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Inside

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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,
Larry Sokoloff,
Contributing Editors

Allison Singer,
Circulation Manager

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Sacramento Grabs Downtown From City-County Agency

Redevelopment Projects To Be Run By City Alone

By Morris Newman

In a surprising move, the Sacramento City Council has shifted control of its downtown redevelopment area from a combined city-county redevelopment agency into the city manager's office.

Although no one has challenged the city's authority in taking the action, officials from both the county and the city's redevelopment commission expressed chagrin that the city appeared to take the action unilaterally, without consulting with other city or county officials. In addition, the loss of the agency's largest redevelopment area made several observers wonder whether the city is contemplating further dismantlement of the redevelopment agency.

The Sacramento Housing and Redevelopment Agency is a joint-powers authority of four city and county agencies (the housing and redevelopment agencies of both jurisdictions) which administers 11 redevelopment project areas in both the city and county of Sacramento. The JPA is primarily a means to consolidate the administrative functions of the member agencies, each of which maintains its own budget and its own commission.

The move essentially brings redevelopment activities under the same roof as the city's economic development program in an effort to end the perceived redundancy and turf battles between the two agencies. "Basically, it was my contention that we needed to integrate and consolidate services to get more focus on the projects downtown," said City Manager Bill Edgar in an interview.

Combining the two agencies saves the city about $400,000 in administrative costs, according to Edgar. In addition, the city manager's office now has control

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Housing Lags Behind State's Economy

Debate Over Whether Fees, Regulations Are to Blame

By Morris Newman

Housing starts in California have failed to rebound to their record high levels of the 1980s, despite the state's robust economic recovery. Both housing industry officials and government officials blame a list of familiar culprits, including high development fees, a slow permitting process, and anti-growth sentiment in suburban communities. Some economists, however, suggest that the reasons for the sluggish pace of housing starts are more complex, and include the slow recovery of prices for existing homes, as well as the departure of many smaller builders for states with cheaper land and less restrictive land-use regulations.

California needs at least 200,000 new dwelling units annually to keep pace with the state's fast-growing population. (In addition, the state may need another 200,000 new units, simply to replace the housing lost through obsolescence, assuming a 50-year life of typical homes, according to economist Tom Lieser, associate director of UCLA Anderson Economic Forecast. Last year, however, homebuilders obtained permits for only 94,000 housing units, and expect to pull another 106,000 by the end of 1997, according to the California Industry Research Board of Burbank. Although those figures show improvement from the recessionary low of 84,600 in 1993, recent figures appear anemic compared to the record high of 314,500 permits in 1986.

"Normally, in the past, homebuilding has led recovery periods. What is troubling is that California has been in recovery for two years and the housing industry is not following that lead," said Bob Rivinius, chief executive officer of the California Building Industry Association, the state's

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of the $850,000 of tax increment that flows from the downtown project area, although state law dictates that such monies must be spent on projects within the designated project area. Edgar has described the consolidation as part of a larger effort to reduce the city's current budget shortfall from $11 million to $8 million.

The shift also gives the city manager's office much more direct control on one of the most nettlesome issues in downtown redevelopment: the city's convention center, which is currently operating at a $1.3 million deficit.

The change in management of the downtown redevelopment area occurred with virtually no job loss. Tom Lee, who had been the executive director of the downtown project area for the agency, was reassigned to virtually the same responsibility in the city manager's office, with the new title of assistant city manager. In addition, seven former redevelopment staff members followed Lee to the city manager's office. The Planning Commission will assume the responsibility of reviewing redevelopment projects in the downtown area, replacing the role formerly handled by the city's redevelopment commission.

Edgar defended the move to put the downtown redevelopment area directly under the control of the city manager's office, saying that "that is how it's done in most cities throughout the state. It's unusual to have a separate staff for redevelopment."

A private planning consultant in the Sacramento area, who asked not to be identified, wondered aloud whether the action was "the first step in the process of dismantling the agency." Because the downtown project was by far the largest redevelopment area controlled by the redevelopment agency, taking downtown away from the redevelopment agency and its board of commissioners essentially "has gutted the redevelopment agency as a whole," according to the consultant.

At the same time, the consultant said, the consolidation had possible advantages. By combining economic development and redevelopment "you bring the activities of the city more closely into alignment." He added that "there was some tension going on" inside the city because "the redevelopment agency was going in one direction and the economic development staff was going in another direction, and were not speaking with the same voice."

