

## Chapter 1

### THE POTENTIAL FOR AN EAST BAY SHORELINE PARK: THE ROLE OF THE EAST BAY CITIES IN LAND USE

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#### Introduction

The State Department of Parks and Recreation (DPR) has offered to the citizens of Albany, Berkeley, Emeryville and Oakland a solid proposal for an East Bay Shoreline Park (DPR, 1982). The park proposal recommends public acquisition of some 940 acres along the nine-mile stretch of shoreline which borders these four cities and suggests potential uses such as camping, pedestrian and bicycle trails, swimming areas, boating facilities and wildlife reserves. Although DPR engineered the draft plan, it relied heavily on the findings of the State Coastal Conservancy which, since January 1981, has called on the services of consultants, private interest groups and concerned citizens to help in the planning process.

Now we have a plan. The park, however, remains a dream. If we want an East Bay Shoreline Park, we, the citizens, must step forth and make our desires known. Most people would agree that preservation of open space is desirable, both to guard precious natural resources and also to provide much needed open space for outdoor recreation. Yet, the question of how much open space is desirable and economical causes many a heated debate. When open space is eventually set aside, often it is due to great public support and pressure. The only realistic chance that the proposed East Bay Shoreline Park has is if organizations such as Save the San Francisco Bay Association and the Audubon Society, as well as the general public, rally in an organized fashion and pressure the cities and Santa Fe Land, Inc. into meeting our needs. If we want a park, we should support the efforts of DPR to see that all the planning done thus far is not completely lost. Grassroots action now will enhance the East Bay shoreline for the use and enjoyment of generations to come.

Albany, Berkeley, Emeryville and Oakland are our cities. We are the citizens. As citizens, we need to work together with city officials to make our needs and desires known. The issues involved in the proposed East Bay Shoreline Park are

basically land use issues. Much control rests with the cities with respect to land use within their jurisdictions. If we are to work with the city officials, understanding how land use is regulated by the cities will be helpful. In this paper, we will explore the basic laws regarding the city's role in land use control. Then we will look at the specific areas in each city that are within the proposed East Bay Shoreline Park. Finally, we will focus on current and proposed land uses. By doing so, we hope to be better equipped to participate effectively in our city governments and to push for the East Bay Shoreline Park.

#### Agencies with Land Use Control in the East Bay Shoreline Park Area

Before looking at the role of the cities, we must define specifically which agencies have land use control in the project area. For the most part, the cities have direct control over land use within their boundaries. However, two additional agencies, the San Francisco Bay Conservation and Development Commission (BCDC) and the Corps of Engineers govern specific shoreline areas within the cities.

Created in 1965 by the McAteer-Petris Act, BCDC is a state planning and regulatory agency. BCDC's jurisdiction covers San Francisco, Suisun and San Pablo Bays, specific tributaries and creeks, all sloughs of the bay system and the area of land 100 feet inland from the bay (Jones and Stokes, 1979). The McAteer-Petris Act empowers BCDC to:

issue or deny permits, after public hearings, for any proposed project that involves placing fill, extracting material or making any substantial change in the use of any water, land or structure within the area of the Commission's jurisdiction.

BCDC was created primarily to protect the bay for the use and pleasure of future generations. Along the East Bay shoreline, BCDC's jurisdiction includes only the land up to 100 feet from the mean high tide and also the land along the banks of creeks 100 feet inland from the line of highest tidal action. Projects in the bay are often initially reviewed by BCDC and then further inspected by the second agency with control, the Corps of Engineers (Phillips, 1982, pers. comm.).

The Corps of Engineers is a federal agency. Its main responsibility is for the waterways, but its jurisdiction also includes all land and water up to the mean high water line. Therefore, any project affecting the water or wetlands must be approved by the Corps, including all dredging and filling activities (Jones and Stokes, 1979).

Within their jurisdictions, BCDC and the Corps of Engineers may negate any planning permits issued by a local municipality if the permit authorizes an

unacceptable use. Yet all land 100 feet from the shoreline and landward remains under the direct control of the cities. Additional agencies such as the U.S. Fish and Wildlife Service and the California Department of Fish and Game play only advisory roles with respect to land use along the shoreline.

