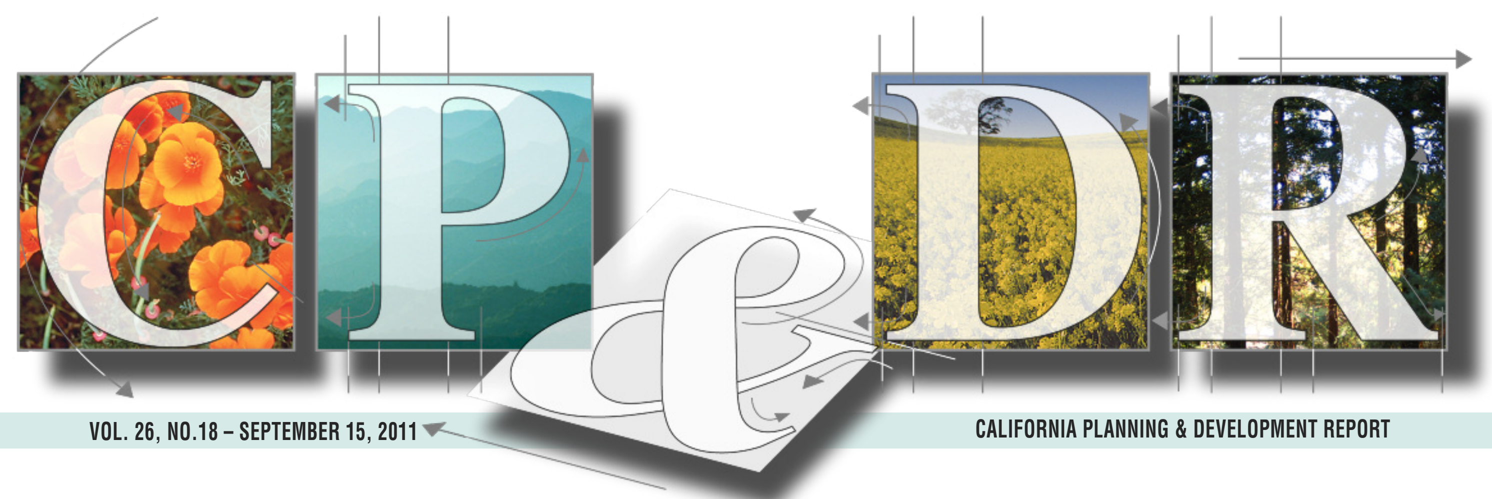


VOL. 26, NO.18 – SEPTEMBER 15, 2011

CALIFORNIA PLANNING & DEVELOPMENT REPORT

Parking Reform Measure Strains Alliance Between Infill Developers, Housing Advocates

BY JOSH STEPHENS

There was a time when the biggest opponents of infill development were the interstate highway, the barbeque grill, and the American dream. Following the failure of Assembly Bill 710, you might be able to add advocates of affordable housing to the list.

Sponsored by Assemblymember Nancy Skinner (D-Berkeley), AB 710 sought to promote infill development by requiring cities to lower baseline parking requirements for residential and commercial development in transit-intensive areas statewide. It would have halved the common practice of requiring two spaces of parking per residential unit or 1,000 square feet of commercial space.

Though cities set their own standards, parking requirements are typically derived from the Institute of Transportation Engineers' Parking Generation. Those standards are meant to apply nationwide and include what some consider absurdly detailed recommendations that overestimate parking needs and are insensitive to urban context. They are outdated at best, say AB 710's supporters.

"It's very difficult for cities to change these parking standards because they're based on mythology," said California Infill Builders Association (CIBA) board member Mott Smith, a Los Angeles infill developer. "If they were based on facts, we could have an easy conversation about what the facts are and adjust accordingly."

Opposition came from, what many consider, a highly unlikely source: advocates of affordable housing. Housing advocates such as the Southern California Association of Nonprofit Housing (SCANPH) contended that AB 710 would undermine what they consider important incentives in Senate Bill 1818, the 2004 law that gives both nonprofit and for-profit developers density bonuses for including or increasing affordable housing in a given development. One of those incentives trumps local parking codes by allowing developers to supply less than the typical two spaces per one-bedroom or studio unit in exchange for the inclusion of affordable units.

– CONTINUED ON PAGE 9

100 Years After Introduction of Voter Initiatives, 'Ballot-Box' Zoning Prevails

This month – October 10, to be exact – marks the 100th anniversary of initiative and referendum in California. It's hard to imagine that Gov. Hiram Johnson, the godfather of the constitutional amendment, could have imagined all the different ways that the initiative process would be used – especially by the moneyed interests that were his target in 1911. But it's equally hard to imagine that Johnson could have foreseen the way the initiative and referendum process would transform planning and development in California.

The bottom line is pretty stark: Almost everywhere in the nation, "ballot-box zoning" is non-existent, but in California it is common. This divergence occurred over a period of many decades and several milestone court cases. The result is that even in places where land use initiatives are rare, the threat of the ballot changes the political equation for development.

– CONTINUED ON PAGE 7

inside

IN BRIEF
Water agencies sue U.S. Fish & Wildlife Service .... *Page 2*

IN BRIEF
Californians still support Proposition 13 .... *Page 3*

LEGAL DIGEST
Developer loses battle against billboard .... *Page 4*

LEGAL DIGEST
Caltrans permitted to hire private engineers through PPP statute .... *Page 5*

Q&A
Kennedy to guide Calif. Redevelopment Assoc. through lawsuit .... *Page 6*

FROM THE BLOG
Sailing towards redevelopment reform in S.F.? .... *Page 11*

TEICHERT INC. is suing the city of Folsom for the city's new development plans south of Highway 50. The development, approved by the Folsom City Council in June, would annex 3,500 acres south of the highway in order to expand the burgeoning urban area. The suit contends that the draft environmental impact report for the new development is far from adequate, but the real issue at stake appears to be the access of company trucks to Highway 50. Treichert, which operates a quarry near Folsom, believes that the city's annexation of the land will pose an impediment to the company's ability to transport materials out of the quarry. The lawsuit, which was filed on June 28, is being reported as an open attempt by Treichert to maintain negotiating power—in other words, pursue litigation concerning the draft environmental impact report until a deal about highway access is reached. A solution may come in the form of a truck-only path along Prairie County Road, which might cost up to $26 million.

