

Revised Floodplain Designations Raise Ire

FEMA Risk Maps Complicate Planning, Could Slow Development

BY PAUL SHIGLEY

Many California cities and counties are wrestling with flood waters these days, but, perhaps more importantly, they also are wrestling with revised flood risk maps issued by the Federal Emergency Management Agency. The new maps have raised the consternation of local government officials, homeowners and developers in numerous locales, and in a few places the new maps are forcing reconsideration of growth plans.

Federal officials offer few apologies and say they are simply following the orders of Congress, which directed FEMA to revisit flood maps in the wake of the Hurricane Katrina disaster. In fact, the federal remapping may be only the beginning of flood headaches for the Central Valley in particular. While FEMA is concerned with 100-year flood protection, 2007 state legislation pegs the standard of protection in the Central Valley at 200 years and, starting in 2015, prohibits development in areas lacking 200-year protection unless agencies prove they are taking steps to provide 200-year protection (see *CP&DR*, October 2007).

It's difficult to generalize regarding the FEMA remapping program because cities and counties are so different. Some local officials praise FEMA for considering local concerns, while others complain of a heavy federal hand in the remapping process. The local governments are also responding very differently to the new maps, with some digging in their heels and others rounding up money for improvements.

One primary issue is this: If a city or county cannot show that a flood-control levee is "certified" by the Army Corps of Engineers, FEMA flood maps assume the levee does not exist. That was the case in the City of Chico, where a new FEMA risk map placed a substantial portion of the city in the 100-year floodplain. If the map were to stand, thousands of property owners would have to buy flood insurance, and new development would have to meet a variety of potentially expensive standards. The levees in question, along Sycamore and Mud creeks, were actually built by the Army Corps during the 1960s. They are owned by state Department

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State Budget Bad News Continues For Transit, Ag, OPR

Capitol
update

BY PAUL SHIGLEY

The Schwarzenegger administration's proposed state budget for the 2010-11 fiscal year promises more of the same, as the spending plan mostly mirrors the current year's version in regards to local government funding, infrastructure and land conservation.

The spending plan provides no money for local transit, offers no subventions to counties for implementing the Williamson Act agricultural land conservation program, and again tries to eliminate the Governor's Office of Planning and Research (OPR). The governor has also resurrected a proposal for additional offshore oil drilling leases in the Santa Barbara Channel, with the

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For a second time, the Bay Area Air Quality Management District (BAAQMD) has postponed adoption of California Environmental Quality Act (CEQA) thresholds of significance for greenhouse gas emissions. The district board delayed a decision until April in the face of ongoing opposition to the thresholds from local governments and some environmentalists, who argue the standards could have unintended consequences.

The thresholds of significance are intended to guide cities and counties as they review the potential impact of land use projects, stationary sources of pollution and general plans under CEQA. The air district has intentionally proposed quite strict project thresholds. For example, the typical 55-house subdivision or 77-unit condominium project would generate enough greenhouse gas (GHG) emissions for GHG to be considered a potentially significant impact; therefore, the project would need an environmental impact report.

Planners in Berkeley, Oakland, San Francisco and other cities argue that the thresholds are not adequately location-sensitive and could require that desirable infill and redevelopment projects undergo an EIR, rather than a faster and cheaper level of review. The planners also question whether the thresholds would apply to infill projects that otherwise qualify for exemption from CEQA. The planners as well as development representatives and some environmentalists say the district should ensure streamlined review of infill proposals.

Other environmentalists and the attorney general's office, meanwhile, have endorsed the thresholds. Air district staff members argue the thresholds are location-sensitive because infill projects close to transit and a mix of land uses would generate fewer GHG emissions than automobile-dependent subdivisions on the fringe. They also say that a project that complies with a city or county climate action plan (many of which are being prepared) could be afforded a "presumption of insignificance" and, therefore, proceed without an EIR.

The BAAQMD would be the first air district in the state to adopt thresholds of significance for greenhouse gas emissions. The proposed thresholds and background documents are available on the district

website at <http://www.baaqmd.gov>.

The California High-Speed Rail Authority business plan released at year's end is inconsistent, unrealistic and potentially illegal, according to a Legislative Analyst's Office (LAO) report to the Assembly Transportation Committee.

The plan lacks a complete discussion of various risks, contains no risk management strategy and has an overly general and inconsistent timeline, according to the LAO. "For example, regulatory approvals are expected by 2018 but procurement is scheduled to be complete by 2014," the LAO reported. "This could mean the train technology and rolling stock will be procured before regulatory agencies approve their use."

The LAO called the plan's expectations of federal funding "highly uncertain." The plan is based on the federal government providing about \$3 billion a year through 2016 for the project, even though the state now receives only about \$3 billion annually for the entire transportation system, including gas-tax funded highways. The plan also appears to assume the public sector will fund insurance and provide a revenue guarantee to private investors, even though the high-speed bond measure approved by voters in 2008 explicitly prohibits a public operating subsidy, the LAO concluded.

Still, the new business plan is an improvement from a 2008 version, according to the LAO. At a mid-January hearing, Transportation Committee members offered tepid support of the new business plan and asked hard questions of rail authority representatives. The new plan pegs construction cost at \$42 billion based on year-of-expenditure estimates. The earlier plan estimated construction at \$33 billion in 2008 dollars. The new plan decreased the 2008 version's annual ridership estimate from 55 million trips in 2030 to 41 million trips in 2035. The new plan also pegs ticket prices at 83% of a comparable airline ticket, rather than the earlier forecast of 50% of a plan ride. The new plan assumes local governments will prove less money for the project, and private investors much more.

The business plan is available on the High-Speed Rail Authority's website, <http://www.cahigh-speedrail.ca.gov/library.asp?p=8200>.

The Legislative Analyst's Office report is available at <http://www.lao.ca.gov>.

The Merriam Mountains housing project in North San Diego County lives – at least until the Board of Supervisors has another chance to consider the proposed development.

