VOL. 28, NO. 11 – NOVEMBER 2012 CALIFORNIA PLANNING & DEVELOPMENT REPORT

West Sacramento Survives Redevelopment Audit, While Hercules Struggles

BY CP&DR STAFF

West Sacramento has become the first city to emerge unscathed from a redevelopment audit by the State Controller's Office. Meanwhile, the Bay Area city of Hercules finds its asset transfers caught in the crossfire of a variety of other problems, including alleged long-term mismanagement of the redevelopment agency.

West Sacramento was the fourth city to have its 2011 asset transfers audited by Controller John Chiang's office [ ]. In general, Chiang's audits have found that redevelopment agencies transferred government facilities to cities in 2011 – rather than letting the successor agency do that – and also have transferred redevelopment project assets to the city or a city-created economic development group.

Like many cities around the state, West Sacramento – located just across the Sacramento River from the State Capitol – transferred most of its redevelopment agency's assets to the city in 2011. Chiang's office found in November that all of West Sacramento's $77 million in asset transfers were legal. Chiang's office said the city should have turned 12 parcels with zero book value involved in that transfer over to the successor agency – but West Sacramento's oversight board subsequently approved the city's retention of those properties, so West Sacramento got a clean bill of health overall.

The first two – Morgan Hill and Milpitas – got whacked for transferring redevelopment assets to a newly created economic development entity controlled by the city. Milpitas's response was more hard-line than Morgan Hill's, though Morgan Hill is suing over the economic development entity. The third – Hercules – was criticized for transferring several critical redevelopment parcels to the city. Chiang's office had previously found mismanagement [ ] in the redevelopment agency prior to 2011.

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insight

WILLIAM FULTON

Has the Funding Spigot for Planning Run Dry?

Five years ago, the planning and development world in California was flush with money. With 20% of the nation's planners and at least that percentage of real estate developers, the state was awash in plans. Big general plans were paid for by flush general funds. Redevelopment agencies had plenty of money to update their redevelopment plans and then subsidize the resulting projects. Ambitious specific plans to accommodate flashy new projects – both infill and greenfield – were paid for by developers itching to build.

That world feels like a lifetime ago for most planners and developers in California today. Although the state's real estate prices are inching upward and construction has clawed its way upward from an astounding low in 2009, business is still slow. The planning and development apparatus has shrunk significantly – maybe permanently – since the heady days of the '00s. Indeed, the whole development industry in California has shrunk so much that the Construction Industry Research Board – always the most reliable source of information for new housing starts in the state – has basically gone out of business.

Even more worrisome is the fact that most of the funding sources that have covered the planning gap since 2008 are on their way out. The $6-billion redevelopment machine is already gone. Proposition 84's $60 million or so in planning grants will be depleted

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AN ECONOMIC REPORT released by the California Nations Indian Gaming Association (CNIGA) has found that tribal casinos in California produce $7.5 billion in economic benefits and support more than 52,000 jobs (30,000 from operations within the casinos, and 22,000 in the broader economy). The study was conducted by Beacon Economics, an independent consulting firm, and surveyed economic data from 13 of 60 gaming tribes in California, including large and small casinos in both urban and rural markets. Although the casinos are not required to pay income taxes on the revenues they derive from casino operations because they are located on sovereign, federally recognized Indian reservations, the study found that the gaming activities generate more than $460 million in tax revenues to the state in the form of income taxes from employees and sales or property taxes from off-reservation facilities such as hotels, restaurants, retail businesses and entertainment venues. According to the founding partner of Beacon Economics in Los Angeles Christopher Thornberg, Indian gaming facilities contribute substantially to the California tax base and capture tourism dollars that would otherwise go to Nevada.

THE CITY OF ISLETON, which has been a city for 89 years, is looking at dissolving itself as a result of enduring economic hardship from a lack of local businesses and development. Despite that the town is home to 840 residents and city leaders see disintegration as a remote possibility, the Sacramento County grand jury suggested years ago that the city might be better off disincorporating. Although Isleton is a picturesque old town situated in a great location along the Sacramento River (see this *CP&DR* blog from 2008 [ ]), it suffers chronic financial problems, including the inability to afford a police force. Dan Hinrichs, Isleton's interim city manager, is doing everything he can to save the city, but explains that the city suffers from years of poor fiscal management. However, the path to disincorporation is a long one should the city decide to head down that road, and would require signatures of at least 25 percent of Isleton's registered voters. If disincorporation takes place down the line, the county would be required to absorb the town's debts, and Sacramento officials are "ready to help."

Half-built subdivisions are part of Isleton's financial woes.

CITIES ARE DISPUTING the state financial department's claim that 27 municipalities have failed to fully pay their share of redevelopment money to the state. Governor Brown planned to eliminate roughly 400 community redevelopment agencies to help bridge the state's budget deficit, expecting to receive $129 million in payment from cities and counties and further saving $685 million in property tax revenue that would otherwise be used to pay the debt of redevelopment agencies. Initially created as a municipal financing tool to bring blighted areas development, Jason Sisney of the legislative analyst's office argues that redevelopment is one of the "largest financial risks in this year's state budget plan." However, cities such as San Jose, Stockton and Brea are disputing this on the basis that the administration is using "unreasonable accounting methods," and Brea is in fact suing the state to force an accounting fix. Brea wishes cash flow to be calculated on an annual basis rather than in six-month periods to more accurately show existing obligations. According to the California Department of Finance, the state has so far received only $6.7 of the $129 million it seeks.

GOVERNOR JERRY BROWN HAS given approval for two Indian tribes, one in Yuba County and the other in Madera County, to build casinos along Highways 65 and 99 respectively, despite the fact that the freeways are miles away from their tribal land. Each casino is planned to include 2,000 slot machines, and supporters forecast that the casinos will bring self-sufficiency to the tribes who have long lived in poverty and thousands of jobs to the Central Valley towns nearby. Supporters also argue that historically both tribes have moved around a large area that includes their current mountain rancherias as well as the proposed casino locations lower in the valley. However, critics say this could set a precedent for future requests from other tribes to expand gambling operations in the same way. Protest is likely to arise in court from other casino-owning tribes that oppose the projects. ■

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legal digest

Tuolemne CEQA Ruling Sets Stage for Supreme Court Showdown

BY WILLIAM W. ABBOTT

In case you missed the recent legal tremor, be advised that land-use lawyers are looking closely at a new appellate court ruling from Tuolomne County on the application of the California Environmental Quality Act to citizen initiatives. The new ruling is in direct conflict to a ruling from a different appellate district in 2004, possibly setting the stage for a showdown in front of the California Supreme Court.

In *Tuolumne Jobs & Small Business Alliance v. Superior Court (Wal-Mart Stores, Inc.)* (October 30, 2012, F063849) __Cal.App. 4th __ the facts involve the efforts of Wal-Mart to seek an expansion of an existing store in the City of Sonora.

An EIR was prepared by the City, and the Planning Commission recommended approval. Before the matter was considered by the City Council, an initiative was filed, the effect of which would change the land use regulations on the Wal-Mart parcel and dispense with the need for a discretionary permit – thus making it easier for Wal-Mart to obtain approval.

Once the city determined that the initiative petition contained the requisite number of signatures, the City Council had two basic choices: enact the measure as its own without modification or place it on the ballot. With the belief that CEQA did not apply, the City Council chose the former option and enacted the initiative measure as its own.

Litigation challenging the approval ensued, including a claim that the City Council was required to complete the CEQA process first. The City and Wal-Mart demurred to the petition/complaint, which the trial court sustained, effectively upholding the city's action. The petitioners, Tuolomne Jobs and Small Business Alliance, then filed a writ petition with the Fifth Appellate District, which granted, effectively reinstating the CEQA claim at the trial court.

