CP&DR

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CALIFORNIA PLANNING & DEVELOPMENT REPORT

SGC begins to shape the Affordable Housing and Sustainable Communities program

BY MARTHA BRIDEGAM

The Strategic Growth Council (SGC) held a celebratory but serious public meeting July 10 to take stock of its budgetary good fortune under California's cap-and-trade program.

Under the SB 862 budget trailer bill enacted this summer, SGC suddenly has $130 million to fund the first year of a new Affordable Housing and Sustainable Communities (AHSC) program, and after that has been promised ongoing funding from 20% of the state's ongoing cap-and-trade auction revenues. Previously funded by one-time grants (see http://www.cp-dr.com/node/3513), the council now has a permanent funding source.

Amid the mutual congratulations, the meeting had aspects of a founding convention -- and moments of the uncertainty that blank pages induce -- and moments, too, of the early-stage shouldering that new prospects of public money induce.

SGC has a program to design. Not that it's starting from

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insight

WILLIAM FULTON

What comes next after LOS?

The Governor's Office of Planning & Research is a month late in issuing its final recommendation on whether to replace "level of service" as the measurement of significant transportation impacts in transit priority areas under the California Environmental Quality Act. But there's not much mystery: OPR has sent clear signals that it is going to propose replacing LOS with vehicle miles traveled, or VMT.

A VMT standard would get California out from under constant use of CEQA to widen roads and facilitate auto travel – a strange environmental outcome if ever there was one – and it would align the CEQA Guidelines with state policy, especially AB 32, the state's greenhouse-gas emissions reduction law, which essentially requires a reduction in overall driving. But it would upend the longstanding practice of traffic engineers in practically every city and county in California. It's hard to know how localities would actually seek to translate a VMT standard into day-to-day practice in

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Inside

Coastal Commission grants last major approval to Santa Monica Mountains LCP

BY MARTHA BRIDEGAM

The Coastal Commission had plenty to worry about in July, but the big-ticket item, the Santa Monica Mountains Local Coastal Program (LCP), was at last not problematic. After 28 years of difficult stop-and-start negotiations, the final Local Implementation Plan (LIP) approval session sounded like a Thursday morning at the Oscars.

The first "I'd like to thank..." litany of gratitude came from Jack Ainsworth, senior deputy director for the Ventura-based district office with responsibility for LA County. That was after he'd announced full agreement between the County and Coastal Commission staff on the 600-odd suggested modifications to the original LIP, which he termed "nothing short of a miracle."

Then it was the turn of termed-out LA County Supevisor Zev Yaroslavsky, who drove the LCP to completion as his legacy project. And then more mutual thanks: to Yaroslavsky, the Coastal Commission staff for long hours against tough deadlines; County Planning Director Richard Bruckner and his staff; the Commission, the public, homeowners' associations, equestrians, voters.

A unanimous vote of the Commission that day gave the plan its last substantive approval. It now goes to the County for re-endorsement as amended, then back to the Commission for endorsement, then becomes fully final.

The plan covers 50,000 acres of steep canyonlands above the City of Malibu's coastal strip: a territory of fragile habitats, expensive houses, organic farms and vineyards, parks — and locally traditional horse corrals. Per the program's last and toughest negotiations, new farming is discouraged, new vineyards are banned outright, and the horse corrals will be either helped toward compliance or, if that's impossible, allowed to phase out, even allowing limited nonconforming uses to continue a while after sales to new owners. (For more background see http://www.cp-dr.com/node/3474.)

Susan Jordan of the California Coastal Protection Network used her public comment minutes to recall, by contrast, the 2002 conflict when the Legislature required the Coastal Commission to draft and certify an LCP for the city of Malibu. "What went down during that fight was -- I can't even describe really what it was like but it was terrible. It was contentious. There was anger on all sides. And it finally got done but it was -- it left everyone really bruised." Whereas this time -- she professed herself "nothing short of amazed" to see letters of support from Malibu City Council members. She said, "This is a very progressive LCP -- well, it's not there yet, but almost."

Consultant Don Schmitz spoke as he had in April for the Coastal Coalition of Family Farmers, a group formed this spring in alarmed response to the planned restrictions on agriculture. Schmitz's group had especially fought the LCP's moratorium on new vineyards. He made two last appeals at the July meeting: first, to let farmers add a little more growing space in the ten-foot "fuel modification zones" required along roads, and, second, to let them install more solid barriers than the required wildlife-permeable fencing around organic farmland. He lost on both counts.

Heal the Bay's last-ditch effort, less insistent, was to call for more mitigation during the "temporal loss" created by the temporary grandfathering of nonconforming horse properties. The group also called for more careful monitoring of stream impacts. Again, no changes were made to the addendum worked out between county and Commission staff before the meeting. At last the deal was done.

The main July agenda document at http://documents.coastal.ca.gov/reports/2014/7/Th15a-7-2014.pdf includes

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inbrief

Walnut Creek starts formal preparation of BART-centric Specific Plan

Walnut Creek officially began preparation last month of a West Downtown Specific Plan focused on links between the city's BART station and downtown, with related attention to nearby major boulevards. The city's initial Notice of Preparation papers are at http://bit.ly/WAz7Wv. Linked thence, the main West Downtown Specific Plan page at http://bit.ly/1lpCXH0 says "This important plan will focus on making it easier to walk and bike between the BART station and downtown; and plan for new homes and businesses between Olympic Boulevard and the BART station, while preserving the Almond-Shuey neighborhood."

The city's Planning Department has already conducted a two-year public outreach process, sampling public opinion in small groups and workshops and obtaining a consultant's report on expected transportation and land use changes. Materials on the planning site include a "Self-Guided Transit Oriented Development Tour" featuring model transit-oriented projects around the Bay Area. A first draft of the Specific Plan itself is expected to appear in October, to be followed by study sessions and hearings starting in January.

Fairfax Town Council backs off from zoning for housing

The Fairfax Town Council in Marin County has repealed a zoning ordinance that would have allowed construction of 124 new housing units. The decision, per the *Marin IJ*, "leaves in limbo the future of a plan to build 40 single-bedroom affordable apartments for seniors at the Christ Lutheran Church property on the west end of town." (See http://bit.ly/1o4q89O.) The repeal followed a start on a referendum petition that got 1000 signatures opposing the ordinance, and a tough meeting July 12, in which officials explained the city's 2010 General Plan provisions and ABAG-determined housing goals, and critics accusing town planners of zoning for too much new housing. See http://bit.ly/1lpGhBY for the *Marin IJ* on the meeting. The city's main site at http://www.town-of-fairfax.org/ provides video and handouts from the event under "Current Topics".

Sacramento Kings seek $100 million bond from CEQA plaintiffs

If environmental and social advocates are going to hold up the Kings basketball arena with lawsuits, the team's owners have asked for a guarantee against possible consequences of opening the structure late. The *Sacramento Bee* reports at http://bit.ly/1nwGzwG that the team's demand for a $100 million bond is based on the possibility of losses if the stadium isn't open by October 2016, and, more starkly, an agreement allowing the NBA to move the Kings elsewhere if they don't have a Sacramento stadium by fall 2017. The cases in question are *Saltonstall v. City of Sacramento*, a CEQA-based environmental impact suit filed in May and *Sacramento Coalition for Shared Prosperity v. City of Sacramento*, filed in late June by housing and environmental activists who, before suing, sought a Community Benefits Agreement to compensate for the arena's alleged future effects on the environment and local economy. (See http://bit.ly/1nHc0TI.) The *Shared Prosperity* and *Saltonstall* suits make overlapping claims about environmental impacts and both question the validity of special provisions granting CEQA relief to the arena under SB 743.

State Lands Commission sues over SF's Prop B height limit

The State Lands Commission has filed a petition to stop the city of San Francisco from enforcing its newly passed Proposition B waterfront height limit. It alleges the port lands addressed in the June ballot measure are not subject to local voters' control because they belong to the state and are governed by the Port Commission for the whole state's benefit. Lt. Governor Gavin Newsom, a former mayor of San Francisco, is one of the Commission's three members.

City Attorney Dennis Herrera posted a defiant response at http://www.sfcityattorney.org/index.aspx?page=605 arguing that the city's port lands are managed by several authorities together, and questioning the Lands Commission's reliance on Public Resources Code Sec. 6009, passed in 2010, as authority for preempting local ballot measures on Port lands.

Pleadings can be downloaded from the online docket at http://bit.ly/1wU6qOJ. The *SF Chronicle*'s Bob Egelko reported at http://bit.ly/1oG6BsL that the case could be consolidated with a suit filed by developers last winter that makes similar arguments. For more on Proposition B and San Francisco port lands, see http://www.cp-dr.com/node/3510. An see this issue's ballot measure report for potential effects on the pending Pier 70 ballot measure proposed for November.

Botched service on developer keeps SLO challengers out of court

California's Second Appellate District ruled July 28 that a developer can assert a statute of limitations defense against a late-filed challenge to a subdivision plan regardless of whether it files a fictitious business name statement. In the case of *Templeton Action Committee v. County of San Luis Obispo*, challengers to a subdivision map and conditional use permit filed a petition naming both the county and developer Templeton Properties, but failed to serve the developer correctly within the 90-day deadline after the county approval of the map and permit.

The court found Templeton Properties was an indispensable party to the efforts to revoke the map and permit approval, so that the only action the petitioners could maintain against the county alone would be a more generic allegation that the county made a pattern and practice of failure

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to comply with its general plan on land use.

The petitioners further claimed Templeton Properties was estopped from invoking the statute of limitations because it did not file a fictitious business name statement. The court found no such estoppel was supported by law – and as a practical matter, when the petitioners botched the service they already knew the name of the development partner who they eventually managed to serve late.

The case is at http://www.courts.ca.gov/opinions/documents/B251788.PDF.

Street washing, some sidewalk washing, still allowed by state water rules

California's new mandatory outdoor water conservation rules have exempted municipal street washing, and they allow exemptions, apparently including use of potable water on sidewalks, to meet an "immediate health and safety need" or to meet a state or federal permit condition. See the *SF Chronicle* at http://bit.ly/1myVPTF and the State Water Board's frequently updated water regulation page at http://bit.ly/U4HBmI. The exemptions were especially sought by the city of San Francisco for its downtown sidewalk and street washing program. (See http://bit.ly/1m2eV4e.) San Francisco has been accused of using water trucks both to clean up waste left by sidewalk campers and to remove the campers themselves. http://alj.am/1gGjTVs

HOAs lose power to enforce lawn watering

Governor Jerry Brown has signed AB 2100, by Assemblymember Nora Campos, D-San Jose, to stop homeowners' associations from fining members for watering their lawns less or not at all during a drought emergency. See http://bit.ly/1tsryM1 for details. The bill is closely similar to AB 2104 by Assemblymember Lorena Gonzalez, D-San Diego, and even closer to SB 992 by State Sen. Jim Nielsen R-Gerber.

Mountain View activists want more housing in shopping center mix

The Mountain View City Council was reportedly leaning toward approval of a plan for more housing at the planned San Antonio Center shopping center project – a significant change from February, according to the *Mountain View Voice* at http://bit.ly/1n8nZKj. The paper reported the Campaign for a Balanced Mountain View activist group had threatened to place a measure on the ballot unless the affected shopping area's San Antonio Precise Plan was readjusted to balance housing with jobs. See http://balancedmv.org/.

Active transportation promoters include Ed Begley, Jr.

True to his many Everyman roles, actor Ed Begley, Jr. showed up at a meeting of the Los Angeles Metro policy committee as part of a group seeking more funding to encourage and ease walking and bicycling in LA. See http://saferoutescalifornia.org/2014/07/16/at_financestrategy_lametro/. The committee passed a motion to create an active transportation finance strategy for the county that would define and fund goals of promoting walking and biking. *Streetsblog LA* livetweeted the meeting on the hashtag #metrofundwalkbike, including Begley's appearance around https://twitter.com/StreetsblogLA/status/489530460540653569. It reported the full Metro board approved the strategy July 24. See https://twitter.com/StreetsblogLA/status/492404131961663489.

