

INSTITUTE FOR LOCAL GOVERNMENT

FUNDING OPEN SPACE ACQUISITION PROGRAMS:

A GUIDE FOR LOCAL AGENCIES IN CALIFORNIA

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All decisions regarding the final content of this guide were made by the Institute for Local Government.

Remember to always consult a knowledgeable attorney when confronted by legal issues.

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A Guide For Local Agencies In California

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Introduction and Overview



*You cannot save the land apart from the people
or the people apart from the land.*

— WENDELL BERRY

*Conservation means harmony between men and land.
When land does well for its owner, and the owner does well
by his land; when both end up better by reason of their
partnership, we have conservation.*

— ALDO LEOPOLD

*We have fallen heirs to the most glorious heritage a people
ever received, and each one must do his part if we wish to
show that the nation is worthy of its good fortune.*

—THEODORE ROOSEVELT



In California and across the nation, more and more communities are developing comprehensive open space protection programs. Rather than being viewed as an “extra,” open space is seen as critical to a community’s long-term success. Protecting open space can create healthier, more livable, economically sound communities. Consider these benefits:

- **Open space is good for the bottom line.** Investing in open space can save communities money by reducing infrastructure and public service costs associated with expensive suburban style development and bolstering local tourism and agriculture. Real estate analysts predict long-term economic advantage will go to communities that are able to guide growth using land conservation and other smart-growth measures.
- **Open space attracts home buyers.** Open space and trails are among the top community features buyers look for when choosing a home. People are often willing to pay more for homes located close to open space, which benefits local agencies through higher property tax revenues. Studies have also shown that homeowners prefer clustered homes with access to permanently protected land to homes on larger lots that lack open space.
- **Open space protects public health.** Land use practices that create runoff, such as paving, are one of the biggest threats to public drinking water supplies. Assuring that certain areas remain as open space reduces this threat by creating a balance between developed and undeveloped areas, thus protecting public health.
- **Open space protects the environment.** By protecting open space, forestlands, and wetlands, communities pro-

tect endangered species habitat and help keep the air and water clean.

- **Open space can prevent costly flood damage.** Protection of a floodplain is a cost-effective alternative to expensive flood control projects, flood insurance, and disaster relief.
- **Open space can provide an alternative to regulation.** Land or development rights, acquired from willing sellers, can relieve regulatory pressure on private property owners.
- **Open space can secure our quality of life and our lifestyle.** When a community’s most treasured places are preserved, so too are its character and quality of life.

DEFINING A CONSERVATION VISION

Before a local agency can answer questions about what type of open space protection program is right and how to fund it, the community must first develop a broad conservation vision. While historically decisions about open space protection have often been made in response to development threats on particular pieces of property, this type of approach is less than ideal. Developing a vision allows a community to be proactive and integrate open space into a broader plan for what it wants to look like in the future. By defining a vision for open space early on, a local agency can guide development in a way that follows sensible growth patterns and protects the places the community values most.

In many cases, in developing an open space vision a community will have to reevaluate the goals and policies of its general plan to integrate transportation planning, land use planning, and zoning with land conservation. Protecting land can then become one component in a larger effort to grow wisely and improve the overall quality of life in a community.

Communities have also achieved success by exclusively implementing an open space protection plan. For some communities, this is the first step toward the development of a more integrated general plan. The bottom line: it is up to each community to define and implement a unique conservation vision—one that addresses the environmental needs of the region and the priorities of its residents.

DEVELOPING AN OPEN SPACE CONSERVATION VISION

The following are the goals and objectives of Placer County's Placer Legacy Open Space and Agricultural Conservation Program.

Goal Statement

Placer County has been blessed with extensive and diverse natural resources. It is the goal of this project to develop a specific, economically viable implementation program which will enable the residents of Placer County to preserve a sufficient quantity of these resources to maintain a high quality of life and an abundance of diverse natural habitats while supporting the economic viability of the County and enhancing property values. The project will further the various open space and natural resource goals of the Placer County general plan and associated general plans of the six cities in Placer County.

Objectives

- Maintain a viable agricultural segment of the economy
- Conserve natural features necessary for access to a variety of outdoor recreation opportunities
- Retain important scenic and historic areas
- Preserve the diversity of plant and animal communities
- Protect endangered and other special status plant and animal species
- Separate urban areas into distinct communities
- Ensure public safety

Key Elements

The Placer Legacy Program will:

- Provide a wide variety of ownership, preservation, and funding methods to address the diverse circumstances present in the county
- Benefit the county's economic future by clearly maintaining the county as an outstanding place to live and do business
- Maintain local land use control by taking a leadership role in the preservation of endangered species and habitat protection
- Identify open spaces of importance to residents of the cities as well as the unincorporated area
- Improve certainty in the regulatory process
- Design the program to allow phasing and early opportunities for successful implementation

Measures of Success

In developing the program, priority will be given to ensuring that

- The process involves all stakeholders and provides meaningful opportunities for public involvement from both unincorporated and incorporated area residents.
- The final program is scientifically sound, ensures the long-term conservation of important open spaces and natural communities, and includes a financing plan for immediate and ongoing implementation.
- The effort receives the widespread support of Placer County residents.

HOW THIS GUIDE IS ORGANIZED

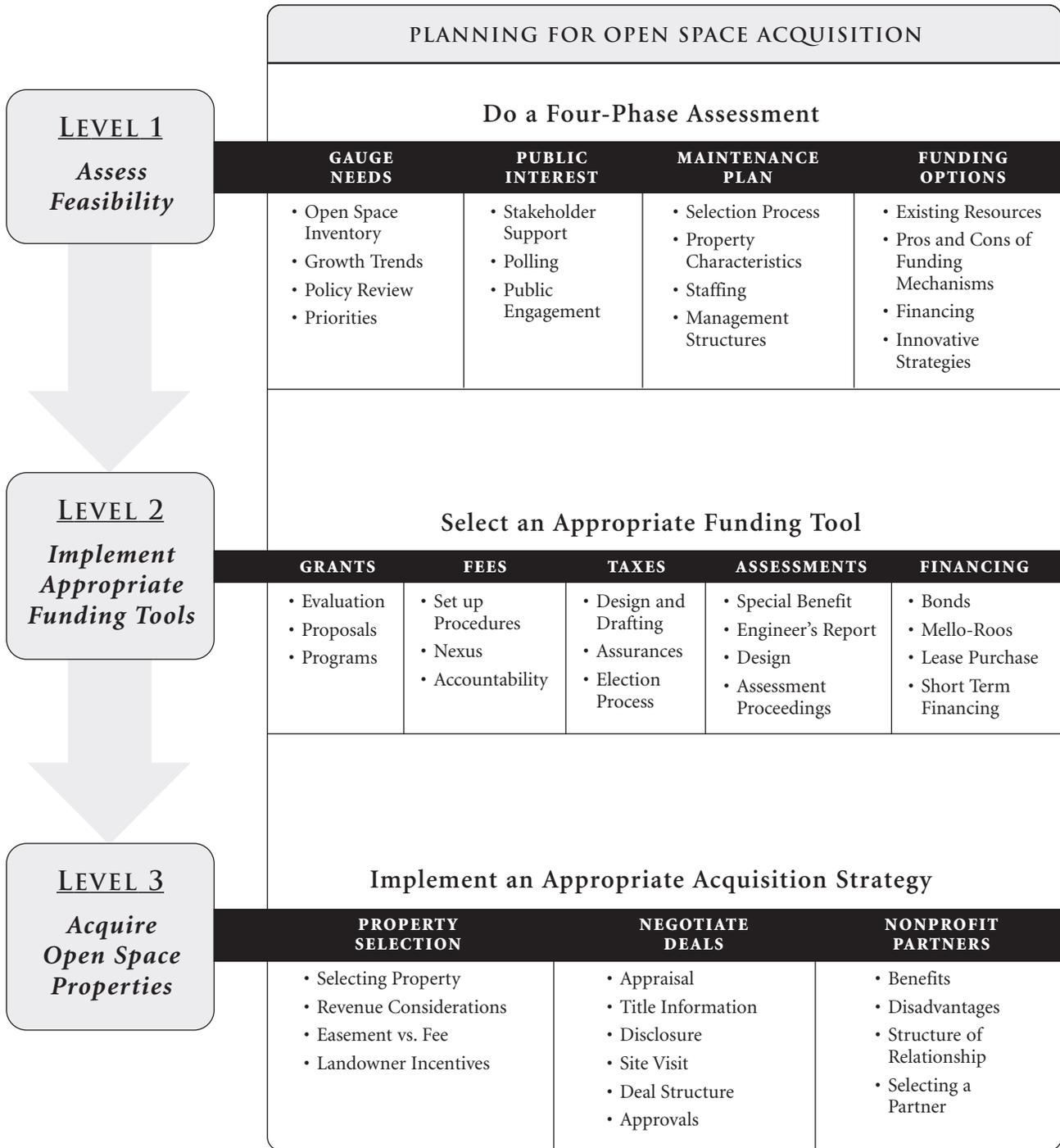
While this guide touches on several broader issues relating to open space planning, this guide's goal is to assist local agencies evaluate and take advantage of options to preserve open space. To this end, it lays out a three-step process, each of which has its own section in this guide:

- **Analyzing Program Feasibility.** Part I of this guide focuses on key aspects of open space planning, including analyzing open space conservation needs, determining public support for open space conservation, projecting program costs and analyzing funding options.
- **Funding Tools.** Part II delves deeper into five key funding mechanisms for acquiring open space: grants, devel-

opment fees, agency-sponsored ballot measures, benefit assessments and debt financing. In most cases, local agencies will use one or more of these mechanisms to finance open space acquisitions.

- **Acquisition.** Part III provides a brief overview of some of the issues connected with the actual acquisition of land once a funding program is in place.

Finally, this guide is offered as a starting point for local agencies analyzing open space planning, funding and acquisition. Whenever practical, the guide identifies additional resources for further information on issues covered. The Institute's website (www.ilsg.org/openspace) lists additional resources on this topic.



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PUBLIC CONSERVATION PRIORITIES

Public opinion polls have shown consistently high nonpartisan support for open space conservation. One national poll conducted in 1999 by the Trust for Public Land ranked open space protection even in importance with education. The nationwide survey of 800 registered voters revealed particularly strong support for open space conservation as a means to protect water, both drinking water and the quality of lakes, streams, and rivers.

The percentages below represented the number of people who indicated that the statements below were “very” or “somewhat” important justifications for local communities to preserve land for open space.

1. To protect our drinking water	94%
2. To preserve our quality of life	91%
3. To improve the water quality in our lakes, streams, and rivers.....	91%
4. To protect natural areas that provide opportunities for kids to learn about the environment	89%
5. To preserve forests and plant more trees to improve air quality	88%
6. To make sure we leave a legacy of parks, open spaces, and natural lands for our children and grandchildren	88%
7. To make communities more livable	88%
8. To create parks and other places where children can play safely	88%
9. To provide recreational opportunities that keep kids away from gangs and drugs	87%
10. To provide habitats critical to wildlife	86%
11. To protect historic and cultural sites	85%
12. To improve access to parks and natural lands for the disabled	85%
13. To revitalize cities and older suburbs, making them more attractive places to live	84%
14. To create neighborhood parks and recreation areas	84%
15. To uphold our moral responsibility to protect the land and open spaces of this country	83%
16. To improve public access to parks and natural lands	82%
17. To preserve the special land and places that make each of our communities unique	82%
18. To preserve and protect the open spaces that are important to the human spirit and to our sense of community	81%
19. To enhance flood-control efforts	80%
20. To protect farm and ranchland from being used for commercial and residential development instead of agriculture	80%
21. To provide community trails and greenways	79%
22. To protect the special places that define our communities’ character	78%
23. To provide a place to get away that is not too far away	77%
24. To reduce sprawl	73%
25. To help spur urban revival by attracting businesses to our cities and towns	73%
26. To avoid new taxes that are required to pay for building the new roads, schools, and sewers associated with new growth and development outside existing neighborhoods	68%

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PART I:
ASSESSING AN OPEN SPACE
ACQUISITION PROGRAM'S
FEASIBILITY

Gauging Open Space Needs and Opportunities



A physical and policy-based needs assessment provides a good starting point for determining whether to go forward with an open space protection and acquisition program. The needs assessment summarizes the status of the community's open space assets, the adequacy of those assets, and public policies and development trends affecting open space and driving the potential need for additional open space. It analyzes these competing interests and creates a factual database to support informed decision-making. In addition, the needs assessment can also take into account unique features in the local open space landscape and call out specific parcels or areas that need special attention.

Gauging need involves logically completing a series of information-gathering steps. The first step is to obtain basic information about the community's open space assets. Second, review the existing policy context to determine the extent to which open space needs can be met through regulation and evaluate policies affecting future development. Finally, the last steps involve analyzing growth and development trends to determine opportunities to incorporate open space protection measures into larger existing programs, such as habitat conservation plans, watershed protection efforts, or cultural resource programs.

Growth and development trends can provide a strong rationale for additional open space protection to meet the needs of a growing population. A comprehensive needs assessment will ensure that the local agency does not reinvent the wheel and instead makes good use of existing information and potential partnerships.

IN THIS CHAPTER

- Inventory Resources
- Assess Growth Trends
- Review Regulatory Policies
- Analyze Planning Efforts
- Identify Priorities
- Determine Acquisition Authority

INVENTORY RESOURCES

Open space planning starts with an understanding of the land—what exists and what is threatened. An inventory of natural and cultural resources will be used throughout the planning and implementation phases, helping the agency and other stakeholders to define a conservation vision, target areas for protection, identify potential properties for acquisition, and manage land.

The inventory can pull from a variety of existing resources. A good starting point is the open space element of the general plan, which details the community's long-range vision for protecting open space¹ and includes an "action program" that describes the measures the city or county intends to pursue to implement the vision.² The general plan should also include a diagram of existing and proposed open space areas. Other elements of the general plan, such as the land use, conservation, safety, and housing elements, may also contain relevant information and mapping relating to open space resources.

Creating a comprehensive inventory is more than just totaling up the number of acres of open space. It also requires a thorough understanding of how the community uses open space and how planned development will impact open space resources. Data on recreational needs, endangered species, agricultural production, flood control needs, and even quality of life can all be used to quantify how the community values open space.

Inventories vary by community, but typically include:

- Parks and recreation lands, including a description of existing parks, average sizes and service areas, and typical uses, such as soccer fields, picnic tables, special gardens, and walking paths
- Lands that safeguard key environmental resources, such as wetlands, wildlife corridors, shore lands, watersheds, oak lands, riparian and groundwater recharge areas, and important habitat areas
- Greenways and urban area separators
- Land that supports industries such as tourism, forestry, and farming

State Government Data Resources

California Digital Conservation Atlas. The Resource Agency's California Digital Conservation Atlas is the state's comprehensive public website for conservation information. It is designed to provide easy-to-use map views of California's natural resources and working landscapes for people who may not be familiar with specialized geographic software. See http://legacy.ca.gov/new_atlas.epl.

Farmland Mapping and Monitoring Program (FMMP). The Department of Conservation's FMMP produces maps and statistical data used for analyzing impacts on California's agricultural resources. Agricultural land is rated according to soil quality and irrigation status; the best quality land is called "prime farmland." The maps are updated every two years with the use of aerial photographs, a computer mapping system, public review, and field reconnaissance. See www.consrv.ca.gov/dlrp/fmmp.

Natural Diversity Database of Species. The Department of Fish and Game maintains a number of databases, including the Natural Diversity Database. To get more information, start with the Department's Wildlife and Habitat Data Analysis Branch, which serves as a clearinghouse for biological data and conducts conservation analyses at statewide, regional, and local scales. See www.dfg.ca.gov/whdab.

- Cultural resources that provide a sense of history, character, identity, and meaning for people, such as historic or archaeological sites and aesthetic resources
- Soil, topographical, and land ownership information

Local, state, and federal agencies, as well as nonprofit organizations, may have additional data. For example, the Nature Conservancy has done extensive habitat mapping in many areas of California. This may include a conservation plan that identifies key protection areas that can be used or adapted to fit the agency's goals. Local land trusts may have also done extensive mapping. Likewise, the local

¹ Cal. Gov't Code §§ 65302(e), 65560-65568.

² Cal. Gov't Code § 65564.

IDENTIFYING OPEN SPACE

There is no set definition of “open space.” Consider the following types of land that have been set aside as open space and the functions they serve.

- Scenic Landscapes
- Trails and Public Access Facilities
- Farmland
- Productive Forests
- Historic Preservation
- Local Parks
- Regional Parks
- Greenbelts and Urban Buffers
- Wildlife Habitat and Corridors
- Shorelines
- Stormwater Runoff Areas
- Flood Plains
- Wetlands, Water Bodies
- Creeks and Watersheds
- Aquifer Recharge Areas

farm bureau or cooperative extension service may have information about agricultural productivity and the chamber of commerce or home builders association may have additional figures about projected economic growth and development.

When completed, an inventory map—particularly when incorporated into a geographic information system (GIS) database—can show land areas permanently protected, temporarily protected, or vulnerable to development and can provide overlays that demonstrate the interrelationships among natural resources, open lands, and the community.

ASSESS GROWTH TRENDS

Another piece of the needs assessment is the extent to which open space areas are vulnerable from new growth. Factors to examine include the following.

- **Historical Patterns.** Review historical documents related to land use and future growth. Have land use designations changed over time? What do those changes indicate for the future?
- **Current Rate of Growth.** Check with the planning department to determine how many new units are being built in a year and where those units are being

built. Is there a pattern in the numbers? Does the pattern of development suggest that some open space areas are in more danger than others? How might these patterns inform the decision to increase programs for the protection of these open space assets? Does the rate of growth suggest a demand for additional open space areas?

- **General Plan.** Analyze the projected densities in the land use and housing elements of the general plan. Also check the circulation element for plans for future transportation projects. What might these projects mean for future development in the area?

This examination can help paint a picture of the relationships between development and open space resources in the community. For example, when Placer County conducted this type of analysis for its Placer Legacy program, it confirmed anecdotal conclusions that sensitive areas in the western half of the county near the fast-growing cities of Roseville, Rocklin, Lincoln, and Loomis were most at risk.

In some communities, an analysis of growth trends leads local leaders to reevaluate the core principles of their comprehensive plans and to integrate transportation planning, land use planning, and zoning policies with land conservation. Riverside County, for example, is in

the midst of a process that fully integrates its transportation, land use, and habitat conservation plans. In these cases, protecting land becomes one component of a larger effort to grow wisely and improve the quality of life in the community.

REVIEW REGULATORY POLICIES

Once the inventory is complete, the next step is to determine the extent that regulatory tools either have been or can be used to protect open space. Some agencies rely solely on their regulatory polices—such as hillside protection ordinances and restricted development restrictions—to protect open space areas. In other jurisdictions, regulatory and acquisition programs complement one another.

The general plan again serves as the starting point for the analysis. The land use, conservation, circulation, safety, and housing elements should provide information about intended conservation efforts, policies affecting future development, and projected growth. In addition, some communities also have optional general plan elements, such as an agriculture or trails element, that may provide additional information relevant to the needs assessment.

» If your general plan provides an insufficient basis for this type of analysis, it may be time to update the general plan.

A review of all applicable zoning codes, specific plans, and other relevant planning documents should also be part of the process. For example, policies that promote higher densities and encourage infill development reduce development pressure on open space lands.

The regulatory tools that are most often part of a local open space strategy include:

- **Zoning.** Typically, a community's zoning includes a variety of open space designations, such as "open space," "agricultural," "rural," "rangeland," and "ridge-line." The type and intensity of allowable uses in these areas are generally severely restricted, making it difficult for land to be developed. Zoning determines minimum

parcel sizes. Open space zones frequently have densities of one dwelling for every 20, 40, or even 80 acres (in some rangeland areas, the minimum parcel size may be much larger).³ In addition, zoning ordinances may include more creative techniques—such as transfer of development rights (TDR) programs, urban growth boundaries, and infill incentives—that are designed to share the burden of open space protection efforts. Note that zoning designations are subject to the will of the majority of the governing body and therefore subject to change.

- **Quimby Act Parkland Dedications.** Under the Quimby Act (which is a part of California's Subdivision Map Act), local agencies may require that three acres be dedicated (or an equivalent fee be paid) for recreation and parkland for every 1,000 persons residing in a new subdivision.⁴ This requirement can bump up to five acres per 1,000 people if the agency's ratio already exceeds the three-acre standard. Although the dedication may be located outside of the subdivision on which it is imposed, the dedication must be reasonably related to the future needs of the subdivision's residents.⁵
- **Other Subdivision Map Act Provisions.** The Subdivision Map Act also authorizes local agencies to condition approval of subdivisions on open space protection. Such conditions can include dedications for river and stream access, groundwater recharge areas, bikeways, and other purposes consistent with an agency's general plan and zoning regulations.
- **Development Agreements.** Development agreements are commonly used to approve large projects. Developers can strike a bargain with a local agency outside of the typical entitlements process in order to lock in development rights. In return, the agency can often negotiate greater concessions from the developer—including permanent protection of open space—than could otherwise be obtained.
- **Special Tax Treatment.** State laws such as the Williamson Act⁶ allow local agencies to enter into contracts with private landowners to restrict specific parcels of land to agricultural or related open space use. Participating landowners pay a lower property tax based on the value of the land as an agricultural enter-

³ See *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988) (upholding zoning of one residence per 60 acres).

⁴ Cal. Gov't Code § 66477.

⁵ *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633 n.6. (1971).

⁶ Cal. Gov't Code §§ 51200 and following; see also Cal. Gov't Code § 16140 (open space subventions).

prise rather than full market value. In return, the landowner agrees to retain the use of the land for a period of years or pay a financial penalty. The state then pays a subvention to local government for its lost share of property tax revenues.⁷

- **Mitigation Measures.** Mitigation measures under the California Environmental Quality Act (CEQA)⁸ may be imposed when approval of a development project would have significant impacts on the environment. Loss of significant open space typically meets the definition of a significant impact. Imposing a requirement that the developer permanently protect open space in return for the loss of open space associated with the

development is a typical mitigation measure. Note, however, that this does not create a net increase in the amount of open space in a community.

- **Large Developments with Specific Impacts.** Larger-scale developments can induce further growth and make existing open space more vulnerable. Look for opportunities in the approval process to protect open spaces. Placer County, for example, negotiated a development agreement on an Indian casino project that required the tribe to make a large one-time payment to the county's Open Space Legacy Fund and subsequent annual payments of \$200,000 for as long as the casino operates.

THINK BEFORE ACQUIRING⁹

Is it always necessary to acquire property to preserve it? The question is worth considering, particularly when there are many regulatory tools that—if applied forcefully but within constitutional limits—could achieve most of the results of an acquisition program. Communities may wish to consider the following issues in designing a program.

- **Cost.** Acquiring land can be expensive. Especially in this era of limited resources, every dollar raised for open space acquisition must be balanced against other public service demands.
- **Incomplete Protection.** Most programs rely on voluntary acquisition agreements. A program's goals can be frustrated if individual landowners decline to participate in land conservation program.
- **Potential for Gaming.** Anecdotal stories suggest that individual landowners and speculators are learning to cash in on the acquisition trend by purchasing sensitive properties and then proposing large developments. The resulting public outrage creates political support to purchase the property at a potentially inflated cost closer to its development value.

- **Easements and Partial Property Interests.** Acquiring less than full fee title to property can create a “strained marriage” between the holders of the different interests in the land. Amicable relationships with current titleholders do not guarantee smooth relationships with subsequent owners.
- **Permanence?** While acquiring property for preservation connotes a long-term commitment, such commitment is not necessarily guaranteed. For example, pressure can be applied to decision-makers to remove or modify easement restrictions.

Of course, land use regulations—the primary alternative tool to protect open space—are also subject to pressures and change. This land that is protected only through regulation can be vulnerable to later policy changes.

The bottom line is that each strategy—regulation and acquisition—has its potential strengths and weaknesses. The key is for each community to determine what strategy or combination of strategies makes the best sense for it.

⁷ See Cal. Gov't Code § 16141.

⁸ Cal. Pub. Res. Code §§ 21000, 21001; 14 Cal. Code Regs. §§ 15000 and following.

⁹ These materials are drawn largely from three documents written by John Echeverria, Director of the Georgetown Environmental Law and Policy Institute at Georgetown University Law School: (1) *Revive the Legacy of Land Use Controls, Open Space*, 12 (Vol. 2 Summer 2004) (published by the Open Space Institute); (2) *Top 10 Reasons to Be Skeptical About Voluntary Conservation Easements*, prepared for the Land Trust Alliance rally, October 28-31, 2004 (www.law.georgetown.edu/gelpi/papers/topten.pdf); and (3) *Buying v. Regulating*, presented at Litigating Regulatory Takings Claims Conference, University of Miami, Oct. 18-19, 2001 (copy on file at the Institute for Local Government).

The next step is to analyze the extent to which regulatory policies are being effective in preserving open space. Quantitative performance measures—such as the total number of times a regulatory strategy has been applied

and the resulting acres protected (and perhaps even the quality of the lands protected)—will enable decision-makers to gauge the effectiveness of existing open space strategies.

DEVELOPMENT AGREEMENT HELPS PROTECT “DARK AND BROODING” MOUNTAINS

In *East of Eden*, John Steinbeck wrote that “*the Santa Lucias stood up against the sky to the west and kept the valley from the open sea, and they were dark and brooding, unfriendly and dangerous.*” Today, much of this range remains intact and undeveloped—and the majority of a 20,000-acre parcel bordering the Carmel Valley¹⁰ will remain that way under a development agreement signed by Monterey County.

The agreement allowed the development of up to 350 residential units and a golf course over 2,000 acres of the property. The resident owners will also own an additional 6,000 acres of land that must remain in a natural state under a conservation easement. Each parcel has a “homeland” site as well as easement-restricted “openlands” and together with the golf course total 8,000 acres. The remaining 12,000 acres will be permanently preserved in fee.

The agreement creates a private conservancy—the Santa Lucia Conservancy—to hold title and manage the wildlands and conservation easements. The conservancy is responsible for monitoring of environmental conditions and providing educational, research, and recreational opportunities for residents of the development and the public. The Trust for Public Land managed the land until that responsibility was transferred to the conservancy.

A key element of the deal was to assure the conservancy’s ongoing solvency. The owner agreed to pay \$85,000 for each residential parcel—capped at \$25 million—to create an endowment to fund operations. The amount of the fee is extremely high compared to more typical developments throughout the state. The ability of the County to negotiate this fee was at least in part due to the fact that the value of the parcels

would be increased by the proximity of fully protected, pristine open space.

To offset the risks of delays, the agreement requires that the developer’s contributions to the endowment are adjusted annually for inflation and a minimum payment is also required when sales are slower than expected. The developer also covers the operational costs of the conservancy for the first five years after the final map was recorded and continues subsidize operations until the endowment is fully funded. In 2003, the subsidy payment to the conservancy exceeded \$800,000. All obligations are secured by a letter of credit.

At prices that range from \$900,000 to \$3.5 million for an undeveloped lot, this deal would be tough to duplicate in most places. In addition, the use of a private conservancy may not be appropriate in circumstances where one of the goals of the open space program is to provide greater public access to open space areas. (Although the conservancy does provide environmental education programs to local schools at no cost, offers periodic guided hikes and is exploring adding some public trails that would integrate with adjacent land managed by the Monterey Peninsula Regional Park District.)

This is a good example, however, of an agency taking advantage of a unique opportunity. Monterey County was able to achieve another important goal of permanently protecting the wild character of 12,000 acres of open space. Moreover, the creation of an endowment assures that the managing organization (the conservancy) will be able to continue to manage the land for a very long time to come.

¹⁰ Admittedly, Steinbeck was most likely referring to the view from the Salinas Valley, not the Carmel Valley.

For example, if an agency frequently uses development agreements, examine how many open space acres have been protected by such agreements. How does this compare with other regulatory tools used in the jurisdiction? With the agency's goals to preserve open space?

A careful quantitative analysis may also reveal that project proponents are exploiting the functional equivalents of loopholes in a given regulatory approach. For example, assume that, for developments of 30 units or more, there is a one-to-one mitigation requirement (one acre of land must be protected for each acre developed). How many developments of that size are being processed? Since the adoption of the requirement, has there been a spate of requests for approval of 29 units? Such a dynamic may suggest a need to lower the 30-unit threshold or otherwise tighten the requirement.

There may also be a political element to the analysis. In some instances, stricter regulatory controls may run afoul of prevailing community sentiment and power relationships. A pattern of not enforcing existing regulatory standards may suggest a need to explore whether acquisition strategies are a more palatable approach to protecting open space resources.

ANALYZE PLANNING EFFORTS

Another aspect of an open space needs assessment is whether there are opportunities to incorporate open space protection measures into more resource—or infrastructure-specific programs. Examples include the following.

- **Habitat Conservation Plans.** Plans to protect endangered species—called habitat conservation plans (HCPs) under federal law¹¹ and natural communities conservation plans (NCCPs) under state law¹²—can provide an important source of authority for open space protection and acquisition. These plans are prepared to comply with state and federal laws requiring the protection of habitat for endangered species and can provide additional support for open space preservation where the habitat of endangered species overlaps



open space areas. In addition, to the extent that a local agency intends to acquire property or purchase a conservation easement, these plans can provide a source of authority for imposing fees to fund the acquisition and protection of habitat.¹³ (For more information, visit www.ilsg.org/habitat).

- **Water Quality and Flood Control Initiatives.** Plans to protect water quality often involve protecting wetlands and designating areas for detention basins in order to minimize the risk of sedimentation entering streams and waterways.¹⁴ Nonpoint source and watershed plans also address similar issues to protect water quality. These measures often overlap with open space goals to the extent that they involve protection of lands and habitat near streams and other waterways.
- **Flood Control.** One form of flood control involves limiting new development in areas prone to flooding. Larger flood plain areas offer more areas for habitat and other open space uses.
- **Regional Transportation Planning Efforts.** Regional councils of government are responsible for distributing federal transportation dollars to local agencies. In some regions, these organizations are taking a more active role in regional planning by promoting transportation projects that minimize urban sprawl and maximize opportunities for transportation choice. Creating

¹¹ 16 U.S.C. §§ 1531 and following.

¹² Cal. Fish & Game Code §§ 2050 and following.

¹³ However, regional HCPs are rarely funded without some form of charge on new development. Section 6 of the Endangered Species Act authorizes the U.S. Fish and Wildlife Service to provide grants to local agencies in partnership with state fish and wildlife agencies. Section 6 grants include HCP Land Acquisition Grants and HCP Assistance Grants. Both grants require local matching funds and are becoming more competitive. See 16 U.S.C. §§ 1361 and following; 50 C.F.R. § 81.

¹⁴ Wetlands are waters of the state for the purposes of the state Porter-Cologne Act, Cal. Water Code § 13050(e), and waters of the United States for the purposes of the federal Clean Water Act. 33 U.S.C. §§ 1342, 1344, 1362(7).

Open Space Acquisition and Regional Transportation Measures

Transportation infrastructure is often viewed as a conduit to future growth and loss of open space. However, regional transportation plans are increasingly compensating for this impact by setting aside funds for mitigation projects.

- **San Diego TransNet.** San Diego County voters recently approved a 40-year extension of its half-cent sales tax for transportation improvements. The measure is expected to raise \$14 billion, of which \$880 million will be used for conservation projects. The measure passed with 67 percent of the vote.
- **Sacramento County.** Sacramento County recently extended its half-cent sales tax for transportation purposes. The tax is expected to raise over \$4 billion, of which \$48 million will be set aside for open space acquisition. The tax passed with 75 percent of the vote.
- **Riverside County.** Riverside County also approved a sales tax primarily to support transportation. The measure sets aside 5 percent of the total tax revenue to mitigate the cumulative impacts of transportation projects. It is expected that \$83 million will be raised for open space protection through the year 2039.

regional open space areas can be related to this discussion. It may be well worth the effort to contact the local council of governments to determine the extent to which a local conservation measure may fit within larger regional goals.

In addition, emerging considerations include military base conversions and proximity to important Native American cultural sites. Taking these bigger-picture issues into account can help maximize the effectiveness of an open space planning effort or acquisition program. It also is just good land use planning practice in general.

IDENTIFY PRIORITIES

Finally, the needs assessment should end by identifying what gaps, if any, exist in terms of the need for greater open space protection. A simple analysis could draw four broad classifications of open space areas (defining open space to include all compatible uses, such as flood control): (1) open space that is permanently protected; (2) open space that is not permanently protected but sufficiently regulated so as not to be vulnerable to immediate development; (3) open space that is presently vulnerable to development; and (4) open space that is designated for future development. Those broad categories would provide a rough estimate of the gaps between permanent protection, regulatory policy and vulnerable lands.

A more detailed assessment would identify gaps more clearly. For example:

- How many acres of open space are called for in the general plan and how many actual acres have been protected or preserved?
- To what extent are important landmarks and other special properties vulnerable to development?
- Are there potential conflicts between lands valuable for open space uses and future development (e.g., agricultural or watershed lands that have incompatible land use designations)?
- What working landscapes, such as farmland or timber areas, are vulnerable to development and what economic impact will its loss have on the community?
- To what extent are flood control areas and other safety zones vulnerable to development and what stresses will development impose on the community's infrastructure and public safety needs?
- Does the general plan propose to acquire additional parkland to maintain the existing per capita ratio or will the community fall behind as the population grows?
- What types of open space uses are lacking (e.g., active parks, trails, other)?

This list, perhaps, only scratches the surface. The needs and resources of each community will likely prompt several additional questions that are particular to that community. The overriding goal is to use the assessment process to form the baseline for the remainder of the assessment and any policy or program that is ultimately adopted.

DETERMINE ACQUISITION AUTHORITY

Cities and counties have specific statutory authority to acquire property for open space by purchase, gift, grant, bequest, devise, lease or otherwise.¹⁵ Other California statutes govern local agency authority to acquire land for open space.

- Local agencies are statutorily authorized to acquire property through eminent domain, grant, purchase, lease, gift, devise, contract, “or other means.”¹⁶
- Cities and counties may acquire property to preserve open space through limitation on future use.¹⁷
- The California Parklands Act of 1980 makes grants available to local agencies for the acquisition of open space lands.¹⁸
- The Open-space Easement Act of 1974 enables cities and counties to acquire or approve open space easements.¹⁹
- Local agencies may acquire conservation easements.²⁰



- The California Farmland Conservancy Program Act makes grant funding available to local agencies to purchase permanent agricultural conservation easements.²¹
- The provisions of various state and local bond measures and grant programs may also contain authority for the acquisition of land (see Chapter 9).

Identifying the statutory authority under which an agency is proceeding is a key step in the open space acquisition planning.

¹⁵ See Cal. Gov't Code §§ 6950 and following.

¹⁶ Cal. Gov't Code §§ 37350, 37350.5; Cal. Civ. Proc. Code § 1240.130.

¹⁷ Cal. Gov't Code § 6950.

¹⁸ Cal. Pub. Res. Code §§ 5096.155-5096.159.

¹⁹ Cal. Gov't Code §§ 51070 and following.

