

Stewardship Council Created To Manage Delta

Although New Entity Would Lack Land Use Authority, Locals Still Worry

BY PAUL SHIGLEY

The package of water legislation approved by state lawmakers and signed by Gov. Schwarzenegger earlier this month may be the most ambitious attempt yet to address the troubled Sacramento-San Joaquin River Delta. However, the legislation angers and worries many interests in and around the Delta, including local government leaders concerned about their ability to approve development.

The centerpiece of the Delta bill – which was one of five pieces in the water legislation package – is creation of a new Delta Stewardship Council. In addition to preparing a comprehensive Delta plan by January 1, 2012, the council will have broad oversight of Delta planning and resource management. Initial drafts of the legislation, SB 1 X7 by Senator Joe Simitian (D-Palo Alto), roughly modeled the stewardship council on the Coastal Commission and the San Francisco Bay Conservation and Development Commission – two state entities with the authority to make land use and resource protection decisions. In the end, the Delta Stewardship Council was not given land use author-

ity. However, local governments fear the council could evolve into a Coastal Commission-like body, and Delta interests complain that they were given only one guaranteed seat on the seven-member council.

“Nobody knows what it means at this point because there is no funding for it,” Rio Vista Mayor Jan Vick said of the stewardship council. Still, she pointed out that the Coastal Commission and the Bay Conservation and Development Commission accumulated power over time, and the new Delta council could follow the same path. “It could impact all of the communities in the Delta on local land use,” she said.

With an entirely different perspective, Rick Frank, executive director of the Boalt Hall Center for Law, Energy and the Environment and a member of the governor’s Delta Vision Blue Ribbon Task Force, said the “biggest shortcoming” of the Delta legislation concerns land use. For Frank and the Delta Vision task force, the need to shift some land use control away from local governments is

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Proposed Quarry Is Unwelcome Neighbor In Fast-Growing Temecula

local
watch

BY LARRY SOKOLOFF

Residents of the Riverside County city of Temecula, which has been among the state’s fastest growing cities for 20 years, have run into some growth they do not want.

City leaders and local residents are opposing a proposed quarry located one mile south of the city limits near the San Diego County line. The quarry, to be operated by Granite Construction of Watsonville, would mine aggregate for use in making concrete and building transportation projects. The area to be mined is 135 acres of a 414-acre site, with mining operations running a half mile long and 1,020 feet deep.

Temecula has “a longstanding policy of creating open space boundaries,”

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A report by the California state auditor gives the Department of Housing and Community Development (HCD) and the California Housing Finance Agency (CalHFA) generally good marks for overseeing nearly \$5 billion in bond funds.

Voters approved a \$2.1 billion housing bond (Proposition 46) in 2002, and the agencies had awarded nearly all of that money by December 2008, when the audit commenced. Voters approved a \$2.85 billion housing bond (Proposition 1C) in 2006, and the agencies have awarded a portion of funds in eight of ten program areas.

Auditors found HCD had not awarded any Proposition 1C money for emergency housing and assistance, or for affordable housing innovations. The department said Proposition 46 provided enough money to fund all applications for emergency housing and assistance through December 2008. The department delayed the housing innovation program so that it could focus on an \$850 million regional planning, housing and infill incentive program, and on a \$300 million transit-oriented development program (see *CP&DR Insight*, August 2008). Auditors accepted HCD's explanations and noted that the state budget mess slowed the issuance of general obligation bonds and the disbursement of bond funds.

Auditors found that travel restrictions prevented HCD from conducting on-site monitoring visits for some projects. The auditors recommended HCD visit higher risk projects, an idea that HCD said it has already adopted. The audit also raised questions about regular reporting and ongoing monitoring to ensure grantees use funds as required. And auditors found that CalHFA did not always have proof that recipients of residential loan development grants had recorded covenants restricting the occupancy of funded units to low-income households. CalHFA said it would complete its files and require grantees to provide copies of restrictive covenants in the future.

The audit is available at <http://www.bsa.ca.gov>.

Four San Jacinto city councilmen, a councilman's wife and four people in the development business were indicted in mid-November by the Riverside County district attorney's office on charges

of money laundering, fraud, bribery, perjury and filing false campaign finance documents.

From the court papers released thus far, it is difficult to define the *quid pro quo* involved in the alleged scheme. The district attorney's 18-month investigation, instigated by a city employee's tip, centered on Councilman James Ayers and Stephen Holgate, whose company, Shelbran Investments, owns numerous pieces of property in San Jacinto and neighboring Hemet. A former San Jacinto Chamber of Commerce CEO, Holgate funneled extensive contributions to Ayers for a failed 2006 Assembly campaign, according to the indictment, which says Holgate channeled the money through numerous people to avoid campaign contribution limits. Ayers was among the councilmembers who voted for a development agreement for a proposed Shelbran Investments commercial project along the route of the proposed Mid-County Parkway (see *CP&DR Public Development*, August 15, 2009).

Also indicted were Ayers's wife Nancy Jo, who is a San Jacinto Unified School District trustee and executive director of the Chamber of Commerce; Mayor Dale Stubblefield, a planning consultant; Councilmen John Mansperger and James Potts; Robert Osborne, who has developed housing subdivisions in San Jacinto and elsewhere in Riverside County; Byron Ellison Sr., a property manager who does work for Holgate and a former Chamber of Commerce executive; and Scott Shaull, the pastor of a Roseville church for which Holgate serves on the board of directors. Everyone involved has either pleaded not guilty or deferred entering a plea.

The San Marcos City Council has adopted the University District Specific Plan, which calls for extensive residential, office and mixed-use development on 194 acres. Adoption of the document completes a planning process begun in 2006 that was intended to create a walkable downtown in the San Diego County suburb (see *CP&DR Places*, September 2007).

The plan provides for 2,600 multi-family residential units, 800 to 1,000 units of student housing, 450 to 600 hotel rooms, about 900,000 square feet of offices and medical facilities, and 40 acres of parks and open space. In addition, 1 million square feet of mixed-use retail and commercial development would be permitted along the two-

mile-long main street corridor, and in an urban lifestyle center and smaller neighborhood-serving locations.

