

# Acquisition of Scenic Easements

JOHN B. MATHENY, Assistant Chief Counsel, California  
Department of Public Works

•THE ability to affect a community's natural and man-made environment for better or worse is not a unique characteristic of the highway program. Other activities, for which state and local governments have assumed varying degrees of responsibility, also have this power to change the appearance of the community, and in various basic aspects all aesthetic programs are related to each other. The need to correlate programs in all of these areas in a comprehensive plan and set of working relationships was well set forth by President Johnson's special message to Congress on February 8, 1965,<sup>1</sup> when he said:

...[A]ssociation with beauty can enlarge man's imagination and revive his spirit. Ugliness can demean the people who live among it. What a citizen sees every day is his America. If it is attractive it adds to the quality of his life. If it is ugly it can degrade his existence.

Beauty has other immediate values. It adds to safety whether removing direct dangers to health or making highways less monotonous and dangerous....

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...[B]ut a beautiful America will require the effort of government at every level, of business, and of private groups....

I am hopeful that we can summon such a national effort. For we have not chosen to have an ugly America. We have been careless, and often neglectful. But now that the danger is clear and the hour is late this people can place themselves in the path of a tide of blight which is often irreversible and always destructive.

The President further went on to say that he was presenting a twofold program relating to highways. One purpose was to insure that the highways themselves would be attractive; the other was to see that more funds would be spent to develop highways that would take people to recreation and scenic areas. His message included recommendations for a comprehensive aesthetic program. Implementing his message, he requested Congress on May 26, 1965,<sup>2</sup> to pass legislation relating to scenic easements, the scenic road system, control of junkyards, greater access to recreation areas, and for greater emphasis on controlling outdoor advertising.

## THE CALIFORNIA PROGRAM

In California, scenic easements are not a new idea. More than 35 years ago the State of California acquired some areas that were called scenic easements. They were not acquired by eminent domain, but rather by purchase. And they were not acquired in relation to highways, but by the state park system in order to save certain areas for scenic preservation. These were very limited acquisitions, and probably were created because of special land interests, to insure that portions of the property would remain attractive and available for use, rather than as part of a planned program of acquisition.

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<sup>1</sup>The President's Special Message to Congress on Natural Beauty of Our Country, Feb. 8, 1965, 111 Cong. Rec. 2045.

<sup>2</sup>President's Letter to President of the Senate and Speaker of the House of Representatives, May 26, 1965.

In 1946, the California state park department made a different and perhaps unique type of scenic easement acquisition when it acquired property to rebuild a historic mining town as a state park. Portions of the scenic easements acquired were for purposes of landscape and architectural control. So far this has been a fairly successful example of multiple-purpose acquisition, and the experience may be helpful in future acquisitions.

The state Department of Public Works has also been actively interested in scenic development, and for many years has been acquiring and maintaining numerous scenic overlooks which will form an important part of the future programs.

It must be conceded, however, that California, like many of the other states, has lagged in carrying out the intentions of Section 319 of Title 23 of the United States Code. But California has not stood still in its aesthetic thinking and planning. In addition to the specific type of programs referred to in Section 319, and the legislation requested by the President, the state has had a highly developed landscaping program. A special section in the Division of Highways has existed for many years, carrying on a continual and expanding program of landscaping. The Division is now spending more than \$10 million per year, and has landscaped with complete plantings more than 950 miles of highways. In the short period of the last six years, the California legislature has authorized and otherwise given guidance for several aesthetic ventures. In addition to provisions authorizing some scenic areas, it enacted roadside rest legislation, established a scenic highway system, and expanded the outdoor advertising control program.

