



- Board of Directors  
*Legislation Committee*

4/12/2011 Board Meeting

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8-7

## Subject

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Express support for SB 328 (Kehoe, D-San Diego) — Eminent Domain Law: conservation easement

## Description

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Existing California law authorizes the creation of conservation easements for the preservation of land in its “natural, scenic, historical, agricultural, forested, or open-space condition.” These easements are required to be “perpetual in duration” and can only be held by government agencies, nonprofit organizations whose primary purpose is the protection or enhancement of those values, or recognized Native American tribes. Conservation easements have become a common tool for the protection of habitat for endangered species, as well as preservation of open space areas for environmental and recreational benefits. The conveyance of conservation easements for the perpetual protection of undisturbed land is often imposed as a condition for environmental permits issued for both private and public projects.

Metropolitan has created several habitat and species reserves in connection with environmental mitigation and permitting for its projects. In particular, there are reserves on lands owned by Metropolitan at Lake Mathews, Diamond Valley Lake, and Lake Skinner. Metropolitan has also contributed lands to the Santa Rosa Plateau Reserve that are protected pursuant to a mitigation agreement with the California Department of Fish and Game and U. S. Fish and Wildlife Service. Metropolitan has an interest in ensuring that the native habitat on these lands is protected to maintain the continued validity of its commitments to mitigate the environmental impacts of its facilities and operations.

Because of the absence of improvements and generally lower land values, open space lands provide an optimal location for public agencies seeking to site and construct public works projects. Using vacant land is not only less expensive, but can result in less public opposition to a project that could otherwise displace homeowners and businesses if a public works project is located on improved lands. The availability of eminent domain authority to acquire lands for public use allows a public agency to select the site of its project regardless of the objections of property owners that do not want to sell their land. The potential for condemnation of reserve lands protected by conservation easements caused California land trusts and conservancies to seek statutory procedures to protect those easements.

The California Eminent Domain Law has existing provisions for dealing with competing public uses of property. An existing public use is protected against condemnation by other public agencies by requiring a showing that the new proposed public use is either compatible or more necessary. The government agency seeking to acquire the property has the burden of proving that its proposed public use is compatible with, or more necessary than, the existing public use. The Eminent Domain Law further provides a hierarchy of public uses by creating presumptions that some public uses are more necessary than others. Each of these presumptions can be overcome by a preponderance of evidence showing a greater necessity for another public use.

SB 328 ([Attachment 1](#)) would add provisions to the Eminent Domain Law that define conservation easements held by public agencies, or conveyed as a condition of permitting a project, as a public use. This would give conservation easements a presumption against condemnation for other public uses that could destroy the habitat values for which the conservation easement was established. The bill would also add procedural protections by

requiring notice of the potential condemnation of the property and an opportunity for the easement holder to appear and be heard when the public agency makes the decision whether to condemn the property. Finally, the easement holder must be named in the eminent domain action and will recover compensation for any taking or damaging of the conservation easement interest. The amount of compensation that can be awarded for the condemnation of land subject to a conservation easement is limited to no more, nor less, than the value of the property as if it were unencumbered by the easement. This avoids giving public agencies an incentive to condemn the land based on its lower value as encumbered, while preventing double compensation for both the underlying fee value and the value of the easement as mitigation.

An identical bill, SB 555 by Senator Kehoe, passed the Legislature in September 2009 and was supported by Metropolitan, the San Diego County Water Authority, East Bay Municipal Utility District and the Association of California Water Agencies. As agencies that have protected lands with conservation easements and require the use of eminent domain to construct public works projects, these agencies understand the need for balance on this particular issue. SB 555, as finally passed by the Legislature, included many amendments recommended by these agencies to provide that balance. SB 555 was vetoed by Governor Schwarzenegger due to concerns it could be used to impede public works projects.

SB 328 (Kehoe) is identical to SB 555. It protects Metropolitan's reserve lands against incompatible public uses by other agencies by requiring those agencies to prove their use is more necessary. It further ensures that Metropolitan would be compensated for any interference with the conservation values protected by the easement, providing funding for any habitat replacement that may be required to maintain mitigation obligations. Finally, it ensures that Metropolitan will have the right to notice and a hearing before its lands are involuntarily acquired for another public use. As a public agency, Metropolitan will also have the continued authority to exercise its eminent domain power across other lands subject to conservation easements where the evidence supports the necessity of using those lands for a Metropolitan project.

## **Policy**

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By Minute Item 46781, dated August 15, 2006, the Board adopted the Policy Principles on Eminent Domain.

### **California Environmental Quality Act (CEQA)**

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CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

## **Board Options**

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### **Option #1**

Adopt the CEQA determination and authorize the General Manager to express Metropolitan's support for SB 328.

**Fiscal Impact:** Unknown

**Business Analysis:** Passage of the proposed bill could provide some protection to Metropolitan's reserve properties from condemnation by other public agencies.

**Option #2**

Take no position on SB 328.


