

**OVERVIEW OF LEGAL RESTRAINTS ON
AGRICULTURAL LAND MITIGATION PROGRAMS***

**Prepared for Department of Conservation
Division of Land Resource Protection
Brown Bag Discussion on CEQA and Mitigation as a Tool for Preserving Farmland
and Our Agricultural Economy**

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Osha R. Meserve
Soluri Meserve, A Law Corporation
1822 21st St.
Sacramento, CA 95811
(916) 455-7300
osha@semlawyers.com

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I. INTRODUCTION

This paper explores the possible legal impediments to in-kind and fee-based agricultural mitigation programs that may be adopted by local agencies. A review of applicable legal restraints on such programs indicates that they are generally permissible when properly drafted. In light of the high rate of conversion of agricultural lands in California, local agencies that have not yet adopted such programs should consider doing so. In the interim, review of projects under the California Environmental Quality Act (“CEQA”),¹ can also lead to the adoption of legally defensible mitigation requirements, though mitigation may not always be required.

II. LEGISLATIVE POLICIES REGARDING PROTECTION OF AGRICULTURAL LAND

The California Legislature has directly addressed conservation of agricultural land in legislative policy statements. In CEQA, the Williamson Act,² and the California Farmland Conservancy Program Act,³ the Legislature emphasizes the importance of agricultural land to the State. Moreover, the Williamson Act and the California Farmland Conservancy Program are specifically dedicated to preserving farmland throughout California.⁴ The statutes indicate that the State of California values agricultural land, and the protection of farmland is a statewide priority.

A. CEQA

In 1993, the California State Legislature added a requirement to CEQA that the Resources Agency create an appendix to the CEQA Guidelines (“CEQA Guidelines”).⁵ The Legislature required that this appendix propose methods to analyze significant effects on the environment from conversion of agricultural land.⁶ The findings for this statutory requirement state that:

- (a) Agriculture is the State’s leading industry and is important to the State’s economy.

¹/ Pub. Resources Code, § 21000 et seq.

²/ Gov. Code, § 51200 et seq.

³/ Pub. Resources Code, § 10200 et seq.

⁴/ Pub. Resources Code, § 21000 et seq., Gov. Code, § 51200 et seq., Pub. Resources Code, § 10200 et seq.

⁵/ Pub. Resources Code, § 21095.

⁶/ *Ibid.*

- (b) The continued productivity of agricultural lands in California is important in maintaining a healthy agricultural economy.
- (c) The conversion of agricultural lands to nonagricultural use threatens the long-term health of the State's agricultural industry.⁷

In response to this mandate, the Resources Agency added Appendix G to the CEQA Guidelines.⁸ Appendix G suggests that when analyzing impacts on agricultural resources, an agency might assess the type of farmland that a project would convert (i.e. "prime" farmland or farmland of statewide importance).⁹ It also recommends that an agency consider whether a proposed project would involve other changes in the environment that could result in the conversion of farmland to non-agricultural use.¹⁰

B. Williamson Act

In its findings for the Williamson Act, the California Legislature stated:

That the preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources, and is necessary not only to the maintenance of the agricultural economy of the state, but also for the assurance of adequate, healthful and nutritious food for future residents of this state and nation.¹¹

The Legislature further asserted:

That in a rapidly urbanizing society, agricultural lands have a definite public value as open space, and the preservation in agricultural production of such lands, the use of which may be limited under the provisions of this chapter, constitutes an important physical, social, esthetic and economic asset to existing or pending urban or metropolitan developments.¹²

⁷/ Section 1 of Stats. 1993, c. 812 (SB 850).

⁸/ 14 CCR, § 15000 et seq.

⁹/ *Id.* at Appendix G.

¹⁰/ *Ibid.*

¹¹/ Gov. Code, § 51220, subd. (a).

¹²/ Gov. Code, § 51220, subd. (d).

C. California Farmland Conservancy Program Act

In the California Farmland Conservancy Program Act, the California Legislature again emphasized the importance of agricultural land to the State:

The agricultural lands of the state contribute substantially to the state, national, and world food supply and are a vital part of the state's economy. Agricultural lands near urban areas that are maintained in productive agricultural use are a significant part of California's agricultural heritage. These lands contribute to the economic betterment of local areas and the entire state and are an important source of food, fiber, and other agricultural products. Conserving these lands is necessary due to increasing development pressures and the effects of urbanization on farmlands close to cities. The long-term conservation of agricultural land is necessary to safeguard an adequate supply of agricultural land and to balance the increasing development pressures around urban areas.¹³

III. STATUS OF AGRICULTURAL MITIGATION REQUIREMENTS IN THE CENTRAL VALLEY

A handful of local jurisdictions presently require some form of mitigation for the loss of agricultural land. For example, the City of Davis has instituted a 2:1 mitigation requirement for changes to farmland.¹⁴ Developers may satisfy this requirement either through the dedication of a farmland conservation easement or payment of in-lieu fees.¹⁵

Yolo County, San Joaquin County, the City of Stockton, and City of Brentwood have also established similar programs.¹⁶ These ordinances generally allow developers to satisfy farmland mitigation requirements by granting a farmland conservation easement, or by paying in-lieu fees sufficient to purchase an easement and pay for administrative costs.¹⁷ These ordinances require 1:1 mitigation for the loss of agricultural land.¹⁸ The

^{13/} Pub. Resources Code, § 10201, subds. (a)-(d).

^{14/} City of Davis Mun. Code, § 40A.03.030: www.cityofdavis.org/cmo/citycode/ (as of July 19, 2007).

^{15/} *Id.* at subd. (b)(1).

