

# Slow Growthers Win In Davis, Mendocino County

But Santa Barbara And Ventura Vote Down Height Limits In Municipal Balloting

BY PAUL SHIGLEY

Slow-growth advocates won major victories in November 3 local elections when voters rejected a housing project in Davis and a shopping center in Mendocino County, as well as sewer extensions in Modesto.

But slow-growth forces suffered some unexpected losses. In Santa Barbara and Ventura, two cities with a history of voter-controlled development, initiatives that would have imposed strict height limits on new buildings were rejected. In the Bay Area, Walnut Creek voters approved amended parking standards necessary for the construction of a Neiman Marcus store downtown.

As usual, the election results was a mixed bag. The slow growth side won eight of 12 easily classified contests, but that total is misleading because Modesto voters rejected five proposals to extend sewer service into potential new growth areas.

All in all, voters decided 22 local ballot measures with land use implications, including the proposed incorporation of Carmel Valley

and three advisory measures on incorporation and annexation in the Santa Clarita Valley. Voters in both locations said they do not want to create a new city.

## No Growth in Davis

The Davis election was the result of a 2000 initiative, Measure J, that prohibits the rezoning of agricultural land without voter approval. Parlin Development Company of Rancho Cordova proposed rezoning a 25.8-acre horse ranch to permit development of 191 housing units – 73 single-family houses, 78 condominiums and a 40-unit apartment complex containing 38 affordable units. Parlin’s Wildhorse Ranch included numerous green building and solar power features, and it even won the endorsement of local Sierra Club organizers.

Pam Nieberg, a leader of the Sierra Club Mother Lode Chapter’s Yolano Group, said she supported the project because of its energy- and water-saving features, compact design

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# Climate Change Adaptation Recommendations Result In Same Old Fight

*insight*  
WILLIAM FULTON

Will California get past stalemate on development-related environmental issues before the world as we know it ends?

Sorry about the apocalyptic reference, but it is common these days in discussions about global warming – and with good reason. If predictions about the impact of global warming are even half right, a lot of us are going to be quite literally swimming – or at least wading – through our daily lives in 30 or 40 years.

Yet in the current debate about how the state should approach “adaptation” strategies, all parties are crouched in their typical postures. The state has released a sweeping game

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The Natural Resources Agency has altered proposed amendments to the California Environmental Quality Act Guidelines. The changes appear to shift the focus of environmental analysis away from a project's effects on automobile traffic and toward impact on the overall transportation system. The amendments are scheduled to take effect January 1, 2010.

Under legislation approved in 2007, the amendments are supposed to address greenhouse gas emissions (see *CP&DR Environment Watch*, May 2009). However, experts who commented on the draft amendments said that the continued reliance on traffic level of service (LOS) standards would only maintain an emphasis on automobile travel, even though less automobile travel is necessary to reduce greenhouse gas emissions. This is because a high LOS requires roads, highways and intersections that can carry automobiles without undue delay.

In response, the agency changed Appendix G of the guidelines to give lead agencies more discretion in choosing methodologies to examine the transportation related effects of projects. The notice of proposed changes states, "The proposed revisions would refocus the question from the capacity of the circulation system to the performance of the circulation system as indicated in an applicable plan or ordinance. The proposed revisions also clarify and update language regarding safety considerations and other mass transit and non-motorized transportation issues."

In addition, the Natural Resources Agency deleted a question dealing with adequate parking capacity from the Appendix G checklist. Transit-oriented developments often run into CEQA difficulty because they provide a limited amount of parking, which is then considered a significant effect that must be mitigated.

The agency made other changes intended to clarify that greenhouse gas emissions are best analyzed as a cumulative impact.

The public comment period on the changes ends November 10. The entire CEQA Guidelines package is available at <http://ceres.ca.gov/ceqa/guidelines>.

The economy in California's Central Valley remains extremely poor, according to a statistical analysis prepared by the Great Valley Center. The region's per-capita income during 2007 was

\$29,790, or about 70% of the state average of \$41,805. If the region were a state, it would rank 48th in per-capita income in the country, according to the center's economic indicators report, which is issued every five years.

"The current recession is just exaggerating the problems we already had," said Amy Moffat, the center's director of research and communications. Even when the overall economy is strong, the Central Valley is plagued by high unemployment and poverty. The biggest difference between this year's report and the 2004 version is that housing foreclosures have replaced rising housing costs as a major problem.

The report makes five recommendations for Central Valley leaders:

- Improve the quality of the workforce.
- Continue to support agriculture as a regional economic base.
- Diversify the economy to meet the needs of a growing workforce.
- Capitalize on momentum from the federal recovery act.
- Understand the needs of rural communities.

The report is available on the Great Valley Center website, [www.greatvalley.org](http://www.greatvalley.org).

**Sacramento Community Development** Director Bill Thomas and Dan Waters, a customer services supervisor under Thomas, have been placed on administrative leave after Waters approved 35 new home permits in an area subject to a federally imposed building moratorium because of flood risks due to substandard levees.

Waters, son of and campaign treasurer for Sacramento City Councilman Robbie Waters, allowed K. Hovnanian Homes to switch 35 building permits in the North Natomas area from one set of parcels to different parcels. The switch occurred earlier this year even though the Federal Emergency Management Agency prohibited new building in the area as of December 8, 2008.

Without authorization, Waters also allowed K. Hovnanian to defer payment of \$61,000 in permit fees for three months. The *Sacramento Bee* reported that 11 of the houses are complete and four are occupied. The developer has denied any wrongdoing.

In late October, the City Council directed the city manager's office to investigate the Community Development Department.

