



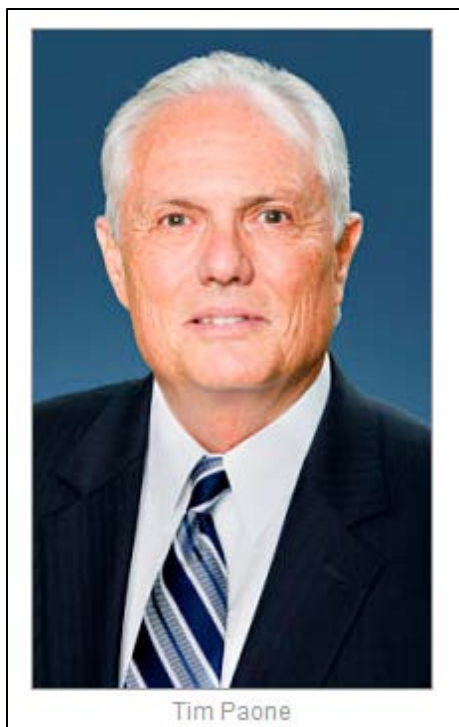
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CALIFORNIA LAND USE STORIES TO WATCH IN 2015

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“As California goes, so goes the nation.” Whether fact or fable, the notion of California as a trend setter in social, environmental and legal arenas could well be tested once again in 2015. This may become another year that, in the rear view mirror, will be seen as a game changer in land use. In the legislature, in the courts and at city hall, California is addressing inclusionary affordable housing, climate change, sea level rise projections and drought in ways that are likely to change not just the pattern of land development, but also the day-to-day lives of Californians. Will other states follow California’s lead? It’s very possible.

Inclusionary Affordable Housing

In a ruling that will impact land values and, at the same time, create new opportunities for affordable housing developers, the California Supreme Court has validated a City of San Jose affordable housing ordinance that can require developers to include affordable housing units within their market-rate projects. In *California Building Industry v. City of San Jose*, the court reasoned that requiring a developer to set aside a stated number of units for sale at below market rate prices differs little from typical zoning requirements. The court stated that “the conditions that the San Jose ordinance imposes upon future developments do not impose ‘exactions’ upon the developers’ property” and do nothing more than “place a limit on the way a developer may use its property.” In effect, the court placed inclusionary



affordable housing requirements in the same category as use restrictions and side yard setbacks that limit, but do not preclude, the viable use of property.

The San Jose ordinance applies to all for-sale projects of twenty or more residential units. It requires that 15 percent of the project's onsite units be available to "moderate income" households, those earning no more than 120 percent of the area median income. While the court noted that the San Jose ordinance does not apply to rental units, because of existing legislation that has been interpreted to prohibit such a requirement, the existing legislation could be repealed or the prior interpretation of the legislation could be overruled, in which case it is likely that the court's decision would be followed with respect to rental units.

The city's rationale behind the ordinance is that new market-rate housing drives up the price of land, diminishes the amount of land available for affordable housing, and creates demands on services resulting in "a demand for new employees" whose earnings will be sufficient to pay only for affordable housing. The court concluded that increasing the supply and distribution of affordable housing is within the city's "constitutionally permissible public purposes" and that the ordinance addresses "the critical need for more affordable housing in this state."

As a result of this ruling, California developers should anticipate that both the Legislature and local municipalities will consider new opportunities to increase the numbers and distribution of affordable units, both rental and for sale, within local communities. Potentially, other states and communities throughout the nation might choose to enact similar ordinances if, like California, they are experiencing high housing prices and limited access to the housing market for income-challenged households. Beyond affordable housing, however, the implications of this decision could prove significant with respect to other land use restrictions and requirements aimed at "promoting the public welfare."

Embracing Traffic Congestion

Along with its beaches, redwoods, movie stars and remarkable climate, California has for well over half a century been noted for its cars, freeways and traffic jams. For most California communities, there are few impacts of a proposed development that are more offensive than



increased traffic congestion. Historically, traffic impacts have been evaluated under the California Environmental Quality Act using a metric known as “level of service” (LOS). LOS focuses upon “driver delay,” the time it takes a driver to navigate through an intersection or a roadway segment, typically at peak hour times. If a project will result in an intersection or road segment not meeting the jurisdiction’s LOS standard, that deficiency will be identified as an adverse environmental impact and mitigation will be required. Such mitigation typically involves physical improvements to keep traffic moving, such as widening roads, adding lanes to intersections and installing traffic signals. Those days may soon be over.

With global climate change in mind, California’s Legislature adopted a bill (SB 743) requiring the Governor’s Office of Planning and Research (OPR) to develop guidelines under CEQA that, when completed, will revolutionize the way that a project’s potential traffic impacts are evaluated. While the drafting of these guidelines remains a work in process, previously circulated draft guidelines indicate the potentially transformative effect of the impending changes to CEQA.

SB 743 requires only that the new guidelines apply to “transit priority areas” where readily accessible rail, ferry or bus service is available. Most locations within the state would not be within “transit priority areas.” Notably, however, the Legislature delegated to OPR the discretion to make the critical decision to apply the new guidelines statewide. In the draft guidelines released to date, OPR has required that after January 1, 2016, the new guidelines would apply to the entire state, rather than just to transit priority areas. In the final version of the guidelines, that date could be extended.