^{16/} Yolo County Code, § 8-2.2416: <http://www.yolocounty.org/CountyCode/Title08.pdf> (as of July 19, 2007); City of Stockton Administrative Guidelines, § I.A.6; Ordinance Code of San Joaquin County, § 9-1080 et seq.; Brentwood Mun. Code, §§ 17.730.010 et seq.: <http://www.ci.brentwood.ca.us/boards/aarg/enterprise/ord683.cfm> (as of February 11, 2011).

^{17/} The applicable mitigation fees were calculated according to nexus studies.

^{18/} *Ibid.*

Brentwood ordinance also allows for transfer of agricultural credits from certain areas to satisfy the mitigation requirement.¹⁹

The Cities of Lathrop, Manteca, and Tracy have also adopted agricultural mitigation fee programs in their Municipal Codes.²⁰ These programs, rather than specify the amount of the fee to be charged, authorize each respective City Council to “calculate the amount of the fee in an implementing resolution.”²¹ Moreover, the regulations require the Cities to enact such fees by resolution, and to identify specific findings to satisfy the requirements of the Mitigation Fee Act.²²

Furthermore, some settlement agreements entered into during the CEQA and project approval process have resulted in imposition of mitigation for agricultural land conversion. For example, two CEQA-related settlement agreements in the City of Lodi included farmland mitigation requirements for major development projects despite the lack of a local mitigation ordinance.²³ In these agreements, the developer agreed to obtain permanent agricultural easements, at a minimum 1:1 ratio.²⁴ One of the agreements specified that the compensatory easement(s) must be located within 15 miles of the project site, while the other agreement required only that the mitigation property be located within San Joaquin County.

In another example, developers entered into a settlement agreement with the Sierra Club after a CEQA lawsuit was filed.²⁵ In this agreement, the developers agreed to contribute funds to assist in creating a land trust organization.²⁶ Moreover, the developer agreed to provide 1:1 mitigation of all lands removed from agricultural use through development fees.²⁷

^{19/} Brentwood Mun. Code, §§ 17.730.040, 17.730.070.

^{20/} City of Lathrop Mun. Code, Chapter 3.40; City of Manteca Mun. Code, Chapter 13.42, City of Tracy Mun. Code, Chapter 13.26.

^{21/} City of Lathrop Mun. Code, § 3.40.060; City of Manteca Mun. Code, § 13.42.060; City of Tracy Mun. Code, § 13.28.060; see also City of Brentwood Mun. Code, § 17.730.040, subd. (2) (providing option of payment of in-lieu fee).

^{22/} *Id.* Gov. Code, § 66000 et seq.

^{23/} These agreements pertained to (1) the Reynolds Ranch project, a mixed use project proposed by the San Joaquin Valley Land Company and, (2) two large residential subdivisions proposed by FCB Homes (“Westside” and “Southwest Gateway”).

^{24/} Westside Agreement at p. 2; Southwest Gateway Agreement at p. 2; Reynolds Ranch Agreement at p. 2.

^{25/} Agreement to Settle Litigation Regarding River Islands at Lathrop (2003).

^{26/} *Ibid.*

^{27/} *Ibid.*

Finally, there have been legal challenges related to agricultural mitigation programs. On May 25, 2007, the Building Industry Association of the Delta (“BIA”) filed a lawsuit against the City of Stockton in the Superior Court of California for the County of San Joaquin.²⁸ The lawsuit challenged the City of Stockton’s agricultural land mitigation program and in-lieu fees, which were adopted in 2007. BIA’s complaint included a number of the potential arguments challenging in-lieu fees and agricultural land mitigation. BIA alleged that the City of Stockton’s in-lieu fee was facially invalid because, among other claims, it: (1) was excessive and violates the California Mitigation Fee Act; (2) constituted an invalid requirement for payment of a fee or dedication of easement prior to the final map under Government Code sections 66007 and 66410 et seq.; (3) constituted an invalid exaction both under constitutional nexus and rough proportionality tests, and due to its failure to comply with CEQA; (4) was an authorized special tax in violation of Propositions 13 and 218; and (5) violated equal protection and due process rights under the United States and California Constitutions.

A decision was issued in February 2009, upholding the City’s agricultural mitigation program. The court’s ruling noted that the City had adopted detailed findings in support of the in-lieu fee program, which were consistent with the studies and analyses in the record of decision for the program. The court also found that the City had the authority to adopt the fee program under its plenary police power. Moreover, the program was entitled to a presumption of constitutionality. With respect to the Mitigation Fee Act claims, the court found: (1) that the in-lieu easement requirement was not a fee within the meaning of the Act; (2) the in-lieu fee is selected at certain developers’ option, and is not imposed; (3) no “public facilities” would be funded; (4) the challenge to the fee was not ripe prior to having been applied to a particular project; and (5) even if the act applied it would survive challenge under the applicable deferential standard. With respect to the Proposition 13 and 218 claims, the court found that the in-lieu fees were not taxes because they are voluntarily chosen by developers. Moreover, the fees do not exceed the cost of mitigating the impacts caused by the project. The court also found that the restrictions in Civil Code section 815.3, subdivision (b) were inapplicable and that the 1:1 mitigation ratio was amply supported in the record.

The events described above indicate that mitigation for agricultural land is becoming more prevalent in the Central Valley. Where lead agencies do not directly require agricultural mitigation through their development codes or through the CEQA process, mitigation for farmland conversion may occur as a result of settlement negotiations between community groups, developers and local agencies. These

²⁸/ *BIA v. City of Stockton* (Super. Court San Joaquin County, 2007, No. CV032651).

developments show both that preserving agricultural land is important to California communities and that agricultural mitigation is feasible for developers.

