

# AB 32 Backlash Clouds Future Of Smart Growth

## Ballot Measure To Suspend Climate Change Law May Impact SB 375

By Josh Stephens

In 2006, the California Legislature passed Assembly Bill 32, a comprehensive bill designed to limit carbon emissions in almost every sector of the state’s economy.

Two years later, it passed a complementary bill, Senate Bill 375, designed to help achieve AB 32’s goals by encouraging cities to remake their built environments and transportation networks in order to limit driving and thereby reduce vehicular emissions. SB 375 facilitates regional planning, promotes the tenets of smart growth and encourages cities to grow more dense (see *William Fulton’s blog* October 2008 and *CP&DR’s SB 375 Resources Page*).

“They’re both pivotal,” said Stuart Cohen, executive director of transportation advocacy group TransForm and member of the SB 375 Regional Targets Advisory Committee (RTAC). “Without getting our land use under control, [achieving greenhouse gas reductions] is basically impossible.”

AB 32 (Fran Pavley, D-Santa Monica) charges the California Air

Resources Board with devising and adopting emissions regulations by January 2011. SB 375 (Darrell Steinberg, D-Sacramento) requires CARB, with the advisement of RTAC, to develop regional greenhouse gas emission reduction targets, and the state’s 18 metropolitan planning organizations must devise “sustainable communities strategies.”

Those bills were passed in headier economic times. Now, as public support for global warming mitigation is faltering, the state’s economy remains stuck in neutral, and developments are dying on the vine, California’s landmark environmental legislation is under attack. AB 32 is facing a formal suspension in the form of a potential ballot initiative. And SB 375, though it is distinct from AB 32, is catching some of the AB 32 backlash as well as facing its own informal referenda.

“The main way that AB 32 reaches into local government’s business is through SB 375,” said League of California Cities Executive Director Chris McKenzie. “There’s lot of support for the policy underlying SB 375 but there’s a growing sense with the

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# Justice Stevens Shaped Modern Era Of Land Use Jurisprudence

*insight*  
WILLIAM FULTON

Since Supreme Court Justice John Paul Stevens announced his retirement a few weeks ago, he has been hailed – and reviled – as the Court’s “great liberal voice” of the past couple of decades. But especially in land use, Stevens’ legacy rests with not only his ardent support of government regulatory power, but also his skill in mustering five votes, on a pretty conservative court, in favor of aggressive use of land use regulation. President Obama’s choice to replace Stevens will undoubtedly be “liberal” – but it remains to be seen whether this replacement will be as skilled at building majorities in land use cases.

The most powerful testament to Stevens’s legacy is probably the famous – or infamous – case of *Kelo v. City of New London*, 545 U.S. 469 (2005) (see *CP&DR*, July 2005), which

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**Los Angeles City Controller** Wendy Gruel has issued a damning audit of the Los Angeles Department of City Planning's case processing activities. Gruel called the audits "one of the most disappointing" that she has conducted because it found that the department had failed to make significant progress on implementing recommendations from a 2005 audit. Gruel found that the the department has failed to streamline the approval process and went so far as to say that delays in zoning approvals and building permits had negatively impacted Los Angeles' economy and made the city less "business-friendly."

The audit found specific deficiencies in the following areas: 1) failure to streamline case processing and assign a single planner to a case for its entire lifespan; 2) the department has not established case processing targets; 3) Commission and Division of Land case processing time has improved slightly while Zoning Administration case processing has slowed; both departments have, however, experienced dramatic drops in applications. Gruel also found that the city's "12 to 2" reforms – which were intended to reduce, from 12 to 2, the number of city departments that had to sign off on approvals – has not significantly streamlined the process.

The audit acknowledges that the city's budget deficit and significant staff reductions have hampered the department's efforts.

**The California High Speed Rail Authority** has announced that it will delay the release an environmental impact report for the Los Angeles to Anaheim segment of the proposed 800-mile rail network until January 2011. It was originally supposed to be released in May but has been delayed in order to assess the potential impacts of an agreement for the high speed service to share tracks with existing conventional train service in that corridor.

Officials from Los Angeles and Orange counties, led by LA Metro CEO Art Leahey and Orange County Transportation Authority CEO Will Kempton, asked CHSR Chair Curt Pringle to revisit the option

of a shared track in a letter dated March 23. The City of Buena Park has expressed concerns about whether the alignment for HSR would require the demolition of its new \$11 million Metrolink commuter rail station; sharing tracks would likely save the station.

State officials insist that the delay will not jeopardize the \$2 billion in federal stimulus funding that have been awarded to the project.

Meanwhile, two efforts are afoot to repeal HSR's voter-approved bond funding. Five Bay Area cities are considering whether to support an initiative that would repeal the state's voter-approved high speed rail bonds entirely. The Peninsula Cities Consortium – which includes representatives from Atherton, Belmont, Burlingame, Menlo Park, and Palo Alto – are expected to discuss the issue. Cities in the South Bay have expressed concern over the environmental impacts of the rail line. Meanwhile, Assembly Member Diane Harkey (Republican-San Juan Capistrano) has introduced Assembly Bill 2121, which would halt bond sales as of January 1, 2011 and effectively cut off state funding for HSR.

**This month the Sacramento mega-suburb** Elk Grove agreed to remove the Cosumnes River floodplain from its growth plan, which eyes 10,500 acres of unincorporated county land to the south and southeast of the city. The removal of the floodplain was approved on a 3-2 vote by the Elk Grove City Council, and the city will revise the application for an expanded sphere of influence that it submitted to the Sacramento Local Agency Formation Committee.

Several years ago Elk Grove was the fastest-growing city in the United States, and at a current population of 130,000 it has long sought to expand its boundaries. The recent plan, which would expand the city by nearly 50 percent, has come under fire both from environmentalists and from residents of the neighboring towns of Wilton and Franklin, upon which the expansion would encroach. Environmentalists are still concerned that much of the remaining expansion area con-

tains critical habitat for wild animals.

