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CALIFORNIA TRANSPORTATION COMMISSION

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December 22, 2008

Mr. Marc Nolan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Re: Opinion No. 07-801

Dear Mr. Nolan:

The California Transportation Commission appreciates this opportunity to comment on the request submitted by Assemblymember Anthony J. Portantino for an opinion on the question:

Does the Constitution prohibit the Department of Transportation ("Department") from selling or disposing of excess property at less than fair market value?

The Commission is aware of the October 3, 2007, letter submitted by the Department. The Commission concurs in that letter's analysis and conclusions.

When, in 1938, the voters approved Article XXVI to the Constitution (later renumbered as Article XIX), they made it clear that fuel taxes should be used for transportation purposes. As the Department points out in its letter, and as the Attorney General noted in a formal opinion, the proceeds of fuel taxes are in the nature of a trust. (See 38 Ops. Cal. Atty. Gen. 207.) If those proceeds are used to purchase property, that property is in effect held in trust. If that property later becomes excess, all the proceeds from the sale of the property likewise are subject to the conditions of the trust: i.e., the limitations set forth in what is now Article XIX, section 1, of the Constitution.

Article XIX, section 1, is part of the Constitution and can only be circumvented by another constitutional provision. Section 9 of Article XIX constitutes such a provision. It allows the sale of excess property for a price equal to the cost of acquisition of the property if the sale

meets one of the enumerated conditions set forth in that section, regardless of any intervening change in the value of the property. That exception supports the conclusion that, except for those enumerated exceptions, the sale of excess property which was originally acquired through the use of the proceeds of fuel taxes must be at fair market value and the proceeds must be used only for purposes set forth in Article XIX.

It is true that Article XIX, section 1, permits the use of fuel tax proceeds for, among other things, “research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of *their* environmental effects.” (Emphasis added.) It is clear from this language that use of fuel tax proceeds for environmental mitigation is restricted to environmental effects caused by those activities specifically enumerated in Article XIX, section 1. Since research and planning do not cause environmental effects, the environmental effects contemplated by Article XIX, section 1, are those that are caused by “construction,” “improvement,” “maintenance,” or “operation” of public streets and highways. Thus, use of fuel tax proceeds for environmental mitigation is constitutional only if the use addresses the environmental effects caused by *construction, improvement, maintenance, or operation* of public streets or highways.

With regard to the Roberti Bill (Gov. Code §§ 54235 et seq.), that measure pertains to property acquired for purposes of completing Interstate Highway 710 through South Pasadena. (See Gov. C. § 54238.3.) That highway, however, has never been completed. If the Roberti Bill’s references to “significant environmental effects” (see the Department’s letter at page 4) are references to the environmental effects caused by the completion of Interstate Highway 710, the Commission fails to see how such effects could have been caused by a project that has never moved forward. This flaw in the Roberti Bill is fatal, since it assumed the existence of a project which has never gone forward and which, therefore, has not caused “highway activities” with “environmental effects.”

If, on the other hand, the environmental effects are the result of something other than the construction of a transportation project, such as the mere sale of excess highway property, the Commission fails to see how those effects fall within the scope of Article XIX. The Roberti Bill refers to the environmental effects caused by the sales of surplus residential properties and the resulting displacement of large numbers of persons. (Gov. C. § 54235.) While the sale of surplus residential properties may result in the displacement of their occupants, and thereby might arguably cause an environmental effect, this environmental effect is not the type of environmental effect described in Article XIX, section 1. Neither the sale of surplus residential property, nor the displacement such a sale may cause, falls within the constitutional provision. It is neither construction, nor improvement, nor maintenance, nor operation of public streets or highways. Constitutionally, any mitigation of the environmental effects of the sales of surplus residential properties must be funded from other sources, and not from fuel tax revenues. Only the mitigation of environmental effects caused by construction, improvement, maintenance, or operation of public streets or highways is eligible for funding from fuel tax revenues.

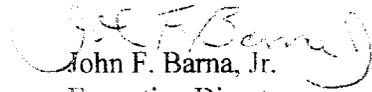
Pursuant to Article III, section 3.5, of the Constitution, the Department and the Commission must act as if that legislation is constitutional unless and until an appellate court

holds otherwise. Thus, the fact that properties acquired through the use of fuel tax proceeds were later sold for less than fair market value does not constitute any sort of precedent.

Based on the foregoing, the Commission urges the Attorney General to conclude that, in general, sales of property acquired through the use of proceeds of fuel taxes, as defined in Article XIX, section 1, must be at fair market value, excepting only those transactions described in Article XIX, section 9. With regard to the Roberti Bill, the Commission believes that measure's references to "environmental effects" represents an unwarranted and unjustified effort to interpret the reference to "environmental effects" in Article XIX, section 1, in a manner inconsistent with the intention of the voters and inconsistent with the limited scope of the environmental effects described in that constitutional provision.

If you have questions, please contact me at 916-654-4245.

Yours truly,



John F. Barna, Jr.

