CP&DR

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The Emergence Of Two Californias

Coastal Areas Continue To Urbanize, While Inland Regions Embrace Suburban Model

BY PAUL SHIGLEY

California is often considered to be two different states – north and south. But when it comes to planning and urban development patterns, the state is more properly divided east and west, or possibly inland and coastal. The real estate boom of earlier this decade only exacerbated the differences between coastal cities and inland suburbs.

In urban coastal cities, most development of recent vintage and nearly all planned development is relatively dense, often contains transit and mixed-use components, and is typically on an infill or redevelopment site. Most of the Bay Area, the coast from Santa Monica to the Mexico border, and even Central Coast locales such as Ventura, Santa Barbara and the Monterey Peninsula generally follow this urban growth model.

Head inland to the 400-mile-long Central Valley, the Inland Empire of Riverside and San Bernardino counties, or desert regions, and the growth model remains primarily suburban. Nearly all growth is characterized by large tracts of single-family houses, segregated uses, a very heavy reliance on the automobile, and greenfield development.

Three reasons appear to lie behind the difference: land economics, lifestyles, and public policy. In coastal urban areas, land is expensive, the bustling way of life is desirable, and land use plans and transportation investment dictate dense, mixed-use development. In inland areas, land is less expensive, buyers want the quiet predictability of suburbia, and land use plans provide the suburban model.

"The coastal areas are historically more attractive to development," observed Alex Rose, senior vice president, development and asset management, for Continent Development Corp., which has projects in San Francisco and metro Los Angeles. "They have the milder weather. They are where the population centers have grown up. Therefore, you sort of run out of land."

Reinforced by the ocean to the west and large public holdings to the east, the coastal land shortage has forced developable real estate prices sky high. The expense means a great – CONTINUED ON PAGE 8

Will $40 Billion Public Investment Create A Transit-Dependent L.A. ?

insight

WILLIAM FULTON

Almost in spite of itself, Los Angeles has emerged as a city focused on transit. The big question now is whether L.A. can move from being a city focused on transit to a transit-oriented city.

No metro area in the Western United States is investing in transit as heavily as L.A., and in late October the board of the Los Angeles Metropolitan Transportation Authority approved a long-term plan that will result in at least $40 billion in new transit investment. The plan calls for a decade or two of intense transit construction that will give Los Angeles the most extensive transit system in the West.

But will that translate into a transit-oriented city? L.A. will still be a spread-out city with large swaths unserved by good transit. And Metro's focus is not heavy rail but, rather, light – CONTINUED ON PAGE 3

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inbrief

Standing only a few feet above sea level on San Francisco Bay's Treasure Island, Gov. Schwarzenegger released the California Climate Adaptation Strategy in early December. The final version of the 200-page strategy is not significantly different from the draft version that drew criticism from environmentalists for not going far enough, and from business and development interests for going way too far (see *CP&DR Insight*, November 1, 2009).

"I think we have a responsibility to have a Plan B in case we can't stop the global warming," Schwarzenegger said.

The plan cites a 2008 University of California, Berkeley, report that found $2.5 trillion of the state's $4 trillion in real estate assets "is at risk from extreme weather events, sea level rise and wildfires." The strategy recommends avoiding significant new development in areas that "cannot be adequately protected from flooding, wildfire and erosion due to climate change." The plan recommends the state consider hazards from climate change when locating infrastructure projects, and it notes that revisions to the California Environmental Quality Act Guidelines could direct local governments "to evaluate the impacts of locating development in areas susceptible to hazardous conditions." The plan further urges cities and counties to consider the impacts of climate change when preparing general plans and local coastal plans.

The governor also named a 23-member Climate Advisory Panel to make specific implementation recommendations based on the plan by July. Among those on the panel are former Gov. Pete Wilson, former Assembly Speaker Robert Hertzberg, former U.S. Environmental Protection Agency Administrator William Reilly, Ron Gastelum, former executive officer of the Metropolitan Water District of Southern California, and Sunne Wright McPeak, a former Business, Transportation and Housing Agency secretary who headed the task force that prepared the adaptation strategy.

The City of Irvine has agreed to pay the neighboring City of Newport Beach $3.65 million to settle a lawsuit over Irvine's approval of a mixed-use plan for 2,760 acres. The Irvine Business Complex plan seeks to bring as many as 15,000 housing units in mixed-used developments to an area near John Wayne Airport that is currently dominated by office buildings and industrial parks.

Newport Beach and Tustin sued Irvine because of traffic impacts of the envisioned development, and a Superior Court judge in 2008 ruled in Newport Beach's favor. Under the settlement approved in late November, Irvine will pay $3.65 million for Newport Beach to use for improvements on and near Jamboree Road. In addition, both cities agreed not to sue one another over projects permitted by their respective general plans.

Negotiations with Tustin, as well as with property owners who have sued over the Irvine plan, are ongoing.

With concern rising that a private entity may attempt to purchase the Orange County Fairgrounds for development purposes, public officials are hurrying to put together bids of their own for the 150-acre site just west of the Costa Mesa Freeway.

The state put the Costa Mesa property up for sale in October to help cover the state budget deficit. Bids are due January 8. In late November, the Orange County Board of Supervisors reversed itself and urged Gov. Schwarzenegger to cancel the sale. But the county is also working with the City of Costa Mesa on a potential joint bid to acquire the property to perpetuate public uses.

In addition, the 32nd Agricultural District Board of Directors has formed a new nonprofit entity, called the Orange County Fair and Event Center Foundation, to submit its own bid for the property.

All four indicted San Jacinto city councilmen and four others charged in an alleged money laundering and bribery scheme have pleaded not guilty. Meanwhile, court papers and newspaper reports are beginning to outline the cozy relationship between two developers and the City Council (see *CP&DR In Brief*, November 15, 2009).

At the heart of things, according to county prosecutors, are Councilman Jim Ayers and developers Stephen Holgate and Robert Osborne. Prosecutors say the developers funneled a combined $200,000 in campaign contributions through a variety of intermediaries into Ayers' unsuccessful 2006 campaign for Assembly and his successful 2008 council re-election bid.

