#36.43 4/20/71

Memorandum 71-27

Subject: Study 36.43 - Condemnation (Open Space Acquisition)

SUMMARY

The California statutes provide a number of means for the acquisition or preservation of open space. Although regional park districts have statutory authority to condemn property or an interest therein to preserve open space, the statutes that govern acquisition of open space by cities and counties apparently do not authorize use of the power of eminent domain.

This memorandum presents for Commission consideration:

(1) Should cities and counties be granted the power of eminent domain to acquire or preserve open space?

(2) What limitations, if any, should be imposed on cities and counties to prevent abuse of the authority to acquire open space?

BACKGROUND

Existing Statutes

Regional park districts. Legislation enacted at the 1970 session authorizes regional park districts to condemn property or an interest therein, whether or not within the district, for "natural areas" or for "ecological and open space preserves." See Public Resources Code §§ 5540, 5541 (Exhibit V, blue). Section 5540 limits disposition of district property; it prohibits conveyance of any interest in "any real property actually dedicated and used for park purposes"--it is unclear whether this includes "open space" property--unless the conveyance is approved by a majority of the voters of the district voting at a special election.

Cities and counties. Methods available to cities and counties for acquiring or preserving open space are: (1) Acquisition by purchase, gift, grant, bequest, devise, lease "or otherwise" of the fee or any lesser interest or right in real property, with a right to acquire the fee and to sell or lease the property subject to restrictions that limit its future use to preserve open space; (2) Voluntary cessation to the city or county of development rights for a specified period; (3) Voluntary zoning to open space use; (4) Involuntary zoning to open space uses. For further details, see Exhibit II (yellow).

Government Code Sections 6950-6951 (Exhibit IV, gold) authorize cities and counties to acquire property to preserve open space, but these sections have been construed by the Legislative Counsel not to authorize the use of eminent domain to acquire property for open space (Exhibit VII, white). For the purposes of these sections, "open space" is defined as "any space or area characterized by (1) great natural or 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."

Other statutes. We have made a careful search in an attempt to find all statutes that may authorize acquisition of open space. We cannot be sure we have discovered all relevant statutes. We have noted, however, that the Cameron-Unruh Beach, Park, Recreational, and Historical Facilities Bond Act of 1964 (which is not really an open space acquisition act) provides for the acquisition "predominantly of open or natural lands" (Public Resources Code § 5096.28) and authorizes condemnation (Public Resources Code § 5096.25). The act provides in Public Resources Code Section 5096.2(b):

> (b) When there is proper planning and development, open space lands contribute not only to a healthy physical and moral environment, but also contribute to the economic betterment of the State, and, therefore, it is in the public interest for the State to acquire areas for recreation, conservation, and preservation and to aid local governments of the State in acquiring and developing such areas as will contribute to the realization of the policy declared in this chapter.

Public Resources Code Section 5096.27 limits use of land acquired by local entities pursuant to the act; it provides in part:

> 5096.27. There shall be an agreement or contract between the State and the applicant in the case of a state grant project which shall contain therein the provisions that the property so acquired shall be used by the grantee only for the purpose for which the state grant funds were requested and that no other use of the area shall be permitted except by specific act of the Legislature.

Effectiveness of Existing Methods Available to Cities and Counties

Restrictive zoning. T. extent to which open space can be preserved by restrictive zoning--whether, for example, it be zoning for uses such as agricultural and compatible uses only or zoning establishing a minimum land area, such as five acres, for each residence--is not entirely clear. Certainly there is a line beyond which the police power cannot be used to preserve open space by zoning. See Study attached as Exhibit II (yellow).

Voluntary methods. The available voluntary methods of preserving open space do not assure that an entire area will be preserved as open space. Whether the voluntary method be voluntary zoning or voluntary sale to the city or county, one owner in a particular area may decide to develop his lands, even though all the surrounding land is preserved for open space by voluntary action of the other property owners. The owners of all of a tract except one key parcel may agree to sell their land or the necessary interest therein to preserve open space. But the owner of the key parcel may either refuse to sell it or may require an unacceptable premium payment as a condition for selling it. The lack of the power of eminent domain in such a case requires the city or county to use its police power to zone the key parcel if it is to be preserved as open space and, in a particular case, involuntary zoning may not be constitutionally permissible.

Should Power of Eminent Domain be Granted Cities and Counties for Open Space?

The staff has been advised that the County of Santa Cruz is using the zoning power to preserve open spaces. Persons in that county who have been holding land and planning ultimately to subdivide it claim they have suffered substantial losses in anticipated profits because the restrictive zoning precludes such development. They cannot develop the land for subdivisions and the restrictive zoning has significantly reduced what they can expect to receive if they sell their land. They would much prefer that the county had either acquired their property by eminent domain or had condemned the development rights and paid them just compensation; instead, they have been paid nothing and are left holding land they cannot develop. Hagman apparently has this kind of case in mind when he states in California Zoning Practice (Cal. Cont. Ed. Bar 1969) at 60:

> Land-use planners currently advocate use of eminent domain to control use of land bordering freeways and to preserve open space through conservation and scenic easements. . . . Zoning competes with eminent domain as a less expensive but more controversial method of control. Since 1959, California has provided that any county or city may acquire scenic easements "by purchase . . . or otherwise." Govt C. §§ 6950, 6952-6953. See also Govt C. §§ 6951, 6954. This probably does not include acquisition by eminent domain.

The prestigious Advisory Commission on Intergovernmental Relations, in its 1970 Cumulative State Legislative Program (August 1969) includes suggested legislation to secure and preserve open space. See Exhibit III, green. This suggested legislation includes an authorization to use the power of eminent domain to acquire open space.

On the other hand, despite the grant of the power of eminent domain for open space purposes to regional park districts, various farm groups can be expected to object to the use by cities and counties of the power of eminent domain to acquire property for open space purposes. Farmers apparently have no strong objection to zoning that preserves open space, for such zoning permits them to carry on their farming activities and at the same time leaves them with the possibility of developing their land for another use in the future when land development in their area justifies a change in zoning. Moreover, the existing voluntary methods of preserving land for open space, being limited in duration and having substantial property tax benefits for the landowner, would operate to the benefit of the farmers. Timber growers would probably take the same position as the farmers.

Reliance on zoning and voluntary procedures as the chief tool of an open space program permits development forces to define and limit to a perhaps unwarranted (and sometimes unanticipated) degree the land resources from which necessary open space may be drawn. Moreover, it seems inevitable that a policy

of pushing the police power to its fullest limits must involve at least some borderline cases where considerations of fairness to private property rights would require that eminent domain be used and "just compensation" paid. At the same time, it must be recognized that the limited fiscal resources available to cities and counties make it unlikely that acquisition by purchase or condemnation will be used as an open space tool in most cases where zoning can be used. Perhaps the granting of the power of eminent domain, together with the demands of property owners who have suffered substantial losses because open space zoning so restricts the development of their property, would be sufficient to force public entities to impose the cost of open space preservation on the public generally (by paying "just compensation") rather than on those persons who happen to own undeveloped land (by involuntary zoning).

