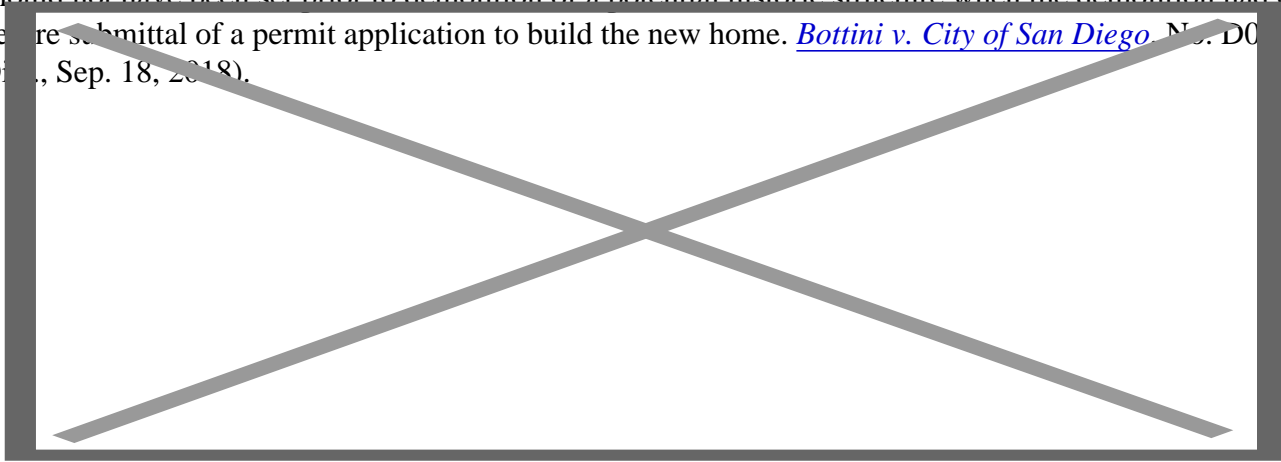


## CEQA Project Baseline Should Not Have Been Set Prior to Demolition of Historic Structure

The Fourth District Court of Appeal held that the project baseline under CEQA for construction of a new home should not have been set prior to demolition of a potential historic structure when the demolition had occurred before submittal of a permit application to build the new home. [Bottini v. City of San Diego](#), No. D0670 (4th Dist., Sep. 18, 2018).



The

Bottinis applied to the City for a Coastal Development Permit (CDP) to construct a single-family home on a vacant lot. City staff determined that the project was categorically exempt from environmental review under CEQA's Class 3 exemption for construction of a single-family home. On appeal, however, the City Council found that full environmental review was necessary because the Bottinis had demolished a 19th century cottage named Windemere on the lot shortly before applying for the CDP. The City had itself previously concluded that Windemere was *not* a historic resource, declared the structure to be a public nuisance, and authorized the Bottinis to demolish the cottage. Nevertheless, the City Council retroactively declared the cottage "historic," concluded that the demolition should be considered part of the new home project, and found that there was a reasonable possibility that CEQA's "historical resources" and "unusual circumstances" exceptions precluded use of the categorical exemption. The Bottinis sued, contending that the City's baseline determination violated CEQA and the City's decisions regarding the historic status of Windemere and the extent of the required environmental review violated the Bottinis' due process rights and resulted in a regulatory taking of their property. The appellate court disagreed with the City's determination that the "CEQA project" included both the Windemere demolition and the proposed construction of a single-family residence. Reasoning that CEQA applies prospectively, rather than to completed work, the court held that the correct baseline was the condition of the property when the Bottinis filed their CDP application. At that time, the property was a vacant lot and Windemere no longer existed. Therefore, the demolition permit and issuance of the CDP were separate projects for CEQA purposes. Using the correct project baseline, the court said, the Class 3 exemption clearly applied to the Bottinis' proposed single-family residence, and the historical resource and unusual circumstances exceptions were inapplicable. The court also held, however, that the City's contradictory decisions regarding the historical classification of Windemere and its status as a public nuisance, and the resulting construction delays, did not deprive the Bottinis of any constitutional rights. Applying the *Penn Central* test to the regulatory takings claim under both the federal and state constitutions, the court concluded that the City's actions had not interfered with the Bottinis' reasonable investment-backed expectations. The court also dismissed the due process claims

because the plaintiffs had identified no property right that was violated by the City's conduct. While the City erred in concluding that full CEQA review was required, the Bottinis had no property right to issuance of a discretionary CDP with no environmental review.

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