CP&DR

VOL. 24, NO.18 — DECEMBER 15, 2009 CALIFORNIA PLANNING & DEVELOPMENT REPORT

The Biggest Stories Of 2009

Predomination Of Public, Private Economics Woes Continues

BY PAUL SHIGLEY

Many people in the planning and development community are saying good riddance to 2009. It was a year marked by extreme financial distress for government agencies and private industry. If 2008 was a year to "do more with less," then 2009 was a year to "do less with even less" – a year simply to hunker down and try to endure.

Thus, it is no surprise that three of *CP&DR*'s top four planning and development stories of the year involve money – or, more precisely, the reaction to a severe lack of money. When there is no funding available, the planning priorities and projects seem to simply slip away.

Will 2010 be any different? Almost every indicator and forecast says money will remain very tight, and we should expect a repeat of 2008 and 2009. On that less-than-encouraging note, we offer *CP&DR*'s Top 10 stories of 2009.

1. State budget disaster

California's budget inevitably affects planning and development heavily, especially when the budget is getting whacked. No matter what protections local governments try to put into place, the state always finds ways to take local revenue. This year was no exception.

The Legislature and Gov. Schwarzenegger settled on a "budget" for the 2008-09 fiscal year in February – more than seven months after the fiscal year began. That budget rested on spending and revenue measures placed before voters in May. Sending mixed messages – the budget cuts were too deep and taxes should be raised; the government has enough money and this isn't the time to raise any taxes – voters rejected the ballot measures. That sent lawmakers, the administration and the lobbying corps back to work. In late July, lawmakers approved a 2009-10 state budget that allegedly closed a $24 billion deficit.

top 10 of 2009

There are a number of reasons why this year's state budget impacts people in the business of planning and development: The budget shifts $2.05 billion in tax increment from local redevelopment agencies to schools and the state; subventions to counties that conserve farmland were eliminated; state funding for transit was axed, at least until a court intervened; and the Governor's Office of Planning and Research was placed on the chopping block.

The budget's redevelopment tax revenue shift of $1.7 billion this fiscal year and another $350 million in 2010-11 is a larger version of a shift approved in 2008. The California Redevelopment Association (CRA) successfully sued to block implementation of the 2008 shift, and the organization filed a new lawsuit over the latest state maneuver. The redevelopment lobby's basic contention is that the state constitution protects redevelopment revenues. According to the CRA, the tax revenue shift would force many redevelopment agencies to halt new activities and devote all remaining revenues to debt retirement (see *CP&DR*, August 1, 2009). Some agencies might even have to go out of business entirely. The potential transfer, along with decreased revenues because of the real estate market collapse, has caused agencies to cut back. For example, San Jose's redevelopment agency, the state's largest, reduced its staff by about 25% this fall.

The budget approved by lawmakers contained $27.8 million for subventions to counties that implement Williamson Act (California Land Conservation Act) contracts for farmland conservation. That amount was down from $35 million during recent years, and from a high of $39 million. The money is intended to backfill county coffers, as the Williamson Act provides substantial property tax breaks for landowners who agree not to develop their properties for 10 years. However, Gov. Schwarzenegger slashed all – CONTINUED ON PAGE 4

inbrief

About 475,000 residents, major sea ports and airports, thousands of miles of roads and rail lines, power plants and wastewater treatment facilities are at risk from flooding due to sea level rise, according to a new report from the State Lands Commission.

Using research from Scripps Institution of Oceanography, University of California, San Diego, and other sources, the Commission report pegs likely sea level rise at 16 inches by 2050 and 55 inches by 2100. Yet a Commission survey of ports, harbor districts, and coastal cities and counties earlier this year found that "the majority of respondents have not yet begun to comprehensively consider the impacts of sea level rise."

The Commission has jurisdiction over tidelands and the beds of navigable rivers, lakes, bays and estuaries. In many instances, especially along the coast, jurisdiction has been transferred to local entities, but the Commission continues to monitor uses. Based on the new report, the Commission is headed toward requiring future development and lease applicants to analyze the potential impacts of sea level rise.

Property rights advocates have raised concerns about the report because it assumes that Commission jurisdiction will creep up the coast as sea level rises. Thus, coastal landowners could lose both real estate and legal rights to sea level rise, according to an analysis by Nossaman attorney Howard Coleman, who is urging property owners to apply for permission to – CONTINUED ON PAGE 3

editor's note

As you may see from our list of the Top 10 stories in 2009, a lot happened last year. A lot of what happened – water legislation, a climate change adaptation plan – was generally good. But a lot of what did not happen – construction, real state budget solutions – was bad.

For *CP&DR*, 2009 was a year of change. In July, we went all-digital and started producing two newsletters every month. We are now able to provide more timely news and full color graphics. The response from readers has been almost 100% positive. Thanks to the elimination of printing and mailing expenses, we also were able to reduce our subscription price. The changes have not been without a few bugs, some of which have arisen later rather than sooner. Stick with us. Our digital machine will be well-oiled in no time.

The close of one year, of course, induces predictions for the coming year. Putting one's predictions in print – even virtual print – is a dangerous business. But I can't help myself. So here are three for 2010.

• Redevelopment deadlines will get delayed by at least 30 years. The state budget deficit is already at $17 billion. That figure is only going to grow, and it seems that lawmakers and the administration have already made all of the "easy" budget decisions. The coming budget scramble promises to be a wild one. During the last budget go-round, the City of Industry proposed letting the state take a cut of property tax increment revenues in exchange for a lengthy extension of redevelopment activity, whether or not blight still exists. The proposal failed, but I think it will return.