A basic objection to land acquisition by governmental entities is that it removes land from the property tax rolls and decreases property tax revenues. However, the voluntary procedures have this effect and granting the power of eminent domain should not significantly increase the problem. Moreover, it can be anticipated that land preserved for open space will be put to some compatible use--either by selling or leasing it for compatible uses--and the possessory right will be subject to property taxation. Finally, any proposal to acquire land for open space--whether by voluntary sale and purchase or by eminent domain--will present a difficult political decision since cities and counties claim that they do not now have sufficient funds to carry on even their essential activities. Certainly, the city council or board of supervisors will take a close look at any proposal to acquire open space lands, especially where condemnation is required. In the Palo Alto

area, for example, a number of cities are currently giving serious consideration to a 30 million dollar proposal for acquisition of foothill land as open space. Palo Alto is considering going ahead on its own or joining in formation of a regional park district.

Protections Against Abuse

The existing authority of cities and counties to purchase land for open space may create a possibility that these public entities will engage in land speculation. It is not likely, however, that granting the power of eminent domain for open space would significantly increase this possibility. As previously noted, the major deterrent to land speculation is the lack of funds to carry on essential services.

Nevertheless, limitations might be imposed on disposition of land acquired for open space that would preclude or significantly limit the possibility of land speculation. At the outset, it should be noted that these limitations, if any are adopted, probably should apply without regard to how the land is acquired. Certainly, if land is donated or voluntarily sold to the public entity for open space use, restrictions designed to limit the ability of the public entity to divert the land to another use would appear desirable even though the granting instrument does not impose such limitations.

Some possible limitations are discussed below.

Restriction on resale. The Advisory Commission on Intergovernmental Relations suggests that a public entity be prohibited from converting or diverting property from present or proposed open space use unless equivalent open space land is substituted within one year for that converted or diverted. See Exhibit III (green), Section 5 at 4.

Substantial federal aid is available for open space acquisition under 42 U.S.C.A. §§ 1500-1500e. Section 1500c limits conversion to other uses:

> 1500c. No open-space land for the acquisition of which a grant has been made under this chapter shall, without the approval of the Secretary, be converted to uses other than those originally approved by him. The Secretary shall approve no conversion of land from open-space use unless he finds that such conversion is essential to the orderly development and growth of the urban area involved and is in accord with the then applicable comprehensive plan, meeting criteria established by him. The Secretary shall approve any such conversion only upon such conditions as he deems necessary to assure the substitution of other open-space land of at least equal fair market value and of as nearly as feasible equivalent usefulness and location.

The staff believes the authority of cities and counties to acquire open space should include a limitation similar to that included in the federal statute. It may be of interest to note that Palo Alto originally planned to "land bank" a substantial tract of land to control more effectively its future development. However, after conferring with the federal authorities, this idea has apparently been abandoned since federal funds are being sought for the Palo Alto area open space project.

Approval by voters of public entity. The regional park district law includes a provision that land actually used for park use may not be diverted to another use unless approved by a majority of the voters voting on the issue at an election called for that purpose or by act of the state Legislature.

The staff believes that restricting disposition by requiring acquisition of substitute land is a better limitation on diversion from use as open space. It would, of course, be possible to permit diversion if either (1) substitute land is provided or (2) the disposition is approved by a majority of the voters.

Finding that diversion is in public interest. Section 51282 of the Government Code provides the standards for cancellation of a contract to retain land in an agricultural preserve. The section reads:

> 51282. The landowner may petition the board or council for cancellation of any contract as to all or any part of the subject land. The board or council may approve the cancellation of a contract only if they find:
>
> (a) That the cancellation is not inconsistent with the purposes of this chapter; and
>
> (b) That cancellation is in the public interest.
>
> The existence of an opportunity for another use of the land involved shall not be sufficient reason for the cancellation of a contract. A potential alternative use of the land may be considered only if there is no proximate, noncontracted land suitable for the use to which it is proposed the contracted land be put.
>
> The uneconomic character of an existing agricultural use shall likewise not be sufficient reason for cancellation of the contract. The uneconomic character of the existing use may be considered only if there is no other reasonable or comparable agricultural use to which the land may be put.

The cancellation procedure requires a public hearing, after notice by publication and mail to various persons.

The staff does not recommend that an attempt be made to draft an appropriate restriction using Section 51282 as a model.

STAFF RECOMMENDED PROVISIONS

The staff recommends that Chapter 12 (commencing with Section 6950) be revised (1) to authorize the use of the power of eminent domain to acquire open space, and (2) to impose appropriate restrictions of diversion of open space property to other uses. A staff draft is attached as Exhibit VIII (pink). (Sections 6950 et seq. are set out as Exhibit IV, gold.)

Respectfully submitted,

John H. DeMoully
Executive Secretary

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EXHIBIT I

EXISTING OPEN SPACE PROVISIONS

E. Craig Smay

Introduction

California presently approaches the problem of preserving open space from a number of directions at once. Two "greenbelt" laws permit localities to zone private land to open space uses upon request of landowners.[1] Cities and counties may also acquire "development rights" (the right to prevent development of land by the owners of the fee) in private land by purchase, gift, or specific term contract.[2] Lands restricted to open space use under the development rights legislation are granted tax preference by measures which confine tax assessors to assessment of such lands at values as restricted in use rather than at the prevailing formula of value in view of development potential.[3] The tax measures are sanctioned by Article XXVIII of the state Constitution, added by the voters in 1966 and declaring that preservation of open space is in the best interest of the state and that assessment practices should be modified to serve that end. Also in furtherance of the mandate of Article XXVIII, the Legislature created the Joint Committee on Open Space. The Committee's 1970 Final Report recommends a coordinated statewide program of involuntary open space zoning with restricted zones protected by tax preference. The 1970 session passed a measure which forms the basis of a statewide zoning program[4] but stopped short of granting tax preference to lands zoned to open space without the owner's consent.

To date, the California open space preservation program combines strong provisions with weak ones in a fashion that may be self-defeating. While tax preferences are a powerful tool for encouraging and protecting open space

restrictions, it is clear that--as long as tax protection is granted only voluntary acquisitions--acquisitions will depend largely upon the limited resources of localities and the enigmatic factor of willingness of landowners to come within the program. By the same token, the power to zone for open space is a strong tool, but failure to grant tax preference to land zoned to open space encourages pressures to remove such zones and thus renders them at least speculatively impermanent.

Agricultural Zoning: The "Greenbelt Laws" (Govt. Code §§ 35009, 35009.1)

The purpose of the "greenbelt laws" is to protect primarily agricultural land from annexation to cities. Landowners may apply to have their land zoned "exclusively agricultural"; once the land is so zoned, it may not be annexed to a city without consent of the landowner.