Executive Director

California Transportation Commission

Yellow Handout

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May 18, 2009

Mr. Marc Nolan
Deputy Attorney General
Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Subject: Supplemental Comments Concerning Request for Formal Attorney General Opinion, No. 07-801

Dear Mr. Nolan:

The Commission submits these additional comments concerning the subject of Assemblyman Portantino's request for a formal opinion of the Attorney General. This letter addresses the question, whether "planning," as that word is used in Article XIX, section 1, of the Constitution, includes the acquisition of property for the purposes specified in that section, and the disposition of such property to the extent it becomes excess highway property.

There are several independent reasons why "planning" does not include acquisition or disposition of property. The *first* is based on the language of Article XIX ("effective of the constitutional provision"), section 1, subdivision (a), the *second* is based on a consideration of the plain language contained in or referenced by section 1, subdivision (a), section 1, subdivision (b), and section 4 of the constitutional provision, and the *third* is based on the core principles of the law of eminent domain.

THE PLAIN LANGUAGE OF THE CONSTITUTIONAL PROVISION CONTRADICTS THE NOTION THAT "PLANNING" INCLUDES ACQUISITION OR DISPOSITION OF LAND

In a letter opinion dated April 14, 1978, ("Letter"), the Attorney General suggested that the law, including the constitutional provision, authorized the Department of Transportation ("Caltrans") to expend fuel tax revenues for (among other things) "the mitigation of environmental effects from the *planning* and construction of streets and highways." (Letter, p. 8; emphasis added; a copy of the Letter is enclosed.) The Letter suggests further that "planning" includes "[t]he acquisition of the property" needed for the street or highway project," and that, therefore, the environmental effects of "planning," understood to include property acquisition, is a proper item for which fuel tax revenues can be expended. (Letter, p. 8.) The Commission respectfully submits that the Letter's conclusions are incorrect.

In quoting from the constitutional provision, the Letter left out that portion of the provision which allows the use of fuel tax revenues to pay for the taking or damage to property occasioned by the purposes specified in the provision. That language, in essentially the same form, has been a feature of the constitutional provision since it was first adopted by the voters in 1938.

The only substantive amendment to section 1, subdivision (a), of the constitutional provision occurred in 1974, with the addition of the words “research” and “planning” at the beginning of the provision, and the addition of the phrase “including the mitigation of their environmental effects.” The reference to payment for property taken or damaged remained essentially the same.

Even before the word “planning” was added in 1974 to section 1, subdivision (a), of the constitutional provision, subdivision (a) allowed the use of fuel tax revenues for the acquisition of property. Thus, it cannot reasonably be concluded that the voters approved the addition of the word “planning” in order to allow fuel tax revenues to be used to pay for property acquisition; that authorization already existed. The reasonable interpretation is that the voters intended “planning” to mean simply “planning,” and not some phase of a project which occurs after the planning has been concluded. The same can be said for the word “research.”

It has been suggested that “planning” must include activities which, like property acquisition, can have environmental effects, and that property acquisition must therefore be included within the meaning of “research.” The suggestion is based on the placement of the word “planning” before the location where the phrase “including the mitigation of their environmental effects” was inserted. In other words, the word “the” as used in the phrase must refer to “planning” as well as to the other activities enumerated in the first part of the constitutional provision.

There are several objections to this suggestion. First, the mere fact that the word “planning” was placed at near the beginning of the constitutional provision, where it would appear to be within the embrace of the reference to “their environmental effects,” does not compel the conclusion that “planning” was understood by the voters to include activities with environmental impacts. To so conclude means that the voters must also have understood the word “research” to include such activities, yet the Commission is not aware of any way in which research can have an environmental impact. The reasonable interpretation of the phrase “their environmental effects” is that it refers to “environmental effects, *if any*,” rather than to rely on it as a basis to conclude that both research and planning must have environmental effects.

As for the placement of both “research” and “planning” at the beginning of the enumeration of activities, the reasonable explanation is that that placement follows the natural sequence of events: research is followed by planning, and planning eventually is followed by construction. A different placement of “research” and “planning” within the provision would have been awkward by comparison.

In addition, the retention of the reference to “payment for property,” and the placement *before it* of the reference to “their environmental effects,” can only be reasonably interpreted as a decision by the voters that the payment of the costs of mitigation of the environmental effects of property acquisition is not a proper expenditure of fuel tax revenues.

Moreover, to suggest that “planning” somehow implicitly includes property acquisition raises the question, what then was the purpose in leaving in the explicit reference to property acquisition? The voter reading the proposed amendment to the constitutional provision in 1974 would have seen the listing of a number of existing and proposed activities for which fuel tax revenues could be used – research, planning, construction, improvement, maintenance, operation, property acquisition, and administrative costs – and would reasonably have identified only one of those activities as involving acquisition of property: namely, the activity so described.

ARTICLE XIX, SECTION 4, CONFIRMS THAT “PLANNING” DOES NOT INCLUDE PROPERTY ACQUISITION

The 1974 amendments to the constitutional provision included the addition of subdivision (b) to section 1. The new subdivision, which was syntactically structured along the same lines as subdivision (a), pertains to “exclusive public mass transit guideways.”

