Demolition of Historic Structures; CEQA Compliance and Tactics

By Douglas B. Aikins

I. INTRODUCTION

Sometimes a historic structure simply has to be demolished. It might be too old, too decrepit, not appropriately located, too marginal historically, or too expensive to rehabilitate to be worth saving. Taking down a historic building is rarely popular, and often generates political and legal opposition. Layers of local, state, and federal regulations governing alteration of historic structures are confusing to most property owners and attorneys, creating the false impression that historic structures — particularly those listed on local, state, or federal inventories of historical resources — cannot legally be altered or demolished. This article summarizes (a) how to comply with the applicable regulations, in particular the California Environmental Quality Act ("CEQA"), (b) how to work with or around a CEQA Lead Agency opposed to demolition, and (c) how to prevent or win litigation challenging issuance of a demolition permit.[1]

CEQA is California's main legal protection for historic structures, but its protections are mainly procedural, requiring public analysis and notice rather than prohibiting demolition. While CEQA clearly governs alteration or demolition of all structures with "historical" significance, it allows "artistic" and "architectural" significance to be considered as well.[2] Architectural distinction by itself does not make CEQA apply. But, when a structure is both historically and architecturally important, CEQA is more likely to apply, opposition to demolition will be more pronounced, and the risk of a litigation challenge to demolition must be taken more seriously. Several municipalities have enacted their own local protections of historically (and architecturally) important structures. This article discusses representative examples of municipal ordinance protections, but does not address them all except in generalities.

Both the "CEQA industry" and the historic preservation community in California are inclined toward restoration and preservation of historic structures. Hundreds of expert consultants, historians, attorneys, and specialized architects comprise the large and influential industry devoted to enforcing federal regulations underlying the National Register of Historic Places, state regulations underlying the California Register of Historic Resources, and CEQA. Most of these experts advocate for restoration or preservation of such structures and will readily advise building owners on how to restore an historic building, adapt it to a new use, or relocate it. Very few, however, will provide guidance or assistance on demolishing a historic resource. As a result, clear and objective information is hard to find regarding the regulations that apply or the practical options that are available to owners of historic structures. The focus of this article is CEQA compliance. Demolition of historic resources requires aggressive use of all of CEQA's legal authority, in ways in which many CEQA professionals are unaccustomed, and in ways seldom needed for more routine projects.

This article assumes that the owner of a historically significant building has analyzed the options and, for whatever reason, has determined that historic restoration, "adaptive re-use," or relocation of the building is simply not feasible or attractive. Typical situations include a local county government that wants the option of demolishing an old courthouse, a corporation that wants to redevelop a landmark downtown office building site, or a family that wants to replace granddad's crumbling mansion with a new "dream house."

II. APPLICABLE REGULATIONS

No federal, state, or local law or regulation flatly prohibits the demolishment of historic resources. If such a statute or local ordinance purported to do so without the property owner's consent, it would be subject to a legal challenge as an uncompensated "taking," or "unconscionable," even though cases invalidating historical preservation regulations are rare.[3]

The federal government has enacted the National Historic Preservation Act of 1966 ("the Act"),[4] and adopted administrative regulations to implement it.[5] This statutory scheme, however, only requires federal agencies to "take into account" the potential effects of their "undertakings" on any place actually included or eligible for inclusion on the National Register. To be sure, federal agencies can take affirmative steps to acquire and preserve historic resources through exercise of their use of eminent domain powers.[6]

California Public Resources Code sections 5024 *et seq.* establish the California Register of Historical Resources ("the Register"). The California Historical Resources Commission has adopted regulations pertaining to the Register and the Office of Historic Preservation at section 14 of the California Code of Regulations. Like the federal approach, California's statutory scheme does not prohibit demolition of historic resources. Rather, it merely regulates alterations to historic resources covered by the statute, and provides various financial incentives for preserving them.[7]

Many municipalities have enacted their own historical preservation ordinances, as well, which vary greatly. Compliance with such a local ordinance obviously is necessary if the ordinance applies to the historic resource in question. Most local ordinances take the general form of the federal and state approaches — that is, they create a "register" of some type that is intended to confer some enhanced distinction to the building, and to restrict major alterations and demolition of listed buildings.

The City of Laguna Beach's ordinance is fairly typical, albeit more complex than those of most smaller cities.[8] It creates an appointed "Heritage Committee" to administer the ordinance;

requires an agreement between the City and the building owner acknowledging the owner's "responsibility to ensure preservation of the historic character of the structure;" and provides various incentives such as parking relief, refunds of building permit fees, setback flexibility, density bonuses, and even financial incentives that may be available under the Mills Act.[9] The ordinance does not prohibit demolition, but instead requires a waiting period before demolition can occur as well as an analysis of relocating the building. Then, the ordinance allows demolition only upon a finding that either it is "consistent with the purposes of the ordinance" or that "there is no reasonable alternative to demolition."[10]

By contrast, the City of Del Mar's approach is simpler. Del Mar's ordinance relies upon compliance with the CEQA review process for whatever protections CEQA affords. Del Mar's ordinance allows demolition only after preparation of an Environmental Impact Report ("EIR") that studies "viable alternatives for saving the landmark" and concludes that there are no such alternatives.[11]

Most large cities, including San Francisco, Los Angeles and Palo Alto have complex regulations which heighten the delay, cost, and public controversy attending a demolition project, but also do not flatly forbid demolition.[12]

III. CEQA APPLICATION TO ALTERATION/ DEMOLITION: AN OVERVIEW

Once a property owner decides to pursue the option of demolishing a "historically significant" structure, it must comply with CEQA. This is because issuance of a demolition permit, normally a "ministerial" decision outside the purview of CEQA,[13] is considered a "discretionary" decision when it could cause a "significant adverse effect" on a qualified historic resource either coming only by itself or in connection with a larger project such as construction of a replacement structure on the same site.[14] In contrast, if the owner decides to restore and preserve the historic structure in compliance with the Secretary of the Interior's standards and applicable federal guidelines, it is entitled to request a specific "categorical exemption" from CEQA unless the old building is within an official state scenic highway area.[15] Use of any otherwise applicable categorical exemption is prohibited if demolition or alteration would cause "a substantial adverse change in the significance of a historic resource."[16]

