1-1-1976

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THE CALIFORNIA OPEN-SPACE EASEMENT ACT:
THE EFFICACY OF INDIRECT INCENTIVES

The Open-Space Easement Act of 1974, like its predecessor, the Open-Space Easement Act of 1969, was enacted by the California Legislature in response to widespread popular concern for the preservation of scenic areas and the enhancement of the physical appearance of urban areas. The 1974 Act reiterates the legislature's determination to conserve land in California, and reaffirms its belief that acquisition of open-space easements is an essential element in local government land use and planning practices. Thus, one of the main objectives of the 1974 revision is to facilitate acquisition of easements by providing increased incentives for citizens to donate land for public use.

Numerous other authors have thoroughly examined the concept of the open-space easement, and a detailed analysis of the subject will not be undertaken in this comment. Consideration will be given to the legislative intent, background and structure of the 1974 Act, with particular emphasis on the tax benefits and detriments afforded the grantor of an open-space easement. The analysis will explore to what extent the 1974 amendments will facilitate the establishment and maintenance of "important physical, social, economic or aesthetic assets to existing or pending urban development."

FRAMEWORK OF THE 1974 ACT

The California Legislature carefully outlined what must be done by the parties in order to create an open-space easement.

3. Bowden, Article XVIII—Opening the Door to Open Space Control, 1 PAC. L.J. 461, 463 (1970); Comment, The Dilemma of Preserving Open-Space Land—How to Make Californians an Offer They Can't Refuse, 13 SANTA CLARA LAW. 284 (1973) [hereinafter cited as Dilemma].
4. Comment, Easements to Preserve Open Space Land, 1 ECOL. L.Q. 728, 735 (1971) [hereinafter cited as Easements].
7. Id. § 51075 et seq.
The initial section of the Act recites that the legislature intended to create provisions for acquisition of open-space easements by cities and counties, and sets out a definition of an open-space easement which parallels the traditional definitions of an easement:

[A]ny right or interest in perpetuity or for a term of years in open-space land acquired by a county or city pursuant to this chapter where the deed or other instrument granting such right or interest imposes restrictions which, through limitation of future use, will effectively preserve for public use or enjoyment the natural or scenic character of such open-space land. An open-space easement shall contain a covenant with the county or city running with the land, either in perpetuity or for a term of years, that the landowner shall not construct or permit the construction of improvements except those for which the right is expressly reserved in the instrument provided that such reservation would not be inconsistent with the purpose of this chapter and which would not be incompatible with maintaining and preserving the natural or scenic character of the land.

The legislature determined that open-space easements are an effective and viable vehicle for the "maintenance of the economy of the state," and to assure the "continued availability of land for the production of food, fiber, for the enjoyment of scenic beauty, for recreation and for the use and conserva-

8. Id. §§ 51070, 51075(d).
9. Id. § 51075(d). Compare traditional definitions of an easement: 1) an interest in land in possession of another, Elliot v. McCombs, 17 Cal. 2d 23, 28, 109 P.2d 329, 333 (1941); Callahan v. Martin, 3 Cal. 2d 110, 113, 43 P.2d 788, 790 (1935); Corea v. Higuera, 153 Cal. 451, 454, 95 P. 882, 884 (1908); 3 R. Powell, The Law of Real Property § 405, at 387 (1973) [hereinafter cited as Powell]; 2) an interest of limited use or enjoyment, Mosier v. Mead, 45 Cal. 2d 629, 632, 290 P.2d 495, 498 (1955); Moots v. Kasten, 90 Cal. App. 2d 734, 736, 203 P.2d 537, 539 (1949); Powell § 405, at 387; 3) an interest that is protected from interference by third parties, Wright v. Best, 19 Cal. 2d 398, 381, 121 P.2d 702, 710 (1942); Powell § 405, at 387; 4) an interest that cannot be terminated at will by the possessor, Powell § 405, at 387; cf. Wilson v. Abrams, 1 Cal. App. 3d 1030, 1035, 82 Cal. Rptr. 272, 274 (1969); 5) an interest atypical of a possessory land interest, Powell § 405, at 387; accord, Zlozower v. Lindenbaum, 100 Cal. App. 766, 771, 281 P. 102, 104 (1929); 6) an interest that can terminate by conveyance, Powell § 407, at 387; accord, Elliot v. McCombs, 17 Cal. 2d 23, 28, 109 P.2d 359, 363 (1941); 7) an interest terminating when the intention of the parties has been met, or by other events, Powell § 405, at 387; accord, Irvin v. Petitfils, 44 Cal. App. 2d 496, 499, 112 P.2d 688, 690 (1941); 8) an interest that can be for years or in perpetuity, see In Re North Beach & Mission R.R., 32 Cal. 499, 500 (1867).
It further found that such easements will be socially, economically and aesthetically beneficial, and well within the realm of public utility and public expenditure.

