CP&DR

VOL. 31, NO. 3 — MAR 2016

CALIFORNIA PLANNING & DEVELOPMENT REPORT

California Cities Join Global Urban Resilience Movement

BY JOSH STEPHENS

Coastal California has long been known for harrowing natural hazards: wildfires, drought, floods, the occasional tsunami, and, of course, earthquakes. It has also developed some serious human-made hazards too: chronic poverty, sea level rise, crime, pollution, riots, fragile energy grids, stratospheric housing costs, among others.

The state is, as urban theorist Mike Davis put it, steeped in "the ecology of fear." Armed with new data and strategies, cities are trying to ease their anxieties.

"Resilience" refers to cities' ability to weather and recover from discrete "shocks," such as earthquakes, and chronic "stresses," such as poverty and the predicted effects of climate change. California has become Ground Zero in the resilience movement.

Four California cities — Berkeley, Los Angeles, Oakland, and San Francisco — have appointed "chief resilience officers" as part of a worldwide experiment in hazard mitigation and bureaucratic reform sponsored by New York-based nonprofit 100 Resilient Cities (100RC), project of the Rockefeller Foundation.

"Being a state that has experienced many disasters… California cities are ahead of the curve," said Corinne Letourneau, associate director for city relationships at 100RC.

– CONTINUED ON PAGE 18

insight

WILLIAM FULTON

The Tuolumne Tactic For Tax Increases

So, why does a court ruling on a medical marijuana ban in Upland affect the Chargers ability to build a new stadium in San Diego?

For the same reason that construction of a Wal-Mart in Sonora affects the Rams ability to build a new stadium in Inglewood, which is:

The apparently magical power of the initiative process to end-run two generations

– CONTINUED ON PAGE 22

inside

L.A. Metro Seeks Ballot Measure to Fund $120 Billion in Projects

The Los Angeles County Metropolitan Transportation Authority released a $120-plus billion spending plan for a potential sales tax initiative on the countywide ballot in November. The plan devotes funds to pedestrian and cycling projects, commuter rail, transit operations and programs, as well as money for local cities for their own projects. The measure is a follow-up to 2008's Measure R, which added a half-cent to countywide sales tax and has already funded numerous transportation projects. Among dozens of proposed projects large and small, a few major proposed public transit projects include accelerated development of an extension of the Purple Line subway to Westwood, a rail tunnel under the Sepulveda Pass, light-rail between Artesia and South Gate, 710 South improving congestion, an added lane on the 5 freeway in Santa Clarita, extensions to the Green Line to Torrance, extension of Eastside Gold Line to Whittier, and a transit hub at LAX. Highway projects include expanded HOV connectors across the county, and purchase of land for the proposed High Desert Corridor. The measure would ask voters to increase countywide sales tax by half-cent for 40 years; it requires a two-thirds majority. Click here for the full staff report and list of proposed projects.

Chargers Pursue New Stadium in S.D.

Having failed in their bid to relocate to Los Angeles, the San Diego Chargers will pursue a new stadium and convention center in downtown San Diego. The proposal flouts Mayor Kevin Faulconer's proposal for the team to remain in Mission Valley in a replacement for Qualcomm Stadium. The Chargers' project will go before voters, and free the Qualcomm center for UC San Diego and San Diego State University. The Chargers' project may receive public funds from a voter-approved TOT increase that can receive tax money from hotels. The Chargers will receive $100 million grant and $200 million loan from the NFL for not sharing the Inglewood stadium that will be occupied by the relocating Los Angeles Rams. There seems to be voter reluctance on grand expenditures, but the team hopes the center can bring economic activity year round such as Comic Con, Super bowls and other large events. The Chargers have indicated that they may pursue the "Tuolumne Tactic" to avoid CEQA review by proposing a ballot initiative for voter approval; this would permit the City Council to approve CEQA exemptions even before a popular vote takes place.

L.A. Slow-Growth Initiative Postponed, Revised

The Coalition to Preserve L.A. has announced it will postpone the Neighborhood Integrity Initiative, a proposed ballot initiative that would have deep ramifications or planning in Los Angeles, until March 2017. The coalition also revised the original 26-page initiative to eight pages. The coalition is concerned that the initiate would get lost among the 20 or so measures on the November citywide ballot. Campaign director Jill Stewart explained: "Our initiative is too important to be buried at the tail-end of this November's ballot, which is beginning to look like it will be." The group is particularly concerned about what it describes as "mega-projects" that do not conform to community plans are out of character with surrounding neighborhoods. The initiative would prohibit the City Council from approving general plan amendments for specific projects, commonly known as "spot zoning," for a two-year period and requires the city to update its General Plan. The new version removes some constraints on the general plan update process. The initiative requires 61,000 valid signatures to get on the ballot. (See prior CP&DR coverage.)

Groups Promote Fracking Ban in Monterey County

Environmental groups are promoting a ballot measure to ban fracking and new oil drilling in Monterey County. Similar bans are in place in Santa Cruz, San Benito, and Mendocino counties. Supporters of the measure

– CONTINUED ON PAGE 3

CP&DR

William Fulton
Editor & Publisher

Josh Stephens,
Morris Newman, Kenneth Jost
Contributing Editors

Susan Klipp
Fiscal Officer

Talon Klipp
Office Manager
Graphics & Website

is published semi-monthly by

Solimar Research Group
Post Office Box 24618
Ventura, California 93002

Phone / Fax: 805.652.0695

Subscription Price: $238 per year

ISSN No. 0891-382X

Visit our website:
WWW.CP-DR.COM

You may e-mail us at:
INFO@CP-DR.COM

– CONTINUED FROM PAGE 2

say it is to reduce risk of groundwater pollution and have until early May to collect 7,391 signatures. Those against say the proponents want to end California oil production, which will require importing foreign oil. There have been numerous proposals: Sierra Club wants to ban fracking in Santa Clara County, Santa Barbara County voters rejected a ban in 2014, and Monterey County supervisors voted 3-2 against a ban last year. Monterey County is the fourth largest oil-producing county with nearly 1,200 wells, supporting 1,941 jobs and generating $138 million in state and local taxes.

Mobility Plan Would Put Downtown San Diego on Road Diet

The San Diego City Council is considering a Downtown Mobility Plan that would introduce a new network of 9.3 miles of protected bike lanes, 5.5 miles of pedestrian greenways, curb bulb-outs, road diets, and more. The city estimates the plan will cost just under $64 million. Funding is not a significant barrier as local sales tax pays for active transportation projects and the regional planning agency sets aside funds to encourage biking and walking. The public has until March 11 to give comments; the City Council will vote in May.

High Speed Rail Authority Prevails in Suit

The California High Speed Rail Authority won a court victory when Sacramento County Superior Court Judge Michael Kenny ruled farmers and other plaintiffs in Kings County had not presented enough evidence to support their claim that the state's high speed rail project had violated the terms of 2008's Proposition 1A. Kenny wrote, "there are still too many unknown variables" and therefore does not constitute sufficient grounds for the suit. The ruling implies that plaintiffs may reopen the case in the future if the project does not comply with requirements of the bond measure. The rail authority still must comply with the bond measure's requirements, including target travel times, ridership, headways, and financial self-sufficiency.

Report Details Consequences of California Housing Shortage

Bay Area think-tank Next 10 released a report predicting that California's housing shortage will impose serious economic consequences on the state. In the ten years between 2005 and 2015, only 21.5 permits were issued per 100 people in the state. The report finds that in urban areas, 45 percent of developers say costs, neighbor opposition or both are reasons they do not proceed with infill projects. Other challenges area CEQA, zoning and potential lawsuits, and Proposition 13 which limits property-tax increases could switch cities from building homes to retail projects. The study found that California has some of the highest rates of post-recession job growth in the nation but also lost 625,000 people to other states. Housing costs in California are the highest in the nation, approximately 35.7 percent more than the national average. "California has an employment boom with a housing problem," said Christopher Thornberg, co-author of the report. "The state continues to offer great employment opportunities for all kinds of workers. But housing affordability and supply represent a major problem."