CEQA establishes three categories of "historic resources."[17] First, a structure ***must be*** treated as a historic resource if it is listed in, or determined to be eligible for listing in, the California Register of Historic Resources.[18] Second, if the structure is listed in a local register of historical resources, or if it is not listed but nevertheless meets the criteria specified in California Public Resources Code section 5024.1 (defining eligibility for listing in the California Register of Historical Resources), then it is ***presumed*** to be "historically significant." This presumption can be rebutted by a preponderance of evidence.[19] Third, CEQA Lead Agencies also have considerable discretion ***voluntarily*** to treat a structure as historically significant, even if it otherwise would not qualify for inclusion into the first two categories.[20]

A look at the criteria set forth in California Public Resources Code section 5024.1 shows how broad, vague, circular, and subjective the definition of "historically significant" is, and how it varies depending on the local context. Historical significance may be inferred from any of the following factors:

1. Association with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.

2. Association with the lives of persons important in our past.

3. Embodiment of the distinct characteristics of a type, period, region, or method of construction, or representation of the work of an important creative individual, or possession of high artistic values.[21]

4. Embodiment, or a likelihood thereof, of ***information*** important in prehistory or history.

Keeping in mind the goal of preventing (or winning) a CEQA litigation challenge to a demolition permit, avoiding CEQA compliance entirely is an invitation for project opponents to litigate. Therefore, it is advisable to interpret these criteria conservatively.

CEQA analysis of the proposed demolition of a historic resource should be performed by means of an EIR, and not by a Negative Declaration. Even in cases where demolition of a historic building would cause no potential significant adverse effects on the environment *other than* adverse effects on its historical significance, the Lead Agency is safer using a normal "Project EIR," because it must analyze alternatives to demolition such as relocation or adaptive re-use. In limited circumstances (infill, small projects, etc.),[22] a "Focused EIR" ("FEIR") can be used.

A litigation risk posed by use of a FEIR, however, is that opponents are likely to challenge the decision to use this "short-cut" device because it allows omission of a study of alternatives, cumulative impacts, and growth-inducing impacts[23] — all of which usually are crucial public policy issues in demolition cases. Preparing a complete, "transparent" Project EIR for historical demolition projects also provides the potential benefits of (a) providing an evidentiary basis for persuading the Lead Agency to issue the demolition permit, (b) helping to prevent a litigation challenge by better informing and partially reassuring project opponents, and (c) satisfying Lead Agency elected officials and the general public that the notice, process, and substantive analysis of the proposed demolition is more thorough and objective, avoiding CEQA shortcuts. The main reason to use an EIR, however, is legal in a "defensive" sense.

Use of a Negative Declaration greatly increases the risk of a successful litigation challenge. A Negative Declaration is proper only when (a) "there is no substantial evidence" that demolition of an allegedly historic resource "may have a significant effect" on that resource[24] or (b) revisions to the demolition proposal are made which completely avoid or mitigate the adverse effects on the historic resource to a point of "insignificance."[25] In the context of this analysis, however, where the entire building or other historic resource will be destroyed, there is no doubt that the effect of demolition on the resource itself will be "significant." The core factual issues would then be whether the resource is indeed "historic," and whether the effects

of demolition will adversely affect the building's ***historical significance***, as opposed to the building itself.

It is often no difficult for demolition opponents to provide enough evidence to satisfy CEQA's "fair argument" test that a given old building is indeed "historically significant," since legitimate experts and local amateur preservation advocates are easy to find, and determining "historical significance" is highly subjective.[26] Historical significance for purposes of determining whether CEQA applies per CEQA Guidelines section 15064.5(a)(1) can be established by personal testimonial evidence, using broad, vague criteria. Even if other substantial evidence supports the opposite conclusion, the Lead Agency still must prepare an EIR if there is any substantial evidence of a significant adverse impact in the record.[27] Evidence supporting a fair argument that complete destruction of an old building will cause significant adverse effects is easy to place in the record, even if it is not substantial, dubious, or directed at architectural rather than historical significance. For example, local residents can testify that a given old house serves as a "landmark" in the neighborhood, it is "unique and beautiful," and the otherwise unknown farmer who built it was a "pioneer figure" or "father of the community." To preservation advocates, "charm" and "architectural appeal" are essentially equivalent to historical significance, even if these concepts technically miss the legal mark.

While historical significance depends largely upon local context and personal judgments, application of CEQA is a binary zero sum game—either it does or does not apply. A court may have little choice but to find that "historical significance" has been adequately demonstrated, thereby requiring more public analysis and CEQA process. While "public controversy" by itself no longer tips the legal scales in favor of requiring an EIR instead of a Negative Declaration,[28] for an arguably historic building owner, it is usually a mistake to try to avoid CEQA or minimize the formality and comprehensiveness that an EIR provides. If a Lead Agency tries to satisfy CEQA by preparing a Negative Declaration and a project opponent inserts evidence into the record that the old building is somehow "*associated with persons important in our past*,"[29] issuance of a demolition permit, could be overturned by a CEQA lawsuit, requiring the Lead Agency to repeat the CEQA compliance process by preparing an EIR.[30] After losing a CEQA lawsuit, however, many property owners and Lead Agencies lose their appetite for fighting demolition opponents and strike some compromise.

CEQA offers a limited "safe harbor" for use of a Negative Declaration for certain qualified restoration projects. This safe harbor applies to projects where the sole adverse impact is historical in nature and the project would maintain, repair, or restore the structure in a manner consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties (1995). CEQA provides that this type of qualified restoration work "shall generally be considered mitigated below a level of significance . . . ."[31] This language should be interpreted as creating a rebuttable presumption that any environmental effects will be mitigated to insignificance. But it is tactically inadvisable to prepare a Negative Declaration only to discover during the public review process that project opponents will not be satisfied with even a qualified historical maintenance or restoration program, leaving the owner with no choice but to replace the Negative Declaration with an EIR.

