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A Guide to Historic Preservation for the California Practitioner

Dorothy Gray*

I. INTRODUCTION

The field of historic preservation law is a relatively new one. Until the mid-1960's little existed in the way of legal techniques for halting destruction of significant cultural resources.¹ The few existing federal and state laws for the purpose of protecting historic properties were either poorly drafted or rarely enforced.² At the local level, historic zoning ordinances existed to prohibit destruction of historic resources, but the question of whether they were a proper use of the police power remained unresolved.³


². E.g., the Federal Highway Act of 1960, 23 U.S.C. § 305 (1976), provided (until recent amendment) only for salvaging of archaeological material discovered in the course of highway projects, but made no provision for leaving the site undisturbed; the Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1976), authorized the Secretaries of the Interior, Army, and Agriculture to protect archaeological sites within their jurisdiction, but in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), the Ninth Circuit held that the act was too vague as to definitions and thus did not provide sufficient notice of what would constitute a violation of its provisions. See also Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978), in which the Fifth Circuit reached a similar conclusion.

³. The classic statement of the issue of taking by regulation is that of Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." It was not until the 1970's that the

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During the interval since the 1966 Congressional enactment of the National Historic Preservation Act, significant change has occurred in the field of historic preservation at all levels of government. Major legislation has been adopted, agencies have been established, and a considerable body of regulation has been developed to carry out the purpose of the legislation. In addition, legal tools have been devised to provide alternatives to destruction, while tax provisions and building codes have been modified in some states to encourage preservation. Further, the courts have confronted and settled several of the most critical issues in preservation including the legal propriety of zoning to prohibit destruction.

Perhaps of greatest overall significance is the growing appreciation in our society generally of historic preservation and the growing determination to advance its goals. At the governmental level historic preservation has been specifically included in major policy statements concerning the environment, as well as in a Presidential Executive Order. In


5. For a list of the major federal and California state agencies established as watchdogs of historic preservation see note 111 infra. At the local level the duties of historic commissions and committees created by ordinance have varied widely; some bodies are purely advisory, while others such as the Old San Diego Planned District Review Board have been delegated power to review proposed change in historic properties. See San Diego, Cal., Ordinance 10,608, § 103.0206.2.

6. CAL. HEALTH & SAFETY CODE §§ 18950-18960 (West Supp. 1980) establish the “State Historical Building Code” under which local jurisdictions may apply alternative building standards to historic buildings where enforcement of existing standards would destroy the authenticity of the historic structure. Prior to enactment of the Historical Building Code, for example, the fact that traditional buildings often failed to satisfy height prescription in the existing code resulted in the replacement of entire staircases at the expense of the owner's pocketbook and historic authenticity.

7. In Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973), the appellate court upheld historic preservation as a valid zoning purpose, holding that (1) such zoning is properly within the police power, (2) delegation of authority to a review board was not improper delegation because the city council had provided standards for architectural review in the enabling ordinance, and (3) regulation of historic structures and of “neighboring” properties did not constitute a taking of the regulated property. In Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), the United States Supreme Court reached a similar conclusion regarding application of New York's historic preservation controls to Grand Central Station.


California, where preservation has until recently lagged behind efforts in some other states, the State Historic Preservation Officer is now a position distinct from the Director of Parks and Recreation and has a staff significantly larger than that of the pre-1975 period. California's efforts have also been enhanced by a new state agency created in 1977, the Native American Heritage Commission, the goals of which often coincide with those of historic preservation.

In the private sector a number of activist groups have formed across the country. They include two lobbyist groups: Preservation Action of Washington, D.C., and Californians for Preservation Action. In addition, numerous articles, newsletters, and periodicals have appeared, among them the new, but prestigious, magazine American Preservation.

In short, historic preservation is coming of age, and perhaps none too soon. Because of America's rampant growth since World War II and the flight from urban centers in the last twenty years, the rate of destruction of historic properties, whether by bulldozer or neglect, has greatly accelerated.


10. Major changes occurred during 1975-77 while the author served as a special consultant to the Director of Parks and Recreation, Sacramento, California, which department includes the State Office of Historic Preservation.

11. CAL. PUB. RES. CODE. §§ 5097.9-.97 (West Supp. 1980). The legislation also provides that "[n]o public agency and no private party . . . shall . . . cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require." Id. § 5097.9.


13. For example, in Santa Clara County one-fourth of all historic buildings identified in a 1966 county survey were destroyed in the following decade. Files of the Santa Clara County Historic Heritage Commission, Planning Department, 70 West
For much of America's visible historic heritage, the eleventh hour has arrived and is ticking inexorably toward a close. Thus, it is essential that action be taken now.

For the attorney who encounters issues of historic preservation, success requires an understanding of the breadth of the meaning of the term "historic preservation" and ingenuity in functioning in the labyrinth of complex laws and regulations and the myriad of agencies at all three levels of government. "Historic preservation" is an illusive term, incapable of precise definition. According to the National Register of Historic Places, it includes property which is "historic," "architectural," "archaeological," or "cultural." Even these broad terms are not inclusive, however, because they fail to encompass nonmanmade entities, those termed "natural historical," such as historically significant trails, rivers, mountain passes, paleontological sites, or plants and trees of considerable age or significance.

There is no precise test for determining that a particular property is worthy of historic preservation. Understandably, governmental decisionmakers would prefer measurements of historic preservation value in traditional economic terms, but historic qualities are not susceptible of economic valuation. Decisionmakers must rely in part on the educated, but nonetheless subjective, opinions of experts. In addition, to some extent they must look beyond the experts and consider the views of the public. Broadly speaking, our historic heritage is composed of what we value as a people, what we cherish. The people of a community may place a great value upon a building that might not pass muster with architectural historians or other experts in the field of preservation. The converse may also occur. A property may be of great value only in the eyes of a small minority or in the educated view of experts outside the community. It is this kind of subjective factor that makes it virtually impossible to create firm standards of historic worth.

In recent years there has been increased emphasis on pre-

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Hedding St., San Jose, Cal.
serving remaining examples of ordinary life of the past: working class homes, commercial structures, factory buildings, farmhouses, and barns. Many preservationists, in fact, believe that primary emphasis ought to be given to preserving entire districts, whether residential neighborhoods or blocks of commercial buildings, which give a stronger feeling of the past than does a single, distinguished building standing alone.  

It is inevitable in a multicultural society such as ours that diverse people will cherish different things and seek different preservation goals. A notable example is that of minority groups who seek recognition and preservation of properties associated not only with their achievements, but with their suffering. The Chinese-American community of the San Francisco Bay Area has, for example, fought a long battle to have the immigration buildings on Angel Island preserved as part of the resource management of Angel Island State Park. Inside the deteriorating buildings are beautiful examples of calligraphy expressing the sorrow, pain, and hope of Chinese immigrants held there for as long as three years before being allowed to enter their new homeland.  

Historic preservation is thus multi-faceted. It includes the traditionally honored: the battlefield, the home of the famous, the architecturally lavish mansion, and the pioneer cemetery. More recently it has come to include historic districts and neighborhoods that illustrate the fabric of daily life of the past. It includes the pioneer vineyard, the engineering marvels, and the artistic expression of the noted artist or the folk artist. It encompasses the places where the oppressed have struggled, suffered, and survived, where political movements have been born, where great discoveries have been made, and where the people of frontier communities have


17. Angel Island State Park Correspondence files, Cal. Dep't of Parks & Recreation. Potential controversy surrounding a property can cause opposition to its being recognized as an "historic" place, as was the case with the placement of historic markers at Manzanar and Tule Lake, sites of the incarceration of Japanese Americans in California during World War II. To some it is incomprehensible that a society would wish to commemorate its dark moments as well as its triumphs; files of the State Office of Historic Preservation contain a number of letters protesting historic recognition of the former concentration camps.
gathered to hear music or see a play.\(^\text{16}\) For the American Indian, historic preservation is bound up with holy places—springs, mountains, forest clearings—where religious ceremonies are held or where the very gods live. Public buildings, from simple wooden courthouses to such formidable structures as San Francisco’s Bureau of the Mint, are within the broad range of historic preservation. Archaeological and paleontological sites, aboriginal cave paintings, old adobes, and formal gardens such as those of the Filoli mansion on the San Francisco Peninsula, the mercury mines at New Almaden, and People’s Park in Berkeley, now site of a notable collection of native plants, may all be viewed as proper subjects of historic preservation.\(^\text{19}\)

Increasingly, historic preservation raises issues and offers solutions in ways that might be overlooked by the uninitiated. Historic preservation can, for example, be used to preserve open space or rehabilitate low-cost housing, provide attractive tax incentives for investors in commercial buildings or halt an environmentally detrimental project, and spur self-help revitalization of a deteriorating neighborhood or conserve energy by “recycling” existing buildings into new uses.\(^\text{20}\) But even without these ancillary functions, historic preservation offers its own values. It speaks to the spirit, nurtures our need for roots, and enriches the visual scene.

The purpose of this paper is to provide a practical legal primer to historic preservation. The field is a complex one, consisting of statutory law at various levels of government, regulations, administrative procedures, case law, and such legal tools as facade easements and development rights trade-offs. The text focuses on the laws and procedures, first with regard to protection—the legal techniques available to prevent or to delay destruction of an historic property—and second with regard to preservation—the legal tools available for obtaining the continued existence of a property as an alternative to destruction.\(^\text{21}\)

\(^{18}\) The various categories of historic properties are to be found in \textit{Cal. Dep’t of Parks & Recreation, California Inventory of Historic Resources} at xi (1976).

\(^{19}\) \textit{Id}.


\(^{21}\) Case law is referenced at the appropriate point in the text, but is not
II. LAWS THAT PROVIDE PROTECTION

A. The Federal Level

1. The National Historic Preservation Act

The lynchpin of historic preservation law at the federal level is the National Historic Preservation Act of 1966 (NHPA). Congress stated that "the historical and cultural foundations of the Nation should be preserved as a living part of our community, life and development in order to give a sense of orientation to the American people." In furthering this goal the NHPA focuses on the historic properties controlled by the federal government and/or those which will be affected by a federal project. To protect these properties the Act does not totally bar destruction, but encourages preservation through the comment process.

The comment process, like other aspects of the Act, will be discussed below. Briefly, under the comment process a federal agency with historic expertise (the Advisory Council on Historic Preservation) works with federal agencies to ensure that projects will be modified through mitigation or alternatives to protect historic properties.

The Act is four-pronged in structure. First, it established the National Register of Historic Places which extends recognition to the properties that are historically significant at the national, state, or local level. Prior to the establishment of the National Register by NHPA, the National Historic Sites Act of 1935 had provided only for recognition of nationally significant properties, through designation as National Historic Sites, National Historic Landmarks, or National Historic Monuments. The limitations of the National Historic Sites Act is illustrated by the fact that the community of New Almaden in Santa Clara County is a National Historic Landmark, but local legislation was required to ensure that

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23. Id. § 470.
24. Id. § 470f (1976 & Supp. II 1978) states: "The head of any such Federal agency [conducting a federal project involving an historic property] shall afford the Advisory Council on Historic Preservation established under section 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking."
27. Id. §§ 461-467.
historic buildings in the community would not be altered or razed.\textsuperscript{28}

Under NHPA the function of the National Register is tripartite. It not only provides recognition for properties of less than national significance, but also qualifies properties for federal funding and, where federal activity is involved, brings properties within the protective provisions of the Act; unless a property is included in or eligible for the National Register, it does not qualify for protection or funding under NHPA.\textsuperscript{29} The National Register is also valuable independent of its relationship to the Act National Register enrollment may qualify properties for special federal tax treatment,\textsuperscript{30} and registration serves as significant evidence that a property is in fact historic for purposes of applying certain other federal and state laws.