In December, county supervisors closed a hearing with a 2-2 vote, which equaled rejection of the proposed 2,600-unit project just west of Interstate 15 and north of Escondido (see *CP&DR In Brief*, December 15, 2009; *Local Watch*, August 2006). Supervisor Ron Roberts missed the meeting, and in early January he asked his fellow supervisors to rehear the matter. "Because of the size of the Merriam Mountains project and its significance in terms of regional population growth, I believe it is important for this project to be considered by the full Board of Supervisors," Roberts wrote. Supervisors scheduled a new hearing for March 24.

In the meantime, project opponents have demanded that the district attorney's office investigate Supervisor Bill Horn for allegedly violating a county ordinance prohibiting supervisors from having contact with a project proponent outside of the public process. A Merriam Mountains supporter, Horn admitted last month that he had advised Stonegate Development Group to request a hearing delay until all five supervisors could be present. Opponents want Horn to recuse himself.

After years of study and negotiations, the San Jose City Council has adopted a citywide inclusionary housing ordinance. The measure, which takes effect in 2013 (unless certain market conditions improve), requires market-rate developers to make 15% of new units available to households with incomes of no more than the median. If developers choose to meet the mandate off-site, the affordable housing requirement rises to 20%. The city has had similar requirements for the downtown area for years.

The City Council's decision on citywide inclusionary regulation came only three months after the council suspended a rule requiring 45-year restrictions on 20% of new units in redevelopment project areas to ensure their availability to low- and moderate-income households. Because prices for market-rate and affordable units are so close these days, there is no incentive for buyers to buy an income-restricted unit, city officials concluded. Developers asked for the relief, which city officials say they will revisit when the market changes. ■



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Oil Drilling Could Fund State Parks

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\$100 million in annual lease revenues funding state park operations.

The state budget will be the dominant issue in Sacramento during the 2010 legislative year, just as it was during 2009. A number of legislative priorities have already been washed away amid the red ink. State Senate President Pro Tempore Darrell Steinberg (D-Sacramento) is limiting senators to eight bills this year, rather than the typical 20. Steinberg himself pulled the plug on his SB 500, which would have established a permanent funding source for affordable housing.

Although the governor has not formally proposed taking additional revenues from cities, counties or redevelopment agencies, rumors persist that a new \$2 billion shift away from redevelopment agencies is in the works.

The state is facing a shortfall of about \$20 billion for the current and next fiscal year. The administration proposes to bridge the gap partly by getting the federal government to provide an additional \$6.9 billion and to allow the state to divert \$1 billion in federal money designated for elderly and disabled people to other programs. Thus far, Congress and the Obama administration have been cool to the state's pleas. In a budget analysis, the state Legislative Analyst's Office (LAO) said, "We believe that the likelihood of Washington agreeing to *all* of the governor's requests is almost non-existent."

Under one proposal, the state would eliminate the 5% (temporarily 6%) sales tax on gasoline and add 10.8 cents per gallon to the existing 18-cent gasoline excise tax. This proposal would do two things: It would eliminate a dedicated funding source for transit capital development and operations, saving the state \$1.5 billion. Second, because the gas sales tax goes into the general fund but excise tax revenues flow to a special fund, the state's Proposition 98 obligation to schools (which is based on the general fund) would be reduced.

The proposal appears to be a direct reaction to a court ruling last year in which the Third District Court of Appeal held that the state had to pay back about \$1.2 billion it diverted from transit agencies during the 2007-08 fiscal year. Although the state has continued the diversion in years since, the court ruled that Proposition 42 and Proposition 1A from 2006 protect the revenues for transit purposes.

League of California Cities Executive Director Chris McKenzie said the governor would "destabilize local infrastructure funding." Plus, he noted, the state just last year attempted to take \$1 billion in gas excise tax revenue that was legally dedicated to local governments for road maintenance.

"This is just the kind of Byzantine proposal that we've seen from the state over and over again in recent years that erodes voter confidence in state government," McKenzie said.

Although the California Transit Association is fighting the governor's plan vigorously, spokesman Jeff Wagner noted, "This proposal exists only as a proposal advanced by the governor. It is, frankly, hard for us to see how the leadership in the Legislature will accept this when it results in a net decrease in revenues for the short-term."

In addition, the governor would shift money currently available for highway expansion into maintenance and rehabilitation accounts, according to the LAO, which suggests increasing the gas tax.

On a different front, the governor has proposed continuing the elimination of subventions to counties that implement the Williamson Act, which provides tax breaks to agricultural landowners who agree not to develop their land for at least 10 years (see *CP&DR*, August 15, 2009).

Since lawmakers approved that plan last summer, a number of counties have stopped enrolling new properties in the land conservation program.

Also like last year, the governor has proposed eliminating OPR. That plan went nowhere last year because lawmakers declined to approve legislation to shift statutory duties to other agencies. Still, the governor has revived the issue. Department of Finance language is murky, but OPR's duties would apparently be handed to the Natural Resources Agencies and the Department of Housing and Community Development.

The oil-drilling-for-parks proposal may be the most intriguing idea contained in the governor's budget. One year ago, the State Lands Commission voted 2-1 against allowing Plains Exploration and Production Company (PDX) to tap the Tranquillon Ridge Field off the Santa Barbara County coast. Although state law prohibits new oil drilling in state waters, PDX proposed slant drilling from an existing oil platform to reach Tranquillon Ridge. The drilling would provide the state with about \$1.8 billion over 14 years, including \$100 million up front. In addition, PDX in 2008 cut a deal with local environmental groups in which the oil company agreed to shut down three other platforms in the area and to donate 3,900 acres to the Trust for Public Land.

Schwarzenegger attempted to go around the State Lands Commission – composed of the lieutenant governor, the controller and the finance director – last year, but lawmakers refused to cooperate. Since then, John Garamendi resigned as lieutenant governor after winning a seat in Congress, and Schwarzenegger nominated Republican state Sen. Abel Maldonado to be lieutenant governor. Assuming Controller John Chiang maintains his opposition to the PDX project, Maldonado could be the swing vote. However, Maldonado is from Santa Maria, and oil drilling is controversial on the Central Coast. He voted against the project last year.

While many state and national environmental organizations oppose the oil drilling, they also oppose Schwarzenegger's state parks closures and cutbacks. Schwarzenegger now proposes to use \$140 million of the oil drilling revenues for parks during the 2010-11 fiscal year and to continue dedicating the revenue to parks.

