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Panel Urges More Work Before GHG Targets Set

Best Management Practices List And Better Modeling Needed, Committee Says

BY PAUL SHIGLEY

A committee of experts appointed by the California Air Resources Board should come up with a list of best management practices to reduce greenhouse gas emissions produced by new development by January 2010. The practices, combined with estimates of future transportation demand, should provide the basis for the board to establish regional targets for greenhouse gas emissions reductions later in 2010, according to the advisory committee.

The 21-member Regional Targets Advisory Committee (RTAC) submitted its recommendations to the Air Resources Board (ARB) at the end of September. While the report contains many compromises, all 21 members signed onto it and there has been no public dissent. That is remarkable considering the controversy swirling around climate change policy.

Formation of the committee was part of SB 375, which calls for tying regional land use planning and transportation needs to encourage development that produces fewer greenhouse gas (GHG) emissions. The law charged the committee with recommending the factors to be considered – and the methodologies to be deployed – in setting GHG emissions goals for passenger vehicles. The committee's importance grew late last year when the ARB decided that the committee would help determine the role land use planning would play in reducing overall GHG emissions to 1990 levels by 2020 and to 80% below 1990 levels by 2050 (see *CP&DR Insight*, January 2009).

Under SB 375, the ARB must set regional GHG reduction targets by September 30, 2010. The state's 18 metropolitan planning organizations (MPOs) must then incorporate these respective targets into their next federally required regional transportation plans, along with a "sustainable communities strategy" that lays out how land use plans and transportation policies will help meet the target. The basic idea is to encourage development projects and land use patterns that reduce reliance on the automobile.

The committee recommended the base – CONTINUED ON PAGE 3

Regions May Get More Climate Change Mandates, But Little Funding

insight

WILLIAM FULTON

Sometime this year or next year, Congress will probably pass a climate change bill that tries to mimic SB 375's link between transportation patterns and reducing greenhouse gas emissions. And the bill will probably generate billions of dollars by capping emissions and placing a market value on them.

But will Congress use the money to invest in the transportation improvements and land use changes required to reduce automobile travel – and hence emissions?

Probably not. The Waxman-Markey bill, which passed the House in June (see *CP&DR Environment Watch*, September 15, 2009), sets aside roughly 1% of climate change revenues for transportation. The Senate bill recently introduced by John Kerry of Massachusetts and Barbara – CONTINUED ON PAGE 10

inbrief

Forced into negotiations by the state Legislature, the City of Walnut has dropped its lawsuit contesting the adequacy of an environmental impact report for a proposed professional football stadium and 3 million-square-foot entertainment complex in the neighboring City of Industry.

Representatives of the two cities and developer Majestic Realty signed the agreement two weeks after state lawmakers tabled a bill that would have exempted the stadium and entertainment complex from having to comply with the California Environmental Quality Act and state planning and zoning laws. The measure would also have barred any legal challenges (see *CP&DR*, September 15, 2009).

Faced with the possibility that state legislation could wipe out its lawsuit, the Walnut City Council voted 3-1 to approve a settlement that is similar to an agreement the City of Diamond Bar signed with Industry and Majestic Realty earlier this year regarding the project (see *CP&DR In Brief*, May 2009).

In exchange for Walnut withdrawing its suit, Majestic agreed to do a number of things. It will pay the city $9 million for traffic mitigation, upgrade one of Walnut's intersections, and pay a fair share for traffic improvements elsewhere in town. The developer promised to pay from $350,000 to $500,000 annually, depending on the number of stadium events, into a "community fund" that Walnut may spend in any way. It will pick up Walnut's legal and consulting expenses. And Majestic and Industry agreed to work toward securing MetroLink train service to the project's site and to prevent stadium noise from reaching Walnut's residential neighborhoods. Multi-jurisdictional committees, composed of public representatives, were established to address transportation management and public safety.

In an open letter to Walnut residents, city special counsel Jan Chatten-Brown said the agreement was the best the city could do under the circumstances. "It is extremely disappointing that so many members of the Legislature are willing to waive compliance with the California Environmental Quality Act and state planning laws in order to further the project," she wrote.

Meanwhile, Industry Mayor David Perez commented, "It has always been our interest to address issues of concern as they relate to our neighboring cities."

Industry and Majestic continue to negotiate with a citizens group that has also filed a lawsuit to block the project.

San Luis Obispo County supervisors have approved a new $165 million wastewater treatment system and plant serving the unincorporated coastal community of Los Osos. The community has been subject to a state-imposed building moratorium since 1988 because the town's 6,000 septic tanks pollute groundwater and the Morro Bay estuary.

Everything about a Los Osos sewer system – such as cost, location, type of system and operation – has been controversial since it was first proposed during the 1970s. The Los Osos Community Services District (CSD) finally approved the project about six years ago, and the Coastal Commission granted a development permit for the wastewater treatment plant in 2004. Voters in the district then recalled CSD board members who approved the project, and construction was halted. The CSD subsequently went into a political and fiscal tailspin, resulting in bankruptcy (see *CP&DR In Brief,* November 2005). Meanwhile, state lawmakers approved a measure handing responsibility for the wastewater project to the county.

Earlier this year, the county Planning Commission approved a gravity-flow system and a wastewater treatment plant on agricultural land east of Los Osos. No fewer than 17 appeals were filed to the Board of Supervisors protesting the decision, among them from the Surfrider Foundation and the owners of a cemetery. They questioned the environmental impact report, complained about the cost that residents and property owners might bear, and urged a different location and design for the plant. Supervisors, nevertheless, backed the Planning Commission's decision. The project next heads to the Coastal Commission. Construction could begin as soon as 2010, although commission hesitancy or litigation by opponents could slow the project.