DESPITE LOCAL OUTCRY, Sunset Beach will become a part of Huntington Beach once the state signs off on it. The annexation of Sunset Beach, which had been an 85-acre unincorporated area for over a century, was approved months ago; however, due to pending legislation filed against the Local Agency Formation Commission by the Sunset Beach Citizen's Association, the annexation could not be formally recorded and completed. LAFCO gave its permission to the merge last December, after Huntington Beach officials approved it in November. With the annexation comes a new tax—a Utility Users Tax, which was the issue taken up in court. Sunset Beach Citizen's Association argued that, under Proposition 218, a municipality cannot enact new taxes without putting them to a vote. In late August, the Orange County Superior Court ruled that Proposition 218 does not apply to annexations, and so the process of annexation could go forward.

TWELVE SOUTHERN CALIFORNIA Water Agencies have banded together against the U.S. Fish and Wildlife Service, filing a lawsuit arguing against a recent habitat ruling. Last December, the federal bureau decided to expand the critical habitat for the endangered Santa Ana sucker fish from around 8,300 acres to over 9,300 acres in Riverside, San Bernardino, and Orange counties. The water agencies are arguing that the expansion of the protected habitat will hinder water collection, recycling, and groundwater recharge operations, which will undermine the water supply of the entire region and directly affect up to 1 million residents. In total, the agencies estimate a net loss of by 125,800 acre-feet of water, which is one-third of the region's supply. The lawsuit alleges that the federal bureau based its decision on studies that were not peer reviewed, and did not work with state and local agencies before deciding on the ruling, which is an Endangered Species Act requirement. U.S. Fish and Wildlife Service spokeswoman Jane Hendron has responded by saying that the restrictions will apply to future proposals and projects, and will not be imposed retroactively. She also specified that the restrictions of designated "critical habitat" does not bar all development, but requires deeper consultation with the federal government to ensure the environment is not altered beyond what the protected species could absorb.

CHEMICAL WASTE MANAGEMENT INC., the company in control of a landfill near Kettleman City, has agreed to pay penalties and upgrade its facilities after EPA and the California Department of Toxic Substances Control found the dump contained toxic materials. The landfill is located about 3.5 miles away from Kettleman City, a San Joaquin Valley community of 1,500. Company records show repeated occurrences of the lab incorrectly identifying toxic materials as safe waste for a landfill. The investigation by EPA and DTSC lasted 18 months, after local activists urged federal and state health agencies to look into the cause of Kettleman City's rash of severe birth defects, including cleft palates and heart problems. State investigators found no link between the landfill and the birth defects, but are requiring Chemical Waste Management to pay $400,000 in fines and $600,000 to upgrade its laboratory equipment, so errors in identifying hazardous material will no longer occur.

THE VERNON CITY COUNCIL has unanimously voted to adopt wide-ranging reforms to avoid a state legislative effort for disincorporation. Most of the reforms in the proposal directly addressed concerns raised by the corruption allegations that surfaced last year. Under the new rules, the council will no longer be able to appoint someone to a vacant seat instead of holding elections, the "at will" designation for city workers will be reversed, and 50 new independent housing units will be created. There was no debate or opposition. State Senator Kevin DeLeon was hopeful that the vote would demonstrate to officials in Sacramento that Vernon was committed to rising above the corruption, and that Assembly Speaker John Perez would reassess the need for AB 42, the disincorporation proposal, with the city council's adoption of the reforms.

RESPONDING TO A LAWSUIT filed by the Center for Biological Diversity, the U.S. Fish and Wildlife Service may soon propose a protected area of "critical habitat" for the Coachella Valley milk vetch. The plant, which flowers perennially and grows up to a foot, was put on the endangered species list in 1998, but currently has no protected land where it can grow. The federal bureau is looking at 25,000 acres in four areas to designate as critical habitat for the milk vetch, which needs wind- or water-transported sand to grow, and windy locales to spread its seedpods. The four units of habitat: south of the 10 interstate from Cabazon east to State Highway Exit 111, along the base of the San Jacinto Mountains; the Whitewater River watershed, north of Cathedral City and North Palm Springs, east of Highway 111, and south-west of the Southern Pacific Railroad; north of the 10 interstate near Desert Hot Springs; and in the Thousand Plains Preserve's Indio Hills.

Additionally, the bureau is open to including areas which will already be covered by the Coachella Valley Multiple Species Habitat Conservation Plan, which may not be well received by local officials. That plan is a grand bargain of sorts, entered into and agreed upon by all nine valley cities in order to limit new listings and protected areas, and could pose a difficulty in designating new areas for the milk vetch.

IN AUGUST, Secretary of the Interior Ken Salazar announced who would receive portions of the $53 million that the federal government slated for state conservation projects. Projects in 17 states received

– CONTINUED ON PAGE 3

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

Visit our website:
WWW.CP-DR.COM

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

William Fulton
Editor and Publisher Emeritus

Josh Stephens
Editor

Paul Shigley
Senior Editor

David Blum
Graphic Design

Morris Newman, Kenneth Jost
Contributing Editors

Abbott & Kinderman, LLP
Legal Digest

Robin Andersen
Circulation Manager

Connie Phu
Editorial Intern

Copyright © 2011. All rights reserved. This publication may not be reproduced in any form without the express written consent of Solimar Research Group.