The LAO has urged lawmakers to take action on a spending and revenue plan by the end of March because time will be needed to enact proposals and to get measures on the June ballot.

In the meantime, advocacy groups are working on their own ballot measures. The League of California Cities, the California Redevelopment Association and the California Transit Association are advancing a measure that would add further protections to local government, redevelopment, transportation, and transit revenues. A group called Conservation Strategy Group supports a measure that would add \$18 to vehicle registration fees, with the revenue designated for state parks in exchange for free access to state parks. Numerous other measures are circulating that would require reassessment of commercial properties, reduce the two-thirds vote required in the Legislature for the budget, and otherwise alter how the state makes budget decisions. ■

■ Resources:

Legislative Analyst's Office: www.lao.ca.gov.

Governor's proposed budget: www.ebudget.ca.gov.

California Transit Association: www.caltransit.org.

Secretary of State's initiative and referendum list: www.sos.ca.gov/elections/ballot-measures/initiative-referendum-status.htm.

Mixed Responses To FEMA Flood Maps

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of Water Resources (DWR) and maintained by Butte County. However, “It’s mostly our citizens who are protected by the levees,” Chico Building and Development Services Director Fritz McKinley said. “The city is taking the lead in this process.”

The process has been mostly bureaucratic, not physical. It involves compiling the Army Corps’ as-built drawings, county maintenance records, and new DWR testing data. Last June, the city and Butte County signed a “provisionally accredited levee” (PAL) agreement with FEMA, and the city has about one more year to convince the federal agency that the levees are sufficient.

McKinley said the episode has had little impact on planning or development because building has been very slow lately. “It does educate the public that they are living in an area protected by a levee,” conceded McKinley. That education is a goal of both Congress and the state Legislature.

South of Chico in Yuba County, residents are well aware they live in an area reliant on levees, as Yuba County experienced disastrous floods during 1997, 1986, 1964, 1955 and 1950. The 1986 flood in the unincorporated communities of Linda and Olivehurst was the subject of the *Paterno* decision, in which the court ruled the state was liable for more than \$400 million in property damage because of inadequate levee maintenance (see *CP&DR*, March 2005; *CP&DR Legal Digest*, January 2004). In addition, the county’s largest growth area – Plumas Lake, located south of Marysville – has flooded several times.

However, Community Development Director Kevin Mallen contended Yuba County is actually a flood control success story. Thanks to impact fees from builders in Plumas Lake, property assessments and about \$150 million in state bond funds, Yuba County is on track to complete a \$400 million levee upgrade program later this year (see *CP&DR Deals*, December 2006). The program’s central component is construction of about 30 miles of new levee along the Feather and Yuba rivers. The new structures replace 100-year-old levees built from mining tailings and native material.

“We started our levee improvement program in 2004,” Mallen said. “We’re now in a position where we are going to have our certification package to FEMA by April.” He expects the final FEMA risk maps to identify a few new small stream hazards, but the county’s populated areas will have 100-year flood protection. In addition, a general plan update will emphasize the critical nature of flood control in Yuba County, he said. “It’s not just building levees, it’s maintaining them.”

While Yuba County’s program for the east banks of the Feather River is nearing completion, Yuba City and Sutter County are still trying to figure out how to pay for about \$200 million in needed improvements to the river’s west bank levees. Virtually all of Sutter County, including Yuba City, lies in FEMA’s revised 100-year floodplain, although flood maps for only the southern portion of the county are final. Still, until levee improvements are made, virtually all new building and most remodeling will have to meet expensive requirements, such as raised building pads, second-story living spaces and stem wall construction. Residents in Sutter County are scheduled to vote on property assessments later this year to raise about \$80 million for levee improvements.

Farther south in San Joaquin County, FEMA identified “large areas

of Stockton, a small area of Lodi and unincorporated areas of the county that are in the urban envelope” as being in the floodplain, said Connie Cochran, of the Stockton city manager’s office. The initial risk maps had the potential to nearly shut down development in a broad area. However, the city, the county and several reclamation districts that own levees worked closely with FEMA for several years to refine the maps. In the end, about 3,800 parcels, mostly in Stockton’s older Smith Canal neighborhood, were added to the floodplain, as well as some properties, mostly agricultural, in unincorporated San Joaquin County.

The bigger issue is actually the provisionally accredited status of levees protecting about 40,000 structures in Stockton, Lathrop and the unincorporated communities of Weston Ranch and Brookside. The cities and county concede the levees in question do not meet Army Corps of Engineers design standards and are applying for \$76 million in state grants to upgrade the levees. The situation threatens to slow development and redevelopment.

The revised FEMA maps are not impacting only the Central Valley. In Ventura County, for example, FEMA identified six uncertified levees that protect portions of Ventura, Oxnard, Camarillo and Simi Valley. In Oxnard, a half-mile-long gap in a Santa Clara River levee threatened to halt development at the city’s 700-acre RiverPark project (see *CP&DR Places*, April 2005). Oxnard officials, however, convinced FEMA to delay final map adoption because of erroneous topographic elevations. The 2 1/2-year delay gives Oxnard time to figure out how to pay for about \$75 million in needed levee improvements, according to

Rob Roshanian, Oxnard building and engineering services director.

“The way FEMA is doing the maps, they are not very accurate. People in D.C. are doing the maps for Oxnard,” Roshanian complained. “They don’t even have good topographic maps to work with.”

Above the Central Valley, Calaveras County officials are dealing with the implications of new flood maps that place some of the Valley Springs area in the 100-year floodplain from Cosgrove Creek.

“There is a lot of development pressure in that area because there is some infrastructure around there,” said David Pastizzo, a planner for the county. “There are several subdivisions being reviewed in the planning department right now.” He could not say how the new flood maps will affect those proposals, but he warned that the maps could complicate a new community plan that has been in the works for several years.

Meanwhile, according to Chico’s McKinley, the FEMA remapping serves as “kind of a precursor” to the more arduous 200-year flood requirement forthcoming for the Central Valley. Like many jurisdictions, Chico may need money for flood control improvements and increased maintenance to meet the mandate. ■

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David Pastizzo, Calaveras County Planning Department, (209) 754-6394.
San Joaquin County flood information: www.co.san-joaquin.ca.us/pubworks/flood_info.html.
Ventura County Watershed Protection District: www.vcwatershed.com/levee/index.html.
Federal Emergency Management Agency flood information: www.fema.gov/hazard/flood/info.shtm.

