

Legislation Would Prohibit CEQA Lawsuits

At Governor's Urging, Up To 100 Projects Would Get Legal Pass

BY PAUL SHIGLEY

California Environmental Quality Act lawsuits may be the next victims of the state's ongoing recession. Democratic and Republican lawmakers have introduced legislation that follows up on Gov. Schwarzenegger's call to exempt 100 projects from judicial challenge based on the environmental law. Citing the ongoing recession, both supporters and opponents of the idea say this just might be the year that lawmakers are willing to take a bold strike at CEQA.

Lawmakers produced hundreds of bills during the days leading up to the February 19 deadline for introducing legislation. The new bills, as well as some bills leftover from 2009, touch on a wide variety of topics, including housing elements, redevelopment, permit streamlining, parking, mobile home parks, the Williamson Act, and high-speed rail. Many new bills remain in "spot" form, meaning they contain few details and little meaningful language.

No land use legislation appears more important than the "CEQA litigation protection pilot program" contained in ABx8 37, AB 1805,

SBx8 42 and SB 1010. The measures would permit the Business, Transportation and Housing Agency (BTH) secretary to select up to 25 projects annually for four years for exemption from judicial review based on CEQA. In other words, no one – not an environmental group, a landowner, the attorney general or another public agency – could challenge the environmental impact report for the project in court. The legislation was introduced with bipartisan support in both houses, as Democratic lawmakers Assemblyman Charles Calderon of Montebello and Sen. Lou Correa of Santa Ana are co-authors along with Republican lawmakers Assemblyman Brian Nestande of Palm Desert and Sen. Dave Cogdill of Modesto.

Proponents of the bills, who include the governor (see *CP&DR Insight*, January 1, 2010), cast the CEQA legislation in economic development terms. The California Chamber of Commerce and the California Business Properties Association (CBPA) back the bills, and other business and development interests are

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Despite Approvals, Proposed Speedways Fail To Provide Fast Track To Jobs

economic
development

BY PAUL SHIGLEY

As the popularity of motor sports, especially stock car racing, blossomed during the late 1990s and 2000s, a number of would-be race track developers and local government officials in California pursued high-speed economic dreams. However, actually building a race track in California has proven to be far more difficult than proposing a track and even winning development entitlements.

At least four jurisdictions approved race tracks from 1998 to 2008, and other local governments have considered with the idea. But not one of the projects has

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San Bernardino County has experienced more than its share of corruption during the past two decades, including the conviction of two county administrative officers, a county supervisor's admission that he accepted bribes, and both successful and pending prosecution of elected officials in county and city government. But none of the past episodes compares with the scandal outlined in mid-February by Attorney General Jerry Brown and District Attorney Michael Ramos.

According to prosecutors, the developers of Colonies Crossroads in Upland provided \$400,000, trips, gifts, prostitutes and other considerations to county officials. In exchange, the Board of Supervisors voted 3-2 to pay the developers \$102 million to drop a lawsuit they had filed over flood control basin improvements.

Prosecutors indicted former San Bernardino County Supervisor Bill Postmus and Jim Erwin, a former assistant to Postmus and former chief of

staff to Supervisor Neil Derry. Postmus and Erwin were arrested on February 9. Prosecutors also allege that five unindicted co-conspirators were involved in the scheme. Although the co-conspirators were not named, they are easily identified as Supervisor Paul Biane, Supervisor Gary Ovitt's Chief of Staff Mark Kirk, Colonies Partners co-managing partners Jeff Burum and Dan Richards, and their public relations consultant Patrick O'Reilly. All involved have denied wrongdoing and contend the prosecution is politically motivated. Biane and Ovitt issued statements saying the \$102 million settlement was in the county's best interest.

Nearly 10 years ago, the City of Upland approved the Colonies Crossroads project on 440 acres adjacent to the 210 freeway (see *CP&DR Local Watch*, December 2003). Partially built since then, the completed project would contain about 1,150 housing units and a 1.1 million-square-foot shopping center. Development stumbled at first because of a dispute over a 65-acre flood control basin in the middle of the site. The developers sued San Ber-

nardino County, arguing the county's flood control easements no longer existed and demanding \$23.5 million for reconstructing flood facilities. A San Bernardino County Superior Court judge ruled for Colonies Partners, but an appellate court overturned the decision in 2003. The litigation returned to Superior Court and a different judge again ruled for the developers in 2006, finding that the county had given up ownership and maintenance of the flood control basin. A few months later, the Board of Supervisors decided not to appeal and voted 3-2 to pay Colonies Partners \$102 million to drop the lawsuit (see *CP&DR In Brief*, January 2007).

Postmus, Biane and Ovitt supported the settlement even though the county counsel's office and outside attorneys with Jones Day urged rejection. Jones Day soon resigned from representing the county, as had the firm Munger, Tolles & Olson one year earlier, when supervisors considered a \$77 million settlement.

Now, prosecutors allege that, to get the \$102 million settlement, — CONTINUED ON PAGE 3

The editorship of *California Planning & Development Report* is one of the toughest — yet most rewarding — jobs that I know. You have to know everything about planning in California, yet be eternally inquisitive about everything that goes on, extremely energetic in going places and talking to people, and willing to keep writing — all the time — to ensure everybody else stays up to date.

When I decided to give up the editorship of *CP&DR* in 1999, I was fortunate enough to connect with Paul Shigley, who turned out to be the perfect guy for the job. Paul is a great reporter and a wonderful writer — and, as it turned out, he had a natural gift for understanding planning in California. That's a rare combination to find.

For the last 11 years, Paul has done a terrific job of being *CP&DR*'s editor. He's put out more than 100 issues in a row, written thousands of stories, edited thousands more, and, in his spare time, he has done excellent articles for publications like *Planning* magazine. He also did most of the heavy lifting on the Third Edition of *Guide to California Planning*.

Now Paul has decided to move on from the editor's role — though not, thankfully, from *CP&DR* altogether. Beginning with our next

publisher's note

issue, Paul will become senior editor — blogging, helping a little with editing, and serving as an all-around senior guru. He'll also devote a lot of his time

to the Fourth Edition of *Guide to California Planning*. I'll miss talking to Paul every day, chewing over the latest events, and getting his take on things, but everyone in California planning is grateful for all he has done.