The scenic easement program started in 1963<sup>3</sup> with a limited authorization which provided for scenic acquisition in conjunction with the construction of the new Interstate Route 5, which runs the length of the state. Concurrently with the construction of this route, the state is constructing the California aqueduct, a gigantic canal which will convey water to the southern part of the state. While this canal must generally follow the land contours as a gravity-flow canal, it is somewhat parallel to the I 5 route. The legislature had the foresight to take advantage of this obvious opportunity for development by authorizing the various resources and finance agencies of the state, singularly or collectively, to accept property and acquire property in fee, or lesser interest. The authorization also included the use of condemnation for the purposes of improving or maintaining areas of significant scenic interest located between the Interstate highway and the California aqueduct. The Department of Public Works was further expressly authorized to acquire other properties for scenic easements when there are funds available pursuant to Section 319 of Title 23 of the United States Code, and where the funds could not otherwise be spent for highway purposes.

In 1957, a roadside rest program<sup>4</sup> was commenced with the Division of Highways furnishing the property and the then Department of Natural Resources being responsible for construction and maintenance. These were intended to be attractive stopping places for motorists. The administration and construction of these roadside rests were eventually transferred to the Department of Public Works, and at the same time additional legislation established 12 roadside rests at designated locations along the new Interstate Route 5. While these are not designed to be complete scenic areas, and there are restrictions on the type of design and uses, they are intended to be made attractive places for the traveling public.

Up to the present time, the planning by our landscaping department, other than the regular landscaping program, has been concentrated on the roadside rest program. We now have some 24 of these sites in operation, and approximately 250 are planned. The roadside rest program, while not a scenic easement program in the true sense, is instrumental in adding to the beauty and enjoyment of the use of highways in California. Roadside rests can also be utilized to implement a scenic highway system and can be coordinated in use with scenic areas.

<sup>3</sup>Cal. Govt. Code, Secs. 7000 and 7001.

<sup>4</sup>Cal. Public Resources Code, Secs. 5080-5092.

California's present scenic highway legislation<sup>5</sup> was adopted in 1963 and became effective on July 1, 1964. The initial recommended system was the result of a study by the Citizens Advisory Committee on Scenic Highways. There now is a continuing Advisory Committee on the Master Plan for Scenic Highways which advises the Department of Public Works in regard to establishing and applying planning and design standards for development of scenic highways. Some of the guidelines and standards developed in California for this scenic highway system can be equally used in planning a scenic easement acquisition and in developing a broader program. The basic considerations of the plan are that special attention should be given to both the impact of the highway on the landscape and the visual appearance of the highway itself. In brief, the additional standards are:

1. Location to preserve the natural environment and to unfold new scenic locations;
2. A design to fit the character of the area minimizing unsightly scars on the terrain;
3. Avoid cutting valuable trees and growth insofar as suitable alternatives are available and utilizing timber screens to hide unsightly views;
4. Wide medians, curvilinear alignment, and independent roadways on multilane facilities;
5. Consideration of bridges, tunnels, and artistic retaining walls in lieu of cuts and fills;
6. Additional flattening of slopes and planting of ground cover;
7. Careful consideration to location and design of structures;
8. Avoid old material sites;
9. Concealment of drainage facilities where possible; and
10. Careful landscaping of interchange areas, particularly with the use of indigenous growth.

The scenic highway corridor created in this system will undoubtedly indicate the future location of many scenic acquisitions.

Another major program, the Outdoor Advertising Act,<sup>6</sup> will probably have to be amended in the future in order to accomplish the purpose ultimately desired, but at the present time it can provide the means of removing many of the unsightly billboards over a period of time.

In the 1965 legislative session an attempt was made to expand on all of the state's aesthetic programs. In particular, legislation was introduced<sup>7</sup> which would specifically authorize the acquisition of scenic easements without limit to statewide location. It would have permitted acquisition of property in fee, or any lesser interest, adjacent to highways for the specific purpose of preserving the natural beauty or for establishing scenic overlook areas. However, during the course of hearings, it was necessary to limit this legislation to acquisitions where Federal funds were available for reimbursement.

