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CALIFORNIA PLANNING & DEVELOPMENT REPORT

Cities providing water for development, if not for lawns

BY MARTHA BRIDEGAM

A generation ago, moratoriums on new water hookups were important to the statewide land use picture in bad drought years. During 1991, new hookups were banned in some large southern and coastal California cities and all of Marin County. Santa Monica made developers mitigate new hookups by buying low-flush toilets for existing users. The Metropolitan Water District suspended annexations.

Not so in 2014.

As this year's drought deepens, urban water systems are in general keeping new hookups available. Not necessarily because there's more water, but thanks to improvements over the past two decades in planning and connectivity.

As every day's news attests, the drought is slamming agriculture, natural habitats, and small water districts that are poor, awkwardly placed, or under-connected. Wood chips from uprooted almond trees have reportedly poured in to power plants as fuel. But meanwhile, like a cozy kitchen in a tumbledown house, the urban centers hold steady. Some urban districts that are enforcing

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insight
WILLIAM FULTON

CEQA Makes Us Lazy As Planners

We're pretty sure at this point that the California Environmental Quality Act does not apply to itself. (www.cp-dr.com/node/3395). But we're still not quite sure whether CEQA applies "in reverse." Does it require developers to consider not just their projects' effects on the environment, but also the potential effects on their projects from environmental hazards like landslides, earthquakes, or rising sea levels?

By appealing the same case that concluded, "CEQA does not apply to CEQA," the California Building Industry Association (CBIA) is hoping to resolve that issue once and for all.

If it *doesn't*, then we might have to go back to actually *planning*.

Of all the bizarre feedback loops built into CEQA, the idea that the law might apply to itself is certainly one of the weirdest of all. The First District Court of Appeal knocked that idea down last summer in *California Building Industry Association v. Bay Area Air*

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Inside

Two court decisions hold back Delta hydraulic plans

March 13 was a bad day for big water in California. A state appellate court blocked preliminary studies for the Delta water tunnel on takings grounds, and the federal Ninth Circuit backed the Delta smelt against California's existing southbound hydraulics.

In the state case of *Property Reserve, Inc. v. Superior Court (Dept of Water Resources)*, California's Third District Court of Appeal ruled the simple precondemnation entry order process under Cal. Code of Civil Procedure 1245.010 et seq. was not sufficient to give the Department of Water Resources (DWR) access to private properties to conduct studies in preparation for the Delta water tunnel project. Justices George Nicholson and Andrea Lynn Hoch ruled for a three-judge panel that intrusions for the geological studies, which would include such activity as drilling test borings, and even for the less disruptive environmental studies, would constitute takings. Hence, they wrote, the state would need to bring full-scale condemnation actions to get the access it sought. In an incredulous dissent, Justice Cole Blease argued eminent domain should not be needed. The case is at http://www.courts.ca.gov/opinions/documents/C067758.PDF. Daniel Kelly, who was among the attorneys for affected property owners, has commentary at http://www.somachlaw.com/alerts.php?id=272. A DWR statement said the decision would not delay the Delta tunnel project because DWR had already invoked the eminent domain process to seek geotechnical drilling rights. http://www.water.ca.gov/news/newsreleases/2014/031414.pdf.

In a mighty opinion whose mere caption extends 14 pages, the Ninth Circuit Court of Appeals upheld a 2008 Fish and Wildlife biological opinion restricting water pumping by the State Water Project and Central Valley Project to protect the endangered Delta smelt. The majority opinion, by Judge Jay Bybee, was joined in most part by Judge Johnnie Rawlinson and to a lesser extent by Judge Morris Arnold. Bybee, formerly of the Bush Adminstration's Justice Department, concluded the biological opinion was reached by reasonable enough methods that the court could not second-guess it regardless of its potentially massive consequences. Key issues were the extent to which salinity had crept up the delta and what flow levels would protect enough small fish from entrainment in the pumping plants. The case is *San Luis & Delta-Mendota Water Authority v. Jewell*, at http://1.usa.gov/1gfv7fo. More from *San Francisco Chronicle* legal writer Bob Egelko at http://bit.ly/1gGOC0D and from water writer Bettina Boxall in the *LA Times* at http://lat.ms/1i8PEXk.

LAO seeks tighter groundwater regulation; drinking water management transfer advances

The Legislative Analyst's Office (LAO) sent an acerbic ten-page handout on groundwater to Assembly committees saying current law fails to "acknowledge the physical connection between groundwater and surface waters," contamination problems need addressing, and oversight is fragmented. It recommended groundwater be better tracked and regulated, including through permits for use. It also urged the Legislature to approve the Governor's proposal to transfer drinking water regulation from the Department of Public Health to the State Water Resources Board and said the Department of Water Resources should be required to report on whether local applicants for Integrated Regional Water Management grants have met a precondition requiring them to

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conduct groundwater monitoring. The March 11 LAO handout is at http://bit.ly/1nLeu52. State officials posted a "transition plan" March 14 preparing for legislation that, if passed, would approve the transfer of drinking water regulation. The Legal Planet academic blog has analysis at http://bit.ly/M3ZyP0. The state transition site is at http://www.waterboards.ca.gov/drinkingwater/.

LAO Also Wonders About Delta Tunnel Budget Risks

A February LAO report on paying for the Delta water tunnel project found its cost estimates essentially fair but questioned assumptions about land costs and construction cost overruns and called for more flexible procurement approaches. More basically it asked if the benefits to water users of the twin tunnels carrying northern water under the Delta will really outweigh their costs, estimated at $24.8 billion. It asked if new water supply contracts could put the state at financial risk and whether the project could safely rely on future bond measures to pay for ecosystem restoration and the "potential for additional public liability if species do not recover." It suggested the Legislature "designate other entities as a backstop" for environmental costs – possibly the State Water Project or California Water Project – and "adopt policies to control factors outside of the Delta that have a negative effect on species." The February 12 report is at http://bit.ly/1jyVbcy.

Water board adjusts flow in farmers' favor but zero allocation still predicted

Over environmentalists' objections, the State Water Board issued orders March 18 allowing more Delta water to flow to farmers, and less out of the Delta, though it did not end the zero allocation forecasts of the Department of Water Resources and Bureau of Reclamation. The *Sacramento Bee* has details at http://bit.ly/PPsr3o. The orders themselves are on the State Water Resources Control Board site at http://bit.ly/1esWgil.

Busy season in the Newhall Ranch conflict

The proposed 60,000-population Newhall Ranch development won an LA Superior Court ruling Jan. 31 on water supply and greenhouse gases in the Phase 1 EIR, as reported in a *Santa Clarita Valley Signal* news story whose comments section reflects fierce local debate: http://www.signalscv.com/section/36/article/113952/. In another decision that supports the project, the Castaic Lake Water Agency's recent acquisition of the Valencia Water Company received a PUC approval in February per documents made available at http://bit.ly/1j90b8v by an opponent of both decisions, Santa Clarita Organization for Planning the Environment (SCOPE).

In early March, environmental and tribal groups filed a federal suit contesting Clean Water Act approvals by the Army Corps of Engineers and EPA based on potential environmental effects and potential intrusion on Chumash heritage and burial sites. For details see the *Los Angeles Times* at http://lat.ms/1gDxhW8 and the site of one of the plaintiffs, Friends of the Santa Clara River, at http://www.fscr.org/html/newhall.html.

And then on March 20 California's Second District Court of Appeal backed the Newhall Land and Farming Co. by upholding a state Fish and Wildlife environmental impact statement that favors the project over objections from a similar group of plaintiffs, who said they would likely seek state Supreme Court review. The decision is at http://www.courts.ca.gov/opinions/documents/B245131.PDF and further details at http://lat.ms/1imoY5D.

