

Court Refuses To Consider RHNA Lawsuit

Irvine Says Housing Allocation Process Threatens Local Control

BY PAUL SHIGLEY

A courtroom is not the location to settle disputes over regional fair-share housing allocations. So ruled the Fourth District Court of Appeal on June 30 in a closely watched case involving the City of Irvine. As a result of the ruling, the city apparently is stuck with having to plan for development of 35,000 additional housing units – equal to about half of existing inventory – over the next five years.

The appellate court’s decision bolsters the authority of the Southern California Association of Governments and other councils of government (COGs) that allocate fair-share housing numbers to cities and counties. The decision raises questions about local governments’ planning authority.

If the Fourth District rejects Irvine’s request for reconsideration, the city will almost certainly appeal to the state Supreme Court. “We simply don’t agree with the court’s analysis and conclusions,” said Rutan & Tucker’s Philip Kohn, who represents Irvine in the litigation. The appellate court’s decision amounts to an “erosion of local control,” he said.

If the ruling stands, Irvine will be responsible for accommodating about 43% of Orange County’s projected housing needs during the 2006-2014 planning period, a mandate that Irvine leaders say is unfair and infeasible.

“We try to balance housing and job opportunities,” Irvine Mayor Sukhee Kang told the Orange County *Register*. “Looking at the overall housing vision for the county, we feel that what is required out of Irvine is inequitable.”

John Edney, an El Centro city councilman and SCAG president, backed the court’s decision but acknowledged the difficulty Irvine faces as a result of it. “SCAG will continue to work with all of its member agencies on the Regional Housing Needs Assessment in a collaborative and transparent manner, and in compliance with the law,” Edney promised.

Kenneth Moy, general counsel for the Association of Bay Area Governments, which supported SCAG in

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Suisun City Redevelopment Advances Into Second Phase

local
watch

BY PAUL SHIGLEY

Ten years ago, Suisun City was one of the nation’s great redevelopment success stories. Plagued by violent, drug-dealing gangs, it literally bulldozed their strongholds to make room for a fancy civic center. The city reclaimed its neglected waterfront and approved the construction of hundreds of homes in a traditional neighborhood development.

Suisun City, located adjacent to the Solano County seat of Fairfield, became a case study for planners, new urbanists and journalists, earning state and national awards for its turnaround. Despite the troubled economy, redevelopment continues, with a new motel under construction and a

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The state attorney general's office has joined a lawsuit filed by affordable housing advocates over Pleasanton's growth management ordinance.

First approved by voters in 1986 and modified in 1998, Pleasanton's growth management program caps annual housing development at 750 units and imposes an ultimate cap of 29,000 units. In 2006, Oakland-based Urban Habitat sued Pleasanton, contending that the growth management ordinance violated a variety of state laws, including the housing element statute that requires cities and counties to plan for their fair share of regional housing needs. Last year, an appellate court cleared the way for the lawsuit to move forward (see *CP&DR Legal Digest*, September 2008).

Attorney General Jerry Brown said he joined the suit because Pleasanton's proposed general plan update would create a huge imbalance between the availability of employment and housing. Specifically, the plan would increase the number of jobs the city hosts by 45,000 – to about 100,000 – while maintaining its 29,000-unit housing cap, which would force workers to commute into Pleasanton. Brown contends that the city, if it adopts the revised plan, would violate the housing element law.

"It's time for Pleasanton to balance its housing and its jobs and take full advantage of its underutilized land and proximity to BART," Brown said. Ear-

lier this year, Brown's office expressed its concerns that Pleasanton's updated plan would increase long-distance commuting and, therefore, greenhouse gas emissions.

The case is *Urban Habitat Program v. City of Pleasanton*, Alameda County Superior Court Case No. RG 06 293831.

The state may not use its gasoline sales tax revenue, designated by voters for public transit purposes, to balance its general fund budget, the Third District Court of Appeal has ruled.

Over the past two years, the state has eliminated virtually all support for local transit operations by diverting about \$1 billion from a public transportation "spillover account" funded by the sales tax on gasoline to the general fund. The state contended it was using the money to retire transit-related debt and to provide transportation for developmentally disabled people and students in small school districts. But the court said those uses of the money violated Proposition 42, which passed in 2002, and Proposition 1A, which voters approved in 2006. While the court did not require the state to refund diverted monies, it prevented future transfers.

The case is *Shaw v. The People ex rel. John Chiang*, No. C058479, 2009 DJDAR 9815, and was filed on June 30, 2009.

The Inglewood City Council in early July approved a specific plan and environmental impact report for redevelopment of Hollywood Park horse

track. The plan calls for development of about 3,000 housing units, a lakefront park and a retail and entertainment district on the 238-acre site (see *CP&DR Local Watch*, June 2009).

Scientists at the U.S. Geological Survey (USGS) have developed a new tool they say will help water managers and public agencies better gauge and preserve Central Valley groundwater. The Central Valley Hydrologic Model is the product of scientists examining 8,500 drillers' logs dating to the early 20th century and reviewing 41 years of ground and surface water data. Among the findings:

- Overall groundwater levels are decreasing in the southern San Joaquin Valley. Although the potential for large-scale, artificial groundwater recharge is good, land subsidence could reduce groundwater storage space.

- Groundwater levels in the northern San Joaquin Valley and the Sacramento Valley are stable.

- The third consecutive year of below-average precipitation is increasing pressure on groundwater supplies, as landowners drill more and deeper wells.

"The Central Valley Hydrologic Model could be used to evaluate regional issues such as the exportation of water from the Sacramento Valley to Southern California, or the upcoming restoration of salmon habitat in the San Joaquin River," said Claudia Faunt, a USGS hydrologist.

A full report and the model is available at <http://pubs.usgs.gov/pp/1766>. ■

California Planning & Development Report has been a monthly publication since 1986. No longer. With the publication today of our second edition in July, we are now a semi-monthly.

