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CALIFORNIA PLANNING & DEVELOPMENT REPORT

Freeway Caps May Reshape California's Urban Areas

BY JOSH STEPHENS

Urban freeways are often described in the language of carnage. Bisecting neighborhoods, disrupting street grids, harming disadvantaged populations, and barreling through valuable downtown real estate, they are variously referred to by detractors as scars, gashes, and wounds inflicted on the urban landscape.

Now, as California's urban resurgence continue apace, several cities are considering reconstructive surgery.

The poultice of choice is made out of the same material as the scar itself: concrete. Cities are now envisioning caps that are, essentially, bridges that cover trenched freeways, typically for three or four blocks. Traffic would pass under them undisturbed while cities would gain acres of new space while restoring their street grids for the benefit of pedestrians and residents.

Cities in California have considered freeway cap

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insight

WILLIAM FULTON

What the SANDAG Case Teaches Us About CEQA

It's tempting to say that the big SANDAG sustainable communities strategy lawsuit ended with a whimper and not a bang. After all, the California Supreme Court ruled in favor of the San Diego Association of Governments' approach to dealing with possible 2050 emissions reduction targets in the environmental impact report for the 2011 SCS. At the same time, environmentalists were arguing off the record that this was the best loss they could have imagined, because it didn't say that

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inside

Legislature Narrowly Approves Extension of Cap-and-Trade

Gov. Jerry Brown, Senate President Pro Tem Kevin de Leon and Assembly Speaker Anthony Rendon proposed a new Cap-and-Trade extension plan and air quality program that was introduced in bill form last week. After weeks of contentious debate and uncertainty, the package, introduced as AB 398 and SB 617, passed with 28 votes in the Senate and 55 in the Assembly, each one more than the two-thirds needed in each house. The program funds a range of land-use grants, including Affordable Housing and Sustainable Communities. The two-bill package includes AB 398 which sets forth the extension plan and AB 617 which would create a new air quality monitoring program. In addition to extending the program through 2030, AB 398 would establish funding priorities for how the state would spend auction revenues over the next decade and establish an Independent Emissions Market Advisory Committee to report to the ARB and the legislature on the environmental and economic performance of the program. The new air quality program, AB 617, would require stationary sources to report annually emission of criteria pollutants and toxic air contaminants, require a statewide strategy to reduce air emissions in communities with a high cumulative exposure burden, and require local air districts that have not attained air pollutant goals under the Clean Air Act to expedite retrofits of industrial sources. Gov. Jerry Brown defended his efforts to extend the cap-and-trade program, which he says "if we don't get it, it'd be a tragedy for California, and for the world." The measure generated criticism from environmentalists and academics saying the package moved too far to the right in the hopes of appeasing industry.

Broad Study Identifies Coastal Areas Threatened by Climate Change

The nonprofit Union of Concerned Scientists released a report and interactive tool that forecasts what parts of the country are likely to see regular flooding from rising sea level rise. Areas that are expected to experience frequent flooding by 2030 are northern parts of Huntington Beach and the peninsula in Newport Beach, Balboa Island, the Seal Beach Naval Weapons Station, the Port of Long Beach, residential peninsula near Belmont Shores, and neighboring Naples Island. These areas will experience flooding of streets and beaches in just 13 years, decades earlier than previously predicted. In the Bay Area, Alameda, Oakland, San Mateo, San Rafael, and South San Francisco will be chronically inundated under a moderate global warming scenario in 2100. In a more rapid warming scenario San Francisco, Corte Madera, Larkspur, Burlingame, East Palo Alto and Palo Alto could see chronic flooding in 2065. In the research, the scientists used high-resolution topographic maps, sea level rise projects, and tide gauges. The Union of Concerned Scientists predicted the number of US communities facing chronic flooding to increase by 83 percent, to 167 communities in 2035. The hope in releasing this report is to encourage cities and the federal government to adopt policies that will discourage building in flood-prone areas and enhance federal policies to support communities dealing with rising sea levels. The report does not include infrastructure plans in place to mitigate some of the effects of rising sea levels.

Report Analyzes Impact of AHSC Grants

A trio of nonprofits released a report assessing the stat's Affordable Housing and Sustainable Communities grant program. "Collaborative Investments to Reduce Greenhouse Gases and Strengthen Disadvantaged Communities" (pdf) was compiled by the California Housing Partnership Corporation, Enterprise Community Partners, and TransForm, which contribute to the AHSC program in technical assistance, research, advocacy, and financial consulting assistance to applicants. The report

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William Fulton
Editor & Publisher

Josh Stephens,
Morris Newman, Kenneth Jost
Contributing Editors

Susan Klipp
Fiscal Officer

Talon Klipp
Office Manager
Graphics & Website

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

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examines the climate and community benefits of AHSC developments and urges California to make a long-term commitment to provide continuous and stable levels of funding to the AHSC program beyond 2020.The AHSC program was established in 2014 and invests in affordable homes and transit infrastructure developments in disadvantaged communities to improve economic well-being and physical health for underserved Californians while also reducing GHG emissions. The program selected 58 out of 236 applications to invest $443 million throughout the state. The developments will reduce 1.1 million metric tons of CO2 over the course of their operating lives, which is essentially removing 8,000 cars from the road. More than 80 percent of total AHSC funds will be located within or will directly benefit disadvantaged communities. (See prior CP&DR coverage.)

Strategic Growth Council Releases Annual Report

The Strategic Growth Council released its Annual Report (pdf) to the legislature for the 2016-2017 Fiscal Year. The SGC has seven programs that award funding with a majority of the funding coming from the Greenhouse Gas Reduction Fund. The Affordable Housing and Sustainable Communities program awarded $291 million in October 2016, Sustainable Agricultural Lands Conservation gave $40 million in awards last August, and this December the Transformative Climate Communities and Transformative Climate Communities Planning Grants will award $140 million and $1.5 million respectively. The Technical Assistance Pilot for CCI's will award $2 million this fiscal year as will the Sustainable Communities Planning Grants & Incentives Best Practices Pilot award $250,000. The Integrated Regional Conservation and Development Program awarded $290,000 in February of this year.

Feds Propose Repeal to 'Waters of U.S.' Rule

The U.S. EPA and the Army Corps of Engineers proposed to repeal a controversial Obama administration regulation that extends the federal government's oversight over smaller waterways, known as the "Waters of the United States" regulation. Under the proposal federal officials would go back to enforcing guidance documents from 2008 when deciding whether a waterway is subject to federal oversight for pollution control purposes. This is the first formal step to fulfilling Trump's campaign promise to repeal the 2015 "Waters of the United States" regulation, which opponents have argued is costly and time-intensive. The goal is to return power to the states and provide regulatory certainty to farmers and businesses says EPA Administrator Scott Pruitt. Supporters of the regulation say the Clean Water Rule is vital for protecting small streams and wetlands that families, communities and businesses depend on. The new proposal will be published in the Federal Register within days and then the public can comment. (See prior CP&DR coverage.)

