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CALIFORNIA PLANNING & DEVELOPMENT REPORT

Burbank Plans Transportation Hub

BY JOSH STEPHENS

The newest among the many notable assets of the City of Burbank is what is billed as the "World's Largest Ikea". The mega-store recently opened in February, replacing a normal-sized Ikea about a mile away. For all its Scandinavian appeal, the new Ikea surely does nothing to mute Burbank's image as an unremarkable quasi-suburb that tries, and often fails, to distinguish itself from Los Angeles's San Fernando Valley, which abuts it to the west and north.

A new plan, though, seeks to give Burbank a stronger identity — and a decidedly urban one at that.

The the Golden State District, which is in the early planning phases, will not turn Burbank into Portland. But it does present a progressive vision for a part of town that currently is home to light industry and not much else.

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insight

WILLIAM FULTON

Supreme Court Hoists Jarvis On Its Own Petard

Four years ago, the California Supreme Court poked a big hole in the California Environmental Quality Act when it held that local elected officials could approve a project without any CEQA analysis if an initiative to approve the project had qualified for the ballot. The so-called "Tuolomne Tactic" was a big-blow to old-fashioned populist NIMBYism in California, using a supposedly populist tool.

That's how both Inglewood and

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inside

Gallegos Retires from SANDAG Amid Ballot Measure Controversy

San Diego Association of Governments Executive Director Gary Gallegos, who has led the agency since 2001, announced his retirement, effective Aug. 18. Gallegos, 57, oversaw the agency for 16 years. In 2004, Gallegos led the effort to extend TransNet, a regional half-cent sales tax for transportation; 67 percent of county voters approved the extension. That measure has been mired in controversy of late as reports surfaced that agency staff, including, presumably, Gallegos, was aware that the agency's official estimates overstated the amount of revenue that the tax would generate. Gallegos said that he achieved many of his personal and institutional goals in the course of his tenure -- including the construction of the Mid-Coast Trolley extension and South Bay Rapid, along with planning for the Otay Mesa East Port of Entry — and noted that "The independent examination found that SANDAG did not intentionally mislead the public or the Board regarding its forecast." "Gary Gallegos will leave us as a giant in regional planning and transportation," said SANDAG Chair and County Supervisor Ron Roberts in a statement. "His drive and effectiveness as a transportation leader are nationally renowned, particularly when it comes to bringing investment into our community and getting creative projects started and completed."

California Cities Rank Highly on Sustainable Development Index

The recently released U.S. Cities Sustainable Development Global Index (pdf) aims to help urban leaders address the many sustainable development challenges affecting their cities. California cites dominated the top of the list. The San Jose-Santa Clara-Sunnyvale region came in No. 1, the San Francisco-Oaland-Hawyard region came in No. 4, San Diego-Carlsbad took No. 5, and Oxnard-Thousand Oaks took No. 8 nationally. The Index covers the 100 most populous cities (measured as Metropolitan Statistical Areas). It synthesizes data available today across 49 indicators spanning 16 of the 17 Sustainable Development Goals (SDGs) that were agreed upon by all countries in September 2015. The data provides a more holistic and comprehensive assessment of sustainable development challenges faced by U.S. cities than available through other metrics. Results show that all U.S. cities, even those at the top of the index, have far to go to achieve the SDGs. Provo-Orem, Utah, and Seattle-Tacoma Washington round out the top five.

Reports Point to Further Cover-Ups over Misleading SANDAG Ballot Measure

In an investigative series, Voice of San Diego reports that the San Diego Association of Governments misled the public on two separate ballot measures. An internal document discussed in November 2016 suggests that agency staff knew that a 2004 ballot measure to increase county sales tax included misleading language but declined to publicly admit the deception. As reported by Voice of San Diego last month, SANDAG misled by telling voters the tax would raise far more funds than the agency actually expected. SANDAG staffers offered the SANDAG board members and the public explanation for its ongoing scandal that they knew were false or incomplete. Agency staffers had multiple opportunities to disclose this information to the board or public and repeatedly withheld the information. The TransNet ballot measure has been running an extreme revenue shortfall, it was predicted to bring in $14.2 billion but now is closer to $9 billion. Now the Voice of San Diego contends that staff at SANDAG took steps to hide public records and delete official documents last year after the major errors in revenue forecasting were revealed.

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Lake Tahoe Report Card Indicates Warming, Record Precipitation

UC Davis' Tahoe Environmental Research Center released the report, "From Treetops to Lake Bottom, Tahoe's Annual Report Card." In 2016 the lake saw the hottest temperatures on record as well as unprecedented levels of rain and snow. The report looks at the ongoing, decades-long measurement programs as well as what autonomous underwater vehicles are finding in the lake. Key findings include the record numbers of dead and dying trees due to drought stress, insect attack and disease. Climate change has led to the warming of the lake 0.5 degrees per year, longer summers, and increased algae growth in the water. The annual report is aimed informing non-scientists about the most important factors affecting lake health and the influence on decisions about ecosystem restoration and management within the lake basin.

