

Farmland Conservation Program Faces Uncertainty

Elimination Of Williamson Act Backfill Forces Counties To Consider Options

BY PAUL SHIGLEY

Gov. Schwarzenegger's unilateral decision to eliminate payments to counties that offer Williamson Act tax breaks to owners of agricultural land has raised doubts about the future of the state's largest farmland-preservation program.

Many representatives of the affected counties have said they would like to remain in the program. But the end of state subventions that help offset lost property tax revenue is causing many counties to re-evaluate their participation.

The governor's blue-penciling of the subventions "has put counties in an awful bind, especially the rural counties that count on this money for discretionary revenue," said Karen Keene, a lobbyist for the California State Association of Counties (CSAC).

One of the hardest-hit counties is Glenn, whose county seat of Willows is about 90 miles north of Sacramento. Glenn County Board of Supervisors Chairman Mark Murray said the board would not make any immediate decisions with respect to the Williamson Act, but he

said the loss of \$950,000 from the state this fiscal year is "a substantial hit" equivalent to nearly half the county's budget deficit.

"It's going to cost us bodies," Murray said of the cut. "That's the lion's share of our expenses, whether it be sheriff's deputies or assessors or whoever."

There is some discussion in the state Capitol of restoring the subventions this fiscal year, possibly through a new dedicated funding source. Several lawmakers, including Assemblymen Jim Nielsen (R-Gerber) and Sam Blakeslee (R-San Luis Obispo), have promised to raise the issue during the Legislature's final month of business, which concludes September 11.

"There will be a number of components of the budget that will be back on the table," predicted Kathy Mannion, a lobbyist with the Regional Council of Rural Counties. "If the Williamson Act was the only issue, that might be problematic. But we think we can get into the discussion."

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Court Rules L.A. Inclusionary Housing Mandate Violates State Law

digest legal

BY PAUL SHIGLEY

A state appellate court ruling striking down an affordable housing mandate in the City of Los Angeles could have statewide implications. Affordable-housing advocates and municipal attorneys say the decision, if it stands, calls into question inclusionary housing ordinances that require developers to set aside and price a certain percentage of new rental units at below-market rates.

Three years ago, Los Angeles approved developer Geoff Palmer's proposal to build a 350-unit apartment complex on a parking lot west of downtown. A condition of approval was that the project had to comply with a 1991 specific plan requiring that some of the units be made

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A draft “California Climate Adaptation Strategy” recommends that development projects and locations be reconsidered in light of rising sea levels, greater potential flooding and higher temperatures.

Released in early August by the Natural Resources Agency, the plan summarizes the latest science on climate change and makes numerous recommendations for dealing with its effects. State officials and climate-change scientists say an adaptation plan is necessary because even if efforts to reduce greenhouse gas emissions are successful, some level of human-caused climate change is a certainty, as heat-trapping gasses remain in the atmosphere for a long time.

Among the recommendations:

- Consider the effects of climate change in environmental review documents for major development and infrastructure projects.
- Amend general plans and local coastal plans to avoid potential climate effects.
- Assess land use, housing and transportation proposals for their compatibility with a changing climate.
- Consider project alternatives that avoid significant new development in areas prone to flooding, rising sea level, temperature changes and precipitation changes.
- Reduce water usage 20% statewide by 2020 and expand water storage. Improve the Bay Delta water supply, water quality and ecosystem conditions.
- Protect habitat areas and manage water systems to aid species most at risk of extinction due to climate change.

The draft Climate Adaptation Strategy is available at www.climatechange.ca.gov/adaptation. A public meeting on the document is scheduled for August 31 in Los Angeles. Final adoption is scheduled for the fall.

Less than one week after the Orange County Board of Supervisors voted to create a task force to overhaul the Planning and Development Services

department, the department director resigned.

In July, a county audit concluded that the planning department was in “critical condition” after years of declining revenues and shrinking staffs. It said the department’s priority had become self-preservation. Department director Tim Neely retired during the audit.

Public Works Director Bryan Speegle replaced Neely. He did not contest the audit’s findings but insisted departmental changes were underway. But only days after the supervisors voted to form the task force on August 4, Speegle announced his retirement after 26 years with the county.

The City of Irvine has approved a controversial amendment to a 2005 agreement with the consortium of developers handling the El Toro Marine Corps base reuse project.

Under the amendment, the developers, headed by Lennar, may build up to 4,900 homes – or about one-third more units than originally approved. The developers were also relieved of their obligation to build 45 holes of golf.

In exchange, the developers transferred 131 additional acres to Irvine and agreed to pay \$58 million over five years for infrastructure and park maintenance, plus \$9 million over nine years for the loss of golf course revenue. The amended agreement also permits the city to build retail space, restaurants, hotels and a police station on portions of the 1,480 acres devoted to the “Great Park.”

City officials say the infusion of cash will jump-start construction of the Great Park, which has stalled because development intended to generate money for it has been slow to occur (see *CP&DR Places*, March 2006. Councilwoman Christina Shea, a longtime skeptic of the El Toro reuse plan, voted against the amendment, saying it amounted to “a bailout for Lennar.”

Stockton’s downtown redevelopment efforts suffered a major setback in August when the Lexington Plaza Waterfront Hotel was closed and repossessed

by the lender, First Bank of Missouri.

Developed by Regent Hotel, LLC, the \$62 million, 150-room hotel opened in December 2007 as a Sheraton but fell into receivership in less than a year because Regent was unable to sell the 40 condominiums topping the hotel.