The greatest risk to an applicant for a demolition permit is the failure to compile an administrative record containing factual support for the demolition option. Scrupulous, comprehensive CEQA analysis of the effects of demolition on a historic resource includes placing evidence in the record of the building's relative "historical insignificance," factual analysis of the practical and economic infeasibility of all non-demolition alternatives, and factual evidence of the feasibility and success of a suitable mitigation program. Preparing an EIR for a historic demolition project better enables the project sponsor to manage the administrative record so that it is even-handed and supports the demolition alternative as well as various preservation options. An EIR need not be much more expensive or time-consuming than a Negative Declaration, and its advantages justify the added effort. In many situations, by clear and transparent use of the EIR "scoping process," an EIR or FEIR can concentrate only on a demolition project's historical significance issues, omitting analysis of topic areas in which no significant adverse environmental effects are posed, saving the sponsor considerable time and expense.[32]

Perhaps more important than the "defensive" (risk reduction) advantages of using an EIR for CEQA compliance are its "offensive" advantages. Use of an EIR allows for a lower, less costly standard of mitigation than a Negative Declaration requires. If demolition of a historic structure could cause a "significant adverse" effect on the structure's "historic significance," then the project applicant must agree before public release of a Negative Declaration to various project revisions that will either (a) "avoid the effects" or (b) "mitigate the effects to a point where clearly no significant effects would occur."[33] The repeated and seemingly circular use of the term "significant" in this context can be confusing, but what this means is that once an old building's "historical significance" has been established, CEQA authorizes use of a Negative Declaration only if one of two possible outcomes can be shown: (1) either adverse effects on the building's historical significance will be completely "avoided" through use of some alternative to demolition or modification of the proposed project, or (2) adverse effects will be "mitigated" (that is, "substantially reduced or lessened"[34] to a conceptual level below the point of "historical significance"). In practical terms, "avoidance" and "mitigation to insignificance" have the same effect; avoidance finds a way not to cause adverse effects, and mitigation lessens or reduces adverse effects to a point where they no longer are "significant."

In contrast to the rigorous mitigation standard required for use of a Negative Declaration, the necessary level of mitigation becomes considerably more flexible and easier to attain if the CEQA Lead Agency prepares an EIR to study demolition of a historically significant resource. The identified adverse effects on the historic resource can be "avoided"[35] or "eliminated"[36] through implementation of feasible alternatives to demolition or mitigation measures, as with a Negative Declaration, or they can be merely "substantially lessened" by means of feasible alternatives or mitigation measures.[37] Use of the term "eliminated" (that is, applying mitigation measures to cancel adverse effects completely) as an equivalent to "avoided" (that is, finding a way not to cause adverse effects) indicates that "mitigation to insignificance" and "avoidance" describe legally equivalent results. An EIR's flexibility in the CEQA standard

of mitigation, however, derives from the term "substantially lessen." To "substantially lessen" a significant adverse effect on a historical resource implies a lesser burden than to avoid, eliminate, or mitigate that adverse effect to a level of insignificance. This lower standard of mitigation is a crucial legal reason to use an EIR (as opposed to a Negative Declaration) to study demolition of a historic resource. A lower standard of mitigation implies lower costs, shorter delays, and less onerous practical mitigation burdens.

In abstract terms, imagine a 100-point scale of "historical significance," with 100% being "extremely significant" (e.g., California's original Spanish missions), 50% being "unarguably significant" (the Alcatraz island prison), and below 10% being "historically insignificant" (the First Round Table Pizza chain store). Imagine as well that a mitigation program of feasible "photo-documentation and salvage" techniques is available by which expert professional photographs salvaged representative remnants of the building, and interpretative historical and architectural records and artifacts can be created, archived, or preserved. Property owners generally favor photo-documentation and salvage mitigation programs over more expensive, difficult, and complicated alternatives to demolition, such as relocation, adaptive re-use, and complete or partial restoration, because they involve substantially lower mitigation costs and burdens. For discussion's sake, assume that such a photo-documentation and salvage program is capable of mitigating the adverse effects of demolition by preserving fifteen "significance points" on this conceptual scale.

In the case of an original California mission, not only would such a photo-documentation and salvage mitigation program not completely "avoid or eliminate" the adverse effects of demolition (making use of a Negative Declaration legally impermissible), but it also might not even "substantially reduce or lessen" those effects, because demolition would cause a loss of 85% of the resource's historical significance on this 100-point scale. Additional mitigation measures would be needed to preserve a more substantial fraction of the mission's historical significance. If no such additional feasible mitigation measures were available, or if such measures could not "substantially reduce or lessen" the effect of the demolition on the mission's historical significance, then demolition could only be approved based upon statements of overriding considerations under section 15903 of the CEQA Guidelines.

Most historical resources, however, are not in the "top 10%" of historical significance. Therefore, a photo-documentation and salvage mitigation program often will suffice as a legally-adequate mitigation plan. In the case of the Alcatraz prison example and in the greater number of instances where historical resources are of only moderate significance, a mitigation program capable of preserving 15 "significance points" would not completely avoid or eliminate the effects of demolition, but it might well be capable of substantially reducing or lessening a demolition's impacts. Preserving 15 significance points out of Alcatraz's total of 50 would represent a loss of only 35 points on this significance scale (70% of the prison's original significance), and the "substantial lessening" of a demolition's adverse effects would be 30%. Reducing an adverse effect by 30% is an effective lessening by most objective standards; in this example, the mitigation program would preserve nearly 1/3 of the prison's total historical significance. For the owner of a historical resource that must be demolished, attaining the ability legally to use a photo-documentation and salvage mitigation program, instead of more costly, burdensome alternatives, is a worthwhile goal. However, CEQA's more forgiving standard of mitigation is available only if an EIR is used as a demolition project's CEQA compliance method.

IV. CEQA COMPLIANCE; PRACTICAL STEPS

A. Role of the Cooperative Lead Agency

If a municipality is both the owner of a historic resource[38] and the Lead Agency for purposes of conducting CEQA review, it has the authority to make the important tactical, substantive, and procedural decisions summarized here. Without "pre-determining" the outcome of its CEQA analysis, a Lead Agency can preserve the option of approving demolition of a historic structure by properly following the process, establishing an administrative record that includes factual support for a decision to demolish, and making careful, complete project approval findings. Lead Agency owners (and even Lead Agencies who are not owners of the resource) sometimes get into trouble, however, when they turn to the CEQA consulting community for technical assistance and find themselves in the hands of committed historical preservation advocates.

If Lead Agency instructions to a CEQA consultant are not clear and fail to direct that all options are to be supported, including demolition, then a historic preservationist consultant might inadvertently make an inadequate administrative record; make improper, missing, or inadequate findings; or even advise the Lead Agency that demolition is not an available legal option. Obviously, neither the Lead Agency nor the public interest is served when a Lead Agency's staff members or consultants fail to examine all feasible options thoroughly, compel selection of some option other than demolition, or allow the Lead Agency to approve demolition without providing a factually or legally adequate administrative record to support that decision.

