

# Cities Play Wait-And-See On Brown's Redevelopment 2.0 Proposal

BY LARRY SOKOLOFF

Redevelopment reform has been gridlocked in the state capital for two years, but Governor Jerry Brown issued new clues on where he's heading in the state budget that was released in January.

The governor proposed changes to the Infrastructure Financing District law, a tool that allows tax-increment funding for infrastructure improvements that formerly were handled by redevelopment agencies. The governor's office is expected to send specific language on the proposal to the legislature by February 1. The real action

should begin then.

IFDs allow cities to use tax-increment financing without a blight finding. They have been part of California law since 1990, but have rarely been used, in part because they require two-thirds voter approval. Brown's budget calls for lowering that voter threshold to 55 percent of the vote, as has been done for some forms of local school funding. But that's still a far cry from the past, when redevelopment agencies could approve individual projects and bonds without direct voter input.

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**insight**  
WILLIAM  
FULTON

## Climate Change Planning On The Rise – And Use of Parking Reductions is Up As Well

In the hurly-burly of daily events in planning and development in California, it is sometimes hard to know for sure which trends are simply getting a lot of publicity and which ones are really sticking. That's why the annual survey of local planning agencies from the Governor's Office of Planning & Research is so valuable. And this year's survey reveals some pretty important trends about infill development and planning for climate change.

[[http://www.opr.ca.gov/docs/2012\\_APSR.pdf](http://www.opr.ca.gov/docs/2012_APSR.pdf)]

To be sure, OPR has an agenda these days. Re-energized under Gov. Jerry Brown – who oversaw the heyday of the agency when he was governor more than 30 years ago – OPR is hot on the trail of climate change at the governor's direction, and the survey's questions reflect this orientation. Even so, the results show how strong the trend toward planning for climate change has

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**PALM SPRINGS VOTERS WILL DECIDE IN APRIL** whether to permit construction of a six-story hotel as part of the plan to redevelop the old Desert Fashion Plaza site in downtown Palm Springs.

The question of whether the hotel should be included in the new plan by Wessman Development has been the subject of intense debate in Palm Springs. Last year the City Council declined to put a referendum on the ballot even though enough signatures had been gathered, saying the approval in question was administrative and not legislative. [<http://www.quesq.com/news/Palm-Springs-City-Council-declines-public-vote-on-downtown-project/-/233092/19220238/-/ttxil/-/index.html>]

In December, Riverside County Superior Court Judge John Evans agreed. [<http://www.courierpostonline.com/article/J1/20131212/NEWS01/312120003/Downtown%20Palm%20Springs%20project%20public%20vote%20ruling/>] A local citizen group subsequently appealed the decision.

But in January, Mayor Steve Pougnet did an about-face,

announcing in his State of the City address that a vote would be forthcoming. The City Council approved the election at its next meeting. [[http://www.mydesert.com/article/20140117/NEWS01/301170038/Palm-Springs-council-OKs-April-22-election-downtown-hotel?nclick\\_check=1](http://www.mydesert.com/article/20140117/NEWS01/301170038/Palm-Springs-council-OKs-April-22-election-downtown-hotel?nclick_check=1)]

Subsequently, however, project opponent Frank Tysen claimed to the Palm Springs police that he received a death threat as a result of being singled out in Pougnet's address as "obstructionist". [<http://www.mydesert.com/article/20140121/NEWS01/301210011/Palm-Springs-business-owner-Frank-Tysen-files-police-report-over-death-threat->]

**DECLARING A STATE OF EMERGENCY BECAUSE OF THE DROUGHT**, Gov. Jerry Brown has suspended the application of the California Environmental Quality Act to efforts by state agencies to "make water immediately available". [<http://grist.org/news/key-enviro-law-suspended-in-california-under-drought-emergency/>]

Brown said the CEQA exemption will help streamline water transfers between agencies and make it

easier to temporarily lift limits on the amount of water removed from the Sacramento-San Joaquin River Delta during the emergency.