Harvard Study Looks at Displacement in Los Angeles, San Francisco

Data-Smart City Solutions at Harvard University released a report, "Where is Gentrification Happening in Your City?", which focuses on six cities nationwide, including Los Angeles and San Francisco. The report looked at multiple cities and the demographic and physical changes that occur in neighborhoods that lead to an influx of wealthier residents, greater investment and more development. The report combined maps and information from six cities: Los Angeles, San Francisco, New York City, Seattle, Portland and Boston. Los Angeles' analysis came from Mayor Garcetti's Los Angeles Innovation Team (i-team) and the Urban Displacement Project from UCLA and UC Berkeley. The i-team came out with the Los Angeles Index of Neighborhood Change in 2016 that allows users to explore degree of gentrification for various zip codes between 2000 and 2014. The Urban Displacement Project tracks neighborhood change in Los Angeles using census data, Geolytics' neighborhood change database, and LA's open data they mapped trends in gentrification from 1990-2013. In the Bay Area the project initiative studied displacement risk, analysis trends and potential policy solutions. The group found that 48 percent of census tracts and 53 percent of low-income households lived in neighborhoods at risk or already experiencing displacement or gentrification.

LAO Predicts Revenue Impacts of Prop. 13-Sanctioned Property Transfers

The Legislative Analyst's Office recently released a report, "How Will Aging Baby Boomers Affect Future Property Tax Revenues?" It finds that, property sales and growth and

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tax revenue have historically been depressed by aging — as Prop. 13 has keep tax rates relatively static — and that this pattern may continue even as boomers age out of their homes. Since 2004, property turnover has been on the decline and there are more homeowners in the 55-75-year-old demographic are up to 41 percent from 31 percent in 2005. In the same time period, the 35-to-55 age group has dropped from 46 percent to 38 percent as a share of the state's population. Additionally, the report finds homeowners in the 55-75 age group are less likely than other groups to sell their homes, and they are likely to take advantage of provisions in Prop. 13 that prevent the state from capturing more tax revenue. A challenge to the state's ability to generate revenue is that the passing of home from parents to children as this transfer does not reset the taxable value of the home. The report finds over the past decade, around 10 percent of property transfers have taken advantage of the parent-to-child exclusion to prevent an increase in property tax payments. This has led to an estimated $1.5 billion tax revenue loss statewide.

Guidelines for Expenditure of L.A. Transportation Monies Approved

The board of Los Angeles Metro board approved guidelines that will direct the expenditure of funds from Measure M, the half-cent sales tax approved by county voters in November. One modification changes the current LOS, car-centric approach, to VMT measures, which evaluate the efficiency of the transportation system that has more high-capacity modes like transit. The new motion would replace LOS with VMT so "that these funds may be spent on operational improvements for movement of people traveling on foot, by bike, or by transit, in addition to automobile travel, in order to optimize the movement of people by all modes, not just vehicular travel." Other modifications that were approved were eliminating restriction that mandated highway funds be spent on streets within one mile of a state highway, allowing private organizations to receive "Visionary Project" seed funding, matching non-local-return funding sources for major transit projects, including relinquished state highways in eligible highway funding, and clarification of percentage for ADA paratransit, student, and senior pass discounts. LA County taxpayers began paying Measure M's half-cent sales tax July 1.

San Francisco Takes No. 2 Spot in Walkscore Survey

In Walkscore's 2017 City and Neighborhood Ranking, a ranking of the most walkable and bikeable neighborhoods and cities in the US, Canada and Australia, San Francisco came out No. 2 with a score of 86. The top neighborhoods were Chinatown, Downtown-Union Square, and Lower Nob Hill. San Francisco also received the No. 2 slot for bike friendly cities with a score of 75 and transit friendly cities with a score of 80. There were 17 California cities evaluated and some cities like Los Angeles (67.4), Long Beach (69.9), Oakland (72) and Santa Ana (66.1) ranked relatively well. Long Beach and Oakland made 9th and 10th most walkable cities respectively. Sacramento ranked No. 8 nationwide in bikeability. Suburban California cities such as San Bernardino, Irvine, Fremont, Chula Vista, Stockton, Riverside and Bakersfield scored in the 30s and 40s, ranking them near the bottom.

San Diego SoccerCity Proposal Goes to Nov. 2018 Ballot

A proposal to redevelop San Diego's Qualcomm Stadium into a into a $4 billion soccer stadium, commercial, retail, and parkland destination has encountered multiple complications of late. San Diego City Council members voted unanimously to send the SoccerCity proposal to voters in November 2018, instead of holding special elections this November or adopting the proposal without a public vote. Supporters of the proposal say delaying the vote sharply reduces the city's chances of getting on of four new franchises that the MLS is planning to award. This delay means San Diego State University mustregroup and decide where to build a new Aztec football stadium. The University has already terminated discussions to share and help fund the SoccerCity stadium, and therefore has no location to play past 2018. The discussion is primarily whether SDSU comes up with their own plan for Qualcomm, since it's all up in the air until the public vote in 2018, or do they evaluate serious alternatives. Meanwhile, AusTex Oil Limited, an associated venture of SoccerCity backer FS Investors, is accused of breaching an agreement with shareholders. FS Investor principals Mike Stone and Nick Stone have minority stake in the company but are not named in the lawsuit. ■

legal digest

Supreme Court Backs SANDAG on SCS

BY WILLIAM FULTON

The California Supreme Court's long-awaited ruling in the SANDAG Sustainable Communities Strategy case gave the regional planning agency a very narrow victory – but also gave environmentalists something they could call a win as well.

In a 6-1 ruling, the court concluded that the San Diego Association of Governments did not abuse its discretion by not using Gov. Arnold Schwarzenegger's 2005 executive order on greenhouse gas emissions as the basis for its analysis of the SCS under the California Environmental Quality Act. But like a stock broker who warns that past performance is no guarantee of future results, the court also said that the ruling "does not mean that this analysis can serve as a template for future environmental impact reports."

For all practical purposes, the ruling means that the state's regional planning agencies will have to turn to the California Air Resources Board and its target-setting process under SB 375 for guidance in how to approach greenhouse gas emissions reductions in the distant future.