San Diego development fee vote put off to September.

In mid-July a deal between housing and business advocates briefly seemed ready to bring about a rare increase in the fee San Diego charges to commercial developers to support subsidized housing. However, the City Council then agreed to wait until September for a vote on the matter. See www.utsandiego.com/news/2014/jul/17/linkage-fee-delay. Andrew Keatts in the *Voice of San Diego* wrote that the increase would only return the fee to 1.5% of 1990-denominated construction costs, which is where it started 24 years ago. The City Council had been forced to undo a vote that last year raised the fee to 1.5% of total development costs. For details and links to the plan as reported before the delay see the *Voice of San Diego* at http://bit.ly/1nvkFUF, *San Diego CityBeat* at http://bit.ly/1t27r78, and the *U-T* at http://www.utsandiego.com/news/2014/jul/09/linkage-fee-double-reform/.

San Pablo Avenue Specific Plan gets an early approval

The draft EIR for the San Pablo Avenue Specific Plan received an initial approval July 16 from the El Cerrito Planning Commission per the *Mercury News* at http://bit.ly/1s0J0al. A collaborative effort between El Cerrito and Richmond, the plan would call for landscaping, polishing and pedestrian/bike amenities along 2.5 miles of commercial corridor. The plan has its skeptics: the *Mercury News* reports one speaker at the El Cerrito hearing said, "San Pablo Avenue is a state highway, it's not going to be Solano Avenue," meaning it couldn't easily emulate North Berkeley's posh main shopping street. An earlier *Oakland Tribune* report at http://bit.ly/1IRMNRf summarizes more of the plan. El Cerrito's plan site is at http://www.el-cerrito.org/index.aspx?nid=396. Planning and City Council meetings on the matter are scheduled for September.

San Francisco passes open space plan

A revised Recreation and Open Space Element (ROSE) for the San Francisco General Plan passed the Board of Supervisors 8 to 3 on first reading July 8. It was headed for final passage July 15. The San Francisco Parks Alliance supported the measure,

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praising it for "up-to-date priority areas for land acquisition; local biodiversity in natural areas; living alleys, POPOS (privately owned public open spaces), and parklets; a plan to connect existing open spaces through "Green Connections"; and more community engagement." http://conta.cc/W9cKXo The proposal drew criticism from a neighborhood advocates' coalition for insufficiently protecting open space from new construction, especially in areas where it's scarce, for lacking a measure of adequately met recreational needs, and for overemphasizing native species at the expense of existing greenery. See http://bit.ly/1r3fPDX and http://sfforest.net/2014/06/10/watch-out-for-rose-action-alert/. The plan is at http://openspace.sfplanning.org/.

State Water Board proposes statewide trash pollution standards

The State Water Resources Control Board is circulating a statewide version of proposed amendments to tighten existing statewide trash control rules. The proposals, released June 10, are at http://www.waterboards.ca.gov/water_issues/programs/trash_control/documentation.shtml. The proposal applies to all California surface waters except for the Los Angeles rivers and streams that, uniquely in the state, already have trash Total Maximum Daily Load (TMDL) standards for trash. Even those would be reconsidered under the statewide rules. The League of California Cities has more links and commentary at http://bit.ly/1kuJWyo. Some presentations are online at the state site from a July 16 workshop on the proposal. Comments are due August 5, also the date of a hearing when the board will take public comment without voting.

SFPark better at managing occupancy than space availability

CityLab's Eric Jaffe looked at some new data on the city's SFPark variable-rate meter system and found that in many ways it successfully rations parking by raising its price, reducing the amount of circling in search of spaces. However, he presented additional data from academic researchers Daniel Chatman and Michael Manville suggesting that, while the meters did successfully control overall occupancy by discouraging those willing to pay less, the result didn't guarantee that a space would be open when someone willing to pay for it wanted one: http://bit.ly/1mpUJOe.

Cal Supremes to review *Property Reserve* case

The California Supreme Court agreed to review the *Property Reserve* appellate ruling on whether the state must bring an eminent domain action to get access to private property for geological testing for a future project. See http://bit.ly/V6KCDR for the Nossaman firm's take on what's at stake in the appeal. On the prior decision, issued in March by the Third District Court of Appeal, see http://www.cp-dr.com/node/3448. The current California Supreme Court docket is at http://bit.ly/1INkZIN. (A prior California Supreme Court review on the same case was concluded in 2011.)

Wintersburg structures rated among most endangered

The National Trust for Historic Preservation has listed the Wintersburg Village structures in Huntington Beach as among the 11 most endangered historic places in the U.S., raising its profile and hence possibly improving its chances of preservation. The site was an early center of Japanese American settlement in Orange County, and one of the few land parcels that Japanese owners managed to acquire before passage of the 1913 Alien Land Law. (See http://bit.ly/TyTNeP.) The six surviving Wintersburg structures include a Presbyterian mission church and the farmhouse established by the pioneering Furuta family. The Huntington Beach City Council has voted to allow demolition of the structures but the property's current owner, a waste company known as Rainbow Environmental Services, may yet arrive at a way to preserve them. See http://bit.ly/1qeqYRQ. JK Yamamoto has more detail in the *Rafu Shimpo* at http://bit.ly/1pSvELb.

Cupertino General Plan comments close August 1

Proposed General Plan and housing element updates for the city of Cupertino are available for comment through August 1. *Mercury News* coverage is at http://bit.ly/1md0IpV and the plan revision site is at http://www.cupertinogpa.org/. Goals of the housing element include energy conservation and encouraging mixed-use development to work toward the city's Regional Housing Needs Allocation (RHNA) goal of 1064 housing units at different levels of affordability. Issues at the most recent study session in April included whether second units at existing single-family houses are an appropriate way to meet affordable housing goals, or what can be done to encourage mixed-use development and construction of small, affordable apartments. A staff commentary said only 31 second units had been built in Cupertino in the past seven years.

Fresno General Plan revision draft out for review

The city of Fresno is circulating the final draft of its 2035 general plan revision with comments due August 18. The *Fresno Bee* reports the plan seeks to increase density and allow housing growth in many kinds of neighborhoods while also addressing the city's problems, with poverty-related disparities among neighborhoods at the top of the list. http://bit.ly/1mghM9N For past coverage of Fresno's growth plans and related negotiations see http://www.cp-dr.com/node/3417. The plan draft is at http://www.fresno.gov/News/PressReleases/2014/2035gpdraft.htm.

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In other news:

- Kern County adopted a regional transportation plan and sustainable communities strategy under SB 375. *Planetizen* has a summary and links to an extended commentary by NRDC consultant Ella Wise: http://www.planetizen.com/node/70026.
- The Association of Monterey Bay Area Governments (AMBAG) approved a sustainability strategy June 11 that predicted 20% population growth from 2010 through 2035: http://bit.ly/1o28hxo.
- The Kings County Association of Governments closed comment July 15 on its draft regional transportation plan and Sustainable Communities Strategy. See http://www.kingsregionalvision.com/.
- The *Stockton Record* has details at http://bit.ly/1mFODuJ on an $11 billion transportation plan adopted by the San Joaquin Council of Governments. Following new sustainability requirements, the plan proposes to protect 10,000 acres of prime farmland, add bike lanes, improve sidewalks and expand transit. The Regional Transportation Plan can be viewed under "Programs" at http://www.sjcog.org/DocumentCenter/Index/20.
- The RFP has been issued for the Terminal Island freeway removal project in Long Beach. See http://www.longbeachize.com/rfp-goes-for-terminal-island-freeway-removal-project.
- The Pacific Legal Foundation sued San Francisco over its requirement that landlords who use the Ellis Act in no-fault evictions of tenants must make relocation assistance payments to tenants. See http://bit.ly/1nXSSkk.
- In a plan that could mute criticism of those big white Google Bus commuter coaches, the company is preparing to offer free shuttle buses for the public in Mountain View. See http://bit.ly/1kOCQVu for the basics. Per the *Mercury News* at http://bit.ly/1kODh1Z, routes for the four electric shuttles aren't established yet but the idea is to connect riders to movie theaters, shopping, errands, and the Google headquarters itself.
- LA's Metro agency approved a new 96th Street station on its Crenshaw rail line to serve the LAX airport more directly than the previously planned Century/Aviation station. *LA Curbed* calls the design "a very fancy stop with all the extras." See http://bit.ly/1rSKRNK.
- The *LA Times* reports at http://lat.ms/1o92dS2 that LA Metro has selected a venture led by Skanska USA to build the Purple Line extension for the Westside subway.
- Gov. Jerry Brown signed AB 577, which rescinds a 1991 ban on light rail in the San Fernando Valley. See http://www.planetizen.com/node/70260.
- The city of Agoura Hills is still considering an annexation although its budget lost half a million dollars to the dissolution of its redevelopment agency: http://bit.ly/1zHLOxs.
- Visalia had a major Planning Commission hearing scheduled July 28 on its General Plan update. See http://www.visaliageneralplanupdate.com.
- The Tahoe Basin Community Plan Update in Placer County began with a Notice of Preparation July 16. See http://bit.ly/1s125Ju.
- The city of Pico Rivera held a community meeting July 21 on its proposed general plan revision. See http://www.pico-rivera.org/depts/ced/planning/plan.asp
- The *LA Times* reported the High Speed Rail Authority had decided strategically to start the timetable leading to construction of the rail line's Burbank-Palmdale segment: http://lat.ms/TLxgvQ
- The *Mercury News* reported at http://bit.ly/1kyGqmk that the city of Milpitas won a court ruling to delay construction of a trench for the BART transit extension into Silicon Valley. The city opposes the transit project's proposed closure of a major local artery, Dixon Landing Road.
- The State Water Resources Control Board has already taken up administration of the state's drinking water under authority transferred to it from the Department of Public Health by a state budget bill. On the transition see http://www.swrcb.ca.gov/drinkingwater/index.shtml. Per the Association of California Water Agencies, long-term drinking water administrator Cindy Forbes has been transferred from the old office to the new one, now to serve as deputy director of the State Water Board's Division of Drinking Water. (See http://bit.ly/1nbt8Rt.)
- The A's reached a deal to stay in Oakland after the Oakland City Council came close to rejecting the plan. See http://bit.ly/UIdOjN. An earlier version of the plan won approval from the Oakland-Alameda County Coliseum Authority board only after owner Lew Wolff threatened to take his team elsewhere. For *San Francisco Chronicle* coverage of that earlier episode see http://bit.ly/U1HDMf. ■

Courts and OPR may revise CEQA sooner than the Legislature

BY MARTHA BRIDEGAM

CEQA's future has been in holding patterns across all California's branches of government this summer. But while big things are expected any day in the administrative or judicial branch, CEQA is a sore and sour subject in the Legislature.

In a way, this isn't surprising. It's always been difficult to change CEQA in the legislature. Most of the action has always been in the courts – perhaps inevitable for such a litigation-driven law – and through the ever-expanding CEQA Guidelines. But it's an anticlimax given the high hopes that Senate leader Darrell Steinberg, D-Sacramento, and others have placed on possible CEQA reform in the last couple of years. The air went out of CEQA reform efforts last year (see http://www.cp-dr.com/node/3437) and this year has been a year of diminished legislative prospects.

In the administrative branch, as Bill Fulton discusses in today's Insight commentary, the Office of Planning and Research (OPR) is nearing completion of an updated alternative to the congestion-based Level of Service (LOS) standard for traffic impact assessments. The new rules, expected to focus on Vehicle Miles Traveled (VMT), may ease the criteria for approving new freestanding and infill construction projects and will certainly shift the tensions that shape project approvals. OPR is also incubating broader revisions to the CEQA Guidelines. See http://www.opr.ca.gov/m_ceqa.php.

