CP&DR

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Will New Transbay Transit Center Transform SoMa?

BY LARRY SOKOLOFF

San Francisco's Transbay Transit Center is slowing taking shape in a hole south of Market Street.

Three years of subterranean excavation are supposed to lead to steel beams for a five-story building that will begin to rise in 2014. When completed in 2017, the four-block-long transit center is expected to become a civic and regional landmark, with a large rooftop park, surrounded by numerous skyscrapers and a pedestrian-dense office, retail and residential community. Project boosters are referring to it as the Grand Central Station of the West.

San Francisco officials are hoping the transit center helps redevelop the surrounding area into the densest neighborhood west of the Mississippi. It's a far cry from what was once a light industrial neighborhood in the shadow of the city's downtown, located only a few blocks away. But the area has benefited from city policies that encourage development to migrate south from the city's financial district, as well as development sparked by the removal of the nearby Embarcadero Freeway after the 1989 Loma Prieta Earthquake.

The new transit center will rise on the same spot as the city's Transbay Terminal, which served commuters from 1939 until 2010. The old Transbay Terminal was a rundown, forlorn structure on Mission Street, where streetcars once ended their routes across the Bay Bridge. Starting in the 1950s, the terminal was strictly used by buses, which arrived from throughout the entire Bay Area on special freeway offramps.

But under the guidance of a Joint Powers Authority, composed of San Francisco officials and the Bay Area transit districts that

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insight
WILLIAM FULTON

The Third Wave of CEQA Litigation

At a glance, the California Supreme Court ruling in the Expo Line CEQA case laid down a pretty clear rule: Lead agencies can use a "future baseline" for environmental analysis, but they have to be very careful in documenting the reasons why. L.A. Metro erred in using a "future baseline," but fortunately for the agency the court concluded that it didn't make any difference to the analysis.

A deeper look at the Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, [http://www.courts.ca.gov/opinions/documents/S202828.PDF] however, reveals a deeply split court that apparently almost went the other way – and that could have significant implications in the future for the way the California Environmental Quality Act unfolds in future court cases. The court split 3-3-1 in the case. Justice Goodwin Liu provided the deciding vote on the future baseline question – but he didn't agree with the plurality decision on the question of whether using the future baseline made any difference in the outcome.

And a close read of the two main opinions – the plurality opinion written by Justice Patricia Werdegar and the main dissent written by Justice Marvin Baxter, both of which got three votes – suggests that Baxter's was originally written as the majority opinion and Werdegar's as the dissent. Baxter's dissent begins with a broad and sweeping description of CEQA – typical of a majority opinion –

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inside

RIVERBANK'S REDEVELOPMENT BONDS HAVE DEFAULTED. But the City of Riverbank avoided liability 18 months ago by refusing to take on the role of successor agency when redevelopment was killed by the state. Riverbank was one of handful of cities around the state that declined to take on the successor agency role. At the time, City Manager Pam Carter said the amount of work involved was too great to be worth it for the small amount of administrative funding involved. [http://www.cp-dr.com/node/3107] But it was well-known that the Riverbank redevelopment project was not in good financial shape.

The RDA had issued a $15 million bond in 2007 to buy, among other things, an old downtown theater, but tax-increment funds had not materialized as expected because of the real estate downturn. Shortly before redevelopment ended, the city had to use general fund reserve money to make a bond payment. [http://www.loansafe.org/harsh-reality-riverbank-rda-broke]

By declining to serve as the successor agency, Riverbank pushed that responsibility off on the state. It remains to be seen whether the state will accept financial responsibility or whether the state and bondholders will go after the city for the funds. Instead of making a $1 million payment, the successor agency claimed to have only $200,000 available. [http://www.mercedsunstar.com/2013/08/12/3161635/agency-defaults-on-riverbank-bonds.html]

PROPERTY-RIGHTS ADVOCATES HAVE USED CEQA TO CHALLENGE THE ONE BAY AREA PLAN. The plan was approved by the Metropolitan Transportation Commission and the Association of Bay Area Governments on July 22 in order to comply with both federal transportation law (as the regional transportation plan) and California's SB 375 (as the sustainable communities strategy). Two weeks later, the Pacific Legal Foundation sued on behalf of a group called Bay Area Citizens under the California Environmental Quality Act. During the comment period for the Plan Bay Area Environmental Impact Report, Bay Area Citizens proposed an alternative scenario which PLF claims will also meet RTP and SCS objectives.

Among other things, the Bay Area Citizens alternative calls for increased bus service, transit fare reduction, and advocacy for locally preferred housing types and changes to state housing law. The Bay Area Citizens alternative and the resulting lawsuit take particular aim at increased rail and ferry service, which the lawsuit calls "low-performing" and "wrongheaded".