In overturning the Fourth District Court of Appeal on the ruling, wrote Justice Goodwin Liu for the majority, "we affirm that planning agencies like SANDAG must ensure that CEQA analysis stays in step with evolving scientific knowledge and state regulatory schemes." The court did not give any more specific guidance on how to deal with greenhouse gas emission reduction targets associated with SCSs, stating only that future regulatory clarifications from the California Air Resources Board may provide more guidance.

The lone dissenter, Justice Mariano-Florentino Cuéllar, wrote passionately that SANDAG should be help to a high standard of CEQA analysis in order to adopt an SCS that calls for increased GHG emissions in 2050. "If SANDAG plans to permit hundreds of billions of dollars to be spent in pursuit of a plan that departs so starkly from scientific and political consensus about the emissions decreases needed to avert climate catastrophe, it must explain this divergence in sufficient detail for the public to recognize the long-term harm that will unfold in its name," he wrote. "SANDAG's EIR is too vague and shortsighted to fulfill that duty."

Both Liu and Cuellar were appointed to the court by Gov. Jerry Brown, who has been an aggressive proponent of greenhouse gas emissions reduction.

The SANDAG case has been pending before the California Supreme Court for 2 ½ years and the outcome had been eagerly awaited. But in the end, the Supreme Court took on only one very narrow question: whether SANDAG abused its discretion under CEQA by "declining to explicitly engage in an analysis of the consistency of projected 2050 greenhouse gas emissions" with the goals contained in Schwarzenegger's EO-S-3-05, which called for state agencies to pursue an 80% reduction in GHG emissions by 2050. Other aspects of the Court of Appeal's 2014 ruling.

When the case was being litigated in the lower courts between 2012 and 2014, it had the potential to be a major precedent because environmentalists seemed to be arguing that SANDAG – which is not a state executive agency – should be bound by a governor's executive order, which is traditionally binding only on state executive agencies. However, by the time the case reached the Supreme Court, the environmentalists merely argued that the EO-S-3-05 should have been explicitly considered as a factor in SANDAG's environmental analysis.

The case was not declared moot but in practical terms it has been overtaken by events. SANDAG has released a second Sustainable Communities

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Strategy that takes the 2050 executive order more explicitly into account, while the state has adopted a new law (SB 32) that provides statutorily required greenhouse gas emissions reductions past 2020 – the time horizon contained in the original climate change law, AB 32, passed in 2006.

The original climate change law, AB 32 from 2006, required the state to reduce greenhouse gas emissions by approximately 20% by 2020. Sustainable Communities Strategies are required under SB 375, a 2008 law intended to implement AB 32 through regional transportation plans. SCSs, which are tied to and sometimes coterminous with regional transportation plans, must show how each region will reduce greenhouse gas emissions per capita – essentially by a reduction in per-capita driving – in the "out" years. The per-capita emissions reduction "target" is set by the ARB.

SANDAG issued its first SCS in 2011. The plan called for a GHG emissions reduction of 7% by 2020 and 13% by 2035, as required by ARB targets. However, the SCS's EIR concluded that emissions would increase by 2050 to a level the EIR concluded was significant.

A wide variety of environmental groups, as well as the California Attorney General's Office, sued SANDAG on a wide variety of topics related to the SCS, including the question of whether the EIR should have analyzed the 2050 Executive Order. The Court of Appeal ruled in favor of the plaintiffs, but the majority of the Supreme Court overturned.

No one argued before the Supreme Court that the Executive Order was legally binding on SANDAG. But in the Supreme Court's decision, both Justice Liu and Justice Cuellar agreed that the 2050 Executive Order was the "elephant in the room". The question was how visible the elephant was in the EIR.

"The SANDAG case has been pending before the California Supreme Court for 2 ½ years and the outcome had been eagerly awaited. But in the end, the Supreme Court took on only one very narrow question."

In his dissent, Justice Cuellar said the EIR "occluded" this elephant. But Justice Liu disagreed. "If the long-term rise in projected emissions was 'the elephant in the room,' then a fair reading of the EIR confirms that an elephant is hard to hide."

Liu further stated: "[I]t was not difficult for the public, reading the EIR, to compare the upward trajectory of projected greenhouse gas emissions under the plan from 2020 through 2050 with the Executive Order's goal of reducing emissions to 80 percent below 1990 levels by 2050." He further stated that just because some of the discussion came in response to comments "is not an infirmity."

"It is not clear," he concluded, "what additional information SANDAG should have conveyed to the public beyond the general point that the upward trajectory of emissions under the Plan may conflict with the 2050 emissions reduction goal."

The Case:

Cleveland National Forest Foundation v. SANDAG, *No. S223603*

The Lawyers:

Virtually all major environmental lawyers in the state were involved in this case. Here are the lawyers who argued the case in front of the Supreme Court.

For Cleveland National Forest Foundation and CREED-21: Kevin Bundy, Center for Biological Diversity, kbundy@biologicaldiversity.org

For SANDAG: Michael Zischke, Cox Castle Nicholson, mzischke@coxcastle.com

For State of California: Janill L. Richards, Principal Deputy State Solicitor General, janill.richards@doj.ca.gov ■

Coastal Permit Conditions Are Land-Use Restrictions, Not Exactions, Cal Supremes Rule

BY WILLIAM FULTON

In a seawall case from coastal Encinitas, the California Supreme Court has refused to expand the meaning of the Mitigation Fee Act to allow landowners to accept land-use permit conditions under protest and proceed with the project's construction anyway. Instead, the court ruled that the Encinitas landowners forfeited their right to protest when they built a new seawall under a permit from the Coastal Commission that contained conditions the landowners later challenged in court.

The ruling puts to rest a significant challenge by the Pacific Legal Foundation to expand landowners' rights in the context of land-use permitting. Like the Supreme Court's recent inclusionary housing case from San Jose, it also reaffirms the distinction between exactions and land-use restrictions – a distinction that property rights advocates would like to blur.

Affirming a split decision from the Fourth District Court of Appeal, the Supreme Court concluded that allowing landowners to build while protesting permit conditions could harm the whole land-use permit process.

"After a project has been built, it may be too late for agencies to propose alternative mitigation measures," wrote Justice Carol Corrigan for a unanimous court. "They may be left with no practical means of addressing a project's significant impacts. Land use planning decisions entail a delicate balancing of interests. An under protest exception to the general waiver rule would upset this balance and inject uncertainty into the planning process."