When we were printing and snail-mailing *CP&DR*, publication of two issues a month was cost prohibitive. To meet expenses, we would have had to raise our subscription rate to an uncomfortable level. But with our switch to an all-electronic format, two issues a month is feasible. This is another way in which we are increasing the timeliness of *CP&DR*.

We received a goodly amount of feedback regarding our first all-electronic edition, published July 1. I thank everyone who emailed or called with praise or suggestions. As we continue to refine the electronic *CP&DR*, we will strongly consider all of your ideas. One thing

editor's note

we would like to know: Are you reading *CP&DR* on the screen or are you printing it out?

I'll note a couple changes in the current edition that I think make *CP&DR* even more useful. Where a story jumps to another page (as do both stories on Page 1), click the "continued on" line and you will go

straight to the remainder of the story. To return to page one, click on the *CP&DR* logo at bottom of any page. In addition, we have included live links to past stories in *CP&DR*. When you come across a reference to an earlier story, just click on the link and you'll be taken to the online version of it. (You will need to be logged on to www.cp-dr.com to gain full access to the story.)

Again, thanks for your input, and please keep it coming. ■

– PAUL SHIGLEY



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San Diego County has been a national

leader in habitat conservation planning, setting aside areas where rare and endangered species can thrive in the midst of ongoing development. Now, 12 years after a plan for the southern, inland part of the county was adopted, a second habitat plan has been released, this time for the inland North County.

The North County Multiple Species Conservation Plan (MSCP) covers an area that is east of the cities of Oceanside, Encinitas, San Marcos, Vista, and Escondido and which runs north to the Riverside County line. The MSCP's boundaries encompass 295,000 acres,

of which 100,000 acres are proposed to be off limits to development. The North County MSCP is intended to protect 63 rare or endangered species, including the California gnatcatcher, Stephens' kangaroo rat, San Diego fairy shrimp, Quino checkerspot butterfly and coast barrel cactus. The area contains chaparral, coastal sage and some forests.

The 12-year-old South County MSCP has been considered a success for providing habitat. It was supposed to preserve 98,000 acres over a 50-year period, and already 78,000 acres have been set aside thanks to local, state and federal funding, as well as developers' contributions. But a different landscape in the North County means there is no guarantee of similar success.

For starters, much of the undeveloped land in the North County is farmland used for growing avocados, flowers and blueberries. Costs of acquiring easements and fee title are expected to be higher than in the undeveloped South County lands, said Jim Whalen, co-chair of the Alliance for Habitat Conservation, a developer-funded group. Whalen also serves on a stakeholders' advisory group that has worked on the North County plan for seven years.

A key part of the new MSCP is inclusion of several creeks and rivers, which provide wildlife corridors. Most of those waterways are owned by farmers who grow crops on fertile land next to the waterway, Whalen explained.

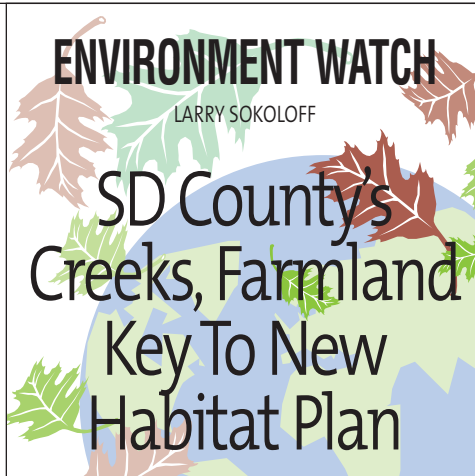
Besides farmland, two large chunks of undeveloped land are within the MSCP's boundaries: Camp Pendleton Marine Corps base and Rancho Guejito, 22,000 acres of ranch land east of Escondido (see *CP&DR Local Watch*, April 2007).

Like the South County plan, the North County MSCP is intended to ease the development process by eliminating case-by-case species evaluations, according to Tom Oberbauer, who oversees MSCPs for the county's Planning and Land Use Department.

"We are also attempting to avoid the pitfalls of a few issues in the South County plan," Oberbauer said. "Specifically, the South County plan had what are referred to as Biological Resource Core Areas, a concept in which property is examined to determine if it meets high value habitat qualities and should be treated as such regardless of whether or not it is located within a pre-approved mitigation area. This has confused the mitigation concept. In the North County plan, we are avoiding the use of the Biological Resource Core Area and instead are focusing on the pre-approved mitigation areas."

The North County MSCP does not appear to have caused much alarm. Escondido Community Development Director Jonathan Brindle, for example, said his city has no conflicts with the plan, which touches the city limits. In 2007, Rancho Guejito's owners asked the city to consider annexation of the property, but Brindle indicated nothing ever happened and the city received no plans to develop the ranch.

While the new MSCP is debated for unincorporated county land, a



proposed habitat protection plan impacting the adjacent cities of northern San Diego County has slowly been taking shape. The seven cities' Multiple Habitat Conservation Program, which is to conserve 19,000 acres for 80 species, was adopted by SANDAG in 2003, but so far has been approved by only one of the cities involved – Carlsbad – according to Dan Silver, executive director of the Endangered Habitats League, an environmental group.

Brindle said the major hurdle to approval of the SANDAG plan is finding a way to finance needed studies that will examine ongoing issues such as the condition of the covered

species and of the vegetation.

The costs of San Diego County's MSCPs are unclear. Oberbauer said acquisition of the mitigation lands is funded by developers, along with money from state and federal sources. The county kicks in several million dollars a year as well. Additional money comes from a half-cent sales tax (called TransNet) approved by county voters in 2004 for transportation projects and associated mitigation.

Government leaders have discussed putting an additional sales tax increase on the county ballot. The "Quality of Life" measure would raise more money for environmental projects, including North County MSCP land acquisition. But in light of the recession, local officials say the measure may not get to voters.