²⁰ Cal. Civ. Code §§ 815 and following.

²¹ Cal. Pub. Res. Code §§ 10200 and following.

Determining the Public's Interest



The feasibility of any open space plan depends on community support. Most large-scale open space planning efforts rely on public engagement to understand and address the public's needs and concerns. Such outreach efforts provide important information to the public, allow residents to add their voice to the local decision-making process, and can contribute important new open space planning ideas. These processes can also generate greater public support while strengthening a sense of community.

Gauging public interest precisely can be difficult. A Placer County vote in the 2000 election illustrates the challenge. The county asked voters to approve two ballot measures, one that increased sales tax, and the other an advisory measure that expressed voter preference that the county use the additional revenues for the acquisition and protection of open space. The advisory measure passed with more than 70 percent of the vote, indicating strong public support for the idea of protecting open space. However, only 27 percent favored the sales tax increase, a sign that voters were not willing to pay more for such protection—at least not in the form of higher sales taxes.

The goal of using public engagement and education techniques during the assessment process is to find out what type of effort would be most appropriate and feasible given the nature and level of public support for open space protection. This includes an understanding of not only whether or not the community would like to see open space saved, but also the extent to which they are willing to fund action.

Any effort to gauge public support for an open space program is likely to include at least one—and possibly even all three—of the following elements:

- A stakeholder assessment effort to gauge the attitudes of organized interests and perhaps to develop partners in promoting the open space effort
- Polling to gauge public attitudes toward open space protection
- A strategy for broader public education and engagement

Together, these activities should yield important information concerning the community's ideas and attitudes about open space protection.

IN THIS CHAPTER

Assessing Support

Polling

Community
Engagement

Resources

KEY QUESTIONS TO ANSWER DURING THE PUBLIC OUTREACH PROCESS

- What areas of open space are important and what purposes do they serve (view shed, recreation, forestry, agriculture, landscape, flood control, habitat for example)?
- To what extent will additional open space benefit the community?
- What are the perceived concerns or hazards (like crime, safety or fire, for example) related to open space areas?
- What community and regional open space preservation efforts are already underway?
- What organizations are already engaged in open space planning and protection efforts? Have their efforts been successful?
- To what extent does the public perceive that open space protection interferes with private property interests?
- To what extent can the agency access baseline information concerning open space areas of interest?
- Are there other big issues, controversies, ballot initiatives, or political races within the community that could influence the debate?

ASSESSING SUPPORT

An important measure of feasibility is the level of support for open space protection among key organized stakeholders. A stakeholder assessment will provide a relatively quick—but still incomplete—snapshot of the views and perceptions of the community. Analyzing how key stakeholders are likely to react to an open space protection program will contribute to the program's overall design.

Where there are wide disparities in points of view, it may be useful to go through a consensus-building or visioning process that can help stakeholders develop common ground. Although such a process can be time-consuming, it will likely mean that the open space plan that ultimately emerges will receive broad community support. Such an effort may be done in conjunction with broader community collaborative forums.

Asking organized groups for their views early on, while helpful on the one hand, may also encourage a more rigid “position”-taking that makes later dialogue and consensus building more difficult. Asking for their “interests” (the reasons underlying positions) relating to the topic, rather specific issues or positions, may help. The more open the agency is in its planning and positions, the more likely that such openness will be reciprocated.

A stakeholder assessment is especially critical if the local agency is considering action that will require voter approval. Local agencies can develop open space protection measures and place them on the ballot, but they cannot use public resources to support such measures or urge people to vote in favor of them (see Chapter 7). That responsibility will fall to key supporters and stakeholders. Conducting a stakeholder assessment will help identify groups willing to take on this leadership role.

Assessing stakeholder support for a specific action is anything but an exact science. The following steps¹ can help.

- **Identify All Necessary Parties.** Simple list-making is a good place to start. Identify all the local individuals, neighborhood groups, organizations, and businesses that are likely to be involved in, affected by, or take a position on an open space protection plan. When relevant, make note of any special concerns that each is likely to have. For example, an equestrian club may generally support the addition of new trails but have concerns about mountain bike use. Likewise, a business located close to a proposed open space area may have special concerns about parking or the ability to expand. It may be tempting to exclude a specific group, but such exclusion usually serves to entrench—and perhaps motivate—opposition. As one maxim of public partici-

¹ Experts break these steps down even further. This section merely provides an overview of how to conduct an assessment. For more information, see David D. Chrislip & Carl E. Larson, *Collaborative Leadership: How Citizens and Civic Leaders Can Make a Difference* (Jossey Bass 1994); Susan L. Carpenter, W.J.D. Kennedy, *Managing Public Disputes, Conflict Analysis Summary*, 91 (1988).

pation says: if you want something to happen, you need those who can make it happen and those who can stop it from happening.

- **Conduct a Background Analysis.** The stakeholder assessment should look for things that reflect values and beliefs as much as specific positions on an issue. Read newsletters and newspaper articles and visit websites. How do key stakeholders characterize open space issues? The assessment must also address the mix of people, agendas, tensions, confidence in local government, and history of previous encounters of everyone involved. If, for example, local environmentalists and developers do not trust one another, they may be unlikely to reach an agreement without some sort of consensus-building process. This in turn might lengthen the time needed to implement an open space protection program.
- **Interview Key Stakeholders.** Interviews will provide more background and deepen the knowledge gleaned from the background analysis. The questions should be open-ended and focus on how the stakeholders value open space and any potential protection efforts. Another key question to ask is what other groups or individuals should be contacted or made part of the process. The interviewer should listen for information that will provide additional insights into the interested parties and the dynamics of the issue. For example, it is often important to identify how various parties plan to use their influence and to note information about values, attitudes, and motives that might influence the discussion. Also of interest will be how each group functions, how information is conveyed internally, and how decisions are made.
- **Format Data.** The next step is to place the information into a format that will allow for easy comparisons. Data points will vary, but typical classifications include issues, interests, relationship to local agency and other governmental entities, significance of issue to organization, source of power or influence, positions, concerns, interest in working collaboratively, and other notes and comments.

- **Assess the Level of Agreement among Stakeholders.** Commonly, stakeholders may only agree that there is a problem and that it would be useful to collaborate to solve it. For example, stakeholders often agree that the community is growing quickly and that open space protection is an issue, but they will have very different ideas about the scope of the problem and what possible solutions would be the most appropriate.

Choosing the right person to conduct the analysis is important. He or she should not be threatening or perceived to favor one group over another. In many instances, it may be appropriate to hire an outside consultant or specialist to do this kind of assessment. Not only are such professionals experienced at organizing and analyzing data, but also their lack of history with any of the key stakeholders enhances the credibility of the assessment.

Checklist of Potential Stakeholder Groups

- Chambers of commerce
- Cultural groups
- Environmental organizations
- Federal and state wildlife agencies
- Historic preservation groups
- Home builders/developers
- Housing groups
- Irrigation districts
- Local landowners
- Neighborhood groups
- Labor organizations
- Land trusts
- Manufacturing groups
- Recreational organizations
- Water and flood control districts
- Neighboring jurisdictions



POLLING

Polling is an important policy research tool despite the common perception that it is used mostly to support political activities. Polling can provide feedback on the feasibility of an open space program or can test community acceptance levels for a particular funding tool.

There are two types of traditional polls: “snapshot” and “benchmark.” There are also newer forms of polling—see for instance “deliberative polls”²—that include deliberative discussions among participants and offer a look at what attitudes might be if the public was more informed on an issue.

Snapshot polls indicate how the public will support a particular measure or idea at that moment in time. The questions in snapshot polls are fairly simple and do not delve into the underlying reason for a position. These are the kinds of polls often used by candidates and news organizations to gauge the “horse race” element of an election. While such polls may provide some useful information about public preferences, they usually do not provide enough information upon which to design a policy or program for open space protection.

A benchmark poll, on the other hand, is a poll taken to measure the public’s attitudes on a specific issue. Such polls provide greater depth and understanding and are more valuable for long-term planning issues. They measure attitudes that are developed over a longer period of time and that tend to change only as a result of

major events—like sharp economic changes or natural disasters. Thus, benchmark polls can be used to set longer-term policy.

A comprehensive benchmark poll runs about 20 minutes per interview and can be used to evaluate public attitudes on a number of issues.

- **Interest in Land Conservation.** How does the community value open space? How important is protection in light of other concerns, such as public safety?
- **Open Space Priorities.** What protection measure is the public most likely to support? Which individual projects are most popular (for example recreation, trails, flood control, farming)?
- **The Depth of Commitment to the Issue.** How committed is the community to an issue? Does it merely “sound good” or is it so important that the community’s commitment to the issue is unlikely to waiver under changed circumstances?
- **Perceived Effectiveness of Local Government.** How much faith does the public have in the local agency to carry out the program? Where the numbers are low, the agency may want to build in assurances to increase the public’s trust level.
- **Funding Tolerance.** To what extent is the community willing to fund an open space acquisition program? Individual tools, such as developer fees, taxes, bonds, and benefit assessments, can be tested.

Polling results should be reviewed with at least a hint of skepticism. Any poll is only as good as the data that underlies it. It is therefore important to be assured that the poll accurately reflects the opinions of the appropriate community before using the data to influence policy decisions. Sometimes important information such as sample size, target population, question wording, or even results unfavorable to the sponsoring organization are purposely not included in reports of survey data, which can lead to misperceptions about the accuracy of and the conclusions drawn from the survey. Problems with any one point do not necessarily mean a poll is suspect, but they should raise a red flag when interpreting and using the findings.

² See, for example, the website of the Center for Deliberative Polling at the University of Texas, Austin (www.la.utexas.edu/research/delpol/).

JUDGING THE ACCURACY OF POLLS³

- **What Was the Underlying Purpose?** “Good” polls are designed to develop statistical information about a topic or issue, not to produce predetermined results.
- **Who Sponsored the Poll?** A sponsor’s point of view can unintentionally skew polling results. When an underlying perspective dominates, data is more likely to be developed and interpreted in a way that is consistent with the sponsor’s mission.
- **Who Was Polled?** The sample may be different than the population it is being used to represent. For example, a poll that tested the issue of farmland protection within a city is not a good indicator of countywide sentiments. Likewise, a poll of landowners would not represent renters. The results are only applicable to the polled population.
- **How Were Respondents Selected?** Respondents should be selected randomly. Each person should have had a measurable chance of selection. This allows the results to be reliably projected with known levels of certainty. A well-designed poll can be used to project statewide opinions on as few as 800 to 1,500 individual surveys.
- **How Were the Questions Worded?** Phrasing affects responses. Asking about willingness “to pay a small fee to increase open space and recreational opportunities” will get a different result than asking about willingness “to support a tax increase to purchase vacant parcels.” Even non-biased questions pose problems. Merely asking “the number of times that you have visited regional parks in the past year” contains ambiguities. Some will use the previous 12 months as a time frame; others the calendar year. The term “regional parks” will also be interpreted differently (for example, does it include local parks?).
- **How Were the Questions Ordered?** Each question sets the context for the next. If the first question was: “What are the biggest problems facing your community?” the top answers might be “jobs,” “traffic,” and “education.” However, if a series of questions related to rapid growth and lost open space were posed just prior to posing the “biggest problem” question, there is a good chance that “open space” would be among the top concerns. In effect, the respondents were “educated” about the issue.
- **What Is the Accuracy of the Poll?** Poll accuracy is measured by sampling error and confidence interval. Sampling error is based on the number of people interviewed; the larger the sample, the smaller the error. It is the difference between actual poll results and the probable results had every member of the population been surveyed. A good sampling error is 4 percent or less (meaning if a poll finds that 61 percent of those surveyed support land conservation, the likely percentage is between 57 percent and 65 percent). Confidence interval measures the quality of the sampling error range; the higher the percentage, the more likely it is that any survey of the same population would yield a result within the range of the sampling error. For example, a 95 percent confidence interval means that 95 out of 100 polls should fall within the range of the sampling error.
- **Has Supporting Data Been Left Out?** Be skeptical of any survey that does not make its supporting data available. Look for documentation of the sample population, sample size, response rate, question wording, and other technical aspects of the survey.
- **How Reputable Is the Pollster?** Polling firms vary in their professionalism. A reputable firm will be experienced at identifying a target population, selecting representative samples, and asking unbiased questions.

³ Adapted from Michael W. Link and Robert W. Oldendick, “Good” Polls / “Bad” Polls—How Can You Tell?: Ten Tips for Consumers of Survey Research (www.iopa.sc.edu/publication/Link.htm) (September 1, 2004) (originally printed in the Fall 1997 issue of the *South Carolina Policy Forum*, published by the University of South Carolina Institute for Public Service and Policy Research).

Legal Note

Close consultation with agency counsel is important whenever making expenditures that could ultimately be used in a ballot measure campaign. The general rule is that public funds may be used for polling to help a public agency make an informed decision on whether to place a measure on the ballot.⁴ However, public funds may not be used to develop a strategy—before or after a measure is placed on a ballot—to gain support for a ballot measure.⁵

A successful public engagement program will result in community members—and local officials—having new perspectives on what land is particularly significant, how people interact with present and potential open spaces, and how the public's experience with open spaces can be improved.

Because land conservation usually creates physical barriers to future development, discussions about how to protect open space often raise broader questions about how a community should grow. There is a benefit to having this kind of public discussion at the assessment stage although care must be taken that the purpose and the process for the discussion forum(s) are clearly understood by all.

Such discussions assure that any resulting open space plan is consistent with projected community growth and housing policies. Moreover, addressing concerns about community growth during the assessment process can improve the prospects for an open space protection measure and increase the likelihood that a more collaboratively developed open space plan will succeed.

COMMUNITY ENGAGEMENT

Developing a public engagement and education process to get broader and often more considered public input can be an important part of the assessment process. The ideas shared through such outreach can help the agency design an open space conservation program that better integrates community sentiments. Additionally, ideas generated at these meetings would often not otherwise have been identified or considered.

ADVISORY MEASURES: THE ULTIMATE POLL?

Some communities have placed advisory measures on the ballot to get the public's feedback on whether they should take action to protect open space. Ventura County initiated the process of creating an open space funding plan as the result of a 1998 advisory measure that indicated overwhelming support for the creation of an open space district.⁶

This method can be an accurate way to assess community sentiments and, if passed, provides the political cover necessary to make tough decisions. An advisory

measure also can be relatively inexpensive for the local agency if combined with a general election.

Such measures, however, are usually vague about implementation and thus the results may not necessarily reflect how the public will feel about specific implementation measures, such as tax increases or bond issues.⁷ Advisory measures also provide opponents with two chances to defeat an issue. In addition, if an advisory measure fails, it is very difficult to move forward with a campaign.

⁴ ___ Cal. Op. Att'y Gen. ___ (2005). Some attorneys believe that subsequent use of polling data for advocacy efforts could still be found improper. These attorneys advise their clients not to volunteer to make publicly funded polling data available to the advocacy effort. Such use may also trigger Political Reform Act reporting requirements. See FPPC Memo Re: Truckee Mountain Area Protection Campaign Committee No. 97-572 (April 16, 1998); Hicks Advice Letter, No. I-98-007 (Feb. 20, 1998) (reporting obligations for city that wants to conduct a poll in connection with proposed ballot measure).

⁵ ___ Cal. Op. Att'y Gen. ___ (2005). *Stanson v. Mott*, 17 Cal. 3d 206 (1976). Public agencies may prepare ballot measures for the ballot as an exercise of legislative authority. See *League of Women Voters v. Countywide Criminal Justice Coordinating Committee*, 203 Cal. App. 3d 529 (1988) (rejecting arguments that a public agency's actions in developing a measure for the ballot and locating a sponsor violated *Stanson v. Mott*).

⁶ County of Ventura, *Open Space District Advisory Committee's Recommendations for Forming, Funding & Governing A Ventura County Regional Open Space District* (June 2003) (www.ventura.org/planning/pdf/OSDAC/OSDAC_report/OSDAC_report.pdf).

⁷ In November 2004, Ventura County voters rejected a measure that would have created an open space district and established a one-quarter percent sales tax increase to fund agricultural land preservation and acquisition of open space. League of California Women Voters Education Fund, *Directory of Ventura County, CA Measures* (November 2, 2004) (www.smartvoter.org/sv/2004/11/02/ca/vn/meas/).



Some believe that extensive public outreach risks “tipping the hand” of open space supporters and gives opponents time to ramp up their opposition. In some circumstances, this may be a valid concern. In most cases, however, the information and goodwill that outreach generates outweighs any downside, particularly when adoption of an open space protection program depends on broad community support.

To be effective, public participation must be structured and substantive. It may be useful to think of four levels of this broader public engagement and education:

1. **One-way, information**, such as newspaper articles, brochures, notices in utility bills, a speakers series, or TV and radio spots.
2. **Individual responses**, including surveys and public hearings.
3. **Collaborative forums** that allow opportunities for community members to gather and jointly address issues through presentations of information and interactive discussions.
4. **Structural approaches**, including more formally established committees or commissions that are typically given specific authority to draft recommendations or propose solutions.

There is some natural overlap among these levels. However they do suggest important differences of approach that local agencies and communities may want to consider when addressing open space planning.

One-Way Information

One-way information-oriented strategies are relatively straightforward, and provide information to a potentially large number of people in the community. At the same time, these approaches are unlikely to change the minds of those with concerns, may raise questions or disputes about the presented “facts,” and, by themselves, don’t allow for any sort of feedback or community contribution to the planning process.

Individual Responses

Typical public hearings and resident surveys are important opportunities for individual community voices to be heard, although there is usually little opportunity for interaction and learning among participants. Public hearings may attract only a small slice of the community and these formats can be polarizing and sometimes frustrating experiences. Surveys (in “hard copy” form or online) can be useful and if done well may involve larger number of people. In most case they still have the drawback of one-way and individual communication, with little new information being brought to bear.

If employed, these individual feedback processes should be designed in a way that maximizes opportunities for participation. The agency’s representatives play a critical role in ensuring meaningful public involvement in these cases. Officials and staff who genuinely welcome diverse public input are more likely to have effective outreach meetings than those who merely “go through the motions.”

DESIGNING INCLUSIVE PUBLIC OUTREACH PROCESSES

- **Meaningful Participation.** Participants must feel that their opinions matter. Agency representatives should genuinely listen to public comments, even from those who oppose open space protection efforts. When people feel that their comments will be heard, they are more likely to take the time to participate.
- **Avoid Pre-Determining Outcomes.** The public is more likely to trust a process that values their ideas and comments. Do not start the process by trying to create advocates for a given position.
- **Promote Visible Support from Acknowledged Leaders.** People serve as catalysts. As community leaders become engaged, they are more likely to share their support with others and spark action.
- **Effective Notices.** Notices and flyers should be distributed widely (and even printed in various languages) to maximize exposure.
- **Policy Backgrounders.** Unfamiliarity with how decision-making processes work presents one of the biggest barriers to public involvement. Information sheets and simple background papers can help people make more meaningful comments.
- **Meeting Times.** Schedule meetings at various times to allow people with different work schedules to participate. Evening meetings may work well for those with nine-to-five jobs, but many people work evenings or have to take care of their families. Including day and weekend meetings will allow for broader participation.
- **Logistics.** Locate meetings near convenient public transportation. In some instances, providing child-care or interpreters can make the process more inclusive.
- **Alternative Input Forms.** Not everyone can attend meetings. Allow people to submit written comments or send comments by e-mail.

While information and individual response-oriented models of public outreach are extremely valuable, such efforts do not necessarily provide an accurate assessment of the sentiments of the entire community. Many public meetings will most likely involve those who have a very strong interest in an issue (on either side) and have the time to participate. In many instances, long-distance commuters and other members of the community who are less connected to local decision-making processes will not attend.

Thus, when practical, it is a good idea to supplement the results of these more limited outreach efforts with broader collaboratively-oriented engagement processes. Polling is also helpful, particularly when the proposed open space program will require obtaining voter approval.

Collaborative Forums

Collaborative forums, whether sponsored by civic groups and/or public agencies, allow for a qualitatively different sort of community input. These approaches typically

allow those participating to become more informed about the issue at hand, to have interactive and reasoned discussions that illuminate points of view and encourage changes in thinking, and result in a clearer understanding of public opinion or actual consensus (by the group) on some or all issues.

Some collaborative forums may be composed of specific identified stakeholder groups representing different interests and points of view (such as environmentalists, businesses, or public agencies) that come together to reach specific agreements through formal consensus-building. (This might build off of the stakeholder assessment work described above.) In most instances of open space planning however, such forums will more likely seek broad public participation and the discussions will result in more common understanding and greater consensus, although usually not final and detailed agreements.

Civic groups around the country have explored various models of collaborative or deliberative forums over the past few years developed by such groups as the Study



Circles Resource Center, the Kettering Foundation, Public Conversations Project, Viewpoint Learning, AmericaSpeaks, and many more.

Bringing these or similar groups in to design and facilitate these processes for open space planning can require a substantial financial investment. It may be useful to explore the websites of these and other organizations to become better acquainted with the approaches. Most communities can develop their own collaborative forums, however, relying on more local resources.

Whatever the exact model, collaborative forums should generally be representative and deliberative while offering concrete ideas that will be considered seriously by open space decision makers.⁸ “Representative” suggests that the many diverse voices in the community are present in the discussions.

Collaborative forums seek more than self-selected groups of frequent public meeting attendees. There is usually not one “community” in any given jurisdiction, but many different communities defined by geography, identity, interest, and other factors. Members of each will need to be notified and invited in the most appropriate ways.

To attract participation, outreach may be done with leadership groups and individual leaders, civic organizations and advocacy groups, faith-based institutions, professional and cultural groups, service organizations—and of course through the media described above. Some collaborative forums, while trying to insure diversity, are open to all. Some use random sampling to ensure that partici-

pants statistically reflect the population. Such forums obviously differ from committees of experts appointed on the basis of their specialized qualifications.

The “deliberative” nature of collaborative forums is important. Participants should have impartial background information that helps to inform them about the open space issues at hand. There should be respectful discussions that allow for an exchange of reasons, not just positions; for all voices to be heard; for different points of view to be explored; and for final understandings and ideas to be recorded. There is frequently a need for qualified facilitation, as well as for qualified assistance with assessment and design overall.

These forums should get down to specifics, identifying concrete ideas about open space plans, and not stay at such a general stage of discussion that difficult decisions and trade-offs are not confronted.

Finally, these forums should be influential and affect actual open space policy decisions. It is important to be clear from the initiation of any public involvement process exactly how public comment and discussions will be used and integrated into open space planning and policymaking. Having an unclear or inauthentic link between public voice and the agency’s decision-making is a sure way to make people frustrated and angry. This is of course not the same thing as saying that local officials must follow all collaborative forum recommendations.

When considering collaborative forums for open space planning, key factors include:

- The size and breadth of the desired participation
- The proposed ties between such public discussions and the actions of decision makers
- The specific nature of the dialogue and discussions proposed

Research suggests that deliberative public engagement improves decision making and builds trust and support. However as there are more interactive face-to-face discussions, there is also frequently more expense and more work involved.

⁸ See generally, John Gastil, *By Popular Demand: Revitalizing Representative Democracy Through Deliberative Elections* (University of California Press 2000) 91.

Structural Approaches

More “structural” options—creating committees or commissions with specific and delegated authority for open space planning—exist as well. An agency may decide that a body should be appointed to oversee broader public engagement and then draft (hopefully) consensus recommendations. Or the group may deliberate primarily among its members and construct a plan that becomes the basis for the action of elected officials.

For particularly contentious matters requiring a larger and longer-term public engagement effort—and/or where there are significant issues of public trust and government transparency—this more structural approach, perhaps combined with collaborative public forums, may be useful. Clarity about the charge and timeline, membership, delegation of responsibilities, and working protocols of such a group is particularly important.

RESOURCES

The Collaborative Governance Initiative, Institute for Local Government (www.ilsg.org/cgi)

The Planning Commissioner's Handbook, Chapter 3 (www.ilsg.org/planners)

Participation Tools for Better Community and Land Use Planning (www.lgc.org/freepub/land_use/participation_tools/index.html)

General Plan Guidelines, 2003 Edition, Chapter 8 (www.opr.ca.gov/planning/PDFs/General_Plan_Guidelines_2003.pdf)

THE STRUCTURAL APPROACH: AN EXAMPLE

Prompted by a county-wide debate over the future of the Tassajara Agricultural Preserve, the Contra Costa County Board of Supervisors appointed an *ad hoc* Committee on Open Space Funding to “make recommendations on whether and how to create new local funding for open space, parks, recreation, natural resources, and farmland preservation.” Two county supervisors participated on the committee, which was staffed by the county’s Community Development Department. Representatives from dozens of local organizations, businesses, and public agencies (local, state and federal) were invited to participate. All meetings were open to the public.

The committee served for four years and delivered a funding plan for the protection of open space. Though the recommended funding mechanism was not ultimately adopted, the process used to develop the funding plan had many elements worth duplicating. Over a four-year period, the committee took a series of steps to determine the need for open space funding, including:

- Polling to ascertain public interest in libraries, open space, and economic revitalization. Open space funding enjoyed a 62 percent approval rating.
- Formation of an advisory committee of over 32 conservation organizations to advise the county supervisors participating on the committee.
- Organizing a kick-off event involving 160 people to launch the process.
- Formation of two subcommittees to investigate which areas should be prioritized for protection (creation of the open space plan) and funding options.
- Completion of a draft priorities map and estimated funding requirements, approved in concept by the board of supervisors.

Projecting Maintenance and Management Requirements



Another consideration in assessing open space program feasibility is ongoing maintenance and management costs that the agency will incur after the property has been purchased. An agency should have some form of an adaptable management plan in place before the acquisition process begins.

As a result, the public must support not just the broad goal of preserving open space, but also the day-to-day realities of owning and using open space. For example, while adjacent property owners may support the acquisition of open space to protect against development, they may not support the public access and use that may accompany such acquisition.

PROPERTY SELECTION

Property acquisition initiatives often begin as efforts to protect specific areas or landmarks. Some communities have focused acquisition efforts and land use controls on specific natural features, such as the visually prominent Ladyface Mountain in the city of Agoura Hills at the gateway to the Santa Monica Mountains Recreation Area. Others have coalesced community support around the preservation of a historic landmark or cultural resource, such as a historic structure or a Native American burial ground.

In some cases, grant-funding criteria will drive the selection process. In other instances, the effort is based more on a notion of stemming the loss of open space and working landscapes in the face of new growth and urban expansion.

IN THIS CHAPTER

Property Selection

Property Interests

Staffing Requirements

Management Structures

Decision-Making

In either case, having a broader acquisition strategy or a set of acquisition priorities can optimize agency decision-making.

In terms of property selection criteria, the agency will need a set of priorities to guide any acquisition decision-making. Each parcel should be evaluated based on how well it meets established acquisition criteria. Specific criteria will vary, but may include the following considerations.

- **Location and the General Plan.** Will purchase of the parcel further the goals of the agency's general plan? Proximity of land in relation to other lands that are already protected may be a consideration if a goal is to create larger blocks of protected lands.
- **Development Pressure.** Priority is often given to land that is likely to be developed in the near future if the agency does not act. Some purchases act as a buffer between growth and protected areas. For example, if the land is part of an area that is experiencing tremendous growth because of its proximity to urban areas, it may be deserving of higher priority if the purchase creates a "beachhead" to protect surrounding lands and discourage "leapfrog" development. Where a patchwork of development is already in place, however, the strategic choice may be to give neighboring lands a lower priority and focus on areas where larger tracks remain undeveloped.
- **Cost and Financing.** Do the terms of the proposed deal make it a particularly appealing opportunity? In some instances, the landowner may be willing to provide very favorable terms in anticipation of a state or federal tax deduction; in others there may be grant funds available. Such opportunities allow the agency to stretch funds and conserve more land.
- **Public Support.** Some areas or types of property may be more favored by the public than others—for example, a well-known landmark.
- **Obstacles.** Parcels that will be difficult to purchase may dissipate limited staff time and resources. Multiple owners, questionable title, and possibility of hazardous wastes on a site may lower the priority of a property that otherwise fits within the agency's conservation goals.
- **Hazardous Materials.** Even the most remote of open spaces can be the site of hazardous materials—perhaps from an old mining operation or from an unauthorized dump site. If the local agency acquires such a site, it might be required to clean the site, regardless of culpability. Local agencies may want to avoid acquiring such properties and work with professionals to minimize the risks associated with doing so.
- **Resource value.** Does a parcel feature important natural resources, such as wildlife habitat, riparian corridors, prime farmland, or other natural attributes?
- **Unique physical characteristics.** Does a parcel possess unusual beauty, geology, or historic quality, provide a scenic backdrop, or have other physical attributes that make it unique in the area?
- **Suitability for public use.** Parcels suitable for public access and recreational uses may merit special consideration, particularly if such parcels complement adjacent uses. For example, a parcel may be desirable because it will allow trails to be extended or because it will facilitate access to other recreational areas.
- **Accessibility.** Another consideration is accessibility for maintenance and patrol vehicles, as well as fire and other emergency vehicles. Parking will be needed if public access is available. Properties that are isolated or that are accessible only via a private road may be less desirable. Neighboring property owners, for example, may be unhappy about increases in vehicle and foot traffic near their land.

More specific criteria will depend on the goals of the program. For example, a farmland protection program may also emphasize factors such as the quality of the soil and productivity of the farm. A wildlife protection goal would suggest criteria emphasizing the presence of or the value of habitat to listed and endangered species. A water quality protection goal would suggest such criteria as avoidance of non-point source pollution, potential for groundwater recharge, protection of riparian zones and/or the protection of hydrological linkages.

Options for identifying properties meeting the above criteria can include a nomination process by the public, staff, an advisory committee, nonprofit organizations or other jurisdictions. One county developed a public nomination process to identify priority properties before the design of a benefit assessment district was completed with the goal of creating greater public support for the measure.

PROPERTY INTERESTS

Another basic management issue will be the type of property interest purchased. Two forms of ownership are most prevalent: fee simple and conservation easement. A fee simple interest is the most common form of ownership. This means that the agency has acquired the entire ownership of the parcel. It affords the purchasing agency with entire control of the land and guarantees public access, but it is also the most expensive way to acquire if the agency is paying market rates for the property. It is also a simpler and more straightforward transaction than purchasing an easement.

An increasingly popular form of ownership is conservation easements. In this type of transaction, the agency merely pays the property owner to relinquish the right to develop the property—thereby preserving the open space or agricultural character of the property. Occasionally, property owners will also dedicate conservation easement over portions of their property as part of or as a condition to, a land use approval. The landowner, however, retains title to the property, meaning that public access and the agency's ability to manage the property is limited.

Some Definitions

“Fee simple” when referring to a property interest refers to the most extensive form of property interest. The holder of such title owns the property unconditionally and forever; the owner may also dispose of such property as he or she may choose.¹

An “easement” is a property interest giving the holder the right to use property owned by another. As such, an easement qualifies the property owner's rights to use and exclude others from his or her property.²



The advantage of an easement is that it costs less money to assure that the land is protected as open space. On the other hand, the local agency has less control over the land. In addition, these transactions also place a long-term burden on the agency to monitor the easement on an annual basis to enforce the terms of the easement. While it may seem a simple prospect, the permanent nature of the easement means that the agency will be coordinating this effort with subsequent landowners. While the terms of the easement may be clear to the present owner, it may be a lot less clear to the person who owns the underlying land 100 or 200 years from now.

The program assessment therefore should match the acquisition strategy to the program's goals. If the goal is to protect working landscapes like agriculture and forestry, then conservation easements are probably the most effective and affordable tool. On the other hand, if the goal is to protect wildlife habitat and create public access, some type of fee purchase will likely be necessary (though some type of easement with a public access provision may be possible). There may also be some cases calling for a combination of fee title purchases and conservation easements. For example, purchasing conservation easements over farmland that abuts a preserve may achieve the goal of separating residential areas from wildlife corridors.

See also discussion in Chapter 10 at pages 95-96.

¹ See *Black's Law Dictionary* (West Publishing Co. 1979) at 554.

² See *Black's Law Dictionary* (West Publishing Co. 1979) at 457.

ACQUISITION OF PROPERTY BY FEE VERSUS EASEMENT: A COMPARISON		
	FEE	EASEMENT
ACQUISITION COST	Generally greater	Generally less
PUBLIC AGENCY CONTROL	Generally greater	Generally less
MONITORING	Generally less	Generally more
MANAGEMENT COST	More	Less

STAFFING REQUIREMENTS

The management needs and costs will be different for property depending on the type of area to be maintained, the use of the area and the tasks associated with maintenance. Different ecosystems—such as forest, desert, farmland grassland, and riparian—require different management techniques. Moreover, the presence of threatened and endangered species often requires additional management practices to assure that no harm comes to the species or the habitat.

A key element in any stewardship plan is staffing. New conservation programs often bring new responsibilities—such as wildlife management, trail-building or easement monitoring—that may not be within the skill set of existing staff. The total number of new staff that will be needed can often be determined by formulas (full time employees per acres of land) established by trade organizations. (See table: *For More Information*, page 25). The need for new staff, however, may not be immediate, but evolve more slowly as new acquisitions occur.

The next step is to determine the extent to which existing staff and departments have the expertise to implement a maintenance and monitoring plan. This can be done by listing the required tasks and responsibilities associated with implementing the open space policy and comparing it to the core competencies of the department (or staff). Such an analysis may confirm the capabilities of existing staff or indicate the addition of new staff. Keep in mind that consultants, nonprofit partners, and volunteers also can fill important roles.

Once developed, stewardship plans continue to evolve with changes to the natural systems on the property or

the recreational and other public uses. For example—a stewardship plan developed in 1980 would not have taken mountain biking—and its collateral impacts—into account. In addition to maintaining the natural resources, the agency will also need to analyze the degree to which the following will be needed.

- **Capital Improvements and Facilities.** Particularly when the public will have access to the property, the agency will need to build fences, trails, parking, recreational facilities, restrooms and other facilities necessary for the types of uses contemplated for the property.
- **Public-Serving Facilities Maintenance.** Special maintenance issues associated with public access—such as trail maintenance, trash removal, weed control and restrooms—will need to be budgeted and addressed if the open space will be used for recreational purposes.
- **Fire Hazards.** Open space can pose a fire risk. This may be a particular concern if there are neighboring urban and residential areas. The local agency may have to adapt a fire management plan to assure that open space areas do not threaten areas that are more developed.
- **Public Education.** The public will need to be educated about the purchase, the recreational opportunities available and the rules associated with the use of the property. Some of this can be accomplished with good signage on the property, other elements may require greater public outreach efforts.
- **Public Safety and Enforcement.** Public safety officers will need to have a presence on the property if it is open to public access. Trespassing, overuse, vandalism, and

safety hazards are among the issues that need attention. Where access is more limited, enforcement measures may be necessary to assure that rules are not broken.

- **Baseline Monitoring (Easements).** If the agency acquires an easement interest in the property, it is standard practice to adopt a monitoring plan to assure compliance with the terms of the easement. This usually involves inspecting the property at least once a year. Some groups have developed forms that help assure that the same items are inspected consistently despite staff turnover and other changes.
- **Administration.** Just like any public endeavor, the agency will need to allow time and resources for administrative items like record keeping, monitoring, budgeting, insurance and community relations.