Court Strikes Down Sonoma County Climate Action Plan

Judge Nancy Case Shaffer rejected the environmental document supporting Sonoma County's Climate Action Plan for reducing GHG emissions, finding it does not adequately account for emissions generated outside the county. Shaffer said the plan adopted by supervisors last year is based on insufficient information and violates CEQA. The California River Watch sued the county and the Regional Climate Protection Authority over the plan. Supervisor David Rabbitt says the county and its nine cities are among the first in the nation to initiate such a progressive policy and access River Watch of halting growth. The county now will have to amend the plan or start over.

Report Suggests Cozy Relationship between Chiang, Affordable Housing Developers

A report by the Sacramento Bee suggests that State Treasurer and gubernatorial hopeful John Chiang gave political favors to affordable housing developers who donated to his campaign. The Bee found that developers, who collectively gave around $100,000 to Chiang's campaign, have received millions in tax credits and bond funds over the years. In some cases, monies were dedicated to the developers within weeks after they made donations. The Bee singles out Pacific West Communities and Domus Development, the latter of which which reportedly gave $40,000 to Chiang's campaign committees while receiving 9 percent tax breaks on three projects in the Sacramento region through the California Tax Credit Allocation Committee. In response to the allegations, a Chiang spokesperson told the Bee, "The evaluation and scoring are done by professional staff who have nothing to do with or any knowledge as to who supports my campaigns."

Ballot Measure Could Extend Reach of Prop. 13

A proposed statewide ballot measure would adjust Proposition 13 with the intent of helping young homeowners purchase homes. The measure, sponsored by the California Association of Realtors, would allowing them to carry a portion of their existing property tax rate across county lines when they purchase a new house. According to Alex Creel, lobbyist for the Realtors, many people feel locked into their properties because of Prop. 13. Currently, homeowners over 55 in certain counties can already transfer existing property tax rates to a new home of equal or less value, but Creel's initiative would expand the program.

Los Angeles Launches Database of City Properties

The City of Los Angeles launched a new online portal that designed to help the city maximize the value of its property, and more efficiently provide options for affordable housing, homeless service facilities, and other priorities. The comprehensive, searchable property database will enable staff to manage city property more effectively, and allow the public to track the development of community assets like police and fire stations, libraries and public parks. The portal is available at lacity.org/property. The portal will be used to maximize the value of underutilized or vacant properties. With departments such as the Department of Transportation, the Economic and Workforce Development Department, and Los Angeles Public Library now utilizing the system, the unused spaces could potentially turn

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into a vast array of public amenities. "City-owned property is one of our most valuable assets, and we must maximize its value to advance critical priorities like building affordable housing and expanding homeless services," said Mayor Eric Garcetti in a statement. "This innovative new portal will streamline our property management, and help us put more of our land to work serving our communities' needs."

San Diego Adopts Suite of Affordable Housing Initiatives

The City of San Diego City Council approved legislation designed to quickly increase the amount of housing constructed at affordable prices to middle and low-income residents. The new law is intended make it easier and cheaper for homeowners to add accessory units; it also expedites approvals. The goals of the 12 initiatives Mayor Kevin Faulconer plans to enact in the next two years are lowering housing costs, boosting supply and promoting "smart growth" along transit lines. The City Council unanimously approved two of the three new laws; looser granny flat rules were approved 8-1. The city's "Expedite Program" makes it so more projects can benefit if they have at least 10 percent of units reserved for low/very low income families or are near transit lines. Streamlining approvals would revamp the appeals process by increases the cost for an appeal from $100 to $1,000 and requiring hearings to be scheduled within 60 days instead of the average 105 days.

New Point Reyes Plan to Eliminate Ranching, Dairying

The Point Reyes National Seashore will update its general management plan and prepare an environmental impact statement that evaluates alternatives including eliminating historic ranching and dairying operations. Three environmental nonprofit groups sued the National Park Service last year as ranching was criticized over its impacts to water quality and public access. The park may issue five-year leases to agricultural operations while it updates the general management plan. In 2012, the Interior Department mandated standards for ranching leases and practices but the park argued that it was postponing an update to its general plan in order to prioritize the ranch plan. Those suing the park say this was "unlawfully prioritizing ranching above other uses of the national seashore," saying there was no environmental review of the ranch operations particularly changes such as global warming, expired reservations of use and occupancy for the ranches, endangered species listings, and evolving visitor uses. The settlement agreement reached states the general management plan amendment and environmental impact statement will address alternatives for future management of the lands within four years.

