CP&DR

VOL. 24, NO.7 — JULY 1, 2009 CALIFORNIA PLANNING & DEVELOPMENT REPORT

Planning, Development To Feel State Budget Cuts

Infrastructure Funding Disappears; OPR's Future Appears Doubtful

BY PAUL SHIGLEY

While California's yawning budget gap remains wide open, the revenue and spending plan eventually approved by legislators will likely have significant ramifications for land use planning and development.

Consider these budget-balancing possibilities: The state taking most of the gas tax revenues that cities and counties would get over the next two years for basic street and road maintenance – a move that would mark a major disinvestment in infrastructure; a $350 million shift in redevelopment tax increment revenues to help fund schools despite a court ruling in April that such a shift would violate the state constitution; and elimination of Williamson Act subventions for the 2009-10 fiscal year, which, if it became permanent, would cost agricultural counties $35 million annually and raise questions about the Williamson Act's long-term viability as a farmland protection tool.

There is more. Lawmakers and the governor himself have targeted the Governor's Office of Planning and Research for dismantling, parceling out its functions to existing agencies. Such a move might leave local planners without the technical assistance they need to comply with the California Environmental Quality Act, develop general plans and properly interpret statutes.

The 2008-09 fiscal year ended with partisan divisions solidified in Sacramento, and there is no prospect of a thaw in the current budget debate. Democrats want to close an estimated $24 billion budget gap for the just-closed fiscal year and 2009-10 cycle with an approximately 50-50 combination of tax increases and spending cuts, while Republicans oppose any tax increases. Gov. Schwarzenegger appears to be somewhere in between the two, although he has threatened to veto most tax-boosting proposals.

A Schwarzenegger proposal to borrow $2 billion in local property tax revenue during the 2009-10 fiscal year, which begins July 1, was taken off the table in mid-June when Republican lawmakers objected. But the plan to take – not borrow – $986 million in Highway User's Tax Account money (the gas tax) ear-

– CONTINUED ON PAGE 3

insight

WILLIAM FULTON

Bureaucratic Compliance With SB 375 May Not Reduce Driving

Now that the age of greenhouse gas emissions reduction is upon us, I think there's an important point worth making: Government agencies in California can try to comply with SB 375 – or they can focus on reducing driving.

There is a lot of overlap between the two, but they are not exactly the same thing. One is a complicated governmental bureaucratic process; the other requires governmental action about infrastructure and new development.

A few weeks ago I got into hot water with some folks for the way I characterized a panel discussion at California State University, San Bernardino's Leonard Transportation Center.

– CONTINUED ON PAGE 12

in brief

There is no evidence that California's enterprise zone program – the state's largest economic development effort – has increased jobs in program areas, according to a Public Policy Institute of California study.

"Our main finding is that, on average, enterprise zones have no effect on business creation or job growth," PPIC researchers Jed Kolko and David Neumark wrote.

The two researchers constructed detailed maps of the 42 enterprise zones and surrounding areas, and matched their employment data with similar data for nearly every business in the state. They then compared employment and business growth within the zones to similar areas outside them. Researchers followed up with surveys of the zones' administrators.

Although the overall program appears to have no effect on economy activity, the PPIC study found that zones with fewer manufacturers of goods and those in which administrators made comparatively stronger marketing efforts did stimulate some job growth.

The state created the enterprise zone program in 1986. It offers a variety of tax benefits to businesses that move to and expand within zone boundaries – incentives that cost the government about $500 million annually. Zones were scheduled to begin phasing out three years ago, but state lawmakers have extended zone lifespans.

The PPIC report is not the first to question the program's effectiveness. In 2006, a California Budget Project study – which the PPIC researchers dismissed as flawed – concluded no link existed between enterprise zone tax breaks and job growth. That same year, an Assembly committee called for greater enterprise zone accountability (see *CP&DR In Brief*, June 2006). Last year, the Legislative Analyst's Office recommended scaling back the program because of its uncertain benefits.

In response to the PPIC study, the California Association of Enterprise Zones released a working paper, by University of Southern California business professor Charles Swenson, that concludes enterprise zones reduce unemployment and raise wages.

The PPIC report is available at http://www.ppic.org/main/publication.asp?i=742. Swenson's research is available at http://www.marshall.usc.edu/leventhal/research/working-papers.htm.

The PPIC's enterprise zone report followed a separate PPIC study of local economic development efforts. Undertaken just before the ongoing recession hit, the study contains these findings:

- The number of local economic development activities is increasing.
- The more redevelopment projects a city undertakes, the more likely it will be spearheading other economic development efforts.
- Such local characteristics as jurisdiction size, employment base, resources and needs influence what local governments do for economic development.
- The perception of competition among local communities drives economic development strategies, although the influence of competition may be exaggerated.
- Local officials are influenced by the belief that state fiscal policies favor retail activity over manufacturing.
- There is little formal evaluation of local program effectiveness.

The report by the PPIC's Max Neiman and Daniel Krimm recommends the state implement a more systematic economic development effort that includes consistent cooperation with local governments. The report, *"Economic Development: The Local Perspective,"* is available at http://www.ppic.org/main/publication.asp?i=787.

Correction. The June *Redevelopment Watch* story incorrectly portrayed an estimate of the Legislative Analyst's Office. The LAO estimated that, over the last five years, redevelopment agency underpayment of pass-throughs to schools and school errors in reporting these pass-throughs to the state increased the state's education costs by about $98 million. The "contacts" section for that same story incorrectly spelled the name of California Redevelopment Association Executive Director John Shirey. ■

editor's note

Welcome to the first all-electronic edition of *California Planning & Development Report*. I'm certain you have already found our new format more colorful than previous editions, and I hope you'll find the new format more useful as well.

As you know, we decided to stop printing and snail-mailing *CP&DR* in favor of providing our subscribers with an electronic version of the newsletter. I would like to note a few things about the change:

- Subscribers have this issue in their possession on the first of the month – roughly 10 days earlier than when we printed and mailed the newsletter – even though our deadline was later in the month. Thus, although the state's budget situation might have evolved a bit, our story on the fiscal mess is more timely than it would have been under the old "dead tree" format.
- The issue you have here is 12 pages, four pages fewer than our typical monthly offering. However, you are going to receive another newsletter in about two weeks – and another newsletter about two weeks after that one. With our shift to a twice-a-month production schedule, we will be providing subscribers with more news and analysis than ever before.
- The links in this PDF document are live. Simply place your cursor on a website address and click. Watch for a lot more of this in coming issues.