Ayers was among the councilmembers who voted to approve projects for both developers, including a 700,000-square-foot shopping center and a 464-unit apartment building and storage facility for Holgate, and two small housing subdivisions and an office complex for Osborne. Ayers also voted for a final tract map for Holgate three years after agreeing to buy a house in the subdivision. Earlier this year, Ayers, who works for the Riverside County Economic Development Agency, abstained from voting on a proposal to rezone 13 acres owned by Holgate to "general commercial" along the route where a freeway is proposed. The three other indicted city officials – Mayor Dale Stubblefield and Councilmen John Mansperger and James Potts – did vote for the rezoning, which greatly increased the value of property Riverside County may need to acquire for the freeway project.

It is not illegal for an elected official to vote on matters affecting campaign contributors. The question is whether the developers hid the source of campaign funds that exceeded the limit for an Assembly election, and whether the developers received improper favors in exchange for the funds.

A new citizen group has formed to collect signatures to recall the four indicted officials.

Correction. A blog entry in the November 15 edition incorrectly stated that the California Air Resources Board would decide on recommendations from the Regional Targets Advisory Committee at the board's December meeting. In fact, the recommendations were not on the board's December meeting agenda and the board has not set a date to take action. ■

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insight WILLIAM FULTON

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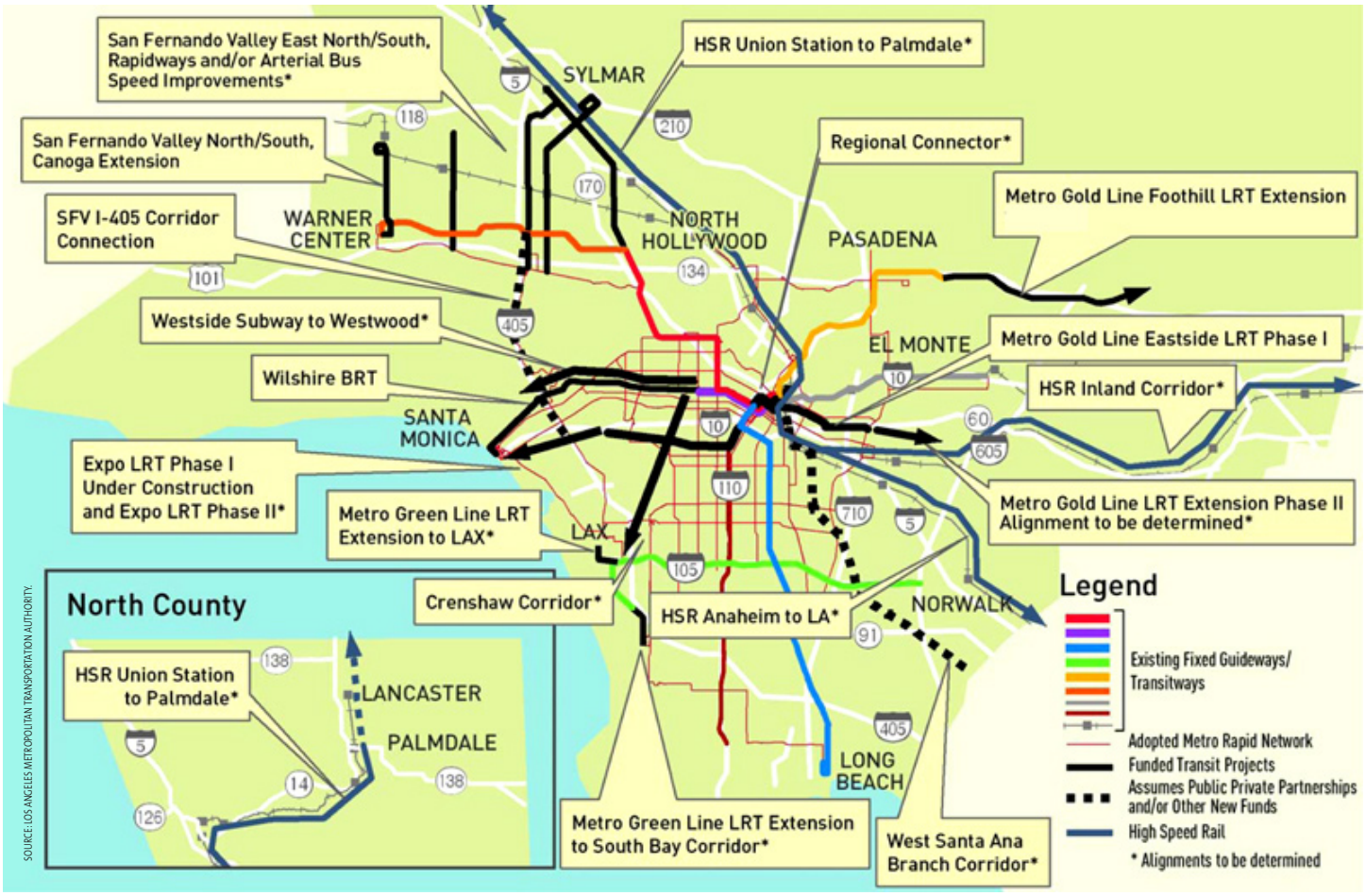
rail and bus rapid transit (BRT). The "Subway to the Sea" project will probably march down Wilshire Boulevard to the west at least as far as Beverly Hills and maybe Westwood, but that's a corridor that's already lined with high-rises. The more interesting question is whether transit-oriented developments will pop up in less likely locations, like near the light-rail line along Exposition Boulevard, the Gold Line extension along I-210 in the San Gabriel Valley, and several locations in the San Fernando Valley where north-south and east-west BRT lines are likely to intersect.

In other words, can a light-rail and BRT system in a spread-out city – even an extensive system – really create a fundamental change in the city's development patterns and the way it functions on a daily basis?

The answer may take decades to emerge. But the experience of the last decade – when there has been a big real estate boom – is that the mere presence of transit (especially light rail) is not enough. Something else has to be happening – usually a very strong market and, in addition to that, probably also some kind of a buzz in the development business. Plus, in many cases, public subsidies are necessary as well.

A century ago, of course, public transit was king in Los Angeles. Metro L.A. was laid out in accordance with the vast Pacific Electric interurban system, which stretched from San Bernardino to Santa Monica and followed a geographically logical set of transportation corridors that had previously served as trails and stagecoach routes. Beginning in the 1940s, the freeway system was laid on top of this same geographical pattern, which led one of L.A.'s keenest observers, Reyner Banham, to conclude that the city was a "transportation palimpsest." (A palimpsest is a scroll that is scraped off and used over and over again.)