The case involved a seawall with a stairway that serves two adjacent parcels on the Encinitas bluffs owned by Barbara Lynch and Thomas Frick. The seawall had been built in the 1980s using wooden poles that were secured to the bluff with steel cables. When the wooden pols began to erode, Lynch and Frick sought permission to build a new seawall. Before the Coastal Commission acted on the permit, however, Frick's house collapsed, destroying most of the seawall, including the lower portion of a staircase leading to the beach.

Subsequently the Coastal Commission approved a new seawall but conditioned the approval on conditions that prohibited reconstruction of the lower part of the stairway and placed a 20-year limit on the permit. Lynch and Frick sued to challenge those conditions, but otherwise accepted the permit and built the seawall. San Diego Superior Court Judge Earl Maas ruled in favor of the landowners and orderd the conditions removed from the permit. But he was overturned by the appellate court, whose position was then upheld by the Supreme Court.

The critical legal question was whether Lynch and Frick could build the seawall while challenging some of the permit's conditions. Their argument – representing an aggressive position on the part of the Pacific Legal Foundation – was that an acceptance of permit conditions under protest should be permissible because the Mitigation Fee Act already permits such protests when challenging ""fees, dedications, reservations, or other exactions."

PLF's argument, in essence, was that the disputed conditions – the prohibition of the stairway reconstruction and the 20-year limitation – fell within this definition.

The Supreme Court rejected the PLF argument in no uncertain terms. Corrigan concluded that the permit conditions were not exactions, but rather land-use restrictions, which were the legislature specifically excluded from the Mitigation Fee Act definition. Quoting the court's 2013 ruling in Sterling Park, L.P. v. City of Palo Alto, 57 Cal.4th 1193, Corrigan wrote: "While the term 'other exactions' encompasses 'actions that divest the developer of money or a possessory interest in property, . . . it does not include land use restrictions'."

This line of reasoning is consistent with the Supreme Court's recent trend of drawing a sharp distinction between a exaction and a land-use restriction. This distinction was at the core of the court's decision to uphold San Jose's inclusionary housing

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ordinance in California Building Industry Association v. City of San Jose, 61 Cal.4th 435 (2015). In that case, the distinction made it much more difficult for landowners to succeed in a takings lawsuit because the ordinance in question was viewed as a land-use restriction, similar to a reduction in density rather than an exaction, similar to payment of a fee or dedication of property.

But Corrigan also expressed concern that PLF's position could "swallow the general rule that landowners must take the burdens along with the benefits of a permit. Permit applicants frequently accept conditions they dislike in order to obtain a permit. An exception allowing applicants to challenge a permit's restrictions after taking all of its benefits would change the dynamics of permit negotiations and would foster litigation."

Corrigan went into considerable detail to discuss the idea that allowing landowners to cherry-pick among conditions in a legal challenge could limit the government's ability to come up with alternative mitigations later on. "If a court invalidated the condition before the wall's construction," she wrote, "the Commission could have adjusted by directing that the seawall be located farther inland, for example, to account for additional sand loss beyond 20 years. Or, it might have required alterations in the wall's size or design. But if the condition is invalidated *after* the seawall has been built, alternative mitigation measures related to the design or placement of the wall, which might follow such a ruling, would be rendered unrealistic or impossible."

The critical legal question was whether the property owners could build the seawall while challenging some of the permit's conditions.

The Case:

Lynch v. California Coastal Commission, No. S221980

The Lawyers:

For Lynch and Frick: John Groen, Pacific Legal Foundation, jmg@pacificlegal.org

For California Coastal Commission: Hayley Peterson, Deputy Attorney General, Hayley.Peterson@doj.ca.gov ■

Appellate Court Gives Malibu Voters A Harsh Lesson

BY WILLIAM FULTON

There's always a tension between the desire of California voters to control development and the constitutional limits on their ability to do so. Especially in desirable smaller cities, voters often want to control everything – and they sometimes want to use their initiative powers to control chain stores. But, as the residents of Malibu recently found out, it ain't that easy.

The Second District Court of Appeal just struck down Malibu's Measure R – the so-called "Your Malibu, Your Decision Act," which sought to micro-manage retail development with the express purpose of limiting chain stores and promoting local businesses. The measure was approved by 60% of voters in November 2014. But in affirming an earlier decision by Los Angeles County Superior Court Judge James Chalfant, the Second District provided Malibu with a pretty harsh dose of reality about the limits of ballot-box zoning.

Measure R had two basic provisions: First, that any commercial development of more than 20,000 square meet must be considered via a specific plan process and sent to the voters. And second, that any chain retail store – defined as any store with 10 or more outlets – is subject to a conditional-use permit process that applies only to that chain. The Second District struck down both sections of the measure.

On the face of it, the specific plan measure did have some measure of legitimacy. After all, specific plans are technically policy documents and therefore they are legislative acts subject to initiative and referendum. But the Second District concluded that the way the initiative was written, the mandatory specific plan process infringed on the city's administrative decisionmaking powers, which are not subject to the ballot box.

The city cited extensive case law showing that cities frequently adopt specific plans, which are then quite legally subject to voter approval. Nevertheless, the Second District ruled that the Malibu process was outside the bounds of legally permissible voter approval processes.

"Starbucks is not a land use. 'Coffee shop' or restaurant is the land use."

"There is a difference," wrote Justice Richard Aldridge for a unanimous three-judge panel, "between, on the one hand, voter approval of a specific plan and, on the other, *requiring* a city council to prepare a specific plan and report, to hold a public hearing about the specific plan and report, and then requiring the plan to be submitted to voters for approval. The former is a legislative act; the latter is an adjudicative one."

In particular, the court criticized the Malibu initiative for requiring very detailed specific plans for all commercial projects over 20,000 square feet while, at the same time, not creating any standards for those specific plans.

"Measure R," Aldridge wrote, "withdraws from Malibu's City Council the ability to issue discretionary land use entitlements or permits concerning a development project—unless and until voters approve a specific plan for that project. In this respect, Measure R is really about project-by-project review—which would otherwise be subject to administrative, not voter, approval— in the guise of a specific plan."

The conditional use permit provisions of the initiative appeared to be an easier call for the appellate court. The initiative requires any chain store to obtain a CUP that theoretically runs with the land but is not transferrable from one business to another.

"The meaning of these restrictions is undisputed," Aldridge wrote. "The nature of the chain establishment is to be considered, and, once a chain, say Starbucks, obtains a

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>>> Appellate Court Gives Malibu Voters A Harsh Lesson

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CUP, the CUP can be transferred to another Starbucks but not to Peet's, notwithstanding that Starbucks and Peet's have the same "use," i.e., both are coffee shops. Measure R CUPs thus are establishment-specific *and* restricted in their transferability."

