CP&DR

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Fire-Safety Planning Legislation Advances

Land Use Bills Are Few As Lawmakers Near Recess Date

BY PAUL SHIGLEY

Two bills that would require greater consideration of fire safety in land use planning appear likely to reach the governor's desk before the Legislature recesses its regular session on September 11. Moreover, a late move to link the fire planning bills to disaster relief legislation could increase the chances that Gov. Schwarzenegger will actually sign the bills.

The fire planning bills are exceptions, as very little substantive legislation – concerning land use or anything else – appears likely to pass the Legislature this year. A number of sources inside and outside the Capitol said they could not remember the situation being so sedate during the final weeks before the mid-term recess.

"It is eerily quiet. It is scarily quiet," said Sande George, the lobbyist for the American Planning Association's California chapter. George's list of bills she is tracking is unusually short. Other bill lists compiled by advocates and legislative aides indicate that many pieces of legislation are "two-year" bills, meaning they will not advance until after lawmakers return from their recess in January.

A package of Bay Delta water bills appears unlikely to win approval this year, especially given rising resistance from agricultural interests. The Democratic authors of AB 39 (Huffman), AB 49 (Feuer), SB 12 (Simitian), SB 229 (Pavley) and SB 485 (Wolk) say the package provides a framework for moving forward with Delta ecosystem restoration and improved water supply reliability (see *CP&DR Capitol Update*, August 15, 2009). Detractors say the bills would do little for water supply, and Schwarzenegger has promised he will not sign the bills unless the package includes a bond to fund increased water storage facilities. Still, the bills remain alive this year and a priority for Democratic lawmakers.

Continuing to loom is a proposal from the City of Industry that would permit redevelopment agencies to extend project deadlines by 40 years without new findings of blight in exchange for giving the state 10% of tax increment. The proposal – CONTINUED ON PAGE 3

Agencies, Growth Council Jockey To Assume OPR's Responsibilities

insight

WILLIAM FULTON

California government never fails to amuse. Gov. Arnold Schwarzenegger appears poised to eliminate his own Office of Planning and Research (OPR) and nobody – not even the state's planners – is rushing to the beleaguered office's defense. Yet throughout Sacramento, vultures are hovering, because while OPR itself may not be worth saving, the carcass appears to have value.

The California Air Resources Board (CARB) is staking a claim on OPR's role in the California Environmental Quality Act (CEQA) – though the legal power to change the CEQA Guidelines lies with the Natural Resources Agency. The CARB is already in the planning game, of course, thanks to SB 375. Nobody knows where the general plan guidelines will land; the most obvious – CONTINUED ON PAGE 10

inbrief

A freeze on processing general plan amendments, rezones and development projects in Bakersfield has apparently been lifted before it got started. City Manager Alan Tandy had proposed the freeze in response to a building industry lawsuit filed in early August that sought to block an increase in regional traffic impact fees.

The City Council said it would not freeze the development review process. But city officials warned that any approved project could be vulnerable to a California Environmental Quality Act challenge while the fee lawsuit is pending. That's because potential opponents of a project could argue that its effects on traffic congestion would not be fully mitigated without the higher fee.

Kern County hiked the regional transportation impact fee from about $7,000 nearly $13,000 in May. The City of Bakersfield followed suit in July.

In its lawsuit, the Home Builders Association of Kern County contends that a "nexus" study does not justify the fee increase because many of the planned transportation projects address existing congestion, not the effects of new development. The builders, who also name the county in the litigation, are additionally demanding the city refund $50 million in traffic fees, claiming that the city has not properly accounted for fee expenditures.

Officials with the city, the county and the Kern Council of Governments insist the higher fee, which would generate an estimated $1.9 billion over 20 years, is necessary to keep pace with development and to match $630 million in federal transportation funds earmarked for the Bakersfield region.

In an unrelated matter, the Kern County Board of Supervisors voted 3-2 in August to reject a proposal to rezone 78 acres of agricultural land northwest of Bakersfield for residential and commercial development. Supervisors said building a housing subdivision amid the orchards and ranches a few miles outside the city would conflict with state goals for reducing vehicle miles traveled and the emission of greenhouse gases.

The environmental impact report for a stretch of the proposed high-speed rail project in the Bay Area has been rejected by a Sacramento County Superior Court. Both project opponents and supporters claimed victory with Judge Michael Kenny's ruling.

The Planning and Conservation League, other advocacy groups, Menlo Park and Atherton sued the High-Speed Rail Authority last year because they want the train to link the Bay Area and Central Valley via the East Bay's Altamont Pass. The authority has chosen to route the train from Merced to San Jose via Pacheco Pass.

Kenny ruled the EIR was faulty because it did not address Union Pacific's refusal to allow the high-speed train on its tracks between Gilroy and San Jose. The authority had assumed it could use the tracks. Without access to them, Kenny ruled, the rail project might produce additional environmental effects and may need to take more residential and commercial property. Peninsula cities and environmentalists cheered that part of the ruling. Proponents of the Pacheco Pass connection praised Kenny's conclusion that the Altamont Pass route could result in "substantially increased construction costs and constructability issues."

Only days before Kenny issued his ruling, a Menlo Park resident sued the authority and Caltrain over the high-speed rail project's planned use of Union Pacific's tracks on the Peninsula, which Caltrain has used for years. Meanwhile, a consortium of five Peninsula cities has yet to reach an agreement with the authority over the precise route, design and technology of the high-speed train system (see *CP&DR Public Development*, June 2009).