In the judicial branch, the California Supreme Court has a towering CEQA backlog of seven cases, several of them major:

• Most recently, on July 9, 2014, the high court agreed to hear an appeal of the March 2014 ruling on the proposed Newhall Ranch development, *Center for Biological Diversity v. Department of Fish & Wildlife*, S217763. The partially published March decision by the Second District Court of Appeal (No. B245141) included a densely technical unpublished discussion of greenhouse gas (GHG) reduction goals. As discussed previously at http://www.cp-dr.com/node/3505, Thomas Henry and Bao Vu of the Stoel Rives firm wrote a technically careful blog post at http://bit.ly/1hxBDWz comparing standards for GHG reduction that were set in the case to those apparently set by the recent AB 32 scoping plan update, suggesting that the scoping plan might be more lenient. The Miller Starr Regalia blog has more details on the grant of review at http://bit.ly/U9hhYj. Although the issues addressed are major, David Pettit, a senior attorney with the National Resources Defense Council (NRDC) said the case was also "pretty fact-bound," and so "I don't really see the case as being a blockbuster."

• The court heard oral argument May 28, 2014, in *Tuolumne Jobs & Small Business Alliance v. Superior Court*, S207173, on whether CEQA review is still required when a local city council or board of supervisors receives signatures on a ballot measure supporting a project and elects to adopt the project as is rather than submit it to a (potentially costly) special election. See http://www.cp-dr.com/node/3506. This is a longstanding unresolved issue, as local government actions are subject to CEQA and initiatives aren't. So the question is, which type of action is the local government taking when adopting initiative language?

• The court agreed last November to review *California Building Industry Association v. Bay Area Air Quality Management District*, S213478, otherwise known as the "CEQA in reverse" case, considering whether developers must respond to the potential future effects of environmental hazards on their projects. See http://www.cp-dr.com/node/3460.

• The extremely significant case of *Berkeley Hillside Preservation v. City of Berkeley*, S201116, on "unusual circumstances" exceptions to the infill exemption, was accepted for review in May 2012 and still has not gone to oral argument. See http://www.cp-dr.com/node/3314.

• On July 9, 2014 the same day it accepted the Newhall Ranch case, the court granted review of the Santa Cruz County rodeo case, *Citizens for Environmental Responsibility v. 14th District Agricultural Association (Stars of Justice)*, S218240. It immediately deferred briefing on the case pending decision of the categorical exemption issue in *Berkeley Hillside*. See http://www.cp-dr.com/node/3465 on the underlying appellate decision and http://www.courts.ca.gov/documents/ws070714.pdf for the court's account of its action.

• *City of San Diego v. Board of Trustees of CSU*, S199557, accepted in April 2012, is also awaiting both argument and decision. The case is discussed briefly at http://www.cp-dr.com/node/3314.

• Review was granted in January 2014 for *Friends of the College of San Mateo Gardens v. San Mateo County*

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>>> Courts and OPR may revise CEQA

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Community College District, S214061. For a discussion from the Remy Moose Manley environmental law firm see http://bit.ly/UDTdwW.

(Online dockets for all California Supreme Court cases, with links to the underlying appellate decisions, can be found via search by case number at http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0. The Court's pending issues summary, which it replaces weekly, currently includes the court's statement of issues presented in all the above matters except for the rodeo case. See http://www.courts.ca.gov/13648.htm.)

Anthony Samson, a former CEQA litigator and now a lobbyist with the California Chamber of Commerce, expressed interest (though not exactly agreement) regarding a news analysis, posted by Erin Coe of Law360, that in March 2013 was already suggesting the California Supreme Court may be frustrated with legislative inaction on CEQA and, in Samson's paraphrase, "appears to be taking it into its own hands based solely on the sheer number of CEQA cases pending before the Supreme Court today." (See http://bit.ly/1qGqKWw and http://bit.ly/1psYWOO.)

If anything, the court's CEQA ambition, and the potential significance of its rulings, have only grown since then.

Stalemate in the Legislature

In the Legislature, on the other hand, meaningful CEQA legislation has slowed since the 2013 resignation of Sen. Michael Rubio, D-Bakersfield, who led major attempts at a CEQA procedural overhaul as chair of the Senate Environmental Quality Committee. (See http://www.cp-dr.com/node/3356.)

This year's primary attempt to change CEQA procedure was SB 1451 (http://bit.ly/1p8udwb), to narrow the procedural rights of objectors to projects, principally on what bill proponents called "late hits" – last-minute presentations of comments and evidence. That bill was shelved in early May. Remaining CEQA proposals in this session have more specific focuses, on Native American cultural resources (AB 52) and the Tesla battery factory (SB 1309, though the bill itself has lagged procedurally).

Queries to members of the Legislature's CEQA community about next steps or lessons learned after the defeat of SB 1451 got desultory responses over the last several weeks. One senior lobbyist who had dealt with the bill answered, "I don't know what else there is to say about it," and recommended asking someone else.

SB 1451 itself has been convincingly dead since it was pulled from a State Senate Judiciary Committee agenda in early May. With Sens. Jerry Hill, D-San Mateo, and Richard Roth, D-Riverside as principal authors, the measure would have tightened procedural rules to bar critics of a project from presenting new grounds for an allegation of noncompliance with CEQA after the close of the public comment period. Exceptions would have applied if there was no public comment period, or if the late-presented grounds previously "were not known and could not have been known with the exercise of reasonable diligence", a phrase borrowed from CEQA Guidelines §15162. (The Senate Environmental Quality and Judiciary committee analyses at http://bit.ly/1ro6ipC and http://bit.ly/1q5CtsB contextualize the bill as the latest in a string of false starts and incremental changes on similar issues.)

At a State Senate Environmental Quality Committee hearing April 30, Sen. Hannah-Ruth Jackson of Santa Barbara, an EQ committee member and lawyer who also chairs the Judiciary Committee, questioned thoroughly whether the measure would serve its stated purpose. (See minutes 4:31 to 5:21 on the hearing video at http://senate.ca.gov/vod/20140430_0914_STV2Vid.)

Proponents of the measure at the hearing called it a necessary safeguard against "late hit" gamesmanship used to delay projects or gain tactical advantages. Opponents, including environmental and labor lobbyists, suggested the bill might do more to deny a hearing to amateur and underfunded opponents who learn about their rights late in the process than it would do to make experienced players play fair. The sides disagreed on whether SB 1451 duplicated effects from the 2011 case of *CREED v. San Diego* (discussed by the Abbott & Kindermann firm at http://bit.ly/1lKmi5U). Opponents said *CREED* already blocked abusive late document dumps; proponents said it only required them to be more clearly presented for review.

Sen. Hill said at the hearing that, among opposition groups, only the Center for Biological Diversity (CBD) had been willing to discuss amendments with him. But later in the same discussion, CBD's California climate policy director, Brian Nowicki, said the group opposed the bill fully, having chosen to withdraw a previously proposed technical amendment.

At the hearing, speakers and legislators gave the impression of being in sympathy with calls to block manipulation of the system, but some, including Jackson, called the bill too crude an instrument to do it. The bill passed out of EQ

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>>> CEQA: looking toward next session

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to Judiciary that day, but by a 4-2 vote: Jackson and Loni Hancock of Berkeley opposed it while Mark Leno of San Francisco gave a reluctant tiebreaking "yes".

Before the bill reached its May 6 Judiciary Committee hearing, the hearing was shown as canceled by author's request.

What's left for CEQA in the current session

The two remaining prominent CEQA bills, AB 52 and SB 1309, are each designed to have major effects in narrow areas. Sierra Club lobbyist Kathryn Phillips noted last month there is always a chance of a a last-minute gut-and-amend attempt to make last-minute CEQA changes – but for now the proposals that are conventionally in the works look pretty specific:

AB 52 would redefine environmental effects to include "a substantial adverse change in the significance of a tribal cultural resource" and would require consultation with a locally affiliated tribe. The bill would allow a resource to include a "cultural landscape" as well as a narrowly defined place such as a grave site. A provision limiting its application to federally recognized tribes has raised questions what effect that may have on unrecognized tribes. See http://bit.ly/1pknpsg. The bill is at http://bit.ly/1khDEro.

Legislation could still pass along the lines of SB 1309, by outgoing Sen. Darrell Steinberg, D-Sacramento. In that bill – which itself appears to have missed some procedural deadlines – Steinberg set out generic "spot bill" language describing an intent to smooth a way to environmental approval for the Tesla company's proposed battery production "Gigafactory". (See http://bit.ly/1u0hGI1 for the SB 1309 bill. Governor Jerry Brown has already signed a different bill, SB 2389, that together with a rich meal of Lockheed incentives allows local governments to offer Tesla tax breaks as incentives to build its factory in their areas. See http://lat.ms/1ydtmLj. On prior efforts to court Tesla see http://www.cp-dr.com/node/3508.)

Topics to revisit next session

That leaves the Legislature waiting for new CEQA ideas, if not eagerly then receptively. In late May the State Senate Environmental Quality and Judiciary Committees even circulated a letter to "CEQA Stakeholders," inviting past participants in CEQA lobbying to submit responses by September 1 – i.e., for the next legislative session. The letter asked open-ended questions about what could be improved in CEQA law. (A copy is at http://www.cp-dr.com/sites/default/files/CEQALetterPrinted.pdf.)

Proposals with a strong chance of movement will most likely come from the political right. Environmental and labor advocates don't appear to see any politically realistic amendment that could be to their advantage. Everyone agrees that procedural gaming happens under CEQA but CEQA's defender say the effects of "document dumping" and other surprise tactics are less than business groups claim.

David Pettit of the Natural Resources Defense Council (NRDC) said, "I don't think CEQA is broken. So I don't understand why we need to fix it."

Told that an environmental advocate had made the comment, Samson at the Chamber of Commerce retorted, "I think that saying CEQA isn't broken is turning a blind eye to reality." Samson said the bill was being used "more and more as a mechanism to stop or otherwise delay projects on grounds completely unrelated to the environment. Anybody who says to the contrary, I think, is wholly misinformed."

In last month's conversation, Phillips said the Legislature and staff face an annual weary task of sorting through a welter of CEQA proposals: some politically outrageous, hence not viable, and some densely technical, giving readers the sense that "someone's trying to pull the wool over their eyes." She said past apparent moments of consensus had failed, so that "there's probably no way now to have an intelligent and constructive conversation about CEQA" and from her point of view there were better areas for legislative energy.

There have been a few efforts to punch through the CEQA deadlock with piecemeal single-project legislation but those kinds of bills may have a limited future. Bipartisan irritation is evident over bills like SB 1309 for Tesla and the Sacramento arena provisions of SB 743 that provide procedural or other relief from CEQA requirements for special projects, rather than address the broad nature of the environmental review system. This spring SB 1309 drew critics across an ideological expanse from the Sierra Club to the *Sacramento Bee* editorial board. With Sacramento a candidate for Tesla's battery factory, the *Bee* carefully expressed approval of Elon Musk and his lucrative businesses — and yet still criticized SB 1309, saying "we don't think that only VIPs – Very Important Projects – should be given relief from the state's important but often misused California Environmental Quality Act." (See http://bit.ly/1nwqu4R.)

Samson said "many are reluctantly supporting those types of bills" because if they don't support them then they

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>>> CEQA: inquiries into groups' identities?

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lose their chances of bringing in an important project, "but at the same time, if this is good enough for some projects why can't it be good enough statewide?"

Among other potential areas for legislation is the CEQA front in the eternal conflict between construction companies and labor unions. That was evident on SB 1451, which important labor groups opposed. Business lobbyists have long accused unions of using environmental objections as leverage for contractual advantages such as project labor agreements. A statement issued by the State Building & Construction Trades Council of California said the SB 1451 bill was held back "after the Building Trades' legislative advocates told committee members that the measure would have allowed agencies to ignore risks to public health, communities and construction workers." The statement called the bill "yet another attempt by the Chamber of Commerce, developers and industry to remove our members' voice from the development process."

