CP&DR
CALIFORNIA PLANNING & DEVELOPMENT REPORT
Vol. 9, No. 1 — January 1994

INSIDE

CP&DR is published monthly by

Torf Fulton Associates
1275 Sunnycrest Avenue
Ventura, CA 93003-1212
805/642-7838

William Fulton,
Editor & Publisher

Morris Newman,
Senior Editor

Stephen Svete,
Elizabeth Schilling,
Contributing Editors

Allison Singer-Schwarz,
Circulation Manager

Subscription Price:
$179 per year

ISSN No. 0891-382X

We can also be accessed electronically on

NEWSNET

For online access information call 800/345-1301

Sacramento, Foothill Areas Undertake Major Plan Revisions

'New Town' Issue Dominates Debate In Placer County

By William Fulton

Facing rapid growth over the next 20 years, most counties in the Sacramento Valley and nearby foothill areas are revising their general plans — and virtually all of them are contemplating at least a doubling of population during that time.

In most of the counties — Sacramento, Placer, Sutter, Yuba, Nevada, and El Dorado — planners and politicians are struggling with the question of how to accommodate more growth while still maintaining the "rural" atmosphere that characterizes most of the area.

The biggest donnybrook is occurring in Placer County, where a bare majority of the Board of Supervisors has endorsed the concept of creating four new "growth areas" in the western part of the county. Critics argue that these areas would compete for growth with existing cities — especially Roseville — and with designated growth areas in neighboring counties, *Continued on page 3*

Fires Highlight Dilemma Faced By Many Communities

Which Should Take Precedence: Rebuilding or Restrictions?

By Morris Newman

The firestorms in late October and early November reminded Southern Californians of the state's persistent problem with spontaneous blazes, particularly in hillside areas where fire is part of the cycle of nature. Yet they also highlighted the dilemma that many communities face in dealing with fire.

Normally slow-growth communities such as Malibu and Laguna Beach are rushing to assist homeowners rebuild in devastated areas, sometimes by suspending the time-consuming procedures that typically make development difficult. But the rush to rebuild is occurring at the same time as redoubled efforts to pass fire-prevention laws, suggesting that California's cities have not come to terms with the fires that are endemic to the state — and with the question of whether local governments *Continued on page 10*

High Court May Decide on Planning by Initiative

In a follow-up to one of the major land-use law issues of the 1980s, an appellate court has ruled that a local general plan can be amended by initiative. The ruling appears to set the stage for a definitive ruling on the issue by the California Supreme Court.

Californians have gained greater and greater access to the ballot on land-use issues in California for almost 20 years. The biggest breakthrough came in *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511 (1980), when the California Supreme Court ruled that even a zone change should be regarded as a legislative act subject to initiative and referendum. Arnel opened the floodgates for "ballot-box zoning" throughout California in the 1980s.

Over the years, the California Supreme Court ruled, among other things, that zoning ordinances may be amended by initiative and general plan amendments may be placed on the ballot by referendum. But the court has never ruled on the question of whether a general plan may be amended by initiative.

The court may have the chance if it accepts the appeal of *DeVita v. Napa County*, in which the First District Court of Appeal ruled that general plans may, indeed, be amended by initiative. Details of the *DeVita* case begin in the *CP&DR Legal Digest* on page 5.

NORTH COAST

New County Proposed

Some residents of southern Humboldt and northern Mendocino counties are proposing that they combine to form a new county that would be known as Sequoia County.

The proposed new county would contain only 16,000 residents, including the communities of Petrolia, Garberville, Leggett, Laytonville, and the Round Valley Indian Reservation. The area is geographically isolated from county government in both existing counties.

Countyhood proponents claim the area generates $1.3 million a year in bed tax revenues but receives only $20,000 of the funds back for visitor services. The proponents are seeking to gather the 2,100 signatures necessary to force the creation of a state commission to study the idea.

SOUTHERN CALIFORNIA

Sybert Named to Conservancy Board

Richard Sybert, former director of the Governor's Office of Planning & Research, has been appointed to the Board of Directors of the Santa Monica Mountains Conservancy.

The move is seen as an attempt to shore up Sybert's environmentalist credentials. He is running for the congressional seat currently held by Rep. Anthony Beilenson, D-Los Angeles, who is regarded as the architect of the Santa Monica Mountains National Recreation Area.

As OPR director, Sybert actively participated in the debate over whether to permit development of the Jordan Ranch in Ventura County. The property has since been purchased by the National Park Service.

SAN DIEGO COUNTY

City Approves Sports Arena

The San Diego City Council has unanimously approved construction of a $155 million sports arena near the city's convention center downtown. The decision is viewed as an aggressive move in San Diego's attempt to lure a National Basketball Association franchise.

Under the proposed agreement, the city will pay approximately $55 million in land-acquisition and infrastructure costs, while the $100 million construction cost will be paid by Arena 2000, a private group headed by developer Ron Hahn.

San Diego previously landed an NBA franchise when the Buffalo Braves moved there in the late 1970s. However, the team — renamed the Clippers — moved to Los Angeles after only a few years in San Diego.

Feds Officially Relinquish Gnatcatcher

At a ceremony in Carlsbad, Interior Secretary Bruce Babbitt officially turned over the fate of the California Gnatcatcher to state and local officials participating in the Natural Community Conservation Planning process.

The gnatcatcher has been listed as a threatened species under the federal Endangered Species Act — a designation that would ordinarily prevent any construction on the bird's habitat. However, last year the Interior Department issued a special rule permitting some construction on gnatcatcher land for landowners participating in the state's NCCP process. Under the NCCP's provisional guidelines, no more than 5% of the land in each of 12 sub-regional areas in Orange, Riverside, and San Diego counties may be developed.

In finalizing the federal rule, Babbitt said the NCCP would be "admittedly ... a long and complicated and sometimes frustrating process." But, he said: "The alternatives are all worse."

BAY AREA

Schools Block Passage of San Jose General Plan

A consortium of six school districts has persuaded the San Jose City Council to withdraw approval of its new general plan.

The general plan is considered innovative because it seeks to accommodate 52,000 new housing units in the next 20 years — all in "infill" sites within the city's existing developed areas, especially along the city's emerging light-rail transit lines. (CP&DR, September 1993.)

Yet this same strategy will cause problems for school districts, because small, high-density projects will provide fewer development fees and fewer school sites. The strategy will also cause a disproportionate impact for San Jose Unified School District because the rail line is located almost entirely within that school district's borders.

The city council approved the general plan as scheduled on December 14. However, the council agreed to withdraw approval later that week after fearing that the schools would challenge the adequacy of the plan's environmental analysis.

Prior to the general plan action, the city had already established a school impacts task force to look into the issue.

Windsor Extends Housing Moratorium

The Sonoma County city of Windsor has approved an extension of the moratorium on new housing originally imposed in 1989.

The city incorporated last year and is now preparing its first general plan. The moratorium was originally imposed by Sonoma County when the area ran out of sewer capacity. Some 300 building permits were issued in 1993. By contrast, building permits totaled more than 1,000 in the year before the moratorium was imposed.

However, the city continues to see houses built because developers have more than 900 outstanding entitlements, and some developers continue to seek exemptions. The city has already approved some 250 units in exemptions and now a 64-unit senior complex is seeking another exemption.

CENTRAL VALLEY

State to Buy Reservoir Land

The state Department of Water Resources is moving forward with the purchase of a 1,700-acre cattle ranch in Merced County, even though the proposed Los Banos Grandes Reservoir may never be built.

DWR is planning to construct a 12,000-acre reservoir in the vicinity, just south of the San Luis Reservoir near Los Banos. However, the cattle ranch is home to California's largest remaining stand of valley sycamore trees and therefore is prized by land conservation officials. The American Land Conservancy is pursuing ownership of the property. Furthermore, water conservationists are opposed to construction of the Los Banos dam.

