CP&DR

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OPR's new traffic draft rethinks congestion

BY WILLIAM FULTON

In a sweeping new set of recommendations, the Governor's Office of Planning & Research has proposed that traffic congestion no longer be considered a significant environmental impact under the California Environmental Quality Act, and that expanded roadways in congested areas be assessed for possible growth-inducing impacts.

In a draft document released August 6 at http://www.opr.ca.gov/s_sb743.php (PDF document: http://bit.ly/1kOofPD), OPR's long-awaited white paper recommends amendments to the CEQA Guidelines to replace the "level of service" traffic congestion standard with a "vehicle miles traveled" standard in order to tether CEQA analysis more closely to other state goals, especially the greenhouse gas emissions reduction goals contained in AB 32, the state's climate change law.

Among other things, OPR appears to be trying to make sure the CEQA/traffic tail does not wag the planning dog – as so often appears to happen in California. "[A]ddressing congestion requires public agencies to balance many factors, including fiscal, health, environmental, and other quality of life concerns," OPR wrote. "Such balancing is more appropriate in the planning context where agency decisions typically receive deference." This is in keeping with a line of CEQA cases going back at least to *Friends of Goleta Valley* in 1990 (http://bit.ly/1nBbFyq), in which the California Supreme Court said that alternatives

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insight WILLIAM FULTON

A Note To Readers

Dear CP&DR Readers,

By now, you may have heard that I have decided to move on from my current job as Planning Director of the City of San Diego to become the Director of the Kinder Institute for Urban Research at Rice University in Houston. (See http://kinder.rice.edu/content.aspx?id=2147485438&blogid=306.) I'm writing this short missive to reassure you that I remain committed to California Planning & Development Report – and, in fact, I'll have more motivation and bandwidth to devote to CP&DR than I have had in recent years.

I know that may seem strange – that somehow moving from being a planning practitioner in California to working

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inside

Oakland releases Coliseum Area specific plan, EIR

Oakland released the draft specific plan and accompanying draft EIR for the mega-development proposed to surround a rebuilt Oakland Coliseum. See http://bit.ly/1wyvMa7 for the city's main page linking to the extensive related planning documents. The *SF Chron*'s Michael Cabanatuan sets out main details at http://bit.ly/1v8Onry. The plan still calls for three separate sports venues, to potentially host professional football, baseball and basketball teams respectively, even though the Golden State Warriors have announced plans for a new arena in San Francisco. Earlier in the month, the *Chron*'s Will Kane wrote that Oakland would have to raise "at least $1.75 billion" to keep both the A's and the Raiders in town. See http://bit.ly/1owlOAg.

Los Angeles buys Taylor Yard parcel for LA River project

Streetsblog LA has a news feature, and links to documents, on the purchase by the City of Los Angeles of a 41-acre parcel that formed part of the former Taylor Yard rail yard along the LA River. It reports the property is to form a major part of the $1 billion project to clean up 11 miles of the river and make it a center for recreation and investment. See http://bit.ly/1vjUdqf. The *Curbed LA* history file at http://la.curbed.com/tags/taylor-yard includes past coverage showing the property's site between Rio de Los Angeles State Park and the river. The state park's site, at http://www.parks.ca.gov/?page_id=22277, explains that the park is another former portion of Taylor Yard, closed to railroad use since the 1980s.

Delta tunnel plan's comment period has closed

The comment deadline closed July 29 for the Bay Delta Conservation Plan (BDCP) – the twin-tunnels plan to carry water southbound under the delta rather than into it. The comprehensive California water blog Maven's Notebook posted an "Internet Guide to the Bay Delta Conservation Plan" several weeks ago that walks through the available plan documents (See http://bit.ly/1rRmD9w).

Maven noted a Capital Public Radio item at http://www.capradio.org/29065 on an anti-tunnel protest rally held in Sacramento to mark the close of the comment period. The BDCP project's own Web site is at http://baydeltaconservationplan.com/Home.aspx.

Stockton Record environment writer Alex Breitler posted samples of the comments on his blog at http://bit.ly/1qKgSVz. (More recent items on Breitler's blog at http://blogs.esanjoaquin.com/san-joaquin-river-delta/ include continuing coverage of the BDCP's interaction with the politics of the statewide water bond ballot measure.)

CAHPC reports on affordable housing defecits

The California Housing Partnership has posted reports at http://chpc.net/ describing failures to meet affordable housing needs in major California metro areas. Separate reports are posted for Alameda, Fresno, LA, Orange, Sacramento, San Diego, San Francisco, San Mateo and Santa Clara Counties. A combined summary report is at http://bit.ly/XRmsyU. Individual findings include defecits of 118,895 units in Orange County and 490,340 in LA County (KPCC coverage at http://bit.ly/1AS8SsV) and a defecit of 40,800 units in the City and County of San Francisco (see http://bit.ly/1mQouVH).

Ponte Vista project breaks ground with a diminished plan for 676 units

A popular article last week by the *LA Times*' Andrew Khouri presented the Ponte Vista project in San Pedro as a case study of a large-project proposal whittled down by community opposition to a smaller design with lower density and higher costs per unit than first proposed. He writes that the original 2005 design called for 2,300 condo and town house units plus 10,000 square feet of retail – but as of the groundbreaking last week, the design called for 676 units including 208 single-family homes. See http://lat.ms/1mpl23M/.

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A series of stories over the years by *Curbed LA*, collected at http://la.curbed.com/tags/ponte-vista, recount more of the project's reshaping over time from a large "mixed-use urban village" to a smaller "suburban-ish" gated complex. It says the project changed owners along the way, lost all its proposed rentals, and picked up agreements for an access road, union labor, local hires, and public access to recreation spaces.

San Francisco could soon run out of Prop M office space allowance

JK Dineen of the *San Francisco Chronicle* posted an in-depth news analysis July 29 on downtown planning effects of San Francisco's 1986 Proposition M, which limits new office space construction to 875,000 square feet per year. His analysis is worth returning to at http://bit.ly/1kkLKiZ, as is the *SF Business Journal* followup with added details at http://bit.ly/1y0wUyO. The *SFBJ* reported the Planning Commission took no action but began discussion August 7 on how to proceed if, as seems likely, San Francisco construction plans use up the currently available Prop M allowance of office space – about 2 million square feet. See http://bit.ly/VMrQln. The Planning staff report for the August 7 agenda item is at http://bit.ly/1AS7Kpb. Dineen put the amount of proposed office construction at 9.2 million square feet but the *Business Journal* called it more than 11 million.

California Economic Summit wants 'peer review' of CEQA guidelines

The California Economic Summit civic organization has asked Governor Jerry Brown to conduct a "peer review" by experts and officials of draft revisions to the CEQA Guidelines before they are circulated to the general public. Revisions to the guidelines are in the works at the Office of Planning and Research. See http://bit.ly/1tTAw4D.

WeHo developer gives up 'poor door' pool policy but still loses Planning vote

Under criticism from the West Hollywood Community Development Department, developers of the 8899 Beverly office building conversion gave up a proposal to bar residential tenants of affordable units from using the property's pool – but they still lost a Planning Commission vote, possibly also due to the size of the project. Southern California Public Radio reported project proponents backed down and agreed to share the pool shortly before the planning commission vote. See http://bit.ly/1ulWBfF (via CACities). The proposal was locally condemned as a "poor door" – a term derived from New York City projects that have fully separate entrances to their affordable sections. Per the *LA Times* at http://lat.ms/1mEA3Pe, the project calls for renovating a 10-story office building into a mixed-use complex including 64 market-rate and 17 affordable residential units. The *Times* reports the commission's August 7 vote against the proposal becomes a recommendation to the city council, which will decide the project's future.

'Boomerang campaign' secures Alameda Co. post-redevelopment funds for housing

Housing advocates persuaded the Alameda County Supervisors on July 29 to commit a dollop of former Redevelopment funds to affordable housing and homelessness prevention. The Supervisors committed $13.7 million in one-time funds to the programs plus a promise to reserve more for the programs starting in 2016-17: 20% of tax funds that would formerly have gone to Redevelopment, or at least $2 million a year. The one-time commitment consisted of $9.8 million in funds "swept" from ex-Redevelopment accounts reserved for housing, plus $3.9 million of additional ex-Redevelopment funds.

The campaign that won the distribution was led by the East Bay Housing Organizations coalition (see http://ebho.org/news) and was associated with the "Boomerang Campaign" of the Non-Profit Housing Association of Northern California. (See http://bit.ly/1vPdhu3.) Although the dissolution of the redevelopment agencies ended Redevelopment's 20% housing set-aside for tax-increment funds, the campaign has urged local governments to honor its intent. The campaign frames returned ex-redevelopment amounts as "boomerang funds" and argues that equivalents to the old 20% set-aside – or more – should be used for housing, not simply poured into the general fund. The campaign claims successes in multiple Bay Area towns and counties over the past two years.

For details on the Alameda County decision see the Supervisors' July 29 "Attachment 99.3" agenda item. The staff-prepared agenda packet materials are at http://bit.ly/1yoROrs and video is at http://bit.ly/1pFCkPC. (The vote is reported in the *Pleasanton Weekly* at http://bit.ly/VdGG3Z. Noted via the League of California Cities.)

Chiu short-term home rental legislation passes SF Planning Commission

San Francisco's Planning Commission gave initial approval August 7 to legislation by Board of

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Supervisors President David Chiu to legalize, regulate and tax short-term rentals through online services such as Airbnb. The *Bay Guardian* covered the long, contentious hearing at http://bit.ly/1sx5XEQ, reporting the legislation would require hosts to "register with the city, pay all associated taxes and sign up for liability insurance." Previously, the *San Francisco Business Journal* reported a new group of short-term rental hosts, the Home Sharers of San Francisco, kicked off a public campaign July 31 in favor of the Chiu legislation. See http://bit.ly/1m5GURx. The *Guardian*'s former editor, Tim Redmond, gave his own opinionated account of the hearing on his own *48 Hills* site at http://bit.ly/1oFHWDM. He and the *Guardian* described arguments from opponents of the legislation who ranged from former planning officials, to apartment landlords concerned about insurance, to a hotel workers' union representative. Redmond reported that although many short-term rental hosts spoke on their own behalf, no direct representatives of Airbnb or VRBO spoke for the companies at the hearing. The legislation next goes to the Board of Supervisors in September.

Tule Lake preservation group sues over airport fence on camp site

The Tule Lake Committee filed a CEQA court petition to block construction of a fence at Tulelake Airport in Modoc County. The airport, which is used mainly by a crop-dusting company, Macy's Flying Service, occupies part of the footprint of the wartime Tule Lake Relocation Center, later designated the Segregation Center, where more than 18,000 Japanese Americans were incarcerated from 1942 to 1946. The fence has been endorsed by the FAA as needed to secure the runway. Lee Juillerat of the Klamath Falls *Herald and News* has the story at http://bit.ly/1poV83T.

In other news –

- The *Mercury News* reports five "budget watchdog" groups have asked the governments of five states not to let the Tesla company draw them into a "race to the bottom" in competition for Tesla's new "Gigafactory" battery plant. See http://bit.ly/1ASRWTj for the news report and http://californiabudgetbites.org/ for the letter.
- Law firm bloggers who follow CEQA have been passing around a side comment from Governor Jerry Brown, made in a "wide-ranging interview" this month with the *Contra Costa Times*. The paper report Brown "wouldn't say CEQA reform is dead," but that he compared the prospects of changing the law to changing the position of the Catholic Church on birth control, saying "Once you start to fiddle with the theology of CEQA, you get into difficulties." See http://bit.ly/1AS1HB9 (via law firm blogs including BB&K's at http://bit.ly/1tanK4Y).
- In an interview on her plans as Speaker of the Assembly, Rep. Toni Atkins, D-San Diego, told the *Voice of San Diego* she would support a "down and dirty discussion" of possible legislative changes to CEQA. The paper reported she "questions the need for an environmental impact report when a property owner wants to upgrade or replace an existing building." See http://bit.ly/1BaBj6H.
- San Francisco's Planning Commission approved the Moscone Center expansion: http://sf.curbed.com/archives/2014/08/15/moscone_growth_spurt.php
- The City of Rosemead scheduled public meetings this fall, beginning September 10, on the proposed Garvey Avenue Specific Plan. See http://www.cityofrosemead.org/index.aspx?page=436.
- A federal judge refused to enjoin the new San Francisco ordinance increasing relocation payments to tenants by landlords who elect to empty their buildings under the Ellis Act. See http://cbsloc.al/1wyKE8y.
- A burst pipe at UCLA led to a flood that wasted 20 million gallons of drinking water. The *LA Times* at http://lat.ms/1kkaJCD responded with a report on concerns about the age and condition of the city's infrastructure.
- The *Sacramento Bee* reported on a statewide increase in available charging stations for electric vehicles at http://bit.ly/1orbVoM.
- The *SF Chron*'s JK Dineen reported on a proposal by Build, Inc. to build 900 residential units on the 14-acre property at 700 Innes Ave. near the India Basin Open Space in the Bayview District of San Francisco. The paper reports it's "the largest remaining privately owned development site in the city". And it says Build, Inc. is "talking to" the John Stewart Co., a major developer and manager of subsidized housing, about including "for-sale housing targeted at middle-income families" on the site. See http://bit.ly/V88kyS.
- The Riverside County town of Hemet approved a specific plan in June for the Ramona Creek mixed-use development at the west end of town. The *Press-Enterprise* reported recently the project would

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turn "200 acres of dirt" into "more than 500,000 square feet of retail, entertainment, restaurant, office and mixed-use development along with approximately 1000 houses." Local officials welcomed the plan as the first local major development since the mid-2000s. The developer is Regent Properties of Los Angeles. See http://www.pe.com/articles/hemet-698633-city-development.html. City documents for the specific plan are at http://www.cityofhemet.org/index.aspx?NID=627.