However, environmentalists challenged Brown's move. Jeff Miller of the Center for Biological Diversity called the move "a back-door attempt to sneak through the change of place approval needed to build the peripheral tunnel project, which will divert more water from the Delta," adding that Brown could have placed restrictions on watering lawns and crops in the Central Valley as an alternative.

**AS WOODLAND'S GENERAL PLAN UPDATE MOVES INTO YEAR 3**, the city has added about \$300,000 to the budget, bringing the total cost of the project to almost \$1.5 million. [[http://www.dailydemocrat.com/news/ci\\_24949180/woodland-general-plan-update-will-cost-more-than](http://www.dailydemocrat.com/news/ci_24949180/woodland-general-plan-update-will-cost-more-than)]

The \$1.1 million or so previously allocated came mostly from development impact fees, with some funds coming from the general fund's capital improvements fund.

The *Daily Democrat* quoted Principal Planner Cindy Norris as saying: "Based on input from the community and the critical

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nature of the General Plan as the community's long term growth plan, it has been necessary to expand the scope of work to beyond what was originally anticipated. An estimated increase of \$272,000 to \$332,000 is projected to cover costs associated with the revised scope and process."

Woodland is a city of 40 square miles with a population of 55,000. It is the county seat of Yolo County.

**MEANWHILE, YUCCA VALLEY'S GENERAL PLAN IS STUCK OVER WHETHER WILDLIFE CORRIDOR MAPS** will be advisory or might be binding at some point. [[http://www.hidesertstar.com/news/article\\_420399ce-7a84-11e3-9e5b-0019bb2963f4.html](http://www.hidesertstar.com/news/article_420399ce-7a84-11e3-9e5b-0019bb2963f4.html)]

At a meeting in early January, City Council of Yucca Valley – a city of 20,000 persons and 40 square miles in the desert east of San Bernardino – certified the general plan environmental impact report but declined to approve the general plan because of the inclusion of maps depicting wildlife corridors.

The corridor designations are not binding on the city but, rather, depict areas where sensitive and endangered species can be found. The wildlife corridors were identified using a variety of environmental databases and Yucca Valley's planning consultants said the information would help developers identify where they might have to do additional environmental studies.

However, the members of the city council said they feared including the wildlife corridors on general plan map would create an additional layer of regulation that would impede growth in the city.

**FINALLY ON THE GENERAL PLAN FRONT, ANOTHER CONSERVATIVE CITY** – Menifee in western Riverside County – has approved its first-ever general plan.

Menifee's general plan actually did define open space areas, but it also established an "economic development corridor" [<http://www.cityofmenifee.us/CivicAlerts.aspx?AID=253>]

The plan calls for Menifee, which incorporated in 2008, to grow from a current population of about 85,000 to almost 160,000 people at buildout – a significant reduction from Riverside County's plans prior to incorporation which called for 225,000 people at buildout. [<http://www.pe.com/local-news/riverside-county/menifee/menifee-headlines/20131207-menifee-lengthy-general-plan-process-winding-down.ece>]

The Menifee general plan debate was not without its controversies, as many citizens sought to retain Menifee's rural character even as the city plans to double the population. Most of the controversy revolved around the area near Bell Mountain, located east of I-15. Much of the current City of Menifee, including the Del Webb-developed Sun City retirement community, is located west of I-15. The City Council rejected the staff's recommendation to designate Bell Mountain for open space, instead choosing to zone it for five-acre lots and call for the subsequent adoption of a hillside ordinance ■



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# legal digest

## Spot Zoning Permissible For Archdiocese's Assisted Living Facility

BY WILLIAM FULTON

Reversing the decision of an Orange County Superior Court judge, the Fourth District Court of Appeal has ruled that rezoning residential property in Tustin to accommodate an assisted living facility is a legitimate use of spot zoning.

"The creation of the new senior residential housing zoning district and its application to the Project site were in the public interest and were not arbitrary or capricious," wrote Justice Richard Fybel for a unanimous three-judge panel.

The case is significant because the Fourth District concluded that "spot" zoning – often viewed as unfair and unconstitutional on its face – can be a legitimate exercise of the police power if it is not arbitrary and capricious. In so doing, the court undercut the plaintiff's main argument, which was that the assisted living facility constituted spot zoning

and was therefore not legal.