At the crux of the PLF lawsuit is the argument that the SCS should be able to count savings from other greenhouse gas emissions reduction strategies associated with vehicle travel, especially the low-carbon fuel standards and the Pavley fuel efficiency standards. GHG emissions reduction experts have consistently claimed – both statewide and nationally – that these measures are insufficient to meet emissions reduction targets. They say that reductions in vehicle miles traveled is a necessary third strategy in a "three-legged stool". [http://www.cp-dr.com/node/2140]

Plan Bay Area argued that the PLF approach would constitute "double-counting" of emissions reduction. The PLF lawsuit [http://www.pacificlegal.org/document.doc?id=944] argues that this is not the case and says that by ignoring Pavley and the low-carbon fuel standard, Plan Bay Area "creates a false need for its draconian high-density development prescriptions. If the Plan were consistently to take the LCFS, Pavley I, and Pavley II into account, it would be clear to the public that the S.B. 375 targets can be reached without the Plan's drastic land-use changes." The lawsuit also claims that increased rail transit will produce a net increase of greenhouse gas emissions "because rail construction produces significant greenhouse gas emissions that are not recouped over the life of the rail project."

The lawsuit plays these arguments out in the context of CEQA with a variety of causes of actions,

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including the following:

1. The plan should have incorporated greenhouse gas emissions reductions resulting from other regulations, such as the Pavley fuel efficiency law and the state's low-carbon fuel law. PLF claims there is nothing in SB 375 preventing MTC from including such GHG emissions reduction savings in the SCS.

2. The environmental impact report did not seriously consider the legally required "no-project" alternative. A more serious analysis of the "no-project" alternative would have revealed that many land use measures included in Plan Bay Area would have been unnecessary – again because the agencies should have considered the Pavley and low-carbon fuel laws.

3. The final EIR "arbitrarily" selected a baseline of GHG emissions that is much greater than what is likely to occur even ignoring Pavley and low-carbon fuel standards. "The upshot of the Final Report's [EIR's] use of a higher-than-actual greenhouse gas baseline is to create the false impression that especially draconian land-use measures are needed to meet the region's SB 375 targets. Thus, the Final Report's approach is irreconcilable with CEQA' s requirement that the environmental baseline normally constitute existing physical conditions, not a hypothetical condition or legal fiction."

4. The final EIR failed to adequately take into account the Bay Area Citizens alternative and also failed to adequately respond to comments addressing the alternative.

REDEVELOPMENT OF THE JORDAN DOWNS HOUSING PROJECT in Watts was approved in mid-August by the Los Angeles City Council. [http://www.latimes.com/news/local/la-me-jordan-downs-20130815,0,1593534.story] Jordan Downs was one of several notorious public housing projects in South-Central Los Angeles – located right along Alameda Street, the historic dividing line between African-American Watts and Anglo Huntington Park. (Both are now mostly Latino, though Jordan Downs itself still has a large African-American population.)

Combined with school district holdings and other public land ownership nearby, the Jordan Downs site is an enormous landholding – encompassing some 100 acres of land. It represents the biggest development opportunity for the land-rich Housing Authority of the City of Los Angeles, L.A.'s public housing agency. The mixed-use development, including market-rate housing, affordable housing, and retail, is being developed by Michaels Organization, Bridge Housing, and Primestor Development.

Jordan Downs was originally built in the 1940s as the first veterans housing project in Los Angeles and was converted to public housing in 1955. All 2,300 residents in the 700 existing units located in the low-rise project are expected to be able to stay ■

Steinberg CEQA Bill Moves Forward Again

BY WILLIAM FULTON

After a surprising hiccup over the summer, Sen. Darrell Steinberg's CEQA reform bill SB 731 appears headed for the finish line.

The bill passed the Senate easily in May. Two months later, however, business-oriented CEQA reformers reversed their earlier position against it, while labor and environmental groups may also have had some problems with the bill.

Steinberg took some amendments to the bill in early August – in particular, making it easier to deal with parking issues in infill locations – and in mid-August the bill passed the Assembly Local Government Committee unanimous.

After the committee vote, Steinberg had tough words for the CEQA Working Group, the business-oriented group that had switched its position. He was quoted in the Los Angeles Times as saying: "You want to move a mile, we will move a mile. You want to move one hundred miles in ways that may not be good, that's not going to happen with this bill." [http://www.latimes.com/local/political/la-me-pc-environmental-streamline-bill-advances-despite-business-opposition-20130814,0,3208137.story]

After the committee vote, Steinberg had tough words for the CEQA Working Group

Capital Public Radio quoted him with even blunter words: "If there is any expectation – and I know there is a big expectation – that my bill will include the lengthy and ever-changing list that the CEQA coalition seems to want, you're gonna have to find another author, another year, another time, another way to do this." [http://www.capradio.org/articles/2013/08/14/steinberg-has-blunt-words-for-ceqa-overhaul-backers/]

Back in May, Steinberg appeared to have a CEQA reform bill in the bag. After Michael Rubio, chair of the Senate Environmental Quality Committee, resigned to work for Chevron, aggressive CEQA reform proposals were dropped and Steinberg came up with a more modest bill that had the support of both CEQA defenders and CEQA reformers. That bill – which, among other things, linked CEQA reform to the implementation of SB 375 – passed the Senate on a unanimous vote in May and seemed headed for Gov. Jerry Brown's desk.

