CP&DR

VOL. 30, NO. 12 — DEC 2015 CALIFORNIA PLANNING & DEVELOPMENT REPORT

Will CEQA-In-Reverse Case Make Infill Easier?

BY MARTHA BRIDEGAM

Last week's unanimous, finely worded ruling by the California Supreme Court has spared builders their worst-case scenario in the long-awaited "CEQA in Reverse" case. It does not interpret the California Environmental Quality Act to require an environmental impact report whenever a project might attract more people within range of an existing hazard such as air pollution or earthquake risk.

Attorneys for the plaintiff/respondent California Building Industry Association (CBIA) cheered the decision as especially likely to spare infill and affordable housing projects that might otherwise face CEQA challenges because of air pollution impacts on residents and others.

But the ruling does still apply CEQA broadly enough to leave both sides claiming partial success in overall impact and in the underlying air quality guidelines matter. Each already disputes the other's claim.

Meanwhile the Office of Planning and Research (OPR) indicated it may circulate a fresh draft of proposed CEQA Guidelines revisions following this ruling and the significant recent Newhall Ranch decision (see http://www.cp-dr.com/node/3848). In a statement issued through the Governor's press office, the agency wrote, "Both

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insight
WILLIAM FULTON

Tax Increment Is Back — But Which Choice Will Cities Make?

Ever since Gov. Jerry Brown killed redevelopment in 2011, the conventional wisdom has been that eventually he would give it a second life – but only after he was sure the old system was completely dead, in a way that protects the state general fund, and probably after he himself won re-election to a final term.

Well, this is one case in which the conventional wisdom turned out to be right – though not quite in the manner everybody

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inside

San Diego Adopts Climate Action Plan

The San Diego City Council unanimously approved a new Climate Action Plan, one of the nation's most ambitious plans to cut carbon emissions by creating legally binding mandates for reducing greenhouse gas emissions. The plan requires annual emissions be cut in half during the next two decades based on a strategy to use 100 percent renewable energy by 2035. The plan will also require that the city boost the urban tree canopy by 15 percent by 2020 and 35 percent by 2035, recycle or compost 75 percent of all solid waste by 2020 and 90 percent by 2035, and cut car trips in key transportation areas by 20 percent by 2020 and 50 percent by 2035. Importantly, since the plan is a legally binding mandate, the city opens itself up to lawsuits from environmental groups and the state attorney general if it doesn't follow through on the plan's promises. The most controversial decision could be whether to implement community choice aggregation, a program that would take control away from the local electric utility when deciding how much renewable energy a city uses.

L.A. Approves Sale of Ontario Airport

The Los Angeles City Council unanimously approved a $250 million agreement to return control of Ontario International Airport to the city of Ontario. The move comes in the wake of a 2013 lawsuit that Ontario filed against Los Angeles claiming that the city, Los Angeles World Airports, and the airport's board of commissioners had made administrative moves since 2007 that cut flight service and cost millions of passengers and billions of dollars to the local economy. Though the Los Angeles vote concludes local government and airport board approvals for the agreement, no transfer can take place without Federal Aviation Administration approval. If the FAA decides to approve the transfer, the city of Ontario will reimburse Los Angeles World Airports about $60 million for all outstanding Ontario bonds. (See prior CP&DR coverage.)

Huge Swath of San Diego Rezoned

The San Diego City Council is expected to approve Southeastern San Diego's first comprehensive set of zoning changes since 1987 with the goal of encouraging more development near mass transit. Community leaders often complain that the area's lack of high-paying jobs discourages developers from building quality retail and housing projects, even though much of southeastern San Diego is less than 10 minutes from downtown. The changes aim to spur development by rezoning 6,740 acres in the area, where there is more vacant and under utilized land than anywhere else in the city. City officials have decided to split the area into two parts — Southeastern San Diego west of Interstate 805 and Encanto east of the freeway — and to adopt separate community plans for each. The number of multifamily housing units would triple from 4,000 to 12,000 in Encanto and increase 37 percent in Southeastern San Diego, from 9,400 to 12,900, while then umber of single family homes would stay about the same. The new housing is restricted to targeted areas along trolley lines and in high-potential commercial spots such as Euclid Avenue, Market Street, Imperial Avenue and Commercial Street.

Bay Area Group Threatens to 'Sue the Suburbs'

The San Francisco Bay Area Renters Foundation, a pro-development group, says that it will fulfill its promise to "sue the suburbs," saying it will file a lawsuit next week against the city of Lafayette, saying that it is failing to construct its fair share of housing. At issue in Lafayette is a development approved by the City Council containing 44 single-family homes, a steep reduction in density from the originally proposed 315 units of middle-income housing that garnered protests. With the Bay Area permitting just about half of the housing it needed from 2007 to 2014, and permitting only about 28 percent of low to moderate income units, the renters' group is using Lafayette as a starting point for its plans to sue other Bay Area suburbs. The suit would

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finds its base on the state's 1982 Housing Accountability Act, which prohibits cities from blocking higher density affordable housing without a specific findings that it threatens health and safety in an unfixable way.

SCAG Releases Draft EIR for Sustainable Communities Strategy

The Southern California Association of Governments (SCAG) has prepared a Draft Program Environmental Impact Report for its proposed 2016–2040 Regional Transportation Plan/Sustainable Communities Strategy. The Draft PEIR is available for a 60-day public review and comment period from Dec. 4-Feb. 1. Two public workshops, each providing the same information, will take place at SCAG's Los Angeles office. The Draft PEIR is available for review on SCAG's website at: http://scagrtpscs.net/Pages/Draft2016PEIR.aspx.

S.F. Supervisors Support EIR for Warriors Arena

The San Francisco Board of Supervisors unanimously voted to support the Environmental Impact Report for the Golden State Warriors' 18,500-seat, $1 billion Mission Bay arena project. Rejecting an appeal from opposition group Mission Bay Alliance saying that the project would have unmitigable impacts on traffic and the UCSF Hospital at Mission Bay, the supervisors found that plans for beefed-up public transit traffic control officers could handle the thousands of basketball fans flooding the neighborhood for games. They also voted 9-1 -- with Supervisor John Avalos voting against -- to establish a Mission Bay transportation fund dedicated to paying for $55 million in transit infrastructure, including four new light-rail vehicles, upgraded Muni power, new signals and signage and an expanded T-Third line platform next to the arena and UCSF. However, Warriors officials fully expect that the project will face its final battle in court, as the Mission Bay Alliance has said that it will file a lawsuit to block the arena.

Pismo Beach Imposes Drought-Related Development Moratorium

The Pismo Beach City Council voted to impose a moratorium on all new development in anticipation of a drastic drop in water supply next year. The moratorium, which is the city's first since 1988 and believed to be the first in the state in the current drought cycle, immediately halts all building permit applications for vacant parcels and requires redevelopment or building changes at existing properties to consume less than or equal to the amount of water currently used. The city did not meet its 24 percent water conservation target set by the state for the months of September and October. State officials have announced that it expects to deliver only 10 percent of the water it allocates to California cities as reservoirs are still well below capacity, contributing to the decision to enact the moratorium. If the city's anticipated water supply falls below two triggers -- 1,130 acre-feet and 850 acre-feet -- two more building restriction tiers will go into effect: one prohibiting any new building permits, and another requiring new commercial use and redevelopment of existing buildings to show that water demand would be at least 30 percent less than the year before the tier was triggered.

Fresno to Miss Deadline for 45,000-Home Expansion

The city of Fresno's plans to expand development into an area called the Southeast Growth Area have languished, as it appears that the city will miss agreed-upon deadlines with the county to build on the land within 20 years. A decade ago, the county approved an expansion of the city of Fresno by 14 miles to the south and east to build a projected 45,000 homes accommodating 110,000 residents, along with the already-built $23.5 million Clovis Unified elementary school. Now, with none of the area built out and the state calling for more infill development and less sprawl, some members of the Local Agency Formation Commission -- which approves future boundaries for cities -- are calling for a reduction of the size of the growth area.