We invite you to contact us at the email address or phone number below with any comments or questions you have about our new electronic format. We hope you're as happy with it as we are. ■

– PAUL SHIGLEY

CP&DR

William Fulton
Publisher

Paul Shigley
Editor

Morris Newman
Kenneth Jost
Contributing Editors

is published semi-monthly by

Solimar Research Group
Post Office Box 24618
Ventura, California 93002

Telephone: 805/643-7700
Facsimile: 805/643-7782

Subscription Price: $238 per year

ISSN No. 0891-382X

Visit our website:
WWW.CP-DR.COM

You can e-mail us at:
INFO@CP-DR.COM

Redevelopment Revenue Shift Still Possible

– CONTINUED FROM PAGE 1

marked for cities and counties in the 2009-10 fiscal year has gained traction in both parties. The Schwarzenegger-backed plan would take an additional $750 million in 2010-11. The state would use the money to service transportation debt. The administration also wants to withhold $288 million of Proposition 42 gasoline sales tax money that would otherwise be spent on road projects during the 2009-10 fiscal year.

"It's absolutely devastating. It just makes no sense," said DeAnn Baker, a lobbyist for the California State Association of Counties (CSAC). "I don't think I have ever seen county engineers so distraught over something."

The cut in money for road upgrades and repairs would more than offset the $600 million in federal stimulus money headed to California regions for transportation projects, Baker said. Revenues generated by the gas tax and Proposition 42 make up 50% to 90% of counties' road funding. The cut in local transportation spending would mean the elimination of about 4,000 jobs in county public works departments alone, and the suspension of such basic activities as repairing traffic signals, operating drawbridges, removing snow and clearing culverts, according to Baker.

Scores of cities and counties have adopted resolutions opposing the state's taking of the gas tax revenues, and the League of California cities has released a legal opinion concluding that the seizure of the gas tax would be unconstitutional. The CSAC board of directors even endorsed a 5-cents-a-gallon gas tax increase, but that idea has gone nowhere in the Capitol.

The proposal to shift redevelopment agency revenues to schools – first approved last fall – appeared doomed after a Sacramento County Superior Court judge ruled it unconstitutional because the money must be spent on redevelopment activities (see *CP&DR Redevelopment Watch*, June 2009). But lawmakers say they can fix the legal shortcoming with SB 80, which says the revenue would be available only to school districts located entirely or partly in redevelopment project areas. Lawmakers and the administration are considering shifting $350 million a year for three years.

Despite the language change in SB 80, the California Redevelopment Association continues to maintain that such a shift would be illegal. One reason is that the state's taking of so much tax-increment money would impair agencies' ability to make contractually required payments to bondholders and public entities that have financed redevelopment projects, said CRA Board of Directors President Jim Kennedy.

Redevelopment projects are already being delayed because of real estate and credit issues, said Kennedy, who heads Contra Costa County's redevelopment agency. The proposed tax increment shift would further freeze redevelopment activity at a time when the federal government is investing billions of dollars in public projects, he said. The drastic reduction in road and street maintenance funding is one more concern, he said, adding, "The inability to maintain infrastructure adequately is one of those pennywise, pound foolish decisions."

A few cities seek to exploit the state's pursuit of revenues to balance its books. The City of Industry, for instance, would have redevelopment agencies turn over a percentage of tax-increment revenue to the state in exchange for the state extending the lifespan of redevelopment project areas by 30 years – whether blight exists or not. Industry could use tax-increment financing to subsidize infrastructure for a proposed football stadium. The CRA board opposes the idea, and CRA Executive Director John Shirey, in a recent legislative update, reiterated that stance.

"We continue to hear about a few local agencies lobbying for special allowances in exchange for giving up funds. These efforts should be stopped," Shirey wrote. "The reason is simple: Any take of redevelopment funds by the state for non-redevelopment purposes violates the California Constitution and is directly counter to the primary argument in CRA's successful lawsuit against the state."

Schwarzenegger's pronouncement in early June that the Governor's Office of Planning and Research (OPR) is a "total waste" virtually kills the agency. Among other things, OPR operates the State Clearinghouse for California Environmental Quality Act documents and maintains general plan guidelines. Because both of these services are required by law, they would have to be parceled out to other agencies if OPR is dismantled.

The larger question for local planners is which state agency, if any, would offer a broad perspective on land use planning and provide the technical advice that ORP has given since the 1970s. Both the California Air Resources Board and the California Energy Commission appear eager to assume the role of technical expert, which would be a departure from their traditional roles as regulatory agencies.

Elimination of OPR should be worrisome to planning practitioners, said Pete Parkinson, vice president of policy and legislation for the American Planning Association, California Chapter. "You would lose an office that is focused on planning in this state. You can argue about how effective it has been, but that's really a function of the different administrations' priorities and focus," he said.

The planning organization has not lobbied strongly for keeping OPR in place, said Parkinson, because the organization must pick its battles carefully and because it recognizes the magnitude of the state's budget problem.

Those budget woes, combined with the economic downturn, has created a "giant sucking sound of money disappearing from local governments," Parkinson said. That, in turn, reduces money available for long-term planning, which is a mostly discretionary activity and therefore easier to cut in the face of so many underfunded mandates, he said. Many general plan updates will be set aside, Parkinson predicted.

The proposed suspension of Williamson Act subventions should also concern planners, said Parkinson. The act provides for property tax breaks for agricultural landowners who agree not to develop their property. The state reimburses counties for the property tax revenues they lose, which amounts to more than $1 million apiece for big farm counties. The Schwarzenegger administration has proposed eliminating the subvention virtually every budget year, but lawmakers have refused to go along – until this year. Planners and farmland preservation advocates worry that if the subvention is ended for a year, restoring it may be difficult. That could result in some counties pulling out of the Williamson Act program, potentially increasing growth pressure on farmland. ■

■ Contacts:

League of California Cities: www.cacities.org

California State Association of Counties budget page: www.csac.counties.org/default.asp?id=235

California Redevelopment Association: www.calredevelop.org

Department of Finance: www.dof.ca.gov

Pete Parkinson, American Planning Association, California Chapter, (707) 565-1925.

Jim Kennedy, California Redevelopment Association, (925) 335-7200.

LOCAL WATCH

PAUL SHIGLEY

Ontario Seeks To Make Its General Plan Everyday Tool

The City of Ontario is on the verge of adopting a general plan unlike any in California. Its goal of transforming Ontario into a bustling urban place of 350,000 residents with the state's most elaborate transit hub is not what sets the plan apart. Instead, it is how the plan is being developed on the Internet and in conjunction with other city plans and policies.