An open space needs assessment should identify these costs and ways in which they can be funded beyond the initial acquisition phase. A recent land acquisition tax measure in the city of Monrovia, for example, included a tax of limited duration (20 years) for acquisition funds, and a permanent maintenance tax to provide ongoing funds for stewardship.

MANAGEMENT STRUCTURES

Once the management requirements are identified, the next task is to determine how these needs might be met. The options include the following.³

- **Work within Existing Departments and Organizations.** This can be accomplished by assigning management to one of the agency's own units or contracting with another agency—like a park district.
- **New Department Within Agency.** The program may merit creating a new department within the agency to both coordinate staff functions and bring new individuals with specialized skills into the agency.
- **Public-Private Partnership.** Agreements with private organizations—often land trusts—are another option. The agency brings the authority to raise money and take action and the private organization usually offers some resource, such as expertise in a specific area or

For More Information

- **Estimating the Cost of Maintenance.** In *Operational Guidelines for Grounds Management*, the National Recreational and Park Association has developed a set of matrices to illustrate staffing levels and the amount of time necessary for particular maintenance tasks. Though local experiences may vary, it serves as a good starting point in the budgeting process. This publication may be purchased through the website of the Michigan Recreational and Park Association for \$125 (www.mrpaonline.org/Store/catalog/items/item86.htm).
- **Official Networking and Information.** The National Association of County Park and Recreation Officials (NACPRO) is an independent organization affiliated with the National Association of Counties that serves county park administrators and professions. It provides technical assistance to park and recreation professionals, information about national trends, policies and funding, news and reports from county park systems and networking opportunities. Members can also post requests for information. For more information, see www.nacpro.org.

perhaps ownership of the land that is of interest. For more information on the pros and cons of working with such organizations, see Chapter 12.

- **Joint Powers Authority.** A joint powers authority may be appropriate when the open space area extends over multiple jurisdictions. In effect, the partnering agencies create a new public entity by agreement.⁴ The authority of joint powers authorities (JPAs) is defined by this agreement and by the principle that it may not undertake any activity that could not be conducted by at least one of its member agencies. (A JPA may, however, issue bonds irrespective of whether the all the forming agencies could independently exercise such powers.⁵) The members appoint representatives to the organization's board. In some cases, the JPA will have its own staff; in others, one or more of the member agencies provides

³ See Placer Legacy Open Space and Agricultural Conservation Program, Public Review Draft, May 15, 2000 (Chapter 7, Open Space Government Structure) (www.placer.ca.gov/planning/legacy/5-18-00-draft-toc.htm).

⁴ See Cal. Gov't Code §§ 6500 and following.

⁵ See Cal. Gov't Code §§ 6584-6599 (commonly referred to as Marks-Roos Local Bond Pooling Act of 1985); 75 Cal. Op. Att'y Gen. 6, 7-8 (1992).

staff. A JPA may encounter difficulty if the cooperating agencies' interests and funding priorities change, but it does provide a flexible structure for creating a regional agency that is dedicated to a particular task.

- **Special District.** Special open space districts are separate governmental units that manage specific resources within defined boundaries. Districts vary in size, encompassing a single community or several counties. An advantage of such districts is that they institutionalize the conservation effort. The process for forming such districts is more rigid than most other alternatives. There must be specific statutory authority⁶ and Local Area Formation Commissions (LAFCO) approval.⁷ As self-financing legal entities, however, special districts can raise predictable revenue streams (through user fees or bonds). Some districts are “dependent” because a city or county governing body serves as the board for the district. This structure has the advantage of ensuring that the district’s actions are consistent with agency policy. However, such a board may subject the district to greater political pressures. An “independent” district, where the district’s board members are elected, is another possibility. An independent district, however, may share overlapping duties with other local agencies within the district.



» The East Bay Regional Park District is one of the more successful examples of using the special district model to protect open space. The district was created in 1934 with a nickel-per-\$100 value property assessment. The district now owns and operates 53 parks, with 78,000 acres, and has an operating budget of more than \$60 million.

Determining which one of these options makes sense for an agency involves an analysis of costs, availability of funds, agency authority, staff expertise and the degree of desired accountability.⁸

DECISION-MAKING

Determining who will decide which parcels to purchase and how much to pay is a key issue. An agency may need to balance the need to maintain control over publicly-collected revenues and seeking public input. An advisory committee is often formed to serve these purposes, sometimes serving merely an advisory role and sometimes taking direct control of spending decisions.

Creating a public advisory committee can boost public support for an open space acquisition program and provide a fiscal safeguard. Advisory committees can represent the diverse interests of a community and contribute to a system of checks and balances between planning staff, the legislative body, and the public.

Advisory committee responsibilities vary, but often include:

- Advising on the design of the acquisition program
- Developing a ranking system to prioritize acquisitions
- Developing meeting procedures

⁶ Cal. Pub. Res. Code §§ 5500 and following.

⁷ See Cal. Gov't Code §§ 56000 and following.

⁸ Dennis M. Barry, Community Development Director, Memo to Finance Committee of the Board of Supervisors, *Options for Funding the Acquisition and Protection of Open Space and Agricultural Land in Contra Costa County* (June 9, 1999).

- Seeking and receiving public input
- Recommending specific acquisitions and spending decisions
- Assisting with community education programs

The composition and structure of the committee will send a signal about the inclusiveness and nature of the program. The committee is an opportunity to reflect a community's diversity in terms of culture, geography, economic interests and political sentiments. Some committees include elected officials and public agency staff, while others are reserved for community leaders such as farmers, developers, businesspeople, community advocates, and people involved in historic, farmland, natural resource, and open space protection.

Advisory committees range in size from fewer than 10 to as many as 60 members with a variety of subcommittees. The length of terms and administrative rules that govern their activities also vary, although three-year staggered terms are common. The local agency's legislative body or chief executive typically makes committee appointments, while other processes call for written nominations or applications. Whatever the size and scope, it is important to establish a structure for a committee that complements existing governmental bodies and facilitates the acquisition plan.



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Analyzing Funding Needs And Sources



Land acquisition typically takes money. Fortunately, Local agencies have a variety of options from which to choose, depending on program goals and scope, agency authority and community preferences. However, many of these sources are the same ones available to local agencies for other programs. As a result, the agency will need to weigh raising revenues for open space acquisition against other policy goals.

Each funding tool has its own strengths and weaknesses. Factors determining the best funding option include the type of agency implementing the program, program objectives, and the degree of public support for these objectives. This section provides a brief overview of the most common financing mechanisms and highlights issues to be considered in determining their feasibility in a particular instance.

GRANTS

A growing interest in open space protection has translated into a number of state, federal, and private grant programs. Funders will often require that local agencies contribute some money of their own, so grant funding is often used in tandem with locally-derived sources of revenue (sometimes referred to as “matching funds”). For example, the federal Farm and Ranch Lands Protection Program requires state and local agencies to provide at least 50 percent of the funds needed to purchase a conservation easement.¹

IN THIS CHAPTER

- Grants
- Fees and Dedications
- Taxes
- Mello-Roos
- Benefit Assessments
- Infrastructure Financing Districts
- Bonds
- Entrepreneurship

¹ Natural Resources Conservation Service, *Farm and Ranch Lands Protection Program* (September 2004) (www.nrcs.usda.gov/programs/farmbill/2002/pdf/FRPPFct.pdf). See 16 U.S.C. § 3838i (2002).

ANALYZING FUNDING OPTIONS

Some questions to ask in the fiscal component of the open space needs assessment include the following.

- **Amounts Needed.** What is the overall funding target, initially and on an ongoing basis? The overall amounts needed for open space acquisition depend on the likely scope of the acquisition program, the likely acquisition costs associated with implementing that program and, as indicated in the preceding chapter, ongoing management costs.
- **Sufficiency.** Will the total revenue that can realistically be generated be sufficient to achieve the program's goals? To what extent has a particular funding tool already been used in the area? For example, impact fees may face obstacles if fee amounts are already perceived to be high. Some funding tools, like sales tax increases, are subject to state limits that may have already been reached by the local agency.
- **Adoption Process.** What are the adoption and implementation requirements for each type of funding tool? Revenue measures that require voter approval may be harder to implement than a mitigation fee program, which can be adopted by ordinance. What are the administrative requirements associated with each tool? For example, how much staff time would be required to secure approval for or implement a particular financing mechanism?
- **Reliability.** What is the relative stability of the revenue stream that would be generated by each funding tool? Will the revenue source be constant or fluctuate from year to year?
- **Cash Flow.** What type of cash flow is needed? Purchase programs often need a lot of money up front, making bonds an attractive option. On the other hand, operation and maintenance programs usually require revenues to be spread out over a number of years.
- **Fairness.** Who will pay the charge? Are the people paying the charge the same people who are the primary users or beneficiaries of the land being protected? Is the general public paying for improvements that only a small part of the community will use? If only a small part of the community is charged, are those people subsidizing the cost of the improvement for the larger community?
- **Duration.** Voters sometimes prefer temporary funding mechanisms to achieve a particular objective. However, if the funding need is significant, it can be more palatable to spread funding for acquisition costs over a number of years. This may also reflect the benefit of the acquisition to future users.
- **Consistency.** Do the agency's planning documents support the use of particular kinds of funding mechanisms? Fees and assessments in particular may be on stronger legal footing if there is language in the general plan that anticipates the acquisition of open space or construction of improvements and discusses—even briefly—who the land or improvements are intended to serve and why they are needed. Local agencies should look for these links early so that they can lay a proper foundation for the financing option that is ultimately chosen.
- **Regional Considerations.** How does the funding option fit with the efforts of neighboring jurisdictions? Have other agencies in the region recently attempted to get funding measures passed or are they planning measures? Would it be feasible to implement a countywide or region-wide measure?

The above questions can bear on the feasibility of using any funding mechanism.

Relying on grant funding for open space protection is most feasible when an agency has the staff resources to research, apply for, and administer grants. Application processes are competitive—sometimes extremely so—and time-consuming, with no guarantee of success. There is an art to writing successful grant proposals. For more information about securing grant funding, see Chapter 5, which also includes a list of grant programs.

FEES AND DEDICATIONS

Land dedications and development fees often provide base funding for open space acquisition programs. Typically, a dedication or fee is imposed to offset the conversion of open space to urban use. The city of Davis, for example, requires developers converting farmland to urban uses to purchase a conservation easement on farmland of equivalent quality or pay an in-lieu fee.² Riverside County imposes fees on housing and commercial development to fund habitat conservation programs.³

Here is how each funding mechanism works.

- **Mitigation Fees.** A city or county may require developers to pay a fee to mitigate the loss of open space related to development as part of the development approval process.⁴ The basis for determining the amount of the fee is generally determined by an underlying report or plan, such as an environmental impact report, habitat conservation plan, or flood control report. The funds can then be used to acquire lands identified for open space protection. (For more on how to implement a fee, see Chapter 6.)
- **Land Dedications.** A local agency may require developers to acquire or set aside open space areas. Often, such set-asides are required on a one-to-one basis (one acre preserved for each acre developed) when particularly sensitive land—such as wetlands, habitat or farmland—is being developed. Some agencies have adopted ratios as high as two—or even three-to-one. Such dedications must be reasonably related and proportional to the impact of the development.⁵

These tools are most feasible in fast-growing communities that are processing large applications for new development. Fees have the particular advantage of reducing open space costs to a simple calculation for which the developer can write a check. This ability to easily calculate the cost often makes it preferred from a developer's perspective to other programs—like land banking or transfer of development rights programs—that involve more specialized (and less predictable) negotiations with individual landowners.

Development-based programs that are imposed on a case-by-case basis must be related to and proportional to the impacts of the development.⁶ As such, they are not likely to be sufficient to fund a comprehensive open space program and will need to be used in conjunction with other funding sources.

In addition, there are limits on the number of conditions that can be imposed on new development, so a local agency will have to balance open space objectives with other public goals.

Finally, at least in the case of fees, there is lag time between the time when the fee is imposed and when sufficient revenues have been collected to begin purchasing interests in property. Given how fast land appreciates in California, this delay can dilute the fee's purchasing power. For more information about development fees, see Chapter 6.

TAXES

Raising taxes to support an open space program may be a feasible option in communities where there is broad public support for open space acquisition. Of course, expressions of popular support for open space may not always translate into the votes to pay for it.

Taxes are classified as either “general” or “special,” depending on how the funds can be spent.⁷ A general tax may be used for any public purpose—the funds are fully discretionary and may be deposited into the general

² Davis, Cal., Code § 40A.03.030. See www.city.davis.ca.us.

³ Riverside County, Cal. Ordinance 810.

⁴ Fee programs must be imposed and managed in accordance with the Mitigation Fee Act. See Cal. Gov't Code §§ 66000 and following.

⁵ See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁶ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁷ See generally Cal. Const. arts. XIII A, XIII C and XIII D.

Mitigation Banks

A mitigation land bank is natural land set aside, paid for, or restored by developers who are compensating for the adverse impacts of development—often the degradation of wetlands. This land can be adjacent to a development or in a location other than the development site. Mitigation is often the best option when development has already occurred in the area or when key natural areas are targeted for protection. This approach also offers local governments flexibility in their land use decisions and gives communities the ability to protect a single larger area rather than smaller scattered tracts of land.⁸

fund.⁹ A special tax is a tax imposed for a specific purpose—the funds must be deposited into a separate, dedicated fund. A general tax requires a majority vote of the electorate, while a special tax requires approval by a two-thirds majority.¹⁰

In deciding between a general and a special tax, a local agency will need to analyze the political climate in relation to the vote requirement. On one hand, voters tend to like the assurance that revenue from a special tax will be spent on a specific purpose, yet (perhaps paradoxically) special taxes have the higher two-thirds vote requirement. On the other hand, voters may be less inclined to adopt a general tax (which is usually attacked by opponents for not guaranteeing how the money will be spent), yet the voter approval requirement is lower.

The major types of taxes that might be used to fund an open space program include:

- **Sales Tax.** Cities and counties may increase the sales tax within their jurisdiction by up to two percent.¹¹ Such increases may be imposed as a general tax but are more

often imposed for a specific purpose—like to fund open space programs.¹² A sales tax can tap into tourism dollars that are generated by open space amenities and has the potential to raise a great deal of revenue in a short amount of time. On the other hand, tax revenues can drop when the economy slows. The sales tax is often criticized as regressive, falling disproportionately on lower-income people. Because of overall limits on the amount of local sales taxes, a key issue is whether the agency already imposes other specific-purpose sales taxes, such as for transportation.

- **Parcel Tax.** A parcel tax is either a special tax or a general tax in the form of excise tax and is generally an annual tax which is based on either a flat per-parcel rate or a rate which varies depending upon use, size or number of units on each parcel, or both. A parcel tax can be imposed on some classes of parcels but not others (such as residential), or graduated based on the size or value of improvements on the parcel.¹³ Parcel taxes require two-thirds voter approval and can be imposed for any number of purposes, including open space protection.¹⁴
- **Document Transfer Tax.** A document transfer tax is an excise tax on the transfer of interests in real estate.¹⁵ Counties may charge 55 cents per \$500 of property value. Cities may impose the tax at one half of this amount, which is credited to the payment of the county tax. This type of tax can create substantial funding for park and open space acquisition, particularly in fast-growing communities. However, winning voter approval for a document transfer tax in the face of opposition (typically realtors) has proven to be a stumbling block for some communities.
- **Real Estate Transfer Taxes.** Some charter cities have enacted a real property transfer tax that imposes a tax on the purchaser of real property based upon the value of the property. This option is not generally available to general law cities and counties.¹⁶ The real-estate transfer

⁸ See California Resources Agency, *A Catalogue of Conservation Banks in California: Innovative Tools for Natural Resource Management* (June 1996) (<http://ceres.ca.gov/topic/banking/banking.html>).

⁹ Cal. Const. art. XIII C, § 1(a).

¹⁰ Cal. Const. art. XIII C, § 2.

¹¹ Cal. Rev. & Tax. Code § 7251.1.

¹² See for example Cal. Rev. & Tax. Code § 7285.

¹³ Care must be taken in drafting a parcel tax to make sure that it is not an unconstitutional *ad valorem* property tax. See generally *Weekes v. City of Oakland*, 21 Cal. 3d 386 (1978).

¹⁴ See Cal. Const. art. XIII D, § 3.

¹⁵ See Cal. Rev. & Tax. Code §§ 11911, 11931.

¹⁶ Although Government Code section 37100.5 gives a general law city the authority to impose the same type of taxes that a charter city imposes, a general law city is subject to the restrictions of both California Constitution Article XIII A, Section 4 and Government Code section 53725, which specifically prohibit a transaction tax on the sale of real property.

tax is levied on the sale of property, increasing with the value of the property being sold. Costs are sometimes imposed on the seller, who has likely experienced an increase in the property's value over the years. Other times the burden is placed on buyers, who, it is argued, are making an investment in the future of their community. The tax can create substantial funds for park and open space acquisition, particularly in fast-growing communities, but revenues can plummet in a soft real estate market. Getting approval for the tax in the face of opposition from real estate interests is often—but not always—a challenge.

- **Other Taxes.** Local agencies typically also impose other taxes, such as a transient occupancy tax, a business license tax, and a utility user tax, among others. However, these taxes are less commonly used for the specific purpose of open space protection, probably due to the perceived lack of a link between the nature of the tax and open space protection. Nevertheless, to the extent that these general taxes are deposited into the general fund and are therefore fully discretionary, they may be used to acquire open space lands. Moreover, the revenue streams generated from such taxes may be used to underwrite bonds.

For more information about agency-sponsored ballot measures, see Chapter 7.

MELLO-ROOS

The Mello-Roos Community Facilities Act¹⁷ provides a unique opportunity to impose special taxes for specific purposes—including park, recreation, and open space facilities—within defined areas through the formation of a community facilities district (sometimes known by its acronym, CFD).¹⁸

These districts function much like a benefit assessment district (see below) but provide much more flexibility in how the tax is imposed. Once established, a community facilities district becomes a separate public entity, although the members of the local agency's governing body may serve in the same capacity for the district.



There are two ways in which community facilities districts are established, depending on whether or not there are twelve or more registered voters living within the proposed district before formation.¹⁹ When there are 12 or more registered voters, two-thirds of the registered voters within the district must approve the tax. When there are fewer than 12 registered voters, a two-thirds weighted majority vote of the landowners living within the district must approve the tax. Under the second procedure, each landowner casts one vote for each acre or partial acre owned. The landowners can waive the right to many of the procedural steps necessary to adopt the tax upon unanimous consent.

» Sonoma County voters approved a quarter-cent sales tax increase in 1990 to form and fund the Sonoma County Agricultural Preservation and Open Space District. The District receives annual revenue of approximately \$17 million from this sales tax. To date, Sonoma County has protected more than 60,000 acres, mostly through the acquisition of easements.²⁰ Other counties have the authority to similarly establish such a district funded by sales tax increase.²¹

¹⁷ See generally Cal. Gov't Code §§ 53311 and following.

¹⁸ Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition*, (revised November 1997), available at www.ceres.ca.gov/planning/open_space/financing.html.

¹⁹ Cal. Gov't Code § 53326. Formation of the district may be initiated by the local governing body by resolution and must be initiated at either the request of two members of the governing body or a specified number of landowners within the district territory.

²⁰ See Sonoma County Agricultural and Open Space District website (www.sonoma-county.org/opensp/).

²¹ See generally Cal. Pub. Res. Code §§ 5501 and following.

The availability of this second procedure makes the Mello-Roos special tax a practical option in fast-growing communities or in cases where a large-scale development has been proposed. In effect, the amount of the tax can be agreed upon by the developer and the agency and applied before the land is subdivided. However, the governing body must adopt policies and procedures that provide adequate notice to prospective purchasers of land or homes within the district.

Mello-Roos districts can cause controversy following formation due to the higher taxes paid by landowners within the district. In cases where bonds have been issued on the tax revenues, the security provided by real property (if any) can be diminished if the real estate values change significantly.²²

BENEFIT ASSESSMENTS

A benefit assessment district may be an appropriate tool when an agency can demonstrate that the assessed properties would be “specially-benefited” from the acquisition of open space. Only the portion of the cost of the improvement that is attributable to the special benefit may be raised through the assessment. For particularly

Propositions 218 Impact

Voters have limited the extent to which local agencies may use assessments, property-related fees, and taxes as revenue measures.²³ This has two implications for open space acquisition efforts:

- Assessments and property-related fees are now less suitable as tools for funding open space programs because such measures must have a direct benefit to the property being charged (beyond an increase to property values²⁴) and may not be used to fund services that benefit the public in general.²⁵
- Raising any tax for a dedicated source of revenue requires approval of two-thirds of eligible voters in an election.²⁶

Close consultation with agency counsel is necessary to make sure that any funding mechanisms meet applicable state law requirements.

USING MELLO-ROOS FUNDS TO ACQUIRE OPEN SPACE

In the context of parks and open space, community facilities districts are typically used to pay for neighborhood parks and local amenities. However, some communities have created community facilities districts with broader goals.

For example, the city of Fairfield and the Solano County jointly formed a community facilities district as part of an annexation proceeding to preserve a portion of the range and farmland included in the annexation area. Though originally adopted as litigation settlement, the program has been expanded to include most new development within the city.

New homes pay about \$100 per year (the amount escalates automatically to track with inflation). The rate for nonresidential space is approximately 12 cents per square foot annually. Units meeting state definitions of “affordable” are exempt.

The Solano County Farmlands and Open Space Foundation, a public benefit land trust, administers the funds. The foundation oversees and manages more than 6,000 acres of farmland, ranchland, wetlands, and open space.

²² Some experts counsel retention of specialists whenever creating a Mello-Roos district because the design of the special tax formula is so critical to the validity of the district and its special tax.

²³ Proposition 218 (Cal. Const. art. XIII C and Cal. Const. art. XIII D) includes detailed procedures for the imposition of all taxes (both general and special), real property benefit assessments, and property-related fees and charges. Proposition 218 does not affect laws relating to the imposition of fees or charges as a condition of property development.

²⁴ Cal. Const. art. XIII C, § 2(i).

²⁵ Cal. Const. art. XIII C, § 4.

²⁶ Cal. Const. art. XIII C, § 2(d).

large assessments areas, properties may be classified by the amount of benefit received and assessed accordingly.²⁷ The Open Space Maintenance Act authorizes local agencies to levy special assessments to improve and maintain open spaces.²⁸

Prior to Proposition 218, many local agencies created landscape and lighting districts to acquire land for open space and recreation on the basis that these amenities increased property values.²⁹ However, determining how property is specially-benefited by open space has been a challenge since the adoption of Proposition 218.³⁰ A new assessment requires the approval of two-thirds of the property owners returning mailed ballots through an assessment ballot proceeding. Voting is weighed in accordance with the amount of the assessment.³¹

Agencies implementing new assessments in pre-existing neighborhoods have to conduct a great deal of community outreach. Creating assessments in new developments is often easier, where the developer of a large tract agrees to create the assessment district before subdividing the property. Once created, the assessment applies to all new lots and homes built or created within the assessment district.

For more information about benefit assessments, see Chapter 8.

INFRASTRUCTURE FINANCING DISTRICTS

Cities and counties can create Infrastructure Financing Districts to finance the purchase of open space.³² Infrastructure Financing Districts divert property tax increment revenues for 30 years. Unlike redevelopment, the property in an Infrastructure Financing District does



not have to be blighted. However, Infrastructure Financing Districts and redevelopment agencies' project areas cannot overlap, and Infrastructure Financing Districts cannot pay for maintenance, repairs, operating costs, and services.

Forming an Infrastructure Financing District is cumbersome. The city or county must develop an infrastructure plan, send copies to every landowner, consult with other local agencies, and hold a public hearing. Every local agency that will contribute its property tax increment revenue to the Infrastructure Financing District must approve the plan. Schools cannot shift their property tax increment revenues to the Infrastructure Financing District. Once the other local officials approve, the city or county must still get the voters' approval to form the Infrastructure Financing District (requires two-thirds voter approval), issue bonds (requires two-thirds voter approval), and set the District's appropriations limit (majority voter approval).³³

²⁷ Cal. Const. art. XIII D, § 2.

²⁸ Cal. Gov't Code §§ 50575 and following.

²⁹ Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition* (Nov. 1997) (www.ceres.ca.gov/planning/open_space/financing.html). The Landscape and Lighting Act of 1972 enables local agencies to acquire land for parks, recreation, and open space. Cal. Sts. & High. Code §§ 22500 and following.

³⁰ Cal. Const. art. XIII D, § 2.

³¹ The ballots are weighted according to the dollar value of their proposed assessments (the equivalent of one vote per dollar). Thus, the vote of a landowner whose lot has an assessed value of \$50,000 counts twice that of a neighbor with a \$25,000 lot.

³² Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition* (Nov. 1997) (www.ceres.ca.gov/planning/open_space/financing.html); see Cal. Gov't Code §§ 53395 and following.

³³ *Infrastructure Financing Districts Information Sheet*, available at the California Senate Local Government Committee website (<http://www.sen.ca.gov/locgov/IFDINFORMATION.HTM>). See also 81 Cal. Op. Att'y Gen. 45 (1998), Peter M. Detwiler "Chapter One: Introduction," in *Exactions and Impact Fees in California: A comprehensive guide to policy, practice, and the law*, by William W. Abbott, et al., (Solano Press Books: Point Arena, California, 2001).

POTENTIAL OPEN SPACE FUNDING TOOLS			
	PROCESS	ADVANTAGES	DISADVANTAGES
GRANTS	<ul style="list-style-type: none"> Formal authorization may not be required. Local agencies often use a resolution. 	<ul style="list-style-type: none"> A new source of funding that does not require balancing with other policy interests. 	<ul style="list-style-type: none"> Requires significant staff time with no guarantees. Reporting requirements. Usually cannot be used for maintenance.
GENERAL FUND ALLOCATION	<ul style="list-style-type: none"> Legislative body authorizes expenditure from general revenues. 	<ul style="list-style-type: none"> Requires approval only by governing body. Does not cost taxpayers extra money. 	<ul style="list-style-type: none"> Competes with other budget priorities such as public safety. No guarantee of ongoing funding.
IMPACT FEES	<ul style="list-style-type: none"> Legislative body adopts a fee formula to be applied to new development that converts open space to housing or commercial uses. 	<ul style="list-style-type: none"> Easy to implement. Helps offset negative impact of development. Can raise substantial revenues. 	<ul style="list-style-type: none"> May increase housing costs. Agency must track how fees are spent. Funding depends on number of permit applications.
GENERAL TAXES	<ul style="list-style-type: none"> Requires a majority vote. Sometimes accompanied by an “advisory” measure.³⁴ 	<ul style="list-style-type: none"> Can provide substantial long-term funding. Requires less administration than an assessment district. Agency retains discretion over how funds are spent. 	<ul style="list-style-type: none"> Public may be skeptical of a tax increase, particularly when there is no guarantee that funds will be spent on open space protection measures.
SPECIAL TAXES	<ul style="list-style-type: none"> Requires a two-thirds majority vote. Revenues can be spent only for dedicated purposes. 	<ul style="list-style-type: none"> Provides long-term funding for operations and maintenance. Potentially less overhead than an assessment district. 	<ul style="list-style-type: none"> Obtaining a two-thirds majority vote is difficult.
BONDS	<ul style="list-style-type: none"> Sale of bonds secured by an increase in a specified tax or assessment. Some types require voter approval. 	<ul style="list-style-type: none"> Provides up-front funding. Increased tax amount sunsets when bonds are paid off. 	<ul style="list-style-type: none"> Cannot be used for operations and maintenance. Subject to market and credit rating. High administrative costs.
SPECIAL ASSESSMENT DISTRICTS	<ul style="list-style-type: none"> Requires approval of the majority of affected property owners. Votes are weighted according to the dollar value of their proposed assessments. 	<ul style="list-style-type: none"> Predictable revenue stream. Provides ongoing funding for operations and maintenance. Establishes link between financing and those who benefit. May be “fairest” method of funding. 	<ul style="list-style-type: none"> Must identify benefit to assessed properties. Subject to majority protest requirements. Requires expensive engineer’s report and accounting.
INFRASTRUCTURE FINANCING DISTRICTS	<ul style="list-style-type: none"> Requires city or county to prepare infrastructure plan, send copies to every landowner, consult with other local agencies, and hold a public hearing. 	<ul style="list-style-type: none"> Requires approval by every local agency that will contribute property tax increment revenue plus two-thirds majority voter approval. 	<ul style="list-style-type: none"> Provides dedicated revenue source for 30 years. Cumbersome formation process. No funding for maintenance, repairs, operating costs, or services.

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³⁴ See *Coleman v. County of Santa Clara*, 64 Cal. App. 4th 662 (1998). After the passage of Proposition 218, however, some attorneys believe that courts may now treat such actions as a special tax requiring a vote.

BONDS

Local agencies may finance acquisition of land through the sale of bonds. A specific revenue stream—such as a tax or assessment—must back a bond issue. The revenue stream guarantees the repayment of the bond amount over time, typically 20 to 40 years.

The primary benefit of bonds is that they provide “up front” funding so that an agency can make immediate acquisitions. Bonds also allow the agency to spread the payment over a number of years.

On the other hand, the agency must pay the cost of issuing the bonds and the accompanying interest, which makes the total expenditure higher. (For information about bonds, including different types of bonds, see Chapter 9.)

ENTREPRENEURSHIP

In addition to more traditional sources of funds, agencies may use a variety of more creative or entrepreneurial tools to raise money for open space programs. The feasibility of these tools for a particular community will depend on its own unique resources and circumstances. However, the lesson is that a little creative thought may go a long way toward helping a local agency reach its conservation goals.

Gifts and Donations

Many individuals (and sometimes corporations) are willing to contribute to park agencies and programs. Donations can be made for capital projects as well as for acquisition. This method of funding is enhanced when a nonprofit organization is in place to support the efforts of the public park agency. For example, the Silicon Valley Parks Foundation was founded to assist the Santa Clara County parks department in raising funds from public and private sources to improve the park system.

A planned giving program can increase the potential to receive bequests and endowments for parks and recreation. To encourage these kinds of transactions, the state



has authorized \$100 million in tax credits for landowners interested in donating in fee or easement qualified lands and water.³⁵ The intent is to protect and conserve open space, agricultural lands, wildlife habitat, and state and local parks. The state tax credits are available to landowners interested in donating qualified lands to state resource departments, local government entities, and qualified nonprofit organizations for conservation purposes.

Covenant on Property to Pay a Sales Transaction Fee

Placer County developed a unique fundraising method in connection with the large—and somewhat controversial—Martis Valley development. Environmental groups and developers were at odds over how (and whether) the valley should be developed. Though the loss of open space and habitat was a concern within the community, the political will was not present to prohibit development, nor were there sufficient funds for development opponents to purchase the property outright.

The groups reached an interesting solution. The developer agreed to place a covenant on the subdivided parcels that would require property owners to pay two percent of their sales price to a local open space trust anytime the property was subsequently sold. In turn, the trust would use the funds to purchase and maintain additional open space areas.

³⁵ Natural Heritage Preservation Tax Credit Act of 2000, Cal. Pub. Res. Code §§ 37000 and following.

In effect, this is a privately created “tax” that creates a long-term revenue stream for the purchase and maintenance of property. A similar agreement—requiring a conveyance fee of half of one percent of the property value—was reached in western Placer County when litigation threatened the approval of a specific plan for 8,400 homes in Roseville.

This tool is probably most appropriate when a large property is being developed and most fair when part of the underlying value of the affected properties is their proximity to the open space that is being protected.³⁶ The Martis Valley, for example, is tucked between the town of Truckee and Lake Tahoe and close to several large ski resorts. New residents were likely to be purchasing proximity to the area’s spectacular scenery as much as they were the lot or home itself. Likewise, Roseville residents will benefit from the proximity of nearby protected lands.

Naming Rights

Companies and other organizations may be interested in acquiring the naming rights for particular properties or capital improvements. Selling naming rights allows an agency to secure funding for a project and, in return, the donating organization gets to have its name associated with its contribution.

While the most visible use of this tool as been in the naming of stadiums and sports arenas, there is no reason why a park or other open space area could not be named “Smith Company Park” if a contribution from the Smith Company made the acquisition possible.

The right to name a park does not need to be limited to corporations. Individuals may also be interested in having a bequest or gift recognized by having a park or a facility named after them. This is not new to conservation. Many of the famous redwood groves in Northern California were named after the individuals who provided the funds for their protection.



Operation or User Fees

User fees for park and recreation facilities are common. Local agencies have implemented a variety of user fees, such as vehicle entry fees, camping fees, boating and lake use fees, use permit fees, filming fees, and others. A park agency might also charge fees for events and programs. If the program has value, the public will pay. A downside, however, of such a fee is its potential to exclude lower-income users.

Rents, Royalties and Concessions

Local agencies derive revenue from a variety of sources. For instance, an agency may rent, lease, or license its real and personal property, such as selling advertisements in employee newsletters or on the sides of city-owned vehicles.³⁷

Some agencies receive royalties from natural resources taken from public property by private companies. Others arrange to receive a percentage of net profits from concessionaires operating on public property. Still others have permitted soft drink vending machines in their parks and have shared in the revenues from the sales. Other possibilities include concerts, grazing leases, and radio and cell phone tower lease agreements.

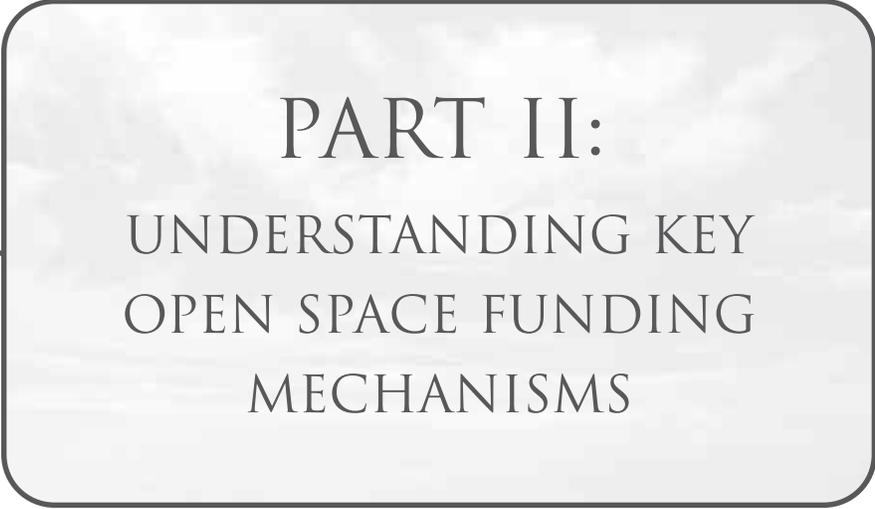
³⁶ While a good idea, such a connection is not legally required because landowners are taking on the obligation to pay the fee “voluntarily.” If they do not want to pay the fee they can walk away from the deal.