New Santa Monica Downtown Plan to Require Up To 30% Inclusionary Housing

The Santa Monica city council approved its new downtown Downtown Community Plan on a 4-3 vote. The plan is the final piece of the city's updated General Plan, which has been in process for years and been marked by successive efforts to reduce densities from levels the plan had originally envisioned. Height limits throughout downtown zone are 84 feet, while three specific sites can go up to 130 feet. The document streamlines administrative approval for housing projects up to 75,000 square feet. Residential projects are required to provide between 20-30 percent affordable housing for all new condos and apartments. Parking minimums will be eliminated and commercial projects up to 10,000 square feet are required to have administrative approval. Some developers say the high affordable housing percentage would dissuade construction in the city, thus stifling the production of both market-rate and affordable housing; they cite a crash in development that occurred when San Francisco raised its inclusionary zoning requirements above 20 percent. Supporters say other housing incentives may be enough to encourage growth that the plan foresees in the famously expensive coastal city. The City Council will receive a monitoring report on housing production every six months to see the effects of the new requirements. (See prior CP&DR coverage here and here.) ■

Under Housing Element Pressure, Los Gatos Approves Project

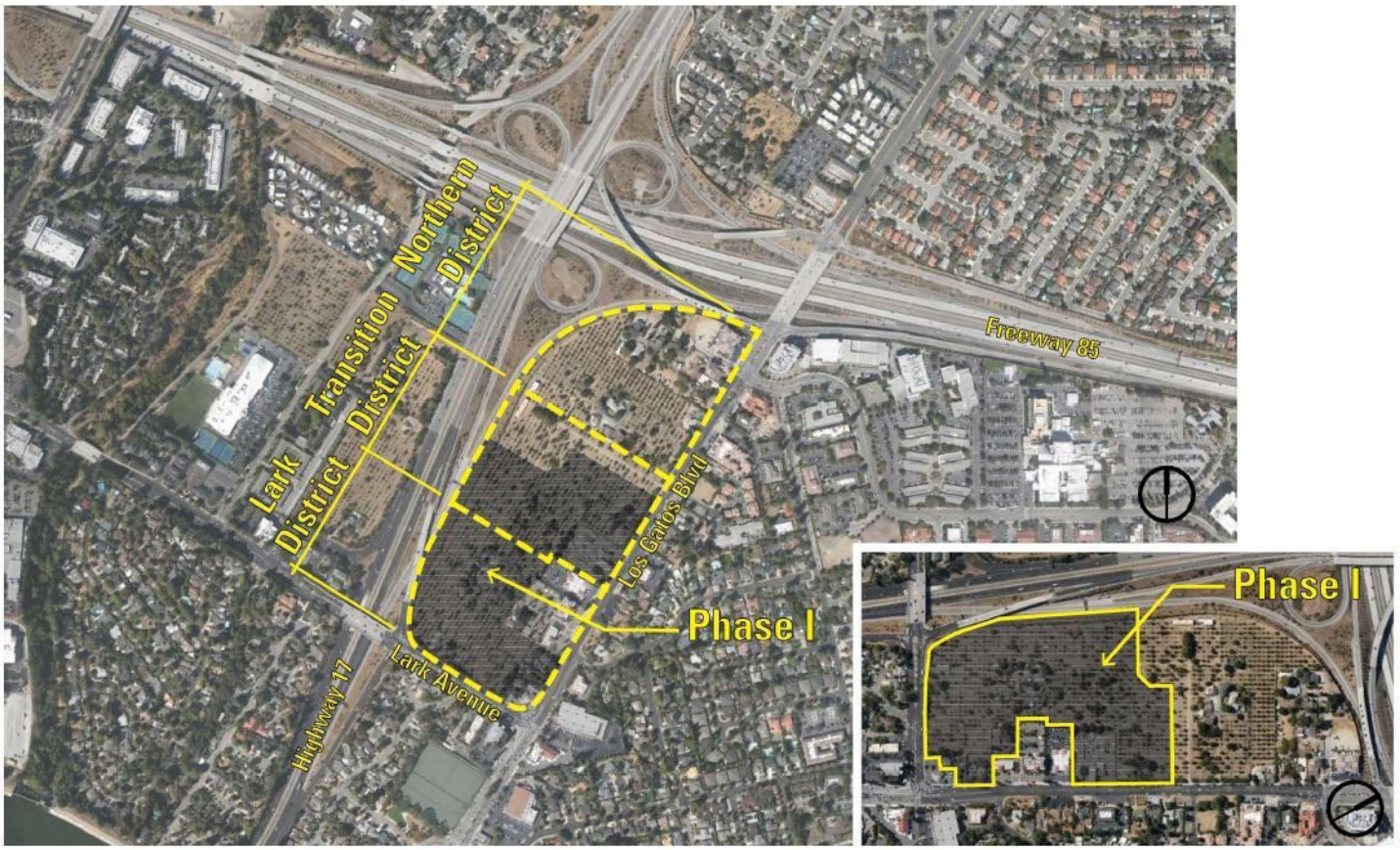
BY LARRY SOKOLOFF

Among the cities of Silicon Valley, large buildable lots are nearly as rare as unemployed programmers. Amid the regional housing crisis and strong slow-growth sentiment, battles over their fate have been fierce – few more so than in Los Gatos.

The Los Gatos Town Council approved plans to develop its last large undeveloped piece of land, 44 acres at the junction of Highway 85 and Highway 17, Aug. 1. Though public opinion on the fate of the parcel is far from settled, the decision was essentially forced after a judge ruled against the city earlier in the summer in a long-running legal battle concerning roughly half of the parcel.

By some measure, it's a win for state housing laws that are often seen as powerless to compel cities to actually realize their housing allocations.