A second major aspect of the Act is the creation of the Advisory Council on Historic Preservation, an independent agency consisting of eight members of the President's Cabinet, ten public members appointed by the President, the secretary of the Smithsonian Institution, and the chairman of the National Trust for Historic Preservation, a non-profit corporation created by Congress in 1949 to encourage preservation. The Advisory Council includes those members of the President's Cabinet who represent departments most likely to engage in projects or policies that will affect historic properties.\textsuperscript{31} It can be assumed from the composition of the Council as dictated by NHPA that the Council is designed to bring together those members of the public significantly interested and experienced in preservation with the heads of major governmental departments for the purpose of making government sensitive to historic values. The Council's role is to advise the President and Congress, report on legislative needs, encourage preservation activity in the private sector, and, most importantly, comment on federal activities affecting historic properties.\textsuperscript{32} It is this latter function which establishes the Council as watchdog for the Act's protective provisions.

The third major aspect of the Act is that of protection. Section 470f requires that federal agencies having direct or in-

\begin{itemize}
\item \textsuperscript{28} Files of Santa Clara County Historic Heritage Commission, \textit{supra} note 13.
\item \textsuperscript{29} 16 U.S.C. §§ 470a, 470f (1976 & Supp. II 1978).
\item \textsuperscript{30} A discussion of potential tax advantages is beyond the scope of this article.
\item \textsuperscript{31} 16 U.S.C. § 470 (1977).
\item \textsuperscript{32} \textit{Id.} §§ 470f, 470j, 470k.
\end{itemize}
direct jurisdiction over "federal or federally assisted undertakings . . . shall take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register."38 This clause has been interpreted to apply also to properties eligible for the Register.34 Under Section 470f, federal agencies "shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."38

Pursuant to the comment authority granted in NHPA, the Advisory Council has promulgated regulations for federal agency compliance with Section 470f,38 including the following:

1. Detailed procedures for compliance with NHPA that federal agencies must follow in consultation with the Council and with a State Historic Preservation Officer, a state-designated liaison person with responsibility for administration of the Act within the state where an undertaking will occur.37

2. A ruling that compliance with NHPA procedures will satisfy requirements concerning historic properties imposed by other federal laws (the National Environmental Policy Act38 and Executive Order 11,59339); however,

33. Id. § 470f. The term commonly used to refer to issues arising under section 470f is "106 action." Section 106 was the designating section number in the act before the codification Act of Oct. 15, 1966, Pub. L. No. 92-268, tit. I, § 106, 80 Stat. 971.
34. 36 C.F.R. § 800.1 (1979).
38. Discussed at notes 78-129 and accompanying text infra.
39. Discussed at notes 73-77 and accompanying text infra.
compliance with these other laws does not satisfy the independent compliance requirements of NHPA. 40

3. Definitions of terms. 41

4. Independent authority in the Council to investigate unilaterally possible threats to historic properties when a federal agency has failed to provide opportunity for the Council to learn about the proposed undertaking. 42

It should be noted that the regulations apply only when there is a federal undertaking. 43 The regulations require that the federal agency, in consultation with the appropriate State Historic Preservation Officer (SHPO), take the following steps:

1. Identify properties which may be affected by a federal undertaking and which are on or eligible for the National Register, engaging a professional survey if necessary.
2. Ascertain from the National Register office whether previously unregistered properties are of Register quality; its determination is conclusive.
3. Determine whether the proposed undertaking will have an effect upon significant properties.
4. Prepare proposals for mitigating or avoiding adverse effects upon the properties.
5. Secure the comments and the approval of the Council on items 2 through 4 above. 44

Within these broad outlines the regulations provide detailed rules for settling disputes as between the consulting parties (the federal agency, the SHPO, and the Council), 45 for holding public hearings at the request of any consulting party, 46 and for achieving a "Memorandum of Agreement" as

40. 36 C.F.R. § 800.9 (1979).
41. Id. § 800.2.
42. Id. § 800.12. This provision was first expressly stated in the 1978-79 amendments to regulations and is highly significant in indicating (1) that the Council will be more aggressive in implementing NHPA, and (2) the public may seek to enlist directly the aid of the Council when a federal agency refuses to conform to the basic provisions of NHPA and the regulations.
44. 36 C.F.R. §§ 800.4-.6 (1979).
45. Id. § 800.6(b)(4), (7).
46. Id. § 800.6(b)(3).
to mitigation of adverse impacts.47

It should be noted that neither NHPA nor the Council's regulations invest the Advisory Council with the power or authority to stop an undertaking that will adversely affect an historic property. On the other hand, the Council's potential power of persuasion may be assumed on the basis of its membership. Almost without exception the Advisory Council's views prevail at least with respect to mitigation.48

Counsel who wish to utilize the protective functions of NHPA should be aware that the SHPO is frequently the key figure in securing proper treatment of a historic property. If the SHPO is delinquent in pursuing NHPA responsibilities, an attorney may contact the Advisory Council directly since the Advisory Council may institute its own "investigation of threat."49 If the federal agency and SHPO refuse to recognize the historic significance of a property, counsel may correspond directly with the Keeper of the National Register who is authorized to make an independent and conclusive determination.50 If a satisfactory resolution cannot be reached by these administrative appeals, three courses of action remain open:

1. Lobbying through one's congressman or senator.51
2. Requesting that one of the three consulting parties hold a public hearing.
3. Filing suit in mandamus for compliance with NHPA and/or seeking an injunction against the undertaking on grounds of noncompliance with NHPA.

Issues of timeliness are frequently raised in connection with NHPA and associated laws.52 Until fairly recently an at-

47. Id. § 800.6(c). See Appendix A infra for a flow chart of the procedural steps.
50. Id. §§ e 63.2(c)-(e) (1979).
51. Lobbying through Congressional representatives may be effective in getting a federal agency to comply with NHPA, but ordinarily should not be used to attempt to effect a determination by the Keeper of the National Register as to the eligibility of property, since the Office of the National Register has an excellent record of deciding such issues solely on their merits.
52. For cases involving timing of invocation of NHPA, NEPA, and Exec. Order No. 11,593, see Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978); Boston Waterfront Residents Ass'n v.
tempt to place a property on the National Register in order thereby to invoke NHPA has not been a successful technique once the project has already begun. In some recent decisions, the courts have acknowledged that NHPA together with Executive Order No. 11,593 (discussed below) have the effect of putting responsibility upon a federal agency for placing eligible properties on the Register and, where agencies have failed in this responsibility, application of NHPA can be secured by subsequent nomination of a property to the Register. The fairness of this new view should be apparent since, absent such provision, a federal agency could avoid any application of NHPA merely by omitting survey and nomination of properties which are of National Register quality. Finally, the Second Circuit has recently held that NHPA may apply, after a project has begun, independent of reliance on Executive Order No. 11,593. This change in case law is mirrored by a new provision in the Council's amended regulations that provides that resources discovered during construction come within NHPA procedures.

As suggested above, application for National Register status for an historic property is not solely within the province of federal agencies or those who wish to remedy the oversight or misjudgment of an SHPO. Any citizen may nominate a property, whether or not it is to be affected by a federal undertaking. Such nomination is in fact requisite to funding of an


For cases involving timing of challenge with respect to the doctrine of laches, compare City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) and Lathan v. Brinigar, 506 F.2d 677 (9th Cir. 1974) with Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971). See Ecology Center of La., Inc. v. Coleman, 515 F.2d 860 (5th Cir. 1975); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972).


55. Waterbury Action to Conserve Our Heritage, Inc. v. Harris, 603 F.2d 310 (2d Cir. 1979).

56. 36 C.F.R. § 800.7 (1979).

57. Procedures for making the nomination may be ascertained from the California State Office of Historical Preservation. See note 63 infra.
historic property under the Act.  

The funding aspect of NHPA is its fourth major feature. The Act authorizes establishment of a federal fund to be distributed to the states for historic preservation work. Monies may be used by the state for its own activities in surveying, planning, or acquiring and restoring historic properties. Alternatively, the state may disperse all or some portion of the monies to private parties for acquisition and restoration of privately owned properties. Counsel interested in assisting clients to secure such funding should note the following points:

1. In California application for funding should be made to the State Office of Historic Preservation.
2. Funds are available only on a matching 50/50 basis and no federal monies from other sources, except Revenue Sharing Funds, may be used as a match.
3. An agreement to preserve a property must be entered into by the property owner, such agreement to extend for a period proportionate to the amount of the grant.
4. In-kind contributions are acceptable in lieu of matching funds (planning, labor, materials).
5. The property must be open to the public for twelve days per year.
6. Proposals may be funded in stages (acquisition one year and project work the next year).

In general, competition for NHPA funds is vigorous. California has been receiving only about $1.5 million a year, and thus must limit severely the number of successful applicants. Counsel who wishes to maximize a client's chances of success should, therefore, recommend that a proposal be made for funding in stages, thus reducing the amount of funds re-

58. See notes 66-68 and accompanying text infra.
60. Id. §§ 470c, 470n.
61. The grants are administered through the California State Office of Historic Preservation. A booklet, CAL. STATE OFFICE OF HISTORIC PRESERVATION, PROCEDURAL GUIDE, HISTORIC PRESERVATION GRANTS-IN-AID (1981), is available upon request.
62. Id. at 4, 5, 15, 50, 70.
63. P.O. Box 2390, Sacramento, CA 95811, (916) 445-8006.
64. CAL. STATE OFFICE OF HISTORIC PRESERVATION, PROCEDURAL GUIDE, HISTORIC PRESERVATION GRANTS-IN-AID (1981). It should be noted, however, that budget cuts by President Reagan have severely curtailed the grants program.
quested for any one year.

Fundamental to all of the foregoing major aspects of NHPA is inclusion of a property on the National Register. It is necessary at this point, therefore, to describe briefly the procedures for enrollment. As noted earlier, private citizens may submit properties for consideration. Under federal law property owners are to be notified of the proposed registration of their properties by the State Office of Historic Preservation. Similar notice is required by state law with respect to the city council and the board of supervisors within whose jurisdiction the property lies.

If a property is to be affected by a federal undertaking, counsel should contact the SHPO and the Advisory Council directly. Otherwise the procedure is as follows:

1. Nomination papers, directions, and information are available from the State Office of Historic Preservation.

2. Upon completion of an application it should be submitted to the above office.

3. A hearing on the nomination will be held before the State Historic Resources Commission, which will first hear the recommendations of staff and then open the hearing to public testimony. Counsel should strongly advise clients to be present and, if the matter is highly controversial, counsel should consider attending. No transcript is made of the hearings, procedures are not always legally satisfactory, no staff counsel is present, and no formal record is made.

4. The recommendation of the Commission is forwarded to the State Historic Preservation Officer and, under current California practice, the SHPO either approves the application or denies it. If the SHPO denies the application, the Commission may apply directly to the Keeper of the National Register for a determination of eligibility.

5. If the application is approved at the state level, it is

65. Id.

66. Id. 36 C.F.R. §§ 1202.12-.13 (1979) (36 C.F.R. chapter I, section 60 was amended and moved to chapter XII and redesignated section 1202. 44 Fed. Reg. 64, 407 (1979)).


68. See note 63 supra.

69. See note 63 supra.

70. 36 C.F.R. § 1204.2 (1980).
forwarded to the Keeper of the National Register whose decision is determinative.

