CP&DR

VOL. 29, NO.12 — DECEMBER 2014 CALIFORNIA PLANNING & DEVELOPMENT REPORT

Agencies Seek Review of Two San Diego Climate Rulings

BY WILLIAM FULTON AND MARTHA BRIDEGAM

Two San Diego agencies that lost recent appellate cases on climate planning have decided to seek review by the state Supreme Court.

On December 2 the San Diego County Board of Supervisors voted to petition for review in *Sierra Club v. County of San Diego*. Decided October 29 by the Fourth District Court of Appeal, that ruling rejected San Diego County's climate action plan, finding it failed to follow mitigation measures prescribed by the county's general plan. It was ordered published as of November 24.

In the similar but separate case of *Cleveland National Forest Foundation v. San Diego Association of Governments (SANDAG)*, SANDAG's board voted on December 5 to seek review.

MORE COVERAGE OF SANDAG AND SB 375 LITIGATION, PAGES 12-14.

The SANDAG ruling, issued November 24, narrowly rejected the environmental impact report for the agency's Regional Transportation Plan/Sustainable Communities Strategy. It held SANDAG should have analyzed whether the plan would comply with Governor Arnold Schwarzenegger's Executive Order S-3-05, which calls for dramatic reductions in greenhouse gas emissions by

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insight
WILLIAM FULTON

The SANDAG Ruling's Disturbing Message About Executive Power

For now, the environmentalists have won their lawsuit challenging the San Diego Association of Governments' sustainable communities plan (which is part of SANDAG's regional transportation plan). SANDAG has appealed the ruling to the California Supreme Court.

If the Supreme Court takes the case, it will provide the justices with an opportunity to clarify the most important – and, to me, most disturbing – part of the environmentalists' case: The idea that a governor's executive order – in this case, Gov. Arnold Schwarzenegger's Executive

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inside

Fresno General Plan Approved

Fresno's 2035 General Plan was approved December 18 by a 5-2 vote in spite of considerable Tea Party-style opposition to the mostly infill proposal. Mayor Ashley Swearengin has personally identified herself with the plan, which includes proposals from canal-side trails to increased infill development. City Council President Steve Brandau had opposed a restriction on sprawl.

Federal Budget Talks Kill California Foothills Easement Proposal

Congressional Republicans have reportedly killed a proposal out of the U.S. Fish and Wildlife Service to create the California Foothills Legacy Area. The project would have bought conservation easements on 200,000 acres of ranchlands in the Sierra Nevada foothills. The *Fresno Bee* has details. As of December 12 the paper also quoted Rep. David Valadao, R-Hanford, as saying the federal appropriations package "ensures no additional federal dollars for California High Speed Rail" and said it did not include language on water issues tentatively negotiated between House Republicans and Sen. Dianne Feinstein.

Protest Takes To Freeways as well as Streets

The nationwide demonstrations over accountability for police killings continued to suburbanize in December, with freeway ramps as well as streets frequently occupied by demonstrators. Sites of freeway demonstrations in California included Oakland and Berkeley, Sacramento, and Los Angeles — places where downtown neighborhoods were disrupted by freeway projects in the 20th century. Among commentaries posted, one choice by *Planetizen* was "On the Symbolism of Highway Protests", featuring Alex Ihnen's *NextSTL* essay about freeways' ambiguous images as symbols of freedom for some but segregation for others.

National Housing Trust Fund to Be Funded at Last

Six years after its formal creation, the federal National Housing Trust Fund will finally be receiving contributions from Fannie Mae and Freddie Mac, per an order last week from the Federal Housing Finance Agency. Affordable housing groups including the National Community Reinvestment Coalition were cheering the news. Reuters has details.

Khosla Still Fighting Order to Open Martins Beach

San Mateo County's Judge Barbara Mallach issued her final order opening Martins Beach to the public on December 1, but the gate stayed shut for two more weeks. The *San Mateo Daily Journal* and *San Jose Mercury News* reported the Coastal Commission was threatening owner Vinod Khosla with fines of $11,250 per day. On December 16, Khosla's limited liability companies responded to the order by filing a motion for a new trial, alleging irregularities in the trial and decision. Meanwhile Khosla's counsel reportedly argued to the Coastal Commission that the gate was properly closed due to inclement weather. The *Mercury News* noted that although a rainstorm hit Northern California December 11, "the weather over the previous five days was mild and dry."

Kinkisharyo Rail Car Agreement Salvaged, Sort Of

Restrained congratulations were circulating in late November over a deal brokered by Los Angeles Mayor Eric Garcetti that persuaded the Kinkisharyo company to expand its rail car assembly operation in Palmdale after all. The Japanese rail car manufacturing company had threatened to move the planned expansion of its U.S. branch elsewhere after activists supportive of International Brotherhood of Electrical Workers (IBEW) Local 11 filed a CEQA appeal with the Palmdale City Council against the expansion. The *L.A. Times* reported the deal allows Kinkisharyo to expand without facing environmental review challenges, while the IBEW may conduct a "card-check" union organizing campaign. But the paper complained editorially, "Kinkisharyo and IBEW win; CEQA loses?"

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Notorious 'Jungle' Encampment Evicted in San Jose

In early December, after a heavy rain but before a worse Pacific storm, local authorities staged a full-scale eviction of the famous "Jungle" encampment along Coyote Creek in San Jose. The eviction followed a partly successful city effort to move residents to subsidized housing. The *L.A. Times* reported "Nearly 150 had found housing, but over 50 had yet to find a place to live." As *CP&DR* reported in May, the site was only one of many unofficial creekside encampments that provide low-quality housing in San Jose, intertwining the problems of housing shortage and waterway contamination.

San Francisco to Combine City Offices in New SoMa Tower

The San Francisco Board of Supervisors agreed to spend almost $327 million to purchase part of the former Goodwill charity's property at 11th and Market Streets and replace it with a 17-story city office building. The *San Francisco Business Times*, partly drawing on the *Socketsite* real estate blog, reported the cost was earlier quoted at $253 million. The reports said developer Related California originally bought the property from Goodwill for $65 million and also planned to develop up to 550 units of housing next to the office building. The news reports say the city will sell its existing five-story office building at 30 Van Ness (likely for housing) to help finance the purchase, and will combine offices in the new building for Public Works, Building Inspection, Planning and Retirement and Health Services.

Studies Look toward More Rail in Northwestern San Francisco

A study commissioned by San Francisco transportation officials predicts a rail extension would be popular if it ran from the end of the currently in-progress Central Subway project westward to Fisherman's Wharf. Michael Cabanatuan of the *San Francisco Chronicle* reports the study found an extension of the T-Third line to Fisherman's Wharf might increase ridership about 55 percent.

Separately, the BART system's planning office announced it would begin a long-range study on a possible new train route that might travel through an additional tube under San Francisco Bay and into San Francisco's currently low-rise western neighborhoods, then curve south to rejoin the existing commuter line in Daly City. *Streetsblog SF* suggests a part of the design that runs into the Richmond District may owe something to former BART board member James Fang's dream of "BART to the beach" — an idea often dismissed in the past as not serving a dense enough population.

Migratory Bird Survey Out of San Jose General Plan

San Jose came close to approving a general plan amendment that would have required surveys of birds during the mid-year nesting season before any trees could be removed or disturbed. But the *San Jose Mercury News* reports the item was removed from a November 18 council agenda by "a last-minute decision." Planner Whitney Berry told the paper the plan was worked out with environmental, development/construction and Fish and Wildlife representatives in hopes of streamlining CEQA review. The paper says developers "expressed concerns" that it would slow development — and then on November 14, current mayor Chuck Reed, mayor-elect Sam Liccardo, and Councilwoman Rose Herrera prepared a critical memo on the proposal, saying it amounted to "precluding construction for seven months of the year." The amendment was expected to resurface in revised form in 2015.

Long Beach Preparing for Freeway Removal Project

The Long Beach City Council is expected to approve a contract December 2 with the Meléndrez firm of Los Angeles for planning and conceptual design services on the Terminal Island Freeway Transition Plan. The Longbeachize blog says it's a big step in moving forward on plans to remove a large section of the Terminal Island freeway, with accompanying plans to approve quality of life in the "park poor" area of West Long Beach. (Item via *Streetsblog LA*.)

O'Connor Out As L.A. Metro Board Member

The Los Angeles Metro system's board of directors was rebalanced last week when officials from cities on the Southwest Corridor replaced former board chair Pam O'Connor, of the Santa Monica City Council, with Mayor James Butts of Inglewood. *StreetsblogLA* has details.

Riverside County Restores Funds In Post-Redevelopment Settlement

Riverside County has reached a settlement with state officials allowing it to use up to $10 million in former redevelopment money on a shopping center rehab project in Jurupa Valley. The *Press-Enterprise* has details. ■

Tribe's Development, Trust Status Efforts Stir Legal and Political Concerns

BY ASHER KOHN

The Santa Ynez Valley in Southern California brands itself as bucolic wine country, a mix between grape-covered hills and Old West charm. The Chamber of Commerce touts the hospitality and diversity of the valley's several thousand residents. But one thing that isn't mentioned in the Chamber's materials is the Chumash Casino Resort, a business run by the government of the Santa Ynez Band of Chumash Indians that generated a reported $366 million in revenue in 2008.

Aided by the casino's success, the Tribe has been able to buy additional land near its 146-acre reservation. What it plans to do with that land has been a subject of angry debate. Many in local government and other local organizations fear that added Tribal land development may upset the power balance in the valley, especially since Indian land is not subject to local or state regulations.

The government of the Tribe (and its approximately 150 members) now appears close to acquiring federal trust status for a 1,400-acre property that it purchased through an ordinary real estate transaction in 2010.