The hotel is part of downtown waterfront redevelopment effort that also includes an indoor arena, a minor league baseball park, a 10-acre public park and amphitheater, and a plaza (see *CP&DR Local Watch*, December 2006. The city sold the land for the hotel and a small convention center for \$1 and provided a \$500,000 development subsidy

The City of Santee has sued San Diego County over the county’s plans to expand the Las Colinas Detention Facility for women in Santee. The city contends the county’s environmental impact report for the 30-acre expansion failed to fully address the project’s effects on traffic and public safety. Ryan Companies US, which is developing a mixed-use project adjacent to the jail site, filed a similar lawsuit against the county. A separate lawsuit filed by Santee in 2008 is on appeal. The city contends the county should have prepared an EIR before accepting a \$100-million state grant to enlarge the jail.

The Palo Alto City Council has voted to adopt a ballot initiative that mandates wider private streets in new development projects. Private streets built after July 31 must be at least 32 feet wide, even if narrower streets were already approved in projects. Some recently built private streets are as slender as 20 feet across, and they have generated complaints about the lack of street parking and poor emergency vehicle access.

In June, proponents of the initiative submitted enough signatures to qualify it for the November ballot. But rather than place the measure before voters, the council decided to accept it. Final adoption is scheduled for September, after the city completes an environmental review of the initiative’s effects. ■



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Williamson Act Contracts In Jeopardy

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Another discussion underway in the background concerns potential legislation that would let counties get out of Williamson Act contracts quickly. Under existing law, if a county cancels a contract with a landowner, the property taxes remain unchanged for four years and then ramp up over the course of the next five years. Only in the tenth year does the property owner pay the full property tax rate. Thus, under existing law, counties receive no immediate fiscal benefit from not renewing a Williamson Act contract.

Four Decades of Farmland Protection

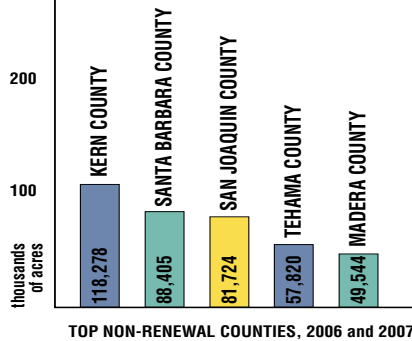
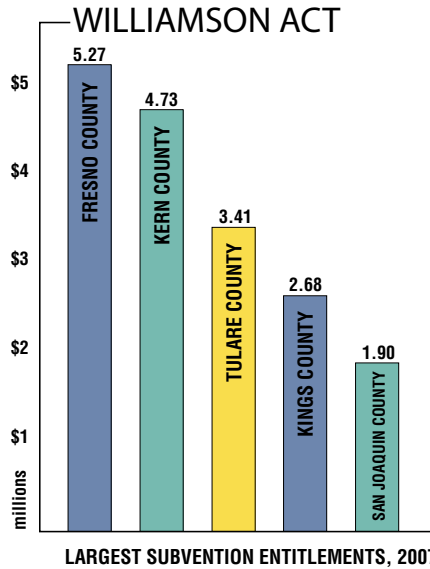
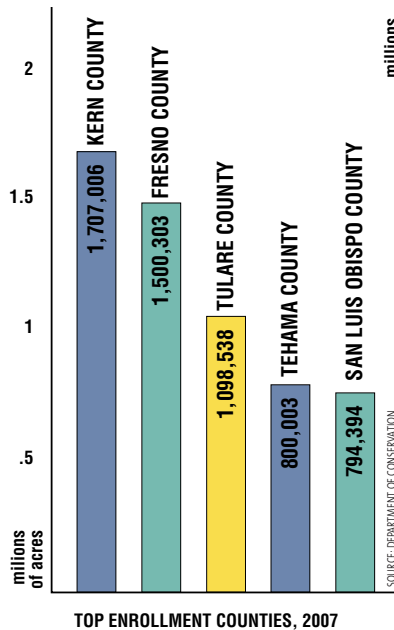
The Williamson Act – formally, the California Land Conservation Act – was approved in 1965 to protect agricultural land from urban development, as well as assist farmers. Authored by Sen. John Williamson, the law allows discounted property tax rates for owners of agricultural land who sign a contract with their county agreeing not to develop the land for 10 years. The discounts range from 20% to 75% of normal tax rates, according to the Department of Conservation. The rolling 10-year contracts automatically renew every year on January 2.

If a landowner declines to renew his contract, his property tax rates gradually increase over nine years. Outright contract cancellations are rare, allowed only in certain circumstances, and require a property owner exercising this option to pay a fee amounting to 12.5% of the land's market value. A county may also decline to renew a contract, but few do.

Of California's 58 counties, only four – Yuba, Del Norte, San Francisco and Inyo – do not participate in the Williamson Act program. A handful of cities also participate. Approximately 16.6 million of California's 29 million acres of farm and ranch land is currently protected by the act, according to the Department of Conservation.

In 1998, lawmakers added the Farmland Security Zone (FSZ), also known as the "super Williamson Act." It provides for 20-year contracts in exchange for even greater property tax breaks. About 1 million acres are enrolled in FSZ contracts. Twenty-five counties participate in the program.

Most of land protected by the Williamson Act has been enrolled since the late 1960s or 1970s, and the total amount of land shielded has varied little during the past 30 years, according to William Geyer, a lobbyist for landowners and former aid to Sen. Williamson. After the law went into effect, counties almost immediately began demanding that the state compensate them for lost property tax revenue. In 1971, \$13 million in subventions flowed to counties, an amount that slowly rose to about \$17 million annually until 1993, when it jumped to \$39 million as part of a broader realignment of government responsibilities and revenues.



Since 2000, both Govs. Davis and Schwarzenegger called for eliminating the subventions, but the funding remained in the budget. The amount was cut to \$35 million in the past two fiscal years, and the budget approved by state lawmakers in July further slashed the amount to \$27.8 million. Schwarzenegger's blue pencil left only \$1,000 in the account.

