CP&DR

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Voters Confront Land Use Measures

Slow-Growth Initiatives, Transportation Taxes Top Local Ballots

BY PAUL SHIGLEY

Construction activity may have declined dramatically, but the number of ballot measures seeking to slow or guide growth remains high. Voters across California will face close to 50 growth-related local ballot measures in November.

It's not unusual for the number of slow-growth measures to increase at the end of a real estate boom. Construction often continues as the real estate market dies, and slow-growth measures are often a reaction to construction rather than the market. In other words, slow-growth ballot measures are a lagging economic indicator of the real estate market. This November's total is down from the 78 measures in November 2006, partly because California had two primaries this year.

If past trends prevail, the slow-growth camp may be in for a big day in November. Two years ago, the slow-growth side won 62% of measures classifiable as slow- or pro-growth. At the November 2004 election, the sides essentially split. During the November 2002 election, the pro-growth side carried the day 19-13. A study prepared in 2000 by *CP&DR* and *Solimar Research Group* found that twice a growth backlash in the form of ballot initiatives did not hit until the market had turned sour. California cities and counties may be seeing a repeat in 2008, although results were mixed during voting in the February and June primaries.

Planners – CONTINUED ON PAGE 14

Presidential Candidates Bypass Substantive Land Use, Metropolitan Policy Issues

insight WILLIAM FULTON

Barack Obama and John McCain are both selling themselves to the American people as reformers. And neither was raised in a conventional American city or suburb. So you'd think that they would have unconventional ideas about how to deal with growth, planning, and development issues.

Think again. By and large, the two presidential candidates have adopted utterly conventional partisan positions on these issues – when they talk about them at all, which is almost never. Barack Obama managed to utter the phrase "cities to rebuild" in his acceptance speech in Denver. John McCain said not a word, though he did name as his running mate the first former mayor on a – CONTINUED ON PAGE 16

inbrief

The Stockton City Council voted 4-3 to accept a settlement with the Sierra Club and the attorney general's office of a lawsuit over a general plan update and environmental impact report adopted in December 2007. The Sierra Club and state attorneys argued that the city must consider the climate change impacts of the plan, under which the city's population could double to nearly 600,000 by 2035. City officials initially resisted, saying such impacts were too speculative to consider (see *CP&DR Local Watch*, February 2008).

The settlement requires the city to:

- Prepare within two years a climate action plan with specific reduction targets for greenhouse gas emissions and vehicle miles traveled;
- Provide incentives for development of at least 4,400 units of new housing in downtown and provide other infill incentives;
- Limit outward growth until certain transit, jobs-housing, greenhouse gas emissions and other milestones are reached.
- Adopt a green building program.
- Approve development with better public transit and alternatives to cars.

Although the attorney general's office has reached climate change settlements with several cities and counties, the agreement with Stockton "pushes the envelope," said Sally Magnani, supervising deputy attorney general.

Three councilmembers opposed the settlement, saying it needed additional review. Stockton's development and business communities strongly lobbied against the agreement.

In exchange for the settlement, the Sierra Club dropped its lawsuit and the attorney general's office agreed not to join the suit. The full settlement is available on the attorney general's website at http://ag.ca.gov.

Merced County supervisors have approved a community plan and environmental impact report for one of the largest housing projects ever proposed in the Central Valley. Located on 6,200 acres of grasslands west of Interstate 5 near Santa Nella, the Villages of Laguna San Luis is proposed to contain 16,000 housing units to be built over 30 years. Specific plans still need to be adopted.

A coalition of property owners has been pushing the project since the early 1990s, even though other huge subdivisions already approved in the area have gone unbuilt. Merced County officials have approved urban development in the – CONTINUED ON PAGE 2

Capitol*update*

State Budget Hits Redevelopment, Public Transit

BY PAUL SHIGLEY

The state budget signed by Gov. Schwarzenegger in late September shifts $350 million from redevelopment agencies to schools, and it provides no funding at all for transit projects contained in the State Transportation Improvement Program. Still, the sentiment among many local government officials was that the budget could have been far worse.

State budget negotiations and the ultimate adoption of a revenue and spending plan for the 2008-09 fiscal year dominated most of September – a month typically devoted to bill signings and vetoes by the governor. Instead, Schwarzenegger stuck to his promise and avoided action on non-budget bills until after he signed the budget on September 23. (The delay resulted in more than 700 bills remaining on the governor's desk at press time for *CP&DR*. Watch our website, www.cp-dr.com, for legislative updates in October.)

On the budget, the administration proposed shifting the greater of $225 million or 5% of redevelopment agency tax increment revenues annually for three years from the agencies to school districts – a proposal that the California Redevelopment Agency (CRA) said could be a step toward a permanent funding shift. With that proposal gaining traction in August and early September, legislative Republicans proposed taking all unallocated money in redevelopment agency low- and moderate-income housing set-aside funds, or about $350 million. Affordable housing advocates immediately went on the defensive, and the housing fund shift appeared to be a nonstarter with both Democrats and Schwarzenegger.

During final budget negotiations, Schwarzenegger backed away from the three-year shift. In 2004, local government organizations endorsed Schwarzenegger's Propositions 1A and 42 – fiscal reform and transportation funding measures. In exchange for those endorsements, the governor promised not to raid local funding sources in the future. The League of California Cities and other organizations called the governor on his vow, and in a speech at the League of California Cities conference during late September, the governor took credit for protecting local revenues.

In his speech, the governor did not mention the shift away from redevelopment agencies. According to analyses by the CRA and the Senate Local Government Committee, local agencies must pay their share of the $350 million total to school and community college districts by May 10, 2009. This is equal to 7.7% of tax increment revenue. If an agency has committed all or a portion of its share to debt service, the underlying city or county may make the payment. If the agency or its underlying city or county do not make the payment, the agency must cease all activities except for debt retirement. If no other money is available, an agency may borrow up to half of its current year contributions to its low/mod housing fund to make the payment; the housing fund must be reimbursed within 10 years.

One question concerns use of bond proceeds to make the payments. "If payments are made using tax-exempt bond proceeds, unless the payment could qualify as a long-term capital borrowing or a de minimus amount, agencies run the risk of jeopardizing the tax-exempt status of the bonds," the CRA advised its members. "However, it may be permissible to use taxable bond proceeds."

The diversion from the public transportation account since 2000 is now more than $4 billion.

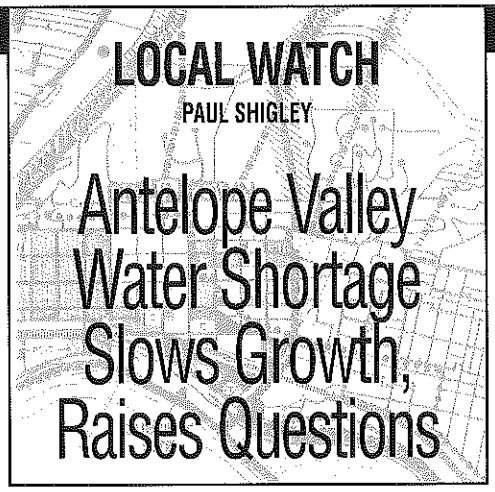
The CRA argues that the revenue shift is unconstitutional, and the CRA board is considering a lawsuit.

A budget trailer bill, AB 1389, also requires redevelopment agencies to make up missed or unreported pass-through obligations to school and community colleges districts from the last five years. There is a sharp dispute about the amount involved but it could be as much as $100 million (see *CP&DR In Brief*, June 2008).

On the transportation front, the California Transit Association dubbed the budget "abysmal." The budget contains $306 million for the state transit assistance program, down nearly $200 million from 2007-08 and down $250 million from legislator's recommendation in July. The budget also shifts nearly $1.5 billion away from the public transportation account to cover general fund expenses. The diversion from the public transportation account since 2000 is now more than $4 billion, according to the association. The budget contains no money for any transit capital improvements listed in the State Transportation Improvement Program.

Aside from budget activity, the governor did sign a collection of bills to address the home foreclosure problems in California. Most of the legislation concerns private market activities, but two bills may be of interest to local government officials and planners.

Senate Bill 1065 (Correa) authorizes cities and counties to use revenue bonds to refinance mortgages on owner-occupied homes for households earning up to 150% of median income. Assembly Bill 929 (Sharon Runner) raises the total debt that the California Housing Finance Agency (CalFHA) may carry by $2 billion. The agency issues bonds to finance low- and moderate-income housing. ■



LOCAL WATCH

PAUL SHIGLEY

Antelope Valley Water Shortage Slows Growth, Raises Questions

In combination with the housing market crash, a water shortage has brought construction nearly to a halt in the Antelope Valley. Even if the market were to bounce back in the next year or two, it's unclear that water providers could serve a substantial number of new homes and businesses.

The largest retail water provider in the area has been unwilling to guarantee water to new development since November 2007, stalling Lancaster's ambitious downtown redevelopment plan and jeopardizing proposed commercial projects and housing tracts. Meanwhile, a nine-year-old groundwater adjudication process grinds on, delaying potential groundwater banking projects.

That's the bad news. The good news is that 11 local agencies have adopted the Antelope Valley integrated regional water management plan, which spells out ways that locals may stabilize, increase and make the best use of the water supply. Implementation of the plan has already begun. No one is saying, however, that carrying out the plan will solve all of the valley's problems.

"The biggest challenge we have had is to try to see collaboration between local agencies and the water providers – to not step on each other's toes," said Laurie Lile, Palmdale assistant city manager. "It's been difficult to come to a consensus as to what we should be doing."

Added Lorelei Oviatt, Kern County Planning Department special projects division chief, "Nobody planned for the fact that the State Water Project was not going to turn on the spigot."

Located in the high desert of Northern Los Angeles and Eastern Kern counties, the Antelope Valley has been one of California's fastest growing areas. Driven largely by Los Angeles commuters seeking affordable single-family homes, the population has increased from about 100,000 people in 1970 to about 450,000 today. But the Antelope Valley is a dry place that gets only 7 inches of rainfall in an average year.

The regional water plan is blunt about the situation: "The demand for water clearly exceeds even the higher estimates of currently available supplies. By 2010, the demand for water in an average year will be 274,000 acre-feet a year and by 2035 could be 447,000 AFY. ... This means demand could exceed supply by 73,600 AFY in 2010 and by 236,800 AFY in 2035. The expected imbalance between supply and demand in 2035 is about the same as currently available supplies."