³⁷ Restrictions on advertising content are subject to First Amendment analysis. State law establishes the maximum term for many types of leases. See, for example, Cal. Gov’t Code §§ 3738 and following.

Three More Sources of Open Space Revenue

- **Mining Fees.** Placer County requires Teichert Inc. to pay a small fee on its mining operations, which the county uses to fund open space acquisition and maintenance. Revenues were used to form the Coon Creek Conservancy. In addition, Teichert paid a one-time \$200,000 fee to the county's Open Space Legacy Fund.
- **Tipping Fees.** Alameda County imposes a tipping fee for using its Altamont Landfill, which is expected to generate more than \$50 million for open space acquisition in the eastern side of the county over the life of the landfill.
- **Development Agreement Mitigation Fees.** Placer County reached an agreement with an Indian tribe on a casino project under which the tribe agreed to pay a large one-time fee plus \$200,000 each year the casino operates into the county's Open Space Legacy Fund to mitigate the loss of open space related to the project.

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PART II:
UNDERSTANDING KEY
OPEN SPACE FUNDING
MECHANISMS

Pursuing Grants for Open Space Acquisition



Grants play an increasingly important role in open space protection efforts. Funding sources include federal and state agencies, private foundations, community foundations, and even local corporations.

A key to obtaining grant funds for open space is to match the goals of a local open space project to the larger objectives of a particular funder. A winning proposal will fulfill both the agency's and the funder's objectives vis-à-vis open space protection. This is where a well-conceived needs assessment can pay off: funders want to see a project's connections to local and regional priorities, as well as wide-ranging public and environmental benefits. Grant proposals that are developed only to meet the funder's interest only satisfy one side of the funding equation.

Grants for open space protection are highly competitive. Having a staff person or a consultant who is familiar with both funding sources and writing grant applications can improve a local agency's chances of success.

Public involvement can also be critical. Many funders will look at the level of political and financial support the proposed project receives from the local community. Funders often look for proposals that have a collaborative approach with community-wide benefits that can be linked to other efforts. The process of preparing a grant proposal can be a valuable opportunity to develop strategic partnerships with other organizations, groups, and agencies. A key funder goal is maximum benefit for their investment; an emphasis on leveraging and tying together concurrent programs can be especially attractive.

IN THIS CHAPTER

Evaluation

Writing Proposals

Grant Opportunities

Leveraging Greenbacks for Greenbelts

The cities of San Luis Obispo and Santa Cruz both have greenbelt land acquisition programs funded by local and outside sources of funding. To date, the San Luis Obispo program has acquired ownership of approximately 2,500 acres, and an additional 1,800 acres in conservation easements. Santa Cruz has purchased about 950 acres to complete a 1,500-acre greenbelt.

Both programs have a planning process to identify the type of land to be acquired and have specific acquisition priorities. Santa Cruz identified specific parcels as “greenbelt” in the general plan. San Luis Obispo designated a large greenbelt area and then undertook a study that identified parcel characteristics and established acquisition priorities.

In both cases, local funds are used to staff the program and leverage outside funding. Santa Cruz has used about \$7 million in local funds (general revenue and part of a bond measure) and about \$16 million in state grant funding. San Luis Obispo has used about \$2 million in local funds (general revenue and a bond measure) to leverage an additional \$6 million in grant funding.

EVALUATION

The decision to pursue a grant should begin with an evaluation of factors like the time that would be involved, the amount at stake and the prospects for success. Successful grant applications take time to produce, and a \$10,000 grant may require the same amount of preparation time and cost as a \$500,000 grant. Before the first draft can even be started, staff (or a consultant) must research the available funding sources, determine eligibility, review the application procedures and estimate the time needed to prepare the proposal.

Agencies should also weigh the cost of administering a grant. Most grants have reporting requirements that include an accounting of how the funds were spent, an analysis of the project’s effectiveness, and summaries of “lessons learned” from the experience. Poor reporting on

a grant, often the result of staff time constraints, will jeopardize future grant opportunities from that particular funder.

In some cases, local agencies will work with nonprofit organizations, such as land trusts, to obtain grants. Often, foundations will only issue grants to organizations that qualify as nonprofit organizations under section 501(c)(3) of the United States Tax Code. A partnership with a nonprofit may also provide the additional benefit of staff experienced in writing grant applications. However, partnering with a nonprofit may only be appropriate when the local agency is willing to share ownership or management of the areas to be protected. (See Chapter 12, page 107).

WRITING PROPOSALS¹

Developing a strong grant proposal starts with research. Funders often showcase past grantees on their websites, which is a great way to learn about the type of programs and projects that capture their interest. Reading successful grant proposals will help in developing a familiarity with the language of grants and the components of a winning application. In addition, research into the requirements for a particular grant application is critical. Understand what the funder requires and then include only those materials in your application. Including additional materials may actually diminish your chances of success.

When writing a grant proposal, be clear, concise, and creative. Avoid long sentences, jargon, and superfluous information that may lose the reader. Be concrete in the presentation of need, goals, and the strategy to be used to achieve the project’s objectives. Think broadly when presenting the importance of both the direct and indirect impacts of your project. Let the proposal communicate the enthusiasm of your agency and your partners in the project. Passion is contagious and ultimately you want the potential funder to share your enthusiasm for the project.

Most grant proposals have similar components, which are described below:

- **Project Summary.** Most decisions to fund a project (or not) are based on the summary. Explain the need for the grant in two or three paragraphs. The language should draw a compelling connection between the goals

¹ This section draws heavily from work done by Tobin Scipione, a Falmouth, Massachusetts-based consultant who provides assistance in strategic planning and organizational development to nonprofit and advocacy organizations.

of the conservation effort and the funder's overall objectives. It should also include the basic parameters of the project in terms of implementation, budget, and expected results. Sometimes, it is easier to draft the summary after the other proposal components are completed.



- **Introduction of the Applicant Agency.** This is the opportunity to present your agency as a credible applicant within the context of the proposed project. Most proposals will require a description of the agency's current open space or parks programs as well as the service areas and population that will be served by the proposal. This is also a place to highlight relevant past successes. Include brief biographies of key board, commission, and staff members. If you are writing a partnership grant, identify the lead agency and include supporting information about other agencies.
- **Need Statement.** The need statement—also called a project narrative—is the place to describe why the project is necessary. Usually the need derives from “gaps” in the planning, service, or funding framework. Depending on the funder, the need might focus on local recreational opportunities, preservation of unique landmarks, protection of endangered species, flood control, environmental justice, storm drainage, water quality, or general environmental issues. Local data should be used to demonstrate these gaps and underscore the need for the project. Then, the need statement should identify how the agency is uniquely positioned to solve the problem and how funding will further this purpose.
- **Project Objectives.** An outline of project objectives as a bulleted list delineates the goals of the proposal. Project objectives are all of the specific activities of the proposed project. Typical objectives might include community outreach efforts, planning efforts, acquisition of specific parcels, the total land or conservation easements sought, or an improved maintenance plan. Project objectives will form the basis of the evaluation process if project is funded, so make sure they are realistic.
- **Methods and Schedule.** The methods and schedule section should designate how each of the project objectives will be implemented. It should describe the actions that will be taken to achieve goals and assign responsibility for each step.
- **Outcomes.** The measurable outcome for most open space acquisition programs will be the purchase of a specific property or the overall conservation of a certain number of acres. However, the funder may also be interested in the manner in which the agency has involved or will involve the community or the extent to which other environmental or social goals will be achieved. For example, an open space area that will serve as an education center for area schools may attract different funding sources or make a proposal more attractive.
- **Monitoring and Evaluation.** After implementing a project funded by a grant, the grant recipient is usually responsible for evaluating how well the project met its objectives. To prepare for this step, the grant proposal should discuss simple, credible procedures for determining whether intended outcomes were achieved. Criteria might include the number of acres preserved, miles of trails or bike paths created, frequency of recreational use, increased water quality measurements, greater public safety, or type of habitat protected. Ongoing monitoring and evaluation throughout project implementation enables adjustments and changes to be made if the project is not meeting its objectives.
- **Budget.** The budget should specify how the goals of the proposal will be achieved. Line items should be consistent with the need statement and the project objectives. In this section, more detail is better than less. Include specific bid estimates and appraisals whenever possible.

In addition, funders often prefer projects with multiple sources of support. Thus, to the extent that such support exists—even in small amounts—include a line item for sources of funding under revenues. Don't shortchange the contribution your community is making to your project; include in-kind contributions such as volunteer time, donated space, and borrowed equipment. Finally, do not "pad" the budget. Competent reviewers will know the cost of goods, services, and prevailing wages.

- **Attachments.** Some grant forms allow the applicant to attach supporting documentation. Others do not want this type of information. If such information is requested from the grantor, include attachments that underscore the broad community support for the project. A unanimous resolution of support from the governing body is a good start (and is required for certain types of grants). Additional letters of support from key stakeholders may also be useful. Be strategic in selecting attachments. Most grantors do not like to receive thick application forms.

When preparing the proposal, do not hesitate to call the contact person listed at the funding agency or organization with questions. Clarifying a question prior to submission is critical and most funders will be happy to answer.

Before submitting the proposal, have people review it who have not been involved in the proposal development process. Look for an unbiased third party who will provide critical feedback that will strengthen the proposal. If you are partnering or cooperating with other agencies or groups, allow time to circulate the proposal for feedback. Having an inclusive proposal preparation process enables partners to stay invested and contribute to crafting the project's scope.

Once the proposal has been submitted to the funder, follow up to confirm its receipt. Many funders now have online application processes that will automatically provide confirmation that the proposal was received. If you are emailing or faxing a proposal, always send a hard copy by registered mail.

GRANT OPPORTUNITIES

For general information on grant opportunities check out these resources:

- "Grants.gov" (www.grants.gov) is a website managed by the U.S. Department of Health and Human Services that allows organizations to electronically find and apply for competitive grant opportunities from all federal grant-making agencies.
- The Foundation Center sponsors a searchable database of foundations (<http://fconline.fdncenter.org>) (requires a monthly subscription).
- *The Foundation Directory* is a complete directory of national, state, and local private foundations that can be found in the reference section of most local libraries.
- State government home pages often provide links to information on state grant opportunities.
- A community foundation or local corporation may be willing to entertain a grant proposal, especially if the city or county is partnering with a local community organization. In addition, the local office of a state agency can provide helpful advice when submitting a grant to that agency.

The funder of this publication, the Resources Legacy Fund, is also be a valuable resource. See www.resourceslegacyfund.org for more information.

In terms of specific grants relating to open space preservation, the following is a list of government grant programs for which local agencies may be eligible. The programs are categorized by the agency that administers the funds rather than the agency that provides the funds (most federal grant programs are administered in California by a state agency).

For a more comprehensive and current list of funding programs that may be applicable to a local open space program, see the *Directory of Grant Funding Sources for California Park and Recreation Providers*, published by the California Department of Parks and Recreation and available at www.parks.ca.gov.

PROGRAMS ADMINISTERED BY STATE AGENCIES

AGENCY	Department of Conservation
PROGRAM/PURPOSE	<i>Farmland Conservancy Program.</i> Conservation easements on farmland. Up to ten percent of funds are available for policy or planning grants.
ELIGIBLE APPLICANTS	Cities, counties, and special districts that have farmland protection among their stated purposes
FOR MORE INFORMATION	www.consrv.ca.gov/dlrp
AGENCY	Department of Parks and Recreation
PROGRAM/PURPOSE	<i>Habitat Conservation Fund.</i> Acquisition of wildlife habitat and corridors; enhancement and restoration of wetland, riparian, and aquatic habitat; acquisition and construction of trails that educate urban residents about local wildlife.
ELIGIBLE APPLICANTS	Cities, counties, and certain special districts
FOR MORE INFORMATION	www.parks.ca.gov
AGENCY	Department of Parks and Recreation
PROGRAM/PURPOSE	<i>Land and Water Conservation Fund.</i> Acquisition of parkland; building certain recreational facilities.
ELIGIBLE APPLICANTS	State agencies, cities, counties, and local park and recreation districts
FOR MORE INFORMATION	www.parks.ca.gov
AGENCY	Department of Parks and Recreation
PROGRAM/PURPOSE	<i>Recreational Trails Program.</i> Recreational trails and trails-related projects.
ELIGIBLE APPLICANTS	Cities, counties, special districts, and nonprofit organizations that manage public lands
FOR MORE INFORMATION	www.parks.ca.gov
AGENCY	Resources Agency
PROGRAM/PURPOSE	<i>Environmental Enhancement and Mitigation (EEM) Program.</i> Mitigation of impacts of modified or new public transportation facilities, including land acquisition.
ELIGIBLE APPLICANTS	State, local, and federal agencies and nonprofit organizations
FOR MORE INFORMATION	http://resources.ca.gov/eem
AGENCY	Wildlife Conservation Board
PROGRAM/PURPOSE	<i>California Riparian Habitat Restoration Program.</i> Restoration and enhancement of riparian areas.
ELIGIBLE APPLICANTS	State, local, and federal agencies and nonprofit organizations
FOR MORE INFORMATION	www.wcb.ca.gov
AGENCY	Wildlife Conservation Board
PROGRAM/PURPOSE	<i>Habitat Enhancement and Restoration Program.</i> Restoration and enhancement of a variety of habitat types.
ELIGIBLE APPLICANTS	State, local, and federal agencies and nonprofit conservation organizations
FOR MORE INFORMATION	www.wcb.ca.gov

AGENCY	Wildlife Conservation Board
PROGRAM/PURPOSE	<i>Inland Wetlands Conservation Program.</i> Protection, restoration, or enhancement of wetlands in the Central Valley.
ELIGIBLE APPLICANTS	State and local agencies and nonprofit organizations
FOR MORE INFORMATION	www.wcb.ca.gov
AGENCY	Wildlife Conservation Board
PROGRAM/PURPOSE	<i>Oak Woodlands Conservation Program.</i> Restoration and preservation of oak woodlands; purchase of conservation easements.
ELIGIBLE APPLICANTS	State and local agencies, districts, nonprofit organizations, and private landowners
FOR MORE INFORMATION	www.wcb.ca.gov
AGENCY	Wildlife Conservation Board
PROGRAM/PURPOSE	<i>Rangeland, Grazing Land, and Grassland Protection Program.</i> Conservation easements to protect rangeland, grazing land, and grassland.
ELIGIBLE APPLICANTS	Partnership of willing landowner with local agency, district, nonprofit organization, or state agency
FOR MORE INFORMATION	www.wcb.ca.gov

PROGRAMS ADMINISTERED BY FEDERAL AGENCIES

AGENCY	National Park Service
PROGRAM/PURPOSE	<i>Rivers, Trails, and Conservation Assistance Program.</i> Preservation of open space and development of trails and greenways.
ELIGIBLE APPLICANTS	Local and regional agencies and nonprofit organizations
FOR MORE INFORMATION	www.nps.gov/rtca
AGENCY	Natural Resources Conservation Service
PROGRAM/PURPOSE	<i>Various Programs.</i> Conservation and management of agricultural lands and other working landscapes.
ELIGIBLE APPLICANTS	State, local, and tribal governments and nonprofit organizations (not all entities are eligible for all grants)
FOR MORE INFORMATION	www.ca.nrcs.usda.gov

Imposing Development Fees



IN THIS CHAPTER

Departmental
Consultation

Avoid the Rush

Nexus Study

Capital Improvements

Staff Report

Setting the Fee

Accountability

Updates

Development impact fees help many local agencies balance development with open space preservation.¹ A well-planned fee program will protect open space and promote the objectives of the agency's general plan.

Establishing a fee program can be costly and labor-intensive. The goal of much of this process is developing the documentation necessary both to meet the agency's policy goals and comply with the various laws relating to fees. An agency that charges an excessive fee risks litigation. An agency that sets its fee too low risks falling short of its goals.

DEPARTMENTAL CONSULTATION

A good starting point when considering a development impact fee is to have an interdepartmental meeting among agency staff to discuss all issues relating to the proposed fee. The benefits of early consultation include efficiency and realistic planning. Valuable resources can be wasted when plans are developed before cross-checking for internal inconsistencies. Early planning also maximizes the opportunity for creativity. At a minimum, the meeting should include representatives from the finance, community development, and public works departments, as well as the agency's attorney.

¹ This chapter draws heavily from "A Short Overview of Development Impact Fees," a paper presented by Peter Brown, City Attorney, Carpinteria, at the 2003 City Attorneys Continuing Education Seminar (February 27, 2003). Peter is with the Hatch and Parent law firm in Santa Barbara. A copy of this paper is available in the resources area at www.ilsg.org/openspace.

A key issue is identifying the agency's authority to impose the fee: typically the police power² or by statutory authority, such as the Subdivision Map Act.³ Note that, while an analysis under the California Environmental Quality Act may identify the loss of open space as a significant adverse environmental impact and require a project to mitigate that impact, the Act itself does not provide legal authority for a public agency to impose a fee.⁴

The legal standard for imposing a fee on a single development to mitigate the impact of that development on the loss of open space is more stringent than the standard for imposing a fee on development generally.⁵ Therefore, it is advisable to establish a general fee program for open space mitigation rather than approaching mitigation on a development-by-development basis. Any fee program must be imposed and managed in accordance with California's Mitigation Fee Act.⁶

Another topic to discuss in this initial meeting is whether the agency should bring on a consultant or financial firm to help establish the legal basis for the fee. This can be a good idea when the fee would cover large areas or when the process of establishing the fee is likely to be time-consuming. The cost of the consultant can usually be incorporated into the fee as an administrative cost.

AVOID THE RUSH

Initial discussion of the proposed fee may spark a "rush to the planning counter" to secure project approval before the new fee is in place. To avoid this, the agency should consider passing a resolution that

- Describes the purpose of the proposed fee
- Refers to the public process that will occur prior to adoption/imposition of the fee
- Identifies the type of development that will/may pay the fee



- Instructs the planning director to include payment of the fee as a condition of approval on projects⁷

The resolution ensures that the fee will apply to any rights that vest while the fee is being considered.

An agency may also provide an interim fee schedule that will enable developers to estimate the fee amount when determining whether a particular project will pencil out. Of course, the agency cannot predict the fee amounts before conducting a thorough study. In the interim the agency may place a cap on fees for all pending applications filed during the study period.⁸ This can help immunize the agency from a due process challenge if it tries to impose the fee on projects pending during the development of the fee. The agency should set the cap high enough to avoid shorting itself when the fee is actually implemented.

NEXUS STUDY

Local agencies often use a nexus study to document that a development impact fee is both "rationally related" and "proportional" to the impact of the development on which it is being imposed.⁹ While it may seem easy to draw a

² Cal. Const. art. XI, § 7.

³ Cal. Gov't Code §§ 66410 and following.

⁴ Cal. Pub. Res. Code § 21004.

⁵ See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁶ See Cal. Gov't Code §§ 66000 and following.

⁷ See *Kaufman & Broad Central Valley, Inc. v. City of Modesto*, 25 Cal. App. 4th 1577 (1994); Cal. Gov't Code § 66474.2.

⁸ *Id.*

⁹ See Cal. Gov't Code §§ 66000 and following. See also *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996); *Surfside Colony Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260 (1991); *Rohn v. City of Visalia*, 214 Cal. App. 3d 1463 (1989).

» In 1995, the city of Davis adopted a mitigation fee for development on agricultural land. The city raised enough revenue to purchase conservation easements on 1,300 acres of land in the first five years of the program. In 2000, the program was supplemented by a parcel tax, which is used to purchase and manage easements, especially easements held and managed by the city. (Most of the conservation easements are held and managed by the Yolo Land Trust, with the city as co-holder.)

The parcel tax has been the primary source of funds for land acquisition since 2000. Few mitigation fees have been collected since then because city policy prohibits development on agricultural land. All easements purchased have been outside the city's urban growth boundary. The city has also purchased land to provide public access and conduct restoration activities—the city's programs coordinate the protection of agricultural and habitat lands.

In addition, Davis has an agreement with the city of Woodland, Yolo County, and the city of Dixon in Solano County to establish greenbelts by purchasing land or easements within the greenbelt areas as willing sellers come forward.

connection between new development and lost open space, the basis for imposing a fee to mitigate for the loss of open space must be more than a series of assertions.

A nexus study documents the underlying basis for the fee and how it will be used to minimize the impacts of lost open space resources on the community or region. A nexus study should address the following issues:

- **Purpose of the Fee.** Describe the purpose served by the fee.¹⁰ Usually a description of the types of open spaces to be protected and their economic and environmental value to the community will establish the legitimate purpose of the fee. When open space areas serve more than one purpose, such as flood protection, habitat, and

recreation, all purposes should be noted. However, the study should clearly state which purpose will be funded by the fee. Clearly identifying the specific purpose of the fee enables the agency to go to the next step of the analysis, which is analyzing the relationship between that purpose and the proportional impact of the private development on the need underlying the purpose.

- **How the Fee Will Be Used.** Describe how the fee will be used.¹¹ Although a reference to the capital facilities plan, applicable general or specific plan provisions, or relevant open space acquisition plan that is consistent with the described purpose of the fee is sufficient, as much detail as is available about the planned use of the fee should be included in the study.
- **Reasonable Relationship to Development.** Describe how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.¹² The connection should be easy to draw in the case of a fee imposed to conserve land for community-wide quality of life purposes. More care should be taken, however, if the impact fee is imposed for more specific reasons, such as flood control or proximity to park space. It may be more difficult to draw a connection if development is geographically separated from the land to be protected. If the connection cannot be drawn, the fee should not be imposed.
- **Impact Relationship.** Describe how there is a reasonable relationship between the need for open space and the type of development project on which the fee is imposed.¹³ Establishing a relationship between new development and loss of open space is usually straightforward, particularly in fast-growing communities.¹⁴ Land that is used for new "greenfield" development usually serves the community by providing habitat, flood control, or economic benefit through farming or other activities. A good study will quantify the impact of the loss of these open spaces. These impacts can be quantified on a cumulative basis by the use of mapping and open space inventories and comparing them against projected growth scenarios. Whenever possible, use local data rather than statewide data to justify the

¹⁰ Cal. Gov't Code § 66001(a)(1).

¹¹ Cal. Gov't Code § 66001(a)(2).

¹² Cal. Gov't Code § 66001(a)(3).

¹³ Cal. Gov't Code § 66001(a)(4).

¹⁴ *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 641 n.6 (1971).



fee; use reasonable estimates where hard data is unavailable or prohibitively expensive.

- **Proportionality.** Describe how there is a reasonable relationship between the amount of the fee and the impact of the development.¹⁵ The fee schedule should ensure that each development project pays its proportionate costs. For example, if an acreage standard is used, then the fee is usually calculated for residential land use categories based on number of housing units per acre.

While some of these issue areas may overlap or seem redundant, most nexus studies should address each in turn in order to specifically address the requirements of the Mitigation Fee Act. The nexus study must be well documented and carefully explain its assumptions and conclusions. The contents of the nexus study must provide evidence upon which the required findings are based.¹⁶ A nexus study that documents this evidence will serve as the underlying legal and economic basis for imposing the fee. In addition, a study will provide a way for the public agency to explain the details of the fee in a way that both developers and the general public can understand and comment on.

CAPITAL IMPROVEMENTS

The purpose for which a development impact fee is imposed will affect the extent to which the fee may be used for capital improvements on a property. Fees imposed to offset the loss of open space cannot typically be used for improvements because there is not a logical connection—or nexus—between the fee’s purpose (protecting open space from development) and capital improvement expenses (using open space for recreational purposes).

However, fees that are imposed as part of a capital improvement plan may be used for capital improvements—such as parking, trails, and other facilities. A cap-

Expressing the Impact Relationship Quantitatively

When imposing a development impact fee, establish a quantifiable standard such as “acres of open space to be preserved per acre of development,” or “acres of open space to be preserved per capita.” Use previously adopted general plan policies to establish the standard, if possible. How the standard is defined drives how the fee will be imposed. If the need for open space is driven by the loss of land, then a per-acre standard makes sense: all development pays the same amount per acre developed. If the need is driven by an increase in population, then a per capita standard may be more appropriate: all development pays a fee based on its service population.

If the fee is based on population or employment increases, quantify the impact of new residents or workers. Use surveys to document who is using open space, or use surveys from other communities as a surrogate. More complicated formulas that weight impact based on acres developed and service population accommodated could also be developed for an open space standard.

¹⁵ Cal. Gov’t Code § 66001(b).

¹⁶ Cal. Gov’t Code §§ 66000 and following.

A NOTE ON ENVIRONMENTAL IMPACT REPORTS AND NEXUS STUDIES

There may be a risk in relying solely on an analysis under the California Environmental Quality Act to justify a mitigation fee. Typically an environmental analysis will identify the cumulative loss of open space as a significant environmental effect of a particular project.¹⁷

At least one court (in an unpublished opinion) invalidated a one-to-one mitigation requirement for loss of farmland on the grounds that the preservation of a different acre of farmland could not mitigate against the loss of the specific acre to be developed under the proposed project.¹⁸ In the court's mind, there was not a sufficient connection between the two.

It is unclear the extent to which future courts would follow this analysis. One approach is to include comprehensive open space protection goals in the general plan that include mitigating for the loss of open space. That way, open space mitigation measures will receive more deference by courts as a general requirement instead of a measure designed to mitigate a particular project.

If protection of open space lands is imposed as a mitigation measure, local agencies should draw the con-

nection between how the particular project or plan is likely to spur future growth and the need for the mitigation.

The Southern Livermore Valley specific plan balances new housing with enhancing the area's wine industry. It was not long ago that cattle outnumbered people in the bucolic valley, but spillover from nearby Silicon Valley was threatening local landscapes.

Now the South Livermore Valley specific plan (adopted by initiative) and development agreement requires development within designated areas to preserve land outside of the urban growth boundary at a ratio of one acre of non-urban land for every acre of developed land plus one acre of non-urban land for each proposed dwelling unit.

The current mitigation fee per unit is running about \$30,000 plus an additional \$10,000 for park protection fees for a total per-unit fee of \$40,000. Non-residential uses also pay a fee. Home prices start at \$750,000 in the area. Fees are paid when building permits are issued and forwarded to the South Livermore Valley Land Trust for acquisition and management of a proposed 10,000-acre agricultural reserve.

ital improvement plan designates the approximate location, size, availability, and cost of all facilities to be financed by fees.¹⁹ The plan also sets a "level of service" standard for each type of facility. For open space and parkland, the level of service standard is typically expressed as a ratio of acres of parkland and associated facilities needed to serve 1,000 people.

A capital improvement plan (often abbreviated as "CIP") can provide a greater level of funding for facilities because the imposed fee can be used both to acquire open space

and build improvements. Funding through this mechanism may also be a possibility for the land and facilities necessary for storm drainage, flood control, and water quality control. However, a capital improvement plan is less effective in situations where the agency is seeking to use its police power to protect broad swaths of land from development for purely environmental reasons.

A capital improvement plan fee is usually based on projections of future growth over a 10- to 15-year time

¹⁷ See Gary Jacobs and Timothy Taylor, *Farmland Conversions: Defining and Mitigating Impacts*, Environmental Monitor (Association of Environmental Professionals, Spring 2004).

¹⁸ See *Friends of the Kangaroo Rat v. California Dept. of Corrections*, 111 Cal. App. 4th 1400 (2003) (depublished, 2004 Daily Journal D.A.R. 2171) (invalidating farmland conversion mitigation requirement for new prison on grounds that prison was unlikely to spur new growth and mitigation requirement did nothing to mitigate the conversion of farmland at the prison site). However, another court drew an opposite conclusion in a different unpublished decision. See *South County Citizens for Responsible Growth et al. v. City of Elk Grove*, No. C042302, 2004 WL 219789 (Cal. App. 3 Dist. Feb. 5, 2004) (holding that mitigation requirement was valid because mall project was likely to induce future growth). Both of these cases are unpublished and may not be cited as precedent. They are provided here for background purposes only.

¹⁹ Cal. Gov't Code § 66002(a). The capital improvement plan is based upon the agency's current service level and its projected growth. Information concerning when, where, and how growth may occur within the city may be drawn from local resources, such as the general plan, or population projections furnished by the local council of governments. The more information the agency can collect about future growth, the more comprehensive and accurate the capital improvement plan will be.

frame.²⁰ When establishing the fee, the local agency should determine if the intended future service level exceeds the present service level. If so, it should develop a plan to bring existing neighborhoods up to the new higher level of service without reliance on the fee. New development cannot be required to pay for existing deficiencies, and the amount of the fee must bear a reasonable relationship to the actual cost of providing the public services needed to serve the development on which the fee is imposed.²¹

For example, assume an agency is increasing its standard from 1 mile of constructed hiking trails per 1,000 resi-

dents to 2 miles per 1,000 residents. The agency could impose a fee on new development equivalent to what is necessary for the 2 mile standard. However, it should develop a plan to pay for the cost of expanding trails to serve the existing population.

Open space tends to be a regional resource, increasing the probability that the cost of capital improvements will need to be spread over existing and new development. Thus, outside of a circumstance where a facility serves only new development, revenue generated through a capital improvement plan will only partially cover the cost of

PRACTICE TIPS FOR FEE PROGRAMS

- **Define Time Horizons.** Use a time frame during which it is reasonably certain that the improvements will be built or projected development will occur. A typical time horizon is 15 to 25 years for long-range programs, though some habitat mitigation and open space programs have time horizons as long as 50 years. The longer the time horizon, the greater the risk that the nexus may be weak. In addition, fees collected in the present will likely be a fraction of the real cost of developing improvements in the future. Local agencies should double check to assure that they have articulated an adequate nexus and proportionality between current development and an acquisition that will occur 20, 30, or even 50 years in the future.
- **Incidental Benefit Okay.** While development impact fees cannot be used to fix existing problems, a fee is not invalid just because existing residents receive an incidental benefit from the new public improvements created through development impact fees.²²
- **No Fees for Operation and Maintenance.** Generally, development impact fees cannot be assessed for operation and maintenance of capital facilities.²³
- **Distinguish Current and Future Open Space Needs.** To help ensure that new development is not required to mitigate existing open space deficiencies, it is useful to establish a baseline, either in the fee study or elsewhere. This baseline should then be considered in deciding how to allocate the cost of open space between existing and future development.

The city of Brentwood adopted an agricultural land conservation fee in 2001. The fee was originally set at \$5,000 per acre but has been adjusted to \$5,105 (it is adjusted annually). The fee applies to all public and private development projects that convert productive agricultural land (Class I-IV) to urban uses. The fee is collected to purchase agricultural land or conservation easements. Up to 20 percent of the fee may be used for administration of the newly created Brentwood Agricultural Land Trust, which will help implement the city's Agricultural Enterprise Program (to market local agricultural products) and recommend purchases to the city council. A copy of the ordinance that authorized the program and resolution that authorized the fee is available in the resource area at www.ilsg.org/openspace.

²⁰ The 10- to 15-year time period is frequently used and easier to defend. Court decisions, however, have upheld the use of a 20-year plan horizon. See *Garrick Development Company v. Hayward Unified School District*, 3 Cal. App. 4th 320 (1992).

²¹ See *Bixel Associates v. City of Los Angeles*, 216 Cal. App. 3d 1208 (1989) (invalidating a fire hydrant fee that funded the cost of new fire hydrants and the cost of upgrading existing, antiquated facilities).

²² *Shapell Industries v. Governing Board*, 1 Cal. App. 4th 218 (1991) (upholding a fee that required new development to pay for new science laboratories, libraries, gymnasiums and administrative buildings to support additional classrooms, even though these new facilities incidentally benefited existing residents who happened to live in the same school district as the new development).

²³ See Cal. Gov't Code §§ 65913.8 (general prohibition; exceptions for a) improvements designed to serve the specific development on which the fee is imposed under limited circumstances or b) improvements in water, sewer maintenance, drainage or sewer districts under limited circumstances); 66477(a)(3) (Quimby Act authorizing fees for parks and recreational purposes only for new facilities or to rehabilitate existing ones).

open space facilities. Once the total cost has been determined, the local agency should apportion the costs between existing and new residents (and potentially businesses).

STAFF REPORT

Typically agency staff will prepare a report for decision-makers and the public transmitting the nexus study and framing the agency's consideration of the proposed fees. As such, the staff report is an opportunity to explain the need for land conservation in a broader context than what is usually included in the nexus study.

For example, new fees are often criticized as singling out developers to bear burdens that should be imposed on the public at large. The staff report should anticipate this concern by documenting the full range of existing and planned public resources devoted to the program to be financed by the fee. For example, the report might explain that the development impact fee will provide only 10, 20, or 30 percent of the funds for the open space program, with the remainder coming from other public agency programs, grants, and other funding sources.

The staff report can also detail the public input and other positive factors that influenced the design of the fee. The staff report will be included in the administrative record and can be used in any later legal challenge. At least one court noted that a city had used a community outreach process that included members of the development community in a challenge to an affordable housing dedication and in lieu fee; the court upheld the city's program.²⁴

The staff report should refer to applicable standards in the open space element of the general plan and explain how the fee will help the agency meet these standards. Finally, the staff report should demonstrate how the impact fee bears a reasonable relationship to the projected impacts of new development and is necessary to mitigate these impacts. It is also a place where staff can explain why other alternatives were less desirable or infeasible.



SETTING THE FEE

A common standard for setting a development impact fee is to use a one-to-one mitigation rate. That is, the fee is set at a rate equal to the amount necessary to protect one acre of open space for each acre developed. Some agencies, however, have adopted rates as high as three-to-one.

Regardless of the proportional rate, the agency will still need to set a dollar amount of the fee. This dollar amount will be drawn from the findings of the nexus study, environmental impact reports, or general plan policies. For example, if the goal is to achieve one-to-one mitigation and the average price of an acre of open space land is \$7,000 (including administrative costs), the fee would be set at \$7,000 per acre. A per-unit fee can be calculated by dividing the likely density per acre into the per-acre price (at 10 units per acre, the fee would be \$700 per unit).

Sometimes agencies impose more moderate fees, but the effect is that it takes longer to raise the funds necessary to make acquisitions. Because of appreciating land values, by the time the fees are actually raised, the value of the fees can be diminished.