And just as Paul emerged 11 years ago as the perfect editor of *CP&DR*, now Josh Stephens has emerged as the perfect choice to guide *CP&DR* into the age of online journalism, new media, social networking, and the like. A longtime contributor to *CP&DR*, Josh is an experienced and very skilled planning and architecture journalist, and I am delighted that he has agreed to take over as editor with the next issue. Josh grew up in Los Angeles, went to Princeton, has written for a wide variety of planning publications, and is currently finishing up a master's degree in public policy at the Kennedy School of Government at Harvard. Josh will provide a fresh perspective and a lot of energy to the editor's job. Both Paul and I are grateful and excited. *CP&DR* will continue to be a good ride. ■

— BILL FULTON, EDITOR & PUBLISHER EMERITUS



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Colonies Partners paid \$100,000 apiece into four separate political action committee accounts used by Postmus, Erwin, Biane and Kirk for political and personal matters. Prosecutors also allege the developers paid for meals, entertainment and a prostitute for Postmus during a 2006 “trade mission” to China, and in early 2007 treated Erwin to a lavish three-day trip to New York City and Washington, D.C., that included the gift of a Rolex watch. At the time, Erwin was assistant county assessor for Postmus, who had resigned from the Board of Supervisors after winning the assessor’s position. Prosecutors allege that Erwin, a longtime labor leader for the Sheriff’s Employees Benefit Association and local political operative, served as an intermediary between Colonies Partners and county supervisors. Prosecutors also allege the developers and Erwin had threatened to blackmail Postmus with public revelations of his homosexuality and drug addiction.

Postmus resigned as assessor in early 2009

after disappearing from public view for months and eventually confessing his drug addiction. He was charged later that year with nine felony counts alleging, essentially, that he ran a full-time political operation in the assessor’s office. Erwin was charged last year with 10 felony counts for allegedly failing to disclose gifts he received from Colonies Partners. The most recent complaint charges Postmus with five new felonies and Erwin with nine.

“These individuals engaged in conspiracy, corruption and bribery that cost San Bernardino County taxpayers more than \$100 million,” Brown said. “This is one of the most appalling corruption cases ever seen in California.”

State and local prosecutors say the investigation is ongoing and they could file additional charges.

Relations between the City of Alameda and developer SunCal appear to have soured in the wake of voters’ overwhelming defeat of SunCal’s plan to redevelop Alameda Naval Air Station. Three days after 85% of voters rejected SunCal’s plan during a February 2 special election, city officials sent SunCal a notice of

default, the first step in ending SunCal’s exclusive negotiating agreement to redevelop the base.

SunCal’s plan for 4,800 housing units and millions of square feet of office, industrial and retail space required the electorate’s willingness to lift existing voter-approved limitations on multi-family housing development and density (see *CP&DR In Brief*, February 1, 2010). About three weeks before the election, SunCal submitted an “optional entitlement application.” However, that application is basically the same as the plan rejected by voters and does not comply with the city’s charter or municipal code, city officials concluded. If SunCal does not “cure the defects” and submit a plan that complies with local laws within 30 days, the city could cancel the exclusive negotiating agreement.

SunCal responded with a public letter in which it questioned the city’s commitment to base reuse and to the exclusive negotiating agreement.

Opponents of the Gold Rush Ranch 1,600-unit housing development and golf resort in Sutter Creek submitted ref- – CONTINUED ON PAGE 4

editor’s note

The very first edition of *CP&DR* that I oversaw from start to finish contained a story on the front page with the headline, “Smart Growth Hits The Agenda Of California And National Leaders.” That’s right, I’ve been editor of *CP&DR* since the concept of “smart growth” was new.

The story was the March 1999 edition of *CP&DR*. The edition you are reading right now will be my last as editor. It’s time for me to move along.

As I started reflecting on my 11 years with *CP&DR*, I assumed that not much had changed in the world of land use planning and development. A quick look through my first issue with *CP&DR* both proves and disproves my assumption.

The March 1999 smart growth story does not make much of an attempt to define the term “smart growth” other than to say it is the opposite of sprawl. Eleven years later, I couldn’t define smart growth if my life depended on it, but I know when I see it! The story quoted true believers and environmentalists saying the time had come for smart growth, as well as a libertarian academic and a building industry representative, both of whom warned against embracing smart growth. The story further noted that the administration (headed at the time by Gray Davis – you remember him) was “hanging back” on the issue. In other words, much of the story would sound exactly the same today.

Other stories in that March 1999 edition concerned litigation over an El Dorado County general plan update, a proposed minor league baseball stadium in West Sacramento, a proposal for the Los Angeles City Council to take direct control of the Community Redevelopment Agency (CRA), and a state Supreme Court ruling that expanded the scope of the anti-SLAPP law. Since then, El Dorado County has adopted a general plan that was upheld by voters, and the county’s growth wars have eased;

West Sacramento’s Raley Field has become the comfortable home of the Rivercats; the CRA has been through at least four different executive directors, but it remains separate from the Los Angeles City Council; and the broad reach of the anti-SLAPP law has become accepted as a given. Indeed, many things have indeed changed, or at least evolved, since 1999.

Unquestionably, planning practices have changed. Although the smart growth story might sound similar today, the overall acceptance of high-density, mixed-use, walkable development near transit (something like “smart growth”) has increased dramatically since 1999. Back then, such projects were limited to big cities and a very small handful of suburbs who embraced something called new urbanism. Now, seemingly every city wants such projects, and plenty of developers are willing to build them.

The term “fiscalization of land use” was only coming into vogue 11 years ago, although it had been around since the 1980s. Today, it’s widely accepted that local governments make many land use decisions based primarily on fiscal ramifications. It is pointless for elected officials, local government administrators and even planners to try to hide this fact. They are simply working within a system they did not design.

In 1999, the only planners who knew anything about “global warming” were the few who read wonky scientific journals. Today, even entry-level planners weigh the climate change impact of projects all the time.

Which takes me to the California Environmental Quality Act. Eleven years ago, the statute was driving the planning process. For better or worse, the preeminence of CEQA has not changed at all – at least not yet (see our Page 1 story about legislation).

I leave *CP&DR* to the extremely capable Josh Stephens. I’ll keep a hand in *CP&DR*, largely as a copyeditor and blogger. Thanks to all who have assisted me over the years, and thanks always for reading. ■
– PAUL SHIGLEY

erendum petitions with 468 signatures in early February (see *CP&DR Local Watch*, January 15, 2010). If as few as one-third of those signatures is valid, the referendum of the Gold Rush Ranch specific plan and general plan amendment would qualify for the ballot, possibly as soon as June.

The nonprofit organization GreenInfo Network has released a newly revised database that attempts to identify every publicly protected parcel of open

land in California, ranging from national forest to urban pocket park. The database inventories 49 million acres of protected land composed of 51,500 separate holdings owned by 860 governmental agencies or nonprofit organizations. Downloadable for free, the information should be of use to planners, academics, government agencies, nonprofit organization, businesses and others, said Larry Orman, GreenInfo Network executive director.