Key to the court's ruling was the fact that the spot zoning in this case essentially amounted to an upzoning, giving the property owner more rights than it would otherwise have. "We hold the creation of an island of property with less restrictive zoning in the middle of properties with more restrictive zoning is spot zoning," Fybel wrote – but quickly added that spot zoning in some circumstances – including this one -- is permissible.

The case involved an attempt by the Roman Catholic Diocese of Orange to rezone for an assisted living facility a 7.25-acre property designated for single-family residential use under the North Tustin Specific Plan. Orange County – which governs the unincorporated portion of North Tustin – changed the specific plan to create a new land use designation for assisted living and

applied it to the diocese's property.

The county also certified an environmental impact report on the action.

Organized as the Foothill Communities Coalition, neighbors sued the county and the diocese, claiming unlawful spot zoning. Quoting *Avenida San Juan Partnership v. City of San Clemente*, Foothill said: "The essence of spot zoning is irrational discrimination."

Relying on *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, the appellate court applied a two-part test to determine whether the spot zoning in this case was impermissible. First, the action must show "abuse of legislative authority". And second, the ordinance must be "unreasonable and invalid," not merely an ordinance that will result in less profit for the landowner. (The court did note that this is the first

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**“The creation of the new senior residential housing zoning district and its application to the Project site were in the public interest and were not arbitrary or capricious.”**

case in which spot zoning actually increased a property’s value rather than decreased it.)

Quoting various city planning documents at length, including the housing element, the court concluded that while the redesignation of the archdiocese’s land constituted spot zoning, it is not impermissible. “We conclude the Board’s findings of consistency with the general plan and the North Tustin Specific Plan are supported by substantial evidence. The creation of the new senior

residential housing zoning district and its application to the Project site were in the public interest and were not arbitrary or capricious,” the court wrote. “The trial court erred in entering judgment in Foothill’s favor and in issuing the writ of mandate.”

In particular, the appellate court ripped the trial judge for basing her decision in part on the fact that the county had not based its decision based on a “comprehensive plan” for housing senior citizens – an argument the plaintiffs did not make in the Superior Court or in the appellate court.

Addressing what was probably the neighbors’ major concern, the appellate court acknowledged that the 1982 environmental impact report for the North Tustin Specific Plan concluded that single-family development was “most appropriate and compatible” for the site, but added: “While this was undoubtedly true, we find that the passage of more than 30 years, the development of the County as a whole, and the changing needs of the people of the County (especially senior citizens) were proper for the Board to consider in determining that the Project site

might be more appropriately rezoned for other uses.”

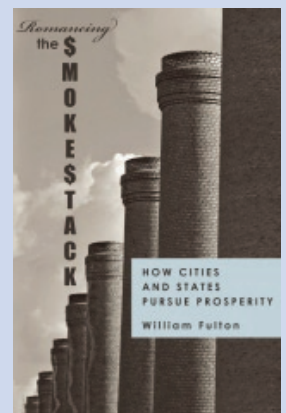
The appellate court rejected several other arguments, including a challenge under the California Environmental Quality Act and an argument that the decision violated the establishment clause of the federal constitution, which prohibits the establishment of a particular religion by the government. The plaintiffs argued that by engaging in spot zoning for the archdiocese, Orange County violated the establishment clause because it was promoting a faith-based objective.

The appellate court knocked this argument down by saying: “We reject Foothill’s argument for the simple reason that the new zoning district has been created and is applicable anywhere in the North Tustin Specific Plan area. The fact that the Diocese’s property is the first to which the new zoning district has been applied does not mean the Diocese has a monopoly on it.”

The Case(s): *Foothill Communities Coalition v. County of Orange*, Fourth District Court of Appeal Nos. G427326 and G048024 ■

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*Bill Fulton’s Book On Economic Development*



# Overflight Easement Requirement Not a Taking

The First District Court of Appeal has argued that Humboldt County did not create a taking of property by requiring the owners of a mobile home underneath an airport flight path to provide an overflight easement in exchange for a permit to build a carport and porch that had been illegally built by the previous owners of the property.