“Yuba County is on track to complete a \$400 million levee upgrade program later this year.”

The largest development project ever approved in Amador County might also become the first project in the county to be decided by voters in a referendum.

With 1,334 housing units, 300 time-share units, a golf course resort and a commercial area, Gold Rush Ranch would approximately double the size of the City of Sutter Creek. Project opponents say the project is simply too big, and they fear Gold Rush Ranch could mark the start of extensive suburban-style development in an area that has been relatively slow to grow.

"It's the beginning of another Elk Grove," said Bart Weatherly, a leader of Preserve Historic Sutter Creek and of the referendum effort. "Elk Grove is not Sutter Creek. Sutter Creek is a quaint little Gold Rush town surrounded by rolling hills and oak woodlands."

On the other hand, Mayor Gary Wooten does not see Gold Rush Ranch as the beginning of the end for Sutter Creek.

"This is a tremendous project," Wooten said. "It's not going to effect the historic preservation. The downtown is going to stay old. You won't even be able to see it [Gold Rush Ranch] from downtown. We're still going to be the small jewel of the Motherlode."

Even if Gold Rush Ranch is not the precursor to a development trend, the project is a substantial one in sparsely populated Amador County. During the last decade Amador County as a whole grew less than 1% annually to about 38,000 people, including about 5,000 who reside at Mule Creek prison in Ione. Sutter Creek grew at roughly 1.5% annually to 2,700 people. That's about 15 new housing units a year. Gold Rush Ranch would blow those numbers away.

Several years ago, the nearby City of Jackson approved an approximately 900-unit project. Opponents qualified a referendum for the ballot, and the City Council, at the request of the developer, rescinded project approvals.

After more than two years of review, the Sutter Creek City Council approved a specific plan and certified an environmental impact report for Gold Rush Ranch in January. But the project has even more history. In 2004, the city approved a golf course, 56-room hotel and 300 time-share units (called "interval-ownership vacation units") on about 600 acres of newly annexed land to the west of the city. The project never went forward, however, and new developers – including Bill Bunch of El Dorado Hills and John Telishak of Corte Madera, and calling themselves Gold Rush Ranch, LLC – entered the picture. They bought the 600-acre project site as well as an adjacent 20,000-acre ranch. The land is generally foothills woodlands and pasture, with some surface mines.



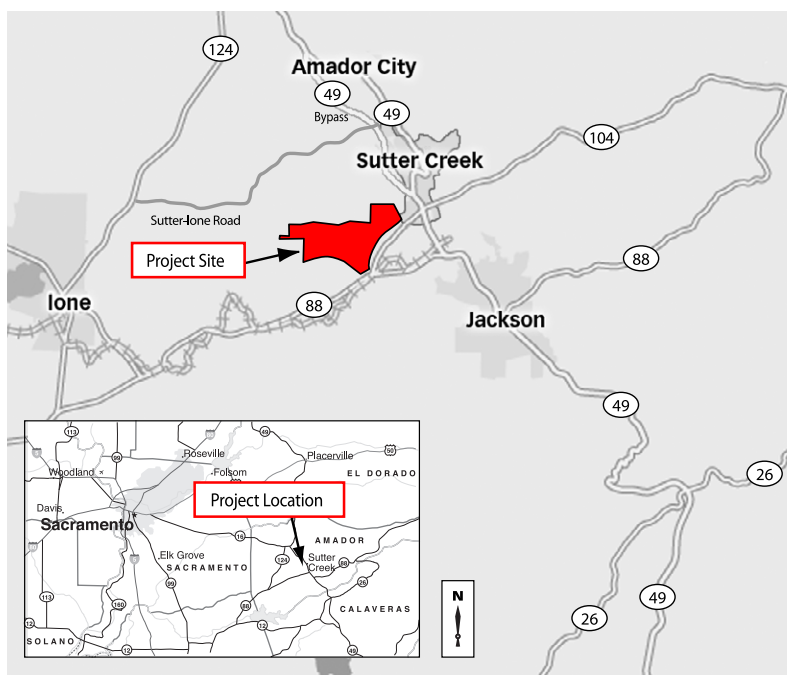
Say what's acceptable?"

The Planning Commission conducted no fewer than 27 meetings at which it examined general plan consistency, developed conditions of approval, and made recommendations regarding the specific plan and development agreement, according to Hauge. The City Council then began its own review in mid-2009 and, over the developers' objections, accepted all of the Planning Commissions' recommendations. In January, the council voted 4-1 to approve the project. Even dissenting Councilman Tim Murphy endorsed the project. He said he voted against the specific plan only because he does not believe it is feasible and developers will end up requesting amendments.

Although the city approved the number of units originally proposed by developers, Hauge and Mayor Wooten insist the project evolved considerably during the city's review. The city required a great deal of up-front infrastructure, including about \$6 million worth of off-site road work, rejected the developer's mass-grading plan and instead required a more site-sensitive approach, and required the planting of two new oak trees for every one removed. While the developer originally proposed only residences in the first phase, the city is requiring the hotel, the golf course, half of the time-share units and about 50,000 square feet of commercial development in the first of four phases in order to generate economic activity. In addition, 10% of units must be affordable to moderate-income households, and market-rate builders must pay a fee into an

