

State Takes \$2 Billion From Redevelopment

Proposed 40-Year Extension Of Redevelopment Projects Dies In Assembly

BY PAUL SHIGLEY

By shifting \$1.7 billion from redevelopment agencies to state programs and schools, the state budget signed this week by Gov. Schwarzenegger could halt numerous redevelopment projects for years to come, according to the agencies and housing proponents. The tax increment shift could also mean the end for some redevelopment agencies.

“This amount is so huge that it really, for most agencies, amounts to 100% or more of their discretionary spending,” said John Shirey, executive director of the California Redevelopment Association (CRA). “The numbers are of such great magnitude, inevitably what it means is that some agencies will go out of business.”

Some redevelopment agencies have already identified projects that may halt because of the state’s tax increment maneuver, such as rail yards re-use adjacent to downtown Sacramento and affordable housing development in downtown Los Angeles.

The CRA has vowed to file a lawsuit challenging the constitutional-

ity of the tax increment shift. The organization won a lawsuit over a similar shift earlier this year.

From the viewpoint of local planning and development, the redevelopment tax increment shift is arguably the most important part of the 2009-10 state budget. The budget does not contain a shift of gasoline sales tax revenue away from local governments, a proposal that appeared certain to pass until the last minute. The budget also does not contain a 30- to 40-year extension of local redevelopment authority in exchange for the state getting a slice of future tax increment. Backed by the City of Industry, the redevelopment tax increment “securitization” plan passed the state Senate but died – for now – in the Assembly.

The budget does borrow \$1.9 billion of local government property tax revenues (8% of total), which the state is required to pay back with interest within three years. The budget included only 80% of Williamson Act subventions to make up

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Sotomayor’s Light Record On Property Matters Creates Uncertainty

insight
WILLIAM FULTON

The conventional wisdom is that Sonia Sotomayor’s appointment to the U.S. Supreme Court doesn’t make a whole lot of difference, because there’s not much meaningful ideological distance between her and her predecessor, Justice David Souter. So, the party line goes, the court will still be stuck in the familiar 5-4 or 4-5 split, depending on how Justice Anthony Kennedy is feeling that day.

But there’s a debate brewing as to whether that’s really the case in land use and property rights law. Souter’s movement toward government power culminated in 2005 with his decision to side with the five-member majority in the controversial case of *Kelo v. New London*, 545 U.S. 469, (see *CP&DR Economic Development*, July 2005) which upheld a city’s power to use eminent domain

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California's farm and grazing lands decreased by 176,000 acres (275 square miles) from mid-2004 through mid-2006, according to the state Department of Conservation. Most of the agricultural land was lost to urban development (102,000 acres) and a little more than half of that urbanization occurred in only five counties – Riverside, Sacramento, San Bernardino, Kern and San Diego. Nearly all urbanization occurred in Southern California and the Central Valley.

“Housing developments were the most frequent and largest category of newly urbanized land,” according to the recently released California Farmland Conservation Report 2004-2006. “Most of the increase was associated with single-family homes located at the periphery of existing cities, and to a lesser degree condominium and apartment complexes. Individual subdivisions ranged up to 300 acres in size.”

The overall amount of farmland conversion increased by about 8,000 acres from the previous two-year period. A total of 81,000 acres of prime farmland were lost to urban development or other changes, such as idling, dry cropping, confined animal facilities and rural residential development, during the 2004-06 period. That's the greatest decrease in prime farmland since the state started the farmland mapping and monitoring program (FMMP) in 1984. In Stanislaus County, 81% of farmland lost to urban development during the 2004-06 period was prime farmland.

“During the 11 biennial reporting cycles since FMMP was established, more than 1.2 million acres of agricultural land in California were converted to nonagricultural purposes. Nearly 79% of this land was urbanized,” the report concluded.

The report and detailed county-level information about farmland is available from the Department of Conservation, www.conservation.ca.gov/dlrp/fmmp/products/Pages/ReportsStatistics.aspx.

A bill that extends the sunset date of tentative subdivision maps by two years has been signed by Gov. Schwarzenegger.

As originally introduced, AB 333 (Fuentes)

would have extended the life of subdivision maps by six years. That unprecedented, lengthy extension met resistance, so it was reduced to two years. The urgency legislation took effect on the governor's July 16 signing date. Last year, Schwarzenegger signed a bill extending the sunset date by one year. About 1,800 maps statewide are affected, according to the California Building Industry Association.

Orange County's Planning & Development Services department “is in critical condition,” according to an internal county audit released in late July.

The 117-page report by the county's Office of the Performance Audit Director detailed a planning department that has seen its workload decline drastically and its staffing drop by 80% this decade because of incorporations and decreased building activity. At the same time, the department adopted a new time-and-materials fee methodology and went through several permanent and interim directors.

Seven years ago, county officials revealed the department was operating at a \$500,000-a-month deficit, a situation that forced out both the planning director and the county administrator. The deficit arose after the county slashed fees to burn off \$18.5 million in excess plan check and building inspection fee revenue. The county later shifted to a time-and-materials fee basis.

The county auditor concluded, “Avoiding an operating deficit continues to be, by far, the top priority for the PDS (planning and development services) organization. In response to drastically declining revenues, PDS has made significant operations changes to achieve financial solvency, in many cases at the expense of customer service.”

Department Director Tim Neely retired earlier this year. New Director Bryan Speegle responded to the audit by agreeing with many of the findings.

The Los Angeles County Metropolitan Transportation Authority (MTA) has approved its first congestion pricing project. It will permit paying

motorists to use carpool lanes on 14 miles of Interstate 10 and 11 miles of the 110 freeway. Rates would range from 25 cents per mile during light traffic to \$1.40 per mile during rush hour, with the intent of keeping traffic flowing at least 45 mph in the carpool lanes at all times.