In whacking the program, the governor said the state needed the money for a reserve fund. State Sen. President Pro-Tem Darrell Steinberg (D-Sacramento) has

since sued to restore the money, contending that Schwarzenegger lacks the authority to make unilateral budget cuts. Schwarzenegger responded that he has the authority to line-item veto parts of the budget and does so every year.

Because the Williamson Act subventions have become a political bargaining chip in recent years, no one was surprised the governor targeted the program. Still, a coalition of counties, landowners, farmers and conservationists is mobilizing to restore the money.

The California Farm Bureau Federation said the cut "created confusion among the thousands of farmers and ranchers in California who have enrolled their land." Darla Guenzler, executive director of the California Council of Land Trusts, called the governor's move a "devastating blow."

"This further adds to farmers' uncertainty about their ability to continue farming, and their children's ability to continue farming," Guenzler said. "I think we are going to see counties get out of the program. We fully expect to see the pace of [farmland] conversation increase."

Policy Options

Greg Gatzka, interim community development director for Kings County, one of the biggest Williamson Act jurisdictions, said his county has suspended all new Williamson Act applications. The county would like to continue the program because "the preservation of agriculture is mainstream here," he said. But the loss of more than \$2 million in discretionary revenue as a result of Schwarzenegger's cut is forcing county officials to consider all options, including non-renewal of all contracts.

Neighboring Tulare County also is weighing its course of action, which includes wholesale non-renewal of contracts, ending contracts for select parcels, halting new contracts and

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Although freeways have helped shape the development of California, very few new freeways have been built since the 1980s. The focus has instead been on widening existing freeways, and adding carpool and transit lanes. But in Riverside County, where construction and development are major economic drivers, county officials are trying to add a new east-west freeway.

The proposed Mid County Parkway is seen as a crucial link as the county's population grows from 2.1 million to 3 million residents by 2025.

Initial plans for the freeway called for a 32-mile road from Corona to San Jacinto to be built at a cost of \$3 billion. Earlier this summer, though, the county's transportation commission bowed to political and economic reality, and shortened the planned freeway by half, deleting the roadway's western portion that would have linked Interstate 215 to Corona. Now the \$1.6 billion freeway – which is scheduled to open by 2016 – is proposed to cover 16 miles from the city of San Jacinto and State Route 79 to Interstate 215 in Perris.

Funding for the parkway is far from certain. Money will come from the county's half-cent sales tax for transportation, development fees, and

PUBLIC DEVELOPMENT

LARRY SOKOLOFF

Riverside County Approves New Freeway, But Abandons Half

state and federal highway funds. Riverside County Supervisor Bob Buster said he expects the roadway to be built in segments as development impact fee revenue becomes available.

But some Perris city officials oppose the project, saying it will cut their city of 55,000 people in half and remove 111 homes, businesses, a new fire station and a skateboard park.

"There's huge development out there, and we have to move traffic," said Perris City Councilman Mark Yarbrough. But, he continued "There needs to be a balance here. We're the only city being impacted like this."

Yarbrough suggests that the Riverside County Transportation Commission focus its efforts on improving and – CONTINUED ON PAGE 5



The western portion of the parkway could have connected to proposed tunnels into Orange County.

Counties Face Farmland Protection Choices

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creating a benefit assessment district in agricultural preserves to replace some of the lost revenue.

Public officials in large farm counties do not want to do anything that would jeopardize agriculture, and a number of counties are dedicated to the Williamson Act program, CSAC's Keene said, pointing to Fresno, Monterey and Napa counties. Even in Siskiyou County, one of the state's poorest, Board of Supervisors Chairman Michael Kobseff declared in August, "As long as I'm a board member in Siskiyou County, I'm going to support the Williamson Act."

There are two views regarding the effectiveness of the Williamson Act. One view is that the program merely offsets the holding cost of large landowners who intend to develop their property in coming decades. The other, more common view is that the program helps limit sprawl into valuable agricultural land, while providing certainty and economic assistance to farmers and ranchers. The Farm Bureau Federation has cited an internal poll in which one-third of the program's participants said they could not continue agricultural operations without the tax breaks.

"From a planning standpoint, it's been really beneficial because it gives everyone a sense of what land is tied up and what is not tied up,"

Geyer said. "The support for the program locally and in the Legislature runs pretty broad and deep."

Guenzler said the program is an important tool, as there is limited funding available to buy conservation easements in environmentally sensitive areas – something that land trusts have perfected in recent years.

Keene and others noted that elimination of the subventions runs counter to the state's anti-sprawl and climate-change legislation. "It just goes so in the face of AB 32 implementation and approval of SB 375," she said. "It's contrary to those measures. We tried to impress that upon the administration." ■

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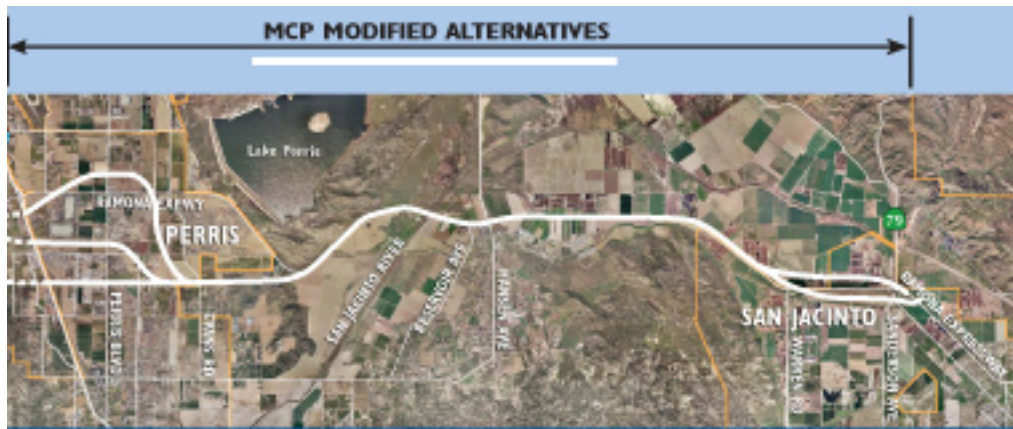
Department of Conservation, Williamson Act reports: www.conservation.ca.gov/dlrr/lca/stats_reports/Pages/index.aspx.