The City and Wal-Mart argued strenuously to the appellate court that the city's actions were ministerial and that the published court decision in *Native American Sacred Site & Environmental Protection Association v. City of San Juan Capistrano* (2004), 120 Cal.App.4th 961, had settled the question. In that case [ ], the Fourth District Court of Appeal upheld San Juan Capistrano's decision to enact a zone change initiative, rather than putting it on the ballot, was not subject to CEQA.

Based on these arguments, the City of Sonora and Wal-Mart argued that CEQA did not apply to the city council option to enact the measure (as compared to placing the matter before the voters.) The Fifth Appellate District wasn't buying it however, expressly declining to follow *Native American Sacred Site* and finding the Council was exercising discretion if it enacted the measure as its own. To further cement its disagreement with the Fourth Appellate District, the *Tuolumne* court then ordered its decision published, potentially setting the stage for resolution by the California Supreme Court. ■

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➤ **The Case:**
Tuolumne Jobs & Small Business Alliance v. Superior Court (Wal-Mart Stores, Inc.) (October 30, 2012, F063849) ___Cal.App.4th ___.

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Fanita Ranch EIR Struck Down, Delaying Project Again

BY WILLIAM W. ABBOTT

THE FOURTH DISTRICT Court of Appeal has struck down the environmental impact report for a large development project in Santee, saying the EIR failed to deal with several water supply issues, including a discrepancy between the EIR and the water supply assessment as to how much water the project would consume.

After a previous proposal was shot down by the voters, the City of Santee approved entitlements for the Fanita Ranch project, along with certifying an environmental impact report and a water supply assessment. Long in the planning stage, the proposed project at Fanita Ranch would involve development 970 acres out of a 2,600-acre real estate holding to build 1,380 single-family dwellings, 230 acres of a pedestrian-oriented village, and a 10-acre lake. About half the area, 1,400 acres, would be approved as an open space preserve.

Opponents – including the Endangered Habitats League and the Center for Biological Diversity – challenged the EIR, and the trial court found a CEQA error pertaining to fire safety. The trial court declined the opponents request to set aside all of the approvals, opting for limited relief as contemplated by Public Resources Code section 21168.9. The trial court also awarded attorneys fees to the opponents under the authority of Code of Civil Procedure 1021.5. Both sides appealed.

The Fourth District held the EIR held to be inadequate for:

(1) Failure to explain a material discrepancy between the EIR and the water demand numbers in the water supply assessment;

(2) Failure to disclose potential uncertainties associated with long-term delivery of a firm water supply, and

(3) Failure to assess impacts of groundwater extraction to fill and maintain a 10-acre project lake. As the project would meet the standards of a multi-species plan (while the plan was yet to be formally adopted the lead agency), the project's contribution would be less than considerable, affirming the cumulative impact analysis in the EIR.

The appellate court affirmed the trial court's decision on the fire issue, but concluded that there were other deficiencies as well. First, as to fire safety impacts, the EIR relied upon a fire protection plan, one element of which was the open space fuel management strategies. When the City approved the project, it did not include the fuel management strategies as part of its approval (although not entirely clear, it may have been omitted due to species concerns.) As a consequence, the appellate court concluded that there was a lack of substantial evidence to support the conclusion of no or less than significant impacts.

The appellate court did uphold the evaluation of cumulative impacts to biological resources. In this case, the lead agency had relied, in part, upon a draft multi-species plan. The multi-species plan had been adopted by the City and County of San Diego, but not the City of Santee.

However, the EIR assumed that the City would either adopt the species plan, or adopt similar standards, but in either event, the project met the species plan standards and would not interfere with plan implementation. On this basis, the lead agency properly concluded that the project's contribution would not be cumulatively considerable.

Turning next to the mitigation measures for the Quino checkerspot butterfly [ ], the appellate court found that the EIR failed to describe the actions contemplated for active management for the Quino within the preserve area and were improperly deferred to a later to-be-developed management plan; thus the approvals failed to contain sufficient protocols and standards as a substitute.

The appellate court also rejected the analysis of the project's water supply impacts and related matters. First, the court observed that there was a significant difference in water demand numbers set forth the EIR (1,446 AF) compared to those in the Water Code 10910-10912 assessment (881 AF) prepared for the project, but there was no reconciliation in the EIR as to these differences. In a very rigid analysis, the appellate court concluded that "such an unexplained discrepancy precludes the existence of substantial evidence to conclude sufficient water is likely to be available for the project."

The appellate court also faulted the City in that the EIR failed to account for uncertain or known contingencies to a reliable water supply (deliveries ultimately tied to the State Water Project.) The EIR also failed to account for the impact of filling and recharging the 10 acre lake with groundwater, which potentially could compound the threshold issue of the water sup-

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>>> Another Delay for Fanita Ranch EIR

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ply assessment, as the water district would be the only other source of potable water necessary to fill the lake.

Addressing next the remedy question, the appellate court recognized that CEQA grants the trial court the discretion of a remedy commensurate with the nature of the CEQA violation and that invalidation of the approvals is not mandated in every instance. However, in light of the additional interrelated CEQA errors it identified, the court intimated that a limited remedy may not be appropriate, although, as the trial court had invalidated all of the local government approvals in a later court proceeding, the appellate court did not have to address the application of this discretion to the case pending before it.

As to the award of attorneys fees and the ensuing appeal, the court remanded it back to the trial court in light of the plaintiff/appellants success on appeal for further proceedings. ■

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➤ **The Case:**
Preserve Wild Santee v. City of Santee (October 19, 2012, D055215) ___Cal.App.4th ___.

Monterey Park Trash Ballot Measure Not A 'Project' Under CEQA

BY DANIEL S. CUCCHI & WILLIAM W. ABBOTT

A BALLOT MEASURE REQUIRING Monterey Park to put municipal trash collection services out for a competitive bid is not a "project" under the California Environmental Quality Act, the Second District Court of Appeal has ruled.

The Monterey Park City Council directed city staff to prepare a ballot measure that would require the City to seek competitive bids for trash service when the current contractor's contract was complete in 2017, and provide a new bidding opportunity every five years thereafter. Measure BB was overwhelmingly approved by Monterey Park voters in March 2011.

The plaintiff was a resident of the City and signatory to the ballot arguments against the measure. He sued to remove the measure from the ballot, arguing the City violated the CEQA by failing to perform environmental review and because the Council "had deemed Measure BB a voter 'initiative,'" but failed to follow the initiative measure requirements for a petition and thus, unconstitutionally restricted the actions of future City Councils.

The trial court found that the measure was not a "project" under CEQA and, therefore not subject to environmental review requirements, and that even if it was a "project" it would have been exempt under the 'common sense' exemption under CEQA Guidelines section 15061(b)(3). It also found the description of the measure as an "initiative" was irrelevant to the question whether it was properly submitted to the voters, but refused to address the issue of whether the measure bound future councils as the issue lacked ripeness. Wing Chung, the plaintiff, appealed.

The Second District Appellate Court agreed with the trial court. It held that the measure was not a "project" under CEQA citing to CEQA Guidelines section 15378(b)(4) which defines "government fiscal activities, which do not involve any commitment to any specific project . . . " as an activity which does not fall under the definition of a "project." The court reasoned that because the measure's effect is limited to the bidding process and the fact that the City can award the contract to a single provider or multiple providers as it sees fit, then the measure is a "fiscal activity" in which "the City has not committed itself to any particular course of action," and is therefore not a "project."