Implementing the Provisions of the Act

The provisions designed to make donation of an easement more attractive for potential grantors and acquisition more practical for government entities appear in Articles Three through Five, inclusive, of the 1974 Act.

One change in the 1974 Act that should offer substantial encouragement to landowners is a provision permitting an easement to be granted for as few as 10 years. The 1969 Act had the minimum term at 20 years. The 20-year requirement undoubtedly deterred many potential grantors of open-space easements, since few property owners were willing to relinquish all development rights for such a prolonged period of time. In addition, the 20-year period served to "lock in" the grantor's assets by minimizing or eliminating any possible liquidity he or she might have in the land.

The shortened mandatory term, which makes donation of an easement more attractive for the grantor, also makes the proposition correspondingly less attractive for the grantee city or county. To assure maximum motivation for both parties, the legislature has coupled reduction of the mandatory term with an interesting renewal procedure that in effect serves to extend the length of the grant by agreement sub silentio. If the open-space easement is for a term of years (the number of years must be specified), the contract shall provide that on the "anniversary date of the acceptance of the . . . easement or on such other annual date specified . . . a year shall be added automatically to the initial term." This procedure creates difficulties if the grantor of the open-space easement should seek to terminate the dedication to the public of such easement.

11. Id.
12. Id. § 51072.
13. Id. § 51073.
14. Id. §§ 51070-73, 51075.
15. Id. § 51081.
18. Id.
19. See notes 30-33 and accompanying text infra.
matic extension provision increases the life of the easement and, though it may be a necessary compromise, it effectively nullifies the liquidity achieved by reducing the term the easement must be granted for.

The 1974 Act also attempted to facilitate acceptance of an easement grant by simplifying the bureaucratic procedures that often accompany governmental transactions. Primarily, the city or county is not permitted to accept an open-space easement grant unless it has adopted an open-space plan, and the governing body has set forth specific findings to support acceptance of each grant. Section 51084 of the Government Code lists the necessary findings and provides that a recital in the resolution shall establish a conclusive presumption that all the required conditions have been met.

In addition, the city or county may require the grantor of the open-space easement to include in the conveyancing instrument any conditions, covenants, or restrictions the city or county deems necessary to maintain the natural or scenic character of the land.

20. CAL. GOV'T CODE § 51080 (West Supp. 1975). An open-space plan is defined as the “open space element of a county or city general plan adopted by the governing body pursuant to Section 65560 of the Government Code.” Id. § 51075(e). Section 65560 provides that an open-space plan shall be an element of the general plan as required by section 65563 of the Government Code. Section 65563 provides that all cities and counties shall have an open-space plan for the “comprehensive and long-range preservation of open space.” Since all cities and counties were required to adopt a final plan by the end of 1973, all jurisdictions that have a general plan qualify for acquisition of open-space easements.

21. Id. § 51084.

22. Id. § 51084 provides in part:

No grant of an open-space easement shall be accepted by a county or city, unless the governing body by resolution finds:

(a) That the preservation of the land as open space is consistent with the general plan of the county or city; and

(b) That the preservation of the land as open space is in the best interest of the county or city.

23. Id. In May, 1974, the California Supreme Court in Topanga Ass’n v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974), stated that in a zoning variance matter the granting agency must set forth findings based on substantial supporting evidence. 11 Cal. 3d at 511, 522 P.2d at 14, 113 Cal. Rptr. at 838. The Topanga court reasoned that since a variance affects a vested interest, see Strumsky v. San Diego County Employees Retirement Ass’n, 11 Cal. 3d 28, 44-45, 520 P.2d 29, 40, 112 Cal. Rptr. 805, 816 (1974), the administrative agency must comply with the findings procedure. As a planning agency under the Open-Space Easement Act must determine whether or not an easement proposal is in the public interest and within the general plan, it follows that the planning agency must comply with the procedures set forth in Topanga.