With many redevelopment project areas scheduled to sunset during the next few years, and with the state desperate for funding, we just might have a marriage of convenience here. I'm betting more than a few redevelopment agencies would be willing to trade a cut of tax increment revenue – 10%? 20%? – for another 30 or 40 years of redevelopment authority. And I'm betting state officials are willing to make the trade for, say, $750 million a year, which is about 15% of current tax increment receipts. I'm not arguing this is a good policy choice. But it is expedient, and expediency is king of Sacramento.

• The SB 375 backlash will start to hit. Truly reducing the amount that people drive is going to take enormous changes in land use development and growth patterns. There's some acceptance of the needed planning changes. But reducing driving also is going to require aggressive measures that discourage people from driving – and that's going to necessitate very unpopular decisions.

We've all heard the pitch from true believers that cities should be designed for people, not for cars. Sounds great until you realize this notion means placing the needs of pedestrians, cyclists and public transit ahead of motorists. This, in turn, means dividing up the public right-of-way to provide more room for sidewalks, bike lanes, and light rail and bus lines – and a lot less room for cars. It means fewer and smaller parking lots. It probably means some form of "congestion pricing." Such ideas will start to come into tighter focus when the Air Resources Board sets regional greenhouse gas emissions reductions targets in September. Good luck selling these ideas to millions of people who are used to driving everywhere.

• Housing production will increase. OK, this is any easy one. In 2009, housing production was at the lowest level ever recorded. It's not going to go down further. The turnaround will not be rapid, but it's coming.

We all read the recent news stories about California's slow population growth of late. Keep in mind, though, that even when population increases slowly, the state still adds a lot of people. From July 2008 to July 2009, the population jumped 353,000. That increase equates to a need for roughly 140,000 housing units – or about 40,000 fewer than builders produced in 2008 and 2009 combined. In other words, market demand is going to necessitate more housing production.

Happy New Year. ■

– PAUL SHIGLEY

CP&DR

is published semi-monthly by

Solimar Research Group
Post Office Box 24618
Ventura, California 93002

Telephone: 805/643-7700
Facsimile: 805/643-7782

Subscription Price: $238 per year

ISSN No. 0891-382X

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in brief

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build structures that protect against sea level rise.

The seal level rise report is available on the State Lands Commission website, www.slc.ca.gov.

The Governor's Office of Planning and Research released updates of two reference documents in December – the 2010 edition of "Planning, Zoning and Development Laws," and the 2010 version of the "Planners' Book of Lists."

The 370-page collection of laws contains summaries of new planning, zoning and development laws, as well as summaries of pertinent attorney general's opinions from 2009. The introduction states, "OPR staff receives hundreds of requests for technical assistance each year from local planning agencies. In an effort to address some of these technical assistance requests, the '2010 Planning, Zoning, and Development Laws' is comprised not only of state planning and zoning laws, but also excerpts from related statutes."

The "Book of Lists" contains all the usual contact information for local, regional, state and federal agencies, as well as general plan status reports. The document also provides the results from OPR's annual survey of planners, which this time concerned regional planning efforts, local transportation planning, climate change issues, energy and water conservation planning, and funding for planning.

Both publications may be downloaded for free from the OPR website, www.opr.ca.gov.

The Riverside County Board of Supervisors has postponed until January a decision on a new town proposal that has drawn significant opposition from hunters, bird watchers and environmentalists because of the 2,800-acre project site's close proximity to the San Jacinto Wildlife Area.

Lewis Group of Companies' proposal is called Villages of Lakeview. It would contain 11,500 housing units, a shopping center, offices, a number of community facilities and 32 miles of bike lanes, trails and paseos. About half of the site would be used for parks or preserved as open space.

Hunters and bird watchers have led the opposition to the project because the 10,000-acre wildlife area, which includes Mystic Lake, provides habitat for many birds traveling north and south on the Pacific Flyway, as well as for resident bird populations. The farmland on which Lewis proposes development also provides bird habitat. In addition, the wildlife area, which the state pieced together during the 1970s and 1980s, provides habitat for about 25 special-status plant and animal species.

Although Lewis's design includes a 500-foot buffer and earthen berm between the wildlife area and homes, opponents say the project would change the nature of the area. "San Jacinto Wildlife Area effectively would be turned into an urban park with all of the associated problems of trash, feral cats and vandalism," wrote syndicated outdoors writer Jim Matthews, who noted the wildlife area is one of the few places in metropolitan Southern California where hunting is permitted.

After hearing from more than a dozen project opponents during a mid-December hearing, supervisors delayed a decision until staff members have time to respond to questions and concerns. Lewis's project website is www.thevillagesoflakeview.com.

The second and final phase of the Playa Vista development near Playa del Rey appears headed toward approval in early 2010, as the Los Angeles Planning Commission recommended approval of the project earlier this month.

The city originally approved phase two in 2004, but the Second District Court of Appeal two years ago ruled the environmental impact report was deficient (see *CP&DR In Brief*, October 2007). Master developer Playa Capital, LLC, started the process over and a new EIR was released this year.

The second phase is proposed for 111 acres between a nearly complete 6,000-unit, mixed-use residential community to the west, and a slow-to-develop office campus on the east. The middle section is viewed as the heart of Playa Vista and is planned to have 2,600 housing units, nearly 200,000 square feet of retail development and 175,000 square feet of offices.

Although a number of Playa Vista residents testified at the Planning Commission meeting in support of phase two, environmental groups that have fought the project for years – including the Ballona Institute and the Sierra Club – continued their opposition. They maintain that much of the site should provide wetlands and open space.

The City of Sacramento has approved a specific plan for the 29-acre Docks site along the Sacramento River, across Interstate 5 from downtown.

The City Council unanimously chose Option B, which allows about 1,000 residential units and 200,000 square feet of office space, mostly in a few towers. The plan further includes about 40,000 square feet of retail development, a large park and the extension of a riverfront promenade from Old Town (see *CP&DR Places*, August 1, 2009). The city also extended for 4 1/2 months an exclusive negotiating agreement with a team of developers led by Darius Anderson's Kenwood Investments.