How did the situation become so dire? The answers are multifaceted but stem largely from a misapprehension about water supply and from a lack of cooperation among the numerous stakeholders. As a result, banking of water in aquifers during wet years – a common practice in the San Joaquin Valley and parts of Southern California – has not begun in Antelope Valley. The Antelope Valley-East Kern Water Agency (AVEK), the area's largest water wholesaler, estimates the area could have captured 300,000 to 400,000 acre-feet of water from the State Water Project since 1992 had water banking facilities been available.

In 1999, Diamond Farming filed a lawsuit asserting its rights to pump groundwater from under its East Antelope Valley fields. Bolthouse Farms, which combined with Diamond provides about 90% of the country's carrots, followed up with its own suit, as did other farmers, water suppliers, special districts, cities and landowners. The litigation is now in one large adjudication proceeding in Los Angeles County Superior Court that could ultimately result in specific allocations for specific entities. However, adjudication proceedings can last for decades – a proceeding for the Mojave River Valley took about 40 years – so some people are hoping a settlement is possible.

Rosamond Community Services District (CSD) General Manager Jack Stewart is not hopeful, though. "There is major disagreement between the water pumpers and the agricultural interests. They are very far apart," he said.

Agricultural interests, government agencies and individual property owners have been pulling about 150,000 acre-feet of water out of the ground every year, according to recent estimates. The sustained yield is often cited as 70,000 to 80,000 acre-feet. Farmers, however, reject the sustained yield figures and say they have the right to continue pumping at historic levels; some even argue they should be able to sell their "excess" water to the highest bidder. Meanwhile, land subsidence has started occurring in parts of the valley.

The contentious groundwater situation has created reluctance over water banking because the agencies fear they might not be able to draw back all of the water they put into the ground. Still, creation of a groundwater bank is a high priority in the regional water plan, and the Rosamond CSD, Los Angeles County and other entities are prepared to start banking water – just as soon as some becomes available. That might not be anytime soon, as deliveries from the State Water Project continue to shrink.

The Antelope Valley-East Kern agency supplies water to a number of retailers and also to agricultural and industrial users. AVEK's biggest customer is Los Angeles County Waterworks District No. 40, which serves portions of the cities of Lancaster and Palmdale, as well as unincorporated territories. AVEK owns rights to 141,400 acre-feet from the State Water Project. According to the agency's 2005 urban water management plan, AVEK expects to receive about 70% of that allocation most years. However, consecutive dry years in Northern California combined with a court-ordered reduction in pumping from the Bay Delta to protect the endangered Delta smelt are drastically cutting into State Water Project deliveries (see *CP&DR Environment Watch*, February 2008). Russell Fuller, AVEK general manager, recently predicted the agency would receive only 10% of its allocation in 2009.

Recognizing the situation, Waterworks District No. 40 last November stopped issuing "will-serve" letters to builders, and large projects that must prove a long-term water supply, whether from District No. 40 or elsewhere, have stalled.

"There is no one," said Rosamond CSD's Stewart, "that is issuing will-serve letters in the Antelope Valley currently because no one knows whether they will have enough water."

"We have been severely hurt in the building industry – in the housing and the retail and the commercial sectors," said Gretchen Gutierrez, executive officer of the Building Industry Association of Southern California's Antelope Valley Chapter. "We have no water in the valley. For nearly a year, we have been shut down. It's having an economic impact."

The connection between land use planning and water management in the Antelope Valley has not always been strong, in part because the cities of Palmdale and Lancaster – which collectively house about two-thirds of the valley's 450,000 residents – do not provide water service. But the cities were eager participants in the regional water planning process and appear willing to assume larger roles in solving the water shortage.

Palmdale has begun reconsidering its – CONTINUED ON PAGE 6

CP&DR Legaldigest

9th Circuit Endorses Antenna Siting Regulation

Federal Court Reverses Itself, Bolsters Local Zoning Authority

BY PAUL SHIGLEY

In a major reversal, the Ninth U.S. Circuit Court of Appeals has ruled that wireless telecommunications providers can no longer challenge local zoning regulations on the basis that the zoning has the potential to prohibit telecommunications services. Instead, providers will have to show that local regulation does in fact prohibit telecommunications services.

The result of the decision is that it will be very difficult for companies to challenge entire zoning ordinances that regulate the installation of wireless telecommunications facilities such as cell phone antennas. Instead, the companies will have to contest how a local agency applies its ordinance in a specific instance.

"There are going to be a lot fewer challenges to local government discretion over these facilities – how they look and where they go," said Thomas Bunton, the senior deputy San Diego County counsel who won the Ninth Circuit decision.

In March 2007, a three-judge panel of the Ninth Circuit upheld a district court decision striking down San Diego County's 2003 ordinance regulating wireless facility location and appearance. Ruling for Sprint Telephony PCS, the court said the ordinance violated the federal Telecommunications Act of 1996 because the ordinance's discretionary review provisions could prohibit wireless communications services (see *CP&DR Legal Digest*, May 2007). The decision was based largely on *City of Auburn v. Qwest Corp.*, 260 F3d 1160 (9th Circuit 2001), one of the first circuit court decisions in the country regarding the Telecommunication Act's pre-emption of local zoning. In *Auburn*, the court adopted a broad interpretation of the pre-emption and struck down an Auburn, Washington, ordinance requiring telecommunications companies to pay for use of the public right-of-way.

Earlier this year, however, the majority of Ninth Circuit judges voted to reconsider the March 2007 ruling in the San Diego County case. An 11-judge en banc panel heard oral arguments in June and in September issued a unanimous opinion that said the *Auburn* decision was wrong.

At issue were two different sections of the Telecommunications Act – 47 U.S.C. § 253(a) and 47 U.S.C § 332(c)(7). The former section bars state or local regulation that "may prohibit or have the effective or prohibiting" telecommunications services. The latter section specifically preserves local zoning authority so long as local regulation does not "prohibit or have the effect of prohibiting" the provision of wireless services. Although the two sections contained some identical language, the Ninth Circuit had been interpreting them differently. The *Auburn* line of cases read the federal pre-emption in § 253(a) broadly. However, in *MetroPCS, Inc. v. City of San Francisco*, 400 F3d 715, a Ninth Circuit panel provided a narrower reading of the federal pre-emption based on § 332(c)(7). In *MetroPCS*, the court ruled that local regulation runs afoul of the Telecommunications Act only if the regulation bans wireless service or actually imposes restrictions that amount to a wireless service ban.

Last year, the Eighth Circuit dismissed the *Auburn* approach and concluded in *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F3d 528, that a telecommunications company "suing a municipality under § 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

The en banc panel reconsidering the San Diego case said it found the Eighth Circuit's critique of *Auburn* "persuasive."

"When Congress uses the same text in the same statute, we presume that it intended the same meaning," Judge Susan Graber wrote for the Ninty Court. "Our holding today therefore harmonizes our interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II). Under both, a plaintiff must establish an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could potentially prohibit the provision of telecommunications services is insufficient."

After throwing out the Ninth Circuit's case law, the en banc panel considered the San Diego County ordinance anew. Adopted in 2003, the ordinance established a four-tier system for granting conditional use permits for wireless facilities, with the level of review varying based on the location, visibility and height of proposed structures. The ordinance requires facilities to be compatible with adjacent uses, camouflaged when appropriate and consistent with community character. The court had no trouble finding the ordinance valid under the Telecommunications Act.

"Sprint cannot meet its high burden of proving that 'no set of circumstances exists under which the ordinance would be valid' simply because the zoning board exercises some discretion," Graber wrote. "[R]equiring a certain amount of camouflage, modest setbacks, and maintenance of facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition."

Jonathan Kramer, a Los Angeles-based consultant to local government on wireless regulation, said the en banc decision "completely reversed the law in the Western United States."

"It is a stirring reversal in the direction of the Ninth Circuit and after many years brings some common sense back into wireless citing," Kramer said. "The Ninth Circuit stood in splendid isolation from other circuits."

A number of local ordinances in California and elsewhere within the Ninth Circuit's territory have been struck down when telecommunications providers challenged entire ordinances. However, said Kramer, most challenges to a local agency's application of its ordinance in a specific instance have failed. Yet under the en banc ruling,

uncertainty, among both landowners and local governments, about what regulations apply to land under Williamson Act contracts," Simons wrote. "Land under contract could effectively be shielded from all subsequent efforts to regulate its use."

The appellate court did not decide whether to nullify the land divisions and transfers, instead directing the trial court to fashion an appropriate remedy. Three weeks after issuing the decision, the appellate court rejected McKee's request for a re-hearing, setting up a likely appeal to the state Supreme Court. ■

■ The Case:
County of Humboldt v. McKee, No. A117325, 08 C.D.O.S. 10837, 2008 DJDAR 12897. Filed August 15, 2008. Modified September 10, 2008 at 2008 DJDAR 14313.

■ The Lawyers:
For the county: Kevin Brodehl, Morgan, Miller, Blair, (925) 937-3600.
For McKee: David Blackwell, Allen, Matkins, Leck, Gamble, Mallory & Natsis, (925) 943-5551.

takings

Inclusionary Housing Ordinance Withstands Property Rights Suit

A property owner challenging the constitutionality of an inclusionary housing ordinance may not employ the nexus and rough proportionality tests from the *Nollan* and *Dolan* cases, the Second District Court of Appeal has ruled.

In litigation stemming from Santa Monica's inclusionary ordinance, the appellate court made clear that the *Nollan/Dolan* tests requiring that there be an essential nexus between a development's impact and an exaction, and requiring the exaction to be roughly proportional to the impact, apply only when a property owner is contesting a government decision on a specific project.

"Both the United States and California Supreme Courts have explained the two-part *Nollan/Dolan* test developed for use in land exaction takings litigation applies only in the case of individual adjudicative permit approval decisions; not to generally applicable legislative ... decisions," Presiding Justice Paul Turner wrote for the unanimous three-judge panel.

The court also ruled that the City of Santa Monica did not have to seek state Department of Housing and Community Development review of its inclusionary ordinance because it was not part of the housing element.

