

Development Outlook Remains Negative

Rebound Appears Far Away, As Foreclosures, Vacancies And Tight Credit Worries Persist

BY PAUL SHIGLEY

It's an exaggeration to say that 2010 will be the year in which nobody builds anything. But it might not be much of a stretch.

The consensus found in numerous prognostications from economists, academics and analysts is that a "normal" level of development activity is still two to four years away. In the meantime, as Chuck DiRocco, director of real estate research at PricewaterhouseCoopers summed up, "Now is not the time to develop."

California is a very diverse state, and some areas are certain to see more development activity than other areas. Still, extremely tight credit markets, concerns over a new wave of residential foreclosures, potential commercial property foreclosures, the scheduled end of federal government programs, high retail and office vacancy rates, and the state's ugly unemployment rate all combine to paint a dismal picture of the year ahead.

"In essence, there are 3 confluences," said Larry Kosmont, a normally optimistic real estate and economic development advisor based

in Los Angeles. "There is still a huge overhang of existing product that is yet to hit the market that everyone is waiting for. That is reinforced by the underlying lender requirements – from the few people who are willing to lend – for new products. The required ratios of capital-to-debt are so much more onerous today that the likelihood is slim and none that developers will be willing to proceed with these loans. The third is that rents are way down."

During last decade's real estate boom, the build-it-and-they-will-come approach prevailed. But that's no longer an effective recipe, said DiRocco. This appears to be especially true for nonresidential products. The annual "Emerging Trends" report prepared by PricewaterhouseCoopers and the Urban Land Institute, and which is based on industry surveys and interviews, said that commercial real estate vacancies will continue to rise and rents will decrease before the market bottoms out at some point this year. That certainly appears to be the case in ever-important Silicon Val-

– CONTINUED ON PAGE 5

Gov. Schwarzenegger Operates On CEQA With Scalpel, Not Hatchet

insight
WILLIAM FULTON

Arnold Schwarzenegger has always been a Republican with a twist. As the governor enters his final year – attempting to deal both with economic woes and an ambitious environmental agenda – it appears that nothing has changed. He is going after the California Environmental Quality Act (CEQA) in his own way. It's legacy time for the governor. For better or worse, the Schwarzenegger approach to skinning CEQA may be part of his legacy.

Given the gravity of the state's economic problems, especially the prolonged real estate slump, a conventional Republican governor would have called for CEQA's repeal long ago. CEQA didn't cause the worldwide economic slowdown, but orthodox Republican philosophy would dictate that streamlining, reforming, or eliminating the law should be part of the recovery.

In his January 6 State of the State speech, Schwarzenegger laid out a five-

– CONTINUED ON PAGE 11

LOCAL WATCH

South Sutter growth finally on track? Page 2

ENVIRONMENT WATCH

Amended CEQA Guidelines take effect Page 3

CP&DR LEGAL DIGEST

Cal Supremes throw out CEQA decision..... Page 6

CP&DR LEGAL DIGEST

Woe to the attorney who misses a deadline Page 7

CP&DR LEGAL DIGEST

Morro Bay mixed-used project denial upheld..... Page 8

PLACES

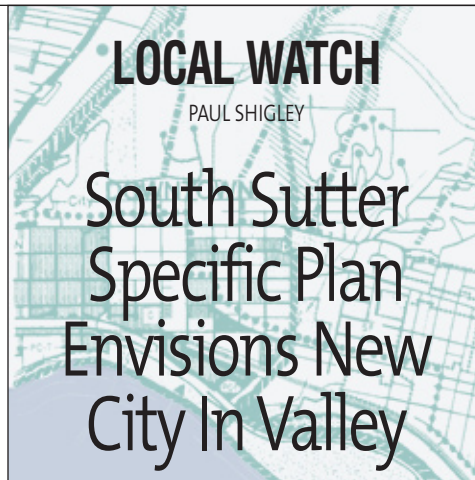
Fish, birds return to restored coastal ecosystem..... Page 9

After two decades of false starts, public and private planning efforts, litigation and ballot measures, development in South Sutter County appears ready to commence – just as soon as the economy rebounds.

In mid-2009, the Sutter County Board of Supervisors approved a specific plan, a land use and development code, design guidelines and an environmental impact report for a new town project known as Sutter Pointe. The specific plan calls for 17,500 housing units and nearly 50 million square feet of industrial and commercial space on what is now mostly farmland. Remarkably, no lawsuit was filed nor ballot measure circulated following the board's approval of the project.

Essentially, the plan permits the Sutter Pointe development consortium to build houses in exchange for providing infrastructure that will enable the industrial job development desired by Sutter County.

"I think this plan helps ensure we have a viable project there, and,



ultimately, a community where people can live and work," said County Supervisor James Gallagher, who represents the area. "We're talking about basically creating a new community in South Sutter County, which was more than a little controversial the first time."

Located in the southern Sacramento Valley, Sutter County has long been an agricultural county. During the 1990s and especially the early part of the last decade, the county seat, Yuba City, became a bedroom for commuters to Sacramento, located approximately 40 miles to the south. Sutter County's unemployment rate is always high. Its unemployment rate for

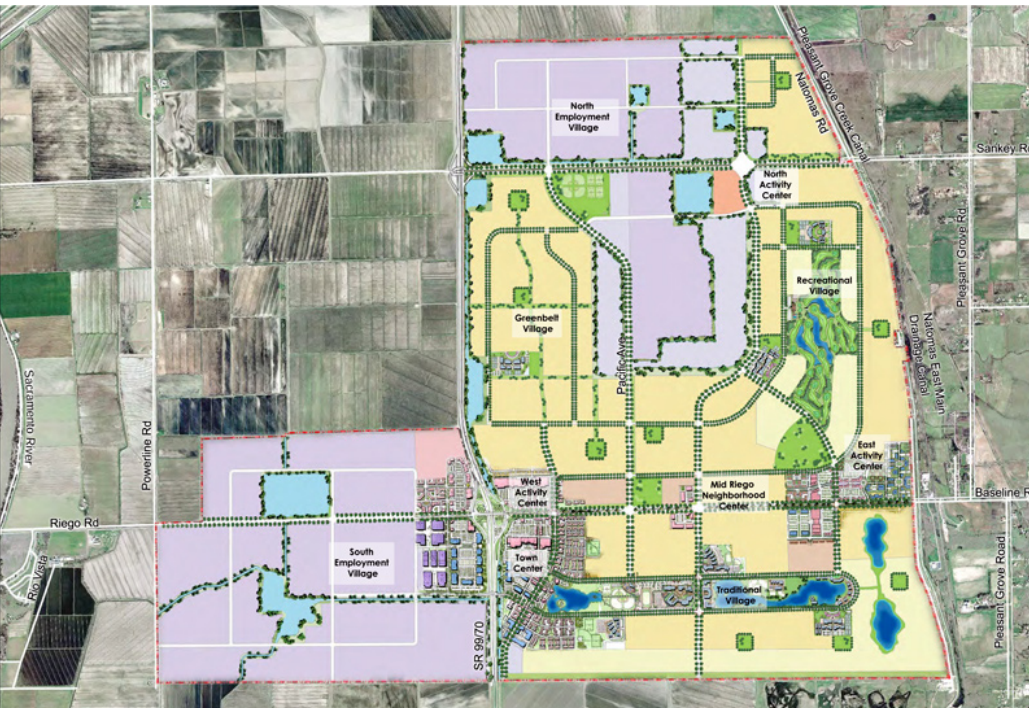
November 2009 was 19.4% – far above the state's 12.2% rate, according to the California Employment Development Department. Thus, county leaders have long sought to boost employment opportunities.