24. CAL. GOV’T CODE § 51082 (West Supp. 1975). The purpose of the restrictions and covenants inserted in the instrument of conveyance is usually to assure that a
Enforcing the Easement

One likely focal point for litigation is section 51086, the compliance and enforcement section. This section provides that no building permit may be issued to anyone if the permit would violate the easement, and that injunctive relief may be obtained to enforce the easement. The 1974 Act grants standing to two parties to seek injunctive relief to prevent construction or other development on the land subject to the open-space easement: the grantee government may seek an injunction to stop any prohibited development or to force removal of "any structure erected in violation of the easement;" and the owner of any property within the city or county "or any resident thereof" may seek an injunction if the city or county fails to do so. Granting standing to the public permits interested members of the public to act as watchdogs over the conduct of local government officers and serves to minimize the effects of officials' inattentiveness.

Although the Open-Space Easement Act provides for strict compliance, it also permits termination of the easement through nonrenewal or abandonment. If either the grantor or the city desires not to renew the easement, that party must submit a notice of termination or nonrenewal 90 days before the annual renewal date. Upon such notification the easement will terminate at the end of the period specified in the grant, plus any years already added through the automatic renewal provision.
As an alternative to nonrenewal, either the grantee government or the grantor may seek to have the easement abandoned. Abandonment of the easement may be accomplished at any time subsequent to a determination by the city or county that the open-space easement is no longer serving a public purpose. The grantor, after abandonment proceedings have been concluded, must pay a fee equal to 50 percent of the assessed valuation of the easement, which terminates at the time the fee is paid by the grantor to the assessor. In effect, the grantor is purchasing the easement back from the city or county; presumably he would be willing to do so only if faced with an immediate pecuniary opportunity involving the property subject to the easement. It would also appear that the city or county would seldom have any reason to certify abandonment, and thus lose the easement, unless it were subjected to intense political pressure exerted by the grantor or a faction that stood to gain economic benefit as a consequence of the abandonment.

Necessary protection for the grantor is provided by section 51095 of the Act, which is designed to minimize governmental abuse of the Easement Act. This section of the Act deals primarily with condemnation proceedings instituted subsequent to government acceptance of an open-space easement. If the government attempts to condemn the servient property for public use, the easement terminates at the time the complaint in condemnation is filed, and the owners of the property to be condemned are entitled to compensation equivalent to what would have been awarded had the land not been burdened by the easement. Government entities are thus prevented from taking advantage of the diminished market value of the burdened property in order to acquire the fee at a greatly reduced cost.

17 & 18 Supra.
34. The governing body may approve the abandonment if it finds
   (1) That no public purpose described in Section 51084 will be served by
       keeping the land as open space; and
   (2) That the abandonment is not inconsistent with the purposes of this
       chapter . . .
Id. § 51093(a).
35. Id. § 51093(c). Prior to approval of the abandonment, the assessor determines the full cash value of the entire parcel as if it were unburdened by the easement and multiplies that amount by 25 percent. The fee that must be paid is equal to 50 percent of that valuation.
36. Id. § 51093(e).
Economic Incentives and Preservation of Open Space

The requirement of strict procedural compliance with the provisions of the Act assures the donee government that it will obtain an easement that requires little governmental expenditure. Facing increasing governmental costs and the population's general reluctance to be subjected to further tax increases, local governments do not and will not take steps to increase their community's open space if the acquisition will increase the cost of government operation.\textsuperscript{37} Numerous states have adopted measures to assure the preservation of open space. Not all utilize California's easement method, but almost without exception they have, like California, attempted to insure that no financial crisis will be precipitated by the government's exercise of its power to create open-space areas.\textsuperscript{38}

The need to minimize the financial burdens upon the city or county acquiring an open-space easement creates obvious difficulties. The preservation and conservation of open space is an abstract proposition unless a landowner can be persuaded to abandon his or her rights to the property. Although the Open-Space Easement Act of 1974 does not provide for any specific remuneration to the grantor of an open-space easement, it appears that the legislature intended that beneficial tax consequences provide the necessary incentive for land donation.\textsuperscript{39} Only if the tax benefits accruing to the grantor of an easement exceed the advantages of immediately developing the land will the impact of the 1974 Act be significant.

A precise balancing of interests must be achieved if the Act is to operate effectively. On the one hand, the need for preservation and conservation of open space would appear to dictate that the tax laws be interpreted liberally, so as to afford the grantor the maximum tax benefits possible, and thereby stimulate numerous grants of open-space land. On the other hand, the courts should not permit the grantor to take unfair advantage of state and federal laws to the detriment of other taxpay-

\textsuperscript{37} See \textit{Time}, Oct. 16, 1972, at 80.

