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ALTERNATIVES TO DESTRUCTION: TWO NEW DEVELOPMENTS IN HISTORIC PRESERVATION

INTRODUCTION

The high rate of population growth in California since World War II, accompanied by a marked surge in land values, has produced a significant loss of historic structures throughout the state. While no figures are available on the rate of loss statewide, one metropolitan county recorded a seventeen percent loss of its recognized historic structures in the 1960's alone.\(^1\) Although the pressures of growth continue, the realization is also growing that California's historic structures constitute an important part of the state's heritage. Concern for conservation of resources and energy also dictates that attention be given to rehabilitating existing structures rather than destroying them.\(^2\)

In response to the threat to California's historic heritage, various approaches have been developed, or are being developed, to encourage retention of historic structures. Among these approaches are changes in property tax law and building code enforcement, institution of locally-administered loan programs, and increased attention to historic resources in local planning.\(^3\) While some of the new programs may be cumbersome or unduly limited, they constitute evidence of growing recognition of the need to protect what remains of California's colorful past.\(^4\)

\(^1\) County of Santa Clara, A Plan for the Conservation of Resources—An Element of the General Plan of Santa Clara County 37 (June 27, 1973).
\(^2\) CAL. OFFICE OF PLANNING \& RESEARCH, URBAN STRATEGY PLAN 13-16 (1978) [hereinafter cited as URBAN STRATEGY PLAN].
\(^3\) Information on these and other programs may be obtained from the Office of Historic Preservation, California Dep't of Parks and Recreation, Sacramento, Cal., and the Western Regional Office, National Trust for Historic Preservation, San Francisco, Cal.
\(^4\) See CAL. DEP'T OF PARKS AND RECREATION, RESOURCES AGENCY, CALIFORNIA INVENTORY OF HISTORIC RESOURCES (1976). In commenting on California's "rich and diverse heritage," the Inventory states:

A broader definition of historic preservation has resulted from a concern for environmental and historical issues. Fundamentally, preservation is the act of retaining the tangible remnants of our heritage. To reach and benefit as many people as possible, preservation now applies to all of the historic resources that contributed to an area's total living environment. Preserved sites will not only include mansions, missions, and house museums emphasizing political, social, and economic elites and events, but also settlers' villages, factories, ships, agricultural developments and
The purpose of this comment is to review two other new developments in the field of historic preservation which may provide alternatives to destruction of historic structures. Since impending demolition is frequently the first problem to be dealt with in preserving an historic structure, an initial examination is made of the relationship of the California Environmental Quality Act (CEQA) to the issuance of demolition permits. Within this discussion, a number of alternatives to destruction are identified.

One of these alternatives, and the second development in the field of historic preservation examined in this comment, is the historic preservation easement. This relatively new approach in historic preservation was selected for review because of its flexibility, its economic advantage to the community, and its benefit to property owners.

APPLICATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT TO DEMOLITION PERMITS

Since its enactment, the California Environmental Quality Act has provided some measure of protection for historic properties. This protection has been afforded principally through the requirement of the Environmental Impact Report (EIR). As judicially interpreted, CEQA requires that all state and local agencies that conduct, approve, license, or issue a permit for a project shall prepare and consider an EIR that analyzes the potential effect of the project on environmental resources. Historic properties are defined within the Act as sites representing ethnic minorities and others whose historical importance has been overlooked, such as the average citizen of the past. Historically and architecturally important districts and neighborhoods will be conserved as well as individual sites.

Id. at vii.

The Inventory recognizes three eras in California's history: the Native American era (to 1849), the Hispanic era (1542-1849), and the America era (1849 to present). Id. at x-xi. In addition, the Inventory identifies nine "themes" in California history: aboriginal, architecture, arts/leisure, economic/industrial, exploration/settlement, government, military, religion, social/education. Within these themes, historic sites range from opera houses to cemeteries. Id. at xi.

6. Although the terms "facade easement" and "architectural easement" are commonly used, the term "historic preservation easement" is favored here because it implies application to historic resources other than just buildings.
8. CAL. PUB. RES. CODE § 21061 (West 1977); Friends of Mammoth v. Board of
Ordinarily, under the Act, an application for a building permit involving alteration of an historic building would be subject to an EIR. Until recently, however, issuance of permits for demolition of historic structures could in many instances be exempt from the EIR process. Since demolition is the principal nemesis of historic structures, it is apparent that the exclusion of demolition permits from CEQA was a significant omission from the protective provisions of the Act. This anomalous situation was created by the state guidelines to CEQA. As issued in 1973, the guidelines categorically exempted demolition permits from the EIR process.

Effective January 1, 1977, new guidelines were promulgated by the Secretary following requisite public hearings. Although the new guidelines do not place demolition permits squarely within CEQA, the categorical exemption has been removed. Under the present guidelines, a demolition permit will be subject to CEQA’s review procedures if issuance of the permit is a discretionary act by the local agency.

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9. Supervisors of Mono County, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (ruling that CEQA applies to private as well as public projects).

10. The EIR would be required if the project might have an impact upon the historic value of the building. The guidelines to CEQA exempt a variety of projects involving “existing facilities,” but alteration of an historic structure is excluded from the exemption. CAL. ADMIN. CODE tit. 14, § 15101 (1978).

11. CAL. ADMIN. CODE tit. 14, § 15101 (1973) (amended 1977) included as a “categorical exemption” from the EIR process the demolition of structures “except where they are of historical, archeological or architectural significance as officially designated by Federal, state or local governmental action.” (Emphasis added.) The effect of this narrow wording was that thousands of historic structures not officially recognized were excluded from the protections of CEQA. CAL. DEP’T OF PARKS & RECREATION, supra note 4, at ix, estimates that only one in sixteen historic sites in California has received official designation. It is apparent, therefore, that the now-superseded section of the Administrative Code would have allowed demolition of most of California’s historic structures with no EIR process.

12. This was contained in the Administrative Code in 1973, as issued by the Secretary of Resources pursuant to CAL. PUB. RES. CODE § 21083 (West 1977).


14. Id. § 15101 (1) (1978) in effect removed the categorical exemption by deleting the requirement that historic significance be established by official designation. See note 11 supra. As presently worded, section 15101 (1) exempts demolition permits from the EIR process “except where the structures are of historical, archeological or architectural significance.” CAL. ADMIN. CODE tit. 14, § 15101 (1) (1978).