**Developers in San Francisco** will now be required to incorporate green landscaping in their designs. The San Francisco County Board of Supervisors unanimously approved the Green Landscaping Ordinance, which had been promoted by Mayor Gavin Newsome and seeks to beautify the city and dispose of storm water in an environmentally friendly way.

In order to divert rain water from the city's strained drainage and sewer systems, the ordinance will require that at least 50 percent of the surface area in front yards be permeable so that water can soak into the ground rather than flow into storm drains. The ordinance applies to new development and to major renovations of existing buildings. It also requires that automobile-heavy land uses such as parking lots and car washes be adorned with more trees or ornamental fencing so that lots are beautified and screened from public view.

**Two major league sports teams** in the Bay Area continue to play musical chairs with potential sites for new stadiums.

The Oakland A's baseball team's hopes of moving south to Fremont may be rising thanks to a recently awarded federal grant to study the potential re-use of the shuttered Nummi auto manufacturing plant. The plant was closed April 1 and its 370 acres are now ripe for redevelopment. The A's had been considering a 120-acre site near the 880 freeway, but the city is now eager to consider uses for the Nummi site and has received a \$330,000 grant from the U.S. Department of Commerce to study the site. The city has already presented a conceptual proposal for a 36,000-seat ballpark on about one-third of the Nummi site.

Across the bay, plans to relocate the San Francisco 49ers football team are not going as smoothly. Cedar Fair, the parent company of Great America Theme Park, has sued the team and the City of Santa Clara for what it considers a deficient environmental impact report for a proposed stadium adjacent

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is published semi-monthly by

Solimar Research Group  
Post Office Box 24618  
Ventura, California 93002

Telephone: 805/701-CPDR (2737)  
Facsimile: 805/643-7782

Subscription Price: \$238 per year

ISSN No. 0891-382X

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to the theme park. The suit contends that the city approved an EIR that did not sufficiently address concerns about game-day traffic and parking such as it would impact Great America. On June 8 Santa Clara residents will vote on a ballot measure asking whether the proposed 68,500-seat, \$937 million stadium should be allowed to proceed.

**If an association of property owners** and business interests in San Diego and Riverside counties are successful, development restrictions on up to 197,303 acres in Southern California may be eased.

On behalf of the Property Owners Association of Riverside County, the Coalition of Labor, Agriculture and Business, and a San Diego-area homeowner, the Sacramento-based Pacific Legal Foundation has filed a petition with the U.S. Fish and Wildlife Service to remove the California gnatcatcher from the Endangered Species List. The small bluish songbird, which lives in coastal sagebrush in Southern California mountains and along the coast, was listed as threatened in 1993 and development has been limited in its vast California habitat since then.

The petition claims that there are healthy populations of the gnatcatcher in Baja that make the California protections unnecessary and damaging to the state's economy. Areas protected as "critical habitat" span parts of San Diego, Orange, Riverside, San Bernardino, Los Angeles and Ventura counties. The economic costs of protecting the species has been estimated at a total of \$900 million by 2025.

**The City of Vista in northern San Diego County** adopted a new downtown specific plan that seeks to transform 350 acres in its central business district into a more dense, mixed use neighborhood. The plan allows for medium- and high-density residential development as well as general commercial and neighborhood commercial uses, and it

provides design guidelines

The plan promotes an increase in shops, restaurants, and entertainment venues that would serve local residents and draw visitors from the surrounding region. Total allowed increases include 1,270 new housing units and 1.9 million square feet of commercial space and building heights of up to four stories.

The adoption of the plan, on a 3-0 vote by the City Council, culminates two years of planning; two council members abstained from voting because they own property in the specific plan area. The Vista redevelopment agency is currently assembling parcels and recruiting developers.

**The Concord City Council approved a plan** this month that would replace the decommissioned 5,000-acre Concord Naval Weapons station with a combination of mixed-use development and open space. The plan, which has evolved since the Navy first announced the closing of the base in 2006, allows for nearly 12,300 units of housing and over 28,000 residents. Commercial areas would host 26,530 jobs, while 65 percent of the parcel would be dedicated to parkland and open space.

The plan approved closely resembles that which it identified as its preferred alternative early in 2009 (see *CP&DR Local Watch*, Feb. 2009)

Several milestones remain before repurposing can commence, including an amendment to the city's general plan and the sale of the property from the Navy to potential developers. At one time the Navy was considering transferring the land to Virginia-based military contractor Shaw Environmental & Infrastructure, Inc., which would have spearheaded the development of the property. That option never materialized.

The plan envisions several "clustered villages" on the site rather than uniform density throughout the developable area. High-density development is

planned for the area adjacent to the North Concord BART station.

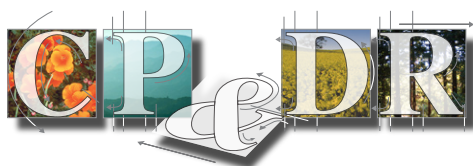
The plan elicited protests from community and environmental groups that, variously, called for more affordable housing, environmental protection, and the setting aside of more land for open space. The plan passed on a 3-2 vote. Vice Mayor Helen Allen voted against the plan because she sided with the community groups and Councilmember Mark Peterson voted against it because of a last-minute provision that would allow an option to replace some low-density housing with a park.

**Arcadia developer Henry Nunez** conducted a 10-day hunger strike in the first half of April to campaign against the re-election of several Arcadia City Council members who last year had voted against a downtown plan that Nunez helped craft as a members of a citizens advisory committee. The plan would have allowed for increased density in downtown Arcadia, a suburb of 60,000 at the western edge of the San Gabriel Valley.

The plan would have relaxed laws limiting buildings to three stories and limiting dwelling units to a maximum of 24 to the acre. At the time it was rejected, it had been endorsed by the Arcadia Planning Commission. None of the three candidates that Nunez endorsed prevailed in the April 13 election.

Nunez endorsed three pro-development candidates. He stressed that with the impending extension of the Gold Line light rail, the city needs to up-zone in order to create density around a future station, and he envisions a comprehensive plan that would link Arcadia's major attractions and commercial centers. The city's general plan is up for review in May.