**As promised**, the California Redevelopment Association (CRA) has sued the state in Sacramento County Superior Court to halt the shift of \$2.05 billion from local redevelopment agencies to school districts and state agencies. The CRA contends that the transfer of property tax increment during the 2009-10 and 2010-11 fiscal years violates the state constitution. The group successfully used the same argument to block the shift of \$350 million in tax increment to schools in the 2008-09 fiscal year (see *CP&DR Redevelopment Watch*, June 2009).

Redevelopment agencies in Union City and Fountain Valley joined the CRA suit. Mark Evanoff, manager of the Union City Redevelopment Agency, said the funds transfer, which would cost his agency \$7.7 million, could halt a 100-acre BART station redevelopment project. The city has obligated all its tax increment to the station and others projects (see *CP&DR Redevelopment Watch*, March 2007).

According to state law, the \$3.3 million transferred from Fountain Valley's agency to the Garden Grove School District could be spent only on the 64 students who live within the agency's redevelopment project area. That amounts to about \$52,000 per student. "This is exactly what happens when lawmakers don't think things through," said Raymond Kromer, Fountain Valley community development director.

**Nine federal agencies** have signed a memorandum of understanding (MOU) intended to speed the review of electricity transmission lines on public lands. Among those signing were the Department of the Interior, the Environmental Protection Agency and the Federal Energy Regulatory Commission.

Under the agreement, a single federal agency will lead the review of a proposed transmission corridor. In addition, the agencies will assess proposed projects simultaneously rather than consecutively, and there will be clear timelines for agencies to complete their work.

The new transmission corridors would carry electricity generated at remote solar, wind and other renewable energy facilities. The proposed routes have frequently become controversial because they pass through sensitive wildlife and plant habitats on public lands. The MOU is available at [http://www.doi.gov/documents/MOU-TransmissionSitingonFederalLands\\_001.pdf](http://www.doi.gov/documents/MOU-TransmissionSitingonFederalLands_001.pdf). ■



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# Not All Voting Results Match The Trends

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and location. The site is bordered on three sides by the Wildhorse housing subdivision and on the fourth side by an agricultural buffer.

“I’ve lived here since 1962, and I have fought against some of the bigger projects, like Mace Ranch and Wildhorse,” Nieberg said. “We lost those votes. I think now that those projects have built out, the mood has shifted. A lot of people don’t want things to change.”

And they will not change, at least on this 26-acre parcel. Almost three out of four Davis voters rejected the rezoning. Davis City Councilwoman Sue Greenwald, who opposed the project, said people voted down Wildhorse Ranch because there is no need for additional housing in town. The University of California has started construction on a 1,500-unit project for students and UC staff members, while ground has not been broken on other approved projects because of the poor housing market, she said.

“Between the city and the adjacent university, we have over 2,000 units approved. This is just the wrong time to bring a development forward,” Greenwald said. She also questioned whether the project was as green as advertised and said the location was too far from the center of town for new housing.

Davis voters will have the opportunity in June 2010 to renew Measure J, which is scheduled to expire at the end of 2010. So far, only two projects have tested the initiative, Wildhorse Ranch and the 1,800-unit Covell Village, which voters rejected in 2005. Greenwald said Measure J has worked as intended and without the growth control, “we would look like Orange County or the Inland Empire.”

Although she lost this election, Nieberg said she backs extending Measure J because she does not trust the City Council to make rezoning decisions.

## Don’t Cross Mendocino County

The biggest project that voters considered on November 3 was Mendocino Crossings, which was proposed by Ohio-based Developers Diversified Realty (DDR).

After getting frustrated with an area plan process for the Ukiah Valley that has started and stopped several times since the mid-1990s – and the refusal of the county to consider DDR project until the area plan is complete – DDR presented its Mendocino Crossings specific plan directly to voters. The specific plan established a unique zoning district for DDR’s property – a 76-acre former door and molding factory just north of the Ukiah city limit – and permitted up to 800,000 square feet of new buildings, including a maximum of 150 residential units.

DDR envisioned a large shopping center on the property anchored by the likes of Costco and Target. But the shopping center apparently was not what voters envisioned, as only about 38% backed the initiative.

The Ukiah City Council, most county supervisors and many local merchants opposed the project because they said it could harm existing business and to tie up traffic in an area with limited access. Opponents also said that DDR should have gone through the normal planning process and that the site should remain zoned for industrial uses.

Brian Sobel, a spokesman for Mendocino Crossings, said the project would have brought jobs and large-format stores to the Ukiah area.

“That obviously did not resonate with voters as well as the opponents’ message did,” Sobel said. “Measure A in the community had a pretty vociferous and hard-working opposition.”

As for the charge that DDR should have worked within the normal

planning process, Sobel, a former Petaluma councilman and planning commissioner, said, “It was a process that had to be gone around because, otherwise, a decision never would have been made.”

## Coastal Height Limits

The Santa Barbara initiative, Measure B, would have reduced the maximum height of new buildings in downtown from 60 feet to 45 feet, and to 40 feet in the historic El Pueblo Viejo district. The Ventura proposal, also Measure B, would have limited new building height to 26 feet in nearly all the city, except downtown, for two years while a new committee drafted a viewshed ordinance.

In Santa Barbara, an unusual coalition of developers, architects, environmentalists and Democratic Party activists rallied against Measure B. They worried that the height limit would force development to the fringes of town, prevent reconstruction of Cottage Hospital if it were damaged by an earthquake or other disaster, and generally obstruct smart growth principles. Many of the town’s historic structures are higher than 45 feet, they noted. Supporters of the initiative said the limit was needed to prevent the proliferation of buildings 60 feet tall and higher from overwhelming downtown and the historic district.