IV. POTENTIAL LEGAL ISSUES RELATED TO AGRICULTURAL MITIGATION REQUIREMENTS

In many instances, courts have upheld in-lieu fees and other exactions.²⁹ However, for an exaction to be valid: (1) the public agency must have the legal authority to impose the exaction; (2) the agency must properly exercise its authority when imposing the exaction; and (3) a reasonable relationship must exist between the imposed exaction and the public needs created by the development.³⁰ In addition, there may be other limitations that the agency must overcome.³¹

A. Authority to Impose Exactions – The Police Power

Cities and counties may impose exactions under the general police power granted in Article XI, Section 7 of the California Constitution.³² The police power is the right of a local government to protect the public health, safety, and welfare of its residents.³³ Land use regulations, including exactions, are within an agency's police power as long as they are reasonably related to the public welfare.³⁴ This authority is "as broad as the

²⁹/ 2 Longtin, Longtin's California Land Use (2nd ed. 1987), § 8.02[2], p. 722 (hereafter 2 Longtin).

³⁰/ See 2 Longtin at § 8.04, p. 780.

³¹/ Potential limitations include statutory restrictions, such as Propositions 13, 62, and 218, and the Mitigation Fee Act. Recently filed lawsuits, including *A.G. Spanos Construction, Inc. v. City of Stockton* and *BIA v. City of Stockton*, have alleged that agricultural mitigation fees did not comply with the Subdivision Map Act. Although these claims may be valid in specific situations, they likely will not arise often in relation to agricultural mitigation programs. Thus, though agencies must ensure that the requirements of the Subdivision Map Act are met, this issue is not addressed further in this memorandum.

³²/ See, e.g., *Candid Enters., Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885 (*Candid Enters.*); *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256; *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325; *Scroging v. Kovatch* (1976) 64 Cal.App.3d 54, 57; *Associated Homebuilders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582. The California Constitution confers on local governments the power to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws."

³³/ See *Berman v. Parker* (1954) 348 U.S. 26, 32-33.

³⁴/ See *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 600-601.

police power exercisable by the Legislature itself.”³⁵ Thus, cities and counties have broad authority to impose exactions on development.

Though public agencies have general authority to impose exactions, many potential limitations exist that may limit the imposition of agricultural mitigation fees. Such exactions must: (1) meet nexus and rough proportionality tests and comply with equal protection and due process requirements under the United States Constitution; (2) be exempt from or comply with the requirements of Propositions 13, 62, and 218; (3) meet the requirements under the Mitigation Fee Act; and (4) be consistent with local General and Specific Plans. These requirements are described in detail below.

B. United States Constitution

1. Nexus and Rough Proportionality

Known as the “Takings Clause,” the Fifth Amendment of the United States Constitution prohibits the taking of private land for public use without just compensation.³⁶ According to the Court in *Armstrong v. United States* (1960) 364 U.S. 40, as quoted in *Dolan v. City of Tigard* (1994) 512 U.S. 374, 384 (Dolan), the principal purpose of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Exactions may be considered unconstitutional takings if they do not meet the “reasonable relationship nexus” test, as set out in *Dolan* and *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (Nollan). In order for an exaction to be valid: (1) the legislation must serve a legitimate governmental purpose, and (2) the means used to achieve the objective must substantially advance the intended purpose.³⁷

a) *Nollan v. California Coastal Commission*

The *Nollan* case described the “nexus” requirement for exactions. In *Nollan*, the California Coastal Commission (“Commission”) granted a permit to the Nollan family to construct a home on their coastal property, on the condition that they grant an access easement for the public to use their beach.³⁸ The Supreme Court found the requirement unconstitutional because of the insufficient nexus between the public burden created by

³⁵/ *Candid Enters.*, *supra*, 39 Cal.3d at p. 885.

³⁶/ “[N]or shall private property be taken for public use, without just compensation.” U.S. Const., 5th Amend.

³⁷/ See 2 Longtin, Longtin’s California Land Use (2007 Update), § 8.22, p. 652 (hereafter 2 Longtin Update).

³⁸/ *Nollan*, *supra*, 483 U.S. at p. 828.

the proposed construction and the permit condition required by the Commission.³⁹ According to the Court, “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.”⁴⁰ Thus, in order for an exaction to be valid, the type of condition imposed must address the same type of impact caused by the new development.⁴¹

b) *Dolan v. City of Tigard*

In *Dolan*, the Supreme Court further clarified the *Nollan* nexus test for an unconstitutional taking. The City of Tigard approved a building permit for Dolan to redevelop a retail site, on the condition that she donates a portion of her property for flood control and traffic improvements.⁴² The Court found that there was a legitimate public purpose in flood control and traffic improvements.⁴³ Unlike in *Nollan*, the Court also found a nexus between the public purpose and the permit requirement that Dolan donate a portion of her property.⁴⁴ However, the Court established an additional step to Takings Clause analysis, and analyzed whether the “required dedication [was] related both in nature and extent to the impact of the proposed development.”⁴⁵ Known as the “rough proportionality” test, the public agency imposing the requirement must make an individualized determination that this element is met.⁴⁶ In *Dolan*, the Court found that the City did not make such a determination, and therefore remanded the matter to the City for further proceedings.⁴⁷

c) *Ehrlich v. City of Culver City*

The Supreme Court of California addressed the validity of development or impact fee conditions in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*). In *Ehrlich*, the court decided whether the requirement to pay a monetary fee as a condition of a permit triggers the application of the nexus and rough proportionality tests in *Nollan* and *Dolan*. The court held that:

³⁹/ *Id.* at p. 841.