The American Society of Landscape Architects has compiled an online "sustainable urban development resource guide." The guide contains links to organizations, research and projects related to sustainable development, with focuses on reusing brownfields, investing in downtowns, limiting sprawl and maintaining open spaces. The guide is available here: http://www.asla.org/ContentDetail.aspx?id=23720. ■

editor's note

I'm of two minds regarding the decision by the California Chapter of the American Planning Association – pardon me, it's called APA California now – to schedule its annual conference in the countryside. One part of me thinks it's a great idea, because I'd much rather spend time in Yosemite Valley (site of the 2005 conference) than in Garden Grove (2006). The other part wonders why we're all going to drive to a fancy resort in the high Sierra to talk about housing density and reducing vehicle miles traveled.

OK, that's a cheap shot. I should give conference organizers credit for strongly encouraging everyone to get themselves to Sacramento to take a charter bus to and from the conference site near Lake Tahoe.

Still, I have to wonder if the Resort at Squaw Creek – this year's venue of choice – is really the best place to talk about the urban and regional planning issues confronting California. The last two years, APA California met in Hollywood and downtown San Jose – excellent laboratories for studying planning and development trends. Both conferences were held in the midst of successful redevelopment projects well-served by transit, yet were also within walking distance of troubled urban neighborhoods.

The same people come to the conference year after year, so maybe variety is good. Or maybe the location doesn't matter. The breakout sessions are the heart of any conference, and once you're in a windowless room with 40 planners, that room could be located in Tahoe City, San Jose, Bakersfield or Blythe. Everyone is going to be watching the PowerPoint slides, jotting notes and trading business cards.

Still, if planners have taught this journalist anything – and they've taught me a great deal – it's that place matters. I'm quite sure the Resort at Squaw Creek is a lovely place to watch the alpenglow, smell the pines and play golf, but is it a place conducive to planning California's complex land uses? I'll find out when Bill Fulton and I arrive at the event on September 13. Look for conference coverage in our blog [http://www.cp-dr.com/blog] and in our next edition, which is scheduled to hit your inbox on September 18. ■

– PAUL SHIGLEY

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Some Land Use Bills Reach Governor's Desk

– CONTINUED FROM PAGE 1

failed when lawmakers approved the state budget in July, but Industry's lobbyists continue to shop around the proposal.

The fire planning bills are AB 666 by Assemblyman Dave Jones (D-Sacramento) and SB 505 by Sen. Christine Kehoe (D-San Diego). In late August, both bills passed out of appropriations committees, which have been death zones for so much legislation during the state budget crisis. The Jones bill would require counties to determine that proposed development in a state fire responsibility area or "very high fire hazard severity zone" would, at a minimum, meet California Department of Forestry and Fire Protection (CalFire) standards for access, design and service availability. The bill would not apply to cities. It is similar to AB 2447 from last year, a bill that Schwarzenegger vetoed because he said it would give a state agency an inappropriate role in local land use decisions.

Citing support from firefighters, Jones brought the legislation back this year with minor amendments. "We cannot continue to approve new building sites in the most hazardous areas if there is not adequate fire protection," he said.

> "We cannot continue to approve new building sites in the most hazardous areas if there is not adequate fire protection."
>
> – ASSEMBLYMAN DAVE JONES.

Although CalFire says it will cost $1 million to provide consultation and project reviews under AB 666, the Senate Appropriations Committee approved the bill. What's more, the committee – chaired by Kehoe – ensured that two disaster relief bills (AB 15 – Fuentes, and AB 50 – Nava) could not take effect unless both AB 666 and SB 505 become law. The disaster relief bills for Southern California wildfires in 2007, 2008 and earlier this year are almost certain to pass.

The California State Association of Counties, which has opposed state-mandated fire planning standards, has dropped its position against AB 666. However, the counties remain opposed to SB 505 because of its cost. That bill would require cities and counties with territory in state responsibility areas or very high fire hazard severity zones to amend general plan safety elements with an extensive explanation of local fire hazards. The elements would also have to contain goals, policies, objectives and implementation measures that conform to an update of a state fire hazard planning guidance document. Local governments would have to amend their safety elements by 2015, and upon each required housing element revision thereafter. The bill also requires the Governor's Office of Planning and Research to update fire hazard planning guidance by 2011 – although OPR may not remain in business (see *Insight*).

A few land use bills have already passed the Legislature and await the governor's consideration. Lawmakers approved AB 720 (Caballero), which permits a city or county to meet up to 25% of its fair-share housing allocation through acquisition, preservation or rehabilitation of affordable housing units. The California Redevelopment Association and League of California Cities sponsored AB 720, but affordable housing advocates are skeptical because no additional units will be created. Those advocates, however, were pleased the Legislature approved AB 570 (Arambula), which modifies the state housing trust fund matching program to make it easier for small jurisdictions to receive money. Also passing recently was SB 215 (Wiggins), a measure that requires a Local Agency Formation Commission, when acting on proposed boundary changes, to consider a regional transportation plan, and the sustainable communities strategies and alternative planning strategies required under SB 375.

In addition, the governor has already signed several bills, including AB 210 (Hayashi), clarifying how cities and counties may adopt green building standards more stringent than state standards; AB 333 (Fuentes), urgency legislation that extended the expiration date of subdivision maps by two years; and SB 430 (Dutton), extending from 10 years to 15 years the time limit on San Bernardino County's Cedar Glen disaster recovery project area redevelopment plan.

Other bills that appear to have some chance of passing before the recess:

• ACA 9 (Huffman). Would decreased the vote threshold for some local bond measures from two-thirds to 55%.