And such a system is not permissible, Aldridge concluded on behalf of the court. "As much as one may believe that Starbucks and McDonalds and their ilk have become so ubiquitous as to constitute a generic land use, the City cites no authority to support such a proposition," he wrote. "Starbucks is not a land use. 'Coffee shop' or restaurant is the land use."

The Case:

The Park at Cross Creek v. City of Malibu, B271620, B275311

The Lawyers:

For Park at Cross Creek: Marshall A. Camp, Hueston Hennigan, mcamp@hueston.com
For City of Malibu: Christi Hogin, Jenkins & Hogin, Chogin@localgovlaw.com
For initiative proponents as intervenors: Robin B. Johansen, Remcho, Johansen & Purcell, johansen@rjp.com ■

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projects for years, predating the recession of the late 2000s. Several projects performed initial studies, including several that received initial planning grants from the Southern California Association of Governments. But none has yet gotten past preliminary planning stages.

Now, with the resurgent economy and dearth of urban land, cities are redoubling their efforts.

Several projects are competing for the title of California's first freeway cap.

Los Angeles's Park 101 would cover a section of the 101 Freeway on the north side of downtown, where the freeway separates Chinatown, Olvera Street, and Union Statin from the Civic Center and the rest of downtown. A few miles north, the Hollywood Central Park would cover a 38-acre diagonal slash of the 101 through a medium-density commercial and residential part of Hollywood. The City of Glendale has similar plans for the 134 Freeway on the north side of its downtown, branded Space 134.

The 101 Freeway would disappear under a proposed cap park in downtown Los Angeles.

"There's all this urban design, active transportation, health benefits to it," said Cecilia Estolano, co-CEO of Estolano LeSar Perez, a planing firm that has conducted studies on Park 101. "There are also financial benefits. You'll be unlocking the value of these parcels that heretofore have not been useful."

More speculative projects include one in downtown Santa Monica, extending the McClure Tunnel and connecting the city's retail district with its civic center; coastal Ventura, where Highway 101 separates the city from its beachfront; downtown Oakland; and two projects in San Diego.

Many of these projects have received support in the form

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of planning grants, and some are championed by nonprofit groups set up by civic leaders.

"We continue to fund them because now we see them as providing destinations, non-motorized connections, active transportation, park amenities, economic development, the whole range of benefits," said Marco Anderson, program manger at SCAG and convener of the agency's ad hoc Freeway Cap Coalition.

While caps could support all manner of buildings, most of these projects propose that parks and other types of public space would occupy the reclaimed real estate.

"We're a built-out city as many are," said Glendale City Manager Scott Ochoa. "How do you create new property for open space?"

"With property values rising...imagine trying to build this type of park by acquiring land in downtown," said Estolano. "We have dedicated so much land to the automobile. We are finally seeing a generational shift in our thinking. We want to reclaim this space for people."

That's the case in Glendale and both Los Angeles projects. Ventura, though, takes a more pragmatic approach. Ventura Community Development Director Jeff Lambert said that the city doesn't necessarily need more park space, at least not in that location, since it's a few blocks from the beach. And the cap could enable the city to demolish an obsolete beachside parking structure and thereby create more recreational space. Lambert said that the cap could provide for a whole host of projects, including a parking lot, a conference center, and, ideally, a new train station created from the existing Union Pacific trestle.

"We are in some ways creating new land….. if we can move that structure on to the freeway, we create a whole beachfront property for development," said Lambert. "We have a beach, so we don't necessarily need the open space. We need something more commercially oriented."

In many ways, boosters see freeway caps as true win-win situations, enhancing the public realm without distributing the essential transportation function of the freeways they cover. But several impediments lie in their way.

For the most part, engineering is the least of cities'

worries. Arguably less complex than the freeways they cover, caps present relatively straightforward engineering challenges. As massive as they are, they are essentially very wide bridges. They do not need supports because the trench walls already exist.

"The technical component is not challenging at all," said Estolano. "This is not an engineering masterpiece, as I understand it."

Freeway caps are, therefore, not necessarily as expensive as other meaty pieces of infrastructure might be. The 22-acre Park 101 is estimated to cost roughly $390 million, while Glendale officials estimate about half that for its 5.2-acre proposal . By far the largest proposed freeway cap, Hollywood Central Park is estimated to cost $1 billion. (By comparison, developable land in downtown Los Angeles has sold recently for well over $20 million per acre.)

"It's not a small sum of money, but building it and getting the money to build it are not one of my bigger concerns," said Glendale Community Development Director Phil

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Lanzafame. He noted that the immediate neighborhood has recently seen over $1 billion in investment for two retail centers alone.

In return for these investments, Estolano noted that the development of Park 101 would enable the city to develop several parcels that are currently moribund because of their proximity to the freeway, thus defraying the cost. It would also free up real estate by eliminating several little-used on- and off-ramps. And the plan calls for improvements throughout the surrounding area. She also suggested that freeway caps present ideal opportunities for cities (or other lead agencies) to use Enhanced Infrastructure Financing Districts, a relatively new funding tool based on tax-increment financing. (See prior CP&DR coverage here and here.)

"EIFD's are really going to be pivotal," said Estolano. "To make these projects work in this day and age, without redevelopment, we're really going to have to figure out value capture."

Even with these funding opportunities, freeway caps are not going to build themselves, in part because they are not considered amnesties and not essential infrastructure.

"While the public sector is going to play the kind of key facilitating role...what's really going to move the needle is a private sector foundation and champion….and to raise a lot of the seed money," said Anderson.

Even with funding, none of these caps will see the light of day without approval from the California Department of Transportation, which has jurisdiction over the freeways in question. When many of these projects were first conceived, Caltrans' cooperation seemed unlikely. Caltrans officials hesitated to support freeway caps because they would essentially prevent widening of the freeway segments that they covered. There was also debate about ownership of air rights.

"It's not something that's conceived of in the Caltrans manual," said Estolano.

"There's all this urban design, active transportation, health benefits to it," said Cecilia Estolano, co-CEO of Estolano LeSar Perez, a planing firm that has conducted studies on Park 101. "There are also financial benefits. You'll be unlocking the value of these parcels that heretofore have not been useful."

Recently, though, the agency has taken on a supportive tone. Anderson said that new leadership at Caltrans and the adoption of Smart Mobility Framework has encouraged the agency to embrace sustainability more so than in the past. It even sponsored a study of a cap over a small portion of State Route 94 in San Diego.

"It goes hand in hand in the last five years with the realization in LA County….those segments of freeway aren't going to be widened anyway," said Anderson. "Now there's an understanding that Caltrans and SCAG and Metro are in a position to say, we know this segment is not going to be widened so we are comfortable going ahead."