A state appellate court has upheld the City of Manteca's 1,200% increase in a "government building facilities fee" despite development agreements the city had with several housing developers. The developers contended that the fee, which the city increased from $350 to $4,700 per home over the course of three years, was actually a new fee prohibited by the agreements. Manteca countered that it was simply modifying an existing fee after a nexus study showed that the original $350 fee would not even be close to covering the cost of adding city office space, a library, an animal shelter and a performing arts center.

In an unpublished opinion, the Third District Court of Appeal rejected the arguments of developers Morrison Homes and Pulte Home. "The mere existence of the development agreements between the builders and city did not entitle the builders to pay only the $350 facilities fee that was in force when the development agreement with the city took effect," the court ruled. The development agreements require payment of the fee at the time of building permit issuance, and nothing in the agreements or the Mitigation Fee Act prevents the hike, the court determined. The case is *Pulte Home Corp. v. City of Manteca*, No. C058744.

A Sacramento County Superior Court ruling blocking the transfer of $350 million from redevelopment agencies to school districts in fiscal year 2008-09 will stand because the Schwarzenegger administration will not appeal the decision. Judge Lloyd Connolly ruled the shift was illegal because there was no guarantee the money would be used for redevelopment purposes (see *CP&DR Redevelopment Watch*, June 2009).

The administration and state lawmakers closed part of the 2009-2010 budget gap by moving $1.7 billion from redevelopment agencies to schools and state programs. This time around, the state restricted spending of the shifted redevelopment tax increment to redevelopment project areas, and to services for people who live in the areas or in redevelopment-assisted housing. The California Redevelopment Association contends the latest shift is still unconstitutional and is preparing a lawsuit. ■

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RTAC Helps Shift SB 375 Conversation

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year of 2005 for setting a uniform, statewide percent-per-capita GHG reduction target. (The committee declined to use 1990 as the base year because not enough good data is available.) Individual MPO targets could be adjusted up or down depending on regional differences, but the adjustments would be subject to what the committee termed a "reasonably tough test."

Meanwhile, a great deal of work needs to be completed in a short period of time, according to the committee. "The most immediate need is the development of a list of BMPs [best management practices]," the committee said. "This list should include data from empirical studies, blueprints and modeling from MPOs that identifies the magnitude of greenhouse-gas reductions that may be achieved through implementation of the policies and practices." The committee recommended the ARB work with "technical experts in land use and transportation, both academic and practitioners," to devise the BMP list by January 2010.

At the same time, the committee said the ARB needs to sponsor an upgrade of existing transportation demand models, which the committee said tend to be inconsistent, difficult to understand and not always compatible with GHG emissions issues. Both the BMP list and better models are critical to setting regional targets, because the committee report lacks specifics to help the ARB establish the targets, said Mike McKeever, executive director of the Sacramento Area Council of Governments and RTAC chairman.

"Both of those products will add a lot more tangibility and specifics that the ARB can use to figure out what the numeric targets ought to be," McKeever said. The short time frame or developing the products is a direct result of SB 375's deadlines, he said. The committee also recommended it reconvene early next year to review the BMP list.

Environmentalists worry about the RTAC's heavy reliance on BMPs. Matt Vander Sluis, global warming program manager with the Planning and Conservation League, said BMPs could be helpful but are insufficient alone to determine targets and regional compliance with them. In an announcement to members, the organization said the RTAC recommendation "opens the door to some dangerous backsliding."

McKeever understands the argument, which was made at several RTAC meetings. The problem is that the transportation demand models, although being improved, are not very good.

"The model results to date, while they are very instructive and useful, don't tell the whole story," McKeever said. "You've got to supplement those with empirical data."

The BMPs should not be created independent of science, McKeever added.

The committee insisted that BMPs would play an important role in translating technical and arcane material into language and concepts that elected officials and the public may understand. "Most importantly," the report added, BMPs "can enhance early implementation of policies and practices under SB 375."

What a BMP list might look like is uncertain. The committee report said only that it should consist of "available land use and transportation policies and practices that will result in regional greenhouse gas reductions." In addition, the list would be accompanied by a spreadsheet tool that "would determine the approximate level of reduction that could be achieved by implementing a particular strategy or set of strategies in a particular setting."

Best management practices for individual projects are fairly common. And earlier this year, the California Air Pollution Control Officers Association recommended policies for general plans. "To my knowledge, though," McKeever said, "there has never been a BMP list created for a regional plan, let alone one with a range of benefits and impacts applicable across a broad region."

While environmentalists questioned the utility of the BMP approach, they strongly endorsed the RTAC recommendation that every aspect of the regional target-setting process be open to the public. Indeed, RTAC recommended that ARB and the MPOs have extensive public interaction leading up to the ARB's June 30, 2010, deadline for setting draft regional targets.

The ARB is scheduled to consider the RTAC report at its November 19 meeting in Sacramento, according to a board spokesman.

Although the committee report might be considered timid for its lack of hard recommendations, the RTAC process of 14 meetings over the course of eight months brought together people and interest groups with very different attitudes toward SB 375 and the role of development in slowing climate change.

"The RTAC process was very worthwhile," said Amanda Eaken, who represented the Natural Resources Defense Council on the committee. "As a result, the key stakeholders in California land use understand the fundamental changes the state needs to make to successfully implement SB 375."

McKeever said the conversation among committee members and MPOs has shifted away from skepticism and frustration, and toward ensuring that SB 375 works as intended.