But, surprisingly, the bill got hung up in the Assembly. At the end of July, Assembly Speaker John Perez told the Los Angeles Times, "There's not been the real discussion necessary for such a huge issue." [http://www.latimes.com/business/money/la-fi-mo-environmental-overhaul-bill-stalled-20130730,0,5341573.story] This is exactly what Steinberg said last August when Rubio tried to push significant changes through at the end of the session.

Perez's comments came a week after a surprising letter to Steinberg from the CEQA Working Group, a business-oriented coalition of CEQA reformers that had previously supported SB 731.

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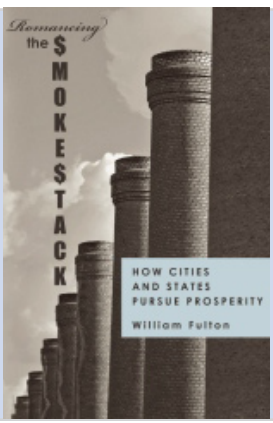
Romancing the $moke $tack
How Cities And States Pursue Prosperity

Bill Fulton's Book On Economic Development



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"Unfortunately, as drafted, SB 731 would not advance true CEQA reform and, in fact, could make approval of worthy and responsible projects even more difficult," the letter said. Specifically, the letter called out the following points:

* CEQA reform should "reduce duplicative environmental reviews and reduce meritless lawsuits" against projects that advance the goals of SB 375 and renewable energy projects. The letter was not specific about how this should occur.

* SB 731 should be amended to "require disclosure of any party that has financially contributed to CEQA litigation, similar to campaign finance disclosure laws and court mandates for third parties seeking to file advocacy briefs in lawsuits.

* CEQA plaintiffs should have "skin in the game" and "be required to pay for the lead agency's preparation of the record required for CEQA litigation."

It is not clear precisely why the CEQA Working Group changed course or what the hang-up in the Assembly is. In an insightful blog , caeconomy.org's Justin Ewers suggested that all sides are now engaged in pushback against the bill but labor in particular has objected to the CEQA streamlining for infill development contained in the bill. [http://www.caeconomy.org/reporting/entry/ceqa-roundup-have-negotiations-really-stalled] Labor sometimes uses CEQA to stall anti-union projects such as Wal-Mart stores, and often sides with environmental justice advocates who see CEQA as a tool to protect low-income communities.

At the heart of the Steinberg bill is a proposal to streamline review of certain issues in transit-rich locations, both by establishing statewide significance thresholds and declaring that certain issues cannot be considered significant impacts. The main change in Tuesday amendments was to move parking from the thresholds category to the no significant impact category. Previously, the bill called on the state to create infill thresholds for noise, transportation and parking, while declaring that no significant impact could be found on asthetics. The new version moves parking from the thresholds to the no significant impact category ■

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legal digest

Does Koontz Mean Revolution Is In The Air?

In June CP&DR reported on the U.S. Supreme Court's ruling in Koontz v. St John's Water Management District [http://www.cp-dr.com/node/3381], suggesting that it might mean the end of California's Ehrlich exactions doctrine. Here's Bill Abbott's take on the case. Abbott is a longtime partner in Abbott & Kinderman in Sacramento, which provides CP&DR with legal material.

BY WILLIAM ABBOTT

There is talk of revolution in the air.[1]

I admit it is a challenge to forecast with any degree of assured accuracy as to the impact of *Koontz* on local government. I will not be surprised if other pundits forecast a revolution in land use practice (consider the *New York Times* [http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?smid=li-share&goback=%2Egde_1013587_member_253643531&_r=0], or the *Sacramento Bee* [http://www.sacbee.com/2013/06/28/5530304/court-ruling-a-blow-to-land-use.html].)

Following *Nollan* and *Dolan*, despite predictions to the contrary, the legal terrain in California shifted only slightly. Why? For many California public entities, their practices were already compliant with the principles of *Nollan* and *Dolan*.

Has the legal terrain shifted following *Koontz*? Yes.

Will some public entities have to curb their historic regulatory enthusiasm following *Koontz*? Again yes.

For the reasons outlined below, I think that for the majority of California cities and counties, continued good planning practices will see them through post *Koontz* without the doom and gloom forewarned by some.

For perhaps the only time in my career, one of my predictions held true. I have stated on more than one occasion that the next entity to cross the exactions constitutional line would be a special district. The scenario of a special district engineer telling an applicant that it's "my way or the highway" is not unheard of by many applicants or their representatives. The single-purpose district, St. Johns River Water Management District, fulfilled my prophecy.