According to the database, the United States Forest Service is the largest owner of protected public land in California, with about 20.7 million acres, followed by the Bureau of Land Management with 15.1 million acres. San Bernardino and Inyo counties have the most public open land, with 8.6 million and 6 million acres, respectively.

The California Protected Areas Database is available at www.calands.org. ■

actually been completed. A multiple race track facility approved by Merced County supervisors in 2006 generated more litigation and hard feelings than anything else; the project officially died last year when the property, near the closed Castle Air Force Base in Atwater, fell into foreclosure. A speedway complex approved in late 2008 by the Tulare City Council appears in serious jeopardy, with the developer lacking capital and the City Council still sharply divided on the project. Construction of a half-mile oval track on the edge of Bakersfield adjacent to Interstate 5 commenced in 2007 but halted midway. Developer Alan Destafani's company declared bankruptcy last year and the property sits for sale. Ground never broke on an oval track approved by Yuba County voters in 1998, in part because developers involved ended up in their own feud. Race track proposals in Madera, Tehama and Fresno counties and in the Coachella Valley have not progressed beyond the dreams-and-schemes stage.

The newest race tracks built on private property in California are located in Fontana and Irwindale. Those speedways both opened during the late 1990s. Auto Club Speedway on the site of the former Kaiser plant in Fontana hosts big league NASCAR stock cars two weekends per year, while Irwindale is a minor league facility that operates most Saturday nights. Both facilities also have busy drag strips and racing schools, and they serve as test tracks.

Speedways provide economic appeal on several levels. The Fontana track is featured before huge television audiences two weekends per year, providing national exposure to Fontana, San Bernardino County and the L.A. area in general. Major league facilities such as the one in Fontana cost hundreds of millions of dollars to develop, providing many well-paying construction jobs. Ongoing operations offer permanent, albeit mostly part-time, employment to hundreds of people. The hospitality industry around the speedway benefits. And speedway operators hope that members of "the industry" – car and parts manufacturers, race teams, souvenir and appeal providers, etc. – will locate near their facility.

An economic impact analysis of the proposed Tulare Motor Sports Complex, prepared by The Ramsay Group, found that the facility would generate between \$367 million and \$735 million in annual economic activity, including receipts from a retail component of the project. An analysis of Riverside Motorsports Park proposed by John Condren and Craig Nicholson in unincorporated Merced County said the eight race track facility itself would do \$180 million worth of busi-

ECONOMIC DEVELOPMENT

CONTINUED FROM PAGE 1

ness per year and employ 600 to 1,200 people.

Nationally, a speedway boom of sorts occurred during the 1990s and first half of last decade, as major league facilities opened in

numerous locations. But while race tracks in places such as Las Vegas and Fort Worth have thrived, others have struggled and at least one, in Colorado Springs, closed after only a few years in business. Meanwhile, far more minor league speedways have closed than have opened during recent years in the United States.

Race tracks are inherently bad neighbors. They are noisy, often operate at night and generate a great deal of traffic. Thus, a new race track proposed near any populated area almost automatically stirs opposition. The Merced County Farm Bureau and environmentalists sued Merced County over the environmental impact report for the proposed Riverside Motorsports Park. Opponents of the Tulare track have filed at least three lawsuits.

On the other hand, there was zero opposition to Kern River Raceway when the Kern County Planning Commission approved the minor league facility in 2006. The track would replace Bakersfield's beloved Mesa Marin Raceway, which closed on the other side of town in 2005 when the owner sold the land for housing development. The stalled Kern County track is in a remote location next to an interstate freeway. Construction halted two years ago when developers reportedly ran out of money. Ted James, interim director of the Kern County Resource Management Agency, said he knows of no plan to resuscitate the project.

The multi-track complex proposed for Merced County may have generated more acrimony than any other project in county history. The Board of Supervisors voted 3-2 to approve a general plan amendment and other provisions for the track in 2006, with the majority touting the 1,200-acre project's economic benefits. Opponents countered that the development would conflict with agriculture, jam roads and generate too much noise and air pollution, and the *Merced Sun Star* repeatedly raised questions about whether developers Condren and Nicholson had the capital and experience to develop and operate the huge facility. A Merced County Superior Court judge in 2008 invalidated the project's EIR, and, last July, Condren declared Riverside Motorsports Park dead. In its wake lie lawsuits and unpaid bills to government agencies, lawyers and consultants.

Scott Galbraith, president and CEO of the Merced County Economic Development Corporation, said the race track project was divisive and simply faced too many obstacles. He – CONTINUED ON PAGE 11

Salinas is the blue collar workhorse of Monterey County and the center of a wealthy agricultural region. But unlike its sister cities on the nearby Monterey Peninsula, Salinas has a downtown that is devoid of upscale restaurants and boutique hotels.

Although it is home to the National Steinbeck Center, a museum honoring the Nobel laureate and Salinas resident John Steinbeck, downtown Salinas has never taken off. Instead, the community has sprawled out on the fertile farmland that surrounds it.

Over the last 20 years, Salinas grew by approximately 45,000 residents to today's population of about 153,000, with that growth reflected in new subdivisions and power centers close to Highway 101.

Although downtown keeps missing its turn, developers continue to show interest in the area sometimes called Old Town. The latest suitor attempting to revive downtown, Salinas Renaissance Partners, recently tried to put together a deal to redevelop 21 parcels owned by the city or its redevelopment agency into 100,000 square feet of office space, 800 units of housing and a 145-room hotel with a conference center. However, city officials backed out of negotiations after a year because of doubts over whether such a large project could be completed. In addition, public buildings are located on some of the real estate and plans to replace those buildings are delayed for fiscal reasons. The two sides are now attempting to reach a deal on development for four of the 21 lots before an April deadline.

It's the latest in a long string of development proposals for downtown since the 1970s. Few have made it.

REDEVELOPMENT WATCH

LARRY SOKOLOFF

Salinas Growth Spurt Bypasses Downtown, But Plans Persist

"We've placed a lot of emphasis on the 100 Main (Street) block across from Steinbeck Center," said Mayor Dennis Donohue. "We need a broader vision."

Salinas is not a wealthy community. In 2004, it considered closing its three libraries due to budget shortfalls. A nationwide fundraising campaign and approval of a new sales tax rescued the libraries, but the city's fiscal problems persist. The city had to plug a \$12 million deficit over two years and is now looking at a \$9 million deficit in the next fiscal year, Donohue said. Last year, voters declined to approve a general one-cent sales tax that could have funded additional police officers and a new police station, even though the city's murder rate is among the highest in the state.