The similarity between the amended subdivision (a) and the newly added subdivision (b) is evident in that both subdivisions provide, among other things, for the use of fuel tax revenues for “[t]he research, planning, construction, and improvement” of their respective types of projects. Both also use the phrase “including the mitigation of their environmental effects.” Since the revision to subdivision (a) and the addition of subdivision (b) occurred at the same time, it must be assumed that those words contained in both subdivisions mean the same thing.

Also added to Article XXVI of the Constitution was a new section 4. Section 4 expressly pertains to section 1, subdivision (b), and to the allocation of funds pursuant to the formulas mentioned in section 3. Section 4 contains an important limitation:

“Revenues allocated pursuant to Section 3 may not be expended for the purposes specified in subdivision (b) of Section 1, *except for research and planning*, until such use is approved by a majority of the voters cast on the proposition authorizing such use of such revenues in an election held throughout the county or counties . . .”

(Emphasis added.) Thus, section 4 draws an important distinction between “research and planning,” on the one hand, and, on the other, the other activities listed in section 1, subdivision (b), including “the payment for property taken or damaged.”

As the ballot argument in support of the proposition which added the new provisions indicate, expenditures for such purposes was subject to local control. “Proposition 5 will give Californians, at the local level, an opportunity to say how they want their gas tax dollars used.” The same sentiment is repeated through the argument in favor and the rebuttal to the argument in opposition. (See attached compilation of portions of the arguments.)

The language of Section 4 and the ballot arguments by the measure’s proponents make it clear that major expenditures of fuel tax revenues for mass transit guideways requires voter approval. The focus of voter approval as required by Section 4 is *not* on the project itself. Instead, the focus of voter approval is on the *expenditure* of fuel tax revenues. As explained by the ballot argument in support of the measure, “[b]efore highway funds may be used for mass transit projects, voters in the area involved must first approve *such use*.”

Given the fact that the focus of Section 4 is on expenditures, an exception to voter approval can only be explained if the exceptions are ones which do not involve significant expenditures of fuel tax revenues and which are necessary precursors to carrying out actual projects. “Research” clearly falls within that category, since research is relatively inexpensive and is a necessary prelude to what follows.

The same is true for “planning,” if “planning” is narrowly interpreted.¹ However, if “planning” is interpreted to include land acquisition, then there is a conflict with the only justification for the stated exemption from voter approval, since land acquisition can be a very significant portion of the total cost of a project.

¹ As the Legislative Analyst’s analysis of Proposition 5 states: “The expenditure of such revenues for public mass transit purposes in any county, or specified area thereof, except for research and planning, would be prohibited, however, unless such use is approved by a majority of voters in the county or area voting on the proposition.” In other words, the general rule is stated in terms of a prohibition absent voter approval. Any exceptions to the general rule – i.e., research and planning – must be narrowly construed.

The significance of land acquisition costs for transportation projects is illustrated by the following example. A bypass has been proposed for Route 65 near Lincoln, California, for which the Commission has been asked to allocate funds. The largest component of project cost, including support costs, is construction, while the second largest is right of way acquisition.

<u>Activity</u>	<u>Cost Percentage</u>	
Construction	218,250,000	67.4%
Right of Way Acquisition	86,750,000	26.8%
Project Approval, Environmental Documentation	5,600,000	1.7%
Plans, Specifications, and Estimates	13,400,000	4.1%
TOTAL	324,000,000	100.0%

Moreover, it makes no sense at all to assume that land acquisition will occur prior to voter approval of a mass transit guideway project, given not only the costs of acquisition but the fact that without approval for funding for the project itself, there would be no reason to acquire the land and certainly no justification for obtaining it through the State's power of eminent domain. Thus, the acquisition of property for a project which can only reasonably be construed as requiring voter approval of funding for the project for which the property is to be acquired.

It follows from the foregoing that "planning," as that word is used in section 1, subdivision (b), and in section 4, cannot reasonably be interpreted to include land acquisition. It would make no sense to allow fuel tax revenues to be spent for property acquisition for a project which the voters had not approved.

If "research" and "planning" are viewed as business enterprises, in terms of cost, the exception for them set forth in section 4 makes sense. In order to propose a project for voter approval, the need for the proposed project needs to be researched and the proposed project needs to be planned in order for the voters to know what it is they are being asked to approve.

Since the amendment to the language in section 1, subdivision (c), the addition of subdivision (b) to section 2, and the addition of section 4 all occurred at the same time, the limitation in the meaning of "research" and "planning," as used in section 1, subdivision (b), which a fair reading of section 4 compels, applies equally to the same words as used in section 1, subdivision (a).²

THE LAW OF EMINENT DOMAIN COMPELS THE CONCLUSION THAT "PLANNING" DOES NOT INCLUDE PROPERTY ACQUISITION

In order to acquire the property needed to construct a transportation project, the agency, such as Caltrans, can utilize the power of eminent domain. However, in order to so acquire property, three elements must be established:

- (a) The public interest and necessity require the project.
- (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
- (c) The property sought to be acquired is necessary for the project.