Bobbie Harland, president of the combined redevelopment commission, declined to say in an interview whether the shift was good or bad. But she was clearly miffed at being "blindsided" by the council's decision. Harland said she was unaware of the council's intention to hand over the downtown redevelopment area to the city manager's office "about two weeks before the meeting of the city council in which that decision was made. I was not privileged to that information until it was too late to do anything."

"If you sat down and did an analysis" of whether the downtown area would be better managed by the redevelopment agency or the city manager's office, she added, "I don't know what the outcome would be. The problem is, I did not have an opportunity to find out."

Harland also suggested that the council action might be the first step toward a further dismantlement of the redevelopment agency, since Edgar, the city manager, has publicly stated that he would like to gain control of federal block grant funds, currently administered by the redevelopment agency.

Bob Thomas, county executive of Sacramento County, said he was also left in the dark about the city's decision. "It came as a surprise, in view of that fact there had been no policy discussion at the (county) board of supervisors" about the city's decision to take over the downtown redevelopment area. "I am concerned about the absence of a dialogue at a policy level, and the implications, long-term, about what happens with the housing and redevelopment agency," he added.

Major organizational shifts should not occur with study and mutual consultation, according to Thomas. "I just think we need to be very studied in our approach to organizational change." The county executive hinted that the city had fixed a redevelopment agency that was not broken. "The organization has worked very effectively for the past 25 years and has a statewide and national reputation of being a model organization," he said.

Anne Moore, the interim executive director for the redevelopment agency, appeared to accept the change. City manager Edgar, she said, "wanted to make a bold change in the way government is structured. We all have to figure out how to make it work," she said.

■ Contacts:
Bill Edgar, Sacramento city manager, (916) 264-5704.
Bobbie Harland, president, City of Sacramento Redevelopment Commission, (916) 723-5075.
Bob Thomas, county executive, Sacramento County, (916) 440-5878.
Anne Moore, interim executive director, Sacramento Housing and Redevelopment Agency, (916) 448-5295.

A Chain Store in Davis!

The City of Davis has approved construction of a new downtown commercial center on land formerly owned by the University of California. The project was controversial because the commercial center will include the first chain bookstore in the downtown area, which is well known for its wide variety of independent booksellers.

The shopping center has been under debate for months, and even council members who voted in favor of the project still appeared to dislike both the Borders and what one council member called its "suburban strip mall". However, the development project met all planning and zoning requirements.

The shopping center, to be located on a 4.75-acre parcel of land, is part of a larger UC Davis development project. An adjacent parcel was developed as the Aggie Village residential project, a New Urban-style housing development for UC employees. UC sold the commercial parcel to a private developer. ❑

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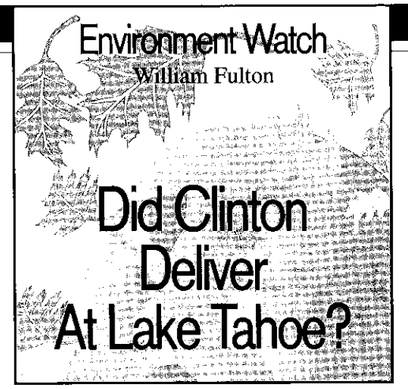

President Clinton's recent visit to Lake Tahoe has focused attention on attempts to negotiate a compromise solution to environmental problems there. But Wilson Administration officials took the opportunity to criticize Clinton for not making a greater financial commitment to the region.

Clinton's visit to Lake Tahoe on July 26 received widespread national publicity and focused attention for recent agreements among environmentalists and development interests on a wide-ranging set of "environmental improvements programs" — a $900 million plan drawn up by the Tahoe Regional Planning Agency to monitor and improve environmental conditions in the Tahoe area. Among other things, the plan will seek to redirect development away from wetlands and other sensitive sites and alter travel patterns to minimize the environmental impact on the area. TRPA was created by Congress under a bi-state compact including both California and Nevada,

So enchanted was Clinton with Tahoe's consensus that he immediately began praising it as a model that could be used to resolve major world problems. "He was struck by people's desire to work together in partnership to come together to save this lake," White House spokesman Joe Lockhart explained after Clinton had left Tahoe.