The general plan is only a part of a more extensive "Ontario plan," and that broader map functions as an interactive website. In other words, the Ontario plan is not something simply loaded onto a website for future reference. Rather, it evolves over time based on day-to-day activities and the city's changing priorities.

City Manager Greg Devereaux said Ontario did not want to invest heavily in a general plan update only to wind up with a document that sits on a shelf. "We wanted it to be a business strategy and to institute an approach to governance that has developed over the last 10 years among the council and the staff," he said.

The Ontario plan, whose development is overseen by Devereaux's office, is intended to serve as a daily tool for use by city employees, residents and anyone doing business with the city. The plan provides comprehensive, easily accessible information on the city's operations – public works, emergency services, finance, land use planning, and more – as well as on such important community issues as health care and education. The idea is to develop the general plan in the context of all these dynamics, and vice-versa.

Ontario officials want the general plan to be part of a feedback loop that includes city staff and the public, explained Kati Rubinyi of The Planning Center, the city's consulting firm. "The best way to leverage the general plan's context was to put it on the web," said Rubinyi, who serves as the site's architect. "It would afford us easy use and flexibility."

The Ontario plan website is up an running, with additions and refinements in the works.

When setting out to update its 1992 general plan more than four years ago, Ontario employed a fairly standard "visioning" process. That process was well along when the city hired The Planning Center in 2006 and the idea of a more democratic, web-based approach emerged. Since then, the consulting firm and the city have built and continually refined the website. Ontario Planning Director Jerry Blum said he sees the web approach as an effective way to get information into planners' hands more quickly. The first thing they do in the morning is log on to the site and instantly gain access not only to general plan policies but also to City Council priorities and information that is constantly updated by city workers in building, planning, public works, finance and other departments.

"You can be sitting at your desk and have a wealth of information at your fingertips," Blum said. In addition, land and business owners, development applicants and the general public may jump onto the website and dig as deeply as they want for information about parcels of land, development projects, infrastructure and city programs.

"You are able to vertically and horizontally layer information with the website," said Brian Judd, vice president of community planning and design for The Planning Center. "That's the biggest change from a paper document, where you create a separate website for community news, and a separate website for the policy plan, etc."

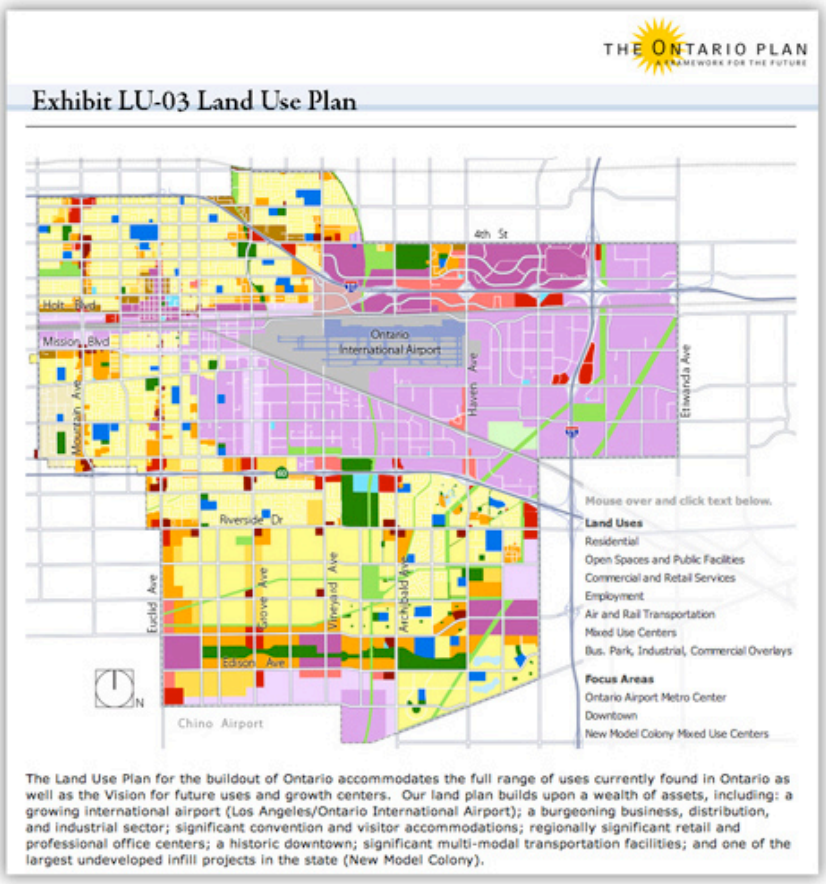
Judd noted that people participating in development review meetings will no longer need stacks of documents spread across a table. Instead, everyone can simply follow along on the website.

Judd, Blum and others presented a draft Ontario plan in the spring to the American Planning Association, California Chapter's California Planning Roundtable, which is working on "reinventing the general plan." Roundtable member and Fullerton Planning Manager Al Zelinka said roundtable members were a bit skeptical at first, but were mostly convinced in the end.

"By and large, the roundtable found the presentation to be intriguing and innovative. I'm not saying that, wholesale, this is the way to go, but there are a lot of lessons in this for other cities," Zelinka said of the Ontario plan. "Using the general plan as an overall governance tool is an idea the roundtable found to be intriguing. And having it owned by the city administration, rather than owned by the community development department, is interesting."

Zelinka said roundtable members had concerns about staffing levels to maintain such a comprehensive plan, and they questioned when plan changes might qualify as "projects" requiring review under the California Environmental Quality Act (CEQA).

Ontario city officials say maintaining the plan is easy because so many aspects of it are part of daily operations. Moreover, the plan can evolve as needed. "You will never have to have the kind of [gen-



This general plan map is interactive for Ontario plan website users.

eral plan] update that people go through in this state," Devereaux said.

Judd said that for CEQA purposes, a general plan amendment would remain a "project" but revisions of portions of the Ontario plan that are only linked on the website to the general plan would not trigger CEQA review. The distinction should be easy to detect, he said.

Once the plan is adopted, the city and The Planning Center intend to immediately move forward with a monitoring and tracking program that includes performance measures, according to Judd. Ontario has scheduled final workshops and hearings on the general plan update this month, with adoption possible by the end of the month.

In 2007, the City Council adopted an "Ontario Vision," with four fundamentals that reflect strong pro-growth sentiment. In light of that vision, The Ontario plan outlines a new Ontario Airport Metro Center north of the Ontario Airport that would be a site for a huge multi-modal facility featuring high-speed rail, magnetic levitation trains, bus rapid transit, airport shuttles, local transit and more. The metro center would be a major regional job center.