The property is a classic expanse of California farmland on Highway 154 near Solvang, known as "Camp 4," and formerly owned by vintner and Hollywood star Fess Parker. It is currently zoned for agriculture and partly managed as a vineyard.

In October the plan won a Finding of No Significant Impact (FONSI) from the Bureau of Indian Affairs (BIA), determining that the trust status would not affect the quality of the human environment significantly enough to require a full Environmental Impact Statement (EIS) process.

The FONSI presumes the Tribe will follow its announced plan for the land, saying "The proposed trust land would enable the Tribe to provide housing for its existing tribal members and continue to provide housing for descendants as they come of age." It states the existing reservation has only about 50 acres of "usable" land within its reservation, "much of which has already been developed."

Many non-Native residents and state and county officials, however, are anxious that the land could be used for economic development projects outside the reach of taxation or regulation at the state and county level. Local opponents' sites include http://polosyv.org, http://savethevalley.info/ and www.syvconcernedcitizens.com. The county's documents page on Camp 4 is at www.countyofsb.org/ceo/camp4.sbc.

A long-disputed claim

Tribal real estate developments can avoid state and local land-use regulations because tribes are outside states' jurisdiction. Native American tribes are recognized by the federal government as separate sovereigns, often with treaty rights recognized and signed by various U.S. presidents over the years.

The extent to which the Camp 4 land was held by or for the Tribe during the last few centuries is disputed. (The federal government can still choose to take property into trust that a tribe has purchased even if it is not considered part of that tribe's past or present reservation land.) Santa Barbara County and the Tribe itself both point to the Reservation's beginning as part of the Catholic Mission Santa Ines. The Tribe's Web site states the reservation was founded in 1901. Opponents have argued that the Tribe did not exist until relatively recent years and that when land was held previously, by owners including the Church, it was not on the Tribe's behalf. The FONSI describes the Catholic Church as having held land for the Tribe that included the Camp 4 area.

Concurrently with the Camp 4 proposal, the Tribe pursued approvals this fall for a further expansion of the casino within the reservation boundaries. The work reportedly was contracted to Tutor-Perini this fall at a price tag of $112 million. In September the Tribe granted its own certification to the project's environmental evaluation.

Opponents have been watchful for expansive tribal sovereignty claims in the context of the casino expansion that could also strengthen the Tribe's position with respect to Camp 4.

Routes to trust status

The Tribe, which requires Federal approval for the "fee to

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>>> Tribal Development: Fee-to-Trust Worries

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trust" transfer, has sought to obtain it through either an administrative BIA process or Congressional action.

Under trust status, the federal government would hold legal title, under terms similar to private fiduciary duty, explicitly for the benefit of the entire Tribe and outside the state regulatory framework. Trust land has been held to be more purely "Indian Country" than land held by a tribe through ordinary "fee simple" real estate titles. So state officials are concerned that if the land becomes trust land they will no longer be able to keep the Tribe from using it however it wishes – possibly building high-rise or high-density apartments against local zoning ordinances, or even constructing casino expansions.

Many non-Native residents and state and county officials, however, are anxious that the land could be used for economic development projects outside the reach of taxation or regulation at the state and county level.

Camp 4 was part of a 11,500-acre parcel that the Tribe applied in 2013 to have designated as a Tribal Consolidation Area (TCA). TCA status would have allowed it to be more easily moved into Trust status. The BIA approved the consolidation plan application, but after objections from the County Supervisors and others, the Tribe withdrew it in October 2013 — an act that Tribal spokesman and attorney Sam Cohen called that of a "good neighbor".

In October 2013, not long after the Tribe withdrew its TCA application, Rep. Doug LaMalfa, R-Richvale, introduced a bill in Congress, HR 3313, to transfer Camp 4 into federal trust for the Tribe. LaMalfa has been criticized for bringing the bill because the Santa Ynez Valley is a long way from his own district, which is in the northeast corner of the state. HR 3313 has not moved in the House since its introduction. But the Santa Barbara *Independent* has reported the bill could be reintroduced in the new Congressional session, especially if the Camp 4 fee-to-trust application is approved by the BIA and appealed.

Although HR 3313 explicitly would exclude gaming from Camp 4, and the Tribe has reiterated that the casino expansion and Camp 4 development are separate projects, the proposal's opponents are worried that this restriction could be overridden once the land is removed from state and county jurisdiction.

Andi Culbertson, a Santa Ynez Valley resident and land use lawyer, expressed concern that once the land is solely in Tribal hands, "they can build anything." Culbertson said there is "hardly a necessity for housing" for those Tribal members who live in the Valley, and that only 17% of the Chumash Tribe (about 25 people) live on the reservation. How many are full-time residents is disputed, but the Tribe says that more Tribal members will return to the valley if there is Tribal-run housing for them.

Objections to the transfer

Opposition to the Chumash plans comes from a variety of sources, but focuses on a few key issues summed up by the California Coastal Protection Network (CCPN). The Network notes that although 100% of the 111 California fee-to-trust applications to the Pacific Region of the BIA from 2001-2011 were approved, those each averaged under 100 acres, far smaller than the Chumash Tribe's application for 1,400 acres.

Santa Barbara County, through its County Executive Office, has opposed federal trust status for Camp 4. In the comment process on the Tribe's Environmental Assessment (EA) for the fee-to-trust plan under the federal National Environmental Policy Act (NEPA), the County

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>>> Tribal Development: Basis for Negotiations Disputed

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submitted strong criticisms of the Assessment and sought more thorough review through a full Environmental Impact Statement (EIS).

One important issue is loss of tax revenue. Tribes do not pay taxes to state or local governments because they are sovereigns of equal standing. In 2011 the Tribe proposed a "cooperative agreement" that among other things called for payments in lieu of taxes. Tribal Chair Vincent Armenta told the local Noozhawk Web site in 2013 that the Tribe had hoped "to negotiate a payment in lieu of property taxes for our Camp 4 land," but was rebuffed by Third District Supervisor Doreen Farr, who has opposed the fee-to-trust application.

A 2011 copy of the proposed cooperative agreement left the in-lieu payment amount blank but an October 2013 comment letter by the Santa Ynez Valley Concerned Citizens said the proposed cooperative agreement (CA) was offering $1 million per year for ten years in exchange for county support of the fee-to-trust transfer. In that group's opinion the offered amount wasn't enough to make up for the property's permanent removal from the tax rolls, especially if the property were to be developed, increasing in value while creating a need for more services.

One recent county action suggested an approach to the cost of police protection: the Tribe received the Supervisors' approval in November 2014 to contract with the county Sheriff's Office for policing on the reservation, at a cost to the Tribe of $849,000 per year. The *Independent* reported that, in joining the unanimous approval, Farr compared the policing agreement to what the paper described as "a longstanding contract between the tribe and County Fire."

The CCPN has decried the Cooperative Agreement as vague, saying it "did not contain an explicit project description for uses on the 1,400 acres, but indicated that it would include housing and unspecified 'economic development'."

Likewise the county has objected that the Tribe's NEPA documents don't say how many people would live on each of 143 proposed residential lots or how many would use planned structures such as a conference center.

The County Supervisors also voted 3-2 to initiate litigation against the BIA if it grants the transfer, which was considered likely to happen in December.

When is 'government-to-government' appropriate?

Local discussions have stalled even over the terms of negotiations on plans for the Camp 4 property: whether they should be conducted government-to-government as the Tribe prefers or county-to-landowner as the County would like.

By a 3-2 vote on August 20, 2013, the Supervisors invited the Tribe to "begin discussions with the County Planning and Development Department" regarding development plans for Camp 4. But the *Santa Barbara News-Press* and *Santa Barbara Independent* reported the Supervisors rejected "government to government" negotiation on Camp 4. They reported Farr acknowledged the Tribe's sovereignty on its reservation but that she said with respect to Camp 4 the Tribe should deal with the County as an ordinary landowner. The *Independent* said Supervisors Salud Carbajal and Steve Lavagnino supported "a government-to-government dialogue" on Camp 4 but were outvoted. Soon after, the *Independent* reported the parties had scheduled a meeting, but with Cohen not "overly optimistic about the opportunity."

Since then each side has accused the other of snubbing invitations to negotiate. In an open letter to Capps in May 2014, Armenta wrote, "the County has refused to even acknowledge our standing as a government by voting to reject any efforts to formally negotiate with the tribe."

Non-CEQA environmental regulation

Tribal land is not subject to the California Environmental Quality Act (CEQA). In practice, tribal authorities are under various pressures to follow the spirit (if not the letter) of local environmental quality acts. Tribes are subject to federal environmental standards, including NEPA, and also often have a political interest in working with local regulatory authorities and contractors.

Culbertson, however, complained of inconsistencies between the Tribe's process and what CEQA would require.

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>>> Tribal Development: Water Concerns

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For example, she saw deficiencies in the public notice process for the Environmental Evaluation prepared by the Tribe for the casino project. She wrote that the Evaluation was "made the subject of a 'public meeting' [that] was so poorly advertised that it only attracted 15 people. The manner of notice was woefully deficient under CEQA."

Culbertson noted that "It's a developer's fondest dream to be able to escape all state regulations," and the Camp 4 development would do precisely that.

The Tribe's 2011 cooperative agreement draft includes a "Consent to Jurisdiction" section that would grant a "limited waiver of sovereign immunity from suit" to the County to enforce the agreement. But that doesn't impress opponents of the notion that tribal sovereignty applies to Camp 4 at all.

"In a perfect world, tribes and their counties would work out some agreed-upon system similar to currently existing county LAFCO processes," said Cohen.