• AB 494 (Caballero). Would exempt from the Subdivision Map Act nonprofit farmworker housing projects of no more than five acres on agricultural land. The scope of the bill has been substantially reduced because of earlier opposition from planners and counties.

• AB 566 (Nava). Would permit cities and counties to consider mobile home park tenant support for a mobile home park owner's proposal to convert a park to condominiums or common-interest ownership (see *Legal Digest*, Page 5).

• AB 1158 (Hayashi). Would modify the definition of a transit village to also include educational facilities. The bill is linked to AB 338 (Ma), which would authorize local governments – without voter approval – to use tax increment financing to pay for transit village infrastructure.

• SB 43 (Alquist). Would authorize creation of a joint powers authority in Santa Clara to construct and operate a professional football stadium.

• SB 93 (Kehoe). Would limit a redevelopment agency's spending on public works outside of a redevelopment project area.

• SB 99 (Senate Local Government Committee). Would impose additional accountability requirements on public agencies that provide conduit financing.

• SB 279 (Hancock). Would authorize use of community facility district (Mello-Roos) financing for water conservation, energy efficiency and renewable energy improvements.

• SB 406 (DeSaulnier). Would permit metropolitan planning organizations, regional transportation commissions and certain air districts to place a $1 or $2 surcharge on vehicle registrations to fund regional and subregional planning efforts.

• SB 545 (Cedillo). Would require that any extension of the 710 freeway through South Pasadena be constructed in a tunnel.

• SB 575 (Steinberg). Cleanup legislation that specifies housing element deadlines under last year's SB 375. ■

San Diego Tax-Processing 'Fee' Declared Illegal

Levy Was Subject To Proposition 218 Voter Requirements, Court Rules

BY PAUL SHIGLEY

A fee that the City of San Diego levied on businesses and landlords for processing their taxes has been declared illegal by the Fourth District Court of Appeal. The court ruled that the fee amounted to a general purpose tax that should have been submitted to voters for approval.

The decision marks another loss for local government in the continuing litigation over the reach of Proposition 13 and its progeny Proposition 218, which contains voter-approval requirements for taxes, as well as for property-based assessments and fees.

San Diego contended its levy was a fee for service and thus not subject to Propositions 13 or 218. But a unanimous three-judge panel ruled that it was a "means for collecting tax payments." The court also rejected the city's argument that the fee was "regulatory" and thus exempt from Proposition 218.

San Diego city officials appear ready to ask the state Supreme Court to review the decision, which both sides said could have significant statewide ramifications. If the high court does not accept the case, the attorney for two landlords who filed the lawsuit said he would demand that the city return the fee revenue, which totaled more than $14 million.

"The city has to pay it all back, and pay it all back with interest," attorney Edward Teyssier said. "There's a strong public policy issue. You should return the money."

San Diego has long levied a business tax, and in 1990, the city extended it to owners of rental housing. The tax generated approximately $13.5 million during the 2008-09 fiscal year.

Faced with a budget shortfall in 2004, the City Council approved a $25 "business tax and rental unit tax processing fee" for the 139,000 businesses and landlords subject to the tax. The city said the fee would recover the $3.5 million in costs associated with processing applications and renewals for business tax and rental unit tax certificates. In 2007, the city cut the fee to $15.

Sidney Weisblat, who owns a rental condo, and Kenneth Ledgerwood, who owns two rental houses, sued the city in June 2005 to end the fee, contending that it amounted to a tax in violation of Propositions 13 and 218. San Diego County Superior Court Judge Charles Hayes ruled against them, but the Fourth District, Division One, overturned the decision.

In its ruling, the appellate court detailed the differences between special taxes, general taxes and fees. Special taxes are levied for a specific purpose and must be approved by two-thirds of voters. General taxes serve general governmental purposes and require only the approval of a majority of voters. Assessments, fees and charges imposed "as an incident of property ownership" and user fees or charges for a "property related service" are subject to Proposition 218. These charges require either majority approval of the property owners or two-thirds approval of the electorate in the affected area. User fees, regulatory fees and development impact fees are not subject to voter or property owner approval.

To help decide where the San Diego charge fell on this legal spectrum, the court cited the state Supreme Court's "primary purpose" test adopted in *Sinclair Paint Co. v. State Board of Equalization*, (1997) 15 Cal.4th 866: "If revenue is the primary purpose, and regulation is merely incidental, the imposition is a tax, but if regulation is the primary purpose, the mere fact that revenue is also obtained does not make the imposition a tax."

The city contended that the processing charge was a regulatory or user fee because it benefited those who paid it by funding courtesy billing notices. But the appellate panel said there was no evidence that "the purpose of the levy is to fund any regulatory activity or provide any municipal services beyond those involved in recovering the costs associated with processing the business tax and RUBT [rental unit business tax] certificate applications and renewals."

Writing for the court, Justice Gilbert Nares said, "The city cites no authority, and we are aware of none, to support the city's novel position that a levy 'courtesy billing notice' is a 'specific benefit conferred' within the meaning of the *Sinclair Paint* guidelines that renders a local government levy a fee, and not a tax subject to constitutionally required voter approval limitations."

The court then considered whether the fee is a general tax subject to majority vote, or a special tax needing two-thirds approval. While it determined that the levy is a hybrid, the panel ruled it should be treated like a general tax because its practical effect "is an increase in the business tax and therefore an increase in a general tax."

City Attorney Jan Goldsmith has asserted that the decision affects only the landlord fee – an interpretation attorney Teyssier dismisses. For purposes here, business owners and landlords are not separate classes, he said.