Yolo County completed one of the more ambitious general plan updates in recent years when the Board of Supervisors unanimously voted for a new plan and an accompanying environmental impact report in early November.

More than six years in the making, the plan maintains Yolo County's longtime priority of preserving agriculture and directing growth to cities and a few unincorporated communities. However, the new plan departs from the previous version by designating Dunnigan, a rural community of about 1,000 people 40 miles northwest of Sacramento, as a major growth area. The plan envisions a largely self-contained town of more than 9,000 housing units with extensive retail and office development on approximately 3,000 acres along Interstate 5 (see *CP&DR Local Watch*, September 2008).

To ensure Dunnigan does not become only a bedroom for Sacramento commuters, the plan contains objectives and triggers intended to ensure new housing coincides with local job growth. Officials have insisted throughout the general plan process that the county needs revenue that development in unincorporated areas could provide.

The updated plan, the county's first since 1983, also addresses climate change at length and calls for a new greenhouse gas emissions reduction plan to be incorporated into all county activities.

The general plan and EIR are available at <http://www.yolocounty.org/index.aspx?page=1514>.

Only about one-quarter of property owners eligible for refunds from the Santa Clara County Open Space Authority submitted claim forms. Last year, the state Supreme Court struck down the authority's annual \$20 assessment on about 320,000 properties, because it was not submitted to voters (*Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority*, (2008) 44 Cal.4th 431; see *CP&DR Legal Digest*, August 2008)

The authority collected about \$51 million from the assessment but never spent the money because of the litigation. After refunds, legal costs and administrative expenses are paid, the authority expects to have about \$30 million from the illegal tax to fund park improvements and land purchases. ■



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Temecula Says Quarry Is The Pits

— CONTINUED FROM PAGE 1

around the city, said Patrick Richardson, the city’s planning and redevelopment director. To the north and west of the city are numerous wineries and agriculture.

Temecula tried an unusual tactic to stop the quarry: The city proposed an environmental annexation of about 5,000 acres that included the quarry site along with an adjacent 4,500-acres of open space, managed by San Diego State University (SDSU), called the Santa Margarita Ecological Reserve. Nearly all annexations are intended to enable development. Temecula’s proposal is intended to preserve the status quo.

However, the Riverside County Local Agency Formation Commission (LAFCO) rejected the proposed annexation in June. Temecula modified the proposed annexation by removing the mine site, but LAFCO said no for a second time in September.

In a staff report on the proposed annexation, LAFCO staff conceded that surface mines are not usually welcomed.

“Surface mining is not a popular use, not unlike landfills, jails, prisons, etc.” the report said. “However, like those uses, it is a necessary use that must exist somewhere. Siting such uses always proves to be a difficult decision.”

The real issue, according to LAFCO Executive Officer George Spiliotis, is land use authority. The whole point of Temecula’s annexation is to halt the gravel quarry, Spiliotis pointed out. But as with any locally unwanted land use, the ultimate decision needs to balance local desires against regional needs. Temecula’s approach would prevent a complete evaluation of the proposed quarry, he noted.

“The agency ultimately charged with siting such uses must balance the regional need for those uses not only with project impacts, but also with the desires of local constituencies,” Spiliotis wrote in a report to the LAFCO board. “In this case, the land use agency must also weigh, after determining the impacts of the project, the relative value of various open space uses. Staff believes the appropriate agency to balance these objectives is the county. The Board of Supervisors does have a regional interest and perspective that is called for in this circumstance.”

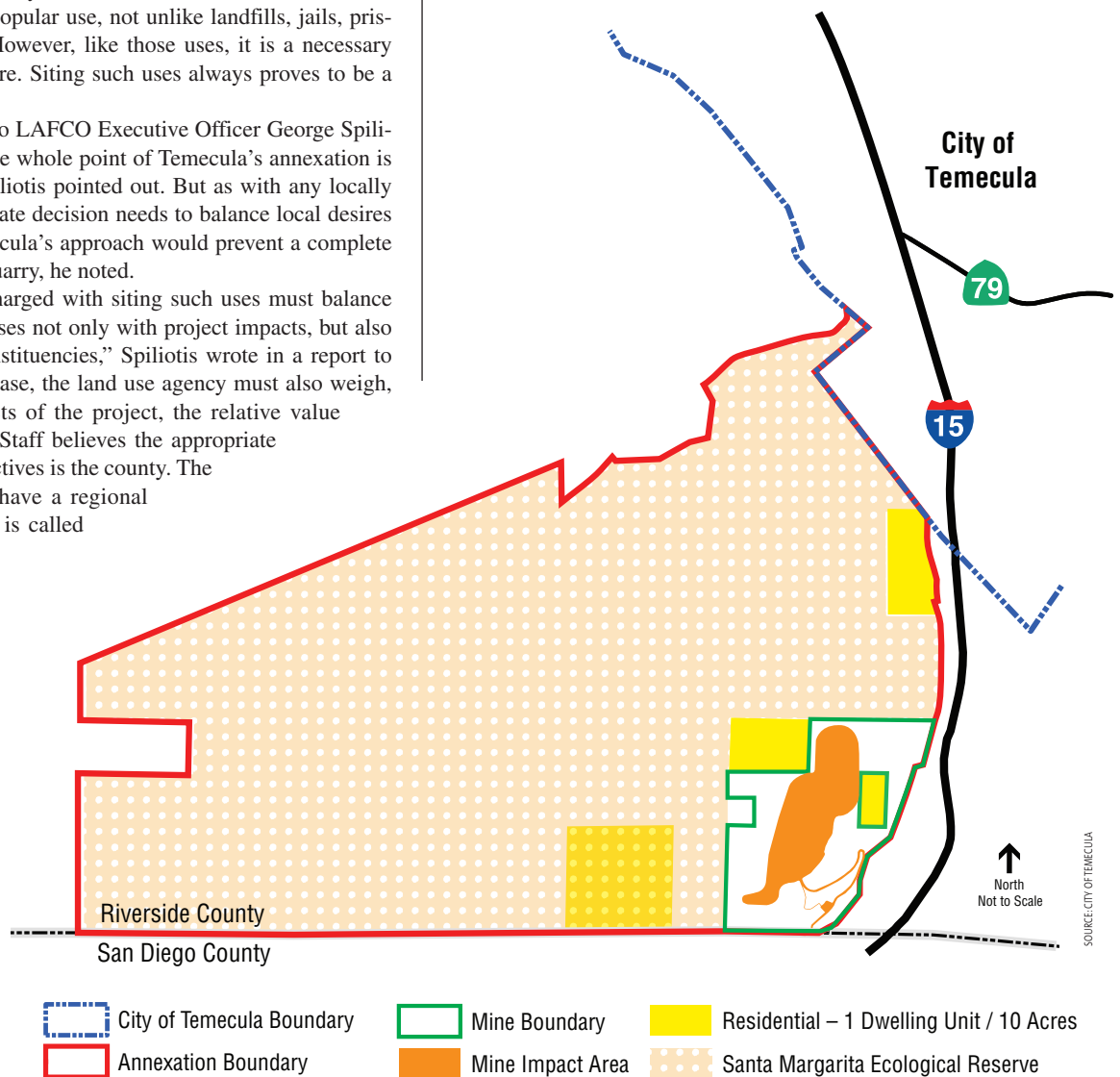
Interestingly, the only support for annexation on LAFCO has come from the two county supervisors on the board – Bob Buster and John Tavaglione.