(Code of Civ. Proc., sec. 1240.030.) The same three elements must be found to exist in order for the agency's governing body to adopt the resolution of necessity which is a necessary prelude to acquisition of the property. (Code of Civ. Proc., sections 1245.220 and 1245.230, subd. (c).)

For purposes of this discussion, the second element is pertinent: "The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury." It follows from the plain language of sections 1240.030 and 1245.230, subdivision (c)(2), that in order for a resolution of necessity to be adopted, the project must *already have been planned or located*. If the project has not yet been "planned" or

² The 1978 Letter contains no discussion of the language in section 1, subd. (b), or section 4.

“located,” the power of eminent domain can not be exercised. Thus, “planning” and “property acquisition” are two discrete, separate steps in the process.³

CONCLUSION

For the reasons set forth above, and in the Commission’s earlier letter, acquisition of property cannot reasonably be considered part of “planning” within the meaning of that term as used in Article XIX, section 1, subdivisions (a) and (b). To do so is in conflict with (1) the history and plain meaning of Article XIX, section 1, subdivision (a), (2) the use of the term in Article XIX, section 1, subdivision (b), and section 4, and (3) the law of eminent domain.

Sincerely,


BIMLA G. RHINEHART
Executive Director

Yellow
Handout

³ The 1978 letter contains no discussion or reference to the law of eminent domain, let alone to the provisions of the eminent domain law described in the text.

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

EDMUND G. BROWN JR.
Attorney General

OPINION	:	No. 07-801
	:	
of	:	December 30, 2009
	:	
EDMUND G. BROWN JR.	:	
Attorney General	:	
	:	
MARC J. NOLAN	:	
Deputy Attorney General	:	
	:	

THE HONORABLE ANTHONY J. PORTANTINO, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following question:

Does the Constitution prohibit the Department of Transportation from selling or renting real property at less than the property's fair market or fair rental value when the department acquired the property with motor vehicle fuel and use tax revenues, and the property meets the definition of "surplus residential property" under the affordable housing legislation known as the Roberti Law?

CONCLUSION

Although the Constitution generally prohibits the Department of Transportation from selling or renting real property that it has acquired with motor vehicle fuel and use tax revenues for less than that property's fair market value or fair rental value, below-market sales or rentals of such properties are constitutionally permissible as a limited exception to this general prohibition if the property qualifies as "surplus residential property" under the affordable-housing legislation known as the Roberti Law.

ANALYSIS

To facilitate the construction of state roads and highways, state law permits the California Department of Transportation (Department) to buy real property, as well as to acquire real property by condemnation and eminent domain.¹ The Department typically pays for such acquisitions with funds from the State Highway Account.² The funds in the State Highway Account consist in large part of revenues generated through the imposition of motor vehicle fuel and use taxes (which for brevity we will refer to collectively as "gas taxes") that are set aside under the Constitution for certain transportation-related purposes, including payment for property taken or damaged for such purposes.³

If the Department finds that a parcel of real property acquired for highway purposes is no longer necessary (for example, because a planned project is abandoned), it may sell or exchange the property under terms, standards, and conditions established by the California Transportation Commission (Commission),⁴ and then use the proceeds or

¹ Sts. & High. Code § 26(a); *see* Sts. & High. Code §§ 102, 104, 104.6, 182; *see also* Cal. Const. art. I, § 19 (eminent domain). Some of the money in the State Highway Account comes from sources other than gas tax revenue and is therefore not subject to the constitutional restrictions. *See Prof. Engrs. in Cal. Govt. v. Wilson*, 61 Cal. App. 4th 1013, 1027 (1998); *see also* Sts. & High. Code § 183.1 (State Highway Account funds not subject to constitutional restriction are to be used for "any transportation purpose authorized by statute.") For ease of analysis, this opinion assumes that all of the relevant properties were purchased with gas tax revenues.

² Sts. & High. Code §§ 104.6, 182.

³ Cal. Const. art. XIX, §§ 1(a), (b), 2(b); *see also* Sts. & High. Code § 2101(a).

⁴ The Commission is the administrative body responsible for selecting, adopting, and determining the location for state highways as well as allocating moneys for the construction, improvement, or maintenance of the various highways or portions thereof

the new property for future state highway purposes.⁵ Properties no longer needed for present highway purposes are characterized as “excess” under the Streets and Highways Code.⁶ Although the Department is under no particular time constraints under which it must determine a given property to be “excess,”⁷ it is required “to the greatest extent possible” to dispose of a property within one year from the date that property is actually determined to be excess. The Department may also lease its excess property pending its sale or exchange.⁸

The Department owns numerous residential properties in and around the City of South Pasadena and nearby communities that were acquired with gas tax funds for a now-abandoned highway project to extend the 710 freeway (formerly State Route 7) through the area.⁹ Many of these properties, if determined to be excess, would also meet the definition of state-owned “surplus residential property” under the affordable-housing legislation commonly known as the Roberti Law.¹⁰ This legislation directs that certain properties (chiefly consisting of those affected by the 710 project) be offered for sale to purchasers who have low or moderate income at an “affordable” price that is at least equal to the state’s original acquisition cost, in part which in many cases would be less than the properties’ current fair market value.