– CONTINUED FROM PAGE 2

grants in varied amounts, and two Southern California projects were awarded large grants. The first is the Coachella Valley Multiple Species Habitat Conservation Plan, which is an agreement between the nine valley cities to preserve 240,000 acres for threatened desert species of plants and animals. The pact was awarded $6 million, the largest amount the department gave out, which will be used to purchase the land for the preserve. The second project is the Desert Renewable Energy Conservation Plan, an initiative to create and improve standards for developing renewable energy in six counties, covering 22 million acres and at least four current solar energy projects. DREC was awarded $1 million, which will be used for wildlife studies.

ACCORDING TO A NEW statewide poll by Field Research, Californians continue to strongly back Proposition 13, the Jarvis-Gann property tax reduction amendment approved by voters in 1978, and resist proposals aimed at amending some of its provisions. By a greater than two to one margin (63% to 29%) voters say that if Prop. 13 were up for a vote again today they would endorse it. By a five to four margin (50% to 41%) voters also oppose the idea of amending Prop. 13 to permit business and commercial property owners to be taxed at a higher rate than residential owners. In addition, two to one majorities oppose changing Prop. 13 to enable the state legislature to increase taxes by either a simple majority vote or a 55% majority vote of the Assembly and State Senate. These findings are from the latest Field Poll conducted statewide September 1–12 in English and Spanish among a representative sample of 1,001 registered voters.

PLANS FOR THE massive, controversial Saltworks project that is under development in Redwood City are being revised after local school districts, the Redwood City port, and the water districts of Santa Clara and Alameda counties all registered different concerns about the project. Developers DMB had solicited the water districts' support for a complex water-transfer deal with a farm in Bakersfield that would have, developers claimed, given the 12,000-home project on the San Francisco Bay sufficient water supplies. Officials from both agencies are now balking at that deal. Meanwhile, the school district is concerned about overcrowding, so DMB has agreed to build a high school. Some of the development will also be shifted away from the port so that it does not encroach on port operations. After receiving 600 pages of other comments, Redwood City this month began the process of assembling its environmental impact report for the project.

A JUDGE HAS THROWN OUT a lawsuit over the construction of a 399-megawatt solar power plant planned for San Benito County. The lawsuit was brought against county supervisors by environmental groups and area residents who claimed the plant would disrupt the area's rural character and encroach on the habitat of several endangered species. The court's ruling says that supervisors properly adhered to the California Environmental Quality act in considering these purported environmental impacts. The $1.8 billion plant is planned to cover 3,200 acres and include 4 million solar panels. ■

CALIFORNIA CITIES FARE POORLY IN ANNUAL TRAFFIC REPORT

TEXAS TRANSPORTATION INSTITUTE at Texas A&M University published its 2011 Urban Mobility Report this month. Based on 2010 data, the report came to the following conclusions regarding traffic nationwide:

- The amount of delay endured by the average commuter was 34 hours, up from 14 hours in 1982.
- The cost of congestion is more than $100 billion, nearly $750 for every commuter in the U.S.
- In many cities, "rush hour" last six hours per day.
- Congestion is becoming a bigger problem outside of "rush hour," with about 40 percent of the delay occurring in the mid-day and overnight hours, creating an increasingly serious problem for businesses that rely on efficient production and deliveries.

The economic recession has only provided a temporary respite from the growing congestion problem. When the economic growth returns, the average commuter is estimated to see an additional 3 hours of delay by 2015 and 7 hours by 2020. By 2015, the cost of gridlock will rise from $101 billion to $133 billion – more than $900 for every commuter, and the amount of wasted fuel will jump from 1.9 billion gallons to 2.5 billion gallons. Out of the nation's 100 largest cities, California cities featured prominently in the institute's ranking of annual hours of traffic delay: Los Angeles (1), San Francisco-Oakland (5), Palmdale-Lancaster (7), Sacramento (32), and San Diego (43). Los Angeles auto commuters lost an average of 39 hours per year and lost the equivalent of $483 annually by being stuck in traffic.

Developer Liable for Obstruction of Illegal Billboard

Easement agreement remains in force even if billboard ran afoul of city codes

BY GLEN C. HANSEN

In the ongoing billboard wars that have taken place up and down the state in recent years, the advertisers have won the latest legal battle.

In *Hill v. San Jose Family Housing Partners*, the Court of Appeal for the Sixth Appellate District held: (1) that a written easement for a billboard was enforceable, even if the billboard was constructed in an illegal manner; and (2) that the servient owners of a development that unreasonably interfered with the visibility of the billboard could owe the billboard owner damages for lost profits.

Plaintiffs James C. Hill and Dawn L. Hill and defendants San Jose Family Housing Partners (SFJHP) own adjacent parcels of land located along U.S. Highway 101 in San Jose. Since the 1970s, the Hills have owned and operated a two-sided commercial billboard on a section of SJFHP's parcel, near the joint property line. In 2000, the Hills and SJFHP's predecessors in interest entered into a written easement agreement relating to the Hills' use of the billboard.

The purpose of that easement was "[t]o do all things necessary and incidental to the operation of the business of a billboard including, but not limited to, placement, construction, reconstruction, maintenance and repair of the billboard … all to facilitate the billboard business or any other lawful purpose associated with the use of the Dominant Tenement." The easement also expressly provided that "no structures, vegetation, or other objects will be allowed to interfere with or encroach on the easements in the above described Grant Deed and as, herein, referenced." In or about 2007, the Hills learned that SJFHP planned to construct on its property a multi-unit residential development, which would obstruct the view of the billboard's north face. The Hills brought a lawsuit against SJFHP in 2007 for injunctive relief and damages.