When presenting this legislation before the legislative committees which were required to give hearings on the proposed legislation, several interesting comments were made on various aspects of it. For example, the chairman of one committee felt such legislation should be preceded by a scenic easement area plan or system. While the desirability of having a plan or system is obvious, and even necessary for a long-range program, the Division of Highways did not feel that it should be so limited at this time. There are many areas now available for acquisition and which would be consistent with any statewide plan. An amendment to require a plan was offered to the committee, but was not adopted.

There was further feeling that there should be a defined corridor of some specified width within which the scenic easements must be located. Widths of 660 feet and more were considered, but, again, no limited corridor was amended into the bill.

<sup>5</sup>Cal. Streets and Highways Code, Sec. 264.

<sup>6</sup>Cal. Business and Professions Code, Secs. 5200-5325.

<sup>7</sup>Senate Bill 363 of the 1965 Cal. Legislative Session.

It was also suggested, and without question determined, that in California just compensation must be paid for such interests when they were acquired.

There were other suggestions that the legislation should indicate the specific types of properties that could be acquired for scenic easements. Some of the examples discussed were forest areas, farms, and points designated as being of specific interest. Again, no such enumeration was placed in the bill.

However, the bill came to an unfortunate end. In the last day of the legislative session, a technical amendment was added to the bill in the State Assembly, after it had already passed the State Senate, which required the bill to be returned to the Senate for concurrence. Because of the many hundreds of bills awaiting final passage on the last day of the legislative session, this one became lost in the shuffle, and it was not learned until the final minutes of the mandatory time for adjournment that this bill had not been returned to its house of origin for concurrence. The hour was too late. The many other proposals to amend other aesthetic programs were also unsuccessful. Unfortunately the legislature, like many others meeting that year, was faced with the serious problem of reapportionment and raising of revenue. These problems alone caused many important bills to fail.

### THE ELEMENTS OF SCENIC EASEMENT PLANNING

Having described the background of California's scenic development program, and some of the problems involved in providing a suitable legislative framework to carry on such a program, it may be appropriate to mention some of the many factors involved in a long-range program of acquiring scenic easements. The principal steps to be considered may be listed as follows:

1. Classifying or defining scenic easements;
2. Preparing a plan including (a) location of the easements, and (b) size of the area;
3. Providing for availability of funds;
4. Assuring existing authorization for acquisition in California and the other states;
5. Defining the scope of any new legislation;
6. The use of eminent domain;
7. Determining the type of title to be acquired; and
8. The acquisition document.

To some extent it may be helpful to look for precedents in the roadside rest program, but I believe that preparing a scenic easement plan will be more difficult. There is a limit to what can be accomplished by looking at maps, measuring distances, and looking at local jurisdictional boundaries to determine where many of the roadside rests can be located. In the scenic program it is almost essential to actually view the natural scenic areas and overlooks after classifying the types to be considered in order to prepare an acquisition plan. It is very similar to studying proposed highway route alternatives.

#### Types of Scenic Easements and Their Location

Defining the types or scope of scenic easements or areas within the meaning of applicable legislation may present difficulties. Section 319 of Title 23, U. S. Code, as well as the present proposed amendments to that section, seems to refer to scenic easements as a type of strip acquisition adjacent to the highway. This interpretation may be very appropriate when the purpose of the easement is merely to screen off what otherwise might be considered an unattractive view, but in most cases this will not include the necessary area required to develop the scenic quality of a particular location.

In this regard, the Bureau of Public Roads' Policy and Procedure Memorandum 21-4.6 probably is the best guide to the types and size of natural conditions that should be considered in acquiring scenic easements. While the memorandum refers to the fact that the scenic area should be of limited width and adjacent to the highway, it also points out that the taking line should be governed by natural boundaries of the feature itself. An example is provided by the case of a stream running adjacent to a highway.

Here easement acquisition lines should be to the opposite side of the stream and to the top of the slope of a hillside beyond in order to protect the stream and the hillside in its scenic beauty. In special situations, widths of several hundred feet or even greater may be necessary. Other types of topographic features which typically require easements of extensive width are wildwoods and groves of trees, lakeshores and rivers, mountains or similar vistas, rock outcrops, and perhaps such other unique features as swamps and islands.