Light Rail to Asuza Opens; to Santa Monica May 20

Connecting downtown Los Angeles with Santa Monica, the Expo Line light rail will open May 20. The 6.6-mile extension cost $1.5 billion and will follow closely to the 10-freeway before ending at Fourth Street and Colorado Avenue, a short half-mile to the Pacific Ocean. Meanwhile, Metro celebrated the opening of the Gold Line Extension Project last March 5. The 11.5 mile light-rail line will connect Pasadena to Azusa going through Arcadia, Monrovia, Duarte/City of Hope, Irwindale, and Azusa Pacific University/Citrus College; it extends the first phase of the Gold Line, which runs from downtown Los Angeles to Pasadena. The extension includes six new stations with intermodal park and ride facilities. The extension was funded through Measure R sales tax.

Anaheim Releases Proposed Streetcar Route

The City of Anaheim released a route for its proposed streetcar. The route would connect the ARTIC transit center in Anaheim to Disneyland and the Convention Center. The project could cost approximately $298.7 million and $4.3 million to operate annually. The 3.2-mile route would have eight stops and carry 120 passengers along the 18-minute trip. But many are opposed citing increased costs and traffic as drivers idle behind the streetcars. The plan will be reviewed by the city council March 14. Disneyland Resort wants to construct its own transportation center for drop-offs and build a new 6,800 space parking structure. The

– CONTINUED ON PAGE 4

– CONTINUED FROM PAGE 3

city projects that 1.25 million annual passengers could ride the route by 2035, by which time the Platinum Triangle area is expected to have 25,000 residents, complementing Disneyland's 25 million annual visitors.

Santa Monica Faces Slow-Growth Ballot Measure

Slow-growth advocates in Santa Monica have introduced the latest in a series of initiatives and protests designed to discourage what they see as overbuilding in the city. The Land Use Voters Empowerment (LUVE), sponsored by the group Residocracy, would require public vote on large and medium-size developments in the city. It would amend the city's zoning code to require a vote on all projects over two stories and on any project that seeks a development agreement. A majority of City Council opposes the measure, as they said it would give developers added power and influence in their politics. Residocracy hopes the measure will slow development in an already congested city. At least 6,500 signatures are to put it on the November ballot. (See prior CP&DR coverage.)

Group Sues Over Alleged Coastal Act Violations

A Venice Beach-based neighborhood group has filed a civil complaint lawsuit against the City of Los Angeles for destroying the community, violating California Constitution and the CA Coastal Act, and local land use protections, according to the suit. Venice Coalition to Preserve Unique Community Character (VC-PUCC) contends that the city planners have approved countless large construction projects that have, according to VC-PUCC, "destroyed character, density, and charm of Venice neighborhoods; blocked airflow and sunlight; destroyed vegetation; obstructed picturesque views; and eliminated affordable housing units in this fragile and unique coastal zone." The group claims it is most alarmed by the "Venice Sign Off" procedure that has allowed developers to construct without notifying neighbors or holding public hearings and the hundreds of illegal Coastal Act exemptions. The group is seeking an injunction that would prevent the city from approving additional exemptions to coastal-area zoning restrictions and prevent administrative sign-offs. ■

legal digest

City Doesn't Inherit Redevelopment Affordable Housing Obligations

BY WILLIAM FULTON

In the latest chapter of a long-running legal battle over affordable housing and redevelopment in Fontana, the Fourth District Court of Appeal has ruled that the city is not required to take on the former redevelopment agency's affordable housing obligations.

"Under the scheme adopted by the Legislature under AB 26 [the law abolishing redevelopment], the liabilities of dissolved RA's [redevelopment agencies] are limited to the assets transferred to successor agencies," wrote Acting Presiding Justice Patricia Benke for a unanimous three-judge panel. "There is nothing in AB 26, or later amendments, that would exend that liability beyond an RA's assets to municipalities and their general funds." Prior to the dissolution of redevelopment agencies, Benke noted, low- and moderate-income liabilities "were never the liabilities of municipalities and their general funds."

Fontana's redevelopment agency had a long and litigious history in dealing with state affordable housing requirements. As laid out in a previous case, Fontana Redevelopment Agency v. Torres, 153 Cal.App.4th 902 (2007), the agency did not meet its low- and moderate-income housing obligation – in large part because of a complicated 1992 agreement with a developer that was a predecessor in interest to an entity now known as Ten-Ninety Ltd.

In 1992, the agency agreed to give its tax increment to a third-party fiscal agent, which would provide 65% of the money to Ten-Ninety to build infrastructure and housing in the Jurupa Hills area and 35% to the city and the agency. The 1992 Owner Participation Agreement stated that the infrastructure Ten-Ninety would build would support affordable housing and therefore payments to Ten-Ninety "counted" toward the fulfilling the city's low- and moderate-income housing requirement. Payments to the city were regarded as compensation for fiscal costs associated with Ten-Ninety's development. A validation lawsuit upheld the agreement under the Code of Civil Procedure.

Subsequently, the Department of Housing & Community Development Department audited Fontana's redevelopment agency and concluded that the agency needed to reimburse its low-mod housing funds by $67 million. Subsequently HCD and the Fontana agency entered into a development agreement to pay $6.1 million into one of the funds and the agency also agreed to float $40 million in bonds to pay Ten-Ninety. In the 2007 appellate ruling on these actions, known commonly as *Fontana I*, the court found an ongoing "lack of compliance" with the affordable housing requirement and permitted litigation on the most recent actions to go forward.

Eight days before AB 26 became effective in 2011, citizens in Fontana – backed by the Western Center for Law & Poverty – sued again, claiming the agency had continually shorted the low- and moderate-income housing funds between 2010 and 2010. Subsequently, the city became the successor agency while the Fontana Housing Authority became the housing successor agency. The plaintiffs amended their lawsuit to make the city and the housing authority the defendants. A trial judge ruled that the city is not liable for the redevel-

– CONTINUED ON PAGE 6

>>> City Doesn't Inherit Redevelopment Affordable Housing Obligations

– CONTINUED FROM PAGE 5

opment agency's liabilities and the appellate court agreed.

Relying heavily on *Pacific States Enterprises Inc. v. City of Coachella*, 13 Cal.App.4th 1414 (1993), the Fourth District said: "An RA and a municipality may, as here, have the same governing body; however, given their separate identities and liabilities, the statutory duties imposed on the RA may not be ascribed to the municipality. In this regard, we note that the low- and moderate-income housing obligation of RA's was defined as a percentage of tax increment revenues received by RA's. Plainly, given this definition, this obligation was never considered one imposed on a city's general fund."

The court also rejected the idea that AB 26 placed the low- and moderate-income housing obligation on cities, even though AB 1484 – the 2012 law that amended AB 26 – defined cities and counties as including former redevelopment agencies for the purpose of audits. "Given that the expressed intention of AB 26 was to assist local municipalities in meeting their fiscal needs in a time of economic crisis," Benke wrote, "it would be incongruous to interpret either AB 26 or AB 1484 in a manner that expanded their liability to include responsibility for low- and moderate-income housing obligations that had never previously been imposed on them."

Eight days before AB 26 became effective in 2011, citizens in Fontana – backed by the Western Center for Law & Poverty – sued again, claiming the agency had continually shorted the low- and moderate-income housing funds

The court also rejected the argument that the city had an obligation to affordable housing because of it was a signatory to the 1992 OPA. "Having relied on the validation judgment in taking those funds, the city cannot now be asked to return those funds without directly undermining the validation judgment," Benke wrote.