The MTA intends to add a second toll lane in both directions of the same stretch of I-10, which is immediately west of the 605 freeway. The congestion pricing project, which received a \$210 million federal grant, also involves construction of automated toll plazas and increased operation of clean fuel buses on the same stretches of highway. Completion is scheduled to be completed by 2010.

A Desert Hot Springs site along Highway 62 that was planned to become a luxury golf resort, shopping mall and high-end housing is instead becoming protected habitat. The Coachella Valley Association of Governments (CVAG) has purchased 638 acres of the 1,766-acre Palmwood development site for \$3.9 million and intends to buy more of the land as funding becomes available.

The Palmwood project was one of the major sticking points in adoption of the Coachella Valley multiple species habitat conservation plan, which designated the site for protection. That caused the City of Desert Hot Springs to oppose the plan, which forced plan amendments and delayed adoption (see *CP&DR Environment Watch*, April 2006). Ultimately, the Palmwood development fell apart, and Desert Hot Springs joined the species planning effort.

Mendocino County voters in November will decide on a proposed 800,000-square-foot shopping mall and housing development on a former industrial site just outside of Ukiah. Project proponent Developer's Diversified is taking its plan directly to voters because of frustration with county officials, who have been considering reuse of the 76-acre Masonite site for many years and who have been unable to reach agreement with Ukiah leaders on the project. ■



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

William Fulton
Publisher

Paul Shigley
Editor

Morris Newman
Kenneth Jost
Contributing Editors

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California's continuing budget woes, coupled with the nation's stubborn recession, could hinder the state's ability to meet its ambitious goal to reduce greenhouse gas emissions to 1990 levels by 2020.

This is one of the chief concerns of the Regional Targets Advisory Committee (RTAC), which will recommend how the California Air Resources Board should allocate greenhouse gas (GHG) emissions-reduction targets among the state's metropolitan planning organizations (MPOs). While the 21-member committee has made no decisions, it appears headed toward setting reduction targets that do not significantly take into account economic factors. The committee also recognizes that the availability of funding will affect implementation.

The allocation methodology devised by the RTAC will help guide the Air Resources Board when it establishes emissions-reduction goals for automobiles and light trucks in each of the state's 18 metropolitan regions, as called for in that portion of the AB 32 implementation plan dealing with land use and vehicle miles traveled. The climate change law, passed three years ago, ties directly to SB 375, which requires MPOs to adopt regional sustainable land use strategies to reduce greenhouse gas emissions. The committee has until the end of September to make its recommendations to the board.

Increased use of public transit is widely seen by public officials as crucial for cutting automobile emissions. But during the RTAC's July 22 meeting, Gary Gallegos, a committee member and executive director of the San Diego Association of Governments, said that the 2009-2010 state budget eliminates state support for transit operations for the next five years. He warned that without the fiscal resources to build or expand public transit, California and its metropolitan regions will fall short of meeting their GHG reduction goals.

"If we want to do this stuff, we've got to figure out how we're going to pay for it," Gallegos said.

Carolyn Cavecche, mayor of the City of Orange and a member of the Orange County Transportation Authority, told the RTAC that her agency faces a loss of \$314 million over the next five years because of state budget cuts and lower-than-expected sales tax revenues. Service levels will decrease dramatically, predicted Cavecche. She urged the RTAC to include recommendations for funding transit in its final report.

"The transit operators are not going to exist next year as they do right now," Cavecche said.

RTCA members were somewhat divided on how far they should push the transit funding issue. Jim Wunderman, who heads the business group Bay Area Council, said that AB 32 and SB 375 marked major points of agreement and achievement for California, but that the state's fiscal policy directly undercuts them. "I think calling the Legislature on the [funding] question is appropriate," Wunderman said.

Chairman Mike McKeever, who heads the Sacramento Council of Governments, said the RTAC lacks the political clout to influence immediate state fiscal decisions. But he suggested that SB 375 author Sen. Darrell Steinberg (D-Sacramento), now the president pro-tem of the state Senate, be invited to a future RTAC meeting to discuss these concerns.

The RTAC continues to wrestle with how much weight it should give economic factors in setting GHG reduction targets. Committee member Carol Whiteside, founder of the Modesto-based Great Valley



Center, has repeatedly argued that lowering emission reduction targets for economic reasons would take the pressure off regions and local governments to comply with the law. They need to find and implement creative emissions solutions, she says, and not look for an escape route based on fiscal issues.

Committee member and Ontario City Manager Greg Devereaux disagreed somewhat, saying that the committee's recommendations should strive to strike a balance between a locale's housing needs and economic growth and its emission-reduction targets. For example, Ontario is willing to take

on a substantial portion of its region's job and housing development (see *CP&DR Local Watch*, July 1, 2009) but that means its GHG emissions will rise, he said. Any methodology recommended by the RTAC should try to accommodate such tensions, he argued, noting that the attorney general's office is already pressing the city to specify in its updated general plan how it plans to meet SB 375 emissions-reduction targets that have yet to be established.

Coming up with a formula to allocate emission-reduction targets among the 18 metropolitan regions committee appears to be dividing the committee. Some members want to rely on performance standards based on regional greenhouse gas emissions modeling. Others are pushing for a "best management practices" system in which regions would have to earn a certain number of points for adopting practices such as zoning for compact development and congestion pricing on roads.

Committee member Barry Wallerstein, executive officer of the South Coast Air Quality Management District, has little confidence in emissions models. He says the models are inconsistent from region to region and not widely understood by experts outside each region, in part because the models contain different assumptions.

Creating a list of best management practices would not ensure precise GHG reductions, Wallerstein said. But he said it would force local governments to take actions – such as zoning for high density; pushing mixed-use development that encourages walking; raising public parking rates; and putting a price on road use during times of congestion – that would start to reduce greenhouse gases.

Committee member Stuart Cohen, who heads the advocacy group TransForm, said any checklist must take into account different place types, such as suburban versus inner-city. Raising density levels in the "wrong place," for example, could lead to an increase in vehicle miles traveled and thus more GHG emissions, he said.