**Fiscal Impact:** None

**Business Analysis:** Metropolitan's reserve properties could be at a higher risk of condemnation.

**Staff Recommendation**

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Option #1

  
Linda Waade  
Deputy General Manager, External  
Affairs

3/25/2011  
Date

  
Jeffrey Wightlinger  
General Manager

3/30/2011  
Date

**Attachment 1 – Senate Bill 328**

Ref# ea12611132

**SENATE BILL****No. 328**

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**Introduced by Senator Kehoe**

February 15, 2011

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An act to add Section 1240.055 to the Code of Civil Procedure, relating to eminent domain.

## LEGISLATIVE COUNSEL'S DIGEST

SB 328, as introduced, Kehoe. Eminent Domain Law: conservation easement.

Existing law authorizes various agencies to acquire land for purposes related to conservation. Existing law provides for a conservation easement to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition. Existing law establishes procedures for the independent appraisal review of land to be acquired for conservation and establishes a conservation easement registry. Existing law prohibits, with a specified exception, the sale of conservation lands to another owner or the transfer of possession and control of conservation lands to another agency, unless specified actions occur.

The California Constitution permits private property to be taken or damaged for public use only when just compensation is paid. The Eminent Domain Law prescribes how that constitutionally authorized power may be exercised and permits that exercise only for a public use. Existing law prohibits a public entity from commencing an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets specified requirements.

This bill would revise the Eminent Domain Law to establish requirements for acquisition of property subject to a conservation easement. The bill would require the person seeking to acquire the property to give the holder of the conservation easement a notice

**SB 328**

— 2 —

containing specified information and an opportunity to comment on the acquisition. The bill would require the holder of the conservation easement to provide notice, under certain circumstances and as specified, of the proposed acquisition to each public entity that helped fund the purchase of the conservation easement or that imposed conditions on approval or permitting of a project that were satisfied, in whole or in part, by the conservation easement, and other information, as specified. The bill would require a person seeking to acquire the property subject to the conservation easement to respond to any comments in writing and provide by first-class mail the response to each easement holder or public entity that filed comments. The bill would require the notice of the hearing on the resolution of necessity to be sent to any holder of the conservation easement and public entity, as specified, and to contain information regarding the effect of failing to file a written request to appear and be heard. The bill would require that a resolution of necessity to acquire property subject to the conservation easement refer to specific authority for the acquisition of the property. The bill would specify that the holder of the conservation easement is entitled to compensation under the Eminent Domain Law, as specified.

To the extent that this bill would impose new duties on a local governmental entity, this bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 1240.055 is added to the Code of Civil
- 2 Procedure, to read:
- 3 1240.055. (a) As used in this section, the following terms have
- 4 the following meanings:

— 3 —

**SB 328**

1 (1) "Conservation easement" means a conservation easement  
2 as defined in Section 815.1 of the Civil Code and recorded as  
3 required by Section 815.5 of the Civil Code.

4 (2) "Holder of a conservation easement" means the entity or  
5 organization that holds the conservation easement on the property  
6 that is proposed for acquisition and that is authorized to acquire  
7 and hold conservation easements pursuant to Section 815.3 of the  
8 Civil Code.

9 (3) "Property appropriated to public use," as used in Article 6  
10 (commencing with Section 1240.510) and Article 7 (commencing  
11 with Section 1240.610), includes a conservation easement if any  
12 of the following applies:

13 (A) The conservation easement is held by a public entity.

14 (B) A public entity provided funds, not including the value of  
15 a charitable contribution for federal or state income tax purposes  
16 but including the California Natural Heritage Preservation Tax  
17 Credit, for the acquisition of that easement.

18 (C) A public entity imposed conditions on approval or permitting  
19 of a project that were satisfied, in whole or in part, by the  
20 conservation easement.

21 (b) A person authorized to acquire property for public use by  
22 eminent domain shall exercise the power of eminent domain to  
23 acquire property that is subject to a conservation easement only  
24 as provided in this section.

25 (c) Not later than 105 days prior to the hearing held pursuant  
26 to Section 1245.235, or at the time of the offer made to the owner  
27 or owners of record pursuant to Section 7267.2 of the Government  
28 Code, whichever occurs earlier, the person seeking to acquire  
29 property subject to a conservation easement shall give notice to  
30 the holder of the conservation easement as provided in this  
31 subdivision. If the person is not required to hold a hearing pursuant  
32 to Section 1245.235, then the notice shall be given 105 days prior  
33 to the time of the offer made to the owner or owners of record  
34 pursuant to Section 7267.2 of the Government Code.

35 (1) The notice required by subdivision (c) shall be sent by  
36 first-class mail and shall state all of the following:

37 (A) A general description, in text or by diagram, of the property  
38 subject to a conservation easement that the person proposes to  
39 acquire by eminent domain.

**SB 328**

— 4 —

1 (B) A description of the public use or improvement that the  
2 person is considering for the property subject to a conservation  
3 easement.

4 (C) That written comments on the acquisition may be submitted  
5 in accordance with paragraph (3) no later than 45 days from the  
6 date the person seeking to acquire the property mailed the notice  
7 to the holder of the conservation easement.