6. No provision exists for direct nomination by bypassing either the Commission or SHPO and making direct application to the Keeper of the Register.

Ideally, Commission hearings should be confined to historic criteria, and counsel may so insist. Recent controversies regarding Register nominations indicate, however, that counsel might find it necessary to take steps to offset adverse lobbying directed at the SHPO or the Commission.71

If expenditure of considerable effort becomes necessary to secure National Register status, such effort may nonetheless be worthwhile. As noted earlier, National Register status is essential to the securing of a number of benefits for public or private properties. Where a property is owned or under direct control of the federal government, National Register procedures are also made applicable by the second major federal law, Executive Order No. 11,593.72

2. Executive Order No. 11,593

Issued in 1971 by then President Nixon, Executive Order No. 11,593 expands upon the protective provisions of the National Historic Preservation Act.73 The most significant portion of the Order is section 2 which requires that federal agencies "locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places."74 Further, agencies are required to take care that no such properties are sold, demolished or substantially altered without consultation with the Advisory Council on Historic Preservation.75 In addition, sec-

71. SHPO decisions have not always been restricted to questions of historic merit. In Young v. Mellon, 156 Cal. Rptr. 165 (1979), the SHPO had rejected a National Register application on grounds of community welfare, rather than historic merit. The First Appellate District, Division Four, held that the SHPO's decision to approve or deny an application is discretionary; he is not bound by the Commission's recommendation. The decision, however, was subsequently ordered unpublished by the California Supreme Court.


73. Id.
74. Id. § 2(a).
75. Id. § 2(b).
tion 2 also requires that federal agencies "initiate measures and procedures to provide for the maintenance, through preservation, rehabilitation, or restoration, of federally owned and registered sites." 76

The above provisions have been too little honored by federal agencies, and in too many instances significant historic resources have been lost or impaired through the poor stewardship of an agency. To date, however, there are no reported cases in which citizens have sought enforcement of these provisions per se. In other circumstances, citizens' suits have effectively invoked section 2 in conjunction with NHPA concerning a federal undertaking. 77 If an historic resource under federal control is being destroyed by intentional act or neglect, counsel should consider invoking Executive Order No. 11,593 even in the absence of a federal undertaking. Appeal should first be directed to the Advisory Council and the national Register before suit is filed and the assistance of the SHPO and the Office of Historic Preservation should be sought.


The National Environmental Policy Act of 1969 (NEPA) 78 is directed at environmental concerns broader than historic preservation, but has strong impact on historic preservation. Section 101 of NEPA states inter alia that it is federal policy to use all practical means to "preserve important historic, cultural, and natural aspects of our national heritage." 79

In support of this policy statement, NEPA provides in section 102 that federal agencies shall "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement ... ." 80 The statement required by section 102 has come to be known as an Environmental Impact Statement (EIS). Under NEPA and its

76. Id. § 2(d).
79. Id. § 4331(b)(4).
80. Id. § 4332(2)(c).
associated regulations, federal agencies must identify adverse effects on the environment that will result from federal action. In addition, the agency must identify possible alternatives that will avoid or minimize the adverse effect. Finally, the agency must consider the EIS in deciding whether to proceed with a project that will have adverse effects. In sum, the agency engages in a balancing process based on EIS data in determining whether to permit a project to proceed, weighing benefits to be gained from the project against any detrimental factors identified.

To assist federal agencies in meeting their NEPA responsibilities, the Council on Environmental Quality (CEQ or Council) issues regulations which are binding on all agencies. The Council has much the same role and authority under NEPA as does the Advisory Council under the National Historic Preservation Act. When problems arise under NEPA concerning an historic property, an attorney may find it useful to seek assistance from both CEQ and the Advisory Council. Some of the procedures that satisfy NHPA also satisfy NEPA (survey and analysis of historic resources), but the converse is

81. See 40 C.F.R. §§ 1500-15 (1980). For cases illustrating EIS content requirement see City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) (EIS required consideration of effects of major highway on agricultural area where no road previously existed); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) (EIS need not discuss alternatives beyond those reasonably related to the project); Tierrasanta Community Council v. Richardson, 4 Envr. L. Rep. (ELI) 20309 (1973) (EIS should be prepared in all cases, but particularly where proposed federal actions are likely to have a highly controversial environmental impact).


83. 40 C.F.R. § 1502.16 (1980).

84. Id. § 1500.3.

85. Id. § 1504. The Council was created by title II of NEPA, 42 U.S.C. § 4347 (1977).
Considerable litigation has arisen under NEPA regarding 
(1) timeliness of identification of a property as historic, 
(2) what constitutes a major federal action, 
and (3) what constitutes a significant effect.
Each of the last two questions is a threshold question: unless both a major federal action and a significant effect are present, an EIS will not be required.

There is a disagreement in case law as to when an activity constitutes a major federal action. Generally speaking, an "action" is present if a federal agency proposes to conduct, fund, approve, or license an activity. "Action" may also include sale or lease of a federal property or an interest therein. The issue of when an action is "major" has been debated as a separate question, but the trend now seems to be that this requirement is satisfied by any activity deemed to have significant effect.

The meaning of the term "significant effect" has also been much litigated. Under the most recent federal regula-

86. See note 40 and accompanying text supra.
87. See notes 52-56 and accompanying text supra.
88. See notes 91-93 and accompanying text infra.
89. See notes 94-96 and accompanying text infra.
91. See Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977) (local agency prohibited from selling historic building because of HUD involvement in urban renewal); Ely v. Valde, 497 F.2d 252 (4th Cir. 1974) (state use of federal funds to build prison near historic houses requires compliance with NHPA and NEPA or refund of federal money); Weintraub v. Rural Electric Administration, 457 F. Supp. 78 (D. Pa. 1978) (use of federal funds to construct building which created need for parking lot resulting in proposed demolition of historic building too remote to trigger NHPA); Don't Tear It Down v. General Serv. Administration, 410 F. Supp. 1194 (D.D.C. 1975) (construction of a federal bank building imposes duties under NEPA and NHPA).

For cases under NEPA, see Kleppe v. Sierra Club, 427 U.S. 390 (1976) (impractical to prepare regional EIS of Northern Great Plains Region since extensive level of coal-related activity would make predictions and analysis of environmental consequences and alternatives impossible); Sierra Club v. Hodel, 544 F.2d 1036 (9th Cir. 1976) (contract to supply hydroelectric power by local power administration created "federalized" project necessitating EIS); Homeowners Emergency Life Protection Comm. v. Lynn, 541 F.2d 814 (9th Cir. 1976) (dam and reservoir construction project within scope of NEPA); Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975) (state-funded airport projects too attenuated from federally funded airport projects to make entire airport program federal action); Sierra Club v. Morton, 400 F. Supp. 610 (N.D. Cal. 1975) (if a major project cannot commence without federal approval then compliance with NEPA required).
92. 40 C.F.R. § 1508.18 (1979).
93. See 40 C.F.R. §§ 1508.8, .27 (1980).
94. For cases defining "significant effect" see Hanly v. Kleindienst, 471 F.2d 823
tions for application of NEPA, federal agencies are to determine significance in part by reference to the intensity of an effect. In listing factors which may contribute to intensity, NEPA regulations specifically mention historic resources: "[D]istricts, sites, highways, structures, or objects listed in or eligible for . . . the National Register of Historic Places or . . . significant scientific, cultural or historical resources." It is thus apparent that historic properties need not be of National Register quality in order for there to be a significant effect. National Register status, however, should help establish the existence of a significant effect.

Since National Register status also triggers application of the National Historic Preservation Act, counsel should consider invoking both federal laws. NHPA involves the SHPO and Advisory Council in the determination of what shall be done to mitigate harm to an historic property. NEPA, on the other hand, requires the federal agency to consider the historic property in a balancing process as to the fate of the entire project. Under NHPA, for example, an agreement may be made to mitigate harm to an Indian burial site by excavating the site. As a practical matter the Advisory Council may be able to insist on no more than this as an alternative. Under NEPA, however, the decision as to what happens to a site is not limited to what the Advisory Council may determine. Since NEPA requires balancing of all pertinent factors disclosed by an EIS, these additional environmental factors may result in a project being abandoned or redesigned so that the burial site will not be disturbed. Further, the EIS process generally takes longer than NHPA procedures. This extra time may give preservationists the opportunity to devise ways to preserve the historic resource or to build enough political force to stop the federal action.

Another area of comparison between NEPA and NHPA is worthy of attention. Under NHPA, provision for public hearings depends on a request by one of the consulting parties. NEPA regulations, on the other hand, seem to place some-

(2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975); Sierra Club v. Morton, 510 F.2d 813 (9th Cir. 1975); and Aberdeen & Rockfish R.R. Co. v. SCRAP, 422 U.S. 289 (1975).
95. 40 C.F.R. § 1508.27 (1979).
96. Id. § 1508.27(b)(8) (emphasis added).
97. 36 Id. § 800.6(b)(3).
what more emphasis on public participation in the information gathering and decision making processes. Under the regulations a draft EIS is circulated to concerned federal, state, and local agencies and, upon request, to "[a]ny person, organization, or agency." Members of the public, as well as government agencies, may comment on the draft EIS. Upon receipt of these comments, the federal agency must compile a final EIS, which in turn must respond to the comments received.

For example, if the comments urge that an alternative to destruction of a resource be adopted, the final EIS must either adopt such proposal, develop a comparable alternative, or explain why the comment cannot be considered. Comments may also be directed to factual or analytical deficiencies in the draft EIS, and the final EIS must also respond to such comments.

NEPA regulations also authorize and encourage federal agencies to hold public hearings and provide adequate notice.

Essentially, there are three stages in the EIS process of which an attorney should be aware. The first is the threshold stage. At this point the federal agency decides whether an EIS is required. If the agency decides in the negative, a "Finding of No Significant Effect" will be issued. This document must be made available for public response for a period of no less than thirty days before the agency may determine to proceed with its action without an EIS. Since "significant effect" is the issue at this stage, argument should include reference to the language in the regulations linking significant effect and historic resources.

A too frequent situation at the threshold stage occurs when an agency ignores NEPA altogether in the belief that no action is present, that no resource will be affected, or that the action is exempt. Since court decisions determining the existence of action present no general rule of thumb, counsel

98. 40 Id. § 1502.19(c).
101. Id.
102. Id. § 1506.6.
103. Id. §§ 1501.4(e), 1508.13.
104. Id.
105. See note 96 and accompanying text supra.
should consult case law to determine whether the precise situation at issue has been ruled upon.\textsuperscript{106} In situations in which an agency has failed to note the existence of an historic resource before beginning a project, there is some authority that an EIS is still required, under the principle that Executive Order No. 11,593 places a heavy responsibility on a federal agency to identify such resources.\textsuperscript{107} If the agency contends that the action is exempt, an appropriate response will depend on the agency's rationale. Continuing actions, for example, are not exempt provided that the agency still has a discernible amount of discretion as to the conduct of the action or the disposition of the historic resource to be affected.\textsuperscript{108} Again, this is an area in which cases tend to diverge along fine lines, and counsel should review the decisions for those closest to the facts at hand.