- The water issues weblog Maven's Notebook posted an August 1 decision by the Mammoth Community Water District to sue the Great Basin Unified Air Pollution Control District over the Casa Diablo IV geothermal project. The water district contends the project's FEIS/EIR failed adequately to consider effects on groundwater that it says could harm the city water supply. See http://bit.ly/1sLLWad.
- The *Mercury News* reported Los Gatos was near approval of a specific plan for a mixed-use development on the "North 40," described as the city's last large vacant parcel. See http://bit.ly/1oFQBGg.
- The State Department of Finance approved release of an additional $4.9 million to continue with San Diego's Horton Plaza project to turn a former department store building into an open downtown public space. The *U-T* has details at http://bit.ly/1IZ4X4D. KPBS has more background at http://bit.ly/1rRuRys. The approval letter is posted at http://bit.ly/1IZ528x.
- Nate Donato-Weinstein of *SFBJ* reported Google has bought more of Mountain View: $98.1 for nine buildings from Boston Properties: http://bit.ly/1xBXxtB.
- Both San Francisco and Los Angeles sent representatives to Colorado Springs in July to discuss possibly hosting the 2024 Olympics. The *Chron* wrote up SF's delegation at http://bit.ly/1spsD7j and the *LA Times* reported on Mayor Eric Garcetti's trip at http://lat.ms/1oa5Egi. The *LA Times* says the U.S. Olympic Committee will pick a U.S. host city in 2017. It remains to be seen if San Francisco is sore enough from its losses hosting the America's Cup to hesitate about investing in another one-time international sports event.
- The Huntington Beach City Council took a measure off the ballot that would have invited voters to approve mobile home rent control after the landlord of two key mobile home parks moved toward negotiating five-year leases with his tenants. See the *Huntington Beach Independent* (noted via the League of CA Cities) at http://bit.ly/1uVVELI.
- The *LA Times* reported a group of landlords and tenants were working together to legalize unpermitted rental units in Los Angeles: http://lat.ms/1uVQejA (Noted via the smart @VamonosLA Twitter account.)
- PG&E pleaded not guilty to federal charges connected with the 2010 San Bruno gas explosion that kiled eight people. The *SF Chron*'s Bob Egelko reported city officials were campaigning for prosecutors "to seek an independent monitor of the company's conduct, saying state regulators are too cozy with the giant utility," See http://bit.ly/YyNefA.
- AP reported the Ivanpah solar array has become a giant bird zapper: http://bit.ly/1pZVPkg.

Legislative roundup: new water bond on the state ballot after all

State legislators blew through a string of constitutional deadlines and even postponed printing of the state ballot pamphlet itself, but they finally agreed with Governor Jerry Brown on a $7.5 billion water bond measure for November of which about $7.1 billion would be raised by new bond issues. The bond measure replaces the dated $11.1 billion proposal that would have appeared on the ballot otherwise.

Ben Adler of Capitol Public Radio followed the final negotiations and approvals closely on August 11 at http://bit.ly/1yoDYFC and laid out the politics as they stood that day at http://bit.ly/1oECjLc. Coverage during the debate included commentary by the *LA Times*' Jim Newton on the politics and context of the bond negotiation -- and the fragility of LA's own water infrastructure -- at http://lat.ms/1opsBx7.

A key goal of the negotiations was to make the plan "tunnel neutral," enabling the argument to be made that it would serve popularly supported water infrastructure needs without advancing the more politically divisive Delta twin-tunnels project. (Inevitably, some clearly bond-supported measures do have their own opponents. Notably the bond would support the Temperance Flat dam proposal, on which see blogger Patricia McBroom's article last February at http://bit.ly/1B9TQzP.)

It promptly became an election issue whether the measure on the ballot actually would help the Delta tunnels after all. Editor Robert Gammon in the *East Bay Express* presumed it would, and opposed it on that basis, at http://bit.ly/1pdQQi1. The *Sacramento Bee*'s

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Dan Walters argued on the contrary that by supporting other responses to water needs "it not only reduces the hydrological rationale for the tunnels, but the financial one as well." (See http://bit.ly/1yO33tL.) The measure meanwhile picked up support from the agriculture lobby (see http://bit.ly/1onzSru).

California finally prepares to regulate groundwater statewide

In SB 1168 and AB 1739 (by Sen. Fran Pavley, D-Agoura Hills and Assemblymember Roger Dickinson, D-Sacramento, respectively), the Legislature considered major legislation that would make California the last Western state to regulate groundwater use statewide.

The bills set out to shift some of the deep political currents in the state, and debate on them isn't over yet. Dave Puglia of the Western Growers Association told the *LA Times*, "California hasn't attempted to change water law this dramatically in 100 years." See http://lat.ms/1yjQUML. The *Bee* editorialized in favor at http://bit.ly/1pRhsn4. Both bills were still nearing passage as of this writing. The League of California Cities included both measures on its "Hot Bills" list for August with a "no position" notation at http://bit.ly/1tRpiOc. Conservation groups were supporting the bills. Reuters reported Monday at http://reut.rs/1vgEeZY that many farm groups, but not all, opposed them.

Meanwhile the *Desert Sun* was headed into litigation with Coachella Valley water officials over access to records of landowners' groundwater use (see desert.sn/VqAAgx), the *Fresno Bee* reported volunteers were delivering drinking water to households where the wells had run dry in Tulare County's East Porterville (see http://bit.ly/1wy2xnY), and celebrities were shipping in water by tanker truck to their estates in Montecito (see http://bit.ly/VPC6sH).

Plea from mayors to enact relief bills for Inland Empire towns

As of this writing, SB 69 and AB 1521, relief bills for new and newly expanded Inland Empire towns, had passed the Legislature and were awaiting Governor Brown's signature decision. Frank Johnston and Karen Spiegel, mayors of Jurupa Valley and Corona respectively, published an op-ed in the *Press-Enterprise* asking Governor Jerry Brown and the Legislature to save Jurupa Valley's incorporated status and protect other towns with the bills. See http://bit.ly/1tIhC1y. The two mayors claimed endorsements from 17 other Inland Empire mayors in asking the Legislature for the temporary financing lifeline that the bills represented. Together the bills would provide relief for cities that completed incorporations or annexations just before the Legislature took expected Vehicle License Fee income out of their local budgets in 2011. For past coverage see http://www.cp-dr.com/node/3515 on SB 69 and http://www.cp-dr.com/node/3516 on AB 1521.

AB 1537 to redefine Marin as 'suburban' goes to Governor

AB 1537, to redefine Marin County from "metropolitan" to "suburban" for affordable housing density purposes, passed the Legislature in late August and was before Governor Brown as of this writing. Its proponent, Assemblymember Marc Levine, D-San Rafael, posted an August 22 statement celebrating the bill's passage, by a unanimous vote of the Assembly, at http://bit.ly/XQdh1P. Levine earlier joined Marin County Board of Supervisors President Kate Sears in an op-ed arguing its case at http://bit.ly/VPO71f. Their argument said the bill would only apply for eight years, and would not limit local jurisdictions' power to make their own density decisions. A June *I-J* writeup at http://bit.ly/1x2WZi6 provides more background on the bill, which would reduce default densities for affordable housing in the county from 30 to 20 units per acre.

Future of SB 270 plastic bag bill still in doubt

The SB 270 plastic bag ban fight went high-profile again in late August as the measure neared its final chance at passage this session. A vote was imminent as of August 27.

On Monday, August 25, the United Food and Commercial Workers yanked support from the bill. On the #SB270 Twitter hashtag meanwhile, the @YesonSB270 account and conservationists did battle with @BagTheBan and grocery and business representatives. The @YesonSB270 account links to a pro-ban lobbying coalition's site at http://www.yesonsb270.org/ that ironically was still displaying the UFCW logo on August 26. The @BagTheBan account is described at http://www.bagtheban.com/about-us as "a project of Hilex Poly." In a vote August 25 the bill fell narrowly short of passage in the Assembly, as reported thoroughly by Capitol Public Radio's Ben Adler via Twitter. Per Adler it can return to the floor once more for reconsideration before the end of this year's session and that return may be on August 28. The *Sacramento Bee* covered the August 25 vote and the UFCW withdrawal at http://bit.ly/1qffyN8.

Readers who want to watch this one to the bitter end may want to follow @AdlerBen on Twitter or watch the #SB270 hashtag.

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Local governments were still meanwhile moving to pass their own bans in anticipation of a grandfathering provision in SB 270. Monterey County granted initial approval for a plastic bag ban in its unincorporated areas, with the final approval vote set for August 26, per the *Monterey County Weekly* at http://bit.ly/1qLbHus. See http://www.cp-dr.com/node/3481 for details on the grandfathering provision and prior legal and legislative history.

AB 52, CEQA bill on Native American sacred sites, advances with significant amendments

AB 52, the Native American sacred sites bill that was among the few possibilities this year for a legislative change in CEQA law, was moving forward as of this writing with amendments that in part appeared designed to reassure landowners.

The bill would strengthen tribes' rights to involvement in consultation processes under CEQA where a newly defined category of Tribal Cultural Resources would be affected by a proposed project. The League of California Cities tracking page at http://bit.ly/VR4w5r shows the bill passed the Senate August 27.

On that same page, the League links to a letter dated July 9, in which it expresses "concerns" about the definition of a tribal cultural resource, about the time(s) for required consultation in the environmental review process, and about tribal notification rules. An August 25 letter then states the League's concerns have been removed.

Amendments since July change the definition of a "California Native American tribe" to define it by reference to the state's Native American Heritage Commission contact list rather than per federal recognition. They add a great deal more specificity about process. And they appear to give the lead agency reviewing a project the primary say in defining whether a cultural resource is significant for purposes of the statute.

Assemblymember Mike Gatto, D-Los Angeles, published an op-ed in support of the bill at http://bit.ly/1IcCXzB. Legislative analyses available through the bill tracking page at http://bit.ly/1wyoe7e show endorsements from tribal governments and conservationists but opposition from the California Chamber of Commerce, a smaller number of tribes, and utility, solar, business and construction organizations. The Chamber of Commerce was cited in the analysis as arguing the bill would "create a disincentive to invest in land" by creating uncertainty on which places might be defined as Tribal Cultural Resources.

In selected other legislative news:

- Readers who follow oil and gas law or fracking issues may be interested in the Stoel Rives mid-August review of oil and gas bills in the Legislature at http://bit.ly/1pIPlra.
- The *Orange County Register* reported AB 1102, to protect the use of fire rings on Orange County Beaches by requiring a Coastal Commission permit for their removal, failed in the Senate in mid-August. See http://bit.ly/1qKpagc.
- Supporters of SB 1199, which would have designated the Upper Mokelumne River as "wild and scenic," told the *Stockton Record* it had failed in the Legislature. See http://bit.ly/1onHhXK.
- The *Sacramento Bee* is reporting at http://bit.ly/1q2t0oJ that the vigorous anti-"gas tax" campaign to postpone the calendared AB 32 expansion into fuels taxation is "finished for the year" with the postponement bill, AB 69 by Assemblymember Henry Perea, D-Fresno, now "sidelined" by outgoing Senate President Pro Tem Darrell Steinberg, D-Sacramento.
- The *Bee* reported SB 1183, authorizing localities to vote in fees for bike facilities by initiative petition, was on the Governor's desk. See http://bit.ly/1q3b5go.
- Governor Jerry Brown has signed AB 1963, a bill by Assembly Speaker Toni Atkins to ease post-redevelopment logistics. The League of California Cities summarizes the new law at http://bit.ly/1kCizIo, with a link to the text. Its major provision is to give the Department of Finance an extra year, until January 1, 2016, to approve Long Range Property Management Plans for real estate caught up in the redevelopment dissolution process.
- It was also the League that picked up this *Monterey County Weekly* item on the signing of SB 2119: http://bit.ly/1owAgYO. Per bill analyses on the SB 2119 official site at http://bit.ly/1y0NRJk, the law adds the possibility of a transactions and use tax to the types of taxes that a board of supervisors can invite residents of a county's unincorporated areas to vote into effect for themselves. ■

>>> OPR's new traffic draft rethinks congestion

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analysis under CEQA should not be used to re-fight land use decisions made in a general plan.

OPR also recommends that anything above the regional VMT average should be considered a significant impact and that the approach should be phased in, applying to areas around transit stops first and all locations later.

OPR's long-awaited recommendations came five weeks after the deadline called for in SB 743, last year's CEQA reform law, which called upon the agency to examine alternatives to LOS within the CEQA context. If adopted, the recommendations could have widespread implications for how traffic is mitigated under CEQA and the leverage local governments have over developers in dealing with traffic congestion issues. The recommendations will now be subject to public comment -- comments are due October 10 -- before formal amendments to the CEQA Guidelines are made. The document is sure to generate widespread discussion among those involved in planning and development in California.

The OPR paper is sweeping because it challenges head-on the longstanding view that the primary goal of traffic analysis under CEQA is to identify and relieve traffic congestion – or, as the paper calls it, "automobile delay". "By focusing solely on delay, environmental studies typically required projects to build bigger roads and intersections as 'mitigation' for traffic impacts," the paper states.

The OPR paper proposes a news section to the CEQA Guidelines, Section 15064.3, which clarifies that "the primary consideration, in an environmental analysis, regarding transportation is the *amount* and *distance* that a project might cause people to drive" (italics mine), rather than the amount of automobile delay. Specifically, the proposal calls for a focus on vehicle miles traveled and trip generation.

VMT and the Regional Average

In proposing the shift away from traffic congestion, OPR is essentially proposing a shift toward vehicle miles traveled, or VMT, as the traffic standard to use in CEQA analysis. This is not surprising – OPR had given every indication that this is would be the direction – but this week's recommendations spell out in more detail how OPR imagines this would work.

Although under SB 743 OPR cannot specify mandatory significance thresholds, the paper does make some recommendations about how lead agencies might set those thresholds. Among OPR's recommendations:

Projects that generate greater than the regional average VMT might be considered significant. This standard would likely tie CEQA traffic analysis to the reduction in per-capita VMT called for in each region's Sustainable Communities Strategy under SB 375.

Projects close to transit stops might be considered below the significance threshold.

General plans and specific plans that conform with the region's Sustainable Communities Strategy might be considered below the significance threshold.

Growth-Inducing Impacts

Almost as bold as the proposal to switch to a VMT standard is OPR's suggestion that expanded roadways in congested areas – currently often a *mitigation* under CEQA – should actually be examined as a possible *growth-inducing impact* under CEQA.

Relying heavily on a paper prepared for the Air Resources Board by Susan Handy of UC Davis and Marlon Boarnet of USC (see http://bit.ly/1opM6ER), OPR concluded that "adding new traffic lanes in areas subject to congestion tends to lead to more people driving further distances" and thus induces more travel. Thus, the OPR proposal would actually *require* lead agencies examine the growth-inducing impacts of adding new roadway capacity in congested areas.

Dealing With Traffic Congestion

Apparently anticipating pushback from local agencies accustomed to using CEQA to gain leverage over developers on traffic improvements, OPR addresses the question of dealing with traffic congestion in several ways:

- The proposed CEQA Guidelines amendments clarify that local safety impacts are appropriate for CEQA analysis. This would appear to be partly in response to concerns from Caltrans about the dangers of queuing at freeway onramps and offramps. However, traffic safety has not traditionally been subject to CEQA analysis.
- OPR said that the actual environmental impacts of traffic congestion – including noise and air quality – should continue to be analyzed under CEQA. However,

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>>> OPR: LOS analysis still will have uses

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mitigation for these impacts should be crafted to solve the specific noise and air quality problems, not traffic congestion problems.

