Here, the evidence supports the opposite conclusion—the HRC is likely to find the Nixon House is a historical resource. Salamone's own expert, Mr. Fischer, testified that the HRC's October 2000 vote caused

the Property to be deemed a "historical resource" under CEQA. Salamone cannot demonstrate that the trial court's reference to the Nixon House as a presumptive historical resource under CEQA was prejudicial error.

We also reject Salamone's arguments about the prejudicial effect of the city's designated expert's testimony about CEQA. A trial court's decision to permit expert testimony is reviewed for abuse of discretion, and we find none here. *(Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 ["we review its ruling excluding or admitting expert testimony for abuse of discretion"].)

DISPOSITION

The judgment is affirmed. Respondent City of Whittier shall recover its costs on appeal.

KRIEGLER, Acting P.J.

I concur:

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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BAKER, J., Concurring

I agree the trial court's judgment should be affirmed. I write separately only to emphasize the Whittier Historic Resources Ordinance (the Ordinance) could be better drafted in certain respects and would benefit from clarifying revisions.

The key question in this appeal is whether the Nixon House is appropriately considered an "historic resource" under the Ordinance. In its current form, section 18.84.040 defines an historic resource as "any improvement, historic landmark or district, or other object of cultural, architectural or historical significance to the citizens of the city, the region, the state or the nation, which is designated or eligible for designation and determined to be appropriate for historic preservation by the [historic resources commission (the Commission)], or by the council upon appeal, pursuant to the provisions of this chapter." The same section of the Ordinance defines a "historic landmark" to be "any singular

historic resource that has been designated as such pursuant to this chapter."[1]

Defendant and respondent, the City of Whittier (City), contends the Nixon House is a historic resource because the Commission's "October 18, 2000[,] unanimous vote made the [Nixon House] 'eligible for designation and determined to be appropriate for historic preservation by the [C]omission.'" As the City details in its Respondent's Brief, that Commission vote "recommend[ed] to the Whittier City Council that the [Nixon House] be placed on the Local Historic Register." The City acknowledges that its city council declined to adopt the Commission's recommendation and the Nixon House was "not place[d] . . . on the Local Historic Register based upon the newly raised opposition from the then homeowners . . . ." But the City maintains the Commission vote made the Nixon House "eligible for designation" and "appropriate for historic preservation"—and that is all that is necessary to make it a historic resource under section 18.84.040 of the Ordinance.

The difficulty, however, is with the term "eligible for designation." At least on the face of the Ordinance, there are no provisions that govern when a historic resource is eligible for designation. Rather, Article II of the Ordinance

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[1] Here is the first of several examples of inartful drafting. The two definitions appear to be partially self-referential and circular: a "historic resource" is "any . . . historic landmark" and a "historic landmark" is "any . . . historic resource that has been designated as such."

nominally pertains only to "Designation of Historic Landmarks and Districts."

Insofar as the provisions of Article II are nonetheless a helpful guide, they do tend to lend some support to the City's actions. Section 18.84.080 of the Ordinance, entitled "Eligibility for designation" states: "Any improvement surveyed and identified by the city, in conformance with state survey standards and guidelines, and/or found to be worthy of consideration for designation by the majority vote of the [C]ommission and/or council at public hearing, shall be placed on the city's list of historic resources and shall be eligible for nomination." This provision can be read to suggest that a majority vote of the Commission determining that an improvement is "worthy of consideration for designation" means the improvement is eligible for designation within the meaning of section 18.84.040. But that conclusion, though permissible, is not straightforwardly drawn because section 18.84.080 never answers an important question: "Designation for what, a resource or a landmark?" If it were the latter, section 18.84.100 tells us the Commission's vote would not suffice; that section states "[t]he sole authority to designate a historic resource as a historic landmark or district shall be vested in the [city] council." And even assuming it were the former, there is still an additional difficulty: the section of the Ordinance that describes the "[l]ocal official register" (section 18.84.110) states that "[r]esolutions adopting designations of historic resources shall collectively be known as the local official

register of historic resources," and here, the city council never passed a resolution concerning the Nixon House and it appears undisputed that the house was never actually included on the City's local official register.

Turning next to the maintenance and demolition provisions in Article V of the Ordinance, section 18.84.400 states that demolition of a historic resource without a certificate of appropriateness is prohibited. That would suggest, if the Nixon House is properly considered a historic resource, that such a certificate was required here. The majority puts forward a reasoned argument for affirmance because the Nixon House is a historic resource under the Ordinance and a certificate of appropriateness is lacking. I agree with that conclusion, in part because I believe the City's application of its own Ordinance is entitled to some measure of deference. (See *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193.) Nevertheless, I do concede the existence of Ordinance section 18.84.410 confuses matters. That provision, entitled "Demolition of other historical structures," provides that the secretary of the Commission must determine whether "non-listed, eligible or designated structures at least fifty years old" do or do not qualify "for designation eligibility." Because I believe the City had a legitimate basis for finding section 18.84.400 applicable here, I leave for another day the task of deciphering what constitutes a "non-listed, eligible or designated structure[ ]" when the procedure that would

apply to such structures is intended to determine whether the structure qualifies for "designation eligibility."

For the reasons I have discussed, the Ordinance would benefit from a careful review of its interdependent provisions and further clarification of its terms. To say the least, it is not "user friendly" in its present form and one can easily understand how frustration with the Ordinance gave rise to this lawsuit. In a future case with different facts, a plaintiff may well be able to demonstrate that the application of the Ordinance leads to ad hoc and arbitrary judgments. But on the facts here, I see no basis to conclude the City violated due process guarantees, misapplied the Ordinance, or prejudicially contravened the California Environmental Quality Act. I therefore concur in the majority's disposition.

BAKER, J.