In 1991, voters rejected competing growth initiatives for South Sutter County. That stalemate led to the Board of Supervisors approving a

huge project called Sutter Bay, just north of the Sacramento County line, the following year. Lead developer Ahmanson Development Company envisioned 80,000 residential units in a 36-square-mile new town. But Sutter Bay became a campaign lightning rod, and a Board of Supervisors with three new members rescinded the Sutter Bay development agreements in early 1993. Months later, voters rejected the project in a referendum election. Ahmanson and its partners sued the county, but the county ultimately prevailed.

Meanwhile, the county updated its general plan and designated a 10,500-acre "industrial/commercial reserve" along Highway 99 near the Sacramento County line, and in 2002 the county approved a 3,500-acre specific plan for a portion of the reserve (see *CP&DR Economic Development*, November 2002). That plan died amid litigation filed by the Sierra Club and the Environmental Council of Sacramento, who successfully challenged the county's lack of an infrastructure financing strategy.

In 2004, county voters approved Measure M, an advisory measure that drew a broad outline for development of 7,500 acres in South Sutter County. The ballot measure called for no more than 2,900 acres – CONTINUED ON PAGE 3



The Sutter Pointe project would create a job-rich town along Highway 99, only a few miles north of Sacramento.



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

Visit our website:
WWW.CP-DR.COM

You may e-mail us at:
INFO@CP-DR.COM

William Fulton
Editor and Publisher Emeritus

Eric Belgau
Associate Publisher/
Marketing Manager

Paul Shigley
Editor

Morris Newman
Kenneth Jost
Contributing Editors
Robin Andersen
Circulation Manager

— CONTINUED FROM PAGE 2

of residential development and at least 3,600 acres of commercial and industrial uses, as well as at least 1,000 acres of parks, open space and community facilities. Measure M provided the starting point for the specific plan that was then prepared by the Sutter Pointe group, which includes Lennar Communities, Angelo Tsakopolous’s AKT Development, Axel Karlshoej and Al Montna. In fact, county officials asked the developers to take the lead in preparing a new specific plan, explained George Carpenter, the project manager.

“Sutter Pointe is based on Measure M. The whole point of Measure M was to bring jobs to the county,” said Carpenter, a former Sutter County planner. “The problem is that there has been no way to finance infrastructure.”

The Sutter Pointe plan attempts to balance between residential growth and industrial development. Developers have long been interested in building houses in South Sutter County because of its close proximity to jobs in both the capital city and in Roseville. But for just as long, Sutter County leaders and voters have insisted they did not want to see development of a new bedroom community. They want jobs.

Like Measure M, the specific plan speaks of residential maximums and industrial minimums. The plan permits residential development in phases as industrial and commercial development proceeds. The residential development will raise the revenue for the infrastructure, including an expensive sewer collection system that developers intend to tie in with a regional wastewater treatment plant in south Sacramento, as well as major improvements to highways and roads. Supervisor Gallagher said he is comfortable that the plan ensures industrial infrastructure will come online at the same time that housing is developed.

The specific plan itself is not overly specific. That was intentional, because county officials and developers want to be able to make adjustments as the area builds out over the next 20 to 30 years. Also, there was a fear that preparing a more detailed plan would drag out the process for too long. As it was, the more general document prepared by EDAW and developers, and approved last year by the county, took four years to complete. Future development will require tract map approvals and subsequent environmental reviews, Carpenter said.

The site is in an area in which the Sacramento Area Flood Control Agency (SAFCA) is undertaking extensive levee upgrades to provide at least a 100-year level of protection. The Sutter Pointe development will provide impact fees to help pay for some of those improvements, according to Gallagher, who sits on the SAFCA board.

The site also sits in an area that provides habitat for the Swainson’s hawk, the giant garter snake and other endangered or threatened spe-

cies. However, a habitat conservation plan is in place, and that plan largely provides the boundaries for Sutter Pointe development, according to Carpenter.

Sacramento and the Natomas Basin Conservancy, which manages the habitat conservation plan, have expressed concern that Sutter Pointe development could inch right up to protected lands. Sacramento planners would like to see significant buffers between Sutter Pointe development and habitat lands, as well as between Sutter Pointe and the City of Sacramento’s potential sphere of influence north of the existing North Natomas growth area, according to Scot Mende, Sacramento’s

new growth manager. The exact location of development, however, will not be known until Sutter County processes tract maps.

In part because of the flood control needs, but mostly because of the slow economy, developers do not foresee much on-the-ground activity before 2013, said Carpenter. But they do anticipate market demand for housing as well as industrial uses once the economy rebounds, he said. The close proximity to Interstates 80 and 5, and to Sacramento International Airport, as well as the immediate access to Highway 99 should entice industry, he said.

	Acreage		Dwelling Units (DUs)			Non-Residential Square Feet		
	Acres (Gross)	Percentage of Total	DUs/Acre Range	Assumed DUs/Acre	DUs	FAR Range	Average FAR	Square Feet
RESIDENTIAL USES								
Low Density Residential (LDR)	512.8	6.8%	2.0-4.0	2.85	1,461			
Medium Density Residential (MDR)	1,950.3	25.9%	4.1-12.0	6.16	12,014			
High Density Residential (HDR)	187.8	2.5%	12.1-24.0	18.26	3,426			
Backbone Residential Roads	249.1	3.3%						
Subtotal	2,900.0	38.5%			16,901			
EMPLOYMENT USES								
Employment 1 (E1)	172.6	2.3%				0.2-0.5	0.35	2,632,000
E1 Interim Flood Zone (EIF)	407.8	5.4%				0.2-0.5	0.35	6,225,000
Employment 2 (E2)	1,990.5	26.4%				0.4-0.6	0.42	36,408,000
Commercial Retail (CR)	178.2	2.4%				0.2-0.35	0.25	1,940,000
Industrial Drainage Basin (IDB)	414.3	5.5%						
Mixed Use (MU)	164.1	2.2%	12.1-45.0	18.26	599	0.2-1.5	0.35	2,501,000
Backbone Employment Roads	299.4	4.0%						
Subtotal	3,626.9	48.2%			599			49,706,000
COMMUNITY FACILITIES								
Parks (P)	431.9	5.7%						
Open Space (OS)	394.8	5.2%						
Elementary/Middle Schools (K-8)	121.7	1.6%						
High School (HS)	52.9	0.7%						
Subtotal	1,001.3	13.3%						
GRAND TOTAL	7,528.2	100.00%			17,500			49,706,000

The Sutter Pointe plan exceeds the housing and employment objectives contained in the Sacramento regional blueprint.