A 1990 initiative, Proposition R, modified the Santa Monica city charter to require 30% of newly constructed multi-family housing to be permanently affordable to low- and moderate-income households. Although the city adopted ordinances to implement the initiative, city officials found that actual production of affordable units fell well short of the 30% mandate. In response, the city in June 2006 adopted Ordinance No. 2191 requiring developers of at least four multi-family units to construct affordable units on-site or at another location. The ordinance eliminated the option of a developer paying an in-lieu mitigation fee.

Aided by property rights attorneys at the Pacific Legal Foundation, a group called Action Apartment Association sued the city. The group argued that Ordinance No. 2191 violated the takings clauses of the Fifth Amendment and the California constitution, violated due process provisions in both constitutions and conflicted with various sections of the Government Code. A Los Angeles County Superior Court dismissed the claims, and the Second District affirmed the lower court ruling.

The two issues on appeal were whether the city's ordinance amounts to an unconstitutional taking, and whether the city had to receive state department of Housing and Community Development (HCD) approval of the ordinance.

Action Apartment Association argued that there was no connection between the construction of market-rate units and the need for subsidized housing – in violation of the *Nollan* essential nexus test. The group also argued that the requirement to build affordable units was not roughly proportional to the impact of constructing new or replacement market-rate units – in violation of the *Dolan* rough proportionality test. The organization argued that the U.S. Supreme Court ruling in *Lingle v. Chevron U.S.A.*, Inc., 544 U.S. 528 (2005), brought the *Nollan* and *Dolan* inquiries into facial challenges of land use regulations.

The court disagreed. The *Lingle* decision overturned the *Agins* line of cases, which held that a regulation that substantially advances a legitimate state interest cannot be a taking. The Supreme Court ruled that the substantially advances test is no longer a "'freestanding" test for a regulatory taking, Turner explained.

"The Supreme Court did not purport to hold the two-pronged *Nollan/Dolan* test applied to a facial challenge such as that asserted by plaintiff," Turner wrote. "Moreover, the Supreme Court in *Lingle* emphasized it was not disturbing any of its prior takings jurisprudence."

"In *San Remo Hotel v. City and County of San Francisco* (27 Cal.4th 643, 670), our Supreme Court explained: 'The sine qua non for application of *Nollan/Dolan* scrutiny is thus the discretionary deployment of the police power in the imposition of land-use conditions in individual cases,'" Turner wrote.

It took the court only two paragraphs to dismiss the contention that the city had to submit the ordinance to HCD. "Only housing elements or amendments thereto must be submitted to the Department of Housing and Community Development for review," the court concluded. "The city's affordable housing ordinance is not a housing element." ■

■ The Case:
Action Apartment Association v. City of Santa Monica, No. B201176, 08 C.D.O.S. 11585, 2008 DJDAR 13789. Filed August 28, 2008.

■ The Lawyers:
For the association: James Burling, Pacific Legal Foundation, (916) 419-7111.
For the city: Alan Seltzer, city attorney's office, (310) 458-8691.

clean water act

EPA Ordered To Write Rules For Construction Site Runoff

The Environmental Protection Agency has until December 1, 2009, to promulgate standards for runoff from construction sites. The deadline is contained in a 2006 federal district court ruling that the Ninth U.S. Circuit Court of Appeals recently upheld.

The ruling marks a victory for environmentalists but could provide a significant blow in the form of added expense to the already beleaguered construction industry.

In 1999, the EPA announced it was undertaking rulemaking to address stormwater discharge pollution from construction and redevelopment sites. On August 31, 2000, EPA published a final notice listing construction activities as a "point-source" category under § 304(m) of the Clean Water Act. From that date, the EPA had three years to complete the rulemaking process.

misapplying the code, the city had decreased surrounding homes' property values. The court was not convinced.

"Logan Neighborhood's 'failure-to-protect' and 'failure-to-enforce' allegations do not suffice. The constitution generally does not require the state to 'protected the life, liberty and property of its citizens against invasion by private actors,'" Fisher wrote, citing *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989). "Spokane has no independent constitutional duty to safeguard the Dressels' neighbors from the negative consequences – economic, aesthetic or other otherwise – of the Dressels' construction project."

The court also rejected the neighborhood group's argument that it had been deprived of procedural due process because it was not notified and given an opportunity to comment before the city issued the Dressels' building permit.

"[W]e conclude that Logan Neighborhood's procedural due process claim failed because Spokane's historic preservation provisions do not 'contain mandatory language' that significantly constrains the decision-maker's discretion," the court ruled.

The court also ruled that the neighbors could not press a claim under the historic preservation act and that potential municipal code violation was not subject to federal court review. ■

■ The Case:
Shanks v. Dressel, No. 06-35665, 08 C.D.O.S. 11447, 2008 DJDAR 13658. Filed August 27, 2008.

■ The Lawyers;
For Shanks: Charles Cleveland, (509) 326-1029.
For Spokane: Milton Rowland, city attorney's office, (509) 777-1610.
For Dressel: Steven Schneider, Murphy, Bantz & Bury, (509) 838-445.

public trust

Environmental Group Sues Wrong Parties Over Bird Death Controversy

Members of the public may sue to defend the public trust resource of wildlife, but the suit must be filed against public agencies responsible for protecting the wildlife, according to the First District Court of Appeal.

The court ruled against environmentalists who sued owners and operators of windmills that are responsible for killing many birds at the eastern Bay Area's Altamont Pass. Environmentalists may sue, but they should have sued the permitting or oversight agencies, not the private parties that own and operate the windmills, the court concluded.

"There is no suggestion that any defendant [windmill owner or operator] has conducted its operations in nonconformity with its conditional use permit," the court ruled. "Thus, a challenge to the permissibility of defendants' conduct must be directed to the agencies that have authorized the conduct."

The California Energy Commission designated the Altamont Pass Wind Resource Area in 1980, and it quickly grew into the state's largest wind farm with about 5,000 turbines. However, the hilly grasslands of the area provide ideal raptor habitat that is even better now because windmill tower foundations provide burrowing opportunities for rodents. What no one seemed to realize during the 1980s was the raptors might fly into the turbine blades. In 2004, the Energy Commission estimated that up to 4,700 birds – including golden eagles, red-tailed hawks, American kestrels and burrowing owls – are killed by Altamont windmills every year. Thus, when 20-year use permits neared their sunset dates and operators sought new permits, environmentalists pressed for the replacement of old turbines with fewer, larger and more bird-friendly models. The Alameda County Board of Supervisors in September 2005 approved the updated permits with new conditions, but environmentalists were not satisfied (see *CP&DR Environment Watch*, August 2005).

Local Audubon Society chapters and a group with ties to organized labor filed California Environmental Quality Act lawsuits. That litigation was settled in early 2007 when the county and windmill operators agreed to adaptive management measures if bird deaths do not decrease by certain amounts.

The Center for Biological Diversity (CBD) took a different approach. Before the county completed use permit renewals, the organization sued the windmill owners and operators for allegedly violating the state Unfair Competition Law and for destroying wildlife in violation of the public trust. One Alameda County Superior Court judge ruled that the CBD could not bring the Unfair Competition Law claims because Proposition 64 approved in November 2004 restricted such suits. Later, a different judge rejected the public trust doctrine arguments.

The environmental group appealed only the public trust doctrine portion of the case. Superior Court Judge Bonnie Lewman Sabraw had accepted the windmill operators' argument that the public trust doctrine applies only to tidelands and navigable waters, and not to wildlife. In its unanimous decision, however, a three-judge panel of the First District, Division Three, ruled that Lewman Sabraw's ruling was wrong on this point. After reviewing the evolution of the public trust doctrine and case law, the First District concluded, "[I]t is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife. They are natural resources of inestimable value to the community as a whole. Their protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions."

The First District also made clear that, although most public trust lawsuits are brought by government agencies, members of the public may also sue. "Many of the cases establishing the public trust doctrine in this country and California have been brought by private parties to prevent agencies of government from abandoning or neglecting the rights of the public with respect to resources subject to the public trust," Justice Stuart Pollak observed in the court's opinion.

Those portions of the ruling were victories for environmentalists. The rest of the decision went the other way.

"The defect in the present complaint is not that it seeks to enforce the public trust, but that it is brought against the wrong parties," Pollak wrote. "Plaintiffs have brought this action against the windmill operators whose actions they allege are destroying natural resources protected by the public trust. Plaintiffs have not proceeded against the County of Alameda, which has authorized the use of the wind turbine generators, or against any agency such as the California Department of Fish and Game that has been given the statutory responsibility of protecting the affected natural resources."

The CBD should have sued "the appropriate representative of the state" charged with upholding the public trust, the court ruled. And because the county approved the new use permits three years ago, it is too late to challenge their issuance now, the court concluded. ■

■ The Case:
Center for Biological Diversity, Inc., v. FPL Group, Inc., No. A116362, 08 C.D.O.S. 12362, 2008 DJDAR 14691. Filed September 18, 2008.

■ The Lawyers:
For CBD: Richard Wiebe, (415) 433-3200.
For FPL Group: William Berland, Ferguson & Berland, (510) 548-9005.

Boston, not entirely unlike a linear park built atop a freeway, connecting a series of other downtown parks and open spaces.