There are factors that mitigate the impact of *Koontz* on California local planning practice. First, concepts of the reasonable relationship of exactions to the project are embedded in the planning and zoning law (Government Code section 65909), CEQA Guidelines section 15041 and the Mitigation Fee Act (Government

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Code sections 66000-66022). As a whole, local planners are well versed in the concept of nexus as a cornerstone of land use practice.

As a case in point, many cities and counties were concerned following the enactment of the Mitigation Fee Act ("MFA") as to its potential burden. In fact, the MFA had the effect of giving local governments the technical tools necessary and steps to enact fees. Chronologically over time, there has been a significant expansion in fee practices.

Second, it is a near-universal truth for cities and counties that disagreements with staff are appealable to the planning commission and then the legislative body. In circumstances in which staff has arguably crossed the constitutional line, there are institutional procedures in place which allow for prompt rectification. No such protections are evident in the *Koontz* fact pattern.

What then are the ramifications of *Koontz*?

"Call me maybe." [2] The facts from *Koontz* derive from the actions of agency staff addressing a regulatory objective. Viewed in one light, *Koontz* may operate to discourage agency staff from collaborating with applicants in crafting regulatory options to a project denial. [3] At a minimum, agencies will clearly label those discussions as "preliminary". Perhaps in some cities and counties the message will be: don't talk to me, go fix it yourself.

"Signed, sealed delivered." [4] I think that one practical consequence of *Koontz* is to further interest cities and counties in development agreements. As a consensual exercise, a development agreement (Government Code section 65864-65869.5) provides a tool to address exaction objectives which may not meet the *Koontz-Nollan-Dolan* standards.

"For the majority of California cities and counties, continued good planning practices will see them through post *Koontz* without the doom and gloom forewarned by some."

"This Time You've Gone Too Far." [5] The Supreme Court recognized the potential for abuse in the conditioning process, wherein as long as the cost of the exaction was less than the value of the approval, the potential existed for the agency to extract property from the applicant that it would not be otherwise entitled to obtain. I welcome a change in heart and practice by regulators who previously recognized and took full advantage of those opportunities.

I've got "Work to do." [6] The Mitigation Fee Act spawned an entire industry of consultants. When push comes to shove over an exaction, the consultants and attorneys will get the call.

"Somebody loan me a dime?" [7] Reimbursement agreements are long time, well established tools designed to avoid takings claims by providing for the agency to collect funds (typically from later developers and builders) and reimbursing a developer who installs a facility with oversized capacity benefiting others. Expect their use to increase to avoid disproportionate burdens falling on individual applicants.

"Money, Money, Money." [8] *Koontz* does not prohibit the imposition of *in lieu*, mitigation or impact fees, whether imposed on an individual basis or as a result of legislative enactment. *Koontz* changes the standard of review applied by a court when examining fees. The extent of the shift in California remains to be determined, but believe that the shift is likely to be small. To avoid creating disproportionate burdens, local governments will need to spread the pain of land use requirements on a broader basis. In many circumstances, this should translate into increasing number and type of facilities funded through fees (spreading the pain) thereby reducing the risk of unfair individualized impositions.

Many years ago, a good friend of mine, a county planning director, announced at a gathering of planners that good planning had nothing to fear from the *Nollan* and *Dolan* decisions and the Mitigation Fee Act. Time has proven him right. I think that the same statement holds true for the holding in *Koontz* ■

Appellate Court Reverses Trial Court on Marin Water EIR

BY KATHERINE J. HART, ABBOTT & KINDERMANN, LLP, SACRAMENTO

The Marin Municipal Water District (District) proposed to construct a desalination plant in Marin County, and certified an environmental impact report (EIR) for the project. The North Coast Rivers Alliance (Alliance) challenged the EIR on the grounds that the EIR failed to properly analyze various impact categories, including aesthetics, land use and planning, seismology, hydrology and water quality, biological resources, and greenhouse gases. The Alliance further claimed that a number of mitigation measures were improperly deferred, and that a feasible green energy alternative was not considered in violation of CEQA. The trial court granted the writ, but on appeal, the Court of Appeal, First Appellate District, reversed and ordered the trial court to issue a new judgment denying the writ petition. *North Coast Rivers Alliance Et Al. v. Marin Municipal Water District Board of Directors* (May 21, 2013, A133821, A135626) ___Cal. App.4th ___.

Background

The District provides potable water to residents in Marin County. In 1989, the District declared a water shortage emergency, having determined that water demand will exceed water supply by 2025, even with aggressive conservation measures.

In August 2003, the District considered the construction of a 5-million-gallon-per-day desalination plant to extract seawater from San Rafael Bay and remove the salt, other solids and constituents from the water by reverse osmosis. The resultant potable water would be supplied to the District's customers; the saline brine would be blended with treated wastewater effluent and discharged back into San Rafael Bay via the sanitary sewer system. In addition to the actual desalination plant, the District would need to construct two pipelines, two pumping stations, and three storage tanks (two on San Quentin Ridge and one on Tiburon Ridge).