Pete Parkinson, Sonoma County's top planner, who represented the American Planning Association, California Chapter, on the RTAC, said the committee experienced some "scope creep" as it delved into housing and social equity issues, and funding recommendations for transit and planning. The committee appeared to take up these tangential issues to keep every RTAC member on board. The end result, though, is a collection of straightforward recommendations urging the state to better fund transit, local planning, redevelopment and affordable housing – sectors that have sustained big cutbacks in the recent state budgets.

The report also recognizes the potentially difficult position in which SB 375 places cities and counties, which are ultimately responsible for growth decisions. The report stated: "SB 375 is not a 'no growth' bill and should not be implemented in a manner that turns it into one. Local agencies will need tools, such as education, retraining, state financial assistance, revenue raising authority and loans and credits to make a smooth transition. Without such resources, it will be difficult to ask local elected officials to make decisions that may reduce emissions while, in some instances, placing economic burdens in their communities." ■

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First Opinion Published On Energy Analysis

Court Accepts Title 24 Standards For Measuring Project Impacts

BY PAUL SHIGLEY

A city may determine that a project has no significant effects on energy consumption if it exceeds the California Building Energy Efficiency Standards, the Third District Court of Appeal has ruled.

The ruling appears to be the first on an environmental impact report's analysis of how a project might affect energy use, an area of the California Environmental Quality Act (CEQA) receiving increased attention because of concerns about climate change.

Opponents of a proposed WinCo Foods store in Tracy argued that the city could not rely on the energy efficiency standards, which are part of the Title 24 building code, in determining if the store and rezoning of adjacent land would have a significant effect on energy consumption. The unanimous three-judge appellate panel disagreed.

"The California Building Energy Efficiency Standards are meant to promote energy efficiency as the name implies," Presiding Justice Arthur Scotland wrote for the court, citing a section of CEQA on energy. "In other words, they 'reduce the wasteful, inefficient and unnecessary consumption of energy.'"

The court ruled that Tracy's EIR did not have to discuss every possible effect of energy use or conservation measure contained in CEQA's Appendix F, which lists numerous energy-conservation measures and their potential impacts.

In a case touching on numerous CEQA aspects, the court also held that the Tracy City Council did not have to return an amended EIR to the Planning Commission for further review; that the city did not have to require the project developer to improve two affected intersections located outside the city limits; and that the city did not have to analyze a smaller store as an alternative.

Still, the court's handling of the energy issue may be of greatest importance to CEQA practitioners.

"This is the very first appellate decision to discuss the analysis of energy impacts in an EIR," said Sarah Owsowitz, an attorney with Cox, Castle and Nicholson and who represented WinCo Foods. As the court noted, CEQA requires mitigation measures to reduce "wasteful, inefficient and unnecessary" energy usage (Public Resources Code § 21100, subdivision (b)(3)). But neither the law nor the CEQA Guidelines explains how to determine if energy consumption will be wasteful, inefficient and unnecessary, she said. The court's decision to allow reliance on Title 24 standards provides some guidance.

Rick Jarvis, Tracy's attorney, agreed that the court's holding is useful – for the time being. There is ongoing discussion of amending Appendix F to include a more prescriptive approach to energy, he noted.

In 2003, owners of two parcels along Interstate 205 in Tracy applied to change the property's designation in the city's general plan and a specific plan from industrial to commercial. While the city was considering the request, WinCo Foods submitted an application for a 95,900-square-foot grocery store on the southern parcel. An EIR addressing the proposed amendments to the plans and the store was prepared. In May 2006, the Tracy Planning Commission approved WinCo's conditional use permit and recommended the City Council certify the project EIR and amend the general and specific plans.

A group called Tracy First appealed the permit approval to the City Council. During a public hearing the following month, representatives of the group objected to the EIR and the project. The council directed its staff to revise the EIR to take into account some of the objections.

By the time the project and EIR returned to the City Council in April 2007, the city had updated the general plan and rezoned the parcels to commercial. Over Tracy First's objections, the City Council certified the EIR and approved the specific plan amendment and conditional use permit. Tracy First sued. San Joaquin County Superior Court Judge Carter Holly ruled for the city and WinCo.

In upholding the Superior Court, the Third District initially published only that portion of its decision concerning process. Specifically, Tracy First had contended that the EIR must be set aside because the City Council did not return the document to the Planning Commission after ordering revisions. The court noted that CEQA Guidelines require an advisory body on zoning and land use – here, the Tracy Planning Commission – to review an EIR "in draft or final form." Because the commission had reviewed the draft EIR in 2006, and because the project did not change, the council was right to go forward with the amended environmental document, the court ruled.

"[T]he City Council was not required to remand the matter to the Planning Commission when the city amended the EIR because (1) although the final EIR considered by the City Council in approving the project may have been a different draft, it was not a different EIR, and (2) there is no express requirement that the project application be remanded to the Planning Commission when the city amends the EIR before it is certified by the City Council and used in granting the project application," Scotland wrote.

The court published the remainder of its opinion after receiving requests to do so from Tracy, WinCo, the League of California Cities, the City of Sacramento and others. On energy, Tracy First argued that the city violated CEQA because it did not include the northern parcel in its energy consumption calculations, and relied the Title 24 standards to measure potential impacts. The group also argued the city's conclusions on the matter were not supported by substantial evidence, relied on unsupported opinion and omitted a CEQA Appendix F analysis.