SGC Releases RFP for Technical Assistance Pilot for AHSC

The Strategic Growth Council has released a request for proposals to provide direct technical assistance to disadvantaged communities interested in applying for the 2015-16 Affordable Housing and Sustainable Communities (AHSC) program. This Request for Proposal (RFP) is to solicit competitive proposals from experienced and qualified contractors who will be engaged to provide technical assistance and specific services to eligible participants through a contract(s) with the SGC for the 2015-16 AHSC program funding round. Selected contractors for the SGC Technical Assistance Pilot will provide direct grant writing, analytical, and project management support to applicants to

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ultimately achieve successful AHSC applications for projects benefiting disadvantaged communities that reduce greenhouse gas (GHG) emissions. The RFP can be found by looking for Bid #RFP SGC 15100 – AHSC Technical Assistance Pilot on the Bid Sync website.

Klamath River Dam Removal in Jeopardy

After stalling for several years in Congress, a settlement between the state, environmentalists, tribes, and farmers to remove four dams along the Klamath River in both Oregon and California may fizzle out, causing a relicensing process to begin. The river basin has long been the site of intense political fights over the sharing of scarce water between farms and fish, and the compromise to remove the dams would restore the river for imperiled salmon and steelhead, and give farmers greater certainty about irrigation water. However, fearing it would set a precedent for dam removal, House Republicans have blocked the removal proposal for years. If there's no legislation by the end of the year, when the agreements expire, several parties indicated they might abandon the settlement. "It's not the end," Rep. Jared Huffman (D-San Rafael), whose congressional district includes the lower Klamath, told the LA Times. "If anything it may be the beginning of a new and potentially more productive push to get these dams out by way of the [dam relicensing] process and the Clean Water Act authority the state of California has." Relicensing of the dams would go through the Federal Energy Regulatory Commission, which licenses hydropower projects for 30 to 50 years.

Groups Present Restoration Plan for Carrizo Plain

Two environmental groups have teamed up on a plan to restore nearly 8,000 acres of degraded wildlife habitat in the Carrizo Plain area of southeastern San Luis Obispo County as a result of several lawsuits requiring two solar companies to conserve the land as environmental mitigation. The two environmental groups, Carrizo Plain Conservancy and the Sequoia Riverlands Trust, plan to replant the land, which has been converted to grassland through centuries of farming and grazing, with 15 percent brush cover. That land serves as habitat for pronghorn antelope, San Joaquin kit foxes, giant kangaroo rats, blunt-nosed leopard lizards and birds. The sprawling 550-megawatt Topaz Solar Farm was required to conserve 5,400 acres under a settlement worth several million dollars, and the nearby 250-megawatt California Valley Solar Ranch was required to conserve 2,500 acres.

Court Rejects Malibu Anti-Chain Store Measure

The Superior Court of California overturned Malibu's Measure R, which voters approved to enact a 30% cap on the number of chain stores in shopping centers citywide and to create a voter-approval requirement for new commercial centers if they measure over 20,000 sq. ft. After their case against the City of Malibu was declined to be seen by a federal judge, opponents of the measure filed the suit in state court. ■

SGC Awards Additional Funds to 2015 Grantees

BY JOSH STEPHENS

The Strategic Growth Council has early Christmas presents in store for some projects that had applied for Affordable Housing and Sustainable Communities grants earlier this year. On December 17, the SGC gave eight formerly that received funds last year an additional total of $32.5 million in grants.

Meanwhile, the SGC also approved changes in program guidelines for the 2016 round of grants.

The fall funding round for last year's winners was open to eligible projects that had scored at least 60 in the initial round but were shut out in part because of jurisdictional caps when the program announced its grants in June. That round included $120 million in total funding, awarded to 28 projects.

The most contentious issue in the first rounding round centered on geography. SGC staff were accused of unfairly disregarding projects from the SCAG region and disregarding projects because of jurisdictional caps.

Projects were evaluated according to their original applications. Some criteria were re-scored according to revised guidelines, focusing on projected greenhouse gas reductions and leverage of other funds. The re-scoring make some projects more attractive than they originally may have been.

The most contentious issue in the first rounding round centered on geography. SGC staff were accused of unfairly disregarding projects from the SCAG region and disregarding projects because of jurisdictional caps. In this round, four of the eight projects are in the City of Los Angeles; two are in San Francisco, and one each are in Walnut Creek and San Leandro.

The SGC also approved the following changes in program guidelines for the new, $400 million round of grants in 2016:

Scoring Criteria and Review Process

The role of metropolitan planning organizations has been formalized. Charged with implementing Sustainable Communities Strategies, MPO's vigorously lobbied for projects to receive funds but did not have a formal role in the process. MPO's may now provide input into an applicant's ability to implement regional sustainability goals.

GHG Reductions Scoring

In order to select the strongest applications within each project area type, applications for Transit Oriented Development (TOD) Project Areas, Integrated Connectivity Project (ICP) Areas, and Rural Innovation Project Areas (RIPA) will be scored separately within their respective project area type. Once the funding targets for TODs (35%), ICPs (35%), and RIPAs (10%) have all been met, the GHG scores for remaining projects will be rebinned and scored as one group, regardless of project area type.

Points may be awarded for collaboration between housing developers and public agencies.

WalkScore and BikeScore may be used to evaluate projects' accessibility. Guidelines have been updated to account for areas where WalkScore and BikeScore data hare scarce, with criteria to award points to projects near critical services.

Strategies to avoid displacement have been made a

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>>> SGC Awards Additional Funds to 2015 Grantees

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threshold requirement. Strategies to promote workforce growth may earn points.

GHG Reductions Methodology

The new guidelines include more guidance for how an applicant should describe the "project setting," using CalEEMod. They also include a mapping tool to help determine distance to central business district and ways to evaluate projects' impacts according to vehicle miles traveled.

Eligibility

Changes to eligibility include reduction of the minimum award amount from $1 million to $500,000; more flexible parking requirements; more latitude for small developers; and encouragement of the use of 4 percent Low Income Tax Credit.

Alignment with Transit Projects

Many stakeholders complained that projects with affordable housing components automatically got a leg up on those that offered only transportation benefits. Staff proposes to remedy this situation by scoring transportation-related projects separately from housing-related projects. As well, the definition of "high-quality transit area" has been refined, and projects can score points for being near high-speed rail station areas.

Catalytic Projects

SGC staff identified the potential to fund catalytic housing and transportation projects that are larger in scale and impact than other project area types

Tribal Entities

SGC is forming a working group to work through legal and regulatory constraints to incorporating tribes and tribal entities as eligible applicants, likely in Round 3.

Timeline

The Notice of Funding Availability and Application is expected to come out in late January, with the deadline for concept applications in March, the deadline for full applications in June, and awards announced in August.

Resources

Staff Report Final 2015-16 AHSC Program Guidelines

Final Draft 2015-16 AHSC Guidelines ■

MTC Tries To Forge Merger With ABAG

BY JOSH STEPHENS

If there's anything more confusing than one regional government bureaucracy, it's two regional government bureaucracies.

This is an axiom that cities in the Bay Area have gotten to know all too well over the past 45 years living under the Association of Bay Area Governments and the Metropolitan Transportation Commission. Calls to merge the two or eliminate one have resounded roughly as long as both have been around. At last, thanks in part to the regional planning mandate set forth by Senate Bill 375, the MTC may finally succeed in a hostile takeover of the much smaller ABAG.

The Bay Area is the only one of California's 18 regions that has a metropolitan planning organization that is different from its council of governments. ABAG, founded in 1961, is a council of government dedicating to regional planning and cooperation among its 101 member cities and nine member counties. Founded in 1970, MTC is designated by the federal government as the region's MPO and its state equivalent, a regional transportation planning agency. It oversees regional transportation and, importantly, controls a portion of federal funds and local toll revenues.

"We never would have designed these two separate regional planning agencies if we were going to start from scratch," said Egon Terplan, regional planning director with the think tank San Francisco Urban Research, or SPUR. "We're not benefitted by having different bodies."

Both organizations have regional planning departments that, in many respects, have overlapping concerns and do overlapping work. In recent years, MTC has contributed $4 million annually to ABAG's planning efforts (out of ABAG's total agency budget of $23.6 million). These funds gave MTC leverage to, in June, demand the merger of the two planning departments. MTC threatened to withdraw funding, essentially forcing ABAG into a hostile takeover. MTC's annual budget is around $750 million.

"What happened in June when MTC made this proposal suddenly forced this issue again," said Terplan. "It forced the issue by putting the funding piece on the table."

MTC's move was seen by some as a trick played on an unsuspecting ABAG.