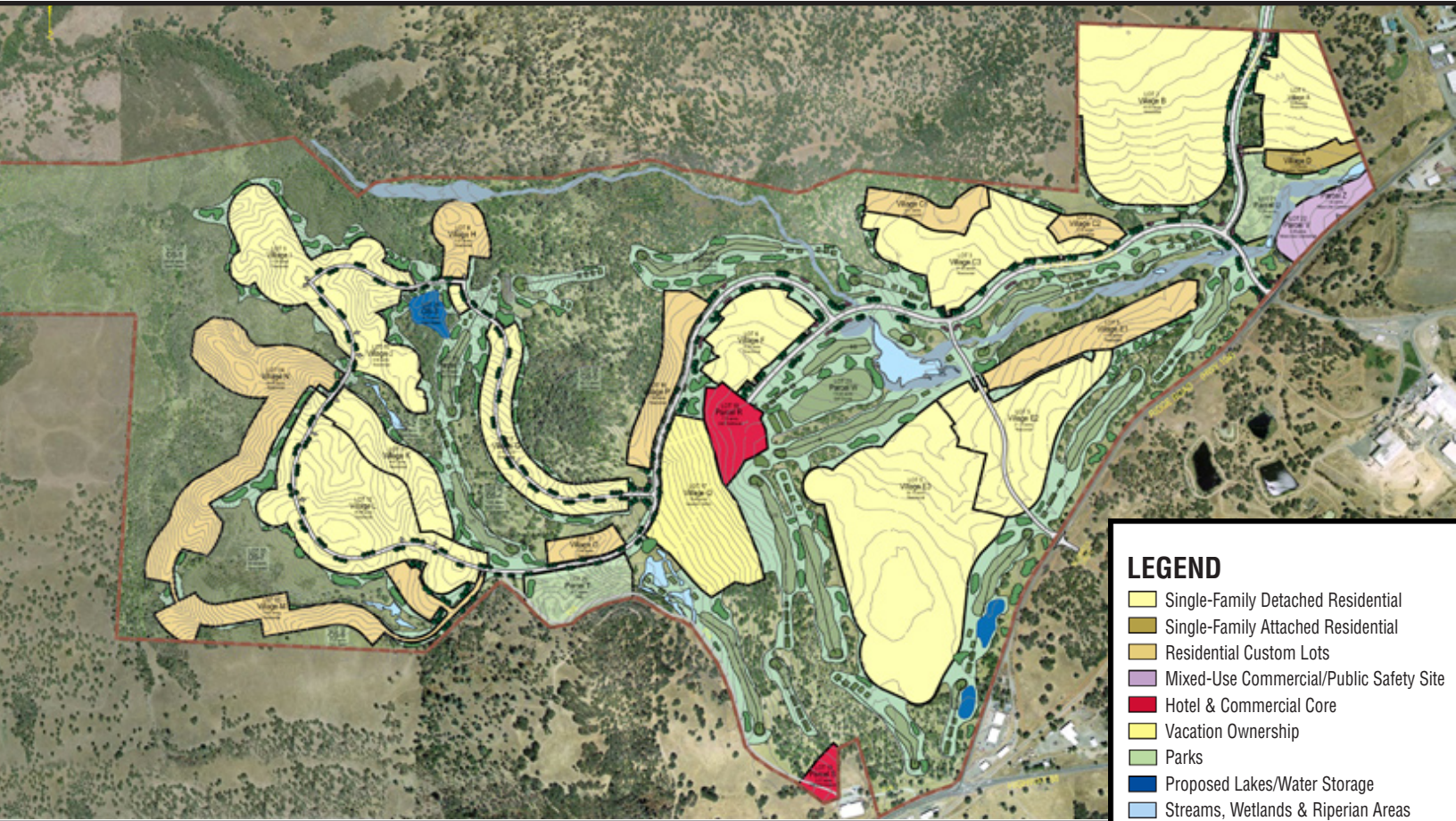
affordable housing fund. The affordable housing conditions are firsts for Sutter Creek, according to Hauge.

Wooten said the project contains attractive features. About 300 acres of the 945-acre site will remain public open space with a multi-use trail system. Development is proposed in individual villages rather than spread across one massive subdivision. The city will get property for two parks and a police station/fire house. – CONTINUED ON PAGE 6



The Gold Rush Ranch project would roughly double the geographic size of Sutter Creek.

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LEGEND

- Single-Family Detached Residential
- Single-Family Attached Residential
- Residential Custom Lots
- Mixed-Use Commercial/Public Safety Site
- Hotel & Commercial Core
- Vacation Ownership
- Parks
- Proposed Lakes/Water Storage
- Streams, Wetlands & Riparian Areas
- Golf Course/Other Grading Area
- Slopes in Excess of 30 Percent

SOURCE: ENVIRONMENTAL STEWARDSHIP & PLANNING, INC.

Housing would be developed in a collection of villages separated by the golf course and preserved open space.

Land also will be set aside for a school and a library. The golf course, hotel, time-share homes and nearly 60,000 square feet of commercial space will generate revenue and about 230 permanent jobs, Wooten said. The new visitors and residents will also boost a struggling commercial area in an unincorporated area between Sutter Creek and Jackson, he added.

Still, opponents argue the project is out of scale. Chris Wright, executive director of the Pine Grove-based Foothill Conservancy, said the city should have insisted on a much smaller project.

“If you look at the basic principles of smart growth, it does make some sense to have growth there, adjacent to the existing city. But the scope here is too big,” Wright said. “It’s your basic golf course-style resort development.”

Weatherly, the initiative proponent, said the city did a very good job of reviewing and conditioning the project. The city’s only mistake was not insisting on a smaller development similar to the original 2004 project, which, he said, won approval without opposition. There is no need for the number of units in Gold Rush Ranch, added Weatherly, who noted Sutter Creek already has about 600 vacant, buildable lots.

Wooten questioned whether opponents would be willing to support even a smaller project. “There’s a lot of people who don’t want one more house built in Amador County,” he said.

To force a referendum election, project opponents have until February 3 to submit about 160 signatures of registered voters. While Foothill

Conservancy’s Wright said voters would overwhelmingly reject the project, Wooten predicted voters would endorse the project if they get the chance.

The funding and market for the project remain uncertain in many people’s minds. Wooten said he expects build-out to take a full 20 years, with retirees and commuters to Sacramento and Stockton – both of which are about an hour away via two-lane highways – buying new homes. Opponents say building houses 50 miles from job centers makes no sense economically or environmentally. Gold Rush Ranch representatives declined to speak with *CP&DR*.