Scott and Lynn Powell own a mobile home within the airport compatibility zone for the Arcata-Eureka Airport. The county's general plan and its airport land use compatibility plan both require an overflight easement as a condition of approval for a building permit. The overflight easement allows, among other things, the county to regulate the emission of smoke, dust, steam, electrical impulses, and light. When seeking permits to legalize their carport and porch, the Powells were told they had to provide the overflight easement. They declined to pursue the permit but were eventually warned that the county would seek monetary penalties and other legal remedies if they did not.

The Powells sought the permit under protest, claiming that the requirement was unconstitutional, and subsequently sued. Broadly speaking they claimed that the requirement violated the *Nollan/Dolan* rule because their proposed improvements had no impact on the safety of airplanes landing at the airport. The trial judge ruled against the Powells, saying they had failed to show that a genuine issue of fact was at issue as to whether the easement itself was either a compensable taking or a requirement that had been imposed upon them alone, rather than all property owners in the airport compatibility zone, as required under *Nollan/Dolan*.

The Powells appealed, partly with the assistance of the public interest property right law firm, the Pacific Legal Foundation.

On appeal, the Powells argued that the trial judge was wrong to lay out this test, and tried to persuade the appellate court that *Nollan* and *Dolan* “constitute a stand-alone regulatory takings test that determines when permit conditions—if imposed—would violate the Fifth Amendment,” without any independent requirement to prove a taking.

In ruling against the Powells, the appellate court relied heavily on the U.S. Supreme Court's ruling in *Lingle v. Chevron USA Inc.* (2005) 544 U.S. 528, 536. In *Lingle*, Chevron challenged a Hawaii state law essentially imposing rent control on service stations owned by oil companies but leased by service station dealers. In *Lingle*, the Supreme Court concluded that a clear taking occurs only when a property owner suffers either a physical occupation of his or her property or loses *all* economic value of the land. Otherwise, the taking is not clear or automatic; the situation must be analyzed under the test laid out by the the Supreme Court in the 1978 *Penn Central* case, the first takings case heard by the court in modern times.

“Before *Nollan* scrutiny of a permit approval condition is required,” the First District wrote, “a court must make a threshold determination whether the condition would rise to the level of a compensable taking for Fifth Amendment purposes if applied to the landowner outside the permitting process. Unless that test is satisfied, the government is not in fact demanding the landowner to trade a constitutional right—the right

to just compensation for the taking of property—in order to receive a discretionary government benefit.”

In this case, the court went on, referring to a variety of takings cases decided by the Supreme Court over the years: “There is no claim or evidence in this case that the County's overflight easement condition completely deprived the Powells of any beneficial use of their property as in *Lucas* or interfered with their investment-backed expectations under the *Penn Central* multifactor test.

“The only category of compensable Fifth Amendment regulatory taking arguably implicated by the overflight easement is a per se physical taking under the standards of *Loretto*. For the reasons discussed below, we do not find the overflight easement by its literal terms would constitute such a taking, and the Powells failed to carry their burden of demonstrating there is a triable issue of material fact as to the easement's practical effect.”

The court also examined whether the overflight easement constitutes a physical taking – a potentially important finding that could have turned the case for the Powells – but concluded: “The Powells put in no evidence and asserted no undisputed facts concerning whether the overflight provision constituted a physical use or occupation of their property, including the private airspace above it.”

Indeed, the court added: “On appeal, the Powells take seemingly inconsistent positions about the effect the easement would have.”

The Case: *Scott Powell v County of Humbolt*, First District Court of Appeal No. A137238 ■

## >>> Cities Play Wait-And-See On Brown's Redevelopment 2.0 Proposal

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But the bill would also require cities to finish up the redevelopment wind-down and conclude all post-redevelopment litigation against the state before they can take advantage of the new law.

Groups such as the League of California Cities, which opposed the redevelopment changes, are waiting to see the actual legislation before they comment, said Chris McKenzie, the group's executive director.

McKenzie expressed concerns about the public vote requirement for IFDs.