L.A. City Council sets out to regulate fracking

The Los Angeles City Council on Feb. 28 ordered the city planning department to develop regulatory controls, and the City Attorney to draft text for a zoning ordinance, that would ban "well stimulation", including "hydraulic fracturing, gravel packing and acidizing". The *L.A. Times* at http://lat.ms/1nL9TQy cited the Department of Conservation for a statement that L.A. has "1880 active and 2932 abandoned oil and gas wells" in the city. It said air quality reports showed "fewer than a tenth of the Los Angeles County wells that have used acidizing, gravel packing or hydraulic fracturing are in Los Angeles' city limits." It didn't say how many wells in the city now use such methods. The Council file on the measure is at http://bit.ly/1evtuhx. Meanwhile three L.A. City Council members have asked for a report on whether

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fracking had anything to do with last week's 4.4 earthquake: http://lat.ms/1gM0Eq1.

Bill introduced to grant local power to restrict Ellis Act use

Assemblymember Tom Ammiano, D-San Francisco, introduced a measure in February that would allow counties to suspend whole-building evictions under the Ellis Act until their local areas met regional goals for affordable housing supply. Less-publicized provisions would convert Ellis cases from summary unlawful detainers to civil actions on slower schedules, and would limit access to public records of Ellis Act filings. The measure is AB 2405, available at http://bit.ly/1laUrv4. The San Francisco Rent Board's most recent Annual Eviction Report, at http://www.sfrb.org/modules/showdocument.aspx?documentid=2700, says 216 units received Ellis Act eviction notices March 2013 through February 2014. It's a small portion of the 1,977 eviction notices filed during that year. However, landlords' ability to threaten formal Ellis eviction can motivate informal moveout agreements that are harder to document. Mayor Ed Lee was among local figures who last fall endorsed efforts to restrain or discourage no-fault evictions in San Francisco's hot real estate market: http://lat.ms/1jd4OhK. Local tenant protection proposals are under debate, including one to raise relocation payments to tenants displaced by Ellis evictions: http://bit.ly/1g9Ln6w. Another measure aimed at expanding housing would legalize "in-law" units. The "in-law" measure recently got Planning Commission approval and next goes to the Board of Supervisors: http://bit.ly/1mkbScN.

In The News:

- The California State University system has chosen not to build a new campus at the Concord Naval Weapons Station. The *Contra Costa Times* has news of other redevelopment plans at http://bit.ly/Nxi1DX .
- Los Angeles City Planning released its Draft Mobility Plan in mid-February, opening a comment period that ends May 13, 2014. See http://la2b.org/.
- The L.A. Dept. of Water and Power, Sacramento and parts of the Metropolitan Water District are all paying homeowners to remove their lawns. See, respectively, http://lat.ms/1nCGjqV, http://bit.ly/1jRKxex and http://www.socalwatersmart.com/index.php/qualifyingproducts/turfremoval.
- San Francisco's Measure B, which would subject all future waterfront height limit variances to referenda, survived a court challenge, keeping its place on the June 3 county ballot, but its campaign manager, Jon Golinger, was in hot water for trying to become the author of the official arguments both for and against the measure that he in fact supported. See http://bit.ly/1lVgxPt and http://bit.ly/1d6oama.
- The L.A. Board of Supervisors has approved the proposed Local Coastal Program (LCP) for the Santa Monica Mountains, which has languished in part-drafted form since 1986. As the *Malibu Times* reports at http://bit.ly/1iJf8LX, Zev Yaroslavsky wrote a furious response to local critics at http://zev.lacounty.gov/blog/exposing-a-mountain-of-deceit. The plan still awaits final Coastal Commission adoption. For the LCP see http://planning.lacounty.gov/coastal. ■

HUD's OIG Joins California Redevelopment Wake

BY MARTHA BRIDEGAM

HUD's in-house auditor has joined the chorus asking what now becomes of assets funded through California redevelopment agencies.

In a report naming specific assets in three cities, HUD's Office of Inspector General (OIG) voiced concern that successor agencies might lose track of which assets had partly federal antecedents, hence might cut the federal strings attached to their use. It expressed concern for affordability covenants and raised a possibility that federally funded assets could be folded into sales by the state government of assets it regards as its own.

Many cities loaned HUD funds to their redevelopment agencies, which then used them to create or purchase real estate assets. HUD has been concerned as to what will happen to those assets now.

The February 28 report said HUD's Office of Community Planning and Development (CPD) needs to extract more documentation from local California grantees, and keep a formal list of affected assets, to safeguard some $99 million in CPD-administered funds that redevelopment agencies have distributed, including Community Development Block Grants, brownfields redevelopment assistance, Sec. 108 loan guarantees, and grants supporting Sec. 108 projects under the Economic Development Initiative.

The report focused on a spot check of 20 large San Francisco, San Jose and Los Angeles assets. Among these, it said 15 grantee entities could not prove they had the required "binding and enforceable rights" to assets funded by the CPD programs. Assets mentioned included San Francisco's Metreon complex; San Jose's 84 South First Street rehab; and, in Los Angeles, elements of the Marlton Square, Noho Commons, Slauson Central Shopping Center and Goodyear Tract projects.

In a rebuttal that formed part of the report text, HUD Deputy Assistant Secretary Yolanda Chavez wrote that OIG's recommendations misunderstood HUD regulations, attributing too much oversight responsibility to CPD and too little effectiveness to CPD's existing risk-based monitoring. Her response recounts HUD's efforts to track transfers of assets in a state-mandated Redevelopment unwinding process not of the agency's choosing. And it protests that some concerns about specific Los Angeles projects, including the Goodyear Tract, were already being addressed after previous audits.

The report is at http://1.usa.gov/PYVZLW. ■

Legislature may allow gloves off again

BY JOSH STEPHENS

In response to outcry from bartenders, sushi chefs, and restaurateurs, State Sen. Richard Pan has introduced legislation that would rescind certain aspects of state Health Code Section 113961, which took effect Jan. 1. This new code, passed by the Legislature last year to combat food-borne illnesses, stipulates that virtually all chefs and bartenders who handle raw food that is not intended to be cooked may not do so with bare hands.

Critics contend not only that the law placed a burden on chefs on food preparers -- especially sushi chefs, who say close contact is crucial for proper preparation – but also that it was passed with too little debate in last year's legislative session. By forcing restaurants, from chain outlets to independent restaurants, to purchase potentially thousands of dollars worth of disposable gloves annually, the law had the potential to stifle the development of independent restaurants, especially in economically depressed areas.

Pan's new bill, AB 2130 (Bill text via http://bit.ly/1gIjD4L) backs down partway by requiring that food preparers "minimize" bare-handed contact and follow strict hand-washing guidelines. Pan reportedly admitted the implementation of Sec. 113961 did not go as planned, partly because different health departments across the state were enforcing the law with varying strictness. Meanwhile, chefs launched vociferous protests and the law was criticized in many media outlets – including CP&DR at http://www.cp-dr.com/node/3438. Some critics claimed the imposition of gloves would encourage food handlers to be less sanitary because they would not be so diligent about washing their hands.

Pan is trying to fast-track AB 2130 so it can take effect by July 1, 2014, which is when state health officials announced they would begin to apply penalties under the existing statute. For more detail see http://bit.ly/OIEWfN. ■

Debate over cap-and-trade revenues continues

With $1.54 billion already spent on California carbon emission rights, debate continues on whether the state's cap-and-trade auction process is valid and what the auction proceeds are for.

The Legislative Analyst's Office (LAO) has repeatedly questioned Gov. Jerry Brown's proposed uses for an expected $850 million in annual revenue from cap-and-trade auctions of greenhouse gas (GHG) emission allowances. While Brown's proposals do support projects related to air quality, LAO has asked if they will achieve the best GHG reductions available for the money. LAO lays out and critiques Brown's proposals in a February 24 report at http://www.lao.ca.gov/Publications/Detail/2953. It urges the Legislature to have the Air Resources Board set standards for state departments to use in deciding what programs would reduce GHGs most effectively.