B. Defining the Scope of the CEQA Project

An important early decision must be made regarding the "scope" of the CEQA project. Is the "project" simply "site clearance" (demolition), or is it site clearance for the purpose of devoting the site to an identified new proposed land use (redevelopment)? CEQA requires an accurate and stable description of the proposed project's scope.[39] This definition typically is compelled by the factual history leading up to the Lead Agency deciding to prepare an EIR. CEQA is clear; the "project" must include "the whole of an action."[40] If a particular proposed new use or replacement structure for the site occupied by a historic building already has been proposed or publicly discussed by the Lead Agency (such as replacing an 1880s courthouse with a new courthouse), then demolition of the old building can be seen as inextricably connected to construction of the new building, and the scope of the CEQA project must encompass both project elements. However, if in fact the old building is simply unsafe, falling down, obsolete, a fire hazard, or the like, and demolition is being evaluated on its own merits independent of any defined new use for the site, then the CEQA project can be accurately defined as demolition alone.

Limiting the scope of the CEQA "project" to demolition alone, where it can be validly done, is clearly one way to limit the breadth (and resultant cost and delay) of CEQA analysis. If the project includes demolishing and replacing a historic structure at the same location, however, the EIR also must study alternative offsite locations for the new building. If there exists a "feasible" alternative location for the new building, use of that alternative location may be one way to "avoid," "eliminate," or "substantially lessen" the project's adverse effects on the building's historical significance.

In the residential context, owners of historic houses may object to expanding the scope of the CEQA project from demolition alone to a study of demolition together with the replacement building because that would allow city planners, volunteer citizens' committees, and even the superior court to become involved with the new site design, historic restoration of the old building, design of the new house, relocation of the old building offsite, and similar issues that convert design of a personal family "dream house" into a process of "design by public committee." Nevertheless, to support findings of the economic infeasibility of various alternatives to demolition, it is necessary to establish in the record how much extra expense historical restoration, relocation, and other alternatives to demolition would add to the cost of the entire site redevelopment project.[41]

C. Identifying Project Objectives

With a cooperative Lead Agency, the scope of a CEQA project and its EIR can be narrowed by careful crafting of the "project objectives."[42] There is a direct relationship between a project's stated objectives and the range of alternatives that an EIR must analyze under CEQA. The only alternatives that must be studied are those "…. which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project."[43] For example, when studying demolition of a crumbling mansion or other building for which no replacement use has been identified, a valid project objective could be to "reduce public safety hazards by eliminating the risk of fire, structural collapse, personal injury to trespassers, vandalism and crime, by demolishing structurally unsound buildings that have been abandoned, deteriorated or damaged." Project objectives like this have the effect of helping to avoid the otherwise applicable legal requirement for an EIR to study alternatives to demolition, such as relocation of the old building to a different site because that alternative would not attain the foregoing project objective.[44]

D. Providing Alternatives to Demolition

1. Alternatives Are Key

Notwithstanding the foregoing discussion, it is generally advisable to include in the EIR an analysis of basic, readily apparent alternatives to demolition. Even if mitigation measures alone evidently will "substantially reduce or lessen" the significant adverse effects of demolition on a structure's historical significance, a failure to include analysis of feasible alternatives to demolition can invite litigation in a relatively unsettled area of CEQA law.[45] CEQA litigation in the form of challenges to demolition alternatives is prevalent (and challengers frequently win) because the public, the Lead Agency, and the courts usually all want to understand what feasible alternatives to demolition exist. Therefore, including explicit, well-supported analysis of two or three basic alternatives is a cost-effective way of demonstrating CEQA compliance and helping to prevent a CEQA challenge.

While CEQA Guidelines section 15126.6(a) limits the range of EIR alternatives to those which are "potentially feasible,"[46] the evidence necessary to establish factual "infeasibility" of a particular alternative must be explicit, substantial, on the record, and well-supported. The best way to present evidence of infeasibility in a clear, organized way is to place that evidence in the EIR. By organizing the analysis to accompany specified alternatives, the Lead Agency can present factual support for findings of infeasibility along with the comparative environmental, historical, and policy consequences of each alternative. Alternatives analysis also must discuss why the chosen alternatives were selected, and why other alternatives were not included in the EIR's analysis.[47]

When dealing with a CEQA Lead Agency that is evidently opposed to demolition, or whose consultant team is failing to support the demolition option adequately with cogent project objectives, neutral facts, and a complete alternatives analysis, it falls on the project sponsor or building owner to augment the administrative record with these analytical elements. The project sponsor can accomplish this goal by (1) proposing the sponsor's own project objectives, (2) providing physical and economic feasibility analyses of alternatives such as relocation and historical restoration or preservation, and (3) providing expert analysis of how a particular mitigation program will in fact "substantially reduce or lessen" adverse effects on historical significance. When a project sponsor is forced to supply important factual elements for a proper administrative record (including expert testimony and economic analysis), it is usually advisable to take the next step (early during the public review process) — that is, to clarify the main CEQA legal issues summarized in this article in the form of a "free legal brief" aimed at the Lead Agency and its counsel, and ultimately aimed at the superior court. Preemptively establishing the CEQA legal framework which authorizes demolition helps to neutralize the influence of potentially biased CEQA consultants and staff, encourages sympathetic Lead Agency decisionmakers, and assists Lead Agency counsel not to make CEQA errors which can be expensive and risky (if not impossible) to correct late in the CEQA compliance process.

The typical alternatives that an owner should study, aside from the proposed (demolition) "project," follow.

2. The "No Project" Alternative[48]

In this context, the no project alternative means no demolition permit and no demolition." In other words, the old building will remain as it is, often boarded up, not maintained, structurally deteriorating, an "attractive nuisance," and an eyesore. In other cases, the building will remain as obsolete, "uneconomic to occupy or rent," and a blighting impediment to renovation and redevelopment of its surroundings. Factual analysis of this alternative can establish a decision not to demolish an old building as poor public policy with adverse environmental, social, economic, architectural, and historical preservation consequences. More specifically, it can project a

future fate for the old building commonly known as "demolition by neglect," in which the historical significance of the structure sooner or later will be lost through inaction — a foreseeable result comparable in effect to the demolition project itself, only not alleviated or "substantially lessened" by any mitigation measures. If the facts support this analysis, explicitly detailing all the unappealing consequences of not demolishing the structure prevents denial of a demolition permit from being characterized as the "environmentally superior alternative."[49] If the "project objectives" are carefully drafted to include goals like "create and maintain a permanent record of the historical features and associated events and personalities that contribute historical significance to this building," demolition will be consistent with this project objective.