However, if the local agency believes that the fee will be challenged, it may be worth considering a fee that is less than the actual cost of acquiring open space—particularly if there is a good chance of leveraging the funding received through the fee by applying for grants from other sources. Taking this conservative approach in adopting a

²⁴ *Home Builders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001). The fee at issue was not subject to the Mitigation Fee Act, but the court analyzed the inclusionary housing requirement under a similar standard. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

» The city of Murrieta imposes a development impact fee for “open space acquisition” of \$343.90 per single-family unit and \$67.67 per multi-family unit. Nonresidential rates are 4.9 cents per square foot for office, 9.8 cents per square foot for commercial, and 6.2 cents per square foot for industrial use.

fee of less than 100 percent of the amount the agency could have charged also demonstrates good faith. If the fee is challenged in court, it will be easier for the agency to establish the fairness of the fee.²⁵

Finally, if an impact fee is set so that it exceeds the amount justified by the nexus study and other documents, then the fee is a special tax and subject to two-

MORE ISSUES IN DESIGNING AND IMPLEMENTING IMPACT FEES

- **Implement by Ordinance.** Fees that are imposed by legislative action receive greater deference from courts than those imposed on a case-by-case basis.²⁶ Courts believe there is a greater chance that a local agency will unfairly leverage its approval authority when dedications and fees are imposed in an *ad hoc* fashion. Project-specific fees must be supported by individualized findings demonstrating a direct relationship between the impact of the project and the fee collected and that the amount of the fee is roughly proportional to the impact.
- **Determine Type of Development to Be Charged.** Determine the type of development—such as infill, residential, or commercial—to which the fee will apply. Assuming the impacts are the same, the loss of revenue associated from exempting one type of development—such as mixed use—cannot be made up by increasing the fee on other types of development. The fee has to remain proportional.
- **Determine Size of Projects to Be Charged.** Will the fee be applied to every development project or only developments of a certain size? Decide what level and types of development will be subject to the fee. Some agencies apply fees to very small projects; others set higher thresholds.
- **Adopt Fees for Sub-Areas.** The impact of development may be different in specific geographic areas. In these cases, fee levels can be set by area. Too many areas, however, can make administering the fee program difficult.
- **Use a Simple Formula.** Avoid designing complex fees. Most fees are collected at the permit or planning counter. The fee should be based on a formula that can be easily calculated and that minimizes the ability of the local agency to exercise discretion.²⁷ Developers should be able to estimate the amount of the fee before they submit their project application.
- **Variance or Adjustment Provision.** A variance provides the agency with a degree of flexibility for unforeseen circumstances when the application of the fee as calculated may yield an unjust result. There are also a number of legal reasons for the inclusion of this procedure.²⁸ For example, someone who challenges the fee must first seek a variance before taking the issue to court, thereby affording the agency the opportunity to avoid an unjust result. For the fee to serve its purpose, however, variances should be granted only in the interest of justice and fairness.

²⁵ *Russ Building Partnership v. City and County of San Francisco*, 199 Cal. App. 3d 1496 (1987).

²⁶ A project-specific fee that is imposed on an *ad hoc* basis is subject to heightened scrutiny. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996); *Garrick Development Co. v. Hayward Unified School District*, 3 Cal. App. 4th 320 (1992). In most cases, additional analysis should not be necessary for each development upon which the fee is imposed. See *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

²⁷ *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).

²⁸ *Home Builders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001).



thirds voter approval.²⁹ Both the political and legal implications of having a development impact fee declared to be a special tax can be grim.

The best defense against such an outcome is careful construction of the development impact fee program and scrupulous attention to the substantive and procedural requirements of the Mitigation Fee Act. The agency's counsel must play an active role in this process.

ACCOUNTABILITY

Unless certain urgency findings are made, a 60-day waiting period applies before a new or increased fee can go into effect.³⁰ Impact fees that are imposed under the general plan and applicable through the Subdivision Map Act may be collected before approval of the final map.³¹

However, fees that are imposed under a capital improvement plan typically cannot be collected until the issuance of a building permit or certificate of occupancy,³² though these fees may be collected slightly earlier under specified conditions.

Fees can be received earlier if the local agency determines that:

1. The fee will be collected for public improvements or facilities for which an account has been established and funds appropriated and for which the local agency has adopted a proposed construction schedule or plan prior to final inspection or issuance of the certificate of occupancy, or
2. The fees are to reimburse the local agency for expenditures previously made.³³

Once the local agency begins collecting fees it must account for them accurately on an annual basis or risk having to return the fees.³⁴ Fees collected for open space acquisition must be deposited into a separate account.³⁵

In addition, to the extent that it has not yet expended all the funds, the agency must make findings every fifth year that the funds will still be used for the purpose of open space acquisition. If the agency fails to make the findings, it must refund any un-disbursed monies to the owner of record of the project sites originally contributing funds.³⁶

UPDATES

Local agencies should adjust fees on a regular basis to keep pace with rising costs. To the extent practicable, the agencies should make the update process as automatic as possible to ensure it is done consistently and keeps pace with inflation. Assuming that the program includes an acquisition element, an agency may want monitor changing conditions in the real estate market and adjust any inflation factors accordingly on a periodic basis.

²⁹ Cal. Const. art. XIII A, § 4.

³⁰ Cal. Gov't Code § 66017.

³¹ Cal. Gov't Code § 66484.

³² Cal. Gov't Code § 66007(a).

³³ Cal. Gov't Code § 66007(b).

³⁴ Cal. Gov't Code §§ 66006; 66001(d).

³⁵ See Cal. Gov't Code § 66006(a).

³⁶ See Cal. Gov't Code § 66001(d).

Some local agencies use a “land index” to quantify the difference between two appraisals done a year apart on the type of land planned for acquisition. Using such indices should more accurately reflect changes in cost than an inflation indicator such as the consumer price index. Moreover, to be safe, local agencies should periodically reconcile the actual amount that is being collected with the actual cost of providing the service (in this case, acquiring land) and make appropriate adjustments if the agency is collecting too much.³⁷

³⁷ See Cal. Gov't Code § 66016(a).

Placing Agency-Sponsored Tax Measures on the Ballot



Generating revenue to acquire open space through a new tax or tax increase will require the approval of either a majority or two-thirds of the voters, depending on the structure of the tax. In most cases, two-thirds voter approval is required. Although the support of city council members or other elected board members is often a key factor in the success of the measure, the law places significant limitations on using public resources to fund political campaigns.

Public agencies may use public funds to explore the feasibility of placing a measure on the ballot. Such expenditures may even include the costs of a public opinion poll to help the agency assess public support for an open space ballot measure. Public funds may also be spent to draft the measure.¹ But once the measure is placed on the ballot, the public agency's role is neutral information provider. The same rules that limit the agency's participation on privately-sponsored ballot measures apply to public agency-sponsored measure. All information that is presented to the public must be impartial in tone, educational in substance, and must not attempt to influence the voter to vote in a particular way.

One effect of these limitations is that there must be a core of individuals who are willing to use their own time and resources to campaign on behalf of the measure.

IN THIS CHAPTER

Design of the Measure
 Timing
 Accountability
 Drafting the Measure
 Impartiality
 Ballot Arguments
 Enlisting Support
 Informational Efforts

¹ *League of Women Voters v. Countywide Criminal Justice Coordination Committee*, 203 Cal. App. 3d 529 (1988).



DESIGN OF THE MEASURE

Many voters recognize the need for and benefits of open space conservation. However, the price tag and a general inclination against tax measures will need to be overcome.

Traditionally, many communities have a base “anti-tax vote” hovering in the range of 23 to 30 percent. This bloc will vote “no” on any tax increase, no matter what the purpose. Thus, assuming the need for two-thirds voter approval, the “no” side needs to accumulate only another 5 to 10 percentage points to defeat the measure. On the other hand, 30 to 40 percent will generally be in favor of raising tax revenues for specific purposes, making necessary to add 27 to 37 percentage points to win approval for a special tax.²

To be candid, it only makes sense to put a measure on the ballot if polling and other research on public sentiment indicates that the measure has a good prospect of passing. Political consultants generally recommend against moving forward with a special tax proposal without preliminary voter-support levels in excess of 50 percent.

However, even when the data is extremely favorable, getting a tax increase passed is difficult. Some questions to be answered include the following.

- **What Type of Tax?** There are a variety of types of taxes. There are taxes on transactions (such as the transient occupancy tax and the use tax) and others based upon the connection between the taxpayer and the facility to be funded (such as the parcel tax). The overview in

Chapter 4 provides information about the characteristics of individual taxes for this determination. (See pages 31-33).

- **General or Special Tax.** The next step will be deciding whether to impose a general tax or a special tax. One of the paradoxes of California’s tax system is that it takes a two-thirds, super-majority vote to pass a measure that earmarks funds for special projects or services, but only a simple majority (50 percent plus one vote) for a general tax increase. In other words, the measure that creates the most accountability and should be more acceptable to the public has the higher voter approval requirement. Some agencies have attempted to counter this paradox by offering a general tax with an accompanying advisory measure. But the validity of this method is uncertain in the opinion of some attorneys. (See advisory measure sidebar.)

Placing an “Advisory Measure” On the Ballot

The advisory measure method involves placing a general tax increase on the ballot and accompanying it with another “advisory measure” that provides guidance on how the public feels the funds should be spent. The advisory measure, however, is non-binding. The tax is a “general tax” which only requires a majority vote because the proceeds of the tax are not legally earmarked for a particular purpose.

The idea is that the adoption of the advisory measure will create sufficient political pressure to guarantee that the tax increase will always be used for open space purposes despite being deposited into the general fund. Sometimes referred to as the “Measure A-Measure B Strategy,” this strategy was upheld³ prior to the adoption of Proposition 218.

Some experts believe, however, that Proposition 218’s more restrictive definition of “special tax” makes it less likely for such a strategy to be upheld today.⁴ This risky strategy requires the time and expense of a ballot measure campaign with an uncertain legal and political result.

² League of California Cities, *Securing Voter Approval of Local Revenue Measures* (1999) 15-16.

³ *Coleman v. County of Santa Clara*, 64 Cal. App. 4th 662 (1998).

⁴ Marin and Sonoma Counties placed similar sales tax and advisory measures on their ballots in November 1998 (after the passage of Proposition 218). However, both failed to receive a simple majority.

» Special taxes may also be imposed through the Mello-Roos Community Facilities Act through a weighted ballot if there are less than 12 registered voters living in the proposed district.⁵ This method is sometimes used when large developments are proposed. For more information, see page 33.

- **Amount of Tax.** How much money should the measure attempt to raise? Polling may reveal voters' spending threshold—the maximum dollar amount that they will spend on conservation. If the agency's conservation budget indicates a need for \$33 million, and the research suggests that voters would only support half that amount, it's probably time to scale down the plan or look for alternative funding sources—such as matching funds and perhaps donations or grants—to make the program viable.
- **Timing.** On which ballot should the measure be placed? Consider local voter turnout trends (such as who typically turns out for special or general elections), poll results and competing spending measures. Note that elections for general taxes must be at the same time as elections for the governing body that placed the measure on the ballot.⁶
- **Framing.** How should the ballot measure be worded? Legal research, poll results, and past similar measures can help guide the wording of a ballot measure, ballot title, and ballot arguments to frame the issue in a way that best presents the underlying reasons for the tax. Preservation of particular kinds of land (farmland, open space, parks, wildlife habitat) may also enjoy greater voter support.

Research by the Public Policy Institute of California suggests that local tax measures have about a 60 percent *failure* rate.⁷ This underscores the need to appeal to voters' sense that any open space tax measure will provide compelling community benefits at a price voters are willing to pay.



» The formation of the Sonoma County Agricultural Preservation and Open Space District was the result of the public's concern over the urbanization and the displacement of agriculture. In 1990, Sonoma County voters approved Measures A and C. The purpose of Measure A was to establish the District while Measure C called for the sales tax to fund agricultural preservation and open space acquisition over a 20-year period. The 5-member Sonoma County Board of Supervisors serves as the District Board of Directors and is the final decision-making body for the District. The District has purchased easements on 17,255 acres of agricultural land and 11,562 acres of other open space lands to date.

Community leaders often mistakenly believe that voters will back a comprehensive conservation measure that protects all of the most significant open space areas within the jurisdiction. While such vision is important, voters are often more inclined to support more modest, less expensive efforts.

⁵ Cal. Gov't Code § 53326. Formation of the district may be initiated by the local governing body by resolution and must be initiated at either the request of two members of the governing body or a specified number of landowners within the district territory.

⁶ Cal. Const. art. XIIIIC, § 2(b).

⁷ Kim S. Rueben & Pedro Cerdán, *Fiscal Effects of Voter Approval Requirements on Local Governments* (Public Policy Institute of California 2003) 90.

HISTORY OF BALLOT MEASURES TO SUPPORT LAND CONSERVATION ⁸			
AGENCY/DATE	DESCRIPTION & PURPOSE	CONSERVATION FUNDS	RESULT
Belmont 11-04-1997	Measure E, Advisory Vote on Preserving Open Space Land in San Juan Canyon	—	Pass 68% to 32%
Contra Costa County 7-27-2004	Creation of special assessment district to fund open-space	\$18,102,000 (\$167,320,000 total)	Fail (54% to 46%)
Davis 11-07-2000	Special Tax for acquisition, improvements, and maintenance of open space	\$17,500,000	Pass 70% to 30%
Duarte 06-26-2001	Special \$48 per parcel tax for open space acquisition and preservation	\$5,000,000	Fail 41% to 59%
Lompoc 04-13-2004	5-year, \$25 per parcel recreation tax to support, preserve and provide parks, open space and recreational services	\$60,000	Fail 53% to 47%
Los Angeles 11-02-2004	Measure O, Clean water bond to reduce total maximum daily load, including storm water retention, parks, and greenbelts.	\$100,000,000 (\$500,000,000 total)	Pass 76% to 24%
Malibu 11-06-2001	Measure K; \$15 million bond for parks, playgrounds, playing fields, trails, and community centers	\$15,000,000	Fail 61% to 39%
Marin County 11-03-1998	Measure B, 20-year, half-cent sales tax increase for transportation improvements, open space, trails, parks	\$55,000,000 (\$377,127,800 total)	Fail 43% to 57%
Martinez 11-02-2004	Bond Measure O, Bond for parks and recreation	\$30,000,000	Fail 62% to 38%
Monrovia 07-11-2000	Special parcel tax for purchase and preservation of urban open space	\$10,000,000	Pass 78% to 22%
Monterey Peninsula Regional Park Dist. 08-02-2004	Parks, Open Space And Coastal Preservation Measure, Proposed assessment for maintaining, improving and preserving parks, open space, wildlife, and watershed protection	\$15,000,000	Pass 55% to 45%
Moorpark 11-03-1998	10-year special tax for open space acquisition	\$10,000,000	Fail 33% to 67%
Moreno Valley 11-03-1998	Measure U, increase of parcel fee to pay for parks and recreation		Fail 41% to 59%
Napa County 11-07-2000	1.5% transient occupancy tax (hotel tax) increase for acquisition and enhancement of parks and open space, and for the Napa Valley Conference and Visitors Bureau	\$640,700 (\$14,900,000 total)	Fail 64% to 36%
Oakland 11-05-2002	Measure DD; bond for watershed protection, water quality projects and open space	\$198,250,000	Pass 77% to 23%

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⁸ Summarized from Trust for Public Land, LandVote Database: www.tpl.org/tier3_cdl.cfm?content_item_id=15266&folder_id=2607 (To access the data, you have to fill out a questionnaire).

HISTORY OF BALLOT MEASURES, CONTINUED			
AGENCY/DATE	DESCRIPTION & PURPOSE	CONSERVATION FUNDS	RESULT
Placer County 11-07-2000	Measure W, 20-year, quarter-cent sales tax increase to protect land around water, save farmland, develop new parks and trails, protect scenic landscapes	\$150,000,000	Fail 27% to 73%
Placer County Park & Recreation District 11-20-2001	\$58 per parcel annual assessment for maintenance, acquisition and development of park land and recreation areas, and walking and bike trails	\$8,388,000	Pass 63% to 37%
Portola Valley 11-04-1997	Measure B, 4-year, 2% Utility Tax Increase for Open Space	\$608,539	Pass 81% to 19%
Sacramento County 11-02-2004	Measure A, 30-year renewal, half-cent sales tax for transportation purposes with a portion to acquire open space	\$48,000,000 (\$4.7 billion total)	Pass 75% to 25%
San Carlos 11-02-1999	Measure G, 10-year, per parcel tax for parks	\$1,200,000	Pass 76% to 24%
San Diego County 11-02-2004	Measure A, 40-year extension of a half-cent sales tax for transit improvements, including mitigation projects	\$880,000,000 (\$14 billion total)	Pass 67% to 33%
San Francisco 03-07-2000	Proposition A, bond for neighborhood recreation and parks	\$110,000,000	Pass 79% to 21%
San Francisco 03-07-2000	Proposition C, Charter Amendment, 30-year property tax set aside for parks, recreation and open space	\$150,000,000 (\$510,000,000 total)	Pass 74% to 26%
Santa Clara County 11-08-2001	\$20 per parcel annual assessment for acquisition, preservation and development of open space, parks, trails, and waterways	\$160,000,000	Pass 51% to 49%
Santa Cruz 11-03-1998	Measure G, Bond for open space, recreation, parks	\$2,700,000 (\$7,000,000 total)	Pass 76% to 24%
Santa Monica, Dist. 1 08-01-2002	Special assessment and bond to acquire and protect open space in the Santa Monica Mountains	\$25,600,000	Pass 77% to 23%
Santa Monica, Dist. 2 08-01-2002	Special assessment and bond to acquire and protect open space in the Santa Monica Mountains		Pass 68%-32%
Valley Center Park and Rec. District, 11-05-2002	\$14 per parcel tax increase to acquire open space, parks and recreation, \$330,000 per year	\$6,600,000	Fail 61% to 39%
Valley Center Parks And Rec. District 11-02-2004	\$19 special tax on each assessor's parcel to acquire park land and open space	\$10,000,000	Fail 57% to 43%
Ventura County 11-02-2004	Measure A, 10-year, quarter percent sales tax increase for the creation of an open space district and funding for acquisitions	\$250,000,000	Fail 49% to 51%

TIMING

General tax measures must be consolidated with regularly scheduled general elections for members of the governing body proposing the tax.⁹ Special tax measures, however, are not so limited.

In either case, however, the agency will have to make the strategic decision when to place the measure on the ballot. Presidential elections, for example, tend to have larger turnouts and attract younger voters who are most likely to support tax increase ballot measures. This tends to create a turnout that is slightly friendlier for revenue measures.

By contrast, special elections see a very significant drop-off of younger voters. The remaining voters may be older, more conservative and less likely to support tax increases. This would seem to create a less-favorable turnout for revenue measures. However, some argue that special elections are good times to put tax measures on the ballot because there is little competition from other measures and those who do vote are more interested in the specific issues.

Understanding the specific voting patterns and demographics in a given area is a key element in the timing analysis. Polling and consultation with those familiar with those voting demographic can also help.

ACCOUNTABILITY

Voters can be skeptical of public agency spending practices and want assurance that any additional tax dollars will be spent wisely. The following accountability tools can be built in to the ballot measure to address these concerns. Such tools include the following.

- **Advisory Committee.** A citizen advisory committee provides a mechanism for public input into agency decision-making as well as some oversight. The role of the committee needs to be well defined and will vary with each program.

Advisory Committees: Issues to Consider

- How will the committee be appointed (by the governing body or by virtue of position)?
- How long will members serve?
- How much input will the committee have on spending decisions?
- What role will the committee play in efforts to obtain matching funds?
- How much decision-making authority will the committee have with respect to individual transactions?
- To what extent will the committee's decisions be subject to review by either the planning commission or the governing body?

Spending public money is generally the legal responsibility of the governing body. An advisory committee may make recommendations to the governing body. The measure establishing the committee should include clearly defined standards to guide the exercise of the committee discretion.¹⁰ Close consultation with the agency's attorney is necessary to make sure the committee is set up properly.¹¹

- **Sunset Clause.** Voters are less likely to support a tax with an infinite duration. A sunset clause makes the tax expire on a date certain (and ideally once the measure's goals have been achieved). Sunset clauses from 5 to 10 years often have the greatest chance of success. But longer periods may be possible where research and polling indicate that the public is particularly supportive of a project.
- **Acquisition List.** Including a list of particular properties to be acquired with the revenues allows voters to see both how the revenues will be used and how they will specifically benefit from the measure's passage. The

⁹ Cal. Const. art. XIII, § 2(b). The exception is an emergency declared by a unanimous vote of the governing body. State law does give some agencies the option of conducting the revenue measure process by an all mail ballot. See Cal. Elec. Code § 4000(c).

¹⁰ Generally, a local agency may only delegate specific administrative power to subordinate boards or persons subject to imposition of standards that constrain the discretion of the board or person. See, for example, *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 201 (1981); *Bagley v. Manhattan Beach*, 18 Cal. 3d 22 (1976); *Kugler v. Yocum*, 69 Cal. 2d 371 (1968).

¹¹ See also Cal. Const. art. XI, § 11; *Howard Jarvis Taxpayers' Ass'n v. Fresno Metropolitan Projects Authority*, 40 Cal. App. 4th 1359 (1995) (limits on the Legislature's authority to delegate powers to private entities).



downside of such an approach is constrained flexibility if problems arise—such as a landowner who is reluctant to sell or is holding out for a high sale price.

- **Property Ranking System.** A ranking system or points system is a good way to blend the certainty necessary to inspire public confidence with the flexibility needed to negotiate individual deals. Points can be awarded based on a variety of factors that are relevant to the community, including scenic value, cost, connection to other open space areas, value as a buffer between growing urban areas, value as farmland, and any other factor that is important to the community. The point system should not be too hard or complex. It may be easier to apply to larger zones.
- **Periodic Reports and Audits.** An annual reporting requirement that focuses on key data points—such as total funds received and allocated to date, total acres protected, total leveraged from matching funds and grants, and a list of all properties acquired or protected to date—institutionalizes reporting on program implementation and how monies are used. Having the reports presented to a public body further enhances program transparency by giving the public a chance to comment on program implementation. Another option is to direct that periodic independent audits occur.
- **Willing Sellers Only.** Some property owners fear that open space acquisition programs will be used to acquire important properties through the local agency's exercise of eminent domain. Inserting a clause that guarantees that funds will only be used for voluntary transactions

reassures property owners that acquisitions will be voluntary.

- **Administrative Cost Caps.** A guarantee that only a certain percentage of the funds will be spent on administrative costs to administer the program helps assure that the funds will actually be used for open space acquisition.

Such accountability measures not only contribute to the success of the measure at the ballot box, but to the overall program. Being able to demonstrate that the tax revenues achieved material public benefits will enhance public confidence in the agency.

Such success and confidence will be a firm foundation on which to build if there is ever a need in the future to seek additional funding. In fact, there are a growing number of examples of where successful first efforts led to the passage of a second measure or an agency needed a funding measure reauthorized.

DRAFTING THE MEASURE

If research and polling indicate that there is sufficient support to warrant going forward with a tax measure, a next step is to design a measure that reflects voter priorities and spending tolerances. The measure should be drafted in a way that is consistent with both the public agency's goals and public sentiment.

Usually, the community outreach processes and polling will help identify the areas where there is common ground (see Chapter 2). For example, communities that have a strong agricultural base are likely to be more supportive of a measure focused on protecting the region's agricultural heritage. Similarly, where an important landmark is at stake, the need to protect that landmark will be central to the purpose of the measure. Polling can test specific language and concepts for a ballot measure.

The language of the ballot measure should be as clear and simple as possible. The more complex a ballot question is, the greater the likelihood that voters will vote against it. Voters will shy away from ballot language that is hard to understand and opponents of such measures can exploit the complexity as part of the opposition campaign.

The agency will also be responsible for supplying an “action question” which is the question that will actually appear on the ballot with a “yes” or “no” beside it. Here are some examples of action questions:

- *To protect public health by cleaning up polluted storm water; keeping pollution, trash, toxic chemicals, dangerous bacteria from rivers, beaches; preserving clean drinking water by protecting groundwater quality; reducing flooding; increasing water conservation; protecting bays, rivers, lakes from storm water contamination; shall the city of Rivertown incur bonded indebtedness totaling \$50,000,000 for storm water projects, with independent financial audits and citizen oversight?*
- *Shall an ordinance be adopted increase the sales tax by a half cent for a ten year period to specially fund open space acquisition and protection the Sierra Wilderness Area, Red River Shoreline and the Gold Dust Trailway with strict oversight and auditing of expenditures by a citizens committee?*

Most voters will read the ballot question, whereas relatively few voters may read the actual measure. Many undoubtedly vote based on the appeal of phrasing of the ballot question. It is therefore worth the effort to make

A Caution About Cut-and-Paste Drafting

It can be tempting to take a tax measure that was successfully adopted in one jurisdiction and place it on the ballot of another. This “one size fits all” approach can be risky. Each jurisdiction has its own circumstances.

While similar approaches can be employed in different jurisdictions, local agencies that are placing a measure on the ballot are well advised to carefully tailor their measure to fit the local needs and political climate within the community in which it is proposed.



sure the concepts or “frames” voters are likely to support appear in the action question.

There are a number of procedural and substantive legal requirements associated with placing a measure on the ballot.¹² For example, the measure must be authorized for the ballot by either a majority four-fifths or two-thirds vote of the governing body, depending on the type of measure and the timing of the election.¹³ Accordingly, ballot measure preparations should be made in consultation with the agency’s counsel.

IMPARTIALITY

The cornerstone of the democratic process is the public’s confidence that the elections are fair and impartial. Accordingly, public agencies that place revenue measures on the ballot have to draw a clear and unambiguous line between their research efforts to design the measure and their duty to administer a fair election.

The agency attorney has two important responsibilities in the process of conducting a fair election as it relates to ballot measures:

¹² Government Code section 53724(b) requires a two-thirds vote of the governing body to place a special tax on the ballot. Also, a unanimous vote is required to place a general tax on the ballot if the body finds that an emergency requires that the tax be presented other than at an election for council members. Cal. Const. art. XIII, § 2(b).

¹³ Such actions can be subject to the California Environmental Quality Act (CEQA). See *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165 (2001). Most revenue measures, however, are designed to fund an underlying approved plan in which has been vetted through the CEQA process. In such cases, the submittal of the measure itself probably will not trigger CEQA analysis.

- **Ballot Title and Summary.** The agency's attorney prepares the ballot title and summary. Both must be impartial and nonargumentative.¹⁴
- **Impartial Analysis.** Whenever a measure qualifies for the ballot, the public agency may request that its attorney prepare an impartial analysis, which is reprinted in the sample ballot.¹⁵ The analysis must not exceed 500 words. The analysis explains the effect of the measure on existing law and the operation of the measure. The public agency does not approve the impartial analysis but rather submits the attorney's impartial analysis to the voters.

These activities are entrusted by law to the public agency's attorney and should not be coordinated with the advocacy effort or those involved in the advocacy effort.

BALLOT ARGUMENTS

The ballot arguments are, of course, an opportunity for advocacy. As such, the argument in support of the ballot measure and rebuttal to the opposition argument should provide strong reasons to support the measure.

Ballot measure arguments are also an opportunity to tell voters who supports and opposes the measure. Voters often attach as much importance to *who* supports a measure as to *what* the measure does. Anyone may submit ballot arguments. If the governing body or its members do not submit ballot arguments, then the law provides a mechanism for selecting whose ballot argument will be selected. Up to five signatures are allowed per argument and rebuttal.

The governing body first must decide whether it, or some of its members wish to submit the ballot argument in favor of a measure that they placed on the ballot. However, when the public already knows that the governing body supports the measure, the better strategic decision might be to find other prominent leaders in the community willing to lend their name to the measure.¹⁶

Sometimes these leaders may have already been involved in developing the measure through a community advisory process.

Otherwise, typical signatories may include "white hat" organizations, taxpayer associations, chambers of commerce, environmentalists, agricultural interests, senior citizen organizations, developers, labor unions, community organizations, and others who are likely to be considered thought leaders within the community on the particular issue.

The governing body may also adopt a resolution or take other official action in support of a ballot measure. A measure is more likely to be successful if the governing body is united behind the measure. If they are not, the public will wonder why. The law allows the body to formally endorse the measure, as long as the endorsement is made at a fully noticed meeting, with the opportunity for both sides to speak.¹⁷

However, at least one regulatory agency has opined that such endorsement can bear on the analysis of whether an agency's informational efforts stepped over the line into impermissible advocacy.¹⁸ In other words, adopting such a resolution may invite heightened scrutiny of an agency's informational efforts. (See page 67).

ENLISTING SUPPORT

Because public resources cannot be used for ballot measure advocacy efforts, a necessary element of any successful ballot measure campaign is a network of leaders throughout the community who will be willing to champion the measure once it is placed on the ballot. Many of these leaders will probably emerge from any assessment and community outreach efforts that have been part of the development of the open space protection proposal.

¹⁴ Cal. Elec. Code § 9203(a).

¹⁵ Cal. Elec. Code § 9280.

¹⁶ This can also avoid Brown Act issues associated with individual local agency officials consulting on an issue within the subject matter jurisdiction of the agency outside of an open and publicized meeting. See generally Cal. Gov't Code §§ 54950 and following.

¹⁷ See *Choice-in-Education League v. Los Angeles Unified School District*, 17 Cal. App. 4th 415, 429-30 (1993); *League of Women Voters v. Countywide Criminal Justice Coordinating Committee*, 203 Cal. App. 3d 529 (1988).

¹⁸ *In the Matter of County of Sacramento*, FPPC No. 93/345 (July 3, 1996).

When Do Voters Decide?

Many voters today make up their minds earlier than they did in the past. Absentee voters make up between 20 and 30 percent of the overall vote. About 25 to 30 percent make up their minds four to six weeks before the election.

These are very high propensity voters, stakeholders in the community and not likely to change their minds. The campaign needs to get into the field early to capture these voters. Another 20 to 30 percent make up their minds in the week prior to the election. These are voters who are susceptible to negative ads and need to be bolstered all the way.

Elected officials (and even staff) can use their personal time to support and organize an independent advocacy effort if they choose.

A successful campaign involves at least seven steps:

1. Developing and following a campaign plan

2. Building a campaign organization
3. Determining campaign messages
4. Raising the funds to deliver those messages
5. Delivering the messages
6. Contacting and mobilizing voters
7. Complying with the elections and campaign reporting laws

There are a number of resources that can assist a campaign organization in further fleshing out these tasks. For example, *Winning the Right Way: How to Run Effective Local Campaigns in California* co-published by the Institute for Local Government and UC Berkeley's Institute for Governmental Studies explores these issues in the context of local candidate campaigns, but many of the concepts are transferable. This resource is available online without charge at www.ilsg.org/campaignethics.

Another resource is the materials available at the Trust for Public Land's conservation finance webpage; these materials also include a campaign guide (www.tpl.org).

TELL IT LIKE IT IS (IN AN UNDERSTANDABLE WAY)

- **Tell Voters What The Measure Will Do.** Give a brief description of what the revenues will be used for and/or why they are needed. Voters are entitled to know what their tax dollars are buying.
- **Provide Financial Context.** Voters want to know why the agency is asking for more money rather than simply trimming other department budgets. Thus, providing information about what percent of the budget the agency will spend on open space acquisition, and its relationship to police and fire, libraries and other public services may provide that information.
- **Speak in Simple Terms.** Avoid legalese and jargon as much as possible; speak in lay terms. Make financial information easy to understand.
- **Keep in Mind the Long-Term Big Picture.** The agency's communications may be scrutinized for a number of reasons, including claims that a tax is really a special tax and that an agency is engaging in express advocacy.



INFORMATIONAL EFFORTS

As has been emphasized elsewhere in this chapter, no public resources may be used for ballot measure advocacy activities. Public resources include property owned by the local agency, including buildings, facilities, funds, equipment, telephones, supplies, computers, vehicles, and travel.¹⁹ The misuse of public resources for campaign purposes may result in civil and criminal penalties.²⁰

Public agencies may impartially explain to the public what the measure will do. This means agency staff, equipment and supplies can generate *informational* materials for ballot measures.²¹ Purely informational materials present a fair and balanced presentation of the relevant facts.²² Materials that expressly advocate are those that explicitly and by their own terms urge the election or defeat of an identified candidate or the passage or defeat of an identified measure.²³ Express terms of advocacy include “vote for,” “cast your ballot,” and “defeat.”²⁴

As part of the informational effort, the public agency and its employees may also respond to requests for information and speak at events as long as all the information provided represents a fair representation of the facts.²⁵ To ensure that employees confine themselves to informational activities, public agencies can prepare fact sheets, talking points and other standardized informational materials. The agency’s legal counsel should review these—as well as other materials developed in conjunction with a ballot measure—for the proper informational style and tone.

Above all, the information effort should be kept separate from the advocacy effort. The public agency should not run its materials by the non-public advocacy effort for approval or have the same individuals play the role of spokespersons for both efforts.

Legal Note

Campaign regulators have advised that if an agency’s website is linked to a campaign website that advocates for or against a candidate, the agency is making a contribution to that campaign for the purposes of the Political Reform Act’s reporting requirements. It is safe to assume that this advice would also apply to a website advocating a ballot measure. Consequently, local agencies should not link their agency website with ballot measure websites.²⁶

¹⁹ See Cal. Gov’t Code 8314(b)(3).

²⁰ Government Code section 8314 provides for civil penalties including fines of up to one thousand dollars for each day a violation occurs, plus three times the value of the unlawful use of public resources. Penal Code section 424 provides for criminal penalties of up to four years in state prison. Furthermore, a conviction disqualifies the party from holding any office in the state. See also *People v. Battin*, 77 Cal. App. 3d 635 (1978) (county supervisor prosecuted for misusing public funds for improper political purposes); *People v. Sperl*, 54 Cal. App. 3d 640 (1976) (county marshal convicted of Penal Code section 424 for having deputies make telephone calls in connection with testimonial dinner for political candidate).

²¹ Cal. Gov’t Code §§ 8314, 54954. *Stanson v. Mott*, 17 Cal. 3d 206, 221 n.6 (1976) (“... we believe it would be contrary to the public interest to bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity.”).

²² See *Stanson*, 17 Cal. 3d at 220 (discussing with approval *Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172, 179-180 (1953), which recognized the broad legislative and fiscal authority possessed by locally autonomous schools boards to make reasonable expenditures to give voters relevant facts to aid them in making an informed judgment when voting).

²³ See *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal. App. 4th 449 (2002); *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174 (2002).

²⁴ See 2 Cal. Code Regs. § 18225(b)(2).

²⁵ *Stanson v. Mott*, 17 Cal. 3d 206, 221 (1976).

²⁶ See *Stanson v. Mott*, 17 Cal. 3d 206, 217 (1976). See also *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174 (2002).

LIMITS ON PUBLIC AGENCY PARTICIPATION IN THE ELECTION

The law allows local agencies to develop proposals for voters' consideration.²⁷ However, once the measure is on the ballot, the agency cannot use public resources for advocacy.²⁸ Government cannot "take sides." But public resources may be used to provide objective, factual information. Here are some guidelines to distinguish between permissible informational efforts and unlawful advocacy:

- Elected officials may campaign for passage of a ballot measure as long as they do not use local agency resources, such as copy machines, fax machines, computers, office supplies, staff time or meeting space to do so.
- Elected officials may use their campaign funds to qualify, support or oppose a ballot measure. The regulatory agency for campaign activities, the Fair Political Practices Commission, should be consulted to determine how to report such contributions.
- Public employees may not use public resources, including their time on the job, to advocate a particular position on a ballot measure.²⁹
- Agencies may not add a link on the agency website to a campaign website.
- Elected officials may lend their names and titles for identification purposes to privately-funded advertisements and campaign literature.
- Public employees may campaign in favor of (or against) a ballot measure on personal time. However, employees may not wear their uniforms while campaigning on personal time.
- An agency governing body may officially endorse or oppose a ballot measure during a public meeting and publicize its decision on the measure in the same way it would publicize every other decision.
- Public employees (or elected officials) may respond to requests for information or speak at a community meeting. Use detailed talking points for consistency and impartiality.³⁰
- Courts tend to guard against unfair interventions in the elections process and are likely to interpret exceptions narrowly.

