#36.43 8/10/71

Memorandum 71-61

Subject: Study 36.43 - Condemnation (Open Space Acquisition)

SUMMARY

The Commission has indicated approval of the concept that cities and counties have the power of eminent domain to acquire open space or open area but has directed the staff to redraft the proposed provisions with limitations on what constitutes open space. Attached as Exhibit I are the provisions redrafted and with comments.

ANALYSIS

At the July 1971 meeting, the Commission tentatively approved the following general scheme for acquisition of open space or open area by cities and counties through their eminent domain power:

(1) Cities and counties should be granted the power of eminent domain to acquire open space.

(2) Some restriction on the property that can be condemned under open space authority needs to be specified.

(3) If open space is disposed of, equivalent property should be substituted within one year.

Grant of the eminent domain power (Section 6953). Cities and counties already have the power to acquire open space or open area by means other than eminent domain. See Section 6953 (attached as part of Exhibit II). The staff draft would add condemnation to the means of acquisition listed in that section. Conforming changes would be made in Sections 6950 and 6952. See Exhibit I.

Restrictions on condemnation of open space property (Section 6955). In order to assure that condemnation of open space property is for a predominantly public purpose, and not to enhance the present or potential value of abutting or surrounding private property (as the definition contained in Section 6954 might indicate), the staff has drafted a new Section 6955 (Exhibit I).

Section 6955 merely reiterates the rule already present in Section 65566 (Exhibit III) that any acquisition of open space property by a city or county must be in conformance with the local open space plan for that city or county. Under such a local open space plan, only land that is a wildlife habitat, watershed, scenic, recreational, agricultural, or encompasses natural resources qualifies as open space land. See Section 65560.

It is the staff's feeling that this limitation is an important one, and should apply to any open space acquisition by a city or county, and not merely to acquisitions through the eminent domain power. Section 6955 has been drafted accordingly. This is the effect, in any case, of Section 65566.

Replacing diverted property. (Section 6956). The staff has redrafted proposed Section 6956 (Exhibit I) to eliminate some of the surplussage found in the comparable federal provision. The section basically requires property diverted from open space use to be replaced by property of substantially equivalent usefulness and location.

Enforcement of this limitation on diversion of open space property should be relatively simple. Enforcement may be by the residents of the city or county either through political pressure or the courts (civil writs). The trust fund device has been retained as an aid for enforcement.

A more specific enforcement provision could be drafted. Exhibit IV (attached) is a copy of Assembly Bill 1981, relating to replacement of public parklands when

acquired by public entities for nonpark purposes. This bill has passed the Assembly and has received the approval of the policy committee in the Senate. Note particularly proposed Section 5406 which contains specific enforcement mechanisms. A comparable provision adapted for use in the open space provisions would read as follows:

> ( ) Property may be diverted from use as open space or open area pursuant to subdivision (a) only after public notice and hearing. Any resident of the entity diverting such property may bring an action in the superior court of the county in which the property is located to determine whether its diversion or replacement complies with the requirements of this chapter.
>
> Comment. Subdivision ( ) of Section 6956 provides enforcement mechanisms to assure that property diverted from use as open space or open area is only diverted in accordance with the local open space plan (Section 65566), and is replaced by substantially equivalent property in accordance with the local open space plan (Section 6955). Subdivision ( ) is based on comparable enforcement mechanisms in Public Resources Code Section 5406 relating to replacement of public park lands.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

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EXHIBIT I

GOVERNMENT CODE §§ 6950-6956

Staff Draft September 1971

ACQUISITION OF PROPERTY BY COUNTY OR CITY
FOR OPEN SPACE

Sec. . The heading for Chapter 12 (commencing with Section 6950) of Division 7 of Title 1 of the Government Code is amended to read:

Chapter 12. ~~Purchase-of-Interests-and-Rights-in-Real Property~~ Acquisition of Property for Open Space

Government Code § 6950 (amended)

Sec. . Section 6950 of the Government Code is amended to read:

6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

Comment. See Comment to Section 6953.

Government Code § 6952 (amended)

Sec. . Section 6952 of the Government Code is amended to read:

6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

Comment. See Comment to Section 6953.