A local jurisdiction may define issuance of the permit as discretionary through appropriate language in a local ordinance. Absent such definitional language, each local jurisdiction must evaluate its issuance procedure as to whether the procedure is discretionary or ministerial.16

Imposition of the EIR process on issuance of the demolition process has two important effects. First, it puts the community on notice that demolition of an historic structure is pending. In the absence of the EIR process, a demolition permit could be issued on a virtually same-day basis with no notice and no consideration of the proposal. The second effect of the EIR process is to guarantee that the historic value of the

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16. The guidelines for CEQA distinguish between ministerial and discretionary acts in the following sections:

15024. Discretionary Project. Discretionary project means an activity defined as a project which requires the exercise of judgment, deliberation, or decision on the part of the public agency or body in the process of approving or disapproving a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.

15073. Ministerial Projects. Ministerial projects are exempt from the requirements of CEQA, and no environmental documents are required. The determination of what is “ministerial” can most appropriately be made by the particular public agency involved based upon its analysis of its own laws, and each public agency should make such determination either as a part of its implementing regulations or on a case-by-case basis. It is further anticipated that the following actions will, in most cases, be ministerial in nature.

(a) Issuance of building permits.
(b) Issuance of business licenses.
(c) Approval of final subdivision maps.
(d) Approval of individual utility service connections and disconnections.

In the absence of any discretionary provision contained in local ordinance, it shall be presumed that these four actions are ministerial. Each public agency may, in its implementing regulations or ordinances, provide an identification or itemization of its projects and actions which are deemed ministerial under the applicable laws and ordinances.

structure and alternatives to its destruction are considered within a formal process.\textsuperscript{17}

\textit{The EIR Process}

Public Involvement. Although CEQA, the state guidelines, and associated judicial decisions have generated a considerable amount of literature, generally little information is available on how citizens may enter the EIR process. Since the courts have repeatedly emphasized the importance of public comment in the EIR process,\textsuperscript{18} a consideration of opportunities for such participation seems warranted.

The EIR process may provide no less than five stages for the public, or another government agency, to challenge the decision making involved in the issuance of a demolition permit.\textsuperscript{19} Opposition may be raised to the “initial determination,” the “negative declaration,” the draft EIR, the final EIR, and the administrative decision ultimately made on the basis of the EIR.\textsuperscript{20}

The issues involved in evaluating demolition of an historic structure will vary at each stage of the EIR procedure. In the “initial determination” phase, the question will be whether the issuance of the permit is in fact subject to the EIR process. The responsible public agency can exempt the issuance from the

\textsuperscript{17} The relevant procedural stages are reviewed in the text accompanying notes 18-69 infra. For a discussion of the elements of an EIR, see Hildreth, \textit{Environmental Impact Reports Under the California Environmental Quality Act: The New Legal Framework}, 17 SANTA CLARA L. REV. 805 (1977).

\textsuperscript{18} County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 197-98, 139 Cal. Rptr. 396, 405 (1977) (CEQA as originally enacted and judicially interpreted has a public information purpose and requires public participation in the EIR process).


\textsuperscript{20} \textsc{Cal. Pub. Res. Code} § 21167 (West Supp. 1979) provides the statutory basis and requirements of timeliness for challenging an initial determination, negative declaration, final EIR, and the administrative agency’s decision on the project. Challenge to a draft EIR takes the form of comments submitted to the agency.
EIR process only if the permit is found to be a ministerial act, or an emergency exists.\textsuperscript{21}

Once the EIR process has been initiated, the next question will be whether a negative declaration is warranted. A negative declaration by the responsible public agency in effect asserts that an EIR will not be required because there is no likelihood that the project, in this case the demolition of the structure, will have a “significant impact upon the environment.”\textsuperscript{22} Ordinarily opponents of destruction will have a limited period of time in which to file a notice of opposition to any negative declaration that is issued.

If a notice of opposition is filed, the issue is whether there is a possibility that the proposed demolition will have an impact upon the environment. To overcome the negative declaration, it is sufficient to show that a project “may have a significant effect on the environment.”\textsuperscript{23} The courts have held that a sufficient showing is made if there is a dispute as to facts or likelihood that the issue of significant effect will generate controversy.\textsuperscript{24}

If it is found that the proposed demolition may have a significant effect on the environment,\textsuperscript{25} the governing jurisdiction must prepare a draft EIR through the appropriate public agency. A legally acceptable EIR must describe the project, identify significant effects upon the environment, propose mitigation measures to reduce adverse environmental effects, and review possible alternatives to the project.\textsuperscript{26} The purpose of the

\textsuperscript{21} CAL. PUB. RES. CODE § 21080 (West 1977); CAL. ADMIN. CODE tit. 14, § 15035.5 (1978) (“Notice of Exemption”).

The term “emergency” is defined in CEQA, CAL. PUB. RES. CODE § 21060.3 (West 1977), and in the state guidelines to CEQA, CAL. ADMIN. CODE tit. 14, § 15025 (1978): “Emergency means a sudden, unexpected occurrence involving a clear and imminent danger . . . .” Id. (Emphasis added.) This definition would not appear applicable to a situation in which an historic structure had deteriorated over a period of time.

\textsuperscript{22} CAL. ADMIN. CODE tit. 14, § 15033 (1978).

\textsuperscript{23} CAL. PUB. RES. CODE § 21100 (West 1977).

\textsuperscript{24} No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974). The City of Los Angeles refused to order an EIR prepared on test-drilling by Occidental Petroleum and based its refusal on the grounds that there was no evidence the drilling would have a significant effect on the environment. Upon suit by No Oil, a citizens’ group, the supreme court ruled that an EIR will be required in the absence of evidence of significant effect if there is a likelihood of controversy or a dispute as to facts.

\textsuperscript{25} It would appear, as discussed previously in this comment, that destruction of an historic entity is per se a significant impact on the environment. Text accompanying note 9 supra; see CAL. ADMIN. CODE tit. 14, div. 6, ch. 3, app. G (1978); see also text accompanying note 34 infra.

\textsuperscript{26} CAL. PUB. RES. CODE § 21100 (West 1977); CAL. ADMIN. CODE tit. 14, §§ 15000-
EIR is to provide decision makers with sufficient information for informed decision making. Recent decisions by the courts have held that an EIR need not be exhaustive in all aspects. The public agency preparing the report may thus overlook pertinent information without rendering the EIR legally insufficient. For this reason it is desirable that members of the public advocating historic preservation volunteer information to the agency preparing the draft EIR.

Of concern are those aspects that apply most directly to the issue of demolition of an historic structure. Fundamental to an EIR concerning an historic property is evaluation of the historic significance of the structure. Unlike such environmental resources as air or water quality, historic values do not lend themselves to quantitative measurement. In fact, there is no simple definition of what is "historic." The concept is broad enough to include such considerations as age, architectural value, workmanship, materials used, the role of the structure in the life of the community, association with an historic person or event, ethnic or racial associations, cultural significance, relationship to neighboring structures or view, and contribution to the community's sense of identity.