In that lawsuit, SJFHP raised an affirmative defense that the easement is unenforceable because the billboard was constructed and maintained in violation of county and city building codes and ordinances. The trial court rejected that defense. The trial court also held that the easement agreement must be interpreted "to allow viewing of the billboard," and that SJFHP's development interfered with the Hills' easement by obstructing it. The trial court therefore awarded damages in the amount of $778,539, which included lost future profits through 2037.

> The trial court awarded damages in the amount of $778,539, which included lost future profits through 2037.

After trial, the City of San Jose issued a compliance order that directed removal of the "illegally constructed billboard." SJFHP moved for a new trial on the grounds that this newly discovered evidence of the city's actions would substantially reduce or eliminate the lost profits portion of the Hills' damages award. The trial court denied the motion. SJFHP appealed.

On appeal, the court affirmed the trial court's determination as to the illegality defense. SJFHP argued that if the billboard is itself illegal, its use for advertising is also illegal, and therefore the easement agreement is unenforceable. The court disagreed. This was not a case where the parties entered into an easement agreement that allowed for an illegal use of the property. The court explained: "The Hills' action to enforce the easement is entirely legitimate because the property's use for advertising purposes is not illegal in and of itself. Although the instrumentality of that use, i.e., the billboard, may be illegal, that is not a bar to the enforcement of the agreement."

The court also affirmed the trial court's interpretation of the easement agreement. SJFHP argued that the easement did not prohibit SJFHP from developing its property since such development does not restrict the Hills from operating, maintaining or accessing the billboard (even if that development reduced the profitability of that billboard business). The court disagreed. Instead of seeking an impermissible easement for light, air or view, the Hills were seeking enforcement of an easement that expressly provided that its purpose is to allow for the operation of a billboard business. The court explained: "Since the point of a billboard is that it be visible to potential consumers, it is clear the intent of the easement was to prohibit unreasonable interference with the structure's visibility. Such interference would necessarily impinge on the Hills' operation of the billboard business….[I]t is clear the parties to the easement agreement necessarily intended that the billboard must be visible to passing motorists."

However, the court reversed the trial court's judgment and order, denying the motion for a new trial, in light of the evidence regarding the city's post-trial efforts to remove the billboard. The court remanded the matter for retrial on the issue of damages, and directed the trial court to stay the retrial pending a final resolution of the city's removal actions. ■

➤ The Case:
Hill v. San Jose Family Housing Partners (2011) __Cal.App.4th __ Filed Aug. 23, 2011. No. H034931. Cal. App. LEXIS 1101

The Attorneys:
For the Plaintiffs/Respondents: Law Office of Scott S. Furstman, Scott S. Furstman; Law Office of Paul J. Derania, Paul J. Derania

For the Defendant/Appellant: Incorvaia & Associates, Joel L. Incorvaia, Lavanya Ramachandran, and G. Ehrich Lenz

Caltrans Permitted to Hire Private Engineering Firms

2009 rule governing public-private partnerships requires Caltrans to take responsibility for, but not necessarily perform, engineering work.

BY WILLIAM W. ABBOTT

As with most things in life, one person's gain is another person's loss, and public-private partnerships are not exempt from these types of tradeoffs. To the state engineers and their representative union, the contracting out to private engineering firms of engineering services traditionally performed by Caltrans engineering staff represents one of those zero-sum games. This becomes the backdrop to a challenge to the Phase II improvement work on Doyle Drive, the highway approach to the southern terminus of the Golden Gate Bridge.

At the heart of the litigation is Streets and Highways code section 143, a section permitting public-private partnerships. This statute allows Caltrans to hire outside engineering companies for work traditionally performed by Caltrans engineering staff. Work on Doyle Drive dates back to 1998, when, through a series of cooperative agreements between Caltrans and San Francisco County Transportation Authority (SFCTA), SFCTA undertook a number of feasibility studies for improving the roadway. In 2009, the Legislature significantly expanded potential opportunities for public-private partnerships, also known as P3s. Caltrans ultimately awarded a P3 contract to a private contractor, and a separate cooperative agreement with SFCTA. The agreements called for a supervisorial role for Caltrans, but project construction would be the responsibility of the private contractor.

> It will be worth watching to see whether the current budget situation will make contracting out services traditionally performed by agency employees more common.

The state Professional Engineers union filed suit, seeking to set aside the contract and enjoin the action. The trial court denied relief, which was affirmed on appeal.

The plaintiff's primary attack claimed the project did not qualify as a P3, as Caltrans had not been acting as a responsible agency, as the initial engineering work had been performed by private consultants working for SFCTA. Responding to an argument over legislative interpretation, the appellate court ultimately concluded that *responsible agency* status required Caltrans to be responsible for the work, not that it was required to perform the work. The court held that, under the terms of the various agreements, this element was satisfied.

Given the current state budget pressures in Sacramento, it will be worth watching to see whether or not the less-government-rather-than-more movement will make further inroads into contracting out services traditionally performed by agency employees. ■

➤ The Case:
Professional Engineers in California Government v. Department of Transportation (2011) Cal.App. 4th No. A131449, 2011 DJDAR. Filed August 8, 2011.