²⁷ See *League of Women Voters v. Countywide Criminal Justice Coordination Committee*, 203 Cal. App. 3d 529 (1988).

²⁸ See *Stanson v. Mott*, 17 Cal. 3d 206 (1976). Several laws prohibit spending public funds on ballot measures, *see* Cal. Gov't Code § 54964 (prohibiting expenditures of public funds to support or oppose ballot measures or candidates); Cal. Const. art. XVI, § 6 (prohibiting gifts of public funds); Cal. Gov't Code § 3206 (prohibiting local agency employees from participating in political activities of any kind while in uniform); Cal. Bus. & Prof. Code § 17533.6 (prohibiting use of stationery or seal in a manner that implies endorsement by the local government).

²⁹ *People v. Battin*, 77 Cal. App. 3d 635 (1978).

³⁰ An elected official who is active in the campaign in favor of the ballot measure should not speak as a neutral provider of information at a community event.

Creating Benefit Assessment Districts



Special benefit assessments (“benefit assessments”) are charges to pay for public improvements that have a special benefit to the owner of real property being charged. The key to a benefit assessment is that the assessment must be levied in proportion to the special benefits received from the improvements financed by the assessment.¹ If the assessment amount exceeds the special benefit, the charge is considered a tax.

An “assessment district” is not a separate public agency. Instead “district” refers to a defined area that has property that is specially-benefited by certain public improvements. Benefit assessments are apportioned and levied within this geographic district according to a benefit formula approved by the agency’s governing body.

The creation of benefit assessment districts has received renewed interest in recent years as a way to fund open space acquisition and maintenance programs. But it is not without controversy. There are two instances—in the Santa Monica Mountains and in Santa Clara County—where the implementation of a large-scale assessment program has led to a legal challenge. Although a court of appeal ruling supported the Santa Clara County assessment (see next page), any local agency that is considering this method of financing should consult with legal counsel regarding the status of the law in this area.

IN THIS CHAPTER

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¹ *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 216 (1919).

COURT OF APPEAL UPHOLDS LARGE SCALE ASSESSMENT, BUT . . .

The use of large-scale benefit assessment districts to fund regional open space acquisition programs is a new development. To date, only the Santa Monica Mountains Conservancy, the Santa Clara County Open Space Authority and Contra Costa County have placed such assessments on the ballot. Only the Santa Monica Mountains and Santa Clara County measures were adopted. Both faced legal challenges. The Santa Monica Mountains litigation settled. A court of appeal decision upheld the Santa Clara County assessment.¹

One of the key issues before the court in the Santa Clara County decision was the distinction between special and general benefit. Assessments must have a direct benefit to the property being charged (beyond an increase to property values²) and may not be used to fund services that benefit the public in general.³

Opponents of the assessment argued that the large scale of the assessment district (which included more than 400,000 parcels) made it impossible to confer a special benefit on a parcel-by-parcel basis. Any benefit drawn from the district was general, making the assessment a special tax requiring approval of two-thirds of eligible voters.⁴

In contrast, the Santa Clara County Open Space Authority argued that the assessment was only based on specific benefits. The Authority had collected data indicating that out of everyone that used the current open space areas, 90 percent came from local areas and 10 percent came from out of the region, which indicated that the special to general benefit ratio was nine to one.

The court agreed with the Open Space Authority and found that the enhanced desirability of properties located in the proximity of parks and open space lands was sufficient to establish a special benefit. In addition, the court upheld the assessment even though it did not require the Open Space Authority to purchase specific open space parcels.

Ultimately, the impact of this decision on agencies' ability to implement large-scale assessments may depend on the California Supreme Court. The court of appeal decision was split two to one, and the dissenting judge authored a well-reasoned dissent. As a result, local agencies that are considering an assessment should consult with agency counsel to make sure that it complies with the law.

To get updates, visit www.ilsg.org/openspace.

Principles Common to All Benefit Assessments

- All property, including publicly-owned property, that specially benefits from the improvement must be assessed.
- The improvement for which the assessment is levied must beneficially affect a well-defined area of land.
- Mere increase in property value is not enough to establish a special benefit. The property must benefit in some other tangible way.

SPECIAL BENEFIT

To qualify for benefit assessment financing, open space must provide special benefits to the properties within the proposed benefit assessment district. A special benefit must be distinct from any general benefit.³ For example, if the purpose of an assessment is to build a neighborhood park, only those parcels located within the park's neighborhood would be "specially benefited." Trying to extend the assessment to other areas on the grounds that all properties benefit from a per capita increase in recreational areas is merely evidence of a general benefit.

Additionally, only the portion of the open space cost that is specifically attributable to the special benefit may be assessed.⁴ Using a variation on the example above, assume

¹ *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority*, ___ Cal. App. 4th ___ (2005).

² *Id.*

³ Cal. Const. art. XIII D, § 2(i). *Craighill v. Lambert*, 168 U.S. 611 (1898), cited and relied upon by the California Supreme Court in *Knox v. City of Orland*, 4 Cal. 4th 132 (1992).

⁴ Only "special benefits" are assessable. The costs associated with general benefit must be paid from other resources of the local agency. See Cal. Const. art. XIII D, § 4(a).

that an agency wanted to fund a project that was part neighborhood park and part regional open space. Here, the neighborhood parcels could be assessed an amount that represented the cost of the portion of the park that would serve the neighborhood's recreation needs. If it could be demonstrated, the neighborhood parcels could also be assessed an amount that was proportional to the special benefit received from their proximity—and thus increased access to trails—to the regional park. However, the neighborhood parcels could not be charged for any general benefit they receive from living in a community with increased regional park space.

This task is made more difficult because the benefit of “increasing property value” must be excluded from the analysis.⁵ Thus, the extent to which the properties within the district will specially benefit from nearby open space protection has to be more defined. Some possible ways include:

- Expanded access to recreational areas
- Protection of views, scenery and other resource values
- Increased flood control
- Increased security from geologic hazards
- Increased economic activity, such as business areas that cater to tourists, as long as there is a connection between the open space and the economic activity



» In 1990, the East Bay Regional Park District established a new Landscaping and Lighting Act assessment district to finance maintenance of parks in eastern Contra Costa County. In 1993, the park district established another Landscaping and Lighting district covering both Alameda and Contra Costa Counties to fund maintenance of trails and trail corridors.⁶

- Improved and protected water quality (including groundwater quality)

The extent to which each parcel is specially benefited along these lines must be logically calculated. This is usually accomplished by apportioning the assessment on a factor—such as parcel size, frontage, view contours, proximity, or other parameter—that correlates the special benefit to a particular property.

This is not to say, however, that a project that is funded by an assessment cannot have any general benefit. Almost all public improvements include a general benefit if only by increasing the general capacity of a community or by increasing property values. Instead, the test is whether the amount of the assessment exceeds the particular benefit to the property, regardless of whether any general benefit accrues elsewhere.⁷

AUTHORITY

There are approximately 20 different statutes that authorize local agencies to impose assessments. Each statute can be used for specific purposes, ranging from general improvements to parking to tree planting. Some allow assessments for construction, operation and maintenance, and others allow for the issuance of bonds. After the adoption of Proposition 218, the procedures for adopting each one of these assessments are the same (and described more fully on page 72.)⁸

The scope of what can be done under a particular assessment will affect the type of assessment the agency elects to use. For example, if the goal is land acquisition, then a

⁵ Cal. Const. art. XIIIID, § 2(i). Increased property values are considered a general benefit.

⁶ Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition*, (revised November 1997), available at www.ceres.ca.gov/planning/open_space/financing.html.

⁷ *Lloyd v. City of Redondo Beach*, 124 Cal. App. 541, 547 (1932).

⁸ Cal. Gov't Code § 53753.

PRIMARY ASSESSMENT AUTHORIZING STATUTES

Open Space Maintenance Act. Allows local agencies to form maintenance districts within which property may be assessed to improve, maintain and reduce fire danger on agency-owned open spaces.⁹

Habitat Maintenance Assessment District. For the acquisition, construction, or rehabilitation of any facilities needed to create, restore, enhance, or maintain natural habitat.¹⁰

The Municipal Improvement Act of 1913. For assessments to construct certain improvements and acquire property necessary for the improvement. It is the most common assessment imposed for maintenance of public improvements. Bonds must be issued under either the 1911 or 1915 Acts.¹¹

The Improvement Bond Act of 1915. Strictly for issuing bonds under other procedural acts such as the 1913 Act and the 1972 Act. The 1915 Act bonds are the most prevalent assessment bonds issued today.¹²

The Landscaping and Lighting Act of 1972 (1972 Act). For assessments to install, construct, and maintain landscaping, lighting, and park and recreational facilities. It has no bond procedures although bonds may be issued under the 1915 Act.¹³

The Benefit Assessment Act of 1982. For assessments to operate and maintain drainages, flood control, street lighting and street maintenance services and to install and improve drainage and flood control facilities. It has no bond procedures.¹⁴

Geologic Hazard Abatement Districts. For assessments to prevent, abate or control geologic hazards, such as landslides, land subsidence, soil erosion, earthquake, or any other natural or unnatural movement of land or earth.¹⁵

procedure that allows for the sale of bonds would probably be the best choice, assuming that the agency wants to have money up front to make acquisitions. On the other hand, if the goal is to fund maintenance of existing parks, the Landscape and Lighting Act, which is one of the few assessment procedures that authorize assessments for operation and maintenance, would be more appropriate.

ENGINEER'S REPORT

A key tool in determining the existence of a “special benefit” justifying the use of benefit assessments is the engineer’s report. Local agencies bear the burden of demon-

strating that the assessed properties have a special relationship to the public improvement and, from that relationship, receive a benefit that is different from that conferred on the general public.¹⁶ The engineer’s report is the document that makes the connection, if it can lawfully be made.

A registered professional engineer must prepare the report. The report must include:¹⁷

- **Project Description.** The project description should be a clear statement of how the revenues will be used to acquire, protect, or improve open space. The report should detail the goals of the project, parameters guiding acquisition, maps of “high priority” or “sensitive

⁹ Cal. Gov’t Code §§ 50575 and following.

¹⁰ Cal. Gov’t Code §§ 50060 and following.

¹¹ Cal. Sts. & High. Code §§ 10000 and following.

¹² Cal. Sts. & High. Code §§ 8500 and following.

¹³ Cal. Sts. & High. Code §§ 22500 and following.

¹⁴ Cal. Gov’t Code §§ 54703 and following.

¹⁵ Cal. Pub. Res. Code §§ 26500 and following.

¹⁶ Cal. Const. art. XIIIID, § 4(f). At least one court has interpreted this to mean that a court “will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed, or that the agency has failed to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large.” *Not About Water Committee. v. Board of Supervisors*, 95 Cal. App. 4th 982 (2002).

¹⁷ Cal. Const. art. XIIIID, § 4(b); see for example Cal. Gov’t Code § 50078.4.

areas,” and, if identified, listings of specific properties to be acquired. In other words, those reading the plan must be able to understand the nature and the scope of the proposal.

- **Cost Estimate and Budget.** The budget should include the costs of acquisition, construction of facilities (if any), maintenance, financing, administration and any other incidental cost. The budget should also include any other funding source that will be used to fund the program—

particularly if the assessment does not cover the entire cost of the project. Any costs attributed to general benefit should be funded from non-assessment sources.

- **Assessment District Diagram.** An assessment diagram should depict the boundaries of the assessment district (meaning those properties that will receive a special benefit) and the parcels within the assessment district. Properties within the district may receive different types of special benefit—either in quality or quantity. In such

TYPICAL TASKS FOR CREATING BENEFIT ASSESSMENT DISTRICTS

Special Consultant(s)

- Prepare information sheet about assessment (city hall/ballot enclosure)
- Edit engineer’s report
- Assemble forms
- Community outreach
- Polling research (prior to assessment proceeding)

Assessment District Engineer¹⁸

- Identify specially benefited properties
- Calculate special and general benefit
- Apportion benefit within assessment district
- Author engineer’s report

Community Services Representative

- Coordinate drafting of engineer’s report
- Describe how improvements are consistent with general and specific plans
- Define open space needs for areas included in proposed assessment district
- Contact fellow professionals at other agencies who have gone through assessment process
- Review engineer’s report

Agency Attorney

- Review and edit engineer’s report
- Review assessment procedures
- Respond to legal questions
- Review all documents
- Provide legal opinions
- Recommend and coordinate with bond counsel

Public Information Officer

- Develop informational materials that explain assessment to property owners without advocating in favor of assessment
- Review engineer’s report

Elections Official/Clerk

- Arrange for notice and ballot printing
- Mail notice and ballots
- Recommend system for tabulating results at public meeting
- Coordinate ballot counting¹⁹

Finance Professional

- Develop budget for program
- Develop finance plan to cover costs associated with general benefits of project
- Provide other supporting financial information
- Review engineer’s report

Parks Department Representative

- Define open space benefits
- Provide input on acquisition and construction expenses and maintenance costs
- Review proposal for feasibility
- Review engineer’s report

District Administrator (after adoption)

- Track parcel changes
- Calculate assessment per parcel
- Forward assessment roll to county assessor
- Attend to other administrative needs

In many instances, particularly in smaller communities, the same person may undertake more than one of these functions. For example, one person might simultaneously serve as the special consultant, assessment district engineer and finance professional.

¹⁸ An assessment district engineer has education, skills, and experience not commonly found among the civil engineers on an agency’s staff.

¹⁹ Cal. Gov’t Code § 53753(e)(1) (identifies the elections official as a potentially unbiased person for counting assessment votes).

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a case, the district may be divided into zones that reflect these differing benefits (sometimes called “zone of benefit”). Each zone will pay a different rate. The boundaries of each zone should also be depicted on the diagram.

- **Description of Properties to Be Assessed.** The report must identify all parcels that will be assessed, including property owned by federal, state or local governments.²⁰ The list can usually be obtained through the county assessor’s office.
- **Calculate Special and General Benefit for Each Parcel.** The report should identify the amount of special benefit for each assessed parcel. The method for calculating and spreading the benefit for each parcel should have a scientific basis that is widely acceptable. The general benefit should be derived from the special benefit calculation. In other words, determine the special benefit and then what remains is general benefit.
- **Assessment Amount Per Parcel.** Different classes of properties often pay different assessment amounts, cal-

culated in proportion to the special benefit each receives.²¹ The report should summarize the proposed assessment by providing the basis of the assessment, schedule of assessments and its duration.²² The report should also identify the amount of assessment for each lot or parcel for the initial fiscal year and the maximum amount of the assessment that may be levied during subsequent years.

The difficult part of the engineer’s report is developing a model upon which special benefit can be identified and fairly apportioned. This is particularly the case for open space programs that involve a large number of parcels. Two Bay Area agencies—Contra Costa County and the Santa Clara County Open Space Authority—have done the most thorough job to date of quantifying the benefits of open space conservation for a large proposed assessment area.

Both studies were based on the same general methodology. The Contra Costa County report is illustrative (and we use it here even though the proposed assessment was

FIVE MORE PRACTICE TIPS FOR THE ENGINEER’S REPORT

- **Increase in Property Value Insufficient.** The tendency of engineer’s reports and of the public process is to emphasize how the improvement will increase property values. However, Proposition 218 states specifically that increased property values are not sufficient to show special benefit.
- **Engineer’s Report Headers Should Match Prop 218 Requirements.** The engineer’s report should have headings and text that match the elements that are required by Proposition 218. This will keep the document focused and assure that all the legal requirements of the report are met.
- **Estimated Budget.** The numbers in the first try at a budget in the engineer’s report are typically not supported with sufficient detail. Categories such as “administration” or “installation” do not explain how the public’s money is being spent. These general categories must be broken down into their component parts. Not every item of expense can be anticipated. However, there is a mid-ground between “installation” and describing the cost of installing the sprinkler system at each park that will be financed with the assessment.
- **Supporting Material.** The engineer’s report should rely on as many published sources as possible to support its conclusions about special benefit.
- **Attorney Review of Report.** The agency attorney should review the engineer’s report. This is often not done because it is thought to be a technical rather than a legal report. However, since the information in the report is the “substantial evidence” upon which the agency will rely if the assessment is challenged, the attorney’s review is important.

²⁰ Public property “shall not be exempt from assessment unless the [levying] agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact received no special benefit.” See Cal. Const. art. XIIIID, § 4(a). Notwithstanding this, property of the federal government is immune from assessment under the U.S. Constitution’s Supremacy Clause. See *Novato Fire Protection District v. United States*, 181 F.3d 1135 (9th Cir. 1999).

²¹ Cal. Const. art. XIIIID, § 4.

²² See for example Cal. Gov’t Code § 50078.4.



rejected by the voters). The special benefit was distinguished by conducting a survey of people who use parkland facilities. The survey found that 9 percent of the users of parklands neither lived nor worked in the proposed assessment area. From this, the report finds that the special benefit percentage is approximately 90 percent. (Go to www.ilsg.org/openspace to see a copy of the report).

The next step was to spread the amount of specific benefit proportionately among the various parcels. The report used a single family household as the typical unit, then through a series of proportional calculations based on local population data and other factors, was able to develop equivalents for multifamily units, mobile homes, commercial and industrial properties, and shopping areas. This method is based on a mathematically sound scientific process upheld by a court of appeal. (see page 70).

After the engineer's report is adopted by the agency, informational materials can be developed for landowners that describe the assessment and how the funds will be used. However, the local agency may not use public resources to advocate for either the adoption or defeat of the assessment. The information must be strictly neutral. The local agency may present the facts fairly, in terms of style, tenor, timing, and attention to all sides of an issue. (For more information about drafting informational materials, see Chapter 7, page 67).

DESIGN CONSIDERATIONS: SANTA MONICA MOUNTAIN CASE STUDY

Getting an assessment approved through a mailed ballot proceeding differs from getting a tax approved through a general election. Fundamentally, the assessment must be consistent with the engineer's report. However, some of the same mechanisms that are used to give the public confidence in the implementation of a tax—such as audits and citizen advisory committees—are also useful to give the public confidence in assessment proceedings. (See discussion on page 62).

The success of the two companion Mountains Recreation and Conservation Authority (MRCA)²³ assessments totaling \$25 million in June 2002 is informative. One assessment was for fire prevention and the second was for protecting open space in the Santa Monica Mountains. The materials produced by MRCA stated that the purpose was to:

- Acquire and preserve remaining open space and wildlife areas
- Regularly clear brush and excess vegetation to reduce local fire hazards
- Create additional parklands and trails
- Protect important habitat and wildlife corridors
- Prevent excessive development and traffic by protecting undeveloped properties

Though the \$25 million was a large sum, the materials produced by MCRA noted that the assessment would cost the typical household \$36.50 per year for open space acquisition and an additional \$3.50 per year for fire prevention over the 30-year life of the assessment.²⁴

The MRCA proposal created two assessment districts—one inside the boundaries of the city of Los Angeles and one outside of the city limits. (The Los Angeles City Council voted to endorse the assessment proceeding by a 10 to 1 vote). To provide further public confidence in the measure, the MRCA created seven different acquisition areas—each with its own acquisition account—within the two proposed districts. All funds raised in each sub-area would be used to acquire land in that same area.

²³ MRCA is a joint powers authority founded in 1985 between the Santa Monica Mountains Conservancy, the Conejo Recreation and Park District and the Rancho Simi Recreation and Park District.

²⁴ Most business properties would pay \$40 per .35 acre; apartment owners would pay \$14.40 per unit for the first 20 units plus \$4 per unit in excess of \$20. Vacant properties would pay \$20 per year.

POLL NUMBERS FOR THE SANTA MONICA MOUNTAINS

Polls conducted prior to the proceeding determined that

- 77 percent of *respondents* felt that protecting the environment was important or extremely important
- 71 percent of *respondents* felt that maintaining local parklands was important or extremely important
- 72 percent of *property owners* would support a measure to clear brush to prevent fires
- 70 percent of *property owners* would support a measure to protect wildlife corridors and nature lands in the Santa Monica Mountains

MRCA also designed ample opportunities for public involvement and citizen oversight. The proposal called for public hearings to get input on which parcels or areas should get priority. Annual public hearings were also required. In addition, independent citizen advisory committees were formed to meet frequently and review whether proposed expenditures were “consistent with the engineer’s report.” Members of the committees were appointed by city council members and homeowners associations in the area.

Finally, the following attributes of the MRCA proposal were pulled from a question and answer guide prepared by MRCA:

- Upon approval, MRCA would match an additional \$5 million to the acquisition fund, meaning that \$30 million in funds would be eligible for acquisitions.
- Property could not be acquired for a price in excess of an independent appraisal of fair market value.
- Criteria for land acquisitions would include citizen input, market conditions and landowner cooperation.

- Reminders that the funds could be used to acquire “signature” properties that were highly visible and important to people in the area.

Together, the amount of the assessment and the overall design of its implementation program was just enough to give area landowners confidence that the assessment would achieve its objectives. The measure was supported by 68 percent of the weighted ballots.

ASSESSMENT PROCEEDINGS

The procedures for establishing a benefit assessment district are governed by Proposition 218 and its subsequent implementing legislation.²⁵ Thus, while individual assessments may have slight differences, most will have to comply with a defined set of procedures.

Assessments must be approved through a “mailed ballot assessment proceeding.” The process of “voting” is different from normal elections. Only those who will be assessed can cast a ballot. The ballots are also weighted in proportion to the assessment. Thus, a ballot cast by property owner who will be assessed \$50 dollars a year will have twice the value of an owner’s ballot who will be assessed \$25. The assessment is approved if a majority of the weighted ballots favor the assessment.

Initial Resolutions

The first step is to adopt a resolution establishing the procedures for creating the district and assessing properties



²⁵ The notice, protest, and hearing requirements of Government Code section 53753 supersede any statutory provisions in existence on July 1, 1997. Thus an agency need only comply with these requirements and not those of the specific statutory provisions. But an agency must still comply with Streets and Highways Code sections 3100 and following where appropriate. Cal. Gov’t Code §§ 53753, 54954.6(h).

PRACTICE TIPS

- **Send Out Information Materials Separately.** To exercise an abundance of caution, send out any information materials separate from the notice and ballot assessment. The rules that govern public agency advocacy during this process are strict. Sending out materials separately minimizes the risk of tainting the entire election process if opponents to the assessment claim that the informational materials were not neutral.
- **Tracking Parcels.** Every parcel must be matched to a special benefit, parcel number, a record owner and address, the specific ballot calculation, and a ballot number.²⁶ This often involves developing a special spreadsheet that can track all the data.
- **Ownership Changes.** The assessor does not update ownership records on a daily basis. Some parcels will probably be sold during the assessment proceedings. Staff should be prepared for this probability, and develop a method for addressing it in the Resolution of Intention.
- **Mark Envelopes for Presorting.** For assessments that involve a large number of parcels, mark envelopes and ballots with a tracking number before mailing them out to voters. That way the ballots can be presorted before the conclusion of the public hearing so that the process of tabulating proceeds more quickly.

within the district. Such a procedural resolution formalizes the procedure and allows all those interested to understand the process in full.

After authorizing the preparation of, and then accepting the engineer's report, the governing body approves resolutions declaring its intention to form the assessment district, levy the assessments, order the works of improvement and issue bonds (if appropriate) to finance the improvements. The legislative body also sets the time and place for a public hearing where all persons are provided an opportunity to speak in favor of or against the assessment, or receive information.²⁷

Local agencies may need to allow for a little extra time (and therefore set the date a little farther back) when putting together notice and ballot packages for assessments that will affect a large number of properties.

Notice

The agency must hold a hearing to hear any protests regarding the proposed assessment. Notice of the assessment and the hearing must be mailed to all property owners in the assessment district at least 45 days before the public hearing. The notice²⁸ must include the total assessment for entire assessment district; the assessment chargeable on the owner's parcel²⁹; the duration of proposed assessment; the reason for the assessment; how proposed assessment was calculated; and the date, time and place of public hearing. In addition, the notice must include a summary of the voting procedures and the effect of a majority protest.

Hearing and Protest Procedure

The hearing allows the public to offer testimony about the assessment. Under Proposition 218, property owners may

²⁶ Cal. Const. art. XIID, § 4(a) and (c); Cal. Gov't Code § 53753(b).

²⁷ Cal. Gov't Code § 53753(d).

²⁸ Each record owner of a parcel identified for assessment must receive notice with specified contents. Cal. Const. art. XIID, § 4(c); Cal. Gov't Code § 53753(b). California Constitution Article XIID, Section 4(d) and Government Code section 53753(c) contain substantive and procedural requirements for the ballots that must accompany the notice.

²⁹ A proposed assessment may state "a range of rates or amounts." If a range of rates is approved, the governing body may impose up to the maximum amount approved. Cal. Gov't Code § 53739. A proposed assessment may also provide for inflationary adjustments to the rate or amount, unless the assessment is itself determined by using a percentage calculation. *Id.*

Build Public Confidence in the Ballot Procedure

The assessment ballot proceeding is new and unfamiliar for most property owners. It is important to take extra steps to make sure that owners understand the process:

- Maintain confidentiality by using ballots that are returned in sealed envelopes.
- Provide a question and answer sheet that provides objective information about the process.
- Provide for the termination of the assessment at specific date in with provisions for automatic extension.
- Adopt ballot procedures by resolution as part of the general procedures prior to imposing the assessment. The ballot procedures should address how the agency will resolve issues like voting on behalf of property with multiple property owners.

express their support or opposition to a proposed assessment by a ballot that must accompany the notice. The ballots must be returned to the clerk³⁰ or other designated official by mail or in person before conclusion of the public hearing. Assessment protesters can recant and withdraw protests during the hearing. Others can run in to cast a ballot for the first time. And voters who change their mind about a vote already cast can come in and change their votes.

No assessment may be imposed if a “majority protest” exists. A majority protest exists if opposing ballots exceed favorable ballots. Each protest is weighted according to the proposed financial obligations of the assessment on the affected property (a property that will be assessed \$20 per year will be weighted twice as heavily as one that will only be assessed \$10 per year).³¹

Tabulating Results

Once the public hearing is closed, the counting of ballots may proceed. One interesting wrinkle in this process is that the assessment ballots must be treated as disclosable public records *during* the tabulation process.³² One agency addressed this by projecting the results of the tabulations on a computer screen so everyone in the room could track the progress (which was easier than having the

PLANNING FOR THE HEARING AND TABULATION

Planning for the hearing involves anticipating problems. Answering the following questions will help identify key issues that may need to be addressed:

- What instructions must the ballot contain?
- How will the agency keep track of original ballots and prevent forgeries?
- What should the agency do if property has changed hands since the assessor last updated the records?
- How can the counting of thousands of ballots be open to the public?
- How many ballots can be counted each hour?
- Whom will the community trust to count ballots (the law requires an “impartial person who does not have a vested interest in the outcome”)?³³
- Where can the public hearing and ballot counting take place?

³⁰ The clerk is considered an impartial counter. Cal. Gov’t Code § 53573(e)(1).

³¹ See Cal. Const. art. XIII D; Cal. Gov’t Code § 53753(c), (e).

³² Cal. Gov’t Code § 53753(e)(1).

³³ Cal. Gov’t Code § 53573(e)(1).



public examine ballots while the counting was proceeding). A spreadsheet program provides an instant record of each parcel's weighted vote and a constant calculation of the total vote percentage for and against the assessment.

Results and Recording

The legislative body can impose the assessment unless the weighed ballots cast in opposition to the assessment exceed the weighed ballots in support.³⁴ The governing body then reconvenes in a properly noticed meeting and adopts a resolution (or ordinance) accepting the results of the assessment ballot proceeding; establishing the assessment district; and imposing the assessment.

The assessment roll is then recorded in the office of the county recorder and the assessments become liens against the properties upon which they were levied. The assessor will then send out tax bills; soon afterwards, the Assessor will usually notify the agency that the first round of assessment payments will appear in the agency's account on a specified date.

For more information about Proposition 218, see the League of California Cities' *Proposition 218 Implementation Guide* (2000 ed.). Copies of the guide are available online (www.cacities.org/attorneys) or through the League's publication unit at 1400 K Street, 4th Floor, Sacramento, CA 95814, (916) 658-8257, FAX (916) 658-8220.

Special District Gets Assessment Approved

Voters approved a 15-year assessment for the Monterey Peninsula Regional Park District that will generate between \$800,000 and \$1 million annually for improvements to existing park facilities and acquisition of land adjacent to current parks. An independent oversight committee will be established to monitor the funds, only 5 percent of which is supposed to be used for administration costs.

The results (which were tabulated and audited by an accounting firm) showed that 7,682 property owners voted in favor of the assessment tax and 5,100 against. The firm's report noted that 34,967 ballots were mailed and 13,208 were returned. Of those returned, 436 were ruled invalid. The "yes" votes represented \$167,550 in assessed valuation, compared to the "no" voters' \$135,144, indicating that larger property owners tended to vote against the parcel tax.

The assessment approved by the voters amounts to \$19 a year for single-family residences and \$15.39 annually for condominiums. Business will be assessed depending on their size and number of employees. The amount of the previous assessment was \$5 per \$100,000 of assessed property value.

Part of the reason for the measure's success was that it received across the board support from environmental organizations and business interests. In addition, the measure won the support of a taxpayer's association that had previously opposed almost every other tax or assessment proposed in the Monterey area.

ADVOCACY GROUPS

Just as is the case with voter-approved tax measures, a proceeding to approve a large-scale assessment district to fund open space acquisition will probably benefit from

³⁴ The assessment can go forward in the case of a tie. Cal. Const. art XIIIID, § 4(e). The final decision to impose the assessment lies with the legislative body, meaning that even if there is no majority protest, the council can still decide not to proceed. Councils sometimes choose for political reasons—like when there is only meager support for measure—to drop an assessment even when it has passed.

organized advocacy efforts by community leaders. An agency would be wise to view the same restrictions that apply to using public agency resources to support a tax measure as also applying to benefit assessment advocacy efforts. (See Chapter 7, pages 65-67).

The starting point for developing this leadership also begins with the community outreach and development process (see Chapter 2). When the concept of an assessment is owned by a citizen advisory committee or similar group, the members of the committee are more likely to take up the mantle of explaining to the landowners why the assessment is a good idea and how the landowners will benefit.

There are some differences in strategy, however:

- Turnout is likely to be different from a general election because there is only one issue on the ballot.
- Those casting ballots are not the entire electorate, but only those landowners (not renters or others) who own lots or parcels within the assessment district.
- The presence of weighted ballots might mean that limited resources are concentrated to specific areas where they are more likely to achieve success.

Advocacy strategies in support of the assessment should take these factors into account.

For example, the limited number of people who can actually cast ballots probably makes broad-based advertising impractical (and maybe even confusing to members of the registered voters in the community who do not have ballots) in all but the largest-scale districts. On the other hand, many of the traditional tools available to campaigns—such as getting key endorsements, phone banks, writing editorials and sending targeted mailings—may be appropriate.

In one successful campaign, the Silicon Valley Conservation Council³⁵ (which was supporting the assessment proposed by the Santa Clara County Open Space Authority) raised \$250,000 from builders and groups like



the Trust for Public Land and the Nature Conservancy to support the assessment. Part of this funding was used for polling to further refine and target the Council's message. That polling indicated that further resources should be focused on diffusing opposition from large landowners (with more heavily weighted ballots) and ensuring that single-family homeowners—who were likely to support the measure—returned their ballots.

Note that neither the Secretary of State nor the Fair Political Practices Commission considers assessment ballot proceedings to be "elections."³⁶ Assessment ballot proceedings are not subject to Elections Code procedures or the reporting requirements of the Political Reform Act.

³⁵ This group included the Land Trust of Santa Clara County, the Greenbelt Alliance (a regional "smart growth" advocacy organization), the Silicon Valley Manufacturers Association, and several large developer interests. At least part of the impetus for forming this group derived from a litigation settlement that involved the scope of permitted development in the Coyote Valley area of Santa Clara County, just to the south of the city of San Jose. The development interests included Coyote Valley Research Park, LLC, Cisco Systems, Inc., and Divco West Properties, LLC. The group was founded for the larger purpose of promoting open space protection and smart growth oriented sustainable housing. One of the organization's specific goals was to promote private and public contributions of \$100 million for open space preservation.

³⁶ Cal. Gov't Code § 53573(e)(4) (declaring that the protest proceedings do not constitute an election or voting for the purposes of the California Constitution or the Elections Code).

ACHIEVING SUCCESS IN ASSESSMENT PROCEEDINGS: LESSONS FROM THE FRONT LINES

Here are the “top ten lessons learned” culled from the comments from staff and community volunteers who were involved in both the Santa Clara County (successful) and Contra Costa County (unsuccessful) measures.

1. **That Vision Thing.** Be able to say what you have done—and exactly how you can do much more in obvious ways. Provide good maps and have well-defined standards.
2. **A Resolute Governing Body.** The governing body should be united in a vision and willing to share that vision with the voters.
3. **Community Leaders.** Names in the community will give credence to the initiative. These leaders should be engaged for the long-haul and be strong enough to bring an occasional reality check to the process.
4. **Promote the Vision.** Community leaders need to educate people and promote the vision. If it’s a positive statement, it should be exciting to talk about!
5. **Know the Community.** Make sure the vision is consistent with what voters are looking for. Polling is critical; meeting with stakeholders should not be postponed or avoided. Be ready to change the vision based on what the community says.
6. **Gauge the Economy.** Open space initiatives are more likely to win in a good economy. A majority of the population consider conservation programs important, but a critical fraction of these voters would still call it a luxury.
7. **Stand Firm.** There is a difference between amending a vision to address what people want and defending a vision to people who will never support it. Do workshops or public meetings turn into forums for opponents of the vision? Is time being spent to set up meetings to have the vision fairly critiqued or is it being merely criticized?
8. **Support from the Local Media.** Don’t underestimate editorials and articles. Don’t take for granted that your vision is obvious or persuasive—especially to the media. Make sure your supporters let the media know that they agree with the vision.
9. **It’s the Vision Thing (Again).** It is worth circling back to this point, especially a week before a vote or after a major disappointment. Polls, armchair critics, and callous opponents can make a cynic of anyone trying to make a difference. Keep close to the heart why you started down this path in the first place.
10. **Luck.** Success often comes from persistently trying to be lucky. It can feel like failure occurred at any of the above points; be persistent! Things change.

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Creating Benefit Assessment Districts
**Using Bonds
 and Debt Financing**



Local agencies may finance open space acquisitions through the sale of financial securities—called bonds. Bonds are “IOUs” issued by public entities to finance large projects or acquisitions. Bonds and other types of debt financing instruments are different from the other tools discussed in this guide in that they require an underlying source of revenue to secure the transaction. In other words, debt financing is used in conjunction with other financing tools, such as fees, taxes, or benefit assessment districts.

Bonds allow local agencies to make acquisitions immediately instead of waiting to accumulate enough funds to make a purchase—a factor that is often important in fast-developing areas where the availability and affordability of land can change from month to month. They also allow agencies to spread the cost of purchasing open space over several years. In addition, interest on bonds issued by a local agency is typically exempt from state and federal income taxes. The downside is that issuing bonds is an expensive process that includes legal fees and other costs (many recoverable through the bonds), in addition to interest payments.