Once past the threshold stage, the next important concern is that the EIS present a convincing and complete review of the importance of the historic resources. Not all purported experts in the field are qualified or sympathetic to preservation; too frequently it is complained that federal agencies have secured opinions from ostensible experts who have apparently ignored data, failed to do proper research, misrepresented facts, or acted despite a conflict of interest.\textsuperscript{109} Courts have been very reluctant to become involved in questions of expertise once an agency decision has been made.\textsuperscript{110} To meet this problem an attorney must act during the EIS process. The help of another federal or state agency may be of great assistance, either in dissuading the agency from using second-rate

\textsuperscript{106} See, e.g., cases cited at note 91 supra.

\textsuperscript{107} See note 54 and accompanying text supra. See also note 55 and accompanying text supra.

\textsuperscript{108} 40 C.F.R. § 1508.18 (1979) ("major federal action" includes "new and continuing activities"). See Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977).

\textsuperscript{109} See Latest G-O Proposal Stirs up Ethics Issue, 1 ARCHAEOLOGY & POLITICS 8 (1978), which notes that some members of the Society of Professional Archaeologists are considering calling for disciplinary action against members who act improperly because of a conflict of interest; many experts are staff members of the agency in question or are paid consultants.

\textsuperscript{110} See Vermont Yankee Nuclear Power Corp. v. Natural Resources Dev. Council, 435 U.S. 509, 551 (1978) (agency need not consider "every alternative device and thought conceivable by the mind of many"). See also Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973) (not necessary that all experts in the field agree with the conclusions presented in the EIS).
professionals or in building a stronger case for review. Similarly, once a draft EIS is complete, counsel should be certain that the document is reviewed and commented upon by the appropriate "watchdog" agencies at federal, state, and local levels. 111

The content of the EIS also raises the issue of alternatives. The range of alternatives in the EIS should include "no project," adoption of different means to achieve the same goal, and mitigation measures to reduce or eliminate harm to the resource. 112 The EIS must include reasonable alternatives, but need not include all possible ones. 113 Again, review by appropriate federal, state, and local agencies may be useful in building a strong case for the least harmful alternative.

From a practical point of view, the burden of identifying and promoting an alternative is upon those who wish to protect a given resource. Counsel should recognize that mere mention of a reasonable alternative in an EIS is not enough to secure its adoption since much discretion is left with the federal agency. Counsel must convince the agency of the desirability of a given alternative. In arguing for adoption of an alternative, the following federal laws may be useful.

a. The Archaeological and Historical Preservation Act of 1974. 114 This act amends the prior Reservoir Salvage Act of 1960 115 which had provided for recovery of historical resources and data to be affected by dam construction. The new act extends the salvage approach to include historic resources affected by any "federal construction project or federally li-

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111. For a list of federal agencies, see note 36 supra. California State agencies affecting historic preservation include: Native American Heritage Commission, 1400 Tenth St., Sacramento, Cal. 95814, (916) 322-7791 (principal state agency responsible for protection of California Indian cultural resources); Office of Historic Preservation, P.O. Box 2390, Sacramento, Cal. 95811, (916) 445-8006 (applications and information concerning National Register of Historic Places, state landmarks programs, grants for historic preservation; assistance in securing compliance with NEPA and CEQA); Office of Planning and Research, 1400 Tenth St., Sacramento, Cal. 95814, (916) 445-0613 (assistance with problems under CEQA); Office of Secretary of Resources, 1416 Ninth St., Sacramento, Cal. 95814, (916) 445-9134 (CEQA problems).


censed activity or program." Under the terms of the act, a federal agency must inform the Secretary of the Interior that a federal action will affect archaeological or historical resources. The agency may request that the Secretary "undertake the recovery, protection and preservation" of the resource, or the agency may elect to do so with a portion of the project funds. The fact that Congress has given blanket authorization for such use of project funds indicates the Legislature's intent that alternatives be adopted to mitigate harm to historic resources.

b. The Federal Property and Administrative Services Act of 1949 (FPASA). This act was amended in 1972 to provide for the disposition and preservation of any federal surplus property deemed to qualify as an historical monument. Under the terms of the act, the federal government may transfer such property without compensation to any political subdivision for use as an historical monument. The determination of an historical monument is to be made by the Secretary of the Interior in conformity with the recommendation of the Advisory Board on National Parks, Historic Sites, Buildings and Monuments under the historic Monuments Act of 1953.

FPASA provides further that the property may be used in part for revenue-producing activity where such is compatible with the historic qualities of the property. Thus, the act offers two possibilities: 1) a local or state government may take a federally owned property that is to be abandoned or destroyed and retain such for public use (with the possibility of revenue-activity to meet operation and maintenance costs), or 2) a government entity may take title to such property and then lease it to an historical group (with the same revenue-raising activities). Where feasible, a building located in a project area could be moved. If the property in question is empty land, a trade might be executed whereby the state or local

116. Id. § 469.
117. Id. § 469a.
118. Id. § 469a(1)(a).
122. Id.
123. Id.
government takes the significant federal property in exchange for nonsignificant property equally suitable to the federal agency's project.

In proposing alternatives to destruction of an historic resource, counsel should explore the possibilities of FPASA and the potential for involvement of private groups working through local or state government. If the act does not provide a solution in a given situation, it at least supports an argument that Congress values the historic aspects of federally owned property and intends that provisions be made for preservation.

c. *The Recreation Act of 1926.* As amended in 1954, the Recreation Act of 1926 makes similar provision for transfer of federal lands without charge to state and local governments for historic and recreation purposes. In addition, a number of programs under the Department of Housing and Urban Development provide for cost-free transfer of structures and for financial assistance for low-cost housing. These programs may provide alternatives to destruction of historic buildings in the right circumstances, for example, in an urban redevelopment area.

The foregoing is not an exhaustive list of the possible alternatives that can be suggested for consideration by a federal agency conducting an action harmful to historic properties. Instead, these alternatives illustrate strong Congressional support for the protection of historic resources and the recycling of existing structures into new uses.

The third stage in the EIS process with which an attorney must be concerned is the final decision on the proposed action. Many federal agencies hold public hearings at this point, although not required to do so. The impact of public hearings is, in any event, limited because an agency decision is often made before such hearings; the agency would not have proposed the action had it not favored it.

Thus, in actuality, decision making will often not rely on a balancing based on the EIS. To overcome agency bias in favor of a project, it may be necessary to use political pressure through lobbying of senators and congressional representa-
tives. These are the persons who hold the purse strings of federal agencies. While citizen appeals to federal agencies may carry only marginal weight, demonstration of public concern is of importance to elected officials who, in turn, have considerable influence with federal agencies.\textsuperscript{127}

Securing a favorable decision by the federal agency is critical, since judicial review of an NEPA decision is somewhat limited. Considerable respect is accorded agency discretion by the courts, and review in most instances will be confined to ascertaining whether or not there was abuse of discretion.\textsuperscript{128} EIS sufficiency or NEPA procedural conformity may receive somewhat more effective judicial review.\textsuperscript{129}

In framing a challenge to an agency decision, counsel may wish to consult with private and public agencies that have had considerable litigation experience under NEPA. One such agency is the Environmental Unit of the Office of the California State Attorney General. Activity by this office, however, has been sharply curtailed since January 1979.

4. Federal Highway Legislation

The Federal-Aid Highway Act of 1968\textsuperscript{130} is of particular interest to those concerned with protection of historic resources. The act contains what is known as a "4(f) provision"\textsuperscript{131} which sets a higher standard for resource protection

\textsuperscript{127} Demonstration of public concern should not only include direct contact with senators and representatives, but an active publicity campaign as well. For suggestions on citizen campaigning see M. GURAR, PROPERTY POWER (1972) and THE GRASS ROOTS PRIMER (J. Robertson & J. Lewallen eds. 1975).

\textsuperscript{128} See City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975); Trout Unlimited v. Morgan, 509 F.2d 1276 (9th Cir. 1974); Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973); Jicarilla Apache Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973); Calvert Cliffs' Coordinating Comm., Inc., v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

\textsuperscript{129} See City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975); Trout Unlimited v. Morgan, 509 F.2d 1276 (9th Cir. 1974); Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); Jicarilla Apache Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973); Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 499 F.2d 1109 (D.C. Cir. 1971).


\textsuperscript{131} U.S. Dep't of Transportation, Historic and Archaeological Preservation (n.d., circa post 1974) is a syllabus for training department personnel. It consistently uses the term "4(f) statements" to refer to the department's equivalent of an EIS. The use of the term is derived from the language of the Federal-Aid Highway Act, stating that it amends "Section 4(f) of the Department of Transportation Act." 49 U.S.C. § 1653(f) (1976).
than is to be found in NEPA. While NEPA and its regulations establish that there shall be a balancing process, the 4(f) provisions goes further and indicates what weight shall be given historic resources in the balancing process. The Act contains, for example, a policy statement that "special effort should be made to preserve . . . historic sites." Further, section 4(f) specifically states that the Secretary of Transportation shall not approve a project "unless there is no feasible and prudent alternative to the use of such land, and such program includes all possible planning to minimize harm." In Citizens to Preserve Overton Park v. Volpe the Supreme Court held that this language means that paramount importance must be given resources mentioned in section 4(f). The Court concluded that protected resources "were not to be lost unless there were truly unusual factors present in a particular case or the cost of community disruption from alternative highway routes reached extraordinary magnitudes."

The decision in Overton Park apparently creates a far higher standard of protection than exists under NHPA, Executive Order No. 11,593, or NEPA. It is anomalous that different standards should exist depending on which agency participates in a project. In the Six Rivers area of California, for example, the United States Forest Service, which is constructing a road for use by loggers, has not met the objectives of those concerned about the destruction of historic resources in the area. The same road, if built by the Department of Transportation, would probably have bee rerouted to avoid use of historic land.

Section 4(f) has been interpreted by the Ninth Circuit Court of Appeals as protecting historic sites not only from the direct use of the land, but from impact resulting from use of neighboring land. While the Department of Transportation has not officially accepted a definition of "use" that is congru-

132. 49 U.S.C. § 1653(f) (1976); 23 Id. § 138.
133. Id.
135. Id. at 413.
ent with "impact" on a resource, the Ninth Circuit interpretation is quoted in a manual by the Department for training employees in how to comply with preservation law.\(^{138}\)

Another noteworthy feature of the two highway laws is their broad view as to what is historic. While NHPA and Executive Order No. 11,593 apply only to National Register sites, section 4(f) applies to properties of "national, State or local significance as determined by [federal, state, or local] officials."\(^{139}\) Thus, protection is extended to historic properties recognized solely at the state or local level.