In the SB 1451 public hearing discussion, agreement had almost seemed to emerge on concern for unlawyered citizens who learned of projects at the last minute, in some cases because of perfunctory compliance with public notice procedures. So would better public notice procedures be a route toward some agreement? Samson said "we made it very clear to the opposition that we were open to" discussing alternatives to make sure that CEQA is providing adequate and effective notice to the public. But he felt more thorough public notice wouldn't resolve the basic disagreements with environmental and labor groups.

Pettit and Samson each independently brought up a possible business-lobby effort on another form of disclosure: to learn more about the identities of organizations challenging projects.

Pettit predicted "the same old stuff" on CEQA in the next session would include disputes over exemptions, efforts to make preparation of the administrative record more difficult for challengers, and more efforts to limit project challengers' standing to sue, in an effort to deter unions and ad-hoc community groups. In that last category he pointed to "very serious First Amendment issues" surrounding goals such as inquiring into organizations' membership and funding sources. He said it's common to point to the narrower standing rules of the federal National Environmental Policy Act as an example – though his own response was that an environmental issue, once raised, needs to be resolved, regardless of who raises it.

But Samson argued for more disclosure on "the new wave of neighborhood groups." He said when a proponent is sued by a neighborhood group – "citizens against blah" or "neighbors against blah" – "You don't know who is actually suing you or who is financing that suit." He said the identity of parties suing thus became an issue, and a problematic one under a statute dedicated to disclosure and transparency.

For a potentially related case from this spring barring depositions of homeowners' association members in a construction defect case, see *Seahaus La Jolla Owners Association v. Superior Court*, discussed at http://www.cp-dr.com/node/3453, text at http://www.courts.ca.gov/opinions/documents/D064567.PDF.

But considering the many changes that OPR and the State Supreme Court could unload any day now, it remains to be seen how much of the current legislative posture will turn out to matter. ■

Martins Beach fight moves from court to Coastal Commission

BY MARTHA BRIDEGAM

Sun Microsystems co-founder Vinod Khosla has defended his closure of Martins Beach successfully in the Legislature and is awaiting a decision on his recently argued case in San Mateo County court. But he still has to handle a ticked-off Coastal Commission.

As of July 24, the Commission posted a request on its official http://www.coastal.ca.gov/ site inviting members of the public to document their past use of Martins Beach in a "prescriptive rights survey". See http://bit.ly/1lBnMe6 for more comment and details.

With trial over in the Surfrider Foundation's suit for access to the San Mateo County beach property, Khosla told the *LA Times* July 17 that he had started out by allowing visitors access to the beach in exchange for a parking fee, as the prior owner had done, but then had decided to close the gate because of "unreasonable" demands from county planners and the Coastal Commission. See http://lat.ms/1nQ0XDi. The *SF Chron* has more coverage and links at http://bit.ly/1nCSEj9.

Mercury News reporter Aaron Kinney posted comments July 21 at https://twitter.com/kinneytimes quoting the Commission's executive director, Charles Lester, as saying "He was 'surprised' & 'disappointed' by #khosla remarks last wk on #MartinsBeach" and that he "Didn't see Khosla's hard stance coming."

The Commission's July 24 press release at http://www.coastal.ca.gov/legal/Martins-BeachCCC-7-24-14.pdf quoted Lester as saying in part, "we are encouraged by recent discussions with Mr. Khosla and his team about how to resolve the matter in a way that is both consistent with public access policies and his rights as a property owner. In the meantime, we also believe it is important to move forward with this survey today to assure that we are fully carrying out our obligations under the Coastal Act on the public's behalf."

The major contentions in the lawsuit are reviewed in the *Mercury News* at http://bit.ly/WgKVwU. Principally, the Surfrider Foundation claimed billionare property owner Vinod Khosla violated Coastal Act access laws by ending fee-based access to the beach; and Khosla claimed he merely exercised his property rights to keep the gate closed. Briefs in the matter can be viewed at http://openaccess1.sanmateocourt.org/openaccess/civil/default.asp under Case No. CIV 520336. One particularly remarked brief, filed by attorneys for Khosla's LLCs in early June, reaches back to an 1859 land case interpreting application to the site of the Treaty of Guadalupe Hidalgo for authority against Surfrider's claim of access rights under the Coastal Act.

SB 968, for public access to the beach, was approved 7-1 in the Assembly Judiciary Committee June 26, but in significantly weakened form. The *Mercury News* reported the original bill called for the State Lands Commission to make a forced purchase of the access road if owner Vinod Khosla wouldn't open it, but the current bill only calls on the commission to consider buying it. The news report attributed the change to lobbying by former Assembly member Rusty Areias, now with California Strategies and representing Khosla. See http://bit.ly/UJxiVZ The bill's author, Sen. Jerry Hill of San Mateo, told the paper, "This keeps the bill alive and keeps the conversation going." (For legislative history see http://bit.ly/1nv7q6c.)

At the Coastal Commission's July 9 session, Commissioner Martha McClure confirmed with staff that the Coastal Commission's legislative representative was still advocating for public access to Martins Beach at the Commission's direction. McClure expressed dismay that SB 968 had been "what I would consider watered down," in that it would merely "authorize the State Lands to take a look at it, and acquire it if possible." She said,"Every time I think public access, I think of that locked gate." She urged the Commission's representative to say, "Put the teeth back in that puppy, we need public access to Martins Beach."

The Surfrider Foundation continues to update the issue on legal director Angela Howe's Twitter at https://twitter.com/angtex. A Twitter search on the hashtag #MartinsBeach picks up a broader range of comments and links on the issue. ■

Can planners find common ground with Tea Party and property rights activists on means even if they don't agree on ends?

BY KAREN TRAPENBERG FRICK

This fall, California's Strategic Growth Council will release a preliminary assessment about SB 375's implementation to date. So now is a good time to step back and deeply reflect on how we are running public participation processes in this state, especially legislatively mandated ones. We need to consider how legislative requirements like those for the SB 375 regional planning process may help or hinder meaningful public engagement.

Public process design is critical when participants are ideologically divided and do not trust each other or the public agencies in charge. It can be important to seek out areas of common ground. For example, all of us in a process may not able to agree on whether climate change exists, but we might be able to agree that hybrid vehicles should pay their fair share for road costs. We may not be able to agree on whether high density housing is beneficial in most circumstances, but we could do joint fact-finding to assess impacts on property rights, property values and public services like schools, police and fire departments.

In the course of my research on contested regional planning issues in the San Francisco Bay Area and in Atlanta, Georgia, surprising areas of convergence emerged.

In the Bay Area, Tea Party and property rights activists came in force to block regional planning meetings run by the Metropolitan Transportation Commission and Association of Bay Area Governments to develop the region's first Sustainable Communities Plan, known as Plan Bay Area. These activists were not alone in opposition, as plaintiffs from across the political spectrum filed four lawsuits against the plan: two with connections to Tea Party and property rights activists, one brought by the Building Industry Association Bay Area, and one was by environmental organizations. And in the progressive left stronghold of Marin County, citizens not affiliated with Tea Party or property rights groups have raised Cain against cities that adopted higher density development areas in order to access regional funds available through the plan.

(On early Tea Party and property rights activists' opposition to SB 375 see http://www.cp-dr.com/node/3011. On the initial Plan Bay Area lawsuits see http://www.cp-dr.com/node/3403. On the suits' partial resolution this year see http://www.planetizen.com/node/69937, http://www.planetizen.com/node/70187 and the *Mercury News* at http://bit.ly/1rngVsh.)

In Atlanta, Tea Party and property rights activists led the opposition to a regional sales tax proposal before the voters in 2012. The measure would have dedicated half of the estimated funds generated to public transit projects. An unexpected loose coalition of strange bedfellows emerged: Sierra Club and NAACP leaders joined the opposition, in part because they felt the proposed transit projects were not the ones the area needed. Although it is hard to say what impact the coalition had on the measure, the tax failed tremendously with 63% of the votes in opposition.

Convergences

When examining the two contentious regions, I found four points of convergence between conservative activists and planning scholars, largely over transport policy and process matters, that warrant planners' attention. These align generally with progressive activists' positions even though the divergent sides come to planning from different vantage points.

First, the most surprising area of agreement was in Atlanta when on a vehicle miles traveled (VMT) fee. Conservative activists supported this fee as a replacement for the gas tax if major administrative and privacy challenges were overcome. Like researchers who argue for fees based on vehicle miles traveled, conservative activists are concerned that drivers of electric and hybrid vehicles are not paying their full share of costs to the transport system. Progressives often advocate for this fee transition too, but with the hope that funding could be directed to transit, bicycle and pedestrian projects.

Second, conservative activists in both the Bay Area and Atlanta questioned the wisdom of running costly rail lines in low-density areas – another area where they align with researchers who caution that mass transit needs a sufficient mass of residents and jobs to generate transit riders or the system will have little use. Instead, these activists, researchers – and often progressive counterparts too – view Bus Rapid Transit service as a viable less expensive option, particularly when a local area does not have the density to support rail. Thus, where we may think that conservative activists oppose transit outright, those I interviewed offered a more nuanced understanding. Like researchers, they looked to development densities for ridership generation

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and found it important to weigh project costs.

Third, activists in both regions questioned the authenticity of the planning process and whether planners went through the motions to arrive at a predetermined outcome. Planners involved likewise questioned the activists' motivations and actions. Planning scholars and progressive activists have debated for decades whether large-scale planning processes with public meetings and hearings are meaningful formats for gaining genuine public input.

Fourth, in Atlanta, activists across the political spectrum opposed the 2012 sales tax proposal because it was a regressive across-the-board tax rather than a user fee. Transportation scholars similarly have cautioned against sales taxes to fund infrastructure. They also argue that in California, where local sales taxes for transport run rampant, the state should move to a user fee system.

Possibilities

A way forward for planning efforts when the citizenry are divided along ideological lines could begin with participants seeking to find areas of common ground like the ones outlined above.

Planners could draw from the political theory of agonism to reframe their approach to civic engagement. In agonistic contexts, actors come to consider their opposition as legitimate adversaries rather than as enemies unworthy of engagement. In such moments, actors retain their core values and identities but they may also find limited common ground with others, or agree to disagree. Group consensus is not a goal, but compromise through bargaining and negotiations may occur. Debates can be informed by analyses jointly developed between activists and planners that examine, for example, the range of potential property rights impacts and the full-lifecycle costs of projects and plans.

While challenging, it may be worthwhile to establish the long-term objective of transitioning from highly antagonistic, counterproductive encounters to interactions of agonistic debate.

In the long run, the state may be well served by looking to areas of convergence as key to a comprehensive examination of SB 375's public participation and general requirements. Current law and practice push regions to adopt plans that can be vulnerable to lawsuits if they are supported only by weak consensus. Such plans may be barely able to hold together over time. We wouldn't ship a package long-distance in crumpled wrapping and fraying tape. Likewise, we need solid community negotiations to keep plans from coming apart.

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Links and references:

For more on the research discussed above, see Dr. Karen Trapenberg Frick's papers in the *Journal of the American Planning Association* at http://www.tandfonline.com/doi/full/10.1080/01944363.2013.885312 and in *Urban Studies* at http://usj.sagepub.com/content/early/2014/04/07/0042098014528397.

For preliminary findings from the Strategic Growth Council on self-assessments by Metropolitan Planning Organizations on their SB 375 planning processes, see http://www.sgc.ca.gov/docs/Agenda_Item_7_MPO_SCS_Self-Assessment_Update.pdf.

On the political theory of agonism, see:

- Hillier, J. (2002) Direct action and agonism in democratic planning practice. In: P. Allmendinger and M. Tewdwr-Jones (Eds.) *Planning Futures: New Directions for Planning Theory*, pp. 110-35.