The Attorneys:
For Plaintiff and Appellant: Somach Simmons & Dunn, Jennifer T. Buckman, Kanwarjit S. Dua and Gerald A. James

For Defendants and Respondents California Department of Transportation et al.: Ronald W. Beals, Chief Counsel, Thomas C. Fellenz, Deputy Chief Counsel, Todd Van Santen, Assistant Chief Counsel and Erin E. Holbrook

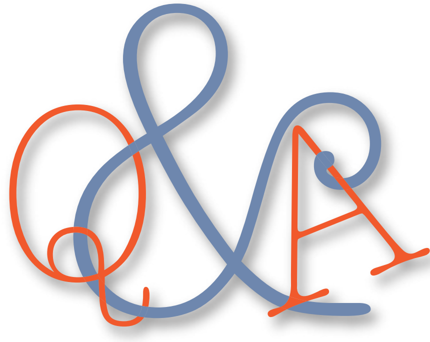
For Defendants and Respondents San Francisco County Transportation Authority et al.: Nossaman LLP, Stephen N. Roberts, Stanley S. Taylor III

For Amicus Curiae American Council of Engineering Companies of California: Stoel Rives LLP, Barbara A. Brenner and Craig A. Carnes

Kennedy to Guide Redevelopment Association While Lawsuit Is Pending

BY JOSH STEPHENS

Jim Kennedy may have taken the most thankless job in all of California planning. The former planning director of Contra Costa County and longtime board member of the California Redevelopment Association, Kennedy succeeds former executive director John Shirey, who recently became city manager for the City of Sacramento. Kennedy, who will serve in an interim capacity for up to nine months, arrives at a time when CRA's member agencies are fighting for their lives, and CRA, itself, is suing the state to overturn the budget provision that could financially cripple many of the state's redevelopment agencies. *CP&DR* spoke with Kennedy about these trying times at CRA.



WITH **JIM KENNEDY**

Jim Kennedy, interim director, California Redevelopment Association

CP&DR: What's the status of the lawsuit, challenging AB 1X26 and AB 1X27?

JIM KENNEDY: The parties are in the process of filing their various briefs with the court. On September 23, the CRA and league(?) will be filing their reply brief to the State Supreme Court. The essence of our brief is AB 1x26 and AB 1x27 are unconstitutional because they violate Prop. 22 and that they also violate Article XVI, Sec. 16.

CP&DR: Are there any different arguments from what was in the initial complaint?

JK: They basically hit the same points, but they do provide additional documentation and citations to cases and legislative history that bolster the case.

The amicus briefs must be filed no later than September 30. A week from that, the parties have an opportunity to file replies. At that point, the formal briefing process will be completed. The court will then take the matter under advisement. They will schedule oral arguments, probably, before the end of November so they can reach a decision before Jan. 15.

We're expecting to get amicus briefs from some redevelopment agencies, and attempting to get amicus from parties that have supported us in the past: the building and construction trades and some other parties in the development field. It's a curious process insofar as you don't necessarily know who's going to file an amicus brief.

CP&DR: Let's turn to the organization itself. What inspired you to take this job?

JK: "Inspire" is not necessarily the correct term. I strongly believe in the value of redevelopment, having been a redevelopment director for 25 years and in local government for 35 years. I've seen what this extremely valuable tool can get accomplished. Having been a member of the CRA board for about 10 years and the president of the board for 2 of the last 3 years, I had a fairly high level of knowledge of matters currently pending before CRA.

As a result, while I had retired from Contra Costa County, the CRA board approached me about taking the position on an interim basis to see the organization through the challenges of the next 6-9 months. At that point, once the decision has been made on the lawsuit and the organization has had an opportunity to reassess what its shape is, going forward, they'll be able to make institutional or structural decisions on what CRA will look like, or be like, going forward and recruit a permanent executive director accordingly.

CP&DR: What are the options for CRA, depending on whether you win or lose the lawsuit? What does the outcome of the case mean for the organization and for redevelopment?

JK: Regardless of whether we win or lose, we believe that the shape of redevelopment will be changed in the future. The general direction of legislative initiatives—leaving aside dissolution—has been to reduce the footprint of redevelopment so that it doesn't quite have the economic effect on local taxing entities as it has had. That means that redevelopment plans that have been adopted and have a time frame should complete their work and be retired. Some of the reforms they're suggesting are that large geographic areas inside of redevelopment project areas should be a thing of the past.

The institution of CRA will generally reflect its current mission, which is training and best practices for its members and working with the Legislature to help shape the legislation that governs us. Hopefully, we can get out of the mode of lawsuits.

CP&DR: What are you hearing from your members? How many will opt to dissolve vs. carry on if the lawsuit fails?

JK: We haven't been keeping a log. We did a survey a couple months ago that said about 75-80 percent of agencies were inclined to opt in. The general tenor of commentary that we get from agencies is that they're concerned. They're fearful about their work and about the activities of their agencies in their communities. They're concerned at a personal level, because they don't know whether they'll have a job in the future. Especially in today's economy, these are pretty sobering circumstances.

CP&DR: What might reform look like, regardless of the lawsuit? Will it be little-by-little, or will there be wholesale reform, which some people are clamoring for?

JK: At the present time, I don't see the basis for wholesale reform. I think the package of bills that we started out with in the last session, AB 286, AB 1250, and SB 450 represented pretty significant modification to the way that redevelopment agencies do business. We would all like to get through this process, get both the law stabilized and agencies' financial situations stabilized, and see how it works, rather than try to tinker with, or make, a wholesale change. On the other hand, depending on the outcome of the lawsuit or, more precisely, how the court decides to render its opinion, may provide the framework that will ultimately drive the answer to that question.

CP&DR: How much of your job now involves raising morale among your members?

– CONTINUED ON PAGE 7

>>>> CRA to Keep Members Apparised of Lawsuit

– CONTINUED FROM PAGE 6

JK: We are preparing for a set of regional briefings that will provide an opportunity for members throughout the state to directly talk to CRA's lawyers on aspects of the lawsuit. That will be rolling out the second week of October. There will be a weeklong road trip by Brent Hawkins of Best, Best, and Krieger, David Jones, our lobbyist, and myself to engage the membership in a conversation about the status of the lawsuit and the legislative activities, both past and prospective, and get their direct input. Hopefully, this will be not just be informative to them but also provide them a level of comfort.

CP&DR: Are you glad you took the job, so far?

JK: It's so different from what I've ever done before. It's both challenging and invigorating. At the same time, it's not what I would necessarily characterize as playing to my strengths. But I'm learning every day.