The corner of Main and Central as it exists today (top) and as envisioned in Salinas Renaissance Partners' concept plan.

The redevelopment agency would suffer if the state's shift of tax increment goes through (see *CP&DR*, August 1, 2009). The redevelopment agency will lose \$2.2 million this fiscal year and another \$500,000 next year, according to Community Development Director Alan Stumpf.

"We frankly do not have redevelopment money to be aggressive," Donohue said.

The city is pinning its hopes on private developers and federal stimulus money, as well as projects that are being planned by other entities, such as one by a transit agency to improve its downtown railroad station with more train service.

The Transportation Agency for Monterey County is the lead agency on a proposal to bring commuter trains to Salinas from Amtrak's Capitol Corridor line, which runs from Sacramento to San Jose, Stumpf said. The city's Amtrak station is located a few blocks north of the Steinbeck Center. Commuter trains could be running by 2012, said Stumpf. Plans call for a new parking garage and additional facilities for servicing trains. Earlier plans to bringing Caltrain, which links Santa Clara County to San Francisco, fell by the wayside when Caltrain began focusing on electrifying its main line from San Francisco to

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San Jose, Stumpf said.

Another major hope for reviving Salinas’s center is called Alisal Marketplace, proposed for 52 acres in a rundown industrial area adjacent to downtown. The city hopes the southern end of the district will include a new \$45 million police station. Donohue and Stumpf said the station may be financed largely by federal stimulus money.

As its name indicates, Alisal Marketplace would be anchored by a marketplace with a Latin feel. The developer is Cooley Development of Walnut Creek. Stumpf said the city is trying to acquire some of the property in the area from Monterey County (which owns 5 vacant acres) and from the Salinas Valley Solid Waste Authority. City officials would like the authority to relocate its trash transfer station to a more appropriate industrial location south of downtown, according to Stumpf. A portion of the Alisal Marketplace area is located in a separate redevelopment project area for East Salinas.

Despite problems in developing downtown, Donohue says the area is already a destination.

“Downtown is a place people go. There is a steady beat to downtown,” he said, noting “artwalks” on Friday evenings, a farmers’ market on weekends, and entertainment venues such as movie theatres.

But Robert Leidig, owner of Salinas Renaissance Partners, says the city has much more potential. He says residents spend more than half of their entertainment dollars out of the city, with many of Salinas’s Latino residents driving one hour to San Jose for entertainment they cannot find in Salinas. He envisions entertaining them closer to home with such attractions as a downtown tequila bar and nightclub. Leidig also says 15,000 students who attend nearby Hartnell College are another group who could be enticed to come downtown if there were businesses to interest them.

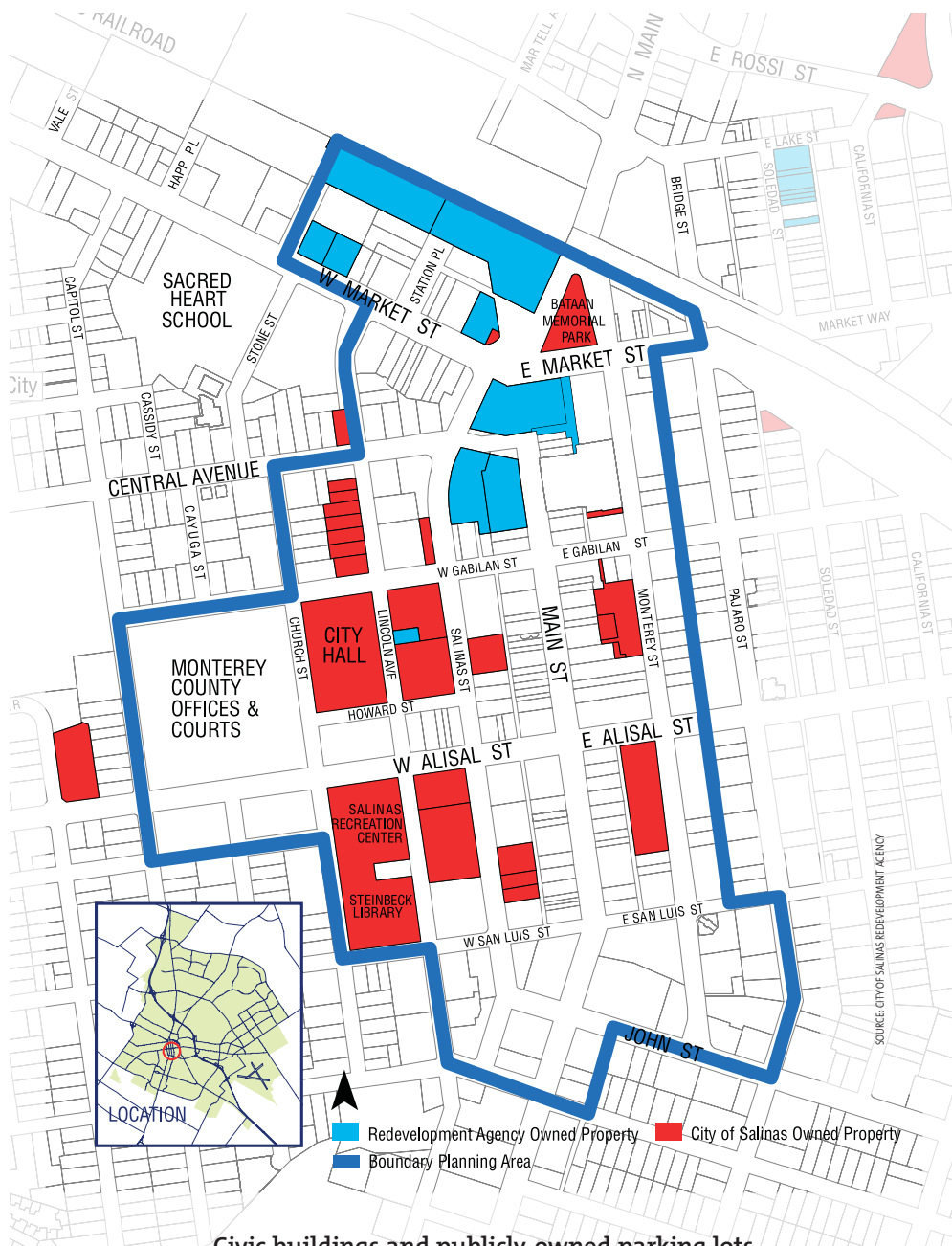
Leidig said the city needs to do more to make downtown appealing to developers, doing such things as changing zoning and extending redevelopment time limits.