\textsuperscript{38} \textit{E.g.}, \textit{Ark. Stat. Ann. §§ 76-2520, 76-2521 (Supp. 1973)} (the scenic area may be acquired by gift, purchase, exchange, or condemnation); \textit{Conn. Gen. Stat. Ann. § 13a-85a (Supp. 1975)} (the Commissioner of Transportation may acquire by purchase or condemnation any land that is deemed to be a scenic highway area); \textit{Va. Code Ann. § 33.1-66 (1970)} (state highway commissioner may acquire land by gift or purchase for the preservation of natural beauty adjacent to scenic highways, drawing upon existing highway funds); \textit{Wash. Rev. Code § 47.12.250 (1965)} (state highway commission may acquire title to real property, and the commission is authorized to utilize federal-aid funds available from the federal government).

\textsuperscript{39} \textit{Cal. Gov't Code § 51073 (West Supp. 1975)}. 
ers who must take up the slack. However, an analysis of probable tax consequences suggests that potential grantors had best be prepared to derive maximum satisfaction from their status as public benefactors. The California property tax provisions offer considerable benefit to the taxpayer satisfied with relatively small but long-term deductions; however, the availability of the federal charitable contribution deduction, which would permit substantial income tax reduction in the year of the grant, is much less clear.

**Federal Tax Consequences**

*The Donation of the Easement*

The remainder of this comment will be devoted to an examination of the federal and state tax consequences of an open-space easement donation. To simplify the taxation principles and problems, the analysis will focus upon an individual taxpayer in a non-business setting, concerned about his or her personal income tax, and desiring to qualify the granting of an easement as a charitable contribution on his or her federal income tax return.40

Whether a transfer qualifies as a deductible “charitable contribution” depends on the true nature of the transaction. If the gift was made “in expectation of the receipt of certain specific direct economic benefits within the power of the recipient to bestow directly or indirectly,”41 which otherwise might not be forthcoming, no “charitable contribution” deduction will be allowed.42

*The Grant Must be in Perpetuity*

It is evident that from the viewpoint of the donor of an open-space easement, the requirement of complete divestiture of the owner’s interest is a formidable obstacle.43 The partial nature of the grant is not a bar, since Internal Revenue Service Regulations specifically provide that conveyance of an open-

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40. Int. Rev. Code of 1954, § 170(c)(1), which permits a deduction of a charitable contribution to “a State . . . or any political subdivision” thereof, but only if the purpose of the contribution is to benefit the public or to provide for an exclusively public use.
41. Stubbs v. United States, 428 F.2d 885 (9th Cir. 1970).
42. Id.
space easement shall be considered a grant of "an undivided portion of the donor's entire interest in property," and so eligible for deduction. The catch, however, is that the grant must be in perpetuity. The regulation is specific: to qualify, the transaction must involve transfer of "an open-space easement in gross in perpetuity."

It seems, therefore, that the California Legislature's attempt to encourage easement donations by reducing the mandatory term to ten years is unlikely to produce the desired results, since the legislature apparently failed to take into consideration the limitations of this particular applicable federal tax provision.

Lack of Consideration is an Absolute Requirement

The Sutton case. Even if the taxpayer is willing to resolve the "entire interest" problem by making a grant in perpetuity, the charitable deduction is by no means assured. There remains a possibility that the Internal Revenue Service would categorize the typical open-space easement grant as a non-deductible quid pro quo transaction. In a 1971 case, Larry G. Sutton, the Tax Court affirmed a ruling by the Internal Revenue Commissioner that a grant of an easement to a city in California was not a valid gift. The court's decision was based on evidence tending to establish that the owner had made the grant in anticipation of economic benefit. In Sutton, the taxpayer was a fee owner of some undeveloped land. A city ordinance prohibited him from improving the land until the streets and highways were widened to a specified size. The taxpayer granted an easement to the city which permitted the widening

47. In 1968, the Congress of the United States passed the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 et seq. (1970). The Act states that an easement donated for purposes of the Act may be a valid charitable contribution under the Internal Revenue Code so long as the government receives the "right to control the use of the land." An important distinction to be drawn is whether this provision was intended to meet the demands of the tax laws or to ensure long-term preservation of wild river areas. In litigating the deductibility of the donation of an open-space easement, this point would appear to be arguable.
49. Id.
50. WESTMINSTER, CAL., MUNI. ORDINANCE ch. 26 § 8200.20 (date of adoption unknown).
of the street; subsequently, he developed part of the land. Since the taxpayer’s primary motive for granting the easement to the public entity was to facilitate eventual development of his property, the transaction involved exchange of consideration. The Tax Court’s conclusion that the taxpayer’s expectation of economic benefit barred the deduction strongly suggests that a grant of easement to a public entity will be considered a charitable contribution only if there is no reciprocal exchange of consideration.51