I have underscored to the board that I was not interested in the position long-term and was simply willing to come in to sort of stabilize things through this transitional period. ■

This interview has been edited and condensed.

>>>> Initiative System Tends to Favor Local Grassroots Efforts

– CONTINUED FROM PAGE 1

Whether the prevalence of ballot-box zoning is a good thing or a bad thing depends on your point of view, but one thing is for sure: In the arena of local government – unlike at the statewide level – grassroots efforts usually prevail over the moneyed interests. In some cases this has forced innovative change, but in many other cases is has cemented the status quo and created a barrier to change of virtually any kind.

It's clear that Johnson and the other California Progressives who pushed the idea of direct democracy didn't think much about its use on local ballots. They were focused on breaking the power that the Southern Pacific Railroad had over the Legislature. In fact, initiative and referendum powers were rarely used on the local level – until communities around the state began to resist growth in the 1970s.

At that time, initiatives that amounted to ballot-box zoning were rare and it was unclear whether they passed legal muster. Initiatives and referenda apply to legislative actions only, not quasi-judicial actions. Many planning decisions fall into the latter category – variances, conditional use permits, and the like. The big legal question was whether a zone change was a legislative act. In 1980, the California Supreme Court concluded that the answer to this question is yes: Since zoning must conform to the General Plan, a zone change is therefore a legislative act. (*Arnel Development Company v. City of Costa Mesa*, 28 Cal. 3d 511 (1980)) [ ]

The Arnel ruling opened the floodgates for ballot-box zoning in California, which really took off during the real estate boom years of the 1980s. According to an analysis we at CP&DR did about a decade ago, there were 600 land use-related ballot measures on local ballots over the next 15 years. [ ]

The result has been voter-imposed restrictions on development of all shapes and sizes: height, density, number of residential units per year, outward urban expansion. Interestingly, as our analysis concluded, the types of legislation being enacted by the voters were no different than the types of legislation being enacted by elected officials. The only difference was that because they were enacted by the voters they could only be changed by the voters – and in many cases they explicitly required subsequent voter approval on specific types of land use changes.

The most famous of these "subsequent voter approval" initiatives are the SOAR initiatives passed in Ventura County between 1995 and 2000 (see *CP&DR* blog Dec. 2000 [ ]). Encouraged by the Supreme Court's decision to uphold Napa County's initiative requiring voter approval to change the zoning of any piece of agricultural land, [ ] SOAR established urban growth boundaries, which have changed little since the initiatives were passed. In most Ventura County cities the boundaries encompassed enough land to accommodate suburban-style growth, though such land will clearly become scarce once the real estate market booms again. (The city with the tightest growth boundary is – yes, you guessed it, Ventura.)

Has SOAR been a good thing for Ventura County? On the one hand, it has constrained outward urban expansion, protected agricultur-

– CONTINUED ON PAGE 8

Abbott & Kindermann, LLP
Land Use, Environmental and Real Estate Law
Counseling, Advocacy and Litigation

2100 21st Street, Sacramento, California 95818
916-456-9595

>>>> Ballot Box Zoning a 'Mixed Bag'

– CONTINUED FROM PAGE 7

al land, and forced infill development. On the other hand, it has – well, it's done all the same things, possibly increasing housing costs along the way. SOAR has also caused agricultural landowners in Ventura County to change their practices. They are moving aggressively toward higher-value crops (meaning a reduction in scenic orchards) and greenhouses. So the landscape has changed – just in different ways than the initiative's drafters expected.

The use of ballot-box zoning has not been evenly spread across the state. Overall, it reflects the deep cleavage between the coastal and inland parts of the state. Ballot-box zoning is common in coastal communities – even in historically development-friendly Orange County – and rare in the Inland Empire and the Central Valley. (The exceptions would be college towns like Davis and affluent suburbs near struggling central cities, like Redlands near San Bernardino and Lodi near Stockton.) Traditionally, it's been most politically successful at the city level – especially smaller cities – where footpower counts the most. Grassroots citizen groups have often gained a political foothold through ballot initiatives, and their leaders have often gone on to become elected officials. Ballot-box zoning has generally done poorly in large county elections, where a big-money campaign by developers can overpower a grassroots campaign.

> Ballot-box zoning is common in coastal communities and rare in the Inland Empire and the Central Valley. Traditionally, it's been most politically successful at the city level – especially smaller cities – where footpower counts the most.

In all the years that former editor Paul Shigley and I tracked ballot-box zoning on these pages, the conclusion we most often came to was mixed bag. It was always hard to know what political events would trigger the nuclear explosion of a ballot measure and harder still to know the effects. Indeed, John Landis, formerly a planning professor at UC Berkeley (now at Penn), once conducted a major research project and came to the conclusion that both the political forces and the policy outcomes were not that different in communities that had imposed growth control via initiative and those that had done so through conventional processes.

Still, I think the impact in many individual communities has been profound – and not always good. A number of cities that adopted restrictive ballot measures in the 1970s, for example, have never gone back and changed the restrictions. For example, Alameda – an island near Oakland in the San Francisco Bay – banned apartments via initiative in the 1970s and banned densities higher than 21 units per acre in 1991. An attempt by SunCal to override the ballot measure to accommodate a large project reusing an old Navy Base was crushed in 2010 by an 85-15 vote (see *CP&DR* Vol. 25, No. 3 Feb. 2010 [ ]).

Whether you liked the SunCal project or not, you have to admit that Alameda has protected something and sacrificed something by adhering to its ballot measures for the past 40 years. Alameda today is a lovely, isolated, and relatively low-density community, featuring mostly single-family houses and older (and not very attractive) apartment buildings. The ban on multi-family development has not, of course, led to the razing or redevelopment of the apartments that nobody likes, and it has prevented construction of the attractive mixed-use projects that have characterized the Bay Area.