To establish historic significance of a structure, the public should provide relevant information to the public agency preparing the EIR. Such information could include: 1) evidence of

15192 (1978). In addition, detailed discussion of what constitutes adequate treatment of these elements is available in the literature on CEQA. See Hildreth, supra note 17.
29. Criteria used in federal landmarks programs may be useful. "The National Register," a bulletin published by the National Register of Historic Places, contains "Criteria for Evaluation:"

The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:
A. that are associated with events that have made a significant contribution to the broad patterns of our history; or
B. that are associated with the lives of persons significant in our past; or
C. that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
D. that have yielded, or may be likely to yield, information important in prehistory or history.

Nat'l Register for Historic Places, Dep't of Interior, The National Register (1975).
past and contemporary opinion as to the historic significance of the structure; 2) inclusion of the structure (or district in which it stands) in a local, state, or federal list of historically significant properties; and 3) comparison of the structure with similar structures that have been recognized as being of historic significance.

Project Description. The materials mentioned above, whether provided by the public or gathered by the agency, will ordinarily be included in the project description section of the EIR. The project description has been termed “a baseline from which the project’s environmental effects can be measured.”

To assure an adequate baseline, the EIR should consider the historic structure in terms of its significance and relative rarity of type in regional, state, and national terms. In addition, attention should be given to possible collateral features of the demolition, such as the loss of archeological artifacts in the land associated with the structure, or harm to historic natural features, such as venerable trees or historic gardens.

Assessment of Environmental Effect. If the project description establishes the historic value of the structure, the environmental impact of the proposed demolition is “significant” by definition under the state guidelines to CEQA. Appendix G of the guidelines states in part:

A project will normally have a significant effect on the environment if it will . . . [disrupt or alter an archeological site over 200 years old, an historic site or a paleontological site except as part of a scientific study of the site. [Emphasis added.]

30. The National Register of Historic Places lists places of local, state, or national significance. See id. The State of California registers landmarks and points of historic interest. Many cities and counties have officially adopted inventories of historic properties. Information on the foregoing programs is available from the Office of Historic Preservation, State of California, Sacramento, Cal.

31. Hildreth, supra note 17, at 808.

32. The Office of Historic Preservation in the California Department of Parks and Recreation is charged with reviewing EIR’s for state and federal projects. According to Office spokesmen, it is anticipated that this information will be present in EIR’s reviewed by the Office. See also D. Gray, Cal. Dep’t of Parks & Recreation, How to Stop the Bulldozers (on file at Santa Clara Law Review); Cal. Office of Planning & Research, Historic Preservation Element Guidelines 38-39 (Sept., 1976).


34. CAL. ADMIN. CODE tit. 14, div. 6, ch. 3, app. G (1978). The term “normally” is not defined in CEQA or its guidelines. Arguably, the phrase “will normally have significant effect” can be construed as creating an inference, if not a rebuttable presumption, that absent abnormal circumstances, the significant effect will be present.
In addition to considering this *per se* significant environmental effect, a comprehensive EIR will also include a discussion of the impact of the proposed demolition on the future of the surrounding neighborhood. Rarely is a structure demolished and the land left vacant for a long period. Economic pressures, such as high urban land values and concomittant high taxes that make demolition attractive, often make construction of a larger, more heavily used building the ultimate goal. A comprehensive EIR will, therefore, look beyond the proposed demolition and attempt to assess the likelihood and the impact of new construction. If this approach is adopted, some effort should be made to assess future noise and air pollution, impact on neighborhood traffic and parking, inducement to growth or concentration of population, and effect on existing water supply and sewage capacity.

Attention should also be given in the EIR to the effect on other historic properties. Frequently the loss of one historic structure seriously diminishes the possibility of creating an effective historic district. Future revitalization of an area as an historic entity can be endangered by the loss of a key building, particularly if its demolition is to be followed by construction of a new building that is architecturally incompatible with surrounding historic buildings.

If the phrase creates the inference or presumption suggested here, then it would appear that the proponents of demolition would have the burden of showing that abnormal conditions exist that preclude the significant effect. If “normally” is not given the force suggested here, then the issue may turn solely on expert testimony. If this be the case and there is conflict in expert testimony, the determination will probably be left to the administrative decision-makers. The trend in California’s courts has been to avoid entering expert-versus-expert controversies. *See, e.g.*, County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977); San Francisco Ecology Center v. City & County of San Francisco, 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1975); Plan for Arcadia, Inc. v. Arcadia City Council, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974).

Changes in the wording of Appendix G have been proposed for adoption in 1979. The changes are primarily directed at broadening the definition of “archeological” and extending inclusion to sites of value in Native American culture and history. Office of Historic Preservation & Native American Heritage Comm’n, Changes Recommended in the State EIR Guidelines (Jan. 12, 1978).

35. For a discussion of historic preservation planning for neighborhoods, see Cal. Office of Planning & Research, *supra* note 32, at 7, 45, 73-85.

36. *CAL. ADMIN. CODE* tit. 14, div. 6, ch. 3, app. G (1978) mentions these potential effects. Whether they need to be dealt with in an EIR on issuance of a demolition permit may be discretionary. For an example of consideration of these effects in an EIR on demolition, see Planning Dept, City of San Jose, Draft Environmental Impact Report, Proposed Demolition of the “Murphy Building” and Adjoining Structures, vol. I (May, 1975).

37. Cal. Office of Planning & Research, *supra* note 32, at 37, states in part:
Other effects particularly associated with demolition of an historic structure may result. Among them are scenic and aesthetic loss, disruption of community patterns of recreational, scientific, educational, or religious use, displacement of people, and disruption or division of an established neighborhood. 28

Further, since energy conservation has received attention under CEQA and its guidelines, 29 an EIR will include consideration of a proposed demolition in terms of the energy loss represented by the demolition process and the destruction of the existing building materials. 40

Mitigation. CEQA requires that once significant impacts are identified in an EIR, mitigation measures must be proposed. Mitigation measures, however, may not be available with respect to the demolition of an historic structure. If it is assumed that each historic structure is unique, then there can be no mitigation of its loss. 41

Project Alternatives. CEQA also requires that the EIR include a consideration of alternatives to the proposed project. 42 Among the alternatives that must be considered is one of “no project.” 43 The most obvious “no project” alternative to demolition is to allow the structure to stand. If, however, the building is already in serious disrepair, its continued existence without rehabilitation may only be a postponement of destruction.

“...Districts have visual unity that would suffer if any single element were to be removed or altered in a way insensitive to the surroundings.”