Currently the incongruous site of a walnut orchard, among single-family homes and strip commercial, the North 40 development is to include 320 residences and 68,000 square feet of retail on a 22-acre plot near the city's border with San Jose. The project includes about 50 low-income and moderate-income apartments.



North 40 lies at juncture of highways 85 and 17.

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>>> Under Housing Element Pressure, Los Gatos Approves Project

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The fate of the other 22 acres of the property is still in dispute, with the Town Council expected to discuss enacting a moratorium on further development at its next meeting Aug. 15.

The intensity of the North 40 development was too much for many stakeholders.

Los Gatos is an affluent community of 30,000 that borders the Santa Cruz Mountains on one end and San Jose on the other. It has a long history of slow-growth politics. Its citizens have opposed freeway widenings and expansions by Netflix, which is headquartered there.

A specific plan, which was in the works for nearly a decade, was approved for the North 40 site in 2015. The Los Gatos Town Council initially turned down the plans for the North 40 development in 2016, on the grounds that it failed to conform with the specific plan. Developers sued, saying that the denial was improper. They claimed that the project helped the city meet its obligations under the Housing Accountability Act and Housing Element Law.

In June, Santa Clara County Superior Court Judge Drew Takaichi ruled against the city, ordering it to reconsider the project and to more specifically articulate the criteria it used for its denial. The council ended its fight at its August 1 meeting, and voted 3-1 to approve the residential and commercial development, according to Town Manager Laurel Prevetti.

The specific plan area is split between two school districts, according to Los Gatos resident Tom Thimot, cofounder of a local citizens group, Town Not City, which opposed North 40. He noted that developers placed all the residences within "the really good school district," implying that the development could place an unfair burden on that district.

By some measure, it's a win for state housing laws that are often seen as powerless to compel cities to actually realize their housing allocations.

Thimot also said Los Gatos residents are frustrated by traffic issues exacerbated in recent years by the app Waze, which often recommends that drivers going to and from Santa Cruz drive on town streets inside of the often clogged Highway 17.

On summer days, he said, "our town is gridlocked. It can take a couple hours to drive across it."

The town council is next expected to begin consideration of a moratorium on commercial development on the remaining land in the North 40 area at its August 15 meeting. Thimot said the council has more discretion over commercial development than residential development. Prevetti said a moratorium requires four council votes to pass.

Prevetti discussed what other cities and towns could learn from Los Gatos' experience.

"The biggest takeaway is the state has been very clear about the importance of housing," she said, referring to California's Density Bonus Law and the Housing Accountability Act. Prevetti also noted other housing bills under consideration in Sacramento may have further impacts.

"We need to be mindful that these state laws have an effect on local control," she said. ■

Contacts & Resources

North 40 Specific Plan

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Image courtesy of North 40 Specific Plan website.

legal digest

Prop. 218 Doesn't Apply to Initiatives

BY WILLIAM FULTON

In a case with potentially broad ramifications, the California Supreme Court has affirmed a lower court ruling that Proposition 218 doesn't apply to initiatives – meaning, in theory, that a tax proposed by the initiative process will could be approved by a local elected body as an alternative to placing the initiative on the ballot.

It's the second time in four years that the Supreme Court has ruled that initiative power trumps another legal mechanism important in local government affairs in California. Four years ago, the court ruled that a legislative act enacted by an elected body as an alternative to placing an initiative on the ballot is not subject to the California Environmental Quality Act. That ruling has led to use of the so-called "Tuolomne Tactic" in several instances – a situation where a developer gathers signatures to place a project on the ballot via initiative and then local elected officials enact the initiative rather than placing it on the ballot – as a way of evading CEQA.

The key to the Supreme Court's ruling was the majority's conclusion that local government is an entity separate from voters and a constitutional amendment like Prop. 218 that constrains local governments does not constrain initiatives. "Without a direct reference in the text of a provision — or a similarly clear, unambiguous indication that it was within the ambit of a provision's purpose to constrain the people's initiative power — we will not construe a provision as imposing such a limitation," wrote Justice Tino Cuellar for the five-justice majority.

In a concurring and dissenting opinion, Justice Leondra Kruger concluded that the Supreme Court had settled the question with an opposite outcome more than a century ago in a case that tested Los Angeles's charter provisions regarding initiatives. Justice Goodwin Liu joined in her opinion.

Referring to *In re Pfahler* (1906) 150 Cal. 71, Kruger wrote: "[T]he court made short work of the argument that the provision's reference to a ' "city" ' must be construed as meaning some board or officers of the city. The city, the court concluded, instead refers to the municipal corporation and body politic."

The case emerged from an attempt by the California Cannabis Coalition to overturn Upland's band 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. The cannabis coalition wanted a special election on the theory that a smaller turnout would help the coalition's cause.

Passed in 1996, Proposition 218 requires that general taxes be submitted to voters for approval in the next general election. Proposition 13 requires that special taxes – taxes earmarked for a specific purpose – pass with a two-thirds vote. In his ruling, Cuellar said that Proposition 218 "applies only to local governments and not to the electorate's initiative power without evidence that such was the intended purpose of the requirement."