Similarly, ballot-box zoning in California has protected some things and sacrificed others. It's often protected a particular scale and type of development – usually older, lower-density, suburban style development. Yet it's often prevented the construction of new, often high-quality development for which there's market demand. After a quarter-century of watching this stuff, my conclusion is that ballot-box zoning in California is still a mixed bag – and a crapshoot. ■

>>>> Lower Parking Restrictions Could Undermine SB 1818

– CONTINUED FROM PAGE 1

"We have 30 years of history with density bonus law that recognizes the value of trading a planning concession, whether it be height, density, or parking for supplying the mix of incomes in a project," said Lisa Payne, policy director at SCANPH. "This bill would have removed that tool."

Julie Snyder, policy director for Housing California, said that she did not doubt that lowered parking requirements would make development less expensive. But she questioned whether those savings would be passed on to residents.

"While we agree with the basic concept of ensuring communities are not 'overparked,'" said Snyder, "we believe this policy should be crafted in concert, rather than in conflict, with state policies that achieve valuable housing affordability goals."

Affordable housing advocates were not, however, the only opponents of AB 710. The League of California Cities also expressed concerns that it amounted to an undue imposition on cities in an arena where cities generally enjoy local control.

"It was a one-size-fits-all mandate," said League legislative representative Kirstin Kolpitke. "We feel that it doesn't address the needs of each individual community. If local officials decide to build in a green or SB 375 manner, their reward for creating the transit-intensive area is that they're stuck with the requirements of the bill."

AB 710 is, thus far, the signature effort of the fledgling CIBA, which formed last year to promote high density development in urban areas. Smith and CIBA president Meea Kang said that AB 710 was written to benefit nearly every conceivable constituency, including developers of all stripes and cities that are seeking to take advantage of infrastructure investments. With some parking spaces costing up to $30,000 each to develop, the bill stood to stimulate development amid California's malaise.

AB 710 would not have imposed maximums. It would have forbidden cities from using the current standards as minimums, which have in recently years been vilified by scholars and activists alike.

"There is a strange affinity we have to cars, which represents everything like freedom and the American way," said Kang. "As a result, we find ourselves in this dysfunction where we know we have to build inside cities."

In his 2005 book *The High Cost of Free Parking*, UCLA planning professor Donald Shoup traced nearly every urban evil plaguing American cities to what he considered an overabundance of parking spaces – which, he said, causes cities to expand outward unnecessarily and inflates the cost of real estate. The so-called "Shoupista" movement has, since then, been waging battles large and small to undo economic distortions caused by legally mandated free parking.

Shoup supported AB 710 and lobbied for it alongside its chief backers from the CIBA.

"AB 710 would have, in one fell-swoop, reset the default parking standards that are in place throughout California and the English-speaking world with sensible urban standards," said Smith.

Those standards are not so sensible to a vocal group of affordable housing advocates, who fear that AB 710 would undermine established incentives for inclusionary density bonuses.

Smith stated that AB 710 could have reduced developers' costs enough to jump-start projects that currently do not pencil out. They recently conducted a survey of both market rate and large affordable developers that, Smith said, revealed $7.5 billion worth of projects that could have been stimulated by AB 710.

While many developers were elated by the prospect of AB 710, environmentalists cheered it as well. AB 710 was intended to complement Senate Bill 375, which calls on cities to develop more intensively around transit in order to reduce vehicle miles traveled and, as a result, greenhouse gas emissions.

"It reduces the cost of housing development around transit stations, therefore making it easier for people to live near transit, making it more affordable to live near transit, making it easier for developers to build the kind of housing the market is demanding and making it easier to develop walkable communities," said Amanda Eaken, policy director with the Natural Resources Defense Council.

Others simply see it as good urbanism.

"Purely from an urban design standpoint, it makes all the sense in the world," said Los Angeles-based architect John Kaliski.

The bill made a triumphal run through the State Assembly, passing with no opposing votes. It ran aground in the Senate, however, falling two votes short of the 21 needed for passage.

The production of affordable housing is generally seen as a nearly perfect complement with infill and transit oriented development. Infill development generally results in dense, accessible, and relatively inexpensive units that fit the budgets of low- and moderate-income residents.

"People have to look at creative ways to take advantage of infrastructure and try to reduce the costs of producing housing next to it," said Kaliski. "The smart growth advocates and the housing advocates should be natural allies." (Kang, Smith, and many other members of CIBA produce affordable, as well as market-rate, housing.)

The wholesale reduction of parking requirements in transit-intensive areas would constitute, say AB 710's opponents, a recipe for gentrification. It would, therefore, contradict the purpose of state-supported affordable housing development.

SCANPH's analysis of AB 710 concluded that reduced parking requirements would eliminate the advantage that SB 1818-compliant units would confer on developments. Market-rate developers would, therefore, have relatively less incentive to produce anything but high-end units that would be unaffordable for low-income, transit-dependent residents.

"We're all interested in creating sustainable communities," said SCANPH executive director Paul Zimmerman. "But you can't have a sustainable community unless you've got equity in the way the land is developed. You can't have a sustainable community if you force out the affordable housing that exists because you're pushing out core transit riders."

Infill advocates say that this interpretation is preposterous. At the most abstract level, they claim that more housing in the aggregate will, by definition, result in more affordable housing. As a practical matter, the very same incentives that AB 710 gives to market-rate developers will apply equally to developments that are affordable, either in part, or in whole. Moreover, they claim that SB 1818's parking provision – or the absence thereof – will have a negligible effect on for-profit developers and zero effect on nonprofit developers.

Zimmerman said that since 2008, the SB 1818 parking provision has spurred the development of 108 units in the City of Los Angeles, plus 45 more in a recently completed development south of downtown. The state Department of Housing and Community Development has estimated that the city's housing deficit grows by over 28,000 units per year.

