



February 6, 2017

Dr. David Ready, City Manager
City of Palm Springs
3200 East Tahquitz Canyon Way
Palm Springs, CA 92262

Dear Dr. Ready,

On January 23, 2017, you spoke by telephone with Palm Springs Preservation Foundation (PSPF) board member Ron Marshall to advise him that the city would not be processing the Abe & Marion Schwartz Class 1 Historic Site nomination and, further, that nomination should be submitted to the Agua Caliente Band of Cahuilla Indians (ACBCI). This guidance was apparently based on advice from the outgoing city attorney.

The PSPF attorney has strongly advised us not to take your suggested course of action. Rather, our attorney has advised us that he believes, pursuant to the Palm Springs municipal code, only the city is authorized to process the Schwartz nomination. He believes the tribe has no authority to process and act on a nomination in the first instance, unless the 1977 Land Use Agreement between the city and the ACBCI is amended. The attached PSPF legal opinion does not address the separate legal issue of “historically tribal land” that is now private land.

We understand that there is only one city attorney and you are obligated to follow his advice except in rare instances. However, it appears that the city is on the verge of setting a bad precedent by adopting a policy that has the potential to cause irreparable harm to the city’s historic preservation program, impact ongoing Mills Act contracts and negatively impact land values. As any new city policies will have long-term ramifications, it only seems sensible that this issue be considered by the incoming city attorney and that in the interim the processing of the Schwartz nomination should continue unfettered and as required by the Palm Springs Municipal Code (Chapter 8.05).

If you have any questions or require any additional information, please feel free to call me at (760) 837-7117.

Sincerely,

Erik Rosenow
President

Copy to:
Palm Springs City Council (R. Moon, G. Foat, G. Kors, J. R. Roberts and C. Mills)
Chair, Palm Springs Historic Site Preservation Board
Palm Springs Modern Committee
Desert Sun

MEMORANDUM

To: PSPF Board of Directors

From: Babak Naficy

Date: January 27, 2017

Re: Schwartz Residence Historic Nomination Tribal Issue

Dear PSPF Board of Directors,

On behalf of Palm Springs Preservation Foundation (“PSPF”), you have asked me to prepare a memorandum to explore whether the City of Palm Springs is correct in its legal conclusion that the PSPF must submit its historic site nomination for the Schwartz Residence to the Agua Caliente Band of Cahuilla Indians (“the Tribe”). The City’s conclusion appears to be based on a December 2, 2015 correspondence from the Tribe to the City through which the Tribe purports to “supplement” the Agreement between the Tribe and the City of Palm Springs. Through this supplement, the Tribe apparently intended to assume the sole responsibility for “decision making regarding historic or culturally significant properties within the exterior boundaries of the Agua Caliente Indian Reservation.” However, this correspondence was only submitted for the City’s consideration and has never been codified into the Palm Springs Municipal Code. To the extent that the Tribe’s supplement actually purports to amend the Agreement, it is invalid unless it is formally adopted by the City, which to our knowledge has not happened. To the extent that the “supplement” purports to clarify an existing regulatory landscape, it must be rejected because, as set forth below, the Tribe’s position is inconsistent with the Tribe’s Agreement with the City.

The issue presented here is complex, but I believe the Tribe cannot displace and assume the role of the Historic Site Preservation Board (“HSPB”) for the purpose of analyzing nominations and making a determination regarding the potential historic significance of structures within the City.

As a matter of general law, as a sovereign, the Tribe undoubtedly has the authority to determine the significance of historic sites and structures on land that belongs to the Tribe. However, in 1977 the Tribe entered into an agreement (“the Agreement”) with the City of Palm Springs pursuant to which the Tribe delegated its planning and permitting authority to the City Palm Springs for all land located within the City’s jurisdiction:

Upon execution of this agreement, the Tribal Council shall by ordinance or resolution make applicable to Indian trust lands geographically located within the City the laws, ordinances, codes, resolutions, rules, or other regulations of the State of California and of the City, limiting, zoning or otherwise governing, regulating or controlling the use or development of Indian trust lands within the geographical limits of the City, and the City will resume the processing and, when all is found to be regular and in accordance with applicable laws and regulations,

the issuance of all permits pertaining to said Indian trust lands in all ways necessary and proper for the development thereof, which shall include but not be limited to the following:

- a. Building and utility permits,
- b. Changes of zone,
- c. Variances from applicable zoning requirements,
- d. Conditional use permits,
- e. Planned Development District permits,
- f. Tentative and final Tract and Parcel Maps,
- g. Changes or amendments to the General Plan,
- h. Enforcement of zoning and building codes,
- i. Compliance with State and Federal environmental regulations, and
- j. Related matters to the above.