5. **Federal Laws Protecting Specific Resources**
   
a. **Archaeological Resources Located on Federal Land.** The Antiquities Act of 1906\(^{140}\) authorizes the Secretaries of the Interior, Army, and Agriculture to regulate excavation of archaeological sites within their control. The Act further provides that unauthorized removal or injury of protected objects shall be subject to criminal penalty.\(^{141}\)

   In 1974, the Ninth Circuit Court of Appeals held in *United States v. Diaz* that the act was unconstitutionally vague as to definition of the protected archaeological objects.\(^{142}\) To amend this deficiency, the Department of Interior in 1978 proposed regulations defining protected entities.\(^{143}\) Under the proposed regulation, protection is extended to extended artifacts at least one hundred years old.\(^{144}\) Examples of protected items include rock alignments, intaglios, paintings, pottery, tools, ornaments, jewelry, coins, fabrics and clothing, containers, ceremonial objects, vessels, ship armaments, vehicles, structures, and certain skeletal remains.\(^{145}\)

   Additionally, the proposed regulations would authorize Antiquities Act protection for federally controlled archaeological and historic areas or by constructive notice through posting of notice by placement of the site on the National Register.\(^{146}\) A further feature of the proposed regulations is

\(^{138}\) Historic and Archaeological Preservation, *supra* note 131.
\(^{140}\) *Id.* §§ 431-433.
\(^{141}\) *Id.* § 433.
\(^{142}\) 499 F.2d 113 (9th Cir. 1974).
\(^{144}\) *Id.*
\(^{145}\) *Id.*
\(^{146}\) *Id.*
discretionary protection for paleobotanical and nonvertebrae
remains, if it is determined that such are rare examples.\footnote{147}

The Archaeological Resources Protection Act of 1979\footnote{148} was enacted by Congress primarily to prevent "the loss and
destruction of \ldots\ archæological resources and sites resulting
from uncontrolled excavations and pillage."\footnote{149} In general, the
Act prohibits excavations, destruction, removal of, or traffick-
ing in archæological resources from federal or Indian lands,
except by permit.\footnote{150} In addition to providing criminal and
civil penalties,\footnote{151} the Act provides for rewards up to $500 for
information concerning offenders.\footnote{152} The Act also has provi-
sions dealing with interstate sales of artifacts obtained in vio-
lations of state law, and provisions for the exchange and pub-
lic use of artifacts and knowledge now in private hands.\footnote{153}

b. \textit{The American Indian Freedom of Religion Act.} Another area of specific legal protection concerns American In-
dian religious and cultural objects. Senate Resolution 102, the
"American Indian Freedom of Religion Act,"\footnote{154} was adopted
in 1978. The resolution declares \textit{inter alia} that it is national
policy to protect sites and objects related to Indian culture.\footnote{155}
The resolution has recently become the basis for a suit regard-
ning proposed construction of a ski facility in the San Fran-
cisco Mountains of Arizona, sacred to the Hopi and Navajo.\footnote{156}

While the effect of Act has not yet been fully explored, it
may prove useful as a clear statement of congressional policy
where Indian burial sites, archaeological sites, or sacred areas
are concerned. Insofar as the resolution also is a congressional

\begin{footnotes}
\item[147] Id.
\item[149] Id. § 470aa(a)(3).
\item[150] Id. § 470cc-1170ee.
\item[151] Id. §§ 470ee(d)-470ff (West Supp. 1981).
\item[152] Id. § 470gg.
\item[153] Id. §§ 470ee, 470jj.
\item[155] Id.
\item[156] Navajo Medicine Men's Ass'n v. Block, No. 81-0493 (D.D.C. 1981).
\end{footnotes}
statement of Indians' first amendment rights, it may also have force with respect to state and local government.

B. The State Level

1. The California Environmental Quality Act

The California Environmental Quality Act (CEQA) was adopted in 1971 and is largely modeled on NEPA. In recognition of this, California courts generally look to NEPA case law for guidance.

At present, CEQA is the most significant California state law for protection of historic properties. In its statement of legislative intent CEQA declares that it is the "policy of the state to ... take all action necessary to provide the people of this state with ... enjoyment of aesthetic, natural, scenic, and historic environmental qualities." CEQA also refers to historic resources in defining "environment."

Like NEPA, CEQA requires that an informational document be compiled and be considered in government decision-making whenever a project may have a significant environmental effect. Under CEQA this document is called an Environmental Impact Report (EIR).

Perhaps the most distinctive feature of CEQA is the scope given to the term "project." The California Supreme Court has held that the term may apply to private projects whenever government is involved in approving, authorizing, or licensing the activity. In effect, government approval of subdivision maps, zoning changes, zoning variants, building permits, and use permits may bring a private activity within the provisions of CEQA. In addition, CEQA applies to a broad range of government activity that is conducted, financed, or otherwise promoted by a state or local public agency.

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160. Id. § 21060.5.
161. Id. § 21061.
163. CAL. PUB. RES. CODE § 21080 (West 1977). See also Wildlife Alive v. Chickering, 18 Cal. 3d 190, 553 P.2d 537, 132 Cal. Rptr. 377 (1976); Bozung v. Local Agency
A second distinctive feature of CEQA is the detailed amount of regulation provided by the State EIR Guidelines, found in Title 14 of the California Administrative Code. In spite of their title, the guidelines actually have the force of regulations. They are issued by the Office of the Secretary of Resources and are revised almost annually.

As under NEPA, the threshold questions of what is a project and what constitutes significant effect must be met before an EIR is required. Counsel may wish to consult the case law on the issue of what constitutes a project, although there has been less fine line-drawing than under NEPA. Review should also be given the categorical exemptions that are found in the guidelines for such activities as those associated with emergencies.

One of the most important exemptions under CEQA is that extended ministerial projects. Under the guidelines, issuance of grading permits or demolition permits is presumed to be a ministerial action unless local law states that such issuance is discretionary. Since demolition is the most frequent nemesis of historic buildings and grading often destroys archaeological sites, treatment of these two activities as exempt from CEQA can cause serious consequences for historic preservation.

Generally speaking, this problem can be met by establishing that the proposed demolition or grading is actually part of a larger project. Almost invariably a new building or other construction project ultimately follows grading or demolition. Under CEQA case law the entire project is to be considered when preliminary stages in that project are proposed; thus, demolition or grading would require an EIR, and the EIR would have to cover the entire project.

Although the guidelines present some problems concerning ministerial projects, they are very helpful in meeting the


166. Id. § 21002.1.
168. Id. § 15073.
169. Id.
issue of "significant effect." Appendix G of the guidelines lists twenty-four items that are normally associated with significant effect.\textsuperscript{171} Arguably this listing creates a rebuttable presumption of significant effect. Among the twenty-four items, Item J specifically associates "significant effect" with disruption of, or adverse effect upon, historic or archaeological resources, which include Native American cultural resources.\textsuperscript{172} No listing on a local, state, or national register is required for application of Item J but such listing may be strong evidence that a property is historical.\textsuperscript{173}

Procedurally, the EIR process is similar to that of the EIS. Under CEQA a public agency will either initiate an EIR or issue a Negative Declaration,\textsuperscript{174} comparable to a Finding of No Significant Effect. The Negative Declaration must be made available to the public for response.\textsuperscript{175} The amount of response time is a matter of local rule,\textsuperscript{176} and in some areas it is no more than ten days.\textsuperscript{177} Where an agency has improperly issued a Negative Declaration or has authorized a project without regard to CEQA procedures, assistance should be sought immediately from the appropriate state agencies.\textsuperscript{178} Such assistance may preclude the necessity of suit.

The process by which an EIR is compiled, circulated, and considered is similar to that of an EIS.\textsuperscript{179} A noteworthy difference is that the EIR guidelines expressly encourage public agencies to hold hearings at various stages of the EIR process.\textsuperscript{180} For an attorney monitoring the EIR process the same

\begin{itemize}
\item[171.] 14 CAL. ADMIN. CODE app. G § 15203 (1980).
\item[172.] Id. at Item J.
\item[173.] In addition to participating in formulating the National Register of Historic Places discussed earlier, the California Office of Historic Preservation maintains two of its own lists of recognized historic sites: State Registered Landmarks and Points of Historic Interest. The former is generally of statewide or regional significance, while the latter designation is given to sites of local significance. In addition, many local jurisdictions have official lists or surveys of historic properties.
\item[174.] CAL. PUB. RES. CODE §§ 21064, 21080 (West Supp. 1979).
\item[175.] Id. § 21092.
\item[176.] Id. The statute provides only that the period of time shall be reasonable.
\item[177.] E.g., SAN JOSE, CAL., MUNICIPAL CODE § 20302.1(c).
\item[178.] See note 111 supra.
\item[180.] CAL. ADMIN. CODE §§ 15164-15165 (1980). For consideration of the EIR comment process see Environmental Defense Fund, Inc. v. Coastside Water Dist., 27
considerations apply as with an EIS: concern for the quality of experts, securing review by appropriate "watchdog" agencies, and building a case for alternatives or abandonment of the project.

Of particular concern in dealing with CEQA is careful observation of deadlines. Time frames for some of the stages of the EIR process are set by the guidelines, but are subject to change with each revision.181 Other deadlines are left to local agencies.182 Counsel should, therefore, be certain to check the most recent guidelines for current deadlines. Any questions on deadlines or other procedural matters may be addressed to the State Office of Planning and Research.183

At the decision making stage CEQA provides more explicit parameters for agency discretion than does NEPA. CEQA states:

[N]o agency shall approve or carry out a project for which an environmental impact report has been completed which identifies one or more significant effects thereof unless such public agency makes one, or more, of the following findings:

(a) Changes or alterations have been required in, or incorporated into, such projects which mitigate or avoid the significant environmental effects thereof as identified in the completed environmental impact report.

(b) Such changes or alterations are within the responsibility and jurisdiction of another public agency and such changes have been adopted by such other agency, or can and should be adopted by such other agency.

(c) Specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report.184

Existing case law indicates that the findings required by

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181. CAL. ADMIN. CODE §§ 15054-15054.3 (1980).
182. Id. § 15083(d)(1).
183. See note 111 supra.
the above must be express and explicit. This is a proper matter for judicial review, as are questions of sufficiency of the EIR and issues of compliance with CEQA procedures. CEQA cases indicate, however, that the courts will avoid, as under NEPA, resolving issues of conflicting expert opinions. With respect to judicial review of the project decision, CEQA provides the standard to be followed: "[T]he court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record." To obtain judicial review of a project decision under CEQA, suit must be filed within thirty days of the decision.

2. Other California Protective Law.

Unlike the federal level, little historic preservation law exists at the state level in California in terms of protective measures. Most of the state law related to historic resources is oriented toward promoting preservation rather than directly stopping destruction. Some anti-destruction devices do, however, exist.

Provisions found in the Health and Safety Code expressly


189. CAL. PUB. RES. CODE § 21167(b) (West Supp. 1979).
prohibit disturbances of graves within cemeteries.190 Native Americans have had little success in getting local enforcement of these laws to stop disturbance of their ancestors' remains.191 As one Indian states, "Buckshot in the rear end of a vandal is the only enforcement available to us!"192

Section 5097 of the Public Resources Code authorizes the Department of Parks and Recreation to survey state-owned land for evidence of historic, paleontological, and archaeological sites before state projects are initiated. The Department may make recommendations concerning these sites, but the recommendations are not binding upon the state agency conducting the project, nor may any study delay a project.193

This provision is virtually a dead letter since no funding has been provided for the work stipulated. Insofar as existing staff is available, projects are instead reviewed under CEQA by the Office of Historic Preservation within the Department of Parks and Recreation. In practice, therefore, section 5097 has been superseded.

Executive Order No. B-64-80,194 issued by Governor Edmund G. Brown, Jr. in 1980, instructs all state agencies to "preserve and maintain when prudent and feasible" state-owned properties eligible for listing on the National Register of Historic Places. The order requires state agencies to formulate procedures for implementation and to submit them to the SHPO by January 1, 1982 for review and comment.195

In addition, state agencies are instructed to survey by July 1, 1983 "all significant historic and cultural sites, structures and objects" that are over fifty years old and may qualify for the National Register.196 Until the inventory is complete, state agencies are to refrain from transferring or substantially altering properties within their jurisdiction that

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191. Files of the Native Heritage Comm'n indicate no cases have been criminally prosecuted under Cal. Health & Safety Code §§ 7051, 7052, 8101. No civil suits have succeeded to date.
195. Id. § 1.
196. Id.
197. Id.
may be eligible for the National Register. Questions regarding potential eligibility for the National Register are to be referred to the SHPO. The order also directs the SHPO to provide local governments with information on preservation of historic properties.