With annexation apparently dead for now, the quarry plan is headed to Riverside County’s Planning Commission, and ultimately its Board of Supervisors. The county has not yet set a date for a hearing, as it first must review and revise a draft environmental impact report following comments submitted this month. Temecula’s

comments alone on the draft EIR were 157 pages long, according to Richardson. “I imagine it’ll take a few months to revise,” he said.

As commuters have moved inland in search of affordable housing, Temecula’s population has nearly quadrupled to 102,000 residents since 1990. Many of the residents in Temecula’s huge subdivisions commute to jobs in Orange County and San Diego. While the city has been very welcoming of urban development, Granite Construction’s proposal has become a lightning rod, and protests have drawn more than 2,000 quarry opponents. The main concerns voiced by local residents are “air quality, traffic congestion, noise, light pollution, and habitat destruction,” said Temecula Mayor Maryann Edwards.

“We have concerns with just about every aspect of it,” added Richardson. “It is essentially a wilderness area.” — CONTINUED ON PAGE 4



The City of Temecula has proposed a 5,000-acre annexation to gain control over a proposed gravel quarry site





LOCAL WATCH

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The quarry would abut the Santa Margarita Ecological Reserve, which is home to nearly 100 rare and endangered species, and five miles of the Santa Margarita River, the only remaining free-flowing river in Southern California.

“An operation of this magnitude is not appropriate next to an ecological reserve or an outdoor classroom,” Matt Rahn, director for research and outreach for field station programs for SDSU at the reserve, said of the proposed mine.

Edwards said she agrees that aggregate is needed for construction. “However, research shows that there are dozens of areas with similar resources that are remote to populated areas,” she said.

New quarries are often hard to locate near urban areas, even as the operators promise modern technology to keep down dust and limit other impacts. “People don’t know what to expect,” said Karie Reuther, director of community affairs for Granite Construction.

The proposed mine would be hidden in steep hills covered with chaparral and coastal sage scrub vegetation, and not visible from the city. Still, residents want to save mountain views and preserve open space.

One local group fighting the project is Save Our Southwest Hills. SOS Hills member Fred Bartz points out that Riverside County has 52 active quarries, while San Diego County has 14. He said Riverside County ends up exporting its aggregate to San Diego County and Orange County.

Bartz said, “Some people are saying ‘Why should Riverside County become one large gravel pit?’”

Residents have suggested increasing extraction at other mines in the county, developing mines in other locations, or even importing aggregate from Mexico and Canada.

Granite’s Reuther argues that having a local mine will help reduce regional truck traffic because aggregate will not have to be shipped in from outlying areas. The mine would, however, send an estimated 700

trucks a day onto Interstate 15.

The project is expected to create 100 local jobs and lead to increased state and local

tax revenues.

Granite has mines throughout California and has fought hard to open new mines in the past. After 23 years of wrangling, it recently received approvals for a smaller mine in San Diego County, called Rosemary’s Mountain Quarry, which is expected to open in 2011.

Bartz said a major concern of SOS Hills is about air quality. “Not all quarries are as simple as excavating gravel from a riverbed,” he explained. “This quarry will require blasting, as much as 10 blasts per week.”

The draft EIR does say that the quarry project will have significant and unavoidable impacts on air quality and traffic/transportation. But Reuther contended that those problems are caused by existing air and traffic problems in the area, and she said that the company will pay mitigation fees as required.

Reuther said the increase in particulate matter on the property’s border will be less than 1% and will decrease further away from the property. The company will have dust mitigation on site, including an indoor crusher, enclosed conveyor belts, paved roads and spray bars on all trucks. All blasts on the site will be controlled to keep energy in the ground, she said, and will not create huge explosions that residents are familiar with from military activities at nearby Camp Pendleton Marine Corp Base. ■

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No Decision On Peripheral Canal

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a matter of public safety. In its 2008 report, the Delta Vision task force complained of “encroaching urbanization” in an area threatened by crumbling levees, rising sea level and ever-bigger flood flows attributed to climate change. Delta Vision recommended restricting development in and around the Delta to preserve floodplains (see *CP&DR Environment Watch*, February 2008).

The politics of the Delta prevented the land use issue from getting the attention it deserves, Frank said. But he endorsed the overall water package and Delta legislation as a major step forward.

“At one level, I’m quite pleased with it. Virtually all the core policies in the Delta Vision plan are incorporated in the legislation,” Frank said. “It’s far from perfect. But it’s a significant improvement over the status quo.”