#### The Cities - Their Organization and Land Use Authority as Local Regulatory Agencies

A city may be incorporated as either a charter or a general law city. Of the cities in which we are interested, only Emeryville is of the latter type. As a general law city, Emeryville must accept the powers entrusted to a general law city as mandated by the state constitution, and is always subject to state law if the state chooses to intervene in a local affair. As charter cities, however, Albany, Berkeley and Oakland differ from Emeryville in two main ways. First, each of these cities must adopt a charter and in doing so they can limit their own power. Secondly, a charter city enjoys the so-called "shield effect," which means that city regulation always supercedes state law with respect to local affairs (Hagman, 1982). In actuality, the differences between charter and general law cities do not affect the functioning of the city to any great degree. Understanding the differences, however, will be helpful as we turn to study the authority vested in cities and its relationship to land use. We will see subtle variations, depending on whether the city is incorporated as a general law or charter city.

The principle of police power entrusts governments to legislate for the health, morals, safety and general welfare of the community (Wright and Webber, 1978). In California the state constitution specifically grants this power to both charter and general law cities through the doctrine of home rule (Curtin, 1981). Under Art. XI, paragraph 7:

A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general law.\*

Basically, home rule allows cities to act on their police power. With respect to land use, the doctrine of home rule allows cities to exercise their police power in the areas of planning and zoning. This power may be practiced even though it may hinder the use and enjoyment of private property.

Home rule affords cities the freedom to regulate but also confers on them the responsibility to govern in the best interest of the citizens. Land use control

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\* Article XI, paragraph 7 covers both charter and general law cities. Home rule power with respect to charter cities is also covered in Article XI, paragraph 5 and Article XI, paragraph 7a.

is a major responsibility of the cities. To help insure that land use is regulated in the best interest of the community, state planning law mandates that "each city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and any land outside its boundaries which in the planning agency's judgment bears relation to its planning" (California Government Code, paragraph 65300). The general plan is to serve as "a constitution for all future development within the city . . ." as stated by the court in O'Loane v. O'Rourke 231 Cal. App. 2d 774, 782 (1965).

As the "constitution" regulating municipal land use, state law further decrees that the general plan must have nine mandatory elements addressing concerns such as housing, seismic safety, and noise (California Government Code, paragraph 65302). The general plan elements, however, that are of particular relevance to the preservation of open space and wildlife are the land use element, the conservation element and the open space element. The land use element designates the proposed general distribution, location and extent of the uses of the land (California Government Code, paragraph 65302). The conservation element concerns the conservation, development and utilization of natural resources and the open space element defines the lands to be preserved for open-space use (California Government Code, paragraphs 65302, 65560). With respect to the potential for the proposed East Bay Shoreline Park, these elements of the general plans of Albany, Berkeley, Emeryville and Oakland are of particular importance in judging each city's desired goals for the land along the bay within its jurisdiction.

The policies and goals set forth in the general plan are regulated by the zoning ordinance. Zoning may be defined as the "legislative division of the community into areas in each of which only certain designated uses are permitted so that the community may develop in an orderly manner" in accordance with the general plan (Riggs and Smith, 1974). As a matter of course, cities adopt general zoning ordinances, although state law only requires them to have a few specific zoning codes. The state law on zoning varies depending on whether a city is a general law or charter city. Whatever zoning is adopted by a general law city must comply to the State Zoning Law. Charter cities are exempt from most of the zoning laws (Hagman, 1982). For our purposes, however, it is important to note that open space zoning is required of both charter and general law cities. Section 65910 of the California Government Code reads:

Every city and county by December 13, 1973, shall prepare and adopt an open-space zoning ordinance consistent with the local open-space plan . . .

In summary, all cities must have both an open space element as part of the general plan, and the open space zoning ordinance must be compatible with the objectives and policies set forth in the plan.

#### The Cities Involved--Their Land Use Policies

In this section, we will take an individual look at the status of the proposed park areas within the cities of Emeryville, Albany and Berkeley.\* Zoning classifications and land ownership boundaries along the East Bay shoreline are presented in FIGURES 1 and 2.

#### Emeryville

The City of Emeryville has followed a pro-development strategy. Thus, most of the land west of Interstate-80 has been developed under a Planned Unit Development (PUD) zoning regulation allowing for commercial, residential and marina uses. Additional development is scheduled to take place within the PUD zone and will include building of two towers, a conference center adjacent to the Holiday Inn and expansion and improvement of the existing marina (Masterson, 1982, pers. comm.).