Annexation is commonly part of a progression of increasing development pressures which is not financially healthy for agricultural interests or cities.[5] The progression begins with the residential or commercial development of agricultural land far from a city center. Initially, such development increases tax assessments on neighboring lands on the principle of assessment according to development potential. Cities must extend services to new developments, and the cost of extending services is proportionately higher as the distance of a development from the city center increases. To defray such costs, cities will annex the area containing a development and levy against the entire area. Normally, such services--schools, streets, water, fire protection, and the like--are not valuable to agricultural interests in proportion to their cost so that, at this point in the progression, farmers in the newly annexed area must pay heavy tax and service assessments

which are superfluous to agricultural concerns. Further, the encroachment of development curtails farming activities such as spraying and use of smudge pots. Classically, in California, the result has been continued extension of development, continued extension of services, and over-extension of city finances. A common offshoot of the progression has been the decay of city centers and financial inability of cities to deal with resulting problems.

The "greenbelt" statutes require that a county taking advantage of the provisions have a comprehensive agricultural zoning plan. Initially, only Santa Clara County qualified as having such a plan; presently, any county may qualify by adopting such a plan. Agricultural zoning has proved a substantial initial success in Santa Clara County.[6]

Land voluntarily zoned to open space uses has not been granted tax preference as have lands containing other open space interests acquired with landowner's consent. The reason, apparently, is that such zones are not regarded as sufficiently "enforceable" or permanent as to deserve tax preference.[7] Failure to grant them preference, however, only increases their impermanence: when tax assessors may continue to assess land according to development potential, the land remains subject to the development pressures that the "greenbelt" laws were designed to counteract. In any case, agricultural zoning is not designed to reach large amounts of land closer to city centers where the need to preserve open space may be greatest. Agricultural zoning is not primarily a means of preserving open space; if relied upon as such, it is bound to be haphazard and it defies the sort of public planning and control a rational open space preservation program demands.

Development Interests: The "Open Space Law" (Govt. Code §§ 6950-6954)

California permits any city or county to acquire by various means short of condemnation the fee, development right, or easement in open land for the purpose of preserving it in its open state.[8] It seems obvious that extensive fee acquisitions with limited local funds are not contemplated;[9] the statutes operate on the theory that the purpose of preservation of open space can be achieved at minimal expense and with reasonable haste by permitting acquisition of restrictions upon the right to develop land without necessitating acquisition of the fee. Besides economy and speed, the development rights approach is thought to have numerous advantages. It avoids government involvement in the land market. It permits the landowner to retain (and to sell or pass on) the possession of and legal title to the land and the right to continue use of the land in manners consistent with open space preservation. It avoids expense to the local government in managing the land. It does not entirely remove the land from the local tax base (which would be the case if the local government acquired the fee).

The development rights approach, however, has drawbacks which have largely prevented its use where most needed. Acquisition of development rights in land close to the city center--and, thus potentially most important to preserve in its open state--is likely to be nearly as expensive as acquisition of the fees in such land. Local governments have not had, and are not soon likely to have, the funds for such acquisitions.[10] Further, the development rights approach in other parts of the country has encountered extreme problems of enforcing restrictions once acquired.[11] The solutions to these problems--increase of local funds for open space acquisitions and more careful drafting of instruments by which restrictive interests are

acquired--do not presently concern the Commission. A third problem with the development rights approach is squarely within the Commission's concern with eminent domain. Where localities are denied power to condemn restrictive interests, the public spirit and restraint of some landowners in consenting to restrictive acquisitions will provide abutting owners an opportunity to reap commercial benefits from the withdrawal of neighboring land from a potential market. In many cases, this will prevent restriction of sufficiently large and contiguous tracts as to be of interest in a rational open space preservation program.[12]

Contractual Acquisitions; Acquisitions by Gift: The Land Conservation Act of 1965 (Govt. Code §§ 51200-51254, 51281-51295)

To a large degree, the Land Conservation (or Williamson) Act overlaps the Open Space Law: generally speaking, the Land Conservation Act fills out the power of localities to acquire open space interests by means short of condemnation.

Originally, the Land Conservation Act empowered local governments to enter into contracts with owners of prime agricultural land for restriction of the land for 10-year periods to agricultural or compatible uses within "agricultural preserves" of not less than 100 acres.[13] That general scheme of the act remains after 1969 revisions which drastically altered details. Restrictions under the act are now declared "enforceable restrictions" pursuant to Article XXVIII of the Constitution, entitling contracting landowners to preferential tax treatment[14] rather than the compensation they were formerly paid if their restricted land was taxed at a higher use value than as restricted. Unless cancelled or revoked, contracts under the act shall be deemed renewed for at least a year upon date of expiration and may otherwise

be extended for longer periods. The act no longer prevents sale of contracted land for a period of years after termination of the contract but still exacts a cancellation penalty of one-half of one year's taxes (computed at the then prevailing rate if not higher than the rate prevailing at the time the contract was made).[15] A contract may not be cancelled except upon request of the landowner and then only if the local agency finds cancellation to be in the public interest. Any local landowner may protest such a cancellation. Contracts may be enforced by the municipality in any appropriate fashion, including injunction. Sections of the act providing for agreements that are not contracts and not limited in duration or to prime agricultural land have been replaced by broader provisions dealing with acquisition of open space rights by gift.[16]

The Joint Committee on Open Space reports that five million acres have been restricted under the Land Conservation Act.[17] Most such restricted land, however, is remote from cities and urban centers.[18] That fact follows naturally from the requirement that restrictions under the act be acquired by gift or pertain to lands part of at least 100-acre parcels. The act is further flawed as an open space preservation tool by built-in impermanence.

Article XXVIII of the Constitution: Modification of the Property Tax to Protect Open Land

In Article XXVIII (1966), the electorate declares that preservation of open space is in the best interests of the state and empowers the Legislature to designate which property, in which the state or local governments have restrictive interests, shall be taxed other than uniformly and at full cash value. The 1969 modifications of the Land Conservation Act were made pursuant to Article XXVIII. At the same session, the Legislature determined that open

space rights acquired by contract under the Land Conservation Act or by agreement under the Land Conservation Act prior to its modification in 1969, "scenic restrictions" acquired under Chapter 12 of Division 7 of Title 1 of the Government Code (commencing with Section 6950), and "open space easements" acquired under Chapter 6.5 of Part 1 of Division 1 of Title 5 of the Government Code (commencing with Section 51050) are all "enforceable restrictions" within the meaning of Article XXVIII and that lands burdened with such restrictions are thus entitled to preferential tax treatment. Assessors are instructed to value such lands, so long as restricted for the foreseeable future, only upon the basis of capitalization of income for the highest use of the land as restricted.[19]

Effectuating the Report of the Joint Committee on Open Space: Statewide Open Space Zoning (Cal. Stats. 1970, Ch. 1590)

The 1970 Final Report of the Joint Committee on Open Space, condensed to simplest terms, recommends a coordinated statewide program of zoning to preserve open space coupled with a grant of tax preference to lands within open space zones as established. The Legislature has enacted provisions which partially effectuate the Joint Committee's recommendation but which fall short at the crucial points of statewise coordination and tax preference.[20]

The 1970 legislation amends the Zoning Law to require, inter alia, that all local zoning plans contain an open space element and an "action plan" setting forth steps to be taken in preserving open space according to the local plan. Local plans are to be submitted to appropriate local coordinating and reviewing bodies and to neighboring localities for purposes of information and comment (no provision is made for a recommended independent state coordinating agency). The grant of police power authority underlying these

provisions is very broad and raises substantial constitutional questions. That the Legislature was aware of pertinent constitutional limitations is demonstrated by a proviso to the legislation which forbids use of the authority conferred in such a way as to take or damage property without just compensation.[21] See Exhibit II (yellow), a discussion of constitutional limitations of zoning for open space.