Government Code § 6953 (amended)

Sec. . Section 6953 of the Government Code is amended to read:

6953. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

Comment. Section 6953 is amended to make clear that a city or county may exercise the power of eminent domain to acquire property for open space use under this chapter. The former law was unclear, but condemnation for open space probably was not authorized. Compare Note, Property Taxation of Agricultural and Open Space Land, 8 Harvard J. Legis. 158 text at n.1 (1970) (implying that condemnation was authorized) with Ops. Cal. Legis. Counsel (Oct. 24, 1969) (concluding that condemnation was not authorized). Compare Pub. Res. Code §§ 5540, 5541 (authorizing condemnation by regional park district for "natural areas" and "ecological and open space preserves").

The power of eminent domain provided in Section 6953 will facilitate compliance with Section 65564 (requiring local open space plans to incorporate

an "action program" consisting of specific programs the city or county intends to pursue in implementing its open space plan). See also Sections 25350.5 and 37350.5 (power of cities and counties to condemn to carry out city and county functions). The power of eminent domain will also provide a means to compel open space preservation where zoning fails. See Section 65912 (open space zoning may not be used to take or damage property for public use without payment of just compensation).

For limitations on the right to acquire property under this chapter, see Section 6955.

Government Code § 6955 (added)

Sec. . Section 6955 is added to the Government Code, to read:

6955. Property may be acquired under this chapter only if its acquisition is consistent with the local open space plan adopted by the city or county pursuant to Section 65563.

Comment. Section 6955 makes clear that cities and counties may acquire open space or open area only if such acquisition is consistent with the local open space plan adopted pursuant to Section 65563 (requiring every city and county to prepare and adopt, by June 30, 1972, a local open space plan for the comprehensive and long-range preservation and conservation of open space land within its jurisdiction). Section 6955 is thus merely a specific application of Section 65566 (requiring all acquisitions of open space land to be consistent with the local open space plan). See also Section 65567 (prohibiting issuance of building permits, approval of subdivision maps, or adoption of open space zoning ordinances unless consistent with the local open space plan).

Section 6955 parallels Section 65910 (requiring cities and counties to adopt open space zoning ordinances consistent with the local open space plan by January 1, 1973). By providing that, when open space is acquired by purchase, condemnation, or otherwise, the acquisition must also be consistent with the local open space plan, Section 6955 recognizes that acquisition of property is an alternative to open space zoning.

Government Code § 6956 (added)

Sec. . Section 6956 is added to the Government Code, to read:

6956. (a) Property diverted by a city or county from use as open space or open area must be replaced within a reasonable time, not exceeding one year. Any replacement property, whether substituted or received in exchange, must be of substantially equivalent usefulness and location for permanent open space or open area as the property it replaces and must be held subject to all the provisions of this chapter. Any money received for property diverted from use as open space or open area must be held in a trust fund to be used only to acquire other open space or open area subject to the provisions of this chapter.

(b) This section applies only to property acquired under this chapter after June 30, 1974.

(c) This section does not apply where property or a right or interest therein is conveyed or otherwise subjected to uses that are compatible with its character as open space or open area and that do not significantly adversely affect such character.

Comment. When open space or open area is diverted to other use, Section 6596 requires that substantially equivalent property be acquired for open space or open area. The equivalent property may be acquired, for example, in exchange for the diverted property, by purchase with the money received from its sale or lease, or (if the city or county uses the open space or open area for its own public project) by public funds available for the project.

It should be noted that the restriction contained in Section 6956 is not the only restriction upon disposal of open space property by cities and counties. Section 65566 requires that acquisition, disposition, restriction, or regulation of open space property be in accordance with the local open space plan. This requirement applies to property acquired for open space under this chapter or under any other provision of law.

Subdivision (a). Subdivision (a) of Section 6956, which requires substitution of equivalent property, adopts the substance of the limitation found in 42 U.S.C. § 1500c (limitation on conversion of open space to another use if federal assistance used to acquire the open space). See also the 1970 Cumulative State Legislative Program (1969) of the Advisory Commission on Intergovernmental Relations, containing suggested state legislation including this same limitation. For a somewhat comparable provision, see Pub. Res. Code § 5096.27 (property acquired by local entity with state grant under Cameron-Unruh Beach, Park, Recreational, and Historical Facilities Bond Act of 1964 to be used only for purpose for which state grant funds requested unless otherwise permitted by specific act of the Legislature). Compare Pub. Res. Code § 5540 (authorization by voters or by act of Legislature required for conveyance of property used for park purposes by regional park district).