The court determined that the EIR analyzed energy use on the northern parcel, and though the analysis was less detailed than the one for the proposed WinCo store on the southern parcel, it – CONTINUED ON PAGE 5

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was acceptable because "no application has been submitted to build" on the northern parcel. The court further ruled that Title 24 standards were appropriate for determining a significant impact and that Tracy First did not prove that the city's conclusions or the expert's opinion lack substantial evidence. As for Appendix F, "[N]either Appendix F, itself, nor any other authority requires that an EIR discuss every possible energy impact or conservation measure listed in Appendix F."

In deciding that the developer did not have to improve two intersections in an unincorporated part of San Joaquin Valley, the court noted that the county did request that the city extract a "fair share" payment from WinCo. But the city declined because the county's transportation program did not include the two intersections. Instead, the city identified the project's effects on them as unavoidable significant impacts and adopted a statement of overriding consideration.

In seeking the mitigation measures, Tracy First argued that under *City of Marina v. Board of Trustees of California State University,* (2006) 39 Cal.4th 341, WinCo was obligated to address the project's effects outside the city limits. In that ruling, the state Supreme Court said that Cal State University, Monterey Bay, which is located on the former Fort Ord Army base, had to mitigate the effects of campus growth elsewhere on the old base (see *CP&DR Legal Digest*, September 2006; *In Brief*, September 15, 2009).

But the Third District noted that the Ford Ord Reuse Authority had a plan for upgrading infrastructure throughout the base. "The county had no similar plan to improve the intersections, either in the near-term or within several years," Scotland wrote. "Because of this, the holding of *City of Marina*, that 'a commitment to pay fees without any evidence that mitigation will actually occur is inadequate,' supports the city's conclusion that the mitigation, though needed, was not feasible."

According to WinCo attorney Owsowitz, the court placed an important limitation on the *City of Marina* decision. "This is significant because a lot of petitioners have been claiming that under *City of Marina*, you have to mitigate any impacts, anywhere," she said.

Jarvis, Tracy's attorney, said the court's reading of *City of Marina* helps local governments confronted by a project's extraterritorial effects. "This issue comes up time and again for lead agencies," he said.

For alternatives, the EIR analyzed four: no project; an industrial development; a larger WinCo store; and the proposed store with a smaller parking lot. Tracy First argued that a smaller store should have been considered too because it could have reduced the project's effects on traffic and air quality. But the group did not demonstrate how the effects would shrink with the store size, said the court.

"There is no evidence in the record that fewer customers would patronize the WinCo Foods store if the store were smaller," Scotland wrote. "Thus, we can only speculate that traffic would be lighter. And Tracy First offers only its 'presumption' that air quality would be improved."

The Third District's decision could be instructive for another lawsuit filed by Tracy First, this one regarding the city's approval of a Wal-Mart expansion project. Tracy First has raised many of the same issues in that litigation. ■

- The Case:
  Tracy First v. City of Tracy, No. C059227, 2009 DJDAR 13866. Filed August 27, 2009. Certified for publication in its entirety September 18, 2009.
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use permits

Medical Marijuana Dispensary Moratorium Upheld

The City of Claremont's moratorium on dispensaries of medical marijuana and a Superior Court injunction shuttering a dispensary have been upheld by the Second District Court of Appeal.

The city won the injunction in 2008 after demanding that the dispensary close because it violated the Municipal Code. The dispensary had contended that the city's moratorium and Municipal Code were superceded by the state's medical marijuana law and that the injunction was too broad.

In 2006, Claremont denied a business license to the operator of the dispensary on the ground that the city's Land Use and Development Code did not permit a business to sell marijuana. The operator defied the city and opened the dispensary anyway. In response, the city adopted the moratorium prohibiting medical marijuana dispensaries. In early 2007, the city went to court to shut down the business as a nuisance. The Second District found that nothing in the Compassionate Use Act (CUA), approved by voters in 1996, precluded the city's actions.

"The plain language of the statute does not prohibit the city from enforcing zoning and business licensing requirements applicable to defendants' proposed use," Justice Victoria Chavez wrote for the unanimous three-judge panel. "The CUA does not authorize the operation of a medical marijuana dispensary, nor does it prohibit local governments from regulating such dispensaries."

While CUA (Proposition 215) passed in 1996, medical marijuana dispensaries have not proliferated until recently. Scores of cities and counties have enacted moratoria to block dispensaries from opening while the cities and counties consider a permanent ban or zoning restrictions. Some jurisdictions have banned dispensaries outright, while others have prohibited new ones from opening. Medical marijuana advocates say some of these regulations are illegal, although courts have sided with local governments.

In the Claremont case, Darrell Kruse and Claremont All Natural Nutrition Aids Buyers Information Service (CANNABIS) applied for a business permit and business license for a "medical marijuana caregivers collective and information service" on September 14, 2006. Months earlier, city planners had advised Kruse that a marijuana dispensary would be illegal under Claremont's Land Use and Development Code. Nevertheless, Kruse opened for business on September 15 – the same day the city denied his application.

He appealed the denial of his application to the City Council, but on September 26, it adopted a 45-day moratorium on marijuana dispensaries. The council later declared Kruse's appeal moot. The moratorium was subsequently extended through September 2007, and then through September 2008. Before the 2008 moratorium expired, the city adopted an ordinance banning dispensaries outright, according to City Planner Lisa Prasse.

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When Kruse kept his doors open, the city ordered him to cease and desist. Eventually, the city took Kruse to court, and, in January 2007, a Los Angeles County Superior Court judge found him guilty of operating a business without a license or permit. He was fined. When Kruse continued to sell marijuana, the city sought a restraining order and injunction to abate a public nuisance. Superior Court Judge Dan Oki backed the city's request and issued a permanent injunction shutting down Kruse's operation.