The requirement of gratuitous motive had been previously touched upon. In Revenue Ruling 64-205,52 the Internal Revenue Service ruled that a gratuitous conveyance to the United States of America of a restrictive easement was a permissible charitable contribution within the meaning of section 170 of the Code. The emphasis in the ruling was on the word “gratuitous,” and the subsequent holding in Sutton indicated that absence of an economic motive is a necessary element of a charitable contribution.53

Reduced property taxation as consideration. The difficulty in this area is created by the 1974 Act’s property tax provisions. In an attempt to provide an immediate inducement to owners of potential open-space land, the legislature, concurrent with the enactment of the 1974 Open-Space Easement Act, amended sections of the California Revenue and Taxation Code to provide property tax relief for the grantor by adjusting the tax assessment to reflect the burden of the easement.54

Specifically, the California Revenue and Taxation Code now contains certain technical provisions for assessment practices.55 Basically, the code requires that “the assessor shall consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected,”56 and specifically provides that land is enforceably restricted if it is subject to

52. But see note 51 supra.
55. Id.
56. Id. § 402.1.
any open-space easement. Therefore, the assessor must use a capitalization of income method in valuing enforceably restricted land, rather than the fair market value method which is used in assessing regular residential property. As a result, the taxpayer stands to benefit from a significant property tax reduction.

The reduction in property tax might be construed by the Internal Revenue Service to be a mutual exchange of consideration. Since, under Sutton, anticipated economic benefit to the grantor would serve to defeat a charitable contribution deduction, and since the grantor of the open-space easement automatically is afforded preferential property tax treatment, it could almost always be argued that the gift was motivated primarily by "anticipated benefit of an economic nature," and thus is not deductible as a charitable contribution under section 170(c).

The Collman case. In a 1975 case, Collman v. Commissioner, the Ninth Circuit Court of Appeals implicitly disapproved the Sutton decision. The court did not overturn the legal principles set forth in Sutton, but did reject the findings of the Tax Court.

57. Id. § 422.
58. Id. § 423. The Code defines the capitalization of income method as assessing the land at a value equal to its income value, which is determined by the fair rental value or some other method. The California Legislature has recognized that a landowner must be persuaded to grant an easement to the local government. Bowden, supra note 4, at 464. See also Hagman, Open Space Planning and Property Taxation, 1964 Wis. L. Rev. 628, 641 (1964); Dilemma, supra note 3, at 289-290. Section 423 of the Revenue & Taxation Code provides in part that an enforceable restriction (such as an open-space easement) shall be taken into consideration when valuing the land. A burdening easement has usually been determined to decrease the value of the dominant tenement. See, e.g., Borough of Englewood Cliffs v. Allison's Estate, 69 N.J. Super. 514, 174 A.2d 631 (1961); Beach Bungalows v. Pushwick Sav. Bank, 285 App. Div. 1069, 133 N.Y.S.2d 712 (1954); People ex rel. City of New York v. Barker, 17 N.Y.S.2d 305 (1939).
59. See notes 48-53 and accompanying text supra.
62. Collman v. Commissioner, 511 F.2d 1263 (9th Cir. 1975).
63. Id. at 1268-69.

The Sutton court, we feel, drew impermissible inferences from the existence of a local zoning ordinance and from the taxpayer's attempt after the conveyance to develop the land.

Id.
In Collman, a plaintiff who faced eventual condemnation proceedings dedicated to the county a parcel of land for road construction. The county had promised, in exchange for the grant, to construct the roads to maximum planned width, which had the effect of making the land eligible to be rezoned for commercial purposes. The grant was not conditioned on rezoning and there was no evidence that Collman was aware of the county ordinance prohibiting commercial use of land unless adjacent streets were of ultimate width.

By permitting the charitable deduction, the Collman court declined to adopt the reasoning of Sutton, concluding instead that “the mere existence of a zoning ordinance [which, in conjunction with the grant, could confer a benefit on the grantor] . . . cannot be sufficient evidence of economic motivation.”