“We’ve got large sites available for big users. We’ve been told by the broker community that there are not very large lots available like this. We’ll be competing with Stockton and Reno,” Carpenter said.

The residential plan is based on the village concept. A traditional village with a grid pattern centered around a great park and civic facilities will provide the most homes. “The whole idea behind Sutter Pointe is that it’s going to be a new city. It ultimately will incorporate,” Carpenter said.

Although environmentalists in the past have complained that South Sutter development would amount to leapfrog growth, the Sutter Pointe plan actually exceeds the housing density and jobs-housing ratio envisioned for the area by the Sacramento Area Council of Government’s regional blueprint. Sutter Pointe would also be located very close to new growth areas of Placer County and Roseville that are endorsed by the regional blueprint. ■

■ **Contacts:**

- George Carpenter, Sutter Pointe project manager, (916) 355-1450.
- Sutter County Supervisor James Gallagher, (530) 822-7106.
- Scot Mende, City of Sacramento new growth manager, (916) 808-4756.
- Sutter Pointe specific plan: www.co.sutter.ca.us/doc/government/depts/cs/ps/cs_sutterpointe.
- Natomas Basin Conservancy: www.natomasbasin.org.



New California Environmental Quality

Act Guidelines that urge public agencies to quantify and mitigate greenhouse gas emissions from projects whenever possible have gone into effect. Outgoing Natural Resources Secretary Michael Chrisman signed the guideline amendments on December 30.

Although not everyone is happy with the changes, this guidelines amendment process appears to have gone more smoothly than recent ones. The Wilson administration spent seven years on guidelines amendments – only to have several components thrown out by a court. In its nearly five years, the Davis administration did not complete a substantive guidelines update.

This time, though, state lawmakers gave the Office of Planning and Research and the Natural Resources Agency a little more than two years to complete the task. Senate Bill 97 from 2007 set a January 1, 2010, deadline for new California Environmental Quality Act (CEQA) Guidelines related to greenhouse gas (GHG) emissions analysis and mitigation (see *CP&DR Environment Watch*, October 2007).

“At bottom, what these changes do is ensure greenhouse gas emissions are included in environmental review documents,” said Christopher Calfee, Natural Resources Agency special counsel. “That’s a big deal. There has been a lot of inconsistency.”

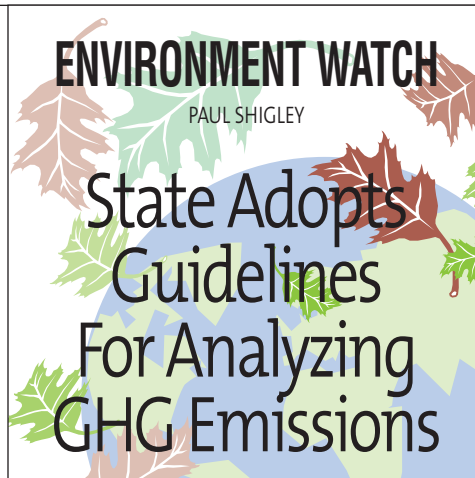
What the amendments do not do, said Calfee, is create a unique scheme or approach for greenhouse gas emissions. The guidelines require an agency that is evaluating a CEQA project to gather the relevant information and analyze that information based on scientific and factual data. Hence, said Calfee, “The analysis you do for greenhouse gas emissions is the same as you do for most other impacts.”

The new guidelines also emphasize the use of tiering in CEQA documents. So, for example, a project-level analysis could rely heavily on a program-level environmental impact report prepared for a local climate action plan or GHG emissions reduction strategy.

The new guidelines do not establish thresholds for determining whether a project’s GHG emissions are significant. The new guidelines do not even prescribe exactly how an agency must quantify or mitigate emissions. Instead, the guidelines permit agencies to describe a project’s emissions quantitatively or qualitatively. The guidelines say on-site mitigation is preferable, but not required, and must be subject to monitoring. The CEQA Guidelines have long recognized lead agency discretion, and the amendments related to GHG are no different, Calfee explained.

The deference to lead agencies did not satisfy some environmental groups, which pressed for a more prescriptive approach. In a letter to the Natural Resources Agency, seven environmental groups, including the Center for Biological Diversity and Earthjustice, say the new guidelines provide a loophole by permitting agencies to describe emissions qualitatively. “Despite the importance of quantitative data on project emissions in understanding project impacts, the language of Guidelines § 15064.4(a) serves to bolster the misplaced argument that readily available quantitative data on project emissions need not be provided to the public,” the letter states. That data, environmentalists say, may be necessary to make a fair argument that a project could have a substantial impact on the environment.

While environmental groups were not satisfied, many planners and environmental professionals said the Natural Resources Agency responded to their concerns. The CEQA Guidelines contain specific thresholds of significance for only a few subjects, and establishing them right now for GHG emissions would have been unnecessary



ily limiting, said Kent Norton, an Association of Environmental Professionals (AEP) board member. Thresholds of significance are typically left to local agencies, said Norton, who works for The Planning Center.

“We were very satisfied with the way this came out,” added Gene Talmadge, AEP president. “Was it perfect? No. It never is. But we think the Natural Resources Agency listened to us.”

The agency also listened to planners and alternative-transportation advocates, who convinced the agency to alter Appendix G checklist questions concerning transportation and traffic. Previously, the first two questions

asked whether a project would impact street system capacity or result in a reduced level of service. Planners and advocates argued that such measurements forced agencies to favor automobiles, even though the state is trying to decrease emissions from automobiles.

One revised checklist question now asks: “Would the project conflict with an applicable plan, ordinance or policy establishing measures of effectiveness for the performance of the circulation system, taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths and mass transit?”

The next question asks: “Would the project conflict with an applicable congestion management program, including but not limited to level of service standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways?”

The idea, said Calfee, is to get agencies to “focus on the entire circulation system.” Although some planners and advocates urged the Natural Resources Agency to disavow the level of service concept altogether, Calfee said the agency could not. “The Congestion Management Act and the Government Code require level of service to be included in congestion management programs,” he explained.

Officials did drop parking capacity from the checklist and expanded a question regarding a project’s potential conflicts with public transit and bicycle or pedestrian facilities. Jennifer Klausner, executive director of the Los Angeles County Bicycle Coalition, endorsed the changes because the previous checklist “emphasized a purely car-centric point of view” that discouraged bicycle travel.

Planners appeared divided on the parking question, which some arguing that a lack of parking could lead to motorists cruising for spaces, thus emitting more greenhouse gases. But UCLA urban planning professor Donald Shoup, author of the influential book *The High Cost of Free Parking*, rejected that argument. “Cruising is caused by the city’s failure to charge the right prices for curb parking,” he wrote.

Shoup continued, “Rather than try to force up the parking supply and automobile trips, CEQA should focus on reducing automobile trips, or should at least not have a policy that will increase automobile trips.”