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extending Highway 74, which would provide a better link between Perris, Hemet and Elsinore. Another option would be to improve already-existing Ramona Expressway, which would parallel the proposed Mid County Parkway.

Environmentalists have long expected the parkway. They accepted the parkway in 2003 as part of the Riverside County Integrated Program. That plan outlined future transportation corridors and set up multiple species habitat conservation areas for endangered and threatened species (see *CP&DR Q&A*, January 2004; *In Brief*, July 2003; *CP&DR*, January 2002).

However, after Mid County Parkway environmental studies were released, the freeway generated opposition – primarily along the proposed western half of the road – from local residents, a landfill operator and environmentalists. The western parkway would have gone through several reserves set up under the habitat plan.



The parkway's eastern portion would connect San Jacinto to I-215.

The Riverside County Transportation Commission board, comprised of all five county supervisors plus city representatives, decided to scale back the project at its July 8 meeting. “They cut off the part that is most vulnerable to litigation,” explained George Hague, conservation chair of the Moreno Valley group of the Sierra Club.

Indeed, lawsuits from environmentalists and residents of the Gaviilan Hills area west of Perris appeared likely if the stretch of parkway from I-215 to Corona were included in the project. Buster said building that section of the parkway would involve a “protracted legal battle.” Supervisor Jeff Stone agreed when he told the *Riverside Press-Enterprise* that the western section of the project was “a litigation minefield.”

Instead of building the parkway, the county now intends to upgrade the existing Cajalco Road in the same area, which is likely to retain its rural character with the new roadway project ending at I-215.

While Perris city officials worry about the eastern portion of the parkway, Hague expressed fears that the western portion will still get built someday, and will be tied into freeways to Orange County. Much of Riverside County’s growth is from workers in Orange County seeking affordable housing.

Hague noted that \$15 million in congressional funding is being used to test the feasibility of building three 12-mile tunnels through the adjacent Santa Ana Mountains to provide new transportation routes to Orange County. However, now that the Riverside County Transportation Commission has dropped plans on the western portion of the Mid County Parkway, those tunnels appear doomed.

Supervisor Buster, who represents western portions of the county, said the decision not to build the western stretch of the parkway “is kind of a watershed point for the county” because it lessens the chance that a new road to Orange County will be built. A tunnel, he said, would have promoted jobs in other counties, while the revised parkway’s focus is on travel within Riverside County. The county can also use money it would have spent on the parkway’s western portion on upgrading arterial roads within the county, he said.

A new environmental study for the San Jacinto-Perris portion of the parkway is expected to be completed by next summer. Hague said environmental groups already are wary of the noise and pollution that the freeway could bring. “Our concern is this roadway will foster sprawl that will significantly impact the area,” he said.

Hague also criticized the name of the Mid County Parkway. “When you say parkway, it gives it a nice, fuzzy feeling,” he said. “It’s a six- to eight-lane freeway.”

Perris Councilman Yarbrough concurred. “This is not a parkway. This is a freeway,” he stated.

Among the projects the new parkway would serve is the Villages of Lakeview, an 11,000- to 15,000-unit housing development awaiting approval by the Riverside County Board of Supervisors. Buster said he had recently met

with the developers, Lewis Planned Communities, and they are still planning on building the project, despite the recession.

The parkway contains no mass transit options such as bus lanes or rail. But Cathy Bechtel, project manager for parkway, said there is room in the parkway’s 60-foot median to add bus lanes in the future, if necessary. A train line would be difficult to build because of the region’s rocky, hilly terrain, she said.

The city of Perris is already expected to gain train service that will tie into the Metrolink rail system by 2012, as part of a 23-mile extension from Riverside, she said.

An estimated 60,000 motorists a day will use the new parkway. Although Bechtel said an additional traffic lane will be added on I-215, Buster said details for the intersection with I-215 and the parkway still need to be resolved. ■

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Mid County Parkway website: www.midcountyparkway.org.

Capitolupdate

New Water Legislation Stirs Old Concerns

BY PAUL SHIGLEY

State lawmakers say that water and the Bay Delta should be the Legislature's top priorities until it recesses on September 11.

Exactly what measures the Legislature might pass is unclear. Earlier this month, Democratic lawmakers rolled out a five-bill package that they insist provides a framework for moving forward with the co-equal goals of Delta ecosystem restoration and increased water supply reliability. Republican lawmakers, however, said the package leans too heavily toward environmental considerations at the expense of water reliability. Representatives of the Schwarzenegger administration have provided a mixed review.

The five bills in the package:

- AB 39 (Huffman) outlines requirements for a Bay Delta conservation plan to be adopted before 2011.
- AB 49 (Feuer) establishes methods for reducing urban water usage by 20% by 2020, a stated goal of the administration.
- SB 12 (Simitian) creates an appointed Delta Stewardship Council that would approve the conservation plan and have other broad authorities.
- SB 229 (Pavley) establishes new requirements for reporting water diversions from the Delta and water usage.
- SB 485 (Wolk) creates a new Delta Conservancy and modifies the membership on, and the responsibilities of, the Delta Protection Commission.

The Democratic bill authors said their legislation must be considered together as one package. "This is an auspicious moment for California water," Assemblyman Jared Huffman (D-San Rafael), chairman of the Assembly Committee on Water, Parks and Wildlife, said during an August 18 informational hearing in Sacramento. "California can't afford to continue this disarray on the most important water system and ecosystem in the state."