The proposed Merriam Mountains housing development in North San Diego County suffered a setback in December when the Board of Supervisors split 2-2 on the project. The tie vote equates to rejection of the project; however, supervisors within 30 days may call for a new hearing, and reconsideration appears likely.

County Supervisor Ron Roberts missed the December 9 meeting at which the board divided on the project, as he was attending a California Air Resources Board meeting in Sacramento. Typically a supporter of growth, Roberts could ask for reconsideration and provide the deciding vote.

Stonegate Development Group proposes 2,700 single-family houses, condominiums and apartments, as well as a 10-acre retail center, on 560 acres of a 2,320-acre site just west of Interstate 15 and north of Escondido (see *CP&DR Local Watch*, August 2006). Stonegate would preserve more than half of the site as open space.

Area residents strongly oppose the project, which they say would be out of place on land currently zoned for low-density, single-family housing. In addition, questions have arisen about fire protection. Supervisors Dianne Jacob and Pam Slater-Price voted against the project, citing the lack of a fire evacuation plan for residents and concerns over water to serve the project. "It's a wonderful project in the wrong location," Jacob stated.

Supervisors Greg Cox and Bill Horn voted for the project. Since the December 9 meeting, project opponents have questioned Horn's pre-meeting advice to Stonegate that the developer request a continuance until all five board members were present. The project website: www.merriammountains.com.

The largest wind energy project ever in California won unanimous approval from the Kern County Board of Supervisors in mid-December.

Alta Windpower Development plans to erect up to 320 wind turbines on a 9,100-acre site between the cities of Tehachapi and Mojave. The extremely tall (more than 200 feet) and efficient machines will generate 1.5 to 3 megawatts of energy apiece for a total of about 800 megawatts – which is more than most gas-fired power plants in California generate.

Area residents complained that the wind turbines would be noisy, unsightly and potentially unsafe, as the turbine blades could toss chunks of ice long distances. Environmentalists argued that the turbines would kill many birds of prey that hunt in the area, including very rare California condors. Supervisors required Alta Windpower to relocate and eliminate a few turbines to help quell residents' protest, but litigation over the project appears likely.

Kern County is considering numerous other wind energy proposals that total more than 4,000 megawatts of energy.

Former Siskiyou County Planning Director Wayne Virag has been fined $2,600 by the Fair Political Practices Commission for failing to disclose economic interests in real property and for failing to file a statement of economic interests upon leaving office.

County supervisors fired Virag in 2006 amid a local law enforcement investigation into alleged improprieties and conflicts of interest stemming from a real estate development business in which Virag was a partner (see *CP&DR In Brief*, September 2006). A county employee for 11 years and the planning director for two, Virag never faced criminal charges. However, the FPPC ruled that Virag failed to disclose on official statements that he owned about a dozen pieces of property in Siskiyou County. ■

No Money For Planning Or Construction

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but $1,000 in subventions (see *CP&DR*, August 15, 2009). As a result, a number of large agricultural counties have revisited their participation in the land conservation program, and some counties have declined to enroll new properties in the program. In Yolo County, which has long enforced some of the strongest agricultural land protection policies in the state, the Board of Supervisors decided to put a farmland preservation tax on the 2010 ballot to replace the $1.1 million in subventions the county lost this fiscal year. Without additional funding, supervisors say, they will have to discontinue Yolo County's participation in the land conservation program.

The budget deal also eliminated the State Transit Assistance program, which provided $230 million a year to local transit agencies for operating and capital assistance. The cut came at the same time the state is requiring regions and localities to reduce greenhouse gas emissions through AB 32 and SB 375. The California Transit Association sued over the cut and won, but it remains unclear when local agencies might receive their money from the state. In addition, a Superior Court in mid-December ruled the state must pay transit operators $1.2 billion the state had diverted during the 2007-08 budget cycle. The state has until April 2010 to show the court how it will replenish the State Transit Assistance fund.

When budget negotiations resumed after the May election, Schwarzenegger called his own Office of Planning and Research (OPR) a "total waste." Soon thereafter, it appeared that most if not all of OPR's planning, environmental and California Environmental Quality Act functions would be parceled out to other entities, such as the Air Resources Board and the Department of Finance (see *CP&DR*, September 1, 2009). But while it remains short-staffed, OPR is still alive and will apparently remain in business unless state lawmakers transfer its responsibilities to other entities.

There were other impacts of the budget mess. Some state funding was slow to go out because the state could not issue debt for a while. "Furlough Fridays" mean most state offices are closed 15% of the time, which, among other things, has done no favors for the City of Sacramento's slow efforts to revive downtown. And there is little reason to think the pain will subside. With revenue coming in slower than expected and accounting gimmickry in the 2009-10 budget becoming evident, the state is already facing another deficit that the Legislative Analyst's Office pegs at $17 billion.

2. Figuring out SB 375

Senate Bill 375 is potentially so far-reaching that it dominated discussion at many California planning and local government conferences this year, even though the law has not taken effect yet at the local level.

Passage of SB 375 was *CP&DR*'s top story of 2008. Here's what we said one year ago: "State Sen. Darrell Steinberg's bill has the potential to alter the planning system in dramatic fashion. Essentially, the bill uses the urge to limit driving as a way to mandate regional planning. Quite clearly, the goal is to encourage infill development, mixed uses and transit, and to discourage greenfield housing subdivisions." In 2009, planners began to grapple with just how dramatic the alteration may be.

The legislation requires the Air Resources Board (ARB) to establish regional greenhouse gas emissions reductions targets related to land use by September 30, 2010. The state's 18 metropolitan planning organizations (MPOs) must then incorporate the targets into "sustainable communities strategies" that coordinate land use and regional transportation plans so as to reduce vehicle miles traveled (VMT). In 2009, an advisory committee completed a report to the ARB regarding methodology for setting targets. The Regional Targets Advisory Committee recommended that the board establish a list of best management practices, and use those practices in addition to modeling to determine regional targets (see *CP&DR*, October 1, 2009). Although the advisory committee in September urged swift action by the ARB, the board has not acted on the committee's recommendations.