Subdivision (b). The requirements of subdivision (a) apply only to open space property acquired after the time cities and counties have been granted the power of eminent domain to acquire open space. Nonetheless, the requirements apply not only to open space acquired by eminent domain but also to such property acquired by any other method.

Subdivision (c). The requirements of subdivision (a) do not affect the right of cities and counties to convey or lease open space property, or a right or interest therein, under such covenants or other contractual arrangements as will limit its future use in accordance with the provisions of this chapter. See Section 6953. Subdivision (c) permits improvements in the open space area that do not significantly adversely affect its usefulness as open space. If, however, the improvement significantly adversely affects the usefulness of the open space area as open space, subdivision (a) is applicable.

STATUTORY AUTHORITY OF CITY OR COUNTY TO ACQUIRE OPEN SPACE

Chapter 12

PURCHASE OF INTERESTS AND RIGHTS IN REAL PROPERTY

Sec.

6950. Legislative intent; preservation of open spaces for public use and enjoyment.
6951. Spread of urban development; scenic or esthetic value of open areas and spaces.
6952. Legislative declaration; expenditure of public funds.
6953. Legislative declaration; public purpose.
6954. Definitions.

Chapter 12 was added by Stats.1959, c. 1658, p. 4035, § 1.

§ 6950. Legislative intent; preservation of open spaces for public use and enjoyment. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment. (Added Stats.1959, c. 1658, p. 4035, § 1.)

§ 6951. Spread of urban development; scenic or esthetic value of open areas and spaces. The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development. (Added Stats.1959, c. 1658, p. 4035, § 1.)

§ 6952. Legislative declaration; expenditure of public funds. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions. (Added Stats.1959, c. 1658, p. 4035, § 1.)

§ 6953. Legislative declaration; public purpose. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter. (Added Stats.1959, c. 1658, p. 4035, § 1.)

§ 6954. Definitions. For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources. (Added Stats.1959, c. 1658, p. 4036, § 1.)

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EXHIBIT III

ARTICLE 10.5. OPEN-SPACE LANDS [NEW]

Sec.
65560. Definitions.
65561. Legislative finding and declaration.
65562. Intent of legislature.
65563. Preparation and adoption of local plan.
65564. Action program.
65565. Blank.
65566. Consistency of action with local plan.
65567. Consistency of proposed construction, subdivision or ordinance with local plan.
65568. Partial invalidity.

Article 10.5 added by Stats.1970, c. 1590, p. ——, § 15.

§ 65560. Definitions

As used in this article and Article 4 (commencing with Section 65910) of Chapter 4, Title 7, unless otherwise apparent from the context, the following definitions shall apply:

(a) "Agricultural land" means land actively used for the purpose of producing an agricultural commodity for commercial purposes. Land may be considered to be "actively used" notwithstanding the fact that in the course of good agricultural practice it is permitted to lie idle for a period up to one year.

(b) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council.

(c) "Natural resource land" is land deemed by the legislative body to possess or encompass natural resources, the use or recovery of which can best be realized by restricting the use of the land as provided by this chapter.

(d) "Open-space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open space use as herein defined, and which is designated on a local, regional or state open-space plan as any of the following:

(1) Natural resource land, as defined herein

(2) Agricultural land, as defined herein

(3) Recreation land, as defined herein

(4) Scenic land, as defined herein

(5) Watershed or ground water recharge land, as defined herein

(6) Wildlife habitat, as defined herein.

(e) "Open-space use" means the use of land for (1) public recreation, (2) enjoyment of scenic beauty, (3) conservation or use of natural resources, or (4) production of food or fiber.

(f) "Recreational land" is any area of land or water designated on the state, or any regional or local open-space plan as open-space land and which is actively used for recreation purposes and open to the public for such purposes with or without charge.