The remaining land of concern within Emeryville is zoned residential, the most restrictive zone in Emeryville. The city's zoning ordinance does not specify an open space zone at this point, but city officials are working on complying with the state law regarding open space zoning as stated above. At present, all the land within the residential zone is open space and although privately-owned development for uses other than recreational activities is highly unlikely. The areas in question are relatively small and any substantial development would require filling. Most of the land, however, is within BCDC's jurisdiction, and permits for filling or for uses other than for open space probably would not be granted. Furthermore, the city's general plan sets forth the policy to "protect and maintain the shoreline for recreation and open space" (Emeryville Redevelopment Agency, 1979, p. 65). Although general plans are sometimes overlooked when development interests are attractive, city officials express commitment to this policy. In addition, restrictions already discussed in effect dictate such a policy.

The open space of concern may be divided into three areas: the Emeryville Fill Southern Shoreline, the land between Powell Street and the Emeryville Crescent;

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\* A short discussion of the area in Oakland is included within the section on Emeryville.



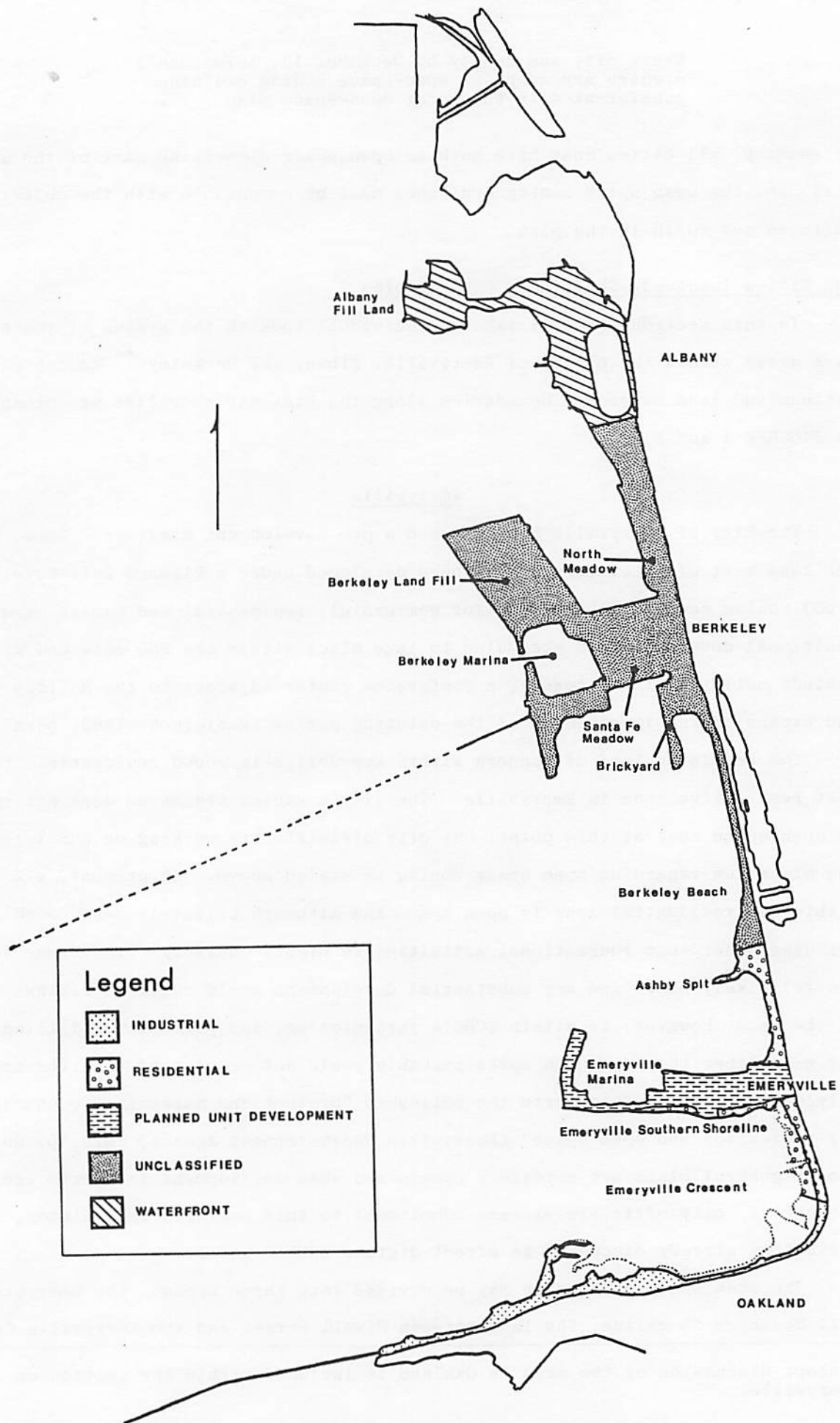


Figure 1. Zoning Classification along the East Bay Shoreline.

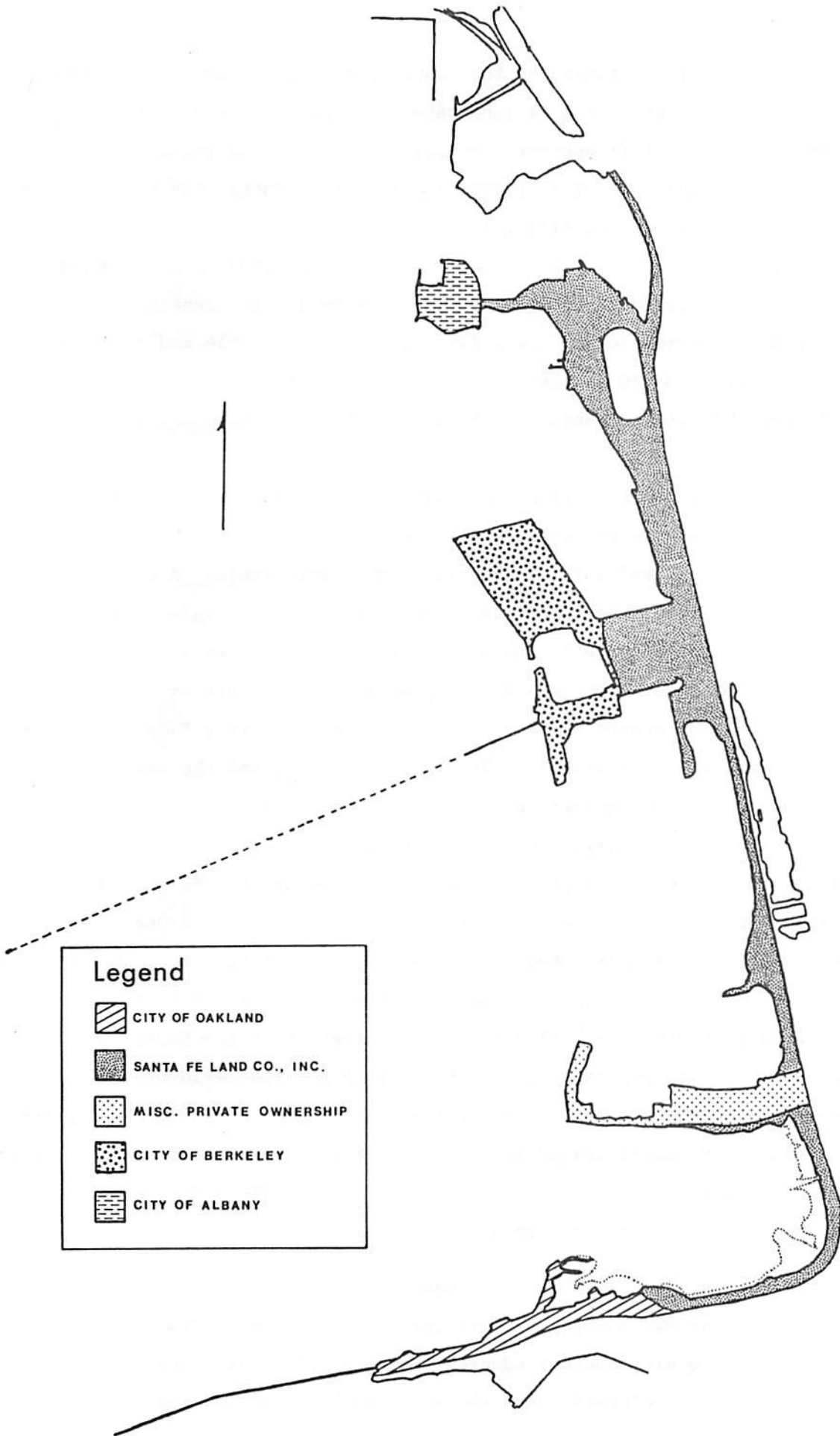


Figure 2. Land Ownership along the East Bay Shoreline.