- Mouffe, C. (2013) *Agonistics: Thinking The World Politically*. London: Verso. ■

legal digest

Third District upholds high-speed rail EIR over Peninsula towns' objections

BY WILLIAM FULTON

In the latest decision on a long series of legal challenges by Peninsula cities and environment groups to the California High Speed Rail project, the Third District Court of Appeal has upheld the final programmatic environmental impact report for the portion of the project that calls for a route from the Central Valley over the Pacheco Pass into Bay Area suburbia.

Perhaps most significantly, the Third District, in *Town of Atherton et al. v. California High Speed Rail Authority*, C070877, ruled that the programmatic EIR does not need to consider specific proposals for a vertical alignment of the rail route along the Peninsula, even though options for that vertical alignment were identified before the PEIR was finalized. Writing for a unanimous three-judge panel, Justice Elena Duarte relied heavily on the California Supreme Court's ruling in *In Re Bay-Delta etc.,* 43 Cal.4th 1143 (2008).

In that case, the Supreme Court ruled that the Bay-Delta project – a 30-year program to restore the ecological health of the Sacramento-San Joaquin Delta – did not have to identify specific water sources to implement the CALFED program in the programmatic EIR. Justice Duarte quoted the Supreme Court as saying that requiring more specific detail "undermines the purpose of tiering." She added: "That such project-level analysis occurred before the program EIR was certified did not require in *Bay-Delta*, and does not require here, inclusion of the analysis in the program EIR."

The Third District also rejected claims that a supposedly faulty ridership-revenue analysis and failure to include an alternative through Altamont Pass, rather than Pacheco Pass, invalidated the PEIR. The court also ruled that the plaintiffs' lawsuit was not pre-empted by federal law.

On the ridership-revenue issue, the plaintiffs jumped on the well-publicized dispute (see http://lat.ms/1nPIJaV) over ridership methodology between Cambridge Systematics, which prepared the ridership projections, and UC Berkeley's Institute of Transportation Studies, which conducted a peer review of Cambridge's analysis. ITS acknowledged that Cambridge had "followed generally accepted professional standards" but highlighted one methodological concern, which was that Cambridge had used some assumptions typically associated with intra-regional travel, even though High Speed Rail would be an inter-regional service. Cambridge claimed it had changed the methodology to conform to recent observed data from travel surveys. The court found the plaintiffs had not proven their case and that the issue was "a dispute between experts that does not render an EIR inadequate" under CEQA Guidelines Section 15151.

The Altamont Pass alternative argument was perhaps the most technical. The plaintiffs argued that the High Speed Rail Authority was required to consider a broader range of alternatives as a result of a previous court ruling in an earlier phase of the litigation because Union Pacific opposed use of its right-of-way for the Pacheco Pass alternative. A group called Altamont Advocates hired a firm called Setec to put an Altamont Pass alternative on the table. The plaintiffs in the Atherton case said the Authority erred in not including Setec's alternative in the PEIR's alternatives analysis.

The court's discussion of the Altamont Pass alternative included several highly technical discussions. Among other things, however, the court concluded that the Altamont Pass alternative was similar to other alternatives considered in the PEIR. For example, the Altamont alternative would require replacement or expansion of the currently unused

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Dumbarton rail bridge across San Francisco Bay. Although the PEIR didn't consider the specific Setec alternative, it did analyze the Dumbarton bridge in its alternatives analysis and concluded that the Pacheco route, which requires no Bay crossing at all, is preferable – because, among other things, of the impact on the Bay and the Don Edwards San Francisco Bay National Wildlife Refuge. The Setec alternative tried to get around this by proposing a variety of mitigation measures, but the court knocked that argument down by saying: "The Setec proposal offered only some *possible* mitigation measures and it failed to address the concerns about endangered and threatened species and construction through the wetlands of the Refuge. The Authority was not required to consider anew an alternative it had already considered and reasonable rejected."

On the pre-emption issue, the High Speed Rail Authority had argued that the Interstate Commerce Commission Termination Act pre-empted state law. The court found that under the "market participation doctrine" – which distinguishes between the state's role as a regulator and the state's role as a market player -- High Speed Rail qualifies for an exemption from federal pre-emption. In other words, because the state is building the project, rather than regulating a private railroad building the project, it is subject to CEQA.

The Case: *Town of Atherton et al v California High Speed Rail Commission,* C070877 (filed July 24, 2014). See http://www.courts.ca.gov/opinions/documents/C070877.PDF. For the High-Speed Rail Authority's documents on the Bay Area to Central Valley route via Pacheco Pass see http://www.hsr.ca.gov/Programs/Environmental_Planning/bay_area.html. ■

Westlands Water District contracts found exempt from CEQA

BY MARTHA BRIDEGAM

California's Fifth Appellate District on July 3 upheld the Westlands Water District's 2012 interim renewal contracts for Central Valley Project water from the U.S. Bureau of Reclamation, finding the changes they represented were exempt from CEQA review sought by environmental groups.

The case dealt with recent iterations in a series of Bureau of Reclamation contracts to transfer water to Westlands from the San Luis Unit of the Central Valley Project (CVP) on the west side of the San Joaquin Valley. Begun with a 40-year agreement in 1963, before CEQA's creation, the contracts now include federal agreements with Westlands itself and with its closely affiliated districts, and also several deals for assignments of other districts' water rights. The assignment contracts have been coming up for interim renewal alongside the original ones.

Westlands serves 600,000 acres of San Joaquin Valley farmland and has for years held rights to 1.15 million annual acre-feet of federal Central Valley Project water.

The case turned on characterizations of timing. The court found the water contract scheme as a whole had gone on consistently enough since the 1960s to qualify for exemptions on that basis – and yet that the 2012-2014 interim renewal contracts were too short to merit cumulative impacts analysis.

The two-year interim renewal contracts had been reached to keep water flowing pending an indefinite delay: Westlands has been promised a new 25-year contract, but only after the Bureau of Reclamation prepares a programmatic Environmental Impact Statement for it. The PEIS has been overdue since 2007; the 2012 round of interim agreements is the third since then.

The plaintiffs appealed both the 2010 and the 2012 renewals but the 2010 renewals expired during litigation and the Fifth District ruled they had become moot. The 2012 renewals expired as of February 2014 but this time the appellate court agreed to address them based on the likelihood of recurring issues.

Westlands and its affiliated water districts sought exemptions from CEQA review because the contracts involved ongoing projects and existing facilities that had been substantially the same since before CEQA's enactment in 1970, and because the interim contracts merely accomplished "rate-setting" without changing how water was already delivered.

Environmental groups objected that the interim contracts would divert water from the Delta, harming water quality and fish populations and adding salts to Valley farmlands through continued irrigation. They cited these problems amounted to unusual circumstances or cumulative impacts sufficient to override exemptions.

The trial court upheld the contracts as exempt from CEQA, following Westlands' reasoning and further finding that the environmental damage to consider with respect to the interim contracts consisted only of new problems the water contracts might cause after December 2011.

On appeal, the three-judge panel agreed on an opinion by Justice Stephen Kane that endorsed the trial court's overall ruling for Westlands but rejected elements of its reasoning.

Kane's opinion noted Westlands had invoked the "rate-setting" exemption and the exemption for pre-CEQA projects, and each of those, being a statutory exemption, is absolute if substantial evidence shows its definition applies to the facts. It dealt separately with the exemption for existing facilities, which as a categorical exemption can be defeated by the exception for unusual circumstances or cumulative effects.

Kane distinguished the "rate-setting" exemption, finding it did not apply because the 2012 contracts did not set rates charged to individual customers of water districts – in fact did not discuss rates at all – hence did not fit the "standard factual pattern" of an exemption typically applied to rates such as bus fares.

On the other hand, Kane found the statutory exemption for existing projects was met, on the theory that the project of providing federally managed water to Westlands began with agreements to build the necessary infrastructure starting in 1965, and the amount of water to be conveyed had been worked out by 1968 – still before CEQA's start date of November 23, 1970. The court found neither of two narrowly defined exceptional situations existed to trump the statutory "existing project" exemption: no unspent funds were potentially available for environmental mitigation, and no plans called for new significant impacts on the environment.

Although new agreements, sometimes involving new parties, followed the original water contracts after 1970, the court found all were to help the district "to receive a stable and adequate supply of water *within the scope and parameters* of the approved pre-CEQA original project." (Emphasis in original.) In the alternative the opinion held the later, more peripheral contracts would

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also fit the categorical exemption for existing facilities.

The court held the categorical exemption for existing facilities applied to all the contracts because the water was provided during the 2012 contracts in the same way as before, in the same amounts previously agreed, and the contracts did not, during the actual two-year period of the renewal contracts, produce a significant effect on the environment that could invoke the "unusual circumstances" exception.

The court refused to halt the current two-year increments based on "cumulative impact of successive projects".

It found the Westlands water districts "are correct that if each interim renewal is measured against the existing baseline at the time of its approval, then in each instance there would be no significant effect on the environment... Moreover, if we were to treat each interim renewal as having a zero impact for purposes of our cumulative impacts analysis, then the cumulative effect of adding each of them together would remain zero."

To plaintiffs' objection that the condition of the Delta and of salt-affected irrigated lands was not remaining the same but deteriorating, the court answered that this was not the time for the claim because the action contested was not truly one in a series of successive projects but merely an interlude between long-term contracts: "Looking to substance over form... the 'successive projects of the same type' are the long-term water service contracts that will, in due course, succeed each other." Hence the court suggested the plaintiffs should instead renew their cumulative-impacts objection with respect to the upcoming 25-year contract.

Extended summaries of the case now online include those from the Stoel Rives firm at http://bit.ly/X7cIQo and Perkins Coie at http://bit.ly/1k4WZLS.

The Stoel Rives summary, by Ryan Waterman and Jackeline Castro, highlighted the court's decision to note, but not decide, an issue where appellate courts differ: what standard of review should apply on whether a project meets an exception to a categorical exemption? It notes that the Fifth District opinion refers to an expected ruling on this matter in the *Berkeley Hillside* case, which has been pending before the State Supreme Court for two years. (See http://www.cp-dr.com/node/3181 and http://www.cp-dr.com/node/3314.) And as the Stoel Rives writers point out, the State Supreme Court also recently accepted the Santa Cruz rodeo case (see http://www.cp-dr.com/node/3465), which raises a similar exception-to-exemption issue. (Our separate CEQA news analysis in this issue of CP&DR has more on the Supreme Court's CEQA backlog.)

The Fifth District opinion predicted the Supreme Court would resolve both the standard of review question and the further question, unevenly answered in existing cases, whether CEQA Guidelines 15300.2(c) calls for a distinction between "*both* unusual circumstances *and* a reasonable possibility of a significant effect on the environment due to such unusual circumstances" (emphasis in original.)

This summer the Westlands district was thirstily negotiating transfers of water from other districts. The Maven's Notebook blog spotted a May application to transfer 15,225 acre-feet from Biggs-West Gridley Water District to Westlands Water District. (Her item at http://bit.ly/1o8cWMD provides a link to the state record of the filing.) In mid-July the *Hanford Sentinel* reported the comment period had just closed on the comment period for a transfer of 35,000 acre-feet from Placer County Water Agency to Westlands. (See http://bit.ly/1nBliRy.)

The case is *North Coast Rivers Alliance v. Westlands Water District*. The July 3 ruling is at http://www.courts.ca.gov/opinions/documents/F067383.PDF. ■

Treasure Island EIR upheld

BY MARTHA BRIDEGAM

The First District Court of Appeal has upheld the EIR supporting a $1.5 billion development plan for Treasure Island, the man-made former World's Fair site at the middle of the San Francisco Bay Bridge.

The court rejected the challengers' claim that the EIR for the project should have been prepared as a program-level EIR (i.e., with subsidiary EIRs for individual projects to follow later), but that it instead was improperly prepared as an insufficiently detailed project-level EIR. The court found the substance mattered more than the title, and the actual detail in the document was enough to qualify the EIR as adequate. (Earlier in July the Sixth District similarly shrugged off the program-project distinction and focused on the facts in the San Jose Airport EIR addendum, as discussed separately in this issue.)