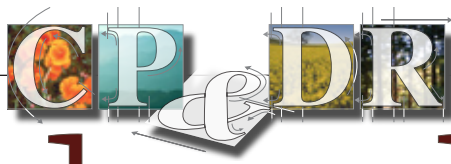
Committee member Jerry Walters, of consulting firm Fehr & Peers, concedes the models are not perfect, but he argues that the system should move toward use of models quickly. "The time is now to initiate an effort to get the models on better footing," he said. The RTAC, he added, is the ideal panel to evaluate models and current scientific literature. "We're missing that opportunity."

McKeever said the committee will address the "very meaty issues" of methodology and other policies at the next meeting, scheduled for August 5 in Los Angeles. The committee also plans to meet in Sacramento on August 18 and on September 1 and 16. A meeting on deadline day – September 30 – is also possible, he said. ■

■ Resources:

RTAC website: <http://www.arb.ca.gov/cc/sb375/rtac/rtac.htm>.

CP&DR's SB 375 Resources Page: www.cp-dr.com/node/2185.



legal digest

Court Reinstates Pleasanton Housing Referendum

Petitions Are Ruled Adequate; Developers May Owe Legal Fees

BY PAUL SHIGLEY

A referendum on a 51-unit housing subdivision in Pleasanton has been reinstated by the First District Court of Appeal.

The unanimous three-judge appellate panel overturned an Alameda County Superior Court judge who had blocked the referendum from the ballot because the referendum petition did not contain the actual development plan. The appellate court ruled that the petition did not have to include the development plan because the ordinance approving the project did not include the plan, attach it as an exhibit or incorporate it by reference.

"No documents that were attached or specifically incorporated into the ordinance were omitted," the court ruled.

Pleasanton has a long history of ballot-box planning. The East Bay city's slow-growth electorate has imposed a growth control scheme, blocked various development proposals and, most recently, adopted hillside development restrictions in November 2008.

In the early 1990s, sibling property owners Jennifer and Frederic Lin proposed developing 122 housing units and a golf course on 562 acres they own in the city's southeastern hills. The city approved the project but voters overturned the approval in a November 1993 referendum election.

The Lins returned 10 years later with a revised proposal for 98 houses on 80 acres, with the remaining acreage to be donated to the city for open space and parkland. A lengthy review concluded that an alternative of 51 units on 66 acres, with a 496-acre donation to the city, was environmentally superior. In October 2007, the City Council certified an environmental impact report and approved Ordinance No. 1961, approving the 51-unit Oak Grove PUD development plan. The council also approved Ordinance No. 1962 providing for a development agreement between the city and the Lins.

Former City Councilwoman Kay Ayala and a group called Save Pleasanton's Hills circulated referendum petitions to block the project. They gathered the requisite number of signatures, and the city clerk certified the measure for the ballot. The Lins then sued the city and Ayala. The property owners argued the referendum petition violated the Elections Code because the referendum did not contain the full text of Ordinance No. 1961 (specifically, the development plan) and because the petition did not advise voters that the referendum would also repeal Ordinance No. 1962 approving the development agreement. The Lins further argued the Save Pleasanton's Hills website was "false and misleading" under the Elections Code. Ayala responded by arguing the lawsuit was an illegal SLAPP (strategic lawsuit against public participation).

Superior Court Judge Frank Roesch ruled the referendum petition did indeed violate Elections Code § 9238, subdivision (b), which requires each referendum petition to contain "the text of the ordinance or the portion of the ordinance that is the subject of the referendum." In this case, the failure to include the development plan "frustrates the purposes" of the law, Judge Roesch ruled. However, he granted Ayala's anti-SLAPP motion regarding the alleged website misrepresentations.

On appeal, Ayala argued referendum proponents did not have to include the development plan in the petition because the plan was not part of the text of the ordinance. The First District agreed, noting the petition did include the ordinance and all of its exhibits – the environmental findings and a statement of overriding considerations, final conditions of approval, and the development agreement.

"The development plan was not included in the text of that ordinance, was not attached as an exhibit, and was not incorporated by reference," Justice Henry Needham wrote. "It may well be the case that an informed voter would prefer to review portions of the development plan before

determining whether to sign a referendum petition that could ultimately result in that plan being set aside. But § 9238, subdivision (b)(2) requires the 'text' of the ordinance being challenged, not the inclusion of additional information a conscientious voter might want to know before signing the petition."

The court made clear the case is different from the landmark *Mervyn's v. Reyes*, (1998) 69 Cal.App.4th 93. In *Mervyn's* the court threw out an initiative to re-enact a changed portion of Hayward's general plan because the initiative petition did not include the affected pages of the general plan. "In the present case, by contrast, the referendum petition advised voters of the precise language of the ordinance being challenged and its attached exhibits," Needham wrote.

What's more, referendum proponents are "constrained by language drafted by others," and neither the proponents nor city clerks should be required to guess what additional materials might be helpful to voters, the court ruled.

On appeal, Ayala sought to have the anti-SLAPP ruling applied to all of the Lins' arguments. The court refused to do so, but it did order Roesch to reconsider whether Lin should have to pay Ayala's attorney fees and costs because his earlier denial of fees "runs contrary to the policy of the anti-SLAPP statutes by effectively penalizing defendants facing claims that are lacking in facial merit."

Last year, the Lins sued to compel the city manager to sign the development agreement approved in 2007. He has refused to do so until the referendum is resolved. Barring state Supreme Court review of the First District's ruling, Pleasanton voters will decide on the referendum in 2010. ■

■ The Case:

Lin v. City of Pleasanton, No. A121147, 2009 DJDR 10575. Filed July 16, 2009.

■ The Lawyers:

For Lin: Andrew Sabey, Cox, Castle & Nicholson, (415) 392-4200.

For Kay Ayala: Benjamin Shatz, Manatt, Phelps & Phillips, (310) 312-4000.