Now, the transit city is emerging. Since the opening of the Blue Line in 1990, L.A. has built more than 100 miles of rail transit – not including bus rapid transit or the Metrolink regional commuter heavy rail line, which connects L.A. to outlying counties. All told, these lines carry close to a quarter-million passengers a day, including about 140,000 on the light-rail system and more than 100,000 on the Red Line and Purple Line subways. (L.A.'s light-rail system alone carries more passengers than any light-rail system in the country except those in Boston and San Francisco, and ridership is far ahead of light-rail systems in both San Diego and Portland.) The light-rail portion of the system just added the Gold Line extension – CONTINUED ON PAGE 4



The recently adopted long-range transportation plan for Los Angeles County outlines about $40 billion worth of public transit projects.

Development Not Yet Following Transit Routes

– CONTINUED FROM PAGE 3

to East L.A., and the Expo Line from downtown to USC and Culver City is likely to be completed next year.

On the development side, however, the results have been decidedly mixed. The only lines that have seen significant transit-oriented development (TOD) are the Red Line and the Orange Line.

A heavy-rail subway from downtown along Wilshire Boulevard to Hollywood and North Hollywood, the Red Line travels through what was previously the most heavily traveled bus-only corridor in America. The big Red Line TOD projects – such as the Kodak Theater project at Hollywood and Highland, and tall mixed-use buildings at the North Hollywood station – have required big redevelopment subsidies to make a go of it.

Meanwhile, the most interesting TOD projects have occurred along the Gold Line, which is pokey and does not carry that many passengers, but connects Los Angeles to cool and urban Pasadena. One apartment building predated the Gold Line and now straddles the tracks in downtown Pasadena, while two Moule & Polyzoides projects have been constructed at different stations, one in Pasadena and one in South Pasadena.

But that's about it. Private development has occurred only along the heavy-rail line with redevelopment subsidies and the cool light-rail line that everybody likes. In other parts of town, the market has not been strong enough, the subsidies have not been deep enough, and the buzz has not been loud enough. Even the Gold Line stations in Los Angeles proper have not seen much development activity.

The Blue Line and the Green Line – running north-south and east-west, respectively, on L.A.'s south side – have seen virtually nothing in the way of development. The Green Line, which runs from Norwalk to El Segundo, will probably never stimulate much, because mostly it runs down the middle of the I-105 freeway through a poor part of town. The Blue Line is better located, running at grade from downtown to Long Beach, but it too suffers from the fact that there is little market demand for TOD in places like Watts and Compton. (One exception might be the currently closed King-Drew Medical Center complex, which is located close to where the two lines intersect.) And the much-ballyhooed Orange Line BRT across the San Fernando Valley has drawn far more riders than anyone expected but, so far, not much in the way of TOD.

The two big-ticket items on Metro's agenda both would play vitally important transportation functions for the region. The "Subway to the Sea" could bring serious transit to the congested Westside for the first time – although whether it can be pushed all the way to Santa Monica in anybody's lifetime is a good question. The second item is the so-called Regional Connector, which will connect light rail lines coming into downtown (Gold Line, Blue Line, Expo Line) so that light-rail riders do not have to change to the subway to go through downtown. Neither the Westside subway nor the Regional Connection, however, is likely to stimulate new TOD, becuase they plow through the most densely developed parts of L.A. (the Wilshire corridor and downtown).

Which leaves the light-rail and BRT lines. Of the new lines, the ones that seem to be getting the most attention – at least from planners and politicians at the City of L.A. – are the Expo Line light-rail system and the Orange Line BRT in the Valley.

The Expo Line ought to be the next big-buzz light-rail line. Though it's on the traditionally depressed south side, it's far enough north – along Exposition Boulevard – that it ought to attract some attention from the market. It's the first rail link from downtown to USC, the largest private employer in Los Angeles. And the line under construction now hits some major north-south arterials, including Crenshaw, La Brea, and La Cienega, before terminating within spitting distance of downtown Culver City, which has undergone an attractive revitalization during the last few years.

Yet even the Expo Line is not a slam-dunk. Metro received a lot of flak during construction from advocates of Dorsey High School, located at the Crenshaw stop, who feared the train would disrupt the school and demanded (unsuccessfully) that the transit line be put underground. The Dorsey flap highlighted another, more hidden concern: Many of the Expo Line stops are located close to stable single-family neighborhoods, traditionally African-American, where residents are not very interested in dense development. Plus, redevelopment of the La Cienega station area – which has the most underutilized land nearby – could be slowed down by L.A.'s pending policy to protect as much industrial land as possible.

In an odd way, the Orange Line, which runs east-west across the San Fernando Valley, may face similar constraints. No BRT in California is better positioned to stimulate transit-oriented development than the Orange Line, especially because Metro's long-range plan calls for three north-south BRTs to connect with the Orange Line. Despite its popularity, however, the Orange Line also traverses some fairly low-density territory, and at least one station (Reseda Boulevard) is not even designated a "center" under the Los Angeles general plan. The Orange Line terminates in Warner Center, which is the most densely built area in the San Fernando Valley, but whether other dense centers can be accommodated politically remains to be seen.

In addition to the political problems, of course, there are the market questions. Light rail may drive development in Portland or San Diego, but L.A. is another story. There are an awful lot of places in L.A. that still won't be on the transit grid in even 20 or 30 years. On the other hand, to paraphrase Yogi Berra, those places may be so crowded that nobody goes there anymore. In that case, TODs along the light-rail and BRT lines may make sense – not just to Yogi, but to the rest of us too. ■

Court Refuses To Order EIR Certification

Sebastopol Developer Complicit In Very Slow Process, Panel Rules

BY PAUL SHIGLEY

An appellate court has rejected a developer's request to order the City of Sebastopol to approve an environmental impact report on which the city began work in 2001.

Although it conceded the environmental review process has been lengthy, the court said it lacked authority under the California Environmental Quality Act (CEQA) to order the city to adopt an EIR. The court also blamed the developer for some of the delay.