Sections 5024 and 5024.5 of the California Public Resources Code incorporate much of Executive Order No. B-64-80. In addition, they require the SHPO to maintain a master list of not only state-owned properties eligible for, or included on, the National Register, but also those designated as, or eligible for, state landmarks status. If a project may potentially affect historical resources, the state agency conducting the project would be required to provide the SHPO with the opportunity to comment. If a state agency intends to alter, transfer, relocate, or demolish an historic structure (as opposed to the broader category of "historic resource"), the SHPO and the agency would be required to adopt "prudent and feasible measures that will eliminate or mitigate the adverse effects." The legislation authorizes the SHPO to seek mediation from the State Office of Planning and Research when a state agency refuses to adopt mitigation.

The California Penal Code contains provisions making it a misdemeanor for a person to disturb or alter archaeological material found in a cave without written permission of the owner. The statute provides for a penalty of imprisonment in county jail for not more than a year or a fine not to exceed $500. It appears that no prosecutions have been brought under this law.

The California Civil Code makes it a misdemeanor to willfully harm or destroy any object of archaeological or historic interest on public land or on private land absent permis-

198. Id. § 2.
199. Id. § 3.
201. Id. § 5024(d).
202. Id. § 5024(f).
203. Id. § 5024.5(b).
204. Id. § 5024.5(d).
206. Id. § 623(a).
207. This conclusion was reached after consultation with the California State Office of Historic Preservation, the California State Native American Heritage Commission, and the California State Secretary of Resource Office, May 1979 and September 1980.
sion of the owner.\textsuperscript{208} The penalty is a maximum of six months in county jail, $500 fine, or both.\textsuperscript{209} It appears that no prosecutions have been brought under this provision.\textsuperscript{210}

C. Local Law

Virtually all laws in California explicitly protecting historic properties exist at the local level. These vary widely as to content, scope, and effectiveness. Enactment of such laws is increasing rapidly, and any detailed survey would undoubtedly be soon outdated. The Office of Historic Preservation, the National Trust for Historic Preservation's Western Regional Office, and Californians for Preservation Action monitor new developments and are excellent sources of information. In general, local protective laws are of the following types.

1. Historic Zoning

Historic zoning by cities and counties is authorized by state statute.\textsuperscript{211} The power of local government to prohibit destruction or alteration of an historic property has recently been upheld by the United States Supreme Court in a much publicized suit concerning Grand Central Station in New York.\textsuperscript{212}

Most local ordinances in California stop short of total prohibition of destruction,\textsuperscript{213} although such ordinances are not uncommon in the Eastern United States.\textsuperscript{214} In the wake of the

\begin{footnotes}
\item[209] \textsc{Cal. Penal Code} § 19 (West 1970).
\item[210] This conclusion was reached after consultation with the California State Office of Historic Preservation, the California State Native American Heritage Commission, and the California State Secretary of Resources Office, May 1979 and September 1980.
\item[211] \textsc{Cal. Gov't. Code} §§ 25373, 37361 (West 1968) authorize county and city governments respectively to enact zoning ordinances for the control of historic property, including regulation of the appearance of neighboring private property. In Bohannon v. City of San Diego, 30 Cal. App. 416, 106 Cal. Rptr. 333 (1973), the appellate court upheld these statutes and the ordinances they authorized as a permissible exercise of the police power.
\item[213] This statement and others herein concerning local ordinances are subject to the qualification that ordinances may exist in California that are unknown to the State Office of Historic Preservation and the Western Regional Office of the National Trust for Historic Preservation. However, both offices attempt to keep abreast of all local ordinances and have been consulted by this writer.
\item[214] Pyke, \textit{Architectural Controls & the Individual Landmark}, 36 \textit{Law & Con-
Penn. Central decision more prohibition ordinances may be enacted in California. At present, Santa Barbara’s historic ordinance is one of the few of this type. Generally, in California, local ordinances instead provide for a moratorium, usually 180 days, on destruction of an historic property.

Historic zoning may be of three types: landmark zoning, district zoning, or floating zoning. Under the first, single properties are protected as landmark properties of outstanding merit. Under district zoning an entire area is covered, including nonhistoric, but compatible, buildings. The third approach is a variant on the second: an historic district ordinance is adopted, but geographical parameters are not specified. The zoning thus “floats” and can be applied to properties anywhere within the enacting jurisdictions. The latter two types of ordinances are generally more desirable, since district zoning comports with preserving a more visually effective sample of the past, while the floating concept offers flexibility.

Where an historic district zoning is adopted that applies to a specific area, architectural controls are usually vested in a review board. The more legally sound district ordinances governing specific areas also include some indication of architectural standards so as to avoid challenge for vagueness.

Attorneys interested in drafting historic zoning ordinances should consult the State Office of Historic Preservation or the Western Regional Office of the National Trust and literature available on the subject.

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Attorneys interested in drafting historic zoning ordinances should consult the State Office of Historic Preservation or the Western Regional Office of the National Trust and literature available on the subject. In securing adoption of such ordinances, it is politically advisable to secure support, if possible, from affected property owners or at least to educate

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TEMP. PROB. 398 (1971).

215. Copies of this ordinance are available from the State Office of Historic Preservation or the Western Regional Office of the National Trust. See note 36 supra.

216. E.g., SOUTH PASADENA, CAL., CITY CODE art. IX, ordinance 1591; VENTURA, CAL., MUNICIPAL CODE, GOVERNMENT COMMISSIONS AND BOARDS art. 4, §§ 1340-1348; San Leandro, Cal., Municipal Ordinance 74-12; Santa Rosa, Cal., Municipal Ordinance 1554.


218. A “Model Cultural Resources Management Ordinance” for California cities and counties has been developed by the State Office of Historic Preservation and is available from that office or from the Western Regional Office of the National Trust. See notes 36 & 111 supra. Other material includes Cal. State Office of Planning & Research, Historic Preservation Element Guidelines 33-40 (1976).
them to the potential advantages of such zoning.\textsuperscript{219}

In drafting an ordinance, counsel should be aware of the necessity of tailoring the ordinance to local conditions, the type of historic resources, and the amount of control that is politically acceptable to the legislative body that must enact the ordinance. For this reason a verbatim use of an ordinance from another area should be avoided. The following points are offered for consideration:

1. A use must remain for properties subject to control by the ordinance in order to avoid defeat on the issue of a taking of property.
2. Where politically feasible, the following provisions are advantageous:
   a. that a certain number of the review board members have expertise in relevant fields, for example, archaeology, historical architecture, history, and cultural history of significant area ethnic groups;
   b. that the review board have a sufficient range of powers: to pass upon applications for demolition or alteration; to enforce architectural and other standards; to inspect subject properties for compliance; to designate properties as being of historic or cultural significance; to enforce anti-deterioration provisions; to prohibit incompatible new construction; to conduct surveys and inventories; to hire consultants; to apply for private or government grants; to receive donations; to negotiate contracts of purchase; to lease or rehabilitate; to maintain a library, archives, or other appropriate collections.
   c. that issuance of demolition permits by the governing jurisdiction shall be discretionary. This provision eliminates a loophole in the CEQA regulations whereby a demolition permit issued by the local jurisdiction may be considered to be a ministerial act for which no EIR is required.\textsuperscript{220}
   d. that coverage extend to gardens, trees, fences, and other features that may have a significant role in the setting of an historic building or district. Controls may also be desirable with respect to signs, paint colors and

\textsuperscript{219} Some of the advantages to property owners are discussed at notes 274-88 and accompanying text infra.

\textsuperscript{220} See notes 168-69 and accompanying text supra.
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other external features.

e. that there be significant penalties for ordinance violations; absent high penalties a property owner may consider destruction to be worth the price of a modest fine.

f. that there be funding for professional and clerical staff to assist the local review board.

3. All provisions, funding, and staffing that are desired should be requested in the initial draft of the ordinance; as a practical matter, governing bodies are more inclined to enact what is initially sought than to strengthen an existing ordinance by amendment.


Anti-deterioration provisions have been enacted separately or incorporated into historic zoning. In simplest terms anti-deterioration regulations prohibit property owners from allowing deterioration to destroy an historic structure. Such provisions must be carefully drawn so as to avoid putting a legally indefensible burden upon the property owner. On the other hand, penalties should be provided that are sufficiently high so as to act as genuine deterents.

3. Subdivision Exaction

Under the power of local government to legislate on behalf of the general welfare, cities and counties may condition approval of real estate developments on the preservation of historic resources within the project area. To date, this technique has been principally used in California for preservation of parkland and open space, but it is equally applicable to historic preservation.

4. Open Space and Agricultural Zoning

Provided that zoning leaves a use to the owner, property

221. E.g., SAN FRANCISCO, CAL., CITY & COUNTY PLANNING CODE art. 10 (concerning designated historic properties) provides inter alia that "the owner, lessee, or other person actually in charge of a landmark or of a structure in an historic district must comply with all applicable codes, laws, and regulations governing maintenance of the property to prevent deliberate or inadvertent neglect."

222. See Pyke, supra note 214.

223. Cf. Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (statute compelling dedication of land for park or recreation purposes).
may be zoned as open space, thereby protecting Indian burial sites, habitation sites, trails, and other historic nonstructure sites. To be legally defensible, such zoning usually must have been anticipated in the city or county General Plan.  

5. General Plan Provisions

General Plan provisions can serve historic preservation in ways additional to those indicated above. The most favorable situation is that in which a city or county has adopted an historic preservation provision in its General Plan. Under state law this so-called "element" is an optional one in General Plans, but an increasing number of California cities and counties are amending their plans to provide specifically for historic preservation. Existence of such elements in a General Plan provides a sound legal basis for a local government to deny approval of a project that would destroy an historic resource identified in the plan.

Historic elements of General Plans usually conform to the broad outlines suggested in the state statute authorizing adoption of such elements: "identification, establishment, and protection of sites and structures of architectural, historical, archaeological or cultural significance." In addition, the State Office of Planning and Research has published a detailed guide for drafting of an historic preservation element.

224. The difficulty with the "OS" zoning, as it is called, is that there are few uses in urban areas that are compatible with such zoning; thus the owner is virtually deprived of all use since urban land in private hands generally can produce no income other than through development. Conversely, in rural areas the OS zone is logically unnecessary since agricultural zoning is a more practical approach; an "A-20" zone would allow no more than one structure per 20 acres with the remainder of the land being available for agricultural use. Nevertheless, a basis for the use of the OS zoning can be argued from Cal. Gov't Code § 65302(e) (West Supp. 1980) which requires local government to plan for open space by including an "open space element" in the general plan for the jurisdiction.


226. E.g., "A Plan for the Conservation of Resources" adopted by the County of Santa Clara in 1973 includes historic preservation. Other adoptions are discussed in Cal. State Office of Planning & Research, Historic Preservation Element Guidelines (1976), which also provides detailed information on development of an effective plan.


228. See note 226 supra.

229. See note 225 supra.


231. Cal. State Office of Planning & Research, Historic Preservation Element
Housing elements, in contrast to historic preservation elements, are a mandated element in General Plans and must by law address the question of an adequate supply of housing. Since many California communities are short of housing, this element could be used to argue against destruction of an historic neighborhood.

Whether a General Plan element is optional or mandatory, the governing body must make zoning decisions or other decisions that are consistent with the plan. Failure of a body to do so provides basis for suit under state law. Counsel should, therefore, review the jurisdiction's General Plan to ascertain whether an historic property fits within the above categories or is related to another plan element, for example community design, recreation, or parkland.