Meanwhile, two different approaches for local governments and MPOs emerged during 2009. Some agencies began designing bureaucratic approaches under which they could prove future compliance with SB 375 and mandates related to climate change. Other agencies took a more direct approach by preparing and starting to implement policies that most people agree will cut the all-important VMT (see *CP&DR Insight*, July 1, 2009).

The ARB's determination of regional emissions reductions targets – and the likely land use consequences of those targets – undoubtedly will be a very big story during 2010.

3. Petaluma lays off all its planners

The Sonoma County city of Petaluma has a special place in planning history. In 1972, Petaluma became the first California city with voter-mandated growth control. In 2009, Petaluma earned a new distinction when the City Council disbanded the Community Development Department and laid off all of the planners (see *CP&DR Local Watch*, May 2009).

Faced with severe budget problems, city officials in 2008 greatly reduced general fund support for Community Development and forced the department to survive primarily on its own fees. But with very little development generating fee revenue, the department had racked up a nearly $300,000 deficit by early April of this year. With no firm alternative to carry on planning functions, the city later that month shut down the department.

In July, the city hired Mountain View-based Metropolitan Planning Group to handle planning functions. In turn, the consultant hired three former City of Petaluma staff members to provide some continuity.

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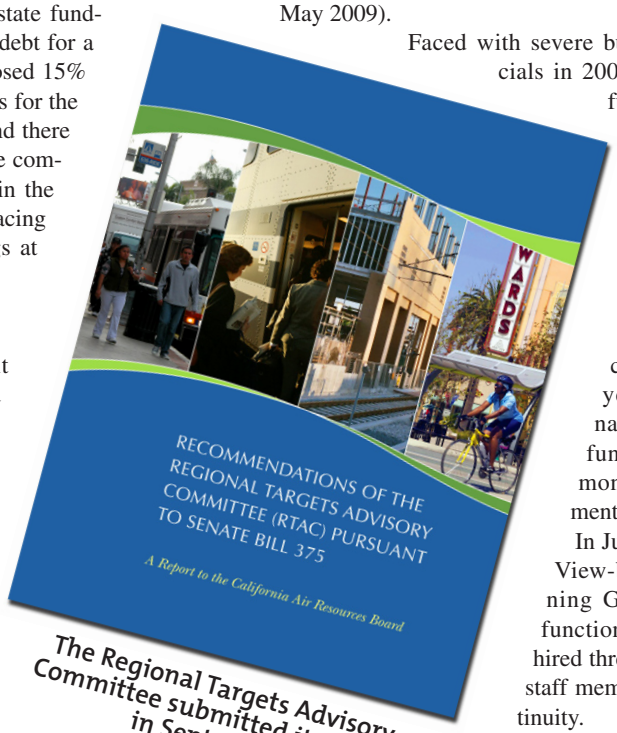

The Regional Targets Advisory Committee submitted its report in September.

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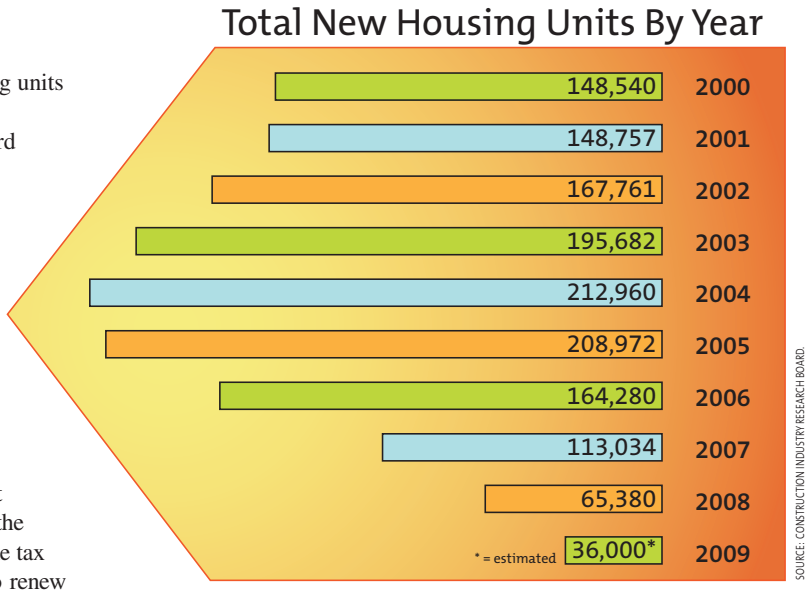
4. Housing construction reaches new low

It was not even close. Builders constructed fewer new housing units in 2009 than any year since the end of World War II.

When the year began, the Construction Industry Research Board forecast that builders would pull permits for 67,000 housing units in 2009 – just up from the previous low of 65,380 units in 2008, and down an amazing 74% from the recent peak of 212,960 units in 2004. But that prediction turned out to be wildly optimistic. By the end of October, builders had received permits for only 29,901 units and the construction board was projecting only 36,000 housing starts for the year. That would mark a 45% drop from the previous record low.

Housing construction remained desperately slow despite a federal tax credit of $8,000 and a state tax credit of up to $10,000 for buyers of new homes. Builders said the state credit in particular increased buyer activity in new subdivisions, and the California Building Industry Association urged an extension of the tax credit program after it expired in July. State officials declined to renew the program, but the builders will lobby to revive the tax credit in 2010.