the strip north of the fill, including the Ashby Spit; and the Emeryville Crescent (FIGURE 1). Currently, the city must landscape the strip east and west of the city hall, the Emeryville Fill Southern Shoreline. It is being required to do so by BCDC as part of a public benefit program in order to "redeem" the city for having dumped 7.5 acres of unauthorized fill into the bay. The city has no specific plans regarding either the shoreline area north of the peninsula including the Ashby Spit or the Emeryville Crescent (Fong, 1982, pers. comm.). The general plan does suggest that public acquisition of the private lands is desirable and that controls should be developed "in the use of the 'Crescent' area to preserve the existing wildlife and natural features" (Emeryville Redevelopment Agency, 1979, p. 66).

The East Bay Shoreline Park proposal includes additional uses for the residential zone areas. For the Emeryville Fill Southern Shoreline, DPR suggests that the strip would be ideal for a pedestrian and bicycle trail. A trail is also suggested for the strip just north of the Emeryville landfill. This strip ends at the Ashby Spit, a 3.5 acre jetty which is currently used primarily for fishing and the harvesting of clams. The DPR plan suggests that the Spit should be developed to allow greater access and suggests that a small parking facility, restrooms, and a viewing area would be desirable. This northern strip and the Ashby Spit are included for priority land acquisition under the DPR proposal.

With respect to the Emeryville Crescent, DPR agrees with the city that access to the area should be limited to protect the valuable wetlands. It should be noted here that a good part of the Crescent lies within the City of Oakland. Although the area in Oakland is zoned industrial, the use of this land is restricted by BCDC and thus is subject to the limitations already discussed with respect to the Crescent area in Emeryville. (For further information on the Emeryville Crescent, please refer to papers by Lisa Cohen, Jim Doyle and David Olson.)

The park development process has not yet reached the point where DPR and the City of Emeryville have participated in joint planning sessions. It seems, however, that the DPR plans are consistent with the goals of Emeryville and thus, coordination between the two should not be too difficult.

#### Albany

The City of Albany has spent years struggling with its waterfront lands, but in February of 1977 the city council adopted the Albany Waterfront Planning and Feasibility Study, often referred to as the Environs Plan (Colby, 1977). In



addition to the city council, the plan is supported by the Albany city planners and the Albany Citizens Waterfront Committee (Guletz, Arnold, 1982, pers. comm.). Furthermore, the plan has been adopted as the DPR plan for Albany. The support for the Environs Plan is documented in the Albany general plan which was revised in March of 1980 to include recognition of the plan. Also, the zoning of the area as "waterfront" with such designated uses as commercial recreation, marina facilities and swimming areas is consistent with the general plan.

The concensus and great enthusiasm behind the Environs Plan is vital to its survival, yet many obstacles must still be overcome if the plan is to be implemented. The 30 acre Albany Land Fill is publicly owned, but thus far the dump has not been closed. At present, a court case over who is responsible for the dump closure is in litigation. If the dump operator is not found liable for closure, the City of Albany will need financial help to pay for closure (Rotramel, 1982, pers. comm.). Only after the dump is closed can development of the marina and other recreational facilities included in the Environs Plan begin.

Even if the dump operator is found liable for closure, the City of Albany will remain extremely short of funds for the plan. For full implementation of the Environs Plan, much additional money will be necessary for acquiring privately-owned land and for developing facilities. Approximately 10 acres of undeveloped lands in the waterfront area are privately owned by Santa Fe. Although there is a public easement over the Santa Fe Land Fill area, acquisition of this land would be desirable to allow for a continuous recreational area from Interstate 80 to the Albany Land Fill. Furthermore, funds would be needed for the marina, fishing facilities, picnic areas, trailer sites and other recreational uses.