3. The "Historical Restoration" Alternative

Again, it is important to use the legal connection between the defined project objectives and the suitability, feasibility, and effects of this alternative. Project objectives can (and should, in this type of project) include the main objectives of the project sponsor. If those objectives include demolition, it is important to be candid and explicit about that. Courts generally will not second-guess the project sponsor's objectives, especially when the sponsor is a public entity, because any given project's basic goals and purposes are "legislative" in nature — that is, they are part of the factual context and policy foundation compelling CEQA compliance in the first instance.[50]

Project objectives cannot, however, be drawn so narrowly that they compel rejection of all feasible alternatives to demolition. Project objectives that stress the policy importance of site clearance, private funding of the project (no public subsidies of historical restoration), and important functional objectives of any resultant or replacement building can contribute to a factual basis for rejecting this alternative.[51]

Historical restoration typically is very expensive, often averaging up to twice or more of the cost of modern new construction. No alternative to demolition needs to be analyzed in an EIR if it is not "feasible" — that is, "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technical factors."[52] When historical restoration is prohibitively expensive, the Lead Agency staff or the project sponsor must place facts supporting that conclusion into the record. If expensive local real estate markets and a project sponsor's wealth could cause the level of "prohibitively expensive" to rise substantially, the analysis supporting an "economically infeasible" determination must be that much more detailed and convincing.[53]

4. The "Relocation" Alternative

On occasion, large old structures can be moved to new locations, even if they have to be cut into large pieces. To analyze and explain whether this alternative to demolition is indeed "feasible," it is advisable to have detailed credible evidence in the EIR on whether the building's structure will allow for relocation without destroying the building, what types of alternative sites might be suitable, and whether this alternative is cost prohibitive. Obviously, some types of buildings, like 200- or 300-year-old adobes, physically cannot be moved intact, nor can they be disassembled and rebuilt elsewhere.

Wood frame structures often can be moved intact, unless they are too big and need to be cut into sections. In other instances, constraints such as low bridges or trees or narrow roads require that the structure be disassembled into such small pieces that they become mere "boxes of air," and the building would be substantially destroyed by being cut into sections and reassembled.

Plaster, masonry, and stucco pose severe problems to relocation proposals. Physical limitations like this sometimes cause the "relocation" alternative to function the same as the "restoration" alternative because the building is essentially destroyed at its original location then rebuilt at a new location, incorporating little, if any, original materials. Clearly, most of a building's historical significance is lost in such an instance. In short, creating a modern copy of an old building in a new location has much the same effect as demolition.

In each instance, the EIR should contain a full analysis of whether relocation is physically feasible and economically feasible. If relocation is not feasible, that is, objectively impracticable or impossible, that conclusion must be well-supported in the record. It may not be enough for project sponsors to show why they personally cannot afford to relocate an old building. Some Lead Agencies will insist that the project sponsor advertise for a financial "angel," typically an investor or speculator or a historical preservation foundation. The angel will buy and relocate the old building, and the project sponsor must subsidize the relocation effort, since "economically infeasible" is an objective standard.

5. The "Adaptive Re-Use" Alternative

When posing a demolition project to a neutral or opposed CEQA Lead Agency, it is advisable to answer the natural question in the public's and decisionmakers' minds: "Can you use the old building for something else, or fix up its interior in a way that preserves its historical exterior?" Normally, every project sponsor will have evaluated this option in some depth long before publicly proposing demolition. The fact that it is either economically or physically infeasible, or simply an unattractive option, typically is a conclusion long since reached by the sponsor, and readily capable of being documented in the administrative record. Even if it is feasible to renovate an old building to "historical standards" using the Secretary of the Interior's regulations propounded under the National Historic Preservation Act,[54] or to renovate it so that it has a modern floor plan within a historic-looking exterior "shell," these new architectural realities sometimes can have little or no effect on preserving an old building's historical significance, particularly where the building's significance is derived from associated historical personalities or events.

E. Mitigation Measures

CEQA requires EIR's to analyze a reasonable range of alternatives that are "potentially feasible."[55] However, these alternatives can be rejected if they are indeed "infeasible" under the circumstances.[56] A similar rule applies to mitigation measures, in that only "feasible" mitigation measures need to be analyzed, and particular proposed mitigation measures can be rejected if they are not feasible.[57] The term "feasible" is defined in CEQA Guidelines section 15364. Most demolition project

sponsors are perfectly happy to accept a mitigation program involving an array of "photo-documentation and salvage" steps — that is, creating an archival set of professional photographs of the historical resource, along with any salvageable artifacts, decorations, fixtures, period building elements, and the like that can convey a sense of the building's historical qualities. Once created, these items can be curated in an existing museum or interpretative facility, or simply archived and stored.

A common misinterpretation of the holding in *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland*, is that "photo-documentation and salvage" types of mitigation programs are categorically inadequate. This is untrue; such a mitigation program was held to be inadequate in *League for Protection* because it involved the use of a Negative Declaration, which the court found did not completely "avoid" or "mitigate to a level of insignificance" the proposed demolition's effects on the historical significance of a large, prominent older retail building. The *League for Protection* holding later found its way into CEQA Guidelines section 15126.4(b)(2), which states: "In some circumstances, [photo-documentation and salvage programs] will not mitigate the effects to a point where clearly no significant effect on the environment would occur." When an EIR is used instead of a Negative Declaration for a historic resource demolition project, this entire issue is avoided because, as explained above, use of an EIR authorizes a substantially more flexible standard of mitigation (adverse effects need only to be "*substantially lessened*").