"This is hard to get—even a 55 percent vote," he said. But he seemed relieved that the governor had made some movement on redevelopment.

"We appreciate the fact the governor has started the conversation," McKenzie said. "There's going to be a serious conversation. We're encouraged by that."

Other leaders, such as Sen. Lois Wolk, D-Davis, chair of the Senate Governance and Finance Committee, were also glad to see the governor's proposal.

"I'm really delighted that he's engaging," she said, noting, "We haven't seen the language. The devil's in the details."

"Many believe local governments could make good use of [IFDs] if requirements were eased or eliminated," said John Shirey, city manager of Sacramento, and former head of the California Redevelopment Association.

Wolk's own bill to make it easier to use IFDs, SB 33, passed the Senate in 2013. It is now awaiting a final vote on the assembly floor. She said a final vote was delayed because Brown's office "gave clear signals last year that he wasn't ready to sign it."

But Wolk's bill doesn't require a public vote on IFD

projects, like Brown's does.

"That's a stark difference," she said.

And Brown vetoed an earlier version of her legislation SB 214 in 2012. In his veto message then, he said the new law would have changed the focus to new tools, "instead of winding down redevelopment."

Wolk's bill on IFDs would improve accountability by requiring annual audits

Other legislative measures to restructure redevelopment have been on hold as well. SB 1, another key redevelopment bill was introduced in 2013 by Sen. Majority Leader Darrell Steinberg-D-Sacramento. It is a re-tooled version of a measure that Brown also vetoed in 2012.

At the start of 2014, Shirey remains unconvinced that anything will happen.

"The governor seems to have launched a preemptive strike in his budget proposal by making his own proposal rather than embracing any of the pending bills in the Legislature," he said. "I think he is signaling that he will not sign any bill that isn't his proposal and so it appears there will be no relief for IFDs again this year."

Brown's proposal on IFDs did more than re-start the conversation on redevelopment in Sacramento. It also offers an inducement to cities and counties to speed up resolution of claims with the Department of Finance. At the time of redevelopment's demise, there were about 400 redevelopment agencies in the state, and the Department of Finance has sought reimbursement for specific expenses made by those agencies.

Currently, 100 lawsuits are pending against the department by former redevelopment agencies, according to H.D. Palmer, the press spokesman for the department.

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Brown's new proposal requires city and counties who want to use IFDs to have no outstanding lawsuits against the state regarding the redevelopment wind-down, to comply with all State Controller's Office RDA audit findings, and have a "finding of completion" from the state.

Wolk noted that many of the agencies have wound down their operations and resolved issues with the Department of Finance in the past two years.

The new proposal on IFDs would expand them beyond infrastructure uses to include military base reuse, urban infill, transit priority projects, affordable housing and "associated necessary consumer services."

"The goal is to maintain the IFD focus on project which have tangible quality-of-life benefits for the residents of the IFD project area," Brown said in his budget message.

The governor suggested IFDs could be used in former redevelopment project areas. He called for retaining the current ban on using tax increments from school districts, which means the state general fund would be held financially harmless.

Despite Brown's embrace of IFDs, they have only been approved three times in the past twenty years. One was to fund public works for a hotel adjacent to the Legoland theme park in Carlsbad in San Diego County, and two others were in San Francisco. One IFD was for improvements in San Francisco's Rincon Hill neighborhood, and the other was to finance waterfront improvements by the Port of San Francisco for the recent America's Cup races.

San Francisco may latch onto IFDs early on because it is both a city and a county, making it easier to negotiate among taxing entities.

***"The governor seems to have launched a preemptive strike in his budget proposal by making his own proposal rather than embracing any of the pending bills in the Legislature,"***

**said John Shirey**

Most point to the two-thirds voter approval requirement for IFDs as the main impediment to their use. In the Port of San Francisco's IFD, the legislature granted San Francisco an exemption from holding an election, according to Peter Detwiler, a retired legislative staffer.

Detwiler thinks the state is in the middle of figuring out the next steps on redevelopment, and he sounded optimistic about the governor's IFD's proposal.

"IFDs are the correct policy response in this early redevelopment reset," he said.