On appeal, Kruse denied that his dispensary was a nuisance on the ground that it did not sell controlled substances illegally and insisted that state law preempted the city from shutting him down.

In rejecting the nuisance appeal, the court cited the city's code, ruling that it "expressly states that a condition caused or permitted to exist in violation of the Municipal Code provisions may be abated as a public nuisance."

In deciding the preemption claim, the court reviewed the 1996 voter initiative and the medical marijuana program (Health and Safety Code § 11362.5 *et seq.*) approved by the Legislature in 2003. The initiative made use of marijuana legal if based on a physician's "recommendation," and the 2003 law provided a defense against prosecution for doctors, patients and caregivers. But because neither measure addressed zoning, land use or business licensing, the state laws could not "preempt the city's enactment of the moratorium or the enforcement of local zoning and business licensing requirements," Chavez wrote.

The court also held that the injunction – which barred Kruse from operating a dispensary anywhere in town while the moratorium was in effect – was not overly broad, and that the city correctly dismissed his appeal to the City Council as moot. ■

■ The Case:
City of Claremont v. Kruse, No. B210084, 2009 DJDAR 14037. Filed August 27, 2009. Ordered published September 22, 2009.

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ceqa

City Permitted To Reject Potentially Feasible Alternatives

A city may determine that project alternatives once considered potentially feasible for California Environmental Quality Act analysis are infeasible as actual projects, the Sixth District Court of Appeal has ruled.

"The issue of feasibility arises at two different junctures: (1) in the assessment of alternatives in the EIR and (2) during the agency's later consideration of whether to approve the project. But 'differing factors come into play at each stage,'" wrote Justice Richard McAdams, citing Stephen Kostka and Michael Zischke's *Practice under the California Environmental Quality Act.*

"For the first phase – inclusion in the EIR – the standard is whether the alternative is *potentially* feasible. By contrast, at the second phase – the final decision on project approval – the decision-making body evaluates whether the alternatives are *actually* feasible. At that juncture, the decision-makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible."

The ruling could chill a frequent argument used by opponents of a project. Because CEQA requires an analysis of feasible alternatives, goes the argument, an EIR is necessarily inadequate if a decision-making agency later rejects the alternatives as infeasible. This was roughly the argument in the case decided by the Sixth District.

At issue was a park plan in Santa Cruz. In 1979, city voters approved a ballot measure identifying greenbelt parcels for preservation. Among the parcels was Arana Gulch, which was privately owned property near Santa Cruz Harbor. In 1992, voters approved a measure requiring preparation of a greenbelt master plan. By 1994, the city had acquired the entire 67.7-acre Arana Gulch site, and in 1997 the city approved an interim master plan for it.

The city's general plan and the greenbelt master plan called for construction of a multi-use path that would run through Arana Gulch and over harbor property to connect two parts of town. The path was one objective in a 2003 Arana Gulch master plan. Another was preservation and restoration of coastal prairie habitat, particularly Santa Cruz tarplant populations.

The draft Arana Gulch plan called for 1.4 miles of pedestrian-only path, plus 0.6 miles of wider, paved path that would comply with the Americans with Disabilities Act (ADA) and be suitable for pedestrians, bicycles and wheelchairs. Also planned were educational displays and viewing areas. Environmentalists objected that the proposed paths would intrude upon tarplant habitat; they urged the city to build the multi-use path around Arana Gulch. In 2006, the City Council approved the draft Arana Gulch plan and certified the EIR.

The California Native Plant Society and Friends of Arana Gulch sued to block the project, primarily challenging the city's analysis of the alternatives. Santa Cruz County Superior Court Judge Paul Burdick ruled for the city.

The EIR contained four alternatives: (1) no project; (2) no ADA-compliant path on harbor property, meaning no continuous east-west route; (3) no paved paths; and (4) no paved paths and no bridge over a gulch, again meaning no east-west connection. Although each alternative lessened or eliminated impacts to tarplant habitat, the City Council rejected all four as infeasible and chose the draft plan because the east-west connector was crucial. The council adopted a statement of overriding that declared that the project's social and transportation benefits outweighed the harm to tarplant habitat.

In their appeal, opponents of the project contended that the four alternatives promoted the multi-use path at the expense of ecosystem restoration. If an ADA-compliant path was a prime objective, the city should have added the alternative of routing the path around Arana Gulch, they argued.

But the court pointed out that the project was a master plan for Arana Gulch, not for a multi-use path. In addition, earlier plans and EIRs had rejected the idea of a multi-use path around Arana Gulch. Every alternative chosen for and analyzed in the Arana Gulch plan's EIR met at least some of the project's 10 objectives, and "Contrary to appellants' assertion," wrote McAdams. "there is no legal requirement that the alternatives selected must satisfy *every key objective* of the project."

The argument in Santa Cruz, summarized McAdams, was really over policy, not environmental analysis. "Here, the city's infeasibility findings … are based on policy considerations, particularly the city's interest in promoting transportation alternatives, as well as its open space

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for persons with disabilities. Such policy considerations are permissible under the relevant statute, which calls for a determination that 'economic, legal, *social*, technological *or other considerations* … make infeasible the mitigation measures or alternatives identified in the environmental impact report,'" McAdams wrote, citing Public Resources Code § 21081, subdivision (a)(3).

In a concurring opinion, Justice Nathan Mihara added, "There is no inconsistency between the city's certification of an EIR that discussed potentially feasible alternatives and the city's determination that those alternatives are not actually feasible." ■

- The Case:
  California Native Plant Society v. City of Santa Cruz, No. H032502, 2009 DJDAR 13873. Filed August 20, 2009. Ordered published September 18, 2009.
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ceqa

Disapproved Project Doesn't Need EIR, Court Rules

The City of Los Angeles had no obligation under the California Environmental Quality Act to complete an environmental impact report for a project that it had rejected, the Second District Court of Appeal has ruled.