Nunez ended his hunger strike in apparent good health and congratulated the election's winners on his website. ■



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**One of the least scenic ways** to visit Napa Valley is to enter from the south, through the industrial zone between the cities of American Canyon and Napa. The congested traffic and office parks near Highway 221 are a long ways from the idyllic pastoral stretches to the north.

But efforts to transform 152 acres of industrial land in the area into a mixed use development has stirred up opposition from Napa Valley residents who fear that its proposed 2,600 units and 6,000 residents – smaller than all but two of the county's cities – will bring sprawl and traffic out of scale with the region's character. The developer, however, claims that the project will actually ease congestion by providing a place for local workers to live, rather than commute from neighboring Solano County.

On the former site of Napa Pipe Corp., a manufacturer of large oil and gas pipelines, the project is proposed near the intersection of Highways 221 and 29, in an area that already has many of the county's non-farm jobs, according to developer Keith Rogal. And, in a region famous for empty, vineyard-flanked country lanes, it also has some of the worst traffic in the county.

The site is a vestige of Napa's relationship not with the vineyards to the north but rather to the former Mare Island Naval Station to the south. It remains a working class town and has struggled in recent years even as tourists have flocked to Wine Country.

Rogal's firm, Rogal+Walsh+Mol, specializes in converting already-developed properties near wetlands into new uses. A decade ago, the firm built the Carneros Inn resort on 27 acres of unincorporated county land that had been an RV park. The project, which includes cottages and homes set in a village setting with shops and restaurants, garnered national awards from the American Institute of Architects and the Congress of New Urbanism.

But Rogal is the first to concede that the Napa Pipe is a different type of project. For starters, it is particularly dense for Napa County, with proposed apartments and townhomes rising to seven stories; it would also include retail, an office park, a small hotel and a continuing care complex for seniors. The property is next to the Napa River, and is envisioned as a walkable community. A marina, river trail and parklands are part of the project's mix. As proposed, Napa Pipe would be the largest project in county history.

The Napa Pipe

## LOCAL WATCH

LARRY SOKOLOFF

# Napa Braces For Massive Brownfield Development

development would add approximately 6,000 new residents, on a site about two miles from the Napa Municipal Airport. Some opponents say the new project would be akin to plopping down a new town the size of St. Helena in the area. Quite unlike the baronial estates of wine country, Napa Pipe will have nearly 2,600 apartments and townhomes, with 20 percent set aside as affordable units. The project is expected to help Napa County meet state-mandated affordable housing goals.

Critics of the project include the nearby cities of Napa, Yountville and American Canyon, along with agricultural and environmental

groups, such as the Napa County Farm Bureau and the Sierra Club. Rogal also noted that some small local developers oppose the project.

The project is adjacent to the city boundaries of Napa, and is located about three miles from Napa's downtown.

In comments on a recent draft of the EIR for Napa Pipe, the City of Napa requested that EIR be substantially revised. The city has not been swayed the project's provision of affordable housing and said in a 47-page comment letter that it would prefer to build affordable housing that the project is supposed to provide within its own borders.

But the county is moving ahead, said Hillary Gitelman, Napa County's conservation, development and planning director. "We're still evaluating all the comments," she said. "We haven't identified any fatal flaws that make us start all over again."

A final EIR should be ready later in the year and come before the county's planning commission and board of supervisors for a vote soon thereafter. Supervisor Brad Wagenknecht, whose district includes the city of Napa, said that with two supervisors up for re-election in November, a vote on the project could be delayed.

Wagenknecht, who hasn't taken a position on the development, said

two major concerns are traffic and water usage. The project is expected to bring 17,600 new trips a day, he said. "It will add to a situation for us that feels like it's already broken."

The draft EIR identifies more than ten intersections in the area that are currently near capacity.

Rogal's firm contends that Napa Pipe could minimize traffic impacts by becoming a transit-oriented development if train service could be introduced on tracks that run across the property. They are even proposing water taxi service to the City of

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SOURCE: COURTESY OF ROGAL+WALSH+MOL

The 2,600-unit Napa Pipe development would sit on the site of a former manufacturer of large-scale concrete pipes.

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Napa via the Napa River. The project also envisions highway improvements and an extension of a bike trail through the property in order to mitigate traffic concerns.

Even if the project wins approval, it could be years before construction begins, Gitelman said, noting that the site has to be raised for flood protection, and remediation needs to be done on soil contaminated by the sites former industrial uses.

In comments on the draft EIR, the Napa Valley Farm Bureau criticized the project. President Jim Lincoln noted that extensive mitigation is required, “most of which has questionable financing and little chance of being implemented in the short or intermediate term.”

Opponents of the project tried to derail it in June 2008, when they placed a ballot initiative to impose a 1 percent annual growth cap and height limits on unincorporated county land as Measure (see *CP&DR*, May 2008 and June 2008). The measure lost, garnering 46 percent of the vote. But one leading opponent said another ballot measure could return if county approves the project.

“One of our options would be to do a referendum if they approve it,” said Mel Varrelman, a former county supervisor and opponent of Napa Pipe.

If approved by the Board of Supervisors, residential units at Napa

Pipe won’t be constructed until 2013, Rogal said.

Rogal said only 200 to 300 units will be built annually, and full build-out is a decade away. Napa Pipe will also provide its share of money for traffic improvements and for schools, he said.

“The population and car trips will increase on a slow pace over a long period,” he said.

The Napa Pipe land sits on 3,000 acre feet of groundwater, Rogal said, more than enough for its needs. But Wagenknecht said that the county generally encourages groundwater to be used for agriculture.

“There’s a priority of groundwater being for agricultural use, but every hotel in the county pumps groundwater,” Rogal said.

Rogal said the developers have acquired additional water for the site, and will recycle water as well. More water would be used if the site stays in its current industrial designation, rather than with his project, he noted. ■

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Napa County website, with draft EIR and comments: [www.countyofnapa.org](http://www.countyofnapa.org).

Nape Pipe project website is: [www.aHomeforNapans.com/](http://www.aHomeforNapans.com/).