DWR was expected to buy the land for $1.7 million in order to keep its options open. ❑

Otay Ranch Approved by Chula Vista and San Diego County

By Morris Newman

The 23,000-acre Otay Ranch new town in south San Diego County has won approval from both the San Diego Board of Supervisors and the Chula Vista City Council. The supervisors approved the project, 4-1, while the Chula Vista council vote was unanimous. Persistent concerns about gnatcatcher habitat, however, may still scale back the project. Otay Ranch will be developed by the Baldwin Co., which bought the land for $150 million in 1988.

The Otay Ranch process was notable for a high degree of cooperation among different jurisdictions, particularly between San Diego County and Chula Vista. In contrast to some other new town proposals in the state, San Diego County officials invited Chula Vista to participate in the planning process at its start four years ago, even though the project is not within the city's sphere of influence.

"The developer recognized that (Chula Vista) would be impacted by any development on Otay Ranch," said planner Anthony Lettieri of Lettieri & McIntyre, who served as general manager of the project for city and county. He added that the planning process was "unique" in that the city and county decided beforehand not to "land grab" or compete for sole control of the project. Added Duane Bazzel, senior planner for Chula Vista, "We realized it was to both our benefits that we did not let the property owner play one agency against the other." Instead, the two jurisdictions have been working jointly to decide which areas will be annexed to Chula Vista and which entity will provide a variety of public services.

The project calls for about 27,000 residential units, of which 21,000 will be clustered in the project's western portion, a 9,500-acre area. A 342-acre "Eastern Urban Center" is to be the regional commercial center, where 6 million square feet of office, industrial and retail space can be built. About 11,000 acres are to be left as permanent open space.

Planned along "neo-traditional" lines, the Otay Ranch master plan envisions 11 "villages," each with its own village center. Four of the villages on the western end of the project will include transit stations. Chula Vista plans to provide bus transit in the area, while the county light-rail system is expected to extend south to Otay Ranch in the next 15 years. (The county's Metropolitan Transit Development Board has adopted light-rail alignments that closely follow the 805 Freeway and State Route 54, but has not acquired the land.) Caltrans plans to build State Route 125 through the area, either as a state project or a private toll road.

The most difficult environmental issues involved the areas immediately south and east of Otay Lake, a man-made reservoir in a wooded area, which has been envisioned as a high-end residential neighborhood with 561 houses on 773 acres of gnatcatcher habitat. Eventually, the developers agreed to scale back the development. Development in this area may be further scaled back or even halted altogether, as the developer is obliged to respond to recommendations of two related environmental negotiations, the City of San Diego's Multiple Species Conservation Plan and the state's Natural Communities Conservation Plan.

Currently, a local environmental group called Chaparral Greens is suing the project, charging inadequacies in the EIR's mitigation measures. Despite that lawsuit, consultant Lettieri observed that Otay Ranch's planning was less contentious than comparable projects in other areas, particularly in affluent north San Diego County. "The South Bay portion of the county is not the same (as the north) economically," Lettieri said. "The area has two jails and Tijuana sewage is flooding over, so the population is not as concerned about development issues as in north county. Most of the comments from local residents were, when does (the project) start?" As a planning consultant, he added, "I'm not used to those kinds of comments." ❑

■ Contacts:
Anthony Lettieri, Lettieri & McIntyre, (619) 238-4241.
Duane Bazzel, senior planner, City of Chula Vista, (619) 691-5031.
William Healy, San Diego County, (619) 694-2968.

Sacramento, Foothill General Plans in Flux

Continued from page 1

such as south Sutter County.

Virtually all the general plans have been in progress for several years. So far, only Sacramento County has actually approved its new plan. After a four-year process, the Board of Supervisors voted 3-0 in favor of the plan in early December. Ironically, one supervisor who helped craft the plan — Toby Johnson — participated in the voting. One supervisor was ill and did not attend the final meeting, while another — Grantland Johnson — recently left the board to accept a position with the Clinton Administration. The other two votes in favor of the plan were cast by new board members.

The Sacramento plan was characterized by debate over the "transit-oriented development" concept first drafted by Peter Calthorpe, the San Francisco architect who has designed several pedestrian- and transit-oriented development projects in Northern California. The final version contained a watered-down proposal permitting transit-oriented development.

Perhaps more important, however, was the decision by the Sacramento supervisors to change the growth boundaries first proposed by the staff and consultants. Originally, the plan called for concentrating most new growth in the northern and southern sections of the county. However, according to County Planner Robert Sherry, the board ran into growth resistance in Rio Linda, an unincorporated area in the north, and expressed concern about preserving dairy farming in the southern part of the county. Expected growth in those areas was scaled down, while new growth areas were added in the eastern part of the county.

The county's 20-year plan would add some 400,000 new residents. More than 600,000 people currently live in unincorporated Sacramento County — some two-thirds of the county's population.

Placer County

Located north of the Sacramento County line and stretching northeast to encompass part of Lake Tahoe, Placer County lies in the path of metropolitan Sacramento's growth. Few in the county dispute that Placer will receive lots of development pressure. However, the question of where and how to manage that growth has bitterly divided public officials in the county.

Most of Placer's growth is expected to come in the southwestern portion of the county, adjacent to Sacramento, where the incorporated cities of Roseville, Rocklin, and Loomis are growing quickly. Roseville, for example, has a current population of about 53,000 but has a general plan

Continued on page 4

Sacramento, Foothill General Plans in Flux

Continued from page 3

capacity of close to 100,000 and is contemplating an increase to 140,000.

Last year, the Placer County Board of Supervisors voted 3-2 to include four large new development projects in the general plan. All are in the southwestern portion of the county, but all are outside the spheres of influence of the three cities. The move was led by board Chairman Phil Ozenick, a former Roseville mayor. Ozenick claimed that city residents in Roseville don't want the city to grow beyond 100,000.

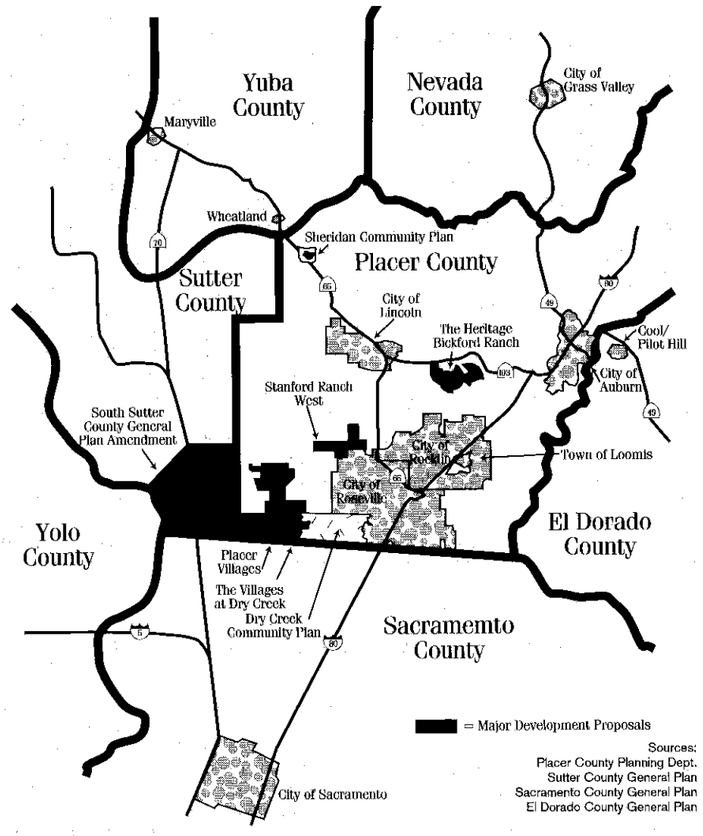
The four development projects — called out in the draft general plan as "growth areas" — are:

• Bickford Ranch, a 2,000-acre project north of Loomis that would include 2,500 dwelling units.