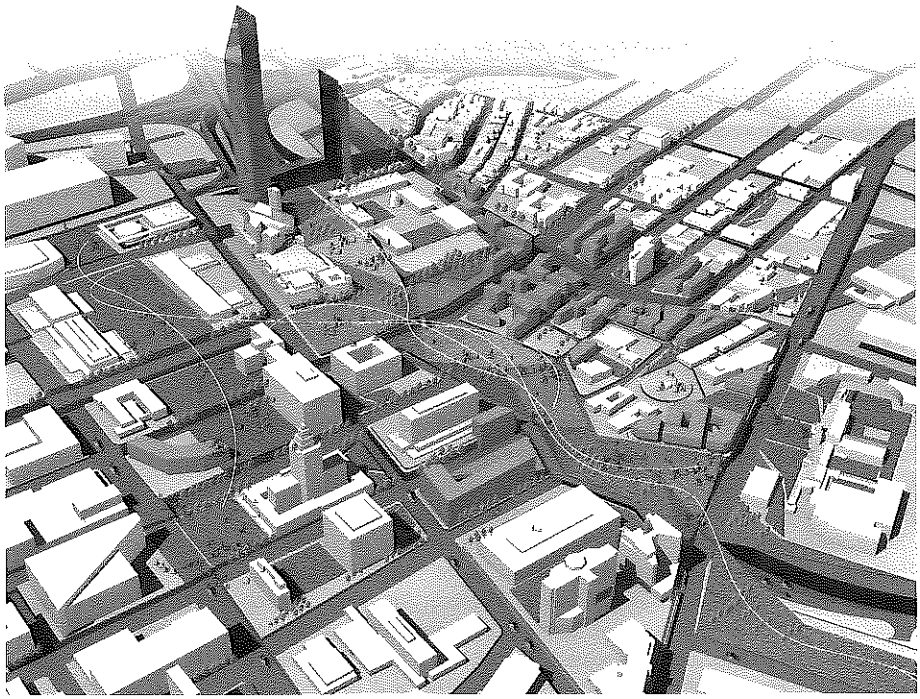
The computer renderings of Park 101 remind me of those black-and-white optical tricks, in which the black lines and the white spaces around them trade places as foreground and background, teasingly asking us to choose which image is "real." Similarly, in Park 101 negative spaces of downtown, such as the dead air above the freeway, become positive green space, changing our mental image of downtown L.A. We can see spaces and spatial relationships previously unnoticed (at least by me), especially the way buildings located on either side of the Hollywood Freeway appear closer to one another when the chasm between them is filled in. As in the environmental art works of Christo and others, Park 101 takes a familiar landscape and makes it into something unfamiliar, and infinitely more attractive. The least appealing and least workable part of downtown could plausibly become its social center.

This is not to say that some parts of Park 101 are not jejune or even downright silly. The intern designers envision an amphitheater, which is a favorite device of landscape architects who love the look of terraced semicircles merging with earthworks, even though small amphitheaters are usually met with indifference by park users. More questionable is an urban forest to be planted atop the cap, although Mike Williams, one of the EDAW project managers, told me that five-foot deep berms may accommodate some tree roots. More questionable still is a parking structure to be located beneath the enclosure, at the freeway level. This sounds dark and hard to secure. And about the proposal for a place-marker tower with a pencil-like profile, foreseen as the tallest building west of the Mississippi. It deserves to be crumpled up in design student's waste basket, as surely it will be.

Engineering the enormous bridge seems the greatest challenge. Williams tells me there are precedents, although none as large as a half-mile long freeway bridge within the mile-long park. A five-acre, above-the-highway park exists in Seattle, and Williams said that EDAW's structural consultant, the Paris office of DMJM, has experience in designing analogous structures.

Beyond the politics of traffic and parking in Los Angeles, which are considerable, is the matter of cost, which I don't pretend to know. A similar proposal a few years back to cover a portion of La Cienega Boulevard in south Los Angeles had an estimated costs of several hundred million dollars. Park 101 would almost surely cost more. (EDAW did a feasibility study for another over-the-bridge in Hollywood that might provide a basis for estimating engineering costs.)

Charming or not, it would take the power of a gale-force wind to turn this scheme into something real beneath our feet. Transportation engineers must reroute much of downtown, where daytime traffic varies between slow and no-go. (Could an increase in foot traffic in the Civic Center reduce the need for cars?) The scheme would also require a long battle with entrenched interests (sorry, "stakeholders") although it is conceivable that the greenway would ultimately boost property values, justifying the public investment. In any event, we should begin troubleshooting this proposal immediately. Cities are impossible without freeways, and they are miserable places without walkable open space. Fanciful or not, Park 101 is worth building. ■



Combined with the planned Grand Avenue Park (left), Park 101 would provide a new series of pedestrian and bicycle links in downtown.

Green space, wildlife and outdoor recreation in downtown L.A.? Park 101 says it is possible.

Growth Initiative (Measure Z) and the Limited Growth Initiative (Measure Y). Put forth by slow-growth advocates, Measure Z would prohibit changes to the general plan's land use element without voter approval. The initiative could force a vote on several large development proposals that are inconsistent with the land use element.

Backed by Mayor Mark Johnson, Measure Y would place a cap on housing units until 2020 and require voter approval of boundary changes and annexations.

• Orange County

Measure V in San Clemente would prohibit rezoning or development of open space lands without voter approval. The measure follows on the heels of a February referendum vote blocking a condominium development on land now designated as open space, although it contains a private golf course. The unrelated Measure W is an advisory vote on the LAB North Beach project, a proposed retail/restaurant/office/parking development on three acres of city-owned land.

Open space is also the issue in San Juan Capistrano, where Measure X would prohibit any change in designation of open space lands, and Measure Z would authorize the sale of $30 million in bonds to acquire and enhance open space.

Measure BB in Yorba Linda would prohibit the use of eminent domain for economic development projects. Measure Z in Seal Beach would impose a 25-foot height limit on the Old Town area.

• San Bernardino County

On the ballot in the City of Loma Linda is Measure T, which would permanently preserve 1,675 city-owned acres in the South Hills for open space and recreation. About 200 miles away in Needles, an advisory measure asks voters about a Fort Mojave Indian Tribe plan to build a casino on 300 acres of tribal land adjacent to Interstate 40, four miles west of town.

• San Diego County

Possibly the most intriguing measure on any ballot is Proposition B, affecting the San Diego Port Authority. The initiative would amend the port district master plan to permit a private entity to build a 96-acre deck 40 feet above marine cargo facilities. The initiative's backers, businessmen Frank Gallagher and Richard Chase, say the deck could provide a site for a football stadium, a sports arena, a convention center expansion, parking or other amenities. Port district directors lost a lawsuit to keep the initiative off the ballot. Proposition B will appear in the port authority's five member cities – San Diego, National City, Chula Vista, Imperial Beach and Coronado

Proposition A tackles the subject of fire protection. Since 2003, large conflagrations have killed 27 people and destroyed more than 4,000 homes in San Diego County. Proposition A would establish a regional fire protection agency and impose a $52 annual parcel tax to fund the agency. Although many local elected officials back the measure, the two-thirds vote threshold could be a major hurdle.

Slow-growth advocates in the City of San Marcos are behind Proposition O, which would bar most land use designation changes without voter approval. The measure purports to be retroactive to July 23, 2007 – which would block a 217-acre specific plan that seeks to create a dense, mixed-use downtown. San Marcos voters will also decide Proposition N, a city-backed measure that would prohibit changes to the city's ridgeline protection overlay zone without voter approval.

• San Francisco

Voters here face the usual lengthy ballot. This time, it includes an $887 million bond to fund a seismically safe replacement for San Francisco General Hospital (Measure A), establishment of an affordable housing trust fund (Measure B), and creation of an historic preservation commission (Measure J).

• San Luis Obispo County

An initiative intended to block a proposed Wal-Mart Supercenter is the talk of Atascadero. Measure D-08 would limit retail stores to 150,000 square feet, and would limit stores with 5% of floor space dedicated to nontaxable goods (i.e. groceries) to 90,000 square feet.

• San Mateo County

Redwood City voters may choose from land use measures that appear somewhat similar. Backed by environmental groups, Measure W would prohibit development of open space, tidal plains, and bayfront without two-thirds voter approval. The initiative is aimed at potential development of 1,400 acres of former salt flats owned by Cargill. The City Council-backed Measure V would prohibit development of the Cargill property without majority voter approval.

• Santa Barbara County

Measure A would extend a sales tax for transportation for 30 years. The existing quarter-cent tax is scheduled to expire in 2010. Measure W would double the rate. Two years ago, an extension of the quarter-cent tax failed to garner two-thirds voter support.

In Buellton, Measure E would prohibit prior to 2025 the expansion of the city limits or the extension of sewer or water service beyond the boundaries without voter approval. Measure F would impose the same requirements but only through 2014.

• Santa Clara County

A one-eighth cent sales tax to provide additional funding for a BART extension to San Jose is on the ballot as Measure B. The tax would be in addition to an existing half-cent sales tax for BART and other transportation projects. The new tax would be collected only if the Federal Transit Administration contributes $750 million to the BART project. Meanwhile, Measure C is a required advisory vote on the Valley Transportation Plan 2035. Measure D would eliminate the requirement that future transportation plans be subject to advisory votes.

In the City of Morgan Hill, voters will decide on the city-backed Measure H, which would modify a housing cap to permit development of 500 units in downtown. An initiative seeking to overturn the city's inclusionary zoning and affordable housing policies, however, will not appear on the ballot because a Superior Court judge ruled it would conflict with state housing law.

• Solano County

Measure T asks voters to extend a slightly modified version of the existing Orderly Growth Initiative and ratify an updated county general plan. Scheduled to expire in 2010, the Orderly Growth Initiative prohibits most development of agricultural lands and directs growth to incorporated cities. Voters rejected an effort to extend those restrictions two years ago, but that opposition appears to have faded.

• Stanislaus County

Measure S is the latest attempt for a half-cent sales tax to fund transportation. The tax would last 20 years and half of the revenue would pay for repairing and upgrading city streets.

• Ventura County

Oxnard voters will decide what might be the most draconian growth-control measure on this fall's ballot. Measure V would require voters to decide on any development project of at least 5 residential units or 10,000 square feet of commercial, retail or industrial space that is proposed within five miles of an intersection with a level of services worse than C. Essentially, the measure would put every project before voters. Councilman Tim Flynn, a candidate for mayor, is the chief proponent. Both the business community and organized labor have come out against Measure V.

In Fillmore, Measure I would limit development in the North Fillmore Area to 350 housing units, instead of the planned 700. ■

CP&DR

CALIFORNIA PLANNING & DEVELOPMENT REPORT VOL. 23, NO. 11 – NOVEMBER 2008

Housing Market Sinks To New Depths

New Home Starts Reach Historic Lows As Capital Disappears From System

BY PAUL SHIGLEY

The housing market slide that began during late 2006 and picked up speed in 2007 has become a full-fledged disaster in 2008. Housing starts are at their lowest level since anyone started keeping track, and prices continue to fall. Neither developers nor lenders are willing to start new projects, and analysts say the market may not turn around for at least three or four years.