Of interest to local planners is that, per the February 24 report, Governor Brown's proposals would include $100 million in each of the next two fiscal years to support transit-oriented development programs related to SB 375 compliance, to be administered by the Strategic Growth Council, including possibly for grants to local governments' projects. These funds would replace the funds previously provided by Proposition 84, which will run out after this year.

The LAO has been chivvying Brown on his proposed uses cap-and-trade proceeds since January, especially on his proposal to spend up to one-third of each year's proceeds on high-speed rail construction. LAO's January 13 report on the budget proposal at http://lao.ca.gov/reports/2014/budget/overview/budget-overview-2014.aspx called the use for high-speed rail "legally risky". As the *Sacramento Bee* noted at http://bit.ly/1cvGNuc, the Feb. 24 LAO report said high-speed rail construction "would actually generate GHG emissions of 30,000 metric tons over the next several years." Similar objections appear in a March 6 transportation report at http://www.lao.ca.gov/Publications/Detail/2966.

Brown's proposals have drawn mixed reviews from others too, as discussed in StreetsblogLA at http://bit.ly/1gGYkA8 and the *LA Times* at http://lat.ms/1g9dJyA.

Per the LAO, the Governor's budget proposal would divide cap-and-trade money among 23 program components run by 11 departments and boards. The High-Speed Rail Authority would get $250 million in the coming fiscal year, and then 33% of all cap-and-trade revenue from 2015-2016 on. The Air Resources Board would get funding to administer the cap-and-trade program itself plus $200 million in each of the next two years for clean transportation. As noted, there would be the $100 million in each of two years for the SB 375 programs. Other recipients would include low-income weatherization, upgrades to Caltrans and state buildings, waste emission reduction and recycling, water conservation, State Water Project generator efficiency, wildfire prevention and watershed restoration. Out of $500 million borrowed from past cap-and-trade income by the General Fund, the budget would pay back $100 million in the coming year.

The report suggested these activities might not reduce GHGs optimally, or if they did, it might be through "activities that would have happened on the natural (meaning without the support of cap-and-trade auction revenues)." Instead, it urged using cap-and-trade income for ending the separate $40 million "Cost of Implementation" charge to polluters or funding energy storage efficiency, carbon sequestration or alternative fuels.

The State Senate's Standing Committee on Budget and Fiscal Review discussed the Governor's proposals for the revenue February 13. Materials are at http://bit.ly/1f0KfxV.

Steinberg's carbon tax proposal: rhetoric or literal legislation?

State Senate president pro tem Darrell Steinberg has commented on Brown's proposals indirectly with a carbon tax proposal that, as the *Mercury News* commented at http://bit.ly/1dcbPx2, may be more rhetorical than legislative. Saying, "My attempt here is to stoke a debate," Steinberg proposed replacing the transportation fuels portion of the cap-and-trade system, which is expected to raise the cost of gas in 2015, with a carbon tax starting around 15 cents per gallon of fuel, rising in future years. His proposal would transfer most of the proceeds to households with incomes below $75,000 through a state earned-income tax credit, and would spend the rest on transit. Steinberg's initial statements on the tax are at http://bit.ly/1gEfKSl. The *LA Times* has more at http://lat.ms/1kZHUG and http://lat.ms/111JGeD. Steinberg introduced a vaguely phrased version of the proposal as SB 1156: see http://bit.ly/1gMpJ4b.

Auctions continue alongside litigation to stop them

As of the most recent auction in February, which sold nearly $330 million in carbon permits, the *Sacramento Bee* reports at http://bit.ly/1hQg8Lz that California companies have spent $1.54 billion on greenhouse gas emission rights so far. The ongoing ARB auction page is at http://www.arb.ca.gov/cc/capandtrade/auction/auction.htm. However, the legality of the auctions themselves is still at issue. Chamber of Commerce official Loren Kaye noted in a blog post at http://bit.ly/1jiR68Z that notices of appeal are on file in *California Chamber of Commerce v. California Air Resources Board*, a Sacramento Superior Court case that upheld the existing auction system last year. The decision and pleadings are at https://services.saccourt.ca.gov/publicdms/Search.aspx under case number 34-2012-80001313. ■

legal digest

LA grading permit ordered despite no tract map

BY MARTHA BRIDEGAM

A Saudi prince's Los Angeles family compound plan in Benedict Canyon has won an appellate court's order clearing the way for a grading permit across a large hillside area, even though the sponsors did not file a tract map.

Writing for a unanimous three-judge panel of the Second District Court of Appeal, Justice Victoria Gerrard Chaney upheld the trial court's order, which found no tract map is required where the land in question will not be subdivided.

The project called for construction of three houses, plus a pool, outbuildings and "accessory living quarters", on three contiguous hillside lots that together covered 85,000 square feet. The land use blog of the Jeffer Mangels law firm, whose attorneys represented project proponent Tower Lane Properties, said Tower Lane was "an entity established by Saudi Prince Abdulazziz ibn Abdulazziz al Saud, who is currently the Deputy Foreign Minister of Saudi Arabia."

The opinion's procedural history said city planners first responded to the proposed project by citing a local code requirement that a tentative tract map must be in place with Planning Department approval before a grading permit may be issued for a hillside area of 60,000 square feet or more. Tower Lane sought a waiver of the requirement. When Planning called for an environmental impact assessment Tower Lane balked and filed a writ petition in court. Two neighbors joined the city in opposing the writ.

The appellate court found the Los Angeles code section containing the grading requirement "by its plain language applies to subdivisions only." It said the code section's phrasing and context, including the very words, "tentative tract map", showed it was meant for subdivisions.

The city had argued the tract map procedure was an appropriate means for the city to review whether the grading was appropriate for the site or should be limited by constraints such as planning restrictions or easements. The court responded, "It is not our place to decide whether the City should make these inquiries, only whether [LA Municipal Code] section 91.7006.8.2 mandates them. It does not. " It noted

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> The appellate court found the Los Angeles code section containing the grading requirement "by its plain language applies to subdivisions only."

separate provisions in the Building Code did call for the inquiries the city had in mind, but did not provide for them to be made by the "advisory agency" mentioned in the tract map statute.

The court further refused to defer to past department memoranda and decisions applying the statute, saying that in the examples put forward, either the decisions were made in the context of subdivisions or non-subdivision applicants for waivers were not put through environmental review as the appellants would have been.

The Jeffer Mangels blog quoted one of the firm's attorneys, Benjamin M. Reznik, as saying his client "has been the target of allegedly unfair and at times vicious attacks by local residents and the media" and "feels completely vindicated by the court ruling." http://landuselaw.jmbm.com/2014/03/appellate-court-rules-in-favor-of-saudi-prince-in-benedict-canyon-case.html.

The case is *Tower Lane Properties v. City of Los Angeles*, at http://www.courts.ca.gov/opinions/documents/B244092.PDF. ■

EIR Found Deficient on Kern Water Bank

In a pair of decisions March 5, the Sacramento County Superior Court's Judge Timothy Frawley invalidated parts of the EIR that has been allowing the Kern Water Bank, a major groundwater reserve near Bakersfield, to function under its current legal framework. The water bank's physical operations and environmental safeguards were at issue, against a background that includes conservationists' criticism of influence in the bank's governance by entities associated with food and farming investor Stewart Resnick.

The March 5 decisions in two companion cases rejected several wide-ranging objections to the EIR by the plaintiffs, who were conservationists and neighboring water districts. However, it found the EIR "fails to adequately describe, analyze, and (as appropriate) mitigate the potential impacts of the Project associated with the anticipated use and operation of the Kern Water Bank." The decision in the *Rosedale-Rio Bravo Water Storage District v. Dept. of Water Resources* case, which was the more focused on neighboring districts, added, "...particularly as to potential groundwater and water quality impacts."