Train tracks that bisect the 152-acre Napa Pipe site would be integrated into the mixed-use plan.

upheld a municipality's right to take a property via eminent domain and transfer ownership to another private entity if the transfer served the public interest. Less well known – but probably more important in the California land use context – was Stevens' deft majority opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (CP&DR, May 2002), in which he undermined the Court's landmark "temporary takings" rule established in the *First English* case even as he insisted the Court was following the *First English* precedent.

In other words, the current Supreme Court has somewhat surprisingly held the line on land use regulation against property rights – and Stevens, now 90 years old, has been the key part of this effort.

Stevens was appointed at the dawn of the modern property rights era. Because of this happenstance, he is the only member of the Court who has participated in all the major land use cases over the past three decades, from *Penn Central* in 1978 to *Kelo* and beyond.

Stevens travelled a long road, however, to become the court's pro-regulation land use champion. For most of his career in private practice he was an antitrust lawyer, though he did do special counsel work for the City of Chicago – making him the only member of the court with municipal law experience. But he was a Republican appointed by a Republican, President Gerald Ford, and it took him about a decade on the court to come around to the pro-regulation point of view on land use.

In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) – the first property rights/land use case heard by the Court in a half-century – Stevens signed on to the pro-property rights dissent. The majority opinion, written by Justice William Brennan, upheld New York City's system of transfer of development rights, thus giving local governments a big win. But Stevens joined two conservatives – future Chief Justice William Rehnquist and then-Chief Justice Warren Burger – in the dissent. Written by Rehnquist, the dissent concluded, "The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change."

The irony of Stevens' participation in the dissent in *Penn Central* is that over time Brennan became the justice whom Stevens most resembled, and after Brennan retired Stevens took over his role not only as the "liberal" leader but as the liberal justice most skilled at lobbying for five votes for a pro-government point of view on an increasingly conservative Supreme Court. By the time the next big land use case came before the Court, in 1987, Stevens had moved away from Rehnquist and had adopted a tone of concern – sometimes over-concern – that reflected great sympathy for municipal lawyers.

In the landmark case *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* 482 U.S. 304 (1987), Rehnquist invented the idea of a "temporary" taking. Previously, property rights lawyers had been unsuccessful in arguing that property owners who suffered from a regulatory taking should be compensated. Their argument had been undercut by the idea that since a regulation can be changed, the property remedy is not compensation but simply changing the regulation. But Rehnquist built a majority for the idea that a regulatory taking could be temporary and that courts could compensate property owners for the period of time that the regulation was in place.

Brennan sided with Rehnquist in the case. Stevens wrote the dissent-

ing opinion and got Burger and Sandra Day O'Connor to sign on to part of it. Adopting what would become a signature tone – understated yet alarmed – Stevens wrote: "One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. The Court has reached out to address an issue not actually presented in this case, and has then answered that self-imposed question in a superficial and, I believe, dangerous way."

It took Stevens 15 years to successfully strike back against *First English*, and when he did it was so skillful that he took six other justices with him and managed to make it look like he was upholding, not undermining, the previous case. By the time the Court heard it in 2002, *Tahoe-Sierra* had been kicking around the courts for almost 20 years. It was an attempt by property rights lawyers to force TRPA to compensate landowners who were held up by a 32-month development moratorium in the early '80s. In a dissent, Rehnquist said that any delay that long couldn't possibly have been the result of a normal land-use planning process. But in the seven-justice majority, Stevens pushed back against the efforts of Rehnquist and Antonin Scalia (who wrote a different dissenting opinion) to create a bright-line test for a regulatory taking.

Stevens slyly used a previous concurring opinion by Sandra Day O'Connor to make his case.

"It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism," he wrote. "But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures. In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the 'temptation to adopt what amount to *per se* rules in either direction must be resisted.' *Palazzolo*, 533 U.S., at 636 (O'Connor, J., concurring)."

Since that time, the temporary takings rule has remained in effect, but it's been almost impossible for any court to decide with confidence how long a delay has to be in order to be classified a taking, as opposed to an acceptable delay due to the normal planning process.

Three years later, in his final triumph in favor of land-use regulation, Stevens managed to bring along Justice David Kennedy – but not O'Connor – in the *Kelo* case.

Since 2005, the conservative wing of the court has become even more doctrinaire. Chief Justice John Roberts, who replaced Rehnquist, is charming and personable but not very flexible. Justice Samuel Alito, who replaced O'Connor, is dense in his reasoning (CP&DR, Dec. 2005), but all the analysis rarely leads in more than one direction.

So Stevens' successor is less likely to find the kind of consensus-building opportunities that Stevens, and Brennan before him, were able to create on the land use front. But even if they did, the lesson of Stevens' career in land uses cases is that skill takes decades to cultivate – especially in areas of law, such as land use, that don't bubble up to the court very often and tend to polarize most of the justices on ideological grounds. If you're a government land use planner, you loved Stevens; if you're a landowner, you probably hated him. But no matter what your perspective, you have to admire the evolving skill with which he shaped modern land use law. ■

# Strapped For Cash, Cities Recoil Against AB 32, SB 375

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economy... [that] there ought to be some relief.”

AB 32’s near-term goal of reducing carbon emissions is in jeopardy due to a loose coalition of legislators, gubernatorial candidates, local officials, and backers of a ballot initiative who are all calling for a halt to its implementation. These opponents claim that the state’s economic condition, including 12 percent unemployment and a budget crisis in Sacramento, make AB 32 too expensive.

“They’re looking at this year as an opportunity, because of the global recession, to attack environmental regulations,” said State Sen. Fran Pavley, who authored AB 32 while in the Assembly. “This one happens to be an initiative, but all regulations are under attack in California.”

Vocal opposition to SB 375 has arisen from cities that consider its provisions onerous and, in particular, are concerned that they do not have sufficient funds to conduct the studies and plan updates that SB 375 calls for. Next week, the board of the League of California Cities will receive recommendations from four different committees about whether to support AB 32 and SB 375. Two of those committees have already recommended that the league ask the governor to suspend both laws. Based on the committees’ final recommendations, the league’s board could take positions on either, or both, laws as early as next week.