"A public agency may be directed to comply with CEQA, or to exercise its discretion on a particular subject, but a court will not order that discretion to be exercised in a particular fashion, or to produce a particular result," Justice James Richman wrote for the First District Court of Appeal, Division Two.

Attorney Edward Grutzmacher, who represents the city, called the decision useful for lead agencies under CEQA. "We think it's a good decision for cities who are involved in these complicated project review situations," he said.

The proposed development at issue in the litigation has been controversial from the outset because of close proximity to the environmentally sensitive Laguna de Santa Rosa open space and because of the number of units proposed (see *CP&DR Local Watch*, October 2002). In early 2001, developer Schellinger Brothers submitted an application for a 182-unit subdivision and a 16,000-square-foot commercial center on a 20-acre parcel. Before the city issued a draft EIR on the project, Schellinger reduced the project to 177 units and a smaller commercial/office center. After public hearings, Schellinger in May 2003 submitted a new application for 145 housing units and no commercial center. The city deemed that application complete on June 23, 2003.

With no objection from Schellinger, the city went back to work on the EIR and released a new draft in August 2004. Public opposition was considerable, resulting in many requests for additional information. Finally, the Planning Commission recommended EIR approval in November 2005. In response to persistent public opposition, Schellinger reduced the project to 125 units. Before the City Council made a decision, the city and Schellinger agreed to participate in mediation. The result of that process was a 125-unit housing development and 2,335 square feet of commercial space. When the City Council declined to support the mediated agreement, however, Schellinger demanded the city approve its 145-unit application. Instead, the City Council in July 2007 decided to recirculate the EIR.

Schellinger refused to fund additional EIR work and instead sued the city for, among other things, violating the anti-NIMBY statute, breach of contract and breach of the mediation agreement. Schellinger pointed to a provision in CEQA – specifically, Public Resources Code § 21151.5 – which requires local agencies to establish a time limit of no more than one year to complete EIRs. In addition to compensation for damages, the developer sought an order directing the city to certify the EIR and set aside all city decisions other than project approval.

Sonoma County Superior Court Judge Robert Boyd said he lacked authority to speed up Sebastopol's "exceedingly slow review" and ruled for the city.

In its appeal, Schellinger cited *Sunset Drive Corp. v. City of Redlands,* (1999) 73 Cal. App.4th 215, in which the court directed the city to complete an EIR that had been pending for several years (see *CP&DR Legal Digest*, August 1999). The First District, however, dissected the *Sunset Drive* decision and decided it did not apply to the Sebastopol situation.

The City of Redlands had refused to exercise its discretion, while the City of Sebastopol "has in effect never stopped exercising that discretion, and, if anything, has overexercised it," Richman wrote. In addition, while the *Sunset Drive* court accepted the developer's promptness as a given, Schellinger only lengthened Sebastopol's slow process.

"It is important to note that a significant portion of the extended delay was solely attributable to Schellinger, which was repeatedly revising the scope of its proposal. The number of units in the project was constantly changing. The commercial element of the proposal at various stages contracted, disappeared entirely, and then reappeared," Richman wrote. "Put otherwise, we are addressing a situation distinctly different from *Sunset Drive*, where … the contours of the project submitted appear never to have changed."

Attorney Grutzmacher said that although the decision does not preclude future claims from developers based on the *Sunset Drive* precedent, the First District provided "a good counter" to *Sunset Drive*.

The court said the one-year time limit in § 21151.5 is "directory" and not mandatory. The court also pointed out that Schellinger continued to participate in the city's administrative process for three years after the one-year time period expired on June 23, 2004.

"Thus, for almost three full years after Schellinger now insists the city had no discretionary power, Schellinger was in effect asking the city to exercise that power – and cooperating with city as it continued to exercise it," Richman wrote. "This is abundant support for a determination that Schellinger itself acted with unreasonable delay, and that it acquiesced in the city taking more than a year to certify an EIR."

Project director Scott Schellinger told the Santa Rosa *Press Democrat* that the developer is considering an appeal to the state Supreme Court and still intends to pursue the project. ■

- The Case:
  Schellinger Brothers v. City of Sebastopol, No. A122972, 2009 DJDAR 16915. Filed December 2, 2009.
- The Lawyers:
  For Schellinger Brothers: Geoffrey Robinson, Bingham McCutchen, (415) 393-2000.
  For the city: Edward Grutzmacher, Meyers, Nave, Riback, Silver & Wilson, (510) 808-2000.

nepa

Largest Proposed Landfill Can't Get Out Of Courtroom

The Ninth U.S. Circuit Court of Appeals has set back a plan to develop the country's largest solid waste landfill near Joshua Tree National Park. The court ruled that the environmental analysis for the project was inadequate and that the Bureau of Land Management undervalued land it would provide to the landfill developer.

In a 2-1 decision, the Ninth Circuit panel found that the range of alternatives in the environmental impact statement was too limited because the Bureau of Land Management (BLM) adopted the developer's goals for the project as the government's own. The court also said the analysis of "eutrophication" – in this case, the introduction of nitrogen to the desert environment – was scattered in too many parts of the EIS for a reader to follow.

The court further ruled the BLM should have considered the federal land's value as a landfill. The BLM's appraisal ignored the possibility that the 3,481 acres of federal land sought by the landfill developer would be used for the project.

The decision is an important one not only for the long-proposed Eagle Mountain landfill, but for scores of solar and wind energy projects proposed for federally owned land in the desert. The decision suggests the federal government needs to consider the value of land for its ultimate use when selling or swapping parcels with a private entity, which could increase land prices dramatically.

In a remarkably sharp dissent, Judge Stephen Trott called the majority opinion "indefensible" and "flatly wrong." He said the two-judge majority ignored the 50,000-page administrative record and elevated process over function.

From 1948 until 1983, Kaiser mined iron ore from about 5,000 acres of Eagle Mountain in eastern Riverside County, about one mile from what has since become Joshua Tree National Park. With the mine played out, Kaiser in 1989 applied to Riverside County for permits to fill the massive mining pits with garbage. Proponents said the landfill could accommodate 20,000 tons of trash daily for more than 100 years – enough capacity to serve Los Angeles, San Bernardino, Riverside, Orange, San Diego, Ventura and Santa Barbara counties. About 90% of waste would arrive by train.