Hauge noted that about 110 acres of the site had long been zoned for industrial uses, and high-density housing is permitted in that zone. As many as 1,600 apartments could have been developed with very little city discretion, he said. Instead, the city has exercised extraordinary discretion over Gold Rush Ranch and will continue to review the project as the developer proposes detailed subdivision maps. ■

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- City of Sutter Creek: (209) 267-5647.
- Anders Hauge, Hauge Brueck Associates, (916) 283-5800.
- Chris Wright, Foothill Conservancy, (209) 295-4900.
- Gold Rush Ranch city documents: http://web.me.com/suttercreek/City_of_Sutter_Creek/Home.html.
- Gold Rush Ranch LLC: www.goldrushranch.com.
- Project opponents’ website: www.nogoldrush.com.

legal digest

Tiburon Loses Prop 218 Assessment Challenge

Division Of Costs Not Proportional To Benefits Provided, Court Rules

BY CORI BADGLEY

The Town of Tiburon has lost another round in its ongoing litigation with property owners over assessments to fund the undergrounding of utility lines.

Under Proposition 218 (California Constitution article XIII D), special assessments shall not “exceed the reasonable cost of the proportional special benefit conferred on a parcel.” The courts have divided this into two general inquiries: (1) Is a special benefit conferred by the improvement to be built through the assessment? (2) Is the assessment proportional? In *Town of Tiburon v. Bonander*, the First District Court of Appeal answered yes to the first question, but found that Tiburon’s division of costs for the undergrounding project was not proportional under Proposition 218.

This case involved the imposition of a supplemental special assessment for undergrounding utility lines. The saga began when the original special assessment was imposed, and certain landowners sued. That case is still pending before the court after the state Supreme Court issued a procedural ruling permitting the property owners to challenge the original assessment (*Bonander v. Town of Tiburon*, (2009) 46 Cal.4th 646; see *CP&DR Legal Digest*, July 1, 2009). After imposing the original assessment, the Town of Tiburon discovered that the costs of undergrounding utilities were higher than anticipated and a supplemental special assessment was necessary. The voters within the district approved the supplemental assessment, and the town brought a validation action requesting that the court declare the assessment valid. Jimmie Bonander and other landowners within the district (“appellants”) filed an answer to the validation action, thereby opposing it. The trial court found in favor of the town and

declared the supplemental assessment valid. The landowners appealed.

The appellate court addressed three questions: (1) Should the record regarding the original assessment be included in the judicial record before the court on the supplemental assessment? (2) Did the town properly identify special benefits that would be conferred by undergrounding the utilities? (3) Did the supplemental assessment satisfy the proportionality requirement under Proposition 218? In the end, the court invalidated the supplemental assessment because the costs were not divided proportionally based upon the relative benefit the properties received as required by Proposition 218.

The methodology used to determine the supplemental assessment was the exact methodology used to determine the original assessment. The same calculations and benefit apportionment applied. Therefore, the court held that information regarding the original assessment was properly before the court in evaluating the validity of the supplemental assessment.

The court next addressed the special benefits conferred. The town identified three special benefits conferred on the properties within the district: improved aesthetics, safety and reliability. Appellants argued that these benefits either had no connection to undergrounding the utilities or these were general and not special benefits because they were conferred on everyone within the district. The court disagreed. The court found that each benefit was “tied to individual properties based on proximity to existing overhead utility lines.” The court also emphasized that the mere fact that the majority of properties within the district received a special benefit did “not compel the conclusion the benefit is not tied to particular properties.” Therefore, the town properly identified special benefits that would be conferred on the properties

within the district.

The town evaluated each property within the district and assigned points under each special benefit category. For example, if the property would only benefit aesthetically, it would receive one point. The points would then determine the assessment amount. In addition to the special benefit points, there was one other factor that determined the assessment amount. The town divided the district into three “benefit zones” based on the construction costs for undergrounding utilities in each of the zones. For example, a property in the Hacienda Drive area that received three benefit points would pay \$20,331.24, whereas a property in the West Hawthorne Drive area that received three benefit points would pay \$7,740. Appellants argued that this methodology violated the proportionality requirement of Proposition 218. The appellate court agreed.

The court stated: “The benefit zones have nothing to do with differential benefits among the three zones but instead are better characterized as ‘cost zones’...” When evaluating proportionality, an assessment should reflect “costs allocated according to relative benefit received.” It cannot be based strictly on the construction costs associated with undergrounding the utilities on a particular property. The town had to take the total construction costs across the entire district and apportion them based on the number of benefits assigned. One property that received three benefit points should pay the same as another property receiving the same three benefit points, the court determined.

The court did point out that, as in *Dahms v. Downtown Pomona Property & Business Improvement District*, (2009) 174 Cal. App.4th 708 (see *CP&DR Legal Digest*, July 1, 2009), the town could have assigned benefit points based on “building size, street frontage, and lot — CONTINUED ON PAGE 8

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size.” However, in this case, the town chose aesthetics, safety and reliability as the three special benefits and did not factor in the size of the lots.

The court also found that the town excluded from the assessment district certain properties that also received the special benefits. If properties are located outside the district benefit, the cost cannot be imposed on properties within the district. This violates Propo-

sition 218’s requirement of not exceeding the reasonable cost of the proportional special benefit. Therefore, the town violated the proportionality requirement by dividing the district into “cost zones” and excluding certain properties that would receive a benefit.

This case clarifies that the construction costs must be viewed as a whole and divided equally by the relative benefit conferred on the properties. This case also illustrates the importance of identifying special benefits.

Tiburon could have avoided this outcome had it determined the amount of special benefits conferred based on lot size or some other relevant factor. ■

■ The Case:

Town of Tiburon v. Bonander, No. A119918, 2010 DJDAR 43. Filed December 31, 2009.

■ The Lawyers:

For the town: Ann Danforth, town attorney, (415) 435-7370.

For Bonander: Frank Mulberg, (415) 388-0605.

redevelopment

Developers’ Challenge To L.A. Design Guidelines Fails

BY KATHERINE J. HART

A state appellate court has upheld the adoption of design guidelines that are intended to implement a City of Los Angeles redevelopment plan.

PR/JSM Rivara LLC v. Community Redevelopment Agency of the City of Los Angeles involves adoption by the Community Redevelopment Agency of the City of Los Angeles, and the city (collectively, the “city”) of design guidelines for the North Hollywood redevelopment project area in September 2007. A developer in the project area, PR/JSM Rivara challenged the guidelines on the grounds the guidelines illegally reduced the maximum allowable densities in the commercial portion of the project area. In other words, the developers claimed their property was down zoned. The developers also argued the city improperly rezoned the properties without complying with the Planning and Zoning Law. Clearly, the developers’ interest in this case was preserving their right to build at densities contained in the city’s zoning ordinance.