The stewardship council will be composed of four governor’s appointees, two people appointed by the Legislature and the chair of

the existing Delta Protection Commission. The new council must adopt a new Delta plan by the start of 2012, based at least in part on recommendations of the Delta Vision reports. Local general plans would have to be consistent with the new Delta plan, as would some infrastructure projects. The council will make consistency decisions. The council is also supposed to consider the Bay Delta Conservation Plan, a habitat conservation plan due to be released in early 2010, as well as Department of Water Resources recommendations for coordinating flood control and water supply operations.

Besides creating the stewardship council, the Simitian bill does many other things. It:

- Codifies the “co-equal” goals of “providing a more reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem.” The concept of co-equal goals has been embraced by Delta Vision and numerous other entities studying the Delta.

- Shrinks the existing Delta Protection

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Commission from 23 to 15 members, primarily by reducing the number of state appointees, and requires the commission to prepare a “regional economic sustainability plan.” The commission was also given until July 1, 2010, to recommend whether the Legislature should expand the Delta’s primary zone, where development is severely restricted and over which the commission has land use appeal authority.

- Creates a new Sacramento-San Joaquin Delta Conservancy as the primary state agency to manage Delta ecosystem restoration. Funding will come from Propositions 84 and IE, the recent water and natural resources bond measures.

- Establishes a “Delta Watermaster” to enforce State Water Resources Control Board decisions regarding necessary freshwater flows into the Delta.

- Creates an independent science board.
- Redefines the Delta to include the approximately 120,000-acre Suisun Marsh south of Fairfield.

The Simitian bill was part of a larger package. The other four pieces are:

- SB 2 X7 (Cogdill), an \$11.1 billion bond that provides \$3 billion for new storage, \$2.25 billion for Delta projects and implementation of the Bay Delta Conservation Plan, \$1.785 billion for watershed and water quality projects, \$1.4 billion for regional supply improvements, \$1.25 billion for water recycling projects, \$1 billion for groundwater projects, and \$455 million for drought relief. The bond is scheduled to appear on the November 2010 ballot.

- SB 6 X7 (Steinberg), which creates a groundwater monitoring program. The legislation authorizes counties, water replenishment districts, groundwater management agencies, and other local agencies and associations to assume responsibility for monitoring groundwater levels, but not for monitoring specific extractions. If no local entity assumes responsibility, the Department of Water Resources would do the monitoring, and local entities would lose eligibility for certain grants and loans.

- SB 7 X7 (Steinberg), which requires the state to reduce per capita urban water usage by 10% by 2016 and by 20% by 2021. In addition, agricultural water suppliers must implement efficient water management practices by August 2012.

- SB 8 X7 (Steinberg), which, among other things, repeals a legal provision that exempted water users in the Delta from reporting diversions.

The water package was put together without state Sen. Lois Wolk (D-Davis), who has been a party to nearly all recent Delta legislation and who carried a failed bill earlier in the year to create a Delta conservancy and expand the role of the Delta Protection Commission (see *CP&DR Capitol Update*, August 15, 2009). Legislative leaders excluded Wolk late in the negotiations after she complained that local interests were not being adequately represented and that the legislation would enable construction of a peripheral canal carrying freshwater around the Delta. Sen. Mark DeSaulnier (D-Concord), normally a strong ally of Senate President Pro Tem Darrell Steinberg, joined Wolk in voting against the Delta legislation.

“The plan would put the Delta at risk” DeSaulnier told the Bay Area News Group. “The plan doesn’t give the Delta and its 4 million resi-

dents a fair say in the process. It doesn’t adequately protect Northern California water users. Nor does the plan state how the Delta and its farms, economy, communities and environment would be protected.”

Rio Vista Mayor Vick, who serves on the Delta Protection Commission, insisted that the primary mission of the water legislation is to move more water, and everything else – including the needs of locals – is an afterthought. “I don’t think we were listened to. That’s the general feeling of all the people who have been involved,” she said.

Environmental groups are divided on the water legislation. The Sierra Club called it a continuation of existing, failed policies. The Planning and Conservation League complained that the legislation contains no assurances that the Delta will have the freshwater its ecology needs. Those groups joined with some conservative lawmakers in opposing

the water bond, which they called fiscally irresponsible.

Meanwhile, the Natural Resources Defense Council and The Nature Conservancy endorsed the legislation. Leo Winternitz, Delta project director for The Nature Conservancy, said the Simitian bill was “absolutely necessary to change the direction we are headed in the Delta.”

“It sets up a governance structure that at least provides for consistency and accountability,” Winternitz said. “We don’t like where we are headed in the Delta. It’s not working for anybody.”

One of the chief problems identified by the Delta Vision task force and in influential reports by the Public Policy Institute of

California concerns the 200-plus agencies – cities, counties, reclamation districts, water districts, federal agencies, state agencies – that have authority over some portion or aspect of the Delta. The agencies often work at cross-purposes while protecting their individual interests. Under the new legislation, though, all the agencies are supposed to work from the Delta Plan adopted by the stewardship council.

“Protecting particular interests may not be good for all of California,” Winternitz said.

Whether the legislation will lead to construction of a peripheral canal or other facility for conveying freshwater from the Sacramento River to the State Water Project and Central Valley Project remains unknown. Winternitz said the legislation makes ecosystem restoration a component of, and not merely mitigation for, any conveyance project. Yet environmentalists raised 30-year-old arguments about the canal being a “water grab,” and many Northern California lawmakers voted against the water legislation because of north-versus-south fears over the peripheral canal.

In the near term, people on both sides of the debate will be closely watching who is appointed to the Delta Stewardship Council, as well as how the agency is staffed and funded.

