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**ARTICLES**

**THE LAND CONSERVATION ACT AT  
THE 32 YEAR MARK:  
ENFORCEMENT, REFORM, AND  
INNOVATION**

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INTRODUCTION

Created long before it became in vogue to speak of market incentives for environmental protection, California's Williamson Act is es-

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essentially just that. In return for voluntarily restricting land to agricultural and open space uses, landowners are rewarded with a property tax reduction based on income stream, as opposed to the normal market valuation cum Proposition 13.<sup>1</sup> Statewide, this “reward” exceeds \$120 million annually.<sup>2</sup> A significant portion of the foregone local revenue is offset by payments from the state.<sup>3</sup> As of fiscal year 1997-98, the state has provided roughly \$460 million in offsetting payments, or \$35 million annually since 1994.<sup>4</sup> The combination of foregone tax revenue and open space subventions render the Williamson Act the largest annual conservation expenditure of the state.

California is the nation’s most productive farming state. California’s gross agricultural product is \$26.8 billion, compared to \$15.9 billion for second place Texas and \$13.6 billion for Iowa, the leading “farm belt” state.<sup>5</sup> California produces over half the nation’s fruits, nuts, and vegetables. California agriculture is considered one of the most diverse in the world, with 350 different crop and livestock commodities. Almonds, artichokes, dates, figs, kiwifruit, olives, pistachios, pomegranates, prunes, and walnuts — these California crops are grown nowhere else in the United States.<sup>6</sup> Reflecting the importance of California farms, the Williamson Act declares: “[T]he preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state’s economic resources, and . . .

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views expressed herein are those of the author and do not necessarily represent those of the State of California Department of Conservation. The author would like to acknowledge Ken Trott and Patricia Gatz at the Department of Conservation, as well as John Gamper at the California Farm Bureau Federation, whose positive vision and tireless work have ensured that the Williamson Act fulfills its promise of conserving California’s agricultural lands. The author currently serves as Director of Open Space and Trails for Pitkin County, Colorado.

<sup>1</sup> See CAL. REV. & TAX. CODE §§ 420-438 (Deering 1999).

<sup>2</sup> CALIFORNIA DEP’T OF CONSERVATION, LAND IN THE BALANCE, pt. 1, at 3-18 (1989) [hereinafter LAND IN THE BALANCE].

<sup>3</sup> Each year, the Department of Conservation certifies the subvention applications from participating local governments and forwards a report to the State Controller, who pays out subventions to cities and counties from a sum appropriated each fiscal year in the state budget. CAL. GOV’T CODE §§ 16140-16154 (Deering 1999); CAL. CODE REGS. tit. 14, §§ 14100-14118 (1999). See *Dorcich v. Johnson*, 167 Cal. Rptr. 897, 899 (Ct. App. 1980).

<sup>4</sup> Telephone interview with Michael Doleman, Land Use Analyst, California Department of Conservation (Mar. 16, 1999). The data was compiled from the Department’s bi-annual Williamson Act status reports.

<sup>5</sup> *California Agriculture* (visited Mar. 12, 1999) <<http://www.cdfa.ca.gov/statistics/california.html>>.

<sup>6</sup> *Id.*

also for the assurance of adequate, healthful and nutritious food for future residents of this state and nation.”<sup>7</sup>

As of March 1, 1995, Williamson Act enrollment included roughly 15.9 million acres of agricultural and open space land within 47 counties and 15 cities.<sup>8</sup> This is about half the state’s total farmland, and one third of the private land in total. One third of these acres were prime agricultural land; over 70% of the state’s estimated acreage of prime land is under contract. By comparison, the total acreage enrolled in the Williamson Act is larger than the states of Vermont (6.15 million acres) and Maryland (6.76 million acres) combined.<sup>9</sup>

#### I. BACKGROUND: THE CONSTITUTIONAL ROOTS OF THE WILLIAMSON ACT

California farmers faced a tax crisis prior to the Williamson Act because the California Constitution generally required that agricultural properties be assessed at their “potential development values.”<sup>10</sup> The relationship of taxes to development potential resulted from a 1922 appellate decision that tax assessors must consider any potential use for which the land is “naturally adapted and which would enhance its value in the estimation of persons . . . purchasing in the open market.”<sup>11</sup> Application of *Wild Goose* was made universal in 1955 when the California Supreme Court held that the term “full cash value” in the state constitution means market value.<sup>12</sup>

Under *De Luz*, agricultural lands were valued by assessors as potential sites for commercial or residential development. Taxes on farmland soared with indifference to the income generated by such properties, or its inherent value as agricultural land. By the time that the Williamson Act and supporting constitutional amendment were put in place, it was estimated that farm property taxes had risen an average of five percent

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<sup>7</sup> CAL. GOV’T CODE § 51220(a) (Deering 1999). See *DeCita v. County of Napa*, 889 P.2d 1019, 1037 (Cal. 1995) (reaffirming that the Williamson Act reflects a strong public interest in the preservation of agricultural lands).

<sup>8</sup> CALIFORNIA DEP’T OF CONSERVATION, THE CALIFORNIA LAND CONSERVATION (WILLIAMSON) ACT 1993 TO STATUS REPORT at iii (1996) [hereinafter STATUS REPORT].

<sup>9</sup> *Id.*

<sup>10</sup> *Dorich v. Johnson*, 167 Cal. Rptr. 897, 900 (Ct. App. 1980).

<sup>11</sup> *Wild Goose Country Club v. Butte County*, 212 P. 711, 711 (Cal. Ct. App. 1922).

<sup>12</sup> *De Luz Homes, Inc. v. County of San Diego*, 290 P.2d 544, 554 (Cal. 1955). At that time, the “full cash” standard was prescribed by the combined effect of former Article 13 section 1, and former Article 11, section 12 of the California Constitution. The general rule of value-based taxation is now contained in Article 13 section 8 of the California Constitution.

per year for the preceding twenty years.<sup>13</sup> Land was being converted from agricultural uses simply to pay the taxes.<sup>14</sup>

Against this constitutional backdrop, the insulation of agricultural and open space lands from development driven tax assessments would require a means of deferring development rights. Attempts in 1957 and 1965 to achieve this result based solely on agricultural zoning failed because under *De Luz*, "assessors were still free to ignore zoning restrictions if the facts so warranted (i.e., if zoning could easily be altered)."<sup>15</sup> Similarly, an attempted constitutional amendment providing tax relief to farmland without binding prospective land use restrictions was defeated in the general election of 1962.<sup>16</sup> The idea of *contracted*

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<sup>13</sup> Alan E. Land, *Unraveling the Urban Fringe: A Proposal for the Implementation of Proposition Three*, 19 HASTINGS L.J. 421, 427 n.36 (1968) (citing Stocker, *Taxing Farmland in the Urban Fringe*, TAX POL'Y 3 (December 1963)).

<sup>14</sup> See *Sierra Club v. City of Hayward*, 623 P.2d 180, 184 (Cal. 1981).

<sup>15</sup> *Dorcich*, 167 Cal. Rptr. at 900. Tax relief based on agricultural zoning was first attempted in 1957 with the adoption of Revenue and Taxation Code section 402.5, which provided that assessment of agricultural lands, restricted as such by zoning, should reflect only their use value if there is no "reasonable probability" that the restrictions would change in the "near future." The Attorney General determined that local assessors should continue to consider potential market values whenever a reasonable probability existed that zoning could change. 30 Op. Cal. Att'y Gen. 246, 247 (1957). In tandem with the original Williamson Act of 1965, a second try was made at a zoning based tax relief through the addition of an evidentiary presumption to Revenue and Taxation Code section 402.5. Where agricultural zoning was consistent with a general plan, it was to be presumed that no change in zoning would occur. Mirroring the reasoning of the 1957 opinion, the Attorney General concluded that *De Luz* required that assessors continue to second guess the effectiveness of zoning in limiting development. 47 Op. Cal. Att'y Gen. 171 (1966).

Subsequent proposals to grant the same tax status to zoning as is currently enjoyed by contracted restrictions have failed. The reasons for this were set forth by Gerald Bowden in *Article XXVIII-Opening the Door to Open Space Control*, 1 PAC. L.J. 461, 520-24 (1970). Most relevant to this discussion is what Bowden describes as the problem of "legal impermanence."

It would be difficult to remain mute on the question of local government's inability to bind itself [through zoning] . . . to a given course of action. Unless this issue is resolved, the public will have no assurance that the open space land will remain open for a period of time sufficient to justify the tax shift resulting from use based assessment.

*Id.* at 522.

Restrictive zoning continues to receive limited recognition in Revenue and Taxation Code section 402.1. Under current law, assessors must consider the impact of zoning on land values. Section 402.1 functions as did the old Section 402.5 in requiring assessors to consider likely variations in zoning and measure the impact of these changes on the *market* value of the property.

<sup>16</sup> Proposition 4 of 1962 would have granted a "use based" tax preference to any

land use restrictions was conceived to further satisfy skeptical assessors that the enrolled lands were indeed limited to agricultural uses.<sup>17</sup>

However, shortly after the Williamson Act was passed in 1965, the State Board of Equalization asked the California Attorney General to review the Williamson Act.<sup>18</sup> In deference to *De Luz*, the Attorney General determined that preferential taxation should be denied if the assessor determined that the restriction to agricultural use was "likely" to be breached in the near future.<sup>19</sup> With the future of the Williamson Act in question, Proposition 3 of 1966 was enacted by popular vote, providing a constitutional amendment requiring that *enforceably restricted* lands are entitled to taxation consistent with the restrictions on use.<sup>20</sup> In sum, Article 13 section 8 was meant to allay the Attorney General's fear that Williamson Act contracts would not adequately restrict land use.<sup>21</sup>

Preferential assessment based on contractual land use restrictions remains a significant exception to California's constitutional norm regarding taxation of real property. As one court put it, the Williamson Act, as enabled by Article 13 section 8, is a "scheme in which landowners agree to not otherwise develop their lands for at least 10 years in exchange for property tax assessments lower than could otherwise be constitutionally obtained."<sup>22</sup> As a result, there is a constitutional di-

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land used exclusively for agriculture for the prior two years, but contained no prospective land use restrictions. The only limitation on withdrawal was that up to seven years back taxes would be paid. Interestingly, many today discuss Williamson Act cancellations as if they were Proposition 4 withdrawals: "If you want out, you just pay the back taxes." However, as discussed below, the Williamson Act is predicated on a constitutional requirement of enforceable land use restrictions. The consistent refusal of California courts to allow easy withdrawal from the Williamson Act reflects the earlier rejection of the Proposition 4 concept. The rejection of unrestricted preferential assessment lead to the concept of enforceable restrictions. See LAND IN THE BALANCE, *supra* note 2, pt. 2, at 12-13.

<sup>17</sup> *Lewis v. City of Hayward*, 222 Cal. Rptr. 781, 783 (Ct. App. 1986).

<sup>18</sup> 47 Op. Cal. Att'y Gen. 171 (1966).

<sup>19</sup> *Id.* at 177-79.

<sup>20</sup> CAL. CONST. art. XIII, § 8 (formerly § 28); See *Kelsey v. Colwell*, 106 Cal. Rptr. 420, 422-23 (Ct. App. 1973); *Dorcich v. Johnson*, 167 Cal. Rptr. 897, 901 (Ct. App. 1980).