Statistics for housing starts and sales indicate that the Central Valley and the Inland Empire are the hardest-hit areas, with starts down by more than 90% in places such as Merced and the Yuba City/Marysville area. Sales of new single-family houses in San Bernardino and Riverside counties have fallen by 80% since the first quarter of 2006. Stockton, Modesto and Merced continue to be national foreclosure leaders.

Housing starts for the year are projected to reach only 66,000 statewide, according to the California Building Industry Association. That's down nearly 70% from the 2004 and 2005 peaks of about 210,000 starts per year, and down 50,000 units from last year's weak performance. For 2009,the CBIA – which is usually overoptimistic – predicts only 67,000 starts.

The bright spots – or at least the less dim spots – are in multi-family housing projects, especially those in urban areas and close to transit. While single-family starts have dropped 78% – CONTINUED ON PAGE 12

inbrief

San Diego City Council approved a giant infill project on the site of a gravel quarry in Mission Valley during late October. The Quarry Falls project proposes 4,780 housing units in a variety of configurations, about 600,000 square feet of retail space, about 600,000 square feet of offices, 70 acres of parks and open space, and a school on the 230-acre site near the junction of Interstates 8 and 805.

The developer, Sudberry Properties, presented the project as an ideal fit within San Diego's "City of Villages" concept because of a pedestrian-friendly design, the inclusion of live-work units and housing above storefronts, close proximity to the trolley and extensive public open space.

The only vote against the project came from Councilwoman Donna Frye, who represents Mission Valley. She voiced concerns about traffic the project would generate in the already congested area. A group called San Diegans for Responsible Planning, organized by rival developer H.G. Fenton, has raised similar complaints in opposing the project. But Sudberry representatives said the company will provide improvements to five freeway interchanges as part of the development.

Developers of an $850 million project on a closed garbage dump in Carson conducted a formal groundbreaking ceremony in October. LNR Property and Hopkins Real Estate Group actually began remedial work on the site in April, but the ceremony offered Carson city officials the chance to celebrate the unusually large infill project.

Since the Cal Compact landfill closed in 1965, numerous developers and speculators have made a run at developing the 168-acre site along the 405 freeway. In the 1980s, the city approved a 2-million-square-foot shopping mall. It went nowhere. More recently, the National Football League eyed the land for a stadium. City officials, however, chose to work with LNR and Hopkins, ultimately approving a project of 1,300 apartments and condominiums, 1 million square feet of retail space and a 300-room hotel.

Originally called Avalon at South Bay, the project is now known as The Boulevards at South Bay and a 2011 opening is planned.

The California Redevelopment Association (CRA) is suing the State of California for shifting $350 million in redevelopment tax increment – CONTINUED ON PAGE 2

SB 375: Legislation Provides Incremental Change, Not Land Use Revolution

insight

WILLIAM FULTON

Supporters and opponents alike are touting SB 375 as the most significant land use reform bill in recent California history. When he signed it in September, Gov. Schwarzenegger called it the biggest bill since passage of the California Environmental Quality Act 38 years ago. Meanwhile, the hilariously over-the-top Orange County *Register* has called the bill "one of the most authoritarian, far-reaching and elitist bills that has ever made it to the governor's desk."

In fact, it is neither. Senate Bill 375 is not a revolution. Rather, it is a step – admittedly a very big step – in California's gradual transformation from suburban planning to urban and metropolitan planning. – CONTINUED ON PAGE 16

ECONOMIC DEVELOPMENT

PAUL SHIGLEY

Public-Private Initiative Seeks A Green Valley In Inland Empire

With an economy based on construction, shipping and warehousing, and heavy industry – and with some of the most conservative politics in the state – the Inland Empire would appear to be an unlikely place for a "green" movement. However, a public-private initiative is under way that seeks nothing less than a transformation of the region to one based on green technology and sustainable living.

The Green Valley Initiative was launched in 2007 by developer Ali Sahabi, president of SE Corporation. Best known as the developer of Dos Lagos in Corona, a mixed-use project that has won American Planning Association and Building Industry Association awards, Sahabi established the nonprofit Green Institute for Village Empowerment last year. That organization has been the key sponsor of the Green Valley Initiative (GVI), which has since attracted endorsements from more than 25 public agencies and private entities and attracted more than 500 people to various gatherings.

"It's really about taking a long-term, holistic, sustainable view of how you change the economy," explained Daniel Cozad, GVI's program director. "I don't think anybody else is attempting to do this on such a grand scale."

Doug Henton, chairman and CEO of Collaborative Economics, which has provided research and guidance to the GVI, called the project "more systematic and comprehensive" than green technology and development efforts in Silicon Valley, Sacramento and the San Diego region.

"What's intrigued me is that it has brought together the two counties and the business sector," Henton said of the GVI.

Still, the San Bernardino and Riverside counties region has a long ways to go before it might be considered a paragon of green virtue. The two counties have grown rapidly to a combined population of 4.1 million people living primarily in low-density, automobile-oriented housing tracts. Green building practices are extremely rare. Trucking, warehousing and railroad companies – which are heavily dependent on burning diesel fuel – employ about 117,000 people in the two counties. Monitoring stations in Perris, Banning and the San Bernardino Mountains report some of the most polluted air in the country. Plus, as Cozad acknowledged, "This is a conservative area – a red portion of a blue state."

Although GVI boosters have been attracting supporters, not everyone is rushing toward the bandwagon. As one of the bigger GVI proponents, San Bernardino County Board of Supervisors Chairman Paul Biane has urged all 24 cities in the county to approve a GVI resolution that promises the city will "participate in the development and implementation of sustainable model standards, policies and programs to benefit the Inland Empire region." Thus far, only seven cities in the county have signed on, although more are scheduled to consider the resolution.

Biane spokesman Scott Vanhorne called the cities a "mixed bag." "It's a pretty broad concept. Some of them haven't really wanted to bite," he said.

"These are business-oriented, conservative cities," added Cozad. "But we have a number of them that see the economic benefits and the quality of life benefits of the green economy."

Cozad said the GVI has had to confront confusion and misunderstanding more than skepticism. Some people initially thought the project was an anti-development effort, while others complained the GVI was simply a "greenwashing" of existing practices. The GVI is neither, he said.

So what exactly what is the Green Valley Initiative? Organizers offer up this statement: "The Green Valley Initiative reflects a new vision for the Inland Empire, combining sustainable green practices and technology with an economic development plan being developed by major stakeholders from throughout the Inland Empire. It integrates social, economic and environmental forces to bring new jobs, greater opportunities and a higher quality of life to the region."

The problem to confront, according to the GVI, is that Riverside and San Bernardino counties lack both enough jobs and the right kinds of jobs. The result is that 30% of region's workforce, including some of the most-educated workers, commute to Los Angeles, Orange and San Diego counties for employment.

For San Bernardino County, one big attraction is the development of alternative energy. Kramer Junction Solar Farms, located west of Barstow, is already one of the world's largest solar facilities, and Palm Springs Wind Farms is one of the largest wind energy facilities, noted Vanhorne. Both counties have the natural resources – sun, wind and relatively inexpensive land – to accommodate many more facilities, Cozad added.

But the possibilities are almost endless. Southern California Edison, for example, is talking about installing solar panels on top of millions of square feet of warehouse rooftops in the region. Officials overseeing conversion of three large military bases in the region are also quite interested in the effort. This month, GVI representatives are scheduled to meet with leaders of the local shipping, distribution and warehousing industry to talk about greening the distribution system. Although that might seem far-fetched, "green logistics" is the name of the game because of AB 32 mandates for reducing greenhouse gas emissions, and because energy efficiency is crucial to reducing costs, Henton said.

And there is no reason why new homes in the region should not have green aspects included, such as solar panels and technologically sophisticated utility controls that minimize energy and water consumptions, Henton said.

The idea is to build bridges between the public and private sectors, and between different public agencies, Cozad said. In the past, local governments have fought to protect their turf. Those battles have not all ended, but GVI is trying to get cities and counties to share because they are all part of one region. The sharing may be as simple as promoting common water recycling and drought-tolerant landscaping standards among the cities and two counties.

"You wouldn't think of this area of California as being green – on the political side or physically, given the amount of rainfall we receive every year," Cozad said. That's where public education and outreach can be useful in convincing people that changing business as usual is beneficial both environmentally and economically.

"I don't know if it's going to be a tough sell," added Vanhorne. "People are seeing what's happened with the price of oil. I think the public's mindset is going to be determined by the market."

The GVI in October qualified for federal Economic Development Administration funding. Green Valley Initiative boosters intend to fill out a board of directors and name an executive director in preparation of a "second launch" of the initiative in early 2009. ■

■ Contacts:

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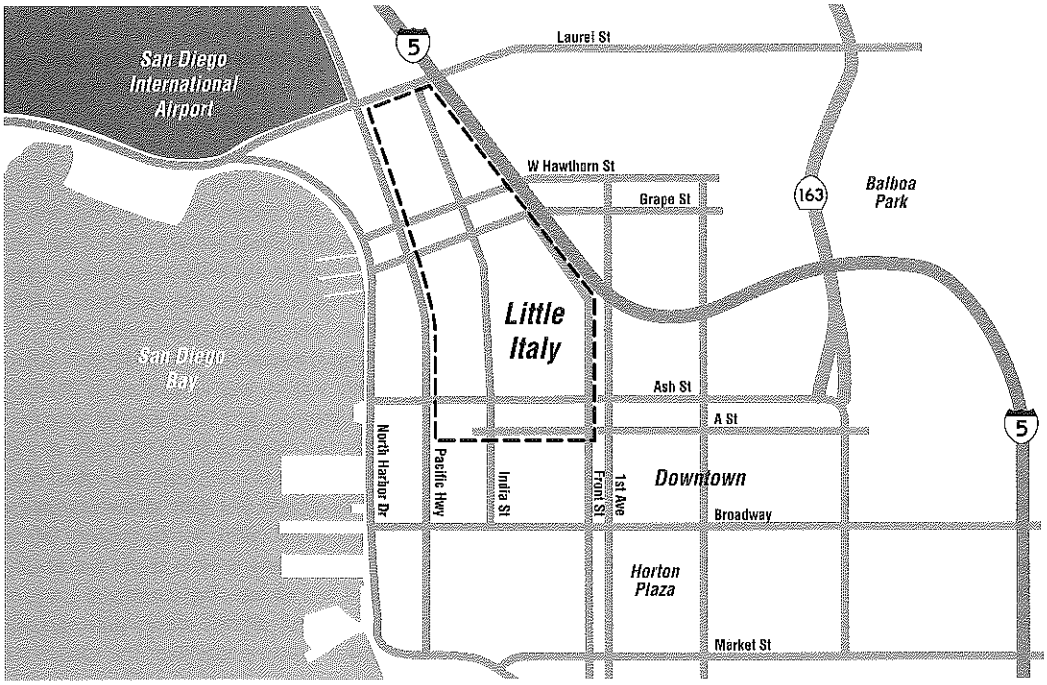
Green Valley Initiative website: www.greenvalleynow.org.