F. Legal Limits on Mitigation

In the context of a proposed demolition of historic resources, the common impulse of Lead Agencies is to try to prohibit demolition. This can be done either by compelling implementation of an expensive or functionally unattractive alternative to demolition (such as relocation or adaptive reuse), or by imposing drastically expensive mitigation measures (such as historical restoration). It is not uncommon, in fact, for Lead Agencies to "go too far" in trying to prevent demolition, invoking the principal of "***legal*** infeasibility" by requiring a project alternative or mitigation measure that under CEQA doctrines is not capable of being accomplished because the Lead Agency lacks legal authority to impose it. As noted above, "'[f]easible' means capable of being accomplished in a successful manner . . . taking into account economic, environmental, ***legal***, social and technological factors."[58]

Mitigation measures must be consistent with all applicable constitutional constraints on governmental power.[59] These include the constitutional doctrines prohibiting imposition of an uncompensated "taking" and the "essential nexus, rough proportionality" doctrines restricting the imposition of exactions and similar conditions for project approval resulting from the *Nollan/Dolan* line of U.S. Supreme Court decisions.[60] The California Supreme Court subsequently concluded in *Ehrlich v. Culver City*[61] that the "heightened scrutiny" of development approval exactions as described in *Nollan/Dolan* applies in the context of project-specific, quasi-adjudicatory land use decisions, but not necessarily in broader, legislative decisionmaking. Because demolition of a historic structure most often involves issuance of a demolition permit or a parcel-specific discretionary land use approval, the *Nollan/Dolan* line of cases dealing with "adjudicatory" decisionmaking is typically relevant.[62] The *Nollan/Dolan* doctrines impose a relatively clear, strict conceptual limit on the power of CEQA Lead Agencies to impose mitigation measures.[63] As amended in 1998, CEQA Guideline section 15126.4 explicitly invokes the *Nollan/Dolan* doctrines by requiring "an essential nexus (i.e., connection) between the mitigation measure and a legitimate governmental interest," and that the "mitigation measure must be 'roughly proportional' to the impacts of a project."

The Ninth Circuit explained how the three-part test of *Nollan/Dolan* should be applied in *Garneau v. City of Seattle*.[64] First, one must ask whether requiring an alternative to demolition or a particular mitigation measure amounts to a "taking." When denying a demolition permit results in a mandate that an old, unwanted structure must remain indefinitely on one's private (or public) property, which arguably is a classic type of "invasive" occupation of property for the public purpose of historical preservation that would be a taking without compensation.[65] Similar objections can be made about mandates that an old building must be relocated to another site (physically occupying that new site); or that an old building must be restored to its original condition (both an economic exaction and a continuing invasive occupation of the building's site); or that its demolition must be mitigated by payment of "in-lieu fees" or other payments or exactions.

Second, one must determine whether the alternative or mitigation measure is rationally connected to a valid governmental purpose; that is, whether there is a legal "nexus" to the actual adverse impacts proposed. Because historical preservation generally has been found to be a valid exercise of municipal police powers, this test element is rarely violated.

Third, and probably most useful in defeating extreme project alternatives and mitigation measures, is the "rough proportionality" test element. The magnitude, economic cost, and other burdens of the project alternative or mitigation measure imposed must be "roughly proportional" to the actual harm to the resource's historical significance; the burden of establishing proportionality is upon the Lead Agency.[66] Historical restoration and ongoing preservation and maintenance is very expensive and frequently not economically justifiable or cost-effective, especially for structures of only marginal historical value. Moreover, the costs are not only direct, but also indirect because the building site cannot be redeveloped for an economically rational new use. It is crucial in each instance, therefore, to establish a factual basis in the record to support a determination of just what the legal upper limit is for the cost of a demolition alternative or mitigation program. This logically involves establishing a "numerator," the cost of the imposed project alternative or mitigation program, and a "denominator," some quantified measure of the project sponsor's fair share of the total cost of providing historical resources to the community at large. To be "roughly proportional" under the third prong of the *Nollan/Dolan* test, these numbers must be roughly equal to each other. If the numerator substantially exceeds the denominator, a proposed alternative or mitigation program would be legally excessive. The numerator can be readily estimated, but the denominator is more difficult to quantify and can be estimated in several ways.

One relatively simple method, perhaps comprising a "safe harbor," would be to use the actual cost of a legitimate

professional photo-documentation and salvage program as a fair measure of the cost of literally "providing an historical resource to the community at large." This type of mitigation measure creates and provides the community with a new historical resource (including a compilation of photographs, a historical narrative text, and possibly artifacts). Its content, scope, and expense presumably varies proportionately with the historical significance of the historical building to be demolished. Although photo documentation is not a full substitute for the building, it embodies a fair approximation of the burden of historical preservation borne by the particular historical resource in question.

Most useful for purposes of a legal "rough proportionality" analysis, an individualized photo-documentation and salvage mitigation program has a finite cost which can be directly compared (as a demonimator) to the "numerator" of all other proposed project alternatives and mitigation measures. In practice, an adequate and effective photo-documentation and salvage mitigation program for a historical building that rates only 20 "significance points" on the foregoing conceptual scale would be fairly modest and inexpensive. Comparing its cost against the cost of more expensive project alternatives and mitigation measures would show them to be disproportional. If those other alternatives and mitigation measures were not "roughly proportional," they could be characterized as legally excessive per the *Nollan/Dolan* test.

A much more significant resource, however, for example the Hollywood Bowl, would merit a much more extensive, impressive, and expensive photo-documentation and salvage program, with the result that some project alternatives or other mitigation measures would be roughly proportional in cost and practical burdens, and therefore legally feasible.

By explicitly incorporating the *Nollan/Dolan* nexus/proportionality test, CEQA places a conceptual upper limit on the types and cost of alternatives and mitigation measures that can be imposed on historical demolition projects. When a CEQA Lead Agency appears to be determined to deny a demolition permit, require hugely expensive relocation or adaptive reuse, mandate historical restoration of the subject building or others, or impose a large "in-lieu mitigation fee" as a condition of demolition, it is important to substantiate the argument that such onerous conditions violate the constitutional *Nollan/Dolan* "essential nexus" and "rough proportionality" doctrines.[67]

An attorney must frame the administrative record as a whole, since the nexus and proportionality arguments are essentially "legal" in nature, but factual evidence is necessary, and best supplied by a credible expert. Accordingly, the recommended way to do this is, first, to hire an expert in historical preservation and architectural history. This can be difficult, in view of the reluctance of many experts to counter the prevailing preservationist culture within the CEQA and historical and architectural communities.

The factual evidence should have three main elements: First, it should establish that the particular old building or structure is "only so significant" by quantifying in relative terms its "historicity" on a historical significance scale like the one described above. If the resource in question is a nice example of an Eichler-designed house dating from 1953, tell the story of Eichlers, how many thousands were built and where, how many remain unaltered, and use this information as the basis for assigning a historical significance "rating," say, 7%. If it is a small, generic Main Street commercial building dating from 1885, unassociated with any important past events or people, tell its story, noting that there are many, many thousands of them, and use that information as the basis for a rating of, say, 10%. Explain the factors that add or subtract historical significance, tracking the elements listed in the California or National Guidelines. At a minimum, there must be "some" credible evidence in the record to justify a Lead Agency determination that "not all historical resources were created equal" -- that some are much more significant than others, and that in the particular instance, the building's historical significance (distinguished from its architecture, beauty, age), the building objectively has a finite significance of only "[whatever it is]."