<sup>21</sup> *Lewis*, 222 Cal. Rptr. at 783-84. Note, however, the Williamson Act does not purport to implement the full scope of open space programs potentially authorized by Article 13, section 8. Several other types of "enforceable restrictions" are designated in Revenue and Taxation Code section 422, although none has achieved the popularity of the Williamson Act. Each type of restriction embodies discrete purposes from the general rubric of open space, ranging from scenic restrictions to habitat contracts.

<sup>22</sup> *Honey Springs Homeowners Ass'n v. Board of Supervisors*, 203 Cal. Rptr. 886,

mension to legal disputes involving the interpretation of land use restrictions under the Act.

The California Supreme Court has recognized this implication by ruling that lax enforcement of Williamson Act restrictions jeopardizes the constitutional footing of the program.

Finally, it is the purpose of the act to extend tax benefits to those who voluntarily subject their land to "enforceable restrictions." (Cal. Const., art. XIII, § 8.) If cancellation were a simple matter of showing that the restricted land is now more valuable for a *developed use*, we doubt whether Williamson Act contracts could qualify as "enforceable restrictions" making the land eligible for taxation on use value rather than market value under the constitution.<sup>23</sup>

The Williamson Act *must* be construed in strict terms to avoid constitutional infirmity. Or, as stated in *Lewis v. City of Hayward*,

if Section 8 allows the Legislature to define restrictions, it *does not permit a definition which renders such restrictions ineffective for land conservation purposes*. We are of the opinion that, to pass constitutional muster, a restriction must be enforceable in the face of imminent urban development, and may not be terminable merely because such development is desirable or profitable to the landowner.<sup>24</sup>

Williamson Act implementation which renders the restrictions "ineffective for (agricultural) land conservation purposes" would violate the state constitution.

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888 (Ct. App. 1984).

<sup>23</sup> *Sierra Club v. City of Hayward*, 623 P.2d 180, 187 (Cal. 1981) (emphasis added).

<sup>24</sup> *Lewis*, 222 Cal. Rptr. at 787 (emphasis added). See also *Shellenberger v. Board of Equalization*, 195 Cal. Rptr. 168 (Ct. App. 1983). There, a landowner who had been in the Williamson Act in 1975 and had since come out, argued that the 1975 base year value under Proposition 13 should reflect the market value of the land *as restricted* by the Williamson Act at that time. The court rejected this contention, reasoning that it would violate Article 13 section 8 by locking in a Williamson Act value on land no longer subject to land use restrictions. *Id.* at 171.

Note also the California Attorney General's 1986 opinion that "the lesson of *Sierra Club v. City of Hayward*, as well as *Lewis v. City of Hayward*, is that the cancellation provisions of the Act require a narrow and strict construction against easy cancellation so as to assure the constitutionality of the Act." 69 Op. Cal. Att'y Gen. 70, 75 (1986) (citations omitted). This opinion was subsequently expressly affirmed by the Legislature. 1987 Cal. Stat. ch. 1305; see also, *Honey Springs Homeowners Ass'n*, 203 Cal. Rptr. at 901-02.

## II. BASIC STRUCTURE OF THE WILLIAMSON ACT

Participation in the Williamson Act by counties and cities is voluntary.<sup>25</sup> Currently, forty-seven counties have entered the program, along with fifteen cities known to the Department through subvention applications.<sup>26</sup> The first step is for local government to designate agricultural preserves, along with rules for the administration of the local program, under Article 2.5 of the Act.<sup>27</sup> The agricultural preserve designation identifies those areas where individual contracts will be offered.<sup>28</sup>

Aside from a limited exception for scenic highway corridors,<sup>29</sup> local government retains significant latitude to tailor the program to local priorities, and may add limitations and restrictions to those provided in the Act itself.<sup>30</sup> Many counties have added eligibility restrictions based on minimum agricultural income and capital outlay.<sup>31</sup> The Act requires adoption of an ordinance setting forth local Williamson Act rules.<sup>32</sup> In practice, local restrictions are often also found in individual contracts, as well as in zoning, general plans, and subdivision ordinances. Such enactments of the local police power must be exercised in a manner that is consistent with the minimum restrictiveness of the Act.<sup>33</sup>

Recently, an interesting trial court decision involving consistency of zoning and the Williamson Act was reviewed on appeal. The trial court had held that San Diego County's "underlay" zoning allowing eight-acre parcels within agricultural preserves violated the minimum

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<sup>25</sup> *Kelsey v. Colwell*, 106 Cal. Rptr. 420 (Ct. App. 1973).

<sup>26</sup> STATUS REPORT, *supra* note 8, at 51. Note that cities may also participate in the program through annexation of enrolled lands, as discussed below. There is no state-wide tracking of cities which have annexed enrolled lands but do not seek open space subventions.

<sup>27</sup> CAL. GOV'T CODE §§ 51230-51239 (Deering 1999).

<sup>28</sup> CAL. GOV'T CODE § 51242(b) (Deering 1999).

<sup>29</sup> A potential exception to the *Kelsey* rule is raised by *Borel v. County of Contra Costa*, 269 Cal. Rptr. 460 (Ct. App. 1990) construing Government Code section 51201.5 to require that a contract be offered to any landowner within a scenic highway corridor. Apparently the contract desired by Mr. Borel was eventually executed by the City of Danville, which does not otherwise participate in the program. Because the county in that case was participating generally in the program, the decision is somewhat unclear on whether a county which had opted not to participate may be compelled to offer contracts to landowners within scenic highway corridors.

<sup>30</sup> CAL. GOV'T CODE § 51240 (Deering 1999); 75 Op. Cal. Att'y Gen. 278 (1992).

<sup>31</sup> *See* 56 Op. Cal. Att'y Gen. 160 (1973).

<sup>32</sup> CAL. GOV'T CODE § 51231 (Deering 1999).

<sup>33</sup> *Delucchi v. County of Santa Cruz*, 225 Cal. Rptr. 43, 48-49 n.9 (Ct. App. 1986).

requirements of the Williamson Act.<sup>34</sup> The lower court had also found the county's general plan to be inadequate, and imposed a moratorium on new building permits until an adequate plan was adopted.<sup>35</sup> The appellate court, while noting the blanket moratorium was overbroad, commented that the remedy would be appropriate if it limited the county's ability to issue building permits which threaten agricultural uses.<sup>36</sup>

The minimum term of a contract is ten years,<sup>37</sup> though at least one county, Monterey, has elected to use twenty year restrictions. However, the restrictions are often somewhat mischaracterized as ten year contracts. The duration would perhaps be more accurately characterized as "indefinite," with an annual option to initiate the ten year nonrenewal process.<sup>38</sup> It is quite common to find continuing Williamson Act contracts dating from the late sixties and early seventies. Hence, a significant number of these restrictions have been in place for twenty years or more. Program enrollment has been relatively stable at its present sixteen million acres since 1975, with only a relatively small portion of the total entering or leaving during that time.<sup>39</sup>

Once land is enrolled in a contract, it is taxed under Revenue and Taxation Code section 423, which relies on a "capitalization of income" formula.<sup>40</sup> The State Board of Equalization publishes guidance for local assessors on the proper application of the formula.<sup>41</sup> One case construed this formula to require that a farmer contesting an assessment under the Williamson Act must present evidence to the local assessment appeals board regarding future income and expenses, notwithstanding recent losses.<sup>42</sup> Should the section 423 formula show a higher value than would otherwise occur unrestricted under Proposition 13, the landowner is entitled to the lower of the two values.<sup>43</sup> However, no subventions are paid where the Proposition 13 value is

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<sup>34</sup> *Save Our Forests and Ranchlands v. San Diego County*, No. D025782, slip op. at 3 (Cal. Ct. App. 4th Dist. Feb. 4, 1997).

<sup>35</sup> *Id.* at 3-4.

<sup>36</sup> *Id.* at 10-14.

<sup>37</sup> CAL. GOV'T CODE § 51244 (Deering 1999).

<sup>38</sup> CAL. GOV'T CODE § 51244.5 (Deering 1999).

<sup>39</sup> The Department of Conservation publishes a biannual report which documents enrollment and termination statewide. See STATUS REPORT, *supra* note 8.

<sup>40</sup> CAL. REV. & TAX. CODE § 423 (Deering 1999).

<sup>41</sup> CALIFORNIA STATE BD. OF EQUALIZATION, ASSESSMENT OF AGRICULTURE AND OPEN-SPACE PROPERTIES (1997).

<sup>42</sup> *Bank of America v. County of Fresno*, 179 Cal. Rptr. 497 (Ct. App. 1981).

<sup>43</sup> CAL. REV. & TAX. CODE § 423(d) (Deering 1999).

used.<sup>44</sup> An optional provision in the tax code allows local government to provide set reductions on Proposition 13 values up to statutory limits.<sup>45</sup>

Notwithstanding the general reduction in taxes provided by Proposition 13, the Williamson Act offers significant tax savings to the large majority of participating farmers. As noted above, the Department's 1989 analysis showed that the program resulted in roughly \$120 million in annual tax savings to participating landowners.<sup>46</sup> The same study, based on a sample of thirteen counties, showed that average tax savings under the program ranged from forty-four percent for tree and vine (prime) land, to seventy percent for grazing land.<sup>47</sup> These results tracked an earlier study done by the Department in 1983 which showed that tax reductions under the Williamson Act were averaging sixty-two percent lower than unrestricted lands assessed under Proposition 13.<sup>48</sup> The Department of Conservation's data from cities and counties on their annual Open Space Subvention Applications show that the Williamson Act valuation equals or exceeds the Proposition 13 valuation on 7% of the prime land, and only 0.5% of the non-prime land.<sup>49</sup>

Lands which typically receive no immediate tax benefit under the program coincidentally appear to have relatively low base year values while enjoying a high agricultural income (typical of prime land only).<sup>50</sup> Even in such cases, it is worth noting that even where *immediate* tax benefits are negligible or non-existent, landowners do derive other advantages from the program. Perhaps most significant is the flexibility to undertake changes in ownership without the adverse tax consequences which would otherwise occur under Proposition 13.<sup>51</sup> Since natural conditions may otherwise be precluding development of such lands, the Williamson Act may continue to be a bargain for some landowners even where immediate tax savings are negligible.

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<sup>44</sup> CAL. GOV'T CODE § 16142 (Deering 1999).

<sup>45</sup> CAL. REV. & TAX. CODE § 423.3 (Deering 1999).

<sup>46</sup> LAND IN THE BALANCE, *supra* note 2.

<sup>47</sup> *Id.* at 3-2, 3-7.

<sup>48</sup> CALIFORNIA DEP'T OF CONSERVATION, THE WILLIAMSON ACT AFTER PROPOSITION 13: STILL A BARGAIN 3 (1983).

<sup>49</sup> STATUS REPORT, *supra* note 8, at 48.

<sup>50</sup> This is because the low base year limits unrestricted taxes under Proposition 13, while the high agricultural income increases assessed Williamson Act value under Revenue and Taxation Code section 423.

<sup>51</sup> Williamson Act taxes remain the same under Revenue and Taxation Code section 423 regardless of changes in ownership, whereas the change in ownership triggers reappraisal for unrestricted property under Revenue and Taxation Code section 50.