“It’s not a discussion of the ballot measure,” said McKenzie. “It’s a question of whether the state is in such precarious economic condition and whether local governments and MPOs have had their own finances strained so much by the economy that...there ought to be some kind of delay.”

McKenzie noted that many city officials are saying that they do not have the funding to do the planning and offer the transit that SB 375 promotes. Sande George, executive director of the California chapter of the American Planning Association, said that APACA will soon discuss AB 32 and SB 375 suspension but has taken no formal position.

The office of State Senator Darrell Steinberg, who authored SB 375, did not respond to repeated requests for comment.

The attack on California’s global warming legislation began in earnest in January when Assembly Member Dan Logue (Republican-Chico) introduced Assembly Bill 118. In its original form, first filed in January 2009, AB 188 would have repealed AB 32 (see *Paul Shigley’s blog* January 27, 2009). A subsequent version, which Logue revived early this year, would have suspended implementation of AB 32 until unemployment in California dropped to 5.5 percent. Logue contended that AB 32’s regulations on greenhouse gas emissions would raise energy prices and exact a wide-ranging toll on the state’s economy.

“It would be a complete disaster...to implement AB 32,” said Logue. “It would shrink the economy and hurt the middle-class.”

Though AB 118 failed, a nearly identical voter initiative now appears destined for the November ballot. The “California Jobs Initiative,” so called because of its backers’ concerns for the economic impacts of AB 32, would suspend implementation of AB 32 until California’s unemployment rate dips below 5.5 percent. However, upon review by Attorney General Jerry Brown, the initiative’s title was changed to “Suspends air pollution control laws requiring major polluters to report and reduce greenhouse gas emissions that cause global warming until employment drops below specified level for full year.”

The initiative’s backers, who include members of the Tea Party movement as well as public officials from cities across the state, say they do not necessarily object to AB 32’s environmental goals but rather believe that they represent expensive and undue top-down regulation. The initiative’s supporters had hoped to collect the necessary 433,000 valid signa-

tures by April 16. They missed that deadline but, with a new infusion of donations, have vowed to keep trying.

The “California Jobs Initiative” website points to survey results indicating that 56 percent of respondents oppose AB 32 after hearing arguments for it and against it.

Cohen, who opposes the measure, said he expects that it will get on the ballot but also said, “We don’t think it will pass.”

“Our campaign... [is] not opposed to AB 32,” said Anita Mangels, spokesperson for the “California Jobs Initiative.” “We’re simply concerned about the timetable for implementation of AB 32, and what the initiative would do is adjust the timetable for implementation so the economic impacts would not be as harsh.”

Meanwhile, Republican gubernatorial candidate Meg Whitman has called for a one-year moratorium on AB 32’s implementation, calling it “well intentioned. But...wrong for these challenging times” in an editorial in the San Jose Mercury News. Whitman has promised to suspend AB 32 if elected.

As these efforts have gained traction and headlines, concerns have arisen among environmentalists and planners that a wholesale backlash against global warming mitigation and related regulations may be afoot.

“The same concerns relate to SB 375, and some of those concerns have been expressed to us by local governments themselves,” said Jon Coupal, president of the Howard Jarvis Taxpayers Association, which is co-sponsoring the AB 32 suspension. “I think discussions involving AB 32 are going to necessarily entail discussions relating SB 375 as it relates to local governments.”

“We’ve never been big fans of government policies trying to force people into concentrated areas,” added Coupal.

Supporters of the “California Jobs Initiative,” however, maintain that their efforts do not explicitly target SB 375. “SB 375 references AB 32, but it is legislation outside of the implementation of AB 32 that we’re focused on,” said Mangels.

Supporters of both AB 32 and SB 375 note that the two are independent and do not rely on each other to achieve their respective goals. However, both are considered fundamental components of the state’s efforts to reduce emissions and, in the case of SB 375, to promote smart growth.

More formal challenges to SB 375 are a ways off, even if the “California Jobs Initiative” measure makes it on to the ballot and passes.

“SB 375, while it’s referenced in the AB 32 scoping plan, is fully its own law right now,” said TransForm’s Cohen. “To be undone, it would have to be undone by the legislature, or it have to be undone by a wholly separate initiative.”

“I think there’s going to be a stronger movement to have the targets for greenhouse gas reductions in SB 375...to be less ambitious,” added Cohen.

If implementation of SB 375 goes forward while that of AB 32 is delayed, its impact on carbon emissions is unlikely to compensate for the expected carbon reductions that would have been created by a fully implemented AB 32. Whether its facilitation of compact development and walkable environments would in and of itself draw protest remains to be seen.

“My own goal right now is to concentrate on AB 32,” said Logue. “Once that’s achieved, then we’ll take a look at SB 375.” ■

#### ■ Contents:

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# legal digest

## Supreme Court Upholds Short Statutes Of Limitations

### CEQA Lawsuit Rejected Because Of Failure To Honor 35-Day Limit

BY KATHERINE J. HART AND LESLIE Z. WALKER

In supporting the City of Stockton's refusal to accept a lawsuit filed by a citizens group against a proposed big-box store, the California Supreme Court has, for the second time in two months, made clear that if a public agency provides notice of a California Environmental Quality Act decision, legal challenges to that decision may be barred by the shortest statute of limitations, among several that the CEQA statute provides for, applies to legal challenges regardless of the context of the challenge.

The April 1 ruling held that a 35-day statute of limitations barred a citizens' lawsuit challenging a proposed Wal-Mart project on the grounds that it violated the California Environmental Quality Act (CEQA). The court abided by the 35-day statute of limitations, articulated in Public Resources Code section 21167 subdivision (d), because the City of Stockton had filed a valid notice of exemption from CEQA and was therefore protected by the shorter statute of limitations rather than by a 180-day statute that the citizen's group believed ought to apply.