The two rulings dig deep into the fiercely arcane water-and-muscle history of the "Monterey Plus Project," a 1995 outgrowth of disputes over the 1994 Monterey Agreement between the State Water Project and its contractors on Southern California water distribution. The California Water Impact Network (C-WIN), among the successful plaintiffs, posted the decisions at https://www.c-win.org/press-room-monterey-plus-amendments.html. The pleadings and decisions are at https://services.saccourt.ca.gov/publicdms/ under case numbers 34-2010-80000561 and 34-2010-80000703. The *LA Times*' Bettina Boxall had initial reactions and analysis at http://lat.ms/1fK3YXu.

Reached soon after the decision, Carolee Krieger, president of C-WIN, sounded thrilled and a little stunned. She said it addressed kinds of questions she had been asking since 1995, when as an amateur local activist she happened into a meeting in Buellton and heard for the first time about the Monterey Agreement. Although the current EIR "surfaced" in 2010, she said "it took this long for the judge to finally get to the merits of the case" – and his ruling was for C-WIN's side. "It's just huge."

She knew it wasn't over. She predicted the matter would be appealed and end up before the state Supreme Court. But she said, "You have no idea how happy I was because that's not what I expected. I expected to have to go to the Supreme Court to get a decision like this."

Krieger said additional issues included the "urban preference" – the question of whether the Monterey Amendments mean the water bank's most essential function is no longer the one originally intended for it: to backstop the State Water Project's supplies to city water systems. More narrowly, she said the decision indirectly affects water supply for large planned developments on the lands of the massive old Tejon and Newhall Ranches. However, Krieger and attorney Adam Keats, who litigated the case for the Center for Biological Diversity, did not comment more specifically about impact on residential development.

Bakersfield Californian columnist Lois Henry, however, suggested in a recent news analysis that the decision might affect Tejon Mountain Village, as its EIR "specifically names water banked in the Kern Water Bank" as a source for its planned residential and business customers. She wrote, "If that water is caught up in some kind of freeze or injunction, what then?"

Asked about consequences of the decision, Keats wrote: "It will all depend on what the court orders in terms of remedies. At this point everything is presumably on the table, from shutting the Kern Water Bank down pending environmental review to business as usual. So it's hard to say right now what effect this will have on any projects being planned or being built. That said, any project seeking to rely on the Kern Water Bank for its water supply should be questioning that supply. But I'm not aware of any such project at this moment."

Attorneys representing Resnick's Roll International Corporation, Paramount Farming Company, LLC and related entities did not respond to comment requests, except that a Roll Law Group attorney wrote, "please refer all inquiries to the Kern Water Bank Authority." At the water bank, director Jonathan Parker responded by email: " The KWBA is disappointed. We are reviewing the decisions and our options. In any event, moving forward we will comply with CEQA." As of March 12 he wrote that the upcoming timeline was "Uncertain. There may be a remedies hearing later summer or early fall." (The court has since scheduled such a hearing for September 5.) He wrote that he was not familiar with the residential projects.

Ellen Hanak of the Public Policy Institute of California said, "I'm a little perplexed by the decision." She said the groundwater bank under its current management was among leaders in Kern County, who others have emulated, enabling active storage of groundwater and making the system more resilient. Hence she said, "I don't understand the argument" that the current operation could worsen care for the water supply. ■

Court defers to local officials and geography on 11-foot variance in Del Mar

BY MARTHA BRIDEGAM

In a dispute between tenacious neighbors in Del Mar, the Fourth Appellate District upheld a variance for plans to tear down and rebuild a house at its existing distance from the street although it did not meet a local 20-foot front yard setback requirement. The court said property owner Jon Scurlock's right to seek a variance for his "complete remodel" was independent of the old building's existing nonconformity, and it found substantial evidence for local officials' decision that granting the variance would be fairest to the property owner while serving local planning goals.

The old housefront, hence the proposed new one as well, stands "nine to 11 feet from the street" on a lot sloping steeply downward. The local Design Review Board found that replacing the house at the same distance from the street as before would best minimize "adverse impacts to steep slopes," land disturbance and the sizes of retaining walls. After an investigation including personal visits by all members, the Planning Commission agreed, adding that "strict application of the front yard setback deprives the property owner of privileges enjoyed by other properties in the vicinity." Neighbors' objections and legal action failed to win over the City Council – again, after personal site visits by all members. Likewise the county Superior Court. Likewise the appellate court. All sided with Scurlock.

The court said it would be absurd and unfair to let a preexisting nonconformity on a property limit the owner's ability to apply for a variance.

Deferring to the city's interpretation of its own code, the appellate court rejected arguments based on municipal statutes that governed property owners' rights to maintain but not increase nonconformities in existing structures. The court said the right to maintain a nonconformity and the right to apply for a variance are "two completely separate concepts" and it would be absurd and unfair to let a preexisting nonconformity on a property limit the owner's ability to apply for a variance. It said since Scurlock meant to do a "complete remodel" he had no rights to continue any nonconformities – only the independent right to apply for a variance, which he did.

The court found substantial evidence for the Planning Commission's approval of the variance, quoting with approval its extensive findings and rationales on the uniqueness of the building site and the fairness of the variance as a way to let Scurlock develop his property in parity with rights of other nearby property owners. Although it would be possible for the property owner to rebuild lower on the slope in compliance with the setback rule, the court said that in light of the greater costs in money, environmental disruption, ugliness and awkwardness, it did not follow that he should be made to do so.

On a municipal code section that called for considering alternate designs, the court said "the inquiry is whether an alternate design could have avoided the disadvantages that stem from complying with the setback requirement. The inquiry is not... whether Scurlock could have designed a house that complied with the setback requirement regardless of the disadvantages."

Decided in February but ordered published as of March 14, the case is *Eskeland v City of Del Mar*, at http://www.courts.ca.gov/opinions/documents/D061370.PDF. ■

HOA's members need not testify about their own side's strategy meetings

Lawyers for organizations may feel both shudders and relief on reading a recent appellate decision protecting attorney-client privilege for the members of a La Jolla homeowners' association. Shudders, that a local court's discovery order would have required individual homeowners to recount group strategy meetings held by their HOA's lawyers. Relief, that the Fourth District Court of Appeal has blocked the order.

The dispute arises from two construction defect lawsuits against developers and builders of a 140-unit common interest development. The homeowners' association has sued over alleged damage to common areas and about 30 individual homeowners are suing separately over alleged damage inside their individual units.

The discovery dispute concerned whether the HOA's lawyers waived confidentiality when they held meetings for homeowners "to apprise them of the status and goals of the litigation," and in one case to get their vote approving the action.

Defendants alleged the protective circle of attorney-client privilege was broken by the presence of individual homeowners who were not the lawyers' clients. A homeowners' association is a different entity from its individual members, not all of these homeowners had chosen to join the other lawsuit alleging damage inside of homes, and in any case that suit was brought by different lawyers.

The appellate court held confidentiality rights were not waived at the meetings based on a review of Cal. Evidence Code §§ 912 and 952 and prior evidentiary rulings specific to homeowners' associations, including their duties to keep members informed. It noted attorney-client privilege can protect third parties to whom disclosure is "reasonably necessary for... the accomplishment of the purpose" of the consultation. While participants in the two lawsuits might have diverging interests in obtaining legal advice, the court found "the Association's attorney was attempting to communicate in the subject meetings with other stakeholders, the individual homeowners, in a manner that would advance their shared interests in securing advice on similar legal and factual issues."