With its excellent location and reinvigorated business community, Little Italy has attracted 3,000 new residents during recent years.

recently, the neighborhood still is considered the most desirable neighborhood in downtown San Diego, he said.

Despite the ongoing gentrification, Little Italy still contains a variety of commercial and office buildings, including auto repair shops and a Mexican consulate, according to Michael Stepner, an architect and former city planner.

Li Mandri's company, New City America, has taken its lessons from Little Italy to a number of other California cities and worked to spruce up business districts with community benefit districts in San Francisco, Oakland, Los Angeles and San Jose.

Not everyone is enamored with Little Italy, although the most common complaint is that an area once covered with parking lots is now one of the most difficult places to park in all of San Diego.

"Outside of six or seven Italian restaurants, it's hard to see the relationship to what Little Italy once was, a working class fishing neighborhood" said University of California, San Diego political science professor Steve Erie. "It's another yuppie neighborhood."

Stepner predicts that the future focus in the neighborhood will be on the waterfront, which lies a few blocks west from inland India Street. Plans for the waterfront, known as the North Embarcadero area, call for developing parks with direct links to Little Italy. ■

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Little Italy Association website: http://littleitalysd.com.

San Diego city attorney's office.

Under Graham's guidance, the CCDC in 2007 chose The Related Cos. from a field of seven bidders for a $400 million condominium and hotel project in the East Village. However, Graham did not reveal until April of this year that she and her former husband had formed a partnership with Related to develop a condominium project in Florida. According to the city attorney's office, Graham received nearly $3 million in income from the Florida development in 2006 and 2007. However, she never reported the income in conflict-of-interest statements. In September, the CCDC board canceled its negotiating agreement with Related.

San Diego's downtown redevelopment has led to a boom in the area, with numerous office towers, hotels and restaurants opening in recent years, along with Petco Park baseball stadium and downtown shopping. But critics have contended that not enough emphasis has been placed on the city's public spaces and buildings, including replacement of an outdated downtown library. SEDC focused on building more shopping, housing and adding jobs in its region.

Michael Stepner, a downtown planning consultant, said some of the recent personnel problems were related to the individuals, and not the set up of the two corporations. "The need for people doing the right thing doesn't change," he said.

University of California, San Diego, professor Steve Erie calls the two corporations "a wonderful thing for developers," because there is less public oversight.

But Derek Danziger, a spokesman for CCDC, said downtown redevelopment has been a success, with the area generating millions of dollars for the city. Danziger said a primary focus during recent years has been on public infrastructure. Redevelopment money has been set aside for a new library, for example, but private fundraising efforts need to be successful before the library project moves further, he said.

Stepner said redevelopment in San Diego may change over the next six months, as the city government debates the future of the two corporations. The City Council is considering whether the two corporations should be merged back into the city's redevelopment agency, and whether the redevelopment agency should run more like agencies in San Francisco and Los Angeles. Another option being considered is for the City Council to directly hire and fire the president of the development corporations, Danziger said. ■

— LARRY SOKOLOFF AND PAUL SHIGLEY

CP&DR Legaldigest

Rancho Palos Verdes Moratorium Deemed A Taking

Court Rejects City's Contention That Building Would Be Hazardous

BY PAUL SHIGLEY

The City of Rancho Palos Verdes' 30-year moratorium on new home construction in an area the city says is prone to landslides is an unconstitutional taking of private property, the Second District Court of Appeal has ruled. The decision marks a rare takings victory for property owners in state court.

The decision is also one of two potentially landmark takings rulings issued recently. In the other case, a federal appellate court ruled that the mandatory diversion of water to aid an endangered fish species is a physical appropriation of a water district's property (see story below.)

The Rancho Palos Verdes decision appears to be the first state appellate court ruling based primarily on the U.S. Supreme Court's 16-year-old *Lucas* decision, in which the high court held that a regulation that prohibits all economic use of a property is taking, except to the extent that principles of nuisance restrict the use (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003). The Second District determined that Rancho Palos Verdes did not prove that building houses on the property in question would constitute a nuisance. The court also ruled that the property owners did not have to exhaust their administrative remedies – namely, file applications for exceptions to the moratorium – because the process would have been futile.

Not surprisingly, views of the decision were mixed. The property owners' attorney, Stuart Miller, said the city's moratorium is a classic "*Lucas* taking."

"We've got a city that is so extreme and unreasonable," contended Miller, who said there is no evidence his clients' land will slide. "It's an absolute ban on use, and there's no justification for it."

J. David Breemer, a principal attorney with the pro-property rights Pacific Legal Foundation, which did not participate in the litigation, said the case could force cities to reconsider long-term building bans.

"I think it vindicates the principle that we argue a lot – that towns and agencies can't rely on speculative concerns of harm as a pretext for a ban on building," Breemer said. "You've got to show that there would be some actual harm,"

But attorney Edwin Richards, who represents the city, called the ruling a bitter one for Rancho Palos Verdes and all municipalities, which may now face greater scrutiny when they restrict development because of potentially hazardous situations.

"We just think that the decision puts this city, and cities in general, in a terrible catch-22 situation. They are being forced to allow development in a known landslide area with all of the hazards inherent in that," Richards said.

City officials and current residents fear that additional development will exacerbate the landslide potential, Richards explained.

"The lesson is a very distasteful one. Here, the city worked extremely hard to weigh the competing interests of these property owners and its citizens, and made a decision in the city's best interest," he said. "Then the court stepped in and said, 'Nice try, but you have to pay market value for these properties.'"

Dan Selmi, a professor at Loyola Law School, said the case is strikingly similar to *Lucas*. "It seems to fall into that pattern like *Lucas* – a relatively rare fact pattern where the city was unwilling to permit housing on safety grounds," Selmi said. Thus, the burden of proof was on the city and, he said, "The court thought there was something wrong with the city's evidence."

Located on a peninsula that separates Santa Monica Bay from San Pedro Bay, Rancho Palos Verdes has a history of landslides. In 1957, an ancient landslide commonly known as the Portuguese Bend landslide began to move again. In 1974, a different area known as the Abalone Cove landslide began to shift. Both slides remain active, with annual movement typically measured in inches, but catastrophic slides are possible. In June 1999, the 18th hole at Ocean Trails Golf Course (now Trump National Golf Club) suddenly separated from the rest of the course by about 100 feet. The golf course is in the same area as the historic slides and about one mile south of the properties in question in the litigation.

In 1978, the City Council adopted an urgency ordinance prohibiting development in the general vicinity of the slides. The city has updated the ordinance a number of times since, always allowing some exceptions, such as for repairs and renovations to existing structures.

The city commissioned several studies over the years and in the mid-1990s divided the area into eight zones for purposes of remediation of residential development. The properties in question here lie in Zone 2, which covers 130 acres largely unaffected by the historic landslides. Zone 2 contains 111 lots, 47 of which are undeveloped. Much of the local controversy centers on the proper "factor of safety," a geotechnical term that describes the stability of a piece of land. A 1.0 factor of safety means that the forces of stability are equal to the forces of instability, and the property is not considered safe for building. A 1.5 factor of safety means that the forces of stability are 50% greater than the forces of instability. Geotechnical professionals consider a 1.5 factor to be the minimum for residential construction, although a lower rating may be appropriate when a great deal is known about an area's geology.

In a 2002 report to the city, geologists with Cotton, Shires & Associates (CSA) said there was insufficient information to establish a factor of safety for Zone 2, but they also concluded that "development of the remaining parcels will not be of sufficient impact, in and of itself, to cause instability." In June 2002, the City Council approved the most recent moratorium resolution. It rejected the CSA conclusion that new homes could be built because the conclusion was not based on a factor of safety of at least 1.5. Under the resolution, the city

Robert Mayer said that Casitas does not own the water in question because water sources in California belong to the public. Even if the agency does own the water, he wrote, the Bureau of Reclamation's restriction is "plainly regulatory in nature," and not physical.

The ruling is somewhat similar to that in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), in which the court ruled that appropriation of water for endangered species should be considered a physical taking (see *CP&DR Environment Watch*, March 2004). However, that ruling was roundly criticized at the time and was later disclaimed in light of the Supreme Court's decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which clearly delineated the differences between a regulatory taking and a physical taking. Still, the Court of Appeals majority in the Casitas case declined to "opine on whether *Tulare* was rightly decided," and said, "*Tahoe-Sierra* did not depart from the substantial body of precedent dictating that the government's physical appropriation of a portion of a water right is compensable."

The decision worries environmentalists and regulatory agencies, who fear the precedent could hamper the government's ability to reallocate natural resources for environmental purposes. In an advisory, Nossaman attorneys Alfred Smith III and Melissa Poole said the decision "could have dramatic repercussions, particularly in the western United States."

Russ Baggerly, a Casitas board member who has opposed the lawsuit from the outset, told the *Ventura County Star*, "If it stands as good law, there isn't going to be enough money in the treasury to deal with all of the takings claims all across the country." The board has consistently split 3-2 on whether to continue the lawsuit.

Property rights advocates, however, celebrated the decision. "The Federal Circuit reached the right decision in this case," said Nancie Marzulla, one of Casitas's attorneys. "The government's argument that it can take the municipal water district's water for any reason, without paying for the water it takes, is a breathtaking proposition."