Elsewhere, approaches to state-federal and tribal-state jurisdictional issues have included federal consistency review for agencies like the Coastal Commission and memoranda of understanding for joint CEQA and NEPA reviews. The California State Association of Counties has posted a tribal and intergovernmental relations platform calling for future tribal-state compacts to include a CEQA consistency process for environmental reviews. But it's unclear what may work in the Santa Ynez Valley.

At the state level, the offices of Governor Jerry Brown and the California Attorney General have taken a skeptical interest in fee-to-trust processes. The AG's office issued several objecting comment letters between 2011 and 2013 on California tribes' fee-to-trust applications. (One such objection concerned 878.55 acres where the Tule River Tribe hoped to build a wastewater plant.)

However, the *Capitol Weekly* reported last summer that the AG and Governor "have declined to involve themselves in the Camp 4 issue" following a strongly worded objection to the comment letters from the California Fee-to-Trust Consortium, a group formed by tribes with the Pacific Region BIA office.

Fear of water rights claims

Tribal water rights are a concern in the valley as throughout the state. Comments opposing the Camp 4 trust status reflect concern over water supply for development and anxiety that the Tribe might assert new water claims via sovereign status.

The county's November 2014 response to the FONSI said the groundwater basin serving Camp 4 was already "in overdraft", and that "Recent data also suggests that the supplemental supplies obtained from the State Water Project and the Cachuma Project, that helped create a surplus in the past, will not constitute a long-term, stable additional water source."

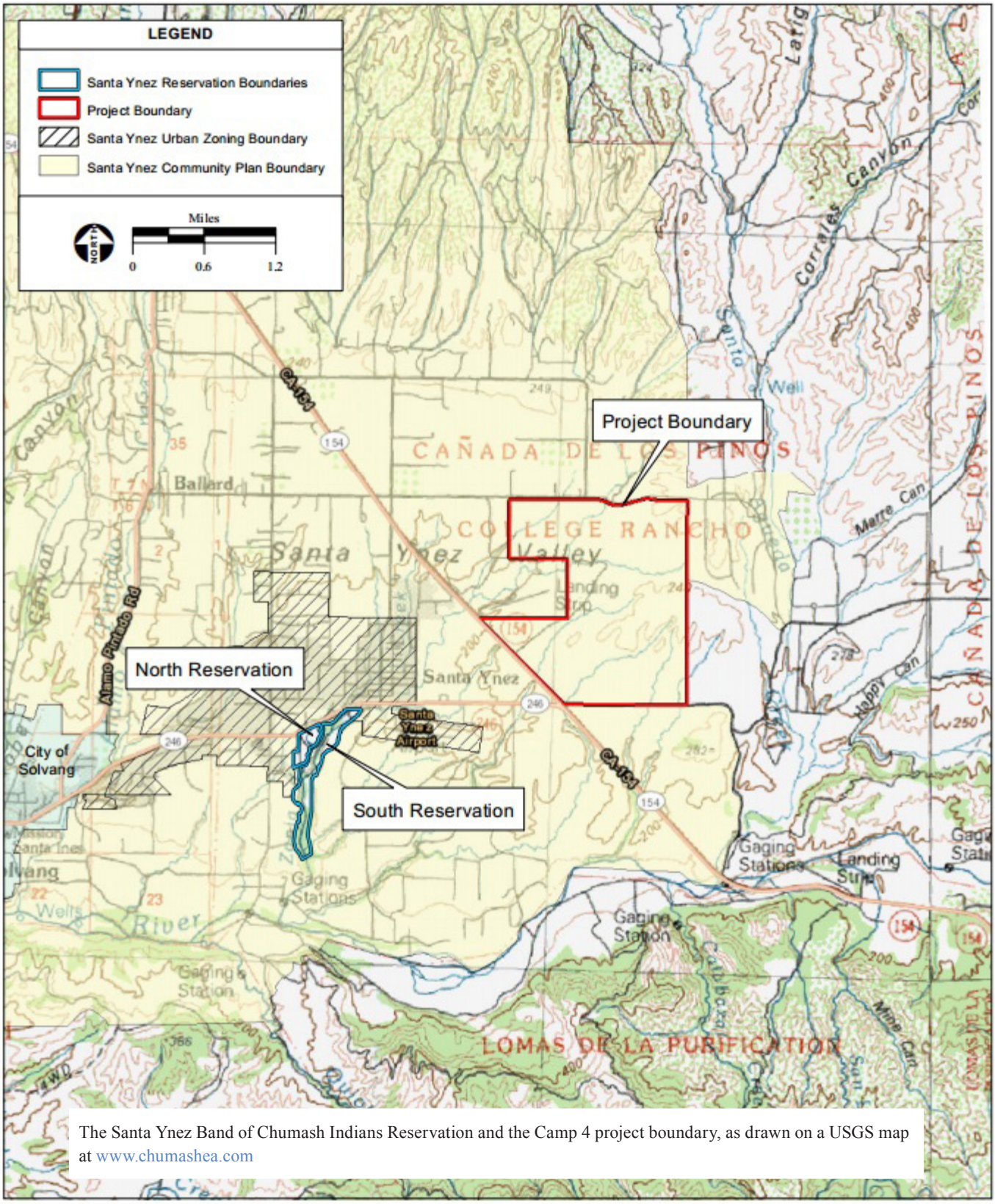
Cohen has offered reassurances that a transfer to trust would not give the Tribe new water right priorities over surrounding county and private landowners. Likewise the proposed text of HR 3313 would disclaim any effect on prior water rights. But while Cohen has generally downplayed water rights on land outside the reservation proper (including the Camp 4 area), he wrote that California's new Sustainable Groundwater Management Act invites tribes to "voluntarily agree to participate" (Cal. Water Code Sec. 10720.3(c) per SB 1168) and argued that it notes federal law supersedes California law on tribal groundwater issues.

Water anxieties also surround a 2013 student note on the Santa Ynez Tribe's case in the *West Northwest Journal of Environmental Law & Policy* by Joanna "Joey" Meldrum. Her note led from a review of recent federal precedents to a hypothetical argument that "the [Chumash] Tribe should have the right to withdraw as much groundwater as is necessary for the Reservation and its people to survive and prosper." Some opponents of the fee-to-trust transfer were alarmed enough to cite it as a reason to oppose "government-to-government" negotiations in 2013.

The current standoff over Camp 4 is local and unique in many senses. But the outcome could also affect the ability of tribes throughout California to plan new development.

Asher Kohn is a writer and editor based in the Bay Area. He writes about land use and disuse. See http://www.asherjkohn.com. ■

>>> Camp 4 Property Affected by Trust Application



The Santa Ynez Band of Chumash Indians Reservation and the Camp 4 project boundary, as drawn on a USGS map at www.chumashea.com

legal digest

Long-Awaited Berkeley Hillside Arguments Test The Meaning of 'Unusual Circumstances'

BY MATT DIXON

The State Supreme Court heard oral arguments December 2 in the major *Berkeley Hillside* CEQA exemptions case, focusing on the legal significance of the term "unusual circumstances".

While the genesis of the case is a single residence, the ruling may have statewide impact on the application of exceptions to categorical exemptions from CEQA. Thus, the case has attracted interest from environmental advocates, public agencies, preservation activists, and the development community across the state.

The case arises from a proposed single-family home in the Berkeley Hills, consisting of a 6,478-square-foot house and an integral 3,395-square-foot parking garage. The City of Berkeley approved the project without environmental review, finding it categorically exempt from CEQA under both Class 3 (single-family residence) and Class 32 (infill development). The house would be one of the largest in town but would comply with local zoning. Because the lot is sloped, the parties have disputed how much earthworks and shoring work would need to be done. In 2012, the First District Court of Appeal ruled against the City.

At issue in the case are two questions of statewide importance.

First is how to interpret the Legislature's intent in Section 21084 of the Public Resources Code, which directs the Natural Resources Agency to list classes of projects categorically exempt from CEQA. This includes CEQA Guidelines Section 15300.2(c), which states that "a categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances" – the so-called "significant effects exception." Specifically, can a project that otherwise fits a CEQA exemption have a reasonably possible significant environmental impact and yet not be "unusual"?

Second is what standard of review should apply to lead agencies' decisions regarding exceptions to

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>>> Berkeley Hillside Oral Arguments: What's 'Unusual'?

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categorical exemptions. Should parties challenging the agency's finding of a categorical exemption be required to demonstrate substantial evidence that there should be a significant effects exception, or is it enough to show substantial evidence *that a fair argument exists* for such an exception?

Arguing for the respondents and real parties in interest, Amrit S Kulkarni, with the firm of Meyers Nave Riback Silver and Wilson, contended that the language of Section 15300.2(c) requires a two-step process to determine if the significant effects exception applies: first, the presence of unusual conditions must be established; and second, the potential for significant environmental effects due to those conditions must be established.

Justice Goodwin Liu quickly cut to the chase, asking Kulkarni if it was his understanding that the Legislature had authorized designation of "categories [of projects] that, as a rough cut, should not concern us because there are no significant impacts and… within the class there may be outliers that have significant environmental impacts, but nonetheless the categorical exclusion applies unless project characteristics, separate from the effects, make it unusual?" Kulkarni confirmed this was the respondents' interpretation, and reiterated their position that to conclude otherwise is to render the phrase, "due to unusual circumstances" meaningless.

In response to questioning from Chief Justice Tani Cantil-Sakauye and Justice Marvin Baxter, Kulkarni argued there should be substantial deference to the city's discretion, and that the First District appellate court went wrong in applying the fair argument standard instead of the substantial evidence standard. He contended the fair argument standard applies in determining if CEQA review is required for projects that are not categorically exempt.