The case is *Seahaus La Jolla Owners Association v. Superior Court*, at http://www.courts.ca.gov/opinions/documents/D064567.PDF. ■

Property owners can't "walk away from" coastal development conditions

BY MARTHA BRIDEGAM

Ruling for the Coastal Commission against property owners represented by the Pacific Legal Foundation, California's Second Appellate District cited the doctrine of collateral estoppel to find that an easement condition on a coastal development permit, once final, cannot be contested in a second permit application.

In *Bowman v. California Coastal Commission*, the court wrote that property owner Walton Emmick obtained construction permits and did some work to fix up a dilapidated house on coastal property, but died before San Luis Obispo County granted his application for a coastal development permit (CDP). After his death, the county granted the CDP to his successors, the trustees of a family trust. As a condition for the permit, the county imposed what the appellate court termed a "quasi-judicial determination that the lateral easement condition was valid for the proposed development because development would lead to an increased use of the property." The trustees let the decision become final without appealing it directly.

The court said the trustees later applied for a second CDP, in part to replace the property's barn, but also for much of the work already authorized under the first CDP -- and, additionally, asking the county to drop the easement condition. The county did approve the second CDP application, and did agree to remove the easement, but "the Sierra Club, the Surfrider Foundation and two coastal commissioners appealed" to the Coastal Commission, which found the easement condition from the first permit to be binding. Both the trial court and the Second District sided with the Coastal Commission.

To a claim by the trustees that they could "walk away" from the initial CDP and seek a new one, the court retorted that they "cannot walk away from collateral estoppel." It held that basic principles on the finality of judgments prevented reopening a settled determination with a new permit application.

The court found appellants showed "nothing that would compel the Commission to modify the access easement condition." Contrary to appellants' claim, it said the Coastal Commission did not try to expand the easement beyond what the original CDP required.

The court found the appellants' contention that they never accepted the easement condition did not prevent it from taking effect. It found that since the construction work was completed under the initial CDP, appellants accepted the benefits of the permit, hence were bound by its condition. The court said this was so even though the work had been completed under the decedent's local construction permits while his application for the first CDP was still pending. The court said the work done then was only legalized by later issuance of the CDP that carried the condition.

In a seeming inconsistency, the opinion's initial procedural history says Emmick obeyed an order to stop construction but the concluding paragraphs say he "completed the improvements".

In a December 2013 blog entry, an attorney for the trustees, Paul Beard II of the Pacific Legal Foundation, gave a somewhat different account. He wrote that the work Emmick did on the property was under local construction permits for repair work that is "categorically exempt" from CDP requirements, and that Emmick completed it while his CDP application for larger-scale work was still pending. Beard wrote that "no further work on the property has been done since the repairs were completed." He contended that "the family did not sign or in any way exercise" the first CDP. His account of the second CDP application says the Planning Department first "eliminated one-half of the public-access easement" and then, per the family's appeal, the Supervisors agreed to drop the easement entirely – after which the environmentalists' appeal to the Coastal Commission followed. See http://bit.ly/1gl5D6k.

The case is at http://www.courts.ca.gov/opinions/documents/B243015.PDF. ■

>>> Cities providing water for development...

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This year it is rare to find municipal districts suspending new water connections specifically as a response to the current dry season.

strict conservation measures are also looking at new annexations and subdivisions without blinking.

People do still ask where the water's coming from for new large developments. It seems possible, however, that drinking-water supply for expanding urban footprints may have lost some importance as grist for development debates compared with the days of the big moratoriums.

This year it is rare to find municipal districts suspending new water connections specifically as a response to the current dry season. An extensive if unsystematic search by phone and Internet found only two: the posh suburb of Montecito, next door to Santa Barbara, and Willits in the parched Mendocino County interior.

Some districts, mostly small, banned new hookups long before the current drought: Bolinas since 1971, Cambria since 1990, Redwood Valley, with very occasional relief, since 1989. Customers of California American Water in the Monterey Peninsula Management District are under a moratorium on water permits for new construction and remodels, addressed in a current proposed bond bill, SB 936: http://legiscan.com/CA/text/SB936/2013.

Brooktrails Township – a community services district near Willits -- is probably not alone in having no need to ban new connections. It has had 24 connections available since a state-imposed moratorium ended in 2010, but district staff member Elizabeth Simpson said there were no takers. Connection fees are $23,711 apiece.

Other districts, including Solvang and Nipomo, have discussed moratoriums but aren't there yet.

Reflecting a contrast between municipal and rural/agricultural pressures, Paso Robles has banned new private wells, including for houses, because of groundwater depletion pressures that have a lot to do with vineyards. The city has not stopped new connections to municipal pipes. Its contingency plan would impose a hookup moratorium at the strictest stage of water crisis but Planning Manager Susan DeCarli said: "That would be a long way out from here now."

In the Redwood Valley County Water District of Sonoma County, general manager Bill Koehler said the district had about 120 days of stored water. He said whether it would last depended whether the vineyards that sustain the local economy required spraying for protection from more than one or two frost events in the next few weeks.

And yet, the list of some 200 local conservation measures compiled by the Association of California Water Agencies at http://www.acwa.com/content/local-drought-response shows no large districts banning water for new development as of March 20.

So what exactly is different since 1991?

Water and infrastructure expert Ellen Hanak, co-director of research at the Public Policy Institute of California, wrote: "The difference is that there have been major strides in drought planning and resiliency investments since then. The 1987-92 drought really marked the beginning of many of the practices that have become very important for the modern approaches to modern water [management] that most large urban agencies now subscribe to."

In an interview, Hanak said the water year (from a statewide perspective) was looking like about the fourth-driest on record, about a "30-year drought." That is, a level of drought already planned and accounted for in long-term water management plans.

Her comments, and other recent PPIC publications,

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viewed the drought as a crisis mainly for agriculture, the environment, and remote rural towns "not connected to a larger grid". Urban systems, she said, were "mostly in very good shape during this drought" though it was further encouraging long-term planning, especially to increase physical connections among existing systems to allow sharing.

Hanak recently coauthored a PPIC report on "serious funding gaps" affecting California water systems, including drinking water contamination in small, poor agricultural towns: http://ppic.org/main/publication.asp?i=1086. The report saw a shortage of funds for other ordinary water management such as responses to floods, storm and other runoff, ecological conservation, and coordination among systems.

In an email exchange, Hanak demurred to the blanket suggestion that urban water systems' strength might make water supply less of a constraint on growth. She wrote: "I think there's potential for things to fall more through the cracks in some places that are growing fast from a smaller base - planning and often supply diversification actions are likely to be less well-established." She declined to name any particular district as one for concern, writing that her comment was based on a statistical analysis in the mid-2000s "where we found that places that were growing faster and that had smaller water agencies were less likely to be complying fully with all the requirements of the Urban Water Management Planning Act," also noting that "communities with fewer than 3,000 service connections don't actually even need to prepare urban water management plans."

Urban Water Management Plans (UWMPs) are required of more than 400 urban water districts every five years, with the next revisions due in 2015. Large new developments must additionally meet "show me the water" requirements under Senate Bills 221 and 610 of the 2001 session.

An SB 610 "Water Supply Assessment" is required for any project with more than 500 housing units or hotel rooms, work space for more than 1000 people, business space on a similar scale, or a 10% increase in the local district's total hookups. The overlapping SB 221 requires "Verification of Sufficient Water Supply" for approval of a tentative map, parcel map or development agreement for a similar-sized project, with exemptions for infill or low-income housing. Both standards require water planning for the next 20 years that anticipates expected population increases and recurrences of known types of drought periods: http://www.water.ca.gov/urbanwatermanagement/SB610_SB221/.

Among local development disputes it is difficult to find substantive connections being drawn between the current drought's effects and projects that have had to pass reviews under SB 610 and SB 221.