(g) Scenic land is land designated on the local open-space plan, as open-space land which possesses outstanding scenic qualities worthy of preservation.

(h) "Watershed or ground water recharge land" is land designated on the state or any regional or local open-space plan as open-space land which is important to the state in order to maintain the quantity and quality of water necessary to the people of the state or any part thereof.

(j) "Wildlife habitat" is any land or water area designated on the state or any regional or local open-space plan as open-space land which is unusually valuable or necessary to the preservation or enhancement of the wildlife resources of the state.
(Added by Stats.1970, c. 1590, p. —, § 15.)

Library References
Words and Phrases (Perm.Ed.)

§ 65561. Legislative finding and declaration

The Legislature finds and declares as follows:

(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

(b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.

(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.
(Added by Stats.1970, c. 1590, p. —, § 15.)

§ 65562. Intent of legislature

It is the intent of the Legislature in enacting this article:

(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.

57

(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.
(Added by Stats.1970, c. 1590, p. —, § 15.)

§ 65563. Preparation and adoption of local plan

Every city and county shall, by June 30, 1972, prepare and adopt a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction.
(Added by Stats.1970, c. 1590, p. —, § 15.)

§ 65564. Action program

Every local open-space plan shall contain an action program consisting of specific programs which the legislative body intends to pursue in implementing its open-space plan.
(Added by Stats.1970, c. 1590, p. —, § 15.)

§ 65565. Blank

§ 65566. Consistency of action with local plan

Any action by a county or city by which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.
(Added by Stats.1970, c. 1590, p. —, § 15.)

§ 65567. Consistency of proposed construction, subdivision or ordinance with local plan

No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.
(Added by Stats.1970, c. 1590, p. —, § 15.)

§ 65568. Partial invalidity

If any provision of this article or the application thereof to any person is held invalid, the remainder of the article and the application of such provision to other persons shall not be affected thereby.
(Added by Stats.1970, c. 1590, p. —, § 15.)

CHAPTER 4. ZONING REGULATIONS

Article	Section
4. Open-Space Zoning [New]	65910

ARTICLE 1. GENERAL PROVISIONS

Law Review Commentaries
Zoning Variances. (1965) 38 So.Cal.L.R. 571, 572.

§ 65800. Purpose

It is the purpose of this chapter to provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county or city. Except as provided in Article 4 (commencing with Section 65910) of this chapter, the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.
(Amended by Stats.1970, c. 1590, p. —, § 10.)

ARTICLE 4. OPEN-SPACE ZONING [NEW]

Sec.
65910. Adoption of ordinance.
65911. Variances.
65912. Legislative finding and declaration.

Article 4 added by Stats.1970, c. 1590, p. —, § 16.

§ 65910. Adoption of ordinance

Every city or county by January 1, 1973, shall adopt an open-space zoning ordinance consistent with a local open-space plan adopted pursuant to Article 10.7 (commencing with Section 65560) of Chapter 3 of this title.
(Added by Stats.1970, c. 1590, p. —, § 16.)

§ 65911. Variances

Variances from the terms of an open-space zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

This section shall be literally and strictly interpreted and enforced so as to protect the interest of the public in the orderly growth and development of cities and counties and in the preservation and conservation of open-space lands.
(Added by Stats.1970, c. 1590, p. —, § 16.)

§ 65912. Legislative finding and declaration

The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.
(Added by Stats.1970, c. 1590, p. —, § 16.)

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EXHIBIT IV

AMENDED IN SENATE JULY 27, 1971

CALIFORNIA LEGISLATURE—1971 REGULAR SESSION

ASSEMBLY BILL No. 1981

Introduced by Assemblyman Sieroty
(Coauthor: Senator Lagomarsino)

April 13, 1971

REFERRED TO COMMITTEE ON NATURAL RESOURCES AND CONSERVATION

An act to add Chapter 2.5 (commencing with Section 5400) to Division 5 of the Public Resources Code, and to repeal Section 103.7 of the Streets and Highways Code, relating to acquisition of property for park purposes.

LEGISLATIVE COUNSEL'S DIGEST

AB 1981, as amended, Sieroty (N.R. & Con.). Public parks.