This opinion arises because the propriety of such below-market sales has been called into question.¹² In essence, the question is whether the affordable-housing

under the jurisdiction of the Department. See Sts. & High. Code §§ 22, 75(a)-(c), 79.

⁵ Sts. & High. Code § 118; see *Bayside Auto & Truck Sales, Inc. v. Dept. of Transp.*, 21 Cal. App. 4th 561, 566 (1993).

⁶ “Excess property” is defined as “all land and improvements situated outside of calculated highway right-of-way lines not needed or used for highway or other public purposes, . . . , and available for sale or exchange.” Sts. & High. Code § 118.6.

⁷ See *Bayside Auto & Truck Sales, Inc.*, 21 Cal. App. 4th at 567-571.

⁸ Sts. & High. Code § 118.6.

⁹ Additional information on the complex history of the highway 710 extension project is available on the City of South Pasadena’s website. See <http://www.ci.south-pasadena.ca.us/transportation/710.html>.

¹⁰ The statutory scheme is set forth at Govt. Code §§ 54235-54238.7.

¹¹ Govt. Code § 54237.

¹² The Commission has adopted Resolution No. G-98-22, pertaining to the sale of the Department’s excess property, which both the Commission and the Department interpret as imposing a requirement that such properties be sold for their fair market

provisions of the Roberti Law are unconstitutional to the extent that they provide for the sale of property, acquired with gas tax funds, for less than fair market value.

Two articles of the Constitution are relevant to our analysis. The first is article XIX, which states that gas tax revenues must be used only for transportation-related purposes. The second is article XVI, which prohibits the Legislature from making gifts of public funds. We conclude that, although the Constitution generally prohibits the Department from disposing of gas tax property for less than fair market value, the Roberti Law establishes a valid exception to the general rule.

Article XIX: Constitutional Restrictions on Use of Gas Tax Revenues

Since 1938, when former article XXVI (now article XIX) was added to the Constitution, the use of gas tax revenues has been “expressly limited to the construction and maintenance of public streets and highways and enforcement of vehicle regulations.”¹³ We have previously reviewed the legislative history of the gas tax provisions, and found that the constitutional amendment was “drawn to halt attempts to divert gasoline tax funds to purposes other than the construction, maintenance, and repair of bridges and highways.”¹⁴

In 1974, former article XXVI was repealed and substantially reenacted (and then renumbered as article XIX in 1976) to provide funding for research and development of public mass transit systems, and to address environmental concerns.¹⁵ Section 1(a) was amended to permit gas tax revenues to be used not only for research, planning, construction, improvement, maintenance, and operation of public streets and highways (uses which were already authorized), but also for “the mitigation of their environmental effects.” Section 1(b) was added to permit gas tax revenues to be used for “research, planning, construction, and improvement” of mass transit systems, “including the mitigation of their environmental effects.”¹⁶ In 1981, we concluded that the new

value, with no exceptions made for the affordable housing provisions of the Roberti Law.

¹³ *Kizziah v. Dept. of Transp.*, 121 Cal. App. 3d 11, 16 (1981); former Cal. Const. art. XXVI, §§ 1-2; see 20 Ops.Cal.Atty.Gen. 224, 228-229 (1952).

¹⁴ 56 Ops.Cal.Atty.Gen. 243, 245 (1973); see *Delaney v. Super. Ct.*, 50 Cal. 3d 785, 801-802 (1990) (ballot arguments may be used to determine voters’ intent in enacting constitutional provision).

¹⁵ *Kizziah*, 121 Cal. App. 3d at 17; *Prof. Engrs. in Cal. Govt.*, 61 Cal. App. 4th at 1023-1024; 64 Ops.Cal.Atty.Gen. 218, 220-221 (1981).

¹⁶ See 58 Ops.Cal.Atty.Gen. 844, 845-847 (1975).

language allowed gas tax funds to be used for programs that would have violated constitutional restrictions before the 1974 amendments.¹⁷ The programs at issue in that instance were small-business loan guarantees and low-interest loans, which were designed to mitigate adverse effects suffered by nearby businesses as a result of prolonged construction of the Century Freeway in Los Angeles County.¹⁸

With this background in mind, we begin our analysis with the current text of article XIX, sections 1 and 2:

Section 1. Revenues from taxes imposed by the state on motor vehicle fuels for use in motor vehicles upon public streets and highways, over and above the costs of collection and any refunds authorized by law, shall be used for the following purposes:

(a) The research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of their environmental effects, the payment for property taken or damaged for such purposes, and the administrative costs necessarily incurred in the foregoing purposes.

(b) The research, planning, construction, and improvement of exclusive public mass transit guideways (and their related fixed facilities), including the mitigation of their environmental effects, the payment for property taken or damaged for such purposes, the administrative costs necessarily incurred in the foregoing purposes, and the maintenance of the structures and the immediate right-of-way for the public mass transit guideways, but excluding the maintenance and operating costs for mass transit power systems and mass transit passenger facilities, vehicles, equipment, and services.