• Placer Villages, a 6,000-acre area that would include 15,000 dwelling units and more than 700 acres of commercial and industrial development. This project borders the Sutter County line and therefore abuts the massive proposed developments in south Sutter County.

• Stanford Ranch West, a 2,400-acre area north of Roseville that could accommodate more than 8,000 dwelling units.

• Dry Creek, a 5,000-acre tract located east of Roseville that could accommodate 14,000 dwelling units.



Ozenick defends these projects as potentially self-contained "new towns" that would provide a politically popular alternative to continued growth of Roseville. Roseville, however, has criticized the county's planning as duplicative. "If you look at what Rocklin's doing and what Lincoln is doing and what we're doing, we can handle all the growth for the next 20 years," said Roseville's Steve Dillon. He said the need to build infrastructure from scratch in the growth areas calls the financial viability of the projects into question.

On top of everything else, citizen activists in Placer County — aided by brand-new supervisor Rex Bloomfield — are drafting an initiative that would require general plan amendments to be approved by a supermajority of the Board of Supervisors and by the voters as well.

The general plan is currently before the Placer County Planning Commission and is expected to move to the Board of Supervisors for a vote next spring.

Nevada County

Located north of Placer County, Nevada County is also undergoing a general plan revision that has raised questions about the conflict between maintaining a rural environment and allowing property owners to build what existing zoning would permit.

The plan would permit a doubling of Nevada County's population to approximately 170,000 people. According to county Planner Sharon Boivin, the existing general plan permits a buildout of 200,000 people, but environmental constraints would prohibit the county from ever reaching that level.

Boivin said the county is seeking to maintain existing zoning — including 40-acre lots — in the county's rural forest areas, while permitting denser development near its existing cities, such as Nevada City and Grass Valley.

The environmental impact will be prepared over the next few months and Nevada County is expected to approve the new general plan in late 1994.

Yuba County

Located north of Sacramento and immediately west of Nevada County, Yuba County is also contemplating a general plan revision that would permit the county's population to double.

The proposed general plan would permit an increase in county population from 62,000 to 188,000 in 20 years, though county planning officials say their goal is a population of 133,000. The county board is expected to adopt the plan sometime in 1994. ❑

■ Contacts:
Robert Sherry, Sacramento County Planning Department, (916) 440-6141.
Phil Ozenick, Placer County Board of Supervisors, (916) 783-9891.
Fred Yeager, Placer County Planning Director, (916) 889-7470.
Sharon Boivin, Nevada County Planning Department, (916) 265-1440.

CP&DR
LEGAL DIGEST

Napa County Agricultural Measure Upheld

General Plans May Be Amended By Initiative, Appellate Court Rules

Restating a point made in several previous appellate cases, the First District Court of Appeal has ruled in a case from Napa County that general plans may be amended by initiative. However, the case is likely to be appealed to the California Supreme Court, which has never ruled directly on the general plan-initiative point.

The appellate ruling upheld the validity of Measure J, an agricultural preservation initiative approved by Napa County voters in 1990. The measure was attacked in court by the Building Industry Association of Northern California and several Napa County landowners.

The Napa case is the latest in a series of cases dating back to the mid-1980s that address the relationship between general plans and ballot measures — two legal tools that are subject to vastly different requirements and procedures. General plans have many process requirements. They also must be internally consistent and consistent with a community's other planning documents. By contrast, the power of citizen initiative and referendum is often interpreted by California courts as permitting citizens unfettered access to the ballot. Thus, some lawyers argue that general plans, as a state statutory scheme, should take precedence over local initiative and referendum powers, while others argue that access to the local ballot is a fundamental right that cannot be impaired by state statutes.

Though the California Supreme Court has heard several cases dealing with these broad issues, the court has never issued a definitive ruling on the initiative question, although in *Yost v. Thomas*, 36 Cal.3d 561 (1984), the court ruled that an amendment to a general plan is subject to referendum. The court appeared to have the opportunity to answer the initiative question in *Lesher Communications Inc. v. City of Walnut Creek*, 52 Cal.3d 531 (1990), which involved a challenge to a Walnut Creek initiative that affected the general plan. However, the court ruled that the initiative was a zoning ordinance, not a general plan amendment. (The court ruled the zoning ordinance invalid because it was inconsistent with the existing general plan.)

Indeed, the Supreme Court deliberately left the door open in *Lesher* by mentioning in a footnote that it had never dealt with the initiative/general plan question.

At least two Courts of Appeal have ruled that a general plan may be amended by initiative, most recently in a *Stanislaus County case, Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal.App.4th 141 (1993). Nevertheless, the Napa County builders challenged Measure J by arguing that general plans cannot be amended by initiative — "challenging a settled assumption in California case law," in the words of the appellate court.

Measure J reaffirmed several agricultural preservation policies of the county and made any change in those policies — or in agricultural land-use designations — subject to a future vote. The initiative received more than 63% of the vote. Napa County Superior Court Judge Herbert W. Walker upheld the validity of Measure J.

On appeal, Division 1 of the First District was not receptive to the builders' arguments at all. At the beginning of a lengthy decision, Justice William Newsom indicated that he saw no reason to distinguish between initiatives and referenda in their relationship to general plans. However, recognizing that the Supreme Court did leave the door open in the Lesher case, he revisited the merits of the issue before ruling in favor of Napa County.

Noting that issues of statewide concern are not subject to local initiative and referendum when they are delegated to local government, Newsom devoted much of his opinion to the question of whether the general plan is a matter of statewide concern.

"Although the general plan has traditionally been regarded as a matter of local concern, closer examination discloses that it affects a mixture of statewide and local concerns, with a core of local concerns in certain areas and dominant statewide concerns in others," Newsom wrote. "Under these complex circumstances, the distinction between local and statewide concerns offers no clear guide to legislative intent."

Relying heavily on the *Yost* case, however, Newsom concluded that the Napa County situation should follow "a frequently expressed concern (in the case law) to safeguard the constitutional right of initiative." The builders had argued that two specific provisions in the state planning law which give a local "legislative body" express power to adopt and amend a general plan (Govt Code §65856 and §65858) does not constitute a delegation of authority specifically to the governing body of a local government that is not subject to initiative and referendum. Newsom did note that housing elements are subject to a separate legislative scheme with a clear statewide intent. But he noted that the Legislature has frequently rejected proposals for statewide planning goals. But the appellate court declined to address the question of whether housing elements are subject to initiative and referendum, saying Measure J did not address housing issues.

The court also rejected the builders' argument that Measure J interfered with the board of supervisors' "duty to amend the general plan" as laid out in the Government Code, especially §65358. The court noted that Measure J permits the supervisors to amend the agricultural sections of the general plan under certain circumstances and also is in effect for 30 years only. Furthermore, Newsom wrote, the Government Code "does not confer on the board of supervisors power to amend the general plan but rather provides procedures for the exercise of this power .... Although local planning clearly touches on some areas of state interest, it is clearly also an attribute of the police power; cities and counties could prepare and amend land use plans in the absence of statutory authorization." ❑

■ The Case:
DeVita v. Napa County, No. A059429, 93 Daily Journal D.A.R. 16022 (December 20, 1993)

■ The Lawyers:
For DeVita et al: Mark Armstrong, Gagen McCoy McMahon & Armstrong, (510) 837-0585.
For Napa County: Robert Westmeyer, County Counsel, (707) 253-4521.

EMINENT DOMAIN

Future Use Must Be Considered In Value, Supreme Court Says

In a 4-3 ruling, the California Supreme Court has ruled that the future value of a landowner's entire property may be included in eminent domain valuation even when a government agency is condemning only part of the property.

In affirming a ruling from the Fourth District Court of Appeal in San Diego, Justice Edward Panelli wrote: "Our recognition that the present value of property may reflect its development potential is nothing more than an acknowledgement of the realities of the marketplace....[C]ontiguous properties held in common ownership but devoted to separate uses may nevertheless be valued by the market for an integrated use."