The revised guidelines additionally make clear that the Appendix F analysis of energy is now mandatory, not optional. However, officials declined to require analysis of a project’s “lifecycle” energy usage because there is no agreement on how to define lifecycle, Calfee said. ■

■ Contacts:

Christopher Calfee, Natural Resources Agency, (916) 653-5656.
Gene Talmadge, Association of Environmental Professionals, (805) 427-4123.
Jennifer Klausner, Los Angeles County Bicycle Coalition, (213) 629-2142.
Revised CEQA Guidelines: <http://ceres.ca.gov/ceqa/guidelines>.

No Rebound in 2010

– CONTINUED FROM PAGE 1

ley, where CB Richard Ellis Group identified 43 million square feet of vacant office and flex space at year's end – the most since the dot-com bust of early last decade. Asking rents are down approximately 20% and, unlike during the dot-com crash, companies are not hanging onto empty space in the hope that they will need it in the near future. Developers did put up about 4 million square feet of speculative office space in Silicon Valley during the last three years, but the speculative building appears to be over for the foreseeable future.

Shortly after the first of the year, *The Wall Street Journal* reported, “The pain is just beginning for commercial property markets.” The *Journal* quoted a Deutsche Bank analyst who said nearly two-thirds of \$1.4 trillion in commercial mortgages due by 2013 will be difficult to refinance. Thus, the foreclosure wave that swept through residential markets during the last two years could move to the commercial property market.

According to Kosmont, the commercial vacancy figures are artificially low because they do not reflect the fact that some leased space is underused. If you account for the underuse, commercial vacancy rates are in the 20% to 30% range, he said.

Retail vacancy rates loom in the teens for many parts of the state, and analysts predict very little construction of new space – whether in lifestyle centers, power centers or enclosed malls – because retailers have their pick of inexpensive vacancies.

As for residential development, which often drives other development in California, there is great uncertainty. Gov. Schwarzenegger has proposed allocating \$200 million to provide buyers of new or existing homes a \$10,000 tax credit. Unlike a 2009 program – which provided a similar tax credit to buyers of new, unoccupied homes – the proposed 2010 version would offer the tax break to buyers of *either new or existing units*. The California Building Industry Association (CBIA) credited last year's program with bringing buyers back to the market, and the association applauded the governor's latest proposal. However, it is not a done deal, as outgoing Assembly Speaker Karen Bass said the state, because of its \$20 billion budget deficit, should not be creating additional tax breaks.

The fate of federal programs that have helped prop up the residential market appears equally uncertain. The Federal Reserve, which helped keep mortgage rates at record low levels during 2009, is scheduled to stop buying mortgages at the end of March. If that occurs, mortgage rates are almost certainly going to increase, according to analysts. An \$8,000 federal tax credit for certain homebuyers is scheduled to expire in July after getting extended once for eight months. A federal government program to help underwater borrowers modify mortgages had resulted in only 31,000 loan modifications nationwide by the end of last November. The program has had little impact in California because borrowers are too deeply underwater to qualify.

Still, some trade organizations insist there is reason for mild optimism. The California Association of Realtors reported that existing home sales statewide increased in November 2009 by 4.7% compared with November 2008, and the median price jumped 5.8% – to more than \$300,000 for the first time in a while. The organization also reported there is far less inventory on the market these days. New home sales increased a bit in October 2009, the last month for which figures are available, according to CBIA and Hanley Wood Market

Intelligence. The numbers were still extremely low – about 2,300 new units sold in October 2009 – but there was reasonable growth in sales of condominiums, townhouses and “plexes,” primarily in Los Angeles County, the Bay Area and San Diego.

Jed Kolko, a research fellow at the Public Policy Institute of California, said the residential market may have hit bottom, as prices have leveled off and inventory is no longer increasing. He also pointed to the fact that although California has led the nation in residential foreclosures, those homes typically do not sit vacant for long spells. Even during times of economic crisis, he said, “California does not have an overabundance of housing. It's one reason why we might see a quicker rebound here than elsewhere.”

The CBIA's findings regarding shared-wall units may reflect the future as well as the past. The PricewaterhouseCoopers report identified San Francisco and San Jose as two of the 10 strongest real estate markets in the country. And the survey found, generally, apartments will provide the strongest market segment.

“We think apartments are pretty good performers in a recessionary period,” said DiRocco. In addition, survey respondents repeatedly cited the advantages of coastal urban areas over suburban inland regions.

“San Francisco and Los Angeles stand out a little bit stronger than Sacramento or the Inland Empire. If you're on the water, people feel, you're likely going to bounce back quicker,” DiRocco said. This is because the Bay Area and Los Angeles serve as important economic gateways, and because they have significant land constraints that prevent the cheap-and-easy development patterns reflected in inland areas. In addition, DiRocco said, people increasingly want to live where the opportunities and action are.

“People want to be back in infill areas and away from the suburbs. People want that 24-hour feel,” DiRocco said.

Kolko agreed there is an east-west division. “Almost all of the housing indicators are better the closer you get to the coast,” he observed.

Kosmont, on the other hand, sees more of an across-the-state development stagnation, but he did say that some very selective opportunities will arise in a few markets. Mostly, though, he sees few individuals or companies willing to build when they can find so many good deals already on the market.

“Right now, you can buy for less than replacement value,” Kosmont said. “There really is not a lot of reason to build new product of any product type in any region.”

Still, Kolko said that construction employment numbers have stopped their decline from a peak of about 950,000 jobs to a little more than 600,000. It could be that some workers who had been building homes and offices are now building government-funded infrastructure, he said. No matter, he said, “it is a positive first sign.” ■

■ Contacts:

Larry Kosmont, Kosmont Companies, (213) 507-9000.

Jed Kolko, Public Policy Institute of California, (415) 291-4483.

PricewaterhouseCoopers “Emerging Trends” Report: <http://www.uli.org/sitecore/content/ULI2Home/ResearchAndPublications/EmergingTrends.aspx>.

California Building Industry Association: www.cbia.org.

California Association of Realtors: www.car.org.

legal digest

No Need To Study Rejected Project, Court Holds State Supreme Court Throws Out Ruling Against Sacramento County

BY PAUL SHIGLEY

To the relief of many public agencies, the state Supreme Court has overturned an appellate court decision that could have increased the number of “projects” subject to the California Environmental Quality Act.

In a 7-0 decision, the California Supreme Court ruled that Sacramento County was not required to complete an environmental review before denying a conditional use permit renewal for a private airport. Project denials are specifically exempted from the California Environmental Quality Act (CEQA), the court ruled.

Attorneys on both sides of the case said the decision clarifies the law regarding when a public agency must complete a CEQA review. A collection of state agencies and the California State Association of Counties had asked the high court to overturn the appellate court’s decision because of its potential to expand CEQA responsibilities, noted Krista Whitman, deputy Sacramento County counsel.

In 2008, the Third District Court of Appeal ruled that the normal exemption for project denials did not apply here because the county’s refusal to grant a requested use permit renewal would result in closure of the airport and “the potential for physical change in the environment” (see *CP&DR Legal Digest*, September 2008). “Accordingly, the county’s action constitutes a CEQA ‘project,’” the appellate panel concluded.