5. Football stadium wins CEQA exemption

Shortly after the new year began, the City of Industry approved Majestic Realty's proposal for a 75,000-seat football stadium, 25,000-space parking lot and about 3 million square feet of entertainment, retail and office development on a 560-acre site near the intersection of the 60 and 57 freeways. That project replaced a 5 million-square-foot business park that Industry had approved for the same location in 2004 but which never broke ground.

Neighbors were not happy about a stadium that would bring tens of thousands of cars to an area already choking on traffic and smog. The neighboring cities of Diamond Bar and Walnut as well as a Walnut-based citizens group sued over the new project's environmental impact report. Diamond Bar quickly settled in exchange for $20 million in traffic mitigation, a school athletic field, property for a hotel, and up to $1 million annually for a community fund.

When the City of Walnut and the group Citizens for Community Preservation declined to settle, Industry began lobbying the state Legislature for an unprecedented exemption from the California Environmental Quality Act (CEQA) and the state law requiring a project to be compatible with a city's general plan. The city also sought to nullify all legal challenges. After lining up support from labor unions, Industry found a surprisingly receptive audience from Democrats in the Capitol.

The City of Industry's football stadium: economic engine or public policy disaster?

Under intense pressure from state lawmakers and the governor's office, the Walnut City Council in late September dropped its lawsuit in exchange for $9 million in traffic mitigation, annual contributions of up to $500,000 for a community fund, and promises from Industry and Majestic regarding transit, noise and public safety. But when Citizens for Community Preservation refused to budge, lawmakers – acting in a special October session – approved AB 81 X3 (Hall). That legislation provided the exemptions requested by Industry and barred all previous and future legal challenges based on CEQA (see *CP&DR Capitol Update*, October 15, 2009). Schwarzenegger signed the bill on the project site amid much fanfare.

Supporters called the project "one of the most significant job-creation projects in the nation." Opponents and CEQA defenders called AB 81 X3 "disastrous."

6. Water legislation passes

Schwarzenegger and Steinberg, who took over as state senate president pro tem in 2009, have proven to be a strange-bedfellows duo willing to address difficult topics. One of those is water.

The five-bill package approved during a special session in November and signed by Schwarzenegger might be the most significant water legislation since approval of the State Water Project in 1960. At least that's the conventional wisdom. But doubters persist, in large part because the legislative package included an $11.1 billion bond for various water and environmental projects that will appear on the November 2010 ballot. Considering the state's perilous budget situation, selling voters on more debt could be very difficult.

Still, the legislation does establish a new Delta Stewardship Council that is charged with preparing a Delta plan by 2012 and determining the consistency of local plans and projects with the Delta plan. Lawmakers also created a new conservancy to manage Delta ecosystem restoration and established a "watermaster" to enforce state decisions regarding freshwater flows into the Delta (see *CP&DR*, November 15, 2009). The idea is to centralize Delta management so that it is more consistent and accountable. In addition, the five-bill package created the first statewide groundwater monitoring program, requires urban water consumption to decrease 20%

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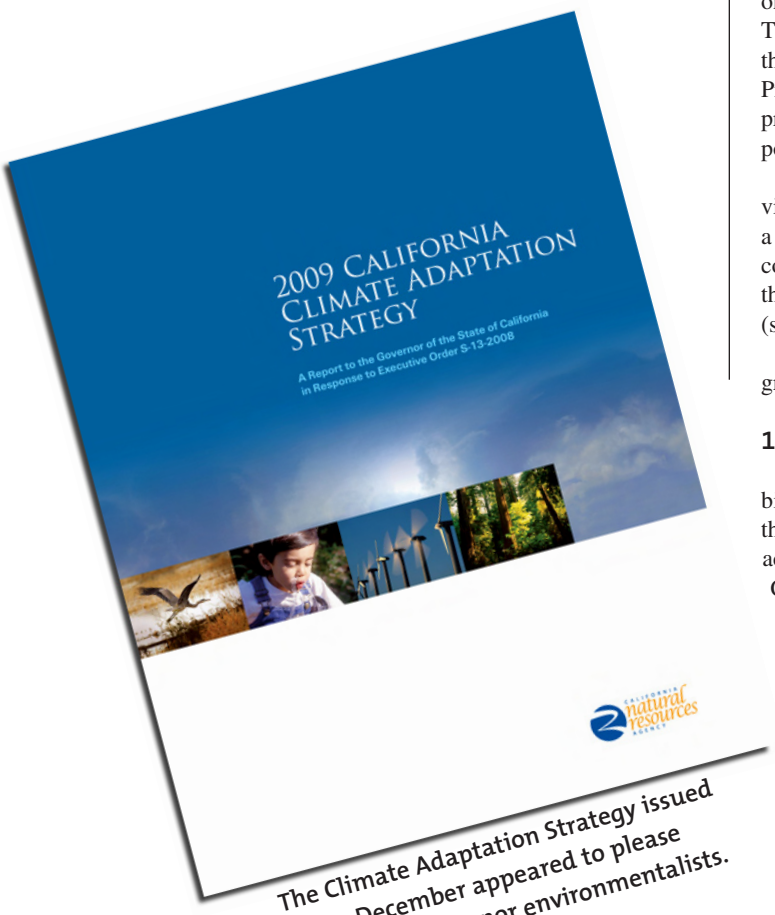
by 2021, and repealed a loophole allowing unreported water diversions by Delta landowners.

California's longstanding north-south division re-emerged during the water legislation debate, and the 2010 water bond campaign may magnify that division.

7. Cal Supremes get serious about Prop. 218 enforcement

In 2008, the state Supreme Court struck down a Santa Clara County Open Space Authority assessment as a violation of Proposition 218 because the authority did not put the assessment to a vote. The court followed up this year with a somewhat technical ruling in *Bonander v. Town of Tiburon*, 46 Cal. 4th 646 (2009), that cleared the way for *Tiburon* property owners to challenge an assessment for placing utility lines underground (see *CP&DR Legal Digest*, July 1, 2009). The property owners argue they have the right under Proposition 218 to decide on the assessment.