"The public has to want this," said Whalen, noting that TransNet barely passed in 2004 despite the building industry's heavy financial backing. Today, he said, builders do not have the money to finance a campaign.

Environmental groups such as the Endangered Habitats League support the proposed North County MSCP.

"San Diego County has been a leader in habitat planning statewide," said Silver, whose group sits on an advisory board for the North County MSCP. "This is the first plan that I know of that is including agricultural land as part of the habitat preserve for connectivity or buffers."

But Silver said his group still wants specific language in the MSCP to protect core areas, such as Rancho Guejito. He said a main concern is preserve fragmentation if areas like Rancho Guejito are developed.

One question remains unanswered as the county moves forward on the MSCP for the North County: Do MSCPs save species?

"We don't know yet," Silver said. "Management and monitoring is less a priority early on than acquisition is. We aren't going to know if these plans will work for 100 years."

A first draft of the North County MSCP was released in February. Another draft and the environmental impact report/environmental impact statement for the program is scheduled to be released in October. The package could be brought to the county's Board of Supervisors for approval in late 2010.

A third county MSCP – for the more rural East County region – should be completed in 2011, Oberbauer said. Major fires that impacted San Diego County twice since 2003 have slowed completion of the MSCPs, as the county's planning department focused resources on helping people rebuild, he explained. ■

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Multiple Species Conservation Program: <http://www.sdcounty.ca.gov/dplu/mscp/index.html>.

Redevelopment Opportunities Remain In Suisun City

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40,000-square-foot mixed-use building nearly complete. As recently as last winter, Peter Katz, founding director of the Congress for the New Urbanism, named Suisun City the third “most enlightened” suburb in the country.

But all the success and awards have not lessened a feeling that Suisun City’s redevelopment still has a long ways to go.

Vacant lots and empty or underused buildings occupy a considerable stretch of Main Street in old town, including several blocks across from the waterfront. A hoped-for transit-oriented development near an Amtrak commuter train station has never materialized.

Solano County Supervisor Jim Spering, who was Suisun City mayor for 20 years, says it is time for the city to re-evaluate the downtown specific plan and to pursue development more aggressively. Camran Nojoomi, who served as redevelopment agency executive director and for two years as city manager during the 1990s, agreed.

“We used to control and run the development business of the city,” recalled Nojoomi, a businessman who is developing a small mixed-use project in town. “Now they [current city officials] are more passive. We didn’t just wait for things to happen.”

Suisun City Mayor Pete Sanchez, who replaced Spering in 2007 after eight years on the City Council, concedes that downtown redevelopment is not complete. He is quick to say that the area needs more residents and more attractions for locals and visitors. But Sanchez said that Suisun City residents are not demanding more aggressive redevelopment. He doubts there is significant interest among the general public for updating the downtown plan.

“We are dealing with a bedroom community of 27,000 people. Everybody is just so busy commuting to work and coming home to their family,” Sanchez said.

It was 1988 when Suisun City hit bottom. That year the *San Francis-*

co Chronicle conducted a quality-of-life survey that compiled statistics on crime, median income, public facilities and such for all 98 municipalities in the nine-county Bay Area. Suisun City ranked dead last.

In his first of five terms as mayor, Spering responded by spearheading development of a downtown specific plan to replace one that had gathered dust since 1982. With the help of San Francisco’s Roma Design Group, the city soon had a new plan, and with Nojoomi running a merged redevelopment, planning and housing agency, the city was soon acting as the lead developer.

One of the city’s first actions was cleaning out the Crescent neighborhood, a 470-unit condominium complex near the waterfront that was a gang haven. The city condemned the properties, relocated about 2,000 residents and approved the 300-unit Victorian Harbor project – a traditional neighborhood development of single-family homes with front porches, narrow streets and extensive trees – on the site. With the gangs gone, some of the former Crescent residents returned to entry-level housing in Victorian Harbor, which remains desirable today.

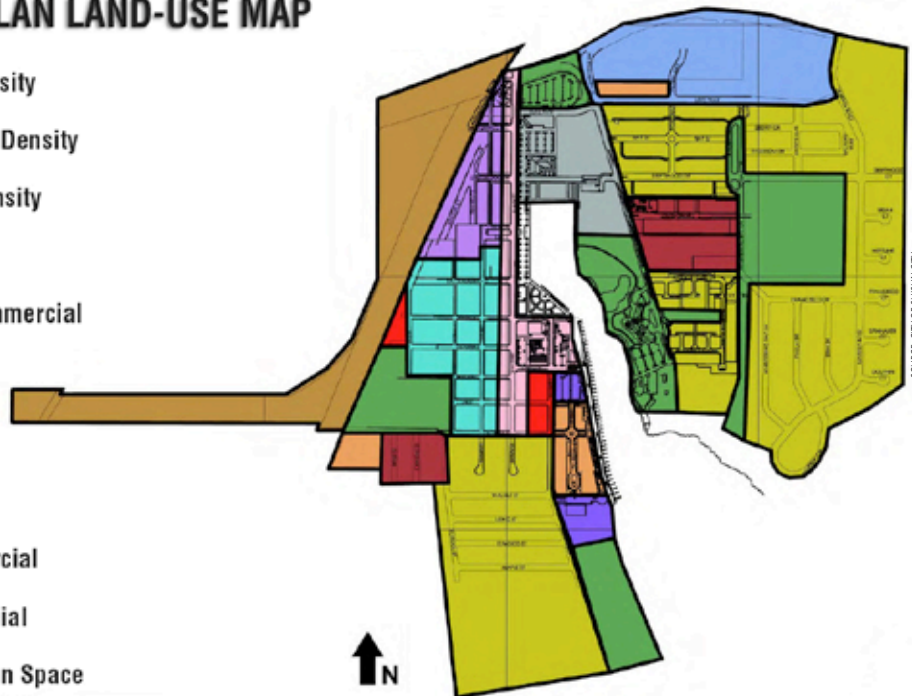
The city also built a nautical-themed civic center on the waterfront just down from the former Crescent neighborhood as a statement that the public was reclaiming the territory. Suisun City funded the iconic project with redevelopment revenue, which would be illegal today.