The justices then pursued the meaning of "unusual circumstances", asking what would make a project unusual, with Justice Liu noting that the project would be an "unusual size for Berkeley". Kulkarni replied that such a subjective standard as "too big" would defeat the purpose of categorical exemptions — to which Liu asked, "Isn't your definition subjective?" Kulkarni responded that it was not, because the project was appropriate for the site per the city zoning code. Justice Carol Corrigan asked if an unusual project would be one that was non-compliant with zoning, and Kulkarni responded yes. Later, during rebuttal, Justice Liu asked it was possible for a significant effects exemption to apply even for a project that complied with zoning. Kulkarni replied that a lack of adequate sewer service at the site would constitute unusual circumstances for a zoning-compliant project.

Arguing for the plaintiffs and appellants, Susan Brandt-Hawley contended that the legislative record and rulemaking file showed Section 15300.2(c) was based on Section 21084 and the holding in *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, a 1976 Supreme Court ruling that a categorical exemption did not apply to Fish and Game Commission actions that might have significant environmental effects. She said neither of these founding sources refers to "unusual circumstances".

In response to a question from Justice Corrigan asking if the appellants agreed with the two-step process for Section 15300.2(c), Brandt-Hawley argued that only one step is required: determination of the reasonable possibility of significant environmental impact, with unusual circumstances being inherent in such projects.

Justice Liu asked what the point of categorical exemptions would be in that light, as opposed to evaluating all projects on a case-by-case basis. He said "fair argument doesn't seem very onerous for potential significant effects exceptions… if the trigger is so light, then we're sent into the quagmire so quickly," to which Brandt-Hawley replied, "That's the sky-is-falling argument" that opponents of the appellants' position had made repeatedly. She said a fair argument must still be based on facts, fact-based assumptions, or expert opinions. She also argued that the appellants' perspective would not interfere with the main time-tested function of categorical exemptions:

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>>> Berkeley Hillside Oral Arguments: Expert's Significance?

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to save local agencies the trouble of investigating each ordinary project's impact individually.

Justice Liu pursued the meaning of "due to unusual circumstances", asking what "due to" meant, and if it implied a causative link between unusual conditions and impacts. Justice Liu asked if it could be understood that it was the "legislative intent to… [strike a] balance, accepting some significant environmental impacts" from some projects that fell within categorical exemptions. Brandt-Hawley repeated that Section 21084 and *Wildlife Alive* made no reference to unusual circumstances, and that there was no presumption in favor of allowing some significant environmental impacts.

Brandt-Hawley argued that in general, unusual circumstances are "not run-of-the-mill, not typical." But Justices Corrigan and Werdegar pressed her for a clearer definition. In response, Brandt-Hawley stated that unusual circumstances for the project resulted from the combination of the size of the house – which she described as planned for "a constrained space" on a small street although the lot itself is large – together with the slope of the hill, seismic hazards, and a nearby roadway bridge.

The justices also asked about the potential significant effects of the project, including those based on the expert opinion of Dr. Lawrence Karp, provided by the plaintiffs/appellants to the city prior to city approval, on the extent of earthworks and retaining walls required to stabilize the house and slope. Justice Werdegar asked if the city implicitly rejected Karp's opinion and if so, whether it had done so in error. Brandt-Hawley argued the city had done so in error, because Karp's opinion presented a fair argument for a significant environmental impact. Responding to Chief Justice Cantil-Sakauye later, Brandt-Hawley argued that appellants provided an expert opinion on potential significant effects, and that the city must study them.

The court's ruling must be filed within 90 days of December 2, 2014, the date the matter was argued and submitted. Due to the complex nature of the case, there are several possible outcomes. The court must decide if it will apply a one-step or a two-step process and what standard of review should apply. Then, it must apply the process and standard it has chosen to whether the appellants have sufficiently shown a reasonable possibility of significant effects, and/or whether the significant effects are due to unusual circumstances. In the meantime, the CEQA community will be anxiously awaiting the ruling.

The case is *Berkeley Hillside Preservation v. City of Berkeley*, Case No. S201116.

Matt Dixon is a transportation engineer in the Los Angeles area. ■

>>> Climate Rulings: SANDAG Court's EO Decision Was Relatively Narrow

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2050.

The SANDAG agency, which has been sparing with public comments outside of the court papers themselves, issued a detailed press release explaining the choice. Its second paragraph stated:

"'The Board decided that it is our responsibility to press forward with this case,' said SANDAG Board of Directors Chair Jack Dale. 'We've done our absolute best to follow the law in everything we've done. At this point, the law needs to be clarified – not just for our region, but for every planning agency and city in California.'"

Plaintiffs' attorneys Kevin Bundy and Rachel Hooper issued a strongly worded response:

"SANDAG's decision to prolong this litigation is disappointing, to say the least. The Court of Appeal simply told SANDAG to tell the truth about how poorly its plan matches up with sound science and state policy requiring reductions in climate pollution.."

If accepted for review by the state Supreme Court, an issue to watch may be how the cases are handled with respect to *Sierra Club v. County of Fresno*, (2014) 226 Cal.App.4th 704. In that case, which was accepted for review in October, the Fifth Appellate District overturned the EIR for a large senior-oriented housing development, the "Friant Ranch," holding that projections regarding increased air pollution from the project were stated only in raw numbers, not interpreted in a way that would explain their significance to the non-expert public. A similar dispute exists in the SANDAG case over analysis of health impacts from freeway widening.

The November 24 SANDAG ruling was not as broad as some expected. It did not, for example, conclude that SANDAG actually had to meet Executive Order S-3-05's target of an 80% reduction in GHG emissions by 2050. Rather, the majority ruling by Presiding Justice Judith McConnell said the EIR was deficient in not analyzing the Regional Transportation Plan/Sustainable Communities Strategy (SCS/RTP) against the policy contained in the executive order.

In a strongly worded dissent, Justice Patricia Benke stated the Executive Order "does not have an identifiable foundation in the constitutional power of the Governor or in statutory law" and said the majority had impermissibly elevated the Executive Order to a significance threshold "without … having to expressly declare that they are doing so."

Although SB 375 only requires an SCS to extend to 2035, the SANDAG SCS that was challenged – technically part of the Regional Transportation Plan – extended to 2050. (AB 32, on which SB 375 is based, contains only a GHG reduction target for 2020, but in the implementation documents for SB 375 the California Air Resources Board set targets for 2035 and often referred to the Executive Order.)

The EIR predicted a reduction in GHG emissions at first but acknowledged that emissions would go up in the out years, and concluded that this increase was not significant for the purposes of an analysis under the California Environmental Quality Act.

The Cleveland National Forest Foundation and other environmental groups sued, claiming that the Executive Order was, in fact, state policy and that SANDAG had to take it into account in the SCS. In 2012, San Diego County Superior Court Judge Timothy Taylor ruled in favor of the plaintiffs. Similarly in the San Diego County decision, when a different Fourth District panel struck down the county's Climate Action Plan, it said the county had failed to show how it would conform with the "trajectory" of the Executive Order – although, in the court's view, the county's environmental impact report had promised to do that.

The *Cleveland National Forest Foundation* case was viewed as a possible blockbuster that could have given the Executive Order the force of law. Executive Orders are issued by the governor to guide state agency actions and typically do not contain such power.

But in the end, Presiding Justice McConnell cast the ruling in fairly typical CEQA terms, saying that the Executive Order should have been taken into account in the EIR analysis and that SANDAG should have considered other alternatives and mitigation measures.

Perhaps most important, she concluded that even though CEQA Guidelines section 15064.4, which lays out the significance thresholds for GHG emissions reduction

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analysis, does not expressly adopt the Executive Order's target, SANDAG was compelled to consider the target anyway.

Noting that the Guideline section states that agencies must use the listed factors "among others" in determining significance, she concluded the following: "the use of the Guideline's thresholds does not necessarily equate to compliance with CEQA, particularly where, as here, the failure to consider the transportation plan's consistency with the state climate policy of ongoing emissions reductions reflected in the Executive Order frustrates the state climate policy and renders the EIR fundamentally misleading."

In reaching this conclusion, McConnell noted that the Executive Order "led directly to the enactment of AB 32" one year later and also influenced the way CARB is required to implement SB 375. "Thus," she wrote, "the Executive Order, with the Legislature's unqualified endorsement, will continue to underpin the state's efforts to reduce greenhouse gas emissions throughout the life of the transportation plan."

Then, McConnell lowered the boom: "SANDAG contends the EIR cannot analyze the transportation plan's [SCS's] consistency with the Executive Order because there is no statute or regulation translating the Executive Order's goals into comparable, scientifically based emissions reduction targets. However, we do not agree the lack of such targets precludes the EIR form performing a meaningful consistency analysis in this instance … Although SANDAG may not know what future emissions targets the transportation plan will be required to meet, it knows from the information in its own Climate Action Strategy the theoretical emissions reduction targets necessary for the region to meet its share of the Executive Order's goals."

McConnell referred repeatedly to the fact that land use and transportation investments, once made, stay in place for many decades and therefore decisions made under the current plan will play a major role in determining whether SANDAG can meet any long-term future emissions reduction targets the state may impose.

McConnell's opinion also found SANDAG acted improperly by evading meaningful alternatives analysis and mitigations. For example, she said the EIR contained three feasible mitigation measures that were easy to meet but contained no concrete steps to reduce emissions, as well as three infeasible mitigation measures that were could not realistically be implemented.

She concluded: "Missing from the EIR is what CEQA requires: a discussion of mitigation alternatives that could both substantially lessen the transportation plan's significant greenhouse gas emissions impacts and feasibly be implemented." For this conclusion she relied on *Lincoln Place Tenants Association v. City of Los Angeles* (2007) 155 Cal.App.4th 425, the same case that the Fourth District relied on in striking down San Diego County's CAP.