An optional tax provision allows participating cities and counties to provide enrolled lands guaranteed tax reductions compared to the normal unrestricted valuation.<sup>52</sup> A ceiling of thirty percent reduction for prime lands, and ten percent reduction for non-prime lands is provided.<sup>53</sup> However, to date, only six counties have opted to follow section 423.3.<sup>54</sup> However, significant 1998 legislation, as discussed below, now offers a set thirty-five percent reduction in return for the landowner's agreement to enter a twenty year restriction.<sup>55</sup>

When contract nonrenewal is filed by either the local government or landowner, taxes are gradually raised under Revenue and Taxation Code section 426. However, the contractual land use restrictions remain in full effect until the nonrenewal period is over.<sup>56</sup> During the phase out period, the use restrictions remain in place while the property tax preference is gradually removed.<sup>57</sup> The nine year phase out is intended to encourage long term planning to avoid the "premature and unnecessary conversion of agricultural land . . . ."<sup>58</sup>

### III. ENFORCEMENT, REFORM AND INNOVATION

Contract cancellations under Government Code section 51280 have received relatively high scrutiny by courts and legal commentators as noted, *infra*. However, other, *less overt* mechanisms for escaping Williamson Act restrictions have received little attention. In the experience of this author as Counsel to the Department of Conservation, significant development of enrolled lands has occurred without formal contract cancellations through city annexations, compatible use designations, public acquisition, and subdivision. Each issue is addressed in detail below. Conversion of enrolled lands through these routes avoids both the planning rigor of the non-renewal process and the cancellation restrictions and penalties. Many of the recent legal issues concerning the Williamson Act involve these areas, and the recent efforts of

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<sup>52</sup> CAL. REV. & TAX. CODE § 423.3 (Deering 1999).

<sup>53</sup> CAL. REV. & TAX. CODE § 423.3 (Deering 1999).

<sup>54</sup> CALIFORNIA STATE BD. OF EQUALIZATION, SPECIAL TOPIC SURVEY: ASSESSMENT OF PROPERTIES UNDER CALIFORNIA LAND CONSERVATION ACT RESTRICTIONS 9 (1997).

<sup>55</sup> 1998 Cal. Stat. ch. 353, § 8 (codified at CAL. REV. & TAX. CODE § 423.4 (Deering 1999); See Op. Cal. Att'y Gen. No. 98-1106 (Mar. 10, 1999) (to be published in the official reports).

<sup>56</sup> CAL. GOV'T CODE § 51246(a) (Deering 1999).

<sup>57</sup> CAL. GOV'T CODE § 51246(a) (Deering 1999); CAL. REV. & TAX. CODE § 426 (Deering 1999).

<sup>58</sup> CAL. GOV'T CODE § 51220(c) (Deering 1999); *Sierra Club v. City of Hayward*, 623 P.2d 180, 186-88 (Cal. 1981).

the Legislature, Department of Conservation, the California Farm Bureau Federation, and others to address them.

#### A. *Annexation*

The original Williamson Act provided simply that annexing cities would succeed to all rights and duties of contracts executed by surrounding counties.<sup>59</sup> However, in 1968 the Act was amended to allow cities to protest county execution of contracts within one mile of their borders.<sup>60</sup> Such protests would then entitle the city to opt not to succeed to the contract in the event of an annexation.<sup>61</sup>

The city protest procedures were revised in 1971 to require that protests be filed with the Local Agency Formation Commission (LAFCO), rather than the county, prior to the execution of the contract.<sup>62</sup> The LAFCO was then required to hold a hearing to decide whether to approve the protest.<sup>63</sup> If the LAFCO upheld the protest, the city would then retain an option not to succeed to the contract in the event of annexation.<sup>64</sup>

These procedures were revisited again by the Legislature in 1990.<sup>65</sup> The 1990 legislation prospectively repealed the protest provisions.<sup>66</sup> Assembly Bill (AB) 2764 further clarified the standards for determining the validity of protests filed before January 1, 1991. Valid protests filed before January 1, 1991 continue to afford a basis for contract termination by annexing cities.<sup>67</sup>

The 1990 repeal of the protest provisions was due to the general feeling that the city protests created a windfall for land owners and developers. The protest provisions were originally justified as an aid to city planners. In the experience of this author, protest terminations were mainly championed by developers seeking to avoid cancellation restrictions and penalties.

In addition to prospectively repealing the cities' authority to protest new contracts, AB 2764 also clarified standards affecting existing con-

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<sup>59</sup> See historical notes to Government Code section 51243 discussing the 1967 amendment to section 51243, 1968 Cal. Stat. ch. 413, § 2 (Deering 1999).

<sup>60</sup> 1968 Cal. Stat. ch. 413, § 2 (amending Government Code section 51243).

<sup>61</sup> See generally, 68 Op. Cal. Att'y Gen. 204 (1985).

<sup>62</sup> 1971 Cal. Stat. Ex. Sess. ch. 1, at 4889-90.

<sup>63</sup> 1971 Cal. Stat. Ex. Sess. ch. 1, at 4889-90.

<sup>64</sup> 1971 Cal. Stat. Ex. Sess. ch. 1, at 4889-90.

<sup>65</sup> 1990 Cal. Stat. ch. 841 (AB 2764).

<sup>66</sup> 1990 Cal. Stat. ch. 841 (AB 2764).

<sup>67</sup> See CAL. GOV'T CODE §§ 51243-51243.5 (Deering 1999).

tracts.<sup>68</sup> Under pressure from developers seeking to avoid cancellation fees, somewhat creative local practice had evolved to expand potential contract protests. For example, relying on a "late" protest, the annexing city would seek to protest the contract retroactively at the time of annexation, sometimes claiming a lack of notice of the original contract. The "blanket" protest was a general policy statement which does not mention a specific contract by which a city purported to protest all contracts. The bill clarified that neither retroactive "late" protests, nor general "blanket" protests, are valid.<sup>69</sup> AB 2764 addressed this issue with two requirements for evaluating protests filed before January 1, 1991. Government Code section 51243.5 was amended to provide that a protest must have identified a specific contract, and that it is presumed that nearby cities received notice of impending contracts.<sup>70</sup>

In *Carter v. City of Porterville*,<sup>71</sup> the court relied on the AB 2764 amendments to rule that a Williamson Act contract remained in effect, notwithstanding a blanket protest that had been filed by the City of Porterville at the time the contract was executed. This decision has been depublished, likely because of its extensive discussion of inverse condemnation law not applicable to the Williamson Act. In another case, an attempt by one city to terminate a contract based on a "late" protest precipitated an enforcement action by the state under Government Code section 16147. This action was settled when the real party in interest agreed to comply with normal nonrenewal and cancellation procedures.<sup>72</sup>

Despite the reform provided by AB 2764, problems with annexation have continued. In repeated instances since 1991, cities have annexed Williamson Act contracted lands and allowed development without proper termination of the contracts.<sup>73</sup> This is in part because of contin-

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<sup>68</sup> See CAL. GOV'T CODE §§ 51243-51243.5 (Deering 1999).

<sup>69</sup> See CAL. GOV'T CODE §§ 51243-51243.5 (Deering 1999).

<sup>70</sup> CAL. GOV'T CODE § 51243.5 (Deering 1999).

<sup>71</sup> *Carter v. City of Porterville*, 17 Cal. App.4th 1588, 1607 (Ct. App. 1993) (*ordered depublished*).

<sup>72</sup> *Wheeler v. Arnaiz-Watanabe II Ltd.*, 3 Civil CO17652 (Cal. Ct. App. 3d App. Dist. 1994) (compromise and settlement agreement).

<sup>73</sup> For example, in 1995 a department store was constructed on enrolled lands following annexation by the City of Tracy. A settlement was reached with the Department of Conservation whereby a formal cancellation was processed including payment of a cancellation fee which reflected the value of the property after development. See Agreement For Payment of Williamson Act Cancellation Fee between Department of Conservation and General Growth Management, Feb. 15, 1996 (on file with the *San Joaquin Agricultural Law Review*); Mark Prado, *Developer to Pay Fee for West Valley*

ued misunderstanding of the city protest provisions. It has been the experience of the Department of Conservation that cities often lack awareness of Williamson Act requirements. Unlike counties, city planning departments are not accustomed to checking on the restricted status of farmland before issuing development entitlements.

Most recently, a significant controversy erupted in the City of Porterville after it was discovered that land subject to a Williamson Act contract was illegally developed, in part through misunderstanding of the limitations on the city protest provisions, and in part through plain carelessness in tracking the boundaries of the contract. Resulting litigation between the state and the developer was ultimately settled by the latter's payment of damages.<sup>74</sup> However, the dispute created much anxiety on the part of homeowners who had unwittingly bought homes built in violation of the Act. Furthermore, the title insurance company faced significant exposure for failing to recognize the continuing land use restriction.

Two bills enacted by the 1998 Legislature are aimed at preventing further such mishaps and ensuring that Williamson Act contracts are handled properly during annexation. Senate Bill (SB) 1834 (Johnston) and SB 2227 (Monteith) were co-enacted and place concurring changes in the Williamson Act and the Cortese-Knox Act (which governs annexation) respectively.<sup>75</sup> As discussed above, AB 2764 eliminated the city protest authority after 1990, and sought to define the requirements of a valid pre-1991 protest.<sup>76</sup> Assuming the old protests were valid, they are effectively grandfathered, which becomes quite important during annexation of affected lands.<sup>77</sup> The authority to terminate contracts during annexation based on *grandfathered* protests is continuing under SB 1834 and SB 2227, albeit with strict limitations. The problem with AB 2764 was that it forced Williamson Act administrators to refer to *repealed* language to determine the validity of the grandfathered protests. SB 1835 significantly further amends Government Code sections 51243 and 51243.5 to ensure the city will succeed to the contract unless all of the prerequisites for a valid protest were

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*Mall Error*, STOCKTON RECORD, Dec. 6, 1995, at 5.

<sup>74</sup> See, *People ex. rel. Wheeler v. Ennis Dev't Corp.*, Civil No. 98AS01208 (Cal. Super. Ct., Sacramento County filed Mar. 27, 1998) (amended judgment pursuant to stipulation).

<sup>75</sup> 1998 Cal. Adv. Legis. Serv. 690, §§ 1.5, 2 (SB 1835); 1998 Cal. Adv. Legis. Serv. 590 (SB 2227).

<sup>76</sup> 1990 Cal. Stat. ch. 841 (AB 2764).

<sup>77</sup> 1990 Cal. Stat. ch. 841 (AB 2764).

met.<sup>78</sup> Also, the law now requires that a certificate of contract termination be recorded if the protest is deemed valid, and the contract canceled. This latter provision will enable diligent local planners and title insurance companies to rely on recorded documents in regard to Williamson Act restrictions following annexation.<sup>79</sup>

The Porterville situation, as well as other incidents involving breaches of contract following annexations, also caused deep concern among farmland conservation advocates. As noted above, the Williamson Act represents a very large annual public investment in land conservation.<sup>80</sup> To date, there has been no systematic tracking of what happens to enrolled lands following annexation. The Department of Conservation annually processes open space subvention applications from thirteen cities.<sup>81</sup> However, many more cities annually annex land subject to contracts, and little is known about the contract enforcement on those lands.

SB 2227 seeks to close this gap with new substantive and procedural requirements in the Cortese-Knox Act. The LAFCOs are required to notify the Department of Conservation concerning proposed annexation of enrolled land, and to schedule hearings on the same.<sup>82</sup> The LAFCOs are now explicitly required to make a determination whether or not the city has a valid protest to allow it not to succeed to the contract.<sup>83</sup> Where the city must assume the rights and duties under the contract, the LAFCO must condition the final annexation on the city's completion of steps which are otherwise required for a city or county to participate in the program; enactment of Williamson Act rules and filing of maps showing enrolled lands with the county recorder and Department of Conservation.<sup>84</sup> These new requirements will dramatically lessen the chance that contracts will simply fall through the cracks following annexation.