State's High Court To Review Another Prop 218 Controversy

The California Supreme Court has taken up another Proposition 218 case. This one involves voter secrecy in fee elections.

Earlier this year, the First District Court of Appeal annulled a fee election held in 2007. Marin County Flood Control and Water Conservation District had asked voters to approve a storm drainage fee to pay for flood-protection improvements in Ross Valley. Affected property owners received ballots in the mail, and each voter was required to sign a ballot printed with the name, address and proposed fee of the voter. The fee proposal passed 3,208 to 3,143.

One property owner sued to throw out the election because the district did not conduct the vote using secret ballots. A trial court judge disagreed, but the appellate panel overturned the lower court. While conceding that

Proposition 218 was ambiguous on secret elections, the First District concluded that "voters who adopted Proposition 218 intended voting to be secret in these fee elections."

With the support of other special districts and local government agencies, the Marin district appealed to the state Supreme Court. It contended that Proposition 218 – the "Right to Votes on Taxes Act" passed in 1996 – does not require voter secrecy, and that the appellate court ruling runs counter to 12 years of practice in fee elections.

The case presents two questions for the court: Does the state constitution's secret voting requirement apply to special elections governed by Proposition 218 (article XIII, section D of the constitution)? If so, was the secrecy requirement violated by the Marin County district, whose procedures were

designed to ensure secrecy but which failed to provide each voter with assurance that his vote would be held in confidence?

Earlier this year, the state high court issued a procedural ruling – *Bonander v. Town of Tiburon* (see *CP&DR Legal Digest*, July 1, 2009) – that appears to make it easier to wage a Proposition 218 challenge to some fees. Last year, the court ruled that an open-space assessment violated Proposition 218 because the fee provided only general, rather than parcel-specific, benefits. That case, *Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority*, (2008) 44 Cal.4th 431 (see *CP&DR Legal Digest*, August 2008), provided a template for the First District's review of the Marin County situation.

The latest case is *Greene v. Marin County Flood Control District*, No. S172199. ■

habitat mitigation

Environmental Groups Excluded From Rancho Cucamonga Preserve

Two environmental groups that sued the City of Rancho Cucamonga and developers to gain ownership of 86 acres of habitat mitigation land have failed to persuade an appellate court to reverse a devastating lower court ruling.

A unanimous three-judge panel of the Fourth District Court of Appeal rejected the argument put forth by The Habitat Trust for Wildlife and Spirit of the Sage Council that the city, developers and San Bernardino County had collaborated to deny the environmental groups' right to own the property. In so doing, the court said that there was nothing improper about the city's method of deciding who could own mitigation land; that the environmental groups had no constitutional right to the land; and that the developers had not breached a contract it had with the groups. The judges also upheld an award of \$954,000 in attorney fees and legal costs to the developers.

Spirit of the Sage has sued Rancho Cucamonga developers and the city numerous times to mitigate the loss of wildlife habitat because of real estate development. The litigation resulted in the formation of a 308-acre wildlife preserve in Etiwanda Canyon.

Developers Henderson Creek Properties and SPS Development Services sought approval

for a 123-house, 65-acre subdivision. The Rancho Cucamonga City Council approved the project in June 2004. Among the mitigations was a requirement that the developers donate at least 54 acres of off-site land to a "qualified conservation entity" for permanent open space and habitat preservation.

To head off litigation by Spirit of the Sage and Habitat Trust, the developers signed an agreement to turn over 86 acres adjacent to the preserve in Etiwanda Canyon to Habitat Trust. They also agreed to provide a \$430,000 endowment to fund property management and \$125,000 to cover administrative and attorney costs.

The developers then asked the city to designate Habitat Trust as a qualified conservation entity. But in early 2005, the city balked because the environmental organization did not put together a habitat management plan, lacked adequate financial and personal resources, did not provide audited financial records and was not accountable to the public. The city reached this conclusion after San Bernardino County Supervisor Paul Biane urged the city to ensure a county agency gained the mitigation lands. Biane and other county officials say habitat lands should be managed for public recreation in addition to wildlife needs, an approach opposed by the

environmental groups. After the city's decision, the developers turned over the land and money to a county service area.

The groups then sued the city, the county, Henderson, SPS, and Granite Homes, which had assumed Henderson's interest in the project. The groups sued the developers for breach of contract and breach of the covenant of good faith and fair dealing. The groups argued the city denied them due process and adopted standards for establishing a qualified conservation entity that conflicted with state and federal law. Meanwhile, Henderson and SPS filed a cross-complaint against Spirit of the Sage and Habitat Trust to rescind the 2004 contract, based upon failure of consideration, mutual mistake and duress.

San Bernardino Superior Court judges granted summary judgment to the city, the county and the developers on every issue. The court also awarded \$667,000 in attorney fees to Henderson and SPS, and \$287,000 in attorney fees and costs to Granite. The environmental groups appealed, but the Fourth District, Division Two, rejected every argument.

On the issue of due process, the court ruled the groups had failed to show why they were entitled to due process, as no constitutional right was implicated in the matter. Even if due pro- – CONTINUED ON PAGE 6

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cess rights applied, the groups were aware of the city's proceedings and were given the opportunity to address the City Council, the court concluded.

Regarding the choosing of a qualified conservation entity, the court found the city's criteria acceptable and not in conflict with any state or federal laws.

On the breach of contract issues, the court ruled that the environmental groups had not proven their case. Essentially, the 2004 agreement fell apart when the city refused to name Habitat Trust a qualified conservation entity, contrary to the contract's assump-

tions. The purpose of the contract was the satisfaction of a mitigation condition. When the city made its decision regarding Habitat Trust, the developers rightly turned over the land and money to the county to comply with the condition, the court found.

Because it upheld the lower court's summary judgment rulings, the Fourth District also upheld the award of attorney fees and costs.