The court cited *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified Sch. Dist.* (1992) 9 Cal.App.4th 464 [holding the formation of a CFD for raising funds for future unspecified school facilities was not a "project"]; *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Assn. of Gov'ts* (2009) 179 Cal.App.4th 113 [holding a sales and use tax measure to fund a non-binding list of transportation projects was not a "project"]; and *Citizens to Enforce CEQA v. City of Rohnert Park* (2005) 131 Cal.App.4th 1594 [holding an MOU with an Indian tribe regarding funding for "possible public improvements" related to a casino was not a "project."].

The court then moved on to the issue of the measure's constitutionality, upholding the trial court's ruling that the matter lacked ripeness. The appellate court reasoned that considering the consequences of the measure's approval on the authority of a future council to amend the ordinance amounted to an advisory opinion since no proposal to amend or repeal it had yet to take place. Until such time, there is no actual controversy before the court. ■

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➤ **The Case:**
Chung v. City of Monterey Park (October 23, 2012, B233859) ___Cal.App.4th ___.

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Two LAFCO Rulings Reveal Importance of Commissions

BY WILLIAM W. ABBOTT

While perhaps not surprising news to LAFCO wonks like Peter Detwiler, two recent decisions illustrate the special role that local agency formation commissions play in influencing local government and special district activities.

The first decision, *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission* (October 5, 2012, G045878) ___ Cal.App.4th ___ , wrestles with the intersection of Proposition 218 voting requirements with LAFCO's ability to order island annexations. (Government Code section 56375.3) Originally developed in 1904, Sunset Beach is a small, unincorporated enclave located adjacent to Huntington Beach. Confined to less than 134 acres, Sunset Beach is home to roughly 1200 permanent residents. As authorized by the Government Code, Orange County LAFCO ("OC LAFCO"), upon review of the location, size and status of Sunset Beach, concluded that the area met the qualification for an island annexation, and ordered it annexed to Huntington Beach.

At the time, existing property owners within the city limits of Huntington Beach paid two taxes that their adjacent neighbors in Sunset Beach did not pay: a five percent utility tax and a pre-Proposition 13 retirement property tax. LAFCOs approval of the island annexation thus triggered the following question: Did Proposition 218 give the Sunset Beach voters the right to vote on the taxes as a condition to the annexation going forward. Voters within Sunset Beach filed suit.

The trial court decided that 218 voting requirements did not extend to LAFCO-compelled island annexations completed under the authority of Government Code section 56375.3. The appellate court reached the same conclusion. In so deciding, the appellate court reviewed the history to voter enacted tax reform starting with Proposition 13 (1978). The appellate court reasoned that had the voters intended to apply the vote requirement to the then existing-statutory scheme which authorized island annexations, the voters would have drafted the measure to expressly do so. Failing the ability to find that legislative objective in Proposition 218, the appellate court declined to read the proposition in a manner to reach a result not reasonably read into the adopted text.

The second case, although primarily a CEQA decision, also illustrates LAFCo's potential range. In *Voices for Rural Living v. El Dorado Irrigation District*, (October 4, 2012, C064280) ___ Cal.App.4th ___, affected parties filed suit, challenging El Dorado Irrigation District's ("EID") approval of a Memorandum of Understanding (MOU) with a tribe, the effect of which was to increase the amount of water delivered by EID to the tribe for a casino operation. In 1989, the County LAFCO had approved an annexation request by EID to serve the tribal property. LAFCO imposed a condition which limited the water service for residential purposes and accessory uses, serving not more than 40 residential lots. Neither the tribe nor LAFCO ever challenged the validity of the limitation. A little more than ten years later, a casino was proposed for the property. This casino in turn necessitated the increase in water deliveries as well as construction of an on off ramp on Highway 50. The affected agencies prepared the required NEPA and CEQA documents.

The water limitation proved problematic, and eventually EID become convinced that the LAFCO restriction was an improper limitation on EID serving a sovereign nation. EID then entered into the MOU with the tribe providing for water deliveries substantially in excess of those authorized under the LAFCO condition. Adjacent owners filed suit, alleging CEQA grounds along with the violation of the LAFCO restriction. The appellate court concluded that EID lacked the authority to unilaterally void the LAFCO limitation even in circumstances in which it thought the limitation was unconstitutional. This authority rests with the LAFCO or courts, not the agency charged with implementing the restrictions previously imposed. The appropriate course of action for EID was to go back to LAFCO (as it expressly had retained jurisdiction) and file a request for an amendment. In circumstances in which the LAFCO declined the amendment request, EID could then seek judicial review.

LAFCOs are not exactly the new sheriff in town; they have been broadly empowered for decades. As the these agencies become more confident in their independence and legal authority, expect them to take a seat at the table where important decisions are made regarding community growth and municipal organization. ■

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The Cases:

Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission (October 5, 2012, G045878) ___ Cal.App.4th ___.

Voices for Rural Living v. El Dorado Irrigation District, (October 4, 2012, C064280) ___Cal. App.4th ___.

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Siskiyou Biomass Plant EIR Upheld

BY WILLIAM W. ABBOTT

IN A LENGTHY 70-page decision, the Third District Court of Appeal has upheld an environmental impact report for a biomass-fueled co-generation plant in Siskiyou County against a wide variety of challenges.

Roseburg Forest Products Co. operates a wood veneer processing facility in Weed, California. In 2008, the County of Siskiyou approved a permit for the purpose of installing a biomass-fueled cogeneration power plant. The project included a steam-driven cogeneration system, turbine, cooling tower and substation (communications tower and building.) Source fuel included waste wood from the veneer plant operation, along with fuel from forest management activities. The County processed an EIR. In September 2008, the Siskiyou County Planning Commission certified an EIR and approved the use permit. Mount Shasta Bioregional Ecology Center ("MSBEC") and others appealed the Commission's decision. The Board upheld the permit in November of 2008. MSBEC and another organization then filed a CEQA challenge. In March 2010, the trial court denied the writ petition

The first issue tackled by the appellate court was the matter of alternatives. Three alternatives were considered but rejected early on. These included reduced capacity (on site), rejected as it would not meet basic objectives; an alternative location onsite, rejected on the basis that impacts in many environmental areas would increase; and offsite at Roseburg's Oregon facility, which potentially would increase hauling related impacts and might not meet one of project objectives, which was to assist in meeting California's renewable portfolio standards. The only alternative studied in the EIR in any depth was the no-project alternative. As to the sufficiency of the alternatives analysis, the appellate court agreed with MSBEC that alternatives considered and rejected early on do not count towards the required reasonable range of alternatives. That said, there was no evidence that there were other feasible alternatives which could have been considered, and based upon these particular facts, the appellants had failed to demonstrate the County abused its discretion in approving the alternatives analysis.

Turning next to the air quality impacts, the court then wrested with the baseline, and whether the lead agency relied upon maximum permitted rates or actual operating conditions as the baseline. In a highly technical discussion of the intricacies of boiler operations, the court ultimately concluded that the lead agency had not committed the sin of using permitted maximums as the baseline, thereby avoiding the error in *Communities for a Better Environment v. South Coast Air Quality Mgmt. District* (2010) 48 Cal.4th 310. Appellant's argument was based in part on a letter submitted after the Planning Commission approval, but the letter was not submitted in compliance with a locally adopted rule requiring written documents be submitted five days in advance of the hearing date.

The appellate court concluded that the letter was not timely submitted in conformance with local administrative rules and therefore, was not information before the court of appeal in review of the Board's decision. On the merits of the argument, the appellate court concluded that although there was a mathematical discrepancy in the calculation of emissions of seven percent, such an error would not have "precluded informed decision-making or informed public participation."