The draft EIR for the project was circulated in November 2007, the Final EIR was released in December 2008, and the District Board certified the EIR in February 2009, and then, following two more public hearings, approved the project in August 2009.

Aesthetics

The EIR concluded that there would be no significant visual impact on scenic vistas from the construction of a water tank on Tiburon Ridge although the tank would be "slightly visible" from various vantage points. The trial court held that substantial evidence did not support such a conclusion, but the appellate court reversed on the grounds that lead agencies are entitled to (and in fact, must) make policy decisions regarding what constitutes substantial versus insubstantial adverse environmental impacts based in part on the setting of the project. Where an agency finds that an impact is insignificant, the EIR is only required to contain a brief statement addressing the reasons for the conclusion. The appellate court held that the District did that. The EIR in question laid out the applicable thresholds of significance and determined there would be no significant impact on "scenic vistas" based on analysis of the location of the tank versus from where and by whom it would be seen. The appellate court then reminded readers that there is a different standard of review that applies to EIRs (versus negative declarations) and under the more deferential standard of review for EIRs, the only issue is "whether substantial evidence supports the agency's conclusions, not whether others might disagree with those conclusions."

To the contrary, the EIR concluded there would be an unavoidable significant impact with respect to the two water tanks proposed to be constructed on San Quentin Ridge. As required by CEQA, the EIR still included a mitigation measure, which required the District to work with the cities of San Rafael and Larkspur to prepare and implement a landscaping plan to shield the tank site on San Quentin Ridge from view. The Alliance argued the mitigation measure failed to comply with CEQA because it did not indicate what type of plants should be used or dictate the location of plantings. The trial court agreed that failure to include these "criteria" rendered the mitigation measure "indefinite" and thus, inadequate under CEQA. The District argued the Alliance failed to exhaust the issue, but in any event, the District's mitigation measure complied with CEQA. Although the appellate court agreed the Alliance properly exhausted the issue, it again reversed the trial court on substantive grounds, holding that the District properly committed itself to working with the cities to reduce the visual impacts by implementing whatever plan was decided upon during project construction. The District also required itself to identify success metrics such as survival and growth rates for the plantings. All this was sufficient under CEQA.

Land Use and Planning

The Alliance argued that the EIR violated CEQA because it did not address whether the Tiburon Ridge tank would be consistent with the Countywide Plan. The District countered that the Alliance failed to exhaust its administrative remedies on the issue, but in any event, the EIR contained substantial evidence to the contrary. The trial court sided with the Alliance, but was again, reversed by the appellate court on the grounds that the Alliance failed to exhaust its administrative remedies, but also that the EIR contained substantial evidence in support of the District's conclusion that the project was consistent with the county's general plan.

Seismology

The Alliance contended that the EIR failed to analyze the project's seismic impacts. Specifically, it argued that the EIR failed to explain the impacts of soil liquefaction or structural damage due to an earthquake. In its defense, the District asserted that the issues of soil liquefaction and structural damage were never raised so it could never address them. The trial

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disagreed, but was yet again, reversed by the appellate court. In holding for the District, the appellate court noted that oral testimony of a very general character was presented during a hearing about the impacts of an earthquake, but neither soil liquefaction nor structural damage of the tanks was specifically raised; thus, the issues were not properly exhausted. The appellate court also held that the EIR contained substantial evidence to support the District's conclusion that the project would not have significant seismic impacts. In particular, the EIR outlined the geologic conditions in the area, considered the potential for seismic hazards (including ground shaking and liquefaction), and analyzed seven potential impacts associated with geologic risks. All this, the appellate court said, was more than adequate to respond to the public's generalized comments regarding seismic impacts.

Hydrology and Water Quality

In analyzing whether the project would violate any water quality standards or waste discharge requirements, the EIR concluded that the project's impacts would be less than significant since the wastewater would be treated to comply with applicable discharge permit limits. The EIR disclosed that periodic "shock chlorination" of the intake pipe would be necessary to control barnacles and mussels that would grow within the pipe, but that no chlorinated water would be discharged to the Bay without first being treated and dechlorinated to meet discharge permit requirements. The Alliance argued that the EIR failed to analyze the potential adverse impact on the Bay from the "shock chlorination." The California Department of Fish and Game (now Fish and Wildlife) asserted that chlorine is toxic to aquatic life and cannot be discharged into the Bay. The trial court ruled for the Alliance, stating that the EIR failed to properly disclose the frequency of the shock chlorination treatments, and thus, it lacked substantial evidence to support the District's conclusions on water quality. Reversing the trial court again, the court of appeals held that the EIRs discussion and explanation of the shock chlorination process, frequency and disposal was adequate.