After Riverside County approved the project, opponents sued over the environmental impact report. They won their case over the first EIR in 1996, but the Fourth District Court of Appeal upheld a revised EIR in 1999 in *National Parks & Conservation Assn. v. County of Riverside*, (1999) 71 Cal.App.4th 1341 (see *CP&DR, Legal Digest,* June 1999).

The opponents turned to federal court later in 1999. Based on the National Environmental Policy Act (NEPA), they challenged the EIS for the project. They also contested BLM's appraisal of 3,481 acres of federal land sought by Kaiser. Kaiser needs the federal land to make the project practical, and federal officials said the swap for 2,846 acres of private land, plus a $20,100 difference, would allow them to better manage habitat for sensitive plant and animal species.

About five years later, District Court Judge Robert Timlin ruled for the opponents on some issues and against them on others. Both sides appealed, and another five years later – including nearly two full years after oral arguments – the divided Ninth Circuit panel mostly upheld Timlin's decision.

On the NEPA claims, the court found that the range of project alternatives studied in the EIS was inadequate because the BLM's stated purpose for the land swap was based on Kaiser's desires. The BLM's purpose and needs statement listed as goals: (1) development of a solid waste landfill, (2) creation of a long-term income source, (3) finding a viable use for mine byproducts, and (4) development of the former mine's town site.

"The first, to meet long-term landfill demand, is unquestionably a valid BLM purpose. The remaining three goals, however, can hardly be characterized as BLM needs," Judge Harry Pregerson wrote for the majority. As a result, five of the six analyzed project alternatives – all except for "no action" – resulted in some measure of landfill development. "The BLM adopted Kaiser's interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange," wrote Pregerson, who was joined by Judge Richard Paez.

On the issue of eutrophication, the court rejected the BLM's argument that the EIS adequately dealt with impacts of bringing nitrogen to the desert environment in sections addressing biological resources and air quality. "A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together," Pregerson complained.

The Ninth Circuit did overturn Judge Timlin on the issue of bighorn sheep, finding that the EIS "contains extensive analysis of potential impacts on bighorn sheep, including migration patterns, habitat loss and water accessibility." The court also rejected opponents' appeals regarding analysis over impacts to desert tortoises, noise levels, night lighting, groundwater, air quality and visual aesthetics.

In its appraisal, the BLM valued the public parcels that Kaiser would acquire at $77 to $106 per acre, and determined that the private land the BLM would receive was worth $104 per acre. The difference was $20,100. The appraisal determined that the "highest and best use" for the public parcels in question was "holding for speculative investment." The appraisal ignored the landfill proposal because the appraiser considered the project infeasible.

The court noted that the landfill provided the basis for the land swap and that Los Angeles County Sanitation District has since agreed to pay Kaiser $8,800 per acre for the project site and permits. The court, noted Pregerson, faced similar facts when it rejected the BLM's appraisal of federal land for a proposed Imperial County landfill. In *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Circuit 2000) (see *CP&DR Legal Digest*, December 2000), the court ruled, "The use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it would be used for that purpose. There is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions."

In a dissent far longer than Pregerson's majority opinion, Trott decried the process and lengthy litigation. It took the District Court five years to issue a ruling and, Trott wrote, "[H]ere we are at the end of 2009, another five years later, burdened by a seriously flawed District Court opinion, hitting the reset button, and unnecessarily sending the parties back to a Sisyphean hill which cannot be climbed in a lifetime."

Trott continued, "Now, in an opinion that is not only not supported by the record, but is irreconcilable with it, the endless process continues. No doubt we will see this case back again, years – CONTINUED ON PAGE 7

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from now, unless the proponents of this project – including seven California counties – weary of it and throw in the towel, thwarted and defeated not by substance but by interminable process."

Unless an *en banc* panel of the Ninth Circuit agrees to rehear the case, it now returns to District Court for further proceedings. ■

■ The Case:
National Parks & Conservation Association v. Bureau of Land Management, No. 05-56814, 2009 DJDAR 15950. Filed November 10, 2009.

■ The Lawyers:
For National Parks and Conservation Association: Deborah Sivas, Stanford Environmental Law Clinic, (650) 723-0325.
For the BLM: Tamara Rountree, Department of Justice (202) 514-2000.
For Kaiser: Leonard Feldman, Stoel Rives, (206) 386-7538.

housing

City Given Discretion To Grant Density Bonuses

The City of Berkeley's approval of density bonuses for a mixed-use project has been upheld by the First District Court of Appeal, which rejected a project opponent's contention that the city had wrongly applied the state density bonus law.

The court built on the two-year-old decision in *Friends of Lagoon Valley v. City of Vacaville*, (2007) 154 Cal.App.4th 807 (see *CP&DR Legal Digest*, September 2007), to make clear that a city has broad authority under the density bonus law to grant additional units to a developer who provides affordable or senior housing.

In early 2007, the Berkeley Zoning Adjustments Board approved developer 1950 MLK, LLC's five-story project with 14,390 square feet of commercial space on the ground floor and 148 apartments on the second through fifth floors. Twenty-two of the units were reserved for low-income households. The project also included a parking lot for the commercial space (to be filled by Trader Joe's) and underground parking for residents. Currently under construction at the busy corner of University Avenue and Martin Luther King Jr. Way, the project replaces a strip commercial center anchored by an auto parts store.

Nearby resident Stephen Wollmer and a group called Neighbors for a Livable Berkeley Way appealed the board's decision to the City Council. In July 2007, the City Council adopted a mitigated negative declaration and approved the project. Included in the approval was the council's decision to award 32 "mandatory" density bonus units and 25 discretionary bonus units (for a total of 148 units), and variances from height, floor-area ratio and setback requirements in the zoning ordinance.

Wollmer and Neighbors sued, arguing the city violated the density bonus law, the California Environmental Quality Act and the Berkeley Municipal Code. Alameda County Superior Court Judge Frank Roesch ruled for the city. The opponents then appealed.

Project opponents argued the city incorrectly calculated the number of bonus units for which the project was eligible. The city had defined the "base project" as 91 units, with 22 units – or 24% – reserved for low-income households. Under the density bonus law – specifically Government Code § 65915, subdivision (g)(1) – the city must grant a bonus of at least 35% for projects with at least 20% low-income units. For this project, the 35% bonus equaled 31.85 units, which the city rounded up to 32. The opponents argued the "base project" should be have been defined as 116 units – the proposed 91 plus the 25 additional bonus units approved by the city, which would mean the 22 units fell short of the 20% threshold for the maximum density bonus. But the court ruled opponent's position was contrary to the density bonus law.