“They need to set the table they have to make the sites ready for development,” Leidig said.

Many of the current parcels in the downtown area are parking lots owned by the city, he said. Some of those parcels could be developed, but the city is adamant about not losing parking spaces.

Stumpf said the size of the downtown redevelopment area should be expanded and time frames for the project areas extended another 20 years. “We have to consider extending and expanding our project area,” he said.

Much of the commercial growth in Salinas during recent years has been in the form of big-box stores north of downtown. An ordinance to make it harder for big-box stores to open in the city was approved by the city council in 2009 but was repealed under threat of a lawsuit, according to Amy White, director of LandWatch Monterey County, an open space and smart growth advocacy group. The council is set to con-



Civic buildings and publicly-owned parking lots dominate downtown Salinas.

sider an ordinance this month that would require any new stores over 75,000 square feet to be subject to additional environmental review.

White described Salinas as “an island, surrounded by the richest farmland in California.” That farmland is unincorporated. White said an updated county general plan with new restrictions on subdividing prime agricultural land, could be adopted by the county’s Board of Supervisors later this year. ■

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legal digest

Cal Supremes Give Plaintiffs 30 Days To Sue

High Court Declines To Loosen CEQA's Statute Of Limitations

BY KATHERINE J. HART

The filing of a notice of determination triggers a 30-day statute of limitations for all California Environmental Quality Act (CEQA) challenges to any decision announced in the notice, regardless of the nature of the alleged CEQA violation, the state Supreme Court has ruled.

In a decision filed on February 11, 2010, in *Committee for Green Foothills v. Santa Clara County Board of Supervisors*, the unanimous Supreme Court reversed the Sixth District Court of Appeal, which had ruled that a 180-day statute of limitations applied in the case.

Factual Background

On December 12, 2000, the Santa Clara County Board of Supervisors certified an environmental impact report (EIR) and approved a community plan and general use permit for Stanford University to add buildings to its campus. The EIR found that the project would significantly impact public access to recreational facilities. As mitigation, condition I.2 of the permit required Stanford to identify and dedicate easements for, develop, and maintain the portions of two trail alignments that cross Stanford lands as shown in the 1995 Santa Clara countywide trails master plan (routes S1 and C1). Route S1 was not challenged in this action. In 2005, the board instructed county staff to pursue an agreement with Stanford on the C1 trail alignment. In December 2005, the trails agreement was presented to the Board of Supervisors for consideration as mitigation for the permit.

The trails agreement realigned the trail routes so that portions of route C1 would be located within San Mateo County and the Town of Portola Valley, so long as the

named jurisdictions cooperated. The resolution adopted by Santa Clara County declared that the agreement satisfied condition I.2. Admittedly, alternatives for the C1 route were not studied for their potential environmental impacts due to the uncertainty of where the routes would be located, but the board approved the agreement pertaining to the C1 alignment as satisfying permit condition I.2, stating: "The county's approval of the agreement for trail easements does not constitute county approval of construction, operation or maintenance of specific trail improvements along those routes. The agreement for trail easements contemplates that, prior to any trail improvements, detailed construction plans will be reviewed and considered by the jurisdictions of San Mateo County, Town of Portola Valley and Town of Los Altos Hills, and that those jurisdictions will have discretion to consider whether and how to improve trail improvements."

The board obligated Stanford to provide requisite funds and easements to the jurisdictions to ensure the trail was completed. Alternatively, if the named jurisdictions did not enter into agreements to permit the construction of the trail, Stanford was to pay Santa Clara County up to \$11.2 million. (San Mateo County has since declined to permit the trail.) Santa Clara County would use the funds – in an unspecified way – to mitigate the adverse effects on recreational opportunities for existing or new campus residents and users who resulted from the larger project under the permit. With that, the board determined no further CEQA review of route C1 was required prior to the execution of the agreement.

Two notices of determination (NODs) were filed for the approval of the agreement. The first NOD did not include a reference to the C1 trail alignment. The second NOD was filed on December 20, 2005, and changed the project description to include the board's

actions with respect to the C1 and C2 trail alignments. The later NOD referenced the EIR for the S1 trail alignment, the 2000 permit EIR and the countywide trails master plan EIR/supplemental EIR as supporting CEQA documents.

The organization Committee for Green Foothills filed a lawsuit after the 30-day period following the second NOD, but within 180 days of the board's adoption of the agreement. The petitioner asserted the county had violated CEQA by approving a C1 trail alignment without conducting a CEQA review.

Court of Appeal Decision

The Court of Appeal, Sixth District, held that the longer 180-day statute of limitations contained in CEQA Guidelines § 21167(a) applied. In sum, the appeals court was largely focused on procedural issues – mainly, that the Committee for Green Foothills was entitled to amend its petition to allege facts sufficient to bring its case within the 180-day statute of limitations (see *CP&DR Legal Digest*, July 2008).

Supreme Court's Decision

The California Supreme Court held that the 30-day statute of limitations under § 21167(e) – rather than the 180-day statute of limitations under subdivision (a) – applied. The court based its decision not only on the language of § 21167, but on the law's legislative history. In looking at the statutory language, the court reasoned that applying subsection (a) of § 21167 as proposed by the petitioner would have made no sense because "the limitations period in subdivision (a) starts when a project is approved or begun, and it continues for 180 days." Further, subdivision (a) specifically contemplates that no NOD is filed by an agency. Here, the county filed a NOD.

An analysis of the CEQA Guidelines conducted by the court – CONTINUED ON PAGE 8

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revealed that “the applicable statute of limitations depends in the first instance on whether a public notice was filed,” and that the 180-day statute of limitations applies only where no public notice has been given (e.g., no notice of exemption or determination has been filed). The CEQA Guidelines further indicate that the filing of a notice of exemption starts a 30-day statute of limitations (see 14 California Code of Regulations, §§ 15075(g) and 15049(g)).

The legislative history of § 21167 indicates that subsections (d) and (e) were added to the statute in 1974. A report prepared by the Department of Water Resources regarding AB 2338 for the 1973-1974 legislative session, in

which the amendments were proposed, said, “[E]ssentially any determinations made by public agencies under the Environmental Quality Act will be subject to a 30- or 35-day challenge limitation, provided a notice of determination has been filed. If no notice is filed or utilized, a 180-day period of limitation applies.”

Finally, the Supreme Court looked to the policy considerations posed by CEQA – the prompt resolution of challenges to decisions of public agencies regarding land use, and the fact that bright line rules provide certainty to public agencies and developers.