Biological Resources

The desalination plant would pump seawater directly from the San Rafael Bay through the intake pipe to the plant. This could lead to entrainment of aquatic organisms, including fish. To study the impacts of entrainment, the District sampled source water from the project vicinity for one year. During the year, the District collected information on various fish and macroinvertebrates. None of the species collected from the project area were special status species. The District also proceeded with a one year pilot desalination plant, which was developed in coordination with NOAA and the CDFG. Part of the pilot study included source water sampling, which the District limited to February and March 2006 given biologic and cost considerations. The EIR analyzed the information from their studies, as well as decades of CDFG data, and the potential impact of the pumping on special status fish and aquatic life, and concluded that the project would not have a significant impact. NOAA and CDFG commented on the Draft EIR and stated that the source water sampling between February and March 2006 was insufficient and should have been carried out over an entire year. The Final EIR addressed NOAA and CDFG's comments and responded that February and March were chosen for the source water sampling due to the peak abundance periods for key species and thus, the data represented the "worst case scenarios" regarding entrainment. Additionally, the District's FEIR noted that source water sampling is disproportionately costs given the laboratory research requirements in comparison to the cost of the pilot program as a whole. The EIR concluded that because the analysis annualized peak entrainment data and assumed maximum plant operation, the results regarding impacts to aquatic life were conservative.

The Alliance claimed the EIR was inadequate because the District refused to follow NOAA's and CDFG's recommendations to perform a year-long source water sampling. Although the trial court agreed, the appellate court reversed. The court reasoned that the substantial evidence standard allows a lead agency to utilize methodologies different than another agency might like to study an impact. Citing the *Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33 (SCWC) case, the appellate court said, "the only issue is whether the lead agency relied on evidence that a 'reasonable mind might accept as sufficient to support the conclusion reached' in the EIR." In sum, a difference of opinion among experts does not invalidate an EIR – even where the experts are responsible agency staff.

The Alliance also alleged that the EIR's description of the environmental setting was inadequate because it should have included the age and types of species likely to be found in the project vicinity. The trial court agreed, but was reversed by the appellate court. The court of appeals held that the EIR sufficiently described the intake site, the species and habitat that could potentially be impacted, and the life cycle information for the species at issue.

As part of the project, pile driving for the reconstruction of the Marin Rod & Gun Club pier would be required. The Alliance argued the pile driving would result in increased underwater noise and acoustic pressure waves which could have lethal effects on sensitive species. The District adopted a mitigation measure to reduce the potential impacts of the pile driving. Specifically, the mitigation measure required the District to consult with NOAA regarding appropriate measures, which could include specifying allowed seasonal work windows, and that the pile-driving activities be monitored for signs that fish are being injured. The District contended that the Alliance failed to exhaust its administrative remedies, but even if it did not, the mitigation measure is adequate under CEQA. The trial court held that the EIR was not sufficiently specific as to how the District would reduce sound pressure levels to less than significant. In reviewing the record, the appellate court noted that the while the adequacy of the mitigation measure was raised briefly, nothing in the letter suggested that the mitigation measures did not comply with CEQA or that the consultation with NOAA

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amounted to improper deferral. However, assuming the issues were exhausted, the court of appeal held that consultation under Section 7 of the Endangered Species Act, in conjunction with the District's commitment to avoid the take of protected species was adequate mitigation under CEQA.

Alternatives: The Use of Green Energy Credits

Reverse osmosis, a major component of the project, is a highly energy-intensive process. The Alliance asserted that the District failed to consider a reasonable alternative to the project that would reduce the project's energy impacts. The District conducted an alternative energy survey that reviewed six alternative energy scenarios for powering the project. While one of the alternatives considered by the survey was purchasing green energy credits, in the end, the EIR incorporated the alternative of replacing the existing power lines, not the purchase of green energy credits. Notably, the EIR concluded that the project would not have a significant energy impact. Here, the court of appeal noted that the green energy credits alternative was not required to be considered since the energy impacts of the project were not significant to begin with.

Cumulative Greenhouse Gases

The EIR set a threshold of reducing GHG emissions to 15 percent below the 1990 levels by 2020 in accordance with a locally adopted plan to reduce GHGs to the same level. The analysis assumed that the project would generate between 4,000 tons per year (5 MGD) and 30,000 tons per year (15 MGD) of GHG emissions; it then concluded that the project would not have significant impacts on GHG emissions. Notwithstanding this conclusion, the District Board required offsets for any project-related GHG emissions, and committed to purchasing only electricity that could be supplied from renewable sources. The Alliance disagreed with the EIR's analysis of whether the project would have cumulatively considerable impact on GHG emissions; it also argued that the District's commitment to purchase renewable energy was unenforceable and thus, improper under CEQA. The trial court agreed, and the court of appeal reversed. The appellate court noted that disagreement with an EIR's analysis is not a reason to discard the analysis so long as the analysis is supported by substantial evidence in the record, which it was in this case. Additionally, the appellate court rejected the Alliance's argument that the commitment to purchase only renewable energy was vague and unenforceable. Such a commitment was not considered a mitigation measure given the project had no significant impacts on energy, but even if it was being used as a mitigation measure, it would have been adequate under CEQA since the Board made a commitment to proceed with the project only if electricity could be supplied from renewable sources, and the record contained evidence that such a commitment was feasible.