⁴⁰/ *Id.* at p. 837.

⁴¹/ See 2 Longtin Update, § 8.22[2], p. 654.

⁴²/ *Dolan* at p. 377.

⁴³/ *Id.* at p. 387.

⁴⁴/ *Ibid.*

⁴⁵/ *Id.* at p. 391.

⁴⁶/ *Ibid.*

⁴⁷/ *Id.* at p. 396.

If a condition is imposed pursuant to an ordinance or rule of general applicability . . . the condition is constitutionally permissible unless the landowner meets his or her burden of proving that the condition either does not substantially advance a legitimate governmental purpose or deprives the landowner of any economically viable use of the land.⁴⁸

Thus, if a condition is adjudicatively imposed on an individual basis, the government must meet the heightened requirements of *Nollan* and *Dolan*.⁴⁹ To the extent an agricultural mitigation program proposal is imposed legislatively, however, it would not need to meet the nexus and rough proportionality tests of *Nollan* and *Dolan*.⁵⁰

2. Equal Protection and Due Process

The Fourteenth Amendment of the United States Constitution (“Fourteenth Amendment”) requires that a local government regulation may not deprive a person of equal protection of the laws.⁵¹ In the context of land use, equal protection does not necessarily require uniform treatment. Instead, an agency must be able to demonstrate that a regulation has a rational relationship to a legitimate government interest.⁵² The agency need only demonstrate some plausible reason for the classification in the regulation.⁵³ It is relatively simple for agencies to meet this test, and courts have generally rejected equal protection claims in the land use context.⁵⁴

The Fourteenth Amendment also requires that a local government regulation or action may not deprive a person of life, liberty or property without due process of law.⁵⁵ Under Fourteenth Amendment case law, an agency’s exercise of power must: (1) bear a rational relationship to a legitimate government interest, and (2) not be unreasonable or

⁴⁸/ *Ehrlich, supra*, 12 Cal. 4th at p. 906.

⁴⁹/ *Id.* For example, conditions in individual land use agreements created between local agencies and developers generally constitute “ad hoc” requirements, and therefore must meet the tests of *Nollan* and *Dolan*.

⁵⁰/ Adjudicative determinations are those that are decided on an individual basis. Legislative determinations, on the other hand, apply to large classes of people

⁵¹/ See also Cal. Const., art. I, § 7.

⁵²/ See 1 Longtin, Longtin’s California Land Use (2007 Update), § 1.32[2], p. 35 (hereafter “1 Longtin Update”); see also, *Nordlinger v. Hahn* (1992) 505 U.S. 1.

⁵³/ See *Id.*

⁵⁴/ See 1 Longtin Update, § 1.32[2], p. 36.

⁵⁵/ See also Cal. Const., art. I, § 7.

arbitrary.⁵⁶ Like with equal protection, courts almost always rule in favor of public agencies in due process challenges.⁵⁷

3. Effect of the United States Constitution on Mitigation Programs

Though the nexus and rough proportionality tests from *Nollan* and *Dolan* may apply to fee exactions, farmland mitigation fees that are imposed through legislation rather than adjudication likely will not be subject to scrutiny under these standards. “It is clear that . . . so long as cities base development conditions on general legislative determinations, the conditions will almost always be within the police power.”⁵⁸ However, it is important to note that regardless of whether a fee is imposed legislatively or adjudicatively, such exactions must meet nexus requirements under the Mitigation Fee Act. (See section IV.D.1, *post.*)

Similarly, equal protection and due process claims under the Constitution likely do not provide barriers to mitigation programs. The agency must be able to demonstrate that a regulation bears a rational relationship to a legitimate governmental interest, and that the regulation is not arbitrary. In the land use context, these requirements are straightforward, and courts generally defer to the discretion of public agencies.

C. California Constitution

1. Proposition 13, Proposition 62, and Proposition 218

Proposition 13 (“Prop 13”), passed in 1978, added Article XIII A to the California Constitution.⁵⁹ Article XIII A requires a two-thirds vote of the electorate for implementation of any local special tax. In 1986, voters approved Proposition 62 (“Prop 62”), which “close[d] loopholes” in Prop 13. This measure established that all taxes must be classified as either “special taxes” or “general taxes.”⁶⁰

^{56/} See 1 Longtin Update, § 1.31[1], p. 27. Note that the “rational relationship” test is easy to satisfy; where a rational relationship is at least fairly debatable, the court must uphold the action. *Nelson v. City of Selma* (9th Cir. 1989) 881 F.2d 836, 839.

^{57/} See 1 Longtin Update, § 1.31[2], p. 27.

^{58/} See Curtin & Talbert, *Curtin’s California Land Use and Planning Law* (21st ed. 2001) Exactions, pp. 252-255 (hereafter “Curtin”).

^{59/} See *Howard Jarvis Taxpayers Ass’n v. City of Riverside* (1999) 73 Cal.App.4th 679 (overview of Prop 13).

^{60/} See Longtin Update at § 8.25[2], p. 663.

Development fees exacted in return for building permits or other governmental privileges are generally not “special taxes” under Article XIII A. A fee is not a special tax when it does not exceed the reasonable cost of providing the service for which the fee is charged, and it is not reasonably related to the type of activity on which it is based. Thus, so long as a fee meets these requirements, it is not subject to the requirements of Prop 13.⁶¹ Moreover, Prop 62 did not impose any additional limitations on local government’s authority to implement “special assessments,” “fees,” or “charges.” Thus, Prop 62 does not typically affect development fees.