Sen. Lois Wolk (D-Davis) said the package would establish a new governance structure for the Delta by creating a new council and removing authority from many of the approximately 200 agencies that have some say over some a portion of the Delta. But she insisted that the Delta locals should have strong representation on the new council.

Republican lawmakers expressed little patience with the bill package, largely because of its lack of a general obligation bond to fund water projects. State Sen. Majority Leader Dennis Hollingsworth (R-Murrieta) said the administration's process for addressing the Delta is already far along, and the bill package simply comes at old questions from an environmental perspective.

"I'm wondering what is the genesis of this hearing today. And what is the genesis of these proposals? A number of these have already been defeated by the Legislature or vetoed by the governor," Hollingsworth said. "I have to question the legislative sincerity of this exercise and these proposals. ... This is looking backwards."

Assemblywoman Jean Fuller (R-Bakersfield) said the Democratic package appeared incomplete, as it did not provide a source for funding implementation, did not spell out exactly what a new Delta council

should do, and did not adequately define the term "water reliability."

Department of Water Resources Director Lester Snow offered a more measured response to the Democratic package. "There is no reason not to shape up the package, add a bond to it, and approve it this year," Snow told lawmakers during the August 18 hearing.

The administration, said Snow, supports the idea of a council with broad authority, and of a comprehensive Delta management plan. But, he said, the bills appear to establish new obstacles to increasing reliable water deliveries from the Delta by placing greater emphasis on ecosystem restoration.

Phil Isenberg, a former Democratic assemblyman who now chairs the Delta Vision Task Force appointed by the governor, offered a qualified endorsement of the package.

"These bills are closer than you think, but each one of them needs to be changed," Isenberg told lawmakers.

One key point of contention concerns the makeup of the Delta Stewardship Council. Wolk, whose district includes large portions of the Delta, said that locals should have substantial representation. Yolo County Supervisor Mike McGowan agreed.

"We are not an interest group," McGowan urged. "We are a group of duly elected representatives. ... You need us. You need our local knowledge to be successful."

Isenberg, on the other hand, said that the council should be composed solely of governor's appointees, confirmed by the state Senate, who have a statewide perspective. Including a number of local stakeholders will only block progress on important policy for the entire state, he said.

Isenberg also said the package should do more to limit urban development in the Delta's secondary zone, which covers about 250,000 acres on the outer edge of the Delta. Currently, development is largely prohibited in the primary zone but allowed in the secondary zone. The concern is that development is hemming in the Delta.

Of course, the biggest concern regards a peripheral canal or "conveyance facility" that would divert water from the Sacramento River past the Delta and directly into the State Water Project. Most environmental groups remain staunchly opposed to the concept for fear it would ruin the Delta's natural systems. The Planning and Conservation League, for instance, complained that the bills "would create a politically appointed council with authority to approve new 'Delta conveyance' and would authorize these bureaucrats to assess unlimited fees on water users through most of California to pay for it."

Sen. Joe Simitian (D- Palo Alto) said such positions are not helpful and contended that opposition to the five-bill package equated to support for the status quo, which no one believes is working.

"The time to be for or against this or that, for or against a conveyance, has long passed," said Simitian, who does not oppose a conveyance facility.

Additional hearings on the Delta and water legislation are scheduled for August 25 and 27. ■

legal digest

Ruling Casts Doubt On Inclusionary Zoning

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affordable to low-income households. Palmer sued to block the mandate, contending that the city was effectively setting the rent for his units, a violation of the Costa-Hawkins Rental Housing Act. Both a trial court and the Second District Court of Appeal agreed with the developer.

“Forcing Palmer to provide affordable housing units at regulated rents in order to obtain project approval is clearly hostile to the right afforded under the Costa-Hawkins Act to establish the initial rental rate for a dwelling or unit,” Justice Steven Suzukawa wrote for a unanimous three-judge appellate panel.

Los Angeles has asked the panel to rehear the case. It is also preparing a possible appeal to the state Supreme Court. If the city is unsuccessful, developers and landowners could challenge inclusionary housing requirements in Los Angeles and across the state when seeking approval for their rental housing projects.

The decision does not affect ordinances that require developers to set aside and price a percentage of new for-sale units at below-market rates, because Costa-Hawkins applies only to rental housing. Nor does the ruling affect housing projects that involve some form of government assistance.

Goldfarb & Lipman attorney Barbara Kautz, an expert on inclusionary zoning and an adviser to the City of Los Angeles, said local governments should let the Palmer litigation reach a conclusion before reconsidering ordinances. “We’re suggesting that if people don’t have projects they are reviewing immediately, they should hold tight,” Kautz said.

Mike Rawson, an attorney with the Public Interest Law Project, agreed: “It’s premature to jump either way on the breadth of this decision.”

Still, Kautz said the Second District judges “definitely wrote [the ruling] to be extremely clear. It says developers, under state rent-control laws, have the ability to set the rents when the unit is built.”

James Burling, a Pacific Legal Foundation property rights attorney who has fought

to end inclusionary requirements, said that many local governments would not be affected by the ruling because their ordinances apply only to for-sale units or they permit in-lieu fees. Los Angeles was more aggressive in pushing inclusionary rules for rental units and it “got slapped down,” he said.

“Anybody that wants to have these kinds of controls on rental housing had better rewrite their ordinances,” Burling continued. “For rental properties, governments may attempt to impose in-lieu fees, but then they run into the Mitigation Fee Act. To the extent they attempt to restrict rent, they can’t do it.”

Palmer’s attorney, Jeffrey Lee Costell, told the *Los Angeles Downtown News* that the ruling should “help reverse mandatory inclusionary housing ordinances wrongly adopted statewide.”

Rent Control History

The 1995 Costa-Hawkins Act (Civil Code §§ 1954.50 – 1954.535) does not prohibit local governments from adopting rent-control policies. Rather, it establishes what is known as “vacancy decontrol” – landlords may set the new rental price when a unit becomes vacant. Local rent-control laws typically restrict the amount landlords may annually raise their rents until a unit becomes vacant once again.