The court dismissed all arguments put forward by the developer of the 555-acre Las Lomas project at the junction of Interstate 5 and Highway 14. "[I]f an agency at any time decides not to proceed with a project," the court said, "CEQA is inapplicable from that time forward."

Six years ago, developer Dan Palmer Jr. proposed 5,800 residential units, 2.3 million square feet of office space, retail space, community facilities and a hotel on the site in unincorporated Los Angeles County. About half the site would remain undeveloped. Palmer filed a preliminary application, specific plan and other entitlements with the City of Los Angeles to annex the county property. The adjacent City of Santa Clarita also tried to gain control of the site (see *CP&DR Local Watch*, January 2004), but Los Angeles had the advantage of already being in the process of expanding its sphere of influence in the area. In late 2006, the Los Angeles Local Agency Formation Commission approved Los Angeles' quest to include a portion of the Las Lomas site in the city's sphere – an early step toward annexation.

A year later, Palmer signed a contract with Los Angeles to pre-pay the city's expected expenses for reviewing the project's EIR and associated applications. The developer followed up with a "master land-use permit application" for a slightly scaled down and retooled project. In December 2007, the city's Planning Department notified Palmer that his application was incomplete because it was missing the EIR. (In Los Angeles, project proponents typically prepare environmental documents for review by the city.)

Throughout, Councilman Greig Smith questioned the project. Although city attorneys said the city was legally required to process the Las Lomas EIR and specific plan, Smith presented a resolution ordering the city to cease work on the application and EIR and to return all materials to Palmer. The City Council approved the resolution by a 10-5 vote in March 2008.

Palmer's Las Lomas Land Company, LLC, which reportedly had spent millions of dollars on planning and environmental analysis, sued the city. Las Lomas contended the city had a duty under CEQA to complete the environmental review. The company further argued that the city's midstream rejection of the project violated due process and equal protection provisions in the United States and California constitutions. The company asked the court to order the city to complete the EIR and pay more than $100 million in damages. Los Angeles County Superior Court Judge David Yaffe dismissed all the claims in January of this year.

On appeal, Las Lomas contended that a section of CEQA – Public Resources Code § 21061 – requires a public agency to complete and certify an EIR before approving or rejecting a project. The company also cited CEQA Guidelines § 15270, which permits a city to reject quickly a project based on a preliminary screening without an environmental review, but which is silent on midstream project denials.

The court ruled that neither the statute nor the guidelines required Los Angeles to complete the Las Lomas EIR before denying the application.

"CEQA applies only to projects that a public agency proposes to carry out or approve, and does not apply to projects that the agency rejects or disapproves," Justice Walter Croskey wrote for the court. "A public agency need not prepare an EIR for a project that it rejects.

"To require a public agency to prepare and circulate a draft EIR, and prepare a final EIR including responses to comments, before rejecting a project would impose a substantial burden on the agency, other agencies, organizations, and individuals commenting on the proposal, and the project applicant," Croskey continued, "Such a requirement would not produce an discernible environmental benefit and would not further the goal of environmental protection."

On the constitutional issues, the court stated that due process applies only when a landowner "has a legitimate claim of entitlement to the approval." Wrote Croskey, "The city's decisions whether to seek to annex the site, enter into a development agreement, and adopt the proposed specific plan were discretionary decisions. Las Lomas can assert no claim of entitlement." Therefore, the city's decision was not a deprivation of property for purposes of due process under the Fourteenth Amendment.

In addition, the court ruled that the state's due process protection extends only to "property interests or benefits that are conferred by statute." Because the city had no mandatory duty under CEQA, Las Lomas's argument failed.

The court weighed the equal protection claims using the "rational basis test," which, the court acknowledged, "does not allow inquiry into the wisdom of government action." In denying the claims, the court stated, "There are numerous conceivable legitimate reasons why the city would choose not to expand its boundaries and facilitate growth in this particular area at the time."

Finally, the court refused to let Las Lomas amend its lawsuit based on different legal theories. ■

- The Case:
  Las Lomas Land Co., LLC v. City of Los Angeles, No. B213637. 2009 DJDAR 13813. Filed September 17, 2009.
- The Lawyers:
  For Las Lomas: Carlyle Hall Jr., Akin, Gump, Strauss Hauer & Feld, (310) 728-3242.
  For the city: Amrit Kulkarni, Meyers, Nave, Riback, Silver & Wilson, (510) 808-2000.

places

MORRIS NEWMAN

SF's Empty Lots: Get Something From Nothing

Impermanence? What's that? Don't planners, architects and developers make stuff that lasts forever, or at least for a very long time? The technocrats of city making are not interested in empty lots and other temporary conditions per se. Empty lots have no value in themselves; they are only blank canvases for their *grandes projets*.

Plus, empty lots are short-lived – unless, of course, you are living through the worst recession in a half century, and every development project in California is standing as if flash frozen in July 2007, when an arctic blast from Wall Street withered the housing market and all of real estate finance.

Empty lots, it turns out, can be interesting and even useful, especially during economic down times. In San Francisco, a number of architects and landscape designers have created temporary uses for cleared construction sites or abandoned construction pits. Finding a temporary use for empty lots discourages graffiti and other kinds of vandalism, which are indicators of places that are socially dead and up for grabs. More to the point, temporary parks or exhibitions can replace eyesores with spaces that give pleasure and in some cases prompt us to think and talk to other people (the phenomenon William H. Whyte called "triangulation").