The decision confirms the protections granted by CEQA to a public agency that adopts a notice of exemption (NOE) and to a project applicant that complies with the NOE's requirements. The ruling is in line with the court's February decision in *Committee for Green Foothills v. Santa Clara County Board of Supervisors*, in which the court ruled that environmentalists had only 30 days to sue over the county's decision to forego an updated EIR for a recreation trail (see *CP&DR Legal Digest*, February 15, 2010).

The latest case, *Stockton Citizens for Sensible Planning v. City of Stockton*, involved a project by developer A.G. Spanos. The

company had prepared a master development plan for Park West within the larger A.G. Spanos Park in Stockton. As a condition of the city's approval of lower density development elsewhere in A.G. Spanos Park, the city required a density transfer agreement obligating the construction of at least 935 multi-family residential units within Park West. In 2002, the City Council certified an EIR for Park West and approved the master development plan, replete with the separate density transfer agreement.

Under the master development plan, the city's Design Review Board and community development director were required to approve proposed projects within the plan area as long as the board and director determined the projects were consistent with the plan's criteria, goals and purposes.

Acting on behalf of Wal-Mart Stores, land use consulting firm Doucet & Associates subsequently proposed a 207,000-square-foot retail store to be sited on land in Park West that had been designated for multifamily residential units. The director approved the project subject to five minor amendments in December 2003. The next day, Spanos informed the city it would not construct 627 of the 935 units required by the density transfer agreement. Instead, Spanos offered assurance that the company would build the additional units within 10 years at locations in the city.

In February 2004, the city filed an NOE for the project, stating the project was a retail use to be constructed in a first phase of 138,722 square feet and a second phase of 68,888 square feet. The NOE did not name Wal-Mart or identify the project as a Wal-Mart Supercenter. The notice did say that the project was consistent with the master development plan, and that the ministerial determination of consistency was not subject to CEQA review. The 35-day period for challenging the NOE expired on March 23, 2004.

Not until July 22, 2004 did the group Stockton Citizens for Sensible Planning file suit, claiming that the project violated CEQA because the city had not prepared an EIR to assess the effects of the Wal-Mart store. They further claimed that the project deviated substantially from the master development plan because the Wal-Mart would be developed on parcels planned for high-density residential housing.

The city, Spanos, Doucet & Associates, and Wal-Mart demurred on the grounds that Stockton Citizens had not commenced the suit within 35 days of the filing of the NOE. The citizens' group argued that the community development director erred in approving the project and that the statute of limitations for a challenge to the NOE should therefore abide by the (Can a statute abide?) 180-day period that applies when no NOE has been filed, and not the shorter 35-day period applicable when public notice has been provided by means of an NOE (Public Resources Code, § 21167, subdivision (d); CEQA Guidelines, § 15112, subdivision (d)(2)).

Both the San Joaquin County Superior Court and the Third District Court of Appeal rejected the city's and developers' statutes of limitations defense and accepted Stockton Citizens' argument the city had processed and approved the project in error.

The state Supreme Court reversed the lower courts' decisions. It found that flaws in the decision-making process underlying a facially valid and properly filed notice of exemption do not prevent the NOE from triggering the 35-day period to file a lawsuit challenging the agency's approval of a CEQA-exempt project.

"We harbor no doubt, on these facts, that the 35-day limitations period ... had expired before plaintiffs filed their lawsuit," Justice Marvin Baxter wrote for the unanimous court.

The court — CONTINUED ON PAGE 9

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explained that when a properly filed NOE complies in form and content with CEQA requirements and declares the agency has taken an action that would constitute final approval of a project under a CEQA exemption, the 35-day period for challenging the validity the approval begins to run. The statute provides that an NOE must contain a brief description of the project and its location as well as a finding that the project is exempt from CEQA. This finding must contain a citation to the statute or CEQA Guideline on which the agency is relying, and a brief statement of reason to support the exemption (CEQA Guidelines, § 15062 subdivision (b)). The court found that Stockton's NOE was

adequate because it stated the project was a retail use consistent with the master development plan, specified the exact location of the project and stated that the project was exempt under Public Resources Code § 21080 subdivision (b)(1) and Guidelines § 15369.

According to the court, Public Resources Code § 21167 subdivision (d) requires that an action or proceeding alleging that a public agency has improperly determined that a project is exempt from CEQA pursuant to section 21080 subdivision (b) shall be commenced within 35 days from the NOE filing date. The court ruled that a statute of limitations "operates conclusively across-the-board" and "does so with respect to all causes of action, both those that do not have

merit and also those that do." This interpretation, Baxter wrote, aligns with CEQA's process of establishing and emphasizing public notification of an agency's action or decision as the event triggering the shortest applicable limitation periods for lawsuits alleging non-compliance with the statute. ■

■ The Case:

*Stockton Citizens for Sensible Planning v. City of Stockton*, No. S159690, 2010 DJDAR S159690. Filed April 1, 2010.

■ The Lawyers:

For Stockton Citizens: William D. Kopper, (530) 758-0757.

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For A.G. Spanos: John Briscoe, Briscoe, Ivester & Bazel, (415) 402-2700.

## ceqa

# Big Boxes Do Not Necessarily Need Analysis Of Urban Decay Impacts

BY WILLIAM ABBOTT

An appellate court has ruled that an amendment to a prior commercial center approval that permits construction of a big-box "supercenter" does not by itself mandate the preparation of a subsequent or supplemental environmental impact report.

In *Melom v. City of Madera*, the Fifth District Court of Appeal ruled that a California Environmental Quality Act (CEQA) document for a supercenter need not always address the question of whether the big box will cause urban decay. The same court that rendered a pivotal ruling on supercenter analysis in *Bakersfield Citizens for Local Control v. City of Bakersfield*, (2004) 124 Cal.App.4th 1184 (see *CP&DR Legal Digest*, January 2005), attempted to limit that decision. In *Bakersfield Citizens*, Presiding Justice James Ardaiz wrote that CEQA "did not hold and should not be construed as holding that the inclusion in a project of a retail store called a 'supercenter' necessarily triggers a requirement that the project's EIR include an examination of possible urban decay effects."