In 1956, Congress authorized the Ventura River Project, which comprises Casitas Dam, Lake Casitas, the Robles Diversion Dam and the Robles-Casitas Canal. Essentially, the dam creates a reservoir on Coyote Creek, and the canal diverts water from the Ventura River into the reservoir. After project completion in 1959, Casitas Municipal Water District took over operation of the project. A state license grants the district the right to divert up to 107,800 acre-feet of water per year from the Ventura River, and to deliver up to 28,500 acre-feet annually.

In 1997, the National Marine Fisheries Service listed the West Coast steelhead trout as an endangered species. In 2003, after negotiations with the Casitas district, the Bureau of Reclamation (BOR) directed the district to construct a fish ladder at the intersection of the Ventura River, the diversion dam and the canal, and to divert adequate water for fish to reach historic spawning and rearing habitat that the water project had blocked. Casitas built the fish ladder under protest and then sued the federal government for breach of contract and an unconstitutional taking.

Court of Federal Claims Judge John Wiese ruled for the federal government. The Court of Appeals for the Federal Circuit, based in Washington, D.C., unanimously upheld Wiese on the contract claims, but divided 2-1 on overturning Wiese's ruling that Casitas had presented a regulatory taking claim in which it could not prevail.

The appellate panel majority built its decision on three Supreme Court cases: *International Paper Co. v. United States*, 282 U.S. 399 (1931), *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), and *Dugan v. Rank*, 372 U.S. 609 (1963). *International Paper* concerned a World War I-era government directive that the Niagara Falls Power Company cut off water to an International Paper plant so that Niagara could boost hydroelectric power production. The Supreme Court determined that the government "directly appropriated what International Paper had a right to use," the appellate panel explained. *Gerlach* was filed by San Joaquin Valley farmers who claimed the BOR's construction of Friant Dam eliminated their access to overflow irrigation. "The Supreme Court analyzed the government's action as a physical taking," the appellate panel explained. *Dugan* also involved Friant and the rights of downstream water users. The Supreme Court concluded the government had physically taken the landowners' water rights.

Federal government attorneys argued those three cases did not apply to the Casitas controversy because they all involved direct appropriation of water, not a restriction on the use of water. But the appellate panel majority said the situations are the same.

"[T]he government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal – after the water had left the Ventura River and was in the Robles-Casitas Canal – and towards the fish ladder, thus reducing Casitas' water supply," Judge Moore wrote. "Similar to the petitioner in *International Paper*, Casitas' right was to use the water, and its water was withdrawn from the Robles-Casitas Canal and turned elsewhere (to the fish ladder) by the government."

The court bluntly rejected the government's contention that a regulatory taking analysis should apply to what the government characterized as a restriction on use of a natural resource. "[T]his case involves physical appropriation by the government," Moore responded. "The United States actively caused water to be physically diverted away from Casitas after the water had left the Ventura River and was in the Robles-Casitas Canal."

The majority ruling sends the case back to the Court of Federal Claims for a determination of whether a taking occurred and what compensation, if any, Casitas is entitled to.

In his dissent, Judge Mayer insisted that the lower court must also consider whether Casitas has a property interest in the water. Mayer made clear how he would rule: "California subjects appropriative water rights licenses to the public trust and reasonable use doctrines, so Casitas likely has no property interest in the water, and therefore no takings claim."

Mayer continued, "The government is not appropriating or taking possession of Casitas' property, but rather is prohibiting Casitas from making private use of a certain amount of the river's natural flow under a public program to promote the common good. Labeling such an action as a physical taking blurs the line *Tahoe-Sierra* carefully draws between physical and regulatory takings."

Still, the majority contrasted its holding with *Tahoe-Sierra* because the latter case "did not involve a claim of physical taking, nor did it involve water rights." ■

- The Case:
  Casitas Municipal Water District v. United States, No. 05-CV-168. Published September 25, 2008.
- The Lawyers:
  For Casitas: Roger Marzulla, (202) 822-6760.
  For the United States: Katherine Barton, Department of Justice, (202) 514-2000.

ing general plan and zoning policies.

In September, the court heard oral arguments in *Save Tara v. City of West Hollywood*, No. S151402 (see *CP&DR Legal Digest*, April 2007). The case concerns exactly when in the development process CEQA is triggered. The Second District Court of Appeal ruled that the city's approval of a conditional agreement with the developer of a proposed housing project should have been subject to environmental review because it committed the city to a definite course of action. The city contends environmental review so early in the process would be premature and possibly lead to repetitive review once the project is fully known. During oral argument, justices asked about the possibility of establishing a "bright line" test to determine when CEQA is triggered. An opinion is due by December 1.

Other pending CEQA cases at the state Supreme Court: *Communities for a Better Environment v. South Coast Air Quality Management District*, No. S161190, which concerns the baseline for an EIR; *Citizens for Sensible Planning v. City of Stockton*, No. S159690, which involves the statute of limitations for filing a CEQA suit when a project is not properly approved; and *Committee for Green Foothills v. Board of Supervisors*, No. S163680, which concerns the statute of limitations for a suit when an agency declares a project could not have a significant impact. None of those three cases has been set for oral argument yet.

Away from CEQA, the court transferred *Dahms v. Downtown Pomona Property and Business Improvement District*, No. S143165, back to the Second District Court of Appeal, Division One. The case involves formation of, and assessments for, a business improvement district. In 2006, the Second District rejected a business owner's argument that a required public hearing was conducted at the wrong time and that the assessments are not proportional to the benefits received.

The Supreme Court directed the Second District to reconsider its decision in light of the recent decision in *Silicon Valley Taxpayer's Assn., Inc. v. Santa Clara County Open Space Authority*, 44 Cal. 431. In that case, the court threw out an open space assessment because it was a special tax that should have gone before voters. The district violated Proposition 218 by subjecting the assessments to a vote of only landowners, the court ruled (see *CP&DR Legal Digest*, August 2008). ■

endangered species

Fish & Game Commission Ordered To Consider Salamander Protection

The California Fish and Game Commission must consider listing the California tiger salamander on the state endangered species list, the Third District Court of Appeal has ruled.

The court determined that the Commission should have accepted a petition filed by the Center for Biological Diversity (CBD) and considered adding the salamander to the list of species protected by the California Endangered Species Act (CESA). "The Commission acted outside the range of its discretion in denying the petition," the court concluded.

Although the ruling was a victory for the environmental group, it was a blow to the development industry, landowners and local governments that for years have fought restrictions and struggled to accommodate the amphibian (see *CP&DR Environment Watch*, February 2006, July 2004).

California tiger salamanders historically lived throughout the Central Valley and the foothills of both the Coast Range and the Sierra Nevada. The species extended from Colusa County in the north to Tulare and Santa Barbara counties in the south. The salamanders breed in large seasonal ponds (vernal pools) and spend the rest of their lives within about a quarter mile of their breeding ponds. However, about 80% of the state's vernal pools have been lost to farming or urban development. Several of the salamander's distinct population segments are listed under the Federal Endangered Species Act (ESA).

Five years ago, CBD submitted its petition requesting the listing for the California tiger salamander. Under state law, the Department of Fish and Game evaluates a petition and other relevant information, and prepares a report and recommendation for the Fish and Game Commission. That panel then decides whether to accept the petition and commence a 12-month process to decide on the listing, or to reject the petition.

The department staff recommended the Commission accept the petition. During a 2004 hearing, Brad Shaffer, a University of California, Davis, ecology professor and salamander researcher, testified about threats to the species, including hybridization with an imported species of salamander, loss of habitat, and competition and predation by nonnative fish and bullfrogs. Shaffer estimated there were about 4,500 breeding female California tiger salamanders remaining.

The Central California Tiger Salamander Coalition, composed of development and local government interests, argued against the petition. The coalition countered much of Shaffer's testimony about habitat loss, estimated the species population was as high as 700,000 to 800,000, and argued the species had adequate protection.

The Commission voted 3-2 to reject the petition. It found there was insufficient information on population trends, there was credible evidence the population was not declining, testimony on loss of native wetland habitat was unpersuasive, there was insufficient information about the degree and immediacy of threats to the species, and existing protections through the federal Endangered Species Act, the Clean Water Act, the state's Porter-Cologne Act and the California Environmental Quality Act were adequate.

The CBD then sued, and Sacramento County Superior Court Judge Lloyd Connelly in December 2006 ruled against the Commission. On appeal, a unanimous three-judge panel of the Third District upheld Connelly's decision.

Under the Fish and Game Code and *Natural Resources Defense Council v. Fish & Game Com.*, (1994) 28 Cal.App.4th 1104, the standard for accepting a petition for consideration is "sufficient information to indicate that the petitioned action may be warranted," the court noted. The term "sufficient information" is defined as that which "would lead a reasonable person to conclude the petitioned action may be warranted." The term "may be warranted" means that there is a "substantial possibility" the listing could occur. The term "substantial possibility" means a greater chance than a "reasonable possibility." The court found that the CBD petition and supporting information easily passed these tests.

"[T]he information supporting the petition presents a *prima facie* showing that the California tiger salamander species is a threatened or endangered species within the meaning of the CESA," Third District Justice Kathleen Butz wrote. "The points raised by the Commission, concerning the strength of the information in favor of the petition, would not lead the objective, reasonable person to conclude there is no substantial possibility that listing could occur."

The coalition countered only some of the

500-home development in Canyon Country.

• SunCal suspended work in October on redevelopment of the Oak Knoll Naval Medical Center in Oakland, where the company plans nearly 1,000 housing units and some retail space. SunCal paid $100.5 million for the property three years ago.

• A proposed 39-story condo and hotel tower overlooking Petco Park in downtown San Diego went bust in October, and the lender took over the property.

• Developers with entitlements to build 1,500 housing units and a shopping center at The Village at Mission Lakes in Desert Hot Springs appear to have walked away after partially completing two commercial structures.

• Developers of three condominium towers in downtown San Jose have received the city's permission to rent the vast majority of units because sales virtually stopped.

• Watt Communities has put on hold its plan to build two five-story, mixed-use buildings containing more than 200 housing units in downtown Pomona.

• Nearly every reuse project at the former Fort Ord military base in Monterey County is on hold, including the ballyhooed, new urbanist East Garrison development (see *CP&DR Local Watch*, January 2006).

• Fresno's high-profile Running Horse project – 800 houses around a Jack Nicklaus-designed golf course – is mired in bankruptcy with no houses built. Donald Trump considered buying the project but backed out when the city declined to provide a subsidy (see *CP&DR Deals*, December 2007).