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<sup>78</sup> See CAL. GOV'T CODE § 51243.5 (Deering 1999) (as amended by SB 1834).

<sup>79</sup> See CAL. GOV'T CODE § 51243.5(h) (Deering 1999).

<sup>80</sup> See Introduction, *supra*.

<sup>81</sup> Camarillo, Corona, Fremont, Hayward, Menlo Park, Newark, Oceanside, Palo Alto, Perris, Redlands, San Jose, Saratoga, and Thousand Oaks each report enrolled acreage to the Department of Conservation on annual Open Space Subvention Applications. See STATUS REPORT, *supra* note 8, at 51.

<sup>82</sup> CAL. GOV'T CODE §§ 56828.5, 56835(g) (Deering 1999).

<sup>83</sup> CAL. GOV'T CODE § 56842.7 (Deering 1999).

<sup>84</sup> CAL. GOV'T CODE § 56844.2 (second of two) (Deering 1999).

*B. Compatible Use*

The year after the Williamson Act was enacted, the Attorney General expressed apprehension that loose definitions of compatibility could result in "a preferential tax exemption for industry under the guise of limiting the use of agricultural land."<sup>85</sup> This issue seemed to disappear until the mid-1980s, when concern emerged at a 1986 Williamson Act Task Force chaired by the Resources Agency (which includes the Department of Conservation) "that some land owners were misusing the Williamson Act's tax benefits by using contracted land for other than agricultural operations . . . ."<sup>86</sup> The Task Force recommended amendments, which were codified in Government Code section 51220.5, requiring local government to consider whether agricultural operations would be impaired by non-farm population in agricultural preserves.<sup>87</sup>

However, lacking any teeth, section 51220.5 had no discernable effect on the trend toward a broad interpretation of "compatible" developments. Notwithstanding section 51220.5, the Department of Conservation was besieged with review of "compatible use" proposals including race tracks, hotels, country clubs, large scale mining, and concrete plants.<sup>88</sup> The trend toward expansive "compatible use" proposals was perhaps a result of more rigorous enforcement of cancellation restrictions and penalties, as discussed above. In 1989, San Joaquin County approved a contract cancellation for a country club development called A&M Farms.<sup>89</sup> A few years later, two similar projects were approved by Yolo and Stanislaus Counties as "compatible uses," avoiding restrictions on cancellation as well as the \$500,000 penalty paid by the San Joaquin developer.<sup>90</sup>

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<sup>85</sup> 47 Op. Cal. Att'y Gen 171, 179 (1966).

<sup>86</sup> Senate Floor Analysis of SB 1506, 1986 Cal. Stat. ch. 607 (SB 1506).

<sup>87</sup> 1986 Cal. Stat. ch. 607, § 3 (codified at CAL. GOV'T CODE § 51220.5 (Deering 1999)).

<sup>88</sup> See letter from Ed Heidig, Director, Department of Conservation to Stuart Brown, President of California Cattleman's Association (Dec. 30, 1993) (on file with the *San Joaquin Agricultural Law Review*).

<sup>89</sup> See Brief for Appellants at 6, *Land Utilization Alliance v. County of San Joaquin*, 3 Civil COO9589 (Cal. Ct. App. 3d App. Dist. 1991).

<sup>90</sup> See Memorandum from Dennis J. O'Bryant, Environmental Program Coordinator, California Department of Conservation to Douglas P. Wheeler, Secretary for Resources and David Flores, Yolo County Community Development Department (June 20, 1991) (commenting on the proposed Pheasant Glen Golf Course); see *Stanislaus Audubon Soc'y v. County of Stanislaus*, 39 Cal. Rptr. 2d 54 (Ct. App. 1995).

The Stanislaus County country club project precipitated litigation which might have established some judicial interpretation of compatible uses prior to the amendments of 1994, discussed below.<sup>91</sup> Although the issue was extensively briefed by the parties and by *Amicus Curiae* Briefs from Department of Conservation and California Farm Bureau Federation, the Court side stepped the issue by ruling the compatible use issue was not ripe until California Environmental Quality Act (CEQA)<sup>92</sup> compliance was achieved.<sup>93</sup>

However, the compatible use questions raised in *Stanislaus Audubon Society v. County of Stanislaus* were addressed by AB 2663 during the 1994 legislative session.<sup>94</sup> AB 2663 was the result of a three year effort to provide statutory guidance on compatible use. Faced with repeated requests for guidance from citizens and local government, in 1991 the Department of Conservation sponsored AB 1770, which failed by one vote in the Assembly on concurrence.<sup>95</sup> Though the concept was narrowly defeated again the following year in AB 724, these bills pioneered three basic principles of compatibility, which were incorporated into AB 2663 and signed into law on September 30, 1994.<sup>96</sup>

To paraphrase AB 2663 and summarize compatible use principles, a compatible use may not: (1) harm soil fertility; (2) obstruct or displace potential agricultural operations;<sup>97</sup> or (3) induce non-agricultural devel-

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<sup>91</sup> *Stanislaus Audubon Soc'y*, 39 Cal. Rptr. 2d at 54.

<sup>92</sup> CAL. PUB. RES. CODE §§ 21000-21177 (Deering 1999).

<sup>93</sup> *Stanislaus Audubon Soc'y*, 39 Cal. Rptr. 2d at 63-64. The Department's brief argued that the scope of potential "compatible uses" is constrained by the constitutional concerns raised in *Lewis v. City of Hayward*: "if Section 8 allows the Legislature to define restrictions, it does not permit a definition which renders such restrictions ineffective for land conservation purposes." Amici Brief for the California Department of Conservation at 16, *Stanislaus Audubon Soc'y v. County of Stanislaus*, 39 Cal. Rptr. 2d 54 (Ct. App. 1995) (quoting *Lewis v. City of Hayward*, 222 Cal. Rptr. 781, 787 (Ct. App. 1986) (emphasis added)).

Compatible use rules effectively define the nature of contractual restrictions. A compatible use designation which rendered a contract "ineffective for (agricultural) land conservation purposes" would violate the constitution.

<sup>94</sup> 1994 Cal. Stat. ch. 1251.

<sup>95</sup> See DEP'T OF CONSERVATION RESOURCES AGENCY, ENROLLED BILL REPORT, AB 1770 (discussing the history of AB 1770) (Sept. 20, 1993).

<sup>96</sup> *Id.*; see CAL. GOV'T CODE § 51238.1(a) (Deering 1999).

<sup>97</sup> This prong echoes the impairment concern in Government Code section 51220.5, albeit this time with teeth. The concept that compatible uses should not impair a primary resource protected by a given use restriction echoes the definition of compatible use for timber protection zones which provides that a "compatible use" is any use which does not significantly detract from the use of the property for, or inhibit, grow-

opment of surrounding enrolled lands.<sup>98</sup> These principles reinforce the Williamson Act contracts purpose: “preservation of a the maximum amount of the limited supply of agricultural land . . . .”<sup>99</sup>

Notwithstanding some recent commentary to the contrary, this legislation is but the most recent in an ongoing process of maintaining the integrity of the overall program.<sup>100</sup> Since the enactment of AB 2663, the earlier spate of adventurous compatible use proposals has virtually ceased. At the same time, there has been no exodus from the program by local government or landowners.

The primary difference between AB 2663 and its narrowly failed ancestors in 1992 (AB 1770) and 1993 (AB 724) are three exceptions to the three primary principles. The exceptions provide alternative compatible use standards for non-prime lands, mineral extraction, and grandfathering provisions.<sup>101</sup>

The alternative approach for non-prime lands under new Government Code section 51238.1(c) was an attempt to refine the somewhat haphazard addition of open space conservation to the Williamson Act in 1969.<sup>102</sup> In its original form, the Act exclusively focused on the preservation of prime agricultural land. Preservation of prime agricultural lands necessarily extends to protecting the soil resource and preventing non-farm congestion from displacing farming operations.<sup>103</sup> On the other hand, preserving open space is more simply a question of limiting urban growth, the focus of principle three.<sup>104</sup>

Reflecting the differing programmatic concerns for prime agricultural lands versus open space lands, AB 2663 allows uses on non-prime lands which may not comply with the first two compatible use principles, subject to conditioning of uses to meet these standards “to the greatest extent possible while maintaining the purpose of the

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ing and harvesting timber . . . .” CAL. GOV’T CODE § 51104(h) (Deering 1999).

<sup>98</sup> See the similar cancellation finding in Government Code section 51282(b)(2) (Deering 1999).

<sup>99</sup> CAL. GOV’T CODE § 51220(a) (as that section reads in Deering 1983 bound volume).

<sup>100</sup> Bill Geyer, *The Williamson Act: AB 2663 and SB 1534; The Beginning of the End for the Act, or a New Beginning*, CAL. LAND USE, Nov. 1994.

<sup>101</sup> CAL. GOV’T CODE §§ 51238.1(c), 51238.2, 51238.3 (Deering 1999).

<sup>102</sup> See 1969 Cal. Stat. ch. 1473 (adding Government Code sections 51201(n), now section 51201(o) (defining open space uses) and 51205 (deeming open space uses to be “agricultural use” for the purposes of the Williamson Act)).

<sup>103</sup> See CAL. GOV’T CODE § 51238.1(a)(1)-(2) (Deering 1999) (stating compatibility principles one and two as paraphrased above).

<sup>104</sup> CAL. GOV’T CODE § 51238.1(a)(3) (Deering 1999).

use.”<sup>105</sup> However, the prohibition on projects which would induce conversion of surrounding Williamson Act lands (compatible use principle three) applies with equal vigor on non-prime lands.<sup>106</sup> The legislation provides several other findings which reflect the understanding that the value of non-prime lands is as much a matter of open space preservation as protection of agriculture per se.<sup>107</sup>

The question of mineral extraction also received special attention in AB 2663. Many counties have never allowed mining on enrolled lands. According to a survey by the Department of Conservation prior to the bill, of the forty-eight counties in the program, twelve allow mining subject to a special use permit.<sup>108</sup>

Under AB 2663, mines are generally subject to the prohibition on compromising fertility and/or displacing agricultural operations.<sup>109</sup> However, incidental mining operations may nevertheless be permitted where the “contractual commitment” to preserve prime or non-prime lands will not be “significantly impaired.”<sup>110</sup>

The statutory reference to the “contractual commitment” is interesting in this context. Litigation over Williamson Act restrictions has tended to be cast as statutory rather than contractual issues. However, several courts have applied contract analysis of the restrictions, in one case preventing a county from unilaterally denying the contractual entitlement to the tax preference.<sup>111</sup>

Practitioners in this area should also be aware of a letter to the Assembly Journal by Assemblyman Byron Sher, explaining section 51238.2. The letter states that the contractual commitment is upheld where the total amount of prime land is not “significantly reduced,”

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<sup>105</sup> CAL. GOV'T CODE § 51238.1(c)(1) (Deering 1999).

<sup>106</sup> CAL. GOV'T CODE § 51238.1(c)(1) (Deering 1999).

<sup>107</sup> CAL. GOV'T CODE § 51238.1(c) (Deering 1999).