"The statute specifically excludes from the base development 'any units permitted by the density bonus awarded pursuant to this section.' (Government Code § 65915, subdivision (b)(1)," Justice Terence Bruiniers wrote for the unanimous three-judge panel. "In addition to mandating density bonuses based on the percentage of low-income housing units, § 65915 also provides that 'nothing in this section shall be construed to prohibit a city … from granting a density bonus greater than what is described in this section for a development that meets the requirements of this section.'"

The opponents argued that the city could not grant the developer additional bonus units on an ad hoc basis. But the court said the decision was not ad hoc and noted that the *Lagoon Valley* decision held that § 65915, subdivision (n) authorized a city to award additional bonus units. Bruiniers cited *Lagoon Valley*: "'Nothing in the density bonus law suggests that a municipality must enact an ordinance any time it wishes to provide more of a density bonus than is required by state law.'"

The opponents further argued that the zoning variances were improper because the city could approve such waivers under § 65915, subdivision (f) only if necessary to make the residential units – rather than the whole project – economically feasible. The opponents also argued the city's findings in support of the variances were inadequate. The court disagreed.

Under the version of the density bonus law in effect in 2007, the city was required to provide incentives to make a low-income housing project feasible. The city made findings regarding the economic need for the variances as well as the community benefits of the project, such as the construction of traffic controls and a new signal, landscaping and more parking than required by ordinance, according to the court. "If the project as a whole was not economically feasible," summed up Bruiniers, "then the below market rate housing units would not be built, and the purpose of the density bonus law to encourage the development of low- and moderate-income housing would not be achieved."

In the unpublished portion of the decision, the court upheld the city's use of a mitigated negative declaration rather than an environmental impact report, and the court ruled there were no violations of the city's Municipal Code. ■

■ The Case:
Wollmer v. City of Berkeley, No. A122242, 2009 DJDAR 16589. Filed October 30, 2009. Certified for partial publication November 24, 2009.

■ The Lawyers:
For Wollmer: Stuart Flashman, (510) 652-5373.
For the city: Zachary Cowan, acting city attorney, (510) 981-6950.
For 1950 MLK, LLP: David Levy, Baird Holm, (402) 636-8310.

housing

West Hollywood Multi-Family Moratorium Invalidated

A City of West Hollywood moratorium on new multi-family housing development has been declared invalid by the Second District Court of Appeal. The court ruled that the city had not made required findings for the moratorium.

Under state law, the city had to adopt written findings to "identify both (i) a specific 'significant, quantifiable, direct and unavoidable impact' upon the public health or safety that would result from continued development approvals, and (ii) objective 'written public health or safety standards, policies, or conditions' on which that impact is based," the court stated. The city's moratorium findings failed to comply, the court ruled.

In June 2007, the West Hollywood City Council approved a 45-day interim ordinance prohibiting – with a few exceptions under interim standards – the issuance of permits for new multi-family dwellings. In July 2007, the City Council extended the moratorium by 10 months and 15 days. A final extension was approved in May 2008. The city stated that a recent proliferation of applications was resulting in fewer and larger multi-family units than were desired to meet the city's housing needs. Essentially, the city sought more and smaller units to increase affordability. The city also began revising its general plan.

Among the applications pending when the city first adopted the moratorium were one by Hoffman Street, LLC, and one from Harper Project, LLC. Hoffman wanted to demolish a 16-unit apartment building on and construct a 17-unit condominium complex on the site, Harper sought approval to demolish a 15-unit apartment building and construct 16 condominiums on the property.

After the city approved the July 2007 moratorium extension, Hoffman and Harper filed a joint lawsuit arguing the city violated the Planning and Zoning Law (Government Code § 65000 et seq.), the Permit Streamlining Act and the California Environmental Quality Act, denied the developers' rights of due process and equal protection, and took property through inverse condemnation. A Los Angeles Superior Court judge ruled for the city. On appeal, the Second District overturned the lower court.

The city first argued that the appeal was moot because the moratorium had expired earlier this year. But the court said that although the appeal was "technically moot," the appeal presented "an issue of continuing public interest" that deserved consideration.

At issue was the interpretation of Government Code § 65858, subdivisions (c) and (g). Subdivision (c) outlines the findings necessary for extending a 45-day moratorium. Subdivision (g) says that certain findings are not required for a moratorium involving demolition or conversion of multi-family housing units or that results in decreased affordability. The city argued, and the trial court agreed, the projects were the type of development described in subdivision (g).

However, the nature of the developers' projects did not relieve the city from having to make the findings required under subdivision (c), the appellate court ruled. "[W]hether the statutory findings are required depends not on the effect of an interim ordinance on a particular applicant challenging an extension, but on the effect of the interim ordinance generally," Justice Walter Croskey wrote.

The court then cited from the statue: "We conclude that by prohibiting the issuance of permits or other approvals for the development of any 'new multi-family structures' not in compliance with the interim zoning standards, the interim ordinance had the effect of requiring the denial of some applications for the development of multi-family housing and therefore had 'the effect of denying approvals needed for the development of projects with a significant component of multi-family housing' within the meaning of the statute. Because the interim ordinance had that effect, the city was required to make the findings set forth in paragraphs (1) through (3) of Government Code § 65858, subdivision (c)."

Under those paragraphs, the city must find there is a specific, adverse impact upon public health and safety, the moratorium will mitigate or avoid the impact, and there is no feasible alternative to the moratorium. The West Hollywood City Council had found there was a "significant unmet need for smaller affordable housing units" and recent projects were not increasing the number of units adequately. The city's findings, the court determined, "failed to identify any specific impact on public health or safety." The findings also did not identify written standards or conditions for determining an impact, and did not address a less burdensome alternative.