IFDs may appeal to Governor Brown because they don't take money from the state, as redevelopment once did.

Redevelopment lost popularity because it became a drain on the state's general fund, said Detwiler, explaining that the state had to make up money to school districts that they lost to redevelopment. But with IFDs, "it's not diverting schools' property tax," he said. "There's no cost to the state general fund." ■

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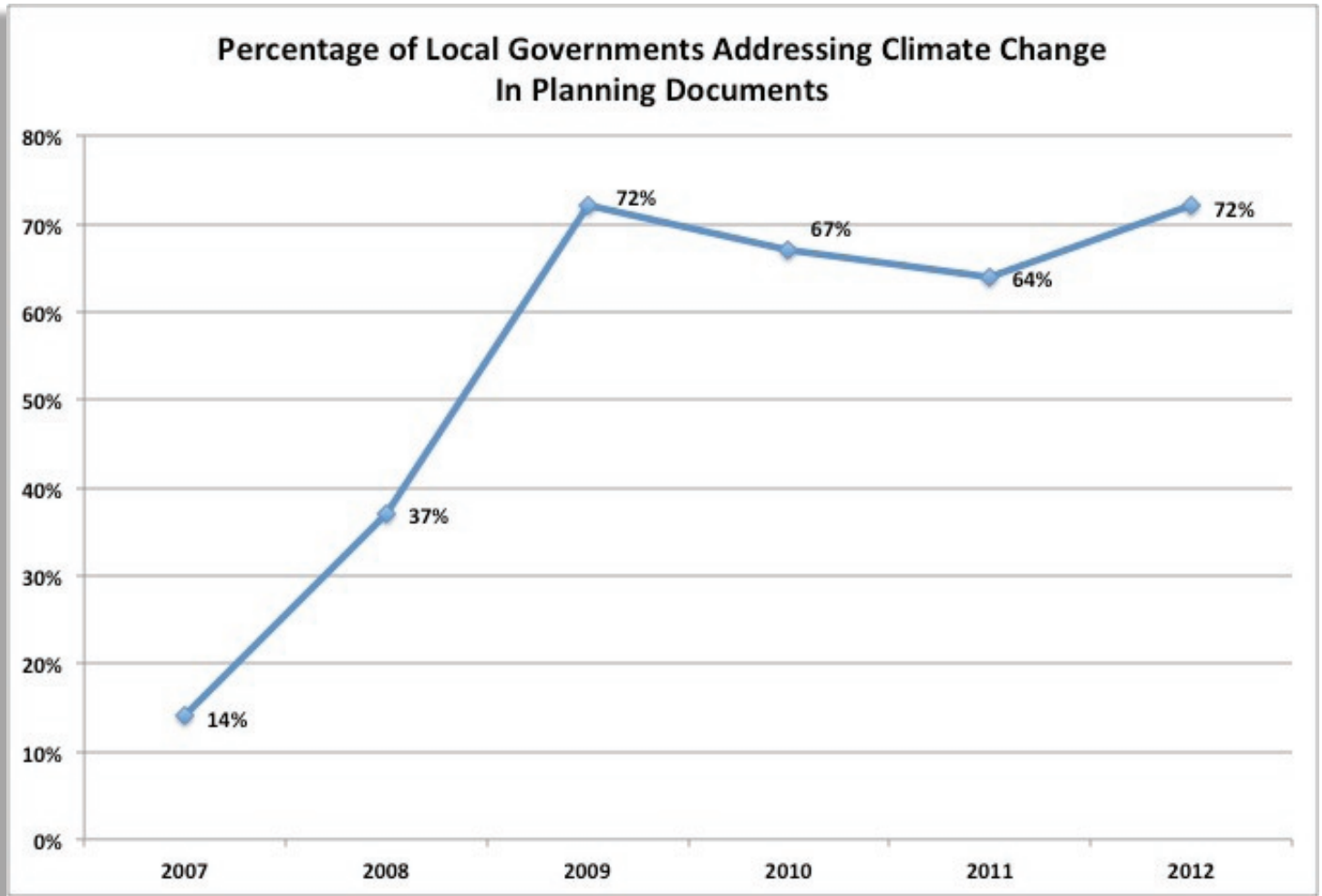


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# >>> Climate Change Planning On The Rise – And Use of Parking Reductions is Up As Well

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become in California – and how much California cities are glomming on to the tools most likely required for successful infill development. About half the cities and counties in the state filled out this year’s survey, so it’s a pretty representative sample.