"I've got landlords for clients, and I've got business owners for clients; you can guess what I might do next," Teyssier said. "We'll decide what to do later on based on what the city does."

Meanwhile, the Howard Jarvis Taxpayers Association, which authored Proposition 218, has warned that it may use the decision to fight similar tax-processing fees in other jurisdictions. ■

- The Case:
  Weisblat v. City of San Diego, No. D052787, 2009 DJDAR 12319. Filed August 18, 2009.
- The Lawyers:
  For Weisblat: Edward Teyssier, (619) 474-7500.
  For the city: Joe Cordileone, city attorney's office, (619) 533-5854.

rent control

Mobile Home Park Conversions Ruled Exempt From Local Control

Cities and counties have little authority over the conversion of mobile home parks to resident-owned subdivisions, the First District Court of Appeal has ruled.

"If the Legislature ever did leave the field of mobile home park legislation to local control, that day is long past," Justice James Richman wrote for a unanimous three-judge panel that invalidated a Sonoma County ordinance because it was superceded by state law.

Backed by mobile home residents and affordable housing advocates, local governments have tried to block the conversions to preserve affordable housing stock. Mobile home parks often make up a substantial portion of a jurisdiction's low- and moderate-income units, and many parks are subject to rent control. But a park that has been converted into condominiums or a common-interest ownership is exempt from local rent control ordinances even if most spaces in a park remain under the same ownership and residents continue to rent the same spaces. The First District decision, appears to jeopardize efforts to block suspect conversions. However, a bill pending in the state Senate could increase local authority.

In the case before the appellate court, the Sonoma County Board of Supervisors had adopted an ordinance in May 2007 that placed conditions on mobile home park conversions. Among other things, the measure prohibited a conversion unless the park owner could show that at least 20% of his renters supported it. The ordinance also required a tenant impact report, a maintenance inspection and detailed plans for funding maintenance of infrastructure and common areas.

The owners of Sequoia Gardens Mobile Home Park outside Santa Rosa sued, contending the ordinance violated state law and was an improper taking of private property. They asked a Superior Court to invalidate the ordinance and award damages. In 2006, the owners had sued to block the county from imposing a moratorium on park conversions, demanding tens of millions of dollars in damages.

Sonoma County Superior Court Judge Raymond Giordano upheld the Sonoma County ordinance, a decision the First District Court of Appeal, Division Two, overturned.

A local ordinance is preempted if it duplicates, conflicts with or "enters an area fully occupied" by state law, Richman explained in the appellate panel's ruling, citing *Big Creek Lumber Co. v. County of Santa Clara*, (2006) 38 Cal.4th 1139 (see *CP&DR Legal Digest*, August 2006). The state has regulated at least some aspects of mobile home parks and mobile home construction since the Legislature passed the Mobilehome Parks Act in 1967. Other related state laws were approved in following years.

Of primary importance in this case were portions of the Subdivision Map Act dealing with mobile home parks, especially Government Code § 66427.5. That section, first adopted in 1991 and amended in 1995, "is a fairly straightforward statute addressing the subject of how a subdivider shall demonstrate that a proposed mobile home park conversion will avoid economic displacement of current tenants who do not choose to become a purchasing resident," Richman wrote. The statute permits park owners to raise rents on tenants who do not buy their lot to market rates over the course of four years after a conversion, and it limits rent increases for low-income tenants.

In 2002, an appellate court in *El Dorado Palm Springs, Ltd. v. City of Palm Springs*, 96 Cal.App.4th 1153, ruled that § 66427.5 prevented a city from adding conditions to a proposed mobile home park conversion (see *CP&DR Legal Digest*, June 2002). In response, the Legislature added subdivision (d) to § 66427.5, which required park owners to submit a "survey of support of residents" when applying for conversion approval. The stated intent was to ensure that conversions were "bona fide," and not a sham to avoid rent control. But lawmakers did not set a required minimum level of support among park residents.

In their suit, the Sequoia Gardens owners argued that the state law made the county's approval of proposed mobile home park conversions almost ministerial. The county countered that state law only addressed the economic displacement of park residents, and therefore the county had broad discretion.

The appellate court said the Legislature's response to the *El Dorado* decision was telling. "[T]he *El Dorado* construction of § 66427.5 has stood the test of time and received the tacit approval of the Legislature. We therefore conclude that what is currently subdivision (e) of § 66427.5 continues to have the effect of express preemption of the power of local authorities to inject other factors when considering an application to convert an existing mobile home park from a rental to a resident-owned basis," Richman wrote.

Toward the end of the opinion, Richman said the county's attempt to ensure that conversions are bona fide was commendable – but not legal under existing state law. "Of course, if the Legislature disagrees with our conclusion, or if it wishes to grant cities and counties a greater measure of power, it can amend the language of § 66427.5," Richman wrote in an apparent invitation to state lawmakers.

Last year, lawmakers approved AB 1542 (Evans), which would have increased local control over conversions and maintained rent control on spaces not purchased by mobile home owners. Gov. Schwarzenegger vetoed the bill, saying a more comprehensive approach was needed. AB 566 (Nava), which is pending in the state Senate, would permit local governments to consider the level of support for conversion among mobile home park residents. The bill was watered down in a Senate committee to eliminate a requirement that a majority of park residents support the conversion. ■

■ The Case:
Sequoia Park Associates v. County of Sonoma, No. A120049, 2009 DJDAR 12533. Filed August 21, 2009.