The Case:

Virginia Macy v. City of Fontana, D068508

The Lawyers:

For Virginia Macy: S. Lynn Martinez, Western Center on Law and Poverty, slmartinez@wclp.org

For City of Fontana: Victor L. Wolf, Best Best & Krieger, Victor.Wolf@bbklaw.com ■

Denial of Upzoning Might Create Disparate Impact Under Fair Housing Act, Ninth Circuit Rules

BY WILLIAM FULTON

The Ninth U.S. Circuit Court of Appeals has reversed a trial judge and ruled that the City of Yuma's refusal to approve an upzoning might constitute a disparate racial impact under the federal Fair Housing Act.

The case involved a request by development entities associated with Hall Construction, as well as the underlying property owner Avenue 6E, to allow 6,000-square-foot lots rather than 8,000-square-foot lots in a neighborhood in southeastern Yuma, a city on the border of both California and Mexico. Both lot sizes are permitted under the city's general plan.

Writing for the the Ninth Circuit, veteran Circuit Judge Stephen Reinhardt, the last remaining federal appeals judge appointed by Jimmy Carter, concluded that the allegations made by the developers "provide plausible circumstantial evidence that community opposition to Developers' proposed development was motivated in part by animus, and that the City Council was fully aware of these concerns when it took the highly unusual step of acceding to the opposition and overruling the recommendations of its zoning commission and planning staff."

The Ninth Circuit remanded the case to District Judge John Sedwick, an Alaska judge who heard the case in Arizona. The appellate court acknowledged that the parties may have to re-brief the case in light of the U.S. Supreme Court's ruling last year in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. ___ (2015), which was decided after briefing in the Yuma case and dealt with disparate impact.

The Yuma case involved a 42-acre property in mostly white southeast Yuma to be developed by entities associated with Hall Construction, which has built many downmarket housing projects in Yuma. After the 2008 housing crash, the Hall entities and the landowner they partnered with sought a zone change from R-1-8 (8,000-square-foot lots) to R-1-6 (6,000-square-foot lots), both of which were permitted by the city's general plan's "low-density residential" designation. The Planning and Zoning Commission recommended approval of the project, as did the city staff.

However, the proposal faced significant community opposition in front of the Yuma City Council. Many residents complained that "Hall neighborhoods" throughout Yuma, many of which have mostly Hispanic populations, had higher rates of crime and "unattended juveniles" and expressed concern that the same would occur in their neighborhood if the 6,000-square-foot lots were built. At the hearing, Hall proposed a buffer area of 8,000-square-foot lots separating the project from surrounding subdivisions but one landowner complained that while the buffer would create a smooth transition in terms of lots size, it would not do so in terms of "ownership demographics".

The City Council turned down the rezoning request – the only one of 76 rezoning requests in the previous three years to be rejected.

The developers then sued in federal court under the Equal Protection Clause of the Constitution and the Fair Housing Act, claiming disparate impact and disparate treatment. Judge Sedwick granted the city's motion to dismiss the disparate treatment claims. The developers then asked for leave to amend the claim to include additional facts – for example, the only denial in 76 cases in three years – but Sedwick denied that request as futile. Sedwick then granted a summary judgment claim from the city, saying that there was an adequate supply of similarly priced and similarly modeled housing in southeast Yuma.

On appeal, the Ninth Circuit ruled that the developer's requested amendment to its claim would not have been futile and reversed the dismissal of the disparate impact claim, remanding the case back to Sedwick.

Quoting *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977), Reinhardt wrote that the developer needed to " 'simply produce direct

– CONTINUED ON PAGE 8

>>> Denial of Upzoning Might Create Disparate Impact Under Fair Housing Act, Ninth Circuit Rules

– CONTINUED FROM PAGE 7

or circumstantial evidence that a discriminatory reason more likely than mot motivated' the defendant and that the defendant's actions adversely affected the plaintiff in some way."

Reinhardt acknowledged that "[n]one of the alleged statements expressly refers to race or national origin; rather, they raise various concerns about issues including large families, unattended children, parking, and crime." Referencing *Galdamez v. Potter*, 415 F.3d 1015 (2005), he added: "We have held, however, that the case of 'code words' may demonstrate discriminatory intent." He then noted that project opponents complained about cars parked in streets and yards, failure to maintain residence, and unattended children, noting that several landowners brought pictures of another Hall neighborhood in which 77% of the homebuyers are Hispanic.

Reinhardt said this provides plausible evidence that disparate impact was at play. "That the facts alleged here are not as egregious as the facts in other cases in which plaintiffs prevailed is of no consequence," he wrote. "Developers need not demonstrate a complete absence of desired housing for Hispanics to prevail; discriminatory zoning practices violate the FHA even if they only 'contribute' to 'mak[ing] unavailable or deny[ing] housing'" to protected individuals.

One landowner complained that while the buffer would create a smooth transition in terms of lots size, it would not do so in terms of "ownership demographics".

Judge Sedwick had concluded that there was an adequate supply of comparable housing in southeast Yuma and therefore no disparate impact was involved, relying on *Hallmark Developers Inc. v. Fulton County*, 466 F.3d 1276 (11th Cir. 2006). But in the Ninth Circuit ruling, Reinhardt said: "The *Hallmark* rule ignores the fact that neighborhoods change from mile to mile, if not from block to block, and thereby overlooks the potential for the purposeful creation of majority areas with few, if any, white homeowners." He noted that if truly comparable housing is available in close proximity to the Hall property, that would be a relevant factor on the disparate impact analysis. But he also said that good schools, infrastructure, public transportation, and proximity to amenities might also be factors.

The Case:

Avenue 6E Investments LLC v. City of Yuma, Ninth Circuit No. 13-16159

The Lawyers:

For Avenue 6E: Elaine Brancart, Brancart & Brancart, ebrancart@brancart.com

For City of Yuma: Andrew M. Jacobs, Smith & Wilmer, ajacobs@swlaw.com ■

Justice Thomas Wants To Go After *Nollen/Dolan*

BY CP&DR STAFF

The U.S. Supreme Court has not decided not to take the appeal of *California Building Industry Association v. City of San Jose*, the case in which the California Supreme Court upheld San Jose's inclusionary housing requirement. But the court was not completely silent.

In concurring with the decision to pass on the case – a decision that not accompanied by a written opinion by the court -- Justice Clarence Thomas said he believes that the question of whether disproportionate exactions can be imposed on developers in legislative actions – as opposed to quasi-judicial action – is not settled.

In the California Supreme Court's ruling last year in *CBIA v. City of San Jose*, Chief Justice Tani Cantil-Sakauye found that the city's inclusionary housing requirement was not an exaction but, rather, a land-use regulation no different than rent control, which simply places a restriction on the use of land in the public interest. In so doing, she quoted the late Justice Antonin Scalia's opinion in*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which held that an exaction had to have a direct nexus to the project in order to avoid a taking.

In referring to the Nollen case, the chief justice made a big deal out of quoting Scalia as saying that an exaction "where the actual conveyance of property is made a condition for the lifting of a land-use restriction, since in that context there is heightened risk that the [government's] purpose is avoidance of the compensation requirement, rather than the stated police-power objective" upon which the condition is ostensibly based. She noted that the San Jose inclusionary housing ordinance did not require conveyance of property.

As Bill Fulton pointed out when Scalia died two weeks ago, Nollan was the irascible justice's first big Supreme Court opinion, and it helped topple William Brennan as the intellectual leader of the court. So maybe that's why the normally reticent Thomas, Scalia's closest colleague on the court, spoke out in the San Jose case when nobody else did.

Noting that the so-called *Nollan/Dolan* line of cases suggests that the direct nexus and rough proportionality test for exactions doesn't apply when dealing with a legislative – as opposed to quasi-judicial – action, he wrote: "I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.' Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity."