Jonas Minton of the Planning and Conservation League said requirements such as SB 221 and SB 610 are determined to be satisfied relatively easily. The laws "have had very little effect to date," he said. Despite a few court cases involving egregious cases of ignoring water supply concerns, he said developers generally have managed to satisfy authorities that a 20-year water supply exists. He said analyses for such purposes are based on "a short record" of the last 150 years, which may not reflect all possible conditions.

But like Hanak, he said forecasts for frightening drought effects "overstate the reality that we're finding this year" and most urban areas would not suffer dire water shortages.

City of Folsom

Minton pointed to the "very development-friendly" city of Folsom as the scene of a land annexation whose planned water supply "was semi-theoretical, a bunch of water wonks arguing about that." The city's main water source, Folsom Lake, this winter left so much of its lake bed exposed that tourists wandered the temporary mudflats admiring ruins from the Gold Rush: http://bit.ly/1fGZD82.

Folsom's South of Highway 50 annexation covers land in which developer Angelo Tsakopoulos was a major initial investor. The 2010 UWMP predicted this "Folsom Plan Area" (FPA) would gain population from zero in 2010 to 24,335 in 2035. Water supply was important in local controversy over the annexation, including a contentious 2004 election season. That year voters approved developer-sponsored Measure W, which allowed the annexation if existing residents' water rights and rates were protected.

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The FPA passed its SB 610 review around 2009. Folsom then planned to serve the new area by purchasing water rights from the Natomas Central Mutual Water Co.: http://bit.ly/PVtnTL; http://bit.ly/1gEsh3F. The Local Agency Formation Commission (LAFCo) approved the annexation in January 2012.

Later in 2012, plans for the FPA's water supply shifted. City spokeswoman Sue Ryan responded to questions about that by sending the first 100 pages of a staff report supporting two approval resolutions that the City Council passed in December 11, 2012. (The report is downloadable from Item 8a on the 12/11/12 agenda at http://www.folsom.ca.us/agendas/.) The resolutions noted the Natomas water rights purchase to bring water from the Sacramento River had run into "uncertainties" about Bureau of Reclamation approval. Instead, they agreed to transfer a water right from the existing city's "East Area" to the FPA, and make up the rest through conservation, if necessary invoking an existing "Fazio Water" purchase right for more American River water.

As of summer 2013 the *Sacramento Bee* reported the developers would spend some $52 million to move and treat water for new properties out of the city's existing supply: http://bit.ly/1ggUvaD. There was an indignant discussion about that on the Tomatopages community site at http://bit.ly/1hK52I3, especially asking if the transfer of water rights infringed Measure W, but that's where the matter appears to have rested.

Marcus Yasutake, who became Folsom's environmental and water resources director in summer 2013, described the year's drought, not as an all-out disaster, but as a data point and opportunity to teach conservation habits. In an interview that did not address technicalities or politics, he said the city was not in a situation to suspend new permits or connections. "Doesn't mean we won't ever be."

He said, "I'm sure at some point in time 2013 will be included as a drought year from a planning perspective because we haven't gone through anything like 2013". He said "typically people look to the '76-'77 years," which at the time were "the worst on record, and now we have something that was even below that. So, the [UWMP] requires us to look at those drought type of years and to identify reduction or other supply alternatives."

He said conservation measures under the 2010 UWMP included finding and patching leaks – locally difficult because water easily seeps through cobbles left by Gold Rush dredging – and an end to unmetered flat-rate water supply. Residential water meters began use in January 2013.

Asked if there were any concerns about the water promises made in the annexation approval process being kept, Yasutake said it would take a drought years worse than the current one to trouble the water supply to the annexed area.

Paso Robles

Though facing a groundwater shortage and currently banning new wells, Paso Robles is not stopping two proposed annexations and a request for a General Plan change to allow further buildout.

Planning Manager Susan DeCarli said recently begun construction will give the city better access to purchased water from Lake Nacimiento and the city also has had conservation successes, in part by replacing flat-rate billing with graduated rates. She said, "We have enough water capacity to withstand our full development buildout," which calls for population expansion from 30,000 to 45,000.

"So as new developments are proposed, it's confusing to people," she said, because there are heavy restrictions on use of groundwater at the same time.

The grandest proposed expansion, the Paso Robles Gateway development, calls for three hotels, houses and vineyards. DeCarli said given the "heightened sensitivity to water resources" the developers voluntarily agreed to do a Water Supply Assessment – "they didn't argue" – and planned to buy their own Lake Nacimiento water. "It's going to be a major issue when they go to LAFCo", she said.

Did better planning help in such arrangements? she said it did help to direct new development to urbanized areas. "You can manage urban water to make sure you've got services." ■

Healdsburg wants Toronto and New York to know its faucets are fine

Officials of Healdsburg and at least three smaller water districts have been trying to shed unwanted status as poster children for the California drought.

In a January 28 press release at http://www.cdph.ca.gov/Pages/NR14-012.aspx, the Department of Public Health issued a list of 17 communities that it said were at risk for running out of drinking water. Since then, Healdsburg City Manager Marjie Pettus has been insisting she doesn't know why.

Pettus said, "We believe that perhaps an assumption was made because our City Council took proactive measures and implemented a mandatory water conservation measure." But she and Planning Director Barbara Nelson said the early move to strict conservation was a stewardship measure, not a sign of immediate shortage.

Healdsburg is at Stage 2 mandatory water conservation, which calls for a 20% reduction below last year's water use. The city's Web site cites low Russian River flows from Lake Mendocino in imposing the restrictions: http://www.ci.healdsburg.ca.us/index.aspx?page=397.

But Pettus said: "Healdsburg has sufficient water to meet current demand." She said the city can additionally draw from wells in Dry Creek Valley as of April 1 of each year. "Between the river and the wells we can meet all of our commercial and residential water needs."

This chic wine-tourism destination with more than 11,000 residents was the largest water district on February's at-risk list. It appeared alongside smaller areas whose reactions have been mixed.

Water managers in Shaver Lake Heights, Bass Lake and Sierra Cedars wrote that they were placed on the "at-risk" list in error and were then removed. Pete Conrad of Sierra Cedars passed on an email from CDPH's Merced District saying Sierra Cedars "should not have been included on the list as there is no indication that the system is experiencing any reduced capacity or other complications due to drought conditions."

Pettus, however, said phone calls to state officials by Healdsburg Mayor Jim Wood got no clear explanation for the at-risk designation. She said, "They might have acknowledged the mistake but there was no corrective action taken."

Some of the districts on the list of 17 do face nervous water situations.

One such is Lake of the Woods, nearly a mile above sea level in the Tejon Pass area of Kern County. The New York Times' Adam Nagourney reported March 7 at http://nyti.ms/1g76cj1 that the community was near the point of trucking in water.

In Redwood Valley, water manager Bill Koehler didn't mind being on the list. "Yes, we are, and yes, we deserve to be." He said tree-ring records suggested his area of Sonoma County, served by drastically low Lake Mendocino – "It's a mudflat" – was suffering a 400-year drought. He said Redwood Valley had about 120 days of water and then would have to depend on neighbors.

The at-risk designation had no formal effect but Pettus said it drew "a tremendous amount of media attention". The 17 listed communities have been mentioned as emblematic of California's drought in news reports as far away as Toronto: http://bit.ly/1bK8n6m. Likewise Nagourney, reporting on Lake of the Woods, narrated, "for 17 small rural communities in California, the absence of rain is posing a fundamental threat to the most basic of services: drinking water..."

