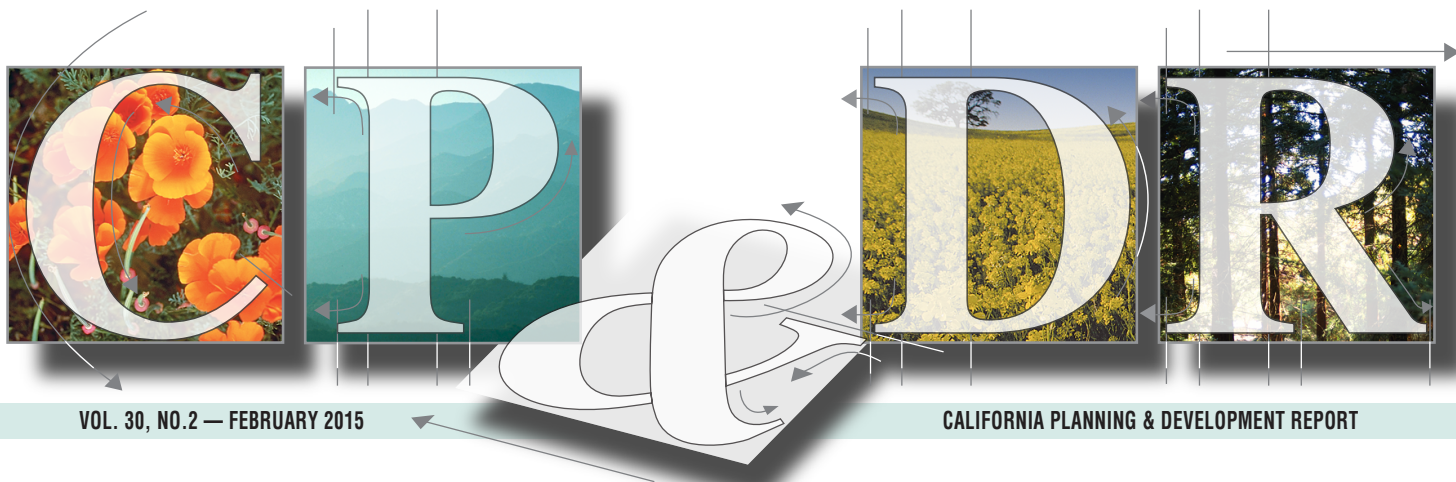




VOL. 30, NO.2 — FEBRUARY 2015

CALIFORNIA PLANNING & DEVELOPMENT REPORT

Cases That Could Broaden Railroads' Path Through CEQA Gather Steam

BY MARTHA BRIDEGAM

Considering their importance, the public hasn't heard much about *Friends of Eel River v. North Coast Railroad Authority* and *Kings County v. Surface Transportation Board*. The two cases, respectively before the California Supreme Court and the federal Ninth Circuit, could end California environmental review of public rail projects in California and might indirectly affect private rail operations including oil trains.

The cases shaped up this winter into tests of whether the Surface Transportation Board (STB) can block environmental reviews of rail projects under the California Environmental Quality Act (CEQA). The STB and two

state rail agencies contend that CEQA review crosses onto the STB's exclusive regulatory turf under the 1995 Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §10101 et seq.

The state Supreme Court [granted review December 10](#) in the *Eel River* case on the proposed revival of a coastal freight rail line by the public North Coast Railroad Authority. The *Kings County* case is a February 9, 2015 appeal of a [December 12 STB ruling](#) that declared California's High-Speed Rail (HSR) line was "categorically exempt" from CEQA review. Because STB rulings are appealed directly to federal circuit courts, that

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insight
WILLIAM
FULTON

Is It Time to Kill the Gas Tax?

In recent weeks, we've seen a lot of moves that suggest it may be time to change the way California funds transportation, including the following:

- Board of Equalization Member George Runner has been touting a [21% cut in the gas tax](#) as part of the "fuel tax swap" formula from a few years ago.
- A committee headed by former San Diego

City Councilmember Jim Madaffer is looking at how to [implement a mileage tax](#) as an alternative to the gas tax.

- And Assembly Speaker Toni Atkins has [proposed a \\$52 annual fee](#) on most drivers as a way to raise almost \$2 billion for road repairs.

The gas tax isn't the only source of funds for transportation in California, of course.

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\$1 Billion for California Infrastructure, Environment in Obama Budget

President Obama's proposed 2016 budget, announced last week, includes several nods to development and transportation in California to the tune of over \$1 billion. In the plan, Los Angeles **would receive \$330 million** for an expansion of the Purple Line of its subway, along with a downtown connector to tie together several strands of the system. The budget also included \$150 million **to fund a streetcar line** in downtown Sacramento. To receive the money, the city has to get approval from residents within three blocks of the proposed line and raise \$30 million in matching funds from property owners nearby. Officials hope to have the trolley operating by 2018. Some of the projects that are likely to survive Congressional whittling, **according to the Sacramento Bee**: restoration projects of the Sacramento-San Joaquin Delta, upgrades to Yosemite National Park, and funding for improvements to Central Valley flood control.

Army Corps Issues New Wetlands Guidelines

Developers in California may have a **more difficult time creating mitigation plans** in wetland areas as of this year. The US Army Corps of Engineers released a new set of guidelines adding more rigorous requirements to mitigation plans,

which "will undoubtedly complicate and significantly increase the cost of preparing and implementing mitigation plans for new development." The guidelines are intended to keep up with 25 years of research since the last update, placing greater emphasis on preservation of California's wetlands.

Inglewood One Step Closer to a Pro Football Stadium

The City of Inglewood **cleared its first hurdle** to building a new 80,000-seat football stadium for a **possible move** by the St. Louis Rams. Backers of the stadium plan gained over 20,000 signatures in a petition drive to put a question about rezoning the proposed stadium site on an upcoming city ballot. By going through the initiative process, developers are hoping to avoid doing a costly and time-consuming environmental review for the 238-acre site, which is the location of the shuttered Hollywood Park race track. Much of the Hollywood Park site is already being redeveloped as a residential community.

Veterans Administration to Dedicate West Los Angeles Campus to Homeless

The US Department of Veterans Affairs will provide permanent housing for homeless veterans on its 387-acre campus in west Los Angeles as a result of a legal **settlement**. A suit alleged that the VA was misusing its property by giving leases to private corporations and non-veteran related

companies. The ACLU Foundation of Southern California sued in 2011, alleging that "the VA was misusing the campus while failing to care for veterans" by neglecting to provide adequate housing and to use the campus for the direct benefit of veterans. As a result of the settlement, the VA will hire a homelessness expert to craft a master plan for the campus. The parcel, which was deeded to the VA in 1888, has long been coveted by developers.

SPUR Opens Oakland Office

The urban policy think tank and advocacy group San Francisco Planning and Urban Research has extended its reach further by opening an office in Oakland. Based in San Francisco's Financial District, **SPUR** also has a location in San Jose. According to a statement, SPUR is committed to both regional and local planning in the Bay Area and will use the Oakland office to focus on issues specific to the East Bay.

Santa Ana Uses Blind Luck to Permit Marijuana Dispensary

Santa Ana **employed a lottery system** to determine who would get one of the 19 permits issued for medical marijuana dispensaries in the city, becoming the first city in Orange County to issue the permits since most California cities banned the shops years ago. However, some criticized the structure of the lottery system, saying that officials should

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have done preliminary screening before opening up the lottery to over 630 applications. “Instead of going through all of this ... you should be vetting people up front, figuring out who doesn’t have a criminal record and all of that, and then have the lottery,” attorney Randall T. Longwith said.

S.D. Fights \$271 Million Stadium ‘Claw-Back’

The demise of redevelopment may leave the city of San Diego with a [monstrous bill](#): \$271 million to cover the development of its downtown stadium, Petco Park. When the stadium’s financing plan was approved in 1998, general obligation bond funds were to be routed through the Center City Development Corp., one of the city’s redevelopment agencies. In anticipation of the 2012 shutdown of redevelopment, CCDC transferred over \$200 million to the city. The state then determined that these funds were not authorized for exemption from state “claw-back.” In a 9-0 vote earlier this month, the City Council determined that it would pursue legal action against the state.

Opponents of Sacramento Arena Raise EIR Concerns in Court

Foes of the efforts to build a new stadium for the Sacramento Kings [aired their concerns in court](#) earlier this month, calling the project’s environmental impact report inadequate. Justices in the Court of Appeals asked lawyers for the city whether planners had surveyed other alternative sites and considered the impact of stadium traffic on I-5. Opponents of the project are concerned about a \$255 million public subsidy that the city is giving to the arena, and that state lawmakers passed SB 743, written specifically

for the project and intended to make it much harder for foes to block construction. The hearing ended without a ruling.

Sen. Jackson Seeks to Streamline CEQA Process

The [latest attempt to reform CEQA](#) comes from State Sen. Hannah-Beth Jackson (Dist. 19 – Santa Barbara). Her bill, SB 122, attempts to streamline the CEQA process but does not make substantive changes to the law. SB 122 would make lead agencies keep an administrative record of all actions on a project in real time. Jackson claims that this change would help streamline much of the data-gathering process, which is now typically done only after a lawsuit is filed. The bill would also establish an online clearinghouse through the Office of Planning and Research that would post all documents relating to environmental impact reports across the state. Finally, the bill would reform what Jackson calls “document dumping” at the scheduled close of the public comment period on draft EIRs.