- OPR clarified that local governments would still be free to analyze congestion impacts – just not within the context of CEQA. "Many jurisdictions have level of service standards in their general plans, zoning codes, and fee programs," OPR wrote. "These proposed Guidelines would not affect those uses of levels of service." Local governments, however, can be expected to push back with the idea that a local plan or ordinance will not give them as much leverage over developers as a state law like CEQA. In many cases, cities have traffic impact fees and then impose additional traffic mitigations on top of that as a result of traffic analysis under CEQA.

Phase-In

Many cities around the state had expressed concern about a sudden switchover from one standard to another. For this reason, OPR proposed the following phase-in:

- The new standard will not be retroactive: Approved projects will be subject to mitigations extracted under the old standard.
- The new standard will only apply at first to areas around transit stops (as defined in state law).
- Local governments may apply the standard to other areas on an "opt-in" basis at first.
- The standard will apply statewide as of January 1, 2016 ■

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LOS to VMT: the arguments have begun

BY MARTHA BRIDEGAM

It can sound like a simple step, to end Level of Service (LOS) metrics in CEQA transportation analysis. The more conceptually elegant Vehicle Miles Traveled (VMT) metric is easy to welcome in the abstract, with its incentives for shared and active transportation, its arguably simpler calculation methods, its potential to realign CEQA analysis with state climate protection law – and most of all, its escape from the addictive spiral of induced demand for broad, free-flowing highways that, under the logic of LOS analysis, always need widening again.

But in early August the Governor's Office of Planning and Research (OPR) published a detailed discussion draft setting out an alternative transportation impacts metric in compliance with last year's SB 743 mandate. And alongside the big-picture discussions of environmentally conscious innovation, the technical arguments began. Last week, with the appearance of a highly critical online comment from the Holland & Knight law firm, the depth of the disagreements involved became clearer.

The state-level policy people who watch this matter aren't so much debating the merits of rail lines or bike lanes. Nor are any of them professing special love for the LOS metric or the internal combustion engine. They're talking about which LOS analyses are still going to be around (a lot), and who may now apply which version of VMT analysis under CEQA, and whether suggested means of reducing VMT represent constructive reforms or potentially "shackling" mandates, and what mix of fresh data with safe assumptions can be used, and whose fault it will be if the assumptions are wrong, and how much this all needs to have to do with the unforgiving math of AB 32 emissions reductions.

Only the 'beginning of the end of LOS'

Amanda Eaken, the sustainable communities deputy director with the Natural Resources Defense Council (NRDC), said "I hope this is the beginning of the end of LOS." But for now the likelihood is that VMT and LOS analyses will both continue to be used, though somewhat differently than before, each still representing important means of negotiating what it means to take up space, and who has power to do so.

VMT analysis is already familiar under the Clean Air Act and, more recently, from greenhouse gas (GHG) emissions analysis and Sustainable Communities Strategies under SB 375. Christopher Calfee, Senior Counsel with OPR, called it "a different way of measuring transportation impacts using tools that people are already familiar with" that would involve "building on that information that's already been developed."

Environmental and transit advocates have their criticisms of the proposed draft but on the whole they like it better than do advocates for developers. For one thing, advocates had not been certain that the proposed new standards would apply statewide – and they do. Or rather, if the guidelines are adopted they'll begin to apply statewide under a phase-in schedule starting with developments within half a mile of transit, and will cover the whole state as of January 1, 2016. NRDC senior attorney David Pettit called it "properly aggressive as to the dates of phase-in." Eaken said state agencies, including Caltrans, were solidly behind the plan.

As Bill Fulton explains this month in CP&DR, local governments will still be applying LOS standards for reasons unrelated to CEQA. These are likely to include general plan provisions, zoning, safety, municipal Congestion Management Programs and impact fee programs. As he also mentions, analysis within CEQA may use LOS approaches to analyze some impacts including noise and air quality – though under the proposed guidelines "automobile delay" (congestion) would not be treated as an environmental impact in itself. (Eaken said she and representatives of the Council of Infill Builders pushed successfully for the clarification regarding auto delay, and it "is going to change things fundamentally.")

'Radical mitigation recommendations'?

Amanda Monchamp, a partner with the Holland & Knight law firm who works on land use and environmental issues, called the draft "far broader and more complicated than the statute actually requires," with "a huge list of mitigation measures" applicable to infill projects, and with continuing requirements for LOS analysis on air quality, noise and "hot spots".

Since Monchamp's comments, the Holland & Knight firm has posted an aggressively phrased critical commentary on the draft. The comment is primarily authored by partner Jennifer Hernandez, with Monchamp and another attorney as coauthors. It charges that "OPR's VMT proposal goes far beyond CEQA's statutory scope by recommending mitigation measures that delve into socioeconomic issues, undermine regional and local greenhouse gas reduction

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plans, attempt to erode local agency constitutional land use policy authority, and increase the cost, complexity and litigation uncertainty already inherent in CEQA."

The Holland & Knight comment refers to Subdivision II(d)(6) in a proposed amendment to Appendix F of the guidelines. which lists 14 "potential measures to reduce" a project's VMT. The comment characterizes them as "radical mitigation recommendations". The listed possibilities for reducing VMT include "Improving or increasing access to housing," "Increasing access to common goods and services such as groceries, schools, and daycare, "Incorporating affordable housing into the project," "Improving the jobs/housing fit of a community," and assorted other measures including traffic calming and bicycle parking. The firm's argument attacks each of these suggested items as a possible means of imposing new demands or mandates on developers beyond the scope of existing CEQA requirements.

The commentary argues the existing proposal should be "tabled," and Monchamp said she would be calling for "a shorter, cleaner, more precise change" consistent with SB 743's direction but more narrowly tailored and more effective in facilitating infill.

The dual use of LOS and VMT analyses concerned Monchamp as a possible cause of extra work for project proponents. She mentioned, for example, the North San Jose area-wide traffic mitigation process, which imposes a clearly defined traffic mitigation fee on projects. She said that process was all LOS-based, whereas, under the new state-level requirements, VMT analysis would have to be added for projects in that area.

Prospects of extra paperwork and uncertainty likewise concerned Mott Smith of Civic Enterprise Associates LLC, a board member with the Council of Infill Builders.

Smith viewed rules on matters like air quality and noise impacts as "back doors for people to reintroduce LOS" into the CEQA environmental process. With requirements such as general plan consistency determinations in the mix, he said builders could end up "right back where we started and we're still looking at level of service."

(Anticipating such discussion, OPR wrote in the draft, "there is nothing in SB 743 that requires analysis of noise or air quality in a transportation section of an environmental document.")

Calfee responded further that LOS analysis for air quality and noise does include a vehicle component but it's not the full LOS traffic study – the analysis does not have to be done "intersection by intersection, roadway segment by roadway segment." He said the reduced analysis for those purposes may rely on data about traffic volumes, speeds, or other trip generation data that are readily available. So he said, "it's not like you'll be doing a full LOS analysis" at least for those purposes.

He said local decisionmakers choosing how to address congestion outside the CEQA context are entitled to a lot of deference if challenged in court – more so than under CEQA – so "This should end up being a good thing for both cities and developers."

But Smith said "I don't have the comfort that... this protects infill builders trying to do the right thing when they've got hostile actors" contesting their projects. He questioned, for example, whether, if he built a project without parking – which ostensibly would reduce VMT – an opponent might point to impacts from cars circling the building in search of parking, hence might "push me into EIR territory" due to the "potential air quality and noise consequences of lowering my VMT."

So in Smith's view, the new approach "pushes the potential impact from one category on the checklist... to other categories," in which case "it doesn't give me the protection that I really need to do smaller-scale... lower-value projects and more incremental projects in infill areas."

(On the issues of noise, air quality, safety and circling for parking, Calfee wrote: "These issues are already being raised in the CEQA context. This proposal does not create those issues.")

Smith said, "If these rules are successful they will make it easy for builders like me to build good incremental, walkable, transit-accessible projects in California cities." He praised the drafters for intending such an effect but asked, "Can they protect me from hostile CEQA petitioners?"

Calfee responded in writing to a somewhat different but related question: whether VMT presents a disadvantage to infill projects by comparison with the prior LOS analysis. He wrote that LOS analysis "puts infill at a disadvantage" compared with lighter-traffic urban peripheries, while "Vehicle miles traveled will not penalize infill development the way that LOS does, because infill developments tend to reduce the amount of driving that is required to get between destinations. The proposed Guidelines go a step further and say that if the project is located near transit, the transportation impact is likely less than significant, which

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>>> LOS to VMT: How to choose thresholds of significance?

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should in most cases eliminate the need for any study."

Thresholds of significance

Many technical responses to the OPR draft have focused on its guidance for local lead agencies in setting thresholds of significance for projects' VMT levels, viewing it as one of the most novel parts of the document.

And under that heading of threshold-setting guidance, areas of argument and uncertainty include how much latitude exists for local lead agencies to choose their own thresholds, and whether the standards should be strict enough to reduce GHG emissions in accordance with statewide AB 32 goals.

The OPR draft states in its "background" narrative, "SB 743 did not authorize OPR to set thresholds, but it did direct OPR to develop Guidelines 'for determining the significance of the transportation impacts of projects[.]'" It argues for viewing the threshold of significance as the regional average VMT, in part because metropolitan planning organizations (MPOs) are already gathering regional VMT data under SB 375. The draft's proposed new Guidelines Sec. 15064.3(b)(1) suggests, "A development project that is not exempt and that results in vehicle miles traveled greater than regional average for the land use type (e.g. residential, employment, commercial) may indicate a significant impact."

Calfee said the proposed guidelines only gave suggestions as to what may or may not be a significant impact. He returned repeatedly to the established legal principle that "Under CEQA it's always the lead agency that determines the level of significance."

On the other hand, a consultant who works in the area suggested the choice to define even an optional threshold standard directly in the Guidelines at the state level would implicitly burden local lead agencies to justify any different choices they might make.

Asked how opposition to VMT metrics might appear, Pettit suggested "a local jurisdiction that hates this idea may fool around with the threshold of significance" so projects would qualify easily – but he warned, local officials raising the threshold too high could expect "litigation by some pesky enviro group, maybe us."

But Calfee said, "That is something that's baked into CEQA... It's always up to the lead agency to determine what's significant... That's not something that this proposal is causing."

Calfee emphasized repeatedly that lead agencies have power to choose their own VMT models. In an interview he noted the proposed guidelines mentioned out applicable case law supporting such power: "That should give relief to lead agencies in picking the model that's right for them." He wrote separately: "The proposed Guidelines expressly note lead agency's discretion in the choice of methodology, the use of professional judgment in adjust model inputs and outputs, and apply the rule of reason. These will each make lead agency decisions more defensible."

Are regional average VMT thresholds fair? To whom?

Eaken's strongest comment on the OPR draft was that significance thresholds based on regional average VMTs would not do enough to meet statewide climate change goals for 2030. She asked, "Is average good enough?"

What qualifies as "average" is part of that question – and a reason why, to a developer, a regional average might not always seem locally fair.

Eaken brought up the possibility of unfair leniency under a "regional average" standard in the very large region covered by SB 375 programs of the Southern California Association of Governments (SCAG) – which states it serves "more than 18 million residents" across Southern California. She suggested it might be too easy for a project that fell below the VMT average for such a large region to qualify as having "no significance".

The consultant (who asked not to be named) made a converse point: with relatively dense Los Angeles bringing down overall average VMTs for the SCAG region, some projects in Riverside County might be almost automatically over the regional average.

Calfee, for his part, said actually the city of Riverside was fairly densely populated so downtown "you can be fairly comfortable that you have a lower VMT," while projects in outlying areas could reduce VMT by means such as adding a commercial component to a residential subdivision.

To the objection that Riverside still wasn't Santa Monica, he said the standard wasn't based on Santa Monica, but on a regionwide average, and it was still up to lead agencies to set the level of significance.

The consultant, however, questioned whether the surveys and methodology yet existed to be sure of VMT levels in the Riverside area as divided up by type of use (office, housing, etc.).

On the more general matter of SB 375 consistency, Calfee

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Promise of $130m draws out a specialists' debate on getting sustainable development right

BY MARTHA BRIDEGAM

It's only $130 million. That's all the Affordable Housing and Sustainable Communities (AHSC) program has to spend this coming year. Spread out statewide, it's enough money to help steer some projects toward the prescribed goal of reducing greenhouse gas (GHG) emissions through environmentally responsible development. It's not enough to build a lot from scratch.

The rules being drafted now to distribute that money will channel more funding later if the Legislature keeps its promise to give the program 20% of future cap-and-trade auction proceeds. (*Streetsblog*'s Melanie Curry reported last week that six mayors of larger California cities paid a lobbying visit to Sacramento in part to make sure the promise held.) But in view of California's housing and infrastructure needs, $130 million isn't big money, not really.

(For comparison, the funding lost to the demise of Redevelopment is $5 billion to $6 billion statewide. And this month in Los Angeles, investors reportedly paid about $130 million for just one building: the former May Company department store at Broadway and 8th. See http://lat.ms/1zpU7Lr.)

When the Strategic Growth Council (SGC) held workshops in mid-August on how to build program guidelines within the new statutory framework, the strength of the response testified to the level of municipal hunger for housing and infrastructure subsidies, as well as interest in sustainability for its own sake.

For the Oakland workshop of August 14, the limited supply of 150 free tickets, reserved via online registration, ran out several days in advance; the organizers announced a waiting list and asked to be told of cancellations.

Chances for projects in the works

Some participants assuredly had projects in mind that could benefit from even a small fraction of that AHSC money.

During the Oakland workshop, Steve Hernandez, a housing specialist with the San Leandro Community Development Department, spoke in a small-group session about his city's need for affordable housing funds. He noted Redevelopment was gone – and with it the affordable housing set-aside of tax increment funds – and that San Leandro's federal HOME program funds had declined by 65% since 2010.

He had a project in mind that AHSC could help: affordable housing across from the San Leandro BART station to be developed in cooperation with BRIDGE Housing. He explained later that the 115 affordable units of Phase 1 "will be underway," hence too far along to qualify for AHSC money, but the new program's Notice of Funding Availability (NOFA) "may coincide with the timeline of Phase 2," so "perhaps Phase 2 can be awarded AHSC program funds" to help build a further 85 units of senior housing planned for the site. (The project is the Cornerstone Apartments – see http://www.sanleandro.org/depts/cd/projects/crossings.asp.)