■ The Lawyers:
For Sequoia Park Associates: Elliot Bien, Bien & Summers, (415) 898-2900.
For the county: Sue Gallagher, county counsel's office, (707) 565-2421.

proposition 13

SD Mall's Corporate Owners Fail To Avoid Reassessment

An appellate court has upheld San Diego County's reassessment of the Fashion Valley Shopping Mall. The court concluded that Equitable Life Assurance Company's transfer of the mall's title to the operating company of a limited liability corporation, in which Equitable owned a 50% stake, amounted to a 100% transfer of ownership and thus triggered a reassessment for property tax purposes.

Equitable owned the mall in 2001 when it entered into a transaction with Simon Property Group, LP. They created a limited liability company, named Fashion Valley MM, LLC (FVM), to function as its holding company, with Equitable and Simon each getting a 50% interest. Equitable contributed the mall to FVM, while Simon provided $165 million. Simultaneously, a wholly owned subsidiary of FVM – Fashion Valley Mall, LLC, or Mallco – was created to hold the mall's title and act as management, leasing and development agent.

In 2002, the San Diego County assessor concluded that this transaction amounted to a 100% change in ownership, which, under Proposition 13, triggered a reassessment. The county raised the mall's assessed value from $247 million to $360 million, boosting its tax bill by more than $1 million a year.

Mallco appealed to the county's Assessment Appeals Board but got nowhere. It then sued to set aside the reassessment and get a property tax refund. A San Diego County Superior Court judge ruled against Mallco, and a three-judge panel of the Fourth District Court of Appeal unanimously agreed.

The central question, according to the appellate court, was "whether Equitable retained a 50% beneficial interest in the mall due to its status as a member in FVM." If the answer were yes, the county could not reassess the mall because ownership of more than 50% of a property must be transferred to trigger a reassessment. Mallco argued that because Equitable receives 50% of the income generated by the mall and has some control over it, Equitable does have a 50% beneficial interest in the mall.

However, "beneficial use" and bare legal title may be split only in a "fiduciary situation," such as a custodianship or trusteeship, Justice Joan Irion wrote for the court. "As no such fiduciary situation exists in this case, we conclude that the entity that holds the beneficial interest in the mall is the same entity that holds legal title to the mall, namely, Mallco."

The fact that Equitable is a 50% member of FVM does not matter because "a member of a limited liability company does not hold any interest in the real property owned by the limited liability company," Irion continued.

In addition, the court refused to recognize a "reformation agreement" approved by Equitable, Simon, FVM and Mallco in 2004. That agreement stated that the original 2001 transaction amounted to a 50% change in mall ownership for property tax purposes, but that all other provisions of the 2001 transaction remained in effect. The court called the 2004 reformation agreement a sham and "nothing more than a paper transaction and a transactional artifice that exists for the purpose of seeking to avoid tax liability." ■

■ The Case:
Fashion Valley Mall, LLC v. County of San Diego, No. D053411, 2009 DJDAR 12211. Filed August 17, 2009.

■ The Lawyers:
For Fashion Valley Mall, LLC: C. Stephen Davis, Cahill, Davis & O'Neall, (213) 622-0600.
For the county: Walter DeLorrell III, county counsel's office, (619) 531-4860.

ceqa

Long Beach Suit Over Planned LAUSD High School Rejected

The Los Angeles Unified School District has successfully defended against a City of Long Beach lawsuit that challenged numerous aspects of a new high school's environmental impact report.

Long Beach contended that the report's analysis and proposed mitigation measures for the high school's project-level and cumulative environmental effects were inadequate, and that its study of alternatives was insufficient. But the court found that the school district complied with the California Environmental Quality Act in every instance.

While Long Beach has its own school district, the boundaries of the Los Angeles Unified School District (LAUSD) extend into a portion of the city. The proposed high school would accommodate approximately 1,800 students on 13.7 acres in the northwest corner of Long Beach adjacent to Carson. The district, which certified a final EIR in 2007, broke ground for the campus in October 2008. The school is intended to relieve overcrowding at Carson and Banning high schools.

Long Beach filed suit in Los Angeles County Superior Court and lost. It appealed, and a unanimous three-judge panel of the Second District Court of Appeal, Division Three, affirmed the lower court's decision.

Long Beach's challenges fell into six areas: health and safety issues; air quality; traffic impacts; land use compatibility; cumulative impacts; and project alternatives.

The city contended that the final environmental impact report was flawed because it did not adequately evaluate the school site's possible effects on students' health or provide any support for its conclusion that there would be no significant impact. In making its case, the city pointed to truck traffic and diesel emissions from the nearby Long Beach Freeway and a rail line bordering the future campus.

But the court expressed satisfaction with the report, which included a health-risk assessment that considered potential long-term exposure to hazardous emissions generated within one-quarter mile of the school site by the freeway, locomotives, trucking terminals and a gas station. The report concluded that with a setback on one boundary and use of an enhanced heating, ventilation and air conditioning system, there would be less-than-significant effects on the health of students and employees.

Long Beach also argued that LAUSD did not adequately address cumulative effects on air quality and traffic, nor the cumulative effects on staff and – CONTINUED ON PAGE 7

– CONTINUED FROM PAGE 6

student health. On the second point, the court made clear that the purpose of an EIR is to address a project's effects on the environment, "not the impact of the environment on the project, such as the school's students and staff." On the first point, the court dismissed Long Beach's argument that the school district conveniently chose to ignore projects such as expansion of the ports of Long Beach and Los Angeles and related railroad facilities – all located several miles from the school site. The court said the school district explained its geographic boundaries for the cumulative impact study.