6. Emergency Moratoriums

Where a local jurisdiction lacks other basis for halting destruction of an historic property, it may use an interim zoning power authorized by state statute. This allows the governing body to place a moratorium on destruction of the property for a period of four months. Under this special procedure the governing body is not required to hold two public hearings, as is required for other types of zoning, and thus may act more quickly. By use of moratorium zoning the city or county may stave off destruction of a resource long enough to find a means of securing its protection.

7. Burial Ground Ordinance

Some local jurisdictions in California have adopted ordinances to protect Indian burial sites from destruction. These provisions range from prohibition of any disturbance to a requirement that all skeletal remains and artifacts be removed by a qualified archaeologist working with local Indians.


232. CAL. GOV'T CODE § 65302(c) (West Supp. 1980).
233. See note 225 supra.
235. Id. The period of a moratorium may be extended after notice and public hearing.
236. The requirement of two hearings, ordinarily controlling, is provided for in CAL. GOV'T CODE §§ 65854-65856 (West Supp. 1980).
237. Information concerning ordinances adopted to date is available from the State Office of Historic Preservation.
The remains are then to be reburied in and any artifacts are to be placed in possession of the local tribe.  

8. Local Application of CEQA

Although CEQA is a state statute, it is also mandatory upon all local governments in California. This includes not only city and county governments, but all regional bodies, school districts, water districts, intergovernmental commissions with decision powers, and transit or harbor authorities. Whether or not a local government agency has officially adopted CEQA procedures is irrelevant; CEQA still applies, as do the EIR Guidelines.

Unfortunately, local governments too frequently ignore CEQA with respect to historic resources or issue Negative Declarations that are unwarranted. Noncompliance may be remedied in court or through the assistance of state agencies.

As noted earlier, the balancing process under CEQA often creates a situation in which the proponents of historic preservation must carry the burden of convincing decisionmakers to adopt alternatives to destruction. It is this author's observation that at the local level the rights of property owners are often considered near-sacred. In order to convince local bodies that they should override an owner's proposed use, preservation forces must do a good selling job on the value of preservation and show how detriment to the property owner may be reduced. The following discussion presents examples of preservation proposals that can be advanced as alternatives to destruction.

238. On the basis that these materials are significant to today's Indians and should be returned to their possession, this type of ordinance is preferred by the Native American Heritage Commission over those which would allow archaeologists, universities, or museums to take possession of skeletal remains or artifacts.  
239. CAL. ADMIN. CODE § 15031 (1980).  
240. For example, the City of San Jose issued Negative Declarations in 1973 for a project that would have demolished the Murphy Building, an 1863 structure that was the oldest standing court building in Santa Clara County, and in 1978 for the Zylog project on Coyote Creek, a project involving construction of a large industrial plant that would have destroyed an archaeological site.  
241. See note 111 supra.  
242. This burden is essentially a political one, but should not be overlooked in the tactics of historic preservation.
III. Preservation Alternatives

In situations in which a property owner refuses to preserve an historic resource and government refuses to prohibit destruction, the only solution may be to acquire an interest in the property. The acquisition may be by a private group, a governmental agency, or one of the foregoing acting on behalf of the other. Acquisition basically poses three questions: What interest shall be acquired? How shall it be acquired? What funding is available?

A. What Interest Shall Be Acquired?

Acquisition of a full fee interest is in some ways the simplest solution to a preservation problem. With full ownership, issues of enforcing maintenance, proper use, and public access do not arise as they may where ownership is divided.

Acquisition of a full fee does, however, present its own problems. First, it is the most expensive approach. The fee will cost more than a lesser interest and the purchaser will also have to meet future costs of restoration, repair, maintenance, insurance, and operation. These considerations can be of considerable weight with government agencies contemplating purchase of an historic property.

A second problem is the issue of use. Too often acquisition of an historic property by a group or government has meant the structure will automatically become a museum. While museums have their place in a community, there is a limit to how many are warranted in one area. Further, many preservationists today believe that historic resources should constitute a vital part of the fabric of community daily life. In this view, buildings should be maintained in use or adapted to new uses (conversion of factories or warehouses to shopping centers, or conversion of houses to offices). This result is usually best achieved if the fee or some lesser interest remains in private, entrepreneurial control.

There are basically four less-than-fee interests that may be used in various ways to insure preservation, yet keep a property in active private use in the community: preservation

243. Information on successful projects of this type is available from the Western Regional Office of the National Trust. Articles on such projects appear frequently in the agency’s newspaper, Preservation News, in the Californians for Preservation Action Newsletter, and in American Preservation. See note 12 supra.
easements, acquisition of development rights, long-term leasing, and life estates.\textsuperscript{244}

1. Preservation Easements

Preservation easements are of two types, depending on the nature of the historic property: facade easements (sometimes called architectural easements)\textsuperscript{245} and scenic easements.\textsuperscript{246} Facade easements are generally more suitable for structures, while scenic easements are more usually associated with nonstructure sites. The thrust of each is the same, however: the easement holder has acquired a right to have a property remain visually as stipulated by the easement holder. Under a facade easement the holder has the right to have the encumbered structure retained in (or restored to) its historically based architecture. With a scenic easement, the site must similarly remain visually as stipulated.

While the scenic easement is recognized by statute in California,\textsuperscript{247} no statutory basis yet exists for the facade easement. Theoretically, the absence of a statutory basis does not preclude transfer of a property right, but may hinder enforcement of the right as against successors in interest of the easement transferor. In the absence of statutory recognition there are, however, other factors that indicate that the courts will probably recognize the easement as valid and binding. First, California courts have traditionally been liberal in recognizing new forms of easements.\textsuperscript{248} Second, the facade easement has been recognized by the administrative branch of government. In 1976 the Department of Parks and Recreation approved

\textsuperscript{244} Covenants and equitable servitudes are additional alternatives, but present legal pitfalls in terms of enforcement. They may be useful, however, in conjunction with resale or lease of restored properties.

\textsuperscript{245} NATIONAL TRUST FOR HISTORIC PRESERVATION, EASEMENTS—THEIR USE TO CARRY OUT HISTORIC PRESERVATION (1975) (a monograph containing a useful bibliography); G. FREEMAN, THE USE OF EASEMENTS FOR HISTORIC PRESERVATION (n.d.) (a monograph available from the National Trust); H. LORD, THE ADVANTAGES OF FACADE EASEMENTS (n.d.) (available from the National Trust).

\textsuperscript{246} Statutory basis for the scenic easements is found in CAL STS. & HY. CODE §§ 895-896 (West 1969).

\textsuperscript{247} Id. at 895.

\textsuperscript{248} See Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 P. 593 (1912), in which the California Supreme Court established that recognition of types of easements would not be limited to those enunciated by the state legislature: "[t]he ingenuity and foresight of the Legislature would be taxed in vain to name and classify all the burdens which might be imposed upon land." Id. at 415, 129 P. at 594.
use of state funds by the County of Santa Clara for purchase of facade easements in the historic community of New Almaden. Finally, the facade easement has been used by governments and private groups for decades in Eastern states.

By nature, the facade easement is an easement in gross as opposed to an easement appurtenant. The latter term means that there is a servient property subject to an easement and a dominant property to which the right attaches. By contrast, creation of an easement in gross involves no dominant estate, but instead the easement rights rest in a person. Under California law easements in gross are binding upon the servient estate and survive transfer to a new holder of the easement.

Both the scenic and facade easements should be carefully drafted to be certain the easement achieves its goal and to prevent successful challenge by subsequent owners of the property. The following points should be considered:

a. Easements can be both positive and negative. The positive easement places an affirmative duty on the owner of the subservient property. This aspect of the easement can be used to require the owner of the fee to restore the property to a specified state and to keep it in good repair. The negative aspects can be used to prohibit changes in the property once the desired level of historic restoration has been achieved.

b. The agreement should specifically state that the easement will be enforceable against successors in interest.

c. Some compensation should pass from the grantee to the grantor in order to help insure that the easement will be recognized as valid if challenged. This is no problem when the easement is purchased, provided the agreement recites the consideration, but where the easement is donated some nominal consideration should be provided, such as a small sum of money or an official plaque. Tax benefits to the grantor may not qualify as consideration, on the theory that these benefits do not flow from the grantee; this issue, however, has not yet been clarified.

249. Minutes of Santa Clara County Historical Heritage Comm’n, (May 20, 1976) (files of the Comm’n, Planning Dep’t, County of Santa Clara, Cal.).

d. Some provision should be made for access to the property so that the easement holder may inspect the property to determine whether the terms of the easement are being respected.

e. The easement may be tailored to include the exterior, the interior, adjacent setting, or some combination of these aspects. Alternatively, the easement may protect only specific architectural elements of a structure or specific features of a nonstructure site.

f. Since an easement in gross may terminate if there be no proper holder of the easement, it may be wise to vest the interest in a corporation or government, thus avoiding problems that may arise upon death of a holder.

2. Development Rights

When property is not being as intensely used as it might be under existing zoning law, the remaining unexploited use can give rise to what are called development rights. Examples of such situations include an historic house in an area rezoned for commercial building, an undeveloped tract of land, or an historic structure that does not fully use the height or set-back limits allowed. Since each of these properties could be more intensively developed, they have a value beyond the present use. This additional value has been recognized as representing a property right that can be severed from the fee and transferred.

An interesting variant of the development rights sale is the development rights trade-off. Where permitted by ordinance, the owner of an historic building could sell this unused


An example of statutory recognition in California is the SAN FRANCISCO, CAL., CITY & COUNTY PLANNING CODE § 122.4 (1968).


253. This is the so-called "Chicago Plan." See Costonis, The Chicago Plan, supra note 251.
right to a developer who wishes to exceed the height limits on another property in the same area. Since the development rights in this case can actually be used to exceed a restriction on another property, they probably have a market value exceeding those rights which are merely sold and held static by the purchaser. This difference in potential price is significant since the higher the potential sale price, the more likely the owner of an historic property will cooperate with such a proposal. To date in California, development rights transfer plans have apparently been adopted only in San Francisco.254

3. Life Estate

In appropriate circumstances, the use of the life estate concept may be helpful in securing preservation of an historic structure. Under this concept the owner retains possession and occupancy for life, with the property then passing to the remainderman, the government agency, or private group that has purchased the underlying fee.255 The advantages of this arrangement are that the purchaser is relieved of operation and maintenance cost for some period, the property remains in active use, the cost of the fee is reduced by the value of the life estate, and the fee purchaser benefits from any appreciation that accrues to the property during the possession of the life tenant.

Often the greatest advantage of this approach is that it allows the pre-transfer owner to remain in possession, which may be an important concern to that party. In effect, the owner can profit from the property, stay in possession, and yet the property's future preservation is assured. Under principles of property law the life estate holder may not commit waste to the detriment of the remainderman,256 but an explicit covenant should be drawn regarding preservation of the historic property during the life estate, with termination of the life estate as penalty for violation.

An arrangement of this type is not unprecedented in Cali-

254. SAN FRANCISCO, CAL., CITY & COUNTY PLANNING CODE § 122.4 (1968).
fornia. The Neary Adobe in Santa Cruz, the last remaining adobe building associated with the Santa Cruz Mission, was acquired by the Department of Parks and Recreation subject to a life estate. This transfer not only gave the elderly owner a chance to remain in her home, but provided the opportunity for the Department to develop plans for the future of Neary Adobe without incurring the immediate expenses of possession.  