On a related air quality issue, the appellants also complained that there was an inadequate description of the process to control NOx emissions. While only a general description was included in the EIR, that is all that the CEQA Guidelines section 15124 requires.

The appellate court then resolved three noise issues: failure to address noise impacts, failure to recirculate the EIR based upon additional noise information, and a lack of evidence to support the conclusion that impacts would be reduced to a level of insignificance. The court's favorable resolution of the noise issue turned largely on the appellant's errors in describing the content of the administrative

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General Plan Inconsistency OK if City Plans to Make Amendments

BY KATHERINE J. HART

IT'S WELL ESTABLISHED that in their housing elements, cities must include site inventory for parcels able to be developed with multifamily housing for seniors and low-income residents. However, it's not unusual that when surrounding parcels have been built out, nearby homeowners may object to the inclusion of such housing in their neighborhood.

Such was the case in *Friends of Aviara v. City of Carlsbad* (November 1, 2012, D060167) __ Cal.App.4th ___, in which the Fourth District concluded that an inconsistency between a general plan's land use element and its housing element is permissible so long as the city intends to amend the housing element. The Fourth District reversed the trial judge in making the decision.

In Carlsbad, the revisions to the City's housing element identified various parcels in the Aviara area for multifamily and low-income housing, when those same parcels were designated by the City's land use element as single-family housing. Friends of Aviara challenged the revisions to the housing element on the ground that the City's revisions created an impermissible inconsistency between the City's housing and land use elements. Citing to Government Code section 65300.5 and the *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90 case, Friends argued that a general plan (and all its elements) must be internally consistent. Consistently is a longstanding principle of general plan law in California.

Both the trial court and the Court of Appeal, Fourth Appellate District disagreed. The appellate court held that Government Code section 65583(c) expressly contemplates that cities may need to alter existing land use regulations if they are to meet their regional housing obligations, and that cities may revise their housing elements to include proposed changes to other general plan elements such as the land use element so long as they also include a timeline for the adoption of those proposed changes. In other words, the appellate court found that "section 65583(c)(7) is a clear exception to the requirement of section 65300.5 that general plans be facially consistent" and that, "in the case of housing, the Legislature has permitted some inconsistency so long as the means of resolving any inconsistency is also set out." ■

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➤ **The Case:**
Friends of Aviara v. City of Carlsbad (November 1, 2012, D060167) __ Cal.App.4th ___.

>>> Siskiyou Biomass Plant EIR Upheld

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record. The County's noise mitigation strategy was in part guided by potential future complaints. In other words, future noise complaints would trigger investigation and future mitigation tied to meeting the threshold of significance. While the appellants complained of this mitigation strategy, the appellate court could find no flaw in the County's approach. Turning next to the EIR recirculation question, the appellate court determined that noise reports summarized and relied upon the draft, but then physically attached to the FEIR did not constitute substantial new information necessitating recirculation.

The final substantive area reviewed involved water supplies and water quality. As to the challenges to the water use, the appellants relied upon comments offered by two residents regarding likely water use (consumptive vs. non-consumptive), however, the court viewed such evidence as speculation which did not overcome the otherwise unrefuted evidence in the record on anticipated water use. Appellant's next objection was aimed at the cooling tower, and whether or not it would operate as a closed loop system (no discharge/loss) or open system. The court viewed the complaint as reflecting a difference of opinion, which was not a basis for invalidating the EIR's conclusions otherwise supported by the administrative record. The veracity of the applicant's witnesses were matters for the Board of Supervisors to decide, not the appellate court.

The appellate court did agree with the appellants that the County did not respond to the an allegation that the project would require 230,400 gallons per day in make-up water, but the court went on to observe that a technical error in addressing this number by itself was insufficient to invalidate the EIR, absent something more. Finally, while there were differences in the record as to whether the project would use groundwater as compared to stream water (the latter to which the applicant had adjudicated water rights), representations on the record by the Planning Director and the applicant's representatives and legal counsel served as substantial evidence that groundwater would not be utilized. ■

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➤ **The Case:**
Mount Shasta Bioregional Ecology Center v. County of Siskiyou (October 18, 2012, C064930) ___Cal.App.4th ___.

Supreme Court Resolves Appellate Conflict on CC&Rs

BY GLEN C. HANSEN

Resolving a split of opinion in the appellate courts, the California Supreme Court has held that a defendant developer who recorded a declaration of covenants, conditions, and restrictions ("CC&Rs") could enforce an arbitration provision in those CC&Rs in a construction defect action filed against the developer by a condominium association governed by those CC&Rs, even though the association did not exist as a separate entity when the CC&Rs were drafted and recorded.

In *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, the California Supreme Court held that a defendant developer who recorded a declaration of covenants, conditions, and restrictions ("CC&Rs") could enforce an arbitration provision in those CC&Rs in a construction defect action filed against the developer by a condominium association governed by those CC&Rs, even though the association did not exist as a separate entity when the CC&Rs was drafted and recorded. The Court resolved a split of opinion in the appellate courts.

In *Pinnacle*, a developer of a condominium project recorded CC&R's that formed a homeowners association. The CC&Rs contained a mandatory arbitration procedure under the Federal Arbitration Act ("FAA") and the California Arbitration Act for the resolution of construction defect disputes that included the waiver of the right to a jury. When it sold each of the condominium units to the buyers, the developer used a standard purchase and sale agreement that contained a dispute resolution provision that referenced the arbitration provision in the CC&R's. Under the CC&R's, each condominium owner must be a member of the association. In this case, the association filed a construction defect action against the developer on its own behalf and as a representative of its members for damage to common areas, property owned by the association, and property owned by individual members.

While the trial court found that the CC&R's provision constituted an agreement to arbitrate entered into by the developer and the association, the trial court nevertheless denied the developer's motion to compel arbitration because it found the CC&R's provision was unconscionable. The Court of Appeal affirmed, but on the basis that the arbitration provision in the CC&R's did not constitute an "agreement" sufficient to waive the constitutional right to jury trial for construction defect claims brought by the association because (a) the association did not exist until the CC&R's were recorded; (b) only the developer signed the CC&Rs; and (c) there was no evidence that the association agreed to the arbitration provision. The Supreme Court reversed and remanded for further proceedings.

In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, the Court recognized that it must apply state contract law while giving due regard to the federal policy favoring arbitration. Those state contract laws include the following:

> Generally, an arbitration agreement must be memorialized in writing. A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a

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party's acceptance may be implied in fact or be effectuated by delegated consent. An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. [Citations omitted.]

The Court disagreed with the Court of Appeal and held that the arbitration clause was binding on the Association because the Legislature provided for the reasonable delegation of authority to consent:

> *That a developer and condominium owners may bind an association to an arbitration covenant via a recorded declaration is not unreasonable; indeed, such a result appears particularly important because (1) the Davis-Stirling Act confers standing upon an association to prosecute claims for construction damage in its own name without joining the individual condominium owners (Civ. Code, § 1368.3) and (2) as between an association and its members, it is the members who pay the assessments that cover the expenses of resolving construction disputes. Given these circumstances, an association should not be allowed to frustrate the expectations of the owners (and the developer) by shunning their choice of a speedy and relatively inexpensive means of dispute resolution. Likewise, condominium owners should not be permitted to thwart the expectations of a developer by using an owners association as a shell to avoid an arbitration covenant in a duly recorded declaration.*

The Court held that there is nothing in the Davis-Stirling Act itself that prohibits a recorded declaration from containing arbitration covenants. The Court further held that the FAA precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses, such as actual notice, meaningful reflection, signature by all parties, and/or a unilateral modification clause favoring the non-drafting party.