39. CAL. PUB. RES. CODE § 21100(c) (West 1977); CAL. ADMIN. CODE tit. 14, § 15143(c) (1978).
40. For a discussion of EIR treatment of energy issues, see Hildreth, supra note 17, at 513. For a discussion of the need to conserve materials and energy represented by existing structures, see URBAN STRATEGY PLAN, supra note 2, at 13-16.
41. The assumption that each historic structure is unique is based on the likelihood that no two structures are identical in architecture, construction, materials, or association with events or persons. Further, it is likely that no two structures bear an identical relationship to surrounding structures or view. See note 37 supra (relationship of structures to historic districts); Cal. Office of Planning & Research, supra note 32, at 22-23 (relationship of individual structures to architectural history of an area), 30 (criteria for determining “Would it be missed if it were gone?”).

Mitigation in the form of moving a structure or recreating it from new materials is questionable, i.e., federal landmark status is denied or removed from structures subject to such treatment. Nat’l Register of Historic Places, Dep’t of Interior, supra note 29.

42. CAL. PUB. RES. CODE § 21002.1(a) (West Supp. 1979).
43. CAL. ADMIN. CODE tit. 14, § 15143(d) (1978). See also County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 386 (1977) (EIR ruled insufficient for failure to consider a “no project alternative”).
The alternatives presented should include suggestions as to what can be done to maintain the historic value of the building as well as meet the underlying purposes of the owner in seeking demolition.

The alternative often favored today by preservationists is rehabilitation of a building for active use through continued private ownership. This approach is favored over public acquisition, not only because public monies for acquisition are scarce, but also because private ownership generally keeps a building within the fabric of community life. In addition, preservationists generally favor retention of a building on its original site in order to protect its historic integrity. Moving a building is generally considered an alternative of last resort.

If a property owner is intent upon demolition for economic reasons, the alternative of rehabilitation may have no appeal to the owner, since rehabilitation means additional expenditures and the prospect of higher property taxes attributable to the resulting improvements. Alternatives need not, however, be limited to those within reach of, or acceptable to, the property owner.

Although an EIR may not be held legally insufficient for failing to consider all possible alternatives, a reasonably sufficient EIR should contain some of the possibilities present today in the preservation field. These include, but are not limited to:

1) purchase of an historic preservation easement by a public or private agency;

44. Lord, The Advantage of Facade Easements, LEGAL TECHNIQUES IN HISTORIC PRESERVATION (1972). See also Paraschos, Mt. Auburn, Helping Residents Take Pride in their Cincinnati Neighborhood, AMERICAN PRESERVATION, April-May, 1979, at 7 (an example of rehabilitation). Other examples are described on a regular basis in American Preservation, and in Preservation News and Historic Preservation, both published by the National Trust for Historic Preservation.

45. See Lord, supra note 44.

46. It is not yet clear what effect Proposition 13 will have on assessments of rehabilitation. CAL. CONST. art. XIIIa.

47. See Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972). Although the decision is under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976), CEQA is modeled on the federal act and California courts have consistently looked to decisions under the federal act. See also County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977) (EIR deficient in overlooking obvious alternative).

48. But see County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977). While stating by way of dictum that an EIR need not consider all possible alternatives, the court chastised the City of Los Angeles for not considering water rationing as an alternative to increased importation of water from the Owens Valley. Id. at 203, 139 Cal. Rptr. at 408.

49. See text accompanying notes 70-115 infra.
2) purchase of the property by a private group through public grant or loan;\textsuperscript{50}
3) reduction of property taxes pursuant to California’s new provisions for historic properties;\textsuperscript{51}
4) donation of an easement by the property owner for federal income tax and estate tax purposes;\textsuperscript{52}
5) rehabilitation of the structure through a matching federal grant under the National Historic Preservation Act of 1966;\textsuperscript{53}
6) reduction of rehabilitation cost by application of an alternate building code, recently authorized under state legislation;\textsuperscript{54}
7) use of community bloc grants or Housing and Urban Development funds for rehabilitation through grants or loans;\textsuperscript{55}
and
8) public acquisition with intent to resell.\textsuperscript{56}

Virtually all of the above alternatives provide some measure of economic compensation to the owner for allowing the structure to remain standing. At the same time, these alternatives represent no substantial continuing burden on local government. Economic concerns of this kind in an EIR are not inappropriate since decision-makers are permitted under CEQA to balance economic considerations against environ-

\textsuperscript{50} Information on sources of funds for purchase of historic properties is available from the Office of Historic Preservation, State of California, Sacramento, and the National Trust for Historic Preservation, Western Regional Office, San Francisco, Cal.
\textsuperscript{51} See text accompanying note 95 infra. In addition to the tax reduction available upon granting of an easement, as discussed in the text, a property owner may enter into a 20-year contract with local government to secure a property tax reduction in exchange for a commitment to preserve the property. \textsc{Cal. Gov’t} Code §§ 50280-50290 (West Supp. 1979) (section added by 1972 Cal. Stats. ch. 1442); \textsc{Cal. Rev. & Tax Code} § 439 (West Supp. 1979).
\textsuperscript{52} See text accompanying notes 86-94 infra.
\textsuperscript{54} \textsc{Cal. Health & Safety Code} §§ 18950-18960 (West Supp. 1979); \textsc{Cal. Admin. Code} tit. 24, §§ 13200-13205 (1976); see also National Trust for Historic Preservation, California: Building Codes and Preservation (May, 1978).
\textsuperscript{55} Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633. See also Office of Historic Preservation, Cal. Dep’t of Parks & Recreation, Sources of Historic Preservation Funds (an annual guide to these and other funding sources).
\textsuperscript{56} Public bodies may use funding sources identified in notes 53, 55 supra. Information on other forms of acquisition, including so-called revolving funds, is available from the National Trust of Historic Preservation, Western Regional Office, San Francisco, Cal.
mental costs. Government officials may elect to approve demolition that will have a significant adverse environmental impact if "[s]pecific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report." 57 The identification of economically feasible alternatives will, therefore, enhance the possibility of an historic structure surviving the balancing test of economic versus environmental concerns.

The Draft EIR. Once a draft EIR has been completed by the appropriate public agency, it must be made available to the public and to other concerned agencies for comment. 58 While neither CEQA nor its guidelines specifies in all cases what distribution of the draft EIR is required, decisions under CEQA have emphasized the importance of public comment in the EIR process. 59 Inadequate circulation of a draft EIR could, therefore, constitute grounds for challenge to the sufficiency of the EIR process.