Although the Legislature did not amend the tax code to provide tax preference to restrictively zoned lands and did not amend the Zoning Law to create an independent statewide coordinating body--as noted, both measures recommended by the Joint Committee--, those steps were not, in practical effect, rejected and are logically the next steps to be taken. The enacted legislation is not otherwise likely to greatly aid the Legislature's frequently stated purpose to preserve open space.[22] The Joint Committee took pains to point out that zoning is impermanent unless there is relief from tax pressures on restrictively zoned land. It was also carefully made clear that the open space problem is in large measure due to lack of statewide, coordinated planning and that statewide coordination of open space zoning is imperative.[23] Although it is nowhere directly stated in the Joint Committee's Final Report, the discussion therein of constitutional limitations on open space zoning implies--and it has been clearly suggested elsewhere--that the question of unconstitutional taking or damaging of property is exacerbated in open space zoning where tax preference is not granted to restrictively zoned lands.

FOOTNOTES

1. Govt. Code §§ 35009, 35009.1.

2. Govt. Code §§ 6950-6954, 51200-51254, 51281-51295.

3. Rev. & Tax. Code §§ 413, 421-429. The tax measures are discussed in Comments, 19 Hastings L. J. 421 (1968); 42 So. Cal. L. Rev. 59 (1969).

4. Cal. Stats. 1970, Ch. 1590.

5. See, e.g., Comment, 19 Hastings L. J. 421 (1968); Snyder, A New Program for Land Use Stabilization: The California Land Conservation Act of 1965, 42 Land Econ. 29 (1966).

6. See 12 Stan. L. Rev. 638, 640-641. As of 1960, 50,000 acres of prime Santa Clara farm land had been "greenbelted." Annexation attempts by Santa Clara cities have resulted in floods of requests to have farm lands "greenbelted."

7. Enforceability of restriction is the major prerequisite for tax preference under Cal. Const., Art. XXVIII.

8. For discussion of the California law and similar plans, some of which have been enacted into law in other states, see generally Eveleth, An Appraisal of Techniques to Preserve Open Space, 9 Vill. L. Rev. 559 (1964); Moore, The Acquisition and Preservation of Open Lands, 23 Wash. & Lee L. Rev. 274 (1966).

9. See, e.g., Comment, 8 Harv. J. Leg. 158 (1970), N.2 at 158: "Cal. Gov't Code §§ 6950-6954 . . . [are] rarely used because of the high cost of acquiring such interests." (The text accompanying this note seems to assume--incorrectly--that Govt. Code §§ 6950-6954 are eminent domain measures.)

10. See generally Rogers, Financing Park and Open Space Projects, in Herring, Open Space and the Law, Institute of Governmental Studies (1965).

11. "The National Park Service has had substantial experience with scenic easements covering some 7,500 acres acquired along several parkways in Virginia, Tennessee and other Southern states. While there has been scant litigation, the service has experienced considerable difficulty in enforcing the restrictions. The courts are reluctant to issue injunctions prior to actual violation of the restrictions, and damages are not only difficult to ascertain but are insufficient relief (as where trees are cut). There have been frequent misunderstandings between the government and landowners as to the meaning of the restrictions, and even as to the existence of the easement where the restricted land was bought without actual notice. As a result, many property owners have been willing to exchange a portion of their land in fee for the extinguishment of the scenic easement on the remainder. The Service, faced with such difficulties, has discontinued the acquisition of scenic easements." 9 Vill. L. Rev. 559, 567 (1964), citing H.R. Rep. No. 273, 87th Cong., 1st Sess. (1961)(footnotes omitted).

12. See, e.g., Krasnowiecki & Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179, 180 (1961).

13. See generally, 19 Hastings L. J. 421 (1968).

14. Govt. Code § 51252.

15. Govt. Code § 51283. And see the discussion of such "roll-back" provisions in similar laws of other states, in 8 Harv. J. Leg. 158, 161 (1970). (The Harv. J. Leg. piece incorrectly computes the California cancellation penalty at 1/2 the cash value of the land.)

16. Govt. Code §§ 51050-51065.

17. Joint Committee on Open Space, Final Report at 27 (Feb. 1970).

18. Id.

19. Rev. & Tax. Code §§ 421-429. The legislation sets forth objective standards for determining when land is restricted for the foreseeable future, specifies methods and rates for capitalization of income of restricted lands, and makes applicable to "scenic restrictions" the provisions for duration, renewal, and cancellation of contracts under the Land Conservation Act.

20. See Govt. Code §§ 65302, 65303, 65305, 65306, 65400, 65401, 65451, 65506, 65553, 65560-65568, 65850, 65910-65912.

21. See Govt. Code § 65912.

22. See, e.g., the sanguine statements contained in Govt. Code §§ 65561-65562.

23. Although the Legislature did not enact the Joint Committee's proposals for a state coordinating agency, the need for statewide coordination was recognized. See Govt. Code § 65561(d).

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EXHIBIT II

CONSTITUTIONAL LIMITATIONS ON POLICE POWER ACQUISITIONS OF OPEN SPACE

E. Craig Smay

The recommendations which led to the new California open space zoning legislation were based on the proposition that California courts take a liberal view of the limits of the police power and will probably sustain open space zoning of a significant amount of land threatened by development throughout the state.[1] The probable accuracy of that underlying assumption can be illustrated by reference to the two general questions commonly referred to in cases testing the validity of zoning ordinances: (1) Is the ordinance calculated to promote the public welfare? (2) Is the ordinance reasonable?[2] California courts hold that the first of these questions is legislative and not the basis for review unless support for the legislative determination is wholly lacking.[3] The second question underlies the two rules, frequently stated in other jurisdictions, that a restriction which prevents a "reasonably profitable" use of property is confiscatory and an invalid attempt to substitute zoning for condemnation,[4] and that the police power may not be used to force a landowner to provide for a public need he did not create.[5] California courts, however, have for some time refused to recognize an automatic connection between severe reduction in value and condemnation. The rule in California is that private financial loss, however great, is not alone a sufficient ground for declaring a zoning ordinance invalid.[6] Further, California courts in a series of recent cases have permitted local governments to demand a dedication of private property to public use in exchange for official sanctions (building permits, zoning variances, and the like) of

seemingly innocuous uses, and this though the landowner in question did not cause the public need for which his property was taken.[7] The California courts have developed a characteristic balance of public need against private cost in determining the validity of exercises of the police power. With regard to zoning, it may be said that the greater the public need, the greater may be the reduction in land values imposed upon private owners.[8]

In California, almost the entire content of the question whether a zoning ordinance is reasonable has been reduced to considerations of whether the ordinance is discriminatory:[9]

> Rights in property have been defined and protected by courts only to the extent that such rights and protections are consistent with social, economic and political realities. How far regulation can go is basically a political question. It is safe to predict that California courts will only intervene in cases of clear discrimination--either because similarly situated owners are being treated unequally, or where demonstrable costs are imposed on just a few landowners while others, quite similarly situated, are tangibly benefitted by the regulation.