He noted that CBIA doesn't present the opportunity to resolve this issue, but he clearly wished that it did. ■

Psychological Damage In Loss of Horse Stable Not A CEQA Matter, Court Rules

BY WILLIAM FULTON

Psychological Damage In Loss of Horse Stable Not A CEQA Matter, Court Rules

By William Fulton

Resident concerns about the social and psychological impact associated with the conversion of a horse-boarding facility to a 12-lot subdivision do not constitute a "community character" issue requiring an environmental impact report, the Fourth District Court of Appeal has ruled.

The appellate court overturned a ruling by San Diego Superior Court Judge Ronald Prager, who found that the City of Poway's mitigated negative declaration did not adequately take into account community character issues. On appeal, the Fourth District ruled strongly that the California Environmental Quality Act only requires lead agencies to community character issues that are aesthetic in nature.

"Community character is not defined in CEQA or in the Guidelines," wrote Acting Presiding Justice Gilbert Nares for a unanimous three-judge panel. "To the extent published California cases have discussed community character in CEQA cases, it has been limited to aesthetic impacts."

The concerns of Poway residents in general and the neighboring Poway Valley Riders Association, or PVRA, do not fall into that category, Nares concluded. "The community character issue here is not a matter of what is pleasing to the eye; it is a matter of what is pleasing to the psyche," he wrote. "…CEQA does not require an analysis of subjective psychological feelings or social impacts."

Relying on the recent California Supreme Court ruling in California Building Industry Association v. Bay Area Air Quality Management District , Nares also ruled that the city did not need to consider the potential impacts of the PVRA facility across the street on the new subdivision.

The case involves the Stock Farm, a longstanding horse-boarding facility with a capacity to board 100 horses. The Stock Farm's owner proposed closing the facility and subdividing the property into 12 building lots, most of them one acre in size, with the combined ability to board up to 90 horses. The project is consistent with Poway's land-use and zoning regulations. The Poway City Council approved the project with a mitigated negative declaration.

Horse-oriented Poway has always advertised itself as "The City in the Country". Approval of the project led to an intensely emotional reaction among Poway residents, especially those who have used the Stock Farm and the PVRA across the street.

Many residents testified that the loss of the Stock Farm would damage the rural, horsey character of Poway. One woman wrote in an e-mail to the city that the Stock Farm and its equestrian activities had played a critical role in her daughter's development: "Her involvement in these activities taught her valuable life lessons, kept her out of trouble, allowed her to excel in school and life, [and] brought our family closer together

An e-mail from PVRA to the city said that locating houses across from its facility would create "untold problems."

Given that the project was consistent with all land-use regulations, however, the city approved the project. A citizen organization called "Preserve Poway" sued and won on the community character issue in Superior Court before the case was appealed by both sides.

In describing the case, Nares essentially framed the issue as a question of whether the city could use CEQA to require a private business owner to stay in business: "Project opponents essentially contend that because Rogers, a private property owner, obtained a conditional use permit to operate horse stables they have enjoyed using for 20 years, the public has a right under CEQA to prevent Rogers from making some other lawful use of his land. "

– CONTINUED ON PAGE 11

>>> Psychological Damage In Loss of Horse Stable Not A CEQA Matter, Court Rules

– CONTINUED FROM PAGE 10

Nares's answer was no, and he backed up his ruling by boxing in the community character question by saying it must be limited to aesthetics. In his ruling, he noted that while New York's version of CEQA specifically requires lead agencies to deal with social and economic issues, the California legislature has specifically ordered lead agencies to stay away from such issues.

Unlike New York, California does not define "environment" to include social or economic effects on community character," he wrote. "Indeed, CEQA expressly excludes social or economic impacts as environmental impacts. California regulations provide that 'substantial evidence' does not include 'evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment'."

He acknowledged that the loss of the Stock Farm may well create social and economic impacts on the community but said they cannot be analyzed under CEQA.

In making the ruling, Nares and his colleagues relied on two appellate cases from a quarter-century ago that basically concluded the loss of an individual business or activity, as opposed to a change to the environment, was not fair game under

"The community character issue here is not a matter of what is pleasing to the eye; it is a matter of what is pleasing to the psyche," Nares wrote. "… CEQA does not require an analysis of subjective psychological feelings or social impacts."

CEQA: *Cathay Mortuary, Inc. v. San Francisco Planning Com.* (1989) 207 Cal.App.3d 275, which involved the loss of a Chinese mortuary in San Francisco; and *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, which involved the closure of a high school in Hayward.

"Like the mortuary proposed to be closed down in Cathay Mortuary, there may be a fair argument that the Stock Farm is integral to Poway's community character as the 'City in the Country'," Nares wrote. "And like the school closed down in Citizen Action, there may be substantial evidence that closing the Stock Farm and building homes in its place may have devastating impacts on young people's ability to engage in horse riding activities, especially those lacking the economic means of boarding their horses farther away from the Stock Farm. However, as those cases hold, such impacts are psychological, social, and economic—not environmental."

He concluded: "Whether the Project should be approved is a political and policy decision entrusted to Poway's elected officials. It is not an environmental issue for courts under CEQA."

The Case:

Preserve Poway v. City of Poway, No. D066635

The Lawyers:

For Preserve Poway: Julie M. Hamilton, Julie@jmhamiltonlaw.com

For City of Poway: Morgan L. Foley, McDougal, Love, Eckis, Boehmer & Foley, mfoley@mcdougallove.com

For the Stock Farm's owner: Michael M. Edwards, Byron & Edwards, (619) 400-4880 ■

Second District Upholds L.A. Billboard Restrictions

BY WILLIAM FULTON

The Second District Court of Appeal has ruled that the City of Los Angeles's ban on billboards advertising offsite businesses is not content-based and therefore not subject to the "strict scrutiny" test under free-speech clauses in either the U.S. or California constitution.

The case was brought by Lamar Outdoor Advertising, which submitted 45 applications for offsite billboards after the ordinance was adopted and saw all 45 denied.

Written by Justice Beth Grimes, the ruling essentially follows the same legal reasoning as similar rulings by the Ninth U.S. Circuit Court of Appeals regarding the same L.A. billboard ban. In concluding that the ordinance conforms with the California Constitution's free speech clause, Grimes relied in part on the Fourth District's recent ruling in *City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291 – a case in which, ironically, the appellate court highlighted the contrast between AMG, which did not comply with Corona's rules for phasing out billboards, and Lamar, which did comply.

In 2002, Los Angeles established a permanent ban, with some exceptions, on new offsite signs, including a ban on alterations of legally existing offsite signs. In 2009, the city explicitly banned offsite signs with digital displays.

After two federal rulings upheld the ordinance, Lamar requested and was denied permits for 45 signs and then sued, claiming the ban is content-based and therefore subject to the strict scrutiny test under both the state and federal constitutions.

Subsequently, the Ninth Circuit ruled on three different aspects of the ban, upholding the constitutionality of the ordinance in each case. In *Metro Lights, L.L.C. v. City of Los Angeles* (9th Cir. 2009) 551 F.3d 898, the Ninth Circuit ruled that the First Amendment was not violated by the city's prohibiting on most offsite advertising while simultaneously permitting similar advertising at city-owned transit stops. In *World Wide Rush, LLC v. City of Los Angeles* (9th Cir. 2010) 606 F.3d 676, the Ninth Circuit ruled that exceptions to the ban for Staple Center and in a special use district didn't undermine the constitutionality of the ordinance; and in *Vanguard Outdoor, LLC v. City of Los Angeles* (9th Cir. 2011) 648 F.3d 737, the Ninth Circuit ruled that the the city's distinction between offsite and onsite signs "has been repeatedly upheld as content-neutral and valid."