"[T]he FEIR analyzes every project within the delineated geographic areas for each subject, and so it does not 'cherry-pick' the projects, despite Long Beach's contention otherwise," Justice Richard Aldrich wrote for the court.

The city further argued that the FEIR should have analyzed the types of chemicals carried by Union Pacific trains on the line adjacent to the school site to determine the potential harm to students and staff caused by possible spills. The report addressed – and included mitigation measures for – the "very low" likelihood of a train accident or derailment, but it did not provide specific information about materials carried in rail cars. Still, the court said the FEIR went far enough.

"Describing and analyzing each specific chemical the trains might theoretically carry in the future would be speculative and infeasible, and hence not required in this circumstance," Aldrich wrote.

One of the biggest issues for the community is parking because LAUSD approved the school without providing for a student parking lot. The district projected a need for 400 student parking spaces but determined that more than 1,000 on-street spaces nearby would suffice. Here is the court's summary:

"Long Beach describes parking in the area as 'scarce' and the spots as 'coveted.' It cites its comment that 'school-generated parking demands in the residential area west of the project site *could* lead to parking restrictions that would force most student and visitor parking into the adjacent industrial area.' But substantial evidence includes 'facts, reasonable assumptions predicated upon facts and expert opinion supported by facts.' Long Beach provided no facts to support its hypothesis that parking is scarce. But LAUSD did. As noted in its response, the consultants found more than three times the needed space available *within one-fourth mile of the school site*, Long Beach's supposition is unfounded."

The city contended that the school district should have studied the new high school's consistency with the Long Beach general plan, which designates the site for light industry. But the court noted schools are permitted in the applicable zoning district and, anyway, the school district had exempted itself from the city's zoning authority.

The court also upheld the list of project alternatives, even though LAUSD declined to consider potential sites in Carson, from which nearly all of the school's students will come. ■

■ The Case:
City of Long Beach v. Los Angeles Unified School District, No. B207721, 2009 DJDAR 12197. Filed July 16, 2009. Ordered published August 17, 2009.

■ The Lawyers;
For the city: Steven Kaufmann, Richards, Watson & Gershon, (213) 626-8484.
For LAUSD: Fernando Villa, Pircher, Nichols & Meeks, (310) 201-8900.

prevailing wage

State Supreme Court Accepts Case Involving Charter Cities

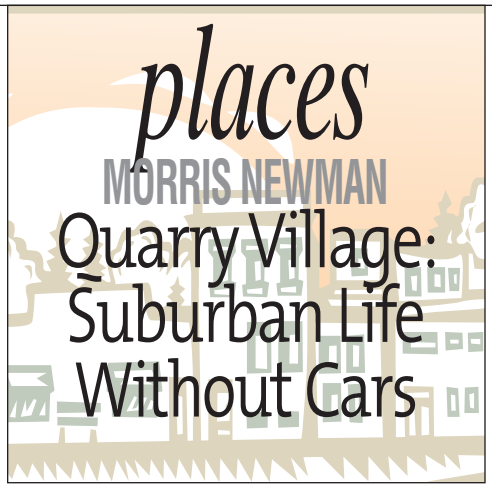
The state Supreme Court will review an appellate court ruling that California's prevailing wage law does not apply to a charter city's public works projects that are funded exclusively with city revenues.

In April, the Fourth District Court of Appeal ruled that the law did not "outweigh the power of charter cities over their municipal affairs." The appellate panel vote was 2-1, with Justice Joan Irion dissenting. She wrote that the court was deciding on the advisability of the prevailing wage law rather than its reach under the state constitution (see *CP&DR Legal Digest*, June 2009).

The litigation was brought by a collection of labor unions against the San Diego suburb of Vista, one of 83 charter cities in the state. In the past three years, Vista has launched $100 million worth of public works projects financed by a voter-approved half-cent sales tax. The projects, which are either complete or well underway, include two fire stations, a civic center, a sport park and an amphitheater stage house. Shortly after approving the sales tax, voters backed a proposed city charter based in part on the argument that a charter would allow the city to save money by exempting it from prevailing wage and other public contracting statutes that apply to general law cities.

The prevailing wage law requires contractors on public works projects to pay workers at rates set by the state director of industrial relations. Typically, the rates are equivalent to union wages in major urban areas. Cities and counties, especially in rural areas, often complain that the prevailing wage law unnecessarily drives up expenses. Supporters say that the law ensures that contractors who use union labor can compete for public works projects, and that it generates funding for apprentice training programs.

All seven justices on the state Supreme Court voted to review the Fourth District's decision. The case is *State Building and Construction Trades Council v. City of Vista*, No. S173586. ■



Something seems to be missing from the site plan for Quarry Village, a 42-acre proposed housing development in Hayward. Here are orderly rows of streets, a scattering of small parks and a "village center" for neighborhood-scale retail. The 950 housing units are made up entirely of three-story townhouses, arranged in rows of four and six units.

Although the layout of Quarry Village does not appear to be based on any historical model, something about the plan reminded me of what I had seen in a history book: The squarish arrangement of dense residential blocks found in the plan of Reading, Pennsylvania, circa 1747. (See Moholy-Nagy, S., "*Matrix of Man: An Illustrated History of Urban Environment*, 1968. p. 17). What do 21st Century Quarry Village and 18th Century Pennsylvania have in common? Neither has any garages.