Only two weeks after issuing the *Tiburon* decision, the state high court accepted another Proposition 218 case for review. The question in *Greene v. Marin County Flood Control District*, No. S172199, is whether Proposition 218 requires secret voting, and, if so, whether the flood control district violated the requirement during 2007 balloting on a proposed storm drainage fee. If the court decides the district's process was legally inadequate, it could make Proposition 218 compliance more difficult for local government. The court is likely to hear the case in 2010.



The Climate Adaptation Strategy issued in December appeared to please neither builders nor environmentalists.

8. MTA approves $40 billion L.A. transit plan

Freeways may define Los Angeles, but in October the Los Angeles Metropolitan Transportation Authority approved a long-range transportation plan that calls for $40 billion worth of public transit projects over the coming two decades (see *CP&DR Insight*, December 1, 2009). Among the projects included in the plan are light rail line extensions to Los Angeles's Westside (including the long-discussed "Subway to the Sea"), to Los Angeles International Airport and further into eastern Los Angeles County suburbs; a new regional connector to ease light rail trips through downtown Los Angeles, and four north-south bus rapid transit lines in the San Fernando Valley.

For nearly two decades, transportation officials in Los Angeles have steered investment toward public transit. The result has been construction of more than 100 miles of light rail lines, creation of the most popular bus rapid transit route in the state in the San Fernando Valley, and establishment of the Metrolink heavy rail system that connects five counties. The MTA's new long-range plan takes the public transit emphasis at least one step further.

9. Air pollution fee on new development is upheld

A first-of-its-kind air pollution fee on new development was upheld in October, when the Fifth District Court of Appeal rejected building and taxpayer group arguments over the San Joaquin Valley Unified Air Pollution Control District's "indirect source" fee program. More than three years ago, the district began assessing the smog mitigation fee on most residential, commercial, industrial, office and public projects. The fee averages about $475 per dwelling unit, and the district uses the money to fund air pollution offsets, such as diesel engine retrofits. Project proponents may reduce their fee by including "smart growth" provisions, such as higher densities and access to transit, and by incorporating energy efficiency and clean air measures.

Builders, business advocates and taxpayer groups argued the fee violated the Mitigation Fee Act because the district did not demonstrate a nexus between the effects of development and the fee. However, the court ruled the fee is regulatory in nature, not a development fee, and, therefore, is not subject to the Mitigation Fee Act's nexus requirement (see *CP&DR Legal Digest*, October 15, 2009).

The ruling is expected to ease the implementation of fees tied to greenhouse gas emissions.

10. State finalizes climate adaptation plan

The Earth's changing climate is going to result in higher sea level, bigger floods, and more and larger wildfires – and public agencies that have land use authority or that provide infrastructure should plan accordingly. That was the message contained in the California Climate Change Adaptation Strategy that the Schwarzenegger administration completed in early December. Development interests said the plan overreaches, while environmentalists said it does not go far enough (see *CP&DR Insight*, November 1, 2009).

What appears certain is the Schwarzenegger administration's commitment to the plan. The governor appointed a committee to make specific implementation recommendations based on the plan. The committee includes such heavy hitters as former Gov. Pete Wilson, former Assembly Speaker Robert Hertzberg, and former U.S. Environmental Protection Agency Administrator William Reilly. With a July 2010 deadline, the committee could make big news next year. ■

CP&DR legal digest

Kern-Castaic Water Transfer EIR Upheld

Water Deal Is Acceptable With Or Without State Plan, Court Rules

BY PAUL SHIGLEY

The environmental impact report for a water transfer from a Kern County irrigation district to an urban water supplier in the Santa Clarita Valley has been upheld by the Second District Court of Appeal.

The unanimous three-judge panel overturned a trial court judge who had struck down the EIR because it did not adequately address a State Water Project framework and ongoing environmental review. The Second District ruled that the EIR did address the State Water Project issues and said the water transfer is a separate matter anyway.

The ruling is a victory for water providers and developers in Los Angeles County's Santa Clarita Valley, and a setback for environmentalists and slow-growth activists. The rapidly growing Santa Clarita Valley has been at the center of numerous legal and political battles over water plans and water supply assessments. A transfer of 41,000 acre-feet of State Water Project (SWP) water to the Castaic Lake Water Agency has been a major point of contention. In 1999, the agency signed a contract under which the Wheeler Ridge-Maricopa Water Storage District (which receives SWP deliveries via the Kern County Water Agency) would permanently transfer the rights to 41,000 acre-feet of SWP water to Castaic. That transfer was based on the "Monterey Agreement," a 1995 plan that modified how the State Water Project allocated water during dry years and which authorized the transfer of 130,000 acre-feet of water from agricultural use to urban suppliers.

In 2000, an appellate court struck down the Monterey Agreement EIR because a Monterey County water agency – and not the Department of Water Resources (DWR) – served as the "lead agency" that certified the EIR (*Planning & Conservation League v. Department of Water Resources*, (2000) 83 Cal.App.4th 892). The Second District followed up by invalidating the EIR for the Kern-Castaic water transfer because the environmental document tiered off the Monterey Agreement EIR. In *Friends of the Santa Clara River v. Castaic Lake Water Agency*, (2002) Cal.App.4th 1373, the court ruled that an EIR that tiers off a program EIR is not valid if the program EIR is no longer in place (see *CP&DR Legal Digest,* March 2002). Importantly, though, the court rejected Friends' request for an injunction halting the water transfer. Castaic has continued to have access to the SWP water since 1999.

In late 2004, Castaic certified a second EIR and approved the water transfer again. The new EIR did not tier off any other document and analyzed the impacts of the transfer under three different scenarios: (1) a transfer based on 2003 amendments to the Monterey Agreement (known as Monterey Plus), (2) a transfer without Monterey Plus or a reallocation of water in dry years, (3) a transfer without Monterey Plus but with other SWP permanent cutbacks. The EIR also included five alternatives to the transfer.