“The Court of Appeal erred,” California Supreme Court Justice Carol Corrigan wrote, “because it misconstrued the nature of the project at issue. Declining to renew the conditional use permit was not a public project under CEQA, because the county did not ‘directly undertake’ to close the airport. Instead, it decided not to reauthorize a private activity that required ‘the issuance of a permit.’ The airport operation was the ‘project’ in question, and projects rejected by a public agency are specifically exempted from CEQA’s requirements.”

Although not pleased with the decision,

airport attorney Lanny Winberry conceded the decision “is a clarification of the rule.”

“Our argument was that an approval of those things [a use permit extension or renewal] would merely preserve the status quo,” Winberry said. “But the denial of those things would change the status quo, and that could have significant impacts.”

The Supreme Court, however, distinguished between private projects such as the airport at issue and facilities operated by a public agency. Twice in recent years, courts have ruled that closure of public facilities are “projects” under CEQA. Here, however, “closing the airport was not an ‘activity directly undertaken’ by the county,” wrote Corrigan, citing Public Resources Code § 21065, subdivision (a).

The facts of the case are unusual. Sunset Sky ranch began operating near Elk Grove in 1934, primarily as an airport for crop dusters. At the time, there were no applicable zoning regulations. In 1971, Sacramento County issued a two-year conditional use permit (CUP) for the airport, which at the time was merely a dirt landing strip and a handful of crop dusters. Airport owner Daniel Lang never renewed the CUP, but he did proceed to improve and expand the facility. By the late 1980s, Sunset Sky ranch had two paved runways, about 20 hangars and 60 airplanes. There were roughly 30,000 annual takeoffs and landings at the facility.

In 1989, Sacramento County denied Lang a business license because his CUP was long expired. When the county declined to issue a certificate of nonconforming use, Lang sued the county and lost. In 1997, Lang and Sunset Sky ranch Pilots Association applied for a new CUP. The county approved a five-year CUP in October 1999. Days before that permit was set to expire, the county Planning Commission approved what it declared to be a final two-year renewal. Development consultant Taylor & Wiley appealed, and the Board of Supervisors voted 4-1 to deny

the permit renewal because urban growth in Elk Grove (which incorporated in 2000) was encroaching on the airport.

Lang and the pilots association sued the county. Their primary argument was that the county’s action conflicted with the State Aeronautics Act, which, they said, required the county to permit continued operation of the facility despite urban growth conflicts. Both the trial court and the Court of Appeal rejected this argument. Lang and the pilots also argued the county violated CEQA by not completing an environmental review before denying the permit renewal. The County of Appeal accepted that contention, concluding the county’s decision had implications for the airport property and pilots that the county had to study. The California Supreme Court in 2008 accepted the case but chose to review only the CEQA issues raised by the county, and not the State Aeronautics Act interpretation questioned by Sunset Sky ranch and the pilots.

For their CEQA arguments, the airport and pilots association relied heavily on two cases – *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.*, (2006) 139 Cal. App.4th 1356, and *Association for a Cleaner Environment v. Yosemite Community College Dist.*, (2004) 116 Cal.App.4th 629. In the *San Lorenzo Valley* case, the court ruled that a plan to close two elementary schools was a project under CEQA, but was categorically exempt from environmental review (see *CP&DR Legal Digest*, July 2006). In the other case, the court ruled that the community college district’s decision to close a shooting range and transfer operations elsewhere was a project subject to CEQA review (see *CP&DR Legal Digest*, April 2004).

The state Supreme Court, however, distinguished those cases from the one at hand. While the school district and community college district took actions to close a public facility, Sacramento County was not actively engaged in closing

– CONTINUED ON PAGE 7

– CONTINUED FROM PAGE 6

the private Sunset Sky ranch.

“Notably, if the airport had decided on its own to go out of business and allow the CUP to expire, there would have been no occasion for CEQA review by the county,” Corrigan wrote. “It was the airport that sought a new approval for its operations, and the county’s denial of that project application was statutorily exempt from CEQA review under [Public Resources Code] § 21080, subdivision (b)(5).”

The fact that the airport sought a CUP renewal, rather than a brand new CUP, was of

no matter, Corrigan added.

What the decision makes clear, said Taylor & Wiley attorney Kate Wheatley, is that a public agency may at any time exercise the CEQA exemption for a project the agency denies.

Meanwhile, the 76-year-old airport’s days appear numbered. County officials in the past have vowed to shut down the airport. The City of Elk Grove, whose city boundary currently is located across the street from the airport, has an application pending before the Sacramento County Local Agency Formation Commission to expand into the area. And Elk

Grove appears to have no use for the airport, as the city and the county recently released a draft of an agreement that envisions extensive residential development in the area. ■

■ The Case:

Sunset Sky ranch Pilots Association v. County of Sacramento, No. S165861, 2009 DJDAR 17959. Filed December 28, 2009.

■ The Lawyers:

For Sunset Sky ranch: Lanny Winberry, (916) 386-4423.

For the county: Krista Whitman, county counsel’s office, (916) 874-5544.

For Taylor & Wiley: John Taylor, (916) 929-5545.

ceqa

Put Hearing Request In Writing, Court Insists

Claims that Sacramento County violated the California Environmental Quality Act while approving a commercial development have been dismissed by the Third District Court of Appeal because the project opponent did not submit a written request for a hearing within 90 days of filing a lawsuit.

The attorney for opponent Forster-Gill, Inc., argued that a telephone call to the court clerk within the 90-day period was adequate, but the appellate court disagreed, ruling that the law “plainly contemplates a written request that can be, and is, filed with the court.”

Although previous cases have addressed the 90-day deadline, the court said its decision marked the first time a published opinion made clear “that a ‘request for a hearing’ required by subdivision (a) of [Public Resources Code] § 21167.4 must be a writing filed with the court.”

In May 2008, Sacramento County approved “The Landing,” an entertainment and retail project proposed by Syufy Enterprises, Sywest Development and others on property located in Del Paso Heights, just north of Interstate 80. Forster-Gill owns an adjacent industrial property and challenged The Landing developers’ access and other aspects of the project. Forster-Gill filed a lawsuit on June 12, 2008, alleging the county violated the California Environmental Quality Act (CEQA) and the general plan. Forster-Gill also sought to resolve who owned an access road.

Under CEQA, the county had until August 19 to complete the administrative record. The county needed more time, and attorneys for all parties in early September signed a stipulation giving the county until October 20. A second stipulation signed in October gave the county until November 7 for the administrative record.

At a March 20, 2009, status conference, the Sacramento County Superior Court determined Forster-Gill’s CEQA claims should be litigated first. Four days later, the county and the developers asked the court to dismiss the CEQA claims because Forster-Gill did not request a hearing within 90 days of filing its lawsuit in June 2008. Forster-Gill’s attorney countered that he had called the court clerk on September 10 to reserve a January 9, 2009, hearing date, which the attorney and a county lawyer later agreed was premature because of troubles with the administrative record. The trial court declined to dismiss the CEQA claims. The county and the developers appealed and won a reversal.