Obviously, then, difficulties do exist and much work and coordination will be necessary to see the Environs Plan implemented. Given the support for the plan, however, the potential for recreational development is good, especially considering that DPR has respected Albany's wishes in its proposal and that the City of Albany is willing to cooperate with DPR in order to see the plan become a reality.

#### Center

Although development of recreational facilities in both Emeryville and Albany will require much additional work, at least there exists a fair concensus on goals for the areas and a desire to see the plans implemented. The situation in the City of Berkeley, however, is a great deal more complex and sensitive.\* The

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\*Due to the sensitive nature of the shoreline issue in Berkeley, sources of information will not be disclosed.

shoreline area within Berkeley's jurisdiction may be divided into the following six parcels (FIGURE 1): (1) Berkeley Beach, 7<sup>+</sup> acres; (2) Brickyard, 27<sup>+</sup> acres; (3) Santa Fe Meadow, 71<sup>+</sup> acres; (4) North Meadow, 37<sup>+</sup> acres; (5) Berkeley Marina, 3<sup>+</sup> acres; (6) Berkeley Land Fill, 90<sup>+</sup> acres. The first four areas are owned by Santa Fe Land, Inc., while the remaining two are owned by the City of Berkeley.

The city has approved plans for the two areas it owns. The Berkeley Marina is already developed and includes the harbor area plus other recreational facilities such as a fishing pier, picnic areas and restaurants. The Berkeley Land Fill has yet to be completely closed, but development of 10 acres of the fill as the North Waterfront Park has been completed, with work on an additional 10 acres to begin in the fall of 1982. (See paper by Sharon Gray for further discussion of the Berkeley Land Fill.) The rest of the shoreline area, owned by Santa Fe, remains vacant.

For years the City of Berkeley and Santa Fe Land, Inc. have been at odds over potential use of the Santa Fe lands. The entire shoreline, including the areas owned by Santa Fe, is zoned unclassified, which allows "all uses not otherwise permitted by law provided that a use permit shall be secured for any use to be established in the unclassified district" (City of Berkeley, 1977, p. 59).<sup>\*</sup> Thus far, Berkeley, has not issued any use permits to Santa Fe. In 1972, Santa Fe sued the City of Berkeley on an inverse condemnation charge regarding the Santa Fe Meadow portion of its land. A private owner may claim inverse condemnation when regulations over private property are employed in an arbitrary, capricious or unreasonable way such that the regulation interferes with the fair use of the land by the owner. Recently, Santa Fe lost on the inverse condemnation charge, but some issues have yet to be resolved.

Because some issues are still in litigation, discussion of the area with Berkeley city officials or with Santa Fe is virtually impossible. Neither party can afford to say much about the land, as it could potentially jeopardize its case. Santa Fe, in particular, has kept very silent. Several City of Berkeley officials have expressed dissatisfaction with the DPR proposal and feel that the interests of the city were not considered fully. They are far from committing themselves on such developments as a conference center on Santa Fe Meadows or a campground in the North Waterfront Park as proposed in the DPR plan. It does seem, however, that city officials would allow some commercial development of the Santa Fe lands but only with close supervision and permission from the city. (See paper by Sharon

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<sup>\*</sup>Uses otherwise prohibited by law would include such establishments as casinos or houses of prostitution.

Gray on the North Waterfront Park and paper by Debbie Brown on the Brickyard. Many of the issues, especially with respect to the Brickyard, are the same throughout the area. Also see papers by Don Bachman, Peter Gee and Linda Goad for information on the Berkeley Beach area.)

As a way to circumvent the inherent difficulties in dealing with public and private sector interests, DPR has suggested direct acquisition of the Santa Fe land. Unfortunately, money for land acquisition is severely limited, and furthermore, Santa Fe does not seem interested in selling its land. DPR has also suggested that an option for the land could be negotiated, but again Santa Fe may not be willing to cooperate.\*

It may be, however, that direct acquisition of the land is neither the most desirable, nor realistic nor economical manner in which to handle the shoreline area. In the past, efforts on the part of Santa Fe and the City of Berkeley to work together have not been particularly successful. Yet, along many California shoreline areas, the public and private sectors have come together and negotiated development projects acceptable to all concerned parties. Many of the project negotiations have been directed by the State Coastal Conservancy. For example, the Aliso Greenbelt Plan covers an area of 5,300 acres along the Southern California shoreline. Fifteen percent of the land involved will be developed with revenue-generating uses to support the remaining 85 percent, which is to be maintained for open space and recreational activities (State Coastal Conservancy, 1982). The Coastal Conservancy was involved in another project, the Los Cerritos Wetlands in Los Angeles County. In that area, dry fill land and wetlands are mixed, but much development pressure exists. At present, however, a plan is being worked out in which the fill lands will be consolidated to allow for development, but the rest of the area is to be restored to a productive wetland habitat (State Coastal Conservancy, 1982). These examples are cited to illustrate that public and private parties can work together and develop projects which are of general benefit.