In an angry dissent, Justice Stanley Mosk said landowners are not entitled to compensation "on the basis of nothing more than a dream of a business plan, regardless of the use to which the land itself has been put or any actual damage to the owner's use and enjoyment of the land." He was joined in dissent by Justices Joyce Kennard and Armand Arabian.

The case involved the City of San Diego's attempt to take three of five lots on San Ysidro Boulevard owned by Fritz and Betty Neumann. The city's desire to take some lots and not others presented complications for the Neumanns, because neither of the two remaining lots had independent access to San Ysidro Boulevard.

At trial the Neumanns attempted to introduce evidence that they would incur "severance damages" on their remaining property. San Diego Superior Court Judge Robert J. O'Neill would not permit the evidence to be introduced, ruling that legally separate lots could be considered together only if there was currently a unity of use. But the appellate court overturned him, (*CP&DR*, October 1992), as did the majority of the Supreme Court.

In reaching a decision, Justice Panelli reviewed more than 100 years of cases at length and concluded that "a split of authority exists" on the issue. He ruled that damages should be based on "the government's impairment of the integrity of his property, as reflected in the diminution in value of what remains after the taking." In the Neumanns' case, he said, the property as a whole held potential for development as a shopping center. "The property that remains [after the condemnation] still has potential for development as a shopping center," he wrote, "but may fetch less in the market because it is less advantageously configured than it was before the taking."

Laying down a standard for future courts to follow, Panelli wrote: "We ... hold that if a landowner establishes that there is a reasonable probability his contiguous commonly owned lots are or will be available for development or use as an integrated economic unit in the reasonably foreseeable future, all of the separate lots may be considered as a larger parcel for the purposes of awarding severance damages."

However, Panelli and his colleagues on the majority did not give property owners the unfettered right to seek compensation in such situations. Panelli's opinion repeats several times that to qualify for such compensation, a landowner "must also demonstrate that his intended use is reasonably probable in the reasonably foreseeable future," and indicated that this standard must be met by considering:

- Evidence of existing uses of the property.
- The time and expense necessary for termination of existing uses.
- Physical adaptability of the property for use as an integrated whole.
- Existing and proposed zoning.
- Local market conditions.
- Local "regulatory climate".
- Property owners plans for development.

In his dissent, Mosk disagreed that case law was divided on the issue and wrote flatly: "California law securely establishes that present unity of use is a prerequisite to any claim of entitlement to severance damages." Quoting from *People v. Ocean Shore Railroad*, 32 Cal.2d 406 (1948), Mosk wrote: "'[T]he mere fact that there is a possible or prospective use of separate property as a unit, or that they are susceptible to a common use, will not justify the allowance of severance damages.' That has been the law for more than four decades."

Mosk wrote a separate section in his dissent warning of policy implications for government agencies. "[T]he majority retain no method of distinguishing between partial takings that destroy integrity from partial takings that do not," he wrote. "Instead, they have transformed severance damages into a cash cow for landowners who happen to have a portion of their land taken by eminent domain....The public interest in orderly development of infrastructure at a reasonable cost should not be held hostage to exorbitant claims of landowners who want guaranteed profit but none of the risk of private land ownership." ❑

■ The Case:
City of San Diego v. Neuman, No. S029018, 93 Daily Journal D.A.R. 16149 (December 22, 1993).

■ The Lawyers:
For the city: Leslie J. Girard, Deputy City Attorney, (619) 533-4700.
For the Neumanns: Roscoe D. Keagy, Asaro & Keagy, (619) 297-3170.

REDEVELOPMENT

Use of Redevelopment Funds For Overpass Not Acceptable

The City of Lancaster cannot use redevelopment housing money to pay for construction of a railroad overpass, the Second District Court of Appeal has ruled.

"There is nothing to suggest this entire plan is anything more than a scheme to divert restricted housing funds to the city to pay for the construction of the overpasses," wrote Justice Miriam A. Vogel for Division One of the Second District.

The appellate ruling is the latest skirmish in a long-running battle over Lancaster's use of the redevelopment funds. The city claims that the overpass will open up a new area for development and some affordable housing will be constructed as a result. But the appellate court concluded that the city had established no provable relationship between construction of the overpass and construction of affordable housing.

Under redevelopment law, most redevelopment project areas must set aside 20% of their property-tax increment for low- and moderate-income housing. In 1991, Lancaster established a clever mechanism to use some of these funds to pay for two railroad overpasses estimated to cost $24 million.

All residential developers in Lancaster must pay traffic impact fees, or TIFs. Under the mechanism, the Lancaster Redevelopment Agency purchased $24 million worth of "TIF offsets" from the city, which the city then planned to use to build the overpasses. The funds came from a $30 million bond issue secured by the 20% housing setaside.

Subsequently, any residential developer in the area served by the overpasses would be granted a waiver of 90% of the traffic fee — approximately $1,000 per unit — in exchange for setting aside 12.5% of its single-family units and 13.5% of its multi-family units for affordable housing. In an example used by the court, a residential developer building 200 single-family units and 1,000 multi-family units would be subject to $1.1 million in traffic fees. However, by participating in the city's low-income housing program, that same developer could pay only $110,000 in traffic fees if 25 single-family units and 135 multi-family units were set aside for low- and moderate-income housing.

However, participation in the low-income housing program would be voluntary, not mandatory. Non-participating developers would pay the normal traffic fees, 90% of which would be sent back to the redevelopment agency as reimbursement. In essence, the redevelopment agency would "play banker" for the city's overpass project. But the city may or may not obtain more affordable housing, depending on whether individual developers choose to participate in the program.

Lancaster resident Dolores Dibley sued, represented by Kane Ballmer & Berkman, the prominent redevelopment law firm in Los Angeles. Noting that the area in question is currently designated for business park development, Dibley argued that the scheme amounted to an illegal diversion of redevelopment housing money to serve business interests. Los Angeles Superior Court Judge David M. Schacter ruled in favor of Lancaster, saying that the area would not be developed at all without the overpasses. "[T]he problem is that if we follow [Dibley's] thinking literally, we would be building low-income houses in areas no one could get to," he said.

However, the appellate court (Division 1 of the Second District) overturned Schacter's decision, especially faulting Lancaster for failing to create a convincing nexus between the overpass project and the affordable housing requirement.

"Although it may be true, as the Agency claims, that the area to be accessed by the overpasses 'has a full build-out potential of 45,000 housing units,' there is no evidence in the record to show that this potential will be fulfilled," wrote Vogel. "The only development presently contemplated is a business park comprised of commercial and industrial buildings with no residential component. We can find no plans, proposals, or any hint at all of new housing, affordable or market priced. Pure speculation (which is all there is) is not enough because it does not show that the program is one 'which results' in new affordable housing."

Writing bluntly, Vogel concluded: "The [affordable housing program] is no more than an illusory promise by the city that, 'if you give us the money to build our overpasses now, then maybe, at some point in the future, there might be a developer who chooses to participate and agrees to construct affordable housing.' Politely stated, that is not enough." ❑

■ The Case:
Lancaster Redevelopment Agency v. Dibley, No. B071317, 93 Daily Journal D.A.R. 16031 (December 20, 1993)

■ The Lawyers:
For Lancaster Redevelopment Agency: David R. McEwen and David H. Mann, Stradling Yocca Carlson & Rauth, (714) 725-4000.
For Dolores Dibley: Murray O. Kane, Kane Ballmer & Berkman, (213) 617-0480.

ANTITRUST IMMUNITY

Plaintiffs in Shopping Center Case Are Immune From Antitrust Violations

Real estate investors who bankrolled an environmental lawsuit against a proposed shopping center are immune from liability under federal antitrust law, the Ninth U.S. Circuit Court of Appeals has ruled.

The case involved an attempt by Liberty Lake Investments Inc. to sell property near Spokane, Washington, to a developer for a shopping center. Opponents appealed the action to the Spokane Board of County Commissioners and subsequently filed a lawsuit in Washington state court. Both actions claimed that an environmental impact statement should have been prepared under Washington's State Environmental Protection Act (SEPA) a law similar to California's CEQA.