In 2006 the City of Madera certified an EIR for a retail center consisting of 795,000 square feet of gross floor area. The conceptual site plan showed one anchor of 125,000 square feet. Following annexation approval of the site to the city in February 2007, developer Zelman Retail Partners submitted to the city a refined site plan that included as anchor tenant a larger "Super Target" of 194,484 square feet, excluding an outdoor garden sales area. The total square footage

for the retail center remained unchanged.

The city's Community Development Department approved the refined site plan three months later. The following month, the Planning Commission considered an addendum to the EIR and recommended approval of a development agreement. Following that recommendation, the City Council approved the addendum and the development agreement in August 2007. The council's staff report and addendum both concluded that the alterations to the Super Target would incur no new impacts compared with those considered in the previously certified EIR.

A citizens group led by local resident Patricia Melom filed a lawsuit challenging approval of the revised site plan the same day as the council was considering the development agreement. The trial court ruled for the city, and Melom subsequently filed an appeal.

The opponent's primary argument was based on decisions in *Bakersfield Citizens* and in a similar case, *American Canyon Community United for Responsible Growth v. City of American Canyon*, (2006) 145 Cal.App.4th 1062 (see *CP&DR Legal Digest*, January 2007). In both cases, which each involved Wal-Mart stores, the opponents contended that CEQA documents for projects involving retail supercenters are required, as a matter of law, to address the potential for urban decay.

In upholding the trial court's ruling the appellate court first acknowledged CEQA's more deferential form of review utilized once an EIR has already been certified for a project (Public Resources Code, § 21166). The

court observed that the project opponents had not pointed to any evidence in the record that would have triggered the preparation of a subsequent or supplemental EIR. Thus it appeared that the opponents based their objections simply on the nature of the store and not on demonstrated evidence that it would cause urban decay.

The opponent based this position on the argument that *Bakersfield Citizens* and *American Canyon* mandated such analysis. The appellate court rejected this argument, noting that no rule mandated the discussion for the potential of urban

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decay that the supercenters might cause. Rather, according to the appellate court's ruling, the evidence in both the *Bakersfield Citizens* and *American Canyon* cases warranted consideration of the issue – but not a mandate. The appellate court then clarified its earlier decision in *Bakersfield Citizens*.

“To the extent that this court's decision in *Bakersfield Citizens* might be interpreted as saying that whenever a project includes something called a supercenter, the project becomes a type of project which necessarily triggers an examination of some particular-

ized effect or effects, we expressly decline to adopt such an interpretation of our *Bakersfield Citizens* decision,” Ardaiz wrote.

What followed in the *Melom* opinion was a discussion of the timing of Madera's addendum, which was prepared before approval of the development agreement but not until after the modified site plan was approved. Thus, the opponent argued that the addendum could not operate as the required CEQA documentation for the revised site plan. However, the appellate court elected to treat the council approval of the development agreement as the operative project approval. The court was

satisfied with the sequence of events because the EIR addendum preceded the approval of the development agreement. ■

■ The Case:

*Patricia Melom v. City of Madera (Zelman Retail Partners, Inc., real party in interest)*, No. F055024, 2010 DJDAR 4451. Filed March 24, 2010.

■ The Lawyers:

For Melom: Mark R. Wolfe, M.R. Wolfe & Associates, (415) 369-9400.

For the City: Richard K. Denhalter, city attorney, (559) 661-5483.

For Zelman: Philip F. Atkins-Patterson, Sheppard, Mullin, Richter & Hampton, (415) 774-2933.

from the blog

<http://www.cp-dr.com/blog>

## Another Third District CEQA Ruling Gets Overturned

0-and-4. That's the Third District Court of Appeal's record in California Environmental Quality Act cases at the state Supreme Court since 2007.

Earlier this month, in *Stockton Citizens for Responsible Planning v. City of Stockton* (see *CP&DR Legal Digest*, March, 2010), the state Supreme Court unanimously reversed a Third District ruling regarding the statute of limitations for filing a lawsuit that challenges a city's notice of exemption from CEQA review.

The state Supreme Court has issued eight CEQA rulings since mid-2006. Exactly half of the rulings have been reversals of Third District decisions. None of the other five appellate districts has been reversed more than once.

A few months ago, when the state high court overturned a Third District decision concerning a Sacramento County general aviation airport, I suggested the justices in the Sacramento-based appellate district might not understand CEQA. Upon reflection, I don't want to try to defend that notion. But if I were a lawyer with a CEQA case in the Third District, I would be hesitant.

To figure out what's going on here, let's have quick look at the cases. In one case, the Third District rejected the programmatic EIR for the Cal-Fed Bay Delta project because the gigantic document lacked detail and did not consider a no-growth alternative for Southern California. In another case, the Third District said Sacramento County must analyze the impacts of not permitting continued operations at a general aviation airport that had skirted county codes for decades. Those two decisions struck me at the time as suspect, and the state Supreme Court later reversed both decisions.

In a third case, *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, (2007) 40 Cal.4th 412, the Third District upheld as adequate the water analysis for a 20,000-unit community plan. Something else was in play here, though. The Third District was so strongly critical of the legal tactics employed by the Citizens' lawyer that the court mostly bypassed the merits. The State Supreme Court, however, had no

trouble getting to the merits, and it rejected the water study.

In the latest case, the Third District in a 2-1 ruling forgave Stockton Citizens from missing the 35-day statute of limitations because the city's approval process was, should we say, nonstandard. The planning director had approved development of a Wal-Mart Supercenter where multi-family housing was not only planned, but was required by the city as a condition of an approval for a master development plan. The planning director's ministerial decision to permit the Wal-Mart store was made without any public notice or environmental review. The city simply filed a notice of exemption (NOE) from CEQA two months later. Not surprisingly, the episode flew under the radar and the normal collection of Wal-Mart opponents and smart-growth advocates was late getting to the courthouse.