If the historical significance of a given old building is already well-known, thoroughly documented, well-photographed, and publicly available, those are factors supporting a conclusion that demolition of the building itself will have a much reduced impact on the "historical significance" of the building because it is merely one large artifact embodying but a part of the available evidence of its historical significance. Similarly, if a building is seriously deteriorated, vandalized, partially burned or damaged, those factors distinguishing its present condition from its historic condition should be placed in the record, to support a conclusion that its "historicity rating" should be lower because it no longer conveys all the historical significance that it once did.

Second, it should establish the efficacy of various feasible mitigation measures in reducing or lessening adverse impacts to the building's historical significance. Using the relevant factors in each particular project (association with historic figures or events, exemplary of a famous architect's work), explain how those factors can be enhanced, recorded, preserved, and publicly interpreted. Using expert testimony inserted into the record, quantify the efficacy of the project sponsor's proposed mitigation program, and the efficacy of each project alternative and mitigation program that the project sponsor considers excessive if imposed. This can take the form of statements that "[i]mplementation of this particular mitigation program will reduce the demolition's adverse effect on this building's historical significance by 40% [that is, it will preserve 40% of its significance]."

Similarly, to help dissuade a Lead Agency from imposing an excessive mitigation program, the efficacy of that program should be quantified and related to the "rough proportionality" test with statements such as the following:

> Relocation from its original location could reduce the adverse effects of demolition by 40%, but at a cost of Four Million Dollars ($4,000,000.00), more than four times the replacement cost of the structure, twice the market value of the structure once relocated, and over ten times the cost of a legitimate photo-documentation and salvage program capable of preserving 15% of its significance.

Relocation in this example therefore should be evidently not "roughly proportional," especially when the structure has

a relatively low historical significance rating. Project approval findings should explain how these calculations were made, and logically how the conclusions were reached that excessively expensive alternatives or mitigation measures are not "roughly proportional" in kind or degree.

Third, the evidence should apply the quantified efficacy of the project sponsor's proposed mitigation program to the structure's objectively quantified historical significance. For example, if Stanford's Hoover Tower has an expertly-established historical significance rating of 30%, and a feasible photo-documentation and salvage mitigation program can preserve 10% of that significance, then the Lead Agency will have an objective basis in the administrative record, intelligible to a reviewing court, for determining that mitigation will preserve a full one-third of the building's historical significance — a "substantial reduction or lessening" of the adverse effects of demolition. Appropriate project approval findings to this effect also must be included in the Lead Agency's record of decision.[68]

Establishing in the record a factual basis for determining that a given mitigation program will indeed "substantially reduce or lessen" the adverse effects on a building's historical significance, and making proper project approval findings to that effect, fully satisfies CEQA.[69] Yet, it is advisable to add backup "statements of overriding considerations" according to CEQA Guidelines section 15093(b). Strictly speaking, these findings are not needed unless significant adverse effects are not avoided or substantially lessened. But, such findings can be made explicitly "in the alternative," by providing that they are being made not because of any ambivalence or ambiguity in the project approval findings under CEQA Guidelines sections 15091 and 15092, but only in case a reviewing court finds fault with the facts or logic of the project approval findings.

G. Dealing With An Uncooperative Lead Agency

If the Lead Agency denies a demolition permit, obviously it need not make findings under CEQA Guidelines sections 15091 and 15092. Moreover, it certainly will not make statements of overriding considerations under section 15093. If the Lead Agency is divided on the issues, though, it is all the more important for the project sponsor to augment the administrative record before the final project approval hearing. A record that has not been properly prepared to support project approval findings, and that consists only of a hostile staff's facts and recommendations to deny the demolition permit, will, if the Lead Agency decisionmakers change their minds, result in a project approval decision that is not adequately and factually supported, rendering it vulnerable to a litigation challenge.[70] It is generally too late to craft an adequate administrative record during a project approval hearing and almost certainly too late to rebut and adequately counter facts and proposed findings in the record that were prepared to support a permit denial decision. While the Lead Agency can decide to issue the demolition permit and direct staff to "prepare findings for its later approval that are consistent with its discussion of the issues," if the facts supporting those findings are not already in the record, it may be too late by then to provide them. In this situation, a project sponsor should request a continuance of the approval hearing so that the record can be augmented.

V. CONCLUSION

It is legally possible to demolish a historic resource in California. The crucial legal hurdles to be overcome are found in CEQA. Diligent preparation of a factual record to support issuance of the permit, crafting strong, detailed project approval findings, and full use of CEQA's legal authority to reject infeasible alternatives and disproportionately excessive mitigation measures are necessary to avoid or, if necessary, win a CEQA litigation challenge.

Mr. Aikins is a member of Hopkins & Carley's Real Estate Department. His areas of expertise include Land Use, Environmental and most aspects of Real Estate Development law. He specializes in legal issues encountered in development of raw land, urban development, and state, federal and local governmental entitlements throughout California.

ENDNOTES

1 CEQA and most of the other applicable regulations treat "demolition" and "substantial alteration" of historic structures in the same way, and so for brevity this article uses the term "demolition" to describe both demolition of and substantial alterations to historic structures.

2 *See* Cal. Pub. Res. Code § 5024.1; *Id.* § 21001(b), 14 Cal. Code Regs. §§ 15000 *et seq.* [hereinafter CEQA Guidelines]; CEQA Guidelines § 15382.

3 *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Benenson v. United States,* 548 F.2d 939 (1977); *People ex rel. Marbro Corp. v. Ramsey*, 28 Ill. App. 252 (1960); *Keystone Assoc. v. Moerdler*, 19 N.Y.2d 78 (1966).

4 16 U.S.C. §§ 470 *et seq*.

5 Beginning with Section 61.1 of Title 36 of the Code of Federal Regulations.

6 *See Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929); *U.S. v. Gettysburg Elec. Ry. Co*., 160 U.S. 666 (1896).

7 *Roe*, 278 U.S. 191.

8 *See* Chapter 25.45, Laguna Beach Municipal Code.

9 Cal. Gov't Code §§ 50280 *et seq*.

10 Laguna Beach Municipal Code, sec. 25.45.010.

11 Del Mar Municipal Code, ch. 30.58.

12 *See* S.F. Planning Code §§ 1005 *et seq*.

13 *See Environmental Law Fund v. City of Watsonville*, 124 Cal. App. 3d 711 (1981).