Although the EIR had to go back to Los Angeles County Superior Court because of the 2002 *Friends* ruling, Friends dismissed its action because the group lacked money to continue litigating. However, the Planning and Conservation League (PCL) and the California Water Impact Network (CWIN) filed a new suit over the second EIR. Superior Court Judge James Chalfant rejected most of PCL and CWIN's arguments. Still, he concluded the EIR was flawed because it did not adequately explain the relevance of the pending Monterey Agreement EIR to the scenarios in the Castaic EIR. Parties on both sides appealed, and the Second District ruled entirely for Castaic.

The appellate panel overturned Chalfant on the issue of the scenarios for two reasons. First, the court ruled, PCL and CWIN never specifically objected to the discussion of the scenarios during the administrative process and, therefore, should not be able to raise the argument in court. Second, the court determined, "[T]he 2004 EIR adequately explains why the three scenarios discussed in connection with the transfers are possible outcomes of DWR's pending Monterey Agreement EIR."

"[T]he 2004 EIR describes the relationship between the pre- and post-Monterey Agreement contractual requirements and the three water supply scenarios in considerable detail," Justice Nora Manella wrote for the appellate panel.

The primary contention of PCL and CWIN was that the Department of Water Resources should have prepared the EIR for the Kern-Castaic water transfer because the Monterey Agreement enabled the transfer. Castaic could serve as the lead agency only after a new Monterey Agreement EIR is complete, they argued. Both the trial court and the appellate court disagreed.

"[N]othing before us suggests that the Monterey Agreement, viewed as a CEQA project, included the Kern-Castaic transfer when the original Monterey Agreement was prepared and certified in 1995," Manella wrote. "As the Kern-Castaic transfer was no more than 'a gleam in a planner's eye' at the time of the Monterey Agreement, the transfer fell outside the original Monterey Agreement EIR, and was properly considered in a separate EIR.

"We also conclude that the decertification of the 1995 Monterey Agreement EIR and its aftermath have not brought the transfer within the compass of the new Monterey Agreement," Manella continued.

The water transfer opponents pointed to the 2000 deci-

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sion in *Planning & Conservation League*, in which the court ruled that DWR's statewide perspective made the agency the logical choice to complete the Monterey Agreement EIR. But the Monterey Agreement, the Second District noted, involves the entire State Water Project. "In contrast, *Castaic's* preeminent role regarding the water transfer renders it the logical choice for lead agency, in view of the transfer's confined scope" Manella wrote.

The opponents further argued that the EIR represented the water transfer as *fait accompli* and that a "no project" alternative that involved both no Kern-Castaic transfer and the state's abandonment of the Monterey Agreement should have been studied. The court rejected both arguments and accepted *Castaic's* arguments that the water transfer could go forward with or without the Monterey Agreement, and that the transfer and the Monterey Agreement "constitute different projects under CEQA, and only the transfer is subject to Castaic's approval." ■

■ The Case:
Planning and Conservation League v. Castaic Lake Water Agency, No. B200673, 2009 DJDAR 17603. Filed December 17, 2009.

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Inyo County General Plan 'Clarification' Invalidated

A state appellate court has thrown out an Inyo County general plan amendment that the county argued was nothing more than a clarification of a longstanding policy.

A unanimous three-judge panel of the Fourth District Court of Appeal, Division Two, concluded that the amendment was more than a mere clarification and that the county should have completed an environmental impact report before approving the amendment.

Inyo County adopted a new general plan in 2001. The plan contained a new definition of the term "net acreage": "The remainder of land left after land devoted to streets, roads, and utilities are deducted from the parcel." Later that year, county planners said the definition was confusing and would result in some properties being rendered too small for development. The concern was that land that was subject to utility easements should not be deducted from the net acreage total because the land would still be usable.

Planners prepared a general plan amendment to redefine "net acreage," as well as a negative declaration stating that the amendment could not impact the environment. Residents of McLaren Ranch Estates outside of Bishop opposed the new definition because they said it could permit property owners to go forward with land divisions that would not be permitted under the 2001 definition. The area is zoned for half-acre minimum parcels, and three properties in question were barely larger than 1 gross acre.

County officials maintained they were only clarifying a policy that had been in effect since 1984 and that the new definition would have no impact on growth. The Board of Supervisors in early 2005 adopted the negative declaration and approved the general plan amendment. It defined "net acreage" as "the remainder of a parcel or piece of property after land dedicated or otherwise encumbered by an easement and/or right-of-way for a public street or road, including a county road, is deducted from the gross acreage or gross parcel size."

A group called Inyo Citizens for Better Planning sued, arguing the county should have prepared an EIR for the general plan amendment (GPA) and for three parcel maps in McLaren Ranch Estates. Retired Los Angeles County Superior Court Judge Phillip Argento, sitting by assignment in Inyo County, rejected the citizens group's contentions.

On appeal, the group argued it had passed the California Environmental Quality Act's fair argument test. Under this test, an agency must prepare an EIR if substantial evidence supports a fair argument that a project may have a significant effect on the environment.

The appellate panel found that such evidence existed. The court cited:

• A letter from the Bishop Creek Water Association saying the amendment could increase subdivisions in an area with low water flows during the dry season.

• A letter from a property owner who testified groundwater levels were falling.

• A resident's letter questioning whether wells and septic tanks could be sited on small parcels without impacting groundwater.

• National Park Service testimony regarding potential impacts to birds from decreased open space and degraded surface waters.

• A statement from then-Planning Director Chuck Thistlethwaite to the Board of Supervisors that the 2001 definition of net acreage "could have countywide implications and virtually place a moratorium on development in every area of the county."