Location of scenic easements must be determined with consideration for both beauty and safety. For example, a scenic outlook must be located so that a motorist may conveniently and safely enter and leave the outlook area. Existing natural areas must be considered in their relationship to practical locations of new highways.

### Financing Scenic Easements

Two major factors in the development of a scenic easement plan are the availability of funds and the type of title that can or should be acquired. Insofar as funds are concerned, California has not as yet made money available for this specific program. In this respect it has been like most other states where highway funds have been more urgently needed and used for acquisition of right-of-way and construction. As noted earlier, however, this has not prevented a certain amount of scenic development activity, including scenic acquisitions, with funds available through non-highway sources. Aside from the subject of availability of funds for land acquisition, consideration should be given to preserving existing scenic areas through other means such as encouraging local zoning to be further extended, increasing outdoor advertising restrictions and taking advantage of natural areas in public ownership.

### Authority to Acquire

Important questions must also be considered in regard to the title of property being acquired for scenic enhancement. What is the extent of the title that can be acquired under existing state law, and what title will best accomplish the purpose? These questions must be considered in the light of the state's fundamental law as well as some of the other existing laws in the state by which it acquires scenic areas.

### Choice of Acquisition Methods

California has a constitutional provision<sup>8</sup> which specifically authorizes purchase or condemnation of property within limited areas which can be used for scenic purposes or otherwise kept in a condition to make the public works more attractive in its environment. It is not limited to highways, and includes most other types of public improvements. Pursuant to this provision, entire parcels up to 150 feet from the boundaries of the project can be acquired and if the property lies partially within and partially outside of the 150-foot limitation, the boundary may be extended to 200 feet. Specifically, it further authorizes the agency acquiring property pursuant to this provision to convey out property so acquired with any desirable restrictions on its use.

California also has a statute<sup>9</sup> specifically relating to the state Department of Public Works which contains similar provisions and limitations, and another which pertains to cities and counties.<sup>10</sup>

Up to the present time the state has not used these provisions for scenic purposes nor has it entered into the practice of conveying property back with restrictions designed to preserve the natural beauty or view. This type of legislation is suitable for certain types of acquisitions and uses (for example, providing property for scenic outlooks), but it does not have the flexibility of other types or forms of legislation.

<sup>8</sup> Cal. Const., Art. 1, Sec. 14-1/2.

<sup>9</sup> Cal. Streets and Highways Code, Sec. 104.3.

<sup>10</sup> Cal. Govt. Code, Sec. 190-191.

There are also inherent practical problems. For example, specification of an exact width on the extent of the acquisition may result in leaving the property owner with no feasible way to use the remainder. In ordinary acquisitions, the highway department could take such land as excess and avoid high severance damages. If, however, the intention is to let the owner have use of the property subject to certain restrictions that will preserve the scenic effect, then this type of legislation may be very useful. For example, one of the types of land uses that has been considered to be scenic in nature is farm properties that are attractively and naturally landscaped. The strip acquisition might be quite compatible with the use that the owner is making of the property at the time of acquisition, and the restrictions could insure the continued preservation. However, other types of legislation offer equally great advantages of flexibility. In Mississippi there is scenic legislation<sup>11</sup> which authorizes the acquisition and construction of scenic easements of up to 50 acres per mile. This, of course, would permit areas of several acres to be acquired at one location when it is desirable for scenic purposes.

There are also provisions in California law<sup>12</sup> that authorize the Department of Public Works to accept gifts of money or property for maintaining memorials at places of scenic, historical, or cultural interest. Things that could be acquired pursuant to this provision could be exemplified by memorial redwood groves. The state is also authorized<sup>13</sup> to specifically enter into cooperative agreements with counties to develop and maintain roadside parks which can lie both in and outside of the highway right-of-way.