California courts have sustained regulation of private land to the lowest common denominator of profitable use where that serves a public interest in maintaining an area in its existing state,[10] and have recognized the validity as one among other grounds for sustaining a restriction against development the fact that the land in question was an important natural resource.[11] Thus it appears that the chief impediment to open space zoning will be the generic situation Professor Heyman notes "where demonstrable costs are imposed on just a few landowners while others, quite similarly situated, are tangibly benefited by the regulation." That situation is likely to be frequent if open space zoning is vigorously used to halt development of dwindling open space: where development focuses on an area of land, to zone part of that land to open space uses plainly involves demonstrable losses of development potential to owners of that land while demonstrably increasing the value of the land not zoned.

FOOTNOTES

1. See Joint Committee on Open Space, Final Report (1970); Bowden, Article XXVIII - Opening the Door to Open Space Control, 1 Pac. L. J. 461 (1970).

2. See generally Heyman, Open Space and the Police Power, in Herring, Open Space and the Law, Institute of Governmental Studies (1965).

3. E.g., Lockard v. City of Los Angeles, 33 Cal.2d 453, 202 P.2d 38 (1949); McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953).

4. See Bowden, supra note 1, at 479.

5. E.g., Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 49 N.J. 539, 193 A.2d 232 (1963).

6. E.g., Zahn v. Bd. of Pub. Wks., 195 Cal. 497, 234 P. 388 (1925); Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542 (1946); Johnston v. City of Claremont, 49 Cal.2d 826, 323 P.2d 71 (1958); Hamer v. Town of Ross, 59 Cal.2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1962).

7. Southern Pac. Co. v. City of Los Angeles, 242 Cal. App.2d 38, 51 Cal. Rptr. 197(1966), appeal dismissed, 385 U.S. 647 (1967); Ayer v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949); Bringle v. Board of Supervisors, 54 Cal.2d 86, 351 P.2d 765 (1960); City of Buena Park v. Boyar, 186 Cal. App.2d 61, 8 Cal. Rptr. 674 (1960). But see Mid-Way Cabinet v. San Joaquin, 257 Cal. App.2d 181, 65 Cal. Rptr. 37 (1967), invalidating a regulation on essentially the same facts as in Ayer and Bringle, the court finding no connection between landowner's activities and the public need for which his land was sought to be taken. In Southern Pac., the court said:

> [T]he exercise of police power in traffic regulation cases is simply a risk the property owner assumes when he lives in a modern society under modern traffic conditions . . . and particularly when he lives in the metropolitan area of Los Angeles. [242 Cal. App.2d 38, 46-47.]

8. See Heyman, supra note 2; Bowden, supra note 1.

9. Heyman, Planning and the Constitution: The Great "Property Rights" Fallacy, Cry California, 31, 33 (Summer, 1968).

10. Consolidated Rock Co. v. City of Los Angeles, 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 638(1962), appeal dismissed, 371 U.S. 36 (1962), in which land potentially very valuable for sand and gravel production was restricted to such uses as chicken farming in order to prevent spoliation of an area as a haven for sufferers from respiratory diseases.

11. McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953). The case should not be taken as a blanket approval of exclusive recreational zoning. See the discussion of the case in Heyman, supra note 2, and see Roney v. Board of Supervisors, 138 Cal. App.2d 7[illegible]0, 292 P.2d 529 (1956), where claimed "exclusive industrial zoning" was upheld on the ground that zoning to exclude "higher" (residential) uses in favor or "lower" (industrial) uses is not objectionable when some public purpose is served.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS
1970 CUMULATIVE STATE LEGISLATIVE PROGRAM

Memo 71-27 EXHIBIT III
88-30-00

SECURING AND PRESERVING "OPEN SPACE"

Legislation is suggested to states which would (a) provide for acquisition by the states of interests or rights in real property which could include, among other interests or rights, conservation easements designed to remove from urban development key tracts of land in and around existing and potential metropolitan areas and (b) authorize local units of government to acquire interest or rights in real property within existing metropolitan areas for the purpose of preserving appropriate open areas and spaces within the pattern of metropolitan development.

It is widely recognized that, for economic, conservation, health, and recreational purposes, adequate amounts of open land need to be retained within metropolitan areas as the spread of population reaches ever outward from the central city. In some instances, acquisition and preservation of open land areas could be justified on the basis of watershed protection alone: many of the areas most likely to be selected for preservation would be stream valleys; the protection of some of these valleys from intensive urban development is essential from the standpoint of drainage, flood control, and water supply. The need for adequate amounts of open land for parks and recreational purposes is also obvious. Finally, provision of adequate open space within the general pattern of metropolitan development helps to prevent the spread of urban blight and deterioration. All of these are compelling economic and social reasons for appropriate steps by various levels of government to acquire and preserve open land.

The states should equip themselves to take postitive action in the form of direct acquisition of land or property rights by the state itself, especially in (a) the emerging and future areas of urban development and (b) those emergency stituations within existing metropolitan areas where, for one reason or another, local governments cannot or will not take the necessary action. Also recommended is the enactment of state legislation authorizing (where such authority does not now exist) such action by local governments. Additionally, zoning powers can be employed in a variety of ways to achieve some of the objectives cited above. Envisaged in these proposals is not only outright acquisition of land but also the acquistiion of interests less than the fee which will serve the purpose of preserving the openness and undeveloped character of appropriate tracts of land. By the acquisition of easements, development rights and other types of interests in real property less than the fee land can continue to be used for agricultural and other nonurban purposes but protected against subdivision and other types of urban development. This type of direct approach is often more effective and subject to less difficulty than are various tax incentive plans designed to encourage owners of farmland to withhold their land from real estate developers and subdividers.

The suggested legislation which follows authorizes public bodies to acquire real property or any interests or rights in real property that would provide a means for the preservation or provision of permanent open-space land or to designate real property in which they have an interest for open-space land use. The public bodies would also be authorized to accept and utilize federal assistance for their permanent open-space land programs. The suggested legislation has been prepared by the State and Local Relations Division, Office of General Counsel, Housing and Home Finance Agency, Washington, D. C., to assist state and local officials. It can be used as a pattern in drafting state legislation to make states and public bodies eligible for federal assistance under the federal open-space land program.

The term "open-space land" is defined to mean land which is provided or preserved for (1) park or recreational purposes, (2) conservation of land or other natural resources, (3) historic or scenic purposes, or (4) assisting in the shaping of the character, direction, and timing of community development.

The use of real property for permanent open-space land is required to conform to comprehensive planning being actively carried on for the urban area in which the property is located. The term "comprehensive planning" would be defined to include the requirements in the federal law to make a public body eligible for grants. These are (1) preparation of long-range general physical plans for the development of the

urban area in which the open-space land is located, (2) programing and financing plans for capital improvements for the area, (3) coordination of planning in the area, and (4) preparation of regulatory and administrative measures in support of the comprehensive planning. A section is included in the bill authorizing comprehensive planning for urban areas and the establishment of planning commissions for this purpose. This section would not be needed in states that have adequate planning laws.