Section 2. Revenues from fees and taxes imposed by the state upon vehicles or their use or operation, over and above the costs of collection and any refunds authorized by law, shall be used for the following purposes:

(a) The state administration and enforcement of laws regulating the use, operation, or registration of vehicles used upon the public streets and

¹⁷ 64 Ops.Cal.Atty.Gen. at 220-223.

¹⁸ *Id.*

highways of this state, including the enforcement of traffic and vehicle laws by state agencies and the mitigation of the environmental effects of motor vehicle operation due to air and sound emissions.

(b) The purposes specified in Section 1 of this article.¹⁹

The first issue for us to address is whether these provisions require the Department to realize “fair market value” when it sells excess real property that was originally acquired with gas tax funds. We think that, as a general rule, fair market value sales are required. Although the term does not appear in the text, we believe it is implicit in fiduciary principles that are associated with section 1 gas tax funds.

We have long believed that properties acquired with gas tax revenues represent an *investment* of gas tax revenues as opposed to a completed expenditure of them. Using an investment model, we have consistently found that *both* the revenues derived from gas taxes *and* any accretions or interest on those revenues are held in what amounts to a public trust to be expended for only the purposes specified in the above-quoted constitutional provisions.²⁰ Specifically, in the context of excess property, we have determined that (1) property purchased with gas tax funds is “impressed with a highway trust;” (2) an increase in that property’s fair market value is an accretion to the principal amount, and therefore held in trust for highway purposes; and (3) the failure to obtain the full value when property is sold as excess may therefore be an “unauthorized diversion” of property in violation of the Constitution.²¹

These conclusions are consistent with California Supreme Court precedent holding that, “Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust.”²² As the opinion in

¹⁹ See also Sts. & High. Code § 2101.

²⁰ 38 Ops.Cal.Atty.Gen. 207, 209-210 (1961); Atty. Gen. Indexed Ltr. 78-56 (Apr. 14, 1978) at 3; Atty. Gen. Indexed Ltr. 68-254 (Nov. 18, 1968) at 1-2.

²¹ Atty. Gen. Indexed Ltr. 68-254 (Nov. 18, 1968) at 2.

²² *Provident Land Corp. v. Zumwalt*, 12 Cal. 2d 365, 375 (1938); see also *City of Long Beach v. Morse*, 31 Cal. 2d 254, 257-258 (1947).

Support for the trust-fund theory can also be inferred by negative implication from language in section 9 of article XIX, which was added in 1978, and provides in relevant part:

Notwithstanding any other provision of this Constitution, the Legislature, by statute, with respect to surplus state property acquired by the

*Citizens for Hatton Canyon v. Department of Transportation*²³ observed, “Since 1938 there has been a constitutional prohibition . . . against the sale for less than market value of [Department-owned] properties acquired with tax fund revenues,” and the “clear purpose of this provision is to protect the highway trust funds.”²⁴

The Roberti Law provides for below-market sales of certain “surplus residential property,”²⁵ based on an express legislative finding that below-market sales in the specified circumstances serve to mitigate adverse environmental effects caused by highway activities.²⁶ Is the Roberti Law exception to article XIX’s general rule unconstitutional?

The Roberti Law’s statement of legislative intent declares that there is a “serious shortage” of affordable housing for low- and moderate-income families; that highway

expenditure of tax revenues designated in Sections 1 and 2 and located in the coastal zone, *may authorize the transfer of such property, for a consideration at least equal to the acquisition cost paid by the state to acquire the property, to the Department of Parks and Recreation for state park purposes, or to the Department of Fish and Game for the protection and preservation of fish and wildlife habitat, or to the Wildlife Conservation Board for purposes of the Wildlife Conservation Law of 1947, or to the State Coastal Conservancy for the preservation of agricultural lands.*

(Italics added.)

If excess properties could generally be sold or exchanged for less than fair market value, there would be no reason to carve out a special allowance under section 9 for “acquisition cost” sales.

²³ 112 Cal. App. 4th 830 (2003). The question before the Court in *Citizens for Hatton Canyon* was whether property was located in a “coastal zone” within the meaning of article XIX, section 9. The Roberti Law was not at issue in that case. We therefore understand the quoted passage as a statement of article XIX’s general rule, and not as an independent holding that below-market sales of properties acquired with gas tax funds are prohibited under all circumstances. *See In re Tobacco Cases II*, 46 Cal. 4th 298, 323 (2009); *Ginns v. Savage*, 61 Cal. 2d 520, 524 n. 2 (“an opinion is not authority for a proposition not therein considered”).

²⁴ *Id.* at 843.

²⁵ Govt. Code § 54237.

²⁶ Govt. Code § 54235.

activities have contributed to that shortage; that the loss of affordable housing and the displacement of households is a significant environmental effect within the meaning of article XIX; and that sales of surplus properties at an affordable price will mitigate that effect.²⁷ It is nonetheless suggested that, despite these clear pronouncements, the legislation is in irreconcilable conflict with the provisions of article XIX and is therefore unconstitutional insofar as it purports to require below-market sales of gas tax properties. We disagree.