Where a public agency determines that issuance of a demolition permit is ministerial, opponents of demolition should determine whether the demolition is prefatory to a larger project, e.g., construction of a new building, which is clearly discretionary and requires an EIR. If such a larger project is to follow, opponents of demolition can argue that the demolition is part of such a project and should be subject to the EIR process. The basis of such an argument is that the policy and procedural requirements of CEQA cannot be defeated by dividing a project into separate stages. 60

The courts' concern with public awareness and input in the EIR process strongly implies that the EIR must be effective in informing the public. Therefore, a draft EIR that is misleading in content or style, or that is incomprehensible because of technical jargon, is open to attack as thwarting the public information purpose that is central to CEQA. 61 Similarly, critical

57. CAL. PUB. RES. CODE § 21081(c) (West 1977).
60. CAL. PUB. RES. CODE § 21083(b) (West 1977) imposes the EIR process on projects that are "cumulatively considerable." CAL. ADMIN. CODE tit. 14, § 15069, requires "a single EIR for the ultimate project" for "[m]ultiple and [p]hased projects." See also County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977).
61. County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr.
omissions or excessive length may make a draft EIR insufficient for the purpose of providing information and eliciting intelligent comment.\textsuperscript{42}

\textit{The Final EIR and the Agency Decision.} After the draft EIR has been circulated for public comment, a final EIR must be prepared that includes comments received and specific responses to them. If the comments offer alternatives to demolition of the structure and these are rejected, the final EIR must give reasons for the rejection.\textsuperscript{43}

In reaching a decision on issuance of the demolition permit, the governing body or responsible agency must consider the EIR.\textsuperscript{11} If significant adverse environmental effects have been identified, the decision-making body cannot approve the project without making one of the findings mandated by CEQA: 1) the proposal has been changed so as to avoid or mitigate the adverse environmental effects; 2) such changes are the responsibility of another agency; or 3) economic, social, or other considerations make the mitigation or alternatives described in the EIR infeasible.\textsuperscript{44}

Ordinarily a decision to proceed with demolition of an historic structure will be accompanied by a finding in the third category. In effect this category allows the decision-making body to balance economic concerns against potential environmental losses. If opposition to a demolition is to be successful, it is necessary that concerned citizens anticipate this balancing process and provide persuasive economic arguments in favor of preserving the structure.\textsuperscript{45}

\textit{Challenge in the Courts.} Once a decision is made on the final EIR, it is open to challenge in the courts. CEQA limits judicial review to the question of whether the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.\textsuperscript{46} The ef-

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63. CAL. PUB. RES. CODE § 21080 (West 1977); CAL. ADMIN. CODE tit. 14, § 15146(b) (1978).
66. Whether environmental or economic considerations shall receive greater weight is not clear. See Hildreth, supra note 17, at 818-19.
67. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1977) set forth two standards: 1) if a decision is based upon a hearing required by law at which evidence was taken, "the court shall not exercise its independent judgment on the evidence but shall only
fect of this rule is that courts have been reluctant to overturn an administrative decision under CEQA unless there are blatan
t deficiencies in the EIR or in the process by which it was compiled. In applying the "substantial evidence" rule, the
courts have refused to evaluate elements of an EIR where ex-
pert testimony is in conflict, leaving conclusions in those areas
to decision-makers.

The result to date is that CEQA and the EIR process still
leave considerable discretion with administrators. In the final
analysis, the EIR process alone does not preclude demolition
of an historic structure but constitutes instead a means for
persuading decision makers. Under the economic balancing
allowed by CEQA, effective persuasion will not be confined to
issues of historic value but will also be directed to economically
feasible alternatives to destruction.

Summary

Although it is apparent that the EIR process in itself may
not "save" an historic structure, the application of CEQA to
demolition permits has several important aspects. First, the
EIR process constitutes a channel whereby the community and
its decision-makers may be educated to the historic value of the
structure. Second, the period of time normally required by the
EIR process may provide an opportunity for development and
implementation of a program to preserve the structure. Finally,
the EIR process provides a means of placing viable alternatives
to demolition before decision makers.

One of these alternatives is the purchase of an historic
preservation easement by a public or private agency. The char-
determine whether the act or decision is supported by substantial evidence in the light
of the whole record." Id. § 21168. In all other types of challenge, section 21168.5
provides that "inquiry shall extend only to whether there was a prejudicial abuse of
discretion . . . [i.e.,] the agency has not proceeded in a manner required by law or if
the determination or decision is not supported by substantial evidence." Id. § 21168.5.

68. San Francisco Ecology Center v. City & County of San Francisco, 48 Cal.
App. 3d 584, 122 Cal. Rptr. 100 (1975) (administrative decision upheld because of
evidence of "good faith and reasoned analysis"); see also Carmel Valley View, Ltd. v.
Board of Supervisors, 58 Cal. App. 3d 817, 130 Cal. Rptr. 249 (1976); Coastal South-
west Development Corp. v. California Coastal Zone Conservation Comm'n, 55 Cal.
App. 3d 525, 127 Cal. Rptr. 777 (1976) (administrative decisions to reject projects
upheld); Plan for Arcadia, Inc. v. Arcadia City Council, 42 Cal. App. 3d 712, 117 Cal.
Rptr. 86 (1974) (administrative decision to allow project upheld).

69. County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr.
396 (1977); San Francisco Ecology Center v. City & County of San Francisco, 48 Cal.
App. 3d 584, 122 Cal. Rptr. 100 (1975).
acteristics and mechanics of this approach should be familiar to attorneys and others interested in historic preservation.

**USE OF THE HISTORIC EASEMENT**

The historic preservation easement has been used with increasing frequency in the Eastern United States in recent decades as a means of preventing destruction of historic properties. Until recently, however, the easement approach has been largely overlooked in California, particularly with respect to use of public money for purchase of this less-than-fee interest.

In 1976, however, the California Department of Parks and Recreation authorized the County of Santa Clara to use state funds for the purchase of an easement on the Perham-Bulmore properties in the nationally designated historic district of New Almaden. The Carson-Perham adobe was a Wells Fargo office constructed in the 1850's, while the Bulmore House is a brick structure from the same period.

**General Features of the Historic Easement**

Essentially the historic easement is designed to preserve the visible features of a property. These may be the exterior or

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71. The National Trust for Historic Preservation holds several historic preservation easements in California. The State of California through the Department of Parks and Recreation has acquired several, principally through condemnation within state historic parks. The Office of Historic Preservation, the state agency charged with assisting preservation on a statewide basis, has record of only three historic preservation easements held by local governments, though it is likely there are others. The three of record with the Office are held by the County of Santa Clara and the cities of Pinole and Palo Alto.