<sup>108</sup> OFFICE OF LAND CONSERVATION, CAL. DEP'T OF CONSERVATION, COUNTY SURVEY OF COMPATIBLE USES, 1993 (on file with the *San Joaquin Agricultural Law Review*).

<sup>109</sup> CAL. GOV'T CODE § 51238.1(a)(1)-(2) (Deering 1999).

<sup>110</sup> CAL. GOV'T CODE § 51238.2 (Deering 1999).

<sup>111</sup> *County of Marin v. Assessment Appeals Bd.*, 134 Cal. Rptr. 349, 350 (Ct. App. 1976) (Williamson Act contracts represent a bargained for exchange wherein land is restricted to agricultural use in exchange for a tax preference); see also 54 Op. Cal. Att'y Gen. 90, 92 (1971) (“chief benefit” realized by the public from Williamson Act contracts is “the preservation of agricultural land”). Issues regarding rights flowing from Williamson Act contracts per se were also evaluated in *County of Orange v. Cory*, 159 Cal. Rptr. 78 (Ct. App. 1979), and *Delucchi v. Santa Cruz*, 225 Cal. Rptr. 43 (Ct. App. 1986). The use of basic contract law to interpret restrictions under the Act is noted at 75 Op. Cal. Att'y Gen. 278, 281 (1992).

and the quality of the soil is not “significantly impaired.”<sup>112</sup>

The compatibility principles also grandfather certain uses, provided that, as of June 7, 1994, either a permit application was pending, the use was already underway, or the use was expressly mentioned in an individual contract.<sup>113</sup> However, these provisions require that the use was indeed “compatible” under the statute at the time it was originally proposed.<sup>114</sup> The grandfather clause raises an interesting legal issue, since there is virtually no case authority on “compatibility” under the prior statute. The degree of leeway under prior law, short of virtual compliance with the new Government Code section 51238.1, is debatable.<sup>115</sup>

### *C. Public Acquisition/Redevelopment*

During enactment of the Williamson Act in 1965, the bill’s author worried about the vulnerability of agricultural preserves to condemnation for public works. In a July 9, 1965 letter urging Governor Edmund Brown to sign the Act into law, Assemblyman Williamson described the eminent domain provisions as follows:

Finally the bill [AB 2117] contains provisions which place some limits upon the use of eminent domain within agricultural preserves, and requires prior submission of all acquisition proposals to the Director of Agriculture and the local governing body for their comments. The provisions are necessary to provide for orderly land use planning, and to ensure that agricultural preserves do not become automatic corridors for condemnation by the very reason of their maintenance as open space.<sup>116</sup>

Assemblyman Williamson was prescient in fearing that relatively inexpensive open space lands preserved under the Act would make inviting sites for public projects. Acquisition of Williamson Act lands for a “public improvement” by threat of eminent domain terminates contractual restrictions with no cancellation fees or other penalties.<sup>117</sup> Re-

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<sup>112</sup> Letter from Byron D. Sher, California Assemblyman, 21st District, to E. Dotson Wilson, Chief Clerk of the Assembly (requesting the statement of legislative intent behind Assembly Bill No. 2663 be printed in the Assembly Journal) (Aug. 31, 1994) (on file with the *San Joaquin Agricultural Law Review*).

<sup>113</sup> CAL. GOV’T CODE § 51238.3 (Deering 1999).

<sup>114</sup> CAL. GOV’T CODE § 51238.3 (Deering 1999).

<sup>115</sup> See *Stanislaus Audubon Soc’y v. County of Stanislaus*, 39 Cal. Rptr. 2d 54 (Ct. App. 1995) (declining to rule on compatible use until CEQA compliance achieved).

<sup>116</sup> Letter from John C. Williamson, California Assemblyman, 29th District, to Gov. Edmund C. Brown (July 9, 1965) (on file with the *San Joaquin Agricultural Law Review*).

<sup>117</sup> CAL. GOV’T CODE § 51295 (Deering 1999) (The contract is deemed null and

development agencies began exploring the possibility that they might use section 51295 to remove Williamson Act restrictions from land and then resell for private development. SB 1534 was conceived to prevent this tactic.<sup>118</sup>

In one particularly egregious instance, the Department of Conservation was informed in 1987 that a city intended to acquire approximately 120 acres of Williamson Act lands for the purpose of expanding a wastewater treatment plant. The city redevelopment agency purchased the property. Then, roughly half of the land in question was resold for a private subdivision. This scheme bypassed the strict limitations on cancellation as well as the attendant penalties which would have been owed to the state.<sup>119</sup>

This bait and switch problem led to 1994 changes under SB 1534, which (1) clarified that contract termination through public acquisition is appropriate only for *publicly owned* facilities and interests; (2) changed the standards in Government Code section 51292 into affirmative findings; (3) required that lands resold by public entities be re-enrolled in the Act or an equivalent; and (4) provided more thorough notice to the Department of Conservation to monitor these provisions.<sup>120</sup>

One report stated SB 1534 imposes "new required findings."<sup>121</sup> This is misleading, as the *standards* in Government Code section 51292 were not changed. The problem was that public entities had no obligation to demonstrate compliance with them. Although the Department of Conservation and local government were empowered to enforce Government Code section 51292,<sup>122</sup> the lack of an administrative record made that task nearly impossible. SB 1534 simply converted the existing standards into affirmative findings, so that compliance could be ascertained on the record.<sup>123</sup>

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void, "and for the purposes of establishing the value of the land, the contract shall be deemed never to have existed.").

<sup>118</sup> See Kathie A. Smith, *Bill to Tighten Rules on Protected Farmland*, FRESNO BEE, May 22, 1994, at A5; Ray Sotero, *Senate Approves Bill to Protect California's Farmland*, SALINAS CALIFORNIAN, Apr. 22, 1994; DEPARTMENT OF CONSERVATION, BILL ANALYSIS, SB 1534 (May 12, 1994).

<sup>119</sup> See Letter from Stephen E. Oliva, Environmental Program Coordinator, California Department of Conservation to Helen Elder, Planning Department, City of Guadalupe (Oct. 11, 1991) (on file with the *San Joaquin Agricultural Law Review*).

<sup>120</sup> 1994 Cal. Stat. ch. 1158 (codified at CAL. GOV'T CODE §§ 51290.5, 51291(b)-(d), 51292, 51295 (Deering 1999)).

<sup>121</sup> Geyer, *supra* note 100, at 55.

<sup>122</sup> See CAL. GOV'T CODE § 51294 (Deering 1999).

<sup>123</sup> CAL. GOV'T CODE § 51292 (Deering 1999).

SB 1534 eliminated the power of redevelopment agencies to terminate the contracts through temporary acquisition.<sup>124</sup> However, the issue of redevelopment within agricultural preserves goes beyond the problem of contract termination. While lands chosen for protection by the Williamson Act are arguably never "blighted," such lands continued to be targeted by redevelopment agencies.<sup>125</sup>

In 1994 the California Resources Agency and the California Farm Bureau Federation joined in a lawsuit challenging a city redevelopment plan which included roughly 1700 acres of prime agricultural land enrolled in the Williamson Act. The case settled after the city agreed to remove the Williamson Act acreage from the redevelopment area.<sup>126</sup> 1996 legislation has essentially codified the settlement in the lawsuit, and now forbids the inclusion of enforceably restricted (Williamson Act) lands within any redevelopment areas.<sup>127</sup> SB 1566 also restricts inclusion of all other agricultural land within redevelopment areas unless specific findings are made.<sup>128</sup>

#### *D. Subdivision and Residential Development Rights*

The subject of division of lands enrolled in the Williamson Act has been controversial throughout the life of the Act. The 1975 Assembly Task Force on Preferential Assessment of Property concluded that land divisions were converting enrolled lands to nonagricultural uses and putting development pressure on adjoining lands.<sup>129</sup> In response, the Task Force proposed lengthy amendments to the Williamson Act. Among the proposed amendments was a restriction on division of

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<sup>124</sup> CAL. GOV'T CODE § 51295 (Deering 1999).

<sup>125</sup> See *Sweetwater Valley Civic Ass'n v. City of National City*, 555 P.2d 1099, 1104 (Cal. 1976) (rejecting an attempt by a city to acquire open space lands for redevelopment); *Emmington v. Solano County Redev. Agency*, 237 Cal. Rptr. 636, 642-643 (Ct. App. 1987) (invalidating redevelopment plan which included productive agricultural land).

<sup>126</sup> CALIFORNIA LEGISLATURE, SENATE SELECT COMM. ON REDEV., REDEVELOPMENT AND BLIGHT, A BACKGROUND PAPER FOR THE JOINT INTERIM HEARING, 12-14 (Nov. 16, 1995); see also Dayna Straehly, *City Handed 2d Suit Over Redevelopment*, HEMET NEWS (Hemet, Cal.), Mar. 1, 1994, at A-1; Dayna Straehly, *San Jacinto, Farm Bureau Compromise*, HEMET NEWS (Hemet, Cal.), Sept. 7, 1995, at A-1.

<sup>127</sup> 1996 Cal. Stat. ch. 617, § 2 (SB 1566) (codified at CAL. HEALTH & SAFETY CODE § 33321.5 (Deering 1999)).

<sup>128</sup> 1996 Cal. Stat. ch. 617, § 2 (SB 1566) (codified at CAL. HEALTH & SAFETY CODE § 33321.5 (Deering 1999)).

<sup>129</sup> ASSEMBLY TASK FORCE ON THE PREFERENTIAL ASSESSMENT OF PROPERTY, PREFERENTIAL ASSESSMENT OF AGRICULTURE AND OPEN-SPACE LANDS, 21-22 (June 1975) (prepared for the Assembly Committee on Revenue and Taxation).

land, which essentially would prohibit any division which would result in parcels smaller than 80 acres for prime land, and 160 acres for non-prime land.<sup>130</sup>

The Act provides that when land under contract is divided, the owner of resulting parcels exercises the rights of the original contracting landowner.<sup>131</sup> However, as the Attorney General recently observed, the Act does not grant an "absolute right to subdivide. The subdivision of land which is subject to a Williamson Act contract would generally not serve the primary goal of the Williamson Act to promote the conservation of agricultural lands."<sup>132</sup> Local government must implement and enforce the Williamson Act in a manner consistent with its purposes.<sup>133</sup>

The Williamson Act sets forth a requirement that enrolled lands be maintained in parcels large enough to "sustain their agricultural use."<sup>134</sup> Mirroring this provision, the Subdivision Map Act forbids cities and counties from approving subdivisions of enrolled lands where the "resulting parcels . . . would be too small to sustain their agricultural use . . . ." <sup>135</sup>

Finally, the Williamson Act provides a presumption that parcels of ten acres or more of prime land, or forty acres or more of non-prime land, is the minimum required to sustain an agricultural use.<sup>136</sup> Subdivision into smaller parcels requires an affirmative finding that the resulting parcels will sustain agricultural uses.<sup>137</sup>

The tension between conservation and subdivision is obvious. Since enrolled lands are generally limited by local ordinance to one homesite per parcel, subdivisions are often motivated by a desire to create additional residential building sites. Courts have consistently recognized that the Williamson Act was intended to curb "the rapid and virtually irreversible loss of agricultural land to residential and other developed uses."<sup>138</sup> A proposed low density subdivision in a rural area was deemed to be "urban" development which required a valid contract cancellation in *Honey Springs Homeowners Association v. Board of*

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<sup>130</sup> *Id.* at 50-55.