Also, the Court found that the provisions for arbitration of construction disputes in the CC&Rs was not unenforceable as either procedurally or substantively unconscionable.

Thus, the Court concluded that, even when strict privity of contract is lacking, the Davis-Stirling Act ensures that CC&Rs that manifest the intent and expectations of the developer and those who take title to property in a community interest development will be honored and enforced unless proven unreasonable. In this case, the expectation of all concerned is that construction disputes involving the developer must be resolved by the expeditious and judicially favored method of binding arbitration. ■

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➤ The Case:
Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223

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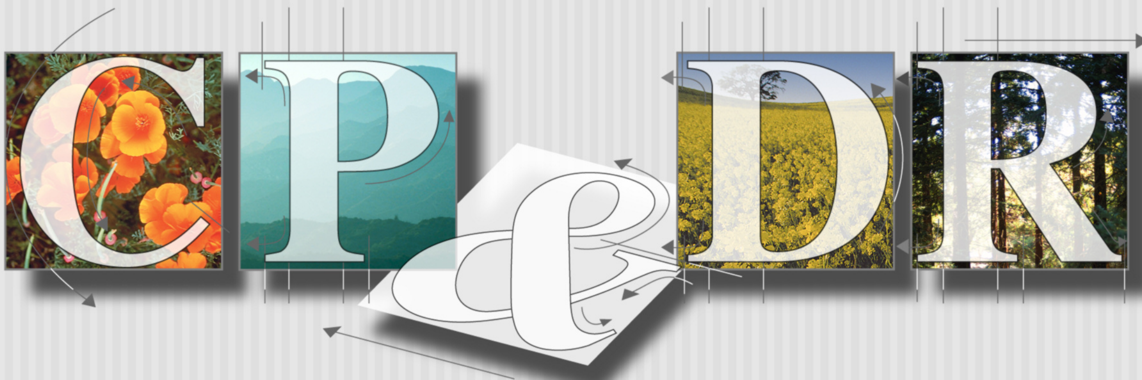

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Land-Use Voters Say: Jobs Yes, Houses No

BY CP&DR STAFF

If skepticism about growth is an indication that the economy is on the rebound, then November's land use elections throughout California might be called good news.

About a dozen land use measures [ ] were on the ballot and most cases the anti-growth forces won. Most of those that did win were focused on job creation. Several measures focused on downtown development in small cities, with mixed results.

Meanwhile, transportation sales tax measures in two major counties – **Los Angeles** and **Alameda** – were narrowly defeated, each getting about 65% of the vote. Measure J in L.A. County would have extended the 2008 Measure R sales tax for 30 years – from 2028 to 2058 – essentially increasing the county's borrowing capacity to build the rail transit system even faster. Measure R has been a major source of transit-oriented planning money in recent years. In addition, a wide variety of open space financing measures were on the ballot – and most passed.

Although the land use ballot measures were – as usual – random and scattered, they suggest that voters were in a more anti-growth mood than you'd expect, given the lengthy slump in real estate development around the state.

In only a couple of places did the pro-growth forces win, and some of those victories were sold as job creators. In **Escondido** in North San Diego County, Measure N passed, rezoning hundreds of acres of land to commercial use. In **Berkeley**, an update to the West Berkeley Plan – also intended to create jobs – is hanging on by 50.2%. In **Napa County**, voters rejected a downzoning of property owned by Pacific Union College in rural Angwin. Voters in rural, conservative **Yuba County** rejected a SOAR-style ballot measure that would have subjected changes in agricultural zoning to a vote.

On the other side of the ledger, voters in **Fullerton** turned down a major project, the West Coyote Hills plan. A major project was also turned down in **Del Mar**.

Here is a complete rundown of results:

Alameda County

City of Berkeley

Measure T [ ] would create more flexibility in the West Berkeley plan, allowing 75-foot buildings and requiring community benefits in return. As of Thursday morning, Measure T was winning by only a few dozen votes.

Los Angeles County

City of Sierra Madre

Sierra Madre is a small, mostly slow-growth community located in the foothills adjacent to Pasadena. The community has traditionally been opposed even to a stoplight at the main intersection in the downtown. However, Measure ALF – which would permit development of a two-story, 75-room assisted living facility on Sierra Madre Boulevard across from City Hall – won with 77% of the vote [ ].

Monterey County

City of Pacific Grove

Voters in this small, traditionally slow-growth community adjacent to Monterey rejected a proposal to double the allowable height [ ] of buildings downtown to 75 feet. Measure F failed by 59%-41%.

Napa County

Countywide voters rejected a proposal to downzone 25 acres of agricultural land in Angwin, in the hills above St. Helena, which was put on the ballot in an attempt to block Pacific Union College from pursuing additional development [ ]. Measure U lost by 60%-40%.

City of Calistoga

Only 13 miles away from Angwin, voters in Calistoga approved the expansion of the Silver Rose resort [ ] to include a hotel with 85 rooms, 21 houses, a new winery, and other amenities. Measure B passed 59%-41%.

Orange County

City of Fullerton

Voters in the scandal- and recall-plagued City of Fullerton rejected the West Coyote Hills Specific Plan [ ], which called for development of an old oil field in North Fullerton to include 760 homes on 500 acres of land. Chevron, the landowner, spend $1 million on the campaign. Measure W lost, 60.5% - 39.5%.

San Diego County

City of Del Mar

Voters in the small beach city of Del Mar rejected the Village Specific Plan, which would have facilitated development in the downtown area. Opponents claimed [ ] the plan would have made traffic and parking in the downtown area worse by adding development without adding parking and narrowing the main street to two lanes with roundabouts. Measure J was defeated 58%-42%.

City of Escondido

In the North County inland city of Escondido, voters approved the city's new general plan. Escondido has required voter approval for even small general plan amendments since 1998. Measure N passed 53%-47%.

San Mateo County

Town of Atherton

In the super-affluent Town of Atherton, voters rejected a plan to build a new library in a city park. Measure F lost, 69%-31%.

Ventura County

City of Simi Valley

Voters in Simi Valley easily passed Measure N, an extension of the city's longtime growth management program [ ], which limits housing construction to approximately 260 houses per year. Measure N won with 74.8% of the vote.

City of Moorpark

Meanwhile, in the neighboring City of Moorpark, voters declined to give the city authorization [ ] to pursue development of 200 affordable housing rental units over the next 10 years. The vote was a so-called Article 34 election, required under a 50-year-old amendment to the California constitution. Measure O lost 63%-37%.

Yuba County

The conservative farming county of Yuba County barely defeated a SOAR-style ballot initiative [ ] which – like its counterparts in Ventura and Napa counties – would have subjected future agricultural zone changes to a vote. The ballot measure was a followup to the 2008 voter defeat of the Yuba Highlands project [ ]. Measure T lost, 52%-48%. ■

>>> Controller's Redevelopment Audits Yield Mixed Results

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Hercules

The Hercules situation is messy because of an underlying financial scandal and other factors.

In January, the city and the RDA were sued by their bond insurer, Ambac, when it became clear that the RDA would miss a bond payment on February 1 – the same day that the RDA was scheduled to go out of business. Subsequently, the city settled the lawsuit [ ] with, among other things, a promise to sell two RDA properties, Parcel C and Victoria Crescent, that had been transferred to the city by the RDA in 2011. It was clear that, without the legal settlement, Hercules would have had to declare bankruptcy.