14 *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App. 4th 286 (2010); *San Diego Trust Bank v. Friends of Gill*, 121 Cal. App. 3d 203 (1981); *First Presbyterian Church v. City of Berkeley*, 59 Cal. App. 4th 1241 (1997); *Prentiss v. City of South Pasadena*, 15 Cal. App. 4th 85 (1993).

15 Cal. Pub. Res. Code § 21084(b); CEQA Guidelines § 15331.

16 Cal. Pub. Res. Code § 21084(e).

17 *Id.* § 21084.1; CEQA Guidelines § 15064.5(a)(1).

18 *See League for Protection of Oakland's Architectural & Historic Res. v. City of Oakland*, 52 Cal. 4th 896 (1997).

19 *See Citizens for Responsible Dev. v. City of West Hollywood*, 39 Cal. 4th 503 (1995).
20 *See Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039 (2008); CEQA Guidelines § 15064.5(a)(94) .
21 This criterion is the closest state law comes to protecting structures due to their "architectural," as opposed to "historic" significance. Classical architecture, the work of a famous architect or a "highly artistic" structure, may cause a structure to be labeled "historic" for CEQA purposes.
22 *See* CEQA Guidelines § 15179.5.
23 *Id.* § 15179.5(b).
24 *Id.* § 15070(a).
25 *Id.* § 15070(b).
26 *Se League for Protection of Oakland's Architectural & Historic Res. v. City of Oakland*, 52 Cal. App. 4th 896 (1997); *No Oil v. City of Los Angeles*, 13 Cal. 3d 68 (1974); CEQA Guidelines § 15065(a).
27 *See No Oil*, 13 Cal. 3d 68.
28 Cal. Pub. Res. Code § 21082.2; CEQA Guidelines § 15064(f)(4).
29 *See* Cal. Pub. Res. Code § 5024.1.
30 *Architectural Heritage v. County of Monterey*, 122 Cal. App. 4th 1095 (2004).
31 *See* CEQA Guidelines § 15126.4(b)(1).
32 *See* Cal. Pub. Res. Code § 21158; CEQA Guidelines § 15082.
33 *See* CEQA Guidelines § 15070(b)(1).
34 *See id.* §§ 15091(a)(1), 15092(b)(2), 15093(b), 15370.
35 *Id*. § 15091(a)(1).
36 *Id*. § 15092(b)(2)(A).
37 *Id*.; Cal. Pub. Res. Code §§ 21083, 21002, 21002.1, 21081; *Laurel Hills Homeowners Ass'n v. City Council*, 83 Cal. App. 3d 515 (1978).
38 For example, an iconic roadway bridge, a 19th century County Courthouse, a coastal lighthouse, etc.
39 *Dudek v. Redevelopment Agency*, 173 Cal. App. 3d 1029 (1985); *County of Inyo v. City of Los Angeles*, 17 Cal. App. 3d 185 (1977); CEQA Guideline § 15124.
40 *See* CEQA Guidelines § 15378; *Laurel Heights Improvement Ass'n v. Regents of the University of California*, 47 Cal. 3d 376 (1988) [hereinafter *Laurel Heights I*].
41 *See Uphold Our Heritage v. Town of Woodside*, 147 Cal. App. 4th 587 (2007).
42 *See* CEQA Guidelines § 15124(a).
43 *Id*. § 15126.6(a).
44 *Id*. § 15126.6(f); *Save Our Residential Environment v. City of West Hollywood*, 9 Cal. App. 4th 1745 (1992).
45 *See Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal. App. 3d 433 (1988); *Laurel Heights I*.
46 CEQA Guidelines § 15126.6(a), *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4th 477 (2004).
47 CEQA Guidelines § 15126.6(c).
48 *See id.* § 15126.6(e).
49 *See id.* § 15021(a)(2).
50 *See Sierra Club v. County of Napa*, 121 Cal. App. 4th 1490 (2004).
51 For example, "creation of a modern, open-floor plate office working environment with a minimum of 40,000 square feet of floor area," and even "elimination of vestiges of outdated, incongruous architecture and structurally obsolete buildings that inhibit redevelopment and revitalization of this blighted area" can help to establish a legal basis for rejecting an historical restoration alternative.
52 *See* CEQA Guidelines § 15364.
53 *See Uphold Our Heritage*, 147 Cal. App. 4th 587, in which evidence that restoration could cost several million dollars was not sufficient on its face to support an "economically infeasible" determination, when the project sponsor, Steve Jobs (or anyone else), might well have spent that sum on a restored or new house in Woodside, on the attractive, secluded 8-acre estate parcel involved.
54 16 U.S.C. §§ 470 *et seq*.
55 Cal. Pub. Res. Code § 21002; CEQA Guidelines § 15125.6.
56 *See Mira Mar Mobile Cmty. v. City of Oceanside*, 119 Cal. App. 4th 477 (2004).
57 *See* Cal. Pub. Res. Code § 21002; CEQA Guidelines §§ 15002(h), 15126.4(a)(1).
58 *See* CEQA Guidelines § 15364; *see also Id.* § 15126.4(a)(4).
59 *Kenneth Mebane Ranches v. Superior Court*, 10 Cal. App. 4th 276 (1992).
60 *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
61 12 Cal. App. 4th 854 (1996).
62 *Id*.
63 CEQA Guidelines § 15126.4(a)(4).
64 147 F.3d 802 (1998). There were three opinions in *Garneau*. As the Ninth Circuit has noted in *McClung v. City of Sumner*, 548 F.3d 1229, 1229 n.4 (9th Cir. 2008), the main opinion, written by Judge Brunetti, found that the *Nollan/Dolan* analysis did not apply to this permit condition. *Id*. at 808. However, in concurring opinions, Judge O'Scannlain stated that *Nollan/Dolan* should apply, *id*. at 814, while District Judge Williams found that the permit condition should be analyzed under the Due Process Clause instead of the Fifth Amendment. *Id*. at 818. "In the end, two of the three Garneau judges agreed that Nollan/Dolan did not apply to the permit requirement." *Id*.
65 *Garneau,*147 F.3d 802; *Dolan,* 512 U.S. 374.
66 *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982).
67 *See Uphold Our Heritage*, 147 Cal. App. 4th 587.
68 *See* CEQA Guidelines §§ 15091(a)(1), 15092(b)(2).
69 *Id*.
70 *See Uphold Our Heritage*, 147 Cal. App. 4th 587.