Upland's fundamental argument was that the term "local government" in Proposition 218 meant not only the city government apparatus and its elected body but also the voters of that municipality.

The Supreme Court shot this argument down with several counterarguments.

First, Cuellar wrote, "the common understanding of local government does not readily lend itself to include the electorate, instead

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generally referring to a locality's governing body, public officials, and bureaucracy."

Second, he relied on Proposition 218's own materials to make this distinction. He quoted the proposition itself in saying: "This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers". He quoted similar comments from the ballot arguments.

He also noted that there was no specific language in Proposition 218 or associated materials stating that the constitutional amendment's provisions apply to voter initiatives.

"In short, these materials indicate both that article XIII C employs the term'"local government' as it is commonly understood and that the provision's intended purpose did not include limiting voters' 'power to raise taxes . . . by statutory initiative'," he wrote.

Where all this gets complicated – as is the case with the Tuolomne Tactic – is the interplay between Proposition 218 and Elections Code Section 9214, which allows the local elected body to simply adopt an initiative rather than placing it on the ballot.

"The common understanding of local government does not readily lend itself to include the electorate, instead generally referring to a locality's governing body, public officials, and bureaucracy," Cuellar wrote.

In the course of arguing the case, Upland's lawyers posited a Tuolomne Tactic-like scenario, only for taxes: Colluding with local elected officials, a employees' union could put a tax increase on the ballot via initiative and then the local officials could adopt the tax increase without ever putting it to a vote. This is, in fact, exactly what developers in Carlsbad, Moreno Valley, and others have done under the Tuolomne ruling – though for legislative approvals of a development project, not a tax increase.

However, Cuellar and the majority chose not to consider this hypothetical, saying these were not the facts presented in the case.

In her concurring and dissenting opinion, Kruger stuck closely to her view that the voters are not distinct from the local government. "It is true, as the majority emphasizes, that the voters are not the city itself. But neither is the city council. Both bodies are, however, empowered to exercise the legislative authority of the city, and the products of their efforts equally become the city's law. If a tax enacted by the city council is a tax imposed by the city, so too is a tax enacted by the voters on the city's behalf." ■

The Case:

California Cannabis Coalition v. City of Upland, No. S234148

The Lawyers:

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CEQA Applies To Railroads Owned By State

BY WILLIAM FULTON

In a 77-page opinion, the California Supreme Court has partially overturned a lower court and concluded that the environmental review of a railroad project is not pre-empted by federal law if the state is the project's owner and the environmental review does not conflict with the scope of federal regulation. The ruling could have significant consequences for the state's high-speed rail project, in which federal pre-emption of the California Environmental Quality Act has been a significant issue.

With the ruling in *Friends of the Eel River v. North Coast Railroad Authority* – and its ruling in the SANDAG sustainable communities strategy case three weeks ago – the court has made a major dent in its big backlog of CEQA-related cases. Both cases had been pending with the Supreme Court for well over two years.

The Eel River case involves the question of whether CEQA analysis of a freight rail project in the North Coast is pre-empted by the federal Interstate Commerce Commission Termination Act, which replaced the ICC with the Surface Transportation Board and lightened federal regulation of railroads. But it did not end broad federal pre-emption of state regulation of railroads, which dates back more than 150 years.

The First District Court of Appeal ruled that the ICCTA overrode CEQA. But the Supreme Court overturned the First District's decision, concluding that the state has the right to impose any decision-making process it chooses on railroads it owns, just as a private railroad would be able to do, so long as that process does not interfere with the regulatory authority of the Surface Transportation Board.

"We see little reason to suppose that when Congress forbade states to regulate rail transportation, it meant to prevent states, as owners of railroad lines, to have the freedom of action we believe would be retained by private businesses under the ICCTA," wrote Chief Justice Tani Cantil-Sakauye for the court's six-justice majority.

Justice Patricia Corrigan dissented, saying: "The majority acknowledges that no CEQA remedy can be imposed on the Northwestern Pacific Railroad Company (NWPCo) in this case. However, it reasons that as applied to the North Coast Railroad Authority (NCRA), a state agency, CEQA is not a 'regulation' but a mere act of 'self-governance.' I do not follow that logic."

The case involved proposed state improvements to a rail line that runs through the environmentally sensitive Eel River Canyon en route from Lombard in Napa County to Arcata. A state agency, the North Coast Railroad Authority, took over the line from private owners in the 1990s. In 1996, the Surface Transportation Board acknowledged a "notice of exemption" from the agency, exempting the rail line from ordinary certification.

However, in 1998, the Federal Railroad Administration shut the railroad down, citing safety and environmental concerns. In 1999, NCRA reached a consent degree with various state agencies to cease environmentally harmful practices and undertake remediation. In 2006, NCRA reached an agreement with a private company, Northwestern Pacific Railroad Company (NWPCo) to operate freight service on the line. The agreement stimulated that NCRA must comply with CEQA "as it may apply to this transaction".