"Reasonable assumptions from these facts were (1) allowing greater residential density might have an adverse impact on water resources; (2) strained water resources might adversely affect plant life and bird life; and (3) subdivisions and residential building that would not be authorized under the 2001 general plan might be permitted under the GPA," Justice Douglas Miller wrote for the court. "[T]he county should have prepared an EIR."

The court pointed out that Thistlethwaite's statement ran counter to the county's legal argument that the county was simply clarifying a long-held policy. In addition, the court noted, a 2004 staff report to the Board of Supervisors provided options for defining net acreage, such as whether or not to count private driveway easements. Wrote Miller, "[I]t does not appear from the record that the change in the definition of net acreage was merely a clarification of existing policies, because the definition was debated and different options were discussed."

The court directed the county to set aside the general plan amendment. However, the court upheld three parcel maps approved by the county, concluding the opponents did not prove the county had incorrectly figured the net acreage of the existing or new parcels. ■

■ The Case:
Inyo Citizens for Better Planning v. Inyo County Board of Supervisors, No. E046646, 2009 DJDAR 17417. Filed November 20, 2009. Ordered published December 14, 2009.

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New Stadium Craze Sweeps The State

All of sudden, or so it seems, a stadium mania has overtaken California. The dreams, schemes and honest-to-goodness plans for football and baseball stadiums are coming so fast that it's difficult to keep track of them.

I concede this list could be outdated at almost any moment, but here goes:

• The most advanced plan is in the City of Industry, where real estate mogul Ed Roski Jr. intends to build a professional football stadium. As you probably recall, state lawmakers and Gov. Schwarzenegger are so excited by the prospect of an NFL return to the Los Angeles region that they exempted the stadium project – as well as 3 million square feet of adjacent development – from the California Environmental Quality Act (see *CP&DR Capitol Update*, October 15, 2009). All Roski needs now is a football team.

• In second place is a San Francisco 49ers' plan to build a stadium adjacent to the team's headquarters, which, you may not know, are actually in Santa Clara – 40 miles and two counties away from the 49ers' current home in Candlestick Park. Earlier this month, the Santa Clara City Council agreed to put the stadium project on the June 2010 ballot. However, Great America – the theme park that sometimes uses the parking lot where the stadium is proposed – has filed a lawsuit over the project's environmental impact report. Great America says the suit is only insurance in case negotiations with the city regarding parking and traffic fail. But the 49ers are seeking their own form of insurance by going to work on a ballot initiative that would not require an EIR.

• San Francisco wants to keep the football team, of course, and three weeks ago the city and developer Lennar unveiled revised plans for a new stadium that would be part of Lennar's massive redevelopment project at Hunter's Point. This project would be very close to the 49ers' Candlestick Park.

• In San Diego, the city and the Chargers are talking about building a downtown football stadium to replace the much-despised Qualcomm Stadium. Several sites are under consideration, but the idea is to build close to the Padres' very successful baseball stadium, which is located across the street from the convention center and adjacent to convention hotels.

• A potential waterfront football stadium in Chula Vista appears to be dead, and an inland location in Chula Vista apparently is not feasible. None of this means Chula Vista is not willing to host the Chargers. Meanwhile, the City of Escondido is making noises just in case the Chargers are willing to move north about 30 miles.

• Also earlier this month, the City of Oakland announced it has identified three potential locations – all near Jack London Square – for an A's baseball stadium. This may be the oldest stadium saga of all, as the A's have made clear since the 1980s their dissatisfaction with the Coliseum, which simply doesn't have a good layout for baseball.

• San Jose, however, wants the A's to move to the South Bay and has identified a site next to the Diridon train station, on the edge of downtown. The city certified an environmental impact report for the stadium in 2007 and appears as committed as ever.

So what we're looking at here are probably three football stadiums and one baseball stadium. And that doesn't count plans for a new basketball arena somewhere in Sacramento.

My question concerns public funding, because I don't see a single one of these projects becoming reality without a substantial public investment. Santa Clara, for example, has pledged $111 million in redevelopment funds, plus ongoing revenue from new hotel and parking taxes. Oakland would provide the A's with free land for a stadium. The Chargers say they need free land for a stadium plus additional subsidies. San Jose would build and own the $500 million baseball stadium. Public money for the Industry stadium is uncertain, but it's worth noting that Industry has lobbied the Legislature for several years to extend redevelopment project sunset dates.

Local economic development advocates and sports boosters will always say what a great investment a stadium is. In September, San Jose released a report that said the baseball stadium would generate $2.9 billion to $4.1 billion in economic activity over 50 years (http://www.sjredevelopment.org/ballpark/EI_Report_09022009.pdf).

However, academic studies have repeatedly demonstrated that stadiums are poor public investments. At best, stadiums simply move around money that would have gotten spent anyway. Dennis Coates, a professor at University of Maryland, Baltimore County, wrote an excellent summary last year for the American Enterprise Institute (http://www.american.com/archive/2008/april-04-08/a-closer-look-at-stadium-subsidies) His bottom line: "There is little evidence of large increases in income or employment associated with the introduction of professional sports or the construction of new stadiums."

I see the issue of public subsidies for professional sports as extremely sensitive right now. The state government faces another giant budget deficit despite already being closed about 15% of the time. Cities are laying off police officers. Transportation agencies are drastically reducing services (http://www.ocregister.com/articles/service-220763-bus-eliminated.html). One in eight California workers is unemployed.

The Santa Clara election in June could be a bellwether. The public funding is actually a relatively small increment of the $1 billion project. The South Bay has never had professional football. The 49ers are going to pump a ton of money into the campaign. In other words, the situation is as favorable as possible for stadium proponents. So if voters still say no – and they could – every other jurisdiction considering charity for pro sports will need to re-evaluate.

– PAUL SHIGLEY | DECEMBER 21, 2009