A very narrow arm of Suisun Bay reaches into the downtown, as it has since the city’s founding in 1848. For many years, the waterfront was a polluted, industrial area inaccessible to the public. The specific plan envisioned a public promenade around the waterfront, parks and *al fresco* dining – which is pretty much what the city got, along with a new 150-slip marina. It is a busy place on weekends and during the many community events on the calendar.

Jason Garben, the town’s economic development director, said Suisun City has been successful because city leaders have stuck with

DOWNTOWN SPECIFIC PLAN LAND-USE MAP

- RL Residential Low Density
- RM Residential Medium Density
- RH Residential High Density
- HR Residential Historic
- HLC Historic Limited Commercial
- GC General Commercial
- CS Commerical Service
- C/O/R Mixed-Use/PUD
- MC Main Street Commercial
- WC Waterfront Commercial
- P/OS Public Facilities/Open Space



The downtown centers on a narrow arm of Suisun Bay, with the old town area immediately west of the water.

the 200-acre specific plan for the waterfront and old town area for 20 years. The plan is flexible in achieving its overall vision, as key properties are zoned to permit a mix of commercial, office, industrial and residential uses. The area contains a number of two-story structures with retail outlets or restaurants below residences, as well as live-work units for professionals. There is also a collection of new craftsman-style bungalows that face onto a greenway across the street from city hall.

During the housing boom earlier this decade, developers pressured the city to rezone properties for strictly residential development, according to Garben. It resisted, and in some ways the boom bypassed Suisun City. Most of the town's suburban housing tracts were built during the 1970s and 1980s. The city did approve a Wal-Mart Supercenter in the eastern part of town, which spurred a recall effort and lawsuit, neither of which were successful.

The residential housing tracts are disconnected from the downtown waterfront area, which the city hopes to fix. Toward that end, the city recently completed a bikeway that runs through town, over Highway 12 and into downtown. Garben points to a vacant 30 acres tucked between downtown and residential areas – and within walking distance of the station where the Capital Corridor train stops 32 times a day. He foresees the property providing a crucial link to and entry into downtown.

“That could be a real opportunity. You could do some high-density, transit-oriented development,” Garben said. However, such a project was difficult to put together even when times were good.

Nojoomi said the site offers a “tremendous opportunity” for high-rise residential development, and he urged the city to plan now to ensure piecemeal development does not swallow the golden egg.

“I really think the area could use a lot more residential with commercial. We need to get more people in old town and capitalize on the lifestyle,” Nojoomi said. “We could increase the use of the train on a daily basis with a resident population.”

Spering suggests replacing some of the warehouses and industrial buildings near the train station with a town square or plaza. The city needs to do something to take better advantage of the station and to generate more traffic for downtown businesses, he said. Like others, he is frustrated by the blocks of vacant and underused properties lining Main Street within a couple blocks of the train station.

“If there is one failure in that whole project, it's that we didn't engage the private sector. That whole west side of Main Street is just as blighted as it used



A south-facing view, with the civic center at the left and old town to the right of the long marina.

to be,” Spering said. “The private sector's absence is just glaring.”

Mayor Sanchez agrees. The Main Street property owners “have not responded for 20 years. They are property owners who have long been out of touch with the city,” he said. However, he noted, the redevelopment agency does have eminent domain authority, and “as soon as the economy picks up, I wouldn't hesitate to use that authority. ...It's just a matter of rounding up the right parcels and working on a good plan.”

Meantime, the city celebrates its successes in a down economy. The 102-room Hampton Inn & Suites – the city's first new motel in 50 years – is scheduled to open in September. The 40,000-square-foot Harbor



A 102-room motel (right) rises next to a new office building on the Suisun City waterfront.

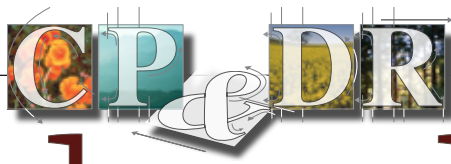


Suisun City's civic center as seen from the marina.

Square development centered on a large courtyard is closing in on opening day and will feature a live music lounge, a bar and grill, an art gallery and offices. ■

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Suisun City general plan and downtown
specific plan: [www.suisun.com/
CommunityDev/Documents/CommDev_
Docs.html](http://www.suisun.com/CommunityDev/Documents/CommDev_Docs.html).



legal digest

Judicial Review Of RHNA Numbers Ruled Out

– CONTINUED FROM PAGE 1

the Irvine lawsuit, said the case was correctly decided. If the court had gone the other way, it would have thrown a monkey wrench into the whole Regional Housing Needs Assessment (RHNA) process, he said.

“On balance,” Moy said of the ruling, “it preserves the integrity of the process for all the participants in the RHNA process. I don’t think it affects how ABAG will conduct future RHNA allocations.”

Two years ago, the cities of Palmdale and La Mirada filed similar suits against SCAG over the fair-share housing allocations. But as with Irvine’s, the suits were dismissed because trial courts said they lacked jurisdiction to hear the disputes. Although more than 20 other cities signed onto amicus briefs in support of the lawsuits, the League of California Cities has remained officially neutral.