Proposition 218 (“Prop 218”), approved by voters in 1996, added Articles XIII C and D to the California Constitution. Prop 218 requires voter approval of all new increases in local general taxes, assessments, and certain fees and charges.⁶² Under Prop 218, “fees” or “charges” are defined as “any levy other than an ad valorem tax, a special assessment, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including user fees or charges for a property related service.”⁶³ “Property related service” is defined as “a public service having a direct relationship to property ownership.” However, “incident of property ownership” is not defined.

Prop 218 states that it does not affect laws existing prior to July 1, 1997, related to the imposition of fees or charges as a condition of property development. Furthermore, development fees that do not fall under the definition of “fees” or “charges” under Prop 218 generally need not meet the requirements of the Proposition.⁶⁴

2. Effect of California Constitution on Agricultural Mitigation Requirements

Mitigation requirements likely do not need to meet the requirements of Props 13 and 62. So long as an agency’s fee requirement does not exceed the reasonable cost of

⁶¹/ See, e.g., *Sinclair Paint Co. v. State Board of Equalization* (1997) 64 Cal.Rptr.2d 447; *Shapell Industries, Inc. v. Governing Board* (1992) 1 Cal.App.4th 218, 240; *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 235-237; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235-238; *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325-328; *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 661-663; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 898.

⁶²/ See Longtin Update at § 8.25[3], p. 664.

⁶³/ Cal. Const., art. XIII D, § 2(e).

⁶⁴/ For example, in a 1997 opinion, the Attorney General ruled that water charges were not subject to Prop 218 because they were based on water usage, and not imposed as an “incident of property ownership.” (80 Ops.Cal.Atty.Gen. 183 (1997).)

providing the service or facility for which the fee is imposed, and it is reasonably related to the type of activity on which it is based, the fee will not be subject to these requirements.⁶⁵

Although Prop 218 clearly does not apply to fee impositions existing prior to July 1, 1997, the law may apply to new development fee exactions that are related to property ownership. Under Prop 218, such regulations must be approved by a majority vote of the local electorate.⁶⁶ Agricultural mitigation fees are typically based on development, and are not an incident of property ownership. Thus, such exactions would not be subject to the requirements of Prop 218.⁶⁷

D. State Laws

1. Mitigation Fee Act

The Mitigation Fee Act, passed by California voters in 1987, establishes requirements for the imposition of fees on a project.⁶⁸ The Mitigation Fee Act would not apply to in-kind mitigation requirements.⁶⁹ Thus, the Mitigation Fee Act would only apply to in-lieu fee programs.

The agency imposing a fee as a condition of approval of a development project must comply with four specific requirements:

- (1) Identify the purpose of the fee;
- (2) Identify the use to which the fee is to be put;

^{65/} Mitigation requirements for the development of farmland to implement agricultural easements may not constitute a “service” or “facility” in the first place. If this is the case, Propositions 13 and 62 may not apply at all to such exactions.

^{66/} See Curtin, at p. 272.

^{67/} For example, in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 426, the California Supreme Court held that an increase of a water service connection fee charged to new users is not subject to Proposition 218 because it is not a property-related fee. The court stated that the water connection charges were not imposed simply by virtue of property ownership, but instead, as an incident of the voluntary act of the property owner in applying for a water service connection. The fees for connection to the system therefore were not imposed as “an incident of property ownership” and were not subject to Proposition 218.

^{68/} Gov. Code, § 66000 et. seq.

^{69/} “‘Fee’ means a monetary exaction other than a tax or special assessment...that is charged by a local agency to the applicant in connection with approval of a development project.” Gov. Code, § 66000, subd. (b) (*italics added*).

- (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and
- (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

Moreover, the agency must be able to demonstrate a reasonable relationship between the amount of the fee and the cost of the public facility attributable to the development.⁷⁰ The fee cannot include costs attributable to existing deficiencies in public facilities.⁷¹ Fees or exactions “shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed.”⁷² A local agency cannot require the payment of fees until the final inspection of the development.⁷³ And finally, “the fee shall not be levied, collected, or imposed for general revenue purposes.”⁷⁴

An agricultural mitigation fee that meets these requirements would not violate the Mitigation Fee Act.⁷⁵

⁷⁰/ Mitigation Fee Act, § 66001, subd. (b). Note that it is unclear whether an agricultural easement would be considered a “public facility” under the Mitigation Fee Act. Mitigation Fee Act, § 66000, subd. (a) defines “public facilities” as including: “public improvements, public services, and community amenities.” Agricultural conservation easements typically do not provide public access, though they do provide a benefit to the public.

⁷¹/ *Id.* at subd. (g).

⁷²/ *Id.* at § 66005.

⁷³/ *Id.* at § 66007. According to the trial court ruling in the *Stockton* case, the adopted mitigation program did not violate this provision (nor § 66001) because fundamentally it was not a fee program. Instead, the program was “a land use regulation that requires developers of agricultural lands to obtain an in-kind easement preserving an equal amount of other agricultural lands.” Payment of the fee is not required; rather, developers were provided an option of paying a fee in certain limited circumstances. (See Statement of Decision dated March 5, 2009 in *BIA v. City of Stockton* (Super. Court San Joaquin County, 2007, No. CV032651). No appeal was filed in this case.

⁷⁴/ *Id.* at § 66008.

⁷⁵ / See also *San Mateo County Coastal Landowners' Ass'n v. County of San Mateo* (1995) 38 Cal. App. 4th 523, 551 (“Clearly, the county has ample authority to require dedication of agricultural and open space easements under several provisions of law.”).