The trial court denied the developers relief, finding that the densities within the project area were set years ago when the redevelopment plan was amended in 1997. Thus, the time to challenge those densities had long expired. The lower court also rejected the argument that the design guidelines acted as a *de facto* amendment to the zoning code.

The Second District Court of Appeal upheld the lower court’s ruling. In doing so, the Second District first gave an overview of redevelopment law. The court explained why the adopted guidelines are not a zoning ordinance within the Planning and Zoning Law, and emphasized the difference between *adopting* a redevelopment plan (a legislative act) and *implementing* one (an administrative

act). If the guidelines were found to be a zoning ordinance, then the Planning and Zoning Law requires public notice and a hearing prior to adoption. While redevelopment law also requires certain procedures for adopting or amending a redevelopment plan, the court found that there were no provisions in either redevelopment law or the Planning and Zoning Law that required public notice and a hearing prior to the administrative act of implementing a redevelopment plan. Because the guidelines were merely implementing the plan, public notice and a hearing were not required prior to adoption.

The court further determined the developers had not provided any evidence as to how the guidelines were inconsistent with the city’s general plan – despite the court’s admission that developer had demonstrated that provisions of the guidelines and general plan were different with respect to certain land uses.

In rejecting the developers’ contention that the guidelines conflicted with the state’s density bonus law, the court paid particular attention to the declaration of the city’s regional administrator. She averred that the discretionary density bonus plan in the guidelines would not interfere with the state law. In addition, the court said that developers could not point to contrary evidence. The court further noted that because the city’s municipal code allows a redevelopment plan to contain a base density lower than the maximum allowable residential density under the zoning code, the developers failed to prove they were entitled to the density set by the zoning code. Finally, the court hammered the proverbial nail in the coffin on this issue when it found that the decision to impose the density regulations was completed in 1997, when the redevelopment plan was amended. Thus, the

statute of limitations to challenge density expired a decade earlier.

Lastly, the court held the developer’s California Environmental Quality Act (CEQA) claims were time-barred. In doing so, the court held that, contrary to developers’ contentions, the notice of determination filed by the city on October 26, 2007, was sufficient. The statute of limitations for filing a CEQA claim expired on November 25, 2007. The developers did not file their lawsuit until the following month. ■

■ The Case:

PR/JSM Rivara, LLC v. Community Redevelopment Agency of the City of Los Angeles, No. B213051, 2010 DJDAR 622. Filed December 17, 2009. Ordered published January 13, 2010.

■ The Lawyers:

For PR/JSM Rivara: Matthew Hinks, Jeffer, Mangels, Butler & Marmaro, (310) 203-8080.

For the city: Deborah Fox, Meyers, Nave, Riback, Silver & Wilson, (213) 626-2906.



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Transit Crisis Could Halt Infill Development Momentum

For quite some time now, we've heard about the credit crisis, the foreclosure crisis, the health care crisis, the state budget crisis, the climate change crisis. Add one more crisis to your worry list: the transit crisis.

Transit providers in California appear to be sliding down a wickedly slippery slope. With their operations funding reduced by the state and local governments, transit agencies have responded by reducing services and raising fares. Naturally, higher prices for less service equates to fewer customers. This causes revenue to decrease even more, which results in more service cuts, which causes additional revenue decreases and on and on. On top of this is the fact that more and more transit agencies are failing to meet the state's 20% fare box recovery requirement in order to qualify for a distribution of gasoline sales tax money, which is intended to fund transit operations.

The situation also makes measuring demand a tricky business. Are people driving instead of riding transit? Are they walking or bicycling more? Are they forgoing trips altogether?

The San Jose *Mercury News* [↖] recently ran a five-part series on the Bay Area's transit crisis. I have some nits to pick with the stories – such as the appallingly erroneous assumption that the only cost to driving a car is buying gasoline. Still, the point of the series is valid: The overall transit system is in failure mode.

A story in the *San Francisco Chronicle* [↖] last week made clear that Muni – the workhorse in California's most transit-dependent city – faces a huge budget problem, along with the aforementioned service cuts and higher fares. The Bay Area is hardly alone. Transit operators all

over California are in a similarly sinking boat.

I cannot overemphasize how bad the transit crisis is for planners, so many of whom are focused on creating compact, mixed-use neighborhoods close to transit. The opponents to such development, especially in infill zones, always cite traffic and parking congestion from a proposed project as one of their biggest complaints. Planners are often quick to dismiss such complaints. The whole point is that the new residents and workers will walk, ride a bike or hop on a skateboard to take make short trips, while many longer trips to work, school or social outings will be made on transit. Heck, a household could get by easily with only one car, say the planners.

I'm here to tell you that no one with a choice – read: car – is going to ride a transit system with 20-minute headways. Three dollars each way for a bus ride to the nearest mall or cinema? Forget it, we're driving.

I fully recognize we're still in the grips of the big recession. (Anyone who tells you otherwise is an economist.) Money for public services is very tight. The Schwarzenegger administration is simply trying to keep the lights on four days a week in Sacramento. But the forecast for transit operations funding is bad for many years to come. There is no evidence the recent service reductions and fare hikes are temporary. Rather, they mark the start of a trend.

Those people complaining that your infill project with stacked flats over commercial space, two blocks from the multi-modal station, will clog narrow streets and consume all the parking? They might be proven right. If they are, good luck getting the second project approved.

– PAUL SHIGLEY | JANUARY 25, 2010 ■

Forecasters Predict Blizzard Of Commercial Real Estate Defaults

The weather report for commercial real estate is bad, according to *The New York Times* [↖], which reports rapid falls in value in local office buildings. In California, the weatherman is predicting flurries of half-empty office buildings and shopping malls to fall on Golden State cities during the next two years. For local governments, which have already watched an exodus of local and national retailers from local shopping centers and office buildings, the prospect of further trouble in commercial real estate is not a cheerful one.