In spite of these rulings, in 2013, Lamar requested and was denied permits for 45 signs and then sued, claiming the ban is content-based and therefore subject to the strict scrutiny test under both the state and federal constitutions. Lamar subsequently sued in state court. Los Angeles County Superior Court Judge Luis Lavin ruled in favor of Lamar and said he was "neither required nor inclined to follow the Ninth Circuit's decisions." In a lengthy and detailed opinion, the Second District reversed.

Lamar's lawsuit delineated several examples where the city permitted offsite outdoor advertising in spite of the ban, including a settlement agreement with Clear Channel and CBS to allow conversion of billboards to digital (a settlement agreement that was subsequently voided by the Second District); the city's decision to contract with a company to provide 166,000 square feet of advertising at city-owned transit stops (which was upheld in Metro Lights); the permissive use of street banners, which to-

– CONTINUED ON PAGE 13

>>> Second District Upholds L.A. Billboard Restrictions

– CONTINUED FROM PAGE 12

taled 189,000 square feet at the time Lamar was denied its permits; the approval of another 17,000 square feet of advertising on Metro buses; and 147 other permits, totaling 85,000 square feet, that the city could not otherwise explain.

In her ruling, Grimes relied – as most courts do in billboard cases – in large part on the U.S. Supreme Court's ruling in *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490, in which four justices in the majority concluded that different standards for offsite billboards did not harm the constitutionality of San Diego's Ordinance and, in a dissent, Justice William Brennan expressed support for that position as well.

Lamar argued, however, that the Supreme Court's recent rulings in Reed v. Town of Gilbert (2015) __ U.S. __ [135 S.Ct. 2218] (*Reed*) and *Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, essentially overturned *Metromedia* and in any event the city ordinance violates the California constitution.

But Justice Grimes didn't buy it. "Neither *Reed* nor *Sorrell* supports the notion that sign ordinances may no longer distinguish between commercial and noncommercial speech, or between onsite and offsite signs," she wrote. In particular, she noted, "*Reed* required strict scrutiny of a sign ordinance that was "content-based on its face," treating various kinds of noncommercial signs differently depending on their subject matter." And she pointed out that *Reed* didn't even cite *Metromedia*. She concluded: "Notably, but not surprisingly, several district court cases decided after *Reed* have found Reed does not apply to billboard bans."

Regarding the state constitutional claim, she rejected a claim that an Oregon should apply and went out of her way to make mention of the AMG case. She wrote: "[W]e now have California precedent finding an onsite-offsite distinction does not violate article I, and in any event we would not follow Oregon precedent that gives no consideration to federal authorities that our own Supreme Court instructs us to consider for their persuasive value."

The Case:

Lamar Central Outdoor v. City of Los Angeles, B260074

The Lawyers:

For Lamar: Michael F. Wright

For City of Los Angeles: Terry Kaufmann Macias ■

Tax Revenue Can't Be Withheld in Redevelopment Disputes

BY WILLIAM FULTON

Under Proposition 22, neither the state Board of Equalization nor a county auditor-controller can constitutionally withhold tax funds as part of a redevelopment dispute, as called for by AB 1484, the 2012 bill that cleaned up the redevelopment wind-down, the Third District Court of Appeal has ruled.

The ruling represents a minor and belated victory for the League of California Cities, which wrote Prop. 22 and got it passed in 2010 expressly to stop the state from taking redevelopment funds – only to be outflanked by Gov. Jerry Brown a year later when he abolished the entire redevelopment system.

In setting the rules for the post-redevelopment world, AB 1484 authorized the Board of Equalization to withhold sales and use tax funds, and county auditor-controllers to withhold property tax funds, as a way of forcing cities and counties to turn over disputed redevelopment funds. But the Third District found these provisions unconstitutional on their face under Prop. 22. The measure, wrote the court, contained a clear statement of purpose – one whose tone would be familiar to those who recall how bitter cities were in the 2000s when the state kept shifting money away from redevelopment agencies: 'The purpose of this measure is to conclusively and completely prohibit state politicians in Sacramento from seizing, diverting, shifting, borrowing, transferring, suspending, or otherwise taking or interfering with revenues that are dedicated to funding services provided by local government or funds dedicated to transportation improvement projects and services."

In setting the rules for the post-redevelopment world, AB 1484 authorized the Board of Equalization to withhold sales and use tax funds, and county auditor-controllers to withhold property tax funds, as a way of forcing cities and counties to turn over disputed redevelopment funds. But the Third District found these provisions unconstitutional on their face under Prop. 22.

Writing for a three-judge panel, Justice George Nicholson, a onetime Deukmejian legal deputy, concluded: "Withholding local tax revenue simply is not a remedy available to the State for taking funds away from a local government entity because the voters precluded that remedy when they passed Proposition 22. Nothing in the language of the initiative or the purpose of the initiative dictates otherwise."

In crafting the ruling, Nicholson boxed it in as a way of deflecting the various arguments from both the state and Santa Clara County, which included the idea that the local governments are not entitled to the funds; that withholding the funds is a penalty; and that it would be impractical for the state to try to obtain the disputed funds in any other way.

"[This case," Nicholson wrote, "is not about whether the sponsoring agencies are entitled to the funds held; instead, it is only about whether the State can withhold local tax revenue.

Later he added: "Withholding the tax revenue to which the sponsoring agency is entitled is not the only means by which the State can acquire from the sponsoring agency the funds that should be distributed to other

– CONTINUED ON PAGE 15

>>> Tax Revenue Can't Be Withheld in Redevelopment Disputes

– CONTINUED FROM PAGE 14

taxing entities, if such a result is justified. For example, the State is authorized to obtain judicial relief for violation of the dissolution law. "

The Third District consolidated two cases – one brought by the City of Bellflower on the sales and use tax question and the second brought by the League of California Cities on the property tax question. In the League of California Cities case, Sacramento County Superior Court Judge Michael Kenny ruled against the state. In the Bellflower case, Sacramento County Superior Court Judge Timothy Frawley ruled partly in favor of the state.

Frawley found that the intent of Prop. 22 was "to prevent the state from reducing the net amount of tax revenue available to the local governments." This interpretation allowed Frawley to find that withholding "wrongfully-obtained funds" from a local government is not unconstitutional. He said the constitution would be violated if the state withheld funds to which

But the Third District overturned Frawley (and also upheld Kenny), focusing on the fact that Frawley erred by not strictly interpreting "the plain meaning of Proposition 22," which he said is to "prevent the State from withholding local tax revenue. Wrote Nicholson: "[T] he language of Proposition 22 is not limited to a prohibition on reducing the net local funds. Instead, it is a prohibition on transferring away from the local government any tax revenue to which the local government is entitled. Nothing cited by the Bellflower trial court or the State supports the limited intent perceived by the Bellflower trial court."

The Cases:

City of Bellflower v. Cohen, C075832, and L*eague of California Cities v. Cohen*, C076075

The Lawyers:

For City of Bellflower: Michael G. Colantuono, Colantuono Highsmith & Whatley

For League of California Cities: Iris Yang, Best, Best & Krieger

For State of California (Cohen): Douglas J. Woods, Senior Deputy Attorney General ■

One Win, One Loss For Cities On Marijuana Bans

BY WILLIAM FULTON

Local governments in the Inland Empire won one and lost one in rulings about medical marijuana, both from the same panel of justices on the Fourth District Court of Appeal.

In a case from Palm Springs, Division Two of the Fourth District ruled that the city's medical marijuana ordinance is not pre-empted by federal law.

In a case from Upland, the same panel ruled that a medical marijuana initiative that qualified for the ballot in Upland must be scheduled for a special election, rather than waiting for a general election.