Talk at the workshop wasn't so much about what to build first, as about choosing which increments to support: what tendencies to encourage most; who could or should benefit soonest from more compact, less vehicle-dependent planning; and just how much holistic multimodal public-private goodness could be realistically coaxed to bloom in each particular project using the frugal irrigation methods available.

Tyrone Roderick Williams, director of development with the Sacramento Housing and Redevelopment Agency, came to the workshop discussion with a large-scale project in mind: the remaking of Twin Rivers, an aging complex of single-story public housing buildings between the closed railyards and the curve of the American River north of downtown Sacramento. Described on the SHRA site at http://bit.ly/1lvmTth, the project is the recipient of a federal Choice Neighborhoods Planning Grant and part of a larger city plan to redevelop the River District-Railyards area.

At the workshop, Williams said Twin Rivers would replace the existing public housing with new units, add more housing, build a new transit station, and add support for a nearby school as part of a plan involving many public and private partners and funding sources. Documents on the Twin Rivers project Web site discuss goals of enhancing employment, education and health services for existing residents in and near the public housing, including the neighborhood's large homeless population.

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>>> Promise of $130m draws out a specialists' debate

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In an interview after the meeting, Williams said AHSC might be able to help with the housing component of the project next to the transit station, though the city wouldn't determine its proposal to AHSC until the guidelines for the program emerged. He said nobody had yet mentioned amounts of money but it appeared types of funding could vary with a project's type and scale.

How many purposes can one project serve?

Williams had been one of several discussion participants warning against creating pressures on projects to serve too many GHG-reducing purposes at once. Later he clarified, "Those of us who are engaged in affordable housing are facing those pressures all the time." For example, under the competitive scoring system for low-income housing tax credit applications, "you get more points by putting more services and more aspects of the project into the budget" so "in an effort to try to score higher you include other things to help you get points but all of those things cost money." He said, "My hope is that we don't fall into that same situation where to be competitive you're trying to do so many things that by the time you get funded your project costs have gone through the roof in an effort to get funded."

Meea Kang, president of Domus Development and a board member of the California Infill Builders Federation, brought concerns to the same small-group discussion at the workshop about the difficulty of keeping neighborhood-serving businesses in the retail spaces of new affordable housing developments. For example (she wrote afterward), "it's difficult to lure new grocery stores into underserved communities." And "it is the developer that has to make the substantial upfront investment to build out the retail improvements and there is always a risk that the small business may not survive the first two years."

At the workshop she suggested that, to encourage genuinely local businesses in underserved communities, program money might be used for tenant improvements – for example, to convert a warehouse to a farmers' market. That would serve GHG reduction, she said, because people wouldn't have to drive so far to the store. She suggested sometimes housing and retail might be best "decoupled" as separate side-by-side projects in different buildings, where the retail use might require its own separately managed support program.

As a developer she had a different perspective from Williams' on the problem of trying to do too much. She said, "every local government is going to know that these projects are going to get funded," so from her experience "you've got every other agency coming at you with barriers." She clarified later that she had in mind, for example, "utility districts, special fee districts, various departments," and "expensive impact fees or mitigation requirements or both." Meaning that each agency would like to see the funded project contribute to a needed improvement in that agency's own area. Her concern being that such demands would together "overburden the project to fix all the problems of the past."

Kang suggested the process should allow the agencies to work together and support projects while cooperating to reduce overall fees and burdens in order to get more built.

Ignacio Dayrit, a brownfields redevelopment specialist from the Bay Area, put in, "Bingo, it's Prop 13." Kang agreed. Dayrit said, "Someone had to say that." Because, he said, "If you've owned property for more than ten, 15 years, you're not paying your fair share of anything [in taxes]." That is, so the burden falls on the developer to pay for infrastructure needs.

(Williams, in his interview, responded to a question about the idea of a cooperative application process by saying any application of the type sought "will require a partnership" by its nature, as at Twin Rivers.)

A professionalized process

The people who reserved and used the Oakland workshop's 150 tickets – developers, planners, officials, advocates – were nearly all policy or planning professionals in some way.

That led to a well-informed level of discussion – for example, when Dayrit noted that only federal subsidies remained deep enough to serve the poorest tenants, he didn't have to spell out the point that "affordable housing" is "only affordable to the middle income" range. Participants already understood the difficulty, for private nonprofits, of using tax-credit housing subsidies to house tenants at incomes below 50% of area median. (In many areas, a minimum-wage or means-tested fixed income is far less.)

On the other hand, it was a conversation held more among professionals than among directly affected community members.

Devilla Ervin, a fourth-generation West Oakland resident now in his second year of AmeriCorps service at West Oakland Middle School, came to the workshop as a member of a community activist group, New Voices are Rising. Wearing a business-casual polo shirt, he said he quickly

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Coastal Commission approves highway expansion, works at access issues

BY MARTHA BRIDEGAM

In a rare four-day session, the Coastal Commission gave the heart of one day to hearing and approving a $6 billion project to expand the I-5 transportation corridor north of San Diego. It spent even more of another day deciding to close the Children's Pool during seal pupping season in La Jolla. And as special beach access legislation moved toward the Governor's desk, discussion returned repeatedly to the Commission's dispute over Martins Beach in San Mateo County with property owner Vinod Khosla.

The I-5 corridor project is to add four new express lanes with other rail, highway, mass transit, bicycle and pedestrian infrastructure. Commissioner Gregory Cox, a San Diego County Supervisor, catalogued the project's span of six cities, four Local Coastal Programs (LCPs), six lagoons, 27 miles of roads and bike paths, and 86 different projects to unfold over 40 years, saying it's "mind-boggling to me".

It arrived at the Commission as largely a done deal, backed by a parade of local government officials. But environmental concerns came up at the meeting over increased emissions from the expansion, and over concern for movement of water and wildlife around the lagoons that have outlets to the ocean running under the freeway.

Caltrans staffer Gabriel Buhr gave the core presentation on the plan, known formally as the North Coast Public Works Plan / Transportation and Resource Enhancement Program (PWP/TREP). The Commission approved enabling revisions to the LCPs for San Diego, Encinitas, Carlsbad and Oceanside.

Critics from the Cleveland National Forest Foundation presented the harshest criticisms of the expected greenhouse gas emissions, saying health impacts and lower-emissions alternatives had not been adequately considered, and claimed the project was justified with an outdated model that overestimated future traffic growth. A Sierra Club representative also made a presentation expressing concern for the project's ability to do its share toward 2030 and 2050 carbon emission reduction goals.

Commissioner Dayna Bochco issued a closing call for more rapid transit statewide but said "that's going to take a will of the people that we haven't seen yet."

For local coverage see, e.g., the City News Service report via ABC 10 News at http://bit.ly/1p6yKia.

Children's Pool closure approved

The Commission agreed to close the Children's Pool for seal pupping season between December 15 and May 15, per the staff report as confirmed by the *U-T* account at http://bit.ly/1uV7dzt. The closure faced local opposition, in part because the pool is used for therapeutic salt-water swimming by people with disabilities. See prior coverage at http://www.cp-dr.com/node/3511.

The Pacific Legal Foundation's "@TheCoastWatch" Twitter account, which makes a monthly point of livetweeting Coastal Commission meetings, was posting updates on the highway expansion matter for about four hours including an hour-plus lunch break. It posted about the Children's Pool for a total duration of six hours, including a lunch break followed by closed session that together lasted about an hour and three-quarters.

Martins Beach: Commission "fighting back"

The subject of Martins Beach kept coming up through the session, via staff reports, Commissioners' comments and public comment, with a continuing sense that the Commission's own dignity had been placed at issue by Khosla's heavy criticisms of demands from the Commission. (See http://www.cp-dr.com/node/3548.) After the *SF Chronicle* published an op-ed by Khosla at http://bit.ly/1kC5bUH, Coastal Commission Executive Director Charles Lester responded in an answering *SF Chronicle* commentary at http://bit.ly/1ALlfHp. Khosla made derogatory comments about "unreasonable" Commission and San Mateo County demands in July (see http://lat.ms/1nQ0XDi), Later that month the Commission began to conduct a "prescriptive rights survey" asking the public to report on past enjoyment of the beach as an amenity. (Further discussion appears in the July CP&DR PDF issue; the survey is on the Commission site at http://www.coastal.ca.gov/.)

Commissioners Steve Kinsey and Carole Groom, and the California Coastal Protection Network's Susan Jordan, thanked Lester for his op-ed. Jordan said "A lot of us were really happy to see the Commission fighting back" and described the prescriptive rights survey response as "extremely strong."

As part of his monthly Chair's Report, Kinsey said, "This Commission does respect private property rights" but said

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>>> Coastal Commission: focus on visitor access

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the Commission also "operate[s] under the rule of law and that's what our permitting processes would allow for."

The SB 968 Martins Beach bill, now passed by the Legislature and awaiting Governor Jerry Brown's signature decision, instructs the State Lands Commission to begin negotiations for a public access right-of-way to the property. If it does not succeed by 2016, the bill authorizes though it does not require the State Lands Commission to proceed under Section 6210.9 of the Public Resources Code, which allows use of the state's eminent domain power. The initial version of the bill had required the Commission to obtain the access whether voluntarily or otherwise. As reported by the *Mercury News* at http://bit.ly/UJxiVZ and http://bit.ly/1ojZQw3, there was a strong effort in June to remove eminent domain from the bill entirely, led by Khosla's lobbyist, Rusty Areias. Now with California Strategies, Areias is a former Assembly member and, as Jordan noted reproachfully, a former Coastal Commissioner.

The *SF Chronicle* has background on the bill at http://bit.ly/1BSD3BN, including discussion of last October's court decision in favor of Khosla's right to close the access, which is now under appeal. A more recent access suit by the Surfrider Foundation completed closing arguments in July and is still under submission. The case is No. CIV 520336 in San Mateo County Superior Court, available via http://openaccess1.sanmateocourt.org/openaccess/civil/default.asp. The legal and lobbying history is spelled out usefully in successive committee and floor analyses available on the Legislature's bill tracking page via http://bit.ly/1zoIPqO.

An argument in Khosla's favor by the Pacific Legal Foundation appears on the organization's site at http://bit.ly/YS8GfD, announcing inter alia, "The Commission couldn't care less about Khosla's (or any other coastal landowner's) private property rights."

Seal Beach project hung up on land swap approval

In a debate heavy on process technicalities, a tied vote of the Commission narrowly backed a staff position that an application for a 10.9-acre residential development in Seal Beach remains incomplete, primarily because part of the property is subject to a public trust easement.

Applicant Bay City Partners, supported by the local governments of Seal Beach and Marina Beach, had been asking the Commission since last fall to authorize the development, consisting of 32 single-family houses plus a park, on a cleaned-up site formerly used for a power plant. But Commission staff had repeatedly rejected the application as incomplete, seeking more assurances about future visitor-serving uses, data about the expected rate of return on the project (in part to compare with likely returns from alternative visitor-serving uses), and, most important, proof that the public trust easement rights claim would be resolved.

Bay City had proposed to compensate for the loss of public trust land status to private housing development by swapping over the easement to a different property and making a payment into a public trust lands fund. The swap requires approval by the State Lands Commission, which for its part had provided a statement saying it did not object to the Coastal Commission acting first -- but Coastal Commission staff argued the ball was in the State Lands Commission's court. Coastal Commissioner Mary Shallenberger agreed with the staff, saying, "It's their job, it's not our job."

A public commenter questioned whether the proposed substitute public-access property is as attractive as the proposed development site, and Laguna Beach activist Penny Elia told the Commission, "We continue to lose and not replace our low-cost visitor-serving accommodations. I hear you talk month after month about your desire to have this."

The August meeting's determination was only that the project application is incomplete; the application must return to the Commission for consideration on the merits.

Commissioners viewing the application as incomplete included Kinsey, who said he didn't want to insist on "rate of return" information but did want to see State Lands Commission's final action.

The Commission then wrapped up the matter by way of a tricky forest of negatives: the members reached a 5-5 tie vote on a motion to reject a determination that the application was incomplete, with the maker of the motion requesting a "no" vote. After consultation with staff counsel Hope Schmeltzer, it emerged that the vote's effect was to consider the application incomplete. Hence proponents must return with new information -- including, presumably, some more definite finding by the State Lands Commission. For more information see the agenda packet at http://documents.coastal.ca.gov/reports/2014/8/T13a-8-2014.pdf, which includes extensive transcript material from the prior November 2013 Coastal Commission hearing on the matter.

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>>> Coastal Commission: enforcement actions, ex partes

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Aliso Canyon initial hotel renovation continues for now

In the continuing Aliso Canyon hotel dispute, the project's owner and objectors made public comment appearances to dispute the propriety of continuing renovation work at the "Ranch at Laguna Beach" hotel and golf course, pending a later Coastal Commission hearing on a proposal to expand the hotel. For now Commission staff said limited renovation work could continue.

Commission staff and project proponent Mark Christy said the current work was per properly issued local permits to do safety renovations on the old hotel building within the scope of the existing structure's dimensions and hence within existing LCP limits. Laguna Beach Planning Manager Ann Larson told the Commission the current work consisted of upgrades to the existing hotel building such as electrical and plumbing work, roofing, ADA compliance, and replacing windows and doors -- as distinct from the proposal on appeal, which was "an intensification of the hotel."

Christy and coastal activist Penny Elia each reported having offered to give the other a ride to a negotiation that the other rejected. Christy said he had welcomed a thorough inspection by Coastal Commission staff, said he had invited others including Elia to inspect, and insisted, "it's a spectacularly beautiful place, it's Fenway Park to me, we're not screwing this up."

But the filer of the Coastal Commission complaint, local neighbor Mark Fudge, joined by his wife, Sharon Fudge said the current renovation work went beyond mere remodeling and should be reviewed as if it were new construction. And Suzanne Forster, vice president of the Banning Ranch Conservancy, said the hotel renovation project had already cleared and trimmed habitat areas and urged the Commission to make the owners stop work on the property until the Commission could take up the permit issue.

The Commission's deputy director for the region, Sherilyn Sarb, told the Commission that based on the inspection the line between renovation and "intensification" of the work was "not as clear as we'd like" but that staff had not seen reason to stop the ongoing work and did not consider the matter an open enforcement case.