2. CEQA

CEQA requires that significant impacts must be mitigated through feasible mitigation measures. According to CEQA, such mitigation includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the line of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

(CEQA Guidelines, § 15370.)

To date, the issue of whether a city or county may impose mitigation under CEQA for the loss of agricultural land is not discussed in a published appellate opinion. However, case law demonstrates that courts and agencies alike have assumed that cities and counties have such authority. Moreover, only a handful of California appellate decisions have addressed whether a city or county must impose such measures under certain circumstances. These cases generally indicate that mitigation for agricultural loss, under the specific circumstances, was not a requirement under CEQA.

a) Published Case Law

Defend the Bay v. City of Irvine (2004) 119 Cal.App.4th 1261 (*Defend the Bay*) is one of only two published decisions to address the issue of mitigation for the loss of agricultural lands. The Fourth District Court of Appeal considered both offsite and onsite preservation as a means for mitigation for the loss of farmland in the context of an Environmental Impact Report (“EIR”) prepared for a mixed use development project. The court ultimately agreed with the defendant agency that it was not feasible to mitigate the impact of developing agricultural land.⁷⁶ Because agriculture in the area was not feasible in the long-term, and because on-site preservation would reduce development and therefore “impede the City from achieving its General Plan goals and objectives,” the court ruled that the City did not need to require mitigation for the project.⁷⁷

⁷⁶/ *Id.* at p. 1269-1270.

⁷⁷/ *Ibid.*

Also from the Fourth District Court of Appeal, *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316 (*Cherry Valley*) concerned a challenge to an EIR for a project that would convert agricultural land to residential uses. Though recognizing the potential for mitigation in the form of agricultural “*conservation easements, Williamson Act preserve status, or temporary protection or conservation plans*,” the EIR noted the long-term trend in agricultural land conversion in the region and concluded that mitigation was not feasible.⁷⁸ The court upheld the City’s determination regarding the feasibility of mitigation on the grounds it was supported by substantial evidence in the record.⁷⁹ The court also examined the City and County General Plans, which acknowledged that development pressures were constraining the continued viability of agriculture and included the expansion of housing, commercial and industrial land uses.⁸⁰ The court then determined that the project was compatible with these planning documents.⁸¹

Notably, the opinions in both *Defend the Bay* and *Cherry Valley* did not conclude that, as a matter of law, agricultural easements are never a feasible form of mitigation for the loss of farmland. Instead, these cases concluded that in the particular circumstances surrounding the project, such mitigation was infeasible and therefore was not required to be adopted.

b) Unpublished Case Law

Opinions of any California Court of Appeal or superior court appellate division that are not certified for publication or ordered published cannot be cited or relied on by a court or a party in any other action.⁸² There are three unpublished cases addressing agricultural impacts; these cases cannot be relied upon as legal precedent. However, they do provide some insight into potential arguments that may arise in relation to mitigation for the loss of agricultural land, and possible reasoning of the courts.

In *County of Santa Cruz v. City of San Jose* (2003) WL No. 1566913 (*County of Santa Cruz*), the Appellate Court for the Sixth District ruled that CEQA does not require the adoption of mitigation measures for the loss of agricultural land in every Environmental Impact Report (“EIR”). The appellants argued that the EIR for a large-scale development project was insufficient because the City of San Jose (“City”) failed to

⁷⁸ / *Id.* at pp. 349-350.

⁷⁹ / *Id.* at p. 350.

⁸⁰ / *Id.* at p. 353.

⁸¹ / *Ibid.*

⁸² / Cal. Rules of Court, rule 8.1115(a).

require mitigation for the project’s significant impact on the loss of open space and agricultural lands.⁸³ However, the City argued and the court agreed that the purchase of easements or fee title over off-site agricultural lands would not offset the loss of agricultural land caused by the project. According to the City, there would still be a net reduction in the total amount of land suitable for agricultural use that is available for such use.⁸⁴ Further, the court recognized that the City’s General Plan did not recognize the protection of agricultural land, and instead stated that “it is the City’s policy that land designated for development in the General Plan should be developed in the General Plan.”⁸⁵ Thus, the court ruled that San Jose had acted within its prerogative in deciding not to require agricultural mitigation measures.⁸⁶

In *Friends of the Kangaroo Rat v. California Department of Corrections* (2003) WL No. F040956 (*Kangaroo Rat*) the Fifth District Court of Appeal ruled similarly to the court in County of Santa Cruz.⁸⁷ The court held that a subsequent EIR for a prison construction project was adequate even though it did not require any mitigation for the loss of farmland due to the project. As in County of Santa Cruz, the court agreed with the defendants that the loss of farmland could not be mitigated because any attempts at mitigation would not create new farmland, nor would they compensate for the loss of farmland incurred by the project.⁸⁸ The court discussed the definition of “mitigation” from the CEQA Guidelines, and stated that “the creation of an agricultural easement does not appear to fall into any of these five categories.”⁸⁹

In a 2004 decision, the Third District Court of Appeal explicitly disagreed with *Kangaroo Rat* and supported the theory that, in the context of CEQA, measures should be applied to mitigate for the loss of agricultural land due to development. In *South County Citizens for Responsible Growth v. City of Elk Grove* (2004) WL No. 219789 (Cal.App.3 Dist.) (*South County Citizens*), also unpublished, the court ruled that mitigation of agricultural losses must be addressed in CEQA documents, and conservation fees and easements can potentially mitigate for the loss of agricultural land.

The court decided whether the City of Elk Grove (“City”) was required to include mitigation measures in its EIR for the Lent Ranch Marketplace Development Project

⁸³/ *County of Santa Cruz*, at p. 29.