72. Historical Heritage Comm'n, Santa Clara County, Cal., minutes 23 (special meeting of May 20, 1976) (on file at Santa Clara Law Review). According to records in the Grants Division, Department of Parks and Recreation, State of California, this appears to be the first time that a state agency has permitted such a use of state funds by a local government. Conceivably this recognition of the historic preservation easement by a department of the State of California will encourage wider use by other public agencies and private groups.

interior of a building as well as its appurtenances and land.\textsuperscript{74} Generally speaking, an easement is the right to use the property of another for a purpose that is of benefit to the holder of the easement. The easement constitutes a legal restriction placed upon the property owner, and when properly drafted, the easement is binding upon successors in ownership of the property. When an easement benefits the owner of an adjacent property, it is appurtenant; when it benefits someone not an adjacent property owner, it is an easement in gross.\textsuperscript{75} Since holders of preservation easements frequently are not owners of adjacent property, most preservation easements are easements in gross.\textsuperscript{76}

One potential problem in the use of historic preservation easements is extinction of the easement. Generally, the owner of an easement must enforce its terms or it will be deemed abandoned and therefore extinguished. Care must be given, therefore, to ensuring that the easement owner has the capability and longevity to be an effective easement holder.\textsuperscript{77} Where a government agency is the easement owner, concern for enforcement and for continued life of the easement holder would seem unnecessary. Where, however, the easement holder is a private individual, corporation, or charitable organization, the possibility of future cessation of the easement may be a problem. Some states, most notably Maryland, have attempted to avoid extinction by encouraging grantees of historic preservation easements to stipulate that their interest shall pass to an appropriate, named state agency should the present grantee cease to exist.\textsuperscript{78}

\textit{Statutory Basis for the Historic Easement}

A possible statutory basis for historic preservation easements in California is found in sections 895 and 896 of the Streets and Highways Code and Government Code sections 51050-51097 which recognize the “scenic easement,” presently used to preserve views and other physical features of open land.\textsuperscript{79} Like the scenic easement, the historic preservation eas-

\begin{itemize}
\item \textsuperscript{74} See Brenneman, supra note 70.
\item \textsuperscript{75} \textit{Restatement of Property} §§ 453, 454 (1944).
\item \textsuperscript{76} Freeman, supra note 70.
\item \textsuperscript{77} Md. Historical Trust, supra note 70, at 8.
\item \textsuperscript{78} Id. at 22-23.
\end{itemize}
ment seeks to confer upon the holder of the easement a right to view a stipulated entity by guaranteeing that the owner shall make no change in the entity except by permission of the easement holder.

Easements in gross have historically raised some problems, specifically in the area of assignment and enforceability against successors in ownership of the property. Under the older view, an easement in gross was viewed as an agreement between two specific parties. Under this view, alienation of ownership of the easement of the subject property could end the easement. In California, this problem has been virtually eliminated by statutory provision and associated case law. California Civil Code sections 654, 801, and 1044 establish that easements can be freely sold or otherwise conveyed. By analogy and by virtue of California case law, an easement in gross may be binding upon subsequent owners of the property; that is, the easement may "run with the land" if the instrument creating the easement stipulates to this provision.

Advantages of the Historic Preservation Easement Approach

Although the use of historic preservation easements re-

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81. For a discussion of the evolution of California's view of the easement in gross, see Collier v. Oelke, 202 Cal. App. 2d 843, 21 Cal. Rptr. 140 (1962). The Collier court summarized the relationship of the three relevant code sections:

- Section 1044: "Property of any kind may be transferred, except as otherwise provided by this article."
- Section 654: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property."
- Section 802: "The following land burdens, or servitudes upon land, may be granted and held, though not attached to land. . . ."

Id. at 845, 21 Cal. Rptr. at 141. The Collier court then concluded that on the basis of these sections, easements in gross may be transferred, as may property of every kind, except a mere possibility not coupled with an interest. In support of this view, Collier traced the development of the California doctrine through a series of cases, including: Rice v. Whitmore, 74 Cal. 619, 16 P. 501 (1888) (under California statutes all property may be transferred); Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29, 41 P. 1024 (1895) (California statutes abolish common law view that servitudes in gross are not assignable); Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788 (1935) (servitudes in gross are assignable unless expressly or by necessary implication made personal to a particular individual); Elliott v. McCombs, 17 Cal. 2d 23, 109 P.2d 329 (1941) (right of way construed as easement in gross and party acquiring it entitled to injunction against interference with use). See also Leggio v. Haggerty, 231 Cal. App. 2d 873, 878, 42 Cal. Rptr. 400, 403 (1965) (citing Collier); 28 Cal. Jur. 3d Easements & Licenses § 37, at 89 (1976) ("Servitudes in gross are assignable unless they are made personal to particular individuals either expressly or by necessary implication.").
HISTORIC PRESERVATION

quires some care and planning, the benefits of such easements can be considerable, both for the community and the grantor.

Benefits to the Community. The historic preservation easement permits the preservation of an historic property at a fraction of the cost of acquisition of full ownership. Although valuations of easements will vary, some studies indicate that an easement may cost as little as ten percent of what would be the full price of a property. Since purchase money for historic preservation is usually limited, the use of easements means that several properties can be preserved for an amount that would ordinarily purchase full fee interest in only one property.

A second benefit of the historic preservation easement is that the holder of the easement is not encumbered with the costs of operation and maintenance of the property. These burdens remain with the property owner. If a property were to be acquired with public money and opened to public use, these costs could exceed the cost of acquisition in a relatively short period. Thus, acquisition of an easement instead of full ownership can preclude a future heavy drain on public monies earmarked for historic preservation.

A further saving of public monies is possible with preservation easements through the fact that the property remains on the property tax rolls because it has remained in private hands.

Concurrent with these benefits is another that cannot be measured in dollars and cents. Property that remains in private ownership and use remains a part of the active life of the community. By contrast, historic property purchased in fee by a public agency is typically converted into a museum and thus is isolated from continued active use. Many preservationists view this "museum approach" as contravening the underlying goal of historic preservation: to conserve the cultural heritage of the community by allowing that heritage to be a living part of the fabric of the community.

Benefits to the Grantor. The advantages to the grantor of the easement will vary according to the circumstances. Where the donor is concerned about assuring preservation of the building, the sale or gift of an easement will allow him or her to retain use of the property without anxiety for its future existence.

If the granting of the easement is to a public agency, the

82. Lord, supra note 44.
83. See note 4 supra.
property may even be secure from condemnation for other public purposes that might be destructive to the property’s historical value. Although there are no recorded cases on the question, it appears that an easement held by a state, county, or city agency for historic preservation purposes could logically bring the subject property within the protective provisions of California Code of Civil Procedure section 1240.610. Under this section, a property in public use cannot be taken by eminent domain for other public uses unless it be shown that the intended new use is “more necessary.” Section 1240.680 provides further that an historic property presently in public use is presumed to be serving “the best and most public use.” Since easements purchased with public money commonly contain provisions for public viewing or other public benefit, section 1240.610 would appear to apply and thus insulate from eminent domain historic properties subject to publicly held historic preservation easements.