#### Title Acquired

Another interesting provision<sup>14</sup> in California law deserves attention and interpretation. The principal statutory declaration of what public uses will sustain the right of eminent domain provides in one section that public use includes "standing trees and ground necessary for the support and maintenance thereof along the course of any highway with a maximum distance of 300 feet on each side of the center thereof." This provision was added in 1915, and now appears to have been enacted with great foresight at that time since it apparently was to encourage the scenic appearance of the highways. It may be queried, however, whether this now limits the highway to a 600-foot corridor where the purpose of acquisitions adjacent to the roadway is to purchase trees or areas to plant trees. The question has not been raised, and perhaps will be avoided by the interpretation of other specific legislation relating to scenic programs.

In looking at the legislation in other states as it expressly relates to scenic easements, the laws presently existing may be put into three categories. The first category is comprised of those states that have specific authorization, and includes Mississippi, Missouri,<sup>15</sup> Wisconsin,<sup>16</sup> and Oregon.<sup>17</sup> In the second category are those states which authorize the acquisition of scenic property which might be extended to cover scenic easement, but which authority is vested with their parks or conservation departments. Three of these states are Virginia,<sup>18</sup> Tennessee,<sup>19</sup> and Kentucky.<sup>20</sup> The legislation in each of these states has three things in common: (a) authorization is given to acquire the land or any interests therein; (b) acquisition may be made by purchase, or through the exercise of the power of eminent domain; and (c) it is not required specifically

<sup>11</sup> Miss. Code Ann., Sections 5964-5984.

<sup>12</sup> Cal. Streets and Highways Code, Sec. 155.

<sup>13</sup> Cal. Streets and Highways Code, Sec. 131.5.

<sup>14</sup> Cal. Code of Civil Procedure, Sec. 1238(18).

<sup>15</sup> Mo. Stat. Ann., Secs. 226.310 and 226.350.

<sup>16</sup> Wis. Stat. Ann., Sec. 84.105.

<sup>17</sup> Ore. Rev. Stat., Sec. 366.345.

<sup>18</sup> Va. Code Ann., Secs. 10-21.

<sup>19</sup> Tenn. Code Ann., Secs. 11-105-11-305.

<sup>20</sup> Ky. Rev. Stat. Ann., Sec. 148.060.

that the land be acquired for use as park or recreation areas. There are many other states that have provisions authorizing the acquisition of scenic lands but they are not as comprehensive as the legislation in the above three states in that they lack one or more of the above characteristics. Among these states are New York, Florida, Minnesota, Maine, Georgia, Montana, and Utah. In a third category are many states that have no legislation expressly authorizing acquisition of scenic lands. However, many of these statutes appear to be broad enough to permit acquisition of scenic properties. In these cases, it is the parks or recreation type departments that are vested with the authority. An example of some of these states is Delaware, Ohio, and Alabama.

In the drafting of legislation for scenic acquisition, the limited experience to date suggests several things that should be considered by the draftsman. While it is not certain that a declaration of purpose would be essential, I believe it would be advisable. California's original scenic easement law provided in part: "The Legislature hereby declares that the acquisition of interests or rights in real property for the preservation and conservation of the scenic lands and areas. . . constitutes a public purpose for which public funds may be expended or advanced."

If the state constitution permits it, the legislation should provide for acquiring property in fee, or any lesser interest, and by negotiation or condemnation. If a provision is included which limits the expenditure of funds, it should be so drafted that other reasonably related expenditures required by Federal legislation could be used. If a width for the scenic corridor is included, then it should be such that it can conform to any change in Federal legislation. If a definition of scenic easement is included, it should be broad enough to be in conformity with Federal laws and regulations. In general, therefore, legislation should be flexible enough to take full advantage of Federal legislation.

There remains the potentially serious question of whether there are constitutional restrictions on condemning property strictly for scenic areas. It would appear that in California the state highway department can obtain scenic areas by eminent domain pursuant to the appropriate legislation, and that the state courts will follow the trend to permit use of eminent domain to accomplish aesthetic objectives. This trend to greater recognition of aesthetics can be seen in the many recent zoning, billboard, and redevelopment cases, following the famous urban redevelopment case of *Berman v. Parker*.<sup>21</sup> While the authors who have written about this decision do not all agree as to the full meaning of the language in Justice Douglas' opinion, it is generally conceded that the concept of using eminent domain for purely aesthetic purposes can be upheld.