The Regional Housing Needs Assessment process is laid out in Government Code § 65584, *et seq.* The law requires the state Department of Housing and Community Development (HCD) to consult with a region’s COG to establish the region’s existing and projected housing needs. The COG then works with its cities and counties on a methodology for allocating the housing needs among them. After the COG prepares a draft RHNA allocation based on the methodology, cities and counties may appeal to the COG’s appeals board. Because a successful appeal typically requires the COG to re-allocate units to other jurisdictions, few cities or counties get far with their appeals. Once appeals are exhausted, the COG adopts a final allocation plan, which is subject to review and approval by HCD. Cities and counties then must update their housing elements to reflect the RHNA allocations for very low-, low-, moderate- and above-moderate-income housing units. Housing elements typically analyze housing needs, identify land where housing may be developed, and list policies and programs to promote affordable unit development. Final authority for certifying housing elements rests with HCD.

In 2004, lawmakers approved SB 2158 (Lowenthal), which revised the RHNA process to give cities and counties greater say in allocations. The revision also spread the affordable housing burden more evenly, promoted infill development and tightened the relationship between housing and jobs.

The penalties for not having a certified housing element used to be minimal. However, state lawmakers in recent years have tied eligibility for certain pots of money to housing element certification. Last year’s SB 375 further modified the housing element law by establishing new planning horizons, requiring more up front zoning for housing and giving advocates greater authority to sue over housing plans.

For the planning period from 2006 through June 30, 2014, SCAG utilized an allocation methodology that considered availability of land suitable for urban development, underutilized parcels and opportunities for infill and increased densities. The methodology also aimed to allocate very low- and low-income units more equitably across the region.

In early 2007, SCAG used this methodology to allocate Irvine 35,300 housing units, about 60% of which were to be in the very low-, low- and moderate-income categories. Among the factors in the allocation were Irvine’s huge job base – the city was home to about 190,000 jobs in 2007, or nearly three jobs for every one housing unit – the city’s annexation of 3,000 acres and its jurisdiction over 4,000 acres of the decommissioned El Toro Marine Corps base.

Irvine protested, saying most the annexed land was protected by a habitat plan, and the majority of the El Toro site was designated for the Orange County Great Park or environmental mitigation by the Navy. In its plea to SCAG’s RHNA appeals board, Irvine agreed to accept an allocation of 8,800 units. The appeal failed, and Irvine was subsequently given an additional 300 units.

Irvine then sued SCAG, arguing the association was violating the state RHNA law (see *CP&DR*, September 2007). No court,

however, has ever considered Irvine’s argument. Orange County Superior Court Judge William Monroe dismissed the lawsuit, finding he had no jurisdiction under state law to hear the case.

On appeal, Irvine argued that Monroe’s interpretation of the RHNA law was absurd because it would mean SCAG serves as the “final judge, jury and appellate tribunal” for any alleged violation of the law. Denied judicial review, cities would have no remedy available, Irvine argued.

However, a unanimous three-judge panel of the Fourth District agreed with Monroe that the RHNA process is “immune from judicial intervention.” The court found that no single entity has complete control of the RHNA scheme. The opinion by Justice William Rylaarsdam outlined all of the consultation and cooperative aspects that are required to be part of the process, as well as HCD’s oversight role. The court also pointed to 2004 legislative amendments that repealed judicial review of COG housing allocations.

“Given the RHNA statutes’ nature, their allowance for public input, and their lengthy and existing administrative procedure, it is clear the Legislature intended to eliminate resort to traditional judicial remedies to challenge a local government’s regional housing needs allocation so as to avoid the disruption of local planning that would result from interference through the litigation process,” Rylaarsdam wrote.

Two other portions of the opinion appear noteworthy. In one, the court hinted that Irvine could plan for fewer units than called for in the RHNA allocation. The court cited Government Code § 65883, subdivision (b) (2), which says that if identified housing needs exceed a jurisdiction’s resources, a housing element’s “quantified objectives need not be identical to the total housing needs.” The court also cited a 2005 attorney general’s opinion that interpreted the same law to mean a community may establish a maximum number of housing units below its RHNA allocation if it has insufficient resources to meet the RHNA needs (88 Ops.

Cal.Atty.Gen. 84; see *CP&DR Legal Digest*, June 2005).

Kohn, the city's attorney, said the court appeared to be offering solace to Irvine. But he pointed out that housing element certification is up to HCD, not the city.

In another part of the opinion, the court states, "The RHNA allocation process must be completed in advance of the revision of a municipality's general plan housing element." It is this procedural aspect the court desired to shield because if it were disturbed, a reallocation of RHNA numbers

could be required. "[A]llowing this judicial action to proceed would require the joining of all affected local jurisdictions in the lawsuit, thereby precluding each affected municipality's completion of its housing element revision," Rylaarsdam wrote.

In practice, however, HCD permits cities and counties to submit housing element updates before RHNA allocations are complete, as long as the city or county is willing to amend the element after the allocation is final. "Perhaps this will be the next RHNA issue to be resolved by litigation," Abbott &

Kindermann attorney Katherine Hart wrote in an analysis of the decision.

Kohn said the court could fashion a remedy to Irvine's situation that does not implicate other jurisdictions' planning. ■

■ The Case:

City of Irvine v. Southern California Association of Governments, No. G040513, 2009 DJDAR 9783. Filed June 30, 2009.

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eminent domain

Government Property Acquisition Costs May Rise

A state appellate court has issued a ruling in an eminent domain case that could have expensive ramifications for government agencies.

The court ruled that a business owner isn't required to have a written lease in order to seek compensation for lost goodwill resulting from a government taking of property. The decision reverses a 1999 ruling that held a business shall not receive compensation for lost goodwill unless the business has an "enforceable property interest."

The decision means that the owners of a recycling business located on property taken by the Los Angeles Unified School District as a site for a new school may seek compensation for lost goodwill, even though the owners occupied the property under a month-to-month tenancy with no written lease.