Further scandal erupted in September, when an audit by Chiang's office [ ] revealed that the city had misspent or otherwise not properly accounted for $50 million in RDA expenditures between 2007 and 2010. The audit specifically called out the city's former city manager, Nelson Oliva, whose private consulting firm received $3 million to run various housing programs during this period, including $2 million from the RDA's housing setside fund, apparently without competitive bid. Many other irregularities were also found, including failure to pay ERAF funds and poor documentation (no appraisals, for example) for four properties the RDA purchased during this time, including Victoria Crescent. The city subsequently sued Oliva and his three daughters [ ], seeking to recover the $3 million.

In November, Chiang's office found [ ] that $35 million of the $124 million in assets transferred from the city to the RDA were improper. These included about $4 million in cash and, apparently, about $30 million in the form of three pieces of property – Sycamore Crossing and the two parcels the city is compelled to sell to settle the Ambac suit, Victoria Crescent, and Parcel C. Chiang's report does not specify these three properties but the City Council ordered the transfer of these three properties at its meeting on November 13 [ ], five days after Chiang's audit came out.

Chiang's office also knocked Hercules for not turning out $15 million in affordable housing assets, but the city claimed this was related to a dispute over who would be the successor agency. Hercules declined to serve as the successor agency for housing and waited all summer while the Contra Costa County Housing Authority – the default entity under AB 1x 26 – determined whether to accept the role of successor agency for housing purposes. The Housing Authority eventually declined and Hercules claimed it did not know who to transfer the assets to.

> In general, Chiang's audits have found that redevelopment agencies transferred government facilities to cities in 2011 and also have transferred redevelopment project assets to the city or a city-created economic development group.

Milpitas

In August, Chiang's office found [ ] that $147 million of the $175 million in assets transferred in 2011 were not permitted and recommended that these assets be transferred to the successor agency. Of these, about $97 million were government facilities and public works assets transferred to the city, including the Milpitas Civic Center, valued by the city at $30 million. About $50 million, including $37 million in investment funds, was transferred to the Milpitas Economic Development Corp., a newly created entity.

Milpitas responded by saying that the assets transferred to the city were governmental assets built, at least in part, with redevelopment funds as was permitted under the redevelopment law. Regarding the assets transferred to the economic development entity, Milpitas claimed that it is a separate entity and the city cannot compel the corporation to surrender assets to the successor agency.

In its counter-response, Chiang's office said that it was up to the oversight committee to determine which government facilities to transfer and noted that the economic development corporation was set up by the city and the City Council serves as its board.

Morgan Hill

Also in August, Chiang's office found virtually identical fault with transfers in Morgan Hill [ ] as its found in Milpitas. Chiang found that $108 million of the $228 million in assets transferred in 2011 were not permitted and recommended that these assets be transferred to the successor agency. Of these, about $88 million were public facilities transferred to the city, including the city library and a variety of sports and recreation complexes. The other $20 million in assets were downtown redevelopment assets, including a parking garage, parking lots, and a theater, which were transferred to the Morgan Hill Economic Development Corp. – which, as in Milpitas, was a new entity created in response to the possible end of redevelopment.

Unlike Milpitas, the city agreed to turn the city assets over to the successor agency. The Morgan Hill Economic Development Corp., however, was another story.

The EDC was created by the city on March 2, 2011, specifically to carry on the work of the RDA. But the city tried to create an arms-length relationship with the EDC. The boundaries were the entire city, not just the old redevelopment project area. The EDC's initial board of directors was the City Council; but on March 7, the EDC met and changed the by-laws so that a majority of its board members were not City Councilmembers. The RDA had initially transferred the downtown assest to the city, but later in March, the city transferred these assets back to the RDA, which then immediately transferred it to the EDC.

In its response, the city argued vigorously that the EDC was beyond the city's control, but Chiang's office didn't buy it, saying that at the time of the asset transfer the EDC board still consisted of the City Council. In September, the Morgan Hill City Council decided to sue the state [ ] on the issue of the economic development entity. ■

>>> Who Will Pay for Planning in California from Now On?

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after one more round of funding. Developers themselves aren't interested in funding big planning efforts these days. And the federal Sustainable Communities planning grant program was zeroed out in the current fiscal year after being funded at $150 million previously. It may come back at a lower level – maybe $50 million nationwide – but it will probably provide funding for, at most, a few projects in California over the next couple of years. Not for decades have local planning departments been so thinly staffed; and never have there been so many unemployed planners in California.

Yet California's development context is changing dramatically and odds are that local governments around the state are going to have to revise and update a lot of plans in the next few years. For one thing, the whole climate-change issue has altered the regulatory context. Greenhouse-gas reduction strategies are now more or less mandatory, and as a result "climate action plans" are becoming common. Also, the real estate bust has resulted in a fundamental change in what developers want to build – or, at least, what they can get financed. The rush to build both single-family suburban tracts and mixed-use infill projects has more or less stopped, and developers are now pushing rental apartment projects – often much more dense than the mixed-use projects envisioned by old plans – because that's what banks will lend on. And finally, all those plans done during the real estate boom – eight, 10, 12 years ago – are getting old. That means, at least in theory, that they are legally vulnerable.

To be sure, some local governments are squeezing their own funds to pay for plans they have to do. Most cities are taking housing elements seriously, though the going rate for them is headed downward. More and more cities are also doing climate action plans – largely because doing such a plan up-front and devising citywide strategies for greenhouse gas emissions reduction is actually less expensive than going project-by-project. (In the case of both housing elements and CAPs, fear of getting sued is a big factor.) And a surprising number of cities are still doing general plan updates with money they've squirreled away, though these efforts tend to be more focused and less wide-ranging than they used to be.

Overall, though, there's not much planning going on. So how will it get done over the next few years? There are three answers: transportation money, developers, and (horror of horrors) efficiency. And there's a wild card: The state's cap-and-trade money.

1. Transportation Money

The conventional wisdom is that there isn't enough transportation money around. State and federal gas tax rates haven't gone up in 20 years, while people are driving less in cars that get better mileage. The federal Highway Trust Fund is bankrupt – propped up by loans from the federal general fund – and the state's accounts aren't much better off.

But many transportation agencies are doing pretty well, thanks largely to countywide transportation sales taxes, and increasingly these agencies are shifting funds to planning on the theory that better land use planning affects travel demand – and also makes it easier to implement SB 375. L.A. Metro, for example, is about to dole out $10 million to localities in Los Angeles County for a program commonly known as "TOD III" – the third round of funding for transit-oriented development planning efforts.

> Not for decades have local planning departments been so thinly staffed; and never have there been so many unemployed planners in California.

It's important to note, however, that this money will go only in one direction – away from greenfield development and toward infill, mixed-use stuff.

2. Developers

Okay, developers have no money at the moment. But they do have chutzpah, entrepreneurial skill, and access to people with capital. And especially on the urban/infill side, they recognize that the end of redevelopment left a big hole. They can't easily drop their infill projects into urban locations unless there's a plan in place that makes it easy for them to do so, as well as public (or public-private) efforts to assemble land and build infrastructure.

So look for savvy developers to figure out how to construct a public-private or non-profit alternative to redevelopment, which can engage in large-scale plans and find new ways to finance infrastructure coordinated with private development. Civic San Diego – the transmogrified Centre City Development Corp. – is the closest thing so far, though it's still basically a city entity.

3. Efficiency

Oftentimes, nobody involved in the planning process has much incentive to increase productivity and efficiency in planning processes. Government agencies begin with either a set pot of money (for their own plans) or money from developers (especially for environmental review); and often they don't track their own staff time against planning projects very well. Consultants are in the business of spending the money the government has. And, frankly, a lot of the most expensive parts of the planning process, especially public meetings, are labor-intensive and therefore expensive.