The provisions of the draft bill are broad enough to authorize acquisition and designation of real property which has been developed, and its clearance by the public body for use as permanent open-space land. This provision is broader than the present federal open-space law since federal grants cannot be given under that law to assist acquisition and clearance of completely developed property. However, some localities may desire this authority in order to provide open space in central cities or other places where there is a need for more open-space land.

The bill prohibits conversion or diversion of real property from present or proposed open-space land use unless equivalent open-space land is substituted within one year for that converted or diverted.

Where title to land is retained by the owner subject to an easement or other interest of a public body under the proposed legislation, tax assessments would take into consideration the change in the market value of the property resulting from the easement or other interest of the public body.

A public body is given for the purposes of the act the power to use eminent domain, to borrow funds, to accept federal financial assistance, and to maintain and manage the property. It would also be authorized to act jointly with other public bodies to accomplish the purposes of the act. Public bodies that have taxing powers and authority to issue general obligations could use those powers for open-space land.

This draft is silent on several questions of state policy in relations with their subdivisions. It is suggested that in considering this draft, states will want to determine whether any additional provisions should be added dealing with state approvals, review of local grant applications, and related matters.

Suggested Legislation

[Title should conform to state requirements. The following is a suggestion: "Any act to provide for the acquisition and designation of real property by the state, counties, and municipalities[1] for use as permanent open-space land."]

(Be it enacted, etc.)

Section 1. Short Title. This act shall be known and may be cited as the "Open-Space Land Act."

Section 2. Findings and Purposes. The legislature finds that the rapid growth and spread of urban development are creating critical problems of service and finance for the state and local governments; that the present and future rapid population growth in urban areas is creating severe problems of urban and suburban living; that the provision and preservation of permanent open-space land are necessary to help curb urban sprawl, to prevent the spread of urban blight and deterioration, to encourage and assist more economic and desirable urban development, to help provide or preserve necessary park,

[1] If any specific public bodies, such as park authorities, or certain districts, are included in the definition of "public body" in section 9 (a) and in that manner authorized to carry out the purposes of the bill, appropriate reference to the public bodies should be inserted in the title at this point.

recreational, historic and scenic areas, and to conserve land and other natural resources; that the acquisition or designation of interests and rights in real property by public bodies to provide or preserve permanent open-space land is essential to the solution of these problems, the accomplishment of these purposes, and the health and welfare of the citizens of the state; and that the exercise of authority to acquire or designate interests and rights in real property to provide or preserve permanent open-space land and the expenditure of public funds for these purposes would be for a public purpose.

Pursuant to these findings, the legislature states that the purposes of this act are to authorize and enable public bodies to provide and preserve permanent open-space land in urban areas in order to assist in the solution of the problems and the attainment of the objectives stated in its findings.

Section 3. Definitions. The following terms whenever used or referred to in this act shall have the following meanings unless a different meaning is clearly indicated by the context:

(a) "Public body" means [ ].[1]

(b) "Urban area" means any area which is urban in character, including surrounding areas which form an economic and socially related region, taking into consideration such factors as present and future population trends and patterns of urban growth, location of transportation facilities and systems, and distribution of industrial, commercial, residential, governmental, institutional, and other activities.

(c) "Open-space land" means any land in an urban area which is provided or preserved for (1) park or recreational purposes, (2) conservation of land or other natural resources, (3) historic or scenic purposes, or (4) assisting in the shaping of the character, direction, and timing of community development.

(d) "Comprehensive planning" means planning for development of an urban area and shall include: (1) preparation, as a guide for long-range development, of general physical plans with respect to the pattern and intensity of land use and the provision of public facilities, including transportation facilities, together with long-range fiscal plans for such development; (2) programing and financing plans for capital improvements; (3) coordination of all related plans and planned activities at both the intragovernmental and intergovernmental levels; and (4) preparation of regulatory and administrative measures in supporting of the foregoing.

Section 4. Acquisition and Preservation of Real Property for Use as Permanent Open-Space Land. To carry out the purposes of this act, any public body may (1) acquire by purchase, gift,

[1] "Public body" can be defined as desired by the proponents of the bill to include any or all of the following: the state, counties, cities, towns, or other municipalities, and any other public bodies they wish to specify, such as park authorities, or other specific authorities or districts. If any specified public body (other than the state or cities, towns or other municipalities) included in the definition has, under another law, taxing powers or other financing powers that could be used for the purposes of open-space land a subsection (c) should be added to section 5 to authorize that public body to use those powers for the purposes of this act.

devise, bequest, condemnation, grant, or otherwise title to or any interests or rights in real property that will provide a means for the preservation or provision of permanent open-space land and (2) designate any real property in which it has an interest to be retained and used for the preservation and provision of permanent open-space land. The use of the real property for permanent open-space land shall conform to comprehensive planning being actively carried on for the urban area in which the property is located.

Section 5. Conversion and Conveyances. (a) No open-space land, the title to, or interest or right in which has been acquired under this act or which has been designated as open-space land under the authority of this act shall be converted or diverted from open-space land use unless the conversion or diversion is determined by the public body to be (1) essential to the orderly development and growth of the urban area, and (2) in accordance with the program of comprehensive planning for the urban area in effect at the time of conversion or diversion. Other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as permanent open-space land shall be substituted within a reasonable period not exceeding one year for any real property converted or diverted from open-space land use. The public body shall assure that the property substituted will be subject to the provisions of this act.

(b) A public body may convey or lease any real property it has acquired or which has been designated for the purposes of this act. The conveyance or lease shall be subject to contractual arrangements that will preserve the property as open-space land, unless the property is to be converted or diverted from open-space land use in accordance with the provisions of subject (a) of this section.

Section 6. Exercise of Eminent Domain. For the purpose of this act, any public body may exercise the power of eminent domain in the manner provided in [ ] and acts amendatory or supplemental to those provisions. No real property belonging to the United States, the state, or any political subdivision of the state may be acquired without the consent of the respective governing body.

Section 7. General Powers. (a) A public body shall have all the powers necessary or convenient to carry out the purposes and provisions of this act, including the following powers in addition to others granted by this act:

(1) to borrow funds and make expenditures necessary to carry out the purpose of this act;

(2) to advance or accept advances of public funds;

(3) to apply for and accept and utilize grants and any other assistance from the federal government and any other public or private sources, to give such security as may be required and to enter into and carry out contracts or agreements in connection with the assistance, and to include in any contract for assistance from the federal government such conditions imposed pursuant to federal

laws as the public body may deem reasonable and appropriate and which are not inconsistent with the purposes of this act;

(4) to make and execute contracts and other instruments necessary or convenient to the exercise of its powers under this act;

(5) in connection with the real property acquired or designated for the purposes of this act, to provide or to arrange or contract for the provision, construction, maintenance, operation, or repair by any person or agency, public or private, of services, privileges, works, streets, roads, public utilities or other facilities or structures that may be necessary to the provision, preservation, maintenance and management of the property as open-space land;

(6) to insure or provide for the insurance of any real or personal property or operations of the public body against any risks or hazards, including the power to pay premiums on the insurance;

(7) to demolish or dispose of any structures or facilities which may be detrimental to or inconsistent with the use of real property as open-space land; and

(8) to exercise any or all of its functions and powers under this act jointly or cooperatively with public bodies of one or more states, if they are so authorized by state law, and with one or more public bodies of this state, and to enter into agreements for joint or cooperative action.