The result of Santa Barbara’s first all-mail election was somewhat confusing. Voters narrowly rejected Measure B, but three of the four winning City Council candidates – Planning Commissioner Bendy White, Frank Hotchkiss, who campaigned against a general plan update and to reduce the size of the Planning Department, and Michael Self, who for years has fought against bulb-outs at intersections and other traffic calming measures – endorsed the initiative.

After the election, Measure B co-author and architect Bill Mahan wrote on the Save El Pueblo Viejo website: “Even though Measure B didn’t pass, it is clear that there is much community concern about building heights. They can be addressed by ordinance.”

By contrast, the vote against the Ventura height limit was a three-to-one blowout. A group called Ventura Citizens’ Organization for Responsible Development pushed the initiative to prevent what it called overdevelopment and to protect ocean views. Opponents said it was unnecessary, a threat to redevelopment of Ventura’s long-struggling midtown area and poorly drafted.

Those arguments got traction in an election topped by a heated City Council race and a half-cent sales tax measure that voters defeated. There was no split as in Santa Barbara. One of Measure B’s authors, Camille Harris, finished 11th in a 14-person race for four City Council seats.

The November 3 election had only three school bonds, the fewest since the 55% threshold went into effect in 2000. Voters approved a \$59.8 million bond in Marin County’s Mill Valley School District and a \$9.3 million bond in the Shoreline Unified School District, which covers slices of Marin and Sonoma counties. A \$6.7 million bond in Tulare County’s Springville Union Elementary School District failed.

An \$88 million bond to build a police, fire and emergency medical services facility in the City of San Rafael received 61% support, well short of the two-thirds required for approval. However, voters in the Tehachapi Valley Health Care District approved a \$50 million bond to help fund construction of a new hospital in Tehachapi.

Voters in Palmdale and El Centro approved city charters that officials said would ease, and reduce the cost of, municipal construction projects. ■

## Contra Costa County

### *City of Walnut Creek*

The long fight over a proposed Neiman Marcus store at Broadway Plaza has apparently ended. Voters approved a general-plan amendment that modified parking and other standards to permit the construction of an 92,000-square-foot, two-story project. The \$2 million campaign was funded by Broadway Plaza owner Macerich and, on the other side, by Taubman Centers, which owns the rival Sun Valley Mall in neighboring Concord.

Measure I: Yes, 71.4% (pro growth)

## Los Angeles County

### *City of Maywood*

The proposed site of a new Los Angeles Unified School District high school proved very unpopular with voters. To make room for the school, 112 apartment units, 10 houses, a Veterans of Foreign Wars post and several commercial buildings would have to be demolished.

Voters rejected the advisory measure supporting the district's plan to acquire the 9.4-acre site at Slauson and King avenues. Instead, they backed an advisory measure urging the district to "fully and adequately" investigate other sites.

Measure MS (LAUSD site): No, 72.0%

Measure SC (alternative sites): Yes, 71.0%

### *Santa Clarita Valley*

Voters sent conflicting messages on three advisory measures regarding incorporation. Proposals to keep the valley unincorporated and to annex into the City of Santa Clarita both passed. The proposal to form a new city adjacent to Santa Clarita was soundly defeated. The measures were on the ballot in Sunset Pointe, Stevenson Ranch, Southern Oaks, Westridge, Tesoro, Castaic and Val Verde.

Measure A (remain unincorporated): Yes, 56.3%

Measure B (new city): No, 77.8%

Measure C (Santa Clarita annexation): Yes, 52.9%

## Marin County

### *Town of San Anselmo*

Voters upheld an ordinance preventing the proliferation of "monster homes" in the "flatlands" by restricting house size. The City Council approved the floor-area ratio ordinance last year. It limits the habitable portion of a house to 45% of the lot size and prohibits homes of more than 5,000 square feet.

Measure F: Yes, 53.0% (slow growth)

## Mendocino County

Voters defeated a specific plan prepared by Developers Diversified Realty that would have permitted 800,000 square feet of development, including up to 150 residential units, on a 76-acre industrial site just north of Ukiah.

Measure A: No, 62.3% (slow growth)

## Monterey County

### *City of Carmel-by-the-Sea*

Voters approved the sale of the Flanders Mansion, a National Register of Historic Places property surrounded by an existing park. The city acquired the property in 1972 but has never figured out what to do with it. Neighbors fought proposed conversion of Flanders Mansion into a park or community center because of traffic and parking concerns.

Measure I: Yes, 63.3%

### *Carmel Valley*

Voters rejected incorporation of the valley as a new city of 39 square miles and 12,000 residents. Located inland from Carmel-By-The-Sea, the valley has been the site of numerous, intense battles over growth. Both sides said they wanted to maintain the valley's semi-rural character.

Measure G: No, 52.3%

## San Francisco

Voters underscored their hatred of billboards by rejecting a measure to relax existing restrictions on illuminated billboards and video signs on Market Street between Fifth and Seventh streets. A measure prohibiting advertising on all city-owned street furniture and buildings, except signs and placards already permitted by contract, passed.

Proposition D (mid-Market signage): No, 54.1%

Proposition E (advertising ban): Yes, 57.5%

## San Mateo County

### *City of East Palo Alto*

A Superior Court judge blocked a vote on a measure overhauling the city's ordinance limiting rent increases and restricting evictions. The city's largest landlord, Page Mill Properties, successfully argued the City Council violated the state open meeting law when considering the changes and should have subjected the ordinance amendments to environmental review.

## Santa Barbara County

### *City of Santa Barbara*

An initiative to lower the maximum height of new buildings downtown from 60 feet to 45 feet, and to 40 feet in the historic district, failed.