There is no constitutional right to compensation for loss of goodwill – essentially, economic losses caused by forced relocation – resulting from a government taking. However, Code of Civil Procedure § 1263.510 authorizes such compensation if certain conditions are met. Ten years ago, the Fourth District Court of Appeal established a bright line for goodwill claims. In *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.*, (1999) 73 Cal.App.4th 517, 533, the court ruled that, "Where the business owner has no enforceable property interest, a claim for compensation for goodwill cannot stand." In other words, month-

to-month tenants could not qualify for goodwill compensation because they are always subject to losing their location (see *CP&DR Legal Digest*, September 1999).

Los Angeles County Superior Court Judge Joanne O'Donnell relied on the *Handlery* decision in rejecting a claim from the owners Mid Town Recycling, Elisa and Juan Pulgarin. The couple's business operated on a site owned by A&D Investment Corporation that the school district acquired via eminent domain. The Pulgarins sought compensation for loss of business goodwill, but O'Donnell ruled that they did not qualify under the *Handlery* rule.

On appeal, a unanimous three-judge panel of the Second District Court of Appeal, Division Four, said that while it agreed with the outcome in *Handlery* because of the specific facts in that case, the Second District disagreed with the *Handlery* court's interpretation of § 1263.510.

"The statute contains no requirement that the real property interest be taken from the business owner in order for the business owner to be entitled to compensation, just that the taking cause a loss to the owner of a business conducted on the property which was taken," Presiding Justice Norman Epstein wrote for the court.

"What is required is that the business owner prove that the loss is caused by the taking of the property. A business which is required to move because of the taking of the property on which it operates has suf-

fered a loss from the taking," Epstein wrote. "This is true whether the tenancy is for a fixed term, or is a periodic tenancy as in this case."

The value of goodwill, the court continued, depends in part of the duration of the tenancy and "the quality and mutual satisfaction in the landlord and tenant relationship."

The ruling set legal analysts abuzz. Rick Rayl, an eminent domain and valuation specialist at Nossaman, wrote in a widely circulated "E-Alert" that while the *Handlery* rule was "somewhat arbitrary," it was also simple and predictable. "Whether one applauds or decries the *Pulgarin* opinion," Rayl concluded, "one thing is clear: This battle goes to the business owners and against the government."

In another publicly distributed analysis, attorneys at Kronick, Moskovitz, Tiedemann & Girard wrote that the ruling "highlights the potential costs a public entity may incur in a condemnation action and the potential damages available to a business owner." Compensation for lost goodwill "could significantly increase the acquisition costs." ■

■ The Case:

Los Angeles Unified School District v. Pulgarin, No. B206892, 2009 DJDAR 9179. Filed June 23, 2009.

■ The Lawyers:

For the school district: Cynthia C. Miller, Oliver, Sandifer & Murphy, (213) 621-2000.
For Pulgarin: Karen A. Larson, Century Law Group, (310) 642-6900.

historic preservation

Court Exempts Church From Landmark Process

A state appellate court has blocked San Francisco from considering an historical landmark designation for a 98-year-old church building.

The court ruled that, under state law, the building is exempt from local regulations to protect historic landmarks. The court rejected the city's contention that because the church owner intends to demolish the building to make way for housing on the site, the old church did not qualify for the exemption. The court also rejected the city's argument that the controversy was not ready for judicial review because the city has done nothing more than start the historical designation process.

First St. John's United Methodist Church, located at Larkin and Clay streets in San Francisco's Nob Hill district, is reportedly the only existing California building designed by noted church architect George Washington Kramer. First St. John's qualifies for placement on both the National Register of Historic Places and the California Register of Historic Resources as a good example of early 20th century church architecture.

Worship services in the building ended in 2002 because of declining membership. Two years later, the congregation transferred ownership of the property to an administrative arm of the United Methodist Church. A daycare and preschool operated at First St. John's until 2005, when the building was determined to be seismically unsafe because of its unreinforced masonry construction. About the same time, the United Methodist Church signed an agreement with Pacific Polk Properties to develop 27 condominiums on the site. The church applied for permits to demolish the old building and construct new housing.

In April 2007, San Francisco released a draft environmental impact report on the project, which triggered historic preservation efforts. The city's Landmarks Preservation Advisory Board conducted a public informational meeting on the draft EIR, and a Board of Supervisors' committee recom-

mended the full board initiate proceedings to determine whether the property should be designated a local landmark. The United Methodist Church objected to the committee's recommendation because the designation could prevent demolition.

Despite repeated objections from the Methodist Church, the Board of Supervisors formally initiated historic landmark proceedings. Both the Landmarks Preservation Advisory Board and the city's Planning Commission recommended that supervisors approve the landmark designation. Meanwhile, the church and Pacific Polk sued the city to halt the landmark designation process. In 2008, San Francisco Superior Court Judge Peter Busch sided with the church and developer, ruling the building qualified for an exemption from local landmark designation. He ordered the city to halt its process; San Francisco appealed.

Fifteen years ago, state lawmakers amended Government Code § 25373 by adding subdivision (d). That provision permits a nonprofit religious group that owns "non-commercial property" to exempt the property from a county's historic preservation regulations. Lawmakers also added a similar provision to Government Code § 37361, which governs cities.

In 2000, the state Supreme Court in a 4-3 decision upheld the exemption's constitutionality in *East Bay Asian Local Development Corp. v. State of California*, (2000) 24 Cal.4th 693 (see *CP&DR Legal Digest*, January 2001).

The basis of San Francisco's appeal was that the building did not qualify as a non-commercial property because converting it into a site for condominiums made its sole purpose revenue generation. San Francisco argued a property had to have a religious purpose to qualify for the exemption. A unanimous three-judge panel of the First District Court of Appeal disagreed.

"[T]he opinion in *East Bay*, as well as the text of the statute and its legislative history, clearly refute this notion and support the trial court's observation that the 'whole

point' of the exemption 'is to allow religious institutions to sell their dilapidated churches for a profit,'" Justice Stuart Pollak wrote for the court. "The *East Bay* opinion makes unmistakably clear that the statute permits a religiously affiliated nonprofit property owner 'to exempt its property from a landmark preservation law if the owner determines in a public forum that application of the law will cause substantial hardship that is likely to deny the owner economic return on the property, or deprive the owner of reasonable or appropriate use of the property in furthering the owner's religion mission.'"