In 2007, NCRA filed a notice of preparation under CEQA indicating that it would pursue a project to resume rail service on the line, which involved "rehabilitation of its track, signals, embankments, and bridges," all of which would be analyzed in the environmental impact report. The 2009 draft EIR acknowledged that "NCRA, acting as the CEQA lead agency, has a duty pursuant to CEQA guidelines to neither approve nor carry out a project as proposed unless the significant environmental effects have been mitigated to an acceptable level, where possible." The final EIR was certified and the project approved in 2011 and freight operations resumed. Subsequently, Friends of

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>>> CEQA Applies To Railroads Owned By State

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the Eel River and Californians for Alternatives to Toxics sued, alleging 10 causes of action involving the EIR.

At this point, NCRA switched gears, arguing that any CEQA analysis was pre-empted by the ICCTA. In 2013, the authority acknowledged that the EIR process had been a valuable source of information for it and for the public, but that the EIR was not legally required as a condition of operation of the line."

The Supreme Court took the case in part because of a circuit conflict between the First District's ruling in the *Eel River* and the Third District's ruling in Town of Atherton v. California High-Speed Rail Authority (2014) 228 Cal.App.4th 314, which concluded that the high-speed rail environmental review was not pre-empted by ICCTA under the "market participant doctrine".

In an extremely detailed analysis, Chief Justice Cantil-Sakauye concluded that "there is little doubt that application of CEQA to halt resumption of service by a private rail carrier pending CEQA review by a state or local agency would have the effect of regulating rail transportation and *would* be categorically preempted regulation."

However, she differentiated between CEQA as applied to a private rail carrier and CEQA as applied to a subdivision of the state, concluding that the latter is not regulation pre-empted by the federal law.

With the ruling in *Friends of the Eel River v. North Coast Railroad Authority* – and its ruling in the SANDAG sustainable communities strategy case three weeks ago – the court has made a major dent in its big backlog of CEQA-related cases. Both cases had been pending with the Supreme Court for well over two years.

"The case law supports the conclusion that the ICCTA does not broadly preempt *all* historic state police powers over health and safety or land use matters, to the extent state and local regulation and remedies with respect to these issues do not discriminate against rail transportation, do not purport to govern rail transportation directly, and do not prove unreasonably burdensome to rail transportation," she wrote.

Most significantly, however, she concluded that the State of California has the power to establish any decision-making process it wishes involving state agencies – including CEQA.

"If a private owner has the freedom to adopt guidelines to make decisions in a deregulated field, we see no indication the ICCTA preemption clause was intended to deny the same freedom to the state as owner," she wrote. "The ICCTA does not appear to us to be intended to effect a blanket preemption of state law governing how a state's own subdivision — its subsidiary — will enter and engage in the railroad business, so long as there is no inconsistency with regulation provided for by the ICCTA."

Indeed, she added, "if state law of general application does not apply to NCRA's decisions concerning the state's railroad project it is difficult to know under what rules NCRA *should* make its decisions. NCRA is not an independent corporation or a private company, but an arm of the state, created and funded by the state to carry out goals established by the Legislature. What rule of decision —

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>>> CEQA Applies To Railroads Owned By State

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with respect to matters not directly regulated by the STB — other than whim would guide NCRA's decisions, if not state law? The state would be committed to some version of the one-way ratchet — able to enter the rail business, but unable to require anything of the subordinate agency it set up to carry out the state's rail initiative."

Regarding the market participant doctrine – which holds that in some cases states are not regulators but market participants who need to interact with private entities for goods and services -- the chief justice concluded that the doctrine was not exactly on point. However, she concluded that the general principles supported the idea that CEQA can apply in this case: "To the extent a private corporate parent would have a zone of freedom under the ICCTA to govern how its subsidiaries will engage in the railroad business — including the freedom to direct them to undertake environmental fact finding as a condition of approving or going forward with their projects — the state presumably has the same sphere of freedom of action."

In her dissent, Justice Corrigan focused on the idea that CEQA is a regulatory tool and therefore in conflict with the ICCTA. "The proposition that a law of general application may be considered a 'regulation' of private activity, but not of public activity in the same sphere, appears to be unsupported by precedent," she wrote. ■

The Case:

Friends of the Eel River v. North Coast Railroad Authority, S222472 (July 27, 2017)

The Lawyers:

For Friends of the Eel River, Amy J. Bricker, Shute Mihaly & Weinberger, amy_bricker@yahoo.com

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For Northwest Pacific Railroad Company: Andrew B. Sabey, Cox, Castle & Nicholson, asabey@coxcastle.com

Land Purchase Agreement Doesn't Trigger CEQA

BY WILLIAM FULTON

Two nearby residents don't have standing in a CEQA lawsuit against Mt. San Jacinto College, an appellate court has ruled. Even if they did, the court ruled, their claims would be struck down because a purchase agreement for property is not an action subject to the California Environmental Quality Act.

Along the way, the Fourth District Court of Appeal said that aspects of the lawsuit border on the frivolous – especially the notion that a 10-side powerpoint prepared by a consultant constituted a development plan for a new college campus under CEQA.