Earlier this year, the Superior Court ordered an auction of Habitat Trust's 308-acre preserve to help pay off the award. In April, Henderson Creek and SPS won the auction, acquiring the property for \$255,000.

They intend to use the site as a mitigation bank. ■

■ The Case:

Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga, No. E042229, 2009 DJDAR 10813. Filed July 21, 2009.

■ The Lawyers:

For Habitat Trust: Craig Sherman, (619) 702-7892.

For the city: Mitchell Abbott, Richards, Watson & Gershon, (213) 626-8484.

For SPS Development Services and Henderson Creek Properties, Alan Kessel, Manatt, Phelps & Phillips, (714) 371-2500.

For Granite Homes: Daniel Friedlander, Jackson, DeMarco, Tidus and Peckenpaugh, (805) 230-0023.

For San Bernardino County: Mitchell Norton, county counsel's office, (909) 387-5455.

base reuse

'Great Park' Officials Awarded Attorney Fees For Suing Own Board

Two members of the board overseeing the Orange County Great Park who sued the public agency over access to executive recruitment information should have their attorney fees paid, the Fourth District Court of Appeal has ruled.

Steven Choi and Christina Shea serve on the board of directors of the Orange County Great Park Corporation and the Irvine City Council. After being denied access to resumes and related materials of candidates seeking the job of chief executive officer, they sued the corporation. When the corporation settled the suit by agreeing to provide them access, Choi and Shea sought \$44,000 in attorney fees. A trial court judge refused to grant them, but the Fourth District, in ordering fees to be paid, found there was "not a whit of evidence" the corporation would have made the documents available without the suit.

When completed, the Great Park will comprise 1,350 acres of the former El Toro Marine Corps Air Station in Irvine. So far, only a 27-acre "demonstration park" has been finished, in part because housing development that would help fund the park has stalled. The Great Park Corporation board of directors is composed of Irvine's entire five-member City Council and four other people appointed by board.

After going through three different CEOs in its first three years, the board hired the Mills Group in 2007 to conduct a nationwide search for a fourth. The board formed a search committee composed of four directors, and Irvine's city manager and deputy

city manager. Mills narrowed the field to 12 candidates out of 150 applicants. The search committee interviewed five finalists before recommending Kurt Haunfelner, president of the Chicago Museum of Science and Industry. Before the full board voted to offer the position to Haunfelner, Shea asked to see the resumes of the finalists. She was refused.

After Haunfelner declined the offer, the committee recommended Rod Cooper, the park's operations manager and an Irvine employee, but he withdrew from consideration before the board could vote. Soon thereafter, the *Los Angeles Times* revealed that Haunfelner was a friend of board Chairman and Irvine Councilman Larry Agran, who had once employed Haunfelner's brother as an aide. The *Times* also reported that the previous CEO, Marty Bryant, was convicted in 1989 of embezzling public funds from the City of San Juan Capistrano.

Choi and Shea asked to see all the resumes and materials received by the Mills Group but Agran and the corporation repeatedly refused to release them. In January 2008, Choi and Shea sued to see the materials. Two months later, the corporation agreed to provide Choi and Shea with complete copies of all materials related to the job search during a closed session.

Choi and Shea then sought to recoup their attorney fees under Code of Civil Procedure § 1021.5 (the private attorney general doctrine) and Corporations Code § 6337. Orange County Superior Court Judge Derek Hunt rejected the request on the grounds that there was no court judgment and that the suit

produced no public benefit.

In overturning Hunt, the unanimous three-judge appellate panel considered the attorney fee request only under § 1021.5. That statute and case law do not require a judgment but a "broad, pragmatic view" of the matter's outcome, the court determined. In this case, the settlement brought about a complete reversal, as the corporation had "unequivocally refused to provide documents prior to the litigation," wrote Justice William Rylaarsdam.

On the question of public benefit, the Fourth District said: "Given the checkered history of the CEO search and the ongoing public criticism of the 'revolving door of Great Park executives,' the method used for selection of the CEO should be beyond reproach. Plaintiffs' request for documents to determine how the search had been conducted to date was an act to maintain the integrity of the process itself, a significant benefit to the public."

The court directed the trial court to determine the amount of attorney fees owed to Choi and Shea, who could also seek fees for the appeal.

One year ago, the board appointed Michael Ellzey, who had been deputy CEO for six months, to the executive position. ■

■ The Case:

Choi v. Orange County Great Park Corp., No. G040823, 2009 DJDAR 9790. Filed June 30, 2009.

■ The Lawyers:

For Choi: Benjamin Pugh, Enterprise Counsel Group, (949) 833-8550.

For the corporation: Robert Thornton, Nossaman, (949) 833-7800.

Redevelopment Raid Could Stall Projects

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for property tax revenues the counties lose through the agricultural protection program. However, at the last minute Schwarzenegger cut all but \$1,000 of the subventions.

The state has shifted money away from redevelopment agencies numerous times in recent years. In April, however, a Sacramento County Superior Court judge ruled that a \$350 million shift from redevelopment agencies to schools in the 2008-09 state budget violated the state constitution because there was no guarantee the money would be used for redevelopment purposes (see *CP&DR Redevelopment Watch*, June 2009). Lawmakers and the administration say they solved the legal flaw with the creation of “supplemental revenue augmentation funds” (SRAF) in each county. Money contributed to the SRAF would fund courts, prisons, Medi-Cal service, hospitals and schools. But the money would be spent only in redevelopment project areas or for services to people who live in project areas or redevelopment-assisted housing. The budget calls for redevelopment agencies to transfer \$1.7 billion to their county SRAF by May 1, 2010, and another \$350 million in 2011. In exchange, redevelopment agencies may extend project area sunset dates by one year.

Shirey, however, said the language in the budget bills does not change the fact that the tax increment in question is legally obligated to fund debt payments and redevelopment projects. “We intend to sue the state just as we did a year ago when they tried to take \$350 million,” he said.