San Diego Awash in Unused Development Impact Fees

An investigation by the San Diego Union-Tribune [found that the city has let pile up millions](#) of unspent dollars of developer impact fees, designed to offset the local impacts of big projects. These monies may be used for local infrastructure projects such as parks and fire stations. Over \$78 million collected has not been spent as of June 2014; \$35 million of that has not been designated for any specific purpose. Public officials have expressed frustration in the wake of a staggering backlog of infrastructure improvements in the city that have not been fixed.

High Speed Rail Opposition Files Petition

Two counties in the Central Valley [have filed a petition with the 9th District Court of Appeals](#), hoping to overturn a ruling by a federal agency prohibiting state courts from citing CEQA in opposition to the high speed rail coming to California. The Surface Transportation Board ruled in December that the state couldn’t use CEQA because doing so could “deny or significantly delay an entity’s right to construct a line that the (Surface Transportation) Board has specifically authorized, thus impinging upon the board’s exclusive jurisdiction over rail transportation.” Kings County and Kern County, in association with several anti-HSR groups in the Central Valley and Bay Area, contend that the previous ruling “violates petitioners’ constitutional right to seek redress of grievances” and that it violates California’s sovereignty as guaranteed by the 10th Amendment.

Chargers, Raiders Propose Shared Stadium in Carson

The San Diego Chargers and Oakland Raiders recently [made a surprise proposal](#) to build a shared stadium in a city near Los Angeles. The teams announced that they will continue to pursue options for stadium deals in their current cities, but that they will jointly pursue the \$1.7 billion stadium in Carson as an alternative. Both the Chargers and the Raiders are on year-to-year leases with their current stadiums, and both teams have shown restlessness with city reluctance to fund new stadiums with taxpayer dollars. The teams stated that they plan to launch a petition drive immediately to put the stadium to a vote of city residents. ■

South Bay Growing Pains at Issue in El Camino BRT Debate

BY MARTHA BRIDEGAM

Look up the El Camino Real BRT project online, and the first impression is one of cheerful support. But that's from transportation advocates such as the TransForm organization, which has given it extensive promotion, and materials posted by the lead sponsoring agency, the Santa Clara Valley Transit Authority (VTA), which would build the route from Palo Alto to South San Jose along an old arterial south of I-280. Those talk at length about making the South Bay's famously abrasive six-lane commercial artery safer for pedestrians and bikes, better for public health, and more efficient as a travel conduit for a denser, less car-dependent population.

It could seem startling from a distance that in December VTA saw a need to post a [rebuttal answering "Ten Myths"](#) about El Camino bus rapid transit (BRT). Closer in, it's evident that the project has become a symbolic focus of worries about the South Bay's uneasy transition from quasi-suburban to fully urban.

From just north of San José up to Palo Alto, the old Spanish "royal road" takes the modern form of Highway 82, a broad commuter artery and commercial strip. To create BRT transit at the maximum level of efficacy, the project would have to [punch a clear path](#) each way through the six very popular existing lanes, reserving two BRT-only "dedicated lanes" on the main street of an area with high growth in housing and office uses. In keeping with the larger-scale [Grand Boulevard Initiative](#), related streetscaping would seek to protect bicyclists and pedestrians.

BRT vehicles in dedicated lanes would function almost like trains, moving at their own pace among widely spaced stops without usually having to wait for other traffic. A VTA [promotional video](#) describes the future BRT vehicle as a 60-foot, WiFi-equipped "giant Prius". The plan would speed BRT vehicles along the narrower San José part of the route by means of bulbouts at stops and signal priority at traffic lights. (*CityLab* [posted a further analysis in November](#) with the help of TransForm's Chris Lepe.)

Seven alternatives are under review, ranging from a "no build" choice, to varying combinations of "mixed flow" with dedicated lanes of various lengths along the route. The

maximum dedicated lane alternative, known as 4c, would run dedicated lanes for 13.9 of the 17.6 miles. Per the DEIR/EIS [executive summary](#), the 4c choice would have the highest price in capital costs, some \$232 million, but would have lower operating costs than other alternatives. (See Page ES-3 of the summary for comparative maps of the alternatives.)

According to [VTA projections](#) the 4c maximum dedicated-lane alternative, compared with the no-project alternative, would reduce BRT travel time along the route from 87 to 48 minutes while lengthening car travel time along the same route from 41 to 44 minutes, and local bus travel time from 102 to 109 minutes.

That may sound attractive if enough people use transit. And transit use has almost nowhere to go but up in Santa Clara County: VTA staff said only 3% to 4% of the county's population uses transit.

But critics worry that even if denser transit is needed, dedicated BRT lanes may not serve the area's present needs, given that many people do still travel in private cars. Cars that, if they can't find space on El Camino, will filter into the adjoining residential streets; that need to be parked; that carry people farther off the central commercial strip into suburban-style neighborhoods not easily served by transit.

Organizing Web sites are less visible for opponents of dedicated lanes. But online comments sections and letters to the editor fill up with arguments over the project's merits; news reports and supporters of the project say the opposition is solid and successful. Opponents have organized more privately, largely at the level of local city governments, six of which have jurisdiction along the route. (VTA in early January became the first public transit agency to join the Nextdoor neighborhood social network, which in some parts of the U.S. has provided hubs for neighborhood organizing.)

Comments are due January 14, 2015 on the draft Environmental Impact Review/Environmental Impact Statement (DEIR/EIS) for [the proposal](#), which was released in November 2014 after a four-year process including 2012 conceptual review by city councils. And then around March

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>>> South Bay Growing Pains at Issue in El Camino BRT Debate

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the VTA board will select a preference among the seven project alternatives currently under review.

It wasn't clear if the six cities would state formal choices among the seven proposed project alternatives, and in any case the choice of project alternative will be up to the VTA board. Among the jurisdictions, San José hasn't debated the plan much because its part of the route is too narrow for dedicated lanes anyway. The city of Santa Clara, which would receive dedicated lanes under several project alternatives, appears to favor the plan. More opposition has been expressed in the more suburban cities of Sunnyvale, Mountain View, Los Altos and Palo Alto.

Both Mountain View and Palo Alto were expected to send letters of concern about the project to VTA. The local *Mountain View Voice* [reported](#) public commenters at the December 16 Mountain View City Council meeting supported the dedicated-lane approach but the Council voted 4-0 to send a letter expressing concern on issues including diversion of traffic to side streets and the possible cutting of trees in the median. A fierce, sophisticated, impolite readers' debate raged through the rest of December in that article's comments section. A [draft of the Palo Alto letter](#) has been posted ahead of a scheduled January 12 Council meeting on the matter.

VTA's proposal is in cooperation with the Federal Transit Administration (FTA), with plans to seek federal [MAP-21](#) funds after the VTA board selects a preferred alternative this spring. Caltrans approval is required as well.

TransForm's Chris Lepe wrote that "some local businesses" including auto dealerships "have coalesced with residential NIMBYs" and are "trying to effectively kill the project." That wouldn't necessarily mean opposing all the alternatives -- just the more substantial ones. He wrote: "The problem is that if all the cities go with mixed flow, the project will not generate much ridership and time savings benefits, which in turn will likely attract little or no federal funding. As a result of the limited benefits and significant costs, VTA may decide not to move forward with a mixed flow project. ... If nobody jumps on board, if nobody supports dedicated lanes within the cities, then that means the project is most likely not going to go forward."

"Mixed flow" results aren't much to write home about. VTA's ["Ten Myths" document](#) said the existing 522 bus along the El Camino Real route would run at 12.2 mph under the "no build" alternative" and a BRT vehicle would run at 13 mph under a "Mixed Flow" alternative," but under a "Dedicated Lane" alternative it would run at 22 mph.

Asked if it would be worth the trouble to increase bus speeds from 12.2 to 13 miles per hour, BRT Project Manager Steve Fisher labeled his comments as made from a staff perspective but said, "I think you're picking up on key data points... I agree with your statement."

And Bernice Alaniz, VTA's marketing and public affairs director, noted as Lepe did that the project would have to compete with other projects for federal funding so it would need to show strong ridership and economic impact figures.

A [portion of the CEQA analysis](#) (p. 25) shows projected weekday transit ridership on the corridor increasing from the present weekday ridership of 12,512, to 14,588 under the "no build" alternative, increasing across the other alternatives to 18,616 riders daily under the maximum Alternative 4c.

Opponents, like supporters, tend to focus on discussion of the maximum dedicated-lane alternatives.

Mark Balestra, owner of the Pearson Buick-Pontiac-GMC dealership in Sunnyvale, commented at a [November 11 Sunnyvale public study session](#) (at 54:28) on behalf of the El Camino Coalition, which he described as "a group of concerned Sunnyvale citizens and small business owners." He said, "We're not opposed to BRT. Our concern is that despite the multiple options supposedly under consideration here... it's clear that the only option that VTA senior management is interested in is the dedicated lane plan and the cost of this plan is far too great."