Plaintiffs in the case were various business people in Spokane, including a downtown tavern called West 514 Inc., but they were paid for by Harry F. Magnuson, whose holdings include an existing shopping center in Spokane.

Subsequently, Liberty Lake sued Magnuson and the other plaintiffs, claiming that the West 514 litigation in state court was a sham and therefore its plaintiffs are not granted the usual immunity from federal antitrust law. The sham exception is part of the so-called *Noerr-Pennington* doctrine in federal court. (The doctrine takes its name from *Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961), which recognized that attempts to influence government action may sometimes be a mere sham to cover an attempt to directly interfere with a competitor's business relationships.)

But the Ninth Circuit ruled that Liberty Lake couldn't meet the two-part test for sham litigation recently laid out by the U.S. Supreme Court in the recent *Columbia Pictures Industries Inc. v. Professional Real Estate Investors Inc.*, 113 S.Ct. 1920.

In that case, the Supreme Court ruled that to qualify as a sham, a lawsuit "must be objectively baseless" and the court must focus on the question of whether the baseless lawsuit conceals an attempt to use governmental processes, rather than the outcome of those processes, as an anti-competitive weapon. The case involved a hotel chain sued for copyright infringement by Columbia Pictures after it sought to enter the video rental business.

The Ninth Circuit ruled that the West 514 litigation did not meet either portion of the test. On the question of baseless litigation, Liberty Lake had argued that the West 514 plaintiffs lacked standing because they were concerned with economic, not environmental, interests. And second, Liberty Lake argued that the suit was baseless because West 514 lost at every stage in the process. To refute both claims, the Ninth Circuit turned to action in the Washington state courts. First, the Washington superior court actually ruled that West 514 did have standing. And second, though the Washington appellate court ruled against West 514, the Ninth Circuit noted that this decision was made not because the lawsuit was baseless but because the appellate court concluded that an EIS must be prepared when environmental harm is "probable," not merely "possible."

Liberty Lake also argued that Magnuson, the real estate investor, had solicited straw plaintiffs who were not really connected with the litigation. The Ninth Circuit rejected this argument by noting that in the declaration of plaintiff Darlene Compton — which Liberty Lake relied on heavily — Compton stated that she willingly agreed to become a plaintiff because of sincere concerns about environmental issues. "Nothing in the record indicates the remaining West 514 plaintiffs were unwilling participants in the litigation," the court wrote. "...Liberty Lake's evidence at most goes to Magnuson's motivation, which we are precluded from examining." ❑

■ The Case:
Liberty Lake Investments Inc. v. Harry F. Magnuson, No. 92-35300, 93 Daily Journal D.A.R. 15959 (December 17, 1993).

■ The Lawyers:
For Liberty Lake: Earle J. Hereford Jr., Culp Guterson & Grader, Seattle, (206) 624-7141.
For Magnuson: Leslie R. Weatherhead, Witherspoon Kelley Davenport & Toole, Spokane, (509) 624-5265.

CEQA

Dock Construction Doesn't Require EIR, Appellate Court Rules

In an unpublished opinion, the First District Court of Appeal has ruled that Marin County did not act improperly in preparing a mitigated negative declaration, rather than an environmental impact report, for nine individual boat docks. The appellate court reversed a Marin County Superior Court judge, who concluded that an EIR

should have been prepared.

The opinion is notable because of the appellate court's decision to apply the "substantial evidence" test, rather than the "fair argument" test, to the question of whether an EIR should have been prepared. In *Friends of B Street v. City of Hayward*, 106 Cal.App.3d 988 (1980), the Court of Appeal laid out a liberal test for determining when an EIR should be prepared — whenever "it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact."

However, in the unpublished opinion from Marin County, Division 2 of the First District Court of Appeal that the *Friends of B Street* test should not be used because construction of the docks had been contemplated in an earlier master plan for which an EIR had been prepared.

The case involved construction of nine boat docks at Strawberry Spit in Richardson Bay, a northern arm of the San Francisco Bay. The spit was created by dredging activity in the late 1950s and early '60s. It is adjacent to the Salt Works Canal. Beginning in the 1970s, harbor seals began using the spit as a "haul-out" site. A mostly submerged portion of the area is leased by the National Audubon Society as a wildlife sanctuary and nature center.

Development of Strawberry Spit began in the early 1980s, when county supervisors approved a master plan and a development plan. A full environmental impact report was prepared at that time, which caused considerable changes to the proposed development. The project was reduced from 96 condominiums and 9 single-family lots, throughout the spit, to 62 single-family lots on the southern half of the spit, while the northern half of the spit would become a wildlife refuge to benefit the seals, among other species. The original plan had called for three navigational cuts in the spit but the final called for only one cut that would separate the developed part of the spit from the wildlife refuge.

In 1989, the county approved a dredging permit for Western Dock Enterprises in the vicinity. At the same time, WDE applied for a design review waiver to construct boat docks on nine waterfront lots. Local officials were divided as to whether this action required an environmental impact report. The design review board and the planning commission called for an EIR, while the planning department staff called for a mitigated negative declaration.

In 1991, the Marin County Board of Supervisors approved the project with a mitigated negative declaration, finding that the cumulative impacts from construction and the added boat traffic were not environmentally significant. A variety of mitigation measures were adopted, including private dock use only, construction of docks only in conjunction with construction of residences, smaller docks, and improvements to safeguard the seal haul-out (which the seals had stopped using in 1986 for an unknown reason).

The Audubon Society subsequently sued, making two claims. First, Audubon argued that the county had improperly "piecemealed" the dredging and the dock construction, which it said were related projects, so as to avoid an EIR. And second, Audubon said that the mitigated negative declaration was improper because the record supported a fair argument of significant environmental impact — thus meeting the *Friends of B Street* test for preparation of an EIR.

Audubon won at the trial level, where a Marin County Superior Court judge ordered the approval of the docks set aside and an EIR prepared. Meanwhile, the Bay Conservation and Development Commission issued a 58-page permit covering both dock construction and dredging.

The Court of Appeal reversed the trial judge and ruled that the *Friends of B Street* test would be inappropriate. "The initial study and negative declaration in this case were expressly tiered to the 1982 EIR, incorporating that prior study, and with good reasons. The nine lots were part of the 62-lot development plan approved in 1982, and prior review envisioned not only the waterfront lots but related mitigation, notably the navigational cut and island refuge, for seals and other wildlife."

The court rejected Audubon's argument that the nine-lot construction project was different enough from the 1982 plan to require a new EIR. "There may well be significant differences or changes between a new project and the scope of the prior study, but this does not make tiering unavailable," the court wrote. "The whole point of tiering is to save time and expense by identifying such differences and then determining whether and to what extent they require a further EIR directed specifically to those differences."

The court also overturned the trial judge's ruling that the county had improperly piecemealed the dredging project and the dock construction project to avoid examination of cumulative impacts. "Audubon urges that dredging was delayed in bad faith in order to await approval of the docks, implying interdependence as to the lower lagoon dredging," the court wrote. "However, there is evidence to the contrary. Delay was caused in part by the need to assess the lot owners for a participating share of the costs ... as contemplated in the EIR." While acknowledging that the two projects were "clearly related," the court concluded that "there was no improper piecemealing" because "the information provided did not preclude informed decisionmaking and informed public participation."❑

■ The Case:
National Audubon Society v. Marin County, No. A058233.

EXACTIONS

City's 'Unwritten Policy' Can't Be Imposed on Developer

A Tracy developer does not have to pay the cost of placing off-site utilities underground, the Third District Court of Appeal has ruled. The court overturned the decision of San Joaquin County Superior Court Judge K. Peter Saiers, who ruled that an off-site underground ordinance was in effect at the time the developer's application for a vesting tentative map was deemed complete by the city.