About one-third of California cities and counties have inclusionary zoning ordinances (see *CP&DR*, December 2007). In general, they require developers to set aside 10% to 15% of new housing units for moderate- to low-income households. Most cities and counties permit developers to pay in-lieu fees to avoid building affordable units.

Policies governing where affordable units may be built vary from city to city. Some ordinances apply only to for-sale units, while others concern for-sale and rental housing. The state Department of Housing and Community Development has long viewed inclusionary zoning as a constraint on housing development. But affordable-housing advocates contend inclusionary mandates are needed because government funding for housing

is insufficient to meet overall demand.

The City of Los Angeles does not have an inclusionary ordinance, though planners, council members and the mayor’s office have for years discussed adopting one.

But in 1991, the city adopted the Central City West specific plan for an area near downtown west of the Harbor Freeway. The plan required developers of projects of more than 10 dwelling units per lot to set aside 15% of the units for households earning 30% to 80% of the median income in Los Angeles (these days, roughly \$14,000 to \$38,000 annually). Rents for these units must be affordable for the life of the project or 30 years, whichever is greater. Furthermore, very low- and low-income units demolished in Central City West after February 13, 1988, must be replaced by project developers.

Palmer, who has built more than 2,000 market-rate apartments in and around downtown Los Angeles, asked the city to waive the affordable-housing requirement for his Piero II project at Sixth and Bixel streets, which involves the construction of 350 residential units and 9,700 square feet of commercial space on 2.84 acres. He claimed the affordable-housing requirement would make his project economically infeasible, as well as violate the Costa-Hawkins Act.

Palmer had sued before to evade the Central City West plan’s affordability mandates. In 2004, he settled the lawsuit by agreeing to pay the city \$2.8 million to bypass the requirements for one project; the city allowed him to convert some moderate-income units to market-rate in another project.

Palmer’s waiver request for his Piero II project was rejected by the city Planning Commission. Because the site had contained a 60-unit low-income apartment hotel that was demolished in 1990, the commission required Palmer, as a condition of approval, to replace those units – either on-site or elsewhere – or pay an in-lieu fee of about \$5.7 million (\$96,000 per unit). Palmer appealed to the City Council and lost.

Palmer then sued the city and won. Los Angeles County

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Superior Court Judge Dzintra Janavs agreed with Palmer's contention that the affordable-housing requirement violated the Costa-Hawkins Act and that the in-lieu fee was illegal. She declined to consider the in-lieu fee separately, finding that it was inextricably intertwined with the pre-empted requirement to provide affordable units.

The City Appeals

On appeal, the city argued that because Palmer acknowledged he would pay in-lieu fees – rather than replace the demolished units – if he lost the lawsuit, he had rendered the issue of Costa-Hawkins moot. The appellate panel disagreed.

The city also argued that it had not violated Costa-Hawkins because the Central City West plan simply required Palmer to replace the demolished low-income units or pay an in-lieu fee – neither of which implicated the rents for his new units. The three-judge panel was not persuaded. It said the plan's replacement provisions, inclusionary housing requirements and in-lieu fee language should

all be read together.

"We find [specific plan] § 11.C's affordable housing requirements to be hostile or inimical to Civil Code § 1954.53 by denying Palmer the right to establish the initial rental rates for the affordable housing units that are required to be built under § 11.C, and by preserving their regulated rent levels for 30 years or the life of the units, whichever is greater," Justice Suzukawa wrote.

Rawson, the affordable-housing lawyer, said the panel ignored the legislative history behind Costa-Hawkins in its ruling. That law, he said, came about as a result of apartment owners pressuring lawmakers to prohibit local rent control. "Inclusionary zoning was not on their [apartment owners'] radar screen," he said.

Kautz said the judges also skipped over a number of potentially complicating factors. For example, state redevelopment law requires a certain percentage of units within redevelopment project areas to be made affordable to moderate- and low-income households. The Mello Act imposes a similar requirement on new units in the Coastal

Zone. The panel's reading of Costa-Hawkins would appear to be in conflict with these laws. She said the court also ignored previous appellate court rulings upholding inclusionary requirements that included an in-lieu fee option, such as Los Angeles's.

The decision is apparently the first published ruling – meaning it may be cited as precedent – that strikes down an inclusionary requirement based on Costa-Hawkins. If the Second District declines to reconsider its decision – such rehearings are extremely rare – Los Angeles will have the support of housing advocates, civil rights groups and local government organizations in its appeal to the state Supreme Court.

Palmer has yet to break ground on Piero II. ■

■ The Case:

Palmer/Sixth Street Properties LP v. City of Los Angeles, No. B206102, 2009 DJDAR 10859. Filed July 22, 2009.

■ The Lawyers:

For Palmer: Jeffrey Lee Costell, Costell & Cornelius, (310) 458-5959.

For the city: Michael Bostrom, city attorney's office, (213) 978-8068.

initiatives and referendums

Court Reinstates SLO Developer's Ballot Measure

A state appellate court has reinstated the results of a local ballot initiative that authorized a large development near the San Luis Obispo County airport.

A trial court judge had thrown out the initiative on the grounds that it was superseded by the State Aeronautics Act and that the ballot measure amounted to an "adjudicative" rather than a legislative act. A unanimous three-judge panel of the Second District Court of Appeal, Division Six, disagreed, ruling that the aeronautics law did not preclude the initiative and that it was appropriately legislative in nature.

Ever since the 1980s, landowner Ernest Dalidio Jr. has been trying to develop his 130-acre property west of Highway 101 and south of Madonna Road. Five years ago, he finally won approval for a project from the City of San Luis Obispo. But city voters nullified the approval in a 2005 referendum, and the city never annexed the property, as Dalidio had proposed.