Measure B: No, 53.7 (pro growth)

## Stanislaus County

### *City of Modesto*

All five advisory measures regarding the extension of sewer service to five unincorporated areas totaling 2,980 acres failed. Most of the land is north of town and largely undeveloped. Measure M from 1995 requires an advisory vote before the city extends sewer services to unincorporated areas.

Measure A (1,310-acre Kiernan-Carver Corridor area): No, 60.3% (slow growth)

Measure B (230-acre College West area): No, 64.8% (slow growth)

Measure C (130-acre Hetch-Hetchy area): No, 61.8% (slow growth)

Measure D (480-acre Roselle-Claribel area): No, 64.0% (slow growth)

Measure E (830-acre Hetch-Hetchy area): No 69.4% (slow growth)

## Ventura County

### *City of Ventura*

In addition to rejecting a height limit, voters rejected Measure C, an anti-Wal-Mart initiative that would have prohibited stores of more than 90,000 square feet from devoting more than 3% of floor space to groceries.

Measure B (height limits): No, 74.7% (pro growth)

Measure C (anti-big-box): No, 54.7% (pro growth)

### *City of Fillmore*

A somewhat confusing measure backed by owners of El Dorado Mobile Home Park failed miserably. The initiative would have sharply limited city discretion over the conversion of the park to condominium ownership. The city has refused to approve the proposed conversion, which tenants oppose, until park owners complete a number of upgrades to the park's infrastructure.

Measure F: No, 85.9%

## Yolo County

### *City of Davis*

Nearly three of four voters rejected a 191-unit housing development proposed for 26 acres of agricultural land. A 2000 initiative prohibits the rezoning of agricultural land in Davis without voter approval.

Measure P: No, 74.6% (slow growth) ■

# legal digest

## Social Justice Advocates Make Case For Annexation

Ninth Circuit Reinstates Lawsuit Over Modesto City Boundaries, Services

BY PAUL SHIGLEY

The Ninth U.S. Circuit Court of Appeals has given new life to a lawsuit alleging that the City of Modesto and Stanislaus County discriminated against four predominately Latino communities.

In overturning a two-year-old ruling by a federal District Court judge, the Ninth Circuit said there is sufficient evidence for the lower court to consider whether the city's and county's annexation policies and provision of emergency services violate residents' constitutional and statutory rights. The appellate panel did, however, uphold rulings that excluded sewer service and other infrastructure from the suit's discrimination claims.

The decision appears to mean that cities and counties that have communities with substandard infrastructure and poor public services – as well as local agency formation commissions (LAFCOs) that help make annexation decisions – need to consider social justice issues when drawing boundary lines. The ruling also has the potential to buttress two bills in the Legislature that would add social justice concerns to annexation policies and general plans.

Stanislaus County and Modesto maintain they have done nothing wrong. Terrence Cassidy, an attorney for the county, told the *Los Angeles Daily Journal*, "When the county gets the opportunity to present all the evidence, it will establish it did not discriminate in any ... fashion."

Two Latino community groups and 12 residents sued Modesto, the county and the sheriff in 2004. They amended their complaints in 2005. Here's the background.

The plaintiffs live in and represent the Bret Harte, Hatch-Midway, Robertson Road and Rouse-Colorado neighborhoods, which are unincorporated islands surrounded, or nearly surrounded, by incorporated Modesto territory. All four neighborhoods were developed during the 1940s and 1950s. Hatch-Midway and Rouse-Colorado lack sewers, while a sewer system has been approved for Rob-

ertson Road. All four lack sidewalks, curbs, gutters, storm drains and street lights. Since 2000, Latinos have been in the majority in all four neighborhoods.

In 1983, Modesto and Stanislaus County signed a master tax sharing agreement (MTSA) that ensures the county would continue to receive two-thirds of the property-tax revenues in an area annexed by the city. The agreement specifically excluded Bret Harte and Robertson Road.

In 1988, residents of Bret Harte applied for annexation to Modesto, but the bid failed because the city and county could not agree on how to divide up the area's property tax revenues. A 1996 amendment excluded Hatch-Midway from the revenue sharing agreement. A 2004 amendment added a portion of Bret Harte to the agreement.

A need for sewer service often drives annexation bids. Thirty years ago, Modesto voters approved a ballot measure prohibiting sewer extensions without an advisory vote. In 1995, they passed Measure M, which requires an advisory election before any sewer improvements could be made in unincorporated areas. (There were five advisory votes in the November 3 election.) The Modesto City Council approved procedures for implementing Measure M in 1998. They prohibit Measure M votes for extending sewer services to "substantial" islands – a term left undefined – unless the county first agrees to install other infrastructure.

The plaintiffs contended that the city's policies and the revenue sharing agreement are discriminatory and violate the Fourteenth Amendment's equal protection clause, the Fair Housing Act and state laws. District Court Judge Lawrence O'Neill issued summary judgment for the city, citing insufficient evidence from the plaintiffs.

The Ninth Circuit, however, found substantial evidence to support some of the discrimination claims. For example, the plaintiffs contended that the islands excluded from the

revenue sharing agreement – an essential tool for annexation – were 71% Latino, according to the 2000 Census, while those included in the tax pact were 48% Latino. In addition, they pointed out that Modesto refused to include Bret Harte when it annexed neighboring Fairview Village in 1996, even though LAFCO recommended that all the territory become part of the city. The court held that the plaintiffs should be allowed to present this information to the District Court.

"[A] reasonable fact-finder could conclude that exclusion from the MTSA is indeed a barrier to annexation that neighborhoods covered by the MTSA do not face," wrote Judge Louis Pollak, a District Court judge from Philadelphia sitting by assignment to the Ninth Circuit. "Given the context of the 2004 reenactment, the trend of neighborhoods to become more heavily Latino over time, the 1988 unsuccessful Bret Hart application, and the example of the Fairview Village annexation, we conclude that plaintiffs have presented evidence of discriminatory impact."