In other Coastal Commission matters --

- The Commission approved a major but not deeply disputed revision to the City of Grover Beach LCP's Land Use Plan. See http://documents.coastal.ca.gov/reports/2014/8/F14b-8-2014.pdf.
- Dr. Terry Welsh of the Banning Ranch Conservancy urged the Commission to oppose the ranch owners' pressure to resume mowing work on the area of the Banning Ranch mesa that is proposed for a major housing development. He said past mowing had been harmful to new scrub growth and grasses, vernal pools, and other important habitat. While he agreed some mowing was necessary around oil rigs in the area, he said mowing around the rigs hadn't been done as aggressively in areas not proposed for developments. Commissioner Jana Zimmer complained of "ping-pong presentations" by community and ranch representatives amid the pendency of an enforcement action on the property. Later in a return to the issue, Commissioner Martha McClure asked when the procedure for a permit application "trumped" a concurrent enforcement action, or vice versa, while Lester suggested they could often proceed independently.
- Under a separate agenda item, Chris Pederson, Deputy Chief Counsel with the Commission, gave a presentation on ex parte contacts. The related agenda packet, at http://documents.coastal.ca.gov/reports/2014/8/F4.5-8-2014.pdf, includes an informal advice letter from the state Attorney General's Office explaining that Commissioners should not engage in ex parte communications "in the context of Commission enforcement proceedings," and a letter from the Commission's own counsel providing a "question tree" on when to decline an ex parte communication. The Latham & Watkins firm has since published a detailed commentary on these and other ex parte issues, and on the Commission's new SB 861 enforcement authority, at http://bit.ly/1mQ1qqa.
- The Commission granted one last approval stage for the slightly queasy deal signed at the April Coastal Commission meeting to allow the 368-unit Sand City resort project to go forward in Monterey County. It approved revised detailed findings based on its prior actions in April, and on last-minute communications from environmentalists and project proponents in August. For local Monterey County coverage leading up to the hearing see the *Weekly* at http://bit.ly/1p4J7Nf and the *Monterey Herald* at http://bit.ly/1uIR1oL. Approval of the "eco-resort" for an ecologically fragile dune area upset some environmental advocates in April, especially regarding potential harm to snowy plover on the site. (See http://www.cp-dr.com/node/3474.) For the proposed revised findings, including last-minute revisions, see the large

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>>> Coastal Commission: easier density bonuses?

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(516 pp.) agenda item file at http://documents.coastal.ca.gov/reports/2014/8/F16a-8-2014.pdf. The Sand City project was a subject of conflict and litigation for years. For some of the prior history see CP&DR's prior coverage from 2008 at see http://www.cp-dr.com/node/1963.

- Amy Trainer of the Environmental Action Coalition of West Marin showed underwater video taken by a volunteer of the Drake's Estero oyster farming area, showing pipes, oyster shells, debris, and "marine vomit" sea squirts (see http://baynature.org/articles/marine-vomit-threatens-drakes-estero/). The video appears with her public comment presentation under the fourth agenda item for August 12 at http://bit.ly/1zCohLq.
- Executive Director Charles Lester said pending second-round applications for LCP assistance grants are posted on the Web site for public review. (See http://coastal.ca.gov/lcp/lcpgrantprogram.html for the Commission's currently closed joint grant solicitation process with the Ocean Protection Council.)
- Lester's report said UC Press would publish an expanded seventh edition of the California Coastal Access Guide late this month.
- Commissioner Cox mentioned support for a beach sanitation bill, SB 1395, which as of this writing was still moving toward passage in the Legislature. The tracking page for the bill is at http://bit.ly/1mFM33t.
- The Commission approved downzoning on 14 properties in Arcata to change industrial designtions to industrial-commercial "in response to changes in the region's economic base from formerly dominant timber and forest products processing uses to lighter manufacturing and fabrication uses."
- A deputy director's report mentioned pending approval for a transfer of 226 military family housing units from the Navy to a public-private venture at Point Mugu, approval for flood damage repairs at Stinson Beach, and approval to drop fluorescein dye in the ocean for an oil spill simulation exercise involving Chevron and state and federal officials. See http://documents.coastal.ca.gov/reports/2014/8/W12-8-2014.pdf.
- The Commission approved its own prior findings on the Trump golf course matter in Rancho Palos Verdes, specifically not resolving the disputed flagpole issue and deferring that to a later hearing. (See prior coverage at http://www.cp-dr.com/node/3528.)
- The Commission approved a plan to build academic housing for the Kavli Institute for Theoretical Physics at UC-Santa Barbara.
- The Commission agreed to amend the Carlsbad LCP density bonus provisions in light of recent years' legal developments, generally by easing housing requirements for developers. It newly allows affordable housing units to count toward density bonus standards even if they are also counted toward developers' compliance with local inclusionary housing requirements -- a practice previously banned as double-dipping. It follows AB 2280 from the 2008 session by relaxing the standard developers must meet in seeking concessions affecting affordable housing and by requiring that "in order for a city to grant a density bonus to a developer who is donating land to that city for very low income housing," the city must first identify funding for the deeply subsidized units that the land gift contemplates. Coastal Commission staff viewed the amendments as merely procedural, hence recommended they be approved.
- Community activists from Marina Del Rey spoke in public comment to protest a renovation project in the Mariners Village development by Marina Admiralty Partners on the north side of the Marina Del Rey harbor entrance. They said it would cut a thousand trees, including nesting trees for great blue herons and double-crested cormorants, and would add 92 boat slips jutting into Marina Del Rey Channel in a place that would create a safety hazard: at the inside of the "elbow" where entering boats must turn left from the channel to enter the harbor. They said many existing boat slips of suitable size are already vacant at existing marinas and argued that such existing yacht slips could be renovated instead to suit the developers' plans. They said a public promenade at the Mariners Village site would be helpful but argued against the rest of the plan.
- The Commission approved four house construction projects on Mildred Ave. in Venice although three of the four lots were previously occupied by a community garden, which was evicted in January.
- The Commission granted approvals with addenda to two adjacent three-story mixed-use projects in the Princeton-by-the-Sea marina town on the San Mateo County coast.
- The August meeting agenda, annotated with outcomes and linking to all staff reports and addenda, is at http://coastal.ca.gov/meetings/mtg-mm14-8.html.
- The next Commission meeting will be a short two-

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day session at the Smith River Rancheria of the Tolowa Tribe, near the Oregon state line. Its agenda is already posted at http://coastal.ca.gov/mtgcurr.html.

- Items to be heard in September, in addition to a budget report, include the usual complement of Southern California luxury home renovations, which could ring differently in the sparser environment of Del Norte County.
- The September agenda includes revised findings on replacing the existing 40-room Beach Plaza Hotel in Long Beach with a larger new condo/hotel/restaurant complex. Per the staff report, it's likely to be grist for the Commission's ongoing debate on preserving "lower-cost" coastal recreation access. Commissioner Martha McClure, who as a Del Norte County Supervisor will play host to the board in September, mentioned during the July debate that "lower cost" had a different meaning "in my part of the world." (See http://www.cp-dr.com/node/3528 and, for the archived video, Agenda Item 18 for July 9 at http://bit.ly/YWXA93.) (Separately in the August session, Lester responded to an inquiry from Commissioner Cox about a special workshop on low-cost accommodations by saying it could possibly happen late this year or early next year.)
- A further item that appears on the September agenda only as a postponement request could be worth watching for later: a proposed revision to the Laguna Beach Local Coastal Plan to ease permitting for second residential units. ■

Los Angeles County Supervisors give their final vote to Santa Monica Mountains LCP

By Martha Bridegam

On August 26 the LA County Supervisors gave final approval to the Santa Monica Mountains Local Coastal Program (LCP) on its return from the Coastal Commission with amendments approved there July 10.

Since the Commission had already approved the whole program with county participation, a quick pro forma approval and a round of congratulations might have been expected. Instead, a group of indignant winemakers and winelovers made a last attempt to beat the plan before it went through.

The plan now bounces back to the Commission and what's expected to be final certification. After which, for the first time in 28 years of trying, Los Angeles County will receive delegated authority to issue its own coastal development permits for the Santa Monica Mountains area.

As reported at http://www.cp-dr.com/node/3528, on July 10 the Coastal Commission reached what appeared to be the last substantive approval for the Local Coastal Program (LCP): endorsement of the county implementation ordinances for the previously passed Land Use Plan. (See http://www.cp-dr.com/node/3474 for prior Land Use Plan coverage.)

The July 10 meeting had been heavy with valedictory talk about success in negotiating approval for the LCP (especially through a negotiated compliance program for properties with horses) and about its status as a closing accomplishment for the area's district Supervisor, Zev Yaroslavsky, whose term is about to end. At that meeting, vintners and farmers, led by consultant and vineyard owner Don Schmitz, objected to a blanket rule against new vineyards in the mountains -- but their fight looked to be more or less fought.

Going into the August 26 Supervisors hearing, an *LA Times* editorial favored the approval (see http://lat.ms/1nfSqdz) and the Los Virgenes Homeowner's Federation urged members to turn out in support (see http://lvhf.org/2014/08/support-our-lcp-attend-bos-meeting-aug-26/).

However, the *Wine Spectator* at http://www.winespectator.com/webfeature/show/id/50439 and the *LA Weekly* at http://bit.ly/1tJj82F showed that winegrowers and appreciators of the relatively new Santa Monica Mountains terroir were still trying to fight the portion of the all-but-final LCP that would ban the planting of new vineyards.

The *LA Times* posted immediate coverage of the August 26 hearing and vote at http://lat.ms/1taoZ48. It reported Schmitz said the mountains had just obtained federal recognition as an American Viticultural Area and told the Supervisors, "It is an ironic tragedy that you are contemplating destroying this at this very moment." KPCC reported at http://bit.ly/1vOERHR that the four Supervisors at the meeting (Sup. Mark Ridley-Thomas was absent) "split 2-2 on a decision to amend the plan to make more allowances for agricultural uses, including wineries," but since the amendment lacked a majority, the board "then voted to adopt the program as proposed."

The *LA Times* reports the Supervisors passed the plan 3-1 with Supervisor Michael D. Antonovich opposed. Extensive attachments for the matter are linked from Item 6 on the Supervisors' August 26 agenda at http://bit.ly/1trtFz7. ■

legal digest

California Supreme Court's Tuolumne ruling: direct adoption of initiatives does not require CEQA review

BY WILLIAM FULTON

The California Supreme Court has ruled that an initiative is not subject to the California Environmental Quality Act even if it is adopted by a local elected body rather than placed on the ballot.

"Because CEQA review is contrary to the statutory language and legislative history pertaining to voter initiatives," wrote Justice Carol Corrigan for a unanimous court, "and because policy considerations do not compel a different result, such review is not required before adoption of a voter initiative."

The case involved the expansion of a Wal-Mart in the City of Sonora. In 2010, as the city was considering expansion of the Wal-Mart to sell groceries, Wal-Mart supporters circulated an initiative petition to adopt a specific plan to accommodate the proposed expansion. Rather than placing the measure on the ballot, the Sonora City Council adopted the initiative. The Tuolomne Jobs & Small Business Alliance – apparently similar to other labor-oriented groups elsewhere in the state that use CEQA to fight Wal-Marts – sued, claiming the city should have conducted a CEQA review before adopting the initiative. The Court of Appeal ruled in favor of the Jobs & Small Business Alliance, but the Supreme Court reversed.

In so doing, the court reminded the plaintiffs that CEQA is just a law and its procedures must sometimes be balanced against procedures contained in other state laws. The ruling may encourage Wal-Mart to end-run CEQA-based opposition in the future by going to the ballot, at least when project approvals depend on legislative, rather than quasi-judicial, approvals.

In large part, the ruling turned on the Supreme Court's interpretation of Elections Code Section 9214, which lays out the procedure for how local governments must deal with initiatives. Under the code, when presented with a valid set of signature petitions, a city council or county board of supervisors has three options: place the measure on the ballot, adopt it as is, or order a report examining the initiative's impacts, which must be produced within 30 days. This report is typically known as a "9212 Report," after the Elections Code section that lays out this option.

The Supreme Court said the Elections Code and CEQA conflict, for two reasons. First, CEQA review cannot be conducted in the time frame permitted under the Elections Code. "Direct adoption would be severely curtailed and, for many initiatives, no longer an option, because it would be impossible for cities to comply with both CEQA and the section 9214 deadlines," Corrigan wrote.

Even if the time problem could be solved, Corrigan added, a CEQA review would be pointless because 9214 requires that a city or county choosing direct adoption must adopt the initiative "without alteration". "[C]ities would be powerless to reject the proposed project or to require alterations in the project that would lessen its environmental impact, no matter what the review showed."

The court also had to assess whether the Elections Code trumps CEQA, since both are statutes. (The direct-adoption option is not enshrined in the Constitution but was created by the legislature.) Reviewing the history of attempts to subject initiatives to CEQA via legislation – all of which have failed – the Supreme Court concluded that it is clearly not the legislative intent to subject initiatives

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to environmental review. In adopting the 9212 report law in 1987, for example, the legislature "enacted the bill that gave local governments the option of obtaining an *abbreviated* review to be completed within the short time frame required for action on initiatives" and "specifically *rejected* the bill that would have required CEQA review before a land use initiative could be directly adopted or submitted to voters."

Finally, the Supreme Court addressed the question of whether direct adoption without CEQA review "offends public policy" – a valid topic for analysis, according to Corrigan, if legislative intent is unclear. The court concluded this interpretation does not offend public policy.

"Appellants warn that developers could potentially use the initiative process to evade CEQA review, and that direction adoption by a friendly city council could be pursued as a way to avoid even the need for an election," Corrigan wrote. Referencing *Associated Home Builders etc., Inc., v. City of Livermore*, 18 Cal.3d 582 (1976), which found that state housing law trumps a local growth-control initiative, she added; "Of course, the initiative powers may also be used to *thwart* development. However, these concerns are appropriately addressed by the Legislature. The process itself is neutral." And, she noted, if local voters dislike the direct adoption of an initiative, they can overturn it via initiative.

The Case: *Tuolomne Jobs & Small Business Alliance v. Superior Court of Tuolomne County*, No. S207173 (filed August 7, 2014), at http://www.courts.ca.gov/opinions/documents/S207173.PDF. Briefs in the matter are available for download at http://www.courts.ca.gov/25993.htm. ■

Fourth District rules special 'electorate' not OK for San Diego's special hotel district

BY MARTHA BRIDEGAM

California's Fourth Appellate District on August 1 struck down a special hotel tax that San Diego hotel operators had willingly imposed on themselves, as members of an unusually defined special district, to raise money for the city's convention center expansion. The court ruled that the tax required a two-thirds citywide popular vote for approval.

Under Proposition 13, broadened in 1996 by Proposition 218, special taxes must be approved by a two-thirds vote of "the qualified electors" of the affected district, also expressed as "the electorate" of the district.