The court rejected the Permit Streamlining Act claim, and it declined to consider the CEQA claim. The Second District also directed the trial court to reconsider the due process, equal protection and inverse condemnation claims. ■

- The Case:
  Hoffman Street LLC v. City of West Hollywood, No. B210789, 2009 DJDAR 16525. Filed November 23, 2009.
- The Lawyers:
  For Hoffman: Benjamin Reznik, Jeffer, Mangels, Butler & Marmaro, (310) 203-8080.
  For the city: Michael Jenkins, Jenkins & Hogin, (310) 643-8448.

Coast Grows Up, Central Valley Stretches Out

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deal of development is necessary to make a project feasible. As Rose, who serves as chair of the Urban Land Institute's Los Angeles District Council, said, "If you're paying $100 per square foot for land, you're going to get a whole lot of density out of it."

Even in inland California's biggest cities, no one paid anywhere close to $100 per square for a development site, even during the housing boom. Thus, the relatively inexpensive price of land in the Central Valley and portions of the Inland Empire actually discourages vertical construction. If a parking structure costs $20,000 per parking space to erect while a simple parking lot costs $2,000 per space to grade and pave, the choice for both private and public developers is easy.

The Tale of Two Oil Towns

Consider the example of Bakersfield, a

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city of about 335,000 people at the southern end of the San Joaquin County, and its longtime coastal counterpart Ventura, population 108,000. Bakersfield has "incredibly suburban development," said Jonathan Watts, a principal with Cuningham Group Architecture, P.A., which has offices in both Bakersfield and Marina del Rey. "It's just that age-old model where you keep building out."

Indeed, when the housing market was at its peak, Bakersfield city officials sought not to fill the city's countless vacant and underused parcels, but to expand the city boundaries from Interstate 5 to the Sierra foothills (see *CP&DR Local Watch*, November 2005).

Ventura, meanwhile, has adopted a form-based zoning ordinance, approved multi-family projects that favor pedestrians and discourage driving in the revitalized downtown, and has repeatedly fended off sprawling hillside development proposals.

Bakersfield and Ventura also provide a prime example of something else that differentiates east from west: In inland cities such as Bakersfield, land use initiatives and referendums are rare. But in coastal cities such as Ventura, the electorate repeatedly decides on land use issues. Voters in Ventura and nearly every other city in Ventura County have approved urban limit lines to prevent development on farmland and open space. In the most recent municipal elections, 12 of the 14 jurisdictions with land use ballot measures were in the west. The only inland exceptions were the cities of Davis and Modesto (see *CP&DR, November 1*, 2009).

Without question, there are suburban exceptions in the midst of coastal urban areas. Places like Newport Beach in Orange County and much of the Bay Area's Contra Costa County are decidedly suburban. But many of these suburban places continue to evolve into more urban locales. Meanwhile, there are very few urban exceptions in the inland sea of suburbia.

In the Sacramento region, ever-outward suburban growth is cheaper than building up, said Michael Notestine, a City of Sacramento planning commissioner and a planner with Mogavero Notestine Associates.

"The old theory was that it was cheaper to build infill. But once we started doing it, we found out the infrastructure wasn't always great. Plus, it's a difficult market," Notestine said. "One of the reasons the coast is so different is people want to be there. That creates a demand, which drives up the price of land."

Californians have proven they want to be where the action is, whether it's within walking distance of downtown baseball stadiums in San Francisco or San Diego, or in districts such as Old Pasadena and downtown Berkeley that offer extensive cultural, dining and educational opportunities. Thus, while it was land economics that first forced developers to build projects like residential flats above retail space on a congested boulevard, buyers and renters are now demanding such real estate products because they want the urban lifestyle. This is especially true of younger professionals and empty nesters.

Watts pointed to a small project his firm designed in Marina del Rey called "Element." Featuring precast concrete construction, the project has 50 loft-style condominiums in four stories above two stories of parking on a tight infill site. "That building topology would not have been possible 10 years, ago," said Watts, because the area was strictly suburban. Now, rather than settling for a two- or three-story apartment building or a handful of townhouses, the market demands lofts with concrete walls. It's an urban style that coincides with the location's easy access by foot or bicycle to restaurants, shops and the beach, Watts explains.

Close-In Suburbs No More

Formerly suburban places in coastal California are evolving into urban centers. In the East Bay, for example, a 50-mile-long string of suburbs from Hercules to Milpitas has adopted plans for dense, mixed-use downtown development, often within the vicinity of a transit station. Although plan build-out has slowed with the recession, developers were interested early on and will likely return when the market improves. These downtown plans reflect the sort of public policy seen frequently in coastal urban areas.

The City of San Jose may be the ultimate case study.

For three decades after the end of World War II, San Jose sprouted housing tracts rapidly, as developers took advantage of readily available flat ground and the city's sewer system. "San Jose was your classic low-density, sprawled, suburban 'city,' if you will, that grew by swallowing up land," explained Gary Schoennauer, who spent 31 years in the city's planning department, including 17 as planning director, before leaving for private consulting in 1997. "If you looked at San Jose and San Diego and Phoenix during that same period, they all looked alike. It was during this time that the downtowns all failed."

Change began during the early 1970s, when Santa Clara County and its cities settled on a growth policy that directed nearly all urban development into the cities. This policy eliminated growth pressure on unincorporated areas adjacent to San Jose. Behind the policy, according to Schoennauer, was the realization that low-density sprawl did not generate enough tax revenue to pay for required public services. San Jose went on an infill and redevelopment binge that continues to this day, bolstered by a heavy investment in light rail. The result is a doubling of San Jose's population to slightly more than 1 million over the last 35 years with virtually no outward expansion of city boundaries. Meanwhile, miles of easily developable farmland and ranchland remain untouched in the Coyote Valley between San Jose and Morgan Hill.

Today, most new housing units in San Jose are multi-family, and they are often within walking distance of shops, services and public transit. The city's next big push is a complete overhaul of the north end of town, which today is dominated by single-story business parks (see *CP&DR Local Watch*, September 2005).

San Jose's all-infill policies are foreign to inland California. Riverside County, for example, urbanized 37,000 acres of land from 2002 to 2006, according to the California Department of Conservation. During that same period, urban growth in the Central Valley swallowed up 76,000 acres of land, about 40% of it prime farmland.

There is some evidence things are changing, however. Sacramento has approved a massive reuse project involving 12,000 housing units and millions of square feet of office and retail space on former rail yards adjacent to downtown. Stockton has poured more than $100 million into its downtown waterfront area and, with the encouragement of state regulators, has adopted a general plan calling for mixed-use, village-style development and easier permitting of downtown projects.