In the Palm Springs case, Luna Crest opened a medical marijuana dispensary without obtaining required city permits, then argued the city permit process was pre-empted by federal law. Luna Crest argued federal preemption based on the premise that local regulations permitting dispensaries overreached by requiring testing of marijuana products.

But the Fourth District panel concluded otherwise. Quoting *Qualified Patients Assn. v. City of Anaheim*, 187 Cal.App.4th 734 (2013), the court wrote:

"[T]he Controlled Substances Act 'does not direct local governments to exercise their regulatory, licensing, zoning, or other power in any particular way,' so exercise of those powers 'with respect to the oerpation of medical marijuana dispensaries that meet state law requirements would not violate conflicting state law/ Moreover, with limited exceptions not relevant here, federal law confers immunity on any 'duly authorized officer of any State, territory, [or] political subdivision thereof, . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." (21 U.S.C. § 885(d).) Luna's premise that the City's implementation of its permitting and testing requirements for medical marijuana dispensaries is in violation of federal law is therefore false."

In the Palm Springs case, Luna Crest opened a medical marijuana dispensary without obtaining required city permits, then argued the city permit process was pre-empted by federal law.

Meanwhile, 70 miles away in Upland, the California Cannabis Coalition had qualified an initiative to overturn the city's ban on medical marijuana dispensaries. The initiative called for a $75,000 licensing and inspection fee for dispensaries. The city concluded that the $75,000 was not a fee but a general tax and therefore under the California constitution the initiative had to be placed on the ballot at a regularly scheduled election rather than a special election. San Bernardino County Superior Court Judge David Cohn agreed but the Fourth District overturned his decision.

The court ruled in favor of the Cannabis Coalition, saying: "Article 13C, section 2 is limited to taxes imposed by local government and is silent as to imposing a tax by initiative."

The Case:
City of Palm Springs v. Luna Crest Inc., No. E062654

The Lawyers:
For City of Palm Springs: Jason M. McEwen, Woodruff, Spradlin & Smart

For Luna Crest: James DeAguilera, Law Offices of James DeAguilera

The Case:
California Cannabis Coalition v. City of Upland, E063664

The Lawyers:
For California Cannabis Coalition: Roger Jon Diamond, (d310) 399-3259

For City of Upland: James R. Touchstone , Jones & Mayer ■

Upland Dispensary Ban Not Subject to CEQA

BY WILLIAM FULTON

In the second medical marijuana ruling out of the City of Upland in the last week, the Fourth District Court of Appeal has ruled that Upland's ban on mobile medical marijuana dispensaries is not subject to the California Environmental Quality Act.

Among other things, the court concluded that the assertions by the Union of Medical Marijuana Patients (UMMP) about the potential impact of the ban – for example, that medical marijuana patients would have to drive to other cities – were too speculative to be considered "reasonably foreseeable" under CEQA.

Last week, the Fourth District ruled that Proposition 218 does not apply to an initiative to overturn the ban.

In the new case, UMMP attempted to challenge Upland's CEQA actions regarding the mobile dispensary ban without success.

In 2007, the city adopted an ordinance that banned all dispensaries, including mobile dispensaries. An initial study under CEQA concluded that there would be no substantial environmental impacts.

In 2013, the city codified the 2007 ordinance by adding a new chapter to the municipal code that specifically banned mobile dispensaries. UMMP filed comments claiming that the new code chapter would have foreseeable environmental effects including increased travel by Upland residents and increased indoor cultivation at Upland residents' homes, which would cause electric and water consumption, waste plant material, and other problems.

The Fourth District rejected UMMP's "ostensible environmental impacts" as being "based on layers of speculation."

The city argued that the 2013 code chapter adopted was not a project as defined by CEQA. The Fourth District agreed, saying the chapter "merely restates the prohibition on mobile dispensaries that was first imposed by the 2007 ordinance … and thus will not 'cause either a direct physical change in the or a reasonable foreseeable indirect physical change in the environment."

The Fourth District rejected UMMP's "ostensible environmental impacts" as being "based on layers of speculation." For example, the court concluded that the idea that Upland residents will have to travel elsewhere to obtain medical marijuana assumes that there are currently Upland residents obtaining medical marijuana from mobile dispensaries operating in violation of the 2007 ordinance and that, as a result of the 2013 ordinance, those residents will begin traveling to other locations to obtain the medical marijuana.

The Case:

Union of Medical Marijuana Patients v. City of Upland, No. D069293

The Lawyers:

For Union of Medical Marijuana Patients: Jamie T. Hall, Channel Law Group, jamie.hall@channellawgroup.com

For City of Upland, Kimberly Hall Barlow, Jones & Mayer, khb@jones-mayer.com ■

>>> California Cities Join Global Urban Resilience Movement

– CONTINUED FROM PAGE 1

Resiliency is not strictly speaking a planning function in municipal governments – in fact, it is cross-disciplinary – though planners and planning firms are playing a key role in the resiliency efforts. Many resiliency officers come from a hazards or emergency preparedness background. Los Angeles's chief resiliency officer, Marissa Aho, is a trained planner, however.

100RC will name 34 more cities in May, bringing the total to its intended 100. 100RC has not released the names of candidate cities, but other California cities may be in contention.

Founded in 2013, 100RC grew out of the devastation of Hurricane Katrina and ensuing efforts to diagnose the failures that took place in New Orleans. The organization awards cities two-year grants, extendable to three years, to fund high-level positions known as "chief resilience officers." Cities gain access to a range of pro bono consulting services and other resources to create resilience strategies.

100RC's $164 million budget is funded entirely by Rockefeller with in-kind donations from corporate partners.

Fifteen cities in the United States are participating. All four California cities were selected in the first group in 2013 (the City of Alameda was approved but never participated), out of roughly 1,000 that applied worldwide. That group included a diverse range of cities from every inhabited continent. Installed in April 2014, San Francisco CRO Patrick Otellini is known as the "world's first CRO."

A Holistic Approach

Historically, prevention and mitigation has fallen to different city agencies and departments, spread among law enforcement, disaster preparedness agencies, utilities, and the like. Resilience rejects this piecemeal approach. It enlists the participation of essentially all levels of city government and a wide range of stakeholders to help cities holistically address their threats.

"Governments in California are very innovative," said Letourneau. But the 100RC grants are useful even in progressive pleas because, "I don't think there's a single government that doesn't fall into their silos."

In the 100RC model, chief resilience officers bear singular responsibility for formulating and coordinating their respective cities' approaches to resilience. Before they can coordinate anything, though, they need to define what it is they're doing.

"Resilience is a very broad term that has a lot of different meanings for a lot of different people," said Berkeley CRO Timothy Burroughs. "There's no one thing that a city can do that solves all the challenges and problems that we have. But there are things we can do to solve more than one challenge as at a time."

Resilience is often confused with sustainability or derided as a buzzword, so broad and vague as to lack practical meaning. But environmentalists say the two terms have distinct meanings – for example, preparing for the impacts of climate change as well as reducing greenhouse gas emissions – and both are necessary.

"The danger was that resilience becomes the 'r word' much like sustainability becomes the 's' word," said Jo da Silva, director of international development at ARUP, the global planning firm that is working with 100RC. "Sustainability is... an agenda that says we need to work towards a more balanced future. Resilience is actually about how we deal with disruption."

Once defined, 100RC encourages each city to set its own priorities, by identifying its most pressing threats and the strategies needed to avoid or recover from them. Likewise, cities identify initiatives already underway and might reframe then as resilience-building efforts. 100RC bases its approach to resilience on the "City Resilience Framework," drafted in a multi-year process by ARUP. The framework is accompanied by an index of 200 indicators of urban resilience.

The first work product in the 100RC program is a Preliminary Resilience Assessment, identifying areas of focus, to be followed by the centerpiece City Resilience Strategy. 100RC's intended timeline for release of a Preliminary Resilience Assessment is 2-3 months, with a City Resilience Strategy following four to six months later.