A constitutional attack on a statute is always an uphill battle. “Legislation is presumptively constitutional and all doubts are to be resolved in favor of its validity.”²⁸ A law must be sustained against constitutional challenge whenever the law is susceptible of a reasonable interpretation consistent with the constitution.²⁹ That is all the more true where, as here, the Legislature has considered the relevant constitutional provisions in crafting the statute.³⁰

Although Roberti’s constitutionality has not been challenged in the courts,³¹ the California Transportation Commission has communicated to us its view that, while the sale of residential property at fair market value might arguably cause an “environmental effect” by displacing low- to moderate income families, this is not an environmental effect that is cognizable under article XIX.³² Rather, the Commission believes that the only environmental effects that can be validly mitigated with gas tax revenues are those that flow from the specifically enumerated highway activities that appear in article XIX, section 1(a)—that is, from the “research, planning, construction, improvement, maintenance, and operation of public streets and highways.” According to this view, the

²⁷ Govt. Code § 54235.

²⁸ *Kizziah*, 121 Cal. App. 3d at 11 (citing *Am. Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976); *Cal. Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 594 (1976)).

²⁹ *Id.*, citing *Welton v. City of Los Angeles*, 18 Cal. 3d 497, 505 (1976); *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 948 (1971).

³⁰ *Pac. Leg. Found. v. Brown*, 29 Cal. 3d 168, 180 (1981) (“[T]he presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind.”)

³¹ The Commission is obligated to enforce the Roberti Law unless the statute is invalidated by a California appellate court. Cal. Const., art. III, § 3.5.

³² See e.g., Ltrs. from Cal. Transp. Commn. to Deputy Atty. Gen. Marc J. Nolan, dated Dec. 22, 2008 & May 18, 2009.

disposal of land acquired for highway purposes, but ultimately not used for those purposes, is not an enumerated highway activity whose environmental effects can properly be mitigated with gas tax revenues.

The Commission does not dispute that gas tax revenues may be used to mitigate adverse economic effects of a highway project that actually goes forward. An example of this occurred in connection with the construction of the Century Freeway in Los Angeles County, which was delayed for many years due to a federal court injunction but was ultimately completed.³³ We issued an opinion on that occasion that the Legislature could constitutionally use gas tax funds for small business loan guarantees and low-interest business loans to assist businesses adversely affected by that project.³⁴

What, then, about the displacement of low- and moderate-income households when residential property is acquired for a highway project but is not ultimately used for that project? Even if the project is cancelled, the displacements may be permanent if the former residents cannot afford to reacquire their former homes at going rates. The Commission does not dispute the Legislature's finding that such displacement can and does occur. Nor does it seriously question the Legislature's finding that this displacement constitutes an "environmental effect."³⁵ Rather, the essence of the Commission's position seems to be that the only environmental effects that are cognizable under article XIX are those that are *directly caused by* one of the specifically enumerated activities, and that the resale of excess property is not directly caused by any enumerated activity.

We respectfully disagree. In 1978, before the Roberti Law was enacted, we considered an analogous issue in an unpublished opinion, when we were asked whether the Department's sale of excess gas tax properties for less than fair market value would be valid if the Department *itself* concluded that such sales would mitigate adverse effects

³³ See 64 Ops.Cal.Atty.Gen. at 219.

³⁴ *Id.* at 220-223.

³⁵ Indeed, a project's impacts on the availability and cost of housing are routinely treated as a significant and necessary element of "environmental impact reports" that are required under the terms of the California Environmental Quality Act. Pub. Res. Code §§ 21000 et seq.; see 14 Cal. Code Regs. § 15126.2(a) (environmental impact report "discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and *changes induced in population distribution, population concentration, [and] the human use of the land (including commercial and residential development) . . .*") (emphasis added); see also, e.g., *Lincoln Place Tenants Assn. v. City of Los Angeles*, 155 Cal. App. 4th 425, 444-454 (2007).

of highway activities.³⁶ We concluded that the Department could reasonably make that determination, and that below-market transfers were consistent with article XIX.³⁷

The Commission acknowledges that property acquisition is listed as a permissible use of gas tax funds in the text of article XIX, section 1(a). However, the Commission notes that property acquisition is listed *after* the six enumerated categories of highway-related activity (i.e., “research, planning, construction, improvement, maintenance and operation”) to which the phrase “including the mitigation of their environmental effects” is attached. This, it is argued, means that property acquisition standing alone cannot be

³⁶ Atty. Gen. Indexed Ltr. 78-56 (Apr. 14, 1978), at 8-10.

³⁷ Our reasoning included the following statements:

The surplus land in question was acquired for right-of-way purposes for State Highway Route 2. The highway route has now been abandoned and the [D]epartment is considering a sale of those properties. Sale of these properties at current market value may result in the displacement of a large number of low to moderate income families.

Gas tax revenues in the State Highway Account may be expended for highway planning.^[27] Planning includes those activities which necessarily flow from the undertaking. The acquisition of the property in question, the decision to rescind Highway Route 2 and the proposal to dispose of the surplus property are activities which are integral to the planning phase for Highway 2. Therefore, the disposal of the surplus land in this case falls within the scope of highway planning activities.