(b) For the purposes of this act, the state, or a city, town, other municipality, or county may:

(1) appropriate funds;

(2) levy taxes and assessments;

(3) issue and sell its general obligation bonds in the manner and within the limitations prescribed by the applicable laws of the state; and

(4) exercise its powers under this act through a board or commission, or through such office or officers as its governing body by resolution determines, or as the governor determines in the case of the state.

Section 8. Planning for the Urban Area.[1] The state, counties, cities, towns, or other municipalities in an urban area, acting jointly or in cooperation, are authorized to perform comprehensive planning for the urban area and to establish and maintain a planning commission for this purpose and related planning activities. Funds may be appropriated and made available for the comprehensive planning, and financial or other assistance from the federal government and any other public or private sources may be accepted and utilizes for the planning.

Section 9. Taxation of Open-Space Land. Where an interest in real property less than the fee is held by a public body for the purposes of this act, assessments made on the property for taxation shall reflect any change in the market value of the property which may result from the interest held

[1]This section is not necessary if the planning laws of the state provide adequate authority.

by the public body. The value of the interest held by the public body shall be exempt from property taxation to the same extent as other property owned by the public body.

Section 10. Separability; Act Controlling. Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of the act and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling. The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law.

STATUTORY AUTHORITY OF CITY OR COUNTY TO ACQUIRE OPEN SPACE

Chapter 12

PURCHASE OF INTERESTS AND RIGHTS IN REAL PROPERTY

Sec.

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.)

STATUTORY AUTHORITY OF REGIONAL PARK DISTRICT TO ACQUIRE OPEN SPACE

§ 5540. Powers; acquisition, lease or conveyance of property; consent of voters

It may take by grant, appropriation, purchase, gift, devise, condemnation, or lease, and may hold, use, enjoy, and lease or dispose of real and personal property of every kind, and rights in real and personal property, within or without the district, necessary to the full exercise of its powers.

A district may not validly convey any interest in any real property actually dedicated and used for park purposes without the consent of a majority of the voters of the district voting at a special election called by the board and held for that purpose. Consent need not first be obtained for a lease of any real property for a period not exceeding * * * 25 years; and consent need not first be obtained for a transfer of any real property if the Legislature by concurrent resolution authorizes a transfer after a resolution of intention has been adopted by at least a two-thirds vote of the board of directors of the district, specifically describing the property to be conveyed. (As amended Stats.1957, c. 51, p. 616, § 3; Stats.1963, c. 1117, p. 2586, § 6.)

1963 Amendment. Substituted 25 years for 10 years.

§ 5541. Powers; parks, playgrounds, golf courses, and boulevards; restrictions in case of municipality or county

A district may plan, adopt, lay out, plant, develop, and otherwise improve, extend, control, operate, and maintain a system of public parks, playgrounds, golf courses, beaches, trails, natural areas, ecological and open space preserves, parkways, scenic drives, boulevards, and other facilities for public recreation, for the use and enjoyment of all the inhabitants of the district, and it may select, designate, and acquire land, or rights in land, within or without the district, to be used and appropriated for such purposes. It may cause such trails, parkways, scenic drives, and boulevards to be opened, altered, widened, extended, graded or regraded, paved or repaved, planted or replanted, repaired, and otherwise improved, may conduct programs and classes in outdoor science education and conservation education, and may do all other things necessary or convenient to carry out the purposes of this article.

The board of directors of a district shall not interfere with control of any of the foregoing or other public property, that are existing, owned or controlled by a municipality or county in the district, except with the consent of the governing body of the municipality, or of the county if the same is in unincorporated territory, and upon such terms as may be mutually agreed upon between the board of directors of the district and the governing body.

(Amended by Stats.1963, c. 1117, p. 2586, § 6.5; Stats.1963, c. 2067, p. 4316, § 7; Stats.1970, c. 857, p. —, § 1.)

CITIES AND COUNTIES -- POWERS WITH RESPECT TO OPEN SPACE PRESERVATION

§ 65302. Elements of plan required to be included

The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

(a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall also identify areas covered by the plan which are subject to flooding and shall be reviewed annually with respect to such areas.

(b) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land use element of the plan.

(c) A housing element consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall endeavor to make adequate provision for the housing needs of all economic segments of the community.

(d) A conservation element for the conservation, development, and utilization of natural resources including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources. That portion of the conservation element including waters shall be developed in coordination with any county wide water agency and with all district and city agencies which have developed, served, controlled or conserved water for any purpose for the county or city for which the plan is prepared. The conservation element may also cover:

(1) The reclamation of land and waters.

(2) Flood control.

(3) Prevention and control of the pollution of streams and other waters.

(4) Regulation of the use of land in stream channels and other areas required for the accomplishment of the conservation plan.

(5) Prevention, control, and correction of the erosion of soils, beaches, and shores.

(6) Protection of watersheds.

(7) The location, quantity and quality of the rock, sand and gravel resources.

(e) An open space element as provided in Article 10 (commencing with Section 65560) of this chapter.

(Amended by Stats.1967, c. 1657, p. 4033, § 4; Stats.1967, c. 1658, p. 4038, § 4, operative July 1, 1969; Stats.1968, c. 632, p. 1870, § 1; Stats.1970, c. 65, p. —, § 1; Stats. 1970, c. 717, p. —, § 1; Stats.1970, c. 1552, p. —, § 3; Stats.1970, c. 1590, p. —, § 1.5.)

ARTICLE 10. ADMINISTRATION OF SPECIFIC PLANS AND REGULATIONS

Sec.
65553. Open space lands; reference of proposal to planning agency for report; report to legislature [New].

§ 65553. Open space lands; reference of proposal to planning agency for report; report to legislature

No street shall be improved, no sewers or connections or other improvements shall be laid or public building or works including school buildings constructed within any territory for which the legislative body has adopted a specific plan regulating the use of open-space land until the matter has been referred to the planning agency for a report as to conformity with such specific plan, a copy of the report has been filed with the legislative body, and a finding made by the legislative body that the proposed improvement, connection or construction is in conformity with the specific plan. Such report shall be submitted to the legislative body within forty (40) days after the matter was referred to the planning agency. The requirements of this section shall not apply in the case of a street which was accepted, opened, or had otherwise received the legal status of a public street prior to the adoption of the specific plan.
(Added by Stats.1970, c. 1590, p. —, § 14.)

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.

(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 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]

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 10.5 (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.)