Any agency that fails to make its mandatory SRAF payment would be subject to the “death penalty,” meaning the agency would have to cease nearly all activity except for the retirement of existing debts. An agency may borrow money from its low- and moderate-income housing fund, but the money must be repaid within five years or else the low-mod housing set-aside jumps from 20% to 25% for the remainder of the project area. The state is permitting agencies to suspend all required low-mod allocations for the 2009-10 fiscal year. An agency may also borrow money from other sources to make its SRAF payment.

Republican lawmakers and the administration in recent years have eyed the hundreds of millions of dollars sitting in redevelopment agencies’ low-mod housing funds. However, agencies say nearly all of the money is earmarked for projects that await other funding before they may be built.

Officials with the Los Angeles Community Redevelopment Agency said the shift of \$71 million away from the agency threatens to halt at least seven projects, including affordable housing development in Hollywood and downtown, a shopping center in Reseda and a shopping center overhaul in Watts.

“The gutting of the CRA-LA budget will mean that we will not be able to complete millions of dollars of redevelopment projects in Los Angeles, resulting in a loss of 2,300 construction jobs and a loss of \$360 million in private investment,” said Cecilia Estolano, the agency’s executive officer.

The Sacramento Housing and Redevelopment Agency would be required to give up \$16.8 million this fiscal year. The hit would prevent the agency from starting any new projects and could imperil several high-profile projects, according to Deputy Executive Director Lisa Bates. Among the projects in jeopardy is rail yards reuse, a project that recently won \$83 million in Proposition 1C funding and was expected to get \$50 million in redevelopment assistance.

San Jose Redevelopment Agency Assistant Executive Director John Weis said the required shift of \$75 million over two years would force his agency to borrow money in order to keep existing projects on track, which the agency did a few years ago to make an \$18 million ERAF payment.

The big loser in all of this will be affordable housing, predicted Christine Minnehan, a lobbyist with the Western Center on Law and Poverty, because the only money many agencies have available to make SRAF payment is in low-mod housing funds. “A take of this level is going to decimate the housing piece of redevelopment,” she said, noting that redevelopment tax increment provides the sole permanent source of funding for affordable housing development in California.

The Industry proposal would have permitted agencies to extend their redevelopment project area sunset dates by up to 40 years without renewed blight findings. In exchange, the state would receive 10% of agency tax increment. The argument in favor of the plan was that the extensions would be voluntary, and if enough agencies signed up, there would be no forced SRAF transfers and there might be no need to borrow the \$1.9 billion from local governments. The plan did pass the Senate but never came up for a vote in the Assembly for reasons that remain unclear.

The CRA strongly opposed the Industry measure, which surfaced as ABx4 27 during the wee hours of the July 23-24 budget marathon. “It takes redevelopment money and spends it on non-redevelopment purposes,” Shirey protested. That is unconstitutional and it would invite more state and public opposition to legitimate redevelopment activity in the future, he insisted.

Minnehan agreed the Industry proposal would “completely undercut” the point of redevelopment, and San Jose’s Weis said the proposal would have been worse than what the state did pass.

“Do I think it’s dead? No I don’t,” Shirey said of the Industry proposal. “They have a whole army of high-powered lobbyists, including four former legislators.”

The immediate focus of many redevelopment agencies now appears to be CRA’s coming lawsuit over the tax increment shift. Shirey said labor unions have also offered to lend assistance, because they fear the loss of tens of thousands of construction jobs as redevelopment projects are halted.

The Williamson Act subventions lie on the other end of the urban development spectrum. The Department of Finance has targeted the subventions for years. Under the Williamson Act, agricultural property owners receive a tax break by agreeing not to develop their property for 10 years. The program costs counties \$35 million to \$40 million annually, an amount the state backfills. The budget contained money for 80% of subventions, or about \$28 million. But the governor “blue penciled” the amount down to \$1,000, saying the money is needed for a prudent general fund reserve. ■

■ **Contacts:**

John Shirey, California Redevelopment Association, (916) 448-8760.

Christine Minnehan, Western Center on Law and Poverty, (916) 442-0753.

John Weis, San Jose Redevelopment Agency, (408) 535-8500.

California Redevelopment Association: www.calredevelop.org.

Department of Finance state budget summary: <http://www.dof.ca.gov/budget/historical/2009-10/governors/summary/documents/enacted/FullBudgetSummary.pdf>.

Legislative Analyst’s Office, 2009 Budget Package: www.lao.ca.gov/la0app/PubDetails.aspx?id=2112

The Docks site was the orphan of downtown Sacramento. The broad, concrete shoulders of Interstate 5 divide the riverfront parcel from the rest of the city. Until recently, this 43-acre triangle of land remained almost entirely out of sight and out of mind from even nearby points in the city, such as the state Capitol and the enormous rail yards development, both only a few blocks from this site.

As it currently exists, the Docks site is an unplanned space, a leftover between the Sacramento River and the interstate. Some runners and bike riders are brave enough to push beneath the shadowy recesses of the freeway structures. In general, however, the Docks site offers very little to the city, and vice versa.

The environmental impact report for large-scale homebuilding, a multi-acre park (there are several proposals) and a linear park on the riverbank are awaiting approval this fall. The city has handled the linear park and the development site as separate projects, under the same specific plan. This article focuses primarily on the development piece; of course, the developer and designer have yet to be selected.

Sacramento is a relative latecomer to the beautification (and monetization) of its formerly industrial riverfront. The redevelopment of industrial riverfronts has become a mainstay of American urban planning and design since the success of Riverwalk in San Antonio, Texas, four decades ago. Unlike many waterfront projects, however, Sacramento's emphasizes housing above entertainment and retail uses.

The plan is admirable both for the planning that connects the riverfront site with the existing city grid, and the way that the southern edge of the site will be used for stormwater detention. When the city considers the EIR, the biggest decision to be made is whether to opt for one of three design choices, Variation A-1, A-2 or B. The public will benefit no matter the choice, because all schemes have virtues. That said, the city and its future private development partners face a choice of a scheme that maximizes open space at the expense of new residential development (Variation B), and two others that offer a smaller park and more development, along with more property tax and hotel tax revenues (A-1 and A-2). Both are good enough to be built. But which is better?