The plan also reconsiders past planning for Ontario's 8,000-acre portion of the former San Bernardino County dairy preserve, from which nearly every dairy has since relocated (see *CP&DR Local Watch*, June 2003, March 2000). The draft general plan calls for more housing units – up to 60,000 – and more of a mixed-use approach in the old preserve, now known as the "New Model Colony." ■

■ Contacts:
Greg Devereaux and Jerry Blum, City of Ontario, (909) 395-2010.
Brian Judd and Kati Rubinyi, The Planning Center, (714) 966-9220.
Al Zelinka, California Planning Roundtable, (714) 738-3347.
Ontario Plan: www.ontarioplan.org

Planning Roundtable Tackles The General Plan

A spate of climate-related legislation – especially last year's SB 375 – has focused new attention on how long-range land use planning has consequences for the emission of greenhouse gases. Partly for this reason, the California Planning Roundtable (CPR) has undertaken a project it calls "Reinventing the General Plan."

The project aims to develop a website-based incubator of good general plan ideas, explained Elaine Costello, who recently retired as Mountain View community development director and who is managing the CPR project.

"Our theory is that progressive ideas and things that are innovative are parts of plans, but they are not the whole plan," Costello said. "We want to dig in and point out to people what is the best in these general plans."

To that end, the roundtable is spotlighting aspects of new general plans by the cities of Ontario, San Diego, Sacramento and Truckee, and by Marin County. For example, the organization spotlights a map in the Sacramento general plan clearly showing which parts of the city the new plan leaves unchanged and which parts could change, she said. What is impressive about the Ontario plan is that it is truly an interdepartmental effort, and that its web-based approach allows for an immediate focus on implementation by making the plan a daily tool, Costello said.

"It really is a *city* document," she said. "It really is a general plan for the entire community that will be used for budgeting and infrastructure decisions."

Implementation of an adopted general plan's objectives and policies often gets lost amid the daily grind, Costello observed, and required annual reports on implementation can lead to last-minute scrambles to figure out what has happened. With the Ontario approach, "from the minute you start, you're looking at implementation."

Writing a general plan should be less of a bureaucratic exercise and more about creating practical tools for planning and managing the city or county, she added. "People are spending a fortune on general plans, and they are not getting the value that they should. They are not getting the documents that they can use and revise easily."

The California Planning Roundtable intends to roll out the new incubator website in time for the American Planning Association, California Chapter's annual conference in September.

California Planning Roundtable: www.cproundtable.org ■

High Court Clears Way For Prop 218 Challenges

Attorneys Differ Over Decision's Importance For Future Litigation

BY PAUL SHIGLEY

For the second time in less than a year, the California Supreme Court has ruled for individual property owners contesting local government assessments, opening the door for future challenges based on Proposition 218.

In the latest case, the court held that Tiburon property owners contesting an assessment levied under the Municipal Improvement Act of 1913 need not abide by cumbersome "reverse validation" procedures. The unanimous decision clears the way for the property owners to challenge the assessments as violations of Proposition 218.

The precise reach of the court's ruling is unclear. Attorney Frank Mulberg, who represented himself and the owners of one other home, said the decision "opens the door, at a minimum, for class action lawsuits. The validation procedure as it relates to homeowners who want to contest an assessment is now gone. It is no longer in the law."

That change is important, said Mulberg, because in a reverse validation lawsuit, a property owner has to prove an assessment is improper. But under the court's ruling, there is no assumption the assessment is legal, and the government entity bears the burden of proof.

"Any one homeowner can now challenge the assessment for any reason, Proposition 218 or otherwise," Mulberg said.

However, attorney Michael Colantuono, who represented the League of California Cities and the California State Association of Counties in the case, called the Supreme Court's decision "a big so-what." The ruling applies only to the 1913 improvement act, and local governments may utilize other statutes to levy property assessments, he said.

Tiburon Town Attorney Ann Danforth agreed the decision will not have major implications, because all the court did was clarify the rules for challenging assessments. "The ambiguity is gone," she said.

More important than the ruling itself is the state high court's ongoing treatment of local revenue measures, Colantuono suggested.

"The decision is evidence that this is a court that is conservative on matters on local government finance," said Colantuono, who helped argue the Tiburon case at the high court. He rejected the idea that the latest ruling bolstered Proposition 218, the 1996 follow-up to Proposition 13 that requires an election on tax increases special assessments and fees. Conversely, Mulberg said the ruling, combined with a 2008 state Supreme Court decision, has breathed new life into Proposition 218.

Last year, the state Supreme Court struck down a Santa Clara County open space assessment on 314,000 parcels. The court ruled the assessment – which an open space district had levied under the Landscaping and Lighting Act of 1972 – provided only general benefits and therefore was a special tax that was subject to Proposition 218's voter-approval requirement (see *CP&DR Legal Digest*, August 2008). The ruling in that case, *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority*, (2008) 44 Cal.4th 431, was a loss for local government and helped provide the basis for the more recent decision involving the Marin County town of Tiburon.

In 2003, the Tiburon Town Council began work on the Del Mar Valley Utility Undergrounding Assessment District based on the Municipal Improvement Act of 1913. The town commissioned an engineer's report, which determined that placing utility lines underground would provide aesthetic, service reliability and safety benefits to the owners of 221 parcels. The report estimated the project would cost $4.2 million, and individual assessments would range from about $7,200 to $31,200. In early 2005, the town mailed ballots to property owners. The ballots were weighted based on the amount of the assessments, and owners of parcels representing 71% of the total proposed assessment voted for the project. In May of 2005, the Town Council officially formed the district and assessed the property owners.

The owners of two properties – Mulberg and his wife, Shelley, and Jimmie and Jean Bonander (she's the city manager of neighboring Larkspur) – sued Tiburon. They argued the assessment violated Proposition 218 because the $31,146 assessment against each of their properties exceeded the special benefits conferred, as overhead wires would remain in place nearby. They further contended the town's procedures were illegal and the town had cherry picked parcels for inclusion in the assessment district.

A trial court judge decided that the lawsuit was a reverse validation action. (A local government will frequently file a validation lawsuit seeking court confirmation that an assessment is legal.) Because Mulberg did not meet the summons and publication requirements in the validation statutes (Code of Civil Procedure §§ 860 – 870.5), the court threw out the lawsuit. The First District Court of Appeal upheld the lower court, ruling the validation procedure applied "regardless of whether the challenge is premised on asserted violations of Proposition 218 or any other constitutional provision" (see *CP&DR Legal Digest*, April 2007).