Quarry Village is a radical proposal, introduced by a quixotic, retired professor from California State University, East Bay, to build a car-free residential neighborhood in suburban Alameda County. Parking is limited to 1,000 spaces on the periphery of the property. Otherwise, the streets – oops, "walkways" – are free of vehicles except for an occasional electric cart. Children can play freely in the streets, or indeed, throughout the entire compound. Mass transit, of course, is the lifeline of Quarry Village: The local bus line delivers commuters to the BART station less than two miles away at the college campus; the bus ride takes six minutes. The smallish retail component, only about 5,000 square feet, may include a tiny market and a child-care center.

The project is the brainchild a group of investors led by Sherman Lewis, a retired political science professor who is also past president of Sierra Club's California chapter. Although not a developer by training, Lewis has mastered many of the financial and planning skills needed for large-scale homebuilding. This is a serious proposal with real numbers: According to his latest spreadsheet, construction costs, including photovoltaic cells on every unit, comes to a moderate $225 per square foot. The internal rate of return (IRR) is a robust 28%, which could make the project attractive to investors.

The environmental review process may not entail much delay: Lewis expects Quarry Village to qualify for a "negative declaration" under the California Environmental Quality Act, meaning developers and the city would not have to wade through a long and costly environmental impact report. Lewis, however, does not get to decide on the level of environmental review, the city does.

Caltrans, which had planned a freeway for the site – "I've spent 30 years of my life fighting that freeway," said Lewis – is expected to sell the acreage for development in the next several years. The professor-turned-homebuilder is trying to raise some additional money from investors to buy an option on the land.

The project, inspired by a similar project in Vauban, Germany, will probably not be for everyone. A *New York Times* story from May relates that some residents left the German project because they could not tolerate the inconvenience of living apart from their cars. Also, individual units are reasonable in price, by California standards, with prices averaging $316,000. Units will range from studios to three bedrooms. Each unit will be fitted with photovoltaic or other solar-power converters that will supply virtually all electricity for household use. In short, Quarry Village seems best suited for young families on moderate incomes, such as junior faculty at Cal State. Lewis, in fact, says he has received at least 10 reservations for future units from university staff.

Car-free cities have long been imagined by ecologists and eco-minded planners. In fact, a number of European cities besides Vauban have set aside entire districts for pedestrians, typically for shopping. While Quarry Village is grounded in similar idealism, there is an encouraging realism to the project; rather than being a utopian island set off by itself, the project is very much part of the present-day Hayward. The biggest difference from surrounding housing, of course, is density; while typical suburban densities are about 8 to 10 homes per acre, the density of Quarry Village would be about 45 units per acre, or equivalent to a medium-density apartment house or condominium complex. In fact, Lewis plans to build the housing on condominium maps, and home owners would be obliged to belong to a condo organization and pay monthly dues for maintenance of common areas and the like. In addition to maintenance, the condo organization will also be charged with policing the residents. Renting out units to subtenants is forbidden.

In a car-free environment, streets turn into active open space, especially for children who would otherwise be limited to their back yards or public parks. The parks, including a wetlands preserve on the southern end of the site, provide additional open space. Not shown on the site plan, but enormously important in terms of open space, is a planned extension of the Highridge Trail, which would run north-south from Castro Valley to southern Hayward, and would take the form of a new, linear regional park.

Getting rid of cars and garages is a practical move toward the ideal of sustainability. Residents would have the use of electric carts to carry heavy loads, and Lewis is also considering a car-share club for village residents. Beyond the quiet atmosphere, clean air and open space made possible by removing cars and garages, the car-free strategy also offers a new model of high-density housing in traditionally low-density suburbs.

The car-free strategy may be attractive to conventional developers, because this new model of density, made possible by excluding garages, translates into potentially higher returns to developers and investors. Developers can charge market rents, without the cost of building either garages or costly subterranean parking. Housing officials, on the other hand, now have an alternative beyond mediocre apartment buildings and "stacked flats" to meet their housing numbers.

Before I allow enthusiasm about pedestrian-oriented planning to gallop away with me, it is important to point out that the project is still only a proposal. City officials appear interested in, but not committed to, Lewis's car-free plan. In late 2008, the City Council conducted a public workshop about the project and suggested that Lewis needed more working capital so he could buy an option on the land. (In a recent interview, Lewis said he needs at least $1.6 million for that purpose.) In June, the Hayward City Council amended the city's general plan to allow housing on the former quarry site, which the city is also considering for a school. For the time being, Quarry Village looks far away.

Even with those caveats about this particular project, I say that idealism is good, practical idealism is better and practical idealism with a realistic business model is best of all. The most intriguing aspect of this suburban, achingly green housing development is the possibility of making density not only tolerable but desirable.

And while you're bicycling to Cal State East Bay, would you please drop off the children's Gameboys at the recycling center? It's time for kids to play outside. ■

– CONTINUED ON PAGE 9

– CONTINUED FROM PAGE 8

SOURCE: SHERMAN LEWIS

LEGEND

- 6-BEDROOM TOWNHOUSE | 140 Units
- 4-BEDROOM TOWNHOUSE | 202 Units
- 3-BEDROOM CONDO | 84 Units
- 2-BEDROOM CONDO | 144 Units
- 2-BEDROOM CONDO | 102 Units
- 1-BEDROOM CONDO | 216 Units
- STUDIO CONDO | 48 Units

0 75 150
SCALE IN FEET

The proposed Quarry Village project is a suburban housing development designed around wide walkways and narrower paths, rather than streets for automobiles.

insight WILLIAM FULTON

– CONTINUED FROM PAGE 1

place to put them is somewhere in the Business, Transportation, and Housing Agency – maybe the Department of Housing and Community Development. (Wouldn't the locals love it if HCD oversaw all general plan elements, not only the housing element!)