Adds Ch. 2.5 (commencing with Sec. 5400), Div. 5, P.R.C.; repeals Sec. 103.7, S. & H.C.

Prohibits acquisition by city, city and county, county, state agency, public district, or public utility of real property used as a public park for use for any nonpark purpose unless compensation or land, or both, determined as specified, is paid to operating entity to enable acquisition and development of substitute park land and facilities. Specifies that provisions do not apply to acquisition of real property or interest in real property for construction or maintenance of underground utility services or to public utility acquiring such real property for purpose of providing services to public park if underground services or facilities are not feasible or as a waterway if it is determined that such waterway would preserve or enhance the recreational or aesthetic values of the park. Requires operating entity to acquire and develop such substitute park land and facilities or, if less than 10 percent, but not more than 3 acres, of existing park land and facilities are acquired, allows operating entity to improve such unacquired portion and use funds or land and funds received for this purpose.

Authorizes acquiring entity and the operating entity to enter into an agreement as to compliance with prescribed requirements in determining amount of compensation or land, or both. Requires public hearing before such an agreement is entered into, except where less than 10 percent of total area of state park is acquired. Provides for bringing of action for determination by superior court of whether such agreement complies with the specified requirements. Provides for sub-

mission of proposals for compensation or land, or both to superior court where the entities are unable to reach an agreement.

Permits operating entity to change location or character of substitute park land, as specified.

Provides that failure of public entity or utility to comply with above provisions does not affect validity of acquisition.

Deletes provisions which provide compensation for park property condemned for state highway purposes to be based on fair market value, plus improvements, and which permit agreements where economically feasible for substitute facilities.

Vote—Majority; Appropriation—No; Fiscal Committee—Yes.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 2.5 (commencing with Section 5400)
2 is added to Division 5 of the Public Resources Code, to read:
3
4 CHAPTER 2.5. PRESERVATION OF PUBLIC PARKS
5
6 5400. This chapter shall be known as the Public Park Pres-
7 ervation Act of 1971.
8 5400.5. As used in this chapter "public park" includes
9 only a park operated by a public agency.
10 5400.6. As used in this chapter "operating entity" means
11 the entity owning the park land and the facilities thereon.
12 5401. No city, city and county, county, public district, or
13 agency of the state, including any division, department or
14 agency of the state government, or public utility, shall acquire
15 (by purchase, exchange, condemnation, or otherwise) any real
16 property, which property is in use as a public park at the
17 time of such acquisition, for the purpose of utilizing such prop-
18 erty for any nonpark purpose, unless the acquiring entity pays
19 or transfers to the legislative body of the entity operating the
20 park sufficient compensation or land, or both, as required by
21 the provisions of this chapter to enable the operating entity to
22 replace the park land and the facilities thereon.
23 5402. The provisions of this chapter shall not apply to the
24 acquisition of real property or any interest in real property
25 for the construction or maintenance of underground utility
26 services.
27 5403. The provisions of this chapter shall not apply to a
28 public utility, whether privately or publicly owned, acquiring
29 real property or an interest in real property for the purpose
30 of providing services to the public park, if it is not feasible to
31 place the utility services or facility underground.
32 5403.5. The provisions of this chapter shall not apply to a
33 public utility, whether privately or publicly owned, acquiring
34 real property or any interest in real property as a waterway;
35 provided, that the legislative body of the operating entity
36 determines by a majority vote that such waterway would pre-
37 serve or enhance the recreational or aesthetic values of the
38 park.

5404. In the event that the park land and facilities are acquired, the operating entity shall acquire substitute park land and facilities. If, however, less than 10 percent of the park land, but not more than three acres, is acquired, the operating entity may, instead of acquiring substitute park land and facilities, improve the unacquired portion of the park land and facilities, using the funds received for this purpose, after holding a public hearing on the matter and upon a majority vote of its legislative body.

5405. Unless the provisions of Section 5407.2 are applicable, the amount of compensation or land, or both, required by this chapter for the taking of the park land and facilities shall be equal to one of the following:

(a) The cost of acquiring substitute park land of comparable characteristics and of substantially equal size located in an area which would allow for use of the substitute park land and facilities by generally the same persons who used the existing park land and facilities, and the cost of acquiring substitute facilities of the same type and number, plus the cost of development of such substitute park land, including the placing of such substitute facilities thereon.