The case then moved to the state Supreme Court. The issue, Justice Joyce Kennard summarized in the unanimous opinion, was whether the general validation procedure applied to assessments levied under the 1913 act. The court undertook a lengthy discussion of the validation procedure, and the 1913 act (Streets and Highways Code § 10000 *et seq.*), both of which the Legislature updated in 1961. The validation statutes contain a procedure to validate and to invalidate public agency matters, the court concluded.

However, the 1913 act permitted only validation actions brought by the legislative body or the contractor involved. The 1961 legislative updates maintained this provision. "[W]hen the Legislature in 1961 amended [Streets and Highways Code] § 10601 to incorporate the general validation procedure, it expressly limited which parties might avail

themselves of the new procedure," Kennard wrote. "[T]he Legislature intended to activate the general validation procedure set forth in the Code of Civil Procedure only for action to validate assessments, not for actions to contest assessments."

The court conceded this reading resulted in internal inconsistency, because § 10400 explicitly permits validation actions to contest an assessment. "In our view, the better interpretation of § 10601 is to give effect to the limiting language in that section even at the cost of rendering meaningless the section's cross-reference to § 10400," Kennard wrote.

Thus, the Tiburon property owners did not have to comply with the validation procedure in their suit contending the city should have complied with Proposition 218. The decision sends the case back to Marin County Superior Court, where Mulberg said he intends to argue the merits of the case.

Mulberg has filed two other lawsuits, as well. One suit involves a challenge to a second assessment district formed to cover the same undergrounding project. Tiburon formed the supplemental assessment district after learning the project would cost about twice as much as originally estimated. Tiburon won in the trial court, but the case, *Bonander v. Town of Tiburon*, No A119918 (*Bonander II*), is now at the First District Court Appeal. A third lawsuit, this one seeking damages for alleged breach of contract and breach of fiduciary duties, is pending in San Francisco Superior Court's Complex Civil Litigation department.

The actual undergrounding project remains on hold. ■

- The Case:
  Bonander v. Town of Tiburon, No. S151370, 2009 DJDAR 8246. Filed June 8, 2009.
- The Lawyers:
  For Bonander: Frank Mulberg, (415) 388-0605.
  For Tiburon: Ann Danforth, town attorney, (415) 435-7370.

prop 218

Challenge To Pomona BID Assessments Rejected

Property assessments levied to fund the downtown Pomona Property and Business Improvement District did not violate Proposition 218, the Second District Court of Appeal has ruled for a second time.

The court issued the same ruling in 2006, which the state Supreme Court agreed to review. Instead of deciding the case, the state high court struck down an assessment in a different Proposition 218 case – *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority*, (2008) 44 Cal.4th 431 (*SVTA*) – and directed the Second District to rehear the Pomona case in light of the *SVTA* ruling.

Proposition 218, a progeny of Proposition 13 that added articles XIII C and XIII D to the state constitution, requires voter approval of most property-based assessments and fees. In *SVTA*, the court held that the measure shifts the burden of proof in assessment lawsuits to the government agency that imposes the assessment, and that courts should independently review levies.

Pomona's Property and Business Improvement District (PBID), as do many of the state's business improvement districts seeking to boost commerce downtown, assesses property owners to pay for security, streetscape maintenance, marketing and special events. In 2004, the city's affected property owners voted 126 to 66 to form the district. The weighted voted, based on property assessments, was $338,000 to $153,000.

In 2006, property owner Robert Dahms sued the city of Pomona to block the assessments. At the heart of Dahms's argument was the contention that Pomona, in forming the district, had violated Proposition 218's requirement that the assessment on each parcel in the district shall not exceed the reasonable cost of the proportional special benefit. Dahms's suit contended the city's discounted assessments for nonprofit entities, such as fraternal organizations and churches, was unjustified; some commercial properties were improperly assessed; and the city's method of determining assessments was illegal.

In rejecting Dahms's claims, the appellate court disagreed that Proposition 218 does not allow discounted assessments because they would not be proportional to the benefits received.

"[A]rticle XIII D does not require that the assessment *be no less than* the reasonable cost of the proportional special benefit conferred on that parcel," Justice Frances Rothschild wrote for the court. "That is, article XIII D leaves local governments free to impose assessments that are less than the proportional special benefit conferred – in effect, to allow discounts."

A discount on a parcel could run afoul of the constitution, Rothschild wrote, if it caused assessments on other parcels to exceed the cost of the proportional special benefit. However, Dahms did not argue this was the case in downtown Pomona.

In a separate concurring opinion, Orange County Superior Court Judge Ronald Bauer, sitting by assignment to the Second District, disagreed with the majority's handling of this question. Proportionality is "at the heart" of article XIII D, Bauer wrote, and thus cannot be ignored. Because the PBID system has no revenue other than the assessments, it "seems inevitable that an assessment against any parcel that is disproportionately low in relation to the benefits conferred thereon (that is, a 'discount') would lead to an impermissibly high assessment against one or more other parcels. This would be a fatal flaw in such a system."

Because Dahms did not make this argument in his suit, Bauer sided with the two-justice majority in the ruling.

In rejecting Dahms's contention that some commercial parcels had been improperly assessed, the court held that even though Proposition 218 shifted the burden of proof in assessment litigation to the city of Pomona, Dahms failed to "support his own arguments on appeal in a manner that will make them susceptible of rational evaluation."

Finally, the justices disagreed with Dahms's contention that the city's formula for determining assessments was illegal because it counted only the length of street frontage of a property's address, and did not consider side street frontage. According to the formula, 40% of a property's assessment is based on street frontage, 40% on building size and 20% on lot size. The inclusion of building and lot size as criteria "should compensate for any disproportionality that might have resulted from exclusive reliance on front footage," – CONTINUED ON PAGE 8

– CONTINUED FROM PAGE 7
the court ruled.

Dahms further contended that the city of Pomona failed to separate "general benefits" from "special benefits" in its assessments, noting that rising property values resulting from the assessments would be a general benefit. In *SVTA*, the state Supreme Court struck down a parks and open space assessment because it provided only general benefits – such as increased access to recreational areas and protected views – to all properties no matter how situated.