But the visit set off a minor political skirmish between Clinton and California Gov. Pete Wilson over whether either side is committed to providing the money required to improve the Tahoe environment. Though Clinton is a Democrat and Wilson is a Republican, they have generally worked together on land conservation issues. No sooner had Clinton left Lake Tahoe, however, than Wilson criticized him for not committing more federal money to the effort.

Prior to Clinton's arrival, Wilson and Nevada Gov. Bob Miller, a Democrat, announced a new memorandum of understanding committing the two states to work together through TRPA to implement the environmental improvements programs. The memorandum committed the two states to "active involvement with our Federal partners, who will share with the States and local members of the partnership the implementation and funding of this effort."

Wilson and Miller pledged some $360 million in funds from the two states over the next 10 years, with about two-thirds of the money coming from California. But the federal government is an especially important partner at Lake Tahoe because federal agencies own 80% of the land in the area. Prior to the Clinton visit, state and local officials said they hoped the federal government would pick up about one-third of the $900 million cost of the environmental improvements program.

Once he arrived at Tahoe, however, Clinton committed only $26 million in additional funds to assist the Tahoe area. Clinton said the funds will be used for "real projects based on listening to local people" and represents a doubling of the federal government's spending on Lake Tahoe.

> *"Once he arrived at Tahoe, however, Clinton committed only $26 million in additional funds to assist the Tahoe area."*

But Douglas Wheeler, Wilson's resources secretary, complained that the federal government was not providing enough money for the environmental improvement program being undertaken by the Tahoe Regional Planning Agency. "Despite his apparent support for the broad consensus that has emerged at Lake Tahoe, the President made no mention of TRPA's plan and proposed 27 disparate federal 'restoration' initiatives, including improved mail delivery on the lake's west shore and the repair of the runway at Reno airport," Wheeler said in a letter to the editor of the San Francisco Chronicle.

But the Chronicle did not take Wheeler's comments at face value. In an editorial, the newspaper noted that Wilson's $275 million pledge "is not binding" on the state legislature or his successors, whereas the president "was offering real money".

Flycatcher Tests NCCP

The U.S. Fish & Wildlife Service's recent designation of critical of the southwestern willow flycatcher, an endangered bird, is expected to provide one of the first tests of the state's new "Natural Communities Conservation Plans" for sub-regions in Southern California.

The Service included areas along the South Fork of the Kern River and a 16-mile stretch of the Santa Ana River in Orange County, as well as portions of five rivers in San Diego County, in its 600 miles of critical habitat. (Areas in Utah, Arizona, and New Mexico were also included.) The Service did not include a controversial area around the shoreline of Lake Isabella in Kern County in its designation.

The San Diego County rivers (including the Santa Margarita, the San Luis Rey, the San Diegito, the San Diego, and the Tijuana) will be covered by the conservation agreements hammered out under the state's NCCP program. These agreements protect landowners from future listings and designation of critical habitat in exchange for participation in the NCCP program. This critical habitat designation for the flycatcher represents one of the first situations in which the NCCP agreements will be tested.

The Fish & Wildlife Service proposed critical habitat for the flycatcher in 1993 but a final decision was postponed by Congress's action to place new listings on hold. However, the Service was then sued by the Southwest Center for Biological Diversity. As a result, a federal judge in Arizona ordered the designation of critical habitat earlier this year.

The Fish & Wildlife Service expressed unhappiness at being required to designate the habitat, claiming in a press release that the designation "will actually do little for the bird, yet it has required us to shift scarce resources away from other species that are still awaiting for protection under the act." ❑

Schools Watch

William Fulton

Land-Use Battle Over High School Near Watsonville

Environmentalists have sued to stop construction of a new high school in a coastal area of Watsonville currently used for farming. The Watsonville school proposal is the second recent controversy over construction of a school on environmentally sensitive land in coastal Santa Cruz County, and reveals the strain involved in coordinating school siting and land-use planning — especially when the Coastal Commission, a state agency with land-use permitting authority, is involved.

After an eight-year search, Pajaro Valley Unified School District trustees approved an environmental impact report for the coastal site last spring despite strong opposition from the Coastal Commission staff. The school would be located west of Highway 1 on one of the few parcels of land in the City of Watsonville located in the coastal zone. Although the school district certified its own EIR, it is working with Watsonville to amend the city's local coastal program to permit the project.