A year later, Dalidio took a proposed development directly to county voters in the form a general plan amendment and

zoning changes. The proposal involved a 530,000-square-foot retail center, 200,000 square feet of office and business space, a 150-room hotel, 60 housing units and a permanent farmers market. County voters passed the proposal, Measure J, by a 2-1 margin in November 2006.

Opponents continued to complain the developer would not pay his fair share for a needed freeway interchange and that plans for an on-site sewage-treatment plant were uncertain to pass state regulatory muster. The Citizens for Planning Responsibly and the Environmental Center of San Luis Obispo County sued to block the project, and San Luis Obispo County Superior Court Judge Roger Picquet ruled in their favor. Dalidio appealed.

In its decision, the appellate panel first addressed the question of whether the initiative was legislative. Only legislative acts are subject to the initiative process. Judge Picquet had characterized Measure J as adjudicative because it involved a specific proposal for a defined area and not more general rules for future cases.

The appellate panel pointed to the landmark cases of *Arnel Development Co. v. City of Costa Mesa*, (1980) 28 Cal.3d 511, and *DeVita v. County of Napa*, (1995) 9 Cal.4th 763. In *Arnel*, the state Supreme Court held that a zoning ordinance is a legislative matter that may be enacted by initiative. In *DeVita*, it ruled that a general plan amendment is legislative and thus subject to the initiative process. The three judges said Dalidio's initiative was no exception to these rulings.

The appellate panel then turned to the State Aeronautics Act, which requires every county to have an airport land use commission that adopts plans for areas around airports. Cities and counties must comply with the plans unless they make certain findings regarding compatibility with airport uses and obtain two-thirds approval from the legislative body. Measure J would alter general plan and zoning designations within an area subject to the San Luis Obispo County airport land use plan. Opponents of Dalidio's project contended that the State Aeronautics Act, because it addresses issues of statewide concern, prohibits any local

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initiative seeking to change how land adjacent to an airport is used. The court rejected the argument.

“Undoubtedly, public safety and environmental concerns related to aviation and airports are matters of statewide concern. But a state statutory scheme does not restrict or preempt the power of the initiative simply because it implicates matters of statewide concern,” Justice Steven Perren wrote.

“Local agencies have traditionally exercised control over land use regulation,” Per-

ren continued. “Absent a clear indication of preemptive intent, we must presume that local regulation and the initiative power do not conflict with the SAA [State Aeronautics Act].”

The judges also rejected the argument that the initiative was invalid because voters could not make the findings required to supercede the airport land use commission. Making such findings is a procedural requirement that is waived in the initiative process, the court determined.

The trial court judge’s award of attorney fees to the opponents of the project was also

overturned. ■

■ The Case:

Citizens for Planning Responsibly v. County of San Luis Obispo, No. B206957, 2009 DJDAR 11387. Filed August 4, 2009.

■ The Lawyers:

For Citizens: Kevin Bundy, Shute, Mihaly & Weinberger, (415) 552-7272.

For the county: James Orton, county counsel’s office, (805) 781-5400.

For Ernest Dalidio Jr.: Michael J. Morris, Andre, Morris & Buttery, (805) 543-4171.

nepa

Bush Administration Forest Management Rules Rejected

Two Bush administration policies for managing national forests were invalidated by the Ninth U.S. Circuit Court of Appeals in early August.

One three-judge panel blocked implementation of a 2004 amendment to the Sierra Nevada Framework that governs all 11 national forests in the mountain range. A second panel rejected the Forest Service’s attempt to eliminate a Clinton-era rule prohibiting development in designated roadless areas of national forests. The court ruled that the Forest Service violated the National Environmental Policy Act (NEPA) and the Endangered Species Act by not conducting required environmental reviews.

The first case involved the Sierra Nevada Framework, which was adopted during the final days of the Clinton presidency. Backed primarily by environmentalists and community groups, the framework reduced permissible logging levels by about one-third by limiting the size of trees that may be cut. The plan was intended to prevent the court-ordered shut down of logging, as occurred in Oregon and Washington during the 1980s and 1990s (see *CP&DR Environment Watch*, April 2005, March 2001).

The Bush-era Forest Service amended the framework to permit logging of much larger trees. The increased logging would generate money for forest-thinning projects to reduce fire danger. Environmental groups sued, arguing the Forest Service violated NEPA, but District Court Judge Morrison England declined to issue a preliminary injunction to block the amendment. Last year, a Ninth Circuit panel overturned England and issued the preliminary injunction (*Sierra Forest Legacy*

v. Rey, 526 F3d 1228). The administration asked for a new hearing, and the same panel reconsidered in light of new standards for a preliminary injunction established in an unrelated case by the U.S. Supreme Court (*Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008)).

In its latest decision, the Ninth Circuit still held that a preliminary injunction was appropriate. The Forest Service in 2004 should not have relied on the environmental impact statement for the 2001 framework because the Forest Service’s own modeling techniques had changed and because the 2004 amendment “introduced substantially new objectives” to the framework, according to the court.

England has since ruled for the environmentalists in their NEPA claim. The Ninth Circuit said the judge should now consider whether to block implementation of the 2004 amendment permanently.

The second case involved Bush administration efforts to repeal the “roadless rule” for millions of acres of national forests. Also promulgated during the final days of the Clinton administration, the rule barred most road building, logging, mining and drilling from inventoried roadless areas. Instead, the Bush administration in 2005 adopted the “state petitions rule,” which allowed individual states to determine how to manage roadless areas of national forests within each state. The Forest Service declared the new rule categorically exempt from review under NEPA and the Endangered Species Act because the rule was merely a procedural change.

In litigation involving numerous states and interest groups, Magistrate Judge Elizabeth Laporte in 2006 blocked the Forest Service

from implementing the new rule and ordered the 2001 roadless rule reinstated. In a blunt opinion, the Ninth Circuit upheld Laporte’s decision.