"I do think that it's changing," said Shane Hart, senior vice president of Stockton-based developer The Grupe Company. "We're definitely heading toward what you are seeing in the Bay Area."

Still, it could take a while. Stockton and other fast-growing inland California cities, such as Modesto, Merced, Bakersfield and Riverside, have consistently ranked among the top 10 foreclosure markets in the country since the housing meltdown began. Thus, Grupe's 7,000-unit "Sanctuary" project featuring a mixed-use town center with 1,000 housing units and a bus rapid transit station is on hold indefinitely.

"The home prices right now are just too low to make these master-planned projects pencil," Hart says. "When resale condos are going for $60,000, you're not going to build any high-density condos on a podium." ■

deals

MORRIS NEWMAN

Apple Valley Trades Plan For Stadium

The Town of Apple Valley wants to build a minor league baseball stadium. That's not unusual in California, where stadium building seems only a slice less popular than tailgate parties with free-flowing beer. What is unusual, however, is the way that the town plans to pay – or rather, not pay – for this $20 million to $25 million project.

Insofar as I can see both points of view, I have structured this analysis in the form of a dialogue between two imaginary people, Mr. Apple and Mr. Valley, both of whom are supposed residents of the community. Readers interested in textual analysis should know that, in this representation, Mr. Apple represents free market ideology, while Mr. Valley represents the principals of planning and orderly government.

VALLEY Hello, Mr. Apple. How goes it this morning?

APPLE It's a great day for Apple Valley, I'm telling you that much, Mr. V.

VALLEY Why, have all the rascals been driven out of local government?

APPLE Ha, ha! At least we agree on that much, Mr. V. No, I mean that the High Desert Mavericks, a farm team of the Seattle Mariners baseball club, are coming to town.

VALLEY I thought our friends just up the road in the City of Adelanto had a lock on that franchise.

APPLE "Had" is the operative word. The team signed a 20-year contract with Adelanto back in '91, and the lease is up in 2010. The team does not want to re-sign in Adelanto, however, because the city does not want to pay $3.4 million in deferred maintenance on the stadium it built 20 years ago. Seems the local city manager thinks that it would be a waste of money to maintain the stadium, seeing that the structure is only worth $3.5 million. They're already talking about "redeveloping" the place.

VALLEY (smacking his forehead) Merciful heavens! Not another swap meet!

APPLE Exactly. And so the Mavericks approached the town government back in February and asked if we wanted to build a brand new stadium for them.

VALLEY That sounds foolish. Why will we succeed financially where Adelanto failed?

APPLE Market forces, my dear Valley, market forces! Adelanto built its stadium on the outskirts of town – hardly a good way of encouraging development in the stadium area. We plan to build our stadium near downtown Apple Valley, just a short drive from Interstate 15. We're geographically close enough to the existing fan base to fill the bleachers, and new development to surround the stadium is part of the deal.

VALLEY I don't know how we can pay for the land and the construction.

APPLE That's the beauty part, Valley! We're not paying a dime for the land. We actually convinced two local landowners to contribute the land. It's genius, I'm telling you!

VALLEY Donate?! What on earth can those land owners be thinking?

APPLE They're thinking like smart people, Mr. V. They believe the baseball stadium will encourage new development on their land.

VALLEY Isn't that a bit of a gamble? Being a timid sort, I generally balk in the face of risk.

APPLE That's the other beauty part! The city is going to allow the developer to build up to 1,644 townhouses and supporting retail on the leftover acreage. The developer will get rich from home sales, the land owners will get rich on the land lease for the stadium, and the city will get rich on new property tax revenues! It's a win-win-win-win-win!

VALLEY So the city is only acting as a go-between between land owners and developers? Is this just the latest episode of "Pimp My Ball Park"?

APPLE The city, in fact, is looking into the possibility of floating some bonds based on rental income from the stadium to pay for road improvements and other infrastructure.

VALLEY Hmmm! So they've gotten it all figured out. Except for one thing….

APPLE Here comes the pro-government, anti-business palaver! Go ahead, Valley, I've been expecting it!

VALLEY Well, government has big limitations, and business has big strengths, but what about public policy? What about planning?

APPLE Seems we're doing pretty well without it.

VALLEY Was this acreage originally zoned for housing or stadiums in our general plan?

APPLE No, it was zoned commercial.

VALLEY Exactly. So whenever a baseball team comes to town, we just throw away all our planning goals and we say, "Build whatever you like." As your friend Rush Limbaugh likes to say, grab your ankles!

APPLE I fail to see your problem. Local officials brokered a mutually beneficial arrangement between private businessmen. The result is that the town gets a stadium, plus a new single-family neighborhood, without having to pay for it. This is a brilliant solution.

VALLEY But doesn't this "arrangement" set a bad precedent? We are essentially throwing away our planning process in favor of a system that literally encourages developers to build whatever they want. That seems like a disaster to me.

APPLE Where's the disaster, Mr. V.? The city gets what it wants – a stadium and some nice housing – without having to bribe developers to build it for us. We're not a big city like Victorville, with a wealthy redevelopment agency to make these projects happen for us. This is poor man's redevelopment: We've got the dirt, you've got the construction loan, let's shake hands. How can you object? Isn't the city getting what it needs?

VALLEY Well, I'm not sure. The general plan is the way we anticipate the city's needs.

APPLE To hell with the general plan! It's just a piece of paper.

VALLEY This way of development opens the door to a potentially chaotic process! It's the opposite of planning.

APPLE And what's the matter with that? What's planning done for us lately?

VALLEY Planning represents the community consensus on the way we want our town to look in 20 years. At least, that's what it's supposed to be. But as soon as someone comes to town with a fistful of money, we just kick planning to the curb.

APPLE Honestly, I just don't see the problem.

VALLEY (in great frustration) You'll definitely see it in 20 years when you're living in a mish-mash like Provo, Utah, or in the in post-industrial ruins like the old oil towns in Kern County!

APPLE Hell, by that time I'll be retired on Oahu, where bargirls with eyes big as oysters will be serving me drinks with parasols in them. But right now, if you don't mind, I've got to see a man about a strip mall just down the street from where that new stadium is planned… ■