Tough noogie, said the Cal Supremes. “Whatever the actual defects or flaws in its process of approving the Wal-Mart project under a CEQA exemption, [the] city attempted, by filing an NOE for the project, to comply with CEQA,” Justice Marvin Baxter wrote. Thus, there was no excuse for missing the 35-day deadline to sue.

Essentially, the court said the law is the law. The justices declined to factor the city's, uh, nonstandard administrative process into their decision on the CEQA statute of limitations.

The high court's approach hints at the common thread in the overturned Third District decisions: In each instance, the Third District went beyond a strict interpretation of CEQA. The law does not require consideration of patently absurd project alternatives (e.g. no growth in Southern California), nor does it require a study of the impacts of a private business closure, permit exceptions when a city does a favor for a well-connected developer, or allow judges to blow off an annoying lawyer.

As of today, no CEQA decisions by the Third District or any other appellate district are on review at the state Supreme Court. Maybe this means that everybody now is clear on the rules. But I doubt it.

– PAUL SHIGLEY | APRIL 9, 2010 ■

## Using Paparazzi For Planning

Say George Clooney went to Nobu last night and ran into Diddy in the valet line, where they discussed their mutual affinity for Kiton suiting. How do we know? Photographs, of course. Why do we care? Not sure, but USC Planning Professor Elizabeth Currid has taken a stab at it.

Three years ago Currid gratified the hipster set with *The Warhol Economy* (Princeton University Press), a glowing account of how creative industries – broadly defined – have elevated not just the culture but in fact the economy of New York City. Her analysis, which included both in-the-know accounts of things that cool people do as well as a rigorous economic analysis of creative industries, met with generally enthusiastic reviews (including one from me) from both the trade and mainstream press, in part because her topic itself was inherently seductive. Currid is emerging as a cross between Andres Duany and Michael Musto.

While *Warhol* barely mentioned any place other than New York, Currid's forthcoming book, *Starstruck: The Business of Celebrity* (Faber & Faber), promises to give a little more love, and hold a little more relevance, to her adopted West Coast. *Starstruck* does not come out until November, but I had the good fortune of hearing her speak on it yesterday in, of all places, Cambridge, Massachusetts (a place where both the celebrities and the planning go back a wee bit further than, say, Miley Cyrus). I went to find out if her work holds any clues for how California – at least the famous, sparkly part of it – can prosper from its association from fame and, more importantly, whether the built environment has anything to do with the fortunes of its stars.

If New York has a monopoly on creativity, we know intuitively that California surely has few rivals in the area of celebrity. That is, in fact, the conclusion that Currid draws empirically: Los Angeles and New York are the mega-galaxies in the universe of stardom. London plays a supporting role, and, beyond that, a smattering of odd places – Park City, Cannes, Canada (broadly defined), and Las Vegas – play host to celebrity escapades, accomplishments, and media events.

Currid's research employs a new methodology that seems incredibly fun and increasingly trendy. She gained access to Getty Images' database of celebrity-related photos and used Natural Language Processing to comb through over 600,000 photos of over 71,000 people in 200 locations. With some statistical wizardry, she used the photos to identify the hottest celebrities and the hottest places where they appear in public (or at semi-public events). This methodology is rife with biases, but it's a fascinating use of the vast natural database that emerges now that everything is available electronically. With more rigorous testing, it may inform planning for generations to come -- the realization of the potential of Web 3.0. As online databases grow, planners from almost anywhere can find photos of their cities and draw conclusions about how people use space within them.

*The Warhol Economy* was mainly a descriptive piece, but it did conclude with some compelling recommendations that imaginative planners could consider in order that the built environment (and, in some cases, city economic development policy) be designed to promote

creative economies. Her thesis is that creative industries thrive almost exclusively on personal contact and that personal contact relies on venues where it can take place. Control and production are one in the same and therefore happen in the same place, unlike, say, industrial production in which headquarters might be located in cities while factories have long fled overseas.

Unfortunately for planners, Currid pans out rather than zooms in this time. In her talk she gave little heed to Los Angeles' built environment, noting only that a small handful of neighborhoods (Hollywood, Beverly Hills, and West Hollywood) host the vast majority of celebrity-related events. Otherwise, she takes her theoretical cues from Saskia Sassen to discuss the ways that celebrities create inter-regional linkages between cities that serve more as nodes than actual places. In some ways, this is only appropriate, if you think that celebrities are images and not real people, I suppose.

Only in the question-and-answer period did Currid address the irony of celebrity and cities: the super-famous and super-wealthy live within camerashot of many of the least privileged people in the country, living and working in neighborhoods that are far from flashy. Great disparities in wealth and disproportionately large underclasses emerge in many major cities, but in Los Angeles the difference is so much more pronounced because the latter often appears literally in the background of the former. On that point, Currid said, and I quote loosely:

*I don't know what you do. This is where policy is very important. It [wouldn't be] policy for stars or for cultural industries. It's policy for equitable cities. Rent or social services that make people's lives all right as they get priced out. Those are real kinds of things we can do that are in many ways removed from the phenomenon I was talking about today. They are more about the global cities with the elite and poor service workers, and that latter group is disenfranchised.*

Currid seems to approve of stardom and the creative industries, at least to the extent that they create significant economic benefits for their host cities. She is careful to point out, though, that it's impossible to know whether the industries created the cities or vice-versa. As much as her current work is removed from the actual practice of planning, it presents planners – at least those in Los Angeles – with the challenge of not accepting this unclear correlation and in fact figuring out how the city can be designed both to keep the celebrities happy and to capture the economic spinoff effects of their wealth. Currid makes it clear that Hollywood (the industry) isn't leaving Hollywood (the place), and yet the industry's urban currency is quite different from that which takes place in New York. It also seems to address the rest of Los Angeles with indifference, if not contempt.

Whether planners in Los Angeles and its neighboring cities can create more places not where awards galas can take place but rather where creative folks can get together and share ideas, and figure how to use the celebrity economy to the benefit of the entire place. The first step might be to encourage LA's public to spend less time reading *Us Weekly* and more time looking around their own city.

– JOSH STEPHENS | APRIL 6, 2010 ■