As a general rule, the term of repayment should not exceed the useful life of the project. Open space transactions, which by their nature have a very long useful life, may be financed over periods of 30 years or more. However, the longer the repayment period, the higher the financing cost. Just like a home mortgage, a 15-year repayment means less interest costs but larger annual payments than a 30-year repayment period.

IN THIS CHAPTER

General Obligation Bonds

Revenue Bonds

Mello-Roos and Assessment Bonds

Lease Purchase Agreements

Short-Term Financing

Marks-Roos Bonds

All local agency actions relating to borrowing where the amount is \$100,000 or more must be discussed, considered, and deliberated by the governing body as a “separate item of business on the agenda” (meaning no consent calendar approvals).¹ This assures that the governing body has an opportunity to ask questions of agency staff and consultants regarding the proposed debt financing before they act on it.² In addition, because issuing bonds is a complex process, local agencies that want to issue debt on a tax-exempt basis should retain bond counsel at an early date to assist in preparation of the necessary documents.³

GENERAL OBLIGATION BONDS

General obligation bonds—often called “GO bonds”—pledge the general funds and “full faith and credit” (meaning the property taxing power) of a city or county as security for payment of principal and interest to bond holders.⁴ Thus, a general obligation bond is essentially a loan taken out by a city or county against the value of the taxable property in the locality.⁵ Property tax revenue (technically, *ad valorem* taxes on real and personal property) is used to

» The *California Debt Issuance Primer*, published by the California Debt and Investment Advisory Commission, provides an introduction to debt financing for local agencies in California. The publication is available at www.treasurer.ca.gov/cdiac.

Bonds and Proposition 218

A number of unanswered questions surround the impact of Proposition 218 on bonded indebtedness. Proposition 218 contained provisions protecting the power of citizens to pass initiatives to repeal taxes,⁶ possibly increasing the risk that a revenue stream dedicated to debt repayment could be terminated. However, the contract provisions of the U.S. Constitution may negate the threat of repeal.⁷ Likewise, since the power of initiatives applies only to legislative acts,⁸ the lack of authority for legislative bodies to terminate revenues for certain types of bonds may restrict the power to accomplish the same action by initiative.

repay a general obligation bond over a 20- to 40-year period (the term cannot exceed 40 years⁹). Two-thirds voter approval is necessary for the issuance of general obligation bonds and they may be only used to fund the acquisition or improvement of real property.¹⁰ Proceeds may not be used to purchase equipment or pay for operations and maintenance.

Since investors perceive property taxes as being less risky than the security for other types of indebtedness, general obligation bonds are generally issued at lower interest rates. The bonds are thus less expensive funding mechanisms for local agencies than revenue bonds, for example.¹¹

¹ Cal. Gov’t Code § 53635.7.

² *California Municipal Law Handbook* § 5.1.50(G) (2005).

³ Additionally, with the advent of federal disclosure requirements, the agency may want to consider retaining disclosure counsel to prepare the official statement and continuing disclosure agreement on behalf of the city. Traditionally, the official statement has been prepared by underwriter’s counsel who is not under contract with the agency. Disclosure counsel, on the other hand, is retained by the agency and is contractually responsible to the agency for the preparation of the official statement. *California Municipal Law Handbook* § 5.1.50(G) (2005).

⁴ The general framework for issuing such bonds is the Municipal Improvement Bond Act of 1901. Authority to issue general obligation bonds comes from Government Code sections 43600 and following (cities) and 29900 and following (counties). General obligation bonds may be sold by the State of California or a local public entity that has the legal authority to levy *ad valorem* taxes on real and personal property located within its boundaries. Although new voter authorizations for general obligation bonding authority were suspended in 1978 with passage of Proposition 13, Proposition 46 (approved by a majority of voters statewide in June 1986) amended Article XIII A of the California Constitution to allow a two-thirds majority of those voting in a local election to authorize general obligation bond issues for specific projects.

⁵ Kim Hopper, The Trust for Public Land, *Increasing Public Investment in Parks and Open Space*, Volume 1 of *Local Parks, Local Financing* (1998), available at www.tpl.org/tier3_cdl.cfm?content_item_id=1048&folder_id=825.

⁶ Cal. Const. art. XIII, § 3.

⁷ U.S. Const. art. I, § 10. Under the contract clause, the legislative body may not revoke a tax that corresponds with a contractual obligation. See *Carman v. Alvord*, 31 Cal. 3d 318, 332 (1982). The people, acting as the legislative body, are subject to the same federal constitutional limitations as apply to their legislative representatives. See *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819 (1980).

⁸ *Yost v. Thomas*, 36 Cal. 3d 561 (1984).

⁹ Cal. Gov’t Code § 53508.

¹⁰ Cal. Const. art. XIII A, § 1(b); Cal. Const. art. XVI § 18; Cal. Gov’t Code § 43614.

¹¹ Governor’s Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition*, (revised November 1997), available at www.ceres.ca.gov/planning/open_space/financing.html.

LOS ANGELES USES GENERAL OBLIGATION BONDS TO PROTECT WATER QUALITY

- “During 2002, there were 269 warnings posted on Los Angeles County beaches where the ocean was too polluted for human use.”
- “Beach attendance in the area has dropped by 56% since 1983.”

These were among the many facts cited by the “Yes on Measure O” campaign in support of a \$500 million general obligation bond for the city of Los Angeles to improve water quality by removing trash, bacteria, and stormwater pollution from the city’s waterways. The measure also set aside significant funds for open space and greenbelt acquisition to reduce flooding and increase water conservation.

Part of the impetus for the measure came from increased enforcement requirements in the federal Clean Water Act. The impartial analysis noted that failure to approve the measure would postpone the city’s ability to comply with federal and state water quality regulations, exposing the city and taxpayers to potential fines and litigation (in addition to the continuing dangers of pollution and the loss of valuable water).

In its endorsement (there was no organized opposition to the measure), the *Los Angeles Times* encouraged voters to liken the proposal to fixing their roofs: a project that “hardly brings the same rush as a new big

screen TV . . . But come the rains, homeowners who put off fixing the roof face buckets in the living room.”¹² The same was true for failing to upgrade the storm drains and prevent storm runoff.

Complementing its focus on improved water quality, Measure O also included significant programs to protect open space. Funds were set aside for the development of greenbelt areas to help treat and conserve stormwater. Along with filtering elements, the greenbelts will help reduce the amount of water toxics that enter the groundwater and rivers. Additional funds were earmarked for the purchase of “water cleansing landscapes and parkways” to reduce stormwater pollution and bacteria that wash into waterways (and to provide for important habitat and recreation needs).

Measure O, which also included oversight by a citizen’s committee, passed with 76.3 percent of the vote.¹³ The average estimated tax increase on a \$350,000 home will be \$35.00 per year for 24 years. The success of the measure suggests that including open space protection within a larger health and safety context—in this case, water quality—can be an effective funding strategy.

Visit www.ilsg.org/openspace to see the ballot language and supporting documents, literature, advocacy pieces, and studies in support of Measure O.

Another advantage of these bonds is that they allow for the immediate purchase of land and distribute the cost of acquisition over time. However, it can be difficult to get the two-thirds voter approval required for issuance. Also, there is typically a great deal of competition for general obligation bonds among the many local programs in need of financing.

In slight contrast to general obligation bonds are “limited obligation bonds.” The difference is that collection for defaulted limited obligation bonds is limited to the pledged

revenues, not the full faith and credit of the local agency. This type of bond limits the city’s financial liability but increases the interest rate the city must pay for the bonds.

REVENUE BONDS

Revenue bonds are issued to acquire, construct, or expand public projects for which fees, charges, or admissions are collected. Some types of revenue bonds require majority voter approval to authorize the size and purpose of the

¹² *O Equals Cleaner H2O*, *Los Angeles Times* (October 16, 2004).

¹³ County of Los Angeles, Department of Registrar-Recorder/County Clerk, November 2, 2004—General Election, Final Official Election Returns (<http://rrcc.co.la.ca.us/elect/04110024/rr0024pi.html-ssi#LS>).

Agencies That Used General Obligation Bonds to Fund Open Space¹⁴

- **Redlands.** In 1987, Redlands passed a \$7.6 million general obligation bond with 71 percent of the vote. Approximately half of the funds were designated for land acquisition for open space, trails, and recreation facilities.
- **Alameda and Contra Costa Counties Measure AA.** In 1988, voters in Alameda and Contra Costa counties approved Measure AA, which authorized the sale of \$225 million in general obligation bonds, of which \$126 million was to be used by the East Bay Regional Park District for park and open space acquisitions. Nearly all of the bonds have been issued.



tem. Because the debt service is directly paid from income generated by the facility, such debt is considered self-liquidating and generally does not constitute debt of the issuer.¹⁸

bond issue.¹⁵ Voter approval is not required if charter provisions or statutes specifically permit, or in certain cases if bonds are sold through joint powers authorities or the debt is structured as certificates of participation. Revenue bonds are not constrained by debt ceilings like general obligation bonds, but are typically more expensive to repay than general obligation bonds.¹⁶

Revenue bonds are secured by a specific source of revenue—such as a fee or charge. The agency does not obligate other funds or revenues for the payment of the bonds, but may nevertheless elect to make payments from other sources in the event of default.¹⁷ The bonds are evidence of direct “debt” incurred in purchasing or constructing a revenue-producing project and are repaid from the income generated by use of that project or sys-

MELLO-ROOS AND ASSESSMENT BONDS

Mello-Roos bonds and assessment bonds are similar. Mello-Roos bonds are secured by a tax imposed under the Mello-Roos Community Facilities Act (see page 33).¹⁹ Assessment bonds are issued to finance the acquisition or construction of improvements being financed by a given assessment district (see page 71).²⁰

Because the remedy for non-payment of special taxes and assessments is foreclosure,²¹ the value of the property subject to either tax levy or assessment is a key determinant of credit quality.

¹⁴ Governor’s Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition*, (revised November 1997), available at www.ceres.ca.gov/planning/open_space/financing.html.

¹⁵ The Revenue Bond Law of 1941 is commonly used for the issuance of revenue bonds. It requires approval by a majority of voters for the issuance of revenue bonds. See generally Cal. Gov’t Code §§ 54300 and following.

¹⁶ Kim Hopper, The Trust for Public Land, *Increasing Public Investment in Parks and Open Space*, Volume 1 of *Local Parks, Local Financing* (1998), available at www.tpl.org/tier3_cdl.cfm?content_item_id=1048&folder_id=825.

¹⁷ *California Municipal Law Handbook* § 5.1.50(B) (2005).

¹⁸ Although revenue bonds require agencies to pledge a specific source of revenue as security, it may elect to make payments from other sources in the event of a default. Typically, revenue bond financing avoids the classification as “debt” for purposes of the state constitution since a specific stream of revenues is being pledged. Thus, voter approval is not constitutionally required, but a number of statutes that authorize revenue bonds, including the Revenue Bond Law of 1941, generally require an approval by a majority of voters for the issuance of revenue bonds.

¹⁹ Cal. Gov’t Code §§ 53311 and following.

²⁰ *California Municipal Law Handbook* § 5.1.50(B)(4) (2005).

²¹ Cal. Gov’t Code §§ 53356.1 and following.

For Mello-Roos tax bonds, state law requires, absent findings to the contrary, that the value of property subject to the special tax be at least three times the amount of the debt issued (known as a value-to-lien ratio).²² The California Debt Advisory Commission has developed advisory appraisal standards that local agencies may adopt to fulfill this requirement.²³

In addition, as with all special taxes, Mello-Roos taxes may be subject to reduction or repeal by initiative under Proposition 218.²⁴

Although assessment bond offerings are subject to neither the 3:1 value-to-lien ratio nor the appraisal standard requirement, the California Debt Advisory Commission recommends that agencies voluntarily comply with these requirements.²⁵

LEASE PURCHASE AGREEMENTS

Except where they are specifically authorized to issue debt instruments, local agencies are constitutionally prohibited from borrowing an amount of money in excess of the amount that can be repaid in a year's time.²⁶ Lease purchase, certificates of participation and other special fund mechanisms are exceptions to this rule.²⁷

A lease purchase agreement works when local agencies might otherwise be prevented from incurring debt to purchase land. Instead of buying the land outright, the agency leases it for a period of years with the option to purchase at the end of the lease.²⁸ The amount of the lease is equivalent to the principal and interest that would be paid if the transaction were financed as a loan.



Certificates of participation (sometimes known as COPs) are a variation on lease purchase agreements. This technique enables a group of investors, instead of a single purchaser, to purchase land and lease it to a public agency. The investors then transfer the right to receive payments to a trustee, who redistributes the lease payments on a proportional basis.²⁹ The important points in any long-term lease-back transaction are three-fold:³⁰

- Rent is paid only to the extent that the agency enjoys beneficial use of the property.
- The agency must make annual payments subject to an appropriation.
- The agency should pay fair market rental.

Because it resembles a lease, certificate-of-participation financing is not limited by statutory restrictions on long-term debt. Also, a city or county may issue certificates of

²² Cal. Gov't Code § 53345.8.

²³ *Appraisal Standards for Land-Secured Financings*, California Debt Advisory Commission, May 1994 (CDAC #94-6). See www.treasurer.ca.gov/cdiac/publications/debtrelated.htm.

²⁴ Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition*, (revised November 1997), available at www.ceres.ca.gov/planning/open_space/financing.html.

²⁵ See *Disclosure Guidelines for Land-Based Securities*, September 12, 1996 [CDAC # 96-6] (providing disclosure practices for complying with the Securities and Exchange Commission's amendments to Rule 15c2-12 (adopted in November 1994)). See www.treasurer.ca.gov/cdiac/publications/debtrelated.htm.

²⁶ See Cal. Const. art. XVI, § 18.

²⁷ Statutory authorization for cities to lease property is contained in Government Code sections 37350 and 37351. Leases by counties are authorized in Government Code sections 23004 and 25351.

²⁸ This financing technique provides long-term financing through a lease or installment sale agreement that does not constitute indebtedness under the state constitutional debt limit and does not require voter approval. See *City of Los Angeles v. Offner*, 19 Cal. 2d 483 (1942); *Dean v. Kuchel*, 35 Cal. 2d 444 (1950).

²⁹ Under a carefully crafted COP program, investors may be entitled to tax-free investment income (that is, the interest portions of the lease payments). Depending on the local agency's credit rating, this type of financing can therefore be accomplished at a relatively low interest rate. Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition* (last modified Nov. 1997) www.ceres.ca.gov/planning/open_space/financing.html.

³⁰ *California Municipal Law Handbook*, § 5.1.50(D) (2005).



participation without a vote of the local electorate, unless an election is required by local charter.³¹

The city of Carlsbad successfully entered into a certificate-of-participation arrangement to acquire and preserve 52 acres of a eucalyptus grove originally planted to provide railroad ties.³² When word of its pending development began circulating, preserving the grove became a hot political issue. The city was able to use the arrangement to settle the matter.

The cities of Los Altos and Cupertino have also issued certificates-of-participation for open space purposes. Both used their funds to acquire surplus school district lands to expand or develop parks.³³

At times, certificate-of-participation financing can be complicated and costly because of all the players and arrangements involved in making it possible. Also, a local agency must be careful that its actions relative to the acquired land do not invalidate the tax-exempt status of the lease-purchase arrangement.³⁴ Lease-purchase arrangements are probably most appropriate when a public agency needs to act quickly to purchase a single important parcel of land and the agency can lock in the land through the lease until the ownership is transferred. The level of paperwork and tracking, particularly for COP arrange-

ments, usually precludes using lease-purchase agreements for a comprehensive open space acquisition program.

SHORT-TERM FINANCING

Local agencies can issue promissory notes and anticipation warrants against funding that is scheduled for receipt in the future. In essence, these are cash flow tools that can be used when an agency needs to act immediately—such as when a key parcel suddenly comes on the market—but lacks sufficient cash on hand to make the deal. Although more costly to the borrowing agency, these mechanisms can help local agencies that have limited long-term bonding authority but sufficient income to cover the debt service of a loan.

The most common short-term financing tools are:

- **Tax and Revenue Anticipation Notes (TRANs).** Notes are issued to eliminate cash flow deficits in the general fund and other unrestricted funds of a public entity before receipt of taxes and other revenues during the same fiscal year. TRANs may be issued year after year, as long as the public entity segregates all money to repay the borrowing in each fiscal year and continues to be eligible on the basis of unrestricted funds and projected cash flows.³⁵
- **Bond Anticipation Notes (BANs).** Used when bonds are authorized but not yet issued. The notes are secured by pledges of the bond proceeds and other revenues or assets from which the long-term bonds are intended to be supported. Authorization is generally found in the various bond authorizing statutes.³⁶
- **Grant Anticipation Notes (GANs).** Grant anticipation notes (GANs) may be issued to eliminate cash flow deficits in anticipation of the receipt of a federal or state grant or loan. By issuing GANs, a local agency is better prepared to pay all project costs, particularly up-

³¹ Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Financing Acquisition* (last modified Nov. 1997) www.ceres.ca.gov/planning/open_space/financing.html.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Cal. Gov't Code §§ 53850 and following.

³⁶ League of California Cities, *Municipal Revenue Sources Handbook* (2001).

front processing and managerial costs, and cash flow deficits that may occur from delayed receipt of reimbursements for grant-eligible costs.³⁷

These short-term financing techniques may be used for many purposes, such as meeting anticipated cash flow deficits, interim financing of a project, and project implementation. Using these techniques involves issuance of short-term notes (or commercial paper); voter approval is not required. The Midpeninsula Regional Open Space District (Santa Clara and San Mateo counties) has used this tool to raise money for land acquisition.³⁸

MARKS-ROOS BONDS

Local agencies may enter into agreements to jointly exercise common powers.³⁹ The common power to be exercised may be exercised within the entire territorial jurisdiction of all participating agencies or within only a portion of the territorial jurisdiction of any one or more of the participating agencies.⁴⁰

Each joint powers entity has the power to issue revenue bonds for a wide range of public projects.⁴¹ The Marks-Roos Local Bond Pooling Act of 1985 provides specific authorization for a joint powers agency to pool all of the capital needs of the agencies which are a party to the agreement into one bond issue.⁴² Under this structure, the financing obligations of individual entities (or one entity) are pooled together and brought to market by the joint powers agency. The joint powers agency does not own the project, it simply makes loans to the local agencies from the proceeds of the bonds it issues.

Whenever a joint powers agency is created as a separate legal entity, notice of the agreement must be filed with the Secretary of State, or the joint powers agency will be

precluded from issuing any bonds or otherwise incurring indebtedness until the filing is complete. Marks-Roos bonds require approval by a vote of the governing bodies of the joint powers agency and each member agency. In addition, a member agency in whose jurisdiction the project to be financed is located must hold public hearings and make a finding of significant public benefit. The security for a Marks-Roos bond is the credit of the underlying obligations (bonds, loans, or leases) that the joint



powers agency acquires with the proceeds of its bonds. The joint powers agency typically does not have revenues other than payments it receives from the obligations it has acquired.⁴³

³⁷ Cal. Gov't Code §§ 53859 and following.

³⁸ Kim Hopper, The Trust for Public Land, *Increasing Public Investment in Parks and Open Space*, Volume 1 of *Local Parks, Local Financing* (1998), available at www.tpl.org/tier3_cdl.cfm?content_item_id=1048&folder_id=825.

³⁹ Cal. Gov't Code §§ 6500 and following.

⁴⁰ The joint powers agreement may authorize the issuance of bonds for projects outside of the territorial jurisdiction of the participating agencies in limited circumstances. Cal. Gov't Code § 6586.5(b); 83 Cal. Op. Att'y Gen. 83 (2000).

⁴¹ Cal. Gov't Code § 6546. See *Rider v. City of San Diego*, 18 Cal. 4th 1035 (1998).

⁴² Cal. Gov't Code §§ 6584 and following.

⁴³ League of California Cities, *Municipal Revenue Sources Handbook* (2001).

COMPARATIVE FEATURES OF ALTERNATIVE FINANCING METHODS				
	LEASE PURCHASE AGREEMENTS	GENERAL OBLIGATION BONDS	REVENUE BONDS	SPECIAL BENEFIT ASSESSMENT BONDS
PERMISSIBLE PROJECTS	<ul style="list-style-type: none"> Acquisition or construction of major public improvements or equipment 	<ul style="list-style-type: none"> Acquisition of and improvements to public land and property 	<ul style="list-style-type: none"> Purchase or construction of revenue-producing public projects 	<ul style="list-style-type: none"> Infrastructure improvements to local properties and additional facilities needed for development
AUTHORIZATION	<ul style="list-style-type: none"> Issuer resolution 	<ul style="list-style-type: none"> Issuer resolution and two-thirds majority public vote 	<ul style="list-style-type: none"> Issuer resolution and in some instances public vote 	<ul style="list-style-type: none"> Mailed notice and majority vote by assessed amount; public hearings
AREA OF JURISDICTION	<ul style="list-style-type: none"> Issuer or service area boundaries 	<ul style="list-style-type: none"> Issuer boundaries 	<ul style="list-style-type: none"> Service area of issuer or enterprise 	<ul style="list-style-type: none"> Properties specifically benefited by improvements
NATURE OF DEBT SERVICE PAYMENTS	<ul style="list-style-type: none"> Lease or installment payments 	<ul style="list-style-type: none"> Property tax 	<ul style="list-style-type: none"> Service charges and other fees 	<ul style="list-style-type: none"> Annual assessments based on benefits derived
REPAYMENT SOURCE	<ul style="list-style-type: none"> General fund and/or project/enterprise revenues 	<ul style="list-style-type: none"> Taxes paid by property owners in jurisdiction 	<ul style="list-style-type: none"> Users of project or services 	<ul style="list-style-type: none"> Property owners in improvement district
SECURITY	<ul style="list-style-type: none"> Lease or installment sale agreement 	<ul style="list-style-type: none"> Full faith and credit of issuer 	<ul style="list-style-type: none"> Rate covenant, coverage tests, and contracts for operation and maintenance 	<ul style="list-style-type: none"> Assessment collection and foreclosure
CREDIT CONCERNS	<ul style="list-style-type: none"> Not backed by full faith and credit of issuer; limited ability to repossess and relet; risk of reduction in pledged revenues; abatement 	<ul style="list-style-type: none"> Assessed valuation trends; overall economic health of community; concentration of property ownership 	<ul style="list-style-type: none"> User charges and rate levels; concentration of rate-payers; competition 	<ul style="list-style-type: none"> Diversity of ownership; value-to-lien ratios

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COMPARATIVE FEATURES OF ALTERNATIVE FINANCING METHODS			
CHARACTERISTICS	MELLO-ROOS BONDS	JOINT POWERS AUTHORITY MARKS-ROOS BONDS	TAX AND REVENUE ANTICIPATION NOTES
PERMISSIBLE PROJECTS	<ul style="list-style-type: none"> Certain public facilities and services 	<ul style="list-style-type: none"> Public capital improvements; equipment; working capital 	<ul style="list-style-type: none"> Cash-flow deficits
AUTHORIZATION	<ul style="list-style-type: none"> Two-thirds majority vote of property owners or public vote if more than 12 registered voters in district 	<ul style="list-style-type: none"> Issuer resolution and resolution of participating entities forming joint powers agency 	<ul style="list-style-type: none"> Issuer resolution
AREA OF JURISDICTION	<ul style="list-style-type: none"> Defined district boundaries 	<ul style="list-style-type: none"> Issuer boundaries or service area 	<ul style="list-style-type: none"> N/A
NATURE OF DEBT SERVICE PAYMENTS	<ul style="list-style-type: none"> Special tax on property 	<ul style="list-style-type: none"> Lease or loan installment payments from local agencies to joint powers agency 	<ul style="list-style-type: none"> Taxes and other revenues deposited in general fund
SOURCE OF DEBT SERVICE PAYMENTS	<ul style="list-style-type: none"> Property owners in special district 	<ul style="list-style-type: none"> Pledged revenues 	<ul style="list-style-type: none"> Taxes and revenue received during fiscal year
SECURITY	<ul style="list-style-type: none"> Tax collection and foreclosure 	<ul style="list-style-type: none"> Pledge or covenant of taxes, lease or installment payments, and/or service fees 	<ul style="list-style-type: none"> Repayment fund set-aside
CREDIT CONCERNS	<ul style="list-style-type: none"> Value-to-lien ratios; absorption rate; infrastructure phasing and needs; diversity of ownership 	<ul style="list-style-type: none"> “Weak-links” in joint powers agency; sources of repayment 	<ul style="list-style-type: none"> Tax and revenue receipt trends of issuer; general economic health

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PART III:
IMPLEMENTING
THE ACQUISITION
PROGRAM

Selecting Properties for Acquisition



As part of the open space planning process described in Part I of this guide, the agency will have identified all lands in the community that might someday be the subject of preservation efforts and prioritized such lands based on resource values or other conservation-related factors. In addition, as part of either the community outreach process or design of the funding mechanism, the agency may have created citizen advisory groups to assist it in selecting and evaluating potential properties for acquisition (see Chapters 2 and 7).

Possible acquisitions come and go for a variety of reasons and in many cases it may not be possible to acquire the highest-ranking property. Striking the right balance between opportunity and overall program goals will be a constant challenge facing any open space acquisition program.

SELECTION PROCESS

An agency may have committed to a selection process as part of its needs assessment and planning process (see Part I, particularly pages 21 and 26 in Chapter 3 relating to possible selection criteria and who is involved in the selection process). A thorough community based selection process might involve the following steps¹ and provide opportunities for public comment:

- **Proposals.** Proposals or nominations are accepted from landowners, individuals, or organizations. Alternatively, public officials, staff, or advisory board members initiate the process.

IN THIS CHAPTER

Selection Process
Revenue Considerations
Acquisition Authority
Landowner Incentives
Fee, Easement or Lease?
Option to Purchase

¹ Adopted from a similar process described in The Trust for Public Land, *Local Greenprinting for Growth Workbook Volume IV: How To Acquire And Manage Park And Conservation Lands* (2003), 14.

- **Staff Review.** Staff reviews the nomination to determine compatibility with preservation goals and selection criteria (see Chapter 3, page 21).
- **Eligibility Determination.** Staff selects eligible parcels according to specific criteria. Recommendations are forwarded to the advisory committee at a public meeting. Other agencies are informed and allowed to review and coordinate planning efforts to the extent that the land is within their boundaries or jurisdiction.
- **Initial Prioritization.** Advisory committee establishes a working list of priority nominations.
- **Staff Investigation.** Staff obtains additional information on the priority nominations, including environmental audits and professional appraisals to determine the market value of the property.
- **Committee Investigation.** Advisory committee and staff visit the properties, meet with landowners, confer with applicants and community representatives, hold public hearings and evaluate the projects based on the previously determined criteria.
- **Final Review.** Advisory committee conducts final review of the nominations, taking into account the preliminary rankings, appraised values and any cost-sharing, restoration and/or property management issues.
- **Recommendation.** Advisory committee presents recommendations to the agency governing body. If approved, staff proceeds with the acquisition of property.

Of course, the unique attributes of a given property or funding mechanisms may suggest additional steps.

REVENUE CONSIDERATIONS

The tax and revenue consequences of acquiring property for open space will vary depending on whether the agency buys land or an easement. Buying land takes it off the tax rolls, resulting in a slight loss of property tax revenue for

each parcel. But the revenue loss may be significant when combined with the cost of maintaining the property.

Land subject to an easement remains on the local tax rolls, though it will produce less revenue than land that is not encumbered by an easement.² For property tax purposes, the value of the encumbered land is based on the easement restrictions rather than on the “highest and best” use of the land (generally, its use for development purposes). This property tax relief can be a significant incentive to landowners who are considering selling an easement.

ACQUISITION AUTHORITY

Cities and counties have broad statutory authority to acquire property for open space.³ Local agencies may acquire property through eminent domain, grant, purchase, lease, gift, devise, contract, “or other means (see Chapter 2, page 9).”⁴

LANDOWNER INCENTIVES

Exemptions from the Subdivision Map Act may provide additional incentives for landowners to transfer property to local agencies.⁵ Because the exemptions are not applicable to transfers to private individuals or nonprofit organizations, a landowner has an incentive to transfer open space to a local agency rather than to a land trust.

The most significant exemption provides that a parcel conveyed to a local agency is not counted when computing the total number of parcels created by a land division.⁶ For example, if five parcels are created by a subdivision and one parcel is transferred to a local agency, only four parcels will be counted for purposes of the Subdivision Map Act. This exemption also applies to easements and licenses transferred to a local agency. For example, if an easement is conveyed to a local agency and the underlying land is transferred to a private individual, only the latter transfer is counted for purposes of the Subdivision Map Act.

² The State Board of Equalization has held that the sale of a conservation easement does not constitute a “change of ownership” for purposes of being assessed. Calaveras County unsuccessfully asserted that an easement was an assessable interest in property. American Farmland Trust, *Field Notes* (June 20, 2003) (www.farmland.org/land-works/private/news/state/062003.htm).

³ See Cal. Gov’t Code §§ 6950 and following.

⁴ Cal. Gov’t Code §§ 37350, 37350.5; Cal. Civ. Proc. Code § 1240.130.

⁵ Cal. Gov’t Code §§ 66410 and following.

⁶ Cal. Gov’t Code § 66426.5.

This exemption can be significant to a landowner who is subdividing his or her land into several parcels. Under the Subdivision Map Act, a subdivision that results in the creation of five or more parcels generally requires the developer to prepare tentative and final tract maps.⁷ In contrast, subdivisions creating fewer than five parcels generally require that only a parcel map be prepared.⁸

Thus, the landowner in the above example whose subdivision results in five parcels would normally be required to prepare a tentative and final tract map. If one parcel is transferred to the local agency, however, the landowner need only prepare a parcel map. Preparing a parcel map instead of a tract map can save the landowner time and money. The procedures for preparing a parcel map are simpler; the Subdivision Map Act expressly limits the types of improvements that can be required in conjunction with a parcel map.⁹

In addition, a parcel map is not required for land conveyed to a local agency, unless a finding is made that public policy requires it.¹⁰ This exemption also applies to land that is conveyed from a local agency to a third party.

FEE, EASEMENT OR LEASE?

There are a number of ways land can be acquired for open space conservation purposes. These include purchase of the entire fee interest, acquisition of a conservation easement, purchase with lease back, and lease. See sidebar at page 97 for a comparative analysis of these approaches.

Most land use acquisitions involve purchasing the land outright. As an alternative, an agency may also purchase a conservation easement giving it limited control over use of the property. Purchasing land is the more expensive option (unless the property is donated), but it also provides the agency the most flexibility. It also has the advantage of being a simpler and more straightforward transaction than acquiring an easement.

If a local agency plans to provide public access to a proposed open space area (for example, for hiking or other



recreational purposes), it should consider buying the land. In contrast, an easement allows the landowner to retain most rights of ownership, including the right to exclude others from the land. The parties can, however, bargain for a provision in the easement that permits limited public access to some or all of the land. The easement may specify, for example, that the public will be allowed access to a trailhead on the north corner of the property between dawn and dusk.

In addition to the greater upfront cost of processing an acquisition, the costs associated with improving, maintaining and managing property can be significant when compared to the costs associated with the purchase of an easement. Improvements such as trails, restrooms and parking facilities may be required if public access is to be provided and such facilities will need to be maintained and patrolled on a regular basis.

Given the costs involved in purchasing land, many agencies opt to purchase easements.¹¹ A conservation easement is essentially the purchase of development rights over a property, in that use of the encumbered land is restricted to open space, agricultural, or resource conservation activities. The landowner retains title to the property and can restrict public access or use the land as collateral for a loan. Easements “run with the land,” binding all future landowners unless the easement is terminated.

⁷ Cal. Gov’t Code § 66426.

⁸ Cal. Gov’t Code §§ 66426, 66428.

⁹ Cal. Gov’t Code § 66411.1.

¹⁰ Cal. Gov’t Code § 66428(a)(2).

¹¹ It is also common for landowners to donate property to obtain certain tax benefits. However, a local agency should never promise or tout any particular tax benefit to a donor.



In many cases, the easement document will specify that the easement cannot ever be terminated (that is, the easement is established “in perpetuity,” or permanently). Permanency is often a requirement for both conservation easements and agricultural conservation easements.¹² Open space easements, however, may be limited to a specific term, such as 20, 30, or 50 years. Term easements may be good solutions in circumstances where there is an open question of whether the land should be permanently preserved.

Although the costs associated with managing an easement are usually less than for owning property, they can still be significant. The agency must monitor the use of the property to enforce the terms of the easement. These activities will require an ongoing investment of time and resources.

OPTION TO PURCHASE

Local agencies often face hurdles in timing public funding to be available when desired park and open space properties are for sale. A local agency may anticipate fund authorization at a future date, but in the meantime it needs to make sure a targeted property remains available for purchase.

There are two basic strategies for providing interim protection: either (1) negotiate the option directly or (2) get assistance from a “friendly” third party—often a land trust—who is willing to take the risk of buying the prop-

erty and holding it until the agency is able to proceed with the acquisition.

An option gives the purchaser the right—but not the obligation—to buy the property in the future. The option binds the landowner to hold the property off the market without any assurance that the sale will be concluded. Because of this lack of certainty, most property owners insist that the prospective purchaser pay for the option, usually an amount between one dollar and ten percent (or even more) of the property’s value.

Options are powerful tools, often enabling the holder of the option to leverage millions of dollars through relatively small option payments. In addition to providing interim protection, an option may help a local agency by highlighting a desirable opportunity and stimulating voter or legislative support to provide the necessary funding. Optioning the land creates an atmosphere for acquisition and allows planners and advocacy groups to say, “This land is available if we want it.”

Not all landowners are willing to consider an option or any form of agreement that does not require a firm commitment to buy in the immediate future. In these cases, help from a nonprofit conservation group that is willing to purchase the property outright may be the only means for a local agency to preserve the opportunity to acquire the open space. Many land trusts have accumulated revolving funds from donations, earnings and loans that can serve as bridge financing until a local agency is able to acquire a parcel. Once the land has been conveyed to protective ownership, the funds are returned to the revolving account.

For more information on partnering with a land trust, see Chapter 12.

» For model easements and more general information on conservation easements visit www.ilsg.org/openspace

¹² Note that agricultural conservation easements may be terminated 25 or more years after the easement is established, upon request by the landowner and review by the agency. Cal. Pub. Res. Code § 10270. See “Determine Acquisition Authority” section in Chapter 1.