Recirculation

The District added an eighth alternative to the EIR in a response to comments, but did not recirculate the alternatives chapter of the Draft EIR for public review and comment. The additional alternative proposed construction of a pipeline to deliver water from the Russian River to the District. The District found Alternative 8 to be infeasible given the evidence in the record indicated that the amount of water to be delivered from the Russian River may not be available in normal years, and would likely not be available drought years. The trial court undertook its own calculations of water supply and weighing of the evidence in the record to determine that the alternative could have been feasible and that the District should have recirculated the Draft EIR. The court of appeal reversed reasoning that Alternative 8 did not add any "new significant information" that had not already been considered by the District in Alternative 2, and thus, recirculation was not required. It also agreed that substantial evidence in the record supported the District's finding of infeasibility.

Comment

This newest CEQA case is a stellar win for the Marin Municipal Water District. The case exemplifies the benefits of an agency going the distance to support of all its determinations with expert evidence in the administrative record. However, this case also reemphasizes the general premise that agencies have the discretion as to what studies they will conduct, even if one or more responsible agencies want to require more, and that courts will grant lead agencies great deference on such issues ■

North Coast Rivers Alliance Et Al. v. Marin Municipal Water District Board of Directors **(May 21, 2013, A133821, A135626) ___Cal. App.4th ___.**

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>>> Will New Transbay Transit Center Transform SoMa?

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used the old facility, a new terminal, with a new name–the Transbay Transit Center–is now being built at a cost of $4 billion. The new center is supposed to bring together 11 transportation systems, and serve 45 million people a year. Some of the transportation systems don't yet service San Francisco, and funding for many of the projects isn't yet secured. But project planners are thinking big.

To encourage the transit-oriented development, the city has created a plan for 40 acres around the transit center, which includes generous upzoning of commercial properties, planned retail corridors, and pedestrian friendly amenities such as wide sidewalks and alleyways lined with townhomes. Much of the new development is planned for land freed up by tearing down parts of the Embarcadero Freeway and one freeway off-ramp that once served the transbay terminal, according to Courtney Pash, assistant project manager for the Transbay Redevelopment Project Area, which is a successor agency to San Francisco's Redevelopment Agency.

The new center is supposed to bring together 11 transportation systems, and serve 45 million people a year.

The revitalized area around the Transit Center is expected to have 4,600 housing units, with 25% of them affordable units. Many of the residences will be at the southern end of the redevelopment area along Folsom Street, complementing new residential construction in nearby Rincon Hill.

Six million new square feet of new commercial and office space will be created, much of it in high rises. The skyscrapers are will be slender, to minimize shadows.

The signature high-rise will be on Mission Street property that once was the front entrance of the Transbay Terminal. Construction is expected to begin soon on a 1,070-foot-high, 60-story glass tower, designed by the firm of Pelli Clarke Pelli. The building, known as the Transbay Transit Tower, will dwarf the city's Transamerica Pyramid by more than 200 feet when it is completed in 2017.

Across the street from the Transbay Transit Tower, two additional towers are supposed to rise, with 1.2 million square feet and 605 condominiums, in a project spearheaded by TMG Partners. The two towers will be almost as tall as its neighboring tower, with a 59- story office tower and 56-story condo tower.

Stephanie Reichin, a spokesman for the Joint Powers Authority, said there are five other new high-rises planned in the area.

The center's construction during the recession may have jump-started development in the area, which had seen many high rises built during before 2008.

"A lot of development was planned prior to the recession and then stopped when it hit," Reichin said. "When we started construction of the transit center in 2010, it was a sign of economic recovery and a catalyst for many developers in the area."

It also helped that zoning increased to allow bigger, taller buildings. "For some of the parcels in the plan area, the allowable height was increased," Pash said . "The goal is to increase the density."

"The goal for the area has always been to extend downtown south of Market," she said.

A successful redevelopment is evident a few blocks from the transit center, at Yerba Buena Gardens, where a park, a convention center and several museums and hotels all expanded the downtown core.

Fears that the increased construction near the transit center might not withstand earthquakes have been addressed, Pash said.

"All buildings have to meet the city's strict earthquake standards," she said. "The terminal and Transbay Tower exceed the city's standards."

The office vacancy rate in San Francisco is currently at 8.7 percent, as San Francisco reaps the benefits of being at the northern arc of Silicon Valley. The new transit center may also make commuting easier for the thousands of San Franciscans who now commute south to San Mateo and Santa Clara County, where many high tech companies are located.

Pash said the transit center and surrounding area will feature 9.5 acres of parks, including a signature 5.4 acre park located on top of the transit center itself. The park will include a 1,000 person amphitheatre.