<sup>131</sup> CAL. GOV'T CODE § 51243(b) (Deering 1999); *see also* CAL. GOV'T CODE §§ 51230.1, 66474.4 (Deering 1999).

<sup>132</sup> 75 Op. Cal. Att'y Gen. 278, 285-86 (1992) (citations omitted).

<sup>133</sup> CAL. GOV'T CODE § 51252 (Deering 1999).

<sup>134</sup> CAL. GOV'T CODE § 51222 (Deering 1999).

<sup>135</sup> CAL. GOV'T CODE § 66474.4 (Deering 1999).

<sup>136</sup> CAL. GOV'T CODE §§ 51222, 66474.4 (Deering 1999).

<sup>137</sup> CAL. GOV'T CODE § 66474.4 (Deering 1999).

<sup>138</sup> *Sierra Club v. City of Hayward*, 623 P.2d 180, 184 (Cal. 1981).

*Supervisors.* The court noted that the Williamson Act was intended to protect farmland from conversion into “scattered, low density, single family subdivisions.”<sup>139</sup>

The Attorney General’s Office has twice opined that subdividing contracted lands for the purpose of residential development is prohibited by the Williamson Act.<sup>140</sup> In one case, the Attorney General concluded:

Unless the single-family residences proposed for each of the subdivided lots are *incidental* to the use of the lot for the purpose of producing agricultural commodities for *commercial* purposes, the division of a 1308 acre preserve into 29 lots of varying acreage from 20 to 185 acres would constitute a violation of the Williamson Act contract binding on that land.

. . . .

If the *primary* use of the land is not agricultural use, the construction of a single-family home would, in our opinion, violate the contract.<sup>141</sup>

This opinion concluded that the subdivision would violate the Williamson Act, and that the facts underlying this violation might also constitute a violation of the Subdivision Map Act.<sup>142</sup> The opinion also observed that any subdivision must also be consistent with the general plan.<sup>143</sup>

In an earlier instance, the Attorney General considered a proposed subdivision of Williamson Act lands into 20 acre “home sites.”

The fact that the land is zoned for 20 acre parcels does not prohibit the board from adopting uniform rules for the administration of agricultural preserves containing permissible land uses *more restrictive* than those permitted under the county zoning ordinance.

. . . .

. . . We conclude that a determination by the board that the division of a 1,200 acre farm into 20 acre homesites will result in a loss of productive agricultural land, is a sufficient reason for the board to refuse to acquiesce in such division . . . . What is proposed here does violence to the letter and spirit of the Williamson Act. If it were permitted, then there actually could be a conversion of approximately 2 square miles of farm land into a rural subdivision containing sixty homes, with no *commercial* agricultural enterprises. It is apparent that to give such parcels special treatment under section 423 of the Revenue and Taxation Code would be inequitable to the county and the state in that each is deprived of the chief benefit of the contract, namely the preservation of agricul-

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<sup>139</sup> Honey Springs Homeowners Ass’n v. Board of Supervisors, 203 Cal. Rptr. 886, 896 (Ct. App. 1984).

<sup>140</sup> 62 Op. Cal. Att’y Gen. 233 (1979); 54 Op. Cal. Att’y Gen. 90 (1971).

<sup>141</sup> 62 Op. Cal. Att’y Gen. 233, 241 (1979) (emphasis added).

<sup>142</sup> *Id.* at 245.

<sup>143</sup> *Id.* at 244.

tural land.<sup>144</sup>

These opinions reflect the Williamson Act's express requirement that parcels be kept large enough to sustain agricultural uses. The import of the opinions is that subdivision for the primary purpose of residential development would violate the Williamson Act *regardless* of the parcel sizes.

AB 2663, as discussed in Part II, B, above, provides standards for determining compatible uses. The primary standards focus on protecting the agricultural viability of enrolled lands, particularly on prime farmland. Greater flexibility is allowed on non-prime lands. However, it should be noted that even under the relaxed standards for non-prime lands, the bill explicitly prohibited subdivision for residential purposes.<sup>145</sup> While AB 2663 is a step toward codifying the Attorney General's earlier interpretation of the Williamson Act, ranchette proponents argue that the prohibition in section 51238.1(c)(4) is very narrow, and should not apply to all ranchette projects.<sup>146</sup>

The constitutional overtones of this issue are similar to those involving compatible uses, discussed earlier. The Attorney General has concluded that the general lesson of *Sierra Club* and *Lewis* "is that the cancellation provisions of the Act require a narrow and strict construction against easy cancellation so as to assure the constitutionality of the Act."<sup>147</sup> Specifically, as held in *Lewis*, it is not constitutional to implement Williamson contracts in a manner that "renders them ineffective for land conservation purposes."<sup>148</sup> As noted above, the *Honey Springs* court determined that the Act was intended to prevent the conversion of farmland into "scattered, low density, single family subdivisions" notwithstanding attempts to characterize such subdivisions as "rural."<sup>149</sup> Therefore, if such subdivisions occur on land under contract, the contract has been rendered ineffective for conservation purposes. This, of course, violates the constitution.

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<sup>144</sup> 54 Op. Cal. Att'y Gen. 90, 90, 92 (1971) (emphasis added).

<sup>145</sup> CAL. GOV'T CODE § 51238.1(c)(4) (Deering 1999).

<sup>146</sup> See Letter from Frederick W. Clough, Schramm & Raddue, Attorneys at Law to Michael Mantell, Under Secretary for the California Resources Agency (Jan. 17, 1996) (on file with the *San Joaquin Agricultural Law Review*).

<sup>147</sup> 69 Op. Cal. Att'y Gen. 70, 75 (1986) (citing *Sierra Club v. City of Hayward*, 623 P.2d 180, 193 (Cal. 1981); *Lewis v. City of Hayward*, 222 Cal. Rptr. 781, 787 (Ct. App. 1986)).

<sup>148</sup> *Lewis*, 222 Cal. Rptr. at 787.

<sup>149</sup> *Honey Springs Homeowners Ass'n v. Board of Supervisors*, 203 Cal. Rptr. 886, 896 (Ct. App. 1984).

The Act's reliance on the non-quantified standard or agricultural viability in tandem with the presumed minimum sizes reflects the difficulty in generalizing about parcel sizes needed to support agriculture. A 10 acre parcel of prime row crop land may be more viable than a 100 acre parcel of marginal grazing land. The Legislature anticipated that local government will tailor minimum size restrictions above the statewide minimums as appropriate.<sup>150</sup> The Williamson Act provides participating cities and counties with the authority to do so.<sup>151</sup> Many jurisdictions have adopted minimum parcel sizes which greatly exceed the statewide presumptive minimums provided in Section 51222. For example, in Tehama County, the minimum allowed for land enrolled in the Act is 20 and 100 acres for prime land and non-prime land, respectively.<sup>152</sup> In Glenn County the minimum for prime land is eighty acres.<sup>153</sup> In Yolo County the minimum parcel size for new contracts is 80 gross acres for cultivated and irrigated agricultural land, 160 gross acres for cultivated but not irrigated land, and 320 gross acres for range and wild lands. When documentation is provided that the land is in agricultural use, exceptions to these minimums are allowed down to twenty acres.<sup>154</sup> The 1986 Williamson Act Task Force published a set of suggested ranges of minimum sizes for different categories of land, from 10 acres for prime land to 640 acres for native pasture lands.<sup>155</sup>

The current subdivision standards were apparently based on the premise that by requiring subdivision to pass a general agricultural sustainability threshold, the type of residential conversion confronted by the Attorney General could be avoided. However, in practice, proposals for ranchette style subdivisions on enrolled lands have continued as evidenced by a survey of county planners conducted by the Department in 1993 which revealed that subdivision and the Williamson Act was considered problematic in eighteen of the forty-eight Williamson

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<sup>150</sup> CAL. GOV'T CODE §§ 51240, 66474.4(e) (Deering 1999).

<sup>151</sup> CAL. GOV'T CODE §§ 51240, 66474.4(e) (Deering 1999).

<sup>152</sup> COUNTY OF TEHAMA, CAL., AGRICULTURAL PRESERVE PROGRAM, Questions and Answers (section 17.12.050 notes that in an Exclusive Agricultural District, minimum lot size is 10 to 40 acres but owners may combine parcels to achieve the 20 acre minimum; section 17.64.030 sets the minimum parcel size for Upland Agricultural District (1983)).

<sup>153</sup> GLENN COUNTY, CAL., ZONING CODE § 19.34.050 (1993).

<sup>154</sup> YOLO COUNTY, CAL. ORDINANCE No. 1157, §§ 5, 7 (amending Yolo County Code subsection 8-2.406(a)) (filed with the Yolo County Clerk Dec. 24, 1992).

<sup>155</sup> LAND CONSERVATION UNIT, CAL. DEP'T OF CONSERVATION, WILLIAMSON ACT TASK FORCE CONSENSUS FOR ACTION: AN INTERIM REPORT TO THE SECRETARY FOR RESOURCES 20 (1986).

Act counties.<sup>156</sup>

In one instance the California Department of Conservation, the California Farm Bureau Federation, and the Sierra Club joined forces in suing to prevent a proposal in Tuolumne County to "cluster" twenty-three dwelling units on two 40 acre parcels which had been divided off a 907 acre parcel enrolled in the Williamson Act.<sup>157</sup> The developer and county argued that since the Williamson Act could allow division of the entire 907 acre parcel into 40 acre lots, and each could then have a dwelling unit, it was therefore legal to "cluster" an equivalent number of houses on the two 40 acre pieces. However, their theory was never put to the test as the developer withdrew the permit following the initiation of litigation.<sup>158</sup>

Another skirmish occurred recently when the Department of Conservation rejoined the Farm Bureau in bringing an action to prevent a subdivision in Fresno County.<sup>159</sup> The saga preceding this lawsuit was documented in a recent comment in the San Joaquin Agricultural Law Review. As chronicled there, the county treated a 340 acre parcel of 60% non-prime land in the Williamson Act as "prime" to facilitate a proposed residential subdivision.<sup>160</sup> Under Government Code sections 51222 and 66474.4, the presumptive floor for parcel sizes for non-prime lands is forty acres, and ten acres for more productive prime lands.<sup>161</sup> A county may not approve subdivision of non-prime Williamson Act lands below forty acres unless a finding is made that such parcels will sustain agricultural uses.<sup>162</sup> In this case, the county documents indicated that the resulting parcels would be "large home sites" with no commercial agricultural potential. The proposed subdivision therefore violated the requirement in Government Code section

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<sup>156</sup> CALIFORNIA DEP'T OF CONSERVATION, COUNTY COMPATIBLE-USE DOC SURVEY (see page 2 of the Compatible Use Survey Results Tabulation which appears as an appendix to the survey) (Feb. 1993).

<sup>157</sup> California Farm Bureau Fed'n v. County of Tuolumne, Civ. No. CV 036987 (Cal. Super. Ct. Tuolumne County) (Intervenor's Opening Memorandum of Points and Authorities in Support of Petition and Complaint, dated Dec. 1, 1993).

<sup>158</sup> California Farm Bureau Fed'n, News Release, *Farm Bureau, Sierra Club Victorious in Land Use Case* (Apr. 6, 1994).

<sup>159</sup> Fresno Farm Bureau Fed'n v. County of Fresno, Civ. No. 580195-6 (Cal. Super. Ct. Fresno County) (Department of Conservation's Motion for Leave to Intervene, filed May 19, 1997).