City Strategies

Actual work has been somewhat slower. No California city has yet released its City Resilience Strategy, though Berkeley is expected to do so within a month. San Francisco will follow shortly thereafter.

– CONTINUED ON PAGE 19

>>> California Cities Join Global Urban Resilience Movement

– CONTINUED FROM PAGE 18

With the programs in their relative infancy, the four California cities have been engaged in broad, thematic strategizing. Themes and focus areas are emerging.

Berkeley

Burroughs described a robust process of community engagement to identify main resilience priorities. Some specific priorities that have emerged include upgrading of the city's aging storm water infrastructure; more robust audits of buildings' energy and seismic performance; upgrade of critical facilities necessary in emergencies, such as shelters; and better disaster preparedness among residents. He said the city will be partnering with community organizations such as churches to create "community resilience centers" that connect residents to resources such as public health education, environmental education, and other programs that help them prepare for emergencies.

"Being a state that has experienced many disasters…California cities are ahead of the curve," said Corinne Letourneau, associate director for city relationships at 100RC.

Oakland

Assistant City Administrator Christine Daniel recently succeeded original CRO Victoria Salinas. Oakland articulates its goals as prosperity for residents, rootedness in the city, safety and security, effective public infrastructure, and the ability to recover from adversity. "Within each of those focus areas we have the opportunity…to answer what we are calling critical questions that will provide us with more information about interventions that can be developed over time to address the resilience aspects of each of these focus areas," said Daniel.

Los Angeles

Under the direction of Mayor Eric Garcetti, Los Angeles has been pursuing resilience initiatives unrelated to the 100RC grant. CRO Marissa Aho has inherited existing resilience-related programs and is working on implementing them. Those programs include the Resilience by Design Plan, which focuses on earthquake readiness and seismic retrofitting, especially regarding buildings, water systems, and telecommunications; the Sustainable City Plan, a comprehensive plan addressing a variety of resilience and sustainability strategies; and a Citywide Resilience-Building Strategy, which centers on gathering community input. The city recently adopted a policy requiring retrofitting of all rental apartment buildings that do not yet meet seismic safety standards.

San Francisco

Otellini has identified four broad goals: housing; neighborhood empowerment; long-range planning, especially for disasters; and the need to, variously, mitigate, adapt to, and retrofit for stresses and shocks. To the last point, Otellini pointed to the Embarcadero Seawall as a piece of infrastructure ripe for retrofitting. "It's not ready for sea level rise, and it's not ready for a seismic event," said Otellini. "You're looking for multiple benefits out of a single project."

"All three (Bay Area) cites have challenges in all those areas," said Laura Tam, sustainable development policy director with San Francisco Planning & Research (SPUR) the venerable urban planning nonprofit. "The way they've settled on their own is really interesting and appropriate."

Some CROs have hesitated to speculate on action items or specific projects that cities might pursue. They insist that resilience depends on a mindset more than on discrete projects.

"Resilience is not a specific project," said Christine Daniel, Oakland's assistant city administrator, who is stepping into the role of CRO. "Projects will come out of the work that we do in each of these focus areas."

In some ways, CROs are cheerleaders for other parts of city government, or evangelists for the cause of resilience within city governments.

"Large, bold goals eventually boil down to metrics and initiatives that are at the department level," said Otellini.

Common themes, regardless of particular projects or approaches, revolve around "silo-busting," with the CRO charged with infusing resilience thinking into all facets of city government. They are also universally on the lookout

– CONTINUED ON PAGE 20

>>> California Cities Join Global Urban Resilience Movement

– CONTINUED FROM PAGE 19

for existing programs and projects that contribute to resilience but that had not previously been identified as such.

"There's a bunch programs in the city that already think strategically, and that's fantastic," said Otellini. "Our focus has been on programs that don't think strategically. How can we help them come up with ways to not just do the same things they've done every year?"

Common themes, regardless of particular projects or approaches, revolve around "silo-busting," with the CRO charged with infusing resilience thinking into all facets of city government.

Thinking from the perspective of resilience often leads to strange bedfellows, at least by bureaucratic standards. Otellini said that San Francisco's efforts to encourage seismic retrofitting of residential buildings complements its long-term struggle to preserve affordable rental housing stock.

The Planning Connection

In each city, and throughout the 100RC program, planners and planning departments are expected to play a major role.

"Much of our program is rooted in the power of urban planning and looking…at ways that land use can be a powerful tool in building resilience," said Letourneau. That role may be informal, however. "This is not the city's master plan. This is the city standing up and saying that 'these are our resilience priorities.'"

To the extent that problems like poverty and segregation can be alleviated through inclusion and urban vibrancy, planners can help relieve social stresses. While the state of California has encouraged cities to alter their land use patterns to mitigate climate change, so may rising seas force such changes in low-lying cities.

On the scale of the block and building, the building codes and other regulations that planners are often involved with have direct implications to resiliency, particularly with regards to seismic threats.

"From the project perspective, I think this is fundamentally changing what we think about our building codes," said Otellini. He said he expects codes to embrace resilience and meet higher performance standards "in the same way you saw green building codes codified instead of just a good idea."

"The resilience movement is very much about thinking long-term and thinking about our various challenges, and that is exactly what planners do," said Aho, who cited the city's recently adopted Mobility Plan, designed to promote active transportation and improve streets and sidewalks for non-drivers, as an example of a planner-led project that supports resilience.

In fact, many contemporary planning trends, including the sort of compact development promoted statewide by policies like Senate Bill 375, may already be compatible with resilience strategies.

"I think smart growth is a great example of what resilience can look like in the community," said Burroughs.

As important as city-based planners may be, participants in the program acknowledge that resilience may be as much a regional issue as a municipal issue. The program encourages the three Bay Area cities to collaborate, but it does not offer a formal structure by which participating cities can collaborate with non-participating adjacent cities. Infrastructure projects to protect San Francisco from sea level rise will have no impact on Foster City, and wildfires that Oakland controls may yet leap into Hayward.

Though many of 100RC's cities are far-flung and therefore are not suited for intra-regional collaboration, 100RC has encouraged the three Bay Area cities to share best practices and think about their neighbors.

"The Bay Area is unique in that we invested in and selected three cities in that region to (find out) how we can learn from those three cities and see what can be adopted for the 98 other cities in the region," said Letourneau. "What from our model can be imparted to other cities in the absence of our funding? How can you take this investment and amplify it around the state?"

Regardless of how much support or funding they have,

– CONTINUED ON PAGE 21

>>> California Cities Join Global Urban Resilience Movement

– CONTINUED FROM PAGE 20

CROs may not be around long enough to witness the fruits of their labors (or to witness the non-events that will take place when cities weather disasters). 100RC hopes that cities will continue to fund CRO positions after two- or three-year grant periods. But cities are not obligated to do so. For that reason, the project has been criticized as encouraging cities to "make plans to make plans."

"There's been a lot of planning and a lot of discussions with the communities….I feel like it's time to see what's in the plans and come up with a timeline for moving some of the ideas forward," said Tam. "It's not like the positions have been around a long time, but it's getting time to see what's next."

Said Daniel of Oakland's early efforts to develop "focus areas": "Within each of those focus areas we have the opportunity to develop further work to answer what we are calling critical questions that will provide us with more information about interventions that can be developed over time to address the resilience aspects of each of these focus areas."

"The concern is that they're three-year positions," said David Fink, director of policy at Los Angeles-based environmental advocacy group Climate Resolve. "People come in, they make a lot of plans, people get excited, the three years end, the person goes away, and the plans aren't implemented."

The expiration of the 100RC grant may also leave cities with relationships with corporate partners whose services are no longer pro bono. As ARUP's da Silva admitted, their relationship with 100RC is "directly aligned with our core business interest."