San Francisco also argued the matter was not ready for judicial review because designation of a landmark is a legislative decision, and the Board of Supervisors has never decided. Again, the court disagreed.

"Simply as a matter of common sense, there is no point in pursuing landmark designation if the city is prohibited from imposing any restrictions on the use or demolition of the property that otherwise might be imposed as the result of such a designation," Pollak wrote. "If an agency is proceeding in a matter beyond its jurisdiction, judicial intervention may be obtained even though the agency has not yet reached a final decision."

While there is no evidence the historic preservation process had delayed the project, the court concluded, there also is no evidence the city would suffer a disadvantage from an immediate court resolution of the controversy. ■

■ The Case:

The California-Nevada Annual Conference of the United Methodist Church v. City and County of San Francisco, No. A122578, 2009 DJDAR 7196. Filed May 20, 2009

■ The Lawyers:

For the church: Gordon Egan, Signature Law Group, (916) 362-2660.

For San Francisco: Kristen Jensen, city attorney's office, (415) 554-4700.

For Pacific Polk Properties: Timothy O'Leary, O'Leary & O'Leary, (415) 247-7900.

Tribe Fights Unwanted Neighbor, Wins Attorney Fees

A state appellate court has upheld an award of attorney fees to a Southern California Indian tribe involved in a California Environmental Quality Act suit, rejecting the argument that the tribe sued only to protect its financial and personal interests in the matter.

An award of attorney fees under the private attorney general doctrine in Code of Civil Procedure § 1021.5 is not unusual in CEQA cases. However, plaintiffs are often ruled ineligible for fees if their personal stake in the case outweighs the public benefit resulting from its outcome.

In the case at hand, San Diego County and the developer of a proposed garbage landfill contended that the Pala Band of Mission Indians pursued the suit primarily to protect the tribe's financial interests in a casino and hotel near the proposed dump site and to safeguard sacred grounds that the landfill would destroy. But the Fourth District Court of Appeal disagreed, finding the Pala Band's efforts to enforce CEQA and a local ballot measure "were not merely coincidental to the attainment of Pala Band's personal goals."

The subject of the litigation is the long-proposed Gregory Canyon landfill and recycling center in northern San Diego County. Originally approved by county voters in 1994, the landfill has been the subject of two published CEQA opinions. In 1998, the Fourth District ruled that the county did not have to complete an environmental impact report on a solid waste management plan that identified Gregory Canyon as a potential landfill site (*Pala Band of Mission Indians v. County of San Diego*, 68 Cal.App.4th 556; see *CP&DR Legal Digest*, January 1999). Earlier this year, the same court ruled a water district should have completed an environmental review before approving a contract to provide water for the landfill's development and operation (*Riverwatch v.*

Olivenhain Municipal Water Dist., 170 Cal. App.4th 1186; see *CP&DR Legal Digest*, March 2009).

In 2004, the Pala Band, the environmental group Riverwatch and the City of Oceanside sued San Diego County, arguing that the environmental impact report on the landfill project fell short of CEQA requirements in numerous ways. They also contended that the approved project conflicted with the 1994 ballot measure and the county's general plan.

In early 2006, the San Diego County Superior Court ruled the county had violated CEQA by not addressing new information regarding the project's potential traffic impacts along State Route 76, by not identifying a source of water for the project, and by failing to set aside adequate open space acreage.

After the ruling, Riverwatch and the Pala Band sought to collect \$455,138 in attorney fees and \$27,340 in costs. The county and the landfill developer, Gregory Canyon, Ltd., fought the request, and a trial court judge ultimately gave the plaintiffs \$239,620, or half of the requested amount.

In appealing the decision, the county and developer argued that the Pala Band failed to show that the cost of its legal victory transcended its personal interest in the matter, which is essentially the standard for granting fees under the private attorney general law. They further claimed that the tribe's primary interest was protecting its financial stake in the casino, hotel and spa located on the reservation that abuts the planned landfill site, and that the trial court had failed to measure the Pala Band's noneconomic interest in protecting the sacred sites.

In deciding the financial interest question, the appellate court, as did the trial court, relied heavily on Tribal Chairman Robert Smith's declaration that he foresaw no economic impact on the casino if the

landfill were developed. Smith's statement shifted the burden of proof to the county and Gregory Canyon, Ltd., who replied only with information from a Yahoo website about casino hotel room rates. That was not enough, the Fourth District concluded.

On the matter of the sacred sites, Justice Richard Huffman, writing for the unanimous three-judge panel, said, "Pala Band's litigation raised numerous environmental and constitutional questions and transcended any undefined personal interest Pala Band had in mitigating impacts to its sacred sites."

Finally, the court rejected the contention by the county and the landfill developer that the Pala Band and Riverwatch failed to prove the litigation benefited the public as a whole because the result established no statewide precedent, changed no rules and upheld no fundamental right. "[T]he areas that the trial court found inadequate under CEQA," the court ruled, "involved an important environmental consideration." The fact that people who could be affected by the landfill got to have additional input on a revised EIR is a significant benefit, the court ruled.

The county certified the revised EIR in 2007. The same three plaintiffs sued over that document and lost a 2008 trial court ruling. That decision is now on appeal in *Riverwatch v. County of San Diego Department of Environmental Health*, No. D054471. ■

■ The Case:

Riverwatch v. County of San Diego Dept. of Environmental Health, No. D049216, 2009 DJDAR 9868. Filed June 12, 2009. Ordered published July 2, 2009.