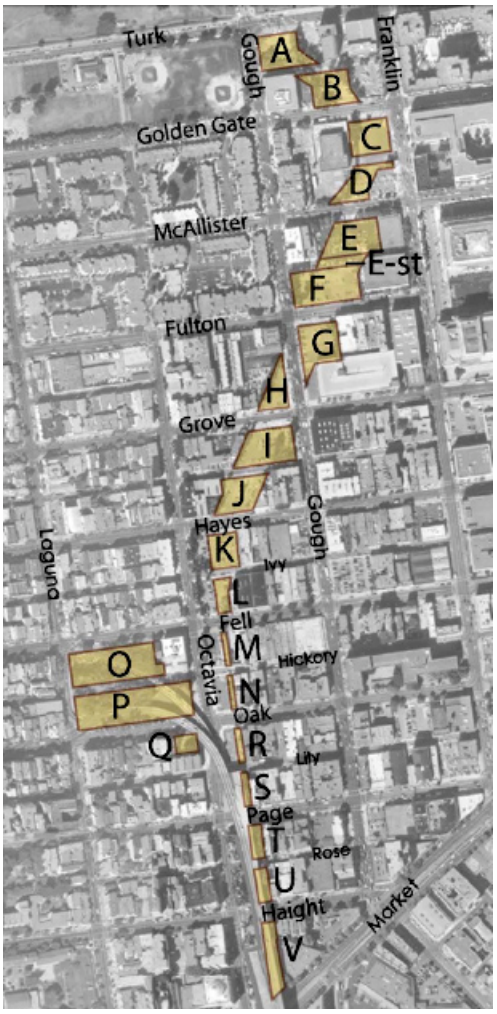
Last spring, John King, the estimable architectural writer for the *San Francisco Chronicle*, invited local designers to submit ideas to reuse some conspicuously vacant spaces in the city. Unlike in many design "competitions," King did not hand out awards or commissions, and the request for empty lot redesigns was reality based. If projects are ever to be built, they will likely rely heavily on volunteer labor and donated materials. Those constraints actually made the empty-lot competition more interesting than a blue-skies type of contest. A tight budget demands simplicity, and simplicity tends to result in strong design solutions.

Ned Kahn, a local artist, contemplated filling a construction site at Fifth and Mission with steel cables on which small metal discs are strung like beads. The discs move easily in the wind, allowing viewers to visualize the movement of the wind. (The piece is not entirely dissimilar from a public art installation by the same artist at San Francisco International Airport.)

For a different site, in a high-rise district of Crescent Heights, is a proposal called People's Public Workshop, which would be a group of exhibits explaining the tools and materials of urban infrastructure. The proponents are an imaginative local design collaborative called REBAR, whose practice seems to combine elements of both architecture and performance art.

REBAR deserves extra credit for popularizing the idea of devising new uses for ugly or under-used city spaces. The firm's greatest notoriety comes from inventing the annual event known as PARK(ing), in which different participants commandeer streetside parking spaces and make individual stalls into mini-parks. The idea seems precious and off-putting until we realize that a little bit of green (such as temporary sod lain on the street) and some shade actually make the street feel very different than before.

For a different site, this time on Rincon Hill, a team composed of Berkeley-based PWP Landscape Design and Kennerly Architecture & Planning propose an unconventional construction fence, with individual fence poles topped by bird houses designed for particular species, while an on-site construction crane would become overgrown in vines – a lovely Gothic touch.



SOURCE ENVELOPE A+D

The Octavia Boulevard corridor and Hayes Valley offer a number of sites for "temporary" uses.

Octavia Boulevard, where the City of San Francisco owns at least 12 vacant lots, is an ideal showcase for temporary installations. In this case, the city's Office of Economic Development has been considering different short-term uses for its properties.

One proposal for Octavia is a multi-use structure called PROXY, designed by Oakland based architect Douglas Burnham of Envelope A+D. Covering two empty parcels at Octavia and Fell Street in front of Hayes Green, PROXY is not much more complicated structurally than a refreshment stand at a county fair: Essentially, it's a group of 9-by-20 cubicles made from off-the-shelf scaffolding and draped in tensile fabric. Inside these elegant, if minimal, spaces are a food court, shops, an art gallery and an outdoor movie screen. Above all, PROXY would offer a place with seating and shade. The proposal is as practical as it is extravagant.

For a different parcel on the same street, a nonprofit known as MyFarm proposes a "communal farm." The group raises produce in the backyards of 120 homes in the city, and the Octavia proposal seems like an extension of the idea of eking farmland out of urban sites.

For me, the big light bulb in all these proposals is the recognition of the potential flexibility in urban land use, in contrast with the narrow and single-purpose way we usually make design decisions. Construction sites or underused lots may be either forbidding no man's lands or serve as vibrant public spaces.

Sometimes temporary uses have a way of lasting longer than originally expected. Nearly a decade ago, I wrote a piece for *Landscape Architecture* magazine about a temporary garden planted in a site immediately west of Los

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Angeles City Hall, where a federal courthouse is to be built. For whatever reason, the courthouse is still in the future, and the low-maintenance garden of tall, native grasses continues to flourish.

A few blocks away, on Grand Avenue, is another temporary solution: an ugly steel parking structure that locals call "the tinker toy," which has stood in the same site for more than 40 years – longer than the life of some commercial buildings. Nowadays, the tinker toy rises across the street from Frank Gehry's Disney Hall, where it provides a constant note of ugliness within sight of the finest recent building in Los Angeles. Temporary can be a very long time, indeed.