"It was sprung on us at the beginning of the fiscal year," said ABAG Executive Director Ezra Rapport. "They voted just to give us half the fiscal year. We had no idea that they were planning to do that. That was used as a guillotine over the organization unless we voluntarily cooperated with them."

Rapport fears the region's smaller cities may feel left out in the absence of ABAG representation. ABAG's board consists of 38 representatives from member cities and counties. MTC's 21 board seats included dedicated seats for each county and for the large cities, as well as seats for groups of smaller cities and one seat for ABAG.

As well, ABAG officials question whether MTC has enough clout among cities. Any plans that it produces will be voluntary, so the agency will need buy-in that, Rapport said, only the ABAG sensibility can provide.

"The problem with that is that ABAG has the relationship with the cities and counties, where the actual land use planning means something, because that's where the authority lies," said Rapport. "We at ABAG have all come from local government so we understand that those long Tuesday nights in front of community groups, planning commissioners, etc. are not replicated by regional planners."

Others insist that the move was entirely predictable.

"This notion of bringing together these two organizations… has been under discussion by policymakers in the form of legislation for decades," said MTC Director of Legislation and Public Affairs Randy Rentschler. "To a certain extent I would say to some people, just because it's new to you doesn't mean it's new." Rentschler noted that the agencies some board members sit on both boards.

Since June, cooler heads have prevailed. Rapport said that ABAG now supports a full merger, with a single governing board, but only after careful deliberation.

In October, the ABAG board voted to hire a consultant

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to study the prospect of a merger of not just the planning departments but also the entire agencies. The two agencies will continue to operate independently in the interim. In the absence of a mutually agreeable result, the merger of the planning departments will proceed by default.

Even so, it will likely be a new day in the Bay Area.

"We never would have designed these two separate regional planning agencies if we were going to start from scratch," said Egon Terplan of SPUR

"They either both go away or something new gets formed," said Terplan. "You don't entirely fold one into another. When you merge they become something new. What that looks like is the question of the next six months."

Numerous reasons, aside from sheer fatigue, have brought the agencies to the brink. On the purely practical front, they have recently moved into a new shared office building, meaning that there is no physical distance between the two. More important, however, may be the mandate to implement SB 375's Sustainable Communities Strategy.

The agencies are working jointly on an update to Plan Bay Area, the region's SCS (see prior CP&DR coverage http://www.cp-dr.com/node/3222). But, with only one final product and the need for a single common vision for the region's transportation and land use patterns, the planning departments must effectively operate as one.

"SB 375, to a certain extent, changed the game. It brought together transportation, housing, and land use and greenhouse reductions under one state rubric," said Rentschler.

Past failures to communicate between the planning departments have led to some potentially perverse outcomes. Terplan noted that the MTC planned for the new Bay Bridge to terminate at sea level — expected, by ABAG planners, to be underwater when climate change causes the sea level to rise.

Officials at both agencies say that, whether there's a wholesale merger or just a planning merger, they do not expect major ideological clashes. The two offices already work closely, and the two boards have significant overlap.

"It's one pool of elected officials who generally have the same political values based on where they're located in the region," said Rapport. "I haven't seen any divergence in ideology."

Retschler noted that ABAG's support for individual cities — regardless of their size or needs --is both a blessing and a curse of planning culture in California.

"How can we do things regionally and still respect this deeply held culture in California about participation, where everyone has a voice?" said Rentschler. "That's the challenge that the board has to deal with. And it's a formidable one."

Contacts & Resources

MTC-ABAG Merger Page on ABAG Website http://abag.ca.gov/media/2015_merger/

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legal digest

GHGs Must Be Analyzed At Project-Level, Cal Supremes Rule

BY MARTHA BRIDEGAM

California's Supreme Court broke the Newhall Land & Farming Company's long winning streak November 30 in a victory for environmental and community groups over the Newhall Ranch megadevelopment.

The plan to extend Los Angeles' urban growth into the Santa Clarita Valley, with a planned community of almost 58,000 people, has been persistently proposed and persistently litigated for two decades. Thanks to recent years' pro-development rulings by the Second District Court of Appeal's Fifth Division, the project seemed to be well launched. Now quite a few bets are off.

The five-vote majority opinion by Justice Kathryn Werdegar sided with opponents of the development on the three major issues before the court. Justice Carol Corrigan filed a brief separate opinion concurring and dissenting, while Justice Ming W. Chin wrote an extensive dissent objecting to the likely delays in the project.

Perhaps most significantly, the court said Newhall could not determine the significance of greenhouse gas emissions (GHGs) simply by applying the raw statewide regulatory goal of reducing GHG emissions 29 percent below "business as usual" levels by the year 2020, as set under the AB 32 Scoping Plan. The court held that an agency trying to apply the statewide goal locally should explain how the local situation related to the statewide goal.

Center for Biological Diversity's Kevin Bundy wrote in response to the decision: "The Court confirmed that AB 32 is a relevant benchmark in determining the significance of greenhouse gas emissions, which wasn't seriously in dispute here. But after this decision, agencies can no longer simply assume that the AB 32 Scoping Plan's statewide "business as usual" assessment can be wrenched out of context and applied to individual development projects. Agencies will either have to show exactly how their projects were contemplated in the Scoping Plan's projections or assess consistency with AB 32 in some other way. In either case, agencies will have to provide actual evidence and rational explanations in support of their conclusions – which is really the way things should work under CEQA in any event."

Second, the decision implicitly defended the existing condition of the Santa Clara River, one of Los Angeles County's remaining wild watercourses, by turning down a plan that would have cared for the unarmored threespine stickleback, a "fully protected" species under California law, by capturing and moving the fish out of the way of construction. The ruling found such a plan would constitute an impermissible "take" of the fish.

And third, the court also sided with the project's opponents by finding they properly exhausted remedies on two added challenges by raising them during a comment period, termed "optional" by the court, that was provided under the federal Environmental Impact Statement (EIS) process after the close of the comment period on the state-mandated Environmental Impact Report (EIR).

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Because of the timeliness finding, challenges can now go forward that raise objections to the project because of Native American cultural resources in the proposed development area and potential effects on steelhead smolt in the river.

John Buse of the Center for Biological Diversity, who with Bundy argued the matter to the court this September, called the ruling "a tremendous victory for both the opponents of Newhall Ranch and the environmental review process in general." Lynne Plambeck, who has been the project's leading local opponent from the start, cheered the news and called it timely in light of the Paris climate talks and Pope Francis' recent calls for global climate change reform.

CEQA petitioner-side attorney Susan Brandt-Hawley, who had submitted an amicus brief with arguments for allowing the two additional challenges as timely, wrote, "I'm not surprised by the decision (I attended the oral argument) but I'm delighted." But when Plambeck's SCOPE issued a statement to its mailing list, the text implied a little surprise with some capital letters: "...AND FOUND FOR THE PLAINTIFFS (that's us!)."

Newhall Land issued a terse statement as its sole initial comment: "We are reviewing the decision of the Supreme Court and will continue to consult and work with the California Department of Fish and Wildlife on appropriate next steps consistent with the Court's guidance. We remain committed to realizing the vision of Newhall Ranch and the significant benefits it promises for the economy and future of Los Angeles County."

The successful challengers, in addition to CBD and Plambeck's Santa Clarita Organization for Planning and the Environment (SCOPE), are the Friends of the Santa Clara River; the California Native Plant Society and the Wishtoyo Foundation/Ventura Coastkeeper.

Relating State to Project-Specific GHG Goals

At oral argument in September on the GHG issue, the parties had debated whether the AB 32 scoping plan's call for a 29 percent statewide GHG reduction below "BAU" properly justified a choice of 29 percent as the GHG reduction standard to apply to a particular single project. They had further debated whether the baseline condition -- the usual business implied by "business as usual" -- should mean the current conditions at the pre-development property, or the conditions projected for a hypothetical project with higher emissions that might have been proposed instead of the one actually proposed.

In her opinion, Justice Werdegar accepted the AB 32 statewide standard of reducing GHG emissions 29 percent below "business as usual" (BAU), and wrote that it was acceptable to use a hypothetical scenario under CEQA Guidelines Sec. 15125 and under the high court's own prior ruling in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310. [https://www.cp-dr.com/node/2644]

However, she went on to hold that, in the absence of regulatory guidance, there was no justification for applying a state-level standard to a particular project without explaining how one related to the other. The opinion said Fish and Wildlife abused its discretion in accepting a contention in the EIR that the GHG effects of the project "would have no cumulatively significant effect on the environment." The opinion reasoned that "the administrative record discloses no substantial evidence that Newhall Ranch's project-level reduction of 31 percent in comparison to business as usual is consistent with achieving AB 32's statewide goal of a 29 percent reduction from business as usual."