Bright Development Co. bought 40 acres of land in Tracy in 1989 and filed a vesting tentative map application with the city. Under the Subdivision Map Act (Government Code §66498.1-66498.9), developers can seek vested rights for their subdivision by pursuing a vesting tentative map. A vesting map "locks in" the city's requirements at the time the application is deemed complete.

Tracy accepted Bright's application as complete in mid-1989. The subdivision was subsequently approved by the planning commission.

In late 1990, the city amended its design standards and standard specifications to require subdividers to place off-site utilities underground at their own expense. Subsequently, Tracy sought to impose this requirement on Bright, but Bright resisted. Bright paid for the undergrounding process under protest and sued.

In court, Tracy argued that the city had maintained an unwritten policy since 1981 to pay for undergrounding of off-site utilities. The city pointed to various policies adopted in 1987 and 1988 requiring underground conduits, though these policies did not explicitly discuss off-site utilities. The city also maintained that in 1989, when the vesting tentative map application was pending, Bright's obligation to pay for underground trenches off-site was explicitly discussed at a public meeting. Based on those arguments, Saiers ruled in favor of the city.

On appeal, Bright argued that substantial evidence does not exist to support Saiers' ruling, and also argued that Saiers had impermissibly allowed Tracy to introduce new information into the administrative record.

But the court ruled that Bright should be pursuing a traditional mandamus proceeding, not an administrative mandamus proceeding — thus requiring a showing that the action was "arbitrary and capricious," rather than merely showing that the findings were not supported by the administrative record. Having so ruled, however, the court found that Tracy had acted arbitrarily and capriciously.

The court did not buy Tracy's argument that a de facto off-site undergrounding policy was in effect at the time of Bright's application. In essence, the court concluded that Tracy's various policies did not apply to off-site utilities except if a contractor damaged and/or removed utility lines in the course of its operations.

The court also rejected Tracy's argument that Bright had sufficient notice of the off-site undergrounding requirement because of discussion at a May 1989 meeting of the Design Review Commission. The court's review of the situation found that discussion consisted of one comment by a Utilities Department employee, who was responding to a question by another employee. "You're trying to get him to get PG&E and telephone — and all that stuff undergrounded before he starts work?" the Utilities Department employee said.

"First," the court stated, "there is no indication in the transcript whether the discussion involved on-site or off-site undergrounding. Second, even if the discussion was about off-site undergrounding, the comment suggests City is 'trying to get' plaintiff to underground utilities. There is no mention of any existing ordinance, policy, or standard. If anything, the inference suggested by the transcript is that there was no such ordinance, policy, or standard then in existence."

The court ruled in favor of Tracy on the question of adding to the administrative record, but this decision didn't help the city at all and may have hurt.

The additions to the administrative record took the form of declarations of city employees, who discussed the city's policies. The court's decision turned on the question of whether the proceeding was a traditional mandamus proceeding or an administrative mandamus proceeding. Both Bright and Tracy proceeded under the assumption that an administrative mandamus was appropriate. The court, however, concluded that Bright should be pursuing a traditional mandamus action.

Under traditional mandamus, evidence outside the administrative record may be introduced, so the court ruled in favor of Tracy on that issue. Having done so, however, the court gave the declarations little weight — and what weight it gave them seemed to work against Tracy's argument. "At best the declarations tend to show no more than that the declarant city employees believed there was ... an unwritten policy in effect. But the declarations do not establish whether the 'policy' existed outside the minds of these employees."

The court also concluded that the city may not apply the policy retroactively to Bright because the city made no health and safety finding that would permit it to do so under the Subdivision Map Act. ❑

■ The Case:
Bright Development Co. v. City of Tracy, No. C014286 93 Daily Journal D.A.R. 15070 (December 2, 1993).

■ The Lawyers:
For Bright Development: Steven A. Herum, Neumiller & Beardslee, (209) 948-8200.
For City of Tracy: Nancy J. Koch, Ferella, Braun & Martel, (415) 954-4400.

TAKINGS

Refusal to Rezone School Land Doesn't Constitute A Taking

The city of Alhambra did not engage in inverse condemnation when it rezoned two acres of a Catholic girls school's property from multi-family residential to open space, the Second District Court of Appeal has ruled.

The appellate court concluded that educational uses are permitted under open space zoning, meaning Ramona Convent of the Holy Names could expand its school onto the two acres, which is currently used for a baseball diamond. The court distinguished the Ramona case from similar cases by noting that the two acres in question are not legally separated from Ramona's entire 19-acre parcel, all of which is zoned for open space.

Ramona has operated a school on the Alhambra property since 1889. In 1986, Alhambra changed the zoning and general plan designation of all school properties in the city from multi-family residential to open space.

In 1989 Ramona sought a tentative tract map that would divide the parcel in two — a 17.2-acre parcel for the school and a 1.97-acre parcel for the senior citizen project. However, the city told Ramona the application was incomplete because it was not accompanied by a development proposal. Subsequently, Wonder sought city sponsorship for the senior citizen project, which would have permitted an 88-unit building. After the council chose not to sponsor the project, Wonder was faced with a maximum of 59 units. Wonder withdrew its development application. Ramona decided to proceed with the lot-split application even though it was not accompanied by a development application. Subsequently, the Alhambra Planning Commission denied the lot split proposal and rejected Ramona's argument that the lot split should be "deemed approved" under the Permit Streamlining Act because time limits had expired.

Ramona sued on a variety of grounds, including no substantial evidence in the record for the lot-split denial, abuse of discretion, a taking of property by regulation, and civil rights violations. The city filed a motion for summary judgment, claiming that the inverse condemnation claim was not ripe, the open space zoning did not create a taking of property, and that if the inverse condemnation claim was improper, the civil rights claim must fail as well. Subsequently, Temporary Judge Herbert Klein granted summary judgment for the city and Ramona appealed.

The Second District Court of Appeal (Division 3) ruled that the Ramona case is ripe for judicial review. The city contended that the case was not ripe because Ramona has not officially proposed a development project. The court agreed with Ramona that because the city "has identified definitively the uses it will permit on the property," the case is ripe.

However, the court ruled against Ramona on the substantive issues. The court ruled that Ramona had not suffered a taking of property, even if the two-acre portion of Ramona's parcel is considered separately from the entire 19-acre parcel of which it is still legally a part. "The city has not zoned the 1.97-acre parcel differently from the rest of the larger parcel....It is Ramona, not the City, which seeks to treat the 1.97-acre portion differently from the rest of the parcel."

The appellate court also rejected Ramona's argument that the property had been taken on the grounds that Ramona had been robbed of all economically viable use of its property. "The open space zoning allows various permitted and conditionally permitted uses on the site, including, most particularly, educational institutions," the court wrote. "Thus, if Ramona wishes to expand its classroom facilities, add science laboratories, or build a gymnasium or dormitories, it could do so on the site." ❑

■ The Case:
Ramona Convent of the Holy Names v. City of Alhambra, No. B064755, 93 Daily Journal D.A.R. 16209 (December 22, 1993).

■ The Lawyers:
For Ramona: Roger M. Sullivan and Henry K. Workman, Sullivan Workman & Dee, (213) 624-5544.
For Alhambra: Leland C. Dolley, Alhambra City Attorney, (213) 236-0600.

Fires Highlight Dilemma Faced By Many Communities

Continued from page 1

should be discouraging construction in high-risk areas.

The late October and early November fires in Laguna Beach, Altadena, Malibu, and elsewhere destroyed hundreds of homes and more than 100,000 acres of brush. This marked the fourth consecutive year that a major wildfire wreaked destruction somewhere in California. And according to the California Department of Forestry and Fire Protection (CDF), hazardous "fuel" conditions still exist on 14 million acres statewide, including land owned by the federal government.

In general, fire-damaged communities are stiffening their local fire codes. Los Angeles County has created a special Wildlife/Wildfire Safety Panel, comprised of 14 experts from various public agencies and building trade groups, including L.A. County Fire Marshall Michael Freeman. The group was given 90 days to review a number of issues, including building and safety codes.