Further, the Sutton decision ignored a distinction present in every reported tax decision disallowing a charitable deduction for dedication of land to a political subdivision: the fact that the benefit obtained by the taxpayer was bargained for. Failure to recognize the “bargaining” distinction would mousetrap the California landowner by making it virtually impossible for any open-space easement grant ever to qualify for the section 170(c) deduction, since the state property tax reduction is automatic. The Collman court’s acceptance of the distinction indicates that California taxpayers may, after all, have an escape route. An analysis of Collman and other charitable deduction cases suggests an acceptable test. Initially, it seems that the donor must be unaware of the ordi-

64. Id. at 1268.

65. In all the tax decisions, the taxpayer received a bargained for economic benefit. Stubs v. United States, 428 F.2d 885 (9th Cir. 1970), cert. denied, 400 U.S. 1009 (1971) (dedication of land conditioned on receipt of favorable zoning); United States v. Transamerica Corp., 392 F.2d 522 (9th Cir. 1968) (private roadway conveyed on understanding that city would improve and maintain it as a public street to taxpayer’s benefit); Taynton v. United States, 5 AM. FED. TAX R. 2d 1468 (E.D. Va. 1960) (land donated pursuant to sales contract with third party and new road would economically benefit taxpayer’s other property); Karl D. Petit, 61 T.C. 634 (1974) (land dedicated in exchange for subdivision concession from local planning board); Charles O. Grinslade, 59 T.C. 566 (1973) (land dedicated in exchange for money, other land for development purposes, and zoning variances); Ackerman Buick, Inc., 1973 P-H Tax Ct. Mem. ¶ 73,224 (1973) (dedication of roadway in exchange for zoning changes); Jordon Perlmutter, 45 T.C. 311 (1965) (dedication in order to obtain approval of subdivision).

In Sutton and Collman there was no evidence that the taxpayer had “bargained” for an economic benefit.

66. 511 F.2d at 1268.
nance or statute affording economic benefits. Moreover, it would appear that the burden would be on the Commissioner to prove that the taxpayer was aware of the potential economic benefits. The key element of the test (derived from all cases other than Sutton) would be the absence of any economic benefit that the taxpayer had “bargained for” and actually anticipated.

The first three elements of the test rely heavily upon the intent doctrine set forth in Commissioner v. Duberstein, the seminal case on the nature of a “gift” for income tax purposes. If the intention of the grantor of an open-space easement is not to benefit himself economically, a charitable contribution deduction should be allowed.

The Collman court’s conclusion that the existence of property tax relief should not automatically bar any possibility of a federal income tax deduction is predicated upon its implicit belief that charitable contributions should be encouraged and not discouraged by the Commissioner. The basis for this preference is found in the congressional intent underlying the charitable contribution deduction section of the Internal Revenue Code. In the opinion of Congress,

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.

The Collman case increases the potential of the 1974 Open-Space Easement Act in that it has cast doubt on the viability of Sutton. Although Collman is not conclusive as to

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67. Id. at 1269.
68. Id. at 1268. The opinion states that inferences may not be drawn from mere disbelief of taxpayer’s contention. In support of this the court cites Schwab v. Bullock’s Inc., 508 F.2d 353 (9th Cir. 1974), an anti-trust case.
69. See note 65 supra.
70. Id.
71. Commissioner v. Duberstein, 363 U.S. 278 (1960). One of the holdings of Duberstein was that the critical consideration in determining the existence of a statutory gift or charitable contribution is the transferor’s intention. 363 U.S. at 285-86.
72. 511 F.2d at 1268.
the problem presented by the donation of an open-space easement, the test derived from it, and particularly the increased evidentiary burden on the government, promises to improve the situation of California taxpayers.

On the other hand, Collman did not involve an open-space easement grant, and there remains the possibility that courts might consider the state property tax reduction a "bargained for" or pre-arranged economic benefit. If so, the "escape route" offered by Collman will prove illusory, and the California grantor will once again find himself caught in a trap of looking-glass logic. It seems likely that an argument for distinguishing a true pre-arranged benefit from a statutorily-imposed benefit could be made successfully. Otherwise, a grantor proceeding with true donative intent, and the recipient of a property tax reduction which in fact is irrelevant to his motive, will be denied the deduction. Further, the congressional and judicial preference for liberality in the charitable contribution area should support the argument.74

Treatment of Termination Fees Under the 1974 Act

Also of concern for federal taxpayers is the treatment of abandonment fees under the 1974 Open-Space Easement Act. Section 51093 of the 1974 Act75 permits the grantor of an open-space easement and the local government to agree to an abandonment of the easement.76 Upon completion of the abandonment proceedings, the grantor must pay a fee to the county treasurer equal to 50 percent of the abandonment valuation of the easement before title is returned to him.77 The deductibility of the fee on the federal tax return is dependent upon the interpretation given to the fee by the Internal Revenue Service. If it is construed as a payment for accrued back property taxes, the taxpayer will be allowed an itemized deduction on his or her federal return under the general provision permitting deduction of local property taxes.78 If the fee is construed as a penalty for failure to comply with provisions of the Open-Space Easement Act, no deduction will be allowed.79