She wrote further: "Newhall points to no expert opinion stating generally that the Scoping Plan contemplates the same emission reductions from new buildings as from existing ones, or more particularly that the Scoping Plan's statewide standard of a 29 percent reduction from business as usual applies without modification to a new residential or mixed use development project."

Plambeck's take was that "While the Court did not object to Newhall's "business as usual" argument (i.e., that the originally proposed project was 25,000 units, then cut back to 21,000, allowing a rather odd definition of

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>>> GHGs Must Be Analyzed At Project-Level, Cal Supremes Rule

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"baseline" that thus reached a finding of no significant impact for this huge proposal), they perhaps reached an even more common sense ruling, They found that the EIR provided no evidence that there would not be an impact."

Michael Zischke of Cox, Castle & Nicholson, a developer-side CEQA attorney who submitted an amicus brief in the matter, wrote: "It is important and helpful that the court generally upheld BAU as a significance metric; that has been used by many agencies and is based on state guidance. It is uncertain, however, how difficult it may be for agencies to comply with the directive that EIRs show how statewide BAU reduction targets apply to impacts of particular projects, and therein lies the rub."

Rob Thornton of the Nossaman firm, who had submitted an amicus brief on both the GHG and stickleback issues for water and transportation agencies, wrote: "The Supreme Court giveth and the Supreme Court taketh away. On the one hand, it is gratifying that the Court acknowledges that agencies have discretion to rely on the AB 32 scoping plan methodology and SB 375 plans to determine whether the GHG emission reductions from a particular project are significant under CEQA. There are many hundreds of billions of dollars in proposed transportation projects that are included in Sustainable Communities Plans determined by the California Air Resources Board to comply with the state's GHG emission reduction goals. The Court's opinion suggests that the transportation agencies' reliance on SB 375 GHG reduction targets should survive CEQA challenges.

Perhaps most significantly, the court said Newhall could not determine the significance of greenhouse gas emissions (GHGs) simply by applying the raw statewide regulatory goal of reducing GHG emissions 29 percent below "business as usual" levels by the year 2020, as set under the AB 32 Scoping Plan.

"On the other hand, as noted by Justice Corrigan, the Supreme Court's determination that the Department of Fish and Wildlife's GHG findings were not supported by substantial evidence undermines the Court approval of the use of AB 32 scoping plan methodology, and its recognition that CEQA leaves discretion to agencies to determine the significance of GHG emissions. The majority opinion will likely result in an increase in GHG based CEQA challenges to many projects."

Stickleback Stays in Project's Throat

At oral argument last September, Justice Carol Corrigan asked the Department of Fish and Wildlife's counsel, Tina Thomas, if an illegal "take" of the fully protected fish could include "just bothering them." In a concurring opinion, Corrigan agreed with the majority that the answer is "yes" on the stickleback issue, though she dissented on other issues.

Thomas referred a request for comment to Fish and Wildlife, where spokeswoman Jordan Traverso issued a cautious statement: "The California Department of Fish and Wildlife (CDFW) only received the decision this morning. It covers important issues raised in a long-running legal case. With the Court's remand for additional legal proceedings, CDFW must fully review the decision to determine appropriate next steps. We may have more to say then. Meanwhile, CDFW remains committed to preserving and protecting the state's natural resources for the nearly 40 million people of our great state."

But CBD's Buse wrote, "For fully protected wildlife such as the unarmored threespine stickleback, California condors, sea otters, and peregrine falcons, developers won't be able to simply move them out of the way to accommodate development - the Court rightly recognized that the

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Department of Fish and Wildlife's authorization to capture and relocate stickleback from the Newhall Ranch site was illegal "take" by another name."

Thornton wrote: "The majority decision prevents relocation of fully protected species if the relocation is characterized as "mitigation." This will certainly make it more difficult, if not impossible, for many projects to comply with the Fully Protected Species statutes -- even where the project is contributing to the recovery of the species. The majority opinion does not appear to foreclose other common compliance strategies such as designing a project to avoid take of fully protected species. "

Zischke suggested a turn toward Natural Community Conservation Plans (NCCPs) might result: "The Fish & Game Code ruling may lead some agencies to consider NCCPs as a means of dealing with fully protected species. NCCPs can be time-consuming to prepare, so I also would not be surprised if there is some discussion of a legislative fix."

Timeliness issue

On the timeliness ruling for the cultural resources and steelhead issues, Buse wrote, "We're also pleased the Court recognized that the public's right to comment on environmental documents is not cut off at an early stage in the process as the Department argued. The Department's attempt to limit public input in this case was somewhat appalling, so this decision is really a vindication of the public's right to be included as an integral part of the CEQA process."

In the absence of regulatory guidance, there was no justification for applying a state-level standard to a particular project without explaining how one related to the other. The opinion said Fish and Wildlife abused its discretion in accepting a contention in the EIR that the GHG effects of the project "would have no cumulatively significant effect on the environment."

Zischke characterized the exhaustion of remedies ruling as "case-specific", commenting that it "should not have any major implications beyond this case."

But Brandt-Hawley wrote: "The Supreme Court importantly reversed a published appellate opinion that created confusion in the application of CEQA's exhaustion of remedies provisions. The reasonable interpretation of section 21177 is again clear."

Buse responded to Zischke's comment: "He may be suggesting that because of the somewhat unusual federal/state process here, the exhaustion ruling does not have broad applicability. I don't think it's case specific, however, because this is a recurring situation. And even if there's no concurrent federal process, I don't think state agencies would be well-advised to ignore comments submitted after the close of the comment period on a draft EIR, although I'd agree that the decision does not directly cover that scenario."

A Long Story, Not Over

Because the Newhall Ranch development has been voluminously litigated, a cascade of effects can be expected from the new decision.

Most immediately, the high court needs to resolve *Friends of the Santa Clara River v. County of Los Angeles (Newhall Land and Farming Co.)*, Case No. S226749. That matter is an appeal of a Second District, Division 5 ruling in favor of the Newhall Ranch project's initial Landmark Village phase. The state Supreme Court granted review on that case in August [https://www.cp-dr.com/node/3778] but held it pending the main Newhall Ranch decision. The Second District's Division 5 also ruled for Newhall on

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its second development phase, Mission Village. The California Native Plant Society and other opponents filed a request for review with the high court in early November, and that request, now pending as Case No. S230336, had not yet received a response.

For more detail on the postures of the cases as of last winter see https://www.cp-dr.com/node/3672 and https://www.cp-dr.com/node/3673.

Disputes over water supplies for the new homes, public services and businesses have produced their own major branch of the decades-long litigation. See https://www.cp-dr.com/node/3742 for our June review of the Valencia Water litigation. The appeal is pending before Second District Court of Appeal's Division Two (Appellate Case No. B264284). The same divison has meanwhile ruled against SCOPE in the related case of *SCOPE v. Abercrombie*, at http://www.courts.ca.gov/opinions/documents/B256976M.PDF.

Newhall Ranch environmental review cases have been referred frequently to the relatively conservative Division 5 of the Los Angeles area's Second District Court of Appeal, though Division 2 was assigned the recent water district cases. Judge Ann I. Jones, the Los Angeles trial court judge whose opinion underlies the new California Supreme Court decision, did not hear further Newhall Ranch matters at the trial court level because she was reassigned to hear other matters -- although the local court considered and rejected a formal effort to have Jones removed from the case on alleged conflict-of-interest grounds. The California Supreme Court opinion returned in many ways to Jones' view of the case and quoted extensively from her opinion.

Photos of the river and valley in CP&DR's early 2015 coverage at https://www.cp-dr.com/node/3672 show drought conditions in September 2014. The river as shown there is a tiny stream, but the Santa Clara River is changeable. It was also the mighty watercourse behind the 1927 St. Francis Dam disaster.