Section II (1), APPENDIX 2 AGUA CALIENTE BAND OF CAHUILLA INDIANS—
INTERIM PROCESSING OF TRUST LAND DEV PERMITS AGREEMENT #1324
(Orig 7-26-77) RES #12298, 7-26-77

Despite the broad scope of this delegation of planning and land use authority to the City, in its letter to the City, the Tribe claims that the above-cited provisions “do[es] not delegate the Tribe’s authority to determinations concerning historic and/or cultural significance to the City or any City Board or Committee.” This claim appears to be false, however, because the language of Section II(1) appears to be broad enough to include determinations concerning historic significance of structures within the City.

While it is true that the main reason for delegating planning authority to the City appears to be the processing of applications for entitlement and permits, the determination of the historical significance of structures within the City seems to be part and parcel of that planning function. The Agreement makes the City responsible for processing and issuing any and all types of permits “in all ways necessary and proper for the development” of Tribal lands. Although determination of historic significance is not a specifically listed task, Section II(1)(j) includes a catchall category: “Related matters to the above.” As such, I believe it can be credibly argued that determination of historic significance of nominated buildings can be considered a “related matter” and therefore within the purview of the City.

Another important point that supports our argument is that by entering into the 1977 Agreement, the Tribe agreed to adopt an appropriate ordinance or resolution in order to “make applicable to Indian trust lands geographically located within the City the laws, ordinances, codes, resolutions, rules, or other regulations of the State of California and of the City, limiting, zoning or otherwise governing, regulating or controlling the use or development of Indian trust lands.” Accordingly,

any and all provisions of the City's municipal code "limiting, zoning or otherwise governing, regulating or controlling the use or development of Indian trust lands" directly apply to Tribal lands, including Chapter 8.05 of the Municipal Code, entitled "Historic Preservation", especially as nothing in Chapter 8.05 specifically exempts Tribal lands.

Pursuant to the City's Code, therefore, consideration of historic site nominations on tribal lands must be conducted by the Historic Site Preservation Board pursuant to the procedure and criteria outlined in Chapter 8.05. The Tribe's assertion that it carved an exception to the City's general authority over all matters concerning land use and planning within the City cannot be reconciled with the spirit and letter of Chapter 8.05 which clearly entrusts the HSPB with the sole authority to consider historic site nominations in the first instance.

The Tribe's claims appear to at least in part rest on the claim that pursuant to the National Historic Preservation Act (54 U.S.C. §302701, et seq.), the Tribe has assumed the role and responsibilities of the State Historic Preservation Office with respect to all tribal lands. As such, the Tribe has the authority to determine the historic significance of structures on tribal lands based on federal "National Park Service" and the Tribe's own standards (which appear to be extremely general and essentially meaningless). Based on the Tribe's own statements, therefore, they are neither authorized nor have any intention of determining the significance of any structures within the City based on the City's own standards. Bear in mind that as set forth above, the Agreement ensures that the Chapter 8.05 standards apply to structures on tribal land. Accordingly, the City's claim that PSPF's nomination application should be submitted to the Tribe is patently untenable as the Tribe is neither authorized nor able to determine the merits of such an application based on the standards set forth in Chapter 8.05.

Based on the foregoing, I believe the City's HSPB must analyze the merits of all nomination applications regardless of whether the structure in question is located on tribal lands. The City Council must then act on the HSPB's recommendation as required by the Municipal Code. At that point, however, the Tribal Council will probably have the ability to make a final decision on the City's action based on the provisions of the Agreement that gives any aggrieved party the right to appeal a decision of the City Council to the Tribal Council.

Sincerely,

Babak Naficy

Babak Naficy, Esq.