Variation A-1 and A-2 are very similar, except that A-2 has more high-rise residential towers. From a purely graphic standpoint, Variation A is a superior composition to the more casual-looking Variation B. I confess I have long harbored a superstition that the design

places

MORRIS NEWMAN

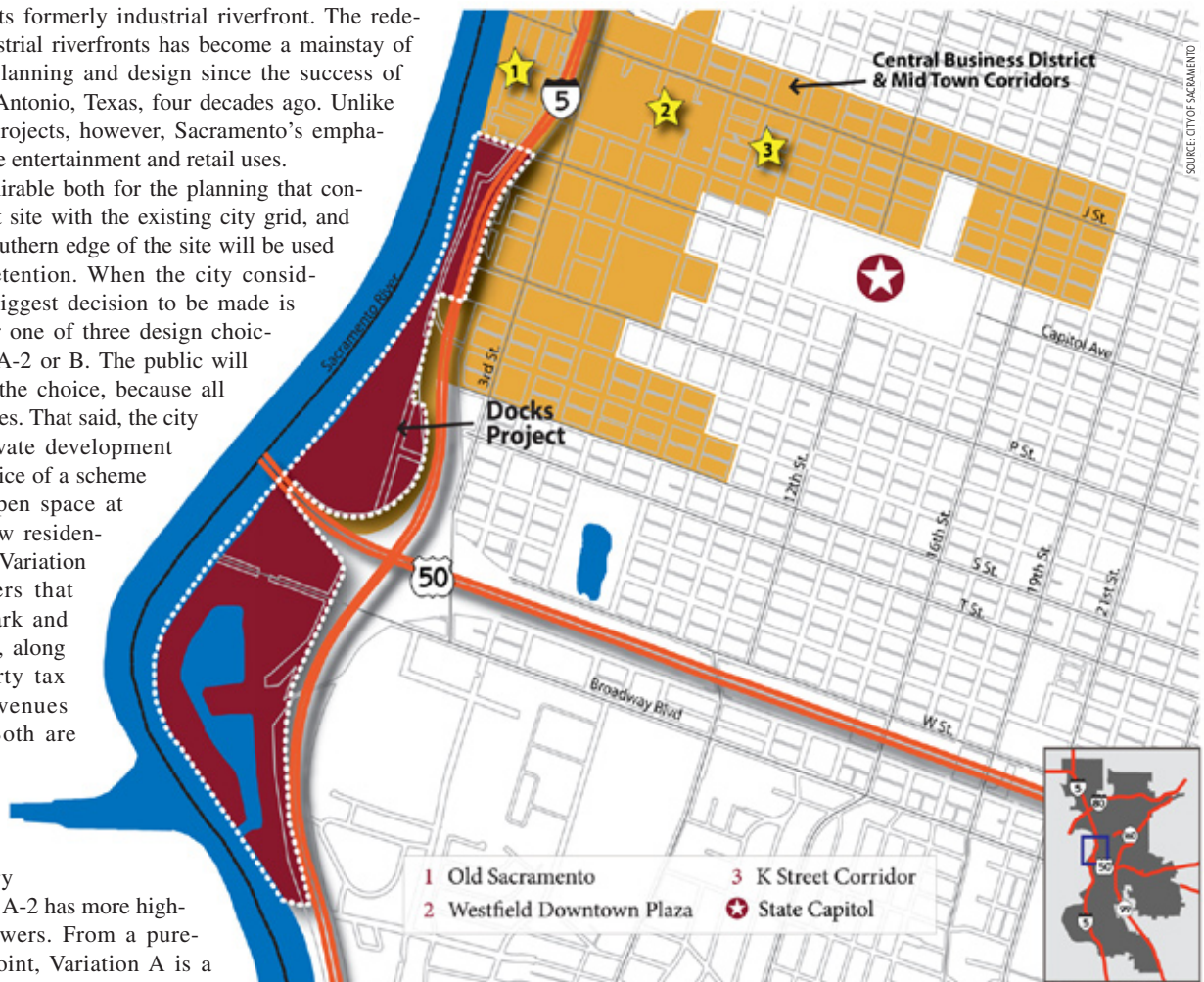
Downtown Sac's Leftover Becomes A Main Course

that looks better on paper is often the better design in real life. And, with a few notable exceptions, that belief has been confirmed by experience. But sometimes a nice, symmetrical picture does not yield superior urbanism. The site plan drawing by itself does not necessarily take into consideration the existing conditions on the site, such as hard-to-ignore roadways that rain down soot and noise.

One criterion for judging the two alternatives is to ask which takes the biggest step toward a successful pedestrian environment, where people set the scale and human movement sets the pace.

Variations A-1 and A-2 (again, they are almost identical) are pretty pictures, for what it's worth. I like the way that planners have routed traffic around the block-sized park, allowing the park to open directly onto the river without any barriers between the two. The scheme is also more urban (in this sense, formal) and far more dense than Variation B.

I'm of two minds about the park in Variation A. On the plus side, the park seems a comfortable size. Being surrounded by buildings



on three sides also helps to give the open space a sense of form.

But why such a small park? What are the priorities here? If the riverfront is truly a regional attraction, why is Sacramento packing this waterfront location full of housing – especially in light of the 12,000 units approved as part of the nearby rail yards re-use project (see *CP&DR* blog entry, December 12, 2007)? Might it be preferable not to max out the number of residential units and the revenue-capture-potential in the Docks development project to take full advantage of the riverfront location?