4. Leasehold Arrangements

When a life estate is not practical or desired, the government agency or preservation group may lease historic property which it owns. The property purchase cost will be higher than the purchase of a remainder interest, but the subsequent leasing will produce revenue.

If the property requires a great deal of repair or restoration the tenant may agree to assume these costs in exchange for no rent or reduced rent. An arrangement like this has been used by the Mid-Peninsula Regional Open Space District in Santa Clara County to secure restoration and preservation of the Fremont-Older house, which is located on land acquired for park use. The district could not justify use of its funds for restoration because historic preservation was not within its legal purpose. Faced with having to demolish an architecturally interesting house long-famed as the residence of a pioneer San Francisco newspaper editor, the district resolved the problem through long-term leasing to a private party.

As with life estates, there should be a carefully drafted lease agreement to control restoration and secure commitment to preservation. Such covenants should provide, as with the life estate, for immediate reversion in the fee owner upon violation of the covenant.

B. How to Acquire the Interest

In situations in which the owner of a property is a willing seller, transfer of an interest in the property may present few problems. If the owner is unwilling to sell, the state or local governing body may have to exercise the power of eminent

257. See Neary Adobe files, Cal. Dep't of Parks & Recreation.
258. See Mid-Peninsula Regional Open Space District files (375 Distel Circle, Los Altos, Cal.).
domain to acquire the property through condemnation. State and local governments in California are authorized to use condemnation to further historic preservation as a proper public use.\textsuperscript{259}

No cases or specific statutes expressly authorize condemnation of a facade easement in California. The most relevant statute is Code of Civil Procedure section 1240.110 which provides that the interest condemned may be "any interest in property necessary" for a particular use.\textsuperscript{260} Under this section, it is clear that if a purpose can be met by less than full fee acquisition, an easement may instead be obtained; thus, if the purpose is to preserve the exterior of a structure, a facade easement may be all that is necessary.\textsuperscript{261}

When a public agency is intent upon securing more than a facade easement, it may be possible to do so. Code of Civil Procedure section 1245.250 provides that "a resolution of necessity adopted by the governing body of a public entity . . . conclusively establishes\textsuperscript{262} that the project is required by public interest and necessity,\textsuperscript{263} is "planned or located in a manner that will be most compatible with the greatest public good and the least private injury,"\textsuperscript{264} and necessitates acquisition of the property.\textsuperscript{265} This determination is subject to collateral attack in the courts only if there has been a gross abuse

\textsuperscript{259} CAL. CIV. PROC. CODE § 1240.010 (West Supp. 1981). Section 1240.010, which superseded former section 1238, does not explicitly state that historic preservation is a public use justifying the exercise of eminent domain. The Law Revision Commission Comment, 1975 Addition, however, states that "every public entity that would be authorized to condemn for a use listed in former Section 1238 may still condemn for that use" and former section 1238 permitted any "public use for the benefit of any county, incorporated city . . . which may be authorized by the Legislature . . . ." CAL. CIV. PROC. CODE § 1238(3) (West 1972). The state legislature has, in permitting creation of historic districts, implicitly recognized historic preservation to be of public benefit. CAL. GOV'T CODE §§ 25373, 37361 (West 1968). Thus, it would appear that the use of eminent domain for the purpose of historic preservation is legally sound. See Merced Dredging Co. v. Merced County, 67 F. Supp. 598, 607 (1946).

\textsuperscript{260} CAL. CIV. PROC. CODE § 1240.110(a) (West Supp. 1981).

\textsuperscript{261} Section 1240.110(a) contains a nonexclusive list of obtainable interests: "submerged lands, rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operations easements, right of temporary occupancy, public utilities facilities and franchises to collect tolls on a bridge or highway."\textit{Id.}

\textsuperscript{262} \textit{Id.} § 1245.250(a).

\textsuperscript{263} \textit{Id.} § 1240.030(a).

\textsuperscript{264} \textit{Id.} § 1240.030(b).

\textsuperscript{265} \textit{Id.} § 1240.030(c).
of discretion.\textsuperscript{266}

Whether development rights can be condemned in California is less clear. Such practice has been recognized by the courts in at least one other state\textsuperscript{267} and appears to be authorized by Code of Civil Procedure section 1240.110(a).\textsuperscript{268} It has been widely used in England for scenic and historic preservation.\textsuperscript{269} There appears to be some basis for optimism concerning the legality of the practice in light of Village of Euclid v. Ambler Realty Co.\textsuperscript{270} which upheld zoning that precluded intensive development of currently undeveloped land. Similarly, the California Supreme Court has upheld the legal propriety of subdivision exaction in Associated Home Buildings, Inc. v. City of Walnut Creek.\textsuperscript{271} If local government may preclude development by the police power without payment of compensation, it would seem that it must be allowed to preclude development when the property owner receives compensation.

While condemnation may be used to achieve historic preservation, it cannot be used in California to defeat historic preservation when the property in question is in public use. California Code of Civil Procedure section 1240.610 authorizes condemnation of property in public use if the proposed use is "more necessary."\textsuperscript{272} Section 1240.680 stipulates that historic property is presumed to be serving a "best and most necessary public use."\textsuperscript{273} Thus the state, for example, could not condemn an historic property owned by a city or other local public body, for the purpose of constructing a highway.

C. Sources of Funding

As noted in earlier discussion, the National Historic Pres-
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Historic Preservation Act provides funding, through the states, for historic preservation by public agencies or private parties. In California this program is administered by the State Office of Historic Preservation and current information should be sought from that office.

No other consistent source of public money is earmarked for historic preservation. From time to time, however, the voters of California have approved state bond acts for parks, beaches, and historic preservation. The most successful bond acts were in 1964, 1974, 1976, and 1980. Under terms of these acts, a significant amount of the bond monies is designated for spending at the discretion of cities, counties, and local park districts. Even though historic preservation is a permitted spending objective, local jurisdictions have in the past spent little bond money to this purpose, principally because preservationists have been largely unaware of the availability of these funds and have failed to lobby for their use for preservation.

In order for a preservation project to qualify for bond money, it must be in accordance with the local jurisdiction’s General Plan. Preservationists must, therefore, do two things to secure bond money expenditures on historic properties: secure amendment of the local General Plan to include the proposed project, and persuade local government to use state park bond monies for preservation projects.

In addition to funds authorized by the 1980 bond act, funds from prior state bond acts may still be available. Some of these funds are within the control of local jurisdictions, while other monies have reverted to the state, but may be available for local use. Other potential sources of preservation money subject to local discretion are Community Bloc Grants administered by the federal Department of Housing and Ur-

275. See note 111 supra.
278. Bond funds were first used in California in this manner in 1974 by Santa Clara County while the author was serving as vice-chairman of the County Historic Heritage Commission.
ban Development (HUD). These funds may be used for a wide range of preservation activities: surveys of historic properties, development of a community plan for preservation, planning pursuant to specific projects, funding of restoration through loans to private parties, public acquisition of historic properties, and restoration undertaken by public agencies. HUD also administers subsidy and financing programs for low-income housing, which can be coupled with important tax advantages in restoring historic structures. Further information on these types of funding may be obtained from the regional office of HUD or from the California State Office of Historical Preservation.

At the discretion of local government, revenue sharing funds may also be used for preservation purposes. As with the above programs, securing these monies for preservation depends almost entirely on persuading local decisionmakers. Inquiry should be directed to local government.

Federal funds for rehabilitation projects may also be available from several other agencies. The Economic Development Administration of the Department of Commerce offers loans for projects which expand business and job opportunities in areas of significant unemployment. The Small Business Administration offers loan programs that may be useful to business interests undertaking rehabilitation of commercial or rental properties.

Since it is apparent that public money for historic preservation is quite limited, techniques have been developed for extending the impact of available funds. These include the "loan-leveraging" approach, whereby a local agency does not expend money directly on preservation, but agrees to bank some portion of its funds with a lending institution at a reduced interest rate. In return, the lending institution agrees to

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281. There are numerous tax aspects involved in historic preservation, but a discussion of potential tax advantages is beyond the scope of this article.

282. CAL. STATE OFFICE OF HISTORIC PRESERVATION, HISTORIC PRESERVATION FUNDING (an annual guide).


make loans to property owners at a reduced rate of interest. Further, the institution agrees to lend a total amount exceeding that deposited by the local government. In some cases the aggregate amount loaned will be as much as ten times that which has been placed on deposit; thus, the local government has used its funds to "leverage" a higher amount of money into use for preservation projects. The feasibility of this approach, however, may be curtailed by high market interest rates. An example of successful use of loan-leveraging is the historic preservation program carried out in the Mission District of San Francisco in the mid-1970's through which over seventy buildings were rehabilitated.

Another technique for maximizing available funds is the revolving trust. This is an approach well-suited to preserving individual, isolated historic buildings (in contrast to loan-leveraging which is better suited to neighborhood restoration). Under a revolving trust, funds are used to acquire and restore a given property which is then resold at a higher figure if possible. The higher figure is attributable to the improvement made during trust ownership. As money returns to the trust through sale of restored properties, other properties are acquired for rehabilitation. Each sale of a restore property is accompanied by a covenant under which the purchaser agrees to preserve and maintain the structure.

The above discussion focuses on the use of public money, but financing of historic preservation may also come from the private sector. Nonprofit groups, as well as commercial ventures, have probably accounted for more preservation projects than have the various levels of government. The National Trust for Historic Preservation is a good source for information on private fund-raising, while the California State Office of Historic Preservation maintains lists of private foundations that contribute to historic preservation.

286. Interviews conducted by author with program chief and the lending institution, August 1976.
287. The National Trust for Historic Preservation particularly promotes this approach and can provide considerable expertise and written materials.
288. Model covenants are available from the National Trust for Historic Preservation, supra note 36.
IV. Conclusion

Although historic preservation is a relatively new area of law, it is a burgeoning one. Increased interest in preserving our past, conserving resources, and revitalizing the urban core has stimulated heightened activity. New legislation has taken a wide range of forms, from new protective laws to changes in unfavorable tax laws. In addition, recent court decisions and new regulations adopted by administrative agencies have made possible more effective preservation activity.

In seeking to protect historic resources from destruction, practitioners must recognize, however, that there is yet a political burden upon preservationists to devise in each case a reasonable and persuasive alternative to destruction. The most significant protective laws require that consideration be given such alternative. If such consideration is to result in a decision that furthers preservation, the alternative must be as attractive as possible. To this end, the concerned attorney should be aware of the variety of alternatives available in securing protection of our national heritage.
APPENDIX A

FEDERAL PROJECTS UNDER NEPA AND HISTORIC PRESERVATION LAWS

Compliance with NEPA

Federal Project is proposed

Scoping Meeting

Negative Declaration (no EIS unless * successful challenge)

Environmental Assessment is prepared (or EIS is begun * immediately

Compliance with National Historic Preservation Act and Executive Order 11593

Agency consults with SHPO on presence of significant resources *

Agree no significant resources *

Agree more study needed

Disagreement as to significant resources referred to Advisory Council *

Advisory Council Decision

Agreement on mitigation ▲

Agency consults with SHPO on proposed mitigation *

Mitigation Proposals referred to Advisory Council *

Advisory Council Decision *

Results of Study ▲

National Register Listing

Draft EIS being written

Draft EIS circulated for comment

Public *

Other Gov't Agencies

Draft EIS returned with comments

Final EIS is written to respond to comments

EIS sent back for * rewrite

Final EIS is accepted *

Project decision is made

* Information should be supplied by the Community.

▲ Appeal to the Advisory Council if not acceptable.

* File suit if not acceptable.