According to various estimates, at least \$500 billion of mortgages on commercial buildings – including office buildings, multi-family complexes and hotels – is due to be refinanced during the next two years. Most banks don't want to touch those mortgages, because the buildings have lost value. With a continuing credit crunch and growing vacancy rates in all major markets, investors who paid – and in many cases overpaid – for buildings during the most recent wave of magical thinking now find themselves unable to refinance buildings that are worth less than their mortgages. Sound familiar?

Inability to refinance will force investors to default and give the buildings back to their lenders, who almost certainly do not want them. Banks almost always lose money on “real estate owned” properties. Everybody loses, because real estate values will tank across the board (actually, they already have) and lenders will act like you're speaking Swahili if you ask about refinancing.

Securitization problems will also increase havoc in markets already melting down. Currently, about \$800 billion in commercial real estate

– office buildings, hotels, shopping centers and larger multi-family complexes – has been securitized. In essence, the mortgages have been pooled with billions of dollars worth of other mortgages, “sliced and diced,” received ratings from credit agencies like Standard & Poor, and sold off primarily to institutional investors like pension funds and life insurance companies. In other words, it's the exact same story as that of securitized home mortgages. As with the mortgage-backed securities, the rating agencies gave thumbs up on ridiculously optimistic assurances of return without adequate acknowledgement of any potential downside. Sooner or later, a large number of those commercial real estate-backed securities will tank. The losses could stack up to \$150 billion nationwide.

Given that we have already damaged our financial system by absorbing the cost of failed mortgage-backed securities, is there a sensible public policy to cushion the coming crash? The prospect of the government shelling out \$150 billion or so to save fat-cat institutional investors and their lenders would be political poison for the Obama administration. The now-infamous “bailout” of major financial institutions in the past year, although it may have prevented a global depression, was almost equally unpopular with both progressives and conservatives.

A better idea, perhaps, is for investors to cut their losses by negotiating the sale of the mortgages and/or mortgage-based securities at some discount rate with new investors. If it were politically feasible, which it's not, it might be useful for the federal government to set up a “bad bank” to buy commercial real estate-backed

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securities at a discounted rate and resell them to investors, who will make a killing on them if they buy them cheaply enough.

The “bad bank” might arguably have the advantage of stabilizing the commercial real estate market by creating an efficient “second market” for non-performing mortgages. Yet this model almost certainly entails a

big investment of public money, so it’s probably a non-starter, too. For the time being, as the bluesman Robert Johnson once sang, you’d better stay inside, “‘cause it’s gonna be rainin’ outdoors.”

– MORRIS NEWMAN | JANUARY 11, 2010 ■

What If Judges Don’t Understand CEQA?

What if the judges are getting it wrong? What if they don’t understand the law?

People don’t usually ask such questions in public. But I’m willing to risk it and to ask out loud: Does the Sacramento-based Third District Court of Appeal issue the wackiest California Environmental Quality Act decisions?

No CEQA lawyer is willing to ask such a question in public because, well, they don’t know when they might end up arguing a case in front of three Third District robes. But I will tell you that more than one CEQA lawyer has muttered to me off the record about the Third District.

I bring this up because the state Supreme Court recently overturned a Third District CEQA decision for the third time in slightly less than three years. In *Sunset Sky ranch Pilots Association v. County of Sacramento* the state high court confirmed that a county does not have to study the potential impacts of a project it denies. And the state high court is scheduled later this month to hear oral arguments in yet another CEQA case from the Third District (*Citizens for Sensible Planning v. City of Stockton*, No. S159690).

Am I singling out the Third District? No, the state Supreme Court is. During the last 3 1/2 years, the California Supreme Court has issued six CEQA rulings. Half of those ruling were reversals of Third District decisions – even though the Third District is one of the smallest of the six appellate districts in California. The state high court’s other CEQA rulings were a reversal of a San Jose-based Sixth District decision on mitigation of impacts (*City of Marina v. Board of Trustees of the California State University*, (2006) 39 Cal.4th 341), reversal of a San Francisco-based First District decision regarding when an EIR is required (*Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, (2007) 41 Cal.4th 372), and affirmation of a Los Angeles-based Second District decision regarding the definition of a “project” (*Save Tara v. City of West Hollywood*, (2008) 45 Cal.4th 116). Three CEQA cases are pending – one each from the First, Second and Third districts.

It’s not that the Third District leans hard toward the pro-environment or pro-development side. In *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, (2007) 40 Cal.4th 412, con-

cerning the adequacy of a water analysis, the court ruled for the Sacramento region’s biggest developer. In another case, the court ruled for agricultural interests and environmentalists opposed to the Cal-Fed plan for managing water and the Delta. In the most recent case, the court ruled for an airport owner locked in an ages-old fight with Sacramento County. In the case the State Supreme Court is scheduled to hear later this month, the Third District sided with opponents of a proposed Wal-Mart Supercenter. The Third District is *not* issuing ideologically driven CEQA decisions. Nor is this a matter of one rogue judge, as four different justices wrote the opinions in the four Third District decisions reviewed by the high court.

Still, two of the Third District’s reversed decisions were obviously, uh ... how to put this gently ... outside the mainstream school of thought on CEQA.

- The court rejected the Cal-Fed programmatic EIR (see *CP&DR Legal Digest*, November 2005) in part because Cal-Fed did not analyze a project alternative in which Southern California population growth would cease and, therefore, Southern California cities would not need additional water. Seriously.

- In the most recent case, the court said Sacramento County could not deny a use permit renewal for a private airport that has been a thorn in the county’s side since the 1970s unless the county first conducted an environmental review of potential impacts to the airport and its pilots (see *CP&DR Legal Digest*, September 2008). It took the state Supreme Court only a handful of paragraphs to reverse that faulty logic.

In the news business, we half jokingly say that one event is simply one event, but two occurrences indicate the start of a trend and three occurrences prove the trend is undeniable. In other words, we journalists have a tendency to jump to conclusions. Still, if the state Supreme Court reverses a Third District CEQA decision for the fourth time in a little more than three years, I can only conclude that something is going on. That something may simply be differing legal interpretations by the Third District and the state Supreme Court. Or, more troubling, that something could be a fundamental misunderstanding of the state’s cornerstone environmental law by judges in an appellate court district.

– PAUL SHIGLEY | JANUARY 12, 2010 ■