A detailed opinion by Justice Cynthia Aaron, joined by Justices Judith McConnell and Terry O'Rourke, found the City of San Diego did not get past that requirement when it enacted an ordinance in November 2011 to define a special "electorate" by reference to a special Convention Center Facilities District (CCFD). Under the ordinance, the special district consisted of hotel properties throughout the city; its voters were described as being the owners and lessees of properties with hotels on them.

The San Diego *Union-Tribune*, reporting on the decision, said hotel operators had "eagerly embraced" the tax in hopes that the convention center expansion would increase overall hotel stays, amid concern that the annual San Diego Comic-Con was outgrowing its venue. See http://bit.ly/1uhsEdG.

Aaron's opinion found that both Proposition 13 and the city charter required special taxes to be approved by two-thirds of the "qualified electors," who, she wrote, are the same as the registered voters for the geographic area affected -- i.e., in this case, the whole city. She separately ruled that the subset of landowners and lessees did not "comprise a proper 'electorate'," citing in part to *Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 297 for the rule that property qualifications are not permitted in elections on special taxes.

Aaron cited *Neilson v. City of California City* (2005), 133 Cal. App.4th 1296, for the rule that "qualified electors" are registered voters under Proposition 13. She additionally followed *Rider v. County of San Diego* (1991) 1 Cal.4th 1, which blocked a prior San Diego attempt to raise money for public works – at that time, for "justice facilities" – by inviting city voters to approve a supplemental sales tax by a majority vote. The Rider court had found a two-thirds vote was needed instead.

The new San Diego CCFD ordinance had borrowed language and approaches from the Mello-Roos Act, which does allow a vote of landowners to approve taxes for community facilities in districts that do not affect residential propert. (The San Diego CCFD ordinance described hotel use as other than residential.) But the opinion said the Legislature's relevant interpretation of Proposition 13 dates from 1979 and trumps the 1986 amendment to the Mello-Roos Act that the city relied on. Aaron wrote that the Legislature, in enacting Mello-Roos, showed no sign of having considered who were "qualified electors" in the context of Proposition 13. She wrote further that, in any case, Proposition 13's careful anti-loophole provisions, at article XIII A, § 4, require a two-thirds vote of the actual registered voters, and "[a] statute cannot trump the Constitution".

Further, the court found it unfair that hotel landowners or lessees would be viewed as the only parties burdened by the tax and hence entitled to control its use, because guests of hotels would be affected too.

San Diego activist attorney Cory Briggs represented one of the challengers, San Diegans for Open Government, which at https://www.facebook.com/sandieganstoropengovernment/info states support for "responsible and equitable environmental development" and government transparency. Briggs called the ruling "a huge victory for the taxpayers and the voters" in comments reported by the KPBS news station on August 1. The station quoted Mayor Kevin Faulconer as highlighting economic advantages of the Convention Center expansion that the tax was meant to fund, while former mayor Jerry Sanders, now with the Chamber of Commerce, called it "a great loss for our city."

KPBS quoted a spokesman for

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the City Attorney's office, Michael Giorgino, as saying, "As we stated in the 2012 briefing...the most reliable way to impose this tax is to place it on the general ballot... Two and a half years later, it still is." With this, KPBS linked to a document dated February 1, 2012 on the San Diego City Attorney's site at http://www.sandiego.gov/cityattorney/pdf/2012/120201boundaries.pdf saying that creation of the CCFD "borrows, in part, from a similar structure used by the City of San Jose in 2010 to finance its convention center project," and that "Lawyers within our office have differing opinions" on the plan's legality. It looked toward the city-filed validation action that was the underlying case in last week's decision.

As of this writing, it was not clear if the city would appeal to the state Supreme Court, and no further activity appeared on the case docket. See http://bit.ly/1qOniUV. The case is *City of San Diego v. Shapiro*, No. D063997, at http://bit.ly/1qAm0gb.

(In a separate matter, the City Attorney's office on July 10 announced it had defeated an effort by Briggs to enjoin the use of "over $1 million raised by 18 San Diego Business Improvement Districts" for events and street amenities. See http://www.sandiego.gov/cityattorney/pdf/news/2014/nr140710.pdf.)

As the convention center expansion plans headed back to the drawing board, JMI Realty, builders of the existing Petco Park ballpark, were proposing a new San Diego Chargers stadium design that could be combined with a convention center expansion plan. See http://bit.ly/1kXMNpo.

In an op-ed at http://bit.ly/1lQ4mCp, City Council member David Alvarez argued that the process by which hotel landowners agreed to tax themselves for the convention center expansion had been short on public participation and would need to broaden into "a citywide civic dialogue".

In a Twitter thread beginning at https://twitter.com/sdutOsborne/status/498487348531712001, Alvarez debated with Mark Cafferty of the San Diego Regional Economic Development Corporation over the quality of the public process last time around. Cafferty argued that the last approach came out of an inclusive process at the start and had a wide coalition "to push this plan across the finish line"; Alvarez wrote in part, "hoteliers dominated previous process. No real input from public was sought or accepted... Real question is: are hoteliers and the mayor willing to engage the public on options going forward?"

[Bill Fulton is the outgoing Planning Director of the City of San Diego. He did not participate in the drafting of this article.] ■

High-Speed Rail bond authorization upheld; already headed for appeal

BY MARTHA BRIDEGAM

Fresh from its major *Atherton* win (see Bill Fulton's writeup in the July issue), the High-Speed Rail Authority won another key ruling July 31 that upheld the validity of its authorization to issue bonds for the project and said the project's preliminary funding plan did not need to be redone.

The petitioners in the matter, led by the Kings County Board of Supervisors, have already decided to appeal the ruling. *Planetizen* has a roundup on the appeal and other surrounding litigation at http://www.planetizen.com/node/70784. (Here's a direct link to the *Fresno Bee* coverage: http://bit.ly/YSFPYD.) The online docket in the bonds case, at http://bit.ly/1p74WAL, shows several petitions for rehearing now pending but no direct Supreme Court appeal as yet.

The July 31 opinion by Presiding Justice Vance Raye of the Third District Court of Appeal began with a sense of unfinished business: "Substantial legal questions loom in the trial court as to whether the high-speed rail project the California High-Speed Rail Authority... seeks to build is the project approved by the voters in 2008. Substantial financial and environmental questions remain to be answered... But those questions are not before us in these validation and mandamus proceedings."

But Raye quickly narrowed the question at hand to one that the court could answer. Joined by Justices Ronald Robie and M. Kathleen Butz, he wrote that the necessary findings were appropriately made to support issuance of the high-speed rail project bonds under 2008's statewide Proposition 1A, and the preliminary funding plan created under 1A had already "served its purpose" of providing guidance to the Legislature -- hence could not be undone nor redone. The 49-page appellate opinion is helpfully thorough with procedural history.

Raye's opinion reversed November 2013 rulings by Sacramento Superior Court Judge Michael P. Kenny. Kenny's Superior Court orders had invalidated the bonds and ordered the High-Speed Rail Authority to rescind and redo its preliminary funding plan -- meanwhile preventing issuance of the bonds.

Raye found no basis for Kenny's "highly unusual scrutiny of the Finance Committee's determination that it is 'necessary or desirable' to grant the Authority's request to authorize the issuance of bonds." He wrote that Kenny expected too much of the 1A-appointed Finance Committee, whereas Raye found nothing that required the Finance Committee to make factual findings, nor to hold a public hearing. He wrote that it was not the business of the trial judge to decide if the project was "necessary or desirable" because the Finance Committee had "exceptionally broad discretion" to make that decision. In Raye's view, too-close judicial scrutiny of such matters was not only unwarranted but also began to create a separation of powers problem.

The appellate opinion offered leeway for the tendency of large public works projects to change after their approval, notably citing a ruling in *East Bay Municipal Utility District v. Sindelar* (1971), 16 Cal.App.3d 910, that validated a late additional issue of bonds under an approval granted by voters years before for a "water development project" although the construction work was essentially done and the expected 10-year project duration had gone by.

As to the preliminary funding plan, Raye's decision found the challenge to it "was too late to have any practical effect," while "it is too early to challenge a yet-to-be approved final funding plan" as further required by Proposition 1A. It found the rail authority had no "clear and present ministerial duty to redo the preliminary funding plan" at a point after the Legislature had already appropriated funds to be raised by the bonds. And it found that Judge Kenny properly rejected a late-raised request to undo the appropriation decision, in part on separation of powers grounds.

The *LA Times* writes up the case and its significance at http://lat.ms/1tRpccu and *Streetsblog LA* discusses the updated state of high-speed rail funding at http://bit.ly/1v2TY3C. *Streetsblog* says the decision "has removed the most significant legal impediment" to the high-speed rail project. The online docket is at http://bit.ly/1p74WAL. The case is *California High-Speed Rail Authority v. Superior Court*, No. C075668 and the decision is at http://bit.ly/1nXNf7e.

Otherwise the High-Speed Rail project has had mixed fortunes this month: The State Public Works Board approved a string of 158 properties to acquire in Fresno and Kings Counties (*Fresno Bee* at http://bit.ly/1tgY8Sk; Stoel Rives blog at http://bit.ly/1uVNLWl). The High-Speed Rail Authority itself met to discuss use of its $250 million in cap-and-trade funds from the upcoming fiscal year's budget. (See http://bit.ly/1rXvMcW.) But the *LA Times*' Ralph Vartabedian wrote that construction has been slowed by lack of authority over land. (See http://lat.ms/1n9fCdC.) ■

Legal Briefs

Priceline hotel case goes to State Supreme Court

The California Supreme Court has agreed to review an appellate ruling that Priceline, Expedia, Travelocity and similar "online travel companies" (OTCs) did not have to pay San Diego hotel tax on income they derived using a "merchant model" approach to marketing local hotel rooms. The Second District ruled that if an OTC contracts with a hotel for a block of rooms at a fixed wholesale rate, and then retails them to guests at higher prices, then city hotel tax is due only on the wholesale rate, not the difference the OTC receives.

The case is *In Re Transient Occupancy Tax Cases*, also referred to as *City of San Diego v. Priceline*. It addresses a coordinated group of cases involving several online hotel room brokers. The Second District decision, as amended on rehearing March 27, is now at http://bit.ly/1tTvm8S. The ruling looks back strongly to two prior cases in Santa Monica and Anaheim, as shown in the Second District's online docket at http://bit.ly/UPLUTn. The Supreme Court online docket is at http://bit.ly/1soYBAy. As of August 26 it noted an extension of time to serve and file the opening brief on the merits until October 14, 2014. For further details on the appellate decision see http://www.cp-dr.com/node/3464. The League of California Cities posted a comment welcoming the review decision, which it had supported in an amicus letter, at http://bit.ly/1o88aV9.

[Bill Fulton did not participate in the drafting of this article.]

First District allows San Francisco's ParkMerced expansion

The First Appellate District cleared the way on August 14 for a major redevelopment of the ParkMerced apartment complex in southwestern San Francisco. ParkMerced is a rare dense high-rise complex in the mainly low-rise western half of the city, located next to San Francisco State University and near the Stonestown shopping mall. The *SF Chronicle* reports on the decision at http://bit.ly/1qpnusx and the *SF Business Times* has more details on the project at http://bit.ly/1w8ikcI.

The project would keep the existing high-rise towers but would gradually demolish and replace the existing 1,538 townhouse units on the property, in each case inviting displaced tenants to move to new units within the complex, with promises of continued rent-controlled tenancy – promises whose enforceability, however, has been disputed. The project would add 5,679 more units to the complex beyond the replaced units. The city Planning Department's page with project documents is at http://www.sf-planning.org/index.aspx?page=2529.

The case is *San Francisco Tomorrow v. City and County of S.F.*, No. A137753. The partly published opinion is available at http://www.courts.ca.gov/opinions/documents/A137753.PDF.

Attorney Robert McMurry of the Jeffer Mangels firm posted a commentary at http://bit.ly/1tvcyyi emphasizing the CEQA discussion in the opinion – which, he wrote, "the court regretfully chose not to publish." He called the decision valuable because the court characterized the project's tenant relocation plan as a "design feature" rather than a mitigation measure, in what he termed "one of the rare court descriptions of the differences between project design features in mitigation measures and how they should be treated in the EIR." His commentary further welcomed the court's analysis accepting the FEIR's greenhouse gas emissions assessment under AB 32.

McMurry's commentary suggests a request for further publication could be made, though none has appeared as of this writing. To follow the online docket see http://bit.ly/1mGwnNa.

Opponents of the project have been San Francisco Tomorrow, at http://sftomorrow.org/, and the ParkMerced Action Coalition, at http://www.pmacsf.org/. Neither group's site has posted a comment directly on the ruling.

CA Supreme Court denies review on Potrero Hills Landfill approval ruling

The California Supreme Court has chosen to let the First District's decision stand upholding the Potrero Hills Landfill expansion in *SPRAWLDEF v. San Francisco Bay Conservation & Development Commission*. The Supreme Court's July 30 denial of review is in the online docket at http://bit.ly/1ouADDt. The underlying decision is at http://bit.ly/XRjU3U as modified June 25 to correct the name of the Solano County Local Protection Program. It was first filed April 29 and was ordered published May 28. As discussed at http://www.cp-dr.com/node/3507, the First District ruling was noted for crediting the developer's own estimation that a reduced-scope alternative plan would not have been "economically feasible."

U.S. Supreme Court denies review on Drakes Bay Oyster Co. permit

The Supreme Court on June 30 turned down a last-chance request to review *Drakes Bay Oyster Co.*

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v. Jewell. With this highest level of appeal gone, it appears the family-run oyster farm at the heart of the dispute has run out of ways to continue operation on Drakes Estero within the Point Reyes National Seashore.

The *San Francisco Chronicle* reported a somber scene at the farm the day after the review denial, with tears, a bagpiper, and a parting seafood feed. See http://bit.ly/WQExg3.

SCOTUSBLOG has Supreme Court filings in the matter at http://bit.ly/1qgi59O.

The campaign to keep the long-established oyster farm operating had become a political cause taken up by libertarians, Sen. Dianne Feinstein, and others. The petition for Supreme Court review, filed by attorneys with Stoel Rives, SSL Law Firm and Briscoe Ivester & Bazel, called the case a disagreement of wide importance that had "started as a regional dispute between modern environmentalists and wilderness extremists." (See http://bit.ly/1s8EzJJ via SCOTUSBlog.)

But when the farm's already-extended lease expired at the end of July, local environmental advocates said it was long past time to replace the oyster operation with conversion to wilderness. See http://bit.ly/1z3eVLn.