“We’ll have to see how seriously the actors – the new government entities and the existing ones – take their charge,” said Frank, of the Delta Vision task force. ■

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Delta Vision: <http://www.deltavision.ca.gov/>

California State Association of Counties water legislation analysis: [http://www.](http://www.imakenews.com/csac/e_article001589865.cfm?x=bgfr4yn,b6GrK1wH)

[imakenews.com/csac/e_article001589865.cfm?x=bgfr4yn,b6GrK1wH](http://www.imakenews.com/csac/e_article001589865.cfm?x=bgfr4yn,b6GrK1wH)

“ I don’t think
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– RIO VISTA MAYOR JAN VICK

legal digest

CEQA Challenges To Revenue Measures Rejected

Santa Barbara County Sales Tax, L.A. Bus Fare Increase Upheld

BY PAUL SHIGLEY

Two separate California Environmental Quality Act lawsuits over unrelated measures that raised revenue for transportation purposes have been thrown out by the state Court of Appeal.

In one case, the court ruled that CEQA did not apply to the Santa Barbara County Association of Government's placement of a half-cent sales tax for transportation projects on the ballot. Environmental review was not required because the ballot measure did not constitute a binding plan to construct the projects, the court ruled.

In the other case, the court held that a bus fare increase in Los Angeles County was exempt from CEQA review because the additional revenue would merely pay for operations and capital projects needed to maintain service in existing service areas.

The Santa Barbara decision is the second published opinion related to the Measure A half-cent sales tax. Voters approved the 30-year sales tax extension in November 2008. Last year, the Second District Court of Appeal ruled that representatives of the Santa Barbara County Association of Governments (SBCAG) did not violate election law by preparing the Measure A transportation expenditure plan and presenting the plan during public meetings (*Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assn. of Governments*, 167 Cal.App.4th 1229; see *CP&DR Legal Digest*, December 2008).

While that case was on appeal, some of the same Measure A opponents – this time organized as Sustainable Transportation Advocates of Santa Barbara – filed a new suit against SBCAG. This suit argued that SBCAG, which functions as the transportation authority, could

not approve Measure A for the ballot and adopt the transportation expenditure plan (also called the “investment plan”) without environmental review. The association of governments had done just that in June.

Santa Barbara County Superior Court Judge Thomas Anderle rejected the Measure A opponents' arguments, concluding SBCAG's actions did not qualify as a “project” under CEQA Guidelines § 15378, subdivision (b)(4). The law does not apply to government funding mechanisms or fiscal activities, and Measure A did not “involve any commitment to any specific project,” Anderle ruled. The Measure A opponents appealed, and a unanimous three-judge panel of the Ventura-based Second District Court of Appeal, Division Six, upheld the lower court.

At the appellate court level, SBCAG argued the lawsuit was moot because the association of governments had certified an environmental impact report for the regional transportation plan in September 2008, and that EIR considered all of the projects in the Measure A expenditure plan. The Second District rejected that argument because the EIR was not in place when SBCAG approved the ballot measure and because that EIR is the subject of separate litigation by the same group. Instead, the court considered whether or not SBCAG's approval of Measure A and the expenditure plan constituted a project.

Helping guide the court was last year's state Supreme Court ruling in *Save Tara v. City of West Hollywood*, (2008) 45 Cal.4th 116, in which the court determined that approval of a development agreement contingent upon later completion of environmental review qualified as a project under CEQA (see *CP&DR Legal Digest*, December 2008). In *Save Tara*, the court ruled that CEQA applied to the development agreement because the city was committing itself to a course of action, namely, development of an

affordable housing project.

Measure A opponents sought support from *Save Tara* as well as from *Friends of Sierra Madre v. City of Sierra Madre*, (2001) 25 Cal.4th 165, and from *Fullerton Joint Union High School Dist. v. State Board of Education*, (1982) Cal.3rd 779. In *Sierra Madre*, the California Supreme Court ruled the city should have completed environmental review of a city-authored ballot measure to remove 29 structures from the city's register of historic landmarks (see *CP&DR Legal Digest*, May 2001). In *Fullerton*, the state Supreme Court ruled that a ballot measure carving a new Yorba Linda school district out of the Fullerton district should have undergone environmental review.

However, the Second District ruled that approval of Measure A and the investment plan were not the same as the projects in the earlier cases because the transportation plan provided “a brief, general description” of the projects, served as an information document for voters, and did not foreclose alternatives or mitigation measures that would be part of subsequent CEQA review. The fact that the ordinance approving Measure A permits SBCAG to amend the investment plan without voter approval indicated that SBCAG “had not ‘committed itself to any project as a whole or to any particular features so as to preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered,’” Justice Steven Perren wrote, citing *Save Tara*.

This portion of the decision drew the interest of a number of transportation authorities concerned that the *Save Tara* decision might have expanded the definition of a project. Those agencies asked the court to publish its opinion so it may be cited as precedent.

“It's the first decision in the post *Save Tara* world. It's the first decision to apply *Save Tara* to a funding

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mechanism,” observed Whitman Manley, the attorney who represented SBCAG.

The Second District further ruled that the *Sierra Madre* and *Fullerton* rulings were not applicable. In *Sierra Madre*, the city committed itself to delisting of 29 structures if the ballot measure passed. In *Fullerton*, the school district was precluded from maintaining the status quo if the ballot measure passed.

“Unlike the city’s action in *Save Tara*, [SBCAG’s] actions did not demonstrate that, as a practical matter, it had committed itself to the implementation of the transportation projects in the investment plan,” Perren wrote. “Measure A does not qualify as a project within the meaning of CEQA because it is a mechanism for funding proposed projects that may be modified or not implemented, depending upon a number of factors, including CEQA review.”

Manley said the court’s reading of *Sierra Madre* is important because it eliminates the argument that any measure placed on the ballot by a local agency is subject to CEQA.

The Santa Barbara attorney who has brought all of the Measure A challenges, Eugene Wilson, said he will appeal to the state Supreme Court. He said the Second District should have recognized that the transportation commission’s actions and the voters’ approval of Measure A amounted to commitment to a course of action that should have received environmental review,

just as the city in *Save Tara* took actions that showed a definite commitment.

“For the court to say there was not a commitment because there was an amendment provision [in the investment plan] doesn’t make any sense,” Wilson said. “The court did not understand *Save Tara*.”