Variation B is far less elegant as a drawing, lacking the formalism of Variation A. Less development is promised in Variation B, in large part because a third or so of the site is set aside for a large-scale, regional-sized park. Beyond offering far more in open space, Variation B is also interesting in the way it seems to pick up on existing conditions. The outer edge of the park, for example, is the freeway structure itself. This decision integrates the freeway into the composition and makes a negative into a positive. Variations A-1 and A-2, in comparison, merely turn their backs on the freeway and pretend that it does not exist.

Assuming that the naked freeway structure would not make a good park wall, we will need to build some fence or enclosure to partly hide



Variation A-1 includes a smaller riverfront park, with offices and a parking garage at left.

the freeway from view. An inventive landscape architect could make that wall into something visually interesting, covering parts of the freeway structure while allowing others to remain visible. This is a great architectural opportunity.

The biggest sore point in Variation B is the traffic planning, which requires drivers to make turns on acute angles. Granted, the Docks is not supposed to be a thoroughfare, but this looks like a miserable place to be stuck during rush hour. On the other hand, we are facing a park and a river, and the need for streets laid out with Teutonic regularity does not extend all the way to the Sacramento River.

Verdict: Either Variation A-1 and A-2 is an easy winner, while Variation B could become something extraordinary if the designers are up to it. Despite my reservations, I vote for Variation B. I predict the city will opt for Variation A-1. The city will benefit in either case and the orphan of downtown will become a golden child; the leftover will become a main course. In this recessionary time when local government tends to think small, the Docks is one of the projects that makes Sacramento the state's most interesting downtown area of the current moment. ■



Variation B contains more high rise residential development, and a much larger park.

insight WILLIAM FULTON

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in a redevelopment situation to transfer property from one private owner to another.

Would Sotomayor have done the same? You'd think so. But unlike Samuel Alito (see *CP&DR Insight*, December 2005, her federal judicial record — while lengthy — doesn't include a lot of takings cases. And, not surprisingly, her confirmation hearings did not provide much insight. Sen. Herb Kohl (D-Wisconsin) asked Sotomayor point-blank what she thought about *Kelo*.

Her stand-pat answer — typical of Supreme Court nominees these days — was this: “*Kelo* is now a precedent of the court. I must follow it. I am bound by a Supreme Court decision as a Second Circuit judge.

“As a Supreme Court judge, I must give it the deference that the doctrine of *stare decisis*, which suggests the question of the reach of *Kelo* has to be examined in the context of each situation, and the court did, in *Kelo*, note that there was a role for the courts to play in ensuring that takings by a state did, in fact, intend to serve the public — a public purpose and public use.

“I understand the concern that many citizens have expressed about whether *Kelo* did or did not honor the importance of property rights, but the question in *Kelo* was a complicated one about what constituted public use. And there, the court held that a taking to develop an economically blighted area was appropriate.”

In other words, she mostly hid behind the Supreme Court's ruling as a precedent, saying almost nothing except she is bound to follow precedent and apply the precedent in a context-specific situation. To the extent that this testimony provides any insight at all — which is not much — it kind of suggests that she would have sided with New London. She provided this hint by acknowledging the whole public use question: Essentially, can forcing a property transfer from one private owner to another serve a public purpose? John Roberts and especially Samuel Alito would surely have hidden behind the precedent and the context-specific idea just as cleverly as Sotomayor — maybe more so — but they probably would not have characterized public use as a complicated concept.

In suggesting that Sotomayor is a typical pro-government liberal on property rights issues, property rights advocates point mostly to a series of Second Circuit rulings, but in almost all of these cases Sotomayor was a member of the panel and not the opinion's author. The case most bothersome to the pro-property side is *Didden v. Village of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006), a case which was not signed by an individual judge and not published in the federal reporter.

The facts would be amusing if they weren't so frightening. A landowner in Port Chester — located in Westchester County, New York,

near the Connecticut border — wanted to build a drug store inside a redevelopment zone. A local developer with influence in the redevelopment area demanded that the landowner either pay him \$800,000 or give him a half-interest in the project, and he threatened that if the landowner did not agree, the village would condemn his property. The landowner refused and the village went forward with eminent domain proceedings.

The Second District upheld a federal trial judge in throwing the case out. UCLA law professor Eugene Volokh, one of the best pro-property bloggers, acknowledged that the panel may have simply thought it was implementing *Kelo*, because the case clearly states that the federal judiciary should give great deference to local judgments in eminent domain cases. But writing for the majority in *Kelo*, Justice John Paul Stevens, the only former city attorney on the high court, concluded that “pretextual” condemnations — condemnations that claim to serve a public purpose but whose real purpose is to benefit a private party — aren't covered by the ruling. “It is difficult to imagine a more clearly pretextual taking than this one,” Volokh wrote of the *Didden* case.

Beyond that you have to go all the way back to her federal trial court days to find an opinion she wrote that seems relevant. In that case she also seems to favor the government. In *In re St. Johnsbury Trucking Co.*, 199 Bankr. 83 (S.D.N.Y. 1996) and 191 Bankr. 122 (S.D.N.Y. 1996), a trucking company claimed the federal trucking rates law represented a taking of property. Sotomayor appeared to agree that the economic value of the trucking company's property had been taken away but ruled in favor of the government based on the well-known three-pronged test in the *Penn Central* case. (My description was taken from another good property rights blog, www.inversecondemnation.com, written by Hawaii property rights lawyer Robert Thomas, who expressed appropriate outrage at the ruling.)

However, there are a few points on the other side that suggest Sotomayor may be more moderate on property rights than these rulings suggest. Chief among these is *Krimstock v. Kelley*, a 2002 Second Circuit decision written by Sotomayor, in which the panel overturned the New York City Police Department's longstanding practice of holding vehicles seized from accused criminals indefinitely and not permitting the owners any legal recourse in attempting to reclaim the vehicle.

This ruling got good press among anti-government types. But it is, of course, a different kind of case. The owners of the property in question are not developers, but, rather, accused criminals. So maybe Sotomayor really is an unquestionably liberal judge, even when she rules in favor of property owners and against the government. ■

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