AB 710's backers say that reduced parking requirements would stimulate housing development by all kinds of developers, simply by cutting in half one of a builder's biggest costs.

– CONTINUED ON PAGE 10

League Objects to Statewide Parking Standards

– CONTINUED FROM PAGE 9

"No one policy move is going to trump the economic climate," said Bill Witte, president of Related Cos. of California, a nationwide for-profit developer that often builds affordable housing. "But I think you're in a situation where every little bit helps."

Zimmerman rejects this rationale, saying that anything that benefits market-rate developers necessarily compels them to produce high-end units in exactly the wrong places. He cited a recent study by the Dukakis Center on Urban and Regional Policy at Northeastern University in Boston that found that high-end development has tended to push out residents in new transit-intensive areas nationwide.

"The savings to the developer of not including the parking is not going to result in a reduction of sales price or rent," said Zimmerman. "There has to be a link between a developer's financial pro forma and the sustainability of that neighborhood by providing housing at lower price points."

That same report, however, lists the reduction in parking requirements as a strategy for counteracting the march of gentrification. The institute's namesake, former Massachusetts Governor Michael Dukakis, a visiting professor at the Luskin School of Public Affairs at UCLA, supports AB 710 and disavowed SCANPH's interpretation of the report in a July 6 email to Sen. Lois Wolk. Dukakis himself was not, however, involved in writing the report.

The idea, therefore, that parking reform should depend on SB 1818 and be conflated with the state's affordable housing crisis, rankles AB 710's supporters. Witte, in fact, claimed that some affordable developers use SB 1818 as a bargaining chip with public officials.

"This is completely disingenuous. They objected to AB 710 because they felt it would take away one of the tools they have to negotiate community benefit agreements on a one-off basis," said Witte. "That is not how you do planning. That is not how you do development."

The League's Kolpitke explained that lower parking requirements might shift the burden of storing cars to city streets, which may or may not be equipped to handle an overflow. She also said that cities might shy away from creating transit-intensive districts because they would not want to accept the lower parking requirements.

AB 710 would have allowed cities to use more parking-intensive standards if circumstances warranted them. However, she said AB 710's provision allowing cities to adopt higher parking requirements amounted to an undue burden. That solution did not satisfy the League.

"Cities don't exactly have an overflow of cash to be able to do studies and jump through so many hoops that it becomes impractical to exempt themselves out of," said Kolpitcke.

The League lobbied actively against the bill as it was being considered by the Senate.

The League's efforts to block AB 710 come after a string of painful defeats that cities say they have suffered at the hands of Sacramento. The devolution of state functions to the local level and, most notably, the threatened disillusion of the state's redevelopment system has put cities and the state at odds with each other like never before.

"There's a huge locals-versus-state battle that's brewing these days, with everything from Prop. 26 to the dissolution of redevelopment agencies," said Casey Daily, assistant to the mayor of the City of San Bernardino, which supported AB 710. "There's a whole lot of friction between state and locals."

As a result, many say that cities were not willing to accept another mandate from Sacramento, even if that mandate has the backing of many progressive planners.

Ultimately, AB 710's backers say they are encouraged by the support that the bill received and that they will return next year with a new version of the bill. Throughout all the discussions over AB 710, Smith said he was encouraged by the response to the bill's fundamental purpose.

"We're saddened that AB 710 went down, but it didn't go down because people thought we don't have enough parking, and it didn't go down because people think infill is the wrong direction," said Smith. ■

➤ Contacts:

Amanda Eaken, Natural Resources Defense Council Deputy Director, Sustainable Communities 415.875.6100

Casey Dailey, Assistant to the Mayor, City of San Bernardino, 909.384.5211

John Kaliski, Principal, Urban Design Studio, 213.383.7980

Kiristin Kolpitcke, Legislative Representative, League of California Cities, 916.658.8200

Meea Kang, President, Infill Builders Association,

Lisa Payne, Policy Director, SCANPH

Mott Smith, Director, Infill Builders Association, **www.infill-builders.org**

Bill Witte, President, Related Cos. Of California, 212.801.1000

Paul Zimmerman, Executive Director, Southern California Association of Nonprofit Housing, 213.480.1249

Planning & Visioning Websites Internet Marketing

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

Is the America's Cup a Clue to the Future of Redevelopment?

COURTESY AMERICA'S CUP

Promotional image for America's Cup 2014, San Francisco

If you want to know where Jerry Brown is going on redevelopment, just take a look at AB 664 – a bill he signed in late September [ ] designed to help San Francisco finance facilities for the 2014 America's Cup race.

The bill does exactly what Brown was trying to undo in eliminating redevelopment: It diverts new property tax increment for a local purpose. But Brown included several other features in the bill that might suggest his thinking on redevelopment. First, he relied on the structure created by the existing Infrastructure Finance District law – a cumbersome law which nevertheless permits tax-increment diversion without a blight finding. Second, he capped diversion of funds from the so-called ERAF fund – the property tax fund used to finance schools – at $1 million per year. And third, he subjected the entire thing to state oversight – in this case, the California Development and Infrastructure Bank, or I-Bank.

The America's Cup situation is an unusual one with a one-of-a-kind backstory. But it's striking that the bill contains so many of the likely components of redevelopment reform. When Brown proposed eliminating redevelopment last January, he promised "a replacement tool." It's never been clear to anybody what he meant by that statement – it may not have been clear to him – but the America's Cup model may show the way.

To understand the bill and the complicated backstory, read Peter Detwiler's bill analysis [ ] for the Senate Governance and Finance Committee. Actually, you should read it just to enjoy it. Like all of Detwiler's bill analyses, it is notable for its clarity, depth of understanding, and humor. There's nobody else in the Capitol who writes like Detwiler, and he retired at the end of the session. Those of us who strive to understand what bills really say will have to find some other shortcut.

– BILL FULTON | SEPTEMBER 25, 2011