The Supreme Court’s decision could be a preview of its ruling in *Stockton Citizens for Sensible Planning v. City of Stockton*, (2007)

157 Cal.App.4th 332, cert. granted, (2008) 72 Cal. Rptr. 3d 622, which was argued before the Supreme Court in January. The Third District Court of Appeal ruled that the CEQA statute of limitations never commenced because there was no valid approval of the project in question. ■

■ The Case:

Committee for Green Foothills v. Santa Clara County Board of Supervisors, No. S163680, 2010 DJDAR 2313. Filed February 11, 2010.

■ The Lawyers:

For Committee for Green Foothills: William P. Parkin, Wittwer & Parkin, (831) 429-4055.

For the county: Lizanne Reynolds, deputy county counsel, (408) 299-5940.

For Stanford University: Barbara J. Schussman, Bingham McCutchen, (415) 393-2380.

ceqa

Can't Ignore Old Mitigation Measures, Court Rules

BY WILLIAM W. ABBOTT

The shelf life of mitigation measures may readily outlast the lives of the projects to which the mitigations are attached, according to the Court of Appeal for the First Appellate District.

While the fact pattern in the case at hand was specific to timber harvesting and the conversion of property, the court’s holding has application in the broader world of all California Environmental Quality Act (CEQA) reviews.

The facts cover a 20-year time frame. In 1988, California Department of Forestry and Fire Protection (CDF) approved a Timber Harvest Plan (THP) on Mendocino County property owned by Greg Kuljian’s predecessor. The adjacent owner objected, and, in response, CDF imposed a condition prohibiting tree removal within 200 feet of the neighbor’s home as a protective measure to avoid wind-related damage. Ten years later, CDF approved another THP in the same location and added the no-harvesting condition once again. Years later, Ed Powers, the owner, sold the property to Kuljian. As part of the purchase agreement, Kuljian agreed to seek a conversion exemption allowing Powers to harvest the timber. As part of the conversion, Kuljian indicated a desire to convert the timberland to orchard. CDF approved the conversion, the effect of which was to extinguish the previously imposed 200-foot no-harvesting mitigation measure.

Paul Katzeff, the neighbor who had object-

ed in the first place, sued, alleging three causes of action: First, the exemption violated the Forest Practices Act and CEQA by elimination of the mitigation measure; two, the conversion was inappropriate as Kuljian did not have a bona fide intent to develop an orchard; and, three, a claim of private nuisance. The CDF brought a motion for judgment on the pleadings and the Mendocino County Superior Court dismissed the action in its entirety. Katzeff appealed.

Judicial review of a judgment on the pleadings invokes a more limited judicial inquiry than a trial. The court assumes that all material facts are true as pled and examines whether or not a cause of action exists, given those facts. As to the first cause of action, CDF argued that because both timber harvest plans had expired, any mitigation measures linked to those plans also expired. Because Kuljian’s request for conversion was a ministerial approval, CDF argued it did not have a duty to carry forward the previously imposed mitigation measure.

On these facts, the appellate court characterized the conversion request as part of a larger project, and, based upon the decision in *Orinda Association v. Board of Supervisors*, (1986) 182 Cal.App. 3d 1145, concluded that CDF could not segment the project and free itself from consideration of previously imposed mitigation measures. The court recognized that mitigation measures are not frozen in time forever. But once a mitigation measure is imposed, the agency

must state its basis, supported by substantial evidence, on which it later cancels or nullifies the measure. Because there was evidence that this analysis occurred, the appellate court concluded that dismissal of the first cause of action was in error and reversed.

As to the second cause of action, the record contained evidence that Kuljian did not have bona fide intent to develop an orchard. This created a factual dispute in the record on bona fide intent; therefore, it was incumbent upon the agency to make a determination to that effect. As the record was silent on this issue, the court found – CONTINUED ON PAGE 9



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dismissal of the cause of action again was inappropriate.

The third cause of action was based in nuisance. While timber operations conducted pursuant to the Forest Practice Act enjoy statutory immunity from nuisance claims, there were sufficient allegations of non-compliance with the act that the trial court's dismissal, based upon a motion for judgment on the pleadings, was premature. Once again, the appellate court reversed the trial court. Whether or not Katzeff can prevail on any of his three theories remains to be seen.

The CEQA aspect of this decision has broader implications beyond timber harvest plans. Some permits are granted for a fixed

term. This case directs cities and counties to at least examine the appropriateness of those mitigation measures when acting on a subsequent permit for an unrelated use in the same location.

More intriguing, and perhaps more problematic, are circumstances in which a site may be subject to a new, significantly different reuse proposal. Typically, those applications are subject to full CEQA review. Is it even relevant to go on archaeological dig for a 25- or 30-year-old CEQA document for a different use? If the current project is a new endeavor, then the lead agency should be able to proceed free of the argument that the new application is part of another project and the earlier CEQA history should be irrelevant.

CEQA mitigation history will continue to be relevant on tiered environmental documents (e.g. general plan to rezoning to tract map) and this case, which involves THPs, serves as a reminder to lead agencies of the need to carry those requirements forward to current permit applications. ■

■ The Case:

Katzeff v. California Department of Forestry and Fire Protection, No. A122642, 2010 DJDAR 1516. Filed January 28, 2010.

■ The Lawyers:

For Katzeff: Paul V. Carroll, (650) 839-8644.

For CDF: Anita E. Ruud, deputy attorney general, (415) 703-5533.

For Kuljian: Ryan F. Perkins, (707) 964-4900.

For Powers: Jared Carter, Carter, Vannucci & Momsen, (707) 462-6694.

Economic Woes Boost CEQA Bills' Chances

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likely to sign on.

"This is an opportunity for us to make some reforms in this arena as we try to pull ourselves out of this recession," said Rex Hime, president and chief executive officer of the CBPA. The state simply needs to consider jobs and economic development when it imposes environmental regulation, he said.

"CEQA has gone through amorphous changes over the years. Anything that tries to ensure the process isn't used in an abusive manner is an important thing," Hime said.

Tom White, chief of staff to Assemblyman Calderon, called the bills "pretty modest." The legislation would not exempt projects from ordinary CEQA review. It would only prevent lawsuits over a project's environmental impact report – litigation that White characterized as "abuse."

The California Chapter of the American Planning Association (APA) has not yet taken a position on the bills but is likely to oppose the legislation, according to its lobbyist, Sande George. She said the planning organization may instead offer alternative CEQA reform, such as expanding SB 375's CEQA exemptions or streamlining for infill projects.