The Los Angeles case concerned a Metropolitan Transportation Agency (MTA) decision in May 2007 to raise the base bus fare by 25 cents to \$1.50, and to boost the price of monthly passes. The MTA declared the first significant fare increases since the late 1980s to be exempt from CEQA. The agency said it needed the money because it had run an operating deficit of \$641 million during the previous five years, and it projected a \$1.8 billion deficit over the next 10 years without an increase. The deficits forced MTA to tap reserves, shift money from capital improvements to operations and lay off more than 500 administrative employees.

The Bus Riders Union, the Labor/Community Strategy Center and the Natural Resources Defense Council sued, arguing the fare increase was not exempt from CEQA because the MTA would use the money for system expansion. The Los Angeles County Superior Court ruled for MTA, and a unanimous three-judge panel of the Second District Court of Appeal, Division Two, upheld the ruling.

The MTA employed a section of CEQA – Public Resources Code § 21080, subdivision

(b)(8) – that exempts from review the setting of rates and fares which the agency intends to use solely for meeting operating expenses, purchasing supplies and funding “capital projects necessary to maintain service within existing service areas.” The fare opponents cited public statements by MTA representatives about the fare increase permitting the agency to resume system-expanding projects.

But the court found that these statements “merely confirm that for many years MTA diverted revenue to cover its operational deficit, and that the additional revenue from the proposed fare increase would allow MTA to divert less money because the deficit will decrease.” ■

■ First Case:

Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments, No. B212524, 2009 DJDAR 15995. Filed October 14, 2009. Ordered published November 10, 2009.

■ The Lawyers:

For Sustainable Transportation: Eugene Wilson, (805) 683-4648.

For SBCAG: Whitman Manley, Remy, Thomas, Moose & Manley, (916) 443-2745.

■ Second Case:

Bus Riders Union v. Los Angeles County Metropolitan Transportation Agency, No. 212145, 2009 DJDAR 15991. Filed October 19, 2009. Ordered published November 10, 2009.

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ceqa

Air District Rule Not Exempt From Review, Court Decides

A state appellate court has struck down a California Environmental Quality Act exemption for an air district rule permitting new power plants to offset emissions by paving roads.

The court found that the Mojave Desert Air Quality Management District did not have adequate evidence to support its finding that the rule could not have a negative impact on the environment. Rather, the court concluded that opponents of the rule had presented evidence the rule could actually increase air pollution, harm plants and wildlife, and induce development.

Run by representatives of member cities and counties, the air district covers much of San Bernardino County and eastern Riverside County. More than two years ago, the air district adopted Rule 1406. Although the

rule was complicated, it essentially permitted new emitters of particulate matter (PM 10, or material that is no more than 10 microns in size) to offset their emissions on a one-to-one basis by paving dirt and gravel roads. The district employed a Class 8 exemption from California Environmental Quality Act (CEQA) review. That categorical exemption applies to regulatory agency actions “to assure the maintenance, restoration, enhancement, or protection of the environment.”

The groups California Unions for Reliable Energy and Center for Biological Diversity sued, arguing the rule did not qualify for a CEQA exemption because of the potential impacts of paving the 5,000 miles of unpaved roads within the district. The district said that any potential environmental impacts were

highly speculative and unknown, and that any potential road paving would itself be subject to CEQA review. Riverside County Superior Court Judge Harold Hopp found that substantial evidence supported the exemption, and he ruled for the district.

The Fourth District Court of Appeal, Division Two, took a far different view of the evidence. The court found that the district based the exemption as much on logic as on evidence, and the logic was questionable.

Wrote Justice Betty Ann Richli, “The District reasoned, in part, that ‘Rule 1406 is positive to the environment as it will encourage additional road paving with commensurate reduction in particulate emissions from unpaved road dust entrainment.’ This overlooks the fact that

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Rule 1406 merely provides for road paving as an offset for new, increased PM 10 emissions. Moreover, it does so in a one-to-one ratio. Thus, even assuming that (1) road dust is environmentally indistinguishable from other PM 10 and (2) road paving itself has no deleterious environmental effects, the net effect is, at best, a push. And if either of these assumptions is false, the net effect would be negative.”

The court noted that the groups opposed to the rule – who received amicus assistance from the attorney general’s office during the litigation – submitted 86 pages of comments based on expert analysis. The groups argued that there is a difference between coarse road dust kicked up at ground level by vehicles and the new sources of PM 10, which would mostly likely be power plants emitting much finer PM 2.5 (no more than 2.5 microns in size) from tall stacks at high velocity. The tinier particles are considered much more hazardous to human health, and their emission by way of tall stacks makes them a regional air issue. The groups also cited a let-

ter from the California Air Resources Board that stated, “We believe there is no technical justification for allowing PM emission reductions from road paving to offset PM 10 increases due to natural gas combustion.” The groups further argued that paving roads would lead to more and faster traffic, resulting in road kill of wildlife and habitat loss. And they contended that additional paved roads would encourage new development.

The district maintained this was all speculation and the link between rule adoption and actual environmental impact was remote. The court, however, was unconvinced and pointed to the City of Victorville’s endorsement of the rule so the city could use the paving of 1.37 miles of road to offset emissions from a new power plant.

“The administrative record contains no evidence, as opposed to the district’s bare assertion, that the environmental effects of the adoption of Rule 1406 are speculative,” Richli wrote. “Basically, plaintiffs showed that trading a pound of PM 10 from road dust for a pound of PM 10 from combustion would mean that the resulting PM 10 would

stay in the air longer, spread more widely and be more likely to cause disease. Also, the very act of road paving would produce still more PM 10 – mostly made up of PM 2.5 – while also having adverse biological and growth-inducing effects. The only thing that was even arguably speculative about these effects was their quantity.”

The fact that future road paving would be subject to environmental review was no basis for a categorical exemption, the court added. Besides, as the rule was written, the district would have little discretion to reject road paving as a mitigation measure, the court noted.