At CDPH, spokesman Ron Owens responded to a request for comment by calling attention to a new list posted March 4: http://bit.ly/1g76RRq. The new list says "CDPH has prioritized assistance to the following public drinking water systems," and names seven districts: Willits, Redwood Valley, Lake of the Woods, and four remote districts that each serve 100 or fewer people. CDPH had not responded specifically by press time to a request for comment on the objections from Healdsburg and the three smaller towns, nor to a question how the criteria compared for the January 28 and the March 4 lists. ■

insight WILLIAM FULTON

>>> CEQA Makes Us Lazy As Planners

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If the doctrine of CEQA-In-Reverse doesn't survive, then we might have to go back to actually planning.

Quality Management District, 218 Cal.App.4th 1171, by ruling that the Bay Area air district's significance thresholds are not subject to a CEQA analysis. But in so doing, the First District ducked the other bizarre CEQA question we're all facing today: Namely, does CEQA apply "in reverse"? CBIA appealed the First District ruling to the Supreme Court – which took the case primarily to resolve that issue.

"CEQA-In-Reverse" simply means this: We all know that CEQA is supposed to apply to a project's impacts on the environment. But does it also apply to the environment's impact on the project? That is, if a project would place people in the way of harm because of a pre-existing environmental problem – or, more to the point, a potential future problem – does the CEQA analysis have to cover that? Do applicants have to mitigate that possible problem? Can projects be turned down on that basis?

We all thought we knew the answer: No. In maybe the most important CEQA case in the last few years, the Second District Court of Appeal ruled in 2011 that CEQA does not require an analysis of the environment on the project. In *Ballona Wetlands Land Trust v. City of Los Angeles* (www.cp-dr.com/node/3121), 201 Cal. App. 4th 455, the First District ruled that the CEQA analysis of the Playa Vista project near Venice did not have to include an analysis of sea-level rise, for the simple reason that sea-level rise isn't caused by the project.

In *Ballona Wetlands*, the court specifically took the state to task for the language of CEQA Guidelines Section 15126.2(a), which said that if a project was proposed to be constructed on a previously identified earthquake fault – thus putting people in harm's way – the potential danger had to be addressed in the CEQA analysis.

In concept, *Ballona Wetlands* makes sense. It's a pretty well-established constitutional principle that you can't make developers mitigate more than their fair share of the problems they create. So it stands to reason that they should have no responsibility for problems that they have nothing to do with.

Except why would you deliberately put people in harm's way by building a project in a dangerous location? Surely, if there is any purpose to planning at all, it is to eliminate the possibility that people will be harmed or killed because a development project is washed away or crumbles to the ground because of an earthquake.

This basic concern for public safety was the reason why – in the end – Los Angeles County eventually won the infamous *First English Lutheran Church* case back in the 1980s. Sure, it was possible, as the Supreme Court said (at 482 U.S. 304), for regulation to create a temporary taking. But in the end, L.A. County prevailed because rebuilding the First English church camp in Tujunga Canyon wasn't safe.

Concern for public safety was also why CEQA practitioners around the state were having trouble with *Ballona Wetlands* – it went against their basic understanding of why we do planning at all. Nevertheless, it appeared to be settled law – at least until the *CBIA v. BAAQMD* case came along and implicitly (though not explicitly) reversed it. We'll see what the Supreme Court does.

On the face of it, the end of "CEQA-In-Reverse" doesn't make sense. But no matter what the Supreme Court says, the truth of the matter is that it's a perfectly reasonable position to take under CEQA. And it might remind us that we're fundamentally in the business of

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planning, not CEQA analysis.

In California, we often use CEQA analysis as our default method of getting a developer to do something – as if we have no other way of doing it. (In this way, CEQA's kind of like redevelopment used to be – the catch-all tool that we think is required to solve absolutely all problems.) So if we don't want a developer to build a project in an earthquake zone, or a place where sea-level rise is predicted to have an impact, then the most obvious thing to do is hit the developer with a significant impact under CEQA and take it from there.

But *Ballona Wetlands* is right in one sense: Sea-level rise or an earthquake fault isn't the developer's fault. So if we are going to stop a developer from building in those locations, we can't do it under CEQA. We have to use actual planning.

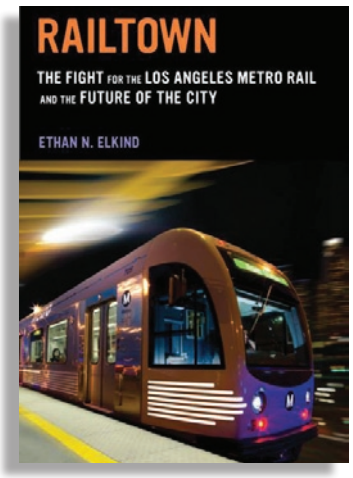
There is, for example, the Alquist-Priolo Act, which permits local governments to restrict development around earthquake faults. As the ultimate outcome of *First English* reminded us, there's also public health and safety, which in that case – and many others – ultimately trumped the landowner's property rights. The public health and safety power also means that planners can use zoning – for example, to restrict housing development near sources of air pollution.

Sea-level rise is a trickier question, because there is no existing law to protect against it and the extent of it is pretty speculative. This is why, with *Ballona Wetlands* on the books, local planners are anxiously awaiting the Coastal Commission's guidance on sea-level rise. But existing regulatory mechanisms – such as health and safety findings – might give planners an important tool to protect against sea-level rise.

As California planners, CEQA drives us crazy. But it also makes us lazy. Because we're so afraid of how it works, we also tend to try to use it for everything. If "CEQA-In-Reverse" doesn't survive, that might actually be a good thing. Because it might force us to actually use planning in order to plan. ■

Slow Train to Los Angeles: Book Review of *Railtown*

BY JOSH STEPHENS



Had it been written about, say, Shanghai or Dubai, Railtown would have been scarcely longer than a page. Autocracies have a knack for infrastructure development. Democracies, especially where nearly 100 cities and other jurisdictions have to get along with each other, are another matter.

Author Ethan Elkind's 227 pages therefore seem almost too few to tell the four-decade, $10-plus billion (and counting) saga of the build-out of Los Angeles County's subway, light rail, and bus rapid transit network. The system currently measures 88 miles, with a dozen or so extensions and new projects in the works.

The counting will go on at least until the year 2039. That's 66 years since Tom Bradley, then a candidate for mayor, promised that the city would break ground on its first subway, beneath the busy Wilshire Boulevard corridor, within 18 months of his election.

Needless to say, that didn't happen. But Elkind, a professor of law at UCLA, still gives Bradley credit for inspiring Los Angeles to dream of rail. He was, according to Elkind, the first major civic leader to seriously challenge the notion that Los Angeles was too dense, too diffident, and too "in love" with its cars to ever embrace rail transit.

In telling the tale of the build-out of Bradley's envisioned system, Elkind, a professor of law at UCLA and UC-Berkeley, could have gone down many spur tracks, into grand discussions of the feasibility of rail and lofty, ongoing debates about quality of life, cosmopolitanism, public subsidies, and transportation economics. He does not. Instead, he tells a straightforward, well researched story – with little embellishment or dramatic flair – not about the politics of rail writ large but rather about the specific political process that birthed, delayed, and, eventually, gave rise to today's system.

Elkind's neutrality seems especially appropriate given that the system itself is still under development. It will surely take a few more decades' worth of ridership statistics, traffic counts, and real estate development to render a verdict. What the rail riders of the future would never know is the toil that went into their ride from, say, Santa Monica to Ontario.

That ride started with Bradley's halting campaign to win voter approval for the subway. His initial transit-funding measure failed in part because it promised that transit would be developed along broad corridors but did not refer to specific projects.

An alternative measure, devised for the November 1980 ballot by County Supervisor Kenneth Hahn and promoted by fellow supervisor and rail enthusiast Baxter Ward, included an innovation that Elkind says was crucial: that of allocating a certain percentage of bond funds for "local projects" to every locality in the county. This way, even people with Joshua trees in their backyards had reason to support an urban subway.