Arguments over the provision of law enforcement and emergency services to the four neighborhoods centered on response times. Over a two-and-a-half year period that ended in August 2004, the average response time of the sheriff's office to the plaintiffs' neighborhoods was 13.4 minutes, compared to 12.5 minutes for majority white communities. O'Neill had ruled that the time difference was not "meaningful."

Writing for the Ninth Circuit, Pollak said the court "cannot agree that, as a matter of law, a difference of one minute can be characterized as not making a 'meaningful difference' when one is waiting at one's home for law enforcement or emergency personnel to arrive, particularly in the absence of any explanation for why the time difference exists."

He went on to write, "A fact-finder should decide if the difference is material and if so if the difference is

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explainable on grounds other than the ethnicity of the population of those neighborhoods.”

The plaintiffs did not fare as well with respect to their claims about sewer service, Measure M and new infrastructure. The appellate court noted that Modesto had extended sewer service to only three of 26 unincorporated islands, and all three have large Latino majorities. As for such infrastructure as storm drains and sidewalks, the court found that the county has many needs and limited funding, and there was no evidence of discriminatory intent in the county's allocation of resources.

Victor Rubin, vice president of research for the social justice organization Policy Link, said the case demonstrates the need for government agencies to address fiscal issues that block annexation drives. It's not acceptable for government agencies to give up because

of difficult fiscal negotiations, he said.

“It's another example of how we end up with an absence of infrastructure, and infrastructure planning, because of the fiscalization of land use,” Rubin said. The Modesto neighborhoods involved in the lawsuit are not unusual in the Central Valley, he added.

The two measures pending in the Legislature are AB 853 (Arambula) and SB 194 (Florez). The former would require counties to initiate annexation proceedings for islands that qualify as “disadvantaged communities” if 25% of landowners, or registered voters, sign a petition supporting annexation. The latter measure would require cities and counties to identify disadvantaged islands and fringe communities in their general plans and analyze the feasibility of annexing the communities. Lawmakers could consider both bills after the first of the year. Cities and counties are skeptical, while Policy Link, California Rural Legal Assistance and

other social justice advocates support the measures.

In an analysis, Colantuono & Levin attorney Yvette Abich Garcia wrote, “Whether or not these bills move forward, the Modesto suit suggests LAFCOs, cities and counties with underserved county areas should consider whether and how to address the social concerns expressed by this litigation and legislation.” ■

■ The Case:

*The Committee Concerning Community Improvement v. City of Modesto*, No. 07-16715, 2009 DJDAR 14628. Filed October 8, 2009.

■ The Lawyers:

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## telecommunications

# Palos Verdes Estates' Aesthetics Topple Cell Phone Antennas

A city may consider aesthetics in regulating the construction of telecommunications antennas, the Ninth U.S. Circuit Court of Appeals has ruled.

The ruling is the latest in a series of court decisions upholding the authority of local government to decide where wireless antennas are located. And it is one of the most explicit: “California law does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of WCFs [wireless communications facilities] within their jurisdiction,” said the court.

In 2002 and 2003, Sprint PCS applied to the City of Palos Verdes Estates for permits to construct 10 cell phone towers in public rights-of-way. The city approved eight. It rejected one proposed antenna because it would disrupt the residential ambience and another because it would detract from the natural beauty of a city entrance. Sprint sued, arguing that the denials violated the federal Telecommunications Act of 1996. District Court Judge Alicemarie Stotler ruled in favor of Sprint, but a unanimous three-judge panel of the Ninth Circuit overturned the decision.

As the Ninth Circuit explained, the Telecommunications Act attempts both to “encourage the rapid deployment of new

telecommunications technologies,” and “to preserve the authority of state and local governments over zoning and land use matters.” Under the act, a local government may deny a request to construct a wireless antenna tower if authorized by local law and supported by a reasonable amount of evidence. Stotler had concluded that the city's consideration of aesthetics was not permitted under the state Public Utilities Code (PUC).

The Ninth Circuit said that the statutes in question – Public Utilities Code §§ 7901 and 7901.1 – do not eliminate local governments' constitutional authority to regulate local aesthetics. “Thus,” Judge Kim McLane Wardlaw wrote for the appellate court, “the threshold issue is not, as Sprint argues and the District Court apparently believed, whether the PUC authorizes the city to consider aesthetics in deciding to grant a WCF permit application, but is instead whether the PUC divests the city of its constitutional power to do so. Therefore, the question actually before us is whether the city's consideration of aesthetics is ‘in conflict with general laws.’”

After framing the issue in a way favorable to the city, the court examined the statutes. Under § 7901, a company may construct facilities “in such a manner and at such points as not to incommode the public use of

the road or highway.” The court cited dictionary definitions of “incommode” that include “trouble, annoy, molest, embarrass, inconvenience.”

“The experience of traveling along a picturesque street,” Wardlaw wrote, “is different from the experience of traveling through the shadows of a WCF, and we see nothing exceptional in the city's determination that the former is less discomforting, less troubling, less annoying and less distressing than the latter.”

Wardlaw continued, “[T]he ‘public use’ of the rights-of-way is not limited to travel. It is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive and aesthetic functions. ... These urban planning principles are applied in the city, where the public rights-of-way are the visual fabric from which neighborhoods are made.”

As for Section 7901.1, the court noted that the statute permits municipalities to control the “time, place and manner” in which rights-of-way are accessed. Aesthetic regulations are time, place and manner regulations.