• Stalled development of a country club housing project in Placer County forced developer CC Myers to declare bankruptcy.

"The reality on the development side of things," said Renata Simril, Forest City Residential West senior vice president, "is that if projects have got development permits and have got their financing, but they have not started construction, they are holding."

Approved projects that lack financing have almost no chance of moving forward in the near future, Simril added. "The debt market has completely frozen up," she said.

"The banks are continually raising the equity requirement," said Donald Brackenbush, who heads the real estate advisory firm Public Private Ventures. "Now it's up to 40% or even higher, and you have to get your project appraised. But they don't know how to appraise it because there aren't any comps."

"Those that borrowed money to buy land will give it back to the bank, or they will simply turn to dust," Brackenbush said.

What happened? Essentially, explained Delores Conway, director of the Casden Real Estate Economics Forecast at University of Southern California's Lusk Center, the system went from a flood of capital to a drought of capital in a short period. "There were a lot of available loans around at very attract interest rates" for both builders and homebuyers, she said. "What's amazing is that the credit markets have dried up and are fueling this decline."

"Where a lot of those new housing starts were was in the Central Valley and the Inland Empire as everyone was building farther and father out," Conway said. "Overbuilding is always associated with real estate cycles."

Even when there was "overbuilding," however, development industry leaders and state officials said construction was not keeping pace with the state's 500,000-a-year population growth. Six years ago, Brackenbush, who serves on the executive committee of the Urban Land Institute's Los Angeles Chapter, lead a planning exercise to figure out how to house 6 million additional people in Southern California. "Now," said Brackenbush, "not only are we foreclosing and houses are sitting vacant, we're not building any new ones."

Housing Starts – First 9 Months

	2005	2006	2007	2008
Single-family	124,541	88,856	57,595	27,160
Multi-family	41,399	43,103	34,282	24,218

SOURCE: CONSTRUCTION INDUSTRY RESEARCH BOARD

Some cities and counties are trying to spur construction. For example, a number of cities in Orange and Sacramento counties and elsewhere have agreed to defer collection of impact fees until the final building inspection stage. Some jurisdictions have postponed scheduled fee increases. The City of Morgan Hill has relaxed its requirement that builders make 13% of new units affordable. But nothing that local government does seems to have much effect.

"We've had some encouraging news in the last few weeks that sales are up a bit and inventory is down," said Robert Rivinius, president of the CBIA. Still, construction is very slow. He recommended that Congress pass a true tax credit for homebuyers – unlike the program approved earlier this year that Rivinius said is more of a loan. He also urged local governments to reduce impact fees, and the state to create a permanent funding source for affordable housing.

Simril said now is the time for governments to undertake aggressive planning. She cited the City of Los Angeles' specific plan process for about 600 acres of industrial land at the Cornfields and Arroyo Seco. The process is likely to result in preservation of some industrial uses, but also in identification of mixed-use development opportunities and upzoning for high-density housing. The city also is preparing a master environmental impact report. All of this will ease the process for builders, she said.

What Los Angeles is talking about may be where the market is headed. Real estate devaluation, the number of available exurban units, high energy costs and even state policy appear to be changing the homebuilding and homebuying calculus.

"What's happening now is that different real estate products are becoming desirable," said Conway. "The developers are not going to do these huge developments where they build hundreds of houses way out there."

Rivinius conceded that the few houses getting built are smaller and less fancy. "Many builders are changing their product some to make their homes more affordable. I think you'll continue to see that," he said.

Noting that land prices have not fallen so sharply in coastal urban areas, Brackenbush predicted that high densities and transit will be the focus of future housing development.

"They said in 1981, 'Stay alive 'til 85,'" Brackenbush recalled. "They said in 1991, 'Stay alive 'til '95.' I don't know what they are saying now. 2015?" ■

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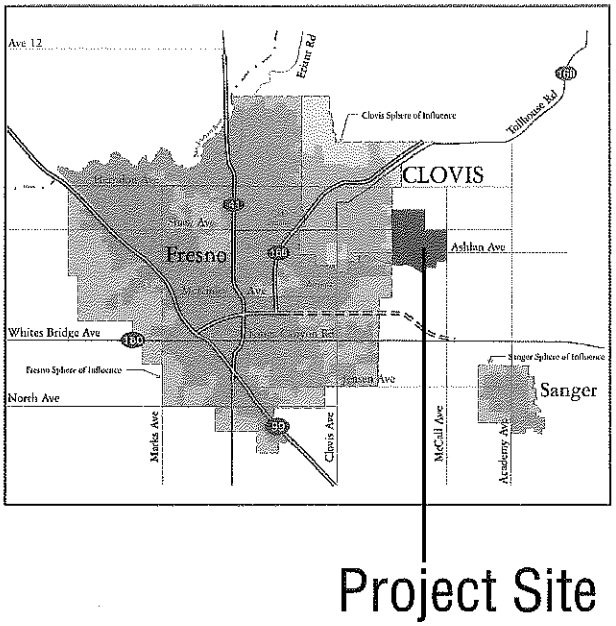
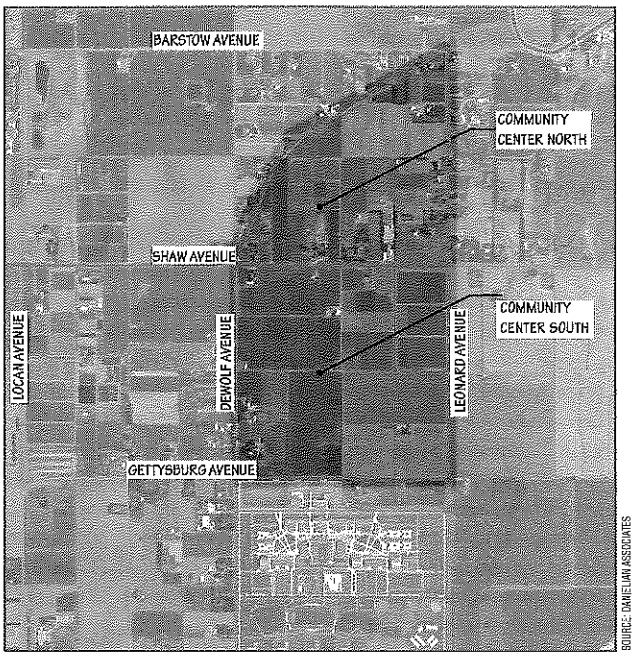
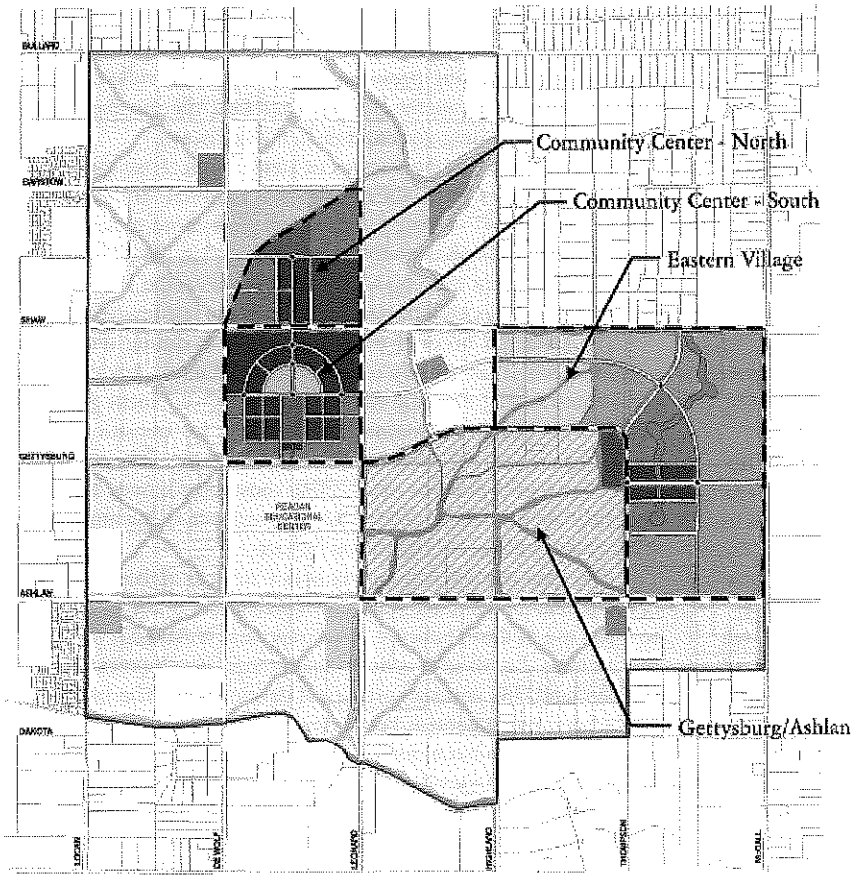
CBIA housing starts and sales statistics: www.cbia.org/go/cbia/newsroom/housing-statistics/





The proposed Loma Vista specific plan covers 3,000 acres of farmland at the eastern edge of Clovis.



Diagonal paseos would provide green space and non-motorized connectivity throughout Loma Vista.

Jackson Pollack canvas. How will developers arrange their two- and three-story apartment buildings on this irregular site? Does this type of planning lead toward orderly streets and boulevards, or the look of scattered bric-a-brac? And, as mentioned before, the master-planned community to the southeast may or may not comport to the new urbanist scheme next door. The promise of orderly planning seems to be breaking up all around us.

Our disappointment, however, turns out to be relatively minor, when we consider the paseos. By far, these pedestrian pathways are best things about Loma Vista. The planners have designed these tree-covered paths to lie at a 45-degree angle to the rest of the old grid so the paseos have minimal contact with vehicular traffic. Even better, the paseos connect with Clovis' existing network of trails that cut across the farmland immediately east of the city, taking an enviable open-space network and making it even better. The result is a linear park that provides a meaningful offset to the crowding and traffic of high-density development.

The formal gizmo at the center of the specific plan may be pretty, but the paseos are the big payoff of Loma Vista. They may not be as dramatic as the meeting of a king and a queen, but this encounter between an old grid and new planning ideas is very good news for Clovis. ■