Pete Parkinson, APA California's vice president for policy and legislation, expressed frustration with the bills' approach to CEQA because of the potential for political manipulation and because the legislation does not attempt to separate legitimate CEQA challenges from bogus lawsuits.

"I understand where the impulse comes from," Parkinson said of the CEQA bills. "CEQA litigation can be a black hole for projects. EIRs have become more and more costly, and sometimes there is nothing you can do to avoid litigation. And sometimes the bills' approach to CEQA has nothing to do with the environmental impacts. It has to do with money or it has to do with jobs or something else."

Still, Parkinson said, the state should not ignore real deficiencies in environmental analyses. "There are jurisdictions around the state that don't take their obligations as seriously as they should," he said.

Attorney E. Clement Shute, Jr., of Shute Mihaly and Weinberger, said proponents' argument about frivolous or abusive CEQA litigation is an old saw of developers – and one that arises every time California's

economy goes south. Shute, who has represented environmentalists and public agencies in numerous high-profile CEQA cases since the 1970s, said the proposed legislation is beyond "modest" because the existing statute relies on citizen enforcement.

"Without recourse to the courts, CEQA would be a meaningless, empty statute," Shute said. "If the attorney general or citizens don't have that right (to go to court), EIRs would become 20 pages and be worthless documents."

Although the legislation is likely to evolve, it currently does not specify what sort of projects would be eligible for the exemption. The administration would apparently have a great deal of authority to choose projects. Looking forward, a Brown administration probably would exempt very different projects than a Whitman administration would pick.

White said Calderon is thinking first about large infrastructure projects, such as a component of the proposed high-speed rail system. The CBPA's Hime also pointed first to public works projects. However, nothing in the bills limits the exemption to public projects, and the model for the program is special session legislation approved last fall that exempts a private 500-acre stadium and commercial complex in Industry from judicial review (see *CP&DR Capitol Update*, October 15, 2009). Housing-only projects appear to be outside the program's likely scope.

"I envision it being pretty big projects – a road project, an energy facility," Hime said. "In Sacramento, maybe something that applied to revitalizing the rail yards or downtown or Cal Expo."

The legislation permits exemptions for 10 projects each year in Southern California, five projects in the Bay Area, five in the Central Valley from Sacramento to Kern County, and five elsewhere in the state. Only projects with certified EIRs would be eligible, and the BTH secretary would have to conduct a public hearing before granting an exemption. Up to 25 projects could receive exemptions each year from 2011 through 2014. Although the legislation would sunset after the pilot period, it could be extended in the future.

"It's important to see that it works, and that it won't be abused," Hime said.

Although Republicans and business inter-

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ests have taken numerous runs at CEQA over the years, ranging from minor amendments to gutting the statute, they have never gotten far. However, there is a sense in Sacramento that 2010 is the year to “do something” about CEQA. No lawmaker wants to get on the wrong side of jobs legislation in a year when one-in-eight Californians is out of work — and in a year with pivotal elections.

“It’s a little bit more scary this time,” Shute said of the legislation, “because this recession is so severe and the state is just about bankrupt.”

Hime declined to characterize the legislation as “CEQA reform.” He insisted that the usual CEQA analysis and public review process would remain in tact. The only change would be that environmentalists or busi-

ness competitors who do not like a project could not resort to CEQA litigation to stall development for years on end, he said.

Proponents introduced the bills into the Legislature’s eighth extraordinary session, which the governor called to deal with the current year’s budget deficit, and into the regular session, which concludes August 31. If lawmakers approve the extraordinary session legislation, the measures would take effect more quickly. ■

■ Contacts:

Tom White, Office of Assemblyman Charles Calderon, (916) 319-2058.

Rex Hime, California Business Properties Association, (916) 443-4676.

Pete Parkinson, California Chapter American Planning Association, (707) 565-1925.

E. Clement Shute Jr., Shute, Mihaly & Weinberger, (415) 552-7272.

Land Use Legislation For 2010

CEQA

• **ABx8 37** and **AB 1805** (both Calderon and Nestande) and **SBx8 42** and **SB 1010** (both Correa and Cogdill). Creates the CEQA litigation protection pilot program that would permit the administration to exempt 100 projects over four years from judicial review based on CEQA.

Economic Development

• **AB 2044** (Caballero). Requires the Business, Transportation and Housing Agency (BTH) to rank enterprise zones, with the apparent intent of eliminating the lowest-ranking zones.

• **AB 2428** (Buchanan). Expands the definition of an enterprise zone to include green technology zones.

• **AB 2518** (V. Manuel Pérez). Requires the Infrastructure and Economic Development Bank to create a local assistance program to provide technical support to small and rural communities seeking funding.

• **SBx8 52** (Correa). Creates a special enterprise zone in the City of Fremont, where the NUMMI auto plant is closing, and authorizes the Department of Housing and Community Development to create 10 additional special enterprise zones.

Finance and Infrastructure

• **AB 1716** (Torlakson). Currently a spot bill regarding school impact fees, this legislation is expected to reduce or eliminate the ability of school districts to charge “level 3” fees. These higher fees apply when state funds run short.

• **AB 2579** (Evans). Creates the 11-member Master Plan for Infrastructure Financing and Development Commission.

• **AB 2642** (Nestande). Authorizes the City of Riverside to form an infrastructure finance district to fund construction of a medical school on city property.

• **SB 10** (Leno). Authorizes counties to seek majority voter approval of increased vehicle

license fees for general fund purposes.

• **SB 194** (Flores). Modifies how cities and counties spend Community Development Block Grant funds.

• **SB 684** (Cogdill). Provides a greater share of future property tax revenues to Alpine, Lassen, Mariposa, Plumas, Stanislaus and Trinity counties, all of which receive less-than-average shares of property taxes.

• **SB 1023** (Wiggins). Expedites the procedure for converting archaic resort improvement districts into more useful community services districts with similar powers and service areas. Napa County is behind the legislation, which could be used to advance redevelopment of Lake Berryessa resort and housing facilities (see *CP&DR Public Development*, October 2006).

• **SB 1048** (Hancock). Authorizes use of Mello-Roos bonds to finance green building measures.

• **SB 1299** (Torlakson). Requires the Department of Motor Vehicles to implement a pilot program to determine the issues involved with levying a vehicle-miles-traveled fee on motorists.

Housing and Housing Elements

• **AB 761** (Calderon). Permits a mobile home park owner subject to local rent control to raise the rent on a new tenant to market rate or double the previous rent, whichever is less.

• **AB 1823** (Torres). Permits the expenditure of money in the state mobile home park purchase fund for relocating a park to a new site within the same jurisdiction.