When scenic areas are acquired by and for the public, whether by negotiated purchase or condemnation, both the constitutions and the statute law require payment of just compensation. The question of the amount of compensation which must be paid and the type of title acquired appear to be closely related. Experience in California seems to indicate that acquisition of any type of a permanent easement costs the state about the same as if it had acquired the fee. However, perhaps scenic easements are a little different because provisions can be made to permit the owner to retain substantial use. Cases will probably have to be considered individually, and perhaps the most analogous situation to this will be the transverse crossing with railroads.

#### Instruments of Conveyance

An article by William H. Whyte, Jr.,<sup>22</sup> contains several suggestions for preparation of instruments transferring title where something less than the fee interest is acquired. The use of a combination of any of the suggestions may result in benefits to the owner which would make it desirable for him to agree on compensation substantially lower than fair market value. This, of course, would also be true if the same provisions

<sup>21</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>22</sup> W. H. Whyte. *Securing Open Space for Urban America: Conservation Easements*. Urban Land Inst. Tech. Bull. 36, Dec. 1959.

were so described in an eminent domain proceeding, but the effect of what is being done may be hard for a condemnation jury to appreciate. Condemnation trial experience with slope easements suggests this conclusion. Various unusual appraisal problems may be involved depending upon which provisions are used. Some of the items, which are similar to those he suggested, are as follows:

1. A clear statement of the purpose to be served by the easement;
2. Prohibition against erecting buildings;
3. Restrictions against altering private roads or drives;
4. Prohibition of destruction or removal of trees, shrubs, or other greenery;
5. Restriction to the present uses that may be consistent with the type of scenic area;
6. Prohibition of outdoor advertising;
7. Prohibition of the dumping of any type of materials on the property;
8. Provision stating what would be the effect if the state abandons the purpose for which the easement was acquired;
9. A provision terminating easement in the event the property is condemned by another agency;
10. Prohibition of any use which would alter the present drainage, erosion, or flood control; and
11. Provision regarding maintenance.

Most of the foregoing items are self-explanatory, with the exception of the provision for termination of an easement when property is condemned by another agency. An example of this would be if an owner conveys an interest across his farmland as a scenic area. Sometime in the future it might be necessary for some public agency to acquire property for a more necessary public use. Property restricted with the scenic easement might be less valuable than other adjoining property. Therefore, an attempt may be made to acquire the property that is subject to the easement for the more urgent public purpose. If, however, the easement terminates upon the initiation of any eminent domain proceedings, such property would have just as much value as any other property and thus the incentive may be lost. This could be a substantial factor in determining the compensation an owner expects.

A possibly significant provision which is absent in the check list is a flexibility provision. Such a provision would be difficult to draft, but its purpose would be to cover unforeseen developments that might arise in the future. One possible way to cover such eventualities might be to permit the highway department to authorize some change of status upon request. It might even go so far as to permit some method of adjudicating the reasonableness of the denial in the event the request is denied.

### CONCLUSION

Given a choice between carrying out a scenic easement acquisition program by negotiated purchase or by eminent domain, which is the more desirable method? In most respects, negotiated purchases seem to be preferable since they permit flexible treatment of the landowner's personal problems within the framework of the public agency's policies and objectives. For one aspect of the acquisition process, however, such a generalization cannot safely be made at the present time. In the matter of valuation of scenic easements, experience has not yet indicated whether just compensation is more realistically determined through negotiation or through condemnation litigation using a judge, a panel of commissioners, or a jury. The answer to this question will depend on how well the restriction of use which the scenic easement involves becomes understood—and how quickly this understanding comes. Studies of the effect of scenic easements on land value will be important in this matter.