Balestra argued the project would cause more congestion and expense than it was worth to provide "only a few minutes" of faster passenger travel across Sunnyvale. He said it didn't include north-south transit options (i.e. crossing El Camino at right angles) and suggested it wouldn't serve "the overwhelming majority of sidehill residents that don't live within walking distance of the four stations."

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>>> South Bay Growing Pains at Issue in El Camino BRT Debate

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(Balestra responded to a query by writing, “the coalition of residents and business owners opposed only to the BRT ‘Dedicated Lane’ plan is far broader than the auto dealers and the concerns are far beyond the turn lanes.” He offered to elaborate but had not done so as of press time. VTA has not yet posted texts of public comments.)

About the auto dealers, Fisher said they hadn’t participated much directly in meetings with VTA but “they are working their own city councils very hard.”

William Cranston, an individual Mountain View neighbor who spoke at a recent meeting of his City Council, wrote afterward, “I have seen no passionate support for any option,” but that people in Mountain View only expressed “enthusiastic opposition” toward the two options that would place dedicated lanes in their town: Option 4b, with dedicated lanes from Santa Clara through Mountain View, and 4c, with dedicated lanes from Santa Clara all the way into Palo Alto.

Cranston focused on the difference for his area between 4b and the less drastic Option 4a, which would include dedicated lanes only across Santa Clara and Sunnyvale. He noted that the 4b addition of dedicated lanes across Mountain View would add 852 more daily riders (see p. 25 of the CEQA analysis.) He focused on a 2018 projection in the CEQA analysis (p. 29) showing daily traffic volumes east of Bush Street in Mountain View would be 53,865 under Alternative 4a but 48,561 under 4b. He wrote: “Where do the drivers go? They are not saying that the 5300 trips stop, they go somewhere else ... like the smaller small neighborhood streets with kids and cyclists. The neighborhood I live in already has a problem with cut through drivers. (They [roll] through stop signs, whip around corners and go well over the 15 mph speed limit.) It doesn’t take many cars on small side streets to make it a problem...”

“Does it make sense to negatively impact more than 53K driving trips to get 850 riding trips? Do we want to push traffic onto small neighborhood streets where kids are walking/riding to school and playing? Do we want more cars on side routes that we are advocating for cyclists? The city council was asking the same kind of questions.”

To concerns of this generic type, Fisher responded that projections showed cars displaced off of El Camino by BRT dedicated lanes would spread out evenly among parallel residential streets without overloading them. And he said “if the cities are with us” on the dedicated lane alternative, then VTA would be happy to work with them on traffic calming projects for neighboring streets.

There is also, of course, the prospect that some drivers would forsake their cars to ride the BRT system.

The [Traffic Operations Analysis Report](#) in the DEIR/EIS, at p. 75ff, predicts that delays from the dedicated-lane BRT alternatives as of 2040 would mainly not be extreme. The maximum Alternative 4c is shown sometimes raising the LOS rating by one letter grade, but producing modest increases in delays except at intersections that are already rated “F”.

Other concerns include whether different transit priorities would suffer, especially north-south transit routes where El Camino runs east-west across Sunnyvale. (Transit advocates have said the best economic benefits would follow from building both).

To the suggestion that VTA should just spend the BRT money on more ordinary buses, VTA media spokesperson Brandi Childress said, “Adding more buses doesn’t make them go faster.”

Another recurring concern is how drivers may respond to losing midblock gaps in medians that currently allow left turns. Fisher said a dedicated lane would require every spot allowing a left turn to be a signalized intersection, but VTA was willing to work with the cities on adding new signals at left-turn areas now without them -- and Caltrans might want to “control” such areas anyway as traffic increases on El Camino.

And then, hovering, there’s the usual trickily double question about who rides transit: is the bus a disadvantage-driven last resort or a voluntary choice? And does promoting a transit system depend on identifying it with prosperous commuters -- or does a system still deserve public resources if it does seem likely to serve and attract a less prosperous public?

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Childress presented the future BRT riders as those who “choose not to drive,” such as “students who are looking to not own cars”.

Fisher said amid the growth on El Camino, “Who you see moving into those new developments” would be typically “younger people” working in tech. “Those folks are looking for a good transit alternative. Their natural inclination is to look to transit.” He mentioned the famous long-distance “Google buses” as an example. “We know that market is there for us if we can provide them with a good transit alternative.”

Childress wrote: “The future generation of riders (Millennials) don’t want the hassles and expense of owning a car. They want good quality, efficient transit service they can depend on to take them where they need to go.” She wrote, “We are looking to capture future riders of this mindset,” rather than try to change those who “prefer their car no matter the circumstance.”

But at the November 11 Sunnyvale event, businessman

Brad Clausen, whose enterprises include a motorcycle dealership, said his 25 employees had told him none of them would use a BRT system to get to work. He asked if VTA had surveyed who rides the bus and why, suggesting: “My guess is the majority of those people don’t have driver’s licenses or have no other means of transportation.” He said he doubted BRT would “impact” the [other] people using El Camino and suggested it would hurt businesses, congest side streets, and worsen offstreet parking in front of people’s houses. “It’s gonna be a mess.”

Meanwhile Lepe said participants in public meetings on the BRT proposal had included disproportionately fewer people who were young, low-income, recent immigrants or people of color compared with the actual demographics of the cities involved. (He found it significant that Sunnyvale is the second-largest city in Santa Clara County.) He wrote that TransForm had begun a survey and other outreach projects to “engage a larger slice of the population.” ■



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New Federal Rule on Wireless Likely to Frustrate California Cities

BY JOSH STEPHENS

Among all of California's non-native tree species, one in particular may experience a growth spurt in the coming years. It's not the fan palm or the eucalyptus but rather the cell-phone pine and its incongruous cousin, the cell-phone palm. A new rule, established in 2012 by the Federal Communications Commission and recently updated, might mean taller palms, bigger pines, and more prominent towers for cities that are caught flat-footed – even if they don't like the way the cell towers are disguised.

The FCC's new guidelines, adopted in December and [published January 8 in the Federal Register](#), clarify what was a significant grey area in Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, which effectively updated many of the rules in the 1996 Telecommunications Act.

The new guidelines establish a strict timeline for evaluating projects that fall under Section 6409 protection. Section 6409 gives localities the right to challenge the modification of cell phone transmission towers if the locality finds that the modifications—such as the addition of a new antenna—would “substantially change the physical dimensions of such tower or base station.”

If a requested modification is not “substantial,” the locality “may not deny, and shall approve” the request, according to Section 6409. The law thus dictates that approval is the default action, and the locality has the burden of proving that a modification is ineligible.

“We're only allowed to deny something if it's a substantial change to the existing structure,” said Christy Marie Lopez, an attorney with Aleshire & Wynder and immediate past president of the States of California and Nevada Chapter of Telecom Officers and Associates.

After two years of debate, in and out of court, over the meaning of “substantially,” the new guidelines define it as a modification that is 10% larger than the facility's existing envelope or 20 feet taller than the existing facility's height. While the federal government may dismiss the impact of smaller modifications, many cities with strict codes for aesthetics and visual blight might disagree.

“I think that the new FCC order strips away more local authority over, most importantly, aesthetics,” said Lopez. “That (guideline) doesn't give a city a lot of wiggle room to require carriers to bring their outdated, un-stealth towers into conformance with the city's rules on aesthetics....And now the community is affected by what could be called visual blight.”

Lopez explained that a city might lose the power to, for instance, compel a carrier to camouflage a tower modification as a pine tree or palm tree, as many towers are.

Modifications that do not meet these significance thresholds may still be challenged by localities. But, the new guidelines place a strict timeline on these challenges. It is this new “shot clock” that has many planners and city attorneys worried.

The new guidelines give localities 30 days to determine whether a project proposal is “incomplete” and, therefore, subject to a challenge. Previous iterations of Section 6409 gave localities 60 days, with more opportunities to stop the clock. The new 30-day period essentially requires that cities line up all of their analysis at once, not only regarding zoning, but also regarding safety and engineering. City officials, such as planners and building and safety inspectors, may need to review applications simultaneously rather than in sequence.

“The procedures...require a level of coordination that is unusual for these types of projects,” said attorney Robert “Tripp” May, vice president of Telecom Law Firm, P.C.

Because Section 6409 defaults to approval, a city's failure to adhere to the 30-day timeline means that an application will be automatically approved. In some cases, applications that would have heavy impacts on cities are the ones most likely to overwhelm their ability to process them.

“One thing that the shot clock doesn't equip cities well for is when a carrier comes in with a batch of applications,” said Javan Rad, assistant city attorney for the City of Pasadena.

The rule may also prey on cities that do not have sufficient staff or are bogged down with other planning matters.

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“What it just depends on is the size of the city, the sophistication of the city staff itself, the need for wireless services in that city, the topography of the city,” said Rad. Rad suggested that, while he does not expect many applications in a built-out city like Pasadena, certain desert cities are likely to see substantial numbers of applications.

“That’s one of the reasons why it’s caused some anxiety among engineers and planners who are going to be the ones in charge of being able to process these and the amount of time that they need,” said Lopez.