"The PBID is nothing like the district at issue in *SVTA*," Justice Rothschild wrote for the appellate court. "In *SVTA*, all seven of the putative special benefits were merely the alleged *effects* of the two services directly funded by the assessments, namely, the acquisition and maintenance of open space land. In contrast, the special benefits conferred by the PBID are not mere *effects* of the services funded by the assessments. Rather, the PBID's services themselves *constitute* special benefits to all of the assessed parcels. The assessments directly fund security services, streetscape maintenance services, and marketing and promotion services for the assessed parcels. *SVTA* in no way suggests that those services are not special benefits."

Dahms also argued the required public hearing on the assessment was premature because the city conducted the hearing on the 45th day after it mailed notices of proposed assessments. In rejecting the contention, the court noted that article XIII D requires the hearing "not less than 45 days after mailing the notice." ■

■ The Case:
Dahms v. Downtown Pomona Property and Business Improvement District, No. B183545, 09 C.D.O.S. 5797, 2009 DJDAR 6855. Filed May 12, 2009. Modified June 8, 2009, at 2009 DJDAR 8321.

■ The Lawyers:
For Dahms: Ronald Friendt, Martineau & Knudson, (951) 285-9955.
For PBID: Scott Nichols, Alvarez-Glasman & Colvin, (626) 858-9121.

ceqa

No Subsequent EIR Required For Project In Specific Plan

Approval of an 88-acre warehouse distribution facility at March Air Reserve Base was exempt from environmental review because the project was included in a general plan and a specific plan, both of which received environmental analysis, the Fourth District Court of Appeal has ruled.

The unanimous decision of a three-judge appellate panel overturned a Riverside County judge who had ruled that the Tesco warehouse development was a discretionary project subject to the California Environmental Quality Act (CEQA). The Fourth District, Division Two, determined that the project required only ministerial approval and thus was exempt from CEQA requirements.

During the early 1990s, the Pentagon began scaling back its operations at the site along the I-215 freeway in Moreno Valley by converting a 6,500-acre Air Force base into a 2,000-acre Air Reserve base. The March Joint Powers Authority – composed of elected officials from Riverside County and the cities of Moreno Valley, Riverside and Perris – adopted, in 1996, a redevelopment plan and accompanying environmental impact report for the land left unused. Three years later, the authority approved a general plan and master EIR for reuse of 4,400 acres. Among other things, the plan allowed for up to 2 million square feet of industrial development on 433 acres. The authority followed up in 2003 with a specific plan and a focused EIR that included a mitigation monitoring and reporting plan. The specific plan established guidelines for future development of a business park as well as office, commercial and other uses. Environmental activists sued to block the 2003 plan and EIR because of concerns over increased air pollution from trucks. The authority settled the suit by agreeing to limit truck traffic.

In 2006, Tesco, the British company that operates Fresh and Easy Neighborhood Markets, applied for approval to build warehouse facilities totaling 1.925 million square feet on an 88-acre site. After finding the proposal was consistent with its specific plan and focused EIR, the authority approved the project and filed a notice of exemption stating that no environmental review was necessary because approval amounted to a ministerial act. The project has since been built and is operational.

A group called Health First sued in 2006 to block the Tesco project because, Health First argued, the authority should have completed an EIR for the development. In 2008, Riverside County Superior Court Judge Thomas Cahraman agreed with Health First, ruling that CEQA required the authority to conduct an additional environmental review of the warehouse project.

The question before the Fourth District Court of Appeal was whether the March Joint Powers Authority's approval of the Tesco project was ministerial (exempt from CEQA) or discretionary (requiring CEQA review). In deciding the case, the court cited CEQA, the CEQA Guidelines and case law. A ministerial decision, it held, involves only the use of fixed standards and objective measures – and not the personal judgment of a public official. In approving the warehouse project, the authority measured Tesco's design plan application against requirements, fixed standards and proposed mitigation provisions contained in the 2003 specific plan and focused EIR, the court determined. In so doing, the authority "exercised no discretion and instead acted ministerially," Justice Barton Gaut wrote for the majority.

"The Tesco facility is not a discrete CEQA project but one component of the specific plan for the larger March Business Center," Gaut wrote. "In contrast, a project may be deemed discretionary when environmental review has not been completed and further review is anticipated. But such is not the circumstance here, where the specific plan and the focused EIR offer a comprehensive environmental review of the proposed industrial development as eventually implemented by Tesco.

"Instead," Gaut continued, "unless there are substantial changes or new information affecting the specific plan, there is no justification for additional environmental review of Tesco's design plan application."

In its suit, Health First also contended that the Tesco facility did not comply with the 2003 specific plan's mitigation measures, but the court disagreed. "Because the mitigation plan applies to the Tesco facility without alteration or modification, Health First cannot argue that the mitigation measures are being implemented in a discretion-

ary fashion," the court ruled.

While deciding the case on the merits, the court questioned Health First's "standing" to bring the lawsuit in the first place because the group was essentially challenging plans and environmental documents approved in 2003, 1999 and 1996 long after the statute of limitations for legal action had passed. Nevertheless, the court resolved the lawsuit on the merits.

The court hinted that lawyers on both sides of the dispute had gone overboard by loading on the court 70 volumes of administrative records dating to 1971, eight volumes of court proceedings and "almost 300 pages of overly elaborate briefings."

"Our analysis resolves the primary issue involving ministerial, as opposed to discretionary, approval. No further discussion is required of the other issues raised by the parties," Gaut concluded bluntly. ■

■ The Case:
Health First v. March Joint Powers Authority, No. E045541, 2009 DJDAR 8441. Filed May 18, 2009. Ordered published June 10, 2009.

■ The Lawyers:
For Health First: Raymond W. Johnson, Johnson & Sedlack, (951) 506-9925.
For the authority: Michelle Ouellette, Best, Best & Krieger, (951) 686-1450.
For Tesco: Lisabeth Rothman, Brownstein, Hyatt, Farber, Shreck, (310) 440-9996.

ceqa

County Attorney Guidance Withheld From Project Opponents

Tehama County did not have to disclose publicly advice it received from an outside law firm on how to comply with the California Environmental Quality Act while dealing with a controversial development project, the Third District Court of Appeal has ruled.

The unanimous three-judge panel ruled that the four documents were protected by attorney-client privilege or work product privilege, even though Tehama County shared the documents with the project's developer.

In an unpublished portion of its opinion, the Third District ordered Tehama County to reconsider the financial feasibility of increased traffic mitigation fees for the project, because the county failed to disclose an advisor's e-mail expressing skepticism about economic feasibility claims.

The retiree development, Sun City Tehama, is proposed by Del Webb California and would be built along Interstate 5 between Red Bluff and Redding (see *CP&DR*, November 2006). It would contain about 3,700 housing units and a 44-acre shopping area on a 3,300-acre site of oak woodlands and pasture.