Economic benefits are also available to grantors of historic preservation easements. If the easement is sold, the property owner receives immediate compensation. The percentage of full property value realized in the sale of the easement will depend in part on the extent of the easement’s physical reach, that is, whether it applies to interior as well as exterior features, and whether it governs use or development of associated land. Similarly, the purchase price will undoubtedly reflect the extent of duties and restrictions placed upon the property owner.

If the easement is donated to an appropriate party, the donor may receive substantial federal income tax benefits. The donation of the easement could qualify for these benefits if two basic conditions are met: 1) the easement must be in perpetuity, and 2) the recipient must be a public agency, a publicly supported charity, or a private operating foundation. Typically, a qualified donation will permit deduction from adjusted gross income of the fair market value of the easement at the time of contribution. Where the underlying property, if sold, would not have qualified for long-term capital gains treatment at sale, the deduction will be limited by the donor’s cost basis in the property. Absent this situation the donor generally may

85. Id. § 1240.680.
deduct an amount represented by the easement value up to thirty percent of his adjusted gross income. Any amount of donated easement value in excess of thirty percent of gross income may be carried forward for deduction in the next five years.\textsuperscript{87} In the alternative, a donor of an historic preservation easement may elect to deduct the value of the easement up to fifty percent of adjusted gross income, provided the donor first computes the value of the contribution by reducing that value by one-half the amount of any capital gain.\textsuperscript{88}

In addition, the gift of an historic preservation easement that qualifies for the above federal income tax treatment generally will not be a gift taxable to the donor.\textsuperscript{89} The Tax Reform Act of 1969 expressly qualifies an "... easement with respect to real property granted in perpetuity ... exclusively for conservation purposes"\textsuperscript{90} for deduction from the donor's taxable gifts pursuant to Internal Revenue Code section 2522.\textsuperscript{91}

Granting an historic preservation easement may also confer important estate tax benefits. If grant of an easement is made during the grantor's life, the value of his holdings will be reduced by the value of the easement. Upon his death, this decreased value will be reflected in lower taxes to his estate. Similarly, a gift upon death to a qualified charity or public agency will permit deduction of the value of the easement from the amount of the estate subject to tax.\textsuperscript{92}

A major tax saving from the use of the historic easement is also possible when one considers how real property is valued generally for purposes of establishing federal estate tax upon the death of the owner. Normally the estate valuation is based upon the fair market value of a property, taking into consideration its potential for development or other "higher use." Encroaching suburban development can force a high valuation of a family farm, for example, even though the heirs intend no

\textsuperscript{87} Id.

\textsuperscript{88} Id. The computation necessitates determining, first, a theoretical capital gain for the entire property. Next, by comparing the fair market value of the entire property with the fair market value of the easement, a proportionate share of the capital gain may be attributed to the easement. One half the theoretical capital gain attributed to the easement is then deducted from the value of the easement to determine the deduction.

\textsuperscript{89} I.R.C. §§ 170(f)(3), 2522.

\textsuperscript{90} Pub. L. No. 91-172, § 201(a), 83 Stat. 487 (codified at I.R.C. § 170(f)(3)).

\textsuperscript{91} Id. See also Freeman, supra note 70, at 3.

\textsuperscript{92} Md. Historical Trust, supra note 70, at 26-30 (general discussion); see also I.R.C. §§ 170(f)(3), 2522.
development. The resulting estate tax may exceed cash in the estate and thus force sale of the property in order to meet the tax. This result can possibly be avoided by the creation of an historic easement. Since the easement is by its nature restrictive, it has the force of prohibiting development of the land and thus, logically, should preclude the estate from being valued at the "higher use" figure.\(^ {93}\) It should be noted that this approach can result not only in a tax saving but also can enable families to maintain their traditional land holdings, family homes, and family occupations. Historic vineyards, orchards, farms, businesses, and homes should be considered for this treatment whenever families wish to protect the continued existence of family holdings and traditions.\(^ {94}\)

The granting of an historic preservation easement can also have a significant effect on property taxes. Under California Revenue and Taxation Code section 402.1, local property tax assessors are required to consider restrictions on a subject property when computing fair market value. In order for an historic preservation easement to qualify for this provision, however, it must be held by a public agency.\(^ {95}\)

**Provisions of Historic Preservation Easements**

Care and skill are essential in the drafting of an historic preservation easement.\(^ {96}\) Of necessity, each easement agreement will vary in accordance with the particular circumstances of each transaction and the specific features of the historic property involved. It is in the strong interest of both grantor and grantee to be certain the grant instrument is sufficient in achieving their purposes. An inadequate document may result in loss to the grantee of the effectiveness of the historic easement or loss to the grantor of the tax benefits that would otherwise follow.

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94. *Id.*
95. **CAL. REV. & TAX. CODE** § 402.1 (West Supp. 1979). The section states in part that the tax assessor "must" take into consideration restrictions that are publicly held, but the section does not explicitly exclude such consideration when the restriction is held by a private foundation. It is not clear, therefore, whether consideration can be given in the latter circumstances. *Id.* According to Dwight Mathieson, then County Tax Assessor of Santa Clara County, consideration would not be given to restrictions privately held.
96. Model easement instruments are available from the Western Regional Office of the National Trust for Historic Preservation, San Francisco, and the Office of Historic Preservation, Cal. Department of Parks and Recreation, Sacramento, Cal.
In order for an easement to be effective it must contain at a minimum the following provisions:

1) agreement by the property owner to refrain from altering the property without prior written approval by the easement holder;
2) agreement by the property owner to repair and maintain the property;
3) permission for the easement holder to enter and inspect the property periodically;
4) statement of duration of the easement;
5) declaration that the easement will bind the property owner's heirs, assigns and successors in interest; and
6) description of the property features to be preserved.97

Beyond these basic provisions, an easement may include whatever provisions fit the needs of the parties and are mutually acceptable. Depending upon circumstances the following provisions may be useful:

1) a statement that the purpose of the easement is to preserve an historic entity, thus increasing the likelihood that the grant will qualify as a taxfree gift under Internal Revenue Code section 170;98
2) provision for public viewing or access, a common provision when public money is used for purchase of the easement;
3) agreement by the owner to maintain insurance adequate to replace or restore the historic structures or other features, with further agreement that proceeds from such insurance shall be used to that purpose;
4) agreement by the owner to maintain comprehensive general liability insurance sufficient to compensate any foreseeable damages arising from the public access provision, with the public agency holding the easement being named as an additional insured;
5) identification of a successor in interest should the easement holder prove incapable of holding and enforcing the easement; and
6) agreement that the property owner will restore the existing structure to a stipulated condition and remove any present specified conditions or additions that are non-historic.99

97. Freeman, supra note 70, at 5.
98. The income tax deduction available for donation of an historic easement is discussed at notes 86-91 and accompanying text supra.
99. Freeman, supra note 70, at 29; Md. Historical Trust supra note 70, at 15, app. A (Sample Deed of Easement); National Trust for Historic Preservation, Reynolds
Judicial Acceptance of the Historic Preservation Easement

The utility of the historic preservation easement depends ultimately upon its acceptance by the courts. To date no courts have considered the question of whether this new form of agreement constitutes a valid easement. As time passes, however, and historic properties change hands, it is likely that a succeeding property owner will raise the question of whether (s)he is bound by the purported easement.