In Orange County, the site of the Laguna Beach fire, officials are currently "in the process of looking at areas for proposed changes in fire codes, on both the county and contract city levels," according to Dennis Hirschberg, the county's deputy fire marshal. So far, the preliminary areas of examination cover "various roofing classes, fuel modification, and requirements to submit applications for grading permits in severe fire-hazard areas to the county fire Marshall." The City of Laguna Beach, meanwhile, is examining its own building and safety codes, according to building official John Gustafson. The city has established a task force to propose new fire regs. "We have not come to any conclusions yet," said Gustafson, who said the city is considering beefing up requirements for fire-resistant building materials on wooden decks and eaves, spark arrestors on chimneys, eave protections, double-paned glass in all windows, non-combustible siding, and limits to the size of wall vents.

At the same time, CDF is working on implementing AB 337, the so-called "Bates bill" passed in 1991, which calls for wide-ranging fire prevention measures by state and local government. Among other things, the bill recommends local agencies to designate certain areas as high fire-severity zones and requires the state fire marshal to prepare and adopt a model fire-prevention ordinance, which requires fire-retardant roofing materials for roofs and decks, defensible space requirements such as 30- to 100-foot clearances, keeping roofs clear of vegetation, and no trees within 10 feet of chimneys.

The bill also requires CDF to develop guidelines for a number of fire-prone counties, including Santa Barbara and most counties in metropolitan Southern California and the Bay Area. Under the Bates bill, severe-fire-hazard areas would be identified as needing "fuel clearance" and other mitigations.

Ironically, federal regulations against destruction of endangered species habitat may complicate the ability of homeowners and local officials to clear away chaparral and other forms of "fuel" in some cases.

In the fire-stricken cities, political sympathy toward fire victims is at an understandably high level. As in the aftermath of the Oakland fires of '91, city officials in both Malibu and Laguna Beach are creating emergency rebuilding policies almost immediately after the fires.

The experience of Oakland was instructive to both those cities, as representatives of the Northern California city flew down to assist officials in both Malibu and Laguna Beach in creating post-fire policies. Shortly after the '91 fire, Oakland officials set up a "One-Stop Restoration Development Center," which was a permit counter designed to "fast-track" the issuance of building permits; the city also waived the customary waiting periods for such permits. Oakland officials believed the fast-tracking was necessary to discourage homeowners from settling in other areas and leaving the city for good. "We felt it was extremely important for Oakland to get the people back into Oakland. The attitude was, don't let them take their insurance money and flee to suburbia and (away from) the problems of Oakland," said architect Bob Odermatt at a West Los Angeles conference in December. The policy, which the city ended about five months after the fire, appears to have been a success: of the 3,300 homes destroyed in Oakland, about 400 have been completely rebuilt, and another 1,200 are in the pipelines, according to Odermatt.

The surprise result of the rush-to-rebuild efforts in Oakland, however, often resulted in houses that were 40% larger than their pre-fire size, whose multi-story bulk intrude aggressively onto the landscape. Architect Odermatt acknowledged that such massive rebuildings were probably not good public policy, but were hard to enforce, because the city had few records of the size and layout of homes prior to the fire. Laguna Beach and Malibu apparently will face similar problems.

In Laguna Beach, the city council approved a rebuilding plan on December 8 to replace the 366 homes lost in the blaze. Homes can be rebuilt without going through a long review process if homes stay within their original footprints and do not increase more than 10% in size. But homeowners can increase the size of their floor areas up to 49% if they meet certain requirements, such as not blocking views or infringing on the privacy of neighbors. Homeowners who want to build even larger homes may be required to obtain the permission of neighbors.

Bob Benard, Malibu's planning director, said the city's interim zoning ordinance already allows rebuilding of structures destroyed by fire. He is advocating a change in the city code to liberalize rebuilding standards. Existing city code allows homeowners to rebuild homes on their original footings, and increase the original spatial envelope of the house by 10%; these standards echo the rebuilding policies of the California Coastal Commission. "We're suggesting modifications to allow homeowners to build up to what would be the maximum permissible under zoning, but not larger," he said.

The question remains whether local governments should not place more restrictions on building in fire-prone hillside areas, rather than making it easier. In a Los Angeles Times editorial shortly after the fires, author Mike Davis audaciously suggested that the hillside homeowners themselves were "real arsonists," because they had built their homes in a natural environment ill-prepared to receive them. But Joseph Edmiston, the director of the Santa Monica Mountains Conservancy, said that "blaming the victim" was the wrong idea. "If we were able to redo what we have done in the past 20 or 30 years, we wouldn't do what we did....But for human, legitimate reasons, that seems to be exactly the direction we are headed."

Edmiston, who heads a public agency that buys parkland in the Santa Monica Mountains, caused a few gasps at the West Los Angeles conference when he went on to suggest that the conservancy would be willing to buy certain of the home sites that had burned if their owners were reluctant to return to them. (He later qualified his statement, saying that the conservancy would be willing to buy only homesites that were contiguous to parklands, and not empty lots in residential neighborhoods.)

And while no formal survey of fire-affected home owners exists, most of the people who lost their homes in Malibu appear intent on rebuilding them, according to Barry Kinyon, president of the Las Flores Homeowners Association. (Las Flores Canyon was among the hardest-hit areas in Malibu.) Ironically, some of the motivation to rebuild comes from the weak home market, because homes in Malibu have fallen in value, and home owners would not be able to pay off their mortgages by selling their home sites at their current value. "The people in my neighborhood are saying, 'I want to rebuild, I want to come back'," says Kinyon. "And economically, they are going to have to." ❑

■ Contacts:

Barry Kinyon, Las Flores Homeowners Association, (310) 457-6550
Joe Edmiston, Santa Monica Mountains Conservancy, (310) 456-5046
Ed Edelman, Los Angeles County Supervisor, (213) 974-3333
Bob Benard, Malibu planning director, (310) 456-0769 ext. 233
Dennis Hirschberg, Orange County Deputy Fire Marshall, (714) 569 3700
John Gustafson, Laguna Beach building official, (714) 497-3311

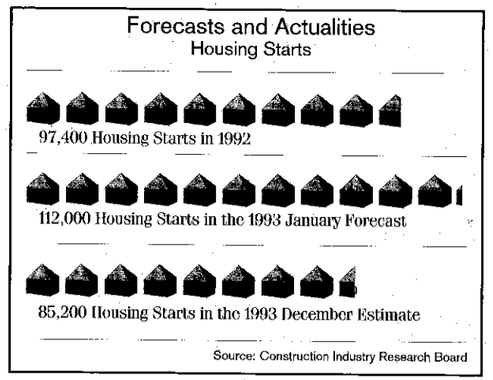
NUMBERS

Stephen Svete

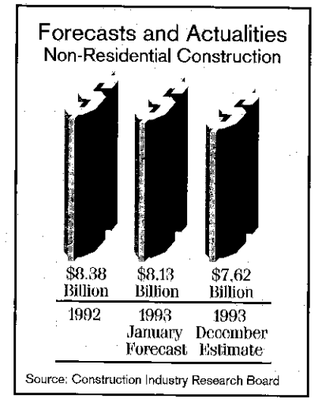
Construction Follows California Out of Recession

Almost a year ago, we reported the Construction Industry Research Board's prediction that 1993 would be the year that the homebuilding industry would reverse its four-year slide.

That forecast will now take its place in the trash heap of erroneous projections, another victim of California's perplexing recession. With its December report, the CIRB — a statewide research institute funded by the construction industry — reversed. Instead of being the turnaround year, CIRB now says, 1993 will become the fifth year of decline — not only for residential development, but overall construction as well.