⁸⁴/ *Id.* at p. *30.

⁸⁵/ *Id.* at p. *31.

⁸⁶/ *Id.* at p. *31.

⁸⁷/ Note that *Kangaroo Rat* was initially published, but the California Supreme Court later de-published the decision.

⁸⁸/ *Id.* at p. 565.

⁸⁹/ *Id.* at p. 566.

(“Project”).⁹⁰ In its EIR, the City concluded that the conversion of farmland from the Project constituted a significant environmental effect.⁹¹ However, the City also concluded in the EIR that no feasible mitigation measure to offset the loss of farmland existed.⁹² The City argued that because it was not possible to create or manufacture new farmland, or to reduce the specific loss of farmland converted to urban use through the project, it did not need to impose mitigation measures to offset these losses.⁹³ Further, the City argued that because it had not conducted a nexus study and did not have a City or County ordinance imposing agricultural mitigation fees, it could not impose such requirements at all.⁹⁴

The Third District Court of Appeal ruled against the City and held that conservation fees can in fact mitigate for the loss of agricultural lands.⁹⁵ According to the court, conservation fees and easements can diminish development pressures created by the conversion of farmland, and can help to preserve against the danger of the domino effect created by projects.⁹⁶ Thus, the City prepared an addendum to its EIR addressing mitigation for the loss of agricultural land.

3. Conservation Easement Act

The Conservation Easement Act enables a city, county, district, or nonprofit organization to acquire perpetual easements for the conservation of agricultural land and open space, or for historic preservation. (Civ. Code, §§ 815-816.) Under Civil Code section 815.3, a local government entity may not “condition the issuance of an entitlement for use on the applicant’s granting of a conservation easement.”

Building Industry Association of Central California v. County of Stanislaus, et al. (2010) 190 Cal. App. 4th 582 (*County of Stanislaus*) addresses whether Civil Code section 815.3, subdivision (b) applies to agricultural conservation easements mandated by a city or county’s General Plan policies. In the *County of Stanislaus* case, the BIA challenged the Farmland Mitigation Program (“FMP”) adopted as an update to the Agricultural Element of the County’s General Plan. The General Plan update included specific mitigation requirements for the conversion of agricultural land to residential development via the FMP. Specifically, the FMP required the County to condition

⁹⁰/ *Id.* at p. *1.

⁹¹/ *Id.* at p. *3.

⁹²/ *Ibid.*

⁹³/ *Ibid.*

⁹⁴/ *Id.* at p. *4.

⁹⁵/ *Id.* at p. *8.

⁹⁶/ *Id.* at p. *8.

discretionary projects converting agricultural land to residential development with the requirement that the agricultural land be replaced at a 1:1 ratio with agricultural land of equal quality located within the County. FMP Guidelines were also considered and adopted. The FMP Guidelines furthermore specified that for a project of 20 acres or more, farmland mitigation must be satisfied by direct acquisition of a permanent agricultural conservation easement, but for a project of less than 20 acres, the County can authorize the payment of an in-lieu mitigation fee.

The BIA challenged the FMP on the grounds that: (1) the County failed to identify its legal authority for mandating the dedication of permanent conservation easements pursuant to its General Plan; (2) there is no reasonable relationship between the requirements of the FMP and the adverse public impacts resulting from agricultural conversion (police power argument); and (3) conservation easements must be voluntary and thus, cannot be required by policies like the FMP.

With respect to the police power argument, the Court held that the BIA had the burden at trial of demonstrating the invalidity of the FMP (not the County's burden to prove the FMP valid), which it did not sufficiently do. Additionally, the court held that the FMP requirements clearly bear a reasonable relationship to the loss of farmland to residential development citing to the goals and policies in the County's agricultural element. The court clarified that "to meet the reasonable relationship standard it is not necessary to fully offset the loss." Reasoning that land use regulation is a function of local government pursuant to the police power, the court also held that, "the trial court [] erred in concluding that the FMP was not authorized by the County's police power."

Finally, and most importantly, the Court held that Civil Code section 815.3, subdivision (b) did not invalidate the FMP. In considering this issue of first impression, the court sided with the County reasoning that the FMP did not violate the statute's prohibition against conditioning the issuance of an approval on the grant of a conservation easement because the applicant and/or developer was not required to grant the easement. "Rather, the FMP allows the applicant to arrange for a third party to voluntarily convey an easement to a land trust or the County." The court's reasoning appeared to be that a developer has a choice to develop or not, and if the developer chooses to develop, that voluntary choice may come with a price (e.g., the permanent protection of one acre of farmland for every acre of farmland developed).

4. Effect of State Laws on Agricultural Mitigation Requirements

The Mitigation Fee Act, CEQA and the Conservation Easement Act do not preclude a jurisdiction from requiring mitigation for impacts to agricultural land. Where

local governments impose in-kind mitigation requirements rather than fee requirements, the Mitigation Fee Act does not apply. However, when the Mitigation Fee Act is applicable, such as when agencies impose fee requirements to mitigate for the loss of agricultural land, regulations must comply with the requirements of the Act.

Under CEQA, local governments generally have the authority to require mitigation for significant impacts to agricultural lands.⁹⁷ As outlined above, courts that have addressed agricultural mitigation programs under CEQA have considered whether such mitigation is necessary, and not whether it is permissible. Furthermore, no challenge of the imposition of agricultural mitigation in the CEQA context has resulted in a published opinion. Moreover, CEQA case law demonstrates that where there is a solid basis in local planning documents, including General and Specific Plans, the courts are more likely to uphold agricultural mitigation programs.