Nevertheless, look for developers, government agencies, and consultants alike to come up with more efficiencies to stretch the dollars farther. There have been a variety of attempts over the years to figure this out, ranging from computerized, do-it-yourself planning templates to – among large firms – outsourcing work to offices in Asia, where labor is cheaper. But nobody has ever really cracked this question. There'll be a lot of pressure in the next couple of years to do so.

4. Wild Card: Cap-and-Trade Funds

The state just held its first, apparently successful, cap-and-trade auction, generating money from greenhouse-gas emitters. There'll be a huge scramble in Sacramento over what to do with this money, but it's likely that at least some of it will flow toward planning – especially if the planning is designed to reduce greenhouse gas emissions. It's up to the Office of Planning & Research and the Strategic Growth Council to lean on the Air Resources Board to make this happen, but the most likely outcome is that some money will be used to replace the dwindling Prop. 84 planning resources. ■

SB 226: Complicated Or Simple?

One of the great things about the world of blogging is that it's dynamic. We were reminded of that recently when we posted a blog from the state planning conference about SB 226. Not sooner had we put the blog out into the world than the Governor's Office of Planning & Research Responded.

Here's our original blog:

Ever since the passage of SB 226 – the law designed to streamline environment review for infill projects – the state has been working on changes to the California Environmental Quality Act Guidelines to implement the law. There's a draft of the guidance out (you can find it here [ ]), and CEQA-sters Ron Bass and Terry Rivasplata of ICF International did a good job of laying out what the draft says at a session at the American Planning Association, California Chapter, conference.

The bottom line, according to Bass: The guidance is "streamlining by complexity. This is supposed to be streamlining but it's extremely complex."

There's no question that Bass is correct. But that's not the fault of the draft guidelines. It's inherent CEQA itself. CEQA's an incredibly complex law. Carving out exemptions can be simple, but streamlining is inevitably complex.

For creating infill exemptions, the definition of infill is, of course, crucial. In the guidance, infill is defined as:

- Being 75% surrounded by existing urban development
- Meeting the new statewide performance standards for infill contained in the new Appendix M
- Being consistent with an adopted Sustainable Communities Strategy or Alternative Planning Strategy.

If you qualify, you can do an SCS Environmental Assessment (spelled out in SB 375) or even an Infill EIR, which covers only impacts not previously analyzed, doesn't have to examine alternative locations or densities and doesn't need to look at growth-inducing impacts. "We're creating new stuff here that we have not seen in common practice," says Rivasplata, who acknowledged that he's not sure what an SCS EA or an Infill EIR will look like.

The performance standards will apply to various land uses and will include things like, a lower-than-average vehicle miles traveled (VMT) with the Transportation Analysis Zone (TAZ) or within 1/2 mile of a state-specified transit corridor (the same 15-minute headways specified in other laws like SB 375). Bass joked that the streamlined rules will "only apply in Europe."

The SB 226 guidance even contains a new checklist (Appendix N), which is not only about impacts but about things like, whether you meet the infill requirement.

You can track the rulemaking process by signing up for a listserve here [ ].

And here's OPR's response:

A little over one year since Gov. Brown signed SB 226 [ ] (Simitian, 2011), CEQA Guidelines [ ] implementing its new infill streamlining provisions are now close to adoption. This blog recently observed that SB 226 is too complex. The Guidelines, though, are not really complicated – they are just new. Get to know them, and you will find a valuable streamlining tool.

SB 226 streamlines the CEQA process for infill development. For decades, state policy has favored infill because it conserves natural resources and is an efficient way to grow. More recently, we have also recognized infill as a key strategy to reduce greenhouse gas emissions. Since many urban environments are already impacted, however, new infill may contribute to existing cumulative impacts. As a result, new environmental impact reports may be required, even for relatively small projects. [For more on why SB 226 treats infill projects differently, see the Office of Planning and Research's explanation [ ] of the proposed Guidelines.]

SB 226 creates an easier path for infill development by narrowing the scope of impacts that need to be analyzed at the project level. Impacts of a project that were already addressed at a programmatic level are not subject to CEQA, even if those impacts remain significant. Impacts that are addressed by local development policies or standards, such as construction noise ordinances and traffic impact fees, are not subject to CEQA either, even if such policies do not fully mitigate the impact. As a practical matter, this means infill projects can avoid lengthy EIRs and instead be approved on the basis of a checklist, without going through new public review, preparing responses to comments, or a statement of overriding considerations. [This is a very big change in the law, and one that should not be overlooked.]

Even if an EIR is needed to address a new or more severe impact, that EIR is focused on just the new impact, and does not look at growth inducing impacts or a full range of alternatives. The proposed new Guidelines Section 15183.3 [ ] and proposed Appendix N [ ] walk users through this process step-by-step.

To be eligible, a project needs to be within an incorporated city on an infill site (i.e., previously developed or mostly surrounded by other development), and be consistent with an adopted sustainable communities strategy or alternative planning strategy. It also needs to implement the performance standards in proposed new Appendix M [ ] of the Guidelines. While the statute requires the standards to promote a wide range of state goals, the Guidelines focused on the simplest way to achieve those goals: reducing vehicle travel. To maximize flexibility in project location and design, the Guidelines created several options to satisfy those standards. Generally, a project will be eligible if it locates in an area that already has lower than average regional vehicle miles traveled (something that MPOs are currently mapping using data developed during the SB 375 process), or by locating near public transit or project-users. Since the performance standards are written into the Guidelines, and not embedded in the statute, they can be updated and refined as necessary.

Still think that SB 226 is too complex to be helpful? Compare SB 226 to other CEQA streamlining for infill. The Guidelines, for example, avoid the prescriptive criteria found in the statutory exemption for infill. (Pub. Resources Code § 21159.24.) They also avoid the inflexibility of the master EIR process. (Pub. Resources Code § 21157 et seq.) Under the proposed Guidelines, programmatic review need not specifically identify future infill projects, and it does not need to be less than five years old. The programmatic review does not even need to be contained in one document, but can instead consist of a program EIR plus supplements and addenda. Finally, unlike tiering in section 21094, the proposed Guidelines do not require the programmatic document to reduce all impacts to a less than significant level.

The Office of Planning and Research and the Natural Resources Agency did extensive outreach [ ] in developing the Guidelines, and actively sought input from working practitioners at the local and regional levels, as well as builders, environmental organizations and other stakeholders. They took seriously concerns about complexity and ease of implementation. According to comments [ ] submitted by the Association of Environmental Professionals, the proposed Guidelines "are clear, concise and well-organized." Planners, agency staff and developers that spend a little time with them may find that they agree.

– WILLIAM FULTON | NOVEMBER 1, 2012

Wendell's World

Wendell Cox, my favorite anti-anti-sprawl researcher, is at it again. This time, he's on *New Geography*, taking on the oft-quoted forecast of Southern California's future housing market by Professor Arthur C. Nelson [ ] of the University of Utah, which found that future demand will be mostly for multifamily housing and small lot (under 5,000 square feet) detached homes.

And – surprise! – Cox concludes that Nelson is wrong. Future demand in Southern California, he says, will be overwhelmingly on the side of (presumably) large-lot single-family homes. This, of course, is completely contrary to what every other housing researcher has found in recent years – not just for Southern California but for practically every large metropolis in the United States.

Nelson based his projections largely on a series of public opinion surveys conducted by the Public Policy Institute of California and the National Association of Realtors. How did Cox reach his contrarian conclusion? Not by refuting Nelson's numbers. He makes no attempt to do that. By using the "revealed preference" theory [ ]. Revealed preference theory posits that you can figure out what people want by what they buy. And between 2000 and 2008, many more single-family homes were built – and therefore bought – in Southern California than multi-family homes.