So the question turned on whether the city had relevant evidence to support its decisions. The court said the city did, citing maps, mock-ups, a staff

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report on aesthetic values, public comments and a presentation from Sprint.

Sprint pointed to provisions of the Telecommunications Act that prohibit regulation from creating a “significant gap” in wireless service. The District Court judge had found such a significant gap. But the Ninth Circuit noted that Sprint has 4,000 customers in Palos Verdes Estates and that a city “drive

test” determined Sprint’s network was functional.

In rejecting the argument that the federal supremacy clause preempted the city’s ordinance, the court alluded to the decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F 3d 571 (9th Circuit 2008). In that case, the court held that a company must prove that local regulation actually prevents telecommunications services (see *CP&DR*

*Legal Digest*, October 2008). ■

■ The Case:

*Sprint PCS Assets LLC v. City of Palos Verdes Estates*, No. 05-56106, 2009 DJDAR 14841. Filed October 14, 2009.

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## takings

# Never-Ending Capitola Litigation Returned To Federal District Court

The Ninth U.S. Circuit Court of Appeals continues to crack open the door to property owners seeking compensation for what they claim is a government taking.

In its most recent decision, the court ruled that the owner of a rent-controlled mobile home park in Capitola should have its day in federal District Court. This despite the fact that the U.S. District Court and two state courts ruled that a state court decision against the property owner should have settled the matter.

The Ninth Circuit did not rule on the merits of the claims, which allege that the city’s rent-control ordinance constitutes an illegal taking of private property. The appellate panel instead decided that the District Court must weigh the claims rather than rely on state court rulings against the mobile home park owner.

The ruling follows a Ninth Circuit panel decision in September that held the City of Goleta’s mobile home rent-control ordinance was a taking on its face and the mobile home park owner is due compensation (see *CP&DR Legal Digest*, October 15, 2009). The same judge who wrote the majority opinion in the Goleta case, Jay Bybee – best known as the author of a memorandum while he was a member of the Bush administration that narrowly construed the definition of “torture” – also penned the decision in the Capitola case.

The Capitola litigation is eight years old. In 2000, the owners of the 108-space Castle Mobile Estates, who had been pressuring tenants either to sign long-term leases that would override rent-control protections or buy the park outright for upward of \$10 million, requested that the city approve a monthly rental increase of 150% – or \$300 – for each space. The city’s 1979 rent-control ordi-

nance limits increases to a percentage of the increase in the consumer price index and the park owners’ capital and operating expenses. The city ultimately approved an increase of about \$15 a month.

Los Altos El Granada Investors, as the park owners are known, filed multiple suits in federal court over the course of three years, as well as a suit in Santa Cruz County Superior Court. Essentially, all the suits contended that Capitola’s ordinance on its face and in its application to Castle Mobile Estates constituted an illegal taking, for which the property owners demanded payment. The owners took the state court route largely because the U.S. Supreme Court’s *Williamson County* decision requires property owners to seek compensation for alleged takings in state court before moving to the federal level. But they also asserted an “*England* reservation” – a legal construct in which a plaintiff reserves the right to try questions of federal law in federal court. Specifically, Los Altos El Granada wanted to present its takings, due process and equal protection claims under the Fifth and Fourteenth Amendments to a federal court.

The park owners lost twice in Superior Court before winning a minor reversal in state appellate court (see *CP&DR Legal Digest*, July 2006). The state court litigation concluded in December 2006 with a Superior Court rejecting all owner’s claims. Importantly for the federal case at hand, both the Superior Court and the state’s Sixth District Court of Appeal denied the property owners’ *England* reservation.

While the state court litigation was pending, federal District Court Judge Jeremy Fogel took no action on the federal lawsuit. When the state litigation played out, Fogel reviewed the case and concluded that the

state court’s “adjudication of California takings claims is equivalent to the adjudication of their federal counterparts, and the doctrine of issue preclusion also bars the re-litigation of those claims as federal claims.” As such, Fogel declined to consider the merits of the claims. He also gave “preclusive” effect to the Superior Court’s rejection of the *England* reservation because the property owners did not appeal.

Los Altos El Grenada Investors then appealed to the Ninth Circuit, which overturned Fogel. The Ninth Circuit explained that the point of the *England* reservation is to ensure that plaintiffs who are compelled by law to litigate in state court should still get a hearing in federal court. Besides, it is not up to state courts to decide who may exercise an *England* reservation, the Ninth Circuit said. “[T]he Superior Court’s action in striking the explicit *England* reservation *by itself* preserves to us the jurisdiction to hear Los Altos’s federal claims,” Bybee added.

“The state courts were aware from the outset that Los Altos intended to return to federal court,” Bybee wrote. The notice provided by the property owner, whether provided in a complaint or given orally to the court, “is all *England* requires.”

The court sent the case back to District Court to reconsider its ruling that the state court decisions precluded the federal court from considering the merits of the property owners’ arguments. ■

■ The Case:

*Los Altos El Granada Investors v. City of Capitola*, No. 07-16888, 2009 DJDAR 14584. Filed October 7, 2009.

■ The Lawyers:

For Los Altos: Mark Alpert, Hart, King & Coldren, (714) 432-8700.

For the city: Henry Heater, Endeman, Lincoln, Turek & Heater, (619) 544-0123.