That's not to say that Caltrans will rubber-stamp any of these projects.

"Our biggest issue is convincing folks that the money question isn't the major question; it's the collaboration among government agencies," said Ochoa. But at least cities now see some hope.

Regardless, none of these projects will proceed without public support and political will. Lambert said, for instance, that Ventura's project has stalled in part because of the retirement of former City Council Member Carl Morehouse, who had been its leading proponent.

But boosters claim that the time may be right for many of these projects. The continuing renaissance of downtowns, like those in Los Angeles and Glendale, plus the dearth of park space make freeway caps essential and urgent, according

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to backers.

"LA can't wait," said Estolano. "We need to create better health impacts for people. We need to address some of the environmental inequities that occurred in the last half-century."

Moreover, these mega-projects have, of late, become less fanciful and less daunting. Boston's "Big Dig" — which included not just a cap but also an entirely new sunken highway — notoriously ran billions of dollars over budget in the early 2000s. But, in 2012, the 5-acre Klyde Warren Park opened atop a 1,200-foot stretch of the Woodall Rodgers Freeway in downtown Dallas. It cost $50 million, paid for with a combination of philanthropic, municipal, and federal funds.

"It is possible," said Anderson. "It's not kind of a fantasy idea."

As idyllic as they sound, some critics see a dark side to freeway caps — and they're not just referring to light-deprived tunnels.

Chris Sensenig, an urban designer with Van Meter Williams Pollack in the Bay Area, founded a group called Connect Oakland. It advocates not just for capping Oakland's 980 Freeway but rather for its removal entirely. Sensenig's position is grounded in a fundamental opposition to urban freeways.

"Freeways were created to connect cities. They were never meant to go through cities. The way they were implemented in cities were, quite frankly, systematic racism."

Sensenig said that the 980 in particular never should have been built in the first place, that it's under-used. At the same time, it commits all the other sins that urban freeways are accused of. Sensenig envisions removing the freeway, reconfiguring the surrounding streets, and reclaiming land for development. Most ambitiously, Sensenig sees it as a possible BART station served by a proposed second Transbay Tube.

The prospect of removing the freeway and turning it into a multi-lane boulevard with opportunities for development is included, in rough form, in Oakland's recently adopted downtown plan. (See prior CP&DR coverage.)

And Sensenig rejects the win-win notion of a traditional freeway cap, which, he said, simply perpetuates cities' reliance on automobiles and automobiles' offenses against cities. He believes that caps accommodate — literally covering up — something that cities should be demolishing with enthusiasm.

"Fundamentally, caps are foolish endeavors. It doubles-down on the freeway," said Sensenig. "You're putting that much more investment in the freeway being there. It's going to be there forever, once that second round of investment is made."

Despite objections such as these, support for freeway caps statewide may be reaching critical mass. And once one project gets approved, others may follow as the novelty wears off and regulations catch up with cities' ambitions.

"If Hollywood cracks the nut, we will follow along," said Estolano. "I would hate to think that each project will have to through all the same battles on their own."

"It would be very interesting to see a piece of legislation that would map out a process that others could use," said Estolano.

Selected Freeway Cap Proposals

East Lost Angeles (pdf.)
Glendale Space134
Hollywood Central Park
Friends of Park 101 (Downtown Los Angeles)
Connect Oakland (Interstate 980)
San Diego State Route 94

Contacts & Resources

Marco Anderson, Program Manager, Southern California Association of Governments
Cecilia Estolano, Co-CEO, Estolano LaSar Perez, cecilia@elpadvisors.com
Jeff Lambert, Community Development Director, City of Ventura, jlambert@cityofventura.ca.gov
Phil Lanzafame, Community Development Director, City of Glendale, PLanzafame@glendaleca.gov
Scott Ochoa, City Manager, City of Glendale, sochoa@glendaleca.gov
Chris Sensenig, Founder, Connect Oakland, info@connectoakland.org

Images courtesy of Friends of Park 101 and Space 134. ■

insight WILLIAM FULTON

>>> What the SANDAG Case Teaches Us About CEQA

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SANDAG's approach was adequate for future analysis.

The whimper came 2 ½ years after a pretty big Court of Appeal ruling that generated a lot of publicity because it seemed like a big deal to a lot people – including me. To a certain extent it all seems moot. After all, SANDAG supposedly remedied most of the potential problems in its second-round SCS and accompanying EIR. And, of course, SANDAG's got bigger problems these days, given the brewing mini-scandal over its tax projections.

But maybe the biggest lesson from the SANDAG case is how hard it is to sort out the complicated stew of regulations, policies, and analyses that has bubbled up around climate change in California over the last few years. There are state laws, which apply to everybody. There are the "scoping plans" – regulatory interpretation of the state laws by the California Air Resources Board, which apply to everybody. There are executive orders, which apply to executive-branch state agencies. And then, of course, there's the California Environmental Quality Act, which focuses not on laws or policies but on "significance" – whatever that is.

The SANDAG case highlighted the big difference between the way planners have to interpret the state's climate change laws and the way environmental analysts have to predict and mitigate the impact of future plans on greenhouse gas emissions. These two things *should* fit together nicely. But as is so often the case in California, they don't.

In the SANDAG case, the bottom line – an important one for the Supreme Court – was that there was no way to know how to translate an overall statewide greenhouse gas emissions reduction target for 2050 into a specific emissions reduction target for cars and light trucks, as called for under SB 375, in SANDAG's SCS. You could do it for 2020. But not for 2050.

Yet that doesn't mean you can't or shouldn't take the overall 2050 target into account in determining significance in the EIR.

The original AB 32 called for a reduction of approximately 20% in greenhouse gas emissions by 2020 and charged the Air Resources Board with figuring out how to do it. Subsequently, SB 375 called upon the state's metropolitan planning organizations to help meet that target – not through technological improvements but through reductions in vehicle miles traveled through changes in transportation investments that could induce changes in land use patterns.

Eventually, ARB used SB 375 to translate the overall emissions reduction goal into targets for each MPO – which turned out to be a per-capita reduction for each region by 2020, not an actual overall reduction. Essentially, ARB was gambling that the state could hit the target through a combination of technological advances that would reduce emissions and transportation/land use policy changes that would limit per-capita driving even if the overall amount of driving went up.

But there are a variety of other targets out there as well. In 2005, Gov. Schwarzenegger issued an executive order calling on state agencies to reduce GHG emissions by 80% by 2050. Gov. Jerry Brown subsequently issued an executive order calling for a 40% emissions reduction by 2030 – a goal that was subsequently embedded in state law via the passage of SB 32 in 2016.