As you can tell, "revealed preference" theory assumes that supply is a pure reflection of demand. If single-family homes were not what people wanted, then developers wouldn't build them. Right?

Well, in a perfect market, maybe. But people have to live somewhere, and when it comes to housing, they select from among the choices they are offered, no matter what those choices are. This is, in fact, the main criticism of revealed preference – that there is no way to know what consumers would have done if they had been provided with other choices besides the one they had. And, unfortunately, there is probably no product in the United States where current supply more poorly reflects emerging demand than housing, for several reasons.

First, it takes a long time to plan and build housing – sometimes several years, so the connection between supply and demand is already thin.

Second, developers build what their lenders tell them to build, and lenders are like lemmings – they want to build the same thing that sold yesterday. In other words, housing supply often reflects yesterday's demand, not tomorrow's.

And third, as Cox himself likes to harp on, developers build what local governments will approve, which means market responsiveness gets all tangled up in regulation and politics. Local governments, seeking to allay concerns of current residents, tend to downzone developers far below housing densities that the market would bear.

Indeed, Cox has devoted considerable effort trying to prove that local regulations foul up housing markets – especially in California. In one recent analysis [ ], he concluded that all differentiation in housing prices nationwide can be attributed to regulation – and that California has the highest housing prices because it has the most onerous regulation.

So which is it? Is the California housing market skewed because of over-regulation? Or is it a perfect reflection of market demand? Depends on which Cox article you read.

More than most researchers, Cox tends to base research on assumptions that reflect his strong world view that sprawl and single-family living are the natural order of things, and that any government intervention in the market will screw up the natural order. As I have pointed out previously [ ], in his piece on housing price and regulation, he concluded that all difference in housing price is due to regulation – but that wasn't surprising, because he started with the assumption that any difference in housing price must be due to regulation.

Not long ago, Wendell and I debated each other on Larry Mantle's show on KPCC [ ]. The whole reason I was on the show was to talk about my recent *L.A. Times* piece [ ], in which I argued that sprawl caused California cities to run operating deficits and therefore was bad for those cities' fiscal solvency. Wendell wasn't interested in this and moved all too quickly to his comfort zone about regulation. I agreed with him that the land use planning should be more responsive to the market – he liked that – but not two minutes later he was railing about SCAG's Sustainable Communities Strategy, and how it was going to force neighborhoods that have been 5 units an acre for decades to go to 30 units an acre. He didn't sound like a market-based economist. He sounded like a cranky NIMBY.

But Cox clearly believes everything he says fits together. Indeed, in a new report [ ] that he contributed to – primarily authored by Joel Kotkin and praised by no less than David Brooks [ ] – the authors state: "…[T]he dominant trend in urban planning favors restrictions against lower density housing favored by families, essentially raising its price."

Practicing planners and developers of California: Raise your hand if you think the biggest problem with our system of land-use regulation is that it is squelching the market's desire for residential *downzoning*!

Meanwhile, as *New Geography* continues to give Wendell Cox lots of what we used to call "ink," serious housing experts are urging the nation to confront these changed conditions. On the day after Cox's piece appeared, the esteemed economist Barry Bluestone, director of the Dukakis Center at Northeastern University in Boston, issued the center's annual "Housing Report Card" [ ]. His conclusion? Millennials are not likely to trend toward suburban living anytime soon. Just keeping up with current trends will require the Boston region to double its multifamily housing construction in the next decade. Actually accommodating economic growth will require a tripling of multifamily construction.

The recent Kotkin report to which Cox contributed, titled *The Rise of Post-Familialism* [ ], argues that the current trend away from families – toward more singles and couples living in higher densities in urban places – is bad for the economy and ultimately bad for society. This is a perfectly legitimate argument and Kotkin argues it well. indeed, it's essentially an extension of Joel's recent shift toward a more values-based position [ ].

But it's an argument about what people *should* do – a moral argument, in a way – not an analysis of what people *are* doing. There's a difference between seeing something coming and not liking it – which is what Kotkin does in the report to which Cox contributed – and pretending something isn't coming because you don't want it to, which is what Cox does. Whatever you want to call that – advocacy, evangelism, whatever – it's not market economics.

Oh, and speaking of "revealed preference," Bluestone's numbers say that single-family homes in the Boston area have dropped in price by 20%, while condo prices have held steady. The average single-family home and the average condo are now the same price. This is not an isolated case: Across the U.S., Zillow.com data reveal that suburban fringe housing prices have fallen by a third or more yet prices for homes closer in have held their own if not increased.

The world is changing, but Wendell Cox keeps expecting it to return to "normal." In Wendell's World, everybody wants to live in sprawl. But that's not the world that most of us – or our kids – live in anymore.

– WILLIAM FULTON | NOVEMBER 19, 2012

Do Mayors Make Better Transportation Secretaries?

A RECENT BLOG [] in *Atlantic Cities* makes the case that a mayor is a better choice for Secretary of Transportation than a career transportation expert or a transplant from Capitol Hill. But it's not a hypothetical discussion about a hypothetical mayor. This discussion is hot because it's rumored that L.A. Mayor Antonio Villaraigosa is in the running for the job if the incumbent, Ray LaHood, steps down as he is expected to.

The job is important to planning and development because the Department of Transportation has by far the most money of any federal agency involved in the field. It's one of three agencies (Environmental Protection Agency and Housing and Urban Development being the other two) involved in the Obama's Partnership for Sustainable Communities. And, of course, transportation investments drive development patterns.

Villaraigosa's name is in play because he is a high-profile Latino with a strong record of accomplishment in the transportation field. On his watch, L.A. has moved to the forefront on rail transit construction, and Villaraigosa has eloquently advocated for "elegant density" [] as a solution to the city's problems.

Most recent Transportation Secretaries have been either transportation professionals (like Mary Peters in the Bush Administration) or members of Congress who worked on transportation issues (like Norm Mineta, who had also been a mayor, and Ray LaHood). In the case of both Mineta, a Democrat, and LaHood, a Republican, the incumbent president used the DOT slot to give a Cabinet job to a respected member of Congress from the other party.

But, as Atlantic Cities points out, mayors have a different take on DOT than other folks, because they view transportation as part of the overall system of their city's functions and they are more likely to view transportation investments in economic development terms.

In many ways, Villaraigosa resembles former Denver Mayor Federico Pena, who was President Clinton's first DOT secretary in 1993. Pena was a well-respected Latino mayor who had gotten one big transportation project done (the new Denver Airport) and had laid the groundwork for urban redevelopment both downtown and at the old Stapleton Airport site. (You can read a piece I wrote about Pena at the time here [].) Pena did not have nearly the high national profile that Villaraigosa has, however.

Pena sometimes seemed over his head in the job at first, but in the end did a good job. But it was easier to be Secretary of Transportation in those days, principally because of money and politics. The pathbreaking ISTEA law had passed with bipartisan support just two years earlier and the federal gas tax had gone up. Now, the federal Highway Trust Fund is bankrupt and it took Congress four years to pass an 18-month extension to the transportation bill. It is also hard to know how Villaraigosa – a big city mayor – would handle the state DOTs, who have enormous influence over how transportation money is spent. It is worth noting, however, that he spent six years in California Assembly, rising to the position of Speaker.

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Los Angeles Mayor Antonio Villaraigosa

In the end, the question of whether Villaraigosa goes to DOT is a political calculation on both sides – whether President Obama sees an advantage to having this high-profile Latino in his Cabinet, and whether Villaraigoisa, who is termed out next year, views the DOT job as a useful stepping stone toward his presumed next goal, a run for governor after Jerry Brown steps down.

– WILLIAM FULTON | NOVEMBER 21, 2012

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