According to briefs by both the oyster company and the Interior Department, the possibility that the oyster farm lease would not be renewed had been under discussion since at least 2005. According to the Interior brief, current owner Kevin Lunny was made aware of the possible conversion to wilderness when he bought the oyster farm in 2004. The existing permit ran out in late 2012. After that the oyster farm stayed open on a series of stays and short-term agreements.

Major news features on the matter have included a report from KQED at http://bit.ly/1kTFmih and another from *California Lawyer* at http://bit.ly/1s8zDo0.

9th Cir. denies review, amends an important sentence, on Salton Sea ruling

The Ninth Circuit on August 1 stood by its May 19 decision to uphold a sale of Colorado River water to San Diego that could leave a broader ring of dry shores around the Salton Sea – despite arguments that resulting dust could harm air quality.

Judge Andrew Hurwitz, joined by Paul Watford and William Smith, made minor amendments to his May opinion, primarily to clarify that Imperial County and the State of California do not receive Colorado River water under their own contracts with the Secretary of the Interior. The amended document revised a statement on the nature of the contracts to read: "Imperial Irrigation, not the Secretary, ultimately controls the allocation of the water that it receives (subject, of course, to existing laws and contractual obligations.)"

The *National Law Journal*'s Amanda Bronstad wrote in May at http://bit.ly/1o9pZIT that the court's prior version of that sentence drew praise from an attorney with the Imperial County Air District, which was otherwise a loser in the case. It then read, "Imperial Irrigation, Imperial County, and the State of California, not the secretary, will ultimately determine how to allocate the water they receive. If they so choose, they could allocate every acre foot of their Colorado River water to the Salton Sea."

Per the Journal, Attorney Alene Taber viewed the May version of the sentence as signifying "that the secretary's authority ends when the water is delivered at Imperial Dam and Parker Dam, and that the secretary does not decide how the water is allocated."

The August 1 ruling refused both a request for reconsideration and a request for hearing en banc. The case is *People of the State of California ex rel. Imperial County Air Pollution Control District v. U.S. Department of the Interior*. The new decision document is at http://1.usa.gov/1lvjCu9. For more detail see http://www.cp-dr.com/node/3494.

In other legal news –

- The California Supreme Court denied requests for both review and depublication on the *218 Properties* case on conversion of mobile home parks from rental to owner-occupied status. The online docket is at http://bit.ly/1qpu2am and CP&DR's prior coverage at https://www.cp-dr.com/node/3497.
- Per the Second Appellate District, when a city-owned tree falls on private property, it can constitute a "public improvement" for inverse condemnation purposes. The opinion is at http://bit.ly/1pQ8fLE and a *National Law Review* writeup at http://bit.ly/1tbgg1B.
- Petitioners in the *Saltonstall* CEQA challenge to the Sacramento Kings arena project filed a notice of appeal July 31, but the *Sacramento Bee* reported the Kings began demolition at the downtown site after the *Saltonstall* petitioners lost an injunction petition in Superior Court. The *Bee* reports the Kings' counsel argued that the NBA could purchase and move the team if the arena failed to open

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on time in October 2016. See http://bit.ly/1s7rraV and http://bit.ly/1saO6AV. With Sacramento's new court document fee rules in place, it will cost you to read the *Saltonstall* Notice of Appeal and the prior decision, but the names on the appeal are just discernible through the gray slashes digitally imposed on the "preview" display. See the online case index, which itself is free to view, at http://bit.ly/1nnr0Sd.

- The State Supreme Court on August 20 denied a request for partial republication of the underlying Fifth District appellate opinion that it reversed in *City of Los Angeles v. County of Kern*. The Supreme Court's July 7 decision concerned a challenge by the City of Los Angeles to a Kern County ballot measure that barred the city government from using biosolids from sewage to fertilize land that it owned in Kern County. The actual decision interpreted the federal grace period statute at 28 U.S.C. §1367(d) to bar Los Angeles from filing a state suit in the matter 78 days after a federal court dismissed its case on preemption grounds. For the State Supreme Court's online docket in the matter, see http://bit.ly/1BTPXj0.
- California's Fourth District ordered publication and modification, by orders August 13 and 14, of its opinion in *San Diego Gas and Electric Company v. Schmidt*, No. D062671. The court upheld a jury verdict setting the compensation amount, rejecting SDG&E's petition for judgment notwithstanding the verdict, and also awarding litigation expenses to the defendant property owners. The property's "highest and best use" was said to be an open-pit aggregate mine. The decision is at http://bit.ly/1vOJDJ5 and the online docket at http://bit.ly/1p57aMh.
- The Ninth Circuit ruled that a citizen suit under the federal Solid Waste Disposal Act was not a proper means for neighbors of railyards to redress alleged harm from diesel particulate pollution, because "Defendants' emission of diesel particulate matter does not constitute 'disposal' of solid waste" under the statute. The case is *Center for Community Action and Environmental Justice v. BNSF Railway Co.* For the opinion, see http://1.usa.gov/1peSyyY.
- In *Sierra Club v EPA*, the Ninth Circuit held petitioners had associational standing to challenge a permit issued by the EPA for construction of a gas-fired power plant. It found the EPA wrongly allowed Avenal Power to build the plant in accordance with grandfathered prior air quality standards that were in effect when the company first applied for the permit. Instead, the court found "the Clean Air Act unambiguously requires Avenal Power to demonstrate that the Avenal Energy Project complies with the regulations ineffect at the time the Permit is issued." For the opinion, see http://1.usa.gov/1oH6T1G.
- A Ninth Circuit opinion by Judge Jay Bybee upheld decisions by the city of San Diego to deny conditional use permits for cell towers run by the American Tower Corporation. The case is *American Tower Corporation v. City of San Diego*, No. 11-56766, opinion at http://1.usa.gov/1rbUydl. ■

insight WILLIAM FULTON

>>> A Note To Readers

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with an academic institution 1,600 miles away in Texas will actually help make CP&DR better. But my recent experience in San Diego has given me a new appreciation of what you, CP&DR's readers, need to know on a daily basis. And my move to Rice University brings with it two major advantages: First, it eliminates a lot of conflicts of interest that have made it difficult for me to make CP&DR as good as it can be; and, second, the move to Texas will give me great motivation to keep in touch with California planning – and bring that knowledge to CP&DR.

The decision to move from San Diego to Houston was a difficult one to make. I have greatly enjoyed my time as the chief planner for California's second-largest city – the fast pace, the interaction with politicians and developers and citizen leaders, and, yes, even the constant CEQA battles. But those of you who know me well can probably readily understand why I'm going: Rice is committed to making the Kinder Institute the leading think tank on urban and metropolitan issues in the country. The chance to lead that effort is too good an opportunity to pass up – and, ultimately, ought to help cities all across the nation, including those in California.

I cannot tell you how important my San Diego experience has been in rounding out my knowledge of planning practice in California – and, in particular, understanding what you need to know on a daily basis. In particular, I have come to appreciate how important – and, often, how frustrating – the California Environmental Quality Act is in the daily life of practically every planner in California. I hope that this experience has already been reflected in the columns and articles I've written over the past few months. I can assure you that I will be bringing all of that experience to my role as publisher and columnist.

My work as San Diego planning director in many ways presented the greatest challenge I have faced in 28 years of publishing CP&DR. The all-consuming nature of the job made it difficult for me to devote enough attention to the publication. The fact that I was a practicing planning director in a city constantly making planning news of statewide importance – and, furthermore, that I was a Form 700 filer with limitations on my outside income – made it very difficult to do the job I needed to do as owner and publisher of this publication.

My new job will be pretty consuming too – but it frees me of many conflicts of interest and puts me back in the mode of writing, analyzing, and thinking about planning issues full-time. That's good for CP&DR. We can finally move forward with so many things, including a long-overdue update of the Web site.

And the move to Texas does not mean I'm checking out of California. California planning has been the primary focus of my life for 30 years, and I owe it to you – and to myself – not to surrender the knowledge and networks I have built during that time. You'll see me around at major conferences and events in California, and soon enough I will have to plunge into producing the fifth edition of Guide to California Planning.

All this will be made much easier by the amazing efforts of CP&DR's new editor, Martha Bridegam, who came on board in March. You've probably already noticed the vast increase in both the quality and the volume of CP&DR's coverage in the last few months. That's mostly due to Martha – an experienced Bay Area journalist and lawyer with a longtime focus on housing issues.

So over the next few months, as I make this transition to Texas, Martha and I will be working hard to make CP&DR better than ever. And look out for me: I'll probably see you at the California APA conference in September and, beyond that, at the annual UCLA Land Use Planning and Law Conference in January. Because just as California will continue to be an important part of my life, I hope CP&DR will continue to be an important part of yours.

Bill Fulton
Publisher

>>> LOS to VMT: how tough is VMT analysis anyway?

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pointed to current "tension" between the CEQA mandate for LOS-based traffic studies and SB 375 calls for reductions in automobile use: "What we've done in these proposed guidelines is attempt to alleviate that tension." He said the proposal was intended to allow lead agencies to use models and data in their analyses that are also used under SB 375, "so that should lead to fewer conflicts, not more."

(The proposal's Subdivision 15064.3(b)(1) reads in part, "Land use plans that are either consistent with a sustainable communities strategy, or that achieve at least an equivalent reduction in vehicle miles traveled as projected to result from implementation of a sustainable communities strategy, generally may be considered to have a less than significant impact.")

Monchamp argued SB 375's "sustainable communities" requirements were only "just starting to come into bloom" and "the schemes aren't harmonized"; that SB 375 needed to play out without adding new complexity.

She said standards worked out under SB 375 in Sustainable Communities Strategies might actually come out different from regional averages for CEQA purposes, requiring double calculation. She argued the new VMT guidelines – especially in the (b)(1) area discussing thresholds – should be handled as a cross-reference to regional averages the MPOs have already calculated under SB 375.

The Holland & Knight comment states as an aspect of inconsistency between the OPR draft and existing SB 375 standards that SB 375 metrics in the Bay Area find new market-rate infill development tends to command higher prices from richer residents, so that "affluence rather than location has led to higher VMT levels." It complains, "OPR's proposal undermines the SB 375 planning framework with a VMT regime... that has social justice and planning implications that extend beyond CEQA's existing framework." It adds: "This proposal raises many litigation issues for those unhappy with the land use decisions" made in local Sustainable Communities Strategies and other local planning documents, "and allows project opponents to happily use CEQA to seek different projects or a different project location."

Are the models 'plug and play'?

A regional average, as the Subdivision (b)(1) guideline draft itself accepts, can be calculated a number of different ways: the subdivision suggests it be done "per capita, per employee, per trip, per person-trip or other appropriate measure." Further questions on how to calculate regional average data include how to count particular trips that fit multiple categories. The many different VMT modeling data sets linked in the draft's amended Appendix F further suggest a diversity of approaches. So does the Holland & Knight comment in its discussion of litigation potential surrounding the possibility of disputes over VMT calculation.

Smith expressed uncertainty whether the models were truly "plug and play," in the sense of whether "I can figure out on my smartphone whether or not my project is above or below" the applicable level of significance – though, again, he suggested "that'll be relatively easy to answer" and the hard part would be "how vulnerable is the methodology itself to one-off attacks by bad actors?" (i.e., by objectors to projects.)

Calfee's comments noted that disputes are common over the methodology of LOS traffic studies. He wrote, "OPR has identified approximately two dozen models that could be used to estimate VMT, many of which have been routinely used to estimate greenhouse gas emissions. To minimize disputes about methodology, the proposed Guidelines would specifically acknowledge the lead agency's discretion to pick its model and adjust model inputs and outputs as needed. The draft Guidelines would also expressly apply a rule of reason to the analysis."

Calfee wrote that for LOS analysis "depending on the scope of the project, the study can take months and cost tens of thousands of dollars," whereas "VMT can be estimated using free models within a couple of hours."

Responding to a prior similar comment from OPR, Monchamp said, "It's far more complicated and takes much longer." She said the draft did not define VMT, while she viewed the guidance on methodology as consisting mainly of links to studies. She said it "is not giving much direction at all as to how to do this," and hashing it out "is going to be a messy and cumbersome process."

Critics' opinions diverged again on the types of projects that Subdivision (b)(1) said "generally may be considered" to lack significant impact: projects within half a mile of good transit, or projects expected to reduce local VMT overall." Eaken said a project near transit could still be high-VMT so such projects should be reviewed for impacts. Even on a transportation project, Eaken said unless it was "crystal clear" that a project wouldn't raise VMT, as with a bike lane, projects should still be analyzed. For example, she said, a new carpool lane might add capacity to a road, hence couldn't be presumed to lack impact.

Taking the opposite view, Monchamp described projects

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>>> LOS to VMT: Exemptions? Cumulative impact?

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outside the 0.5-mile radius as "shackled" with many more mitigation measures.

Calfee wrote, under the heading of factors likely to reduce litigation, "Projects near transit generally will not be subject to doing a study, so there will be fewer issues to litigate."

Smith, saying he'd borrowed the point from Monchamp's colleague Jennifer Hernandez, argued it might work better to drop VMT analysis from some projects entirely, as "by definition good, and we're not going to analyze the traffic impacts, period." Which he said wasn't to argue against local authorities doing their own traffic analyses, only against allowing traffic analysis to push a pro forma project toward a required EIR.

Monchamp, having noted that the proposed Subdivision (b)(1) language does not really grant exemptions, said "Oh, exemptions would be lovely." She said so would clarifications: "We're not against the VMT approach. I don't think you're going to get anyone on our side of the world to say VMT is bad, it's just VMT has to be done more clearly and with more certainty."

Cumulative impact

David Pettit of NRDC asked how cumulative impacts would be handled. Calfee, in an interview clarified by written comments, responded that under current law, consistency with a plan that deals with a cumulative problem can support a presumption that a contribution is less than significant. He wrote: "If you are asking 'does my project have a cumulative VMT impact?' you might look at whether the project is consistent with the regional sustainable communities strategy to help address cumulative impacts."

Pettit had asked how fairness would be maintained if one of several similar projects in a popular infill area became the first to exceed local average VMT for its building type.

Calfee responded, "When you look at the data and the maps, that's not how it appears to play out." He noted some regional governments have been developing maps of VMT levels for areas within the region, in part through past work under SB 226, which also refers to regional averages. Recalling the lead agency's power to use professional judgment in adjusting models, he wrote: "If the model gives you a result that does not make sense, the proposed Guidelines would recognize that it is appropriate to make adjustments."

Comment on the OPR draft is due October 10, 2014.

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Links:

The August 6 proposal from OPR is at: http://bit.ly/1kOofPD via http://www.opr.ca.gov/s_sb743.php.