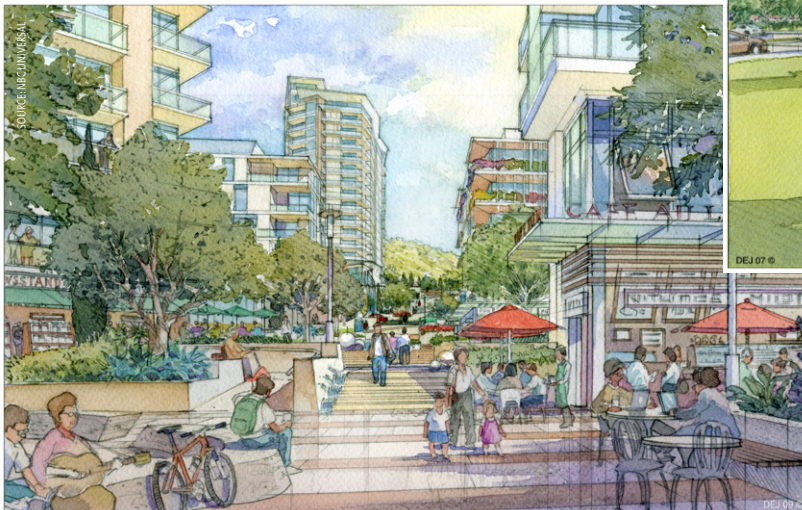
[Scene opens on a middle-aged man, gray at temples, carefully trimmed mustache, sunken eyes, dressed in a very expensive woven leisure suit that looks made for him. He wears a diamond pendant that sparkles conspicuously from time to time. He speaks quickly in a husky, low voice, if not as low as the one he's trying to use.]

Hello yourself. So you recognized me. Congratulations. Sure I'll shake your hand. You can call me N.U. Because I'm a mythical composite who bears no resemblance to any person, living or dead, that's why, kid. Edgy? Sorry, nothing personal, just a little nervous. Whaddaya mean, what about? Are you crazy? I'm worried sick about the master plan for Universal City. You know, that 391-acre piece of heaven that towers over the Hollywood Freeway at that bend in the road where people driving out of Hollywood take a westward turn for the San Fernando Valley.

[Pause.]

Well, Sugar Mountain has been good to NBC Universal. But the hill has one last flake of gold to be panned, and that's real estate development. By God, we mean to cover every piece of Mount Universal that remains to be built upon. It's as if old Carl Laemmle, bless his soul, were looking down at us from heaven and giving us one last windfall from the former cow pasture that the old man bought as a back lot way back in the Twenties. Talk about before and after, like, wow! The hill is already an entertainment compound, with a concert amphitheater, a flagship multiplex, the City Walk shopping street and the tour.

[Pause.]



**Pedestrian-friendly shopping and dining are integral to the master plan.**

Look, we've been working on this master plan for years, talking to the neighbors, the stakeholders, the bordering cities. I'm hopeful that Caltrans will get on board, too. We've got a lot riding on this project, about \$3 billion when it's all done. It's a mother of a master plan, with millions of square feet of new construction – studio buildings, entertainment buildings and a large residential neighborhood.

[Pause.]

# places

## MORRIS NEWMAN

### NBC Universal's Growth Plans: A Monologue

the housing ranges from three stories to 19 stories on 124 acres of terraced hillside. We're going to build 2,900 units – conventional apartments, lofts, condos. Most residential buildings will be mid-rise, four to seven stories. We'll put the 19-story buildings down the hill, to spare “view corridors.”

The scheme's still preliminary, but Hale has created a comfortable, walkable, dense residential neighborhood. Hale struck a balance between a straightforward urban street and the quasi-suburban image that we can sell to our neighbors. Plus, we're providing 35 acres of parks, open spaces and trails. Everyone loves trails. They're the new golf courses, but a lot cheaper to build.



**Parks, open space and trails are part of the NBC Universal Plan.**

So look at what we're doing: We're creating new housing for 8,000 people, we're transit oriented and we've got a great shot at achieving the jobs-housing balance. What's not to like? If only that mental case from – what's it called? California Planting & Redistribution of Wealth Report? – would pipe down. The moron thinks he can tell us what to do. What, you know him, too?

[Pause.]

We're good guys, good neighbors. We're aware of the traffic impacts, and we've come to the table with checkbook in hand. That's right, we're willing to pay \$100 million, and maybe help raise another \$100 mil, to pay for some really amazing traffic mitigations: That's right, we're going to add a lane to the Hollywood Freeway for a five-mile stretch that separates NBC-Universal on the north from the Hollywood Bowl on the south. Plus new entrances and

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The conceptual site plan for NBC Universal's "Evolution Plan," a 20-year blueprint for development of the 391-acre property.

exits along the same freeway. Pretty impressive, huh? And Caltrans? They love it. We've got the money, they've got the payroll. Everybody wins. If Hollywood knows how to do one thing, it's put a deal together. Then that guy – you know the one – has to start shooting off his mouth.

[He imitates an annoying person with a whiny, affected way of speaking.]

"I mean, why do you want to spend \$200 million on widening the Hollywood Freeway, when that corridor is already served by Metrorail? You are not going to address the traffic problems simply by adding new freeway lanes. Plus, you are creating an incentive for people to drive, rather than use the train! This kind of stupidity would be possible only in California, where transportation is divided between two rival agencies, Caltrans and the Los Angeles County Metropolitan

Transportation Authority, each of which has its own idea about how to accomplish regional transportation goals. Really, you'd be better off contributing \$200 million toward a connection between the MetroLink station at Bob Hope Airport in Burbank, which is three or four miles north, through Universal to the Red Line. Everyone in downtown, in Hollywood and at Universal could hop on a train to get to the airport."

[Pause.]

Mass transit in L.A.? Spare me! I've got the makings of a deal with Caltrans. He's crapping on our EIR and messing up billions of dollars of real estate. I tried to play nice with that guy. Nothing can make him happy. This is *our* mountain. He can do what he wants on *his* mountain.