Links:

The case is *Center for Biological Diversity v. Department of Fish and Wildlife (Newhall Land and Farming Company)*, Case No. S217763: http://www.courts.ca.gov/opinions/documents/S217763.PDF

Briefing: http://www.courts.ca.gov/32839.htm

Oral argument on the Supreme Court case, September 2015: https://www.cp-dr.com/node/3795

Appellate ruling:

http://www.courts.ca.gov/opinions/revpub/B245131.PDF

Trial court ruling: http://www.biologicaldiversity.org/programs/urban/pdfs/Newhall_Statement_of_Decision.pdf

Appellate ruling in the companion case, *Friends of the Santa Clara River v. County of Los Angeles (Newhall Land and Farming Company),* CA Supreme Court Case No. S226749: http://appellatecases.courtinfo.ca.gov/search/searchResults.cfm?dist=2&search=number&query_caseNumber=B256125

Prior CP&DR coverage:

Litigation review, early 2015: https://www.cp-dr.com/node/3672 and https://www.cp-dr.com/node/3673.

Valencia Water disputes, June 2015: https://www.cp-dr.com/node/3742

"Wildlands of the Santa Clara River Watershed," a report on the ecosystem discussed in today's decision: http://www.scwildlands.org/reports/wildlandsofthescrwatershed.pdf

The Case:

Center for Biological Diversity v. California Department of Fish & Wildlife [http://www.courts.ca.gov/opinions/documents/S217763.PDF

], S217763.

The Lawyers:

For Center for Biological Diversity: Kevin Bundy, kbundy@biologicaldiversity.org

For Newhall Land & Farming Co., Mark J. Dillon, Gatzke Dillon Balance, **mdillon@gdandb.com**

For Fish & Wildlife, Tina Thomas,Thomas Law Group, **tthomas@thomaslaw.com** ■

Court Orders Cal State East Bay to Reconsider Offsite Traffic Mitigation

BY WILLIAM FULTON

In light of a similar ruling by the California Supreme Court in a case from San Diego, the First District Court of Appeal has ordered Cal State East Bay to revisit the question of offsite traffic mitigation in the environmental impact report for its long-range master plan. As the Supreme Court did in San Diego, the court ruled that Cal State cannot simply declare mitigations infeasible unless the state legislature appropriates funds specifically for that purpose.

The Supreme Court remanded the East Bay case to the First District after ruling in the San Diego State case earlier this year. The First District reaffirmed its 2012 ruling on all other grounds, also ordering Cal State to conduct a better analysis of the impact of the campus expansion on surrounding parks.

Cal State East Bay's master plan, approved along with a certified EIR in 2009, focused on expanding the campus's population from the current 12,500 students to its longtime systemwide goal of 18,000 students. This expansion includes, among other things, a significant increase in the residential student population and, therefore, on-campus residential areas. The offsite traffic mitigations were valued at $2 million, but in certifying the EIR the Cal State trustees said they didn't have to do the improvements unless the legislature specifically appropriated funds for that purpose.

The Supreme Court remanded the East Bay case to the First District after ruling in the San Diego State case earlier this year.

The City of Hayward and the Hayward Planning Association, led by retired Cal State professor and planning activist Sherman Lewis, sued Cal State immediately, alleging a wide variety of inadequacies in the EIR. In 2012, the appellate court generally upheld Cal State's EIR with the exception of the impact on surrounding parks. (See CP&DR coverage here. The First District did not address the offsite traffic mitigation issue because the plaintiffs had not raised it during administrative proceedings. However, the court did not that the fact situation was similar to the San Diego State case then being appealed to the Supreme Court from the Fourth District.

The city and the association appealed the East Bay to the Supreme Court, which placed the case behind the San Diego State case because of the similar fact situation.

In the San Diego State case, the Cal State trustees had made the same argument about the offsite traffic mitigations. But in the Supreme Court's ruling last summer, Justice Pamela Werdegar wrote: "[S]uch a holding would logically apply to all state agencies, thus in effect forcing the Legislature to sit as a standing environmental review board to decide on a case-by-case basis whether state agencies' projects will proceed despite unmitigated off-site environmental effects."

The Supreme Court noted that the Cal State system has considerable discretion over much of the funding provided by the legislature and therefore is not prohibited

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from using non-earmarked funds fof the offsite mitigations. (See *CP&DR* coverage here.

In the remand of the Cal State East Bay case, the First District ordered the Cal State trustees to reconsider their approach to offsite traffic mitigation. "Although the issue was not fully presented when the adequacy of the EIR was before the Trustees, in view of the clarification provided by City of San Diego and the scope and public importance of the project in question, it is appropriate for the Trustees to heed the Supreme Court's guidance with respect to this project, especially since the matter must in all events be remanded for further consideration of the parkland issue discussed," wrote Acting Presiding Justice Stuart Pollak for the unanimous three-judge panel.

In a brief submitted on remain, Cal State lawyers aid the system "is working to ensure all future CSU projects are consistent with the Supreme Court's directions."

However, the court did not specify what action Cal State should take with regard to the offsite traffic mitigation and Cal State's lawyers did not promise anything more specific.

The Cases:

City of Hayward v. Board of Trustees of the California State University System, A131412

Hayward Planning Association v. Board of Trustees of the California State University System, A131424

The Lawyers:

For City of Hayward: Harriet Steiner, Best Best & Kreiger

For Hayward Planning Association: Stuart Flashman

For Cal State: Diana K. Hanna, SSL Law Firm ■

County Can't Recapture Money Loaned to Redevelopment Agency, Court Rules

BY WILLIAM FULTON

San Bernardino County is not entitled to the return of $9 million in loan principal to the former county redevelopment agency, even though the funds were not tax-increment revenues and had come from the county's general fund, the Third District Court of Appeal ruled Monday.

The appellate court concluded that once the funds had been transferred from the county to the redevelopment agency, they were subject to a state law voiding all agreements between local governments and their redevelopment agencies. The source of the funds is irrelevant, the court said.

In reaching this conclusion, the court saw no difference between a government agency spending tax money on items such as office supplies and a government agency loaning funds to another government agency. "[M]oney loaned by the county, even if the County obtained those funds as an allocation of taxes, does notretain its character as tax revenue in the hands of the borrower," wrote Justice George Nicholson, a onetime Republican candidate for attorney general and aide to Gov. George Deukmejian, for a unanimous three-judge panel.

Nicholson chided the county for not seeking the support of the former redevelopment agency's oversight committee to categorize the loan proceeds as an enforceable obligation under the redevelopment wind-down law, which would have cleared the way for a return of the funds.

In 2005, the County loaned $10 million to the redevelopment agency to repair infrastructure in the Cedar Glen area near Lake Arrowhead. The community had been devastated by fire in 2003. When redevelopment was shut down in 2012, the redevelopment agency retained $9 million of the funds, so the county included these funds on its list of enforceable obligations submitted to the state Department of Finance.

DOF rejected the loan repayment as an enforceable obligation, noting that the redevelopment wind-down law specifically stated that "any agreements, contracts, or arrangements" between the former redevelopment agency and the city or county that created that agency could not be considered enforceable obligations.

The county's main argument was that the redevelopment law should be trumped by Proposition 22, the 2010 initiative drafted by the League of California Cities and the California Redevelopment Association, which was designed to protect tax-increment funds from being raided by the state. This constitutional provision was the subject of the League's unsuccessful legal attempt to overturn the redevelopment wind-down law in *CRA v. Matosantos*, 53 Cal.4th 231 (2011).

However, that argument rested on the idea that the loan proceeds could be classified as tax revenue even after it was loaned to the redevelopment agency, which is why Nicholson's opposite conclusion was so central to the case. "This case is unlike Matosantos, where the argument was made that the state could not redirect tax-increment revenue allocated to the redevelopment agencies. There, the agencies that received tax-increment revenue could not be directed by the Legislature to redistribute it to the trust fund for the purpose of reallocating it to local agencies and school entities. Here, the former redevelopment agency received the funds as a loan, not as a distribution of tax revenue and does not implicate article XIII, sections 24 and 25.5 of the California Constitution," he wrote.

Nicholson also knocked down a variety of other argments from the county, including the idea that the county imposed binding "contingencies" on the loan proceeds that maintained their status as tax revenue, and the idea that because the loan included third-party beneficiaries (ratepayers in Cedar Glen), then the agreement was not solely between the county and the redevelopment agency.

The Case:

County of San Bernardino v. Cohen, C074413

The Lawyers:

For County of San Bernardino: Amy E. Hoyt, Burke, Williams & Sorenson, ahoyt@bwslaw.com

For State of California (Cohen): Marc A. LeForestier, Deputy Attorney General ■

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cases interpret provisions of CEQA guidelines that address greenhouse gas emissions and OPR will incorporate the rulings into the current draft update. OPR is carefully evaluating the decisions and will likely publish a revised draft for further public comment in the coming months."