“If everybody is playing fair, the applicants have done a good job of explaining how their application fits into 6409 and they will allow the city to make a decision,” said Rad.

According to May, the new rules are largely a matter of expediency, which neither respects nor disrespects localities’ aesthetic concerns. “They’re a federal agency that is tasked with rolling out wireless broadband at the highest rate possible,” said May.

That is precisely what has not happened in the past, according to the guidelines’ proponents. Others say that that is exactly what the guidelines are supposed to do – and that cities should embrace them.

“We’ve often been stymied at the local level with local planning authorities,” said Michael Shonafelt, partner Newmeyer & Dillon LLP, which represents carriers and telecom industry groups. “That allows carriers to deploy those technologies in a way that the Telecom Act originally envisioned.”

The rule may also be designed to thwart what some in the telecommunications industry consider to be frivolous objections to cell phone towers. Shonafelt dismissed many aesthetic concerns as a “tempest in a teapot.” He said, in fact, that many objections raised on aesthetic grounds are often proxies for stakeholders’ concerns about health. Some believe that microwaves from cell towers can have ill effects on health, but federal law forbids governments from taking these claims into account.

A single antenna may not ruin a neighborhood, even if it does slip through bureaucratic cracks. But many critics of the new guidelines and Section 6409 are concerned about larger issues.

Many are decrying the guidelines as the latest chapter in a long-running debate over the role the federal government may play in land-use matters that are typically considered the sole domain of localities. Some consider it an attempt by the wireless industry to pre-empt local zoning codes that the industry considers inconvenient or hostile to its business.

“The FCC stepping into what was traditionally local control is certainly a concern,” said Rad. May went so far as to say that some attorneys think that the FCC’s approach to local land use may be “unconstitutional, because it basically mandates that local officials...implement federal program.”

Shonafelt said that local officials need to look at the bigger picture. He contends that the FCC has identified a national interest that compels localities to accept the constraints of the Telecom Act and Section 6409 because wireless communications transcend local boundaries.

“We’re falling behind as a nation,” said Shonafelt, in reference to the nation’s telecom infrastructure and, in particular, its deployment of 4G wireless broadband. “Because there’s a national interest that overrides the local interest sometimes, some of those powers will be curtailed a little bit.”

He also encouraged cities to put the new guidelines in perspective.

“These facilities are pretty small-scale,” said Shonafelt. “It’s not like the entitlement of a multiunit apartment complex where you need lots of time to study the environmental impacts and other things.”

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legal digest

California's Supreme Court About to Consider One Strand of the Newhall Ranch Tangle

BY MARTHA BRIDEGAM

The Newhall Ranch environmental review litigation, itself a mighty matter of land use legend, has an important strand of its multiply braided conflicts awaiting an oral argument date before the state Supreme Court.

The parties' briefing is complete. The court has accepted a deep layer of amicus briefs from state-level land use players. And with the confirmation of Justice Leandra Kruger, the court has finally returned to full membership. It's still not clear, though, when an argument date will be set. The court recently extended a deadline for parties to file answers to amicus briefs until March 16, 2015.

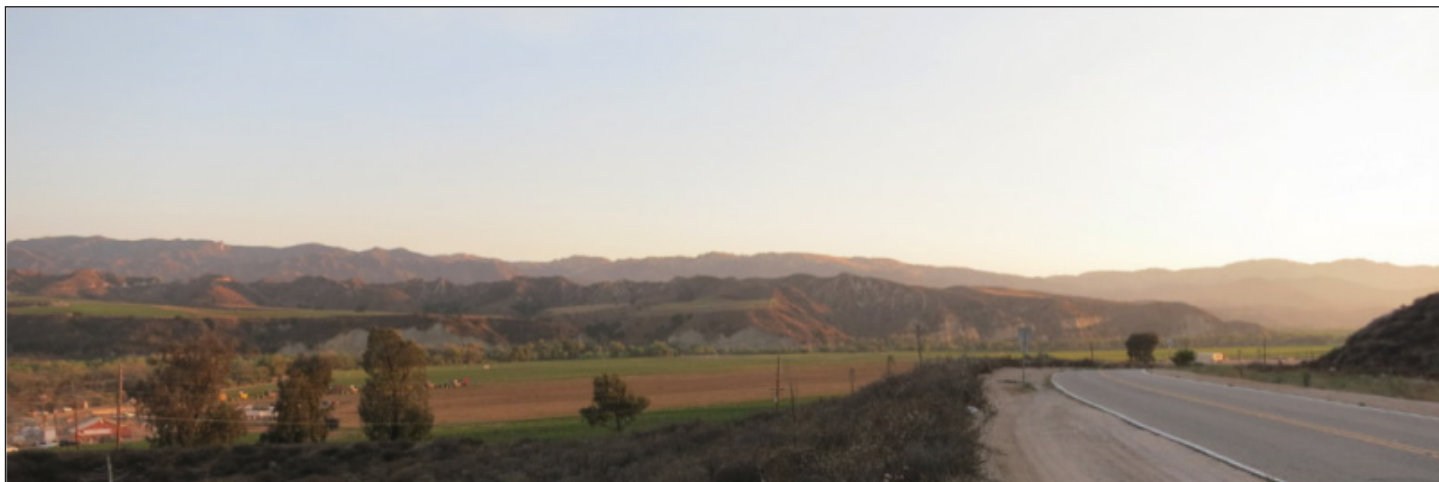
Disputes over the proposed Newhall Ranch planned development

have been a [mainstay topic](#) in Southern California land use politics [for two decades](#). If completed as envisioned, the project would create a city of nearly 60,000 people in northwestern Los Angeles County. The site is at the edge of Los Angeles' current urban footprint, along the Santa Clara River north of the Six Flags amusement park, southwest of the junction between Interstate 5 and Highway 126. Debates about the Newhall Ranch site affect the Santa Clara River system, described by its advocates as "one of the last free flowing natural riparian systems left in southern California." They also provide occasions for public conversation in Los Angeles about the limits of suburban expansion.

The case before the state Supreme Court, [Center for Biological Diversity v. California Department of Fish and Game](#), No. S217763, is one of the four currently litigated Newhall Ranch cases. In accepting the case, the high court granted review only on three questions out of a larger dispute.

The first question asks if environmental mitigations that involve catching and moving fish are acceptable for one of California's very few "fully protected" species, the Unarmored Threespine Stickleback.

The second asks if it was proper for a state-level lead agency to treat public comments as late because they came in after the draft environmental review (DEIR) stage -- where the



The eastward end of the Newhall Ranch project site along the Santa Clara River, looking west.

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only subsequent comment period was offered by a federal agency, in the concurrent process for its related final environmental impact statement (EIS).

The third question asks whether the California Department of Fish and Wildlife (CDFW, formerly the Department of Fish and Game) properly accepted Newhall's choice of a baseline to measure its promised greenhouse gas (GHG) emissions reductions under AB 32. In an approach derived from existing Air Resources Board practices, Newhall set as its baseline an unbuilt "business as usual" version of the project, and measured GHG "reductions" by comparing that to the actual plan. Environmental advocates argue this was unfairly manipulating expectations by setting the opening bar too high.

The Newhall Ranch project began its first review processes in 1994, starting environmental review in 1996. The county approved a programmatic EIR in 2003 for a specific plan covering the whole huge project of almost 12,000 acres. That version proposed up to 21,308 dwelling units to house up to 57,903 people in five "villages" with mixed-use development, business parks, designated parks and open space, several schools and a golf course. More recent designs call for 19,812 residential units on a developed area of 2,587 acres of which 2,221 would be residential.

The 2003 specific plan's programmatic EIR was long ago settled as approved, but it looked

toward future state and federal environmental reviews and to project EIRs for individual phases of the big plan. Those have provided grist for dispute ever since.

The Newhall Ranch issues now before the State Supreme Court concern state-level permits and environmental planning approvals issued in a joint state-federal review process. The state's lead agency was CDFW, working under the California Environmental Quality Act (CEQA). The lead federal agency was the U.S. Army Corps of Engineers, working under the National Environmental Protection Act (NEPA) to prepare an EIS and issue federal permits and approvals.

CDFW in 2010 approved an EIR and EIS, a project-wide resource management plan, a large-scale conservation plan for preserving the endangered San Fernando Valley Spineflower, a plan to mitigate the intended alteration of streambeds, and two incidental take permits for damage to endangered species that the approved actions might cause. Environmental and community groups, including advocates for Native American cultural sites, challenged the approvals.

The [initial Superior Court opinion](#) on the matter, by Superior Court Judge Ann I. Jones, underlies the current California Supreme Court appeal. Her unhurried 38-page opinion discussed the environmental value and political/procedural history of the Newhall Ranch, arriving at a ruling in petitioners' favor. Jones' impartiality was later [questioned](#)

by the Newhall Ranch in a [formal challenge](#) in late 2012, in part because of her participation in a land-use dispute in her own neighborhood. The motion to disqualify Judge Jones was [rejected](#) in a January 2013 ruling by Judge Glenda Sanders of Orange County, but Jones remains assigned to other matters, making it unlikely she will hear more Newhall Ranch cases.