The case arose when Mt. Sac College began to pursue the purchase of 80 acres of land in Wildomar from the Riverside County Parks & Open Space District for a possible new campus in western Riverside County. The proposed purchased was delayed several times and took many years to plan. Mt. Sac issued a notice of preparation under CEQA in 2006 and in 2010 a consultant to the college prepared a 10-slide powerpoint entitled "2050 Facilities Master Plan: Wildomar Campus".

In 2014, the college and the parks district finally approved a purchase agreement which stated that all CEQA analysis must be completed before the land transfer actually occurs.

Neighbors Martha Bridges and John Burkett sued, claiming that the purchase agreement was a project under CEQA. The appellate court said because the plaintiffs had not commented on the purchase agreement's CEQA status during the administrative process they did not have standing to sue.

Even so the court opined extensively about what its opinion would have been had it reached the substantive questions of the case – and the discussion was not good for the plaintiffs.

In so doing, the court compared the case favorably to *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772 – and distinguished it from the the case residents pointed to, Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116.

Relying heavily on *Stand Tall*, the court concluded that the purchase agreement did not trigger CEQA. In *Stand Tall,* a school district passed a resolution selecting a specific site for the construction of a new high school and a resolution directing its administration to make a formal purchase offer contingent on "completion of the EIR process." In *Stand Tall*, the California Supreme Court upheld CEQA Guidelines § 15004, subd. (b)(2)(A), which provides an exception to the rule that CEQA must be complied with prior to land acquisition if the purchase is contingent on future CEQA compliance, as the Wildomar property purchase was.

"What CEQA compliance entails in this context is completion of an EIR before the college buys the property," the court wrote. " And, because nothing in the purchase agreement (or in any of the college's resolutions) commits the college to any type of construction plan, the college has in no way precluded its consideration of alternatives."

It was the fact that there is no commitment to a construction plan that distinguished the case from *Save Tara.* In that case, the question was whether the City of West Hollywood had essentially committed itself to a project whether or not that project's approval had been finalized. The answer in *Save Tara* was yes. In this case, "Nothing in the administrative record indicates the college has committed itself to a definite use of the Wildomar property. We can tell the college has put some thought and effort into the idea of building an additional campus in southwest Riverside County, however, unlike in *Save Tara*, no funds have been committed to the project and there is not even a developer (let alone 'detailed' development plans) in the picture yet. In fact, the college has not even gone as far as the school district in *Stand Tall* because it has not passed any resolutions selecting a site for its future campus."

The consultant's powerpoint, the

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>>> Land Purchase Agreement Doesn't Trigger CEQA

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court concluded, "is a far cry from a development plan" and was "too vague and generalized to trigger meaningful environmental review."

The plaintiffs argued, among other things, that the purchase agreement represented the selection of a site and the powerpoint represented a Long-Range Development Plan, the educational equivalent of a Specific Plan.

"This argument borders on the frivolous," the court wrote noting that the educational code permits the college to buy land "for possible future development." As for the powerpoint, the court concluded: "This brief, conceptual presentation is nothing like a development and land use plan." ■

The court concluded that a 10-slide powerpoint presentation did not constitute a Long-Range Development Plan for the campus.

The Case:

Bridges v. Mt. San Jacinto Community College District, No. E065213 (August 8, 2017).

The Lawyers:

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For Mt. Sac College: Atkinson, Andelson, Loya, Ruud & Romo, John W. Dietrich, jdietrich@aalrr.com

For Riverside County Parks and Open Space District: Karin Watts-Bazan, Deputy County Counsel, KWATTSBA@co.riverside.ca.us

>>> Burbank Plans Transportation Hub

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The 640 acres encompassing the district presents some of the most remarkable, and un-replicable, opportunities in southern California by virtue of its infrastructure. The district contains, or is adjacent to, Interstate 5, two Metrolink commuter rail stations (one planned, one extant), a future High-Speed Rail station, and, to top it off, Hollywood Burbank Airport.

really," said Deputy City Planner Scott Plambaeck, who is overseeing the Golden State District (so named for its proximity to the stretch of I-5 known as the Golden State Freeway). "An area where there's multiple uses that work well together."

The transformation of the district includes two major components. With some funding from the California High-

The Golden State District partially surrounds Hollywood Burbank Airport.

The city calls it "a stunning intersection of air, rail, and transit networks."

Currently, it's not so stunning. With an incoherent mix of uses, ranging from single-family homes to parking lots to airport hotels, the district used to be home to offices and factories of Lockheed Corporation. After Lockheed left in 1990, the district languished, losing thousands of jobs. Recently, media companies have haphazardly occupied old industrial and commercial spaces, many of which are far less expensive than equivalent spaces in Hollywood and west Los Angeles. The district's recent resurgence a an employment center, as well as the pending transportation improvements, prompted the city to reconsider its future.

"We want to create a cohesive district, a neighborhood

Speed Rail Authority, the city is currently preparing a $1.2 million station area plan for three nearby potential station locations, which would fall entirely within the district. The city will also prepare a broader Golden State District Specific Plan, which will incorporate the station area plan and govern the remainder of the district.