Tehama County approved the project's specific plan and certified an environmental impact report in late 2006. The California Oak Foundation sued to block the project, arguing that the EIR's handling of the project's impacts to oak woodlands and traffic was inadequate. The foundation lost in Tehama County Superior Court. The group appealed and won a reversal on one claim.

Most of the appellate court's opinion is unpublished, meaning it may not be cited as legal precedent. The only published portion of the ruling concerns the release of four documents prepared by a law firm retained by the county. During trial court proceedings, the foundation asked Judge Richard Scheuler to compel Tehama County to put the documents into the administrative record. The county opposed the request, and Scheuler sided with the county. On appeal, the foundation argued the California Environmental Quality Act (CEQA) – specifically, Public Resources Code § 21167.6 – requires the disclosure.

But the court said the statute did not apply here. Attorney-client or work product privilege "is a general background limitation to disclosure requirements" and the CEQA section "is at best ambiguous concerning intent to override privilege," the court concluded.

The foundation's contention that the county had waived its attorney-client privilege when it shared the documents with Del Webb's attorneys was also rejected by the court.

Writing for the court, Justice Kathleen Butz cited *OXY Resources California LLC v. Superior Court*, (2004) 115 Cal.App.4th 874, 890: "'While involvement of any unnecessary third person in attorney client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication.'"

The foundation argued Del Webb's involvement was not reasonable necessary because the county's purpose was CEQA compliance, while the developer's purpose was winning project approval. Butz called the foundation's view of the county's role "too crabbed."

"The purpose of achieving compliance with the CEQA law," she wrote, "entails a further purpose. It includes producing an EIR process and product that will withstand a legal challenge for noncompliance. Thus, disclosing the advice to a co-defendant in the subsequent joint endeavor to defend the EIR in litigation can reasonably be said to constitute 'involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the original legal consultation.'"

In an unpublished portion of its decision, the Third District ordered Tehama County to reconsider its rejection of higher traffic-mitigation fees for the project because it failed to include in its EIR a consultant's e-mail regarding economic feasibility.

The project development agreement calls for about $10 million in I-5 traffic mitigation fees. Caltrans insisted the project's fair share for needed improvements should be about $60 million. The county refused to raise the fees, saying they were not economically feasible.

In the e-mail, the county's economic advisor had earlier suggested that higher infrastructure costs might be feasible because they would be offset by the lower cost of land in remote Tehama County. The court ruled the county had a duty to disclose the e-mail because it concerned a point of contention among experts.

The court sent the matter back to Tehama County "for the limited purpose of allowing the Board [of Supervisors] and the public an opportunity to consider the effect of this evidence and any further germane showing that it may engender on the issue of the financial feasibility of a greater fee to mitigate traffic impacts on I-5." ■

■ The Case:
California Oak Foundation v. County of Tehama, No. C057578, 2009 DJDAR 8485. Filed June 11, 2009.

■ The Lawyers:
For California Oak Foundation: Thomas Lippe, Lippe, Gaffney, Wagner, (415) 777-5600.
For the county: Arthur Wylene, county counsel's office, (530) 527-9252.
For Del Webb California: Richard Zeilenga, Stowell, Zeilenga, Ruth, Vaughn & Treiger, (805) 446-1496.

places

MORRIS NEWMAN

Clever Project Develops School, Housing Together

A working-class neighborhood north of downtown L.A. is slated for a development project unlike any other previously built in the state: A combination of housing and a public school on a shared site. Set to start construction this winter, the Glassell Park project is being built jointly by Los Angeles Unified School District and Abode Communities, the non-profit homebuilder formerly known as Los Angeles Design Center.

Joint use is an awkward name for an attractive concept. Two or more public agencies – schools, libraries, child-care centers, clinics – put their money together to build a single project that serves several purposes. This method of combining the resources of two underfunded departments can solve problems for both parties, such as inadequate resources of any single agency to build a project by itself.

The novel combination of a public agency and a private developer makes Glassell Park even more innovative still. In this case, Los Angeles Unified and Abode are sharing a small, 1.4-acre block that until recently served as surface parking for an elementary school across the street. The south side of the block will contain the Glassell Park Early Education Center, devoted to kindergarten and pre-K children. (The existing elementary school remains across the street from the project.) On the north side of the block is a four-story, 50-unit apartment building, made up entirely of two- and three-story units appropriate for families. All the units are intended for low- or moderate-income households, in this case, families earning 30% to 60% of median income in Los Angeles County.

SOURCE: GOODALE-GONZALEZ ARCHITECTS

A southeast-facing aerial view of the Glassell Park Early Education Center.

Beneath the block are two levels of underground parking, which replaces the parking for the elementary school while providing spaces for both teachers and residents. The underground parking would be impossible without joint use. And without the subterranean parking, the project itself would have been impossible, because much of the buildable area would be eaten up by surface parking.

The master plan by Goodale-Gonzalez, which also designed the buildings, has made the two buildings as different as possible. The school is an L-shaped building that hugs the sidewalk with a row of single-story buildings that looks outward to the public realm. The apartment slab, on the other hand, looks inward to maximize privacy on a block surrounded by streets on three sides.

In between the buildings is a 10,000-square-foot "outdoor learning classroom," which provides outdoor space for young children. During non-school hours, the playground can be opened for the use of apartment residents. Again, this generous amount of active open space, typically lacking in most affordable housing projects because of cost, is made possible by the joint-use model.

Although Abode Communities has not built housing on a school campus before, it has built several child-care centers, and these experiences have taught Abode how to secure areas intended for young children, according to Robin Hughes, Abode president and chief executive.

"From a physical design standpoint, there is always a need to separate public and private uses on the same site, and this is one of the things we do well," she said. Both the school and the apartments have separate street entrances, and even the parking has separate entrances.

Abode won the project through a request for proposals process initiated by the school district. The combined school-and-housing development was approved by the Los Angeles Planning Commission in April.

As with most low-income housing projects, the financing for the Glassell Park project is complex (I still can't get used to the idea that financing a few dozen units of affordable housing is far more difficult than funding a giant shopping center). The $27 million package consists of a $2.3 million mortgage from US Bank; $2.6 million from the Los Angeles Housing Department, a $2.6 million Proposition 1C infill grant, and $11.7 in general partner equity. As mentioned above, Los Angeles Unified is a big underwriter, providing $2.9 million in a ground lease note and another $4.1 million equity contribution. The school district contribution covers the cost of the underground parking, to be shared by the early education center, the nearby elementary school and apartment residents.