What if a garden or an exhibit hall replaced the tinker toy, at least for the time being? Public gardens are a solution that gore no oxen while providing something positive to urban life. And because cities are never finished and always in transition, there's a permanent need for the artfully temporary. ■

SOURCE: ENVELOPE A+D

The proposed PROXY project would cover two blocks with temporary structures full of commerce and art.

SOURCE: PWP LANDSCAPE ARCHITECTURE AND KENNERLY ARCHITECTURE & PLANNING.

A crane and other construction remnants would become wildlife habitat on Rincon Hill.

SOURCE: PWP LANDSCAPE ARCHITECTURE AND KENNERLY ARCHITECTURE & PLANNING.

How about an unusual construction site fence topped with bird houses?

insight WILLIAM FULTON

– CONTINUED FROM PAGE 1

Boxer of California adds a little money for transportation, but not a whole lot.

So, not unlike California, the federal government may soon be in the business of arm twisting local governments into pursuing smart growth strategies. And, like California, the feds are not likely to come up with the money required to build the necessary public transit systems.

All of which underscores an important and often-overlooked point about the federal climate change bill: It's not really about reducing emissions. It's really about the biggest new source of money the federal government has seen in a long time.

The money is coming along at the exact time that the federal government is stumped about how to fund transportation – not just public transit but highways too. Gas tax revenue is on the decline and Congress has used general fund money to prop up the federal Highway Trust Fund twice during the last year, including a $5 billion bailout just a couple of weeks ago. House transportation guru James Oberstar (D-Minnesota) wants $500 billion for the six-year reauthorization of the transportation funding act, but nobody knows where the money is going to come from.

Meanwhile, public transit advocates are losing the money battle in the climate change bill. This means MPOs and local governments may soon be faced with a big new mandate to reduce automobile travel – in the climate change bill, not the transportation bill – and not a much money with which to do it.

Part of the reason that regional planning advocates are having a tough time squeezing money out of the climate bill is that there's so much competition. The other reason is that the climate bill appears to be moving forward with little regard for what the transportation bill might say.

The money will come from the sale of greenhouse gas emission "allowances," which will have market value because overall emissions will be capped – and gradually ratcheted down – under the climate change bill. Many allowances will be given to current polluters, such as electricity generators, which will be able either to use allowances or sell them to other polluters, whichever is more profitable. (This is what is known as the "cap-and-trade" program.) Other allowances will be retained by the government and sold to generate money for various purposes, including transit. (Some allowances would be distributed to other government agencies, such as states.)

The battle over allowance revenue has been going on for several years on Capitol Hill (see *CP&DR Blog*, March 11, 2008). Other vested interests have gotten the jump on public transit and smart growth advocates, including the coal industry and – in particular – advocates of alternative-fuel vehicles. The smart growth approach has clearly been a sideshow. Meanwhile, public transit and smart growth advocates have had to fight a separate war on the transportation reauthorization bill.

The Waxman-Markey bill would permit states to use up to 10% of their allowances on transportation, but this would not be mandatory. The Kerry-Boxer bill goes farther by *requiring* states to use 10% of their allowances on transportation. Kerry-Boxer also creates a potential funding source for public transit. Some federal allowance sale revenue would be deposited into a fund known as the state "Climate Change Response and Transportation Funds." First call (10%) on these funds would be for coastal states dealing with sea-level rise; then a small portion (1%) would go to Indian tribes. After that, half of the remaining money would go to public transit. (The best description of these provisions can be found on Streetsblog.)

The kicker, of course, is that nobody yet knows how many allowances will be sold to provide revenue for this fund or how much money will result.

The question of how to link transportation planning with air pollution regulations has vexed regional planners for a long time. But it gets even more complicated with climate change legislation at the federal level.

Transportation and air pollution are linked, of course, by the fact that the burning of transportation fuels causes air pollution. That's why metropolitan planning organizations – such as the Sacramento Area Council of Governments – must make "conformity" findings so ensure that transportation funding decisions conform to the local air quality plan.

Senate Bill 375 seeks to reduce a particular type of pollution emissions – greenhouse gases – and it gives the California Air Resources Board considerable power. But it's not linked to other air quality laws. The state's metropolitan planning organizations are required to create what is known as a "sustainable communities strategy," which amounts to a land use scenario and a set of transportation policies supporting that land use scenario that will reduce travel enough to meet the greenhouse gas emissions reduction target set by the state. Still, because it's a state law, SB 375 recognizes that it can't operate in conflict with the federal transportation law. That's the whole reason for the "alternative planning strategy" under SB 375. If an MPO can't create a sustainable communities strategy that meets the emissions reduction targets – because the strategies must be realistic according to the regional transportation plan – then the MPO must create an alternative strategy that is not binding.

At the federal level, however, it's possible that climate-related transportation directives may be approved separately from federal transportation policy, and that's giving MPOs fits. The MPO provisions in the climate bill may be written as an amendment to the federal transportation law, which is tied to the Clean Air Act (CAA), even though transportation reauthorization is being considered separately. In June, MPO leaders from around the country wrote to Waxman and Markey expressing concern: "Creating a new parallel transportation process under the CAA, led by EPA, would create major difficulties in the transportation planning process." Among other things, the MPOs noted that one result could be that the climate bill will permit citizen lawsuits against MPOs on climate issues – something the MPOs clearly don't want to allow.

It is unlikely that a federal climate bill will be passed this year. But passage next year is likely. There is no question that the result with be an SB 375-style process mandated federally. The big question is whether there will be any money to fund the mandates. ■