8 (D) That the holder of the conservation easement, within 15  
9 days of receipt of the notice required by subdivision (c), is required,  
10 under certain circumstances, to do all of the following:

11 (i) Send a copy of the notice by first-class mail to each public  
12 entity that provided funds for the purchase of the easement or that  
13 imposed conditions on approval or permitting of a project that  
14 were satisfied, in whole or in part, by the creation of the  
15 conservation easement.

16 (ii) Inform the public entity that written comments on the  
17 acquisition may be submitted in accordance with paragraph (3).

18 (iii) Notify the person seeking to acquire the property of the  
19 name and address of any public entity that was sent a copy of the  
20 notice pursuant to this paragraph.

21 (2) (A) The holder of the conservation easement, within 15  
22 days of receipt of the notice required by subdivision (c), shall do  
23 all of the following:

24 (i) Send a copy of the notice by first-class mail to each public  
25 entity that provided funds for the purchase of the easement or that  
26 imposed conditions on approval or permitting of a project that  
27 were satisfied, in whole or in part, by the creation of the  
28 conservation easement.

29 (ii) Inform the public entity that written comments on the  
30 acquisition may be submitted in accordance with paragraph (3).

31 (iii) Notify the person seeking to acquire the property of the  
32 name and address of any public entity that was sent a copy of the  
33 notice pursuant to this paragraph.

34 (B) Subparagraph (A) shall apply only if one of the following  
35 applies:

36 (i) The holder of the easement is the original grantee of the  
37 conservation easement and there is a public entity as described in  
38 subparagraph (A).

39 (ii) The holder of the easement has actual knowledge of a public  
40 entity as described in subparagraph (A).

— 5 —

SB 328

1 (iii) Recorded documents evidence the identity of a public entity  
2 as described in subparagraph (A).

3 (3) The holder of the conservation easement or the public entity  
4 receiving notice, or both, may provide to the person seeking to  
5 acquire the property written comments on the acquisition, including  
6 identifying any potential conflict between the public use proposed  
7 for the property and the purposes and terms of the conservation  
8 easement. Written comments on the acquisition may be submitted  
9 no later than 45 days from the date the person seeking to acquire  
10 the property mailed the notice to the holder of the conservation  
11 easement.

12 (d) The person seeking to acquire the property subject to a  
13 conservation easement, within 30 days after receipt of written  
14 comments from the holder of the conservation easement or from  
15 a public entity described in paragraph (2) of subdivision (c), shall  
16 respond in writing to the comments. The response to the comments  
17 shall be mailed by first-class mail to each easement holder or public  
18 entity that filed comments.

19 (e) The notice of the hearing on the resolution of necessity,  
20 pursuant to Section 1245.235, shall be sent by first-class mail to  
21 the holder of any conservation easement and to any public entity  
22 whose name and address are provided as described in paragraph  
23 (2) of subdivision (c) and shall state that they have the right to  
24 appear and be heard on the matters referred to in Sections 1240.030,  
25 1240.510, and 1240.610. The notice shall state that, pursuant to  
26 paragraph (3) of subdivision (b) of Section 1245.235, failure to  
27 file a written request to appear and be heard within 15 days after  
28 the notice was mailed will result in waiver of the right to appear  
29 and be heard. The resolution of necessity to acquire property  
30 subject to a conservation easement shall refer specifically either  
31 to Section 1240.510 or 1240.610 as authority for the acquisition  
32 of the property.

33 (f) In any eminent domain proceeding to acquire property subject  
34 to a conservation easement, the holder of the conservation  
35 easement:

36 (1) Shall be named as a defendant, as set forth in Section  
37 1250.220.

38 (2) May appear in the proceedings, as set forth in Section  
39 1250.230.



**SB 328**

— 6 —

1 (3) Shall have all the same rights and obligations as any other  
2 defendant in the eminent domain proceeding.

3 (g) (1) The holder of the conservation easement is an owner of  
4 property entitled to compensation determined pursuant to Section  
5 1260.220 and Chapter 9 (commencing with Section 1263.010) and  
6 in accordance with all of the following:

7 (A) The total compensation for the acquisition of all interests  
8 in property encumbered by a conservation easement shall not be  
9 less than, and shall not exceed, the fair market value of the fee  
10 simple interest of the property as if it were not encumbered by the  
11 conservation easement.

12 (B) If the acquisition does not damage the conservation  
13 easement, the total compensation shall be assessed by determining  
14 the value of all interests in the property as encumbered by the  
15 conservation easement.

16 (C) If the acquisition damages the conservation easement in  
17 whole or in part, compensation shall be determined consistent with  
18 Section 1260.220 and the value of the fee simple interest of the  
19 property shall be assessed as if it were not encumbered by the  
20 conservation easement.

21 (2) This subdivision shall not apply if the requirements of  
22 Section 10261 of the Public Resources Code apply.

23 (h) This section shall not apply if the requirements of Section  
24 1348.3 of the Fish and Game Code apply.

25 SEC. 2. If the Commission on State Mandates determines that  
26 this act contains costs mandated by the state, reimbursement to  
27 local agencies and school districts for those costs shall be made  
28 pursuant to Part 7 (commencing with Section 17500) of Division  
29 4 of Title 2 of the Government Code.

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