Where the easement is express and formally drafted, it appears likely that the courts will uphold it even in the absence of specific statutory recognition. As early as 1912 in Jersey Farm Co. v. Atlanta Realty Co., the California Supreme Court confronted the question of creation of easements not expressly recognized by statute, in this case sections 801 and 802 of California’s Civil Code. Section 801 of California’s Civil Code first defines an easement as a land burden or servitude on land which may be attached to other land as an incident or appurtenance and then enumerates eighteen types of easements, ranging from the traditional right of way to the right of a seat in church. In Jersey Farm the state supreme court upheld the validity of a purported appurtenant easement not included in Section 801, stating:

The ingenuity and foresight of the legislature would be taxed in vain to name and classify all burdens which might be imposed upon land. . . . [I]t is of no consequence whether that particular burden will fall into or can be forced into any of the . . . subdivisions of section 801.

Should the courts of California maintain this liberal approach to the question of new easements, it is likely that the historic preservation easement will be confirmed judicially.

Tavern Facade Easement (Sept. 11, 1973); City of Pinole, Cal., Gift Deed of Easement (Dec. 17, 1973). Additional easements containing these features are on file with the National Trust for Historic Preservation, Western Regional Office, San Francisco, and the Office of Historic Preservation, State of California.

100. 164 Cal. 412, 129 P. 593 (1912). For a general discussion on a national basis, see Conrad, Easement Novelties, 30 Cal. L. Rev. 125 (1942).
102. Id. § 802 (Deering 1971).
103. 164 Cal. at 415-16, 129 P. at 594.
104. On the likelihood of new easements being recognized under sections 801 and 802, 28 Cal. Jur. 3d Easements & Licenses § 7, at 39 (1976), states: "The listings are
Such confirmation would also appear to be warranted by the trend in California's courts to uphold legal devices that are intended to protect and preserve the environment.¹⁰⁵

The possibility that a specific grant of an historic preservation easement will be upheld in court may be affected by two factors. First, where consideration has passed in exchange for the grant of the easement, the likelihood that the easement will be confirmed is increased. Some commentators have suggested that the donation of an historic preservation easement should be accompanied by at least token compensation: placement of a plaque on the historic site or formal recognition of the donor.¹⁰⁸ Income or property tax benefits have been suggested as constituting compensation,¹⁰⁷ but even where present, these do not always flow from the grantee to the grantor and thus may not constitute true consideration. Whatever consideration is present in the transaction should be recited in the instrument creating the easement.

The second consideration in effecting a valid easement may be the existence of affirmative rather than negative duties. Traditionally, American courts have more readily accepted novel easements that impose affirmative rather than negative duties.¹⁰⁸ Although an historic preservation easement is essentially restrictive in nature, its prohibitive provisions can be cast in affirmative language. A prohibition against destruction or alteration of an historic property can also be cast as an affirmative duty to maintain the property in a specified state. In point of fact, it may be worthwhile to draft the easement in both affirmative and negative terms.

A collateral question regarding judicial recognition of hist-

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¹⁰⁵. E.g., Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (extending to private projects); McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953) (upholding so-called “spot zoning” that directly serves public interest); Bohannon v. City of San Diego, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973) (upholding historic district ordinance controlling signs).


¹⁰⁷. STANFORD ENV'T'L LAW SOC'Y, supra note 106, at 35.

Historic preservation easements is whether such easements may be created through exercise by a public agency of the power of eminent domain.

Two issues are involved: is an easement of property interest subject to condemnation in California, and does the eminent domain power of public bodies in California extend to the taking of an easement of this type.

California's Code of Civil Procedure permits condemnation of easements generally. Although the California Code of Civil Procedure no longer enumerates appropriate public purposes of the condemnation power, the California legislature has created a broad area of permissible public uses:

The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use.

Further, the repeal of the section dealing with enumerated permissible public uses indicates that "a legislative authorization of condemnation on behalf of a particular purpose constitutes a declaration that the purpose is a public use." There are other California code sections that expressly authorize and encourage acquisition of historic property interests. These are, most notably, portions of the Public Resources Code and the Code of Civil Procedure which establishes a rebuttable presumption that recognized historic landmarks in public ownership have been appropriated "for the best and most necessary public use.

Of additional interest are California Government Code sections 37361 and 25373 which authorize city and county governments, respectively, to "acquire property for the preservation or development of an historical landmark."

Since Code of Civil Procedure section 1240.110 defines property for the purposes of public acquisition to include easements,\(^\text{115}\) it would appear that local governments may acquire a property interest of less-than-fee for historic preservation purposes through the usual means of public acquisition, including condemnation.

In summary, the public and private benefits of historic preservation easements merit their favorable treatment by the courts and their wider use in both the public and private sectors. The state legislature could do much to advance the acceptance and use of preservation easements through expressly recognizing their validity by statute.

**CONCLUSION**

Preservation of historic structures is essentially a two-phase process. Under the California Environmental Quality Act (CEQA), procedures are available, where the act is applicable, for forestalling demolition of an historic structure. Pursuant to CEQA, a formal process must be followed by government agencies in compiling and evaluating an Environmental Impact Report (EIR) before a demolition permit may be issued for the destruction of an historic structure. The EIR process not only serves a notice function in alerting the community, but also provides a means whereby concerned citizens can have input into the evaluation of potentially adverse environmental effects resulting from the proposed demolition. An equally important aspect of CEQA is the requirement that alternatives to demolition be identified and considered.

Of the alternatives available, historic preservation easements have many advantages. Typically easements are far less costly than acquisition of the full fee. The easement approach allows the property to remain in private ownership, thus encouraging its active use in the life of the community. Tax benefits available to grantors add to the attractiveness of the easement approach.

In view of the benefits provided to the community and to the parties involved by CEQA and historic preservation easements, the legislature should act to clarify the role of CEQA and easements in the preservation field. The legislature should amend CEQA to define as discretionary any issuance of a per-

mit for demolition of an historic structure. Absent this amend-
ment, local jurisdictions can determine that their issuance pro-
cedures are ministerial and thereby avoid the EIR process. The
legislature should also act to recognize specifically the historic
preservation easement as a way of encouraging its wider use.

Dorothy Gray