(b) Substitute park land of comparable characteristics and of substantially equal size located in an area which would allow for use of the substitute park land by generally the same persons who used the existing park land, and the cost of acquiring substitute facilities of the same type and number, plus the cost of development of such substitute park land, including the placing of such substitute facilities thereon.

(c) Any combination of substitute park land and compensation in an amount sufficient to provide substitute park land of comparable characteristics and of substantially equal size located in an area which would allow for use of the substitute park land and facilities by generally the same persons who used the existing park land and facilities, and to provide substitute facilities of the same type and number, plus the cost of development of such substitute park land, including the placing of such substitute facilities thereon.

5406. Upon receiving an offer of compensation or land, or both, from the acquiring entity for the acquisition of the park, the legislative body of the operating entity may enter into an agreement with the acquiring entity to the effect that the acquiring entity has complied with the requirements of Section 5405 or Section 5407.2 in determining the amount of compensation or land, or both. Such agreement may be entered into only after a public hearing, except where less than 10 percent of the total area of a state park is acquired, in which case the operating entity shall follow the procedure it adopts for such purposes. Due notice of the public hearing shall be posted at the park being acquired. Any resident of the operating entity may bring an action in the superior court of the county in which the park is located for determination of whether such agreement complies with the requirements of

Section 5405 or Section 5407.2. If no such agreement has been entered into within six months after the receipt of such offer, either party may submit a proposal for compensation or land, or both, to the superior court of the county in which the park to be acquired is located for the determination of proper compensation. The court may reject any such proposal as not meeting the requirements of Section 5405 *or Section 5407.2*. The court may approve only one proposal as meeting such requirements.

5407. Unless improvement of an unacquired portion of the park land and facilities is undertaken pursuant to Section 5404, all funds, or land and funds received by the operating entity shall be used to obtain or provide substitute park land and facilities in accordance with the provisions of Section 5407.1 or Section 5407.2.

5407.1. Such substitute park land and facilities shall be of comparable characteristics and of substantially equal size located in an area which would allow for use of the substitute park land and facilities by generally the same persons who used the acquired park land and facilities. However, the operating entity, after holding a public hearing, with due notice posted at the park being acquired, and after finding on the basis of evidence submitted at such hearing that there are compelling reasons for acquiring a substitute park of a different character, may, upon the recommendation of the park commission or if none exists, upon the recommendation of the administrative department, unit or agency charged with the responsibility for the maintenance and operation of the park land and facilities, and by a three-fourths vote of its legislative body, provided it is otherwise legally permissible to do so, change the general character of the substitute park land and facilities.

5407.2. The operating entity, after holding a public hearing, with due notice posted at the park being acquired, and after finding on the basis of evidence submitted at such hearing that there are compelling reasons for acquiring a substitute park in another general location, may, upon the recommendation of the park commission or if none exists, upon the recommendation of the administrative department, unit or agency charged with the responsibility for the maintenance and operation of the park land and facilities, and by a three-fourths vote of its legislative body, provided it is otherwise legally permissible to do so, change the general location of the substitute park land and facilities.

If the legislative body votes to change the general location of the substitute park land and facilities, the amount of compensation or land, or both, for the taking of the park land and facilities shall be determined on the basis of the fair market value of the property taken, considering all the uses for which it is available and adaptable regardless of its dedication to park purposes, plus the value of any and all improvements constructed thereon.

1 5408. Failure of any public entity or public utility to
2 comply with any provision of this chapter shall not affect the
3 validity of an acquisition by such entity or utility.
4 5409. Nothing in this chapter shall in itself be construed
5 to authorize the use of eminent domain, or to define more nec-
6 essary use, or to authorize, in itself, the taking of property not
7 the subject of eminent domain. The provisions of this chapter
8 shall apply only if the use of eminent domain is otherwise
9 authorized by law.
10 SEC. 2. Section 193.7 of the Streets and Highways Code is
11 repealed.

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