Benke wrote a very long dissent that harshly criticized the majority opinion: "Whereas the majority purports to enforce CEQA and its Guidelines, I believe my colleagues weaken and confuse the law," she wrote.

Benke gave considerable space in her dissent to arguing that the Executive Order on its face "does not unilaterally qualify as a threshold of significance."

The majority opinion – while stating that the Executive Order must be taken into account – did not say that it should be used as a significance threshold. Benke appeared to view this as evasion. She wrote: "They offer that the *policy* underlying the Executive Order is of such overarching importance that it *must* be included in the significant factors listed" in the CEQA Guidelines – which, she argued, essentially means the majority concluded that the Executive Order *must* be regarded as a significance threshold.

Benke concluded that "I believe the GHG statewide emissions reduction targets set forth in the Executive Order are nothing more than mere policy recommendations unless and until our Legislature independently acts to adopt such targets, which … it has done for 2020 and 2035, but not for 2050."

The case is *Cleveland National Forest Association v. SANDAG*, No. D063288. It can be found at http://www.courts.ca.gov/opinions/documents/D063288.PDF.

For a prior report on briefing in the case, with comments from plaintiffs' attorneys, see http://www.cp-dr.com/node/3625. ■

SANDAG Ruling Included Holdings on Project Alternatives, Impact Analysis

BY WILLIAM FULTON

Although the question of Executive Order S-3-05 was the main event in the *Cleveland National Forest v. SANDAG* appellate ruling, Presiding Justice Judith McConnell's split-decision majority ruling covered a number of other important areas interpreting how the California Environmental Quality Act (CEQA) should be used in the context of a regional transportation plan.

Some of these other issues are related to the question of EO S-3-05, but many of McConnell's conclusions stand on their own as being worthy of note by CEQA practitioners.

Much of McConnell's ruling criticized SANDAG for its selection of alternatives, concluding that the agency had deliberately selected only those alternatives that were either not achievable or not meaningful. However, she also concluded that SANDAG erred in not analyzing an alternative that would have significantly reduced total vehicle miles traveled compared to the plan that was adopted.

McConnell did not mince words. She noted that SANDAG's "transit emphasis" alternatives focused primarily on ramping up rapid bus projects without increasing the amount of rail service. This has been a major point of contention between SANDAG and environmentalists. SANDAG has emphasized high-occupancy vehicle lanes and bus rapid transit, which means building more freeway lanes rather than more rail lines. "In fact," McConnell wrote, "the 'transit emphasis' alternatives include fewer transit projects than some of the other non-'transit-emphasis' alternatives."

She added: "The omission of an alternative which could significantly reduce total vehicle miles traveled is inexplicable given SANDAG's acknowledgement in its Climate Action Strategy that the state's efforts to reduce greenhouse gas emissions from on-road transportation will not succeed if the amount of driving, or vehicle miles traveled, is not significantly reduced."

Quoting the Climate Action Strategy that formed part of the plan, McConnell concluded that the SANDAG alternatives were focused primarily on congestion relief, including via freeway widening, even though the strategy notes that congestion relief may not be an effective greenhouse gas emissions reduction strategy.

Justice McConnell's majority opinion also found fault with the way SANDAG dealt with air quality impacts in the environmental impact report. In particular, she criticized the way SANDAG approached the question of particulates and toxic air contaminants. She agreed with the environmentalists' argument that SANDAG needed to provide more detailed information on the impact of air pollution on sensitive receptors in close proximity to transportation projects.

For example, she wrote, "the EIR failed to correlate the additional tons of annual transportation plan-related emissions to anticipated adverse health impacts from the emissions. Although the public and decision makers might infer from the EIR the transportation plan will make air quality and human health worse, at least in some respects for some people, this is not sufficient information to understand the adverse impact."

She concluded that, while there are limitations to a program-level analysis, SANDAG did not provide any evidence that it is not possible to provide more detailed information. "SANDAG is nonetheless obliged to disclose what it reasonably can about the correlation [between transportation projects and air quality impacts on sensitive receptors], it has not done so, and there is not substantial evidence showing it could not do so."

McConnell ruled against the environmentalists on their contention that SANDAG did not adequately address the impact of the plan on agriculture and especially on small farms, in large part because she concluded that the environmentalists' comment letter did not raise these issues in the context of growth-inducing impacts. ■

Planners Face Climate Planning Woes In the Upper San Joaquin Valley

BY MARTHA BRIDEGAM

California's mandates pressing large urban regions to reduce vehicle travel are tough. They possibly just got tougher with a recent San Diego appellate court ruling.

But spare a thought for the planners of the upper San Joaquin Valley. They're struggling to apply smart-growth principles in places not known for lavish public budgeting or love of urban density. They must all meet the same greenhouse gas emissions reduction standard – easier for some than for others. And now, one agency is facing a suit, *Sierra Club v. Merced County Association of Governments (MCAG)* (Merced County Superior Court Case No. CVM 019664) that has lawyers and allegations in common with the much-noted San Diego case, *Cleveland National Forest Foundation v. SANDAG*.

The San Diego region's 2011 transportation plan – the one that was slapped hard in a recent Fourth District appellate ruling – actually met its state-imposed goals for reducing per capita greenhouse gas (GHG) emissions from cars and light trucks as of 2020 and 2035. The ruling called for the environmental impact review (EIR) to look beyond those numbers, toward more possibilities for environmental improvement. If upheld by the State Supreme Court (SANDAG's board has voted to seek review of the ruling), it could limit lead agency discretion in preparing EIRs and impose more pressure to work toward deeper GHG reductions in planning years after 2035.

Merced and Madera Counties should be so lucky.

Out of California's 18 Metropolitan Planning Organizations (MPOs), all but the Shasta and San Luis Obispo regions have adopted Regional Transportation Plans/Sustainable Communities Strategies (RTP/SCSs) as required under SB 375. And of the 16 adopted plans, only Merced's and Madera's do not fully meet the per capita GHG reduction targets that the state Air Resources Board (ARB) set for them in 2010.

Merced's plan meets its 2020 target but not its 2035 target. Madera's meets neither. Meanwhile some of the other San Joaquin Valley MPOs, notably Stanislaus and San Joaquin Counties, have managed to adopt RTP/SCS plans that go far beyond the assigned Valley-wide targets: a 5% reduction in 2020 and a 10% reduction in 2035.

Missing a target carries no direct penalty, but when an MPO misses a target it must prepare an Alternative Planning Strategy (APS) explaining hypothetically what actions could help meet the target.

The CEQA writ petition filed against MCAG in October was brought by attorneys from the environmentalist team that won the SANDAG ruling, including Rachel Hooper and Erin Chalmers of Shute, Mihaly & Weinberger LLP and Kevin Bundy of the Center for Biological Diversity. In echoes of their SANDAG contentions, they alleged the MCAG plan did not call for enough changes in transportation policy, that the EIR failed to analyze and mitigate "the human health risks caused by expanding highway capacity" and that it "fails to analyze the Project's greenhouse gas emissions in light of scientifically relevant long-term climate stabilization targets contained in Executive Order S-3-05 and the AB 32 Scoping Plan."

The petitioners also contend the MCAG board erred by adopting a "Scenario B" model that called for moderate density increases, when a Scenario C, calling for greater density, was identified as "the environmentally superior alternative" in the EIR and "MCAG did not adopt this alternative or make any findings as to why it was infeasible." (The RTP/SCS as prepared for the September 25 meeting is here.) The complaint further alleges the analysis improperly used a supplemental rather than a full EIR, relying in part on environmental review work prepared before SB 375 became law.

Terry Roberts, manager of the ARB's Sustainable Communities Policy and Planning Section, said at least for 2014 RTPs adopted by the Valley MPOs, with the exception of Merced, EO S-3-05 wouldn't necessarily be an issue. She did say the Valley MPOs would have to consider the executive order the next time around in their four-year RTP/SCS preparation cycle if the court ruling stands.

Roberts said when the ARB has taken up the issue of SB 375 publicly,

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board members have often expressed a desire for regional RTP/SCS plans to show how GHGs can continue to be reduced beyond 2035. So she said the SANDAG ruling reinforced a previously expressed need to look at continuing emissions reductions beyond 2035.

MCAG officials have declined to comment directly on either the SANDAG litigation or their own, but public reports and comments suggest their answering argument would be that they're not bad, they're just drawn that way.

In an interview soon after the MCAG plan's adoption in September, Matt Fell, transportation planning manager with MCAG, said when the targets were set in 2010, "the valley didn't have some of the modeling capabilities that we have now." He said some San Joaquin Valley MPOs were able to supply data to the ARB about travel patterns, but MCAG was unable to do so in the same way, so targets were "set somewhat arbitrarily." (The eight San Joaquin MPOs have since upgraded their modeling of travel and land use patterns with grants from the Strategic Growth Council's Model Incentives Grant Program.)

During the 2010 target-setting process under SB 375, there was early talk of assigning the San Joaquin Valley MPOs "placeholder targets" of 1% to 7%. The final determination that year assigned each Valley MPO individually to plan for the same per capita GHG reduction targets: 5% below 2005 levels in 2020 and 10% below 2005 levels in 2035.

Of the 16 adopted plans, only Merced's and Madera's do not fully meet the per capita GHG reduction targets that the state Air Resources Board (ARB) set for them in 2010.