Especially in San Diego, environmentalists have often tried to argue that the executive orders represent state policy that both MPOs and local governments must take into account in their climate planning. But, of course, executive orders are binding only on state executive agencies. And even now that SB 32 has put a statutory requirement in place for 2030, ARB hasn't yet finalized the per-capita regional targets required to implement the new law in the SCSs. Beyond that, of course, there is no legally binding target for 2050 – just an old executive order that most people in Sacramento seem to agree ought to be the 2050 target.

But, of course, none of them matters under CEQA. Or perhaps the point is that all of these various targets and policies and so forth matter under CEQA.

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Because under CEQA, environmental analysis runs on a completely separate track from existing plans, policies, and targets. What matters is *significance*. Will the project have a significant impact on the environment? And when a new issue comes along – such as climate change – CEQA practitioners have to figure out what the threshold for significance is, because neither the law or the guidelines typically provide guidance. They grasp for whatever they can. Sometimes it is a state law and sometimes it is a policy but sometimes it is just some CEQA practitioner's best judgment.

And by its very nature, CEQA analysis is based on an enormous number of assumptions, many of them very speculative. And this is where the interplay between CEQA and other laws gets complicated.

When SANDAG's 2011 SCS was being prepared, the only statutory and regulatory guidance the agency had were the ARB-required targets under AB 32 of a 7% per-capita reduction in VMT (essentially, a reduction in driving) by 2020 and 13% by 2035. But remember, those targets emerged after ARB balanced the need for reductions from the transportation/land use patterns against those from technological advances such as cleaner fuels. SANDAG's SCS predicted the region would hit the targets for 2020 and 2035 but would experience an overall *increase* in GHG emissions by 2050, partly – environmentalists claimed – by backloading road projects into the regional transportation plan.

The environmentalists argument went something like this: Given AB 32, the targets, and the Schwarzenegger executive order, the correct assumption to make under CEQA was that meeting the state's goals would require a further decline in emissions between 2035 and 2050 and therefore an increase was significant under CEQA and needed to be mitigated. This was the essential point in Justice Tino Cuellar's passionate dissent.

But deciding which mitigation measures to use in the SCS would have required SANDAG to make an assumption about what the 2050 target would be *and* how much reduction would be required by the SCS once technological advances are taken into account. In other words, SANDAG would have had to engage in a whole mini-ARB-like target-setting process, even though ARB hadn't set targets for 2050 – in part because there was no state law covering 2050.

Under CEQA, environmental analysis runs on a completely separate track from existing plans, policies, and targets. By its very nature, CEQA analysis is based on an enormous number of assumptions, many of them very speculative. And this is where the interplay between CEQA and other laws gets complicated.

Doing so was impossible task, at least according to the majority opinion written by Justice Goodwin Liu. There is no way to know what the technological advances will be and therefore no way to reliably back into a target for the SCS.

And that's the rap on CEQA: It requires environmental analysts – often working at private firms and using their own judgment – to make a lot of assumptions about what local and state policy *would* be if it existed and then put together essential a mini-version of the planning or policymaking process that *would* occur.

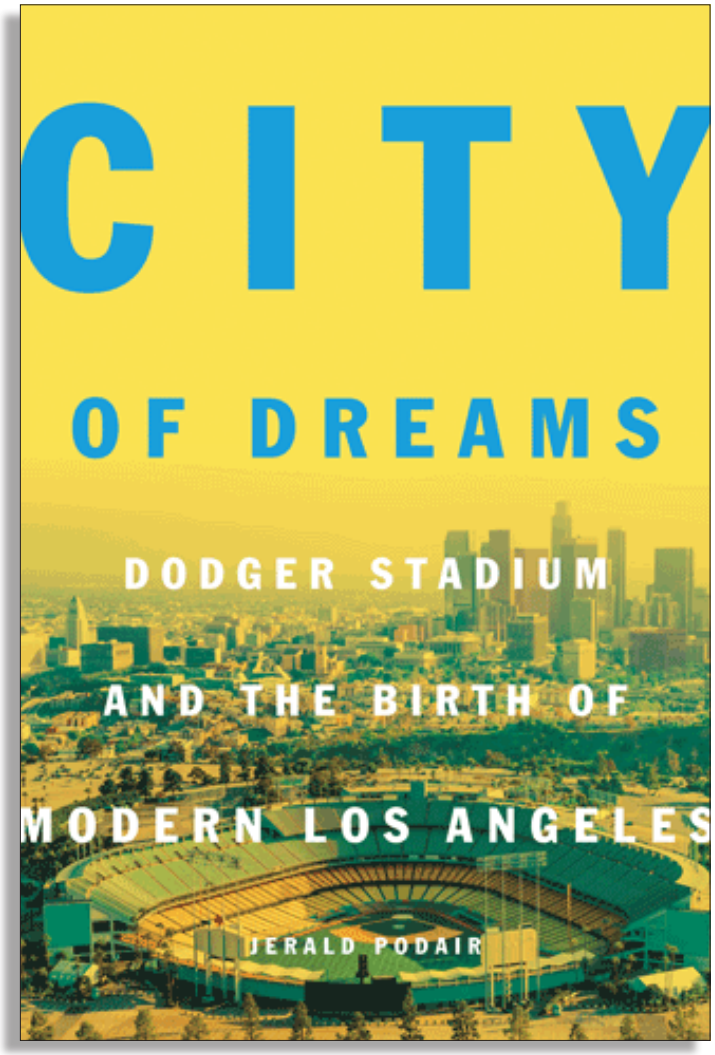
The best thing that the state can do is issue clear guidance through the CEQA Guidelines – which has been done on some aspects of GHG analysis. But understandably the environmentalists like to continue pushing the envelope. ■

Los Angeles Learns to Play Ball

Football fans who suffered through umpteen stadium proposals and yearly false starts before being rewarded with the Rams last year can be forgiven for thinking theirs was the most anguished tale of relocation in the history of Los Angeles sports.

Not by a hail Mary.

The all-time championship of uncertainty, politicking, and contentiousness surrounding a Los Angeles sports team goes to none other than the Dodgers. In *City of Dreams,* Jerald Podair, professor of history at Lawrence University, reveals that the most stalwart and, arguably, beloved L.A. franchise did not descend upon Chavez Ravine like a pop fly hit from Heaven. It is an encyclopedic, if not always engrossing, account.