At issue was interpretation of Public Resources Code § 21167.4. Subdivision (a) gives a petitioner 90 days to file a request but does not specify the form of the request. Subdivisions (b) and (c), which were added during the 1990s, speak to filing a request and serving a notice of request upon all parties.

“Subdivision (a) ... cannot be read in isolation from the remainder of § 21167.4,” Justice Ronald Robie wrote for the unani-

mous three-judge Third District panel. “[S]ubdivisions (b) and (c) of § 21167.4 do ... clarify that the request for a hearing required by the statute is to be a writing that can be filed with the court, not simply an oral request.”

Forster-Gill argued it would have been futile to serve notice of a hearing while the parties were negotiating over preparation of the administrative record. But the court ruled, “[A]ll Forster-Gill had to do was ‘request a hearing’ and serve notice of the request. The setting of the actual hearing date, and the briefing schedule to proceed the hearing, could have come later.”

Forster-Gill pointed to the two stipulations, the second of which stated the hearing date would be moved from January 9 to March 6. The court, however, said the stipulation did not supplant the statutory deadline. The court also rejected the argument that the county baited Forster-Gill into missing the deadline by signing the stipulations.

The Third District did not consider anything other than the CEQA portion of Forster-Gill’s lawsuit. ■

■ The Case:

County of Sacramento v. Superior Court, No. C062025, 2009 DJDAR 18022. Filed December 29, 2009.

■ The Lawyers:

For Sacramento County: Krista Whitman, county counsel’s office, (916) 874-5544.

For Forster-Gill: John Belsher, Belsher & Becker, (805) 542-9900.

coastal commission

Deferential Court Upholds Morro Bay Project Denial

A state appellate court has upheld the California Coastal Commission's denial of a development permit for a small mixed-use project in Morro Bay.

The court rejected developer Dan Reddell's arguments that the commission violated his due process and equal protection rights, and that its decision was a regulatory taking of property. Instead, the Second District Court of Appeal ruled that substantial evidence supported the commission's finding that Reddell's project was inconsistent with Morro Bay's local coastal plan (LCP).

In 2003, the City of Morro Bay approved Reddell's proposal for six Harbor Street parcels located on the bluff above the city's waterfront Embarcadero. The project involved a 22,700-square-foot building containing 5,100 square feet of visitor-serving commercial uses and six single-family residences with a combined total of 17,600 square feet. The commercial uses would be on the ground floor, while the residences would be on the second, third and fourth floors of the building. Because the project site is in a planned development overlay zone and would provide extraordinary public benefits – underground utilities, handicapped-accessible sidewalks, small plazas and a chance to master plan six lots – the city exempted the project from the underlying visitor-serving commercial district (C-VS) zoning standards.

Local resident George Contento appealed the city's decision to the Coastal Commission. Contento argued the project violated the city's LCP and the Coastal Act because the project was inconsistent with the C-VS zoning, had inadequate parking, exceeded height restrictions and would block public views. A commission staff report identified similar issues. Reddell responded by agreeing to remove the fourth floor and increase some setbacks on upper floors. The staff said the revised project would still be inconsistent with the LCP, but nevertheless recommended project approval with additional conditions.

At an April 2004 hearing, the Commission denied the project, finding it inconsistent with the LCP's policies regarding bluff development, visual resources, parking, visitor-serving priorities and community character.

Reddell sued the Commission. San Luis

Obispo County Superior Court Judge Barry LaBarbera rejected all of Reddell's contentions and upheld the Coastal Commission's decision. On appeal, a unanimous three-judge panel of the Second District, Division Six, agreed with LaBarbera.

Two of the primary issues on appeal were whether the project would conflict with the underlying zoning's requirement that residential uses be secondary, and, alternatively, whether the project's public benefits qualified the project for an exemption from the zoning standards, which include a 30-foot height limit. The Coastal Commission and the trial court judge found the residential uses were not secondary in light of a residential to commercial floor space ratio of greater than three-to-one. Reddell had argued that commercial was the primary use because of its ground floor orientation and that the square footage for residential garages should not be included in the residential-to-commercial ratio.

As for Reddell's first argument, the Second District cited the city's ordinance: "Whether the determination of primary and secondary uses is based on square footage or some other method, the project violates the letter and spirit of the C-VS zoning designation because it consists of six residential units, many more than the 'single apartment unit or security quarters' permitted by the regulation, and these residential uses are not 'commercial uses intended primarily to serve the needs of tourists and other visitors to the city.'"

On Reddell's argument that the project qualified for an exemption, the court deferred to the Coastal Commission. Under the Coastal Act, the commission has "broad discretion to make a benefit/detriment analysis," and substantial evidence supported the commission's decision, the court ruled. The court was similarly deferential regarding the commission's findings on bluff-top development, visual resources, parking and community character.

Reddell further argued the commission decided on the wrong project because the panel did not consider his proposed changes. However, the Second District ruled, "The record shows that the commission considered but was not persuaded by Reddell's revised plans."

Finally, Reddell argued that his claim for damages based on a regulatory taking of property should stand despite the trial court's ruling. The Second District, though, said Reddell's takings claim was not ready for adjudication because the Coastal Commission has not identified what project it will permit on the site.

"The commission has indicated its willingness to review a revised proposal," Justice Steven Perren wrote for the court "There is nothing in the record, and we may not presume, that the commission will fail to do so. Therefore, his [Reddell's] claim for damages for a regulatory taking of property is not ripe." ■

■ The Case:

Reddell v. California Coastal Commission, No. B206428, 2009 DJDAR 18027. Filed December 1, 2009. Opinion modified and certified for publication, and rehearing denied December 29, 2009.

■ The Lawyers:

For Reddell: William Walter, Walter & Bornholdt, (805) 541-6601.

For the commission: Rosana Miramontes, attorney general's office, (213) 897-2693.



**URBAN
INSIGHT**

- Planning Websites
- Public Participation Strategies

Phone 877 872-6150
Fax 877 944-6792
info@urbaninsight.com
www.urbaninsight.com

Can 12 million fish be wrong? Virtually no finned critters were to be found in the San Dieguito Lagoon as recently as 2007, when bulldozers began to push tons of earth to create berms along the banks of the coastal waterway. Seven months later, in January 2008, marine biologists were astonished to find millions of baby fish – far in excess of their expectations – squiggling in the newly irrigated lagoon in San Diego County.

Birds also showed up. During a three-year period starting in 2006, when the first phase of the environmental restoration began, waterfowl species nearly doubled in number from 89 to 160. “Clearly, there was an unmet demand for habitat,” said Kelly Sarber, a biology consultant who serves as spokesperson for the \$90 million effort.

On paper, the 150-acre San Dieguito wetlands restoration project, which is scheduled to reach completion this fall, seems fairly straightforward: Newly constructed river banks, or berms, along the lagoon and the San Dieguito River will channel ocean water into the wetlands. During severe floods, the new berms prevent silt from overflowing the river banks and spoiling the habitat.