In comments during the ARB's October 2014 meeting on SB 375 target-setting, Roberts referred to the 5%/10% goals as "placeholder targets" as well, saying they "were intended to be revised once transportation modeling improvements were completed and alternative scenario analyses could be provided." At that time she said ARB staff would recommend new Valley targets in 2016 for Board adoption by 2018 – though some Valley administrators at the meeting were asking that target updates be made in the third round of SCS development.

Fell said interregional travel issues, especially involving long-distance commutes leading out of the region, tended to create variations in travel as measured from one county to the next. For example, he said 30% of travel in Merced County remained within the county, another 30% began or ended there, and 40% passed through and kept on going. He said if the jobs/housing imbalance persisted or worsened, that could mean more long commuter car trips, hence fewer GHG reductions. With limited revenue for "smart growth" incentives, he suggested MCAG was running out of levers it could pull.

Meanwhile Bill Higgins, executive director of CALCOG, advocated for more funding to make changes, and more flexibility: "While a tech worker in Silicon Valley may seek an infill unit within biking distance to her office, employees at Tulare County's dairy farms are likely to opt for a van pool rather than proximity."

Executive Director Andy Chesley, of the San Joaquin County MPO, has brought up the possibility of a three-county North Valley model (Merced, Stanislaus and San Joaquin) – an approach that might take more inter-county journeys into account as "local". (See MCAG's September 25 agenda packet.) The report notes that the nine Bay Area counties are held to a single standard as members of the Metropolitan Transportation Commission (MTC) region, without asking each county to meet the same standard separately, as in the Valley. ■

Legal Briefs

State Supreme Court To Address CEQA Preemption for Rail Plans

In granting review on *Friends of the Eel River v. North Coast Railroad Authority*, the State Supreme Court appears ready to face a conflict between the First and Third District state appellate courts on the extent to which federal regulation of rail projects preempts the California Environmental Quality Act.

The First District's *Eel River* ruling upheld a contract for use of railroad tracks against a challenge to its EIR, finding that as a federally regulated matter it was outside the purview of CEQA. The contract was between a state-created public agency, the North Coast Railroad Authority, and a private rail company. It first drew local attention because it could allow lumber shipping by rail to resume in Willits. But it has become clear a lot more is at stake statewide.

Among recent commentaries, attorneys with Barg Coffin Lewis & Trapp, LLP posted an analysis suggesting the *Eel River* decision, if affirmed, could advance freight rail expansions throughout the state, possibly including shipments of crude oil by rail to California refineries.

The *Eel River* case is in tension with the Third District's July ruling upholding the Bay Area leg of the state High-Speed Rail project in *Town of Atherton et al v California High Speed Rail Commission.*

Although the *Atherton* ruling sided with the High-Speed Rail (HSR) Authority on the immediate question of the rail line EIR, the Third District court rejected a federal-preemption theory based on the "market participation doctrine," finding that the California High Speed Rail Authority was subject to CEQA because it was acting, not as a regulator, but as builder of the project. Accordingly it was the HSR Authority that sought depublication of the *Atherton* case while environmentalist petitioners wanted the published decision to stand. The state Supreme Court denied depublication in October.

In a move that adds administrative pressure, the *Fresno Bee* reports that the U.S. Surface Transportation Board ruled 2-1 on December 12 that CEQA review of the High-Speed Rail project's Fresno-Bakersfield route "is categorically pre-empted". The paper counted seven lawsuits that could potentially be blocked by the order.

***Lynch* Seawall Case Accepted by State Supreme Court**

The state Supreme Court has agreed to review the Pacific Legal Foundation's seawall case, *Lynch v. Coastal Commission*. The property-rights organization is championing two blufftop property owners who have sought a permanent rather than temporary permit for a seawall to prevent erosion. The high court will review a Fourth District appellate opinion that backed the Coastal Commission's decision requiring a permit to rebuild the seawall after storm damage, and the Commission's refusal to issue seawall permits for more than 20 years at a time.

Procedural Tangle on EIR Resolved In Aggregate Mine's Favor

In *Friends of the Kings River v. County of Fresno*, the Fifth District upheld dismissal of a challenge to the EIR for a new aggregate mine in Fresno County. Petitioners claimed the trial court decided their case when it was not ripe for review because by the time the court's decision emerged, the plan they were contesting was no longer in effect. By the time of the court's decision, the plan at issue in the case had been rejected by the State Mining and Geology Board, reconsidered and revised by the Board of Supervisors, and was being re-appealed to the state mining board — which later approved it as revised. Based on these facts the appellate court found the dispute was "neither unripe nor moot." It rejected several challenges to the substantive adequacy of the EIR.

APA Joins Amicus for Regulating Signage by Type

Do free speech rights trump a city's ability to regulate signs placed in public? The American Planning Association has gotten nervous enough about the answer to join the National League of Cities, U.S. Conference of Mayors and other groups in filing a Supreme Court amicus brief in the case of *Reed v. Town of Gilbert*.

The petitioners in *Reed* seek to overturn rules in the city of Gilbert, Arizona, that regulate publicly placed signs according to their general purpose. In the underlying dispute, a pastor who posted signs advertising church services was cited under a local sign code regarding the size, placement, and other physical characteristics of "temporary directional signs". The pastor and church have argued on free speech and equal protection grounds that

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the city engaged in content-based regulation by treating signs about church services differently than, for example, yard signs for political campaigns. The city contends that in regulating signs based on their generic purpose, it regulated only the "time, place and manner" of displays.

Review Denied in Pasadena Case

The State Supreme Court declined to review *City of Pasadena v. Cohen*, an August ruling by the Third Appellate district in one of California's many disputes over asset claims of former redevelopment agencies. The appellate opinion, by Justices M. Kathleen Butz, George Nicholson and Harry E. Hull, Jr., held the city of Pasadena mistakenly sought declaratory relief when it should have filed for a writ of mandate, in trying to hang on to property tax funds that it said it needed to pay bond obligations.

Ninth Circuit: No New Ozone Rules

The Ninth Circuit turned down a petition in *WildEarth Guardians v. McCarthy* that sought to require the EPA to create new "Prevention of Significant Deterioration" rules for ozone pollution under the Clean Air Act. It based the rejection on ambiguity in the relevant statute, § 166(a) of the Clean Air Act (42 U.S.C. § 7476(a)), saying the law did not establish clearly enough that the duty to establish the standards was mandatory.

Kruger Nominated to Fill State Supreme Court Vacancy

Governor Jerry Brown has nominated Leondra Kruger, a senior Justice Department lawyer noted as a rising star, to fill the vacancy on the California Supreme Court created by the retirement of Justice Joyce Kennard. Kruger has argued a dozen cases before the U.S. Supreme Court, most prominently in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a 2012 case on the interaction of a religious employer's prerogatives with an employee's disability rights. Kruger has seldom taken positions on land use issues as an attorney, but as a Harvard undergraduate she had a front-row seat for the demise of Massachusetts rent control per a November 1994 statewide vote, and she clerked for U.S. Supreme Court Justice John Paul Stevens, a former city attorney who often sided with government agencies on land use and property rights issues. ■

Homeless Vets Seeking a Place on West L.A. Campus Have Won an Early 9th Circuit Round

BY MARTHA BRIDEGAM

Some important institutions got an awkward surprise last year when U.S. District Judge James Otero blocked them from leasing parts of the Veterans Administration's sumptuous 387-acre West Los Angeles Campus, holding that the campus was reserved for the provision of health care to U.S. military veterans.

His order sided with a group of chronically homeless veterans living with mental disabilities and/or brain injuries who argued that veterans like themselves had a priority right to receive care on the campus, including through supportive housing. Veterans are reportedly often seen sleeping outdoors near the campus gates.

The third-party lessors aren't going quietly; some have appealed to the Ninth Circuit. But the veterans' attorneys – drawn from LA's major poverty law nonprofits plus a deep bench of pro bono counsel – remain intent on seeing them off. On December 15, 2014 the veterans won an initial order from the appellate court blocking a third-party construction project that had resumed work on the West L.A. campus.

Judge Otero's rulings in the case of *Valentini v. Shinseki* included an August 29, 2013 order invalidating a list of "Enhanced Sharing Agreements" (ESAs) that, for many years, allowed third parties to use parts of the West L.A. Campus for purposes that may have been more welcomed by the neighboring communities of Brentwood, Westwood and Bel Air. The uses included gardens, UCLA's Jackie Robinson Stadium, athletic facilities for the Brentwood School, an industrial laundry, and a "butler building" for storing film sets.

The third-party users who held ESAs on the West L.A. Campus were on the sidelines during the initial two years of litigation leading to the August 2013 order. But when Otero ended the ESAs, UCLA and the Brentwood School moved to intervene, then appealed to the Ninth Circuit alongside the original parties. In a much-quoted statement, UCLA's counsel wrote that the baseball team could be made "homeless". Mediation attempts in mid-2014 fizzled and the parties are scheduled to file briefs in early 2015.

The construction that was stopped by the December 15 order is the "Hollywood Canteen Amphitheater," a project of the nonprofit Veterans Parks Conservancy (VPC). The same group reportedly leases 16 acres on the West L.A. Campus for purposes including the Historic Women Veterans Rose Garden.

The ESA allowing VPC to use the property was among those invalidated by Judge Otero in August. But as of late November the plaintiffs alleged VPC was again at work building the amphitheater on VA land. According to the plaintiffs' court exhibits, VPC signed a new agreement with the VA that said it could continue its construction work for 90 days, from mid-November until mid-February, on the "Hollywood Canteen Amphitheater". As noted in the *L.A. Times*, VPC's Web site implicitly justifies it as a veterans' health use by saying it "will be used exclusively for veterans and their families" and will be "a tranquil space for various alternative wellness therapies." But the plaintiffs argued that Otero's order made an agreement for any such construction improper.