The plan will build on recommendations in the "Link Burbank" study of 2015, which studied connectivity and mobility around the airport.

"It's a golden opportunity. I think there will be a lot of creative thinking about how to do a plan for that area that not only looks at regulatory control but goes even further and looks at the creative use of infrastructure," said Burbank Vice Mayor Emily Gabel-Luddy.

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>>> Burbank Plans Transportation Hub

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City planners are currently conducting research and will soon present alternatives. The entire specific plan process is expected to take 18 months. The development of the plan coincides with the construction of a new passenger terminal at Burbank Hollywood Airport. The plan is expected to respond to the new terminal, but airport officials terminal was not planned with the Golden State District in mind.

The city calls it "a stunning intersection of air, rail, and transit networks."

City planners have held one major community workshop so far. Most consistently, stakeholders called for the district to promote walking and biking and to shed its current images as a "dead zone." Stakeholders want the district to maintain an eclectic mix of uses but to do so with a more attractive public realm and with amenities, such as shops and restaurants, to activate the area. Planners' biggest challenge, perhaps, will be to maintain the district's job base without creating further automobile traffic. Less tangibly, city planners want the district to create an "elevated sense of arrival" as the gateway to the city.

"We can develop complete streets for an area that is in a fascinating post-industrial uses," said Gabel-Luddy.

Stakeholders want to preserve existing housing in the district. However, despite a crisis-level housing shortage in the Los Angeles area, calls for additional housing, be it market-rate or subsidized, have been faint so far. Housing was not listed as a priority voiced by stakeholders at the Februrary meeting, and Plambaeck said that planners will consider adding housing but that nothing is certain yet. ■

Contacts & Resources

Golden State District Website

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Scott Plambaeck, Deputy City Planner, City of Burbank

Image courtesy of City of Burbank.

insight WILLIAM FULTON

>>> Supreme Court Hoists Jarvis On Its Own Petard

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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).

Now the Court has used the same populist tool to poke a hole in old-fashion populist tax activism, saying that the initiative process isn't subject to Proposition 26, the 1996 ballot measure that sought to restrain tax increases by subjecting them to a vote. And, ironically, the Supreme Court's ruling used Proposition 26's own language to create a possible loophole that would permit taxes to be raised in a locality without a vote – if the tax increase is brought forth via initiative. It's a blow to the Howard Jarvis Taxpayers Association – and maybe the organization's fault as well.

It's the same interplay with the Elections Code that we saw in the Tuolomne case. Because Elections Code 9212 permits local elected officials to simply enact an initiative rather than put in on the ballot, taxes could be raised without any vote at all under certain circumstances since Proposition 13 doesn't apply.

The ruling also holds out the possibility that a special tax increase brought forth by initiative could pass with a simple majority vote rather than the two-thirds vote called for under Proposition 13. Indeed, this is almost certainly the reason that the Chargers football team joined the case on an amicus basis. Before they left San Diego for Los Angeles, the Chargers were looking at all options for financing a new football stadium and were struggling to make a deal with the city.

The majority ruling of the Supreme Court – written by Justice Tino Cuellar, a recent Brown appointee – rests on what seems, at least to me, to be a weird interpretation of California's constitutional provisions on initiative and referendum: The idea the voters and the local government are two different things. The argument appears to be that when the voters step into the shoes of the elected officials, they are some how not acting as the local government.

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?

Well, no, according to the California Supreme Court. An initiative isn't an action undertaken by the local government, which is not the "municipal corporation and body politic" (as dissenter Justice Leondra Kruger argued) but an array of elected officials and bureaucrats occupying City Hall. "A contrary conclusion," wrote Cuellar for the majority, "would require an unreasonably broad construction of the term 'local government' at the expense of the people's constitutional right to direct democracy, undermining our longstanding and consistent view that courts should protect and liberally construe it."

And here is where the Howard Jarvis Taxpayers Association – which unsuccessfully sought to defend Upland in the case – got hoisted on its own petard, as it were. Exhibit A in Cuellar's argument is the plain language of Proposition 218 itself – language which seems to suggest that citizens, especially taxpayers, are separate from the government. Proposition 218 itself says: "This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers."

For decades, the Howard Jarvis group and other taxpayer organizations have argued that the government has gotten out of control – that it is a kind of "deep state" that must be reigned in by voters, because government has gone off on its own as a separate, largely unaccountable entity. Now,

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at last, the Supreme Court – in an opinion written by a Latino appointee of Jerry Brown – has agreed. Even though the initiative process is set up so voters step into the shoes of elected officials to enact legislation, somehow or other those voters are a different entity than the elected officials.

And the loser is the Howard Jarvis Taxpayers Association. Because the end result of all this litigation is that you can use the initiative process to pass a tax without a vote or with a simple majority vote instead of the two-thirds supermajority the Jarvis people love.

The end result of all this litigation is that you can use the initiative process to pass a tax without a vote or with a simple majority vote instead of the two-thirds supermajority the Jarvis people love.

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 – even without a vote at all -- 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. ■