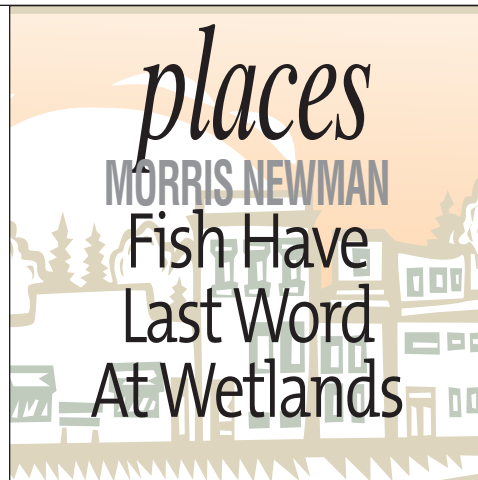
Downstream from the lagoon, biologists have replanted the barren flats with native plants that now thrive on the edge of newly filled saltwater ponds. The lagoon remains open to the ocean year-round, so the tidal action of the Pacific can recharge the water inland. Ms. Sarber singles out the work of Hany Elwany, the hydrologist who figured out the proper levels of tidal water needed to keep the wetlands alive, while controlling the flow.

Coastal wetlands are also a suitable home for some famously endangered species, including the California least tern, the light footed clapper rail and the Belding savannah sparrow, and could stabilize the populations of the threatened birds over the long term. The same habitat, of course, is suitable for many other animals, including frogs, coyotes, raccoon, striped skunk, opossum, mice and rabbits, along with assorted reptiles and invertebrates that complete the bio-balance.

Heading the project are two power companies – Southern California Edison and Sempra Energy, the corporate parent of San Diego Gas & Electric – who took on the restoration of the San Dieguito marshlands.

The project fulfills the power companies’ obligation to mitigate the effects of hot water discharged by the San Onofre nuclear power plant a few miles up the coast; water from the reactor kills many fish larvae. The power companies will maintain the wetlands until the year 2050, when responsibility for the marsh will go to a joint powers authority made up of surrounding cities.

The speedy response of wildlife may have been particularly gratifying for the biologists, hydrologists and other experts who pursued the project for 16 years before obtaining the necessary entitlements from a host of public agencies, including the California Coastal Commission, the state Department of Fish and Game, the State Lands Com-



mission, Caltrans, the cities of Del Mar and San Diego, the San Diego Regional Water Quality Control Board, the Army Corps of Engineers, the Coast Guard, U.S. Fish and Wildlife Service and the 22nd District Agricultural Association. I have no problem with placing stumbling blocks in the path of developers and overweening homeowners who want to muck up the coastline. But why should wetlands restoration projects travel the same tortuous route?

The degradation of the San Dieguito wetlands followed a familiar story line: Early in the 20th century, the area was drained for farming. During the Second World War, the military built an air strip on the former coastal marsh. Later, in the 1950s, Interstate 5 installed a concrete wall down the center of the wetlands. The rapid growth of San Diego County, meanwhile, hemmed in the wetlands on all sides, endangering the wetlands themselves.

Local support for wetlands restoration has been strong and organized, however. After 75 acres of wetlands were restored during the mid-1980s, local residents pushed for further restoration of 150 acres. The San Dieguito wetlands project becomes part of a 440-acre wetlands, providing the scale and “critical mass” that biologists say is necessary for a viable habitat.

As it says in the Talmud, one good deed begets another. In this case, the wetlands are a centerpiece of a larger ambition to create a greenbelt that stretches from the ocean to Volcan Mountain, 55 miles away. In 1989, the joint powers authority – made up of the city and county of San Diego, plus the cities of Del Mar, Escondido, Poway and Solana Beach – acquired 20,000 acres of land in the area. Another 20,000 acres are already under public ownership. Currently, about eight miles of the “coast to crest” trail exist, and proponents say they hope to complete the corridor within 10 years.

The San Dieguito project has not been free of political hiccups (see *CP&DR Environment Watch*, September 2003). Last August, the City of Del Mar briefly went into a tizzy when a draft land use proposal for the wetlands suggested designating the entire city and its popular beachfront as a protected area. City officials feared such designation would prevent Del Mar from replenishing the sand on its beachfront. The proposal did

not move forward, and Del Mar’s beaches actually benefit from the wetlands, because the sand that accumulates in the lagoon can be used to replenish the city’s beaches.

Kerfuffles aside, the San Dieguito wetlands restoration has some historical ironies: Our forefathers were eager to drain the marshes during the 19th and 20th centuries, and California has lost 95% of its coastal wetlands. Today, we spend heavily to recreate those same wetlands, which have become prized open space amenities. By itself, the growing fish population vouches for the success of restored wetlands in San Diego County. Fish don’t talk, of course, but they don’t lie, either. ■

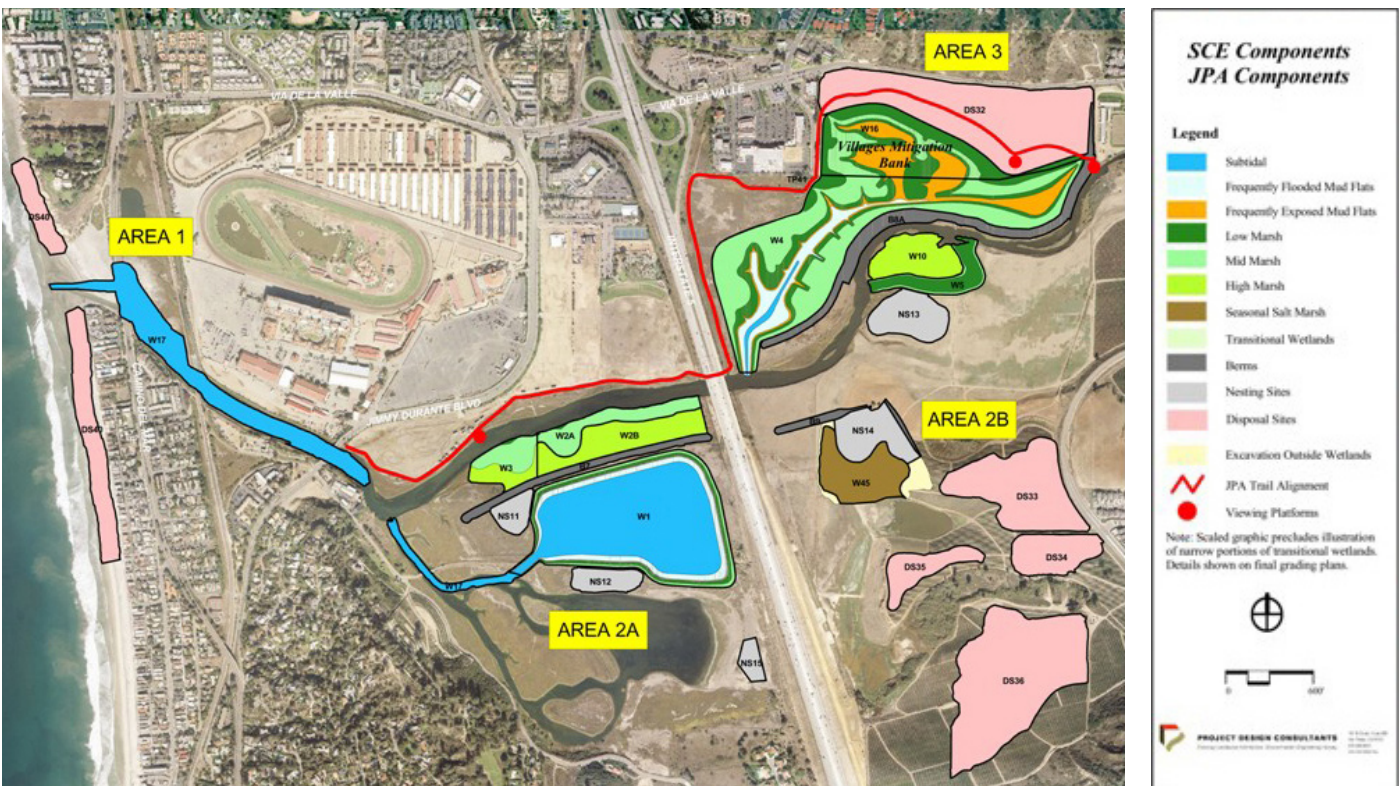
“ The 440-acre San Dieguito wetlands project provides the scale and critical mass that biologists say is necessary for a viable habitat. ”