The project calls for up to 8,000 housing units, plus hotel, office and commercial space. It's important that, as the court noted, the EIR requires the Navy to finish its toxic cleanup work on every land parcel before transferring it to the Treasure Island Development Authority for new use. Plans to build dense housing on Treasure Island, and decisions to house poor people there in recent years, have been criticized based on concerns about incomplete cleanup of hazards left by prior military uses, from mold to asbestos to radioactivity. (See http://bit.ly/1wtS7jP and http://bit.ly/O0JZHG.)

Perhaps surprisingly, rising sea levels are less of a concern than the cleanup although the site is a low-lying, mainly artificial island in the middle of San Francisco Bay. The court decision does not mention sea levels at all, and the June report by San Francisco's Civil Grand Jury said Treasure Island's development plans had taken sea level rise into account better than many other parts of the city. The grand jury report is available via http://bit.ly/1zHWFrk.

The case is *Citizens for a Sustainable Treasure Island v. City and County of San Francisco*, available at http://bit.ly/1t2f0dW. Legal writer Bob Egelko's report in the *SF Chronicle* is at http://bit.ly/W9AGKk. More technical legal analysis is available from Parissa Ebrahimzadeh of Stoel Rives at http://bit.ly/1rfXXXY and Art Coon of Miller Starr Regalia at http://bit.ly/WgZ6lE.

Local news coverage since the decision has turned to the logistical planning and construction work that can now proceed. Transportation projects including highway ramp improvements are already underway to link the island's people and places more fully and safely via the Bay Bridge to the mainland. (See http://bit.ly/WKIToS.) For the *San Francisco Bay Guardian*'s roundup of lingering concerns and next steps, see http://bit.ly/1lPnQad. ■

Airport plan can proceed on eighth addendum to its EIR

BY MARTHA BRIDEGAM

A planning change to reconfigure San Jose Airport for more corporate jet traffic does not need full environmental review under a state appellate case newly ordered published.

The planning document challenged by Citizens Against Airport Pollution (CAAP) was approved by the City Council in 2010 as the eighth addendum to the EIR for San Jose's Airport Master Plan. It responded to projections for slower growth in the airport's cargo and passenger capacity than previously expected, and changed the planned use of a 44-acre area from air cargo facilities to general aviation "in order to accommodate the forecast that large corporate jets will comprise the majority of general aviation". Further, it called for modifying two taxiways to better accept corporate jets. City staff argued there would be no new significant environmental impacts beyond those addressed in previous planning rounds.

CAAP claimed the modified plan needed assessment in a supplemental or subsequent EIR because it called for construction work affecting "noise, air pollution and... burrowing owl habitat". The group additionally argued new rules on greenhouse gases (GHG) and climate change assessments had not been properly applied.

In a three-judge opinion authored by Justice Patricia Bamattre-Manoukain, the Sixth District Court of Appeal upheld the trial court's findings and its rejection of the environmental challenge.

The case had an aspect similar to the more recent Treasure Island case (discussed separately in this issue), in that the parties had disputed whether the existing EIR was at the program or project level. The challengers argued the original EIR had been program-level whereas the changed renovation plan was a new project; the city asserted the original EIR had been at the project level all along, and the addendum revised a continuing project; the court distinguished cases that had emphasized the distinction in other contexts and, turning to focus on the fact pattern, said either way the addendum still wasn't a new project.

The trial court had found air and noise impacts from the most recent iteration of the plan were no worse than envisioned in previously approved versions and, in the appellate court's paraphrase, "the effects of greenhouse gases do not constitute new information that could not have been known at the time the 1997 [Final] EIR was certified as complete."

Per the appellate court's summary, the trial court found effects on the owl habitat from the proposed work on the taxiways "could be mitigated, and therefore the severity of the previously identified impact on the burrowing owls would not be increased."

The court declined to rule on the city's claim that CAAP had failed to exhaust its administrative remedies, where CAAP claimed the addendum process was not sufficiently formal to offer remedies to exhaust. The process amounted to meetings hosted by the city, followed by a notice of determination, while CAAP had responded with letters making "general comments" only.

On the noise standard issue, the court followed *Santa Teresa Citizen Action Group v. City of San Jose*, 114 Cal. App. 4th 689 (2003) and *Citizens for Responsible Equitable Environmental Development (CREED) v. City of San Diego*, 196 Cal. App. 4th 515, 532 (2011) for the rule that an EIR must be conducted initially if there is substantial evidence for significant environmental impact -- but after environmental review has been conducted, "the statutory presumption flips in favor of the developer against further review." At that point, said the court, the question becomes whether the record contains substantial evidence for a finding that the proposed changes are not substantial enough to require a supplemental EIR. Thence the court found substantial evidence for the eighth addendum's conclusion that the new changes would not result in substantial noise impacts.

CAAP argued for a fresh assessment of GHG emissions based on new legal requirements added in that area since the 1997 EIR and 2003 Supplemental EIR. The appellate court saw no need, noting that awareness and regulation of the GHG problem dated back to the 1970s.

The court dealt with other air quality matters briefly, noting a finding that daily aircraft operations were actually projected to decrease from 2010 to 2027.

The parties agreed on one definite impact: the new plan would cause the loss of four acres of burrowing owl habitat. But again flipping the presumption, the court found substantial evidence that the changed construction plans, as mitigated under an existing plan, would not make enough difference to call for a supplemental EIR.

The city's 1997 "Burrowing Owl Management Plan" called for designating four substitute acres as "owl management area," moving previously created artificial owl burrows away from the taxiway work, and using one-way doors to keep owls from becoming trapped in their burrows by construction.

CAAP argued, however, that even more detailed owl habitat mitigation plans had been found inadequate in *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal. App. 4th 645 (2007). The court said that case "did not involve review of an EIR addendum and is otherwise distinguishable."

The airport case is *CAAP v. City of San Jose*, available at http://www.courts.ca.gov/opinions/documents/H038781.PDF.

The decision was first made public June 6, then ordered published July 2. The publication order cited requests from the real estate law offices of Remy, Moose, Manley, LLP and Nossaman Guthner Knox, and from the Silicon Valley Leadership Group. ■

Court allows Kern wind farm mitigation that depended on FAA action

BY MARTHA BRIDEGAM

California's Fifth District Court of Appeal has issued a partial publication order for its June 30 decision upholding the EIR for a wind turbine farm in Kern County's Tehachapi Wind Resource Area.

Proponents North Sky River Energy, LLC and Jawbone Wind Energy, LLC proposed to build a wind farm with 116 turbine generators. The plaintiff group opposing their plan, Citizens Opposing a Dangerous Environment (CODE), included the owner of a nearby private airstrip, Kelso Valley Airport. CODE claimed the proposed mitigations in the EIR were insufficient to protect planes and gliders using the airstrip. The court quoted a letter from the airstrip owner's counsel stating that, beyond creating a general risk of collisions, the turbines would block ridges that glider pilots used to pick up enough lift to return to the airport.

The main disputed mitigation required the wind farm proponents to obtain a separate building permit for each turbine, and to obtain a "Determination of No Hazard to Air Navigation" from the Federal Aviation Administration (FAA) as a prerequisite for each permit. Alternatives called for canceling the project, moving it, or canceling up to 23 of the turbines.

The airstrip owner's counsel argued that a mitigation measure relying on the FAA was ineffective because the FAA had no power to order changes in the turbines, only to approve of them or not, and in the event FAA simply endorsed 102 of the proposed turbines after "auto-screening" the proponent's information rather than substantively investigating the plans.

The county argued the FAA was still the relevant expert agency.

In the published part of the decision, the appellate court found that as a matter of law the EIR "described a legally feasible mitigation measure." It noted that if the FAA had disapproved of a turbine, the proponents would have had to change its design. Although the FAA couldn't directly order a design changed, it could declare a structure hazardous, creating an obligation for the county to stop construction.

Unpublished portions of the decision found the County had the right to choose not to respond to comments submitted more than a month after the comment period closed; that substantial evidence supported the Kern County Supervisors' choice of a mitigation measure; and that the Supervisors did not need to accept either the environmentally best alternative offered or the one the airport sought.

The online docket noting the partial publication order is at http://bit.ly/1lIlJ85. The opinion is at http://www.courts.ca.gov/opinions/documents/F067567.PDF. ■

>>> SGC meeting: August workshops on guidelines set

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scratch: The money has destinations and priorities fixed by statute, and SGC can call on cooperating state agencies for staff to administer it. But the program as yet lacks precise rules for allocating the money and a definite pipeline for the money to flow through. The Council has to build both, largely in deference to a public process, more or less in a hurry.

The Affordable Housing and Sustainable Communities program will fund planning and construction to reduce greenhouse gas (GHG) emissions by means consistent with SB 375 and AB 32, coordinating energy-efficient transportation, land conservation and compact housing growth. Under requirements in the new SB 862 budget bill and 2012's SB 535, half of the money must be spent on "housing opportunities for lower income households" and, as a separate requirement, half must benefit disadvantaged communities. Ten percent must be spent on programs actually within disadvantaged communities. Other environmental legislation passed since AB 32 conditions the program's responses to GHG reduction and its obligation to monitor success at the task.

Those rules left room for a lot of questions at the meeting. Would the program focus on urban transit-oriented development, or could it fund more varied and more rural projects? Among the goals of housing, conservation and transportation efficiency, would one predominate? Would one of the state agencies partnering with SGC assert primary control? How much power would locally affected people and organizations have over the nature of promised benefits to disadvantaged communities? How would larger nonprofits be involved? And -- as Bill Higgins of the California Association of Councils of Government (CALCOG) has suggested -- should regional planning entities help allocate the money?

Delegation to agencies of some powers, not all

The July 10 meeting's agenda was simple: Hear briefings from agencies, hear public comment, make basic delegations of new duties. The Council accepted a staff recommendation to delegate administration of one program component, the Sustainable Communities Agricultural Land Preservation Program (SCALPP), to the Natural Resources Agency or Department of Conservation (which is housed in Natural Resources), and administration of the rest to the Department of Housing and Community Development (HCD). At the initiation mainly of Natural Resources Secretary John Laird, and of the Council's public member, Bob Fisher, the Council removed a clause from the delegation phrasing that appeared to privilege those two agencies over others in working with SGC to develop the new program's rules. At the last minute members took out the word "separately" from a reference to the SCALPP program because it might imply lack of interest in coordinating land preservation with other aspects of projects.

Speakers from advocacy groups repeatedly asked for and got reassurances that the SGC itself would retain approval power over the program's guidelines and distributions. Laird particularly said he had been lobbied by callers suggesting that money once given to HCD to administer would get stuck there, "and you'll never see it again." Susan Riggs, deputy secretary for housing policy at the Business, Consumer Services and Housing Agency, parent agency to HCD, said the agencies given the delegated administration tasks would handle technical processes such as scoring and reviewing grant applications under SGC's direction. Council members and staff presenters confirmed to each other that additional agencies, prominently including Caltrans and the Air Resources Board (ARB), would consult as necessary, in a program especially meant to encourage projects combining multiple agencies' expertise. For example, SGC chair Ken Alex noted, only the ARB had the expertise to monitor and quantify projects' effects on GHG emissions.

(For an account of the meeting by the National Resources Defense Council that emphasizes the definition of roles, see http://switchboard.nrdc.org/blogs/aeaken/strategic_growth_council_clari.html.)

Staff from SGC and cooperating state agencies presented a calendar calling for quick work on a double track.

Edie Chang, deputy executive officer with the ARB, told the panel the hope was to have draft interim guidance ready in August for agencies' use in September to "start getting money out the door later this summer and early this fall." Among its tasks, ARB has begun designing methodologies to measure various types' of projects' success in reducing emissions.

On a parallel, longer-range track, SGC planned three workshops, in Northern, Central and Southern California, for public discussion of the program's long-term guidelines.