At the same time, the city is moving forward with attempts to annex two nearby properties in the coastal zone — one for an industrial park and the other for a residential complex that would be located adjacent to the school site. But all three development projects are located adjacent to the Watsonville Slough, and a local environmental group has challenged the adequacies of EIRs on all three projects. The industrial park is scheduled to come before the Santa Cruz County Local Agency Formation Commission in September, while the city has slowed down the schedule on the residential project.

The Coastal Commission staff opposed the coastal location for the school in late May, when the Pajaro Valley school board conducted a hearing on the EIR. Staff members said Highway 1 creates an urban-rural boundary in Watsonville and called the project "a leapfrog out of the existing boundary." In an interview with *CP&DR*, Coastal Commission staffer Steve Manowitz said his office was especially concerned about the impact of the high school project on the slough.

At the May meeting, the Coastal Commission staff's remarks received angry responses from school trustees, who say they must alleviate overcrowding in two existing high schools in the district, which serves both Watsonville and Aptos.

After the trustees certified the EIR, the school district was sued by two environmental groups, the California Coalition for Resource Conservation and Watsonville Wetlands Watch. Bill Parkin, the environmentalists' lawyer, said he is challenging the adequacy of the EIR on several counts. The same groups are suing the City of Watsonville on the proposed industrial park and the residential development that would be constructed adjacent to the school.

The Coastal Commission recently went through a similar dispute in nearby Soquel, where the Live Oak School District disputed the Coastal Commission's jurisdiction over school siting decisions. Acting in contradiction to the Coastal Commission staff's wishes, the school district filled a wetland to build a middle school. After the school was built, the school district and the commission reached an agreement on a mitigation plan calling for restoration of native plants both on site and on an off-site location.

By contrast, the Pajaro Valley district is not contesting the Coastal Commission's jurisdiction. Harold Freiman, the district's lawyer, said that even though he believes the law is "unclear," the school district intends to work with the Coastal Commission to reach an agreement. Thus, the school district and the City of Watsonville are working together to amend the city's local coastal program, which the Coastal Commission will eventually have to approve.

Under state law, school districts are exempt from local land-use regulations. However, in coastal areas, ultimate land-use regulatory authority lies with the Coastal Commission — which, like a school district, is a state agency.

Meanwhile, Watsonville is moving forward with at least one of the two other development proposals on the coastal size of Highway 1. Neither the so-called "Tai" site (named for the developer that owns the property) nor the "Riverside" site is currently located inside the city boundaries or even within Watsonville's sphere of influence.

On the Tai site, which is immediately adjacent to both the Watsonville Slough and the proposed high-school site, the developer is proposing some 1,800 homes on about 600 acres. On the Riverside site, located nearby, the city is seeking to encourage the development of an industrial park on about 200 acres adjacent to Highway 1.

Parkin, the environmentalists' lawyer, alleges that the city supports the high school project partly because it will open up the other properties across Highway 1 for development. The Tai residential development would share the cost of extending sewer and water service to the area.

However, Watsonville planner Martin Carver said that the city has decided to move forward quickly with annexation of the Riverside property, while slowing down the proposed annexation of the Tai property. He said that, among other things, the creation of jobs in the industrial park is a higher priority to city officials than the construction of more housing. The unemployment rate in Watsonville, a poor and largely Latino farming town, is hovering at close to 20%. The Riverside property was identified by a panel of development experts from the Urban Land Institute as a highly desirable property for industrial development.

Pat McCormick, executive officer of the Santa Cruz County LAFCO, said that the Riverside annexation will likely come before the LAFCO in September. He said that loss of agricultural land and the impact of development on the slough would likely be issues in the LAFCO debate. ❑

■ Contacts:
Steve Manowitz, Coastal Commission, (408) 427-4863.
Harold Frieman, lawyer for Pajaro Valley Unified School District, (408) 646-1501.
Bill Parkin, lawyer for environmentalists, (408) 462-2053.
Martin Carver, City of Watsonville, (408) 728-6177.
Pat McCormick, Santa Cruz County LAFCO, (408) 454-2055.

CP&DR
LEGAL DIGEST

Victory for Homeless Advocates

San Diego Housing Element Struck Down on Homeless Issues

The Fourth District Court of Appeal has struck down the City of San Diego's housing element, concluding that the document does not contain enough information about specific sites for homeless shelters and transitional housing. However, the appellate court stayed a trial court's ruling that the city must approve all pending conditional-use permits for homeless shelters and transitional housing until it repairs the legal defects in its housing element.