The federal stimulus bill also makes an appearance, in the form of $1.3 million funneled through the California Tax Credit Allocation Committee. These funds supplement the value of low-income housing tax credits, which are sold to investors and are an important source of cash for below-market projects. The recession has driven down the market value of the credits; the stimulus is providing up to 12 cents on the dollar above the price the investors pay for the credits so projects can meet their budgets.

In return, the Glassell Park housing development must pay rent to the school district for its 66-year ground lease; these payments vary with the income generated by the housing and will likely range between $10,000 and $15,000 yearly.

When I first began writing this column 20 years ago (!), I tried to guess whether certain innovative projects could serve as prototypes. While there is always danger in such pronouncements, the Glassell

The northwest corner of the apartment block at Glassell Park.

Park concept definitely has legs. Combining schools and housing is a winner, especially in communities where public resources have dwindled to a trickle.

The concept of monetizing surplus school land is a long-established doctrine in the state, even if few projects have been able to realize it. Glassell Park is a modest project that leverages the resources of the school district to make a superior environment for both school and apartment dwellers. Ms. Hughes of Abode Communities says her firm is already under contract with L.A. Unified for a second project of the same type. The awkward name of joint use has begun to sound like music. ■

Glassell Park Early Education Center is seen from the south.

insight WILLIAM FULTON

– CONTINUED FROM PAGE 1

I said that Ty Schuiling from the San Bernardino Associated Governments – and, to a lesser extent, Hasan Ikhrata from the Southern California Association of Governments – were saying that SB 375 is not the best way to reduce greenhouse gas (GHG) emissions (see *CP&DR* Blog, May 27, 2009).

The complaint was that this isn't all they said. Schuiling in particular also outlined SANBAG's smart growth efforts, including focusing development around possible bus rapid transit lines. But there is no question that an undercurrent in the SB 375 discussion these days, especially in Southern California, is that if you want to reduce GHGs, SB 375 may not provide the most efficient path.

To a certain extent, this idea reflects the view of a lot of elected officials – not necessarily of Schuiling and Ikhrata – that there must be some other way, any other way, to reduce GHGs besides leaning on local governments to change their land use policies (see *CP&DR* Blog, May 11, 2009). But it also reflects, understandably enough, the disconnect between the very bureaucratic process contained in SB 375 and the very real challenge of actually using land use strategies to reduce greenhouse gas emissions in real life – which means reducing driving.

Like a lot of regional planning efforts, SB 375 is a real contraption. The goal is to reduce greenhouse gas emissions from cars and light trucks through land use strategies. Regional planning agencies are given an emissions reduction target from the state. Then they have to prepare a "sustainable communities strategy" (SCS) that shows how emissions will be reduced. But the SCS has to be tied to the regional transportation plan (RTP), and the RTP has to be grounded in realistic travel forecasts. So if the SCS doesn't meet the state target, then the regional agency has to produce an "alternative planning strategy" (APS), but unlike the SCS, the APS doesn't have to be financially tied to the RTP. The bottom line is that a city or county does not get transportation funding unless it acts consistently with an SCS (but not an APS). There is also some streamlining under the California Environmental Quality Act tied to both. But local general plans do not have to have anything to do with any of this.

All of which means a lot of people will do a lot of paper-shuffling in an attempt to meet the bureaucratic requirements of SB 375. But on the ground, using land use strategies to reduce greenhouse gas emissions from the burning of transportation fuels means one thing: Figuring out how to lay out California in such a way that people drive less.

This has been the basic issue buried in SB 375 from the beginning, as we have been reporting for some 18 months now (see *CP&DR* Blog, January 27, 2008). It's understandable that people are a little intimidated by this idea, and hiding one's self in the bureaucratic rigmarole of SB 375 is indeed an attractive alternative.

But there are ways to tackle the driving issue head-on, and if California is going to make a successful transition to a more urban society – remaining livable without too much congestion or pollution – it seems to me that planners in the state simply have to dive into it.

How do you reduce driving? The standard planning answer of compact, mixed-use development, transit, bicycling and so forth is, broadly speaking, correct. But the most effective solutions are both simpler and more nuanced than standard planning theology, partly because the goal is to drive less, not revolutionize how people live, and partly because California contains a particular form of urban development that is not the same as in New York, Europe, or Asia. So, as planners move forward trying to reduce driving, here are a few tips:

1. Put things closer together. I know, this sounds incredibly simple-minded. But it's true. If you want people to drive less, don't put things so far apart. The studies by environmental activist and researcher John Holtzclaw of the Bay Area, which show vehicle miles traveled increase as you move from the center of the metropolis to the edge, is based partly on transit; but it's also based partly on the simple fact that things are closer together in Berkeley than they are in Pleasanton, even if you have to drive.

There are a lot of consequences to putting things closer together, including a fair amount of localized traffic congestion that average citizens won't like. But there are huge environmental benefits, including less driving and probably less congestion overall.

2. Density for its own sake isn't enough. Simply building high densities of one type of land use will be counterproductive. A high-rise office center will generate a lot of trips, a lot of commuting, and, without good transit, a lot of traffic. A high-rise residential area will do the same.

3. Concentrate housing and jobs in close proximity to one another. This is effective not for the reason you might think. Hardly anybody walks to work anywhere. But considerable evidence exists that if you put lots of jobs and lots of housing in close proximity to one another, a sustainable market for everyday businesses and services can be created. If a daytime worker population can create some business for a dry cleaner, a drug store, and so forth, a nighttime/weekend resident population can glom onto those same businesses and make them truly viable.

4. Pay attention to the actual businesses, not just the land uses. Planners tend to think in terms of land uses. But people think in terms of businesses. Where is the business that serves my particular need? The most successful mixed-use districts usually have popular, local, service-oriented businesses. If even one of those businesses goes away, the local residents and employees will start driving elsewhere.

5. Think like a shopping mall. I know – the worst sin a planner can imagine. But shopping malls are a prime example of the "park once" strategy. Your grandmother drove all over town to different little businesses; now, you just go one place, park your car, and buy all kinds of things. Even a Wal-Mart or Costco superstore operates on this principle. The idea is to get you out of your car and into a particular location, and then manipulate you to do as many different things as you possibly can before you get back into your car. Isn't that what planners are trying to accomplish?

You won't find any of this in SB 375, nor under discussion at the state's Regional Targets Advisory Committee, nor at the regional planning agencies. Still, these are the things that California will have to do on the ground to accomplish SB 375's goals. ■