Comments on OPR's "preliminary discussion draft" closed in October but the statement seems to imply the comment period might be reopened.. Governor's spokesman Gareth Lacy wrote: "OPR is still reviewing the Court's decisions, but that is certainly a possibility."

In the "CEQA in Reverse" matter, the court overturned a portion of the existing CEQA Guidelines, in Sec. 15126.2(a), with respect to assessment of "significant environmental effects the project might cause by bringing development and people into the area affected."

The winner of the case in broad strokes was the CBIA. The builders' group had begun the litigation by challenging administrative guidelines issued by the Bay Area Air Quality Management District (BAAQMD) regarding CEQA "thresholds of significance" for Toxic Air Contaminants (TAC) from pollution sources such as freeways or freight yards.

Generally the court found that "agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents."

But per statutory exceptions, the court found analysis is still required for certain listed safety hazards around proposed airports or schools, or specified kinds of infill, transit-oriented, low-income or farmworkers' housing developments. (See our initial writeup at http://www.cp-dr.com/node/3853 .)

And per the court's interpretation of the law, environmental review is still required where a project's impact on the environment (not vice versa) might exacerbate existing hazards.

In the court's example, if "an agency wants to locate a project next to the site of a long-abandoned gas station," and the ground below the site is contaminated with the gasoline additive MTBE, and new contruction on the site "threatens to disperse the settled MTBE and thus exacerbate the existing contamination," then "(t)he agency would have to evaluate the existing condition — here, the presence of MTBE in the soil — as part of its environmental review."

The court wrote: "Because this type of inquiry still focuses on the project's impacts on the environment — how a project might worsen existing conditions — directing an agency to evaluate how such worsened conditions could affect a project's future users or residents is entirely consistent with this focus and with CEQA as a whole."

One effect of the ruling may well be to move land use regulation toward planning mechanisms other than CEQA. CP&DR's Bill Fulton had commented last year at http://www.cp-dr.com/node/3460 that it might not be a bad thing to take planning approaches other than CEQA to sites with preexisting environmental hazards.

Andrew Sabey of Cox, Castle & Nicholson, who argued the case for CBIA, agreed. He noted that many other regulatory schemes than CEQA do exist, and many of those offer fewer "litigation hooks" to opponents who might "use CEQA as a sword to attack projects rather than as a shield to protect the environment." He saw this effect as especially likely to help infill and affordable housing projects that might otherwise face CEQA challenges.

Already, regulatory responses other than CEQA exist to address urban housing proposals for sites near freeways. Land near freeways is especially likely to be made available for affordable housing due to social stigma, and transit-oriented development by definition is along transit corridors, and those do produce emissions.

The California Air Resources Board and Los Angeles County Department of Public Health recommend siting residences more than 500 feet from freeways [http://planning.lacounty.gov/housing/program9]. The Los Angeles County Community Development Commission refuses to subsidize multifamily housing projects within

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that 500-foot "buffer" distance from a freeway unless the areas where people will live or gather (homes, play areas, patios, etc.) are outside the 500-foot limit. [http://www.lacdc.org/for-developers/multifamily-rental-housing].

BAAQMD supplied a comment attributed to its counsel, Brian Bunger, suggesting that many environmental reviews would still be required under the court's interpretation:

Generally the court found that "agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents."

"The Court did not find that the Air District's thresholds are invalid and it does hold that where a project will exacerbate an existing hazardous condition, CEQA requires an analysis of the impacts of the project on the environment. The Air District's thresholds that were challenged are designed to address existing air quality hazards and in most cases, new development will contribute additional air pollution that will exacerbate those conditions. Therefore, we believe that the thresholds are consistent with the Supreme Court's holding... The Court also recognizes that agencies may, and for many years have, conducted this type of analysis. The thresholds are designed to assist agencies in considering the health impacts of their decisions regarding the location of new development and nothing in the Court's opinion would prevent them from doing that."

Ellison Folk of Shute, Mihaly & Weinberger had argued before the court on behalf of BAAQMD that the disputed Guidelines Sec.15126.2(a) was consistent with the Legislature's expressed intent from the start. (For an account of the oral argument see http://www.cp-dr.com/node/3802 .)

She wrote after the decision: "Most projects will contribute to an existing environmental hazard. New residential projects create toxic air contaminants, projects in fire prone areas increase wildfire risk, sea level rise could cause flooding that will spread contamination from a new project. Therefore, most projects will still trigger the requirement to analyze the impacts of the project on future residents or users of a project."

Sabey disagreed substantially. On the actual BAAQMD significance thresholds underlying the dispute, he wrote that "the Court specifically invalidated a portion of Guideline 15126.2(a) that read: '[A]n EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there.' The invalidated portion of the Guideline is precisely the language that BAAQMD had relied upon to justify its adoption of TAC Receptor Thresholds."

On broader impact, he wrote: "The air district and sympathetic commentators are understandably trying to engage in damage control. But in their zeal to minimize their loss, they are making claims that simply don't hold up, and that are inconsistent with the plain language of the Supreme Court decision."

Sabey disputed the BAAQMD attorneys' suggestion that most new development would still create air pollution hazards exacerbating existing conditions, hence falling into what Sabey called "the exception to the general rule."

He wrote: "It would be a strange "general rule" indeed if virtually every project was not subject to it by way of a major exception. Merely bringing people to an area affected by existing TAC impacts is not a CEQA impact under this holding. That is precisely what the air district's TAC Receptor Thresholds at issue had attempted to convert to a CEQA impact. The Court has rejected that notion. Moreover, the air district has separate TAC Thresholds for a

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source, and those source thresholds were not implicated in CBIA's challenge—source thresholds will continue to be available to measure a project's air quality impacts because they appropriately measure a project's impact on the environment, including a project's exacerbation of existing conditions."

The court specifically mentioned four appellate cases cited by CBIA, saying the ruling was "not inconsistent with these cases."

Sabey summarized the four as having "rejected challenges based on (1) existing hazardous material buried underground on or near the project site, (2) existing air quality impacts surrounding a proposed school site, (3) existing odors affecting a proposed housing site, and (4) existing risk of flooding due to sea level rise on a proposed project site." He wrote, "These fact patterns exemplify how CEQA cannot now be used. The District's TAC Receptor Thresholds fall into this precise category of invalidated applications of CEQA."

Sabey disputed the BAAQMD attorneys' suggestion that most new development would still create air pollution hazards exacerbating existing conditions, hence falling into what Sabey called "the exception to the general rule."

The four listed cases are:

- *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464 (see *CP&DR Legal Digest*, March 1995, decision text at http://resources.ca.gov/ceqa/cases/1995/baird.html);

- *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889 (summarized by Abbott & Kindermann at http://blog.aklandlaw.com/2009/09/articles/ceqa/appellate-court-emphasizes-ceqas-focus-on-reasonableness/);

- *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604 (see http://www.cp-dr.com/node/3068); and

- *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455. (http://www.cp-dr.com/node/3121)

The 1995 *Baird* ruling, which began this line of cases, was a classic case of CEQA used as sword rather than shield, in which neighbors opposed expansion of an adult residential treatment program, in part by citing preexisting environmental contamination in the area.

Unlike the current court in its MTBE analysis, the 1995 *Baird* court wrote: "Baird's complaint is not that the proposed facility will cause an adverse change in the environment--that is, in any of the physical conditions within the affected area. Rather, Baird's point is that preexisting physical conditions, consisting of the various forms of purported contamination, will have an adverse effect on the proposed facility and its residents. Any such effect is beyond the scope of CEQA and its requirement of an EIR. The purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment. CEQA is implicated only by adverse changes in the environment."

The Case:

California Building Industry Association v. Bay Area Air Quality Management District, No S213478, http://www.courts.ca.gov/opinions/documents/S213478.PDF

The Lawyers:

For California Building Industry Association: Andrew Sabey, Cox Castle Nicholson, **asabey@coxcastle.com**

For Bay Area Air Quality Management District: Ellison Folk, Shute Mihaly & Weinberger, **folk@smwlaw.com** ■

insight WILLIAM FULTON

>>> Tax Increment Is Back — But Which Choice Will Cities Make?