BERNARD CZESLA
CHIEF DEPUTY

J. GOULD
OWEN K. KUNS
RAY H. WHITAKER

KENT L. DECHAMBEAU
ERNEST H. KUNZI
STANLEY M. LOURIMORE
SHERWIN C. MACKENZIE, JR.
EDWARD F. NOWAK
EDWARD K. PURCELL
PRINCIPAL DEPUTIES

ANN M. MACKEY
DEPUTY IN CHARGE
LOS ANGELES OFFICE

3021 STATE CAPITOL
SACRAMENTO 95814

110 STATE BUILDING
LOS ANGELES 90012

Legislative Counsel of California

GEORGE H. MURPHY

GERALD ROSS ADAMS
MARTIN L. ANDERSON
CARL M. ARNOLD
JAMES L. ASHFORD
JERRY L. BASSETT
EDWARD BERSHATSKY
JOHN CORZINE
CLINTON J. DEWITT
ROBERT CULLEN DUFFY
CARL A. ERIKSON, III
ALBERTO V. ESTEVA
LAWRENCE H. FEIN
JOHN F. FOSSETTE
HARVEY J. FOSTER
BION M. GREGORY
ROBERT D. GRONKE
L. DOUGLAS KINNEY
VICTOR KOZIELSKI
ALLEN R. LINK
EUGENE W. MCCABE
ROSE OLIVER
TRACY O. POWELL, II
MARGUERITE ROTH
CAREY W. ROYSTER
MARY SHAW
ROY K. SIMMONS
RUSSELL L. SPARLING
JOHN T. STUDEBAKER
JAMES E. WADLEIGH
BRIAN L. WALKUP
THOMAS D. WHELAN
JIMMIE WING
DEPUTIES

Sacramento, California
October 24, 1969

Honorable John T. Knox
2114 State Capitol

Eminent Domain - #17885

Dear Mr. Knox:

QUESTION

May a city or county acquire open space lands under the authority to acquire property by eminent domain for use as public parks?

We have assumed, for the purposes of this opinion, that by "open space" lands you mean lands having the characteristics set forth in Section 6954 of the Government Code.*

OPINION

In our opinion a city or county may not acquire open space lands under the authority to acquire property by eminent domain for use as public parks.

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* Section 6954 of the Government Code reads as follows:

> "6954. 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."

ANALYSIS

The California Supreme Court, in the case of People v. Superior Court of San Bernardino County (10 Cal. 2d 288, 295) stated:

> "It is a well established legal principle that although the power of eminent domain is inherent in sovereignty, nevertheless neither the state itself nor any subsidiary thereof may lawfully exercise such right in the absence of precedent legislative authority so to do."

A city or county has no inherent power of eminent domain and can exercise the power only when authorized to do so by the Legislature (City & County of San Francisco v. Ross, 44 Cal. 2d 52, 55).

The Code of Civil Procedure lists specific public uses for which the power of eminent domain may be exercised (Secs. 1238-1239.4, C.C.P.). Subdivision (3) of Section 1238, Code of Civil Procedure, authorizes the condemnation of property for use as, among other things, "public parks." A "park" has been defined as "a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open air recreation" ** (County of Los Angeles v. Dodge, 51 Cal. App. 492, 506).

In 1959, the Legislature enacted Chapter 12 (commencing with Sec. 6950) of Division 7 of Title 1 of the Government Code, which specifically authorizes cities and counties to acquire "the fee or any lesser interest or right in real property in order to preserve ... open spaces and areas for public use and enjoyment" (Sec. 6950, Gov. C.). Section 6954 (which is in Chapter 12), set forth in full in a footnote on page 1 of this opinion, defines "open space" or "open areas" for purposes of the chapter. No provision of that chapter authorizes, either directly or by necessary implication, the acquisition of "open space" by means of eminent domain.

We think that a reasonable comparison of the definitions of "park" and "open space" set forth above

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** Emphasis added.

indicates that the two are not identical concepts of land use. It is well settled that statutes authorizing the exercise of the power of eminent domain must be strictly construed (Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 306).

Therefore, we conclude that the authorization in Section 1238, Code of Civil Procedure, to acquire property for use as public parks cannot be interpreted to allow condemnation for "open space." If the Legislature had intended to extend the power of eminent domain to allow acquisition for "open space" purposes, it would have been an easy matter to so provide when specific provisions defining and authorizing acquisition of "open space" lands were enacted (see Chapter 12 (commencing with Section 6950), Division 7, Title 1, Government Code).

We conclude, therefore, that a city or county may not acquire open space lands under the authority to acquire property by eminent domain for use as public parks.

Very truly yours,

George H. Murphy
Legislative Counsel

By
James L. Ashford
Deputy Legislative Counsel

JLA:cs

Memorandum 71-27

EXHIBIT VIII

GOVERNMENT CODE §§ 6950-6956

Staff Draft April 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 § 6955 (added)

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

6955. A county or city may exercise the power of eminent domain to acquire the fee or any lesser interest or right in real property necessary to achieve the purposes of this chapter.

Comment. Section 6955 is added to make clear that a city or county may exercise the power of eminent domain to acquire property for open space use under Sections 6950-6954. 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 Harv. 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 for "natural areas" and "ecological and open space preserves").

Government Code § 6956 (added)

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

6956. (a) As used in this section, "open space property" means property acquired under this chapter after June 30, 1974.

(b) Open space property shall not be converted or diverted from use as an open space or area unless the conversion or diversion is determined by the county or city to be:

(1) Essential to the orderly development and growth of the urban area; and

(2) In accordance with the program of comprehensive planning for the urban area in effect at the time of the conversion or diversion.

(c) If open space property is to be converted or diverted from use as an open space or area, other property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as a permanent open space or area shall be substituted or exchanged within a reasonable time not exceeding one year for the open space property. All money received for open space property converted or diverted from use as an open space or area shall be held in a trust fund to be used only for the purpose of acquisition of an open space or area subject to the provisions of this chapter. The city or county shall assure that the property substituted or received in exchange for open space property will be held subject to the provisions of this chapter, including this section.

(d) The requirements of this section do not apply where a fee is acquired and the property or a right or interest therein is conveyed or leased under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the provisions of this chapter.

(e) Nothing in this section affects the right of a city or county to use or to grant the right to use open space property for a use that is compatible with its use as an open space or area if such use does not significantly affect its usefulness as an open space or area.

Comment. Section 6956 prevents the diversion or conversion of an open space or area to another use unless such diversion is in accordance with a program of comprehensive planning for the urban area and essential to its orderly development and growth. This requirement assures that any diversion or conversion is in keeping with sound planning but, at the same time, permits adjustments and improvements in the open space preserve to reflect developments in the comprehensive plan for the area. Section 6956 applies whether the open space or area is acquired by gift, purchase, eminent domain, or otherwise. However, the section does not apply to property acquired before July 1, 1974.

When an open space or area is to be converted or diverted to other use, Section 6956 requires that substantially equivalent property be acquired for an open space or area. The equivalent property, for example, may be acquired

in exchange for the open space or area which is converted or diverted to another use, may be purchased with moneys received from its sale or lease, or--if the city or county uses the open space or area for its own public work or improvement--the equivalent property may be acquired with the public funds available for the public work or improvement. Subdivision (c) of Section 6956, which requires substitution of equivalent property, adopts the same limitation as 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).