The appellate decision, which sided with Newhall Ranch, was by Justice Paul Turner with concurrence by Justices Richard Mosk and Sandy Kriegler, all of the Second District's Fifth Division. [Turner's 113-page opinion](#) included an extended, highly technical discussion of appropriate GHG reductions under AB 32. That analysis, Section IV.G., was much discussed on environmental law firms' blogs, including [Stoel Rives'](#), but the appellate court [insisted](#) on excluding it from publication. It is not before the California Supreme Court.

Instead, the high court granted review on three relatively narrow issues:

First, the court will consider whether "take" of unarmored threespine stickleback is acceptable as part of a mitigation program to protect the endangered fish by moving them from one part of the river to another. Plaintiffs, represented by senior attorneys with the Center for Biological Diversity, a UCLA law school clinic and others, contend that stickleback may not be caught even for mitigation purposes because they belong to one of a few highly fragile populations covered by the

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The Santa Clara River, home to the unarmored three-spined stickleback, not far upstream from the Newhall Ranch site, during the recent drought. The river's water level and surrounding vegetation vary dramatically with rainfall conditions.

Fully Protected Species Laws, Cal. Fish & Game Code Sec. 5515. They argue that catching stickleback is in itself an impermissible “take”, and note that in practice some would die in being caught. To plaintiffs, Sec. 5515 supplements the California Endangered Species Act (CESA) by adding additional protections for “fully protected” species.

But CDFW contends that it properly chose to allow “incidental take” permits under CESA in connection

with relocating stickleback, in an exercise of both administrative discretion and “common sense” for which it claims judicial deference. Newhall Ranch, whose attorneys include Mark Dillon of Gatzke Dillon & Ballance LLP and Miriam Vogel of Morrison & Foerster, argues that the U.S. Fish and Wildlife Service, which would perform the relocation work, has independent federal authority to do so.

In one of the many filed amicus

briefs, attorneys with Cox, Castle & Nicholson including Michael Zischke, writing for building industry and real estate groups, argued that CDFW and the appellate court followed the settled interpretation of “take”, whereas adopting Petitioners’ approach would “paralyze” CDFW and stop all development on land harboring any of the 37 “fully protected species.”

Second, the court will consider whether comments responding to the

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final EIR were raised soon enough to meet CEQA's exhaustion of remedies standard. The comments concerned Chumash and Tataviam Native American cultural resources on the project site and expected runoff impacts on California Steelhead. Plaintiffs contend they raised these objections timely on the final EIR/EIS if not during the Draft EIR comment period. (A November 25 reply brief also contends the steelhead comments were raised sufficiently during the draft EIR period.)

Defendants contend that, although plaintiffs did comment on those issues, and received responses to their comments from Newhall Ranch, that happened in a comment process that was required and provided only under NEPA, for the final EIS, and not under CEQA for the final EIR. Defendants argue in the alternative that the appellate court rejected the cultural resource and steelhead claims on the merits, and that the state supreme court should do the same.

In an amicus brief, several California tribes argued against an over-strict reading of timeliness provisions. In addition to more technical arguments, the brief argued that if early comment cutoffs became widespread, that could worsen tribes' reluctance to participate in state rather than federal environmental processes.

An amicus brief by Susan Brandt-Hawley for the Planning and Conservation League argued in part that an agency's decision not to offer a comment period or hearing on a final EIR "cannot preclude meaningful public participation" nor justify excluding evidence offered

before EIR/EIS certification.

The Zischke brief included an argument that "CEQA does not direct agencies when they must hold hearings, and in fact CEQA does not require hearings at all."

Third, the court will consider if CDFW properly allowed Newhall Ranch to calculate its planned GHG reductions based on differences between the actual plan and a projected "business as usual" version of the project design. Plaintiffs argue that CDFW improperly allowed Newhall Ranch to game the GHG reduction requirements under AB 32, as implemented by [CEQA Guidelines Sec. 15064.4](#), by projecting the emissions from a hypothetical exaggerated, legally impermissible version of the project, treating that as its baseline, and counting as a GHG "reduction" the 31% difference between that and the actual plan's projected emissions. (The projected reduced emission would still be 269,000 metric tons of GHGs per year.)

CDFW made a compact argument that it acted within its discretion to select methodologies but mainly stepped back and let Newhall Ranch argue the GHG issue under a "division of labor". In addition to the discretion argument, Newhall argued that its analysis complied with Sec. 15064.4, and that, while disclosing current existing conditions on the site -- now largely farmland -- it acted on the realistic assumption that populations grow.

Newhall Ranch argued that the "business-as-usual" baseline

followed the Air Resources Board's approach to the AB 32 requirement of per capita GHG reductions from 1990 levels to 2020 levels. It said the ARB had set the example of "assuming emissions controls remain static between 1990 and 2020" as "an analytical construct."

The developer argued the project should get credit for its environmentally conscious features, including more than 10,000 acres of open space, plans to protect drainages and wetlands, energy efficiency, rooftop solar, provisions for public transit, walking and biking trails, and "close proximity of homes to jobs and services".

A Sierra Club amicus brief focused on the GHG issue, arguing that the "business as usual" baseline was "predicated on an alternate reality" in which GHG emissions had not been further regulated since 2005. The Sierra Club amicus presumed that Executive Order S-3-05 created a substantive emissions reduction target -- a position placed in doubt by the ruling in *Cleveland National Forest Foundation v. San Diego Association of Governments*, discussed at <http://www.cp-dr.com/node/3632>.

An amicus brief by attorneys with the Nossaman and Best, Best & Krieger firms, among others, amplified several CDFW and Newhall arguments on the GHG review baseline, then closed by arguing that a ruling for plaintiffs would be disruptive. It sided with Justice Patricia Benke's dissent in the San Diego matter, arguing as Benke had that too much executive power should not interfere with agency discretion. ■

Parallel Cases on Newhall Ranch: Cal Supremes Won't Decide Them All

BY MARTHA BRIDEGAM

In addition to the [state Supreme Court dispute](#) on the California Department of Fish and Wildlife's action, three other Newhall Ranch cases continue in litigation, all brought by plaintiffs and attorneys overlapping with the group before the high court. (See <http://www.cp-dr.com/node/3461> for more links on these cases.)

Advocates filed suit in 2011 [challenging](#) Los Angeles County's approval of the project-level EIR for the Landmark Village phase of the project. The writ petition in that matter, No. BS136549, was thrown out by Los Angeles Superior Court Judge John A. Torribio in February 2014 and was appealed in May 2014. In the Second District Court of Appeal the matter was assigned to the Fifth Division. Now captioned as *Friends of the Santa Clara River v. County of Los Angeles*, Case No. B256125, it was argued and submitted January 6, 2015.

The Mission Village phase received county approval for its January project-level EIR approval in 2012. It was [challenged](#) as of [June 2012](#). After two years' litigation in Los Angeles County Superior Court, the writ petition, No. BS138001, was denied in June 2014. The petitioners appealed in August 2014. Their attempt to be reassigned to a Second District division other than the Fifth was rejected in October. The case continues as *CA Native Plant Society v. County of Los Angeles*, No. B258090.

A similar group of advocates

filed a federal complaint March 6 in the U.S. Central District of California, challenging the federal side of the parallel state and federal review processes on environmental resources. The suit was primarily against the Army Corps of Engineers but initially also against the federal Environmental Protection Agency (EPA), objecting to the EIS certification and the Section 404 permit issued under the Clean Water Act, and alleging noncompliance with other environmental laws and the National Historic Preservation Act. The Newhall Land and Farming Company joined the case as intervenor. It is *Center for Biological Diversity v. U.S. Army Corps of Engineers*, Case No. 2:14-cv-01667-PSG-CW, initially assigned to Judge Audrey B. Collins but more recently to Judge Philip S. Gutierrez and Magistrate Judge Carla Woehrl.

Plaintiffs in the federal case responded to defendants' opening dismissal motions with an amended complaint last summer. On September 26 the court narrowed the scope of the case, dismissing the EPA and some individual officials as defendants, but allowed claims against the Corps to go forward. Preliminary steps were taken toward summary judgment motions over the winter. As of early January 2015, plaintiffs had amended their complaint a second time per agreement among the parties. The court meanwhile required that a mediation attempt be made by the end of April.

More information on the Newhall Ranch controversy is readily available

online, though sometimes difficult to parse because information and arguments have traveled in so many braided channels for so long.

CDFW has its own [environmental review page](#) for the project with an exceptionally clear site map. The developer, Newhall Land and Farming Co., has posted [a promotional site](#) showing what homebuyers and others could gain from the project. The Los Angeles County Department of Regional Planning, saddled with Newhall review processes for a generation, has relevant Web pages including [the specific plan](#), the initial [Landmark Village](#) phase, the second-calendared [Mission Village](#) phase, and the overarching [Santa Clarita Valley Area Plan](#).

The environmental and community groups that have fought the project for a generation each maintain their own Web sites, but many point to a presentation, "[Wildlands of the Santa Clara River Watershed](#)" (11.3 MB), using maps and photos to show what the ecosystem could lose. Lynne Plambeck, who has fought the Newhall Ranch proposal since its start as head of the Santa Clarita Organization for Planning and the Environment (SCOPE) said, "It's too late for the LA River. They can't take the houses out. We have the opportunity to not put the houses in."

Editor's Note: The CP&DR e-mail blast of Feb. 3, 2015 contained a misstatement; only one of the four pending Newhall Ranch court cases is before the California Supreme Court. ■

Homeless Case May Move Forward on Equal Protection Grounds

BY WILLIAM FULTON

A lawsuit challenging the constitutionality of the City of Sacramento's ban on camping in public parks – and allowing only limited camping on private property -- may move forward because the plaintiffs have stated a valid equal protection argument, the Third District Court of Appeal has ruled.

In response to concerns about the homeless, Sacramento adopted an ordinance banning camping on public property and in public parks and permitting camping on private property for only one consecutive night. In 2009, the city cracked down on a group of homeless people who were camping in a fenced lot on private property with the property owner's permission. Several times in September of 2009, the homeless people were arrested and their belongings were seized even though they were camping on private property.

The homeless residents and two social service providers sued, claiming among other things that the anti-camping ordinance was unconstitutional on its face based on a variety of grounds, including a violation of the constitutional protections of due process, equal protection, and freedom to travel.

A number of other causes of action were also brought – for example, that the criminalizes the status of homelessness in a way which is prohibited under *Robinson v. California* (1962) 370 U.S. 660.

Sacramento Superior Court Judge Shelleyanne W.L. Change ruled in favor of the city, granting a demurrer with leave to amend. Rather than filing an amended complaint, however, the plaintiffs appealed to the Third District Court of Appeal.

The Third District upheld Justice Change on virtually all causes of action. However, the court did rule that the plaintiffs had set forth a potentially valid claim that the anti-camping ordinance, as applied to the plaintiffs, violates the equal protection clause of the U.S. Constitution, meaning the case can go forward in Superior Court.

“The first amended complaint alleges the City selectively enforces the camping ordinance against homeless persons and those non-homeless persons who support the right of the homeless to be in the City,” wrote Justice Louis Mauro for a unanimous three-judge panel. “We must read those factual allegations liberally and assume their truth on a demurrer.”

Mauro went on to make it clear that the Third District was not – and did not need to – rule on the constitutionality of the anti-camping ordinance. “Here, we conclude the allegations are sufficient to state a cause of action for declaratory relief asserting an as-applied challenge based on equal protection,” he wrote.

The Third District ruled that the plaintiffs did not make a sufficient as-applied constitutional challenge based on several other grounds, including:

1. Cruel and unusual punishment under the 8th Amendment.
2. Right to travel
3. Arbitrary and discriminatory enforcement of laws
4. Substantive due process
5. Protections against vague laws.

The Case: *Allen v. City of Sacramento*, No. C071710 <http://www.courts.ca.gov/opinions/documents/C071710.PDF>

The Lawyers:

For Homeless Plaintiffs: Mark Merin, mark@markmerin.com

For City of Sacramento: Chance L. Trimm, Senior Deputy City Attorney, CTrimm@cityofsacramento.org ■

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CALIFORNIA PLANNING

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edition

William Fulton
Paul Shigley

>>> Cases That Could Broaden Railroads' Path Through CEQA Gather Steam

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case is already before the Ninth Circuit as No. 15-70386. (Dignity Health, a participant in ongoing HSR disputes, appealed the same STB ruling to the District of Columbia Circuit as Case No. 15-1030.)

Ironically, the cases pit a broad alliance of CEQA petitioners against not only the STB, but two state rail authorities that have argued for federal limits to their own power. The *Eel River* petitioners are environmental groups while the Ninth Circuit petitioners are a mix of municipal, farm, community, environmental and transit-specific groups involved in litigation against the HSR system, and significantly including CEQA attorney Stuart Flashman.

Although the emphasis is on review of public rail projects, projects that are fully private could be affected indirectly as well. Rulings in *Eel River* or *Kings County* could clarify, and might broaden, the scope of the existing recognized rule that ICCTA preempts state and local environmental regulation for private rail operations.

Partner Donald Sobelman of Barg Coffin Lewis & Trapp LLP suggested projects that could be affected include crude-by-rail operations, and freight rail operations in connection with intermodal facilities and capacity expansions. (Sobelman co-wrote a [commentary](#) last November with associate Nicole Martin suggesting that *Eel River* could help freight rail projects; as of the interview for this article he was not assisting any clients with amicus briefing on the matter.)

Eel River and Atherton

In taking up *Eel River*, the California Supreme Court justices announced they would address a split between state appellate districts on whether the “market participant” doctrine shields a CEQA process from preemption where a state agency is itself a participant in a rail project. Additionally they planned to consider whether the ICCTA preempted “a state agency’s voluntary commitments to comply with CEQA as a condition” for using state funds or property.

In the *Eel River* [appellate decision](#), the state First District court of Appeal upheld a Marin County Superior Court ruling that the ICCTA preempted CEQA review of a project by the state-created North Coast Railroad Authority (NCRA). The

NCRA planned to reopen the Northwest Pacific Railroad line from Napa County to Arcata. The court found CEQA review was preempted although NCRA’s agreement with its private contractor, the Northwestern Pacific Railroad Company, required that NCRA comply with CEQA.

The Third District in *Town of Atherton v. California High-Speed Rail Authority*, on appeal from [litigation](#) in Sacramento County Superior Court, [upheld the HSR planning process](#) but also ruled that the Authority’s public status invoked the “market participant” exemption, making it unnecessary to consider whether CEQA review was preempted. The “market participant” doctrine distinguishes the role of the state when it conducts CEQA reviews not to regulate private activity, but to guide its own participation in the transportation “market”.

The HSR Authority, though substantively the winning party, asked the state Supreme Court to depublish the case last fall. [The high court refused](#), allowing the “market participant” exemption ruling to stand. (See *CP&DR*’s December 2014 PDF issue, Page 17.)

The facts in *Eel River* sharpen what’s at stake, according to the directors of two law school clinical programs working with petitioners. Prof. Helen Kang, director of the Environmental Law and Justice Clinic at Golden Gate University, wrote that the project itself, a “300-mile rail line,” was “monumental” in itself. She wrote that the project “will likely disturb toxic chemicals along the rail line and rail facilities where chemicals are stored; and since the line traverses some of the most ecologically sensitive areas of California, including the Eel River, a wild and scenic river, environmental review is particularly important.”

Prof. Deborah Sivas, director of Stanford’s environmental law clinic, noted the case had a complex history in which early disputes concerned the adequacy of the EIR, not whether to prepare one at all. A disputed EIR was prepared on one segment of the proposed rail line project. But as of the CEQA preemption ruling, no EIR had begun on a long remaining segment that includes the sensitive Eel River Canyon. If the state Supreme Court finds CEQA is preempted, no such review will be conducted. Since there is no federal role in the project beyond STB permitting, review

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>>> Cases That Could Broaden Railroads' Path Through CEQA Gather Steam

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is not required under the National Environmental Policy Act (NEPA). So neither state nor federal environmental review would happen.

STB declaratory relief

The Ninth Circuit case will test the STB's [December 2014 holding](#) that CEQA review was "categorically preempted" by the ICCTA on California's entire high-speed rail line. If allowed to stand, that ruling could wipe out the seven HSR lawsuits at a stroke, and would broaden the federal road that ICCTA cuts through CEQA review of public or private rail projects alike.

The STB majority, outgoing chair Daniel R. Elliott III and Deb Miller (now acting chair), reviewed federal preemption case law and the current California disputes in detail; they noted the California Supreme Court had granted review in *Eel River* just two days earlier. The majority acknowledged the HSR Authority wasn't asking for full CEQA preemption, only an order to prevent injunctions so work could continue during CEQA litigation. But the decision kept things simple anyway: "As a practical matter, we find it difficult to separate the prohibitive injunctive remedy available under CEQA from a California state court's ability to enforce compliance with CEQA itself."

The dissenting member, vice chair Ann Begeman, protested, "In other words, there is now no means of enforcing CEQA with respect to the Project. Authority claims of CEQA compliance will be merely claims, and deviations from any of the CEQA provisions included in the Board's own-approved EIR/EISs will not be challengeable."

Sobelman noted that the Ninth Circuit should trump the state Supreme Court in interpreting federal law, but it's not clear what scope the Ninth Circuit will choose for its decision.

The question is, how simple is the question?

If CEQA simply doesn't apply to rail projects, there's little more to say. Likewise the analysis is simple if state or local action becomes preempted as soon as it stops or delays a rail project that the STB regulates.

That kind of simplicity might come as a relief for planners

wearied by problematization -- but for petitioners a lot rides on persuading the California Supreme Court and Ninth Circuit that detailed case-by-case preemption analysis is appropriate.

Kang wrote, "Hopefully, it's an opportunity for the Ninth Circuit to right where it went wrong with the *City of Auburn* decision that came out shortly after the [ICCTA] was enacted." She meant *City of Auburn v. U.S. Government* (9th Cir. 1998) [154 F.3d 1025](#), which is the awkwardly placed eight-ball on the table from petitioners' point of view. Like *Eel River*, the *Auburn* case involved a planned rehabilitation of a lapsed rail line, through the Stampede Pass in Washington state. Unlike in *Eel River*, the project was private, without state agency participants. *Auburn* held state and local regulation of the project were broadly preempted.

The 1998 *Auburn* decision rejected an argument that "Congress only intended preemption of economic regulation of the railroads" as opposed to environmental review. But Sivas argued the court did not consider legislative history. She contended that, when Congress passed the ICCTA in its "deregulatory mood" of 1995, its focus was on standardizing economic regulation. She wrote that other courts have agreed that for preemption purposes "regulation" should be understood as "'managing' or governing rail transportation." And she said some courts have acknowledged local governmental authority in areas such as public safety issues at railroad crossings.

Sivas said "It can't be that everything that has some potential out there to affect some future operation of a rail line is preempted." The petitioners raise Tenth Amendment arguments along those lines as a separate matter from the "market participant" exemption; for example, the Ninth Circuit appeal argues the STB ruling infringes on a state's power "to oversee its own subordinate governmental entities."

Sivas argued that as a state agency the NCRA rail agency had a right to use CEQA as a "decision tool" in evaluating its own proposed choice to authorize a private contractor to run the railroad for the state agency and to support rehabilitation of the line with \$60 million in state funds.

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>>> Cases That Could Broaden Railroads' Path Through CEQA Gather Steam

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Rather than consider CEQA's effects of delaying and possibly blocking projects, petitioners emphasize CEQA's purpose of gathering information about the project rather than telling the operators how to run a railroad. The HSR petitioners' appeal to the Ninth Circuit argues that the STB order "ignores the fact that CEQA is not a regulatory statute, but an informational statute" meant to inform decision makers and the public.

Private rail projects too

As Sobelman and Martin's article suggested, the *Eel River/Atherton/King County* clutch of cases could have indirect effects on oil trains, transport of supplies such as "frac sand", and other elements of plans to move crude oil by rail from inland hydraulic-fracturing zones to processing sites nearer the coast.

Sobelman also saw implications for intermodal container transportation projects, which he noted often face CEQA challenges: "A clear and broad preemption ruling would remove this litigation risk and make it more efficient and less expensive to complete these projects." He saw similar effects for capacity-building projects such as building new lines, better access to ports, rerouting, or replacing bridges or outmoded crossings.

Stuart Flashman wrote, "It is pretty clear already that local/state regulation of private rail projects is preempted - at least in most cases." But he wrote, "It is less clear whether CEQA's application to a private rail shipment would be precluded, because I think a good argument can be made that CEQA, like NEPA, is basically an informational, rather

than a regulatory statute."

Sobelman noted two current lawsuits on crude-by-rail shipment projects in Richmond and Bakersfield, saying these were among the first of their type, and further crude-by-rail proposals would likely also face CEQA challenges.

The [Richmond terminal case](#) pitted environmental groups against the Bay Area Air Quality Management District and corporate entities of Kinder Morgan and Tesoro. The petition contested the air district's choice to approve increased crude-by-rail operations without an EIR but Superior Court Judge Peter J. Busch dismissed it on timeliness grounds. The petitioners' appeal is [before the First District](#).

The Bakersfield case, filed this fall, challenges an EIR by the Kern County Supervisors and Planning Department on plans for expanding crude-by-rail operations at the Alon Bakersfield Refinery. Environmental groups' [opening petition](#) specifically protests the EIR's choice not to review "mainline rail transportation impacts... on the assumption that CEQA is preempted by federal law regulating mainline rail activities."

Sivas had heard of informal arguments made to regulators even that an oil terminal at the end of a new rail spur was under STB jurisdiction, precluding other environmental review "or any kind of local control." In that case, she asked, where does STB jurisdiction stop? "That's the monster that eats the whole world, right? Because we're all at the end of some rail line." ■

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>>> Is It Time to Kill the Gas Tax?

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Local transit agencies and some local street and road repairs are funded by the sales tax on gasoline – not the same, obviously, as the gas tax. Most large counties have an additional sales tax on gasoline to pay for transportation and road repairs. But most of the state's big-ticket transportation projects are paid for out of the gas tax, and the buying power of that funding source has been in decline for decades.

Typical of California public finance, the whole gas tax story is so convoluted it's nearly impossible to understand, primarily because of the "fuel tax swap" back in 2010, which increase the gas tax in exchange for reducing the sales tax on gasoline. But for all practical purposes the gas tax has not increased since the year that today's college seniors were born – 1994. (Yes, the tax has increased but only as part of a deal that reduced other taxes to maintain the pool of transportation revenue even.) Since then, the state has added about 7 million new residents. Yes, gas tax revenues have gone up in recent years. But Hybrids and greater fuel efficiency has cut into the growth in gas tax revenues. The value of every sales tax dollar has dropped by 40% due to inflation. Taxable sales of gasoline dropped every year from 2005 to 2013, though it's since recovered.

It's no wonder, then, that the state and its local governments still struggle to pave streets and roads and fund the long list of transportation projects that comes to Sacramento for consideration every year. And it's no wonder that the gas tax looks to be on its last legs.

Though it's technically a tax in the purchase of gasoline, the gas tax has always functioned in effect as a user fee: The more you drive, the more you pay. And the gas tax

has always been the financial foundation for the California freeway system. It was the passage of what was then known as the Collier-Burns Act in 1947 – which increased the gas tax by 50% -- from 3 to 4.5 cents per gallon – that funded the freeway system and helped California avoid toll roads in the postwar era. (Gas cost 23 cents a gallon at the time.)

For most of the postwar era, the gas tax formula worked fine. But a wide range of factors – inflation, the rising environmental and labor costs of transportation projects, and better fuel mileage to name just a few – have conspired to undermine the gas tax as a stable funding source.

Policymakers in California have known about this problem

Most of the state's big-ticket transportation projects are paid for out of the gas tax, and the buying power of that funding source has been in decline for decades.

for a long time. I can remember back in the '90s running into Richard Katz – then the chair of the Assembly Transportation Committee – shaking his head. He'd just gotten pathbreaking California's electric vehicle law passed, only to realize that if it worked it would reduce the gas tax revenues he needed to move other parts of the transportation agenda.

In case you haven't noticed, the federal government has had the same problem. Rather

than raise the gas tax – or reduce transportation spending – Congress has been shoring up the federal transportation trust fund by borrowing billions of dollars every year from the federal general fund.

So California – like other states and the federal government – is faced with a bunch of tough choices. Here are some of the things the state might do:

1. Raise the gas tax – though this is both politically difficult and, for the reasons described above, an imperfect approach. (Among other things, the fuel tax swap has resulted in California having one of the highest gas taxes in the country.)

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2. Switch to a mileage tax – something that may have legs in California, since the main criticism seems to be that the government will know your driving habits, which is a Republican criticism rather than a Democratic one.
3. Create some additional fee on drivers, as Speaker Atkins has proposed – though there might be some pushback against this as being an additional tax.
4. Or, of course, live with the money we get now.

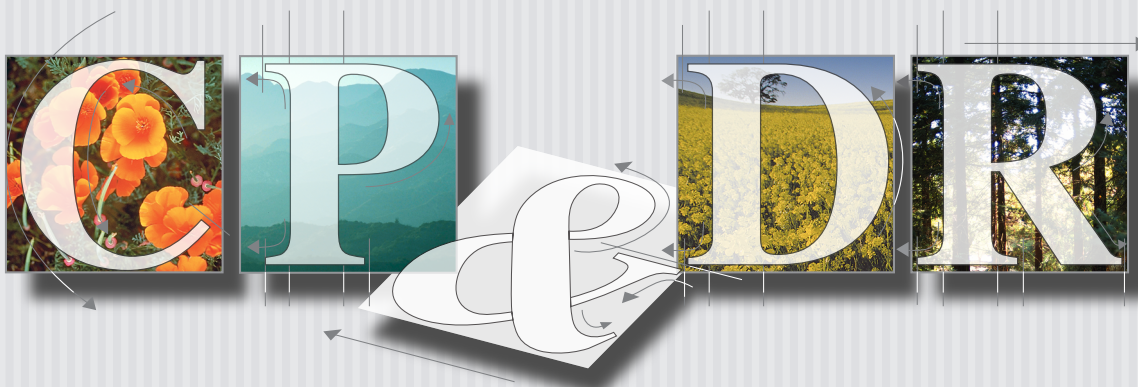
This last one is tough but actually worth thinking about. The problem for both states and the federal government in recent years has been pretty simple: There's enough money

to maintain the transportation system we have *or* build new transportation facilities, but there's not enough money to do both.

That's why some mostly left-wing advocates have argued for a "fix-it-first" approach, on the theory that focusing on maintenance will mean the current system will be in better shape and sprawl will be discouraged because new facilities won't be built.

Even conservative politicians, of course, like to be able to cut ribbons on new facilities, so "fix it first" may not have legs. But something has to give. The gas tax era is over. ■

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An Underwhelming Attitude Toward Density

Consider this headline, which accompanied a recent Citylab [article](#) on a townhouse development in Echo Park: “In Los Angeles, Density That Doesn’t Overwhelm.” It doesn’t take much to unpack that statement. It implies that density is inherently overwhelming.

The Blackbirds development, reviewed by Deborah Noonian Glenn, consists of 18 townhomes that take advantage of the city’s innovative, but underused, Small Lot Ordinance. They’re being built in a hillside neighborhood that consists mainly of single-family homes. Blackbirds is a bold move for that neighborhood. But it doesn’t follow that density is the problem that Blackbirds’ design solves – or that density is a problem in the first place.

For Glenn’s part, her appraisal of Blackbirds doesn’t really echo her headline. She portrays Blackbirds as a neat little development (designed by architect Barbara Bestor) that makes good use of a tight space. Blackbirds’ common driveway is designed as a *woonerf*, which is a street meant to accommodate humans and cars alike. Even then, I’m not sure how exemplary Blackbirds is. While it may use space efficiently, the rendering that accompanies the article makes the design look apologetic. The structure recedes from the curb and hides behind a row of trees, lest it offend neighbors who want to pretend that they’re living in rural Montana.

Many people in Los Angeles share this fantasy, what with their front yards and setbacks juxtaposed against traffic jams, diversity, and whatnot. But responsible commentators should know better. I suspect that Glenn does, in fact, know better. She’s from New York City. She knows real density, and she probably knows how incredible it can be. But, for this post, she, or her editor, has given in to conventional wisdom.

Glenn’s post is, in some ways, a conversation between a reasonable article and a provocative headline. Blanket criticism of density arises all the time, and it’s almost never valid. I’ve said so [before](#). Let’s explore, yet again, what it would mean for density to be truly “overwhelming.”

Can density be aesthetically overwhelming? Sure, if it’s designed poorly – or not designed at all. The patchwork canyons of Hong Kong are culturally fascinating but visually assaulting. Same with the shantytowns of the developing world. Arguably worse are the Corbusian superblocks of Beijing, which are ugly, dense, and dull. But many of the most beautiful cities in the world – London, Paris, San Francisco, Amsterdam – are designed to showcase

density, with little of the parking lots, setbacks, superfluous vegetation, and other gimmicks that make buildings, especially residences, in the U.S. look like they’re terrified of the sidewalk and of each other.

Can dense crowds be overwhelming? Sure, in Times Square or the street markets of Kolkata. Densities of human bodies might get uncomfortably, and even morbidly, high in some places at some times, especially in megacities of the developing world. But I can scarcely think of any American streetscape that wouldn’t benefit from more foot traffic, more activity, and more features to catch the eye.

Can density overwhelm infrastructure? Of all the concerns about density in Los Angeles, the impact on mobility is the most legitimate. While predictions about the traffic impacts of residential developments are often overblown (especially when, say, a high-density development might enable residents to live closer to their workplaces), there’s no doubt that density can equal vehicular congestion. Then again, when density is well designed and well located, traffic can improve, especially when a city is adding to its public transportation system.

I’m all for great design, which seems to be the goal of Bestor and of developers LocalConstruct. But I hope that architects and developers don’t equate “good” with “unobtrusive.” The better a design is, the *more* of it I’d like to see.

Anyone can hide a masterpiece behind a gate and a lawn. Making something both noticeable and inviting poses a greater challenge – and one that is more worthy of an ambitious architect’s skills and of a great city’s image. And let’s not forget about craftsmanship. The buildings that define the great streets of Europe rely on age-old details, like brickwork, masonry, windows, doors, and even flowers and plants, to delight passers-by. The same is true of Charleston, S.C., whose longtime mayor, Joe Reilly, recently rhetorically asked the [New York Times](#), “The question really is, how does a building enhance the city?.... How does it enhance the street?”

Too few people elsewhere in the country are asking Reilly’s questions. And yet, they are exactly the ones that planners in center cities should be answering for stakeholders, elected officials, and headline-writers alike. I hope that the next Small Lot development in Los Angeles, and similar developments elsewhere, will dare to be even better, bolder, and more “overwhelming.”

– JOSH STEPHENS | FEB 3, 2015 ■

Oakland A's to San Jose: It Was Just One of Those Things

The following is a fictitious letter written, by the magic of anthropomorphosis and creative license, by the Oakland A's baseball team to the City of San Jose. It stands to reason that any statement attributed to these entities is fictitious. Only the facts are real.

My dearest San Jose,

This is a hard letter to write. Just a few short years ago; you asked for my hand and I was ready to accept. I felt happy about leaving the mean streets of Oakland, especially that horrid stadium, which everybody agrees is the worst place in the world to play baseball, which I am forced to share with a ... *football team*! Can you imagine anything more unbecoming? My outfielders have to watch their step, for fear of getting bits of brain and bone on their clean uniforms. You, San Jose, tried to give me, the Oakland A's, what I have so desperately long for: An exit strategy! I planned on leaving Oakland, and travelling 50 miles to live with you, San Jose, in a 32,000-seat love nest, Cisco Stadium, that was to be built just for us! Oh, it was a beautiful dream, darling, but it was fated to be only a dre—(At this point, a splattered tearstain smudges the ink on the page.)

Yes, darling, it was just the two of us against the world: The hard-slugging ball club from the town that Tech forgot, and the least glamorous city in Silicon Valley. Together, we had a reason to hold our heads up: The A's would be a suburban ball club with a fan base that is rich, rich, *rich*! And you, San Jose, my funny valentine, could finally become a Destination, not just “whudda they call it, you know, that place with the airport.”

Well, we had our “trip to the moon, on gossamer wings,” didn't we, darling? But there was a problem. My daddy, Major League Baseball, didn't approve of the match. In 2011, I had three suitors – San Jose, Fremont and my estranged husband, Oakland. Daddy Baseball promised to study their proposals and choose a husband for me. But before Daddy made up his mind, my younger sister, the San Francisco Giants, eloped with the City of Santa Clara. They were married and, er, consummated their union quicker than we could. As a wedding present, Daddy Baseball gave them “exclusive rights” to professional baseball market

in Santa Clara County, which includes the proposed site of Cisco Stadium, only six miles away. Despite the fact that we asked first, and that Daddy Baseball never made up his mind in a timely way about which city was going to marry the Oakland A's, the marriage of San Jose and the baseball club was a no-go. That's just a fact. And facts, my dear San Jose, are something you're going to have to accept, sooner or later.

Yes, we vowed eternal love. You, San Jose, vowed to fight Daddy Baseball, who was acting in a controlling way, just like the father played by Charles Laughton in *Hobson's Choice*. (You can see it now and then on Turner Classic Movies. I recommend it.) Oh, gallant San Jose! You went to court, accusing Daddy Baseball with racketeering and being unfair, because he never decided who was to marry the Oakland A's. And you couldn't understand why people were laughing.

You see, Daddy Baseball is very powerful. He has an anti-trust exemption given him personally by his friend, the U.S. Supreme Court, back in the 1920s. Even more than other sports leagues, Daddy Baseball is a power unto himself. He decides which teams get married to which cities, and which don't. San Jose, you sued Daddy and lost, then appealed the case and lost again. Now San Jose, darling, you're about to ask the Supreme Court to hear the case. Beating Daddy Baseball has become an obsession for you, like a man raving in a fever. Don't you realize that suing Daddy is like a mosquito trying to sting a catcher's mitt? The mosquito is only going to hurt himself.

Besides, dear San Jose, I've met someone. He name is Coliseum City, and he's a developer. He wants to tear down my horrid old stadium in Oakland and build a new stadium on the same spot, just for me! Meanwhile, those dreadful footballers (what do they call them – The Waders? The Faders?) can get their own stadium, too, if they can ever stop losing long enough to sign the deal. In addition, Coliseum City says is going he's going to build lots of houses and apartment buildings and stores, which promises a good return on capital for the \$2 billion (swoon!) he plans to spend on me. This guy is rich. I haven't made up my mind, San Jose, but I think this baseball club from

Oakland A's to San Jose: It Was Just One of Those Things

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Oakland is going to fall in love with Coliseum City, that is, if he can, er, perform. We're going to have a modern stadium! We're going to have sky boxes for every damn Fortune 500 in the Bay Area!

I'm sorry to let you down, San Jose. You must shake this off; you're beginning to act like a stalker. Big Daddy Baseball has the muscle and Coliseum City has the bucks. End of story. I'm sorry to lose you, sort of, but I'm going to be rich, you hear me, RICH! Oakland and I will renew our vows in our new temple in front of tens of thousands of guests – maybe we'll get a ring out of it someday!

Our story is just like the end of *Stella Dallas*, the old, old movie starring Barbara Stanwyck. I, the baseball team, am just like Stanwyck's daughter in the picture,

who marries the rich boy from the high-class family. And you, sad San Jose, are like Stanwyck, who has been rejected by her daughter and who hasn't been invited to the wedding, forcing Stanwyck to stand outside in the snow and watch her child get married through a window. Oh, the heartbreak, the ingratitude! Everybody in the audience is in tears. Thank God for Turner Classics! They don't make three-hanky movies like that anymore.

Yours,
The A's

– MORRIS NEWMAN | FEB 5, 2015 ■