With respect to the shoreline areas within Berkeley, perhaps similar discussions and coordination, possibly mediated by the State Coastal Conservancy, could help city officials, the citizens and Santa Fe come to an agreement on development of the area. At this point, it does seem that some development of the area is probable-- Santa Fe certainly wants to develop in some way, the City of Berkeley feels that

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\* Taking an option on land means that an agreement has been reached between the owner and a potential buyer in which the buyer obtains the sole right to buy the land within a specified time period. In the shoreline area, taking an option would essentially buy time to find the money for direct acquisition.

development would generate much needed revenue and money for acquisition of the whole area is simply not available. Projection of the possible outcome of negotiation is beyond the scope of this paper. However, we will now examine two zoning measures, namely, Planned Unit Development (PUD) and density transfers, which might be utilized in this negotiating process.

PUD ordinances are becoming more and more popular, as they allow for various compatible uses within the same area (Riggs and Smith, 1974). PUD stands in contrast to traditional zoning which designates an area for a single use--such as residential, commercial, or industrial. In a PUD zone, the city can determine the uses to be permitted and also can regulate such factors as height of buildings, parking restrictions and open space requirements. Basically, PUD would allow for the entire shoreline area to be considered, and thus for compatible uses to be established on neighboring parcels. It should be noted that the PUD area in Emeryville is not indicative of the potential that PUD has for setting aside open areas and for controlling development. High-rise buildings and large condominium complexes are not necessarily the compromises given for open space.

Density transfer is another means of setting aside valuable open space. In density transfer ordinances, property owners are given the opportunity to recoup the value of a site which is desired for open space use by allowing higher density development in another area. Possibly an arrangement could be made in which Santa Fe Land, Inc. would be allowed to build with higher density in a designated area with the agreement that another area would be developed for recreational use, or possibly, land most desired for open space could be dedicated to the public in exchange for development rights. In such arrangements, the types of uses in the areas to be developed are certainly negotiable. Basically, both PUD and density transfer could serve as tools for compromise to help put as much land as possible under public control especially given the limited amount of resources available for acquisition of land.

### Conclusion

Private sector interests. Zoning ordinances. Value of land in question. General plan policies. Open space desires. Current land restrictions. Law suits. All of these factors are involved in land use questions along the East Bay shoreline. The more factors involved in any particular question, the more difficult it will be to consolidate the concerned interests and to go forth with a positive land use policy.

Although the concept that the more factors involved will require more negotiation is very straightforward, it helps to explain why we see such differences in the present situations in Albany, Berkeley, Emeryville and Oakland. As we have seen, the issue of the shoreline area in Emeryville and Oakland is fairly clear cut. The open space areas are not of high value and current land restrictions rule out the possibility of development. In sharp contrast, however, the situation in Berkeley involves a complicated mix of all of the above factors, including strong private sector interests, zoning restrictions and high land values. The situation in Albany lies somewhere in between. Some private sector interests and a law suit do complicate the picture, yet a firm consensus has been reached for a majority of the land in question.

At some point, however, the situations in Emeryville and Albany were as complicated as the issues involved in the Berkeley shoreline today. Emeryville chose to develop high-density commercial and residential complexes; Albany has set the land aside for commercial recreational uses. We must see to it that the remaining open space in Emeryville be developed for recreational use. We must help to pressure potential money sources to assist Albany in beginning recreational development of the Albany Land Fill and to acquire privately-owned land. Most of all, however, we should direct our maximum attention to the shoreline area in Berkeley. If we want most of the land set aside for open space, we need to commit ourselves to working with city officials and other interests to see that this end is met.

The fate of the East Bay Shoreline Park rests largely in our hands. We the citizens must make our desires heard.

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