RIGHTS AND INTERESTS IN LAND THAT CAN BE ACQUIRED			
METHOD	DEFINITION	ADVANTAGES	DISADVANTAGES
PURCHASE IN FEE	<ul style="list-style-type: none"> Obtaining full ownership of the land. 	<ul style="list-style-type: none"> Gives public full access. Guarantees permanent protection. 	<ul style="list-style-type: none"> Expensive. Usually removes land from tax base. Agency liability and maintenance.
CONSERVATION EASEMENT	<ul style="list-style-type: none"> Owner agrees to forgo certain uses of the property. A partial interest is transferred to a nonprofit or local agency. As ownership changes, the land remains subject to the easement restrictions. 	<ul style="list-style-type: none"> Less expensive. Tailored to the protection requirements. Landowner retains ownership and property remains on the tax rolls, but at lower value. Potential tax and estate tax benefits from donation. More permanent than land use regulations. 	<ul style="list-style-type: none"> Public access may not be required. Easement must be enforced. Restricted use may lower value.
PURCHASE OF LAND WITH LEASE BACK	<ul style="list-style-type: none"> As part of the purchase contract, an agency agrees to lease land back to the seller, subject to restrictions. 	<ul style="list-style-type: none"> Agency gets income through lease-back. Liability and management responsibilities assigned to lessee. 	<ul style="list-style-type: none"> Public access may not be available. Land must be appropriate for lease-back (for example, agricultural land).
LEASE	<ul style="list-style-type: none"> Short- or long-term rental of land. 	<ul style="list-style-type: none"> Low cost for use of land. Landowner receives income and retains control of property. 	<ul style="list-style-type: none"> Does not provide equity and affords only limited control of property. Temporary.

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Going Through The Acquisition Process



The acquisition process can take several forms, including purchase at market value, bargain sale, donation, bequest, donation with reserved life estate, land exchange, eminent domain and tax foreclosure. The acquisition of land for open space purposes is most frequently accomplished through a negotiated purchase agreement for market value.

In planning the acquisition of open space, local agencies may find it useful to employ a two-tiered process for evaluating individual parcels for potential fee title or easement acquisition from willing sellers. Ideally, in the first phase of the process, all lands in the community that might someday be the subject of preservation efforts are identified and prioritized based on resource values or other factors making them suitable for conservation. (See Chapter 2). In the second phase of the process, individual parcels are carefully evaluated for possible acquisition as they become available for sale or donation.

A preliminary activity in any acquisition process is a determination of how the property will be used, managed, and maintained. Part of the equation is whether the land will be held by the public agency or simply be encumbered for a particular use. Another part of the equation will depend on opportunity. Rarely does exactly the right piece of land come on the market at exactly the right price and exactly the right time. Because every acquisition is unique and will, most likely, necessitate new evaluations and implementation actions, the steps and strategies should be reviewed as to their appropriateness.

IN THIS CHAPTER

- Selection
- Appraisal
- Title Information
- Preliminary Negotiations
- Environmental Review
- Landowner Disclosure
- Site Visit
- Structuring the Deal
- Easement Document
- Approval

WAYS PROPERTY INTEREST MAY BE ACQUIRED ¹			
METHOD	EXPLANATION	ADVANTAGES	DISADVANTAGES
MARKET SALE	<ul style="list-style-type: none"> Property sold at value for “highest and best” use. 	<ul style="list-style-type: none"> Transactions usually proceed quickly. Highest sales income for seller. 	<ul style="list-style-type: none"> Expensive for local agency. Difficult to determine market value, particularly when speculative pressures drive prices higher.
BARGAIN SALE	<ul style="list-style-type: none"> Sale at less than market value. 	<ul style="list-style-type: none"> Landowner often eligible for tax deduction for the donated portion (market value less actual sales price). 	<ul style="list-style-type: none"> Time needed to educate owners about the deal. Tax benefits do not always equal donation value.
DONATION	<ul style="list-style-type: none"> Donation of land. 	<ul style="list-style-type: none"> Ownership without public expenditure. Donor may qualify for tax benefits. 	<ul style="list-style-type: none"> Very few landowners willing to consider.
BEQUEST	<ul style="list-style-type: none"> Landowner retains ownership until death. 	<ul style="list-style-type: none"> Agency can begin planning for acquisition. Management responsibility usually deferred until donor’s death. 	<ul style="list-style-type: none"> Uncertain date of acquisition. Donor does not benefit from income tax deduction. Owner can change mind.
DONATION WITH RESERVED LIFE ESTATE	<ul style="list-style-type: none"> Owner donates land but reserves the right of lifetime use and access. 	<ul style="list-style-type: none"> Owner retains use and may receive tax benefits. 	<ul style="list-style-type: none"> Uncertain date of acquisition. Management issues related to ownership of property.
LAND EXCHANGE	<ul style="list-style-type: none"> Exchange developable land for land that has high conservation value. 	<ul style="list-style-type: none"> Minimal or no agency funds required. Owner may defer capital gain recognition. 	<ul style="list-style-type: none"> Properties must comparable in value. Can be complicated and time-consuming.
EMINENT DOMAIN	<ul style="list-style-type: none"> Agency takes property by court action, pays fair market value. 	<ul style="list-style-type: none"> Agency can acquire important properties if other techniques are not available. 	<ul style="list-style-type: none"> Owner and public opposition. Potentially expensive and time-consuming litigation.
TAX FORECLOSURE	<ul style="list-style-type: none"> Land acquired through payment default. 	<ul style="list-style-type: none"> Limited expenditure. 	<ul style="list-style-type: none"> Land might not be appropriate for open space. Potentially cumbersome process.

SELECTION

Before open space is acquired, it is advantageous to hold community workshops. In many instances, processes may already have been established through the feasibility analysis or as a part of the funding authorizations. (See, for example, Chapter 2, page 16). Nearby property owners and others in the community will often have questions and concerns about how the property will be used, the costs and benefits to the community of acquiring open space and the effect the acquisition will have on surrounding land values. Community workshops may help allay fears and provide local agency officials with valuable insight into community perspectives and preferences.

Also, notifying adjacent landowners educates them and may encourage them to also consider selling an easement.

Keeping the community involved once the open space has been acquired is also an important consideration. The community will need to be kept informed about issues of maintenance, use of the property, and future acquisitions. This is another area where partnering with a nonprofit group can be beneficial as these organizations often have links to the community and can help in organizing and planning workshops or other meetings.

¹ Adapted from the Trust for Public Land, *Local Greenprinting for Growth Workbook Volume IV: How To Acquire And Manage Park And Conservation Lands* (2003), 24-25, which in turn was incorporated from *Tools and Strategies: Protecting the Landscape and Shaping Growth*, 1990, the Regional Plan Association, New York. The information was also published in *Doing Deals: A Guide to Buying Land for Conservation*, written by the Trust for Public Land and published by the Trust for Public Land and the Land Trust Alliance in 1995.

For more information about public engagement, see Chapter 2.

APPRAISAL

When a local agency, rather than nonprofit organization, purchases land for conservation purposes, state law generally requires that the property be appraised before an offer is made.² The appraisal must be completed “before the initiation of negotiations,” and the owner or the owner’s designated representative must be given an opportunity to accompany the appraiser during his or her inspection of the property.

There is a limited exception to the appraisal requirement where the property to be acquired has a low fair market value. In such cases, “the public entity may prescribe a procedure to waive the appraisal.”³

There is no requirement, however, that the public agency offer the full appraisal value for the property; indeed, the agency will often be wise to bargain for a lower price.⁴ If public monies are used to fund a portion of the purchase or the entire purchase price, the agency may not pay more than the appraised fair market value. To do so would constitute a prohibited gift of public funds.⁵ Acquisitions that occur in conjunction with settlement of litigation may be subject to slightly different standards.⁶

Many funding sources, including funds authorized under the California Farmland Conservancy Program⁷ also prohibit grantees from paying more than the appraised fair market value.

Purchasing an easement requires two appraisals: one to determine the current fair market value of the land with no easement and one to determine the value of the land encumbered by the easement. The easement value is



then calculated by taking the difference between these two appraisals.

The value of an easement can depend on several factors, including the restrictiveness of the encumbrance and local market conditions. Generally, the easement value will be 30 percent to 60 percent of the fair market value of the land without the easement. In rare cases, however, the value may range from 20 percent to 90 percent of the unencumbered fair market value.

The current fair market value of a property is generally based upon the “highest and best use” of the land and on what similar, unencumbered properties in the area are selling for. Other valuation methods may also be used, including summation of the component values of the land and calculating expected income.⁸

Landowners should be advised that the details of an appraisal and other facts relevant to the sale of their property or an interest in their property, including the landowner’s name, may become public. Local agencies may disclose this information, for example, in response to

² Cal. Gov’t Code § 7267.1. When open space is purchased by a land trust or other nonprofit organization, a formal appraisal is required only in certain circumstances. For example, an appraisal is required if public funds are used to finance some or the entire purchase price, or if the landowner wishes to claim a tax deduction for the value of the donated or bargain sale easement. Even where not required, having an appraisal avoids disputes between a landowner and purchaser over what is a fair sale price.

³ *Id.*

⁴ In contrast, the public agency *must* pay the full appraisal value for property acquired through eminent domain, unless certain exceptions apply. Cal. Gov’t Code § 7267.2; *Melamed v. City of Long Beach*, 15 Cal. App. 4th 70 (1993).

⁵ Cal. Const. art. XVI, § 6.

⁶ See, for example, *Emeryville Redevelopment v. Elementis Pigments, Inc.*, 101 Cal. App. 4th 1083, 1107 (2002).

⁷ Cal. Pub. Res. Code §§ 10200 and following.

⁸ Note that if land is acquired through the public agency’s power of eminent domain, the appraisal must be conducted in accordance with the valuation requirements in Civil Procedure Code sections 1263.010 and following. An appraisal conducted in conjunction with a negotiated purchase need not comply with these requirements.



a Public Records Act request by a member of the public.⁹ The Public Records Act requires agencies to disclose this information upon request once the purchase agreement has been signed.

Prior to signing, agencies may rely on an exemption contained in the Act that permits real estate appraisal information to be withheld until the acquisition is final.¹⁰ This exemption, if invoked by the agency, allows the agency to negotiate without the seller knowing the agency's maximum price. Also, it can protect landowners willing to sell to a local agency but reluctant to have their private information made public before the deal is closed.

Public disclosure of landowner information may also be required when public funds are used to finance all or a portion of the purchase price. A California Farmland Conservancy Program grant, for example, is conditioned upon the local agency or other grantee providing notice to interested parties, including adjacent landowners, of the receipt of the grant.

TITLE INFORMATION

Title information is necessary in order to identify a property's legal owner or owners, obtain a legal description of the property, and identify any liens or other encumbrances, including conditions, covenants and restrictions on the property. Such encumbrances, such as oil and gas,

mineral and water rights, may defeat the agency's purposes in acquiring the property. Sometimes such encumbrances can be modified or cleared from the title. If not, the property may not be appropriate for acquisition.

PRELIMINARY NEGOTIATIONS

In some cases, landowners will be motivated to work with local agencies, either because they are eager to sell their property or because they want to see it preserved for future generations. In other cases, finding landowners interested in selling their land or the rights to develop their land can be a big challenge. A number of informal discussions over the course of several months or years may be required.

Partnering with a nonprofit may be helpful in this regard, as such organizations often are well connected to the community and trusted by landowners. (See discussion in Chapter 12 on the pros and cons on working with a land trust or nonprofit organization).

ENVIRONMENTAL REVIEW

Local agencies should keep in mind that the acquisition of open space may be a "project" requiring environmental review under the California Environmental Quality Act.¹¹ The regulations interpreting the California Environmental Quality Act list a number of "categorical exemptions"—classes of projects that have been determined not to have a significant effect on the environment and that do not require environmental review—including an exemption for the acquisition, sale, or other transfer of land to preserve open space or lands for park purposes.¹² There is also an exemption for projects involving the acquisition of land or an easement for purposes of maintaining "the open space character of the area."¹³ These or other categorical exemptions may be applicable to open space acquisition.

An exemption, however, is not automatic. All categorical exemptions are subject to overriding exceptions.¹⁴ For example, where the project will result in a significant

⁹ Cal. Gov't Code §§ 6250 and following.

¹⁰ Cal. Gov't Code § 6254(h).

¹¹ Cal. Pub. Res. Code §§ 21000 and following.

¹² 14 Cal. Code Regs. § 15316.

¹³ 14 Cal. Code Regs. § 15317.

¹⁴ See 14 Cal. Code Regs. § 15300.2.

cumulative impact, or where unusual circumstances exist that may cause the project to have a significant effect on the environment, a categorical exemption is not available.

For each acquisition, an agency should review the list of categorical exemptions and exceptions to the exemptions carefully. If an exemption applies, the local agency may, but is not required to, prepare a “notice of exemption” notifying the public of the agency’s determination.¹⁵

LANDOWNER DISCLOSURE

In addition to the information included in the title report, the landowner must disclose his or her knowledge of activities on the property, including construction, the condition of facilities, structures and the potential for environmental contamination. Disclosure also includes information on water rights, easements, existing public rights, property lines and fence line locations.

SITE VISIT

A site visit to the property is essential in order for the local agency to investigate the condition of land and any structures on the land. The site visit also enables the agency to identify ecological resources, existing uses, sensitive habitat and any other conditions that may affect the suitability of the land for conservation or open space purposes.¹⁶

An environmental assessment to identify any contamination on the property is also important. The presence of contamination may affect the suitability of the land for preservation or public access purposes and may later expose the agency to liability for clean-up costs. Contamination can result from agricultural, commercial, mining, or timber operations. Several federal and state laws impose liability on current (including the purchasing local agency) and former landowners for costs associated with cleaning up property, without regard to fault. These costs can exceed the value of the property.¹⁷

In most cases, only a preliminary, or “Phase I,” environmental assessment will be necessary. A Phase I assessment consists of an historic review of the property, including a chain of title review and research regarding the current and past uses on the subject and neighboring properties.

If the Phase I assessment indicates that contamination may be present, a more in-depth Phase II assessment will be required to determine the nature and extent of the contamination. A Phase II assessment typically involves soil, groundwater, and surface water sampling and analysis in suspect areas of the property.

STRUCTURING THE DEAL

There are many ways of structuring the acquisition of open space. In the simplest cases, the local agency, working alone or with a land trust, purchases land or an easement and assumes responsibility for managing the property or enforcing the terms of the easement. In other cases, a more complicated transaction may be necessary.

Examples of more complicated arrangements include:

- **Temporary Purchase.** This option may be useful when land under threat of development becomes available for immediate purchase, requiring the local agency to act quickly in acquiring it. Purchasing the land and then reselling it to a private landowner subject to an easement can preserve the land as open space without bankrupting the agency. The California Farmland Conservancy Program provides funding for temporary acquisitions of this type. As a condition of the grant, the property must be resold to a private landowner, subject to an agricultural conservation easement, within three years of the purchase. The grant recipient must then reimburse the Conservancy Program in an amount equal to the fair market value of the land less the value of the easement and associated transaction costs.
- **Land Trust as Intermediary.** Land trusts and other nonprofit organizations, with their connections to funding sources, are often in the best position to purchase property for open space preservation. The land trust can acquire the property when the opportunity arises, hold it while the local agency gathers together funding from grants or other sources and then transfer the property. The property can be sold to the agency, or it can be sold to a private landowner subject to a conservation easement held by the agency. Note, however, that this may not be the best option in situations where

¹⁵ 14 Cal. Code Regs. § 15062.

¹⁶ A sometimes-overlooked step is obtaining a right to enter from the property owner in order to conduct these due diligence activities.

¹⁷ See Clean Water Act of 1977, 33 U.S.C. §§ 1251 and following; Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000 and following; Cal. Health & Safety Code §§ 25360 and following.

the property being acquired is part of a larger subdivision. In these cases it may be advantageous to the landowner to sell the land directly to the local agency rather than to a land trust or other nonprofit organization, in order for the landowner to take advantage of certain exemptions under the Subdivision Map Act. (See “Landowner Incentives” in Chapter 10.)

- **Purchase Option.** Instead of using a land trust as an intermediary in situations where the land is threatened but funding is not immediately available, the local agency can acquire a purchase option on the property. In a purchase option contract, the local agency pays the landowner a sum of money in exchange for the right to purchase the property within a given period of time. The purchase option is essentially a tool that can be used to buy time.
- **Lease with Purchase Option.** This alternative provides the agency with more flexibility than a purchase option. The agency enters into a lease with the landowner for a given period of time, usually one year or less, that allows the landowner to continue to use the land. At the expiration of the lease, a purchase option is activated, providing the agency with an additional period of time within which it may purchase the property.
- **Transfer of Land to a State Agency.** In some cases it may be beneficial for ultimate ownership of a property to be placed in the hands of a state agency, such as a land conservancy. For example, where the parcel is large or recreational activities such as hiking, bicycling and horseback riding are to be permitted, the local agency may not have sufficient resources to manage the property. In these cases, the local agency can transfer land that it has acquired from a private landowner to a state agency. The land can be sold in its entirety or subject to a conservation or other easement to be held by the agency. The parties may also enter into an agreement providing for the joint management of the property.

EASEMENT DOCUMENT

Most acquisitions will involve purchasing land or a conservation easement. Purchasing land is a fairly straightforward, commonplace transaction, involving a purchase agreement and the associated escrow process. There are some instances that will require extra attention, such as

Common Uses Prohibited in a Conservation Easement

- Any residential, commercial, or industrial use
- Constructing any new road, structure, or other improvement
- Building fences, barriers, or other structures that would jeopardize the open space character of the property
- Altering the land surface, including leveling, grading, landscaping, mining, or cultivating
- Hunting and trapping of wildlife
- Discharging, dumping, burning, or storing of wastes or hazardous materials
- Driving or parking any vehicles except emergency or maintenance vehicles
- Removing or altering any native plant species, other than for brush-clearing purposes
- Introducing exotic species
- Posting signs

when there are conditions on the purchase, subsequent uses of the property, reservations by the seller, or other unique transactional details.

Purchasing an easement is generally a more complicated transaction requiring careful drafting skills. The terms of the easement, which are entirely up to the landowner and the prospective easement holder to negotiate, must be carefully and accurately worded so there will be no question in the future as to what each party’s rights are. Typical sections in a grant of easement document include the following:

- **Statement of Purpose.** The purpose of the easement is normally to assure that the resource values of the property are preserved and/or restored by preventing any uses of the property that would impair or interfere with those values. Other purposes may also be identified, such as accommodating public access consistent with the preservation and/or restoration of the resource values.



- **Baseline Inventory.** This section should describe the baseline conditions of the property (normally by referencing a report prepared for such purpose). The baseline inventory identifies the current location, characteristics and status of the resource values and other site elements. The language of this section is critical, as it will provide a starting point for monitoring compliance with the terms of the easement.
- **Rights and Obligations of the Grantor.** The uses and activities that are prohibited on the property should be listed in this section. The prohibited uses will vary depending on the purpose of the easement and the particular characteristics of the property. Most conserva-

tion easements also include a general prohibition on all uses inconsistent with the purpose of the easement. The grantor retains all rights of ownership not specifically prohibited or limited by this section of the easement. For clarity, however, this section will often list the rights and privileges that the grantor retains. The section may require the grantor to give notice or obtain permission from the grantee before specific activities or uses may be undertaken.

- **Rights and Obligations of the Grantee.** The grantee's rights must be specifically stated in the agreement. The primary right of the grantee is the right to monitor and enforce the terms of the easement. Monitoring is typically accomplished by periodic site visits. Other rights of the grantee may include the right to permit public access to all or a portion of the property. Obligations of the grantee may include resource management or maintenance obligations. Note that under state law, conservation easements may only be acquired by state agencies, local agencies, California Native American tribes and qualified nonprofit organizations.

» A model agricultural conservation easement is available on the California Farmland Conservancy Program website at www.consrv.ca.gov/DLRP/cfcp/overview.

EMINENT DOMAIN MAY BE APPROPRIATE IN SOME INSTANCES

Although the overwhelming majority of land deals involve voluntary transactions, local agencies may use their powers of eminent domain to acquire open space when it furthers the public interest. For example, the Yolo County Board of Supervisors is pursuing an eminent domain action to acquire the 17,000-acre Conaway Ranch, a large expanse of farmland near downtown Sacramento.

To exercise the power of eminent domain, the county must determine the public need for acquiring the property. Yolo officials contend the property must be put in public hands to permanently ensure protection

of its open space, habitat and water rights. In their view, eminent domain is necessary to ensure that the land remains undeveloped. A joint powers agency that comprises the county, Yolo County's cities, UC Davis and the Yolo County Flood Control and Water Conservation District is charged with developing a management plan for the property.

The county must attempt to negotiate with the owner to pay a fair market price. If negotiations are unsuccessful, the county may seek a jury determination of the fair value. A local Indian tribe that runs a casino in the county has pledged to finance the acquisition.¹⁸

¹⁸ Mary Lynne Vellinga, *Tribe to Help Acquire Ranch*, *Sacramento Bee* (May 18, 2005).



- **Allocation of Costs and Liabilities.** Typically, the easement document will specify that the grantor retains all responsibilities and bears all costs and liabilities related to ownership, operation, upkeep and maintenance of the property, except for those responsibilities specifically undertaken by the grantee. Costs of inspection, monitoring compliance and keeping resource data current are normally borne by the grantee. This section may also include an indemnity provision. The grantor may agree to indemnify the grantee against liabilities arising out of the use of the property or the existence of any toxic or polluting substances on the property, unless caused by the grantee. The grantee may also indemnify the grantor against any liabilities or damages caused by the negligence or willful misconduct of the grantee.

- **Dispute Resolution and Remedies.** The easement document should include a section setting forth the procedures to be followed in the event a dispute arises between the parties and the remedies that the parties agree will be available.

APPROVAL

Before the deed or grant conveying the land or easement to the local agency can be recorded, the agency's legislative body must evidence its acceptance of the conveyance. Acceptance may be evidenced either by attaching a certificate or resolution of acceptance to the deed or grant, or by printing it on the deed or grant itself.¹⁹ The agency may delegate the authority to accept the real property interest to its officers or agents by general resolution.

A Note On Donations Of Property

Cities and counties have specific statutory authority to acquire property for open space by gift, grant, bequest, or devise.²⁰ If such a gift, bequest or devise does not limit the uses to which the property received or the income or increase from it may be put, it may be put to any use the entity desires.²¹

Gifts to a city are considered charitable contributions and are tax deductible, so long as the gift is for entirely public purposes.²²

¹⁹ Cal. Gov't Code § 27281.

²⁰ See Cal. Gov't Code §§ 6950 and following.

²¹ See, for example, Cal. Gov't Code § 37355

²² 26 U.S.C. § 170(c)(1).

Partnering with Nonprofits: Pros and Cons



In some instances, open space is acquired through the joint efforts of a local agency and a land trust or other nonprofit organization. There are a number of organizations that are taking active roles in land conservation statewide, ranging from local land trusts and regional organizations to nationally recognized groups such as the Trust for Public Land, Nature Conservancy and Ducks Unlimited. These groups provide a degree of flexibility to the management process and, as 501(c)(3) nonprofit organizations, can qualify for funding that is not available to public entities.

Most land trusts are local nonprofit entities.¹ They rely on private funds, corporate or foundation grants, property gifts and fees to carry out their land acquisition and management activities. A number of California land trusts have received public funds through state bond initiatives² or the California Coastal Conservancy to purchase open space.³

IN THIS CHAPTER

Partnership Models
Benefits
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Choosing A Partner

¹ Over 170 land trusts operate in California. See *2003 Land Trust Alliance Census Addendum* at www.lta.org/aboutlt/census.shtml.

² See for example Cal. Pub. Res. Code §§ 5096.310 and following; §§ 5096.600 and following.

³ Governor's Office of Planning and Research, *Putting Action into the Open Space Element: Conservation and Preservation Organizations*, http://ceres.ca.gov/planning/open_space/conserv_organizations.html (Revised November 1997).

PARTNERSHIP MODELS

These partnerships usually work in one of two ways, depending on who will ultimately manage the open space property (though other arrangements are also possible). In the first, the nonprofit organization will provide the funding for an acquisition with the idea that it will turn it over to the public agency to be used as a park. The agency can then raise the funds to reimburse the organization and take control of the land.

In the second model, the local agency acts as a fundraiser for the nonprofit agency, raising money through development agreements, impact fees or other sources and then turns the funds over to the agency to acquire title and permanently conserve the land.

» The Yolo Land Trust, established in 1988, holds and administers conservation easements within Yolo County. According to the most recent available information, the trust holds easements on 4,629 acres. It gets money to purchase the easements from the city of Davis, city of Woodland, Yolo County, and other sources. In 2000, Yolo County adopted a program that requires developers to compensate for development of agricultural land by donating conservation easements on a like amount of land elsewhere in the county.

BENEFITS

For the local agency interested in acquiring or preserving open space, working with a land trust or other nonprofit organization can provide many benefits. Among the most important are the following:

- **Expertise and Access to Resources.** Negotiating the purchase of land or an easement is a complex process that can be time-consuming and resource-intensive, particularly for a local agency short on staff or unfamiliar with the acquisition process. Working with a land trust allows some of these tasks and responsibilities to be shared with an organization that specializes in the preservation of open space.
- **Structuring “Bargain Sales.”** Often, the key to placing land in public ownership is finding a solution sensitive to the financial and legal needs of landowners. A land trust will be in a better position than a local agency to counsel landowners confidentially on the tax benefits of bargain sales, showing them how deductions based on charitable donations of land can offset in some measure a lower selling price.
- **Funding and Grant Proposal Writing.** Most land trusts qualify as public charities under Internal Revenue Code section 501(c)(3). As such, they can often secure independent sources of funding that are unavailable to public entities. Also, because the central focus of land trusts is the preservation of open space, they are usually well versed in grant proposal writing and have established contacts with funding sources. In addition, they are often adept at generating funds from individual, corporate and philanthropic sources and can help educate voters about conservation finance measures.
- **Credibility Among Landowners.** Independent land trusts, particularly those with local farmers or other residents on their board, are often well connected to the community and can lend credibility to the acquisition process. Owners often may fear that negotiations with a local agency will expose their personal affairs to public scrutiny. The involvement of a land trust in an acquisition deal can provide an air of independence to the process and may ease the fears of landowners uneasy about giving up rights to their land.
- **Long-term Monitoring.** Land trusts are often better suited to manage and monitor easements than local agencies.
- **Cash flow and Response Time.** Larger organizations that are dedicated to conservation purposes may have cash on hand to help local agencies make an unplanned purchase when a key property suddenly becomes available.
- **Real Estate Experience.** The real estate experience of a land trust can help local agencies with the mechanics of acquisition.

- **Authority.** Only public agencies and certain tax-exempt nonprofit organizations (land trusts) that qualify to do business in California may hold conservation easements in California.⁴

Of course the degree to which an individual land trust will bring these benefits to an acquisition will vary, so it is important to investigate the background of any particular land trust with which an agency is considering partnering.

» In California, there are 173 land trusts currently operating and 298,472 acres of land are protected by conservation easements.⁵

DISADVANTAGES

Although there are many benefits to working with a land trust or other nonprofit organization, there can be drawbacks as well. Perhaps most significant is the transaction cost that is often involved. Land trusts need to cover their overhead costs and other expenses. In some cases these costs may be paid through grants, charitable contributions or other funds acquired independently by the land trust. In other cases, landowner donations or local agency funds will cover these charges.

The decision of whether to work with a land trust may turn on the amount of the transaction fees, whether the local agency is able to pay them and whether the agency has the resources to undertake and complete the acquisition process itself. Negotiating the level of these costs with the land trust early in the acquisition process can be helpful. The amount and method of calculating transaction fees can vary widely among different organizations. Agencies should also ask about any “hidden costs” that might be involved.

Another consideration is the anticipated permanence of the nonprofit organization. Local land trusts are usually perceived as permanent organizations that will hold and maintain property beyond the foreseeable future. In some circumstances, however, another local community organization may be taking on a monitoring function or assist-



ing in the land deal in some other way. In these cases, it is wise to determine what will happen if the organization ceases to exist due to lack of funding or interest on the part of its members. Typically, the local agency can insert some form of automatic termination clause that is pegged to the failure to take some form of action (for example, failing to file status with the Secretary of State or failing to hold a board meeting in a given year).

WRITTEN AGREEMENTS

An effective partnership between a local agency and a land trust or other nonprofit organization requires a great deal of forethought, particularly when an open space acquisition program connects acquisition to larger land use goals. In some cases, it may be appropriate to enter into an agreement, such as a memorandum of understanding, to clarify each party’s responsibilities. Such an agreement can specify, for example:

- How the parties will share in costs for the management, monitoring and/or maintenance of the property.
- Whether joint approval will be required before any improvements to the property can be made.
- How staff, equipment and facilities will be allocated.
- How the parties will cooperate in encouraging public use and enjoyment of the property.

⁴ Cal. Civ. Code § 815.3.

⁵ See 2003 Land Trust Alliance Census Addendum at www.lta.org/about/lt/census.shtml.

- If easements are involved, who will maintain and pay for the costs of monitoring, maintaining a relationship with the landowner, and respond to violations of the easement terms.

The details of the agreement will depend on the nature of the relationship. When the relationship is based on sharing of financial resources (for example, the local agency provides funding for the land trust to purchase easements), the agreement may be limited to the assurances that each party needs regarding the availability of funds and how the money will be spent. More detailed agreements will be necessary, however, when title will be jointly held by both the agency and the land trust.

CHOOSING A PARTNER

Choosing a land trust or nonprofit organization that is based in the area where the property is located can be advantageous. Local land trusts are usually well connected to the community, are familiar with the local environment and have local staff and volunteers.

One consideration in partnering with a land trust is whether the organization is a member of the Land Trust Alliance. Member organizations must adopt the *Land Trust Standards and Practices* as the guiding principles for their organizations, indicating their commitment to upholding the public trust and the credibility of the land trust community as a whole. Local agencies can take comfort in an organization that has agreed to these standards,

» Much of the information in this section derives from “*Partnering with Nonprofits to Implement Land Use Policy*” presented by Michele Clark (California Rangeland Trust) to the 2005 City Attorneys February Continuing Education Conference. To obtain a copy, visit www.ilsg.org/openspace.



which including upholding “high standards of ethics in implementing its mission and in its governance and operations.”⁶ A list of California land trusts that have adopted the *Land Trust Standards and Practices* can be found at www.lta.org/findlandtrust/CA.

Another factor to consider is whether the easement is consistent with the organization’s mission statement. While some mission statements are broad, others are more limited. For example, the Solano Land Trust works to preserve agricultural land, open space and natural resources. The Pacific Forest Trust is dedicated to enhancing, restoring and protecting private, productive forests. The California Rangeland Trust seeks to preserve the open space, habitat and rangeland of working ranches.

Most California land trusts are also defined by a geographic boundary. The mission of the Bolsa Chica Land Trust, for example, is to acquire, restore and preserve 1,700 acres of the mesa, lowlands and wetlands of the Bolsa Chica, an area along the coast near Huntington Beach. Napa Land Trust works to protect the natural diversity, scenic open space and agricultural vitality of Napa County. The mission of the San Joaquin River Parkway and Conservation Trust is to preserve and restore San Joaquin River lands having ecological, scenic or historic significance. Local agencies should inquire into the mission of the selected land trust to confirm the proposed conservation easement corresponds with the organization’s mission.

⁶ Land Trust Alliance, *Land Trust Standards and Practices*, Standard I, Practice D: Ethics (Revised 2004).

LOCAL AGENCIES WORK WITH LAND TRUSTS TO PROTECT WILDERNESS PARK

The website of the Laguna Canyon Foundation states that Orange County's Laguna Coast Wilderness Park is a "testament of how the efforts of concerned citizens and local and state governments can combine to preserve land for public use and protect wildlife." Several acquisitions involving multiple organizations over the past several years have shaped the park into what it has become today.

The process began formally in 1990 when the city of Laguna passed a general obligation bond for \$20 million for acquisition of 4 of the 5 open space parcels comprising an area called Laguna Laurel Canyon—roughly 2,000 acres. The bond was written into a larger park bond measure that received 81 percent of the vote.

When the initial four parcels were acquired, the agreement allowed an additional four years for the agencies and conservation groups involved to raise \$33 million to purchase the fifth parcel. After the agreement expired, a seven-year negotiation began between representatives from the cities of Irvine, Laguna Beach, Laguna Woods and Laguna Hills, along with Orange County and interested individuals.

Ultimately, the parties agreed to balance the allowable development between the fifth parcel and a neighboring parcel where more intensive development would be less intrusive on the park. But funds were still necessary to purchase the fifth parcel. Then, in 2001, the Irvine Company donated the fifth parcel as part of a larger donation of 11,000 acres of land made to Orange County. The acreage was preserved as parkland by a conservation easement to the Nature Conservancy. The primary five parcels needed for the park had been preserved.

Another parcel was added to the park through the efforts of a diverse partnership that included the Laguna Canyon Foundation, the Trust for Public Land, California State Coastal Conservancy (Coastal Conservancy), Orange County and the city of Laguna Beach. The property was conveyed to the city of Laguna Beach, but it is managed by Orange County with the rest of the Laguna Coast Wilderness Park. Part of the acquisition funding came from an \$800,000 allocation of the Proposition 12 Park Bond funds⁷ to the city of Laguna Beach from the Coastal Conservancy.

Perhaps the best aspect of the multi-agency partnership is the ongoing commitment that the organizations have to the protected parklands. The Laguna Canyon Foundation in particular has been active in maintaining and improving the parkland. Some of its activities include:

- Helping to fund a nature center and interpretive education program
- Developing a multi-park education program
- Publication of a plant identification guide and trail maps
- Providing cell phone service for park rangers
- Providing structure and facility improvements
- Organizing support meetings between park staff and volunteer groups

The involvement of a broad-based coalition has created a tremendous amount of community support and care for the ongoing maintenance and management of the park and its facilities.

⁷ Approved by California voters in March 2000, Proposition 12—the Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act—allocated \$12.5 million to the Coastal Conservancy “to acquire land needed to connect important coastal watershed and scenic areas in Laguna Coast Wilderness Park.”



A more recent trend is the emergence of “captive” land trusts that are often created by a developer to hold a conservation easement as mitigation. Allowing an organization controlled by the developer to hold the easement leaves open the risk that the easement may be terminated at a point in the future when it is politically and financially expedient to do so. To determine whether the selected land trust is a “real” land trust or is one controlled by the developer, ask whether the land trust has a governing body that represents the broad interests of the public rather than personal or private interests of a limited number of donors (or persons standing in a relationship to such donors) and how often the governing body meets.

Finally, in some cases, it can be advantageous to work with a national land trust, such as the Nature Conservancy and or the Trust for Public Land, which generally have larger staffs and access to more resources. This can be helpful where the amount of land to be acquired is large or long-term monitoring or management services will be required.

Creating New Organizations to Fit the Mission

Local agencies can also create a land trust as part of a conservation strategy. For example, the city of Livermore worked closely with Alameda County and the city of Pleasanton to form the South Livermore Valley Agricultural Land Trust, which helps implement its South Livermore Valley Plan. Easements are acquired under two ordinances. One requires developers to purchase easements, which are passed on to the trust. The second imposes a fee that is deposited with the trust for purchasing additional easements.

The city of Livermore is the third-party beneficiary for the easements and will take over the easement program if something unforeseen happens to the trust. The drawback to a trust formed by a local agency is that it is more likely to be viewed skeptically by landowners. The city of Brentwood, which also created a new land trust to protect locally important agricultural lands, addressed this issue by including a significant number of local farmers on its board of directors.

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