Holland & Knight's critical comment: http://bit.ly/1la6slD

Latham & Watkins: http://bit.ly/1vHMO1l

Fehr & Peers: http://www.fehrandpeers.com/sb743/

Streetsblog LA initial news analysis: http://bit.ly/1kOtP4n

CityLab preview before draft release: http://bit.ly/1qGCFB1 ■

>>> Promise of $130m: defining who should benefit

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decided, "I'm a little underdressed." (Most participants arrived in suits or similar, though one tall bearded man wore denim overalls.)

Ervin told the small-group session that West Oakland was seeing "a lot of development thrown at us" and people "coming in telling us what the community should look like." Out of an extended family formerly based in West Oakland, he said he and his cousin remained in town, but the rest were mainly displaced: "Sacramento, Stockton, Tracy, Lodi." (Ervin's related comments on Plan Bay Area, prepared through a project of Breakthrough Communities and Six Wins Coalition/New Voices are Rising, are at http://bit.ly/VN0mvO.)

Among his concerns related to GHG reduction, Ervin said he personally hoped to buy a house and, when he did so, didn't want that to lose his current strong access to transit. He was concerned that new families moving to new development in West Oakland were often sending their children to Claremont or other schools out of the area – so although the new arrivals' children could walk to West Oakland Middle School, they were actually traveling elsewhere each day. And he worried that new development near transit could displace low-income transit riders, only to replace them with more affluent residents who could afford not to depend on transit, hence might use it less.

Asked if he had thoughts about who was or wasn't in the room, he wrote later, "Yeah, I was a little disappointed with the lack of community voice in the room especially from the youth. Our young people are the ones that are going to inherit the cities that reflect the decisions we make today. They should have been there. Other than that I think it was a very informative and worthwhile investment of my time."

Defining 'disadvantaged communities'

Discussion at the workshop returned often to questions that the meeting officially needed to sidestep due to the regulatory division of labor: What constitutes a "disadvantaged community"? And when can a disadvantaged community be said to benefit?

Formally speaking, those questions are largely to be answered by another process.

As established by SGC's opening actions on the program (see http://www.cp-dr.com/node/3529), the AHSC program will be directed by SGC, but in close cooperation with several other state agencies, with administrative duties delegated to the Department of Housing and Community Development for the main stream of funding, and to the Natural Resources Agency for the smaller fraction reserved to protect agricultural land from sprawl.

By statute the program must spend half its money on affordable housing, and it also must spend a potentially (but not necessarily) overlapping half to benefit disadvantaged communities.

(At each of last week's three SGC workshops – in Fresno, Oakland and Los Angeles – staff made an opening presentation explaining the statutes, institutional history and program mandates. For the 45-minute Fresno version of the presentation see http://sgc.ca.gov/s_affordablehousingandsustainablecommunitiesprogram.php.)

Discussion moderators from SGC and HCD directed further discussion about the meaning of "benefit to disadvantaged communities" toward a separate set of workshops on defining disadvantaged communities under the SB 535 rules that apply to all cap-and-trade grant programs, to be held August 25 through September 3 by the Air Resources Board (ARB) and CalEPA. Discussions on agricultural land protection were also deferred to their own set of workshops, to be scheduled for October.

At the August 14 Oakland workshop, Allison Joe, deputy director of the SGC, said in the opening group session that, although ARB's timetable for developing guidelines is longer than SGC's, "We have all been working with ARB very closely to ensure that what we do, and what we develop at this point, will adhere to and actually align with what will be developed as guidance next year, so there's a little bit of a dance but there's some really good coordination going on that's actually really helped our overall program by being able to work with ARB so closely."

The rules reserving benefits for disadvantaged communities brought hope to some workshop participants from areas of the state that broadly qualify for such status. But they drew worried questions from some urban policy veterans who asked what would count as a benefit, and what overlap might be presumed to exist between a disadvantaged place and a disadvantaged group of people. And several participants seemed uncertain exactly where the line fell between SGC's rulemaking authority and that of the environmental agencies. (A discussion group leader offered an illustration on the difficulty of defining a benefit: if a bike path passes through a disadvantaged community, does it provide enough of a benefit to that community?)

In preparation for the August 25 - September 3 workshops,

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>>> Promise of $130m: disadvantage and health

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the ARB began to post guidance on its workshop site at http://www.arb.ca.gov/cc/capandtrade/auctionproceeds/upcomingevents.htm explaining potential applications for CalEPA's CalEnviroScreen tool to the definition process.

The screening tool, which appears in its newest form at http://oehha.ca.gov/ej/ces2.html, provides compelling maps that apply CalEPA's disadvantage formula statewide at census tract level. The widest spreads of red and orange colors indicating disadvantage are across the San Joaquin Valley; they reappear in poorer neighborhoods of each major city, notably in inland LA County and between Ontario and San Bernardino.

The CalEnviroScreen standard is based on a weighted combination of pollution burdens, population characteristics that imply vulnerability to further effects of pollution, and socioeconomic disadvantages: low formal educational attainment, linguistic isolation, poverty and unemployment. A CalEPA paper posted on the workshop site August 19 offers five alternative measures consisting of either the unchanged formula, or choices based on narrowing or re-weighting the mix of factors.

On the workshop site at http://bit.ly/VQk4GE, ARB has posted its draft interim guidance for "maximizing benefits to disadvantaged communities." The 39-page draft opens with a lengthy review of familiar statutory and regulatory background but then turns to detailed programmatic and economic specifics, notably in Sections V and VI and the appendix. Comment on that draft is due September 15 for ARB consideration September 18. The workshop notice itself gives a September 9 deadline for written comments.

'Benefit' to whom?

Jeffrey Levin, policy director for the East Bay Housing Organizations, was among those wary of assumptions in "disadvantaged communities" definitions. He wrote later, "We have two sets of concerns about this process. The first is whether 'disadvantaged communities' should be defined based on populations or geographic places. We think it's important to focus on populations as well as places. Second, investments need to be guided by principles and criteria that ensure that lower income households are the primary beneficiaries of the investment, and that lower income communities do not suffer adverse impacts."

He warned, "We have all seen examples where investment in a 'disadvantaged community' brings little or no benefit to lower income households, and where such investment actually causes harm," as with transit-oriented development in areas defined as disadvantaged that does not itself contain affordable housing.

Where such choices displace lower-income people "from transit-rich areas to the periphery of the region," he wrote, "they become more dependent on automobiles and that means more GHG emissions. And the transit may actually lose ridership because the more affluent new residents tend to be less likely to use transit as much as lower income residents."

Meanwhile, he suggested, it might sometimes help disadvantaged populations to place affordable housing in higher-income areas instead of lower-income ones. "In short - we are very supportive of Transit Oriented Development, but it needs to be done in a way that clearly promotes social equity." Goals of EBHO included mandatory affordable housing in transit-oriented development and early planning for affordable housing in areas that may become expensive in time because of private development.

At the meeting, Dayrit, the brownfields redevelopment specialist, worried that programs encouraging infill tended to lead to construction in areas that often lack services, where it's easier to build, that often tend to be "disadvantaged communities to begin with," so when housing for disadvantaged people is built there, "the concentration of these disadvantaged communities in existing disadvantaged communities" gives the impression of creating a "ghetto or unattractive neighborhood." He noted, for example, the appearance of strong opposition to new services for homeless people in Hunter's Point in San Francisco – though also that affordable housing might also be opposed in an affluent neighborhood.

Public health cautions

Solange Gould, a PhD candidate at UC-Berkeley working with the Public Health Institute, brought some public health warnings to the "unintended consequences" part of the discussion, which she clarified after the workshop:

- While she joined the public health consensus in favor of walking and biking – for personal health and "community cohesion" as well as GHG reduction – she warned against inviting people to walk and bike in risky traffic situations, instead calling for "good infrastructure that separates cars and people as much as possible."
- Gould wrote, "Disadvantaged communities are often more exposed to heat with lack of vegetation or green canopies" and "Studies of extreme heat have shown large racial disparities in heat-related deaths. There are maps

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>>> Promise of $130m: wish lists and warnings

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that show that low-income and communities of color are more likely to live in areas with little tree canopy and permeable surfaces and are thus more vulnerable to urban heat islands." She suggested projects should get priority if they are in urban heat islands and add mitigations such as vegetation, white roofs, permeable surfaces, open space or other mitigations.

- Proximity to transit, while mainly a good thing, has special risks for the many low-income tenants who live with asthma, cancer or respiratory illnesses. (Vulnerability to respiratory illness is among the CalEnviroScan criteria for disadvantage.) So Gould suggested siting transit-oriented development more than 500 feet from freeways or, if that can't be done, then "really high-quality indoor air ventilation systems" such as MERV 13 systems. She wasn't calling for all such costs to fall on the developer but said "reducing those health care costs is worth the cost of the indoor air filter." She suggested they could be financed as in the State of Oregon's "on-bill financing program, in which the energy savings from home energy upgrades pay off the bill from the installation."

More ideas and arguments:

- Rob Wiener of the California Coalition for Rural Housing raised a question during the main presentation about the choice of rental apartments as examples in the opening presentation, asking staff to confirm that the legislation was "tenure-neutral" – allowing homes to be built for single-family ownership as well as multifamily rental. A staff member responded that in the prior transit-oriented development program, the possibility was left open to build single-family homes for sale, but no qualified applications came in for that approach, and there were also relatively few applications for acquisition/rehab of existing affordable housing.
- Rico Mastrodonato of the Trust for Public Land brought a message in favor of urban parks and open space, including to reduce heat effects and sequester carbon, along the lines of a paper his group has published at https://www.tpl.org/quantifying-greenhouse-gas-benefits-urban-parks
- Ervin responded to a comment about the need for urban open space by saying West Oakland had several parks already but people were afraid to use them.
- Kang argued against requirements for infill developers to pay for transit passes. Clarifying her comments later, she wrote, "If infill developers have to factor in the cost of transit passes, it will raise the cost of market rate housing and make affordable housing very hard to underwrite." Despite a suggestion in the discussion that computer-tracked passes like the Bay Area's "Clipper Card" might make such costs more predictable, Kang wrote, "In my opinion if the new housing is located near reliable transit and are located in walkable communities new residents will choose to get out of their cars. The new housing should not be overburdened with the additional cost of transit passes."
- Dayrit, who is a consultant to the Center for Creative Land Recycling, had a comment related to his work there: that a property to be redeveloped would have "transaction costs associated with environmental site assessments" that ought to be included as an eligible activity.
- Gould and Dayrit mentioned the perennial Bay Area transit advocates' goal of building more new housing, including affordable housing, in suburbs as well as urban centers. Dayrit argued for walkable density in suburbs as a good in itself: "people are afraid to talk about density."
- Gould said support for local schools should be part of efforts to draw households to newly developed areas.

Workshop materials and comment instructions are on the SGC site at http://sgc.ca.gov/s_affordablehousingandsustainablecommunitiesprogram.php and on the ARB workshop site at http://www.arb.ca.gov/cc/capandtrade/auctionproceeds/upcomingevents.htm. Comments on the ARB and CalEPA materials are due September 9. A summary by *Streetsblog*'s Melanie Curry, who was at the Oakland meeting, is at http://bit.ly/1n88azo.

[Allison Joe briefly provided editorial assistance to CP&DR in the past.] ■

OFFICIAL: NEARLY SURE NO FAULT UNDER BIG-DOLLAR TOWER IN TINSELTOWN

BY MORRIS NEWMAN

It's hemi-semi-official: In the opinion of one of the state's leading geologists, no earthquake fault lies beneath the immense Millennium office development in Hollywood. That is the expert opinion of Stephen Testa, who is executive director of the State Mining and Geology Board. Unlike several other geologists who have addressed the board in this case, Testa is not a consultant for the Millenium project. He testified on August 13 that a much-debated official geological map of the area was probably wrong for suggesting the possibility of a fault beneath the aforementioned real estate development. (Please note the word "probably.")

That finding undoubtedly comforted multiple developers in the hot Hollywood office market. Understandably, those developers had been discomfited by the suggestion that the earth could open its maw and inhale their buildings like a hungry whale making a canapé of some unrepentant Jonahs. In an earlier posting about this controversy, at http://www.cp-dr.com/node/3451, we made merciless fun of the developer, based on an admittedly uncharitable suspicion that he might be trying to change the rules of reality to soothe his nerves (and those of his investors). Testa, however, is a nationally recognized expert who knows more about this subject than the rest of us. Hell, he probably knows more about geology than I know about anything (except maybe the holograms that can be seen on certain vinyl LPs of the Psychedelic Era, when they are spinning on a turntable).

But even with Testa's assurances, some developers in Hollywood may still feel nervous about even the mere possibility of an earthquake fault beneath their properties, however unlikely. For those irrational few who decline to take the word of an expert in the absence of absolute certainty, we offer the following magic formula:

Take some earwax of a City Council member (or her planning deputy), a hair from a politician's toupee, a gram of perspiration from a lender, and an ounce of sand from the shoe of a consulting geologist. Mix these ingredients together in a poultice. Add some glitter, just for looks.

Proceed to rub this poultice onto the structural columns of a billion-dollar building currently under construction. (This process is best undertaken under the light of a full moon, preferably in the presence of a coyote, who embodies the spirit of survival in the Hollywood Hills.) Finally, with great solemnity, intone the following:

Yo, Cosmic Cartographer! It's me, your favorite developer:

May all cracks in the earth be removed from this damn earthquake map,

Yea, even unto the dotted lines indicating conjectural faults.

May this blight be removed from the rocky underpinnings of my lovely asset.

Let no troublesome finding be found under my foundations.

Let no unforeseen condition bust a move on my big-ass building.

For I have skin in this game, mine own precious skin.

Let not my building wiggle in some weird-ass seismic dance,

Let nothing jiggle or shake not specifically architected to do so,

Nor let this development, which I love like my own child,

Be swallowed up by the earth like that guy in the Bible whose name I can't remember.

Get me out of this crisis, O Cosmic Fixer! Take away my seismic blues.

Make that map say: 'Move along, people, no fault to see here.'

Thanks, Buddy, I owe you one. Anything, you name it.

As with all magic formulae that appear on this site, typically under the byline of our most questionable reporter, this incantation has a good likelihood of success most of the time. (By way of disclosure, you should also know that our staff geologists, who are fictitious and do not otherwise exist, say this same incantation has the habit of failing, and I mean *catastrophically*, at least once every 50 years or so. (Which could be tomorrow morning; you never can tell with geologists.))

If you think about it, though, one failure in 50 years is pretty good odds. Hell, I wish my desktop only failed once in 50 years… Pardon me for a second; my iPhone is ringing. *(Hello? Your sheep gave birth? And the lamb had HOW many heads?...Yikes! I mean, what are the odds of that?)* ■