Dodger owner Peter O'Malley's plight begins, as do many stories of 1950s urbanism, with New York City infrastructure czar Robert Moses. A careful steward of public funds, Moses refused to contribute to a stadium to replace the decrepit Ebbets Field. Though O'Malley wanted to stay in Brooklyn, he decided he had to accept an offer from the upstart city on the opposite coast. O'Malley had visited Los Angeles all of three times. With promises of 300 acres in Chavez Ravine, a fresh fan base, and dominion over a city on the rise, it seemed like the right move.

O'Malley's unfamiliarity with Los Angeles meant that he was also unfamiliar with Los Angeles politics. It's too bad O'Malley didn't have Podair to show him around.

According to what was, essentially, a handshake deal, O'Malley agreed to pay for Dodger Stadium's construction. But the city had to kick in some of the land and develop associated infrastructure – an expense some city council members refused to bear, to O'Malley's surprise and consternation.

The Dodgers' biggest fans were City Council Member Rosalind Wyman, a Democrat representing the west side, and centrist Mayor Norris Paulson. Meanwhile, Republican John Holland and Democrat Edward Royal insisted that baseball was all well and good but that public funds should not support the team. They represented citizens whom Podair refers to as "the Folks"—conservative, suburban Angelenos who wanted nothing to do with the Dodgers' potential to put Los Angeles on the national or global map.

The formation of coalitions for and against public funding "defie[d] conventional urban narratives," according to Podair, because it dispensed with party rivalries in favor of factions based on world view: "one group's dreams were local and limited, the other's national and global." This tension, argues Podair, gave birth to "modern Los Angeles": a provincial city with global impact, a diverse city with marginalized minorities and no single power base, and a bland, ahistorical cityscape with cosmopolitan assets. This analysis is Podair's greatest contribution to Los Angles political history, as it could apply to any number of issues before and after the arrival of the Dodgers – including,

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most recently, the debate over Measure S, the slow-growth ballot measure that failed this March.

Unable to negotiate past the deadlock, the team and its allies sponsored a ballot measure, Proposition B, to call the question in 1958. It prevailed by a slim margin: 25,000 out of 675,000 votes. It got support from African-American and Latino neighborhoods and indifference from the white, suburban San Fernando Valley. O'Malley was far from home free, though.

As every Angeleno knows, Dodger Stadium controversially displaced a small but thriving Latino community in the semi-wild of Chavez Ravine. O'Malley settled lawsuits with stalwart ravine residents. Another lawsuit went to the California Supreme Court, and local debates continued about zoning changes and development of supporting infrastructure. O'Malley nearly ran out of money before convincing Union Oil to stake him $12 million worth of advertising revenue in advance. (The "76" globe hung undimmed over the outfield until only recently.)

Given that the Dodgers arrived only 59 years ago, some of those "Folks" the Measure S campaign targeted might have been the same to vote against Proposition B in 1958.

Podair argues that political enthusiasm for the Dodgers ran parallel with enthusiasm for downtown Los Angeles. At the height of suburban migration, the development of the stadium coincided with plans to build the Music Center, redevelop Bunker Hill, and otherwise solidify downtown's cache of civic assets. But, as with everything in Los Angeles politics, the categories were not so tidy.

Podair roughly characterizes Dodger Stadium as a "downtown stadium." That's true, as far as it goes. Home plate is less than two miles from City Hall. And yet, for pedestrians, the Dodgers might as well still play in Brooklyn. Major boulevards, two freeways, landscaping, 16,000 parking spaces, and an empty hillside insulate the site. So, while Dodger Stadium certainly isn't suburban the way Anaheim Stadium is (built in 1966 for the Angels), it is nothing like the cozy retro/urban ballparks of the past 20 years. It has none of the intimate urban connections of its relatively new counterparts in San Diego and San Francisco.

Podair competently describes the innovations of Dodger Stadium, especially its nearly perfect sightlines and intimacy, created by cantilevered decks stacked neatly on top of each other, which "was probably the most important departure from the architecture of the traditional stadiums." Podair praises architect-engineer Emil Praeger but oddly neglects to identify the stadium's other architect, Los Angeles-based Edward Fickett (known mainly for designing massive tract housing developments).

Podair calls their creation "the nation's first truly modern ballpark," but he uses "modern" only superficially: "the stadium's look, operation, and culture were distinctively modern. Its lines were sleek and symmetrical." Though Podair does not claim to be an architectural historian, he misses some crucial points by ignoring the ideology of Modernism and its historical context. This oversight elides the fact that Dodger Stadium is a prime example of auto-centric, space age design that, arguably, represents the worst of 20th century American urbanism.

Indeed, Dodger Stadium is, in many ways, a microcosm of Los Angeles. Modern and ambitious, but also neither fish nor fowl, neither urban nor suburban.

O'Malley insisted on such a spiffy stadium not because he wanted the stadium to delight not only Brooklyn-style roughnecks but, indeed, everyone else: men, women, families, and fans of all ethnicities, backgrounds, and income levels. Dodger Stadium introduced many delights that fans take for granted today. It had better food and

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bathrooms. It had an organ. Inspired by master modernist-capitalist, and fellow Southern Californian, Walt Disney, O'Malley insisted that "at Dodger Stadium, everything would be pleasantly predictable, except for the outcome of the game itself."

This approach, argues Podair, was O'Malley's stroke of genius: in a city without provincial rivalries like New York, he recognized that the Dodgers could be everyone's team. He even attracted ample numbers of Latino fans, despite the Chavez Ravine controversy.

City of Dreams adds an essential volume to the Los Angeles canon. And yet, in keeping with an unfortunate convention in scholarly writing — it is not a book for the fair-weather fan — Podair allows the present to fade into oblivion.

Even today, the Dodgers' impact on Los Angeles is debatable. Really, the "revitalization" of downtown didn't begin until the early 2000s. In fact, the assault of Modernism, embodied by the 1955 clearing of Bunker Hill (which puts the destruction of Chavez Ravine to shame, in terms of sheer volume), was arguably the worst thing ever to happen to downtown Los Angeles. And Podair discusses none of the subsequent political battles that echo those that he so painstakingly describes – most recently Measure S, a slow-growth measure that appealed directly to "The Folks." Given that the Dodgers arrived only 59 years ago, some of those Folks might have been the same to vote against Proposition B.

Meanwhile, the original question of whether the Dodgers deserved public support, remains unanswered. Maybe, as is often the case with Los Angeles, the city managed to strike such an exquisite, if unexciting, compromise that the question becomes moot.

Podair even fails to mention a crucial piece of Dodger Stadium trivia: O'Malley's Space Age creation is now the third-oldest stadium in the country. And yet, with few recent upgrades, it's still going strong.

The Rams have a lot to live up to.

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– JOSH STEPHENS | JUL 16, 2017