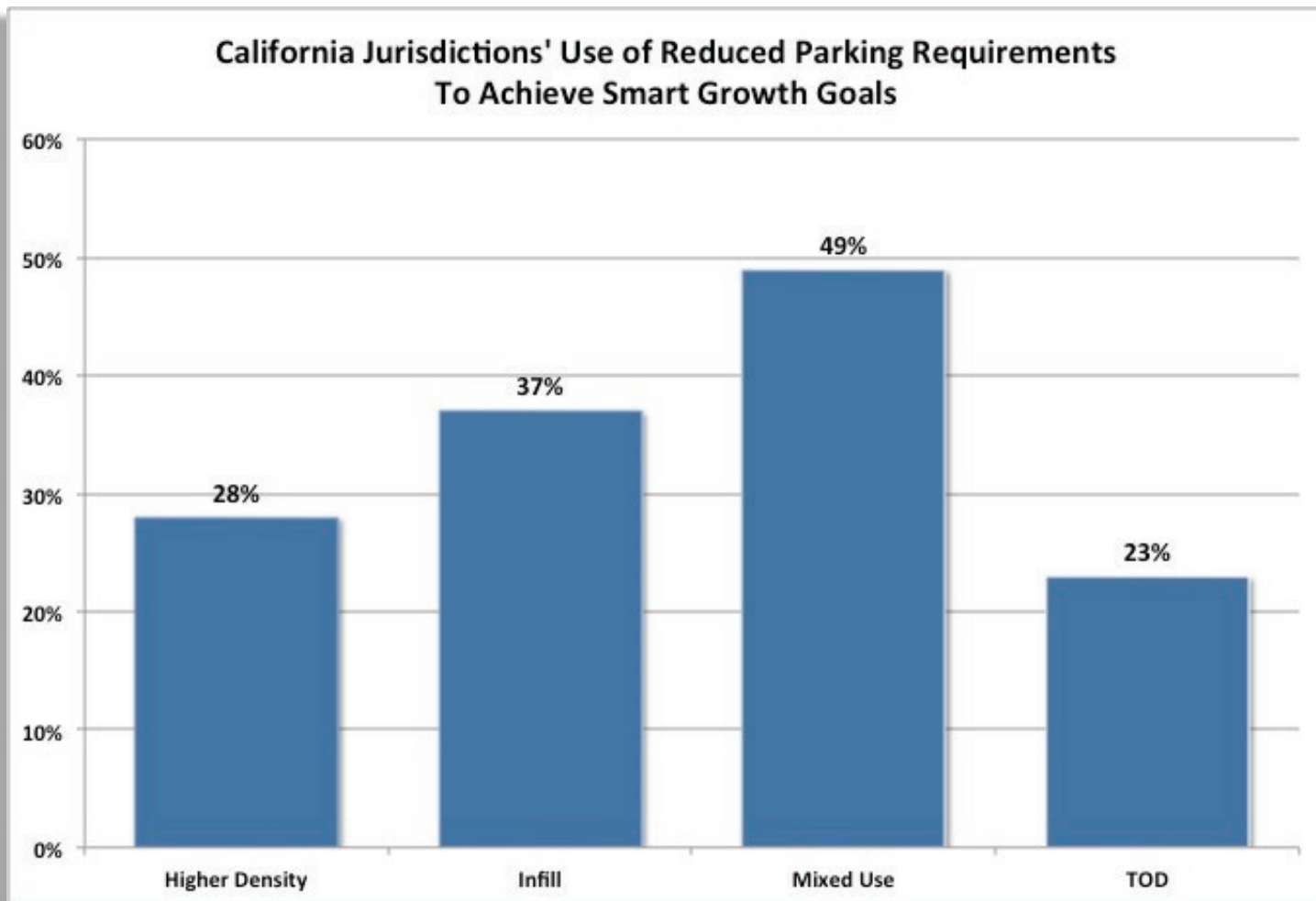
Perhaps the most profound finding is just how deeply engrained climate change has become in California planning.