Plans for the new transit center envision tying together 11 different transportation systems, although not all have yet been funded One example is California's high speed rail, with bullet trains beginning their journeys to Los Angeles there. But funding fights over that project, and opposition to its operation on the San Francisco Peninsula, have raised questions about whether it will ever be built.

In addition, Amtrak is supposed to end its lines at the transit center, if Amtrak decides to deliver rail passengers to San Francisco. Caltrain, the peninsula's three-county rail service, is also supposed to terminate there, if money is ever found to extend the rail system from its current San Francisco terminus about a mile away. Plans also call for a people mover sidewalk to speed passengers from the center to a BART station in downtown's Embarcadero Center ■

insight WILLIAM FULTON

>>> The Third Wave of CEQA Litigation

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while Werdegar's plurality contains many refutations of Baxter's points, as a dissent typically does. Had Baxter's reasoning carried the day, lead agencies would have virtually unlimited discretion in deciding what kind of baseline analysis to use.

Why is this important? Because we've entered a new period of CEQA court rulings focused on narrow, technical decisions that have enormous consequences on the size and scope of the analysis.

For the first 20 years after CEQA was passed – from 1972 until 1990 – the courts consistently expanded CEQA's scope so that more and more issues had to be analyzed in great technical detail, thus creating ever-expanding environmental analyses. For the next 20 years – after the California Supreme Court's New Year's Eve 1990 ruling in Citizens Of Goleta Valley, v. Board Of Supervisors, 52 Cal.3d 553, 801 P.2d 1161, 276 Cal.Rptr. 410, the courts were much less aggressive in expanding CEQA's scope – largely because Goleta Valley contained a pretty clear warning.

Now, however, we appear to have entered the CEQA's "third wave." The courts are not vastly expanding CEQA's reach, and plaintiffs know better than to push in that direction. Instead, plaintiffs are relying on narrow technical arguments to make their case – mostly about what the ground rules for the analysis are. But while the arguments are narrow and technical, the impact of the rulings is not. For example, in Ballona Wetlands Land Trust v. City of Los Angeles (2011) 201 Cal. App. 4th 455, the Second District Court of Appeal ruled that a project's impacts do not have to be measured against future changing environmental conditions (for example, sea level rise).

Similarly, in last week's Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, the issue was whether or not L.A. Metro erred in the way it created the baseline of analysis for traffic and air quality impacts. For those two issues – but not for others – Metro use a "future baseline" of 2030 without the Expo Line Phase 2 in place, rather than a current baseline.

In a lot of ways, this makes sense. After all, we're not talking about a development project here. We're talking about a transportation project. So, whereas you might be able to analyze a development project against current conditions – assuming that the only change is whether or not the new subdivision is built – the whole point of a transportation project is to change future conditions from what they otherwise would be.

This was persuasive to Justice Baxter and the two judges who agreed with him. To quote Baxter at some length:

"As a major infrastructure project designed specifically to address projected long-term increases in traffic congestion and air pollution, Expo Phase 2's very operation will, over time, achieve environmental objectives and efficiencies in complete alignment with CEQA's goals of enhancing and protecting the environment in this state. The majority does not disagree that the traffic and air quality conditions in 2007 will no longer exist when Expo Phase 2 is fully operational. But despite Expo Authority's reliance on this reality as a justification for omitting an impacts analysis based on the 2007 conditions, the majority proceeds to fault the agency for failing to analyze the conditions projected to exist eight years after that date, when Expo Phase 2 is scheduled to begin operations in 2015.

"The unfairness of today's decision is stunning: the majority finds an abuse of discretion based on the lead agency's failure to use a baseline that is nowhere mentioned in the CEQA statutes, regulations, or case law, and that no agency or member of the public ever advocated in the administrative review process below."

But it wasn't persuasive to the majority. Quoting Werdegar's opinion – which got four votes: "Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in Guidelines section 15125(a)—is justified by unusual aspects of the project or the surrounding conditions.

"That the future conditions analysis would be informative is insufficient, but an agency does have discretion to completely omit an analysis of impacts on existing conditions when inclusion of such an analysis would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public."

This last bit of reasoning – that existing conditions can only be omitted if uninformative or misleading – appeared to be especially infuriating to Baxter. "It is unclear," he wrote, "how an agency might show that an existing conditions analysis would be "uninformative" or "misleading," without actually conducting such an analysis."

Baxter concludes that the majority's decision will increase the complexity of CEQA analysis significantly and will lead to further conclusion and delay for both public and private projects in California. He may well be right. One can't help but notice that Baxter's reasoning is pretty clean and simple, while Werdegar's – while not tortured – is nevertheless complicated. As Baxter says, it's hard to know exactly how to follow the bouncing ball.

When CEQA's critics complain that the law is unnecessarily complicated, this is the kind of thing they're talking about. At its core, the question in the Expo Line CEQA analysis is simple: Will the construction of a major light-rail line benefit the environment or harm it? The Neighbors for Smart Rail ruling, unfortunately, deals with the question of "compared to what" – and provides a difficult-to-follow rule ■