Meanwhile, the California Energy Commission is trying to figure out what to do with the $20 million it controls in federal Energy Efficiency Block Grant funds, which could be used to finance climate-sensitive general plan updates. The new Strategic Growth Council is deciding how to dole out $90 million in planning money from Proposition 84, even though the Legislature has already given $12 million of it to regional planning agencies for modeling. And, attempting to take its mission seriously, the Strategic Growth Council is also undertaking a number of other efforts that look like the stuff OPR is supposed to do.

In other words, OPR is not exactly being eliminated. It's being broken up like a debt-ridden company that still has some valuable assets. Because OPR has a pretty checkered history anyway, maybe the breakup isn't such a bad idea. The question is whether the resulting reconfiguration will bring better coordination of planning in California, or only create a bunch of planning mini-fiefdoms in Sacramento, all jockeying with each other for power.

The discussion about OPR's future began with the state budget deal, which called for the office's elimination. It's not surprising that OPR is on the chopping block. The office has long been criticized as a lackluster performer, largely because it is housed directly in the governor's office and is therefore hostage to the governor's agenda. In this current budget environment, the only political asset OPR had – patronage jobs that the governor controls – has become a liability. Breaking up OPR and scattering its pieces throughout the state government allows the governor to say he is eliminating positions in his office as a cost-saving measure. In June, Schwarzenegger called OPR "a total waste".

So far, most of the talk about OPR has revolved around the State Clearinghouse, whose most important role is to coordinate public agency review of documents produced under CEQA. Schwarzenegger has proposed shifting this role to CARB, which regulates air pollution. The air board has, of course, been given considerable power over land use planning as a result of SB 375, which requires regional planning agencies to do regional plans that meet CARB's targets for greenhouse gas emissions reduction (see *CP&DR Insight*, January 2009). Processing CEQA documents so that different state agencies can comment on them isn't exactly the same thing as regulating air pollutants, but in a world where climate change drives most environmental policy, maybe they're close enough.

Schwarzenegger's proposal quickly drew the attention of veteran Sacramento policy analyst Peter Detwiler, staff director of the Senate Local Government Committee, who drafted a memo to his committee explaining OPR's wide-ranging duties under the law and laying out four possible alternatives, including dismantling the office. The solution Detwiler seemed to favor was what he called "shrink and focus" – moving the State Clearinghouse to the Natural Resources Agency and other functions to the Department of Finance while allowing OPR to focus on general plans and the quadrennially required (though rarely produced) Environmental Goals and Policies Report. (This report was last produced by Gov. Gray Davis the day he left office in 2003, and labeled an "instant historical curiosity" by Sacramento insiders (see *CP&DR In Brief*, December 2003). It also appears to be on the chopping block.)

It's unlikely that Detwiler's recommendations will be followed in Sacramento, though his committee could stall an OPR elimination bill by insisting on careful study and multiple hearings. Nevertheless, the Detwiler memo appears to have blunted the clearinghouse-to-CARB idea by noting that the Natural Resources Agency is a much more logical home for the clearinghouse. OPR already works jointly with the Natural Resources Agency on the CEQA Guidelines, whose revisions must be issued by the Natural Resources secretary, not the OPR director.

Maybe the most interesting playlet surrounding the main OPR drama, however, has to do with the Strategic Growth Council, which appears to be positioning itself as OPR's successor in coordinating state planning and growth policy. The Strategic Growth Council was created by Legislation last year (see *CP&DR Insight*, March 2008) largely to promote and coordinate infrastructure investment, though it was also given a wide-ranging mission to promote sustainable development. The agency also controls the $90 million from Proposition 84 set aside for planning – at least when the Legislature isn't spending the money.

The Strategic Growth Council has six members: four Cabinet members (BTH's Dale Bonner, Natural Resources' Mike Chrisman, CalEPA's Linda Adams, and Kim Belshe of Health and Human Services), OPR Director Cynthia Bryant and one public member, Bob Fisher, former chairman of The Gap and a former board member of the Natural Resources Defense Council.

The Strategic Growth Council adopted a resolution some months ago stating that "early money" from Proposition 84 should go to blueprint planning efforts around the state. The initiative itself says the money should be for "urban greening projects," including at least $20 million for urban forestry. Nevertheless, the Legislature has appropriated $12 million for regional planning agencies to do modeling for SB 375, and the agencies apparently want far more money for modeling in the future. So it will be interesting to see if the Strategic Growth Council flexes its muscles on Proposition 84 funds in the future.

Potentially more interesting, however, is the way the Strategic Growth Council interprets the rest of its mission, which includes promoting sustainable growth and coordinating the planning- and growth-related policies of the four agencies represented on the council. California has been down this path many times before – most recently with the passage of AB 857 in 2002, which requires state agencies to follow a "smart growth" approach. Nothing much ever came of that, but because the Strategic Growth Council includes four Cabinet members, it could carry a lot of clout if the members wanted it to. The council will soon add two full-time staff members – presumably transferred from OPR.

Big, diverse California has never successfully figured out how to shape and implement growth policy in a consistent and comprehensive way. No governor ever gave OPR a wide enough berth to give it a try. The breakup may make coordination even more difficult, or, alternatively, the Strategic Growth Council could become a more effective, streamlined version of OPR, focusing on policy and coordination while leaving the day-to-day duties to the line departments. Folding OPR would definitely be a loss, but using a Cabinet-level group to coordinate policy wouldn't be the worst outcome in the world. ■