In sending the case back to Superior Court, the Fourth District said the district could still use a Class 8 categorical exemption if it provides substantial evidence to support the exemption. ■

■ The Case:

California Unions for Reliable Energy v. Mojave Desert Air Quality Management District, No. E046687, 2009 DJDAR 15531. Filed October 30, 2009.

■ For CURE: Marc Joseph, Adams, Broadwell, Joseph & Cardozo, (650) 589-1660.

■ For the district: Michelle Ouellette, Best, Best & Krieger, (951) 686-1450.

ceqa

Consultant Not Held Liable For Developer’s Losses

A developer is not entitled to reimbursement or damages from a consultant hired by a local government to complete an environmental impact report, the First District Court of Appeal has ruled.

Even when the consultant fails to complete an EIR in a timely manner, the consultant owes no contractual duty to the developer that paid for the consultant, the court concluded. If a project applicant could sue a government-hired consultant for damages, it “would be likely to compromise the independence and objectivity of environmental consultants” whose chief responsibility under the California Environmental Quality Act (CEQA) is to the public, the court determined.

The lawsuit at hand involved a proposed resort development that appears to have died in the recession. In April 2005, Lake Almanor Associates L.P. submitted an application to Plumas County for the 1,400-acre Walker Ranch project. The developer proposed 1,032 residential units and a golf course, along with retail and resort amenities. Three months later, the county signed a contract with Huffman-Broadway Group to prepare an EIR that would

be funded by Lake Almanor Associates.

After Huffman-Broadway missed deadlines, the county sent a notice of termination to the consultant in June 2006. Huffman-Broadway sought more time and in September 2006 delivered a “preliminary working draft EIR.” The county deemed the document unacceptable and sent a second notice of termination. Huffman-Broadway then sought payment for its services from the county, which demanded that Lake Almanor Associates pay the bill. The county also hired a second consultant to prepare an EIR and billed the developer for that document, as well.

The developer then sued the consultant in Marin County Superior Court (Huffman-Broadway is based in San Rafael) seeking reimbursement and \$50 million in damages for breach of contract, negligence, and negligent interference with prospective economic advantage. Essentially, Lake Almanor Associates argued that its sale of the property to a third party fell through because Huffman-Broadway failed to complete the EIR on time. Superior Court Judge W. Bruce Watson Jr. rejected the developer’s claims. A unani-

mous three-judge panel of the First District Court of Appeal, Division Five, upheld the lower court’s ruling.

Lake Almanor Associates argued that the consultant had a contractual obligation to the developer to complete the EIR on time. But the First District said no such obligation existed. The court cited *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, (1998), 65 Cal.App.4th 713, in which a court refused to award damages to a developer who sued over what it claimed was an erroneous EIR. In *Mission Oaks*, the court ruled, “The county, as lead agency on the project, owes its duty to the public to release a proper EIR. The county owes no duty to assuage the desires of a potential developer” (see *CP&DR Legal Digest*, October 1998).

Lake Almanor Associates argued that *Mission Oaks* did not apply because that lawsuit was over the content of an EIR, not production of the EIR in the first place. But the court insisted that the principles were the same: The duty of the government agency and the consultant is to the public, not to the developer. Suits – CONTINUED ON PAGE 9

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seeking \$50 million in damages could undermine the necessary independence and objectivity of consultants, the court found.

“The exposure to potential claims of such magnitude, and even much smaller claims, could affect the availability of consultants and the fees they charge. This exposure would create incentives to complete the report that could undermine the analysis of the relevant environmental issues, creating a conflict between the consultant’s duty to the public and its financial self-interest,” Justice

Mark Simons wrote for the court. “[A] direct action against [Huffman-Broadway] is not consistent with CEQA.”

The court used similar reasoning to reject the developer’s claim that Huffman-Broadway was liable for negligence. “The analysis of the duty issue in *Mission Oaks* is helpful,” Simons wrote. “The court pointed out that the contract for preparation of an EIR was ‘not intended to affect the applicant directly; it was intended to provide the county and public with the information it needed to assess the proposed project pursuant to CEQA.’”

Holding the consultant liable to the developer could create a conflict that “would undermine the Legislature’s goal of obtaining accurate EIRs for proposed projects,” the court concluded. ■

■ The Case:

Lake Almanor Associates L.P. v. Huffman-Broadway Group Inc., No. A122563, 2009 DJDAR 15526. Filed October 30, 2009.

■ The Lawyers:

For Lake Almanor Associates: William Neasham, Neasham & Kramer, (916) 853-8030.

For Huffman-Broadway Group: George Ziser, Lewis, Brisbois, Bisgaard & Smith, (415) 438-6659.

from the blog

<http://www.cp-dr-com/blog>

Divisions Emerge Over SB 375’s Reach

As the full weight of SB 375 starts to become evident, divisions on the state board charged with implementing the legislation are coming to the forefront. Some members of the Air Resources Board (ARB) are welcoming what they see as an opportunity to overhaul land use planning and remake cities, while others see the state intruding into an area where it is not wanted and has no experience.

The divergence emerged publicly during the November 19 ARB board meeting to consider recommendations from the Regional Targets Advisory Committee (RTAC), a group charged with helping determine the methodology for setting regional greenhouse gas emissions reductions targets. The RTAC report (see *CP&DR*, October 1, 2009) received a generally favorable reception from the board, which postponed a final decision on committee recommendations until December.

However, one board member – San Diego County Supervisor Ron Roberts – voiced a concern that others in local governments and even in Sacramento have been expressing in the background regarding the potentially expansive role the board may assume. He said the ARB appears to be heading toward becoming a “super planning agency,” even though that would be outside of its mission and expertise.

“I’m afraid that we’re getting way off,” said Roberts. “We’ve never been in the position of ruling on local land use planning. That’s what we’re doing.”