74. Id. See also 511 F.2d at 1268.
75. CAL. GOV'T CODE § 51070 et seq. (West Supp. 1975).
76. Id. § 51093.
77. See text accompanying notes 34-36 supra.
78. Id.
California's provision for deductibility of termination fees, section 17299.1 of the Revenue and Taxation Code, appears to offer the only concrete indication of how the termination fee will be treated by the Internal Revenue Service. According to section 17299.1, an individual paying California income taxes will not be permitted to deduct the termination fee on his or her California return. Since California's personal income taxation system is similar in many respects to the federal personal income taxation system, the California Legislature's classification of the abandonment fee as a non-deductible expense suggests that similar treatment would be afforded the fee in the federal system.

It is equally unlikely that the termination fee would be deductible as a personal expense. To ascertain the federal tax effect of an expenditure connected with property, the effect and purpose of the expenditure must be determined. An expenditure which neither adds to the value of the property, nor appreciably prolongs the life of the property, nor increases the adaptability of the land for another use, is a non-deductible expense. If the outlay accomplishes any one of the above, it will be considered a capital expenditure and will be included in the adjusted basis of the property when it is sold. The fact that the payment of the fee is not completely voluntary is immaterial.

Although the law is unsettled, the economic consequences of paying termination fees under the Open-Space Easement Act suggest that the Internal Revenue Service will treat the fee outlay as a capital expenditure. Prior to the abandonment or nonrenewal of the easement, the grantor's main parcel is burdened with the open-space easement. If the assessor has followed the proper procedure, the grantor has been the beneficiary of decreased property valuation. Should he or she attempt
to sell the burdened parcel, the grantor would ask a price appropriate for land burdened by an easement. However, if the termination fee is paid and the easement abandoned, the grantor once again owns the land free and clear of any burden.\textsuperscript{90} The land would then command a price commensurate with its unburdened status, which will be greater than that of land burdened by an easement. Therefore, since the outlay has served to increase the value of the land, the expense must be capitalized and the grantor's basis accordingly adjusted upward.\textsuperscript{91} The net effect of this increase in basis is to decrease the amount of taxable capital gain the grantor will realize on sale of the property.

\section*{Goal for a Progressive Legislature}

California has often been given credit for originating modern concepts of preservation of scenic areas. The passage of the Coastal Initiative in 1972\textsuperscript{92} clearly established that the California electorate is deeply concerned with the preservation of valuable scenic lands. Within this ubiquitous concern for the protection of the outdoors is an implied logic of orderly preservation. The passage of the Coastal Initiative\textsuperscript{93} indicates that the electorate desires a concerted land-preservation effort. A major distinction between the Coastal Initiative and the Open-Space Easement Act is that the goals sought by the Initiative and methods to be utilized by the Coastal Commission are specified,\textsuperscript{94} while the goals of the Open-Space Easement Act are not clearly defined.

To insure that the desires of the people of California are

\begin{footnotesize}
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\item \textsuperscript{90} \textsc{Cal. Gov't Code} § 51094 (West Supp. 1975).
\item \textsuperscript{91} \textsc{Int. Rev. Code of 1954}, §§ 1011(a), 1016(a)(1). "Basis" is defined as cost: specifically, historic cost. \textsc{Hinckley v. Commissioner}, 410 F.2d 937 (8th Cir. 1969). Section 1016 requires upward adjustment of the basis to include capital expenditures on property. The adjusted basis is then used to compute gain or loss realized upon subsequent sale of the property.
\item \textsuperscript{92} \textsc{Cal. Pub. Res. Code} § 27000 et seq. (West Supp. 1975). The Coastal Zone Conservation Act was proposed by initiative petition (1972) and approved by the voters at a general election held November 7, 1972.
\item \textsuperscript{93} \textsc{Cal. Pub. Res. Code} § 27000 et seq. (West Supp. 1975) provides for preliminary studies and subsequent design of a comprehensive scheme for preservation of coastal lands. Development is to be restricted. The Commission that supervises the implementation of the Act has quasi-judicial and quasi-legislative powers. Acting as a legislative body, it is empowered to set forth specific policies, plans and regulations for coastal development. \textit{Id.} §§ 27300-405. The judicial function is to hold hearings and to seek remedies penalizing and enjoining violations of the law. \textit{Id.} § 27405 et seq..
\item \textsuperscript{94} See note 93 \textit{supra}.
\end{enumerate}
\end{footnotesize}
realized, the legislature should attempt to reorganize and buttress the Open-Space Easement Act. As it now stands, the Act is not sufficiently effective to ensure the granting of a significant number of open-space easements. The provisions of the Act do not offer strong incentive for gratuitous donations, and the legislature did not allocate funds for the acquisition of open-space easements,95 nor has there been a concerted effort by local or state government to obtain such easements. The type of program necessary in California is one that sets forth specific and attainable goals and provides a fund for the purchase of open-space easements.