Last, the purpose of the Conservation Easement Act is to voluntarily convey conservation easements to qualified entities to conserve open spaces and other environmental values. Civil Code section 815.3 prohibits jurisdictions from requiring an involuntary conveyance of a conservation easement. Where a landowner chooses to develop a property within a jurisdiction that requires converted farmland to be mitigated with placement of easements on other property, however, this requirement not run afoul of this prohibition.

E. Local Laws

1. Planning and Zoning Law

City and county zoning ordinances and land use decisions must be consistent with General and Specific Plans.⁹⁸ Thus, local jurisdictions can justify exactions on the basis that they are necessary to assure consistency with adopted General and Specific Plans.⁹⁹ Thus, when development fees and dedication requirements are judicially attacked, many local governments now rely on General and Specific Plans to support their decisions.¹⁰⁰

⁹⁷/ Under CEQA, mitigation measures must meet the essential nexus and rough proportionality tests of *Nollan* and *Dolan*. (CEQA Guidelines, § 15126.4, subd. (a)(4).)

⁹⁸/ Gov. Code, §§ 65860 and 65910; see also, *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.

⁹⁹/ See, e.g., 58 Ops.Cal.Atty.Gen. 41 (1975), as cited in Longtin § 8.14, p. 787; see also, *J.W. Jones Cos. v. City of San Diego* (1984) 157 Cal.App.3d 745.

¹⁰⁰/ See *Curtin*, *supra*, at pp. 27, 259.

2. Effect of Local Laws on Agricultural Mitigation Requirements

Planning and zoning law provides jurisdictions an opportunity to implement mitigation programs to protect agricultural land. If cities and counties clearly emphasize the importance of farmland in their General and Specific Plans, and include specific programs to protect agricultural land, subsequent regulations to preserve agricultural land should be defensible.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Legality of Fee and In-Kind Mitigation Requirements

Local agencies have the general authority to implement in-kind and fee mitigation requirements under the police power of the California Constitution.¹⁰¹ Moreover, the California Legislature's support of and emphasis on agricultural preservation provides a backdrop by which agencies can implement these regulations. However, it is necessary for agencies to ensure compliance with requirements under the United States and California Constitutions, the Mitigation Fee Act, CEQA, the Conservation Easement Act and planning and zoning laws.

1. In-Kind Mitigation Requirements

Because in-kind mitigation requirements do not involve monetary fees, they generally will not trigger Propositions 13, 62 or 218, or the Mitigation Fee Act. Moreover, so long as they are applied legislatively, in-kind mitigation requirements need not meet the nexus and rough proportionality tests under Nollan and Dolan. To comply with Civil Code section 815.3, though a particular landowner may be required to *arrange* for the grant of compensatory easements, the landowner may not be required to actually *grant* a conservation easement.

Under the Equal Protection and Due Process clauses of the United States and California Constitutions, mitigation requirements must bear a rational relationship to a legitimate government interest. Such regulations also cannot be arbitrary. To support the assertion that the protection of agricultural land is a legitimate interest, agencies can also point to their own General and Specific Plans and the State Legislature's statements. As outlined above, courts generally hold in favor of local agencies on this issue in the land use context. As long as in-kind mitigation programs satisfy these requirements, agencies have the legal authority to impose such regulations.

¹⁰¹/ Cal. Const., art. XI, § 7.

2. In-Lieu Fee Mitigation Requirements

In-lieu fee requirements, in addition to meeting the requirements under Due Process and Equal Protection as outlined above, must either be exempt from or comply with Props 13, 62 and 218. They also must comply with the Mitigation Fee Act.

In order to qualify as exempt from Propositions 13 and 62, a development fee must not exceed the reasonable cost of providing the service for which the fee is charged. Furthermore, the fee must be reasonably related to the type of activity on which it is based. Also, because mitigation fees are not imposed incident of property ownership, such exactions need not meet the requirements under Prop 218.

Under the Mitigation Fee Act, an agency imposing a fee must: (1) identify the purpose of the fee; (2) identify the use to which the fee is to be put; (3) determine that there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; (4) determine that there is a reasonable relationship between the need for the public facility and type of development project on which the fee is imposed; and (5) determine that there is a reasonable relationship between the amount of the fee and the cost of the public facility attributable to development.

B. Recommendations to Provide a Foundation for and Implement Fee and In-Kind Mitigation Requirements

1. Incorporate Policies and Programs Related to Preservation of Agricultural Land in General and Specific Plans

As demonstrated in the CEQA cases outlined above, courts generally defer to city and county General Plans. Moreover, the General Plan is considered the “constitution for development,” and all land use approvals must be consistent with such plans.¹⁰² Thus, agencies can use policies in their General Plans to support implementation of dedication and fee requirements for preserving agricultural land. Jurisdictions should incorporate policies into General and Specific Plans that emphasize the need for permanent preservation of agricultural land. Such policies should specifically support the use of conservation easements for mitigation for the loss of farmland.

¹⁰²/ See *J.W. Jones Cos. v. City of San Diego* (1984) 157 Cal.App.3d 745, 749.

2. Conduct Nexus Studies

Particularly if implementing a fee program, local agencies should conduct nexus studies. Such studies should analyze and demonstrate an adequate nexus between the mitigation requirement and the impacts of the project, thus providing support for the nexus requirements of *Nollan* and *Dolan* and the Mitigation Fee Act. Such studies should also substantiate the selected mitigation ratio.

3. Include Findings That Demonstrate Compliance

When public agencies adopt mitigation programs, they should also adopt findings that demonstrate compliance with each applicable legal requirement.