- CONTINUED FROM PAGE 9



Top: The site of the San Dieguito Lagoon restoration project in August 2007, just as major construction was beginning.

Bottom: Components of the \$90 million effort are identified.



insight WILLIAM FULTON

– CONTINUED FROM PAGE 1

point plan to “create jobs and get California’s economy back on track.” One of the five points is, “Streamline Regulations To Get Shovels In The Ground.” This is targeted at CEQA, and although it sounds sweeping, it really is not. Schwarzenegger is not proposing to reform CEQA or even change it in any way. Instead, he is going to propose a bill that would give the Business, Transportation, and Housing Agency (BTH) the power to identify 20 private projects around the state with completed environmental impact reports and declare them to be exempt from legal challenge under CEQA.

Even though it’s not a broadside against CEQA, it got a predictable response from the Democrats. Senate President Pro Tem Darrell Steinberg – who joined hands with Schwarzenegger on climate change legislation – called the CEQA proposal “an ideological battle” and said the administration should focus instead on spending \$23 billion in unspent money from state bonds and the federal stimulus package.

Schwarzenegger’s CEQA proposal is similar to the CEQA reform he successfully wrestled from the Legislature last year as part of the budget deal (see *CP&DR Insight*, March 2009). That reform called out eight highway projects and specifically exempted them from CEQA, substituting a somewhat truncated alternate process. The governor’s approach was the same as it is now: Keep CEQA, but attack it surgically in order to advance certain key projects and put people to work.

Indeed, in announcing the CEQA proposal, Schwarzenegger went out of his way to make it clear he’s leaving CEQA intact. “This proposal will not exempt projects from the California Environmental Quality Act and will expedite shovel-ready projects that have followed environmental law, not provide a way for projects to circumvent California’s strong environmental protection law,” he said in a press release. This statement came immediately after he criticized the use of CEQA in the Industry stadium situation as “needless lawsuits brought by a tiny group of individuals.”

Together with last spring’s exemptions and the recent legislation exempting a new football stadium in Industry from CEQA (see *CP&DR Capitol Update*, October 15, 2009) – Schwarzenegger’s latest proposal may represent a new way to cut into CEQA’s power that will transcend his term of office, especially during hard times. Instead of gutting CEQA, move along chosen projects – especially by end-running the litigation process. There’s one big difference between the highway and stadium exemptions, however, and his latest proposal: The latest proposal doesn’t specify which projects are going to be moved along. If Schwarzenegger’s bill is passed, it would set up a highly competitive – and, presumably, highly political – process to decide on the exempt projects.

As the bill is drafted, BTH will have the power to identify 20 projects statewide and exempt them from CEQA lawsuits. Seven of these projects would be in the Los Angeles area, three in the Bay Area, five in the San Joaquin Valley, and five in other parts of the state. (There is no explanation as to why the bill specifies 20 projects, rather than 5 or 100.) The bill calls upon BTH to work with “local economic agencies” and chambers of commerce to solicit applications for exempted projects. As an urgency law, it would require a two-thirds vote, which pre-

sumably means Schwarzenegger intends to make it part of the budget package, as last year’s reform was.

Like last year’s exemption, Schwarzenegger’s idea is a big change from traditional CEQA practice. Last year’s provisions provided exemptions to eight projects based on economic hardship, not the traditional concept of natural disaster. This year’s idea is even more of a deviation.

The idea of an executive branch agency giving certain projects a CEQA pass is not new. The natural resources secretary has always had the power to declare certain categories of projects exempt from CEQA if they provide a net benefit to the environment. In this case, however:

- The power goes to the business-oriented BTH secretary, not the environmentally oriented natural resources secretary.
- The power is not tied to the idea of a net environmental benefit, as the categorical exemptions are.
- The power is tied in the bill only to economic criteria – specifically, “the number and quality of jobs” and the amount of capital investment.

Ordinarily, BTH would go through a lengthy process of devising criteria for selecting the projects. (The Strategic Growth Council has been working on criteria for doling out Proposition 84 planning money for several months.) But Schwarzenegger wants to move quickly. BTH has to pick the projects within five months and finalize the choices within nine months. There’s no requirement for public discussion of the criteria, though there is a requirement for one public hearing on the projects selected before the list is finalized.

So BTH will have to scan the state quickly for the biggest pending private projects that appear close to EIR certification and, in a short period of time, pick the 20 likely to have the most economic pop if construction begins immediately. Given the intense lobbying that went for the Industry stadium CEQA exemption, it’s frightening to contemplate the amount of lobbying that will be devoted to leaning on BTH. For any large developer in California, throwing lots of money at a Republican administration is likely to be far more attractive than throwing money at CEQA lawsuits. Indeed, there’s a good argument to be made that the worse your EIR is, the harder you should try to get the exemption. Developers with environmentally “good” projects may choose to slap down plaintiffs in court quickly; developers with environmentally “bad” projects will be highly motivated to end-run the courts.

The bill will hit resistance, of course. Even if it passes, some environmental group will figure out how to file a lawsuit over it. This is CEQA, after all. And if I were an environmentalist, I’d start adding non-CEQA claims to my CEQA lawsuits so that a project on BTH’s exemption list could be hung up in court on other grounds.

For decades, nobody ever even proposed this kind of thing. CEQA was considered more or less beyond the Legislature’s purview, and most CEQA battles were hashed out in court. The legislative debate, when it occurred, took place at the “nuclear” level of repealing CEQA or gutting it beyond recognition – an approach that was guaranteed to have enviros laying down in front of the bulldozers, so to speak.

Yet CEQA isn’t a sacred text or a constitutional provision. It’s only a law – a statute that could be changed at any time. And so Schwarzenegger’s final legacy in the growth wars might be to show how you can use legislation to bypass CEQA processes selectively for your own purposes, while still being able to say you’re an environmentalist. If he is successful, he will provide a lesson that will not be lost on future governors. ■