California is mistaken in its reliance upon the intricacies of the tax system to provide the necessary incentive for the granting of easements. An excellent example of what might be accomplished through a unified approach to an open-space easement program is Wisconsin’s Resource Development and Outdoor Recreation Act of 1961.96 The Wisconsin Act established a fund of $50 million for the purchase of easements for open space over a 10 year period.97 As of 1968, the state had not kept pace with its timetable for acquisition;98 however, Wisconsin’s achievements in the acquisition of open space clearly surpassed California’s success under the Open-Space Easement Act of 1969.99 After only a few years of the program, the state of Wisconsin had acquired 1125 scenic easement parcels,100 which included 12,500 acres and 282 miles of highway frontage.101 Since the California program is not a complete one, no statistics are readily available to determine its success with exactness. However, in a 1971 survey a researcher found that two years after the passage of the 1969 Act, six California counties had acquired a total of only 22 parcels of land, and the acreage involved was insubstantial.102

In addition, many of the governments which acquired easements under the Act did not receive the grants in perpetu-
ity. In Wisconsin, since the easement is purchased outright, the state obtains title to and possession of the property and can proceed with legitimate planning and utilization of the land as it sees fit. In contrast, local governments in California are placed in the predicament of not being able to use the open-space easements in long-range planning.

In order for California to accomplish long-range preservation of open space, the legislature must implement a program designed to maximize the ability of state and local governments to acquire and use open-space areas. To accomplish this, additional legislation should be enacted. First, the goals of the open-space easement program should be narrowly defined and limited. Most open-space acquisition programs, including Wisconsin's, specifically limit the purchase program to designated areas, particularly those that have great aesthetic value and are most susceptible to the type of development that is likely to produce adverse ecological and aesthetic effects. By limiting the goals of the program in this way (and providing a state purchasing fund), the California Legislature could maximize the effectiveness of expenditures for open-space easements; further, the areas most endangered and of most potential value would be taken care of rapidly, without dependence upon local action for preservation.

Second, the legislature should rely upon direct economic incentives to induce persons to grant open-space easements rather than upon relatively indirect tax incentives. As has been discussed, the rigidity of the tax structure casts doubt on the availability of any major federal tax benefits for the grantor of an easement. Because the donation of an easement may not qualify for a charitable contribution deduction, the only tax advantage available to the grantor is the reduced property taxation. Since local governments pressed for funds may very well be unwilling to surrender substantial tax revenue by accepting property offered by an open-space easement, the net effect of the property tax reduction may be negative. It is the local community that has the burden of financing the open-space program, and the smaller the community the less able it is to bear the burden of decreased property tax revenue. If the

103. Id.
105. See note 95 supra.
state were to finance the acquisition of open-space easements, the cost of the program would be spread out among all the taxpayers of California and would afford those communities that have opportunities to acquire open-space easements the ability to do so.

Implementing a narrowly defined, adequately funded open-space easement acquisition program would assure the preservation of areas now endangered by development. Passage of the Coastal Initiative clearly indicates that the people of California would support such a program.

CONCLUSION

It appears that the Open-Space Easement Act of 1974 may be severely disabled even before it has an opportunity to function. The piecemeal legislation that has created the open-space program, and the counterproductive property tax provisions, do little to assure successful implementation of the policies behind the Act. The intended tax incentives are unlikely to stimulate donations since the grantor who donates an open-space easement stands to lose in two ways: first, if the local government decides to terminate the easement, the grantor will be liable for a substantial termination fee; and second, the grantor may be afforded only long-term tax relief, which might not be the type of tax benefit he or she needs.

A better approach would be creation by the legislature of a single organized program for acquisition of open-space areas. Such a program would require establishing a state fund to be used for the purchase of easements. Other states, notably Wisconsin, have instituted open-space easement programs that are rewarding for both the grantor and the public. The grantor receives direct payment and probable capital gain treatment for the amount realized on the sale of the land, and the public benefits by the preservation of open-space land acquired and administered under a program guaranteeing coordination and expertise.

Laurence M. May

106. See text accompanying notes 33-36 supra.
107. See text accompanying notes 48-74 supra.
108. See text accompanying notes 97-102 supra.