From that measure right up to 2008's (successful) Measure R and 2012's (unsuccessful) Measure J, transit funding has usually entailed compromise between the City of Los Angeles and the rest of the county. The former has the density, but the latter has the money. With only 40% of the county's population, the city must always find ways to please its neighbors.

That 1980 measure passed, providing funding for the subway's initial segment, with development to be overseen jointly by the Southern California Rapid Transit District and the Los Angeles County Transportation Commission. But the vote of every person in Palmdale, Lancaster, and Santa Clarita -- and every other city in the county – was no match for that of one man: U.S. Rep. Henry Waxman.

With the subway's 1986 groundbreaking still a year away, a methane explosion erupted from the basement of a Ross clothing store along the proposed subway route. Citing concerns about safety, Waxman used his clout in Congress to ban the use of federal funds in the

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corridor.

Elkind's account reads like a who's who of power brokers in Los Angeles, many of whom he interviewed for his book. In nearly every case, Elkind casts neither heroes nor villains. Waxman is the only one whom Elkind portrays as truly disingenuous.

Elkind invokes the common wisdom—the product of much unproven speculation—that Waxman wasn't nearly as concerned about tunneling safety as he was about the political clout of wealthy mid-city residents who didn't want undesirables to rise up from beneath their streets. Elkind notes that engineers considered the route safe for tunneling and that Waxman's ban did not include other alignments considered by engineers to be more dangerous.

With the Wilshire tunneling ban in place, the system staggered forward for the rest of the 1980s and into the 1990s and 2000s. Each proposed subway segment and light line prompted bickering, compromise, and regret.

The L.A.-Long Beach Blue Line went over budget and ticked off car dealers in Long Beach. The methane-free subway route got changed so many times, it might as well have been designed on an Etch-a-Sketch; one route was called the "broken leg" for doubling back on itself en route from Mid-Wilshire to North Hollywood. Meanwhile, construction sites on the initial segments variously caught fire, caved in, and flooded.

The Green Line lost its transit center at its eastern terminus and, when the aerospace industry tanked, it lost many of its riders at its western terminus. The land for the Expo Line almost didn't get purchased, and the Pasadena Gold Line's trains ran too slowly. The Orange Line got turned into a bus, and the SCRTD and LACTC got turned into Metro, the uber-agency that oversees both highways and the majority of public transportation in the county.

Then there was the consent decree.

The buses of Metro/RTD were getting increasingly crowded in the early 1990s. A group of activists that became known as the Bus Riders Union took note of this development and declared it "transit racism."

Whether or not Metro had been neglecting minority and low-income riders deliberately, the BRU – led by Eric Mann -- sued over alleged discrimination. Federal Judge Terry Hatter imposed the "consent decree," which limited rate hikes, mandated the purchase of hundreds of new buses, and restricted the use of agency funds for rail investments. Fairly or unfairly, BRU has long insisted that rail serves middle class white commuters rather than transit-dependent minorities.

Anyone at RTD/Metro would likely have choice words for Mann and the BRU. The organization has relentlessly antagonized the agency and never backed down from its accusations. Elkind treats even them with an even hand.

In 2006, ten years after its imposition, Judge Hatter lifted the consent decree. A few years later, Waxman, citing improved tunneling technologies, pushed through a reversal of the tunneling ban. Measure R, the 30-year, $30 billion sales tax measure, passed in 2008. New projects, such as the Crenshaw Line, have recently broken ground. Before long, nearly every resident of Los Angeles will have easy access to a train. It is indeed becoming a rail town.

Elkind offers few surprises for anyone who has lived in Los Angeles and patiently accepted political dysfunction and gelatinous traffic. But, then again, that may be his point: Angelenos have lived through a ridiculous era, which has been so protracted that no one even notices how ridiculous it has been. Los Angeles took decades and tens of billions of dollars to build much the same system that Bradley first proposed.

Nearly every major city in the world relies on systems that Los Angeles can still only dream of. In some places, those systems are mature and grew up when the technology was still young. Opening its first line two years after Los Angeles did, Shanghai has built 334 miles of subway in 21 years. Dubai did 45 miles in six years.

Elkind does not make these comparisons, stark as they may be. Nor does he speculate on whether rail in L.A. has been a failure of democracy or a triumph. That debate will continue. Railtown is more of an archive than a revelation.

The story makes for hard driving, but essential reading.

Railtown: The Fight for the Future of the Los Angeles Metro Rail and the Future of the City

Ethan N. Elkind

University of California Press 2014

$29.95 ■

The Hollywood earthquake fault: geology as a matter of opinion

BY MORRIS NEWMAN

In a case that could reset the parameters of reality, the developer of a mixed-use development under construction in Hollywood has asked the state geological service to change the earthquake map of Los Angeles.

In January the state Mining and Geology Board issued updated California Geological Survey maps with a surprise for Tinseltown developers. They showed an earthquake fault underlying the massive Blvd6200 project, which is currently under construction on Hollywood Boulevard. In a hearing of the same Mining and Geology Board last week, lawyer John M. Bowman, representing developer Clarett West, told officials the fault line "is not clearly detectable… and therefore is not sufficiently well-defined to be included on the map."

Much rides on the determination of the actual fault line on the Geological Survey. In addition to the $200 million Blvd6200, which is a multi-building development, the same fault could conceivably imperil the multi-tower Millennium Hollywood project, planned for parking lots surrounding the famed Capitol Records building. A third project, a 535-unit apartment complex planned on nearby Argyle Avenue, could also be affected.

To avoid damage from the fault as newly mapped, it has become crucially important to change the map.

As is well known, the physical behavior of the earth and surrounding celestial bodies depends largely on the maps that people draw of them. This phenomenon, known as map-to-reality conversion, first became evident in the early 16th Century, when Copernicus drew a map of the solar system with the sun at the center, rather than the earth. This map caused the earth, which had been the center of the universe up until that time, to suddenly begin orbiting the sun. The upshot for the publishing industry was dramatic: Remainder houses were suddenly full of books like the *Summa Theologica* by St. Thomas Aquinas and the *Divine Comedy* by Dante Alighieri, both of which had been written under the previous cosmology and were now obsolete.

This map-to-reality conversion is a special feature of a philosophy I invented as an undergraduate that I call "concrete idealism." In essence, it holds that the earth is real, but can take any form that I find convenient at the moment. Although the paper was poorly received at an academic conference, I do recall that a distinguished professor of philosophy, well known for his chronic depression, suddenly perked up and made loud whooping noises with his throat while slapping his thighs in an excited way. I don't recall his exact comments afterward, although he did mention that my work was "the best medicine." I do hope my theory can play a helpful role in rescuing an important real estate development, and, in so doing, finally convince my brother-in-law that I did not waste my time in college.

As for the case at hand, geologists testifying on behalf of the developer have suggested the actual fault lies elsewhere in Hollywood, rather than directly beneath the soon-to-be-completed building.

In defense of the developer and his geologists, I'd like to point out that nobody really knows exactly where the earthquake fault is located. That means the location of the fault is conjectural in the absence of established fact. Insofar as the location of the fault is a conjecture, that means reasonable minds can disagree on the subject. Thus it may be *not unreasonable* to locate the fault elsewhere than underneath this valuable real estate. *Quod erat demonstrandum.*

Of course, there are legal matters of great moment here. If (heaven forbid) the project were to be built on a currently mapped fault and a seismic cataclysm were to ensue, the owners might be sued by any persons emerging from the rubble thereof based on said owners' alleged awareness that the project had been built on a fault. (Assuming, of course, that the project would not simply have vanished into the bowels of the earth, much like a little plastic hotel from a Monopoly game that has slipped through a storm drain, never to be seen again.)

If the map were to be amended, however, the developers could distance themselves from the fault. "The official map showed the fault to be elsewhere," they could say in retrospect, with a shrug. "Who knew?" ■