■ The Lawyers:

For Riverwatch: Everett DeLano, (760) 931-1512.
For the Pala Band of Mission Indians: Walter Rusinek, Procopio, Cory, Hargreaves & Savitch, (619) 515-3812.
For the county and Gregory Canyon, Ltd., Patrick Breen, Allen, Matkins, Leck, Gamble, Mallory & Natsis, (213) 622-5555.

Mass Transit Gets The Stimulus Shaft

How did mass transportation in urban areas wind up getting shafted by the federal stimulus bill? According to an analysis published in *The New York Times*, (<http://www.nytimes.com>) urban transit systems are set to receive far less of the \$26.6 billion than are rural areas. This is hard to justify, given that population, jobs and education are concentrated in urban areas. (You can do your Homer Simpson imitation at this point.)

Mecklenburg County is the most populous area of North Carolina – it is home to Charlotte – but will receive only \$7.8 million of \$423 million in stimulus transportation money allocated for projects in the state thus far, according to the *Times* story. Seattle found itself “shut out” of stimulus money for roads, bridges and highways when the State of Washington cut up the stimulus pie.

California cities seem to fare better than cities in some other states. The federal government has allocated \$3 billion in transportation money to the state, of which about \$1.53 billion has been committed to 512 projects, all of which involve pavement. According to my personal tally, less than a third of those projects are unambiguously urban (without getting into a tendentious argument about what is urban and what is not along the California coast; our megapolitan sprawl has blurred those distinctions.) In actual spending, however, at least two-thirds of the money goes to cities; a handful of costly projects, such as adding a lane to the 405 freeway and drilling a fourth Caldecott tunnel on Highway 24, skews the numbers.

How is it possible that cities are getting screwed? In a word, local politics. The *Times* piece quotes Robert Puente, a senior fellow at the Brookings Institution, who cites a “peanut-butter approach” among many states, which prefer to spread dollars thinly and evenly among counties despite disparities in population. According to Puente, the peanut-butter approach is typical of the way many states divvy up federal dollars among their constituent counties. (I’ll pause while you smack your head again.)

I was already having difficulty digesting the high level of investment the stimulus has given to high-speed rail projects over creating or expanding commuter rail in major urban areas. I support high-speed rail, to which America is a latecomer. Mass transit, however, is the central issue in urban economies, after jobs and housing.

Scanting transportation money for cities is discouraging news for both urban growth and urban design. In Southern California, the expansion of commuter rail is a do-or-die issue, especially for gridlocked cities in Los Angeles, Orange and San Diego counties. Southern California is becoming an unattractive job environment because of high housing costs and long commute times (<http://www.latimes.com>). I believe that a working mass transit system that is attractive to middle-class commuters could stabilize deteriorating neighborhoods and old suburbs, which have lost value, in part, because of their distance from employment centers.

The expansion of commuter rail is arguably the single most powerful force in the shaping California cities since the federal highway programs of the 1950s and ’60s. Most major cities in the state now offer density bonuses, waivers of certain zoning requirements and economic assistance to transit-oriented development. This means that the path of commuter rail will determine the location of new development, much as the freeway system and its off ramps determined the location of development during the past 50 years.

Let’s shift the discussion slightly to the issues of urban growth and economic revitalization of aging urban areas. The Santa Monica architect Johannes Van Tilburg – he’s a friend and we taught a university extension course together years ago – has talked about the need to bring near-uniform density to hundreds of miles of city streets in Los Angeles County. His target is the network of major thoroughfares that crisscrosses L.A. County; those streets, viewed together, could be called a “supergrid.” Much of this supergrid is ugly and economically underperforming. Van Tilburg, a principal of Van Tilburg Soderbergh Bavard, calls this proposed densification “boulevard urbanism.” In a recent conversation, Van Tilburg said rail transit would bring economic health to aging neighborhoods by encouraging new investment.

Call me simplistic, but I believe the federal stimulus would be better spent on developing mixed-use projects near rail stations in East L.A. than fixing potholes in Podunk. But, then, I may underestimate the hunger of rural lawmakers for a taste of peanut butter.

– MORRIS NEWMAN | JULY 10, 2009 ■

Air Resources Board May Assume OPR’s Duties

The California Air Resources Board will take over many duties of the Governor’s Office of Planning and Research (OPR) by the first of the year.

That’s the word in Sacramento right now. I haven’t been able to confirm the precise plan, but already people are starting to operate under the assumption that the Air Resources Board (ARB) will assume responsibility for the State Clearinghouse and planning unit for the California Environmental Quality Act. In addition, the air board apparently will take control of the strategic growth program, of which the Natural Resources Agency has been in charge with a great deal of assistance from OPR.

All of the shifting duties are the result of California’s budget shortfall, now pegged at \$26 billion.

In early June, Gov. Schwarzenegger called OPR a “total waste,” and the Legislature’s Conference Committee on the Budget voted to eliminate the office. What followed was a struggle between the ARB and the California Energy Commission over which agency would gain control of OPR’s responsibilities. It appears the ARB has won. This is significant for planners – and for developers, when the economy starts to right itself – because the ARB is very

focused on reducing greenhouse gas emissions, whereas OPR tried to view the big picture. Make of that what you will.

In addition, OPR’s census activities will get moved to the Department of Finance’s Demographic Unit. The work OPR has been doing on the pass-through of federal stimulus funds will move to finance and the governor’s office itself.

One other move of note: the California Infrastructure and Economic Development Bank (I-Bank) is reportedly going to move from the Business, Transportation and Housing Agency to the Department of Housing and Community Development, as the agency’s secretary position and administration is an apparent budget casualty.

Also about to be axed are the secretaries of the Natural Resources Agency, the Environmental Protection Agency and the Labor and Workforce Development Agency. Most offices, boards and departments housed within those agencies will apparently survive in some form, although the Bay Conservation and Development Commission appears to be on squishy ground.

– PAUL SHIGLEY | JULY 2, 2009 ■