In the ruling the Fourth District laid down a set of guidelines for local governments to follow in identifying sites for homeless facilities and other low-income housing.

The ruling is an important victory for housing advocates, who have long sought to use housing element law to overcome local opposition to homeless shelters and other low-income housing facilities. In its opinion, the appellate court ruled that a housing element must identify specific sites immediately available for construction of low-income housing, rather than provide a broad survey of land available for housing use.

"Within a zoning and land-use context, simply coordinating the resources and efforts of the public and private sectors does not identify sites 'available' for development of emergency shelter and transitional housing for the homeless," wrote Justice Don R. Work for the unanimous three-judge panel. "Adequate funding and ownership of land does not equate to available usable sites, absent a program of zoning development controls, meaningful regulatory concessions, and incentives, which will permit and encourage such development."

Housing element law is one of the most contentious areas of local land-use planning in California. Housing is the only area of public policy in which local governments must meet state policy objectives in their general plan — a fact that has engendered resentment from local governments. In the housing element, they must pursue the goal of providing housing for all income groups. However, it has long been debated whether the housing element law requires local governments merely to lay out land-use policies to permit low-income housing, or imposes a mandate on the locals to actually assure the construction of such housing.

Poverty advocates originally sued San Diego in 1994, charging that the city failed to revise its housing element in 1991, as required under the state's mandatory five-year cycle. The city adopted an updated housing element in 1995, but the poverty advocates revised their lawsuit, claiming that the new document did not designate adequate sites for homeless facilities and did not provide an adequate five-year action plan.

In its defense, the city claimed it had done an adequate site inventory and had streamlined the conditional-use permit process for homeless facilities. The city also argued that under law it was not statutorily required to meet the entire homeless housing need over the five-year period, which the city estimated at about 3,400 beds.

San Diego County Superior Court Judge Wayne Peterson ruled that in acknowledging that it would not meet the homeless need under its housing element, the city was violating the law. He ordered the city to revise its housing element and approve all pending CUPs for homeless shelters and transitional housing until the housing element was revised.

On appeal, the Fourth District acknowledged that the city had done considerable statistical analysis and also documented its own policy initiatives. However, the court concluded, these efforts were not enough to meet state law.

In the housing element, the city identified some 11,000 acres of land available for housing that could accommodate 95,000 residential units — and, in particular, about 900 acres of land available for housing at 25 units per acre or more, which would yield about 32,000 units. The city also outlined its "Good Neighbor Policy", which encourages homeless advocates and neighbors to resolve their differences through mediation or similar means, and its conditional-use permit regulations that relate to homeless shelters and transitional housing facilities.

But the appellate court ruled that these efforts were not enough. Regarding the acreage available and the number of units that could be built, the appellate court said the city must identify "an inventory of sites" and laid down a set of rules to follow, borrowing those rules from the Department of Housing and Community Development. The sites identified must:

- Be available for immediate development.
- Be located within "reasonable access" to public agencies and transportation services.
- Not require unusually high site development costs.
- Have available public services and facilities.
- Be consistent with General Plan and zoning designations, so that the housing can be built "without undue regulatory approval".
- Be consistent with parking and fire regulations and design standards.

"[F]or identification [of sites] to be meaningful, it must necessarily be specific," Justice Work wrote. "Available sites should be officially designated and publicized, preferably in the housing element, for this use."

In addition, the court concluded that the city's CUP requirements for homeless facilities are not adequate. CUP processes should "actually encourage the development of emergency shelters and transitional housing," the court stated. By contrast, San Diego's residential care facility requires a CUP for facilities with six or more beds and requires only one facility in each quarter-mile radius. These restrictions "substantially constrain siting homeless facilities for emergency shelter and meaningful transitional housing in any location within the city."

In addition, the "Good Neighbor Policy", the court said, "contains no provision requiring City to assist applicants in obtaining community approval for a CUP and the comments of council members [on the record] suggest City's unwillingness to intervene in the process."

In summary, Justice Work wrote: "While City's planning efforts have been substantial and positive, the trial court correctly concluded it has failed to present an action program to offset the strictures of the residential care facility ordinance by identifying adequate sites which will be made available to meet City's quantified objectives as to the housing needs of the homeless." But, he added, "in reaching this conclusion, we recognize our role is simply to determine whether the municipality has substantially complied with