In late November the plaintiffs asked Otero for a temporary restraining order against the amphitheater construction; he kicked it up to the Ninth Circuit, saying the appellate court had jurisdiction. The plaintiffs therefore took their request to the Ninth Circuit November 24, requesting emergency action within 21 days.

In the December 15 order that followed, the appeals court consolidated four separate appeals of the August decision, brought by ESA land users plus the VA itself, and sent the matter temporarily back to Otero for him to decide whether to issue an order preserving the status quo on the campus pending the rest of the appeal.

For most of the litigation's history, the dispute was between the plaintiffs and the VA alone.

Plaintiffs argued that housing for veterans with disabilities was a specific purpose of the 1888 land gift

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that founded the West L.A. Campus as a veterans' service site, and they added disability rights claims to claims that the VA had failed to comply with governing statutes, especially regarding the meaning of a "health-care resource" under 38 U.S.C. Secs. 8151 to 8153.

The VA defended in part by arguing that general principles of deference to agency discretion applied, and that the ESA decisions were within administrators' discretion under Secs. 8151 to 8153. The VA also argued the administrative record was "replete with examples" of administrative determinations that "veterans will receive priority for services" and that ESAs would help services and the community. In some cases it said agreements had been reached with "Compensated Work Therapy" jobs in mind for veterans, and in the case of the sports facilities, "recreational opportunities for Veterans."

The *L.A. Times* reported arguments for preserving the baseball stadium included that veterans received free admission to games and could use the stadium in the off-season.

Both UCLA and the Brentwood School reportedly argue they have spent millions of dollars to create and maintain sports facilities on the land they have leased from the VA.

But the *Los Angeles Times* recently editorialized in favor of a settlement that would provide veterans with supportive housing, and in the meantime for stopping the Hollywood Canteen Amphitheater. The editorial said it might be all right to let baseball games continue at the existing stadium pending the appeal, but new construction was another matter.

Use of the West L.A. campus to house veterans would not be a break with the past. The plaintiffs' papers said the campus housed a "Soldier's Home" for disabled war veterans "for some 80 years". The *L.A. Times* reported last year that the site was used as veterans' housing into the 1980s.

Nor would it break with typical uses of VA hospital campuses. The VA has made available an "Enhanced Use Lease" mechanism nationwide for the specific purpose of enabling long-term ground leases to nonprofits to build subsidized veterans' housing on VA hospital campuses. A recent report on the mechanism by the National Housing Conference and Center for Housing Policy features a number of "best practices" examples, and one of them is in Los Angeles: the New Directions Sepulveda I and II project in North Hills.

Attorneys for the plaintiffs include Mark Rosenbaum of the Los Angeles ACLU and Gary Blasi, an elder statesman of LA-area poverty law who is a UCLA law professor emeritus. Among the pro bono counsel are several attorneys with Arnold & Porter, the same firm that also recently won a settlement in Fresno for 36 homeless people who lost property in a city sweep of encampments.

UCLA's attorneys include counsel from Manatt, Phelps & Phillips. Brentwood School is represented by Gibson, Dunn & Crutcher.

The following resources have more on the West L.A. Campus case:

- The ACLU's page on the case.
- Clearinghouse.net.
- Rep. Henry Waxman's office.
- August 2014 GAO report on VA land use agreements that was included as an exhibit to the recent injunction petition.
- News features in *The Nation* in March and April 2013.
- *Los Angeles Times* profile of lead plaintiff Greg Valentini in 2011. ■

California Water Experts Face Drought-Driven Changes

BY MATT HOSE

With California in one of its worst droughts in recorded history, cuts have fallen swiftly on users of surface water, but the effects on groundwater will percolate more slowly.

Unlike surface water sources, including deltas, rivers, lakes, and basins, groundwater has remained largely unregulated in the state, even though it accounts for about a third of California's total water supply. That will begin to change soon under the Sustainable Groundwater Management Act, signed into law this past September by Gov. Jerry Brown.

It will take effect mainly through the action of new groundwater sustainability agencies (GSAs), according to water attorney Eric L. Garner, managing partner of Best Best & Krieger, LLP.

Garner was the keynote speaker Dec. 4 at the Association of California Water Agencies (ACWA) fall conference in San Diego. The conference gathered experts and practitioners to discuss California water policy as affected by this year's drought pressures.

Traditionally, California courts have adjudicated the allocation of water in groundwater basins. Garner said the new GSAs will be able to do what courts do now, by imposing fees and monitoring subsidence of land. Importantly, he said they will also be able to monitor the amount of water that owners extract from the ground. Though owners have certain rights to the water underneath the land they own – known as overlying rights – the agencies could tell owners to stop pumping water out of the ground if the supply is depleted faster than it is replenished.

He said that's a big change from the way groundwater monitoring happens now: "You pump until a judge tells you not to, and that is the law of California groundwater [today]."

While the law takes effect on January 1, 2015, it gives districts until 2017 to form the GSAs. Then, depending on how "critically overdrafted" a basin is, each GSA has until 2020 or 2022 to implement a Groundwater Sustainability Plan (GSP), which reports the amount of groundwater being used, levels of subsidence, and identifies areas to replenish the groundwater supply.

Districts then will have 20 more years to get their groundwater use to "sustainable yields," meaning the point where the supply taken out nearly equals the amount brought back in, and does not have adverse consequences for the environment.

Among other things, Garner said the biggest risks to the groundwater supply in the coming years will be California's rapidly growing population and seawater intrusion, which can ruin existing supplies of groundwater in coastal areas.

Some districts have already begun implementing changes that will be mandated by the SGMA. At a separate panel during the conference, Mark Larsen, the general manager of the Kaweah Delta Water Conservation District, said his "severely" overdrafted basin in Sequoia National Park has begun placing recharging basins to replenish the groundwater supply throughout the district. To date, the Kaweah district has installed 11 basins to recharge the supply of groundwater in the district.

SWRCB counsel faces ag water lawyers' ire

Responding to unprecedented drought conditions during the past four years, state officials had to change the rules of the game in enforcing mandates to curb water usage throughout the state.

In California's complicated, history-rich water rights world, no big change happens without a fight. Michael Lauffer, the chief counsel of the State Water Resources Control Board, faced that head-on at an ACWA panel full of indignant water lawyers. The lawyers lambasted the state's response to the drought as "draconian," and as harmful to due process rights.

The lawyers' anger focused on the water board's May 2014 emergency water measures, which allow the board to impose fines of up to $1,000 per day for violations of curtailment orders. They noted state law formerly required there be two straight dry years for the board to adopt

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>>> California Water: Drought-Driven Changes

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emergency regulations, and despite the year 2013 being the driest in recorded history for California, 2012 got enough rainfall that it didn't fit the category. So the orders were authorized by the Governor's April 25 executive order allowing the board to adopt emergency regulations.

The lawyers complained that the emergency measures limit due process rights as well as water flows: they allow the board to fine violators of curtailment orders directly, without a hearing, whereas under ordinary curtailment orders, the board would have to issue cease-and-desist notices, and then conduct an evidentiary hearing to assess guilt.

Lauffer said the usual hearing process would be too time-consuming, and that the board lacked resources to carry that out on an individual, case-by-case basis.

Instead of issuing individual curtailment orders for each owner of water rights, the state compiles data for the watersheds and issues curtailment notices based on the amount of demand in a particular stream. Through this process, Lauffer said the state is able to broadly enforce the requirements in a "particularly dire situation." He admitted that some due process was foregone, but argued the measures were necessary as California heads into its fourth year of drought.

On the contrary, Jeanne Zolezzi, a lawyer with the firm of Herum, Crabtree & Brown who represents senior water rights holders, said the cuts should have been individualized, not applied across the board.

"Water rights have very specific rules," she said. "They're property rights; they're protected. And we need to follow those rules, they've worked for over 150 years in California, and we don't need to reinvent the wheel."

Zolezzi said many junior water users were being forced to cut water use under the new procedures even when that use didn't affect holders of more senior rights. She said, "The only difference provided by the emergency regulations was that the state board has an easier job of enforcement…It's more efficient and effective, because inconvenient things like evidentiary hearings and due process are dispensed with."

Tom Birmingham, general manager of the Westlands Water District, which does not hold senior rights, agreed, saying "some type of opportunity to be heard before you are punished is critically important."

Zolezzi lamented that her clients have found themselves in opposition to rights holders in areas like Birmingham's.

She said, "I think you know that if any other industry in California were brought to its knees the way that agriculture has been in the past two years, laid off the number of people that they have laid off in California, the state would step in and do something about it. They wouldn't allow that industry to go under. We have been...forced to fight one another for this water. No other industry would ever be required to do that."

Matt Hose has been a reporting intern with the Voice of San Diego. ■

insight WILLIAM FULTON

>>> The SANDAG Ruling's Disturbing Message About Executive Power

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Order S-3-05 from 2005 – can be viewed as "state policy" and therefore must be considered in a lead agency's analysis under the California Environmental Quality Act.

This may seem kind of silly, but given the circumstances it's probably worth reviewing the difference between a statute and an executive order and then walking through how the Court of Appeal came to this conclusion.

A statute is a state law, binding on everyone in the state, which has been approved by both houses of the legislature and signed by the governor. The process for adopting a law is laid out in the California Constitution.

An executive order is statement issued by the governor directing state agencies in their operations – most often directing them on the question of how to implement statutes. The president also issues executive orders (the most famous one was the Emancipation Proclamation), and the current food fight in Washington over President Obama's independent action on immigration is essentially a fight over whether Obama has the power to issue an executive order telling federal agencies how to implement federal immigration law. Even when executive orders are not explicitly designed to implement law but rather simply provide direction for government operations, obviously they have to abide by the laws on the books.