Under SB 743, driver delay will not be considered a significant environmental impact. Instead, metrics such as “Vehicle Miles Traveled” will be used to measure greenhouse gas (GHG) emissions. Thresholds will be established to identify when a project’s traffic emits unacceptable amounts of GHG. Road improvements, historically considered mitigation, may be viewed as significant impacts because they accommodate more cars and, therefore, create additional GHG emissions. Predictably, highly urbanized cities and urban infill developers support the goals of SB 743, while cities without significant transit capabilities and traffic-sensitive residents are less welcoming.



The new guidelines will play out in different ways in different communities, principally because most jurisdictions likely will retain the LOS metric in their general plans as a criterion that new projects must meet. Unlike significant impacts under CEQA, an agency may neither mitigate nor “override” a proposed project’s inconsistency with its general plan. Thus, it will become easier for agencies to reject projects that result in driver delay. On the other hand, cities desiring new development might require road improvements to be included as part of a proposed project to meet their general plan LOS standards. Then, when the project’s EIR identifies those road improvements as significant impacts, the city could “override” the significance finding as permitted by CEQA.

Sea Level Rise and Coastal Development

Owners and developers of coastal land should pay close attention to the California Coastal Commission’s development of policies to address rising sea level. Adopted in 1976, the California Coastal Act is intended to permanently protect California’s natural and scenic resources within the state’s coastal zone. Responding to global climate change and projected levels in sea rise attributed to it, the Coastal Commission is considering the adoption of policies intended to “protect the coastal economy, California livelihoods and coastal resources and the ecosystem they provide.” Although the final policy has not yet been adopted, the commission’s Draft Sea-Level Rise Policy Guidance concludes that sea level rise over the next century threatens “seven wastewater treatment plants, commercial fishery facilities, marine terminals, Coastal Highway One, fourteen power plants, residential homes and other important development and infrastructure.” Add in cited impacts to tourism, coastal agriculture, the ports and sensitive coastal resources, and it is easy to anticipate that the projected risks from sea level rise will influence commission decisions on planning and permitting applications from local governments and developers.

Hazard avoidance and mitigation arguably related to projections of sea level rise are likely to result in proposals for constraints on development. While every site and project will be different, it will be important to evaluate the potential significance of sea level rise over the life of a project in the context of any investment or development within California’s coastal zone. Outside of



California, developers and investors should recognize that the actions of the Coastal Commission may be followed by regulators in other coastal states subject to projected sea level rise.

The Drought

California is suffering through historic drought at the same time that it is experiencing a significant housing shortage. As a result, state and local regulators are increasingly challenged to develop balanced policies that address both new housing production and water conservation.

With respect to water, California Governor Jerry Brown has issued an executive order calling for a 25 percent reduction in the state's water usage and California's State Water Resources Control Board has adopted an emergency regulation requiring an immediate 25 percent reduction in overall potable urban water use statewide. Local water agencies will determine the most cost effective and locally appropriate way to achieve their allocated shares of this reduction. In addition, the State Water Board has issued curtailment "notices" to holders of pre-1914 water rights, threatening enforcement actions if the requested curtailments do not occur. These notices have, in some instances, the potential to impact new residential development and have already spawned a spate of litigation over the State Water Board's authority. On the longer-term front, counties and water agencies around the state are scrambling to respond to California's new "Sustainable Groundwater Management Act," which requires the adoption of groundwater sustainability plans for most groundwater basins around the state.

These regulatory developments affect the development community in significant ways. In some instances, municipalities have tabled plans for new development even where adequate water resources exist. Developers should anticipate that any new significant projects will need an adequate "water story" to address the political challenges. Conservation strategies may include compliance with the state's new landscaping and energy requirements, the use of recycled water and single-home grey-water recycling systems and potentially the development of "offset" programs to retrofit existing housing stock with water-efficient appliances or the removal of turf. Moreover, given the new drought "baseline" that undoubtedly will be built into currently required urban water management plans and water supply analyses, we anticipate novel legal



challenges to the manner in which environmental impact reports evaluate the relationship between the drought, water supply and individual projects. The bright side to this story is that new housing is already vastly more water efficient than existing housing product and serves to actually reduce overall per capita water use in the state. Moreover, California's historic water bond (Prop 1) has generated significant funding for local conservation and other water-generating programs.

For California and many western states, the current drought is a reminder that the availability of water will remain a critical concern for their long-term viability. Population growth is inevitable and housing that population is essential, so it will become imperative for California to develop water infrastructure programs and reasonable conservation policies that will sustain the state's water needs through times of normal rainfall as well as times of drought. From developing new programs for conjunctive use and other forms of local storage, to increasing opportunities for recycling, reuse and desalination, to implementing conservation practices in homes, businesses and agriculture, solutions exist. The question is whether California will retain the drought-inspired focus needed to implement long-term solutions once the drought has passed. Or, will the state simply turn to other priorities, then react in crisis mode the next time it is struck by drought?

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