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expected. One year after Brown's re-election, California's cities have not one but two tax-increment options. But, as redevelopment experts such as Cecilia Estolano [https://www.cp-dr.com/node/3847] have repeatedly pointed out, options they are – two very different approaches to a gaining access to a limited amount of property tax increment. It will be interesting to see how California's cities take advantage of these tools – if they take advantage of them at all.

From the beginning, Brown made it clear that any attempt to revive redevelopment had to meet at least four requirements:

First, the general fund had to be protected – which meant that that portion of property tax that goes to school districts had to be off the table.

Second, counties and special districts couldn't lose their property tax without their permission. They had to be consulted and give their consent.

Third, cities that wanted access to a new tax increment system had to close out all of their battles with the state Department of Finance over wind-down over the old redevelopment system.

And fourth, there could be no connection to the old redevelopment system whatever – even to the point of making absolutely no reference in the new law to the old state code sections about redevelopment.

And now there are two state laws permitting cities to engage in tax-increment financing that meet all these requirements.

The first is the "Enhanced Infrastructure Financing District," or EIFD, a revision of an old but rarely used technique which passed the legislature last year [http://www.cp-dr.com/node/3563].

The second is the "Community Redevelopment Investment Authority," or CRIA, which was Brown signed this year after vetoing last year largely because it linked to old redevelopment code sections. [http://www.cp-dr.com/node/3800]

Both are limited in the amount of tax increment a city will be able to receive. Schools are out and counties and special districts must cooperate in order for cities to receive their tax increment.

But they represent two different approaches.

EIFDs can be used to finance any kind of public infrastructure in any neighborhood. There's no need to find blight or anything like that. But the creation of an EIFD requires a city to win a vote with a 55% majority. (One of the major elements of last year's bill was to reduce the required vote margin from two-thirds.)

CRIAs, by contrast, don't require a public vote. But they do require a city to restrict the tax-increment zone to areas that meet specific criteria – not just physical deterioration but also high crime and unemployment rates.

In other words, you can gain access to tax-increment financing – but only if you *either* win a public vote *or* hit certain social justice requirements. And you'll get – at most – half of the overall tax increment, since the tax increment that goes to school districts is off the table.

Obviously, either of these options is a lot more constraining than the old redevelopment system, which at its peak diverted $6 billion in property taxes into the coffers of redevelopment agencies. Even so, however, the new system still gives local governments a lot of leeway over how to use tax-increment funds. Increasingly, states that are granting tax-increment powers to local governments also constrain the purposes to which the tax-increment funds can be used – for example, in Washington, where tax increment can be used only for affordable housing, parks, public infrastructure, and a few other items.

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>>> Tax Increment Is Back — But Which Choice Will Cities Make?

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And, as I have pointed out before, the state chose *not* to tether either of these options to the rest of the state's own growth management policy, including the whole sustainable communities strategy process called for over SB 375. Former Senate leader Darrell Steinberg, now a candidate for mayor of Sacramento, attempted to make this connection with his redevelopment revival bills in 2012 and 2013, neither of which became law. [https://www.cp-dr.com/node/3404] But by the time Brown signed the CRIA law last fall, Steinberg was gone from the Senate and the connection to SB 375 was gone from the bill.

You can gain access to tax-increment financing – but only if you either win a public vote or hit certain social justice requirements. And you'll get – at most – half of the overall tax increment,

All of which means that although local governments have a lot of constraints on how they can access tax increment, they have fewer constraints than you might think on how they can use it.

So the one question that remains is: Will the amount of money a city might receive be worth the hassle of creating these new tax-increment districts?

Broadly speaking, about half of California's property tax goes to school districts, while a third goes to counties, about 15-17% goes to cities, and the remainder to special districts. The numbers vary for each jurisdiction – and, often, they vary in different parts of the same jurisdiction – because of historical allocation peculiarities. Before redevelopment was killed, a city that created a redevelopment agency could unilaterally capture about two-thirds of an area's property tax increment once pass-throughs to schools, counties, and special districts were taken into account. Even with restrictions on the use of tax-increment funds, going from 15-17% of the property tax to over 60% was well worth the hassle.

But with school money off the table, and accounting for the likely negotiations with counties and special districts, the typical city may now be looking at something like 30-40% of the property tax revenue. Is that still worth it?

Surprisingly, the answer might be yes. In fact, in some cases even using EIFD or CRIA for just a city's portion of the property tax might be worth it. Several sources have suggested that cities which capture at least 20% of the property tax pie might generate enough increment to bond against, even if they don't include county or special district funds.

So whether it's EIFDs or CRIAs, 2016 will be the first year since 2011 that California cities actually have something to work with on the tax-increment front. Whether it will be enough to work with remains to be seen. ■

Urban Planning Takes Center Stage In If/Then

Sometime in the not-too-distant future, the American Planning Association's Burnham Award will go to Dr. Elizabeth Vaughan. She will be recognized for, among other accomplishments, forcing improvements to a mega-development on Manhattan's West Side, elegantly creating more affordable housing, and making peace with anti-gentrification activists.

A former professor of planning, Vaughan is exacting, keeping an entire Census' worth of data in her head and crunching numbers on the fly; she analyzes every alternative in her head and sees demographic and social trends long before they take place. She has the toughness, intellect, and resolve of Janette Sadik-Kahn. She also has the awkwardness, self-doubt, and nonexistent dancing skills of Elaine Benes.

If Elizabeth sounds like an improbable character, it's because she is. She is fictional. Even so, as the central character in the Broadway musical "If/Then," currently on a national tour that begins in California, Elizabeth Vaughan may be the most famous urban planner in the country.

Played by Broadway megastar Idina Menzel, Elizabeth the quintessential child of the 1990s (she celebrates her 39th birthday onstage). She and her cohort weathered urban decay, stayed healthy through the early AIDS crisis, made the country (or at least New York) a more tolerant place, and survived life before iPhones. She and her friends are spirited, liberal, and diverse to a fault. Matrices of gay couples, straight couples, biracial couples portray a colorblind and gender-neutral culture. It's a sanitized version of the cosmopolitanism that flourishes in many American cities even as intolerance and fear rises in the hinterlands. Their world is chaotic yet comfortable; they are not quite yuppies, but they're doing OK. They enjoy New York City for all it's worth, from strolls in the park to soliloquies on the fire escape to the chance to bump into 8 million other fascinating humans in any one of the 525,600 minutes that make up a year.

Maps and architectural renderings hang over pillow talk between Elizabeth (Idina Menzel) and half-husband Josh (James Snyder). Photo Credit: Joan Marcus

If "If/Then" sounds like "Rent" all grown up, that's because it is. It shares both cast members (including Menzel) and creative team members with the original 1996 Broadway production of Rent. And of course it shares a city. But, whereas New York was but the backdrop for the Rent kids to explore their Bohemian anguish, the city takes center stage in "If/Then." The "sidewalk ballet" is literally on display in song-and-dance numbers — in parks, on balconies, in offices — that celebrate urban life with full throat.

Menzel has just enough humility to play Elizabeth with humor and self-awareness. Perhaps too much self-awareness. Elizabeth constantly enumerates her flaws, chief among them is her ability to make "poor choices." Elizabeth is happiest when she is analyzing the tendencies of 8 million data points. When she has to decide for herself — work for the city vs. teach college; go to a party or go to a protest; sleep with her boss or marry the handsome Army doctor — she is nearly paralyzed. She wonders constantly, obsessively about the sidewalk less traveled.

In many cases, the world ends up choosing for her.

"If/Then" operates on a clever, if overwrought, narrative conceit. Like the 1998 Gwyneth Paltrow movie Sliding Doors, it follows two storylines at once, with scenes and their alternatives weaving in and out of each other. The people, places, and relationships remain the same but the choices are different. And, of course, so are the outcomes.

If Elizabeth, who is "Liz" in one storyline and "Beth" in the other, chooses to marry the handsome doctor, then her best friend, Lucas, marries the doctor's best friend David. If she takes the job with the city, Elizabeth doesn't marry the doctor but instead ends up in halting friendship-romance with the same Lucas. Taking cues that date back to Sophocles, "If/Then" wonders, pedantically and entertainingly, whether we are governed by ourselves or our stars. Or by our city.