A governor of either party with a sweeping frame of mind could issue an executive order on almost any topic and it would have to be considered – not just in the CEQA context but possibly more broadly as well – as state policy.

Schwarzenegger's Executive Order S-3-05, however, is breathtaking in its scope – a fact that the environmentalists have taken advantage of in this case. It is written as if it were a law. Citing no state statutes whatsoever, S-3-05 simply states that climate change is a major threat to the future of California and establishes greenhouse gas emissions reduction targets statewide for 2010, 2020, and 2050. (The executive order does allude to other actions taken by the California Air Resources Board to reduce GHGs under the special regulatory power California has under the federal Clean Air Act, which was challenged by the Bush Administration at the time.)

The year after EO S-3-05 appeared, AB 32 was adopted and enshrined many of the aspects of the executive order in state law, including the 2020 GHG emissions reduction target. But it did not set a target for 2050 – nor, indeed, for any year beyond 2020.

Subsequently, SB 375 directed CARB to establish emissions reduction targets for 2020 and 2035. But SB 375 does not deal with all emissions – only transportation emissions that can be controlled through the Regional Transportation Plan. CARB subsequently adopted per-capita emissions targets for transportation for each region – not an overall emissions reduction target.

So how did an executive order – which under law is a directive guiding state agencies – become the state's climate policy, according to environmental lawyers and the Fourth District Court of Appeal? Through the wording of the legislative intent in SB 32. According to Presiding Justice Judith McConnell, who wrote the majority opinion, that wording states the following:

- The legislature intends for the emissions limits to continue past 2020 to maintain and further reduce

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>>> SANDAG Ruling: a Stronger Dissent

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emissions.

- The legislature intends for the emissions limits to work in concert with other environmental laws rather than trump any of them.
- The legislature intends that the state Climate Action Team created by EO S-3-05 continue in its role as coordinator of state climate policy. (This is the only explicit mention of EO S-3-05 in SB 32.)

Justice McConnell bought the environmentalists' argument that these statements of legislative intent "effectively endorsed the Executive Order and its overarching goal of ongoing greenhouse gas emissions reduction as state climate policy." She also noted that SB 375 called upon CARB to adopt 2035 targets for the transportation sector and revisit the targets every few years through 2050.

McConnell didn't say that SANDAG actually had to meet the 2050 target, but she did say that because EO S-3-05 is state policy, the environmental impact report must analyze why SANDAG is not meeting the target.

I think this is a pretty big leap. If I were a state legislator charged with voting on statutes, I'd feel cut out. If I were still a local elected official charged with implementing state policies, I'd wonder why I had to follow the directives of the governor rather than making him get laws passed by the legislature first.

In her dissent in the SANDAG case, Justice Patricia Benke wrote bluntly: "[T]he fact that the Legislature has enacted environmental legislation in recognition of the Executive Order's goals does not bestow on the Executive Order any more power than it had before the Legislature acted." She called McConnell's ruling "judicial fiat".

I usually reserve this space for analysis rather than to express a strong opinion, but in this case I'm going to depart from my customary practice. I agree with Justice Benke and disagree with Justice McConnell. You can see the danger embedded in the McConnell ruling: A governor of either party with a sweeping frame of mind could issue an executive order on almost any topic and it would have to be considered – not just in the CEQA context but possibly more broadly as well – as state policy.

It's also worth noting that Justice McConnell's majority opinion is – in my opinion, at least – tortured in its reasoning, whereas Justice Benke's is straightforward and strongly argued. This is often the case when a majority opinion is straining to make the reasoning fit the desired outcome. Benke's dissent also addresses the CEQA implications much more directly, making a convincing argument that the majority opinion essentially tells lead agencies to use the executive order as a significance threshold. This is a conclusion that the majority opinion takes care to avoid stating directly, but, as Benke points out, it would be almost impossible not to use EO S-3-05 as a significance threshold given McConnell's opinion.

Part of the reason I have strong personal feelings about this is because of the experience I had in crafting the still-pending climate action plan when I was the planning director for the City of San Diego. Even before the appellate ruling – when all they had was Superior Court Judge Timothy Taylor's ruling in the same direction – environmentalists routinely threw around EO S-3-05 as the rationale for their insistence that the CAP contain hard post-2020 targets that would be locked in under CEQA. We tried to push back by arguing that, as a city, we didn't have to follow an executive order because, simply put, it wasn't a law. You'd be surprised at how hard it was to get people to see the argument.

But that's the danger of Justice McConnell's ruling, if it stands: If you want all the regional and local governments in the state to do something – or at least explain why they are not doing that something – then you don't need to pass a law. All you need is a governor with a pen. ■

Los Angeles' Slow Burn

I noticed the da Vinci apartment complex for the first time only a few months ago. How could I not notice it? It looked like a plywood ocean liner beached against the northbound side of the 110 freeway. Rising 4-5 stories at the time, it hovered over the freeway, uncomfortably close to the roadway. I remember hoping that it would have serious soundproofing. And air filtering.

The Da Vinci cut an impressive profile on the L.A. skyline, even before it went up in flames. And did it ever go up in flames.

When I woke up Monday morning to read the headlines and see the photos in the online Los Angeles Times, I knew that the structure in question was the Da Vinci. No other pile of kindling in downtown Los Angeles could have created flames the height of skyscrapers. Now the roughly one-million-square-foot complex has been largely reduced to ash. Nearby buildings suffered damage from radiant heat, and a freeway sign nearly melted. It's not quite the Great Fire of Rome, but it's pretty bad.

Commentators have already started to wonder whether the fire represents a turning point in Los Angeles urbanism. Is this our Pruitt-Igoe?

Now the question in L.A. is whether something good will come of it.

Suspicions of arson and speculation about an "architectural hate crime" have arisen. Feelings of schadenfraude and poetic justice are rampant. I imagine that, for some urbanists in Los Angeles' smart growth crowd (of which I consider myself a member), the only thing better than the destruction of one faux-Italian megablock apartment complex would be the destruction of four faux-Italian megablock complexes.

It's hard to say which L.A. real estate developer is more reviled: Don Stirling or Geoffrey Palmer? Stirling ran one of the world's worst basketball teams (the Clippers), owns dozens of mediocre midcentury apartment complexes, and has roundly been decried as a racist. Palmer doesn't have a losing record or a history of bigotry, but he does have terrible taste and terrible timing.

Though Palmer claims credit for participating in the revival of downtown Los Angeles, his is a funny version of revival. His four major projects are each an affront to urban living. They are self-contained fortresses, with residential units sitting atop enormous plinths full of parking. If his residents ever walked on the perimeter sidewalks (unlikely), they'd be dwarfed by the walls that keep the city at bay. Some of his developments have pedestrian bridges, ensuring that residents never have to set foot in the actual city or encounter undesirables.

Designed in a style that is kindly described as "Italianate" (I guess Italian-ish was taken), each has an anachronistic name and design flourishes, like balustrades and tile roofs, meant to invoke... I don't know. Siena? They're hideous. Trust me. True to its name, the da Vinci was set to follow this pattern. I'm sure its replacement will do the same. (See a photo of Da Vinci's sister ship the Visconti here.)

The one and only thing about Palmer's properties that can be considered remotely "smart" or even urban is the density. Da Vinci was to have 526 units. Palmer packs a lot of people into relatively small footprints. So do prisons.

Palmer probably didn't fiddle while the Da Vinci burned. His company has hundreds of millions of dollars riding on it. But he otherwise has been the Nero of downtown Los Angeles. As we consider the ash heap of the Da Vinci, commentators have already started to wonder whether the fire represents a turning point in Los Angeles urbanism. Is this our Pruitt-Igoe?

I tend to think not, and not just because Palmer will surely build an identical replacement. The regulations, tastes, financing mechanisms, stakeholder passions, and general civic attitudes that created the Da Vinci are almost as old as the Pantheon. They will not be erased in a day. They're the same forces that have created soulless suburbs and all the other lousy apartment buildings in Los Angeles. The Da Vinci is unique for its size, but not for the way that it retreats from the cityscape or for the way that it segregates Angelenos from each other. And then there's the market: Palmer wouldn't be building the Da Vinci if he didn't think

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that at least 526 people would want to live there.

The Da Vinci was a disaster long before it burned down. Progressive planners and urban critics knew it was a disaster. Developers behind downtown's real success stories, the adaptive reuse of scores of old commercial buildings, probably concurred. But, like public attitudes towards climate change and natural selection, the convictions of the progressive elite — such as they are -- don't matter much, especially in a field that measures change by the decade. It's easy to say that this fire never should have happened. We've been developing better ideas about cities for a long time. They're being enacted elsewhere downtown and in other pockets throughout L.A., but they haven't reached the mainstream yet.

Of course, we can gladly consider the Da Vinci a turning point. But to call it a "point" belies the glacial pace of change. The process of making a better city is usually a long, wide arc. It's amazing, of course, how quickly lousy cities can grow (Las Vegas, Dubai), but how long good cities take. You have to bake them slowly and gently, and wait patiently for them to rise. So, we're in a turning era, if anything. We need to stay the course, keep the faith, and know that a true renaissance is coming.

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If there's a truly heartbreaking story in this disaster, it's the destruction of holiday gifts that had been donated for needy senior citizens and stored across the street from the Da Vinci. LA CARES, the sponsoring organization, is now scrambling for donations and a space to store a new trove of gifts. I've made my donation. I can think of another potential donor, with a $3 billion real estate portfolio, who should be willing to write a much, much larger check.

– JOSH STEPHENS | DEC 12, 2014 ■

BEST WISHES TO OUR READERS FOR 2015 FROM CP&DR