"One of the important byproducts of 100 RC program is creating….market opportunity for the types of skills and thinking we have to offer," said da Silva.

Whether the resilience movement is itself resilient depends on cities' commitments and their budgets. Some cities have made a "10 percent pledge" to spend 10 percent of their budgets on resilience efforts. This pledge, which is largely symbolic, can include extant activities that fit the definition of resilience, so it does not necessarily entail new spending or new initiatives.

San Francisco has already made a move towards permanence. As of April, Otellini will be the director of a new city office, the Office of Resilience and Recovery.

Though 100RC is "trying to brand themselves as funders of resilience efforts," according to Fink, of Climate Resolve, it has not yet cornered the market. Cities in California concerned about resilience have a raft of state programs and other resources available to them.

Various state programs explicitly and implicitly address resilience. They include CalEnvironScreen, the California Climate Adaptation Planning Guide and other resources under the state's Climate Adaptation Strategy, the sustainability goals put forth by the Strategic Growth Council, and legislation such as last year's Senate Bill 379, which requires cities to consider resilience in their local hazard mitigation plans.

"(Resilience) sort of needs to be approached from both ends of the spectrum," said Fink. "Community-building efforts and local projects that change neighborhoods and educate people (should be) coupled with the local and state government approach. The CRO effort is only part of that equation."

Contacts & Resources

100 Resilient Cities
ARUP City Resilience Framework
California Climate Adaptation Strategy
Senate Bill 379
Marissa Aho, Chief Resilience Officer, City of Los Angeles, Marissa.aho@lacity.org
Christine Daniel, Asst. City Administrator, City of Oakland, cdaniel@oaklandnet.com
Jo da Silva, Director of International Development, ARUP, Jo.da-Silva@arup.com
David Fink, Director of Policy, Climate Resolve, dfink@climateresolve.org
Corinne Letourneau, Assoc. Diretor for City Relationships, 100 Resilient Cities, cletourneau@100resilientcities.org
Patrick Otellini, Chief Resilience Officer, City of San Francisco, patrick.otellini@sfgov.org
Laura Tam, Sustainable Development Policy Director, San Francisco Planning & Research, ltam@spur.org ■

insight WILLIAM FULTON

>>> The Tuolumne Tactic For Tax Increases

– CONTINUED FROM PAGE 1

of laws that make it more difficult to approve new buildings and adopt new taxes in California.

By now you all know about the Tuolumne Tactic – the end-run of the California Environmental Quality Act sanctioned two years ago by the state Supreme Court. The trick is simple: Initiatives aren't subject to CEQA. Local governments can simply adopt an initiative rather than put it on the ballot. So, by adopting an initiative – often for a development project – the local government can end-run CEQA altogether. That's how both Inglewood and Carson got their NFL stadiums approved so fast. More recently, developers have tried the tactic to approve a logistics center in Moreno Valley and a shopping center in Carlsbad (though that approval was overturned by a referendum).

If you can pass a tax with a simple majority to fund something specific – not just stadiums but, say, police protection or affordable housing or new rail transit, just to name a few possibilities – well, that's an end-run we're likely to see over and over again.

It's a pretty direct assault on 1970s and '80s left-wing California environmentalism.

Now, thanks to medical marijuana advocates, the initiative process may also be used to bypass Propositions 26 and 218 – the two ballot initiatives that embedded in the California constitution the requirement that "special taxes" (taxes dedicated to a specific purpose) require two-thirds voter approval.

And that could turn out to be a pretty direct assault on 1970s and '80s right-wing California fiscal conservatism.

At first glance, the Upland case wouldn't seem like a blockbuster because the issue in front of the appellate court was pretty narrow. (In fact, I missed the broader significance last week when I wrote the case up and was tipped off to its important only by my friends at Voice of San Diego.) The issue in front of the appellate court was whether the initiative to overturn Upland's medical marijuana ban had to be placed on a special election ballot or could wait for a general election.

But the answer was a big one: The Fourth District concluded that Article 13c of the California Constitution doesn't apply to initiatives. That's the provision – contained originally in Proposition 218 – that says, among other things, special taxes are subject to two-thirds voter approval.

The reason the Upland ruling might come into play in San Diego is simple: If the Chargers need to win a supermajority to get their stadium funded by taxpayers, they probably need to play ball with Mayor Kevin Faulconer and others, meaning they would have to swallow things they don't like in the same tax measure. But if the Chargers only need to win a simple majority, they may go their own way.

The implications are much bigger than just the Chargers, of course. If you can pass a tax with a simple majority to fund something specific – not just stadiums but, say, police protection or affordable housing or new rail transit, just to name a few possibilities – well, that's an end-run we're likely to see over and over again.

It's also punching a hole in the two-thirds-approval armature that the Howard Jarvis Taxpayers Association and other taxpayer advocates put into place in the two decades after Proposition 13 passed in 1978 – armature they assembled in large part, ironically, via the statewide initiative process.

It's the third big hole in the armature, after the 2010 passage of Proposition 25, which ended the requirement of two-thirds legislative approval for the state budget. That move stopped the gridlock in the state budget process,

– CONTINUED ON PAGE 23

insight WILLIAM FULTON

>>> The Tuolumne Tactic For Tax Increases

– CONTINUED FROM PAGE 22

which basically required Republican approval for a budget. The two-thirds voter approval requirement for school bonds has also been dropped to 55%, meaning property tax increases to fund school facilities are much easier to pass than before.

The architect of this master legal move, by the way, was longtime porn attorney Roger Jon Diamond, who represented the California Cannabis Coalition in the Upland case.

It's not clear whether the Upland ruling will hold. It's only an appellate court ruling. And the ruling turns on what is, in my mind, a somewhat dubious legal distinction: The idea that an initiative placed on a local ballot in a local election is not an action of the local government. "Taxation imposed by initiative is not taxation imposed by local government," wrote Justice Carol D. Codrington, a Schwarzenegger appointee, in her decision for the court.

Huh? The whole point of the initiative process is to allow voters to step into the shoes of elected officials (the state legislature, county boards of supervisors, and city councils) and enact legislation that has exactly the same legally binding power. If voters in San Diego approve an increase in the hotel tax to pay for the new Chargers stadium, isn't that exactly the same thing as if the San Diego City Council or San Diego County Board of Supervisors approving such a tax? Aren't the voters "imposing" a tax on taxpayers in the same way elected officials would?

The rest of Codrington's ruling isn't exactly helpful on this point, because it spends several pages making the point that just because the city or county collects the tax, that doesn't mean the local government "imposed" it if it were passed via initiative. Fair enough, but …

The city could seek an appeal to the California Supreme Court. If this were an important case for cities around the state, the assembled legal firepower of the League of California Cities would be arrayed against the marijuana advocates. But does the League want a fight to the deal over a court case that makes it easier to raise taxes for police, transportation, and other special purposes? Maybe they'll just let it stand.

You can see advocates for transportation, open space, and affordable housing jumping on this one all over the state. Transportation agencies, for example, have struggled for decades with passing or renewing their half-cent sales taxes because they need a two-thirds vote. A simple majority would be so much easier. But it also takes the bat out of the hands of elected officials acting in their official capacity – and probably creates a legal mess as to how involved those elected officials can get in drafting the initiative. Could a county transportation commission, for example, draft a wish list of transportation projects to be funded by a tax – and then let a group of prominent citizens place it on the ballot via initiative? Yikes. A typical California problem.

Meanwhile, if what you want to do is raise taxes and then build something with the money, life keeps getting easier. If you go the initiative route, you can raise taxes without the two-thirds vote that those pesky right-wingers like and then build the project without a CEQA analysis that those pesky left-wingers like. Whether anybody thinks all this is worth doing for anything other than a football stadium remains to be seen. ■