Whatever choices "If/Then's" mere mortals make, they take place on the foundation of New York. Whereas "Rent" celebrated urban life, "If/Then" celebrates the city as such. "Urban planner" isn't just a convenient backstory for Elizabeth. It's a focal point of the plot. Amazingly, we see Elizabeth "doing" urban planning in scene after scene. When Elizabeth isn't actively guiding the city's future, she and her friends are out there living in it. One of its best scenes has Elizabeth's irrepressible friend and obsessive matchmaker Kate serenading gentlemen in a subway car, quite unlike the common panhandler.

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Urban Planning Takes Center Stage In If/Then

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Menzel has a colorful supporting cast, but the story revolves literally around her. She is the fulcrum between which head and heart balance. Her choices are the ones that determine whether her friends are gay or straight and whether they take one job or another. By the time she becomes Director of the Department of City Planning, her choices are also the ones that determine where thousands of New Yorkers will live, how their public spaces will look, and whether Penn Station will finally get exhumed.

If ever a character has romanticized the planning profession, it is Elizabeth. She is the consummate pragmatic idealist. She understands the joy that pulses through a great city while she keeps the numbers all in their rows. Elizabeth and her colleagues speak honestly about gentrification, demographic trends, tensions between developers and stakeholders, political alliances, housing costs, and everyday things like bike lanes and sidewalks. Planning — if we take it in its purest form, serving the masses and making life better on average — is the ideal foil for the messiness and uncertainty of individual existence.

As much as "Rent" romanticized the creative loafing and angst of the 1990s (while its predecessor, "Angels in America" revealed the horrors of the AIDS crisis), "If/Then" is a celebration of professionalism. It's a little forced, but it's a refreshing change from Broadway's obsession with meta-drama. (Think "A Chorus Line," "The Music Man," "Cabaret," "Gypsy," "42nd Street," "Phantom of the Opera"…) "If/Then" is not quite dancing about architecture, but it's close, and it works.

Brian Yorkey, who wrote the book and lyrics, did his homework. Though Menzel's black mane would have to go silver before some of her signature projects actually got approved, it's a reasonable portrayal of basic planning. Terminology is used correctly, the issues are genuine, and even the places in Manhattan — right down to a thinly veiled Hudson Yards — are real, illustrated with street maps and images of landmarks. If only all planners were as passionate as Elizabeth is, or as dazzling as Menzel is. Indeed, there seems to be an intentional chasm between Menzel's celebrity and talent — though occasionally nasal, her voice is crisp and powerful -- and the anonymity and bureaucratic tendencies of her character's career. Whatever choices we may face, we cannot all be Broadway stars.

As a musical about place, it's hard not to think about "If/Then's" audiences. When performed in a theater encircled by the city it portrays, the urban themes must have been obvious. On Hollywood Boulevard, "If/Then" reveals urban possibilities about which Angelenos are becoming increasingly aware but from which they still sometimes recoil. San Diegans may have to consider the battles they've waged over regional planning. Folks in Orange County may glimpse a world they'd prefer to experience on stage than in real life.

The production must be prepared for a chilly reception when it goes to Tempe Jan. 12-17. One of Elizabeth's more regrettable choices was spending 12 years in Phoenix with her then-husband. With its sprawl and its air conditioning, the city bears the brunt of some genuinely unkind jokes in a musical that is otherwise sweet and forgiving. The creative team may have had no problem unloading on the city of Joe Arpiao and the state of SB 1070.

Let us, then, stop for a moment to contemplate that this review is about a major Broadway musical that is about urban planning. It is a first and probably a last. Whether this means that the profession has come into its own or whether it means that a single creative team got a whim and ran with it is anyone's guess. Planners should enjoy the spotlight while it lasts. And maybe they can even learn from it.

Understandably, neither Menzel nor her production won a Tony Award. The clever first act, which sets up the relationships and amply explores Elizabeth's dilemmas, devolves into melodrama in the second act. The music is not memorable enough, and the whole thing stumbles when it goes from light fun to grave seriousness. And yet, if "If/Then" can get audiences to think more deeply about cities and even get planners to discover (or rediscover) their inspirations, then maybe Elizabeth will deserve that Burnham Award after all.

– JOSH STEPHENS | DECEMBER 10, 2015 ■

'If/Then' Selected Tour Dates

ifthenthemusical.com

Dec. 8 - Jan. 3, Pantages Theater, Los Angeles

Jan. 5 - 10, San Diego Civic Theater

Jan. 12 - 17, Gammage Auditorium, Tempe, Arizona

Jan. 19 - 24, Segerstrom Center, Costa Mesa

Is This The Right Meeting? Really?

If NIMBYs are, proverbially, planners' worst enemies, then planners are sometimes their own second-worst enemies.

Monday morning I attended one of a dozen or so workshops and listening sessions, this one in Los Angeles, put on by the Governor's Office of Planning and Research to publicize and solicit input into the new draft General Plan Guidelines. It's a momentous occasion for planners in California. Legislative, demographic, and cultural forces have forged a different world in the 12 years since OPR last updated the guidelines.

Cities that update their general plans, usually to the tune of hundreds of pages, need all the help they can get. That's why it's so important for OPR to clearly explain what it has in mind and to hear what planners and citizens need to make the magic happen.

Some citizens, though, see nothing magical about, well, anything that planners do.

The meeting in Los Angeles was attended by 40 or so people (compared to the 100-plus that organizers said had RSVP'd). About one-quarter of them were self-described "interested citizens," or something of the sort. The rest came from various public agencies.

The two OPR representatives who led the meeting — and shall remain nameless -- had their talking points and their slideshow . The agenda called for a presentation in the first half of the session and a "targeted discussion" in the second half. What it didn't include was a way of preventing a small minority of audience members from co-opting the meeting.

Did these interested citizens attend so they could share their excitement about the use of vehicle miles travelled metrics? Did they have invaluable suggestions for ways cities can articulate the relationship between their mobility elements and their health elements? Not exactly.

Instead, they came with an earful about woes. They bemoaned offenses like the adulteration of neighborhoods, raucous parties on rooftops, over-bulding in Hollywood, and greedy developers who are turning a sleepy seaside town into, well, a major world city. One audience member railed against the evils of "urban infill," on the premise that homes "filling in" pristine ridgelines in the hills were environmentally destructive. No one had the heart to explain to her that this is the opposite of urban infill.

Above all else, the citizens lamented the deafness of public officials. They said they have raised these concerns time and again and, according to them, no one has listened.

Maybe that's because they're going to the wrong meetings.

You have to sympathize with citizens who are frustrated with government. Then again, you don't have to be James Madison to understand how hierarchical jurisdictions work. No matter how unresponsive, oblivious, or indecisive a local official or bureaucracy might be, shouting at a state agency with zero legislative authority in a meeting about a program that serves a purely advisory function is the epitome of futility.

Unfortunately, those citizens will probably go home and, seeing no result, will only grow more frustrated.

Meanwhile, the timidity of the planning profession was on full display. Yes, the public must have a chance to speak, and planners must listen. But, still, there's only so much time and so many ears.

Time and again, audience members interjected with little resistance. The presenters, looking weary as can be, issued some tepid reminders about jurisdictions. Then citizens went on with their rants. One slide stayed up for over a half-hour, hovering excruciatingly above the lectern, while the discussion went this way and that.

Any greenhorn planner in the most podunk jurisdiction knows that he needs to keep a few audience-management tricks up his sleeve. Why veterans of the state's most important planning-related agency don't is beyond me. Any number of trinkets — a gavel, a microphone, a conch — would have helped. Even better: stick to the agenda and

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Is This The Right Meeting? Really?

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that "targeted discussion."

I respect the OPR representatives for their patience. Then again, public meetings involve an unfortunate asymmetry: what's polite and patient to one group is rude to everyone else. I, for one, was there to hear about the General Plan Guidelines, and so was almost everyone else.

Ultimately, my disappointment here is twofold. The "concerned citizens" were wasting their time by speaking to the wrong people. Meanwhile, OPR wasted its time because they failed to convey much of the information that they were there to convey. I'm sure they didn't get much useful commentary either. Some very smart people in the audience had very little chance to get words in edgewise.

Thus, in one fell swoop, stakeholders and local officials both grow more frustrated and less informed. If I'd heard anything interesting or coherent at the meeting, I'd be writing about it, and not about this.

So, I don't know what the final General Plan Guidelines will end up looking like. If we're lucky maybe it'll include a chapter on holding effective public meetings.

– JOSH STEPHENS | DECEMBER 2, 2015 ■