On July 29, SGC announced at http://sgc.ca.gov/ that it would hold workshops on the guidelines as follows:

- August 12, 2014, at Fresno City Hall, 1-4 p.m.
- August 14, 2014, in Oakland's ABAG office, 1-4 p.m.
- August 15, 2015, in LA's Caltrans district office, 9 a.m.-noon

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>>> SGC meeting: What will AHSC projects look like?

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For the main announcement document see http://sgc.ca.gov/docs/SGC_AHSC_Public_Workshop_Notice_August_2014_FINAL.pdf. The document includes links to register for the limited number of seats at each workshop.

At the July 10 meeting, SGC Deputy Director Allison Joe said the plan was to bring guidelines initially to the Council in October, then back for final approval in December, so a solicitation for funding proposals could go out to candidates in January. Deadlines for applicants would fall in March or April of 2015, with awards to follow in May or June.

Laird, who is one of several state agency chiefs serving on the Council, warned that the continuing funding was only "as good as the next budget vote, so keep that in mind." But discussion at the meeting presumed the first year's work would put a structure in place for longer-term use. (For detailed June budget bill coverage see http://www.cp-dr.com/node/3509.)

SGC Executive Director Mike McCoy described a careful staff process seeking to propose enough structure to start operations, while purposefully leaving many details imprecise to avoid pressuring the public guideline-drafting process. He told the panel, "We worked very diligently to not have undue influence from any existing set of guidelines of anyone's, whether it be the SGC's or Housing and Community Development or transportation programs of various stripes... We started out with a seed document that was an amalgam of a couple of different programs, and decided that it had too much precision and we didn't want to preclude valuable discussion by the Council or the public, so we backed off from that..."

Staking out early claims

There was push-and-pull already in the public comment period, which was populated entirely by administrators and advocates closely familiar with past transportation and housing programs.

Speakers associated with the SB 535 Coalition and affordable housing and social equity groups, including Joshua Stark of TransForm, asked for careful definitions of who counted as low-income, which communities counted as "disadvantaged," and how to measure benefits to either. Some called for transit pass subsidies and emphasis on affordability for genuinely low-income residents. Several said funding awards should be conditioned on protections against displacement of low-income residents, and that projects causing displacement should not be funded. There were related calls for technical assistance to potential grantee groups in disadvantaged communities, where the capacity might not already exist to prepare competitive grant proposals.

Several speakers called for a full review of the program's new structure and direction after a year of operation.

And was there an ideal model in mind for AHSC projects, or should there be?

One project discussed at the meeting, if not exactly put forward as a prototype, was the Union City Intermodal transit-oriented project: 800 new housing units, of which 251 are affordable, surrounding a BART station built in the 1970s, with new public investment in the affordable units and in a new entrance and approaches that shortened the walk to the station from the new housing. Acting Director Randy Deems of HCD presented the project as an example of environmentally sound work done through the past Transit-Oriented Development (TOD) grant and Infill Infrastructure Grant (IIG) programs funded by Proposition 1C, the 2006 housing bond. Mark Evanoff, redevelopment manager for Union City, gave a more detailed, enthusiastic description of the project, saying it would need more funds to complete its buildout and making a pitch for release of 2011 redevelopment bond funds through the proposed AB 2493 and SB 1129.

But Rob Wiener of the California Coalition for Rural Housing said the new program shouldn't be entirely for transit villages at the kinds of transit stations that only can exist in urban areas. He said the existing TOD program, though worthy, has only awarded funds in 7 counties to date, and over half of that in Alameda and Los Angeles Counties. He pointed the Council's attention toward San Bernardino, the Inland Empire and San Joaquin Valley, all places with terrible air quality: "They are transit-poor. They don't qualify for TOD." On the other hand, he said, they are exemplars for projects reducing vehicle miles traveled (VMT) and for construction with zero net energy use -- projects that could qualify for funding under the new SGC program.

For similar reasons, Rachel Iskow of Mutual Housing California, said she feared the new SGC program, like TOD, would "effectively become one more contributor to the 'two-California' phenomenon," aiding the more prosperous coastal cities while inland towns suffered from poverty, air pollution and unhealthy housing. As an alternative example to the TOD transit village model, Iskow offered a project of her own, planned for the small town of Woodland. She said Woodland's only public transit is a bus system with low service levels, but the development will be a zero net energy project, exclusively for agricultural workers and

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>>> SGC meeting: A role for regional groups?

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their families, allowing them to live in healthy housing near a bus stop, with lowered utility bills and a chance to contribute to the grid through their new rooftop solar panels. It wouldn't be TOD, she said, but it would help "close the green divide and California's own divide."

Less frequent speakers leaned toward preserving farms and open land against sprawl, especially at urban boundaries. Jeanne Merrill of the California Climate and Agriculture Network called strongly for integrating the conservation of agricultural land with the rest of the sustainable communities goals. She argued projects should have to show how they will avoid converting agricultural land or open space, and that the project should not fund projects counter to those goals. Further, she called for long-term permanent protection of land at risk of development, calling conservation easements the best tool for the task. Uniquely, she argued that SCALPP land preservation projects in disadvantaged communities should be counted toward the required percentages of disadvantaged-community spending under SB 535.

But Laird warned that conservation easements and other traditional open-space preservation measures can be expensive enough for one such project to eat the whole new program's budget, creating a need instead to "leverage this or stretch the reach as far as we can."

(Since the meeting the *Sacramento Bee*'s Jeremy White has published a look at the AHSC program's possibilities from an agricultural land preservation point of view. See http://www.sacbee.com/2014/07/19/6568511/cap-and-trade-could-aid-preservation.html.)

A role for regional government councils?

Bill Higgins of the California Association of Councils of Government (CALCOG) called attention to a pre-hearing letter submitted as public comment by State Sen. Darrell Steinberg, the legislator most credited with bringing through funding for the sustainable communities program. (See http://www.sgc.ca.gov/docs/Public_Comment_Letters_071014.pdf.) Steinberg had written that SGC should be the lead agency in ranking projects and distributing funds, and that councils of governments should be involved formally as they have been on prior SB 375 implementation, emissions reduction should be maintained as the chief goal, and there should be flexibility for future changes.

Higgins asked for more clarity on how to involve the Metropolitan Planning Organizations (MPOs) in the new program, and separately suggested "regional delegation" could be an element of the program as well as competition for grants. Expanding on his comments after the hearing, he wrote: "We believe strongly that MPOs and regional agencies outside of MPOs are the right level of government to make project level determinations about funding. It's what MPOs and RTPA do with existing sources of federal and state funding. Our members have existing staff expertise—we do not have to staff up. And it makes sense that the agencies responsible for implementing the SB 375 mandate have discretion over project selection. To be sure, the state should have a significant role in setting clear, comprehensive guidelines about how such funds could be awarded. But as Senator Steinberg noted, putting this 'knowledge and expertise' to use is 'crucial to the success' of the AHSC program."

Higgins also suggested a longer view might be in order on grant-making. At the meeting he said, "What's good for this year might not be good for five years from now." He suggested creating a process to offer "funding certainty" for new kinds of projects. Later he wrote, "Members of the council stated that they needed to develop a program quickly to demonstrate effectiveness to the Legislature before the next budget cycle. While it is understandable, there should be an acknowledgement that more effective programs could be developed with more time. The short term need for speed should not affect long-term design options that may be more sustainable and equitable. The Council should commit to continuing to examine longer-term options during and after the first year."

A full video recording of the meeting is at http://www.sgc.ca.gov/s_071014_meetingmaterials.php with links to the meeting agenda, handouts, and pre-meeting comment letters.

[SGC Deputy Director Allison Joe, who was among staff presenters at the meeting, has provided editorial assistance to CP&DR in the past. She did not participate in the drafting of this article.] ■

>>> Coastal Commission: defining visitor affordability

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as attachments the LCP's two now-completed parts: the Land Use Plan, approved in April, and the Local Implementation Plan, approved in July.

Agenda materials for this and all July Coastal Commission items, with votes noted, are at http://coastal.ca.gov/meetings/mtg-mm14-7.html.

San Diego port district plan withdrawn over visitor affordability

The Port of San Diego withdrew a proposal to rezone East Harbor Island, which it owns, after the Port, Commission staff, and the Commissioners themselves could not agree on rules for lower-cost visitor accommodations on the site.

The case drove the Commissioners to renew discussion about the meaning, purpose and appropriate quality of "lower cost" accommodations, and to ask whether Commission staff were making policy on the subject backhandedly in negotiating mitigation fees case by case.

Current zoning on East Harbor Island calls for a single 500-room hotel. The property's long-term lessor, Sunroad Marina Partners, LP, proposed to divide those 500 rooms among three different hotels. The Commission found that troubling because it would take up more space, crowding out other possible lower-cost visitor accommodations such as campgrounds or a hostel.

The Port's proposal called for the developer to "develop or designate its fair share of on-site or off-site lower cost visitor accommodations or pay an in-lieu fee based on a study conducted by the District." But the Commission found that short on specifics. By contrast the Commission staff were calling for a very specific, and rather steep one-third of the hotel units -- 166 rooms -- to be lower-cost overnight accommodations.

Asked where the one-third fraction came from, a staff member explained late in the discussion that the proposal called for three hotels, the one-third proposal was made at "the beginning of our negotiations with the port," and discussion on the subject hadn't gone farther.

The port district and developer were seeking to push back more specific commitments on low-cost visitor accommodations until it could complete a study on the subject. Randa Coniglio, Executive Vice President for Operations at the Port, described the study as investigating demand, location and types of lower-cost accommodations "that will be successful and [will] drive visitors to San Diego Bay." The study would come back to the Commission as a Port Master Plan Amendment, she sad.

Coniglio withdrew the application, saying "We absolutely understand your concerns and have the same concerns ourselves." With the application withdrawn, it was left that the Port would return after making progress on the study.

It wasn't clear when the Commission would next discuss or draft general rules governing lower-cost accommodations but the pressure for such a discussion appeared to have risen.

(More detailed coverage of the Commissioners' East Harbor Island visitor affordability exchange appears in our online edition at http://www.cp-dr.com/node/3528.)

Ventura's 'Triangle Site' primed for development

A relatively easy affordability discussion wrapped up what Ainsworth called a "long hard negotiation" in Ventura on the so-called "Triangle Site." The long-debated site, also known as the "Promenade Parcels," is an undeveloped bluff-top area isolated by railroad tracks and the inland side of Highway 101 but close to Ventura's beach and pier. It was before the Commission for approval of a requested LCP amendment to allow a promenade and other development including potentially houses or hotels.

The essential term of the city-Commission agreement provided that any future proponent of residential development on the site would need to pay a $1.8 million mitigation fee to support lower-cost visitor accommodations, presumably elsewhere. The fee was based on the calculation that a 210-room hotel could be built on the site under the zoning sought, imposing a fee based on 25% of those rooms at an in-lieu fee of about $34,000 (inflation-adjusted from a 2007 study that recommended $30,000 per room). Plans under the new zoning called for construction of parking and a bluff-top promenade more strongly linking the site to the waterfront.

The city sought the amendment at the initiation of owner Lloyd Properties, which planned to either develop the property or sell it to a developer. Larry Bucher, chair of the Lloyd Properties board, offered support for the agreement. He said the Lloyd family company had owned the property 75 years "and I personally have been involved in trying to do something with it" for 30 years. "We're not developers, this is something that we've owned for 75

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>>> Coastal Commission: Sierra Club sues on Marin LUP

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years and we're attempting to find a solution. With this amendment I think we're on the right path."

The Commission granted approval to the LCP change, but with a revision sought by City of Ventura representatives: adding the city as a party to the Memorandum of Understanding for administration of the fee, along with the Coastal Commission itself and the California Department of Parks and Recreation. Ainsworth accepted the three-party structure reluctantly, saying he didn't want disputes about state parks management within the city to "somehow get mixed up" with the new MOU discussion.