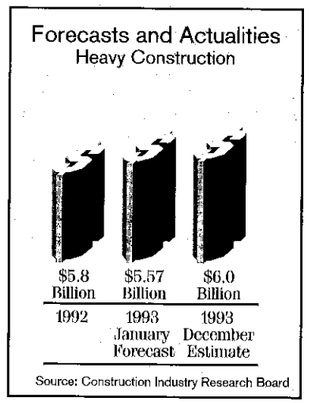
Rather than 112,000 units being built — an 18.3% increase over 1992 — CIRB now estimates the final figure will be 85,200, a 12.5% decrease. Final 1993 numbers won't be out until March. But if this forecast holds, it means that residential construction in California will have dropped to its lowest point since World War II. And this continued plunge points to yet another significant change in the way California's economy works: Real estate development — and especially homebuilding — isn't leading the state out of the recession. It's following the rest of the economy.



The continued plunge in home building runs counter to the trend in home-buying in the state, which began to climb in 1993. It also diverges from several other key economic indicators: corporate profit taking, unemployment, and retail sales — all which showed small to moderate improvement over the last year.

Once again, the optimistic CIRB has forecasted a turnaround in homebuilding for 1994. But this time, CIRB economists hedged their bets, saying that the forecast "assumes continued low mortgage interest rates, and a modest statewide economic recovery." The point is clear. Rather than being a stimulus in the California economy, construction as an industry is now merely an after-effect.

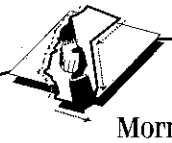
Commercial and industrial construction declined as well, though this was forecasted by CIRB. If there was a bright spot in building, it was in the "heavy construction" category. A year ago, CIRB forecast $5.6 billion of activity in the category that encompasses infrastructure and public works. Presently, the adjusted forecast sees a total of $6 billion in that area, mostly due to rail transit, port, and prison construction around the state. But this was not enough to offset the overall decline in construction, which totaled $26.6 billion instead of the $29.4 billion forecast a year ago. The revised total represents a 9% drop in all building, compared against a 5% gain forecast a year ago.



The latest figures reveal another trend in the building industry that runs counter to other sectors of the economy: employment. Construction employment is down — declining 19% since the peak year of 1990. But construction employment is still very high compared to the go-go years of the 1980s. Ten years ago, it took 366,900 construction workers to produce a total of $32 billion in construction product. Last year, it took 455,000 workers to produce $26 billion of product. These figures suggest a drop in construction productivity of nearly 50%.

Why is the construction industry not showing any signs of life, while the rest of the economy seems to be rallying for at least an anemic rebound? For the answer, one needs to recall the deregulated, free-lending years of the mid-1980s, when money was easy and speculation knew no bounds. Fast-forward to the mid-1990s, and we find ourselves with profitable but severely downsized industries that leased the office and industrial space built for them in the '80s. Homebuilders got ahead of themselves as well, buying and trading with land brokers in the path of suburbia, but ending up with a seriously overvalued inventory of land. Now these builders are nervous about building on land that has plummeted in value at the same time that housing prices are dropping.

The evidence certainly points to a different type of building industry for California's future: one that no longer leads, but cautiously follows. And until the economy gathers enough steam to absorb the excesses of overdevelopment, the CIRB may need to develop a different set of assumptions before developing forecasts. ❑



DEALS

Morris Newman

West Sacramento's Good Deed Backfires

"No good deed goes unpunished" is a favorite saying in our family. In the City of West Sacramento, that adage could be expanded to say: No good deed goes unpunished — by another good deed. In an unusual case, two Mom-and-apple-pie public agendas — the creation of affordable housing and the rights of renters — have come into an embarrassing conflict. The obvious questions are how such conflict came to occur, and whether there was a way of preventing it. As it turns out, the city's apparent goodness may not have been unalloyed.

The good deeds, in this case, concern the city's attempt to clean up a notorious Motel Row near the downtown area. Motel Row is a fen of drug dealing and prostitution which city officials very much want to eradicate. And because motel rooms are cheap, Motel Row is, for better or worse, an affordable housing resource, particularly for very poor families, who often "bundle" up in groups of two or three in a single unit.

> *"The city's solution to poverty, apparently, is dispersion."*

Two years ago, the city's redevelopment agency decided to vacate a particularly run-down motel. They had at least two worthwhile agendas: to clean up a public eyesore, and to convert the 191-unit building into affordable senior housing. To make this possible, the city required about 180 households to vacate the premises. Generally, when landlords or public officials force people to move, they are required by state law to pay relocation costs. But in this case, the city apparently considered the residents hotel guests, rather than residents of "permanent housing," and offered no relocation assistance. At that point, residents contacted a poverty law group, Legal Services of Northern California Inc.

In July 1991, senior attorney David Jones went to court. Jones filed for — and got — a preliminary injunction and a restraining order to compel the city to pay relocation costs. In Jones' view, the motel residents were entitled to such payments, since the motel was effectively a permanent home for many of the residents, and that they were unfairly being deprived of what any other renters would receive. He also asked the court to compel the city to pay the difference between market-rate rents of their new rental units and 25% of their income, in conformance with the relocation payment formula specified by state law.

In an effort to settle the case, the city offered a compromise relocation package, in which the city would pay the difference between the rent and 30% of residents' income for up to one year. That did not satisfy the residents, because state relocation law requires landlords to pay the difference between the rent and 25% of tenants' incomes for up to four years. "Our clients' contention is that the city is seeking to circumvent state relocation statutes to provide full benefits, and tried to come up instead with a way to move people without following the full dictates of the law," Jones said. Shortly after, Jones again filed and won injunctive relief compelling the city to provide the reduced benefits for up to four years.

The lawsuit's second cause of action is a fair-housing issue. Under state law, redevelopment agencies are barred from vacating family housing for the purpose of creating units for seniors only. This portion of the case remains in litigation, although both sides have been negotiating a settlement, and it seems unlikely that the case will go to trial.

Robert E. Murphy, the contract city attorney, naturally takes issue with the suit. His description of the property at issue: "It's a rundown large motel. The owners were in financial difficulty. There were very high crime statistics coming out of there. The city also had a desire to provide senior housing through redevelopment. It seemed the best of all worlds to go in there, work with the owner, and convert it to affordable senior units."

On the fair-housing issue, he finds the plaintiffs' arguments unconvincing. "The law for years has been for permanent housing. We don't view motels as permanent housing." In fact, permanent housing per se would be illegal in the area, Murphy added, because "in a technical sense, it is an illegal zoning use, not to speak of a dozen health code and safety code violations." Regarding the issue of creating seniors' housing in a family complex, "motels are not housing to start with, so the various rules (pertaining to relocation) do not apply." In his view, the squall over relocation payments simply "gets in the way of our doing our job."

This case is difficult because the law is cut and dried, and a just solution involves something more like the spirit of the law than the letter. It is true that the motels by definition are transient housing. But like many technically short-term rentals such as hotels and RV parks, the motels really have become housing, and appear to be one of the few options for very low-income renters. The city is right in its desire to clean up Motel Row, and perhaps equally right to be impatient with kinds of liberal arguments that would provide good fodder for Rush Limbaugh.

But something is possibly rotten in the city's do-gooder scheme. The city's solution to poverty, it appears, is dispersion: throw the poor on the streets and let them scatter. As an urban strategy, that dates back to the Neanderthal days of urban renewal — as if mere dispersion solved deep-seated problems in the community. We have no problems with affordable senior housing (and a judge may decide its legality in any event) but clearly the need here is for family housing. The best course the city could have taken would have been to build or rehab new housing and to relocate the motel residents into those units; the city could avoid the "ghettoizing" syndrome by breaking up the residents into groups of two or three in middle-income areas.

Speaking of good deeds coming into conflict with other good deeds, one Sacramento observer remarked that the city might get into hot water all over again by relocating motel residents to newly rehabbed housing, because that would make the city appear to be giving preference to residents who already had roofs over their heads, as opposed to the homeless sleeping under a bridge. Well, perhaps cities attempting to do good will take their lumps in any event. But the act of dispersing the poor in the name of creating affordable housing is one good deed that should not go unpunished. ❑