Board member Ron Loveridge, who is the mayor of Riverside, and board member Daniel Sperling, who is director of the Institute of Transportation Studies at University of California, Davis, responded that SB 375 presents the state with an historic opportunity. The legislation – which created the RTAC and requires the ARB to set regional greenhouse gas emissions reductions targets next year – uses climate change concerns to “do something about our cities,” Sperling said. Strategies to reduce greenhouse gas emissions are the same strategies that could make cities more livable and healthier, he said.

“This is really a historic proposal,” Loveridge added. “This is an effort to shape the urban form in ways that I have no past memory of.”

And that, said Roberts, is what is so frightening about SB 375.

Roberts pointed to the board’s decision last year on the scoping plan for implementation of AB 32, the law requiring the state to reduce greenhouse gas emissions to 1990 levels by 2020 and to 80% less than 1990 levels by 2050. The scoping plan calls for the state to cut emissions by 174 million metric tons of carbon dioxide equivalent (MMT) by 2020. After heavy lobbying by development interests and environmentalists, the board set a tentative goal for reductions from land use changes at 5 MMT – a decision generally applauded by the developers (see *CP&DR Insight*, January 2009). James Goldstene, ARB executive officer, said the 5 MMT figure was simply a placeholder. Lynn Terry, deputy executive officer, said the RTAC did not assume 5 MMT was the ultimate goal. The RTAC did not recommend a numeric target.

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But Roberts insisted the RTAC and staff had discarded the board's scoping plan decision without showing that the 5 MMT figure was faulty.

Later on, board members and RTAC members said that "business as usual" planning would not be sufficient to meet greenhouse gas emissions reductions goals. Roberts challenged that assertion. In San Diego County, business as usual means spending \$1 billion to expand the trolley system and rewarding communities that approve higher density housing, he said.

"We're doing a lot of things, and I'm concerned we're not going to get credit for it. The state has a habit of penalizing you for doing the right thing," Roberts said. "I don't trust the state to do planning, and I don't trust the state to review our land plans."

Sperling and other board members said they have no intention of putting the ARB in the land use planning business. Still, the SB 375 process calls for the board to review and approve "sustainable communities strategies" that metropolitan planning organizations must adopt to meet the ARB-mandated greenhouse gas emissions reductions targets

(see *CP&DR Blog*, October 1, 2008). Because sustainable communities strategies have never been done before, no one is exactly sure what they will look like. But they could well be broad brush or even fairly detailed regional land use and transportation plans that are aimed at getting people to drive fewer miles, which likely equates to higher densities, mixed uses, more transit and compact neighborhoods.

Ontario City Manager Greg Devereaux, an RTAC member, said local officials have great uncertainty over the scope of SB 375.

"Densities that work in some markets are not economically viable in other markets. The fear is that these factors will not be considered in determining what is 'ambitiously achievable,'" Devereaux said, referencing the ARB's goal for the RTAC.

Board member Ken Yeager, a Santa Clara County supervisor, said more local planners and elected officials need to be participating in the SB 375 process right now, because it could ultimately result in local officials having to make unpopular decisions about growth.

Said Yeager, "Most people win elections by saying, 'No, I'm a NIMBY.'"
– PAUL SHIGLEY | NOVEMBER 20, 2009 ■

Are The Days Of The 'CEQA Stadium' Numbered?

For the second time this year, we've been reminded that the California Environmental Quality Act is not a set of tablets brought down from Mount Whitney. It's just a state law, and it can be changed whenever the Legislature and the governor can agree on changing it – especially during bad economic times.

The latest reminder is AB 81X3, signed by the governor the other day, which exempts the proposed football stadium in Industry from CEQA – and even from several pending CEQA lawsuits (see *CP&DR Capitol Update*, October 15, 2009). This law comes only a few months after the state budget deal, which truncated or eliminated CEQA review on several highway projects that Gov. Arnold Schwarzenegger wanted to get moving (see *CP&DR Insight*, March 2009).

At least you could argue that the highway projects are in the public interest. It's much harder to make the same argument for the stadium in Industry, whose exemption appears to be mostly the work of powerful lobbyists on behalf of a powerful developer, Ed Roski, and a small but powerful city. It saves the stadium project not only the trouble of doing an EIR, but also the trouble of getting into picayune fights in court with stadium opponents over things like whether the stadium is a project under CEQA. With the economy still sluggish, you have to wonder how many other cities and developers will come out of the woodwork seeking similar exemptions.

For example, Sam Farmer of *The Los Angeles Times* suggested the other day that it would be impossible now for the state to deny the same exemption to football stadiums in San Diego and the Bay Area. This could especially become an issue in San Diego. How can the city expect to keep the Chargers when it has to build a "CEQA Stadium" and Industry – trying to lure the Chargers away – does not? You can

see how, in theory at least, the whole CEQA house of cards could come tumbling down quickly.

Given that almost 40 years has elapsed since CEQA was first adopted, it's kind of surprising that this kind of thing hasn't happened more often. Public Resources Code Section 21080 contains a long list of "statutory exemptions" – things the state has given a pass on CEQA – but by and large they are not individual private development projects. Remarkably, for all the battling over CEQA, only very rarely has heavy-duty lobbying for a powerful developer such as Roski come into play.

As mayor of San Francisco, Willie Brown famously manipulated CEQA to move along the expansion of San Francisco International Airport. He did it not by exempting the project but by having the Legislature pass a bill specifying what the mitigations would be. As mayor of Oakland, Jerry Brown got the Legislature to pass truncated CEQA review of infill projects in downtown Oakland.

But a hard-charging developer hiring several big-ticket lobbyists to get his project exempted in Sacramento, as Roski did? Despite all the bitching about CEQA over the years, I can't ever remember that happening before. The CEQA debate in the Legislature each year is pretty much confined to the homebuilders and the enviros arm-wrestling over whether or not to streamline arcane and time-consuming CEQA practices.

So it'll be interesting to see whether Roski and Industry have opened a new line of attack on CEQA. Up to now, CEQA has been known as the law that launched a thousand environmental consulting firms. Will it now become known as the law that launched a thousand lobbying firms as well?

– BILL FULTON | OCTOBER 27, 2009 ■