• **AB 1867** (Harkey). Expands the definition of “substantially rehabilitated” units that a city or county may count toward meeting its affordable housing obligation.

• **AB 2085** (Saldaña). Authorizes the state auditor to audit the Proposition 1C infill incentive and the transit-oriented development grant programs, and the housing-related parks program.

• **AB 2425** (Hagman). Exempts the City of La Habra Heights from the next regional housing needs assessment.

• **AB 2508** (Caballero). Changes the definition of “suburban” to include jurisdictions of up to 175,000 people for the purpose of determining regional housing need.

• **AB 2709** (Blumenfield). Authorizes the California Housing Finance Agency to make loan guarantees to nonprofit housing developers and local public agencies.

• **SBx8 28** (Yee). Revises criteria for awarding \$87.5 million in unallocated Proposition 1C funds with an emphasis on “shovel ready” projects that could create jobs.

• **SB 326** (Strickland). Requires a city or county that fails to identify adequate sites for affordable housing required in its housing element to identify and zone additional sites in the next housing element update.

• **SB 812** (Ashburn). Requires cities and counties when updating their housing elements to analyze housing needs of people with developmental disabilities.

Local Planning

• **SB 518** (Lowenthal). Permits cities and counties to adopt an ordinance to reduce or eliminate subsidies for parking. The measure would also establish a voluntary system in which the state Air Resources Board would award points to jurisdictions that adopt measures to reduce free parking. Jurisdictions that achieve a certain number of points would be eligible for carbon reduction credits through a cap-and-trade program and for air board loans and grants.

• **SB 959** (Ducheny). Establishes a streamlined system for project applicants who need state agency permits. The bill would also require cities and counties to coordinate project reviews and decision-making through a “single administrative entity,” and require the Office of Planning and Research to prepare guidelines for cities and coun-

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ECONOMIC DEVELOPMENT

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said economic development boosters these days are emphasizing more popular projects, such as reuse of Castle Air Force Base as a heavy maintenance facility for the proposed California high-speed rail system.

The current situation in Tulare is somewhat similar to the one Merced County experienced. Approved by the Tulare City Council on a 3-2 vote, the proposed development includes a one-mile oval track with seating for 55,000 spectators, a quarter-mile drag strip, go-kart tracks, a conference center, about 400 hotel rooms and 600,000 square feet of retail space. Backers tout the expected direct and indirect jobs from the 700-acre project proposed next to the International Agri-Center, while opponents site conflicts with farming, the cost of a freeway interchange for the project that the city agreed to build, and noise, air pollution and traffic impacts. Questions have also arisen over Fresno-based developer Bud Long's ability to complete the project. Negotiations that Long and other track investors have had with the International Agri-Center over purchase of land for a portion of the

project have started and stopped several times, and the developers have been slow to pay city processing and review fees. City of Tulare

officials did not return *CP&DR* calls.

Other proposed race tracks have never even come close to the approval phase. A negotiating agreement between the Riverside County Economic Development Agency and an organization known as DJTRM, LLC, over the proposed sale of county land near Thermal for development of a road course race track apparently expired earlier this year without formal action. The proposed Yosemite Motor Speedway in Madera County received a great deal of national attention nearly a decade ago, but a flurry of legal activity buried the project long before the Board of Supervisors ever weighed the idea. ■

■ Resources:

Tulare Motorsports Complex: www.tularemotorsport.com.

Tulare Motorsports Complex EIR: www.brandman.com/TMSC-EIR/index.html

Land Use Legislation For 2010 (continued)

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ties to use for streamlining permit processing.

- **SB 1174** (Wolk). Requires cities and counties to address in their general plans the presence of unincorporated islands, fringe communities and “legacy unincorporated communities” near city borders.

- **SB 1207** (Kehoe). Revises the general plan safety element requirements for very high fire hazard severity zones and territory protected by CalFire. Similar bills have been voted each of the past two years.

Redevelopment

- **AB 1791** (Monning). Exempts the Fort Ord Reuse Authority from having to make blight findings before exercising certain redevelopment powers on vacant lands.

- **AB 1870** (Norby). Currently a spot bill carried by longtime redevelopment opponent Chris Norby, this measure could contain restrictions on redevelopment activities.

- **SB 2043** (Torrico). Authorizes redevelopment agencies to loan up to \$75,000 to reduce the principle mortgage balance of homeowners participating in the federal home affordable modification program.

- **AB 2050** (Fong). Permits redevelopment agencies to finance green technology facilities and capital equipment.

- **AB 2759** (Nestande). Authorizes redevel-

opment agencies in contiguous cities to create a joint powers authority for the purpose of pooling housing set-aside fund to pay for emergency homeless shelters.

- **SB 530** (Dutton). Attempts to expand the redevelopment pass-through reporting and re-payment requirements that were in last year's state budget to all redevelopment project areas.

- **SB 1374** (Kehoe). Modifies the information a redevelopment agency must provide to the legislative body when the agency seeks a 10-year time extension.

Transportation

- **AB 266** (Carter). Requires the California Transportation Commission to develop an assessment of transportation funding and needs every five years.

- **AB 726** (Nielsen). Specifies that local road rehabilitation projects are eligible for regional project funds under the State Transportation Improvement Program.

- **AB 744** (Torrico). Authorizes the Metropolitan Transportation Commission to create a “Bay Area express lane network” of high-occupancy and toll lanes.

- **AB 1375** (Galgiani). Creates the Department of High-Speed Trains within BTH, and specifies that the governor shall appoint the department director.

- **AB 1747** (Galgiani). Encourages the High-Speed Rail Authority to consider California job creation when awarding major contracts or purchasing trains.

- **AB 2658** (Conway). Creates a short-line railroad program to improve goods movement.

- **SB 409** (Ducheny). Attempts to increase oversight of the High-Speed Rail Authority by requiring Senate approval of the governor's appointees to the authority board, requiring the authority to submit an annual funding plan to the California Transportation Commission, and requiring BTH to prepare a five-year rail connectivity plan.

- **SB 1245** (Simitian). Ensures that existing toll-free high-occupancy vehicle lanes remain free to high-occupancy vehicles.

Other

- **AB 2530** (Nielsen). Funds Williamson Act subventions to counties with fees collected from Williamson Act contract cancellations.

- **SB 715** (Wolk). Gives local government more authority for enforcing Williamson Act contract compliance and conditioning the subdivision of land under contract.

- **SB 1042** (Walters). Repeals the authority of counties to take property by eminent domain for the purpose of conveying the land to the federal government for military uses. ■