More than 70% of jurisdictions said they are either preparing a plan to reduce greenhouse gas emissions or are have already adopted one.

Admittedly, this isn’t a new finding. Indeed, a look at the trend over the past six years shows that the big bump came in 2009 – when the percentage of local governments saying they were addressing climate change doubled, from 37% to 72%. (See graphic.) There’s an obvious answer for that big jump: The year before – 2008 – Attorney General Jerry Brown reached his pathbreaking settlement with San Bernardino County on dealing with greenhouse gas emissions reduction in its general plan. Once local governments understood what was expected of them – and were

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sufficiently scared by the attorney general’s office – they started acting.

What the survey doesn’t quite pick up, of course, is the extent and quality of the climate planning being done in 2014 versus 2009. Climate planning today reaches far more broadly across both public and private sector activities than it did in 2009, when – based on the San Bernardino settlement – it focused mostly on new development and governmental operations, not on overall GHG reduction.

The trend toward broader and more comprehensive climate planning has come about in large part as the result of SB 375, the state law passed in 2008 that called upon metropolitan planning organizations to adopt sustainable communities strategies. This law didn’t truly begin to get implemented by the MPOs until around 2011, and the resulting impact on how

local governments in California use land-use tools has been noticeable.

Also contained in the OPR survey were a series of detailed questions about different land use tools – focused on tools that tend to and what they are used for in achieving smart growth.

The OPR survey asked about five specific tools – density bonuses, reduced parking requirements, specific plans, expedited permitting processes, and financial incentives – and how they were being used to achieve four different policy goals – infill development, transit-oriented development, mixed-use development, and higher densities.

Not surprisingly, the state density bonus law was most cited as the most common tool used to achieve higher densities – more than 50% of jurisdictions

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reported using density bonuses to achieve higher densities.

The survey also spoke to the frequency with which jurisdictions use specific plans in urban or smart growth settings – about 50%, give or take, which is a surprising number considering the fact that specific plans were traditionally used most frequently to facilitate the development of large single-developer greenfield projects.

Perhaps most surprising, however, is the frequency with which California jurisdictions are now using reduced parking requirements in smart growth situations. As the accompanying chart shows, more than 50% of the responding jurisdictions said they are using parking reductions to facilitate mixed use projects – and close to 40% say they are doing so for infill projects generally. Parking reductions are less frequently used for higher density and transit-oriented development – only about 25% in the latter case, though that may be partly due to the fact that TOD opportunities are concentrated in a relatively small number of jurisdictions with good transit service.

Maybe it's not surprising, given the end of redevelopment, that very few jurisdictions – no more than 15% at most – stated that they are now using financial incentives to facilitate any type of smart growth development.

**If tax-increment financing is off the table, what do you do? You find other ways to encourage developers to do the right thing – principally by providing them with other things that save money, such as reduced parking ratios.**

Overall, the patterns speak to the rapidly changing nature of California planning and development, driven by the simultaneous requirement to do climate planning and end redevelopment. If tax-increment financing is off the table, what do you do? You find other ways to encourage developers to do the right thing – principally by providing them with other things that save money, such as reduced parking ratios.

More jurisdictions reported using parking reductions as a way to facilitate mixed-use development as opposed to density bonuses. There's an obvious set of explanations for this trend – not the least of which is that it's much easier to permit shared parking for mixed-use development, where office, restaurant/retail, and residential users can take priority in the parking garage at different times. Reducing parking is a reduction in cost, plain and simple. By contrast, a density bonus might generate more revenue for a developer – but also higher cost, especially if parking reductions are not permitted.

It's clear we're in a transition time in California planning. We still use old-style suburban planning assumptions a lot, and the new-style urban tools have not been fully incorporated into our bag of tricks yet. But as the OPR survey shows, we're making a lot of progress ■