<sup>160</sup> Kathleen McGurty, Comment, *The State of Agricultural Land Preservation in California in 1977: Will the Agricultural Land Stewardship Program Solve the Problems Inherent in the Williamson Act?*, 7 S.J. AGRIC. L. REV. 135, 140-50 (1997).

<sup>161</sup> CAL. GOV'T CODE §§ 51222, 66474.4 (Deering 1999).

<sup>162</sup> *Id.*

66474.4 that enrolled lands be maintained in large enough sizes to "sustain agricultural use."<sup>163</sup> However, as in the Tuolumne case cited above, there was to be no hearing on the merits as the case settled.<sup>164</sup> In this instance, settlement was prompted by the Department of Conservation's exercise of its authority (delegated from the California Resources Agency) under Government Code section 16146 to withhold a portion of Fresno County's subventions in light of the contract violation.<sup>165</sup> The landowner has now agreed to forgo further processing of a subdivision permit until the subject land completes contract nonrenewal in the year 2006.<sup>166</sup>

More recently, a developer unsuccessfully challenged a county's refusal to allow subdivision of a 3,877 acre ranch enrolled in the Williamson Act into 32 separate lots for upscale homesites ranging from 100 to 224 acres in size.<sup>167</sup> On March 16, 1998, the Santa Barbara Superior Court held that since continued ranching would not be feasible on the individual lots, the county was justified in denying the subdivision.<sup>168</sup>

#### *E. Contract Cancellation*

From the very beginning of the Williamson Act program the cancellation of Williamson Act contracts was meant to be severely limited. As noted above, the Williamson Act was by necessity crafted to overcome assessors' refusal to give special tax treatment to a transient land use restriction such as zoning. Speaking for the Supreme Court of California in *Sierra Club v. City of Hayward*, Justice Mosk stated:

The Legislature recognized that in rare instances unforeseen events might require the release of land from its contractual restriction before that restriction lapses by its own terms. The Legislature declared, however, that cancellation of Williamson Act contracts is permissible "only when the continued dedication of land under such contracts to agricultural use is

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<sup>163</sup> McGurty, *supra* note 160, at 141-44.

<sup>164</sup> See *Fresno Farm Bureau Fed'n v. County of Fresno*, Civ. No. 580195-6 (Cal. Super. Ct. Fresno County) (Settlement Agreement and Release signed by parties Aug. 1997) (on file with the *San Joaquin Agricultural Law Review*) [hereinafter Settlement Agreement].

<sup>165</sup> Letter from Kenneth E. Trott, Manager, Land Conservation Unit, California Department of Conservation to William C. Greenwood, Fresno County Assessor (Jul. 1, 1997) (on file with the *San Joaquin Agricultural Law Review*).

<sup>166</sup> Settlement Agreement, *supra* note 164.

<sup>167</sup> *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, No. 209146 (Cal. Super. Ct. Santa Barbara County) (statement of decision denying petition for writ of mandate, filed Mar. 16, 1998).

<sup>168</sup> *Id.* at 4.

neither necessary nor desirable for the purposes of (the act).” The cancellation provisions were included “[a]s a means of dealing with strictly emergency situations where the public interest no longer dictates that the contract be continued . . . .”

The act is intended to preserve open space land. But if those with an eye toward developing such land within a few years are allowed to enroll in contracts, enjoy the tax benefits during their short holding period, then cancel and commence construction on a showing that their land is ripe for needed housing, the act would simply function as a tax shelter for real estate speculators. The Legislature’s findings clearly spell out its intent, and nowhere among them appears a motivation to subsidize those who would subdivide. On the contrary, the overwhelming theme of the legislation is the need to preserve undeveloped land in the face of development pressures.<sup>169</sup>

The court went on to suggest that there was no doubt that the legislature intended cancellation to be approved only under “extraordinary circumstances” which could not be anticipated through contract nonrenewal.<sup>170</sup>

The *Sierra Club* decision precipitated years of judicial, legislative, and academic review of the cancellation issues.<sup>171</sup> The strict limitations on cancellations have been discussed at length in these cases and commentary, and need no further mention here. Also, unlike the less visible means by which enrolled lands are developed, as discussed above, the mandatory public hearing and overt termination of land use restrictions ensures a measure of public involvement and notoriety in these

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<sup>169</sup> *Sierra Club v. City of Hayward*, 623 P.2d 180, 185 (Cal. 1981).

<sup>170</sup> *Id.* at 186-88.

<sup>171</sup> See 1981 Cal. Stat. ch. 1095 (AB 2074) (modified cancellation findings and provided a one year window for cancellation under the former relaxed standards); Jeffrey P. Widman, *New Cancellation Rules Under the Williamson Act*, 22 SANTA CLARA L. REV. 589 (1982); 1983 Cal. Stat. ch. 864, § 2 (amended Government Code section 51284 to require notice of cancellation be given to the Department of Conservation); *Honey Springs Homeowners Ass’n v. Board of Supervisors*, 203 Cal. Rptr. 886 (Ct. App. 1984) (state constitution requires strict reading of window provisions); *Lewis v. City of Hayward*, 222 Cal. Rptr. 781 (Ct. App. 1986) (window provision violative of Article 10 § 13 of California Constitution); 69 Op. Cal. Att’y Gen. 70 (1986) (Board of Equalization regulation reducing cancellation fees under Proposition 13 deemed erroneous); 1987 Cal. Stat. ch. 1305 (SB 338) (codified Attorney General Opinion that cancellation fees must reflect current market value at Government Code section 51283); 1991 Cal. Stat. ch. 125, § 1 (AB 720) (amended Government Code section 51284 to give Department of Conservation notice of tentative as well as final cancellations); 1993 Cal. Stat. ch. 89, § 1 (AB 582)(amended Government Code 51284 to require notice of tentative cancellation to the Department of Conservation *prior* to hearing).

actions.<sup>172</sup> In addition, the payment of contract cancellation fees to the state discourages cancellations and ensures that the public is made whole for its investment through reduced taxes and open space subventions as discussed above.<sup>173</sup>

#### *F. Cancellation Fees*

A somewhat common misunderstanding regarding the cancellation fee required by Government Code section 51283 is that it is simply a payment of back taxes. A back taxes calculation was in fact provided in Government Code Section 51283.1.<sup>174</sup> The deferred taxes collected under section 51283.1 were “collected at the same time and in the same manner as the *cancellation fees* provided in section 51283[,]” and were paid to the local taxing agencies which actually lost tax revenue under the Williamson Act.<sup>175</sup>

In complete contrast to the calculation of tax savings under section 51283.1, section 51283 provides for the calculation of a cancellation fee that is wholly unrelated to the actual tax savings enjoyed by the canceling landowner.<sup>176</sup> The cancellation fee is set at 12.5% of the “current fair market value of the land as though it were free from contractual restriction.”<sup>177</sup> Note that this flat fee is the same regardless of how long the contract has been in effect, and is therefore unrelated to actual tax savings.

Additional confusion regarding the cancellation fee resulted from the passage of Proposition 13 in 1979. At that time, Government Code section 51283 based the fee on “full cash value” which, universally, had meant current fair market value.<sup>178</sup> In 1979 the State Board of Equalization determined that Proposition 13 and the redefinition of “full cash value” for tax purposes also applied to the cancellation fee.<sup>179</sup> In 1986, the Attorney General disagreed and determined that the Board of Equalization had incorrectly applied Proposition 13 to section 51283.<sup>180</sup> The following year, the Legislature took the unusual step of

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<sup>172</sup> See CAL. GOV'T CODE §§ 51280-51286 (Deering 1999).

<sup>173</sup> CAL. GOV'T CODE § 51283 (Deering 1999); *Dorcich v. Johnson*, 167 Cal. Rptr. 897, 899 (Ct. App. 1980).

<sup>174</sup> CAL. GOV'T CODE § 51283.1(e) (repealed by 1986 Cal. Stat. ch. 607, § 4).

<sup>175</sup> CAL. GOV'T CODE § 51283.1(e) (repealed by 1986 Cal. Stat. ch. 607, § 4).

<sup>176</sup> CAL. GOV'T CODE § 51283 (Deering 1999).

<sup>177</sup> CAL. GOV'T CODE § 51283(a) (Deering 1999).

<sup>178</sup> 69 Op. Cal. Att'y Gen. 70, 74 (1986).

<sup>179</sup> *Id.* at 75.

<sup>180</sup> *Id.* at 76.

explicitly adopting the Attorney General's opinion.

The Legislature is aware of the Attorney General's Opinion No. 85-1002, dated April 22, 1986 . . . . In enacting Section 1 of this act, it is the intent of the Legislature to *concur in that interpretation* by clarifying that term [the meaning of "full cash value" for cancellation purposes].<sup>181</sup>

SB 338 replaced the term "full cash value" with the term "current fair market value" in section 51283(a) of the Government Code, thereby reviving cancellation penalties as a strong disincentive for contract cancellation after a temporary low under the Board's rule.<sup>182</sup>

A significant dispute arose over the appraisal of current fair market value in *People ex rel. Wheeler v. Triplett*.<sup>183</sup> In *Triplett*, the County Assessor had based the cancellation valuation for the Diablo Grande new town project solely on agricultural use. Notwithstanding the assertions of both the project proponents and the Planning Commission that the new town was a viable and economic development, the assessor dismissed the development value of the project site, and valued the land as if restricted to dry grazing. The case thus presented a paradox where the assessor's estimation of the economic viability of the project was in conflict with supportive findings made by the county to promote the project.<sup>184</sup> More vexing, after extensive discovery it remained unclear how the assessor had determined that the highest and best use of the land was dry grazing notwithstanding the impending development.<sup>185</sup>

The suit went to the court of appeal on several preliminary issues involving whether the Resources Agency and Department of Conservation were within their jurisdiction to challenge a County Assessor's determination of the fees.<sup>186</sup> The court held that the state's action was not barred by the 180 day statute of limitations provided in Government Code section 51286 regarding the decision of a board or council to cancel a contract.<sup>187</sup> The court also affirmed the standing of the Resources Agency and Department of Conservation to maintain such an action.<sup>188</sup> Finally, the court held that the state agencies were not re-

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<sup>181</sup> 1987 Cal. Stat. ch. 1305 (SB 338) (emphasis added).

<sup>182</sup> 1987 Cal. Stat. ch. 1305 (SB 338).

<sup>183</sup> *People ex rel. Wheeler v. Triplett*, 55 Cal. Rptr. 2d 610 (Ct. App. 1996) (*cert. denied*).

<sup>184</sup> *Id.* at 612.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 620.

<sup>188</sup> *Id.* at 623. One other commentator has erroneously suggested that the Department of Conservation has only "monitoring and reporting duties under the Williamson

quired to first seek an assessment appeal pursuant to Government Code section 51203.<sup>189</sup>

However, after remand and prior to trial, the parties reached a settlement whereby Diablo Grande has dedicated a 3500 acre conservation easement on grazing/habitat land surrounding the development.<sup>190</sup> The agreement was reached as a sort of “debt for nature” swap, and set the stage for enactment of SB 1240, discussed below. The conservation easement encompasses much of Wilcox Ridge and the southwest flank of Mikes Peak in western Stanislaus County. This area is characterized by Blue Oak woodland, and is deemed important habitat for deer and upland game. Historic grazing will continue consistent with best management practices. The easement will be administered by the West Stanislaus Resource Conservation District.<sup>191</sup> The settlement in *Triplett* allowed the Department of Conservation to convert a claim for additional cancellation fees into a more lasting benefit to the land conservation goals of the Williamson Act.<sup>192</sup>

#### IV. LEGISLATIVE INNOVATION

##### A. *SB 1240: Leveraging Permanent Protection from Contract Termination*

The settlement agreement in the Diablo Grande case provided the model for a newly enacted provision of the Williamson Act which authorizes rescission of contracts under certain circumstances in return for the dedication of an agricultural conservation easement on comparable lands.<sup>193</sup> The Agricultural Lands Stewardship Program Act of

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Act . . . .” McGurty, *supra* note 160, at 150. Pursuant to Government Code sections 16146, 16147, and 51294 the Department of Conservation (which is within the Resources Agency) may initiate enforcement actions and to date has done so numerous times.