“By permanently removing the roadless rule from the Code of Federal Regulations, the state petitions rule did much more than establish a new procedure for consideration of state-specific land management rules: It purported to ensure that future land management decisions would never again be constrained by the roadless rule and its enhanced protections for inventoried roadless areas,” Judge Robert Beezer wrote for the court. “It was unreasonable for the USDA to characterize the permanent repeal of these substantive protections as ‘merely procedural’ and within the scope of the cited categorical exclusion.”

Other litigation over how to manage roadless national forest areas continues. In the meantime, the Ninth Circuit decision applies nationwide. ■

■ First Case:

Sierra Forest Legacy v. Rey, No. 07-16892, 2009 DJDAR 12032. Filed August 13, 2009.

■ The Lawyers:

For Sierra Forest Legacy: David Edelson, (510) 527-4116

For the Forest Service: Jennifer Scheller, U.S. Department of Justice Environment and Natural Resources Division, (202) 514-2000.

■ Second Case:

People v. U.S. Dept. of Agriculture, No. 07-15613, 2009 DJDAR 11669. Filed August 5, 2009.

■ The Lawyers:

For the People: Claudia Polsky, California attorney general’s office, (510) 540-3951.

For the Forest Service: John Smeltzer, U.S. Department of Justice, (202) 514-2000.

CDC Lends Support To Healthy Design Movement

A new report from the Centers for Disease Control says that planning may play a significant role in reducing the obesity epidemic in the United States. The report, which compiles numerous research studies and recommendations of experts, provides additional scientific backing to the healthy design movement that has started to gain traction during recent years.

The report recommends 24 community strategies to prevent obesity, ranging from school lunch improvements, educational programs and breastfeeding support to mixed-use zoning and better pedestrian facilities.

The report makes nine recommendations related directly to land use planning:

- Improve geographic availability of supermarkets in underserved areas. The report does not speak specifically to zoning, but I learned while working on a story for in the August/September edition of *Planning* magazine that zoning policies influence supermarket access. In Los Angeles, for example, city officials who want to encourage new neighborhood grocery stores in underserved neighborhoods have backed off some policies that essentially require giant stores with acres of parking – stores that are almost impossible to build in dense urban areas.

- Provide incentives to food retailers to locate in and/or offer healthier food beverage choices in underserved areas. Some of this is basic economic development assistance, such as grants for installing dairy and produce cases. Zoning for small food markets also plays a role.

- Improve access to outdoor recreational facilities. As you may guess, this involves building parks and community exercise facilities, and ensuring people may reach them.

- Enhance infrastructure supporting bicycling. Create bike lanes and shared-use paths, and establish bike routes on existing roads.

- Enhance infrastructure supporting walking. The report makes clear that providing sidewalks, walking trails and pedestrian crossings is not enough. The report also speaks to “street-scale urban design and land use interventions” such as improved street lighting, traffic calming and enhanced landscaping.

- Locate schools within easy walking distance of residential areas. In California, planners have limited influence on where school districts locate their facilities. But the report also states, “Among students living within 1 mile of school, the percentage of walkers fell from 90% to 31% between 1969 and 2001.” The report attributes this startling decrease to the walking environment, specifically, single land uses, long blocks and incomplete sidewalks.

- Improve access to public transportation. People who ride transit often walk or bicycle to and from transit stops.

- Zone for mixed-use development. The report says succinctly, “Zoning laws restricting the mixing of residential and nonresidential uses and encouraging single-use development can be a barrier to physical activity.” Gosh, who knew?

- Enhance traffic safety in areas where persons are or could be physically active. In other words, engineer streets to slow traffic in areas where you want to encourage walking, running and bicycling.

The report, “Recommended Community Strategies and Measurements to Prevent Obesity in the United States,” is available here: <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5807a1.htm>

– PAUL SHIGLEY | AUGUST 5, 2009 ■

State Budget Clouds Redevelopment's Future

Will redevelopment mean anything once the dust settles on California's budget crisis?

Last month's state budget deal attempts to whack redevelopment agencies to the tune of \$2.05 billion (see *CP&DR*, August 1, 2009). The redevelopment agencies are suing, claiming it's an unconstitutional shift of funds. This is nothing new; last year, the state attempted to take \$350 million, and the redevelopment agencies successfully sued to block the revenue shift (see *CP&DR Redevelopment Watch*, June 2009).

In fact, this is merely the latest skirmish in a decades-long fight over redevelopment funds. Redevelopment is one of the few ways that local governments – especially cities – can unilaterally gain control over tax revenue. By declaring an area blighted, a city can capture 60% to 70% of the increases in property tax revenue from that area in the future. By comparison, cities typically receive about 15% of the property tax revenue inside their borders absent redevelopment. Statewide, redevelopment agencies capture close to \$5 billion a year in property tax revenue, which is nearly 10% of the statewide property tax total.

The problem, of course, is that there is a fixed amount of property tax, so money that flows to redevelopment agencies flows away from somebody else – principally counties and schools. That's why the state always goes after redevelopment funds in bad times. Half of the property tax in the state goes to school districts, so every time a dollar flows to redevelopment agencies that means the state must backfill 50 cents to school districts.

Whatever you think of redevelopment agencies – and there are strong feelings on both sides – they have far less money than they used to. Over the last 30 years, the state has gradually boxed redevelopment agencies in and diverted more and more tax increment revenue away from them, either directly or indirectly.

The latest tax transfer is far more massive than anything we have seen before.

It's more than worth it to keep existing project areas going; but we may soon be to the point where creating new ones doesn't pay off.

– BILL FULTON | AUGUST 4, 2009 ■

“The state has gradually boxed redevelopment agencies in and diverted more and more tax increment revenue away from them.”