By the way, kid, what's your name again? ■

# insight WILLIAM FULTON

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plan that's ambitious but not very specific. The enviros are complaining that it doesn't go far enough. The developers are complaining – in terms almost as apocalyptic as global warming activists use – that the plan overreaches and serves as just another excuse for land use activists to promote their agenda. And the planners (serving, apparently, as a proxy for the silent local government groups) are complaining that the state isn't going to provide any money.

I suppose it's inevitable that, in tough times when a new issue arises, the interest groups retreat to their typical party lines. But you'd think we're past this in California. The state has had 40 years of political jockeying over development and environmental issues. Things are not perfect, especially now, but in general there has been a pretty compelling balance of innovative environmental protection and innovative urban development. So it's too bad we're back at square one on adaptation.

The current ruckus began a year ago, when Gov. Arnold Schwarzenegger signed an executive order instructing the Natural Resources Agency – in combination with several other state agencies – to draft a game plan for climate change adaptation. As I wrote in a blog from the state planning conference a few weeks ago, adaptation gets very little play – even among planners – compared with greenhouse gas emissions reduction efforts. This is too bad. The threat is very real; even a minor increase in the sea level would inundate dozens, if not hundreds, of crucial roads and sewer plants, to say nothing of schools, stores, and houses. From the point of view of planners, adaptation is something that will have to happen, and communities across the state face some pretty fundamental choices (hard versus soft infrastructure, for example) in going about it.

The draft California Climate Change Adaptation Strategy (see *CP&DR In Brief*, August 15, 2009) has succeeded in focusing the attention of Sacramento insiders – if not planners and developers across the state – on these hard choices. In some ways, this 161-page document is very deft. It devotes a lot of time and attention to making the case about why adaptation is important and what some of the sea level rise scenarios might be. And the proposed strategy itself, while ambitious, is fairly general – and this is probably deliberate.

On the potentially explosive topic of land use, for example, the strategy's main recommendation reads like this:

*Consider project alternatives that avoid significant new development in areas that cannot be adequately protected (planning, permitting, development, and building) from flooding due to climate change. The most risk-averse approach for minimizing the adverse effects of sea level rise and storm activities is to carefully consider new development within areas vulnerable to inundation. State agencies should generally not plan, develop, or build any new significant structure in a place where that structure will require significant protection from sea level rise, storm surges, or coastal erosion during the expected life of the structure. However, vulnerable shoreline areas containing existing and proposed development that have regionally significant economic, cultural, or social value may have to be protected, and infill development in these areas should be accommodated. State agencies should incorporate this policy into their decisions, and other levels of government are also encouraged to do so.*

The recommendation says nothing about what local governments should do, and it provides very general guidance for state agencies,

which are exempt from local government planning regulations. It's not nearly as specific as some of the other recommendations, such as the one that sets a target for a 20% reduction in water use by 2020. It's also, in many ways, a mere restatement of other existing state policies.

Careful, cautious, general, and redundant – and therefore the perfect target from all sides.

It is predictable, of course, that the environmentalists – represented most aggressively, in this case, by the sharp-elbowed but skilled and effective Center for Biological Diversity – would say the strategy doesn't go far enough. The Center's 13-page comment letter says the recommendations are “too general to be meaningfully analyzed by the public and largely lack commitments or directives for action by the relevant state agencies to implement the actions.”

Typically, the Center does not focus directly on land use and urban development but, rather, on protecting and restoring ecosystems and habitats. Among its goals is to restore degraded wetlands that might otherwise be available for urban development as a means of providing “resiliency” – meaning, in this case, ensuring that wetlands are resilient enough to absorb and purify a lot of the water that is draining into newly risen estuaries and rivers.

Even more interesting is the equally long comment letter from a coalition of business and development groups, including the California Chamber of Commerce, the California Building Industry Association, the California Manufacturers & Technology Association, the California Business Properties Association, and the American Council of Engineering Companies, California. Whereas the enviros criticized the strategy for being too general, the business/developer coalition criticizes it for being too ambitious – and uses biting words in many cases.

Not surprisingly, some of the sharpest words are aimed at the land use recommendation reprinted in its entirety above. The business/developer coalition's letter calls the recommendation “redundant, hyperbolic and nonsensical.” The letter goes on to say: “The state shouldn't be determining where building should occur or where it should not.” Instead of new guidance from the Natural Resources Agency on adaptation, the business/developer coalition suggests relying on existing state and federal laws relating to the flood risk, which already tell local jurisdictions “what can be built and how it should be built in areas that are at some flood risk – regardless of the source of the risk.”

Secondly, the business/developer coalition says that new guidance is not necessary because this kind of analysis already gets done through the California Environmental Quality Act (CEQA).

Ah, CEQA. In keeping with the theme of this column – nothing new under the sun – it's pretty obvious that in the end this will come down to a CEQA fight. The business/developer coalition points out that CEQA “already provides the appropriate framework for disclosing the full range of climate change-related impacts for which reliable scientific evidence is available, and a mechanism for mitigating them as feasible.”

In theory, this is true. Any CEQA analysis could look at the possibility of future inundation and suggest mitigation measures, including moving the project to another location. But local agencies have been very skittish and uncertain about how to deal with climate change in CEQA documents, and they're banking on the state to tell them how to handle climate change in the pending CEQA Guidelines changes, authorized by SB 97 and now out for public review.

However, the SB 97 guidelines changes don't say anything about sea level rise and adaptation. The guidelines deal exclusively with reducing greenhouse gas emissions.

So, for now, the whole issue of adaptation has boiled down to a typical fight over how to use CEQA. Not surprising, but pretty disheartening. Keep your life vests nearby. ■