<sup>189</sup> *People ex rel. Wheeler v. Triplett*, 55 Cal. Rptr. 2d 610, 625 (Ct. App. 1996) (*cert. denied*).

<sup>190</sup> *People ex rel. Wheeler v. Triplett*, No. 87166 (Cal. Super. Ct. Stanislaus County) (settlement agreement signed by parties July 31, 1997).

<sup>191</sup> California Dep’t of Conservation News Release, *Land Conservation Deal between State, Diablo Grande: Stanislaus County Gets Permanent Development Protection for 3,500 Acres* (Mar. 10, 1998).

<sup>192</sup> See CAL. GOV’T CODE § 51220 (Deering 1999).

<sup>193</sup> 1997 Cal. Stat. ch. 495 (SB 1240); Government Code section 51256 now provides as follows:

Notwithstanding any other provision of this chapter, a city or county, upon petition by a landowner, may enter into an agreement with the land-

1994 (ALSP) had previously provided a statutory framework for the purchase of permanent agricultural conservation easements.<sup>194</sup> SB 1240 provides a bridge between the Williamson Act and the ALSP whereby lands which would otherwise qualify for contract cancellation can be removed in exchange for a permanent conservation easement on comparable lands.<sup>195</sup>

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owner to rescind a contract in order to simultaneously place other land under an agricultural conservation easement, as defined in Section 10211 of the Public Resources Code, provided that the board or council makes all of the following findings:

(a) The agreement will not result in discontinuous patterns of urban development. (b) The agreement is not likely to result in the removal of adjacent land from agricultural use. In making this finding, the board or council shall consider testimony and other evidence presented by the owner or operator of agricultural operations on land adjacent to the contracted land. (c) The proposed agricultural conservation easement is consistent with the criteria set forth in Sections 10251 and 10252 of the Public Resources Code. (d) The land proposed to be placed under an agricultural conservation easement is of equal size or larger than the land subject to the contract to be rescinded, and is equally or more suitable for agricultural use than the land subject to the contract to be rescinded. In determining the suitability of the land for agricultural use, the city or county shall consider the soil quality and water availability of the land, adjacent land uses, and any agricultural support infrastructure. (e) The value of the proposed agricultural conservation easement, as determined pursuant to Section 10260 of the Public Resources Code, is equal to or greater than 12.5 percent of the cancellation valuation of the land subject to the contract to be rescinded, pursuant to subdivision (a) of Section 51283. The easement value and the cancellation valuation shall be determined within 30 days before the approval of the city or county of an agreement pursuant to this section. (f) The agreement is approved by the Director of Conservation. The director may approve the agreement if he or she finds that the findings of the board or council, as required by this section, are supported by substantial evidence, and that the proposed agricultural conservation easement is consistent with the criteria set forth in Sections 10251 and 10252 of the Public Resources Code. The director shall not approve the agreement if an agricultural conservation easement has been purchased with funds from the Agricultural Land Stewardship Program Fund, established pursuant to Section 10230 of the Public Resources Code, on the same land proposed to be placed under an agricultural conservation easement pursuant to this section.

<sup>194</sup> CAL. PUB. RES. CODE DIV. 10.2. Agricultural Land Stewardship Program of 1995; *see also* McGurty, *supra* note 160, at 150-52.

<sup>195</sup> The findings required by Government Code section 51256(a) & (b) for a SB

The Williamson Act has often been criticized for failing to provide lasting protection for enrolled lands. According to the Department of Conservation's 1993-1995 status report, in that period approximately 35,404 acres left the program through nonrenewal, and 5694 acres through cancellation.<sup>196</sup> SB 1240 seeks to trade on this development pressure and buttress against continued losses by exchanging temporary Williamson Act restrictions for permanent protection under a conservation easement.<sup>197</sup> In this sense, SB 1240 allows a transfer of development rights from a Williamson Act parcel that is otherwise likely to exit the program, onto lands set aside permanently for agricultural uses.

The formula codified in Government Code section 51256(e) provides that the value of those development rights must at least equal the cancellation fee as discussed above.<sup>198</sup> However, unlike the cancellation fees normally paid to the state, the conservation easement represents an environmental asset that stays in the local community. Granting such an easement gives landowners an opportunity to *mitigate* for the conversion of enrolled lands, a concern not addressed by either the ten year nonrenewal period or the payment of a cancellation fee. While advocates of farmland preservation have been successful in enacting comparable mitigation requirements at the local level, SB 1240 is the first codified statewide use of conservation easements as a mitigation tool.

### B. SB 1182: The "Super" Williamson Act

Touted as the "super" Williamson Act, SB 1182<sup>199</sup> follows last year's SB 1240 in a new wave of Williamson Act innovations. The bill provides an intermediate step between the ten year protection offered by the Williamson Act, and the perpetual agricultural conservation easements under the Agricultural Lands Stewardship Program Act. The basic notion of SB 1182 is to provide additional tax savings to landowners who convert from ten to twenty year contracts.<sup>200</sup> The twenty year contracts are created within "farmland security zones" (FSZ), which offer additional protection from city annexations, special

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1240 exchange parrot the cancellation findings under Government Code section 51282 (b)(2) & (4).

<sup>196</sup> STATUS REPORT, *supra* note 8, at Table A-4 and Table A-6.

<sup>197</sup> CAL. GOV'T CODE § 51256 (Deering 1999).

<sup>198</sup> CAL. GOV'T CODE § 51256(e) (Deering 1999).

<sup>199</sup> 1998 Cal. Stat. ch. 353, § 5 (SB 1182).

<sup>200</sup> CAL. GOV'T CODE § 51296 (Deering 1999).

taxes for urban services, acquisition activity by school districts, and stricter controls on compatible uses.<sup>201</sup>

Whereas SB 1240 seeks to translate contract terminations into permanent conservation of replacement agricultural lands, SB 1182 seeks to encourage landowners to *increase* their conservation commitments under pre-existing contracts.<sup>202</sup> By tying the increased commitment to increased property tax savings, the bill answers complaints that tax benefits are inadequate on productive croplands. A set reduction of thirty-five percent is provided to the current Williamson Act tax, or unrestricted tax, whichever is lower.<sup>203</sup> The Attorney General recently affirmed that this tax formula is consistent with Article XIII section 8 of the California Constitution, as discussed in Part I above.<sup>204</sup>

At the same time, the strengthening of contracts under SB 1182 offered the opportunity to revisit problem areas of annexation, compatible use, and public acquisition as discussed above. No annexations of the FSZs are allowed unless the zone was created within a pre-existing urban limit line, the land is needed for a public improvement, or the landowner consents to the annexation.<sup>205</sup> It remains to be seen whether the latter of these exceptions may swallow the annexation limitation. However, the farmer within the FSZ, at least, cannot be forced into a city. The compatible use restrictions, discussed in Part II, B, above, are further tightened to eliminate the relaxed standards for non-prime lands which apply in the Williamson Act generally.<sup>206</sup> Finally, school districts are prohibited from taking FSZ lands, notwithstanding the general powers of public entities to acquire Williamson Act lands.<sup>207</sup> Also, special taxes for urban related services can only be applied within an FSZ at a reduced rate.<sup>208</sup> Combined, these special FSZ restrictions are intended to create added insulation of enrolled lands from urbanizing development.

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<sup>201</sup> CAL. GOV'T CODE § 51296 (Deering 1999).

<sup>202</sup> CAL. GOV'T CODE § 51296 (b)(4) (Deering 1999).

<sup>203</sup> CAL. REV. & TAX. CODE § 423.4 (Deering 1999).

<sup>204</sup> Op. Cal. Att'y Gen. No. 98-1106 (Mar. 10, 1999) (to be published in the official reports).

<sup>205</sup> CAL. GOV'T CODE § 51296(d) (Deering 1999).

<sup>206</sup> CAL. GOV'T CODE § 51296(h) (Deering 1999).

<sup>207</sup> CAL. GOV'T CODE § 51296(g) (Deering 1999).

<sup>208</sup> CAL. GOV'T CODE § 51296(c)(2) (Deering 1999).

## CONCLUSION

As a pioneering incentive based land conservation program, the Williamson Act has proven to be immensely popular and durable. Huge tracts of farmland and open space lands have been enrolled in the program for over three decades.<sup>209</sup> The general public has continued to support this effort through forgone tax revenue and state open space subvention payments to local government. The beauty of the program lies in the simplicity of this basic contract; the landowner agrees not to develop during the term of the contract in return for tax savings.

The challenge in implementing the Act has been to ensure that this basic bargain is kept. As chronicled above, diligence has been required to ensure that the basic bargain is not eroded through loose application of the rules related to annexations, public acquisitions, compatible uses, subdivision, and cancellation. The response of the Department of Conservation, the Legislature, and the California Farm Bureau Federation has been effective in curbing abuse through enforcement and legislative reform.

However, the work should not stop there. In the end, the Williamson Act can only slow the rate of farmland loss. Landowners' nonrenewal right<sup>210</sup> and the right to seek contract cancellation<sup>211</sup> mean that lands will continue to exit the program. Therefore, at best, enforcement efforts can channel development pressure through nonrenewal, or cancellation in more limited circumstances. Opportunities to *recapture* lands lost to nonrenewal and cancellation are found in the innovative changes provided in SB 1240 and SB 1182. The first allows a landowner to avoid the cancellation fee by dedicating a permanent conservation easement of equal value.<sup>212</sup> The second encourages landowners to double the term of their conservation commitment by offering significantly increased tax savings.<sup>213</sup> Each bill, in its way, seeks to build on the enforcement and reform which has taken place during the Williamson Act's lifetime, and to harness the large enrollment and wide-

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<sup>209</sup> See STATUS REPORT, *supra* note 8, at 6.

<sup>210</sup> CAL. GOV'T CODE § 51245 (Deering 1999).

<sup>211</sup> CAL. GOV'T CODE § 51282 (Deering 1999).

<sup>212</sup> CAL. GOV'T CODE § 51256 (Deering 1999). As this article goes to press, another approach to this same end has been embodied in proposed legislation which would redirect Williamson Act cancellation fees not used to support programs already specified under existing law into the Agricultural Land Stewardship Program Fund to be used for the purchase of agricultural conservation easements. SB 95 (Chesbro & Johnston) was introduced December 7, 1998; AB 47 (Cardoza) introduced December 7, 1998.

<sup>213</sup> CAL. GOV'T CODE § 51296 (Deering 1999).

spread acceptance of the program to more fully promote its basic and original purpose of preserving the maximum amount of the limited supply of agricultural land.<sup>214</sup>

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<sup>214</sup> CAL. GOV'T CODE § 51220(a) (Deering 1999).