Under article XIX, section 1(a), and Streets and Highways Code sections 182 and 210, the [D]epartment may expend gas tax revenues to mitigate the environmental effects of highway planning activities. The next question which arises is whether the dislocation of a large number of households is an effect that may be mitigated under article XIX, section 1(a). [¶.] In this particular instance, the dislocation of a large number of households may be a direct result of the decision to sell the surplus property in question. The possible dislocation would also be a result or effect of the highway planning process.

A bill analysis prepared for the Assembly Ways and Means Committee in 1979 made reference to our 1978 letter and stated that the Roberti Law’s legislative intent section was “generally consistent” with the views we expressed there. Assembly Ways & Means Comm. Staff Analysis Sen. 86, as amended Jul. 5, 1979 (Sep. 5, 1979).

understood to produce environmental effects that may be mitigated with gas tax funds.

In our view, the critical phrase in article XIX section 1(a) is that gas tax funds may be used for “the payment for property taken or damaged *for such purposes.*” “For such purposes” can only refer to the purposes of “research, planning, construction, etc.” of public streets and highways. In other words, gas tax funds cannot be used to pay for property unless the property is acquired in connection with a highway purpose. This means that gas tax property acquisition is never an isolated activity, and therefore it should not be evaluated as a category of highway activity separate from other highway activities. In any event, we discern nothing in the language of section 1(a) that would foreclose the Legislature from concluding, as it has, that property acquisition (or disposition) is within the range of highway activities that produce environmental effects, and that may be mitigated with gas tax revenues.

The Commission further posits, however, that highway planning, as such, even though it is one of the aforementioned six categories of highway activity specifically enumerated in section 1(a), is not the type of activity that can cause environmental effects. We understand and appreciate the Commission’s position, but the Legislature has concluded otherwise, and we believe the Legislature’s conclusion is a reasonable one. When residential properties are acquired as a result of highway planning, but are later sold because of a subsequent decision to forgo the planned project, an environmental effect of this process may certainly be the displacement of low- to moderate-income occupants. The Roberti Law seeks to mitigate the displacement of these occupants that results (if indirectly) from highway planning and changes in plans. We simply cannot conclude that the Legislature’s findings and judgments present a “total and fatal conflict” with the provisions of article XIX.³⁸

For the same reasons, we believe that surplus residential properties under Roberti may lawfully be *rented* at below-market rates. To conclude otherwise would countenance a result that undermines the purpose of the Roberti Law, which is premised on the likelihood that there will be low- or moderate-income tenants occupying the excess units when they are offered to such qualifying occupants at below-market rates.³⁹

Article XVI: Proper Use vs. Illegal Gift of Public Funds

Having examined the specific constitutional limitations placed on the use of gas tax revenues, we must also consider the more general restrictions placed on the

³⁸ *Pac. Legal Found. v. Brown*, 29 Cal. 3d 168, 180-181 (1981).

³⁹ See Govt. Code § 54237(b) & (c).

expenditure of all public funds. Thus, we now turn to the issue whether the ban against the gift of public funds contained in article XVI, section 6, of the Constitution prohibits the below-market sale or rental of Department-owned excess properties (originally acquired through the expenditure of gas tax revenues) that also qualify as surplus residential properties subject to the affordable housing terms of Roberti. Among other things, that constitutional provision states that the Legislature shall have no power to “make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever. . . .”⁴⁰ In this case, it is suggested that such below-market sales or rentals would constitute the gift of a “thing of value”—the acquisition of or right to occupy real property—to some private person for less than what the Department could obtain on the open market. We reject this suggestion because the contemplated transfers of property fall “within the well recognized ‘public purpose’ exception to the constitutional prohibition against the gift of public funds.”⁴¹

The Legislature found and declared there to be a “pressing need for the preservation and expansion of the low- and moderate-income housing supply”⁴² and that “the sale of surplus residential property pursuant to the provisions of this article will directly serve an important public purpose.”⁴³ The Legislature’s judgment in declaring that this same property-disposal scheme serves an “important public purpose” is likewise reasonable. Thus, neither the below-market sales made pursuant to Roberti, nor the below-market rentals that are made attendant to such sales constitute an illegal gift of public funds within the meaning of article XVI, section 6.

⁴⁰ See *Jordan v. Cal. Dept. of Motor Veh.*, 100 Cal. App. 4th 431, 453 (2002) (“The Legislature holds public monies in trust for public purposes and the ‘gift of public funds’ limitation in the Constitution is directed to ensure that public funds are spent only on public purposes. [Citation.]”).

⁴¹ See *Cal. Hous. Fin. Agency v. Elliott*, 17 Cal. 3d at 583.

⁴² Govt. Code § 54235.

⁴³ *Id.*

Therefore, we conclude that, although the Constitution generally prohibits the Department of Transportation from selling or renting real property that it has acquired with motor vehicle fuel and use tax revenues for less than that property's fair market value or fair rental value, below-market sales or rentals of such properties are constitutionally permissible as a limited exception to this general prohibition if the property qualifies as "surplus residential property" under the affordable-housing legislation known as the Roberti Law.

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