

With AB 744, State Steps Into Parking Fray

BY JOSH STEPHENS

The High Cost of Free Parking, by UCLA professor emeritus Don Shoup’s landmark call for parking reform, was published in 2005. On the occasion of its tenth anniversary, some of his strongest devotees can, at long last, celebrate a victory in the state where the “Shoupista” movement began.

Assembly Bill 744 (Chau) – recently signed by Gov. Jerry Brown -- ushers in a new era in parking regulations in California cities. Chipping away at rules that many consider arbitrary and anti-urban, it dictates that a city may not impose parking minimums greater than 0.5 spaces for housing developments comprising 100 percent affordable

units within a half-mile radius of a major transit stop.

It extends similar benefits to developments of senior citizen and special needs housing as well as to developments with a combination of market-rate and affordable units.

“We’re talking about being able to sometimes fit another 30 parking spaces into a building that was going to be 100 units that can now be 130 because the ground floor is no longer podium parking,” said Stuart Cohen, executive director of the advocacy group TransForm.

It might also lead to better developments.

“It’s going to help us make better buildings,” said Meea

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insight
WILLIAM
FULTON

The Tech Housing Crunch’s Fracking Dilemma

A couple of weeks ago I heard a spiel by one of the founders of a new startup called Feastly [eatfeastly.com], which is trying to pair up chefs with diners. Chefs wake up in the morning, go into their kitchen, prepare whatever they want, put out a call on the

Internet – and if it’s something you want to eat, you go to their house and dine. Feastly, in other words, turns every dining room into a restaurant.

It was a compelling pitch, but the truth of the matter is that Feastly is one of hundreds

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Activist Group Seeks to Curtail Development in L.A.

A group calling itself the Coalition to Preserve L.A. [announced](#) that it is seeking to put on the November 2016 citywide ballot a measure to block “mega-projects” in Los Angeles. The initiative would effectively freeze all development in the city that does not conform to the current General Plan and community plans. The initiative includes several major provisions: 1) halt amendments to the City’s General Plan in small bits and pieces for individual real estate developer projects; 2) require the City Planning Commission to systematically review and update the City’s community plans and make all zoning code provisions and projects consistent with the City’s General Plan; 3) place city employees directly in charge of preparation of environmental review of major development projects; and 4) impose a construction moratorium for projects approved by the City that increased some types of density until officials can complete review and update of community plans or 24 months, whichever occurs first.

The initiative’s main backers, several of whom have actively protested major developments in Hollywood, say the initiative will help preserve the character of Los Angeles neighborhoods. The measure would apply citywide. “This ballot measure is bad for L.A., and bad for

the economy,” City Council Member Mitch O’Farrell told the [Los Angeles Times](#). “It’s bad for transit-oriented neighborhoods. It will also cost thousands of good-paying jobs.” The measure requires 61,486 signatures to qualify for the November 2016 ballot.

Proposed Ballot Initiative Would Shift Funds from Rail to Water Storage

Two Republican state senators are backing a proposed [ballot initiative](#) that would take billions from the state’s bullet train project and spend it instead on generating more water in the state. The initiative would take the \$8 billion left of the original \$9 billion in train bonds along with \$2.7 billion in storage money and spend it on water facilities including two new dams, an expansion of current dams, and recharging aquifers. Hidden within the proposal is an amendment to the state constitution that would make domestic use and crop irrigation the top priorities for California water in lieu of the environment. “It’s a very sneaky attack on the environment,” Doug Obegi, senior attorney for the Natural Resources Defense Council, told the LA Times. Bob Huff and George Runner are the two senators who have supported the initiative, which is targeted for the Nov. 2016 ballot. “If you’re down to your last 50 gallons,” Huff asks, “would you give it to a person who’s thirsty or a fish

so it could migrate upstream? People should be No. 1, agriculture No. 2 because it’s feeding people.”

S.F. Adopts Measure to Curb Displacement, Support African-American Residents

The San Francisco Board of Supervisors [voted](#) to reserve 40 percent of all new affordable housing units for people living within a half mile of where the units are being built. Passed by a 9-2 vote, the legislation comes as a way to stabilize the city’s African American population, which has declined from 13.4 percent in 1970 to 5.5 percent last year, by allowing them to take advantage of new developments in historically black neighborhoods, including the huge Hunters Point Shipyard development. Less than 1 percent of subsidized units built by private developers and sold to low-income residents between 2008 and 2014 went to African Americans. Including rentals, the figure rises to 4.7 percent. Supervisor Katy Tang, whose district has virtually zero subsidized housing units being built, voted against the legislation, saying that residents in her district would be pushed to the “very, very bottom of the waiting list.”

Mountain View Considers Expanding Households by 30 Percent

The Mountain View City Council specified the number of houses it is

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prepared to build in the city's North Bayshore business district, choosing the densest option of building 9,100 units in the area that's home to Google, LinkedIn, and Microsoft. "It gives us the most flexibility moving forward," Vice Mayor Pat Showalter said at the meeting, according to the [San Francisco Business Journal](#). "It's not all going to be built. So having more areas where it's allowed is better." Getting to that number of units would require a revision of the final Environmental Impact Report, which the previous council had approved without any residential space. After that, voters put a pro-housing council majority into office last November as housing advocates said approving office space with no housing would aggravate traffic issues and promote suburban sprawl. Councilmembers supported a land-use plan that would allow residential uses for over 60 acres of land, most of which is owned by Google. Mountain View currently has 31,000 households.

Downtown L.A. Subway Project Falters

Los Angeles' Downtown Regional Connector project -- considered as a crucial missing link in Metro's expanding mass transit network -- is already encountering [cost overruns](#) and schedule delays, even before tunneling has begun. Half of the project's \$92.7 million reserve for unexpected cost has been expended because of complications with underground utilities, and a Metro analysis indicates that the estimated \$1.42-billion price tag for the subway connection needs to grow by \$130 million, or 9%, to cover the added expenses and replenish the reserve fund. The project will be a 1.9-mile

connection between the 7th Street subway station near Staples Center to the eastern edge of Little Tokyo near Union Station, and is seen as the linchpin of an unprecedented boom in rail construction for Metro. "These kinds of stumbles that we're having here are very common in construction projects, but especially when you're doing it in a huge business area, in a downtown environment," said Metro spokesperson Pauletta Tonilas. "It's not a surprise that we've hit some bumps in the road."

Bay Area Group Calls for Penalties on Cities that Shirk Housing Obligations

A new [report](#) from the Bay Area Council suggests that Bay Area cities that do not build enough housing to keep up with the region's growth should be punished by having their ability to approve or reject development projects stripped. The "Roadmap for Economic Resilience" report suggests creating "super agencies" to supersede local planning authorities in approving and funding projects, and it suggests that the state could expand "by right" approvals in which cities are powerless to block a project if it complies with local zoning and building codes. It also said that the area's 26 transit agencies need to begin coordinating their planning immediately. "The mission of the report isn't to say, 'It must be done this way,'" Jim Wunderman, the council's chief executive officer, told the [San Francisco Chronicle](#). "It's to start a region-wide conversation. ... We don't, in any way, want to put local governments out of the business of deciding what goes in their neighborhoods."

L.A. Audit Reveals Failure to Collect Impact Fees

An [audit](#) (pdf) by Los Angeles's controller finds that the city is failing to charge developers millions of dollars in development impact fees -- frequently used to increase police and fire protection, traffic mitigation, and improve public facilities -- and has left millions in collected fees unspent. Comparing Los Angeles to other cities, the audit finds that Los Angeles had \$5.3 billion in permitted construction projects in the 2013-14 fiscal year, but collected less than \$5 million in impact fees. These numbers compare with San Francisco's \$96 million collected off of \$3.6 billion in construction, and Portland's \$31 million collected off of \$1.5 billion in construction. The audit also identified \$54 million in impact fees that have been collected but that has been sitting idle various accounts with balances that haven't changed substantially in three years, indicating the city wasn't spending the money. "The city's haphazard application of the fees today is unfair to communities and to developers," Galperin [told](#) the [Los Angeles Daily News](#). "Both have every expectation that the city will apply fees consistently and spend them to mitigate the impacts of development on our neighborhoods."

Bill to Transfer Native Land Unites Congressional Delegates

A [bill](#) to transfer 80 acres of the Stanislaus National Forest into a trust for the Tuolumne Band of Me-Wuk Indians has brought together an unlikely alliance between Democratic Sen. Barbara Boxer and Republican Rep. Tom McClintock. "In what I believe is a first in American history,

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Sens. (Dianne) Feinstein and Boxer and I all agree on this legislation,” McClintock said Wednesday at a House subcommittee hearing. The legislation would transfer the two isolated Forest Service parcels into trust for the tribe, easing management and making it easier to thin overgrowth and prevent forest fires. Gaming operations would be prohibited on the transferred property.

High Speed Rail Runs into Setbacks, Potential Cost Overruns

California’s High Speed Rail project is finding more hurdles in the way of the intended 2022 finish of its first phase from Burbank to Merced. A Los Angeles Times analysis finds that the project’s first phase will likely [exceed](#) the \$68 million budget and will almost certainly not meet the 2022 deadline because of the difficulty of punching 36 miles of tunnels through mountains north of Los Angeles. The analysis finds that contractors will find difficulty boring a 20 mile stretch of tunnel through the rocks of the San Gabriel Mountains, formed over 1.7 billion years ago and lying on numerous fault lines. “Having looked at a number of these long tunnels, [the California] plan is aggressive,” Herbert Einstein, an MIT civil engineer, told the L.A. Times. “From a civil engineering perspective it is very, very ambitious — to put it mildly.” [The Associated Press](#) obtained a questionnaire of 36 private companies by the High Speed Rail Authority which found that private companies are skeptical about investing in the project. “The market cannot absorb a single \$20 billion contract ... financial

institutions would not invest into a project of such unprecedented scale and cost,” ACS Infrastructure Development Inc. led other companies in writing. Additionally, the Rail Authority decided to push a restart button on its segment from [Anaheim to Los Angeles](#) in order to get more support from local communities. The new plan would involve a “sealed corridor” fenced off from the community. Officials in 2009 asked for a slow-down of the original plan because of concerns about aesthetics, noise, safety, vibrations from the train and the possible need to condemn homes or businesses.

L.A. County to Set Aside \$100 Million for Affordable Housing

The Los Angeles County Board of Supervisors voted to gradually begin setting aside \$100 million per year to construct and maintain [affordable housing](#) in order to combat growing homelessness in the region. Supported by business leaders, anti-poverty advocates and nonprofit housing developers, the housing fund will start with \$20 million next year and expand over the next five years to \$100 million to address the area’s homeless population of 44,000. The supervisors did not say where the money would come from, but directed the county chief executive to come back with a plan as part of next year’s budget process. Supervisor Don Knabe criticized the uncertainty of the funding sources, but Supervisors Sheila Kuehl and Mark Ridley-Thomas said that it is important to begin work soon regardless of funding. “The objective is to get moving and moving now on

building more affordable housing, and the formula, the methodology can and will be worked out,” said Ridley-Thomas. “... We are not moving fast enough keeping up with the crisis that has enveloped us.”

Governor Fast-Tracks San Diego Stadium EIR; Initiative for Alternative Downtown Stadium

The San Diego Chargers stadium saga continues as Gov. Jerry Brown [fast-tracked](#) the judicial review process for the city’s Environmental Impact Report, forcing courts to resolve any lawsuit challenging the EIR within nine months of the document’s certification. The move allows Mayor Kevin Faulconer to assure NFL owners that the new stadium will be able to open at its current Mission Valley by 2019 even if there is litigation. However, Chargers attorney Mark Fabiani, who broke off talks with the city and has instead been focusing on plans to relocate to Los Angeles, said that the nine month period “is unfortunately irrelevant at this point” and the “quickie EIR is fatally flawed.” Further serving as a boon to Fabiani’s relocation cause, San Diego attorney Cory Briggs filed an [initiative](#) to build a new stadium downtown instead, along with expanding the city’s downtown convention center and paying for those projects through a 15.5 percent hotel tax. Far from demonstrating to the NFL the city’s commitment to building a viable stadium, Briggs’s move could allow Fabiani’s camp to show NFL owners that the city’s efforts to build a new stadium are as dysfunctional as ever. ■

Election Results: Has the Density Fight Turned The Corner in San Francisco?

BY CP&DR STAFF

Was November's election the turning point in the San Francisco density battles?

There's been a lot of talk lately about how the city's longtime policy of controlling new development may be outdated now that it's the most expensive city in the country. And in the election, affordable housing, urban density, and short-term housing rentals all prevailed. In fact, more people voted on land use measures yesterday in the City and County of San Francisco than in the rest of the state's jurisdictions combined -- four times as many, in fact. Roughly 130,000 San Francisco voters weighed in on a ballot packed with six land use measures.

Elsewhere in the state, measures to curtail development and/or preserve open space prevailed in Malibu, El Dorado County, and San Anselmo, so some things never change.

The ballot's four measures to promote housing in San Francisco each prevailed by huge, and nearly identical, margins. These include Proposition A, to establish a \$310 million fund for affordable housing; Measure D, to raise height limits in the Mission Rock Development; and Proposition K, to promote development of housing on surplus city lands, all prevailed with 73 percent of the vote. Proposition I, a highly contentious measure to curtail new development in the Mission District, failed with 73 percent of voters casting "no" votes. Presumably, all 98,000 or so votes for each measure came from the same voters, unified in support of housing in what is arguably the nation's most unaffordable housing market.

Meanwhile, Proposition F, which would have placed stiff regulations on short-term rentals such as Airbnb, was defeated, with 55% of San Franciscans voting to maintain the mostly laissez faire approach to short-term rentals. Proposition F was arguably the most controversial land use measure in the state this year. While its supporters argued that short-term rentals take conventional rental units off the market, this argument was not strong enough to sway those who voted for the ballot's other pro-housing measures.

Meanwhile, the "Stamp Out Sprawl" measure in Modesto passed by a margin of less than one percentage point. The only anomaly was the defeat of a parks bond measure in San Carlos that would have preserved open space at the cost of \$45 million.

El Dorado Hills Community Services District (El Dorado County) Former Golf Course Rezoning Advisory Question Measure E

Should the El Dorado County Board of Supervisors rezone the approximately 100 acres of the former executive golf course in El Dorado Hills from its current land use designation as "open space recreation" to a designation that allows residential housing and commercial development on the property?

Failed 90.9% - 9.1% (7,285 - 730)

City of Malibu (Los Angeles County) Shopping Center at Cross Creek and Civic Center Way Measure W

Shall an ordinance be adopted approving the Civic Center-Northeast Specific Plan for property located at the northwest corner of Cross Creek and Civic Center Way that regulates development and limits uses to allow construction of a commercial shopping center up to 38,425 square feet, proposed to include a grocery store, retail and recreational/educational uses? Note: Measure W is required by Measure R, which was approved by city voters in November 2014. Measure R required voter approval of any commercial or commercial-residential development larger than 20,000 square feet.

Failed 57.3% - 42.7% (1,575 - 1,173)

Town of San Anselmo (Marin County) Memorial Park Initiative Measure D (Citizen Initiative)

Shall an ordinance be adopted to amend the San Anselmo

>>> Election Results

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General Plan to do the following: prohibit the use of Memorial Park as a flood detention basin; prevent any non-recreational uses that adversely affect or reduce Memorial Park’s current recreational amenities; and require voter approval before the park can be sold or transferred by the Town? Proponents collected 1,484 [valid signatures](#) to qualify this initiative for a voter decision. The town council could have approved the initiative directly. Council members voted to put it before voters instead.

Approved 59.2% - 40.8% (1,789 - 1,234)

Town of San Anselmo Council-Referred Memorial Park Ordinance Measure E

Shall an ordinance be adopted to amend the Town’s General Plan to affirm continued use of Memorial Park as primarily a recreational facility and to permit accessory use of Memorial Park for flood control by way of a detention basin only if a majority of voters approves a specific plan detailing development of the park for flood control following environmental review?

Approved 59.4% - 40.6% (1,801 - 1,231)

City of Sausalito Advisory Vote on Leasing the MLK Public School Site Measure F

City of Sausalito No-Tax-Increase Park Improvement/Safety Measure. To bring Robin Sweeny Park, Southview Park, Dunphy Park and the MLK site to current health/safety standards; repair unsafe children’s playground equipment, upgrade safety lighting, pathways and play courts; add needed restrooms; restore wetlands/natural areas, shall the City of Sausalito enter into an agreement with the Sausalito Financing Authority and permit revenue from the MLK site to be used as revenue financing, with no increase in taxes?

Approved 62.7% - 32.3% (1,132 - 673)

City of San Francisco Housing Bond Issue Proposition A

To finance the construction, development, acquisition, and preservation of housing affordable to low- and middle-income households through programs that will prioritize vulnerable populations such as San Francisco’s working families, veterans, seniors, disabled persons; to assist in the acquisition, rehabilitation, and preservation of affordable rental apartment buildings to prevent the eviction of long-term residents; to repair and reconstruct dilapidated public housing; to fund a middle-income rental program; and to provide for homeownership down payment assistance opportunities for educators and middle-income households; shall the City and County of San Francisco issue \$310 million in general obligation bonds, subject to independent citizen oversight and regular audits?

Approved 73.5% - 26.5% (98,251 - 35,415)

Mission Rock Development Initiative Proposition D

Shall the City increase the height limit for 10 of the 28 acres of the Mission Rock site from one story to height limits ranging from 40 to 240 feet and make it City policy to encourage the development on the Mission Rock site provided that it includes eight acres of parks and open space and housing of which at least 33% is affordable for low- and middle-income households?

Approved 73.3% - 26.6% (97,172 - 35,278)

Initiative to Restrict Short-Term Rentals Proposition F

Shall the City limit short-term rentals of a housing unit to 75 days per year regardless of whether the rental is hosted or unhosted; require owners to provide proof that they authorize the unit as a short-term rental; require residents who offer short-term rentals to submit quarterly reports on the number of days they live in the unit and the number of days the unit is rented; prohibit short-term rentals of in-law units; allow interested parties to sue hosting platforms; and make it a misdemeanor for a hosting platform to unlawfully list a unit as a short-term rental?

Failed 55% - 45% (73,556 - 60,027)

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>>> Election Results

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Mission District Housing Moratorium Initiative Proposition I

Shall the City suspend the issuance of permits on certain types of housing and business development projects in the Mission District for at least 18 months; and develop a Neighborhood Stabilization Plan for the Mission District by January 31, 2017?

Failed 57% - 43% (74,697 - 55,543)

Legacy Business Historic Preservation Fund Proposition J

Shall the City establish a Legacy Business Historic Preservation Fund, which would give grants to Legacy Businesses and to building owners who lease space to those businesses for terms of at least 10 years; and expand the definition of a Legacy Business to include those that have operated in San Francisco for more than 20 years, are at risk of displacement and meet the other requirements of the Registry?

Approved 57% - 43% (72,591 - 55,409)

Development on Surplus Public Lands Proposition K

Shall the City to expand the allowable uses of surplus property to include building affordable housing for a range of households from those who are homeless or those with very low income to those with incomes up to 120% of the area median income; and, for projects of more than 200 units, make some housing available for households earning

up to 150% or more of the area median income?

Approved 73.3% - 26.7% (95,093 - 34,665)

City of San Carlos (San Mateo County) Black Mountain Park Bond Issue Measure V

To permanently protect and preserve rare San Carlos open space from development, protect a local water source, prevent increased traffic congestion, and improve access to tranquil natural areas and parks, including walking trails, recreation, and restrooms/facilities, shall the City of San Carlos issue \$45 million in bonds to acquire, create, and enhance Black Mountain Park located along Alameda de las Pulgas between Madera Avenue and Melendy Drive, with citizen oversight and funds restricted to these specific purposes only?

Failed 61.7% - 38.3% (4,016 - 2,489)

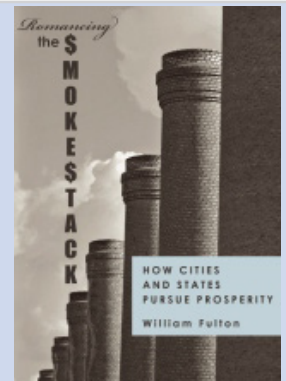
City of Modesto (Stanislaus County) Stamp Out Sprawl Voter Approval of Development Initiative Measure I

Shall the City of Modesto 2008 Urban Area General Plan be amended to establish limit lines (boundaries) for nonresidential and medium and large lot residential development, outside of which areas new development subject to the limits would require voter approval?

Approved 50.3% - 49.7% (6,355 - 6,272) ■

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legal digest

Santa Cruz Rodeo Case Reaffirmed in Light of *Berkeley Hillside*

BY CP&DR STAFF

Reconsidering the case in light of the California Supreme Court's recent *Berkeley Hillside* ruling, the Third District Court of Appeal has reaffirmed last year's ruling concluding that a rodeo at the Santa Cruz County Fairgrounds does not qualify as an "unusual circumstance" that can override an exemption under the California Environmental Quality Act.

In April 2014, the Third District ruled that the rodeo – the first held at the Watsonville facility in many years – did not constitute an "unusual circumstance". [<https://www.cp-dr.com/node/3465>] The plaintiffs, Citizens for Environmental Responsibility, appealed the ruling to the California Supreme Court, which stayed briefings pending the Supreme Court's ruling in *Berkeley Hillside*, which also dealt with the unusual circumstances override of CEQA exemptions. After the Supreme Court ruling in *Berkeley Hillside*, the case was remanded to the Third District to revise the 2014 ruling in consideration of the Supreme Court's decision.

In *Berkeley Hillside*, the Supreme Court laid out a two-step approach to the "unusual circumstances" question when a lead agency is considering an exemption.

As CP&DR reported back in March [<https://www.cp-dr.com/node/3693>], the lead agency must first review the record to see whether unusual circumstances exist and if so courts must use the "substantial evidence" test in determining the validity of an exemption under those circumstances. The court ruled that a categorical exemption can be defeated by a "fair argument" that supports a reasonable possibility that significant environmental effects will result from the "unusual circumstances."

But it also held that "a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect."

The Third District used this framework in re-examining the Santa Cruz rodeo case, making it the first appellate case to do so.

The rodeo case began in 2011, when the Santa Cruz County Deputy Sheriff's Association sought to have a charity rodeo at the county fairgrounds in Watsonville, even though no rodeo had taken place in at least 20 years. The fairgrounds invoked the Class 23 exemption, which is used for "normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose". Local environmental activists sued. Sacramento County Superior Court Judge Lloyd Connelly permitted the event to go forward but the case was appealed because of the legal principles involved.

The plaintiffs had claimed that, in adopting a Manure Management Plan to protect nearby Salsipuedes Creek, the fairground managers essentially gave up their claim to a categorical exemption by admitting there was a hazard to mitigate.

The environmentalists argued that the court had to compare the rodeo not to other events at the fairgrounds but to

>>> Santa Cruz Rodeo Case Reaffirmed in Light of *Berkeley Hillside*

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public gathering facilities, including “racetracks, stadiums, convention centers, auditoriums, amphitheaters, planetariums, swimming pools, and amusement parks.”

The appellate court rejected this argument. Writing for a three-judge panel, Justice William J. Murray said: “[I]t would be extremely unusual to have horses or cattle and manure anywhere near a public swimming pool; thus, a comparison of the operations of the public swimming pools to fairground facilities for usual and unusual circumstances would be unfair.”

So the court compared the rodeo to other events at the Santa Cruz County Fairgrounds: “The normal operations of the Fairground included about two dozen equestrian and/or livestock events each year for at least the last three years before the rodeo. The proposed rodeo did not involve more horses or livestock than were used for the other events and no changes to the facility or the operations were necessary.”

Even if an unusual circumstance could have been established, the court concluded, substantial evidence was not submitted by the plaintiffs that the environment may have been harmed. In particular, the court concluded that the plaintiffs had merely speculated about the difference between the Watsonville facility and “the normal fairground,” rather than providing any hard evidence.

The court found nothing unusual about the rodeo: “The normal operations of the Fairground included about two dozen equestrian and/or livestock events each year for at least the last three years before the rodeo.”

“As we have noted, once an agency meets its burden of establishing that a project is categorically exempt, the burden shifts to the party challenging the exemption to produce substantial evidence establishing the exception,” the court wrote. “Appellants cannot satisfy this burden by speculation. They must provide evidence.”

Turning to the other test – that the plaintiffs can establish an unusual circumstance “with evidence that the project *will* have a significant environmental effect” – the court basically found that the environmentalists’ own briefing strategy undercut this argument, mostly because the plaintiffs didn’t

argue this point in the rodeo case before the *Berkeley Hillside* case was decided.

“Appellants made no attempt before the District’s board or in the trial court to prove the rodeo project will actually have a significant effect on the environment,” the court wrote. “The entire thrust of appellants’ argument below and on appeal is that the rodeo project creates an environmental *risk* to the Salsipuedes Creek because in their view, there is a *reasonable possibility* that the project *may have* a significant environmental effect on the creek.”

The court added: “We conclude that appellants have failed to establish unusual circumstances based on substantial evidence that the project *will have* a significant effect on Salsipuedes Creek.”

The Case:

Citizens for Environmental Responsibility v. State of California ex rel. 14th District Agricultural Association, C070836 [<http://www.courts.ca.gov/opinions/documents/C070836A.PDF>]

The Lawyers:

For Citizens for Environmental Responsibility: Douglas J. Chermak, Lozeau/Drury, doug@lozeaudrury.com

For Fair District: Randy L. Barrow, Deputy Attorney General, randy.barrow@doj.ca.gov ■

JPA Can Be Used To Avoid Two-Thirds Vote, Court Rules

BY WILLIAM FULTON

The Fourth District Court of Appeal has rejected arguments from San Diegans for Open Government that the City of San Diego improperly created a joint powers authority in order to avoid a two-thirds vote requirement for issuing sale-leaseback Marks-Roos bonds.

San Diegans for Open Government – a plaintiff frequently used by watchdog lawyer Cory Briggs – sued the city, claiming that a joint-powers authority between the city, the San Diego Housing Authority, and the city’s successor agency did not have the power to issue the bonds for several reasons. SDOG attempted to distinguish the situation from the facts of *Rider v. City of San Diego* (1998) 18 Cal.4th 1035, a California Supreme Court ruling which held, essentially, that the city could end-run the two-thirds requirement by creating a JPA.

The Fourth District found that the situation in this case was distinguishable from *Rider* in some ways but these distinctions didn’t matter. “*Rider* made clear that for purposes of the debt limitation provisions, when a financing authority created to issue bonds ‘has a genuine separate existence from the City,’ ‘it does not matter whether or not the City “essentially controls” the [f]inancing [a]uthority,” wrote Acting Presiding Justice Richard A. Huffman for a unanimous three-judge panel.

The City of San Diego and its redevelopment agency created the Public Facilities Financing Authority in 1991. After redevelopment was killed in 2012, the Financing Authority was reconstituted to be a JPA between the city, the successor agency and the San Diego Housing Authority, all of which use the San Diego City Council as its governing board. In 2014, the Financing Authority approved a \$130 million bond issue under the Marks-Roos law that involves a sale-leaseback agreement with city facilities. The city leases several city properties to the Financing Authority for a nominal amount, and then the Financing Authority leases the property back to the city for an amount equal to debt service on the bonds, which provides the revenue source for the Financial Authority to pay the bond debt. The Financing Authority then uses the bond proceeds to finance a wide variety of city capital projects unrelated to the sale-leaseback buildings.

San Diegans for Open Government brought a reverse validation action on a wide variety of grounds – the most important being that the bond deal required a two-thirds vote because the Financing Authority is, in reality, indistinguishable from the city government.

The leading case on this topic is *Rider*, which was also a reverse validation action against the City of

San Diego – in that case, asserting that convention center bonds issued by a JPA consisting of the city and the San Diego Unified Port District were subject to the two-thirds vote requirement. But the Supreme Court ruled in favor of the city in that case. Wrote Justice Ming Chin for the court: “[T]he Constitution and the City’s charter permit the City to avoid the two-thirds vote requirement *by creating a joint powers agency to finance public works projects*. Therefore, however we might characterize the financing plan at issue here, we cannot characterize it as unlawful.” [CP&DR’s coverage of the court ruling at the time can be found here. [<http://www.cp-dr.com/node/1466>]

Chin did not mince words in suggesting that the JPA was a blatant end-run around the constitutional requirement for two-thirds voter approval. “We are not naive about the character of this transaction,” he wrote. “If the City had issued bonds to pay for the Convention Center expansion, the two-thirds vote requirement would have applied. Here, the City and the Port District have created a financing mechanism that matches as closely as possible (in practical effect, if not in form) a City-financed project, but avoids the two-thirds vote requirement. Nevertheless, the law permits what the City and the Port District have done.”

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>>> JPA Can Be Used To Avoid Two-Thirds Vote, Court Rules

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SDOG argued that this case is distinguishable from *Rider* because, whereas the port district is a completely separate entity not controlled by the city, the housing authority and the successor agency are both essentially creations of the city with the same governing board. The Fourth District did not dispute the facts but said, nevertheless, that *Rider* applies to the situation. Quoting *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1424 the court said: “Well-established and well-recognized case law holds that the mere fact that the same body of officers acts as the legislative body of two different governmental entities does *not* mean that the two different governmental entities are, in actuality, one and the same.”

“SDOG asks us to ignore the separate legal status of the entities, but we may not do so,” the court said. “Other than attempting to distinguish *Rider*, SDOG cites no authority to support its position.”

SDOG made a variety of other arguments, all of which were rejected by the court.

For example, SDOG said this situation was distinguishable from *Rider* because the Financing Authority’s financial status is reported in the city’s financial reports, largely to comply with the requirements of the Government Accounting Standards Board, or GASB. But the court noted that GASB rules, while they may be desirable for a city to

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follow, are not legally binding on California jurisdictions.

SDOG also said the case was distinguishable because the properties involved in the sale-leaseback deal were not being improved with the bond funds. To support its argument, SDOG relied on the appellate court’s ruling in *Rider -- City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1481. But the Fourth District chided SDOG on this one because, Huffman claimed, in that case the court actually ruled the opposite. In fact, Huffman quoted the 1996 case as follows: “Contrary to *Rider*’s contention, *nothing in the opinion*

suggests a restriction on how or for what purpose a public entity may use bond proceeds obtained in the financing arrangement.”

Finally, the court rejected SDOG’s argument that under the redevelopment dissolution law it was illegal for the successor agency to enter into a JPA. In fact, the court noted that SDOG conceded the opposite at trial.

The court noted that Health and Safety Code section 34178 provides that “agreements are not invalid and may bind the successor agency,” including a “joint exercise of powers agreement in which the redevelopment agency is a member of the joint powers authority.”

Wrote Huffman: “SDOG conceded this means that after the dissolution of a redevelopment agency, a joint powers authority of which it was a member ‘doesn’t go away’ and the successor agency may ‘step into the redevelopment agency’s shoes.’ That is what occurred here.”

The Case:

San Diegans for Open Government v. City of San Diego, D067127 [<http://www.courts.ca.gov/opinions/documents/D067127.PDF>]

The Lawyers:

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For City of San Diego: Daniel Bamberg, Assistant City Attorney, dbamberg@sandiego.gov ■

MTA's EIR for Beverly Hills Subway Upheld by Appellate Court

BY WILLIAM FULTON

The Second District Court of Appeal has upheld the environmental impact report for the extension of Los Angeles's Purple Line, removing another hurdle for construction of the "Subway to the Sea" through Beverly Hills. Now we'll see whether the Beverly Hills city and school district will appeal to the California Supreme Court.

The subway extension has been consistently opposed by both the City of Beverly Hills and the Beverly Hills Unified School District, primarily because it would require tunneling under Beverly Hills High School. The Los Angeles Metropolitan Transportation Authority is planning to locate a station at Constellation Boulevard and Avenue of the Stars, in the middle of the Century City business district, which is located immediately west of Beverly Hills High School, rather than further north along Santa Monica Boulevard.

In ruling against the city and the school district, the appellate court emphasized the need to give great deference to the lead agency in reviewing decisions about whether to recirculate an EIR.

The opponents' lawsuit was based primarily on the argument that the MTA based the decision on new information obtained after the EIR was first circulated and therefore it should have been recirculated. In large part their argument was based

on the fact that in the draft EIR, the MTA referred to the Santa Monica station as the "base" alternative and the Constellation station as the "optional" location with less seismic risk, but in the final EIR the MTA removed these designations and characterized Constellation as the only choice.

"School District and City mischaracterize the contents and analysis of the draft EIS/EIR," wrote Justice Thomas Willhite for a three-judge panel of the court. "In their view, the draft EIS/EIR considered the Santa Monica station to be the primary choice for the Century City station, with the Constellation station being a 'backup' choice that was not subjected to much scrutiny. They are mistaken.

"Although they are correct that the draft EIS/EIR referred to the Santa Monica station as the "base" station and the Constellation station being a "backup" option, the conclusion they draw from the use of those terms is not," the court went on. Each station option was fully analyzed. "Those terms have to do with how the Project was developed rather than how they were viewed and evaluated in the draft EIS/EIR."

Substantively, the main argument of the city and the school district was that the MTA had not adequately analyzed the seismic risk, the noise and vibration impact of the tunneling,

and the air quality impacts of the project. But they didn't get very far with the Court of Appeal.

On the question of analyzing the seismic risk, the main question had to do with the risk associated with the West Beverly Hills Lineament, the fault considered most likely to be active in the area. However, as the appellate court noted, there is a dispute about whether this fault even exists and more extensive investigation will be done at the design level.

On the question of air quality impact and noise and vibration, the appellate court basically concluded that the MTA had properly identified the impacts and mitigated them to the extent feasible.

On the overall question of recirculation, regarding seismic safety, the court concluded: "The new information in the final EIS/EIR merely confirmed that the Santa Monica station was, in fact, not viable because the Santa Monica fault ran through that location, and that an alternate station further east on Santa Monica Boulevard was not viable because it was not possible to rule out the existence of an active fault at that location."

On the recirculation based on air quality impacts, the court concluded that new information after the draft EIR actually supported the MTA's decision so therefore recirculation was not necessary.

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>>> MTA's EIR for Beverly Hills Subway Upheld by Appellate Court

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The city made two other arguments dealing with the MTA's compliance with the 1964 law that created the MTA's predecessor agency, the Southern California Rapid Transit District. In creating the RTD, the state also created a process by which local cities could request a hearing under the law [Public Utilities Code Sections 30639 to 30645] when considering the question of where to place transit facilities. Beverly Hills requested such a hearing in this case, and the hearing was held in April of 2012.

At the hearing, the MTA board presented documentary evidence but no witnesses. The city presented several expert witnesses. The MTA board then concluded the hearing and started the meeting of the Metro board. At that meeting, the board heard from both Metro's staff and experts. The board then adopted the Constellation station location.

The city made two arguments: First, that the hearing was a "sham" because MTA had already made findings of fact about the Constellation station prior to the meeting; and second, that the MTA should have presented experts at the hearing and given the city the opportunity to ask rebuttal questions of the experts.

The appellate court rejected both arguments. Willhite concluded that the MTA did not adopt findings of fact until after the hearing; and, in any event, the MTA's decision was a legislative decision, not a quasi-judicial decision, which gave the

“Although they are correct that the draft EIS/EIR referred to the Santa Monica station as the “base” station and the Constellation station being a “backup” option, the conclusion they draw from the use of those terms is not,” the court said.

agency more leeway.

On the question of whether the city should have been given the opportunity to rebut at the hearing, Willhite wrote:

“Given that its stated purpose for requesting the transit hearing was to provide information that it believed was not included or properly analyzed in the EIS/EIR, it is not surprising that City accepted the hearing officer's proposal to have Metro just submit its documentary evidence -- primarily the EIS/EIR and supporting materials circulated with the EIS/EIR -- in order to give City the maximum time to make its presentation. Nor is it surprising that

Metro's documentary evidence was a primary focus of City's presentation because City was attempting to show that the information and analyses in those documents were incomplete and/or inadequate. In other words, City got precisely the transit hearing it had requested.”

Finally, the city had argued that MTA relied on hearsay evidence in making the siting decision. But the court rejected that argument on a wide variety of grounds, including the fact that the transit hearing law – which apparently was originally designed to deal primarily with fares – provides little guidance as to what decision the MTA is supposed to make. “[T]he documentary evidence was not used as proof of the matter asserted, but simply to show that it exists, and therefore it is not hearsay,” Willhite wrote for the court.

The Case:

Beverly Hills Unified School District v. Los Angeles Metropolitan Transportation Authority,

The Lawyers:

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Separation of Property by Condemnation Does Not Equal Subdivision

BY WILLIAM FULTON

The division of one parcel into four noncontiguous pieces via eminent domain does not automatically create four legal parcels and permit the landowner to avoid the Subdivision Map Act, the First District Court of Appeal has ruled.

“We hold that a ‘division’ of property within the meaning of the [Subdivision Map] Act does not occur simply because an eminent domain proceeding results in a physical separation of a property’s non-condemned portions,” wrote Presiding Justice Jim Humes, a former top aide to Jerry Brown for a three-judge panel of the First District. “The owner of such a property is therefore not entitled to a certificate of compliance for each of the resulting separate parts.”

The case involved a 586-acre tract of land now owned by the Ronald and Shirley Nunn along Vasco Road in Contra Coasta County. In 1997, the Contra Costa Water District acquired 20,000 acres from 40 property owners to construct a dam. The property now owned by the Nunns was cut into four non-contiguous pieces in order to relocate Vasco Road and build an underground pipeline. The predecessor property owners were awarded \$964,000 in compensation under eminent domain.

“We hold that a ‘division’ of property within the meaning of the [Subdivision Map] Act does not occur simply because an eminent domain proceeding results in a physical separation of a property’s non-condemned portions,” the court wrote.

The Nunns acquired the property nine years later in 2006. The deed describes the property as a single parcel. In 2008, the Nunns applied to the county for a parcel map under the Subdivision Map Act, legally splitting the property into four lots and one remainder parcel.

Save Mount Diablo, a local citizen group, raised several objections to the application. The Nunns then abandoned the application and asked

the county to issue a “certificate of compliance” under Government Code Section 66499.5, a portion of the Subdivision Map Act, which states that a property owner does not need to file an approved map if the responsible agency – in this case Contra Costa Conclude – concludes that the property complies with the provisions of the Subdivision Map Act and the local subdivision ordinances.

The county planning staff rejected the request. The Nunns appealed to the Contra Costa County Planning Commission, which reversed. Save Mount Diablo appealed to the Contra Costa County Board of Supervisors which reversed again and issued the certificates. Save Mount Diablo sued and Contra Costa Superior Court Judge Laurel Brady overturned the county’s issuance of the permits. The Nunns then appealed.

The Nunns main argument was that the condemnation created a defactor division of their property into four parcels. While conceding that the Nunns’ property includes four separate pieces separated from one another, Justice Humes disagreed that the condemnation created four separate legal parcels. “Characterizing the parts of their property as parcels is of no legal consequence because

>>> Separation of Property by Condemnation Does Not Equal Subdivision

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no provision of the Act entitles real property to a certificate of compliance merely because it can be described as such,” he wrote. He also said the mere fact that pieces of property do not touch does not mean they are separate parcels.

The Nunns also argued that it would be unfair to them to require them to go through the parcel map process because they did not separate the property. Again, Humes noted that the fact that the Nunns did not initiate the separation does not mean the pieces

of the property are now legal parcels; and in fact he noted that, given the fact that the previous owners were paid almost \$1 million, “the Nunns presumably paid a reduced price for the property because of the condemnation.”

Also not applicable, Humes concluded was an exemption dealing with condemnation. But Humes noted that the exemption applies to property being conveyed by or to a government agency, not private property affected by condemnation.

The Case:

Save Mount Diablo v. Contra Costa County, No. A 142357

The Lawyers:

For Save Mount Diablo: Winter King, Shute, Mihaly & Weinberger, king@smwlaw.com

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For the Nunns: Michael Durkee, Nossaman: mdurkee@nossaman.com ■



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Q&A: Julia Lave Johnston

In a field that is often fragmented, Julia Lave Johnston has long acted as a unifying force for planners in California. Most recently, Johnston headed UC Davis Extension's program in continuing education for planners. She recently left that post to join the Institute for Local Government, a nonprofit organization affiliated with the League of California Cities that seeks to help cities achieve their planning goals, especially in the area of sustainability. As both an educator and a cheerleader of planning, Johnston brings nearly three decades of experience in local and state government to this role. She spoke with *CP&DR* about her new position and the state of the planning profession in California.

How was your tenure at UC Davis?

I was honored to work with the Natural Resources Program.

In the 1970s there were all these new planning regulations and requirements: CEQA, the general plan guidelines came out from OPR, and during the last Brown administration. There was a lot of technical assistance provided by the Governor's Office of Planning and Research to cities and counties around these new laws, but when the administration changed that technical assistance kind of dried up. The program at [UC Davis Extension](#) was founded to fill that gap.

One of the things that inspires me the most is working with planners. Not to sound Pollyannaish, but at the core they really do want to make the world a better place and improve their communities.

As your program helped planners do their jobs, what insights did you gain into the state of planning in California?

I started there during the recession. I had this interesting perspective being involved with the American Planning Association and watching the membership drop within the state, particularly in the Sacramento section, which lost a third of its members. Going into UC Davis, I knew there were fewer planners in the region, but I saw how dependent

planning and planning education is on the economy. Everyone said, "Here is this wonderful opportunity. We're not very busy now, so let's invest in next steps." Yet, there were no resources for planners to increase their knowledge or to think about these big-picture issues.

It cemented to me that there's this issue with how we fund planning, how we invest in professional development, particularly at the local level. Most of the resources go towards educating planners on things they need to know, like regulatory issues, and not so much on big-picture policy issues.

Are planners hungry for that information? Do they know what they are missing?

I think that they want the information. But I think that we as a society need to think about how we make this kind of information available.

UC Davis Extension is a self-supporting entity, so classes are not inexpensive. There are a lot of conferences and workshops that are funded by foundations or groups that have a certain point of view. I think planners are interested in high-quality, unbiased education. But it's dear. It's not considered a priority by the larger planning system.

That brings up something that Steve Sanders, who's now my supervisor at ILG, has talked about:

We've done a lot of research and done a lot of talking, but how do you actually help people implement it and make successful programs? It's not enough to just talk to them or put out a report. It's not even enough to have a class. That's just like a first step. There needs to be a comprehensive process to help implement wide-scale change.

What brought you to the [Institute for Local Government](#)?

I have a history of working for the state in policy development. I've had the pleasure of working with AB 32 scoping plan and SB 375 and the Blueprint program. I missed being part of the policy discussions and working with folks who are trying to make a difference on the

>>> Q&A: Julia Lave Johnston

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ground.

I turned 50 and said, “OK, 15 more years: what’s going to inspire me every day?” I decided that I want to make that connection between good policy and meeting the needs of the communities in California and improving the lives of people in California.

Institute for Local Government, which works with cities, counties, and special districts, was a nice fit. The focus here is identifying emerging issues: What are the opportunities? What are the challenges? How do we help elected officials and staff understand these issues?

I know it sounds a little like I’ve drunk the local government Kool-Aid. Both my parents have been city council members. My mom was on the planning commission for over a decade and served on a Local Agency Formation Commission. My father is a transportation engineer. I grew up in a house where there were dinnertime conversations about what was going on at the local level and what was happening at the state. I thought about how much of a commitment they made to their communities and what the potential was to make a difference at that level.

What’s changed since your time in state government? What new policies are you excited about?

It’s interesting to me both how much things change and how little they change. When I left, they were still debating how cap-and-trade would work. The funding battles had already started between state agencies and departments. That’s much more developed now.

Somehow there needs to be a way to fund good policy with a stable funding source. This is the ongoing dilemma at

“We’ve done a lot of research and done a lot of talking, but how do you actually help people implement it and make successful programs? It’s not enough to just talk to them or put out a report. It’s not even enough to have a class.”

the state level. Certainly cap-and-trade money, everybody wants it, everyone is trying to reconfigure programs to go after it.

I used to always try to explain to people about planning: planning should be a consistent story. In a general plan, everything needs to be consistent. The state needs to have policy that makes sense to people so that people understand the role that they can play. Oftentimes, there are so many starts and stops: now this is the criteria, now that is the criteria. While the criteria have changed and created new opportunities, it’s kind of left behind some of the good starts: the programs that were developed in the past that made sense to people and that

people were organizing around.

Affordable housing is a great example: The SGC money for affordable housing is a great opportunity (see [CP&DR coverage of AHSC program](#)). But let’s not forget that that doesn’t replace redevelopment funds. It’s not even a drop in the bucket. Let’s stop trying to find these band-aid solutions and take a step back and look at how we can really make a difference.

What is it about planning that prevents a coherent story from emerging or that allows good ideas to wither?

That is the question. I think it’s the positioning of planners in government. They don’t have a lot of control. There are a lot of interests when it comes to planning and development and land use and resource allocation. There are water wars and land wars.

In Oregon, they did their statewide land use plan. They always said that they were able to pull it off because there was a moment when not a lot of development was going on. Agriculture was where the money was, so there was

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this perfect window where everyone saw their interests in supporting that plan. California has never had a window when everyone was on the same page. I'm not so sure that with SB 375 there was actually that much agreement. If you read it closely, I think there's a lot of hidden implications in that law that show that people weren't really on the same page.

Long-term land use planning often takes a back seat to other big goals and interests. There's no advocate for good land use planning. There's federal laws to protect the fish, air, and water, but there's no regulatory system that guides good planning. There's all these other competing requirements, and I think sometimes land gets forgotten.

It may also be that land use planning is boring. People tell me that it's boring, no one really cares about it, it's too technical, it's too wonky, planners don't know how to speak to people. It may just be that we aren't effective in making our case and that people are more interested in the outcomes than in the foundations.

What's your agenda at ILG? What areas will you be focusing on?

We do a lot of work with ethics and good governance. The part that I'm focusing on is sustainability. We have a program called the Beacon Program. I think of it as like a LEED program whereby you qualify for different levels of recognition by doing things like establishing a baseline for energy use/GHG emissions, putting a plan in place to reduce energy use. Then there's a number of sustainable policy

categories: water, energy, land use. You reach different levels in those areas. It's supporting local governments and addressing some of these huge issues that they face.

We want to provide good information to help cities, counties, and special districts achieve whatever their goals are. The goals for every city go back to the basic tenets of sustainability: they want to be environmentally healthy, they want to be economically healthy, and they want to address the needs of all of their residents.

It's not enough just to provide information. There's a lot of good information, but how do you help people act on information? How do you build networks of support across cities and counties with best practices? How do you adapt them for your own use?

What's one wish for better governance in California?

I would like to see more of a partnership develop between the state and local government. I think the state and local jurisdictions have the same goals. But I think that they sometimes get caught up in arguing about how to reach them. I think there are opportunities for better collaboration. The state wants to meet its goals, so sometimes it tries to be too prescriptive for local governments. Local governments are concerned about one-size-fits all. They want to maintain the flexibility to make the best decisions for their communities. Within that space, there's a lot of opportunity to collaborate.

Conducted in June, this interview has been edited and condensed ■



>>> With AB 744, State Steps Into Parking Fray

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Kang of Domus Development, who also heads the Council of Infill Builders, which was the principal sponsor of the bill. “We’re going to have...much more walkable neighborhoods. We’ll have better architecture because we’re not dedicating so much space to empty parking spaces and curb cuts.”

Local officials are understandably skeptical, fearing that rather than change their modes of transportation, residents and employees will simply hunt for street parking.

“I think they [local officials] resist this kind of formula from state law that when you try to apply it across a state of 38 million people, in some areas it’s not going to make any difference because there’s plenty of parking around,” said Dan Carrigg, senior director of legislative affairs for the League of California Cities. “In other areas where it’s dense or maybe preexisting problems to fit new development with what’s perceived as inadequate parking is going to be a problem.”

While developers have wanted to reduce costs from the beginning of time, a new regulatory environment and new funding sources gave AB 744 greater urgency. The maturation of the state’s Sustainable Communities Strategies has made cities more eager to implement regulations that might curb greenhouse gas emissions. And cap-and-trade funds are now available to support projects that discourage the use of personal automobiles under programs like the [Affordable Housing and Sustainable Communities](#) grant program.

“AB 744 fits within that construct because it’s an implementation tool to get us what we need, i.e. reduced greenhouse gases,” said Kang.

AB 744 promises to be a remedy for planners and developers alike who have grown weary in project-by-project battles over parking-related variances.

“We’re talking about being able to sometimes fit another 30 parking spaces into a building that was going to be 100 units that can now be 130 because the ground floor is no longer podium parking,” said Stuart Cohen, executive director of the advocacy group TransForm.

“Local agencies and affordable housing developers eventually got to these standards, but it was a variance process,” said John Terrell, vice president for policy and legislation of the American Planning Association, California Chapter. “Time is money. If you’re getting to that end point anyway, how do you make it easier for everybody?”

If a project meets AB 744’s criteria, parking relief must be granted – regardless of ideology. For planners and elected

officials, this means no parking studies, no haggling over local impacts, and no answering to stakeholders.

“Because the state is taking this role, many local officials can essentially say this decision is out of my hands,” said Kang. “The state...you can blame the governor. You take the heat off the individual elected or commissioner because the state has intervened.”

AB 744 came about in part because of a truce in an unlikely four-year-old rivalry.

Four years ago, the campaign for Assembly Bill 710, also backed by the Council of Infill Builders, opened an unexpected rift between unlikely adversaries: affordable housing developers and proponents of infill development (see [CP&DR coverage](#)). AB 710 was the first earnest legitimately attempt to reduce parking at the statewide level. It failed in part because of opposition from affordable housing developers. They were not necessarily opposed to infill development; rather, they were protecting turf staked out for them in an existing law, Senate Bill 1818.

SB 1818 uses reduced parking minimums as one of many incentives to encourage developers to create subsidized affordable housing. Affordable housing developers argued that, whatever its intentions, AB 710 would have effectively eliminated what they considered an important piece of an important law. That’s why AB 744’s supporters designed it as an amendment to SB 1818, focusing their incentives

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>>> With AB 744, State Steps Into Parking Fray

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narrowly to support affordable housing rather than compete with it.

“The big focus on AB 744 was to cater it to include affordable housing,” said Kang.

That change, narrowly applied, enabled this year’s bill to “hit the sweet spot,” according to Cohen. “It’s not necessarily the only piece of parking-related legislation we’ll ever need, but it’s an excellent start,” said Cohen.

Numerous affordable housing developers and associations thereof supported AB 744, as did a wide range of bicycle and pedestrian advocates, environmental groups, and municipalities. Shoup himself was a supporter.

The relationship between AB 744 and SB 1818 also addresses a common concern about transit oriented development. Affordable housing and social justice advocates have long contended that market-rate housing near transit stops tends not only to displace low-income residents but also reduce transit ridership because wealthy residents tend to drive cars even when transit is available.

“What’s really wonderful about the bill that we chose to amend, which is SB 1818...in that there are provisions to protect displacement,” said Kang. “It requires that a developer is relocating or gentrifying a neighborhood that they provide replacement housing under the statute.”

Nonetheless, concerns remain about AB 744. Two dozen or so entities, mostly suburban cities, opposed the bill. Encinitas Deputy Mayor Catherine Blakespear added that, though Encinitas has a commuter rail station, its train service is not on par with that of an urban transit system.

“We have a train station, but the frequency of the train and the reality of where people need to go using the train exclusively it’s really not practical,” said Blakespear. The City of Encinitas was one of the cities that opposed AB 744.

“I think they [local officials] resist this kind of formula from state law that when you try to apply it across a state of 38 million people,” says Dan Carrigg of the League of California Cities.

AB 744 does have an escape clause: Communities that are concerned about spillover parking can commission a parking study and, based on the study’s results, exempt neighborhoods from AB 744.

“Having it just handled once and for all as statewide standard makes it easier for the development community”, said Terrell. “It’s very important to us to allow the local agencies if they felt there were

unique circumstances to do a study on their own and justify a higher standard.”

Opponents reject this provision as burdensome and impractical.

“You have a lot of micro-environments in a city,” said Carrigg. “They’re going to have to spend a lot of money paying for consultants to end up with ordinances close to what they have today.”

Carrigg added that AB 744’s default provisions could backfire by cutting stakeholders out of the discussion.

“What happens when the citizens feel that those in charge aren’t looking out for the interest of the community?” said Carrigg. “They’ll look at ballot measures locally. There are options the public has if they don’t like the way land use decisions are going.”

Contacts & Resources

[AB 744 Text and History](#)

[Catherine Blakespear](#), Deputy Mayor, City of Encinitas

[Dan Carrigg](#), Senior Director of Legislative Affairs, League of California Cities

[Stuart Cohen](#), Executive Director, TransForm

[Meea Kang](#), Director, Council of Infill Builders

[John Terrell](#), Vice President for Policy and Legislation, American Planning Association, California Chapter, ■

>>> The Tech Housing Crunch's Fracking Dilemma

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– thousands – *millions?* – of startups trying to be the Uber or AirBNB of [name your activity]. And it highlights a sudden and enormous challenge that planners in California are facing. Planners, for the most part, write and implement regulations that seek to plan for and control land uses. They do so for a variety of well-established reasons – ensuring that public health and safety are protected, but also helping to stimulate, shape, and channel the supply of built space so that the interests of a given community are balanced against the demands of the marketplace.

But how can you possibly plan for and control land uses when every bedroom is a hotel room, and every dining room is a restaurant, and every coffee shop is an office, and conversely every office is a potential living room or dining room or bedroom?

The answer, of course, is that you can't. And talk about *disruptive*. It's hard to imagine anything more disruptive to planning in California. Because planning for a presumed set of land uses drives everything else. The whole California planning system, created mostly in the 1970s, is based on the assumption that land uses will be rigidly separated – and the idea that you can predict everything as a result.

The needs for parks, libraries, schools, and lots of other public facilities is all based on formulas tied to land uses. Residential densities determine the number of housing units (based on formulas tied to land use), which in turn determines the need for all these facilities (based on formulas that assume household size and composition), which in turn determines the need for both public investment and impact fees.

Even the need for road improvements – maybe the biggest driver of planning in California – is based on assumptions about different land uses. Road improvements are based on traffic estimates, which in turn are based on formulas about how much traffic is created by different land uses – single-family homes, apartments, office buildings, restaurants, and so on.

Indeed, even mitigations under the California Environmental Quality Act – the most powerful and legally binding tool in the California planning toolkit – is based on all kinds of assumptions about how different land uses will

affect everything from traffic to the waste stream.

The pending update to the General Plan guidelines [http://www.opr.ca.gov/docs/DRAFT_General_Plan_Guidelines_for_public_comment_2015.pdf] devotes many pages to land use requirements embedded in state law, including maps, density, intensity, and the impact thereof. It doesn't say anything about AirBNB.

In a certain way, this is pretty liberating for planners – kind of an extension of the form-based code movement, which focuses more on urban design than on the specific uses contained within buildings. Instead of micro-managing private development through regulation, California's planners could rediscover the kind of planning that originated with Daniel Burnham and the Olmsteads: Focusing on created a beautiful and well-functioning public realm, around which the developers can build private projects that respond to the market.

Which might be fine except for two things. And these two things reveal the emerging conflict in the planning of California communities.

First is the well-established desire of longtime residents – especially “Boomers or older” folks in affluent communities – to use the planning process to restrict additional development. These folks exert outsized influence on planning in the typical California community, especially compared with people who don't yet live there because the development projects they would live in haven't been built yet. The “regulatory generation” doesn't want change, and over the past 40 years they have been very effective in restricting both the type and the amount of development – especially residential development – in communities throughout California.

Second is the growing concern by Millennials that they are getting aced out of the housing market – especially in the Bay Area, where the success of tech companies appears to be driving housing prices through the roof. One recent study [http://sf.curbed.com/archives/2015/09/22/are_sfs_crazy_high_rents_due_to_venture_capital_investment.php] concluded that a third of San Francisco's housing price inflation is due to presence of venture capital. Even *The Onion* recently got into the act, publishing a fictitious

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news story saying that home prices were rapidly escalating in Oakland because a tech worker strolled around and decided he liked it. [<http://www.theonion.com/article/housing-prices-spike-tech-employee-takes-stroll-th-51813>]

The result is that tech workers busily trying to create the next AirBNB are getting priced out of the Bay Area housing market, perhaps because of the very disruptive apps they are creating.

Being tech workers, their general reaction has been to suggest eliminating the arcane regulations created by their parents and grandparents, goosing density, and unleashing the power of long-suppressed housing demand. (The archetypal argument of this kind was put forth by Kim-Mai Cutler, the public policy writer for Tech Crunch, in her now-famous primer on the subject, “How Burrowing Owls Lead To Vomiting Anarchists (Or SF’s Housing Crisis Explained)” [<http://techcrunch.com/2014/04/14/sf-housing/>])

There’s no doubt that over-regulation has skewed the housing market, especially in the Bay Area. But at a time of such extreme income inequality, can the market really be *unskewed* by unleashing the power of the market – given the fact that a small percentage of the population possesses most of the buying power?

That’s the dilemma of the tech housing crunch: If you build more housing for tech workers, won’t those same tech workers just create new apps to disrupt the balance once again – to the benefit of well-off folks, at the expense of everybody else, including most of the tech workers? It’s a little like the Gold Rush, when hydraulic mining was all the rage.

The fracking of its time, hydraulic mining extracted gold from the Sierra Nevadas by using high-pressure nozzles to literally hose down the mountains, so that the mountains washed away and the gold remained. Marysville, in particular, became a rich city by manufacturing the hoses

It’s hard to imagine anything more disruptive to planning in California than an AirBNB or Uber for everything.

and nozzles and providing the miners with the supplies they needed. The resulting runoff caused the water level in the Feather and Yuba Rivers to rise so much that flooding became endemic in ... Marysville. Literally flooded by its own success, Marysville built a massive set of levees to protect it from the deluge – levees which are still necessary today, because the water level in the rivers is still higher than normal, 130 years after hydraulic mining was outlawed. (I wrote at

length about hydraulic mining and Marysville – as well as the connection between the Gold Rush and the modern tech economy -- in my book *California: Land and Legacy*, [<http://www.amazon.com/California-Legacy-William-B-Fulton/dp/1565792815>])

The regulatory generation’s immediate impulse in San Francisco has been to build the equivalent of Marysville’s massive set of levees – primarily by blocking as much market-rate housing development as possible and favoring off-market affordable housing instead. This was the impulse behind the recent failed ballot initiative in the Mission District, which would have completely prohibited market-rate development and permitted only affordable housing instead. [<http://www.cp-dr.com/node/3822>] San Francisco has a long history of this kind of intervention, going back to the first hotel conversion fees in 1981, and there is no doubt that building a lot of affordable housing in San Francisco is a good thing to do. But does it make sense to try to protect workers in the hottest business sector in the world by shutting down the private real estate market completely? Maybe that’s just the ironic result of locating the hottest business sector in the world in the most regulation-friendly city in the United States.

One thing I have learned over the years is that, worthwhile though land-use regulation can be at times, if you completely contravene the market forces at work you will fail to accomplish your goal. Either the power of the market will force the politicians to overturn the regulation in question, as often happens when developers are granted

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variances; or else the regulation will become fossilized in a way that creates perverse outcomes, as is the case with New York City's rent control system, which was originally created 70 years ago to deal with a World War II housing shortage. In other words, if you're not careful, you'll get hosed, just like Marysville did.

So the solution in San Francisco and elsewhere simply *has* to unleash the market in some way – to allow developers to respond to the market by allowing more density, or at least more housing units of some kind (even if they are small units), than is permitted under current zoning. But that same solution also has to tame the market in some way – not by suppressing

If you build more housing for tech workers, won't those same tech workers just create new apps to disrupt the balance once again

development but by focusing on affordable housing and developments with a mix of incomes, densities, and housing types wherever possible. As for AirBNB, there's probably no way to stop it – but maybe you could use the revenue stream of transient occupancy tax from AirBNB to build or maintain actual residential housing elsewhere in the city.

And, like it or not, we all probably have to recognize that, in some situations, you just can't build enough housing – or, at least, enough housing of the right type – fast enough. No matter what the general plan guidelines say ■