Possibilities for use of the money included improvements to existing campgrounds. One possible site the city had recommended was the Emma Wood State Beach group camping area. But State Parks District Superintendent Rich Rozelle said the site was unsuitably located in the river flood plain and the whole $1.8 million could be used up running a sewer line there.

The only outright opposition was in a complaint letter to the Commission by the Pacific Legal Foundation, questioning the legality of the $1.8 million fee. (Commissioner Zimmer said PLF's client wasn't clear; PLF's @TheCoastWatch Twitter feed clarified that the letter was "submitted on behalf of PLF only.") At Zimmer's suggestion, the attorney for Lloyd Properties committed on the record to making it a condition of sale for the purchaser not to contest the in-lieu fee in future.

The agenda materials are at http://documents.coastal.ca.gov/reports/2014/7/Th15b-7-2014.pdf.

Donald Trump's flagpole issue still unresolved

For now, a 70-foot flagpole will continue to fly a large U.S. flag next to the clubhouse at the Trump National Golf Club in Rancho Palos Verdes but the flagpole's future isn't resolved. First set up in 2006, the pole was locally approved in 2007 but never got Coastal Commission approval. In this month's Coastal Commission session, the Trump organization sought retroactive approval of the flagpole together with permission for less debated improvements such as a driving range.

In a two-hour debate July 9, members of the Coastal Commission more and less stoically received edification on the national flag's symbolism by Trump counsel Jill Martin and a parade of ardent public commenters. Commissioner Jana Zimmer delivered a lecture of her own on national values attached to the rule of law.

But the discussion's real sticking point was unmoving insistence by Commission staff that the flagpole was restricted by a 26-foot building height restriction in the local municipal code, which is part of the Local Coastal Program. Rancho Palos Verdes town officials testified that the 26-foot limit had been intended to limit the heights of houses, whereas a flagpole was more like a radio antenna and shouldn't be regulated as to height at all.

The hearing ended in an understanding: the proponents withdrew the flagpole portion of their proposal while the Commission approved the other proposed work on the property. It was left that the proponents would seek local approval -- which was clearly likely to be popular -- for a proposed Local Coastal Program revision legalizing the flagpole. The Commission would then consider waiving or reducing the filing fee -- otherwise potentially $500,000 -- to come back with the proposed LCP revision and the request to have the flagpole approved.

With all eyes on the flagpole, it became a side issue that the golf course does not use recycled water and does not now have infrastructure to do so. Martin told the Commission it was "something that we are actively exploring," and an area where the company wanted to improve because it was "incredibly expensive to maintain our golf course with the water resources we have now."

In other Coastal Commission news:

- The Sierra Club's Marin Group of chapters brought a court challenge July 10 seeking to reverse the Coastal Commission's May approval of the Marin County Land Use Plan Update. Filed by attorney John E. Sharp of San Rafael, the writ petition alleges violations of the Coastal Act, principally in the update's provisions allowing farmers to obtain permits as of right for more houses and other structures under a broadened definition of "agriculture." It further alleges noncompliance with CEQA through failure to analyze feasible alternatives or mitigation measures -- an argument founded on the requirement that, although local coastal plan revisions need not prepare a full EIR, they must include findings functionally equivalent to those required by CEQA. The Environmental Action Committee of West Marin (EAC), which had sought more development restrictions in the spring, chose not to file suit. Amy Trainer, executive director of EAC, listed continuing criticisms of the May-approved plan, but wrote: "EAC is committed

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>>> Coastal Commission: New ex parte reporting required

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to working with the Coastal Commission staff to address our concerns in the Implementation Plan. We decided that a lawsuit at this time was not in our best interest." The Coastal Commission has yet to certify the implementing legislation required to complete Marin' Local Coastal Program update, its first since 1981. For more detailed coverage of the lawsuit and the two groups' positions on the matter, see http://www.cp-dr.com/node/3535.

- Governor Brown has signed AB 474, to broaden requirements for disclosure of Commissioners' ex parte contacts. Prior law required them to report who spoke or wrote to them and what was said. Now they must also report who if anyone the speaker was representing in making the ex parte contact and who else was "present during the communication," and must provide copies of "all text and graphic material that was part of the communication". See http://bit.ly/1jvQaTj and http://bit.ly/1sluhcc.

- The August Coastal Commission meeting will be a four-day session, Tuesday through Friday, rather than the ordinary three-day monthly meeting. The agenda, already available at http://coastal.ca.gov/mtgcurr.html, includes a major proposal: the I-5 expansion from San Diego to Camp Pendleton. See http://bit.ly/1zoq0FS for a preview. Other expected agenda items include the perennially debated future of the Children's Pool seal haulout area in La Jolla.

- During its July session, the Commission issued a notice of violation and a cease and desist order to Robert and Judith McCarthy, who had upset neighbors by fencing off a hiking trail in Avila Beach. The San Luis Obispo *Tribune* has details at http://bit.ly/1jvIUa0. The news account also describes the Commission's rejection of a county plan to add paving and a restroom to the visitor areas at Pirate's Cove Beach. After hearing from local opponents, the Commission granted only limited approval for a coastal trail to be built linking the area to Pismo Beach. Now that the Commission has rejected the parking lot and beach access projects, the *Tribune* reports the San Luis Obispo Council of Governments plans to consider spending the funds — up to $175,000 — on public access at the nearby Pismo Preserve, which the Land Conservancy of San Luis Obispo County is raising $12 million to purchase and maintain. See http://bit.ly/WQEMI3.

- The Commission agreed to hold a separate public hearing about proposed major renovations to the former Aliso Creek Inn and Golf Course in Laguna Beach. The project proponent said the planned work would not increase the buildings' square footage but appellant Mark Fudge presented environmental, public access and affordability concerns. See http://bit.ly/1slwtR9 and http://www.lagunabeachindy.com/coastal-panel-ropes-ranch-another-review/

- The Commission easily approved a movie theater conversion in the third floor of the Santa Monica Place Bloomingdale's and an office remodel by Google in the city of Venice.

- The Commission gave permanent approval to a temporary revetment of boulders placed to stop erosion at Port Hueneme Beach. For details see the city's own site at http://www.ci.port-hueneme.ca.us/index.aspx?nid=1000.

- The Commission approved, with modifications, a revised map of the eternally debated sites of public beach access areas in the city of Malibu. The maps are at the end of the agenda packet, which is at http://documents.coastal.ca.gov/reports/2014/7/Th15c-7-2014.pdf, but if you're actually looking for a place to sun yourself, it may be wise to study up on the disputes and modifications mentioned earlier in the documents. ■

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>>> What comes next after LOS?

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reviewing both plans and projects – or whether they would continue to use outside transit areas our outside the CEQA context.

SB 743 required OPR to come up with an alternative standard by July 1 – at least for transit priority areas. OPR's December "preliminary evaluation"(see http://www.opr.ca.gov/docs/PreliminaryEvaluationTransportationMetrics.pdf) prominently considered switching over to the "Vehicle Miles Traveled" (VMT) standard, saying travel distances were easier to predict than congestion levels and that mitigation approaches focused on reducing VMT would do more to promote bicycle, foot and mass transit methods of travel. The document also invited discussion of other standards: Automobile Trips Generated, Multi-Modal Level of Service (including LOS ratings for transit, walking and biking), Fuel Use, and Motor Vehicle Hours Traveled. And perhaps most important, the December document suggested that some geographical areas might be under a "presumption of less than significant transportation impact" category if those areas are already well served by transit.

All this strikes at the very heart of traffic analysis as it has been conducted in California at least since the passage of the Congestion Management Act in the early '90s, a law that more or less requires CEQA analyses to take traffic congestion into account. (http://www.cp-dr.com/node/3404.) Obviously, free-flowing traffic can, under some circumstances, reduce air pollution – meaning that, counter-intuitive as it seems, expanding road capacity can improve environmental conditions.

But the truth of the matter is that CEQA analyses rarely make the connection between traffic congestion and any type of environmental harm. Most cities and counties simply adopt some particular LOS standard as a significance threshold that requires an environmental impact report. And the real driver of both time and expense in the typical EIR is the traffic analysis, which hogs financial resources compared to other topics. This, of course, makes all development projects more expensive and time-consuming and sometimes has put infill development at a disadvantage.

Maybe most significant is how all the people involved in CEQA project review – traffic modelers most of all – have come to regard CEQA and LOS-based traffic analysis as so intertwined that they can't be separated out. CEQA provides a lot of the leverage that localities in California use to get developers to cough up traffic improvements. After all, if as a planner you frame conditions for an approval so they require a developer to do something as a mitigation under CEQA, the developer and everyone else concerned can be held accountable under a state law that lends itself to easy litigation. The planners and modelers feel like they have a lot of leverage; and the neighbors are confident that you're trying to solve the congestion problem. If you try to require developers to pay for traffic improvements outside the context of CEQA, you have to rely on your own … policy, which can be … changed, and not so easily … litigated. The whole thing makes everybody pretty uncomfortable.

But there comes a point in an infill context where LOS no longer makes sense. At its core, the LOS standard drives a congestion analysis that boils down to – oversimplifying here, but not much – "How many cycles of a red light does a typical motorist have to wait through before they clear the intersection?" (Congestion on road segments is also analyzed, but that's not nearly as big a problem.) If your goal is to keep traffic flowing no matter how much traffic there is, you'll try two different types of mitigation measures. First, you'll expand the overall roadway capacity. And then, second, you'll fiddle around the edges as much as possible by adding more left-turn lanes and so forth.

And if none of that works, then you'll adopt a statement of overriding consideration, saying you simply can't fix the traffic congestion. And, oddly, that's another CEQA security blanket for a lot of localities in California, because it gives them an "out" under state law that is hard to challenge in court. Letting traffic congestion exist outside the context of CEQA makes a lot of people very uncomfortable.

But we are rapidly reaching the point in many California cities where there is simply no way to mitigate your way out of the problem by building more traffic improvements. Traffic congestion is so bad that statements of overriding consideration are becoming more common.

So, not surprisingly, a few leading-edge cities are beating the state to the punch by moving away from LOS – San Francisco and San Jose especially. (See http://www.spur.org/blog/2014-06-26/can-new-law-free-cities-car-oriented-development.) More are likely to follow, especially if the state adopts an alternative standard.

That doesn't mean that local traffic modelers won't do congestion analysis. There's too much pressure on them to ignore congestion completely. They'll just do it outside the CEQA context. And especially at the plan level, it will be difficult to differentiate between transit priority

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>>> After LOS: decongesting CEQA

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areas and other locations, as the plans may straddle those boundaries. It'll be an interesting test of the power of non-CEQA conditions of approval to see whether localities can extract congestion improvements from developers outside of CEQA. (After all, this somehow happens in every other state.)

The more interesting question may be how localities interpret and implement a VMT approach. You can see this working way better at the plan level than the project level – where you can rejigger the land uses (and maybe create more mixed-use) to drop VMT below a level of significance. But how do you do that at the project level? You run the risk of re-fighting the plan's land uses, something the courts have taken pains to discourage.

More likely, a VMT standard will morph at the local level into something that kind of looks like a multi-modal LOS. In essence, cities will conclude that VMT for a particular project is high because everybody is forced to drive. Unable to solve the congestion problem either, they will seek to reduce both VMT and congestion by getting developers to build or pay for other transportation improvements, especially transit and the pedestrian connections required to connect the project to the transit lines.

This won't work everywhere; as SPUR pointed out in the article linked to above, smaller cities and rural areas may still use the LOS standard. And it won't be easy, because a significant increase in transit capacity requires huge capital investments far behind the ability of individual developers to pay and it may require them to commit to long-term operation subsidies, which are hard to enforce.

But with VMT becoming the preferred approach to assessing transportation effects of new projects, we may see transportation planning become more flexible, and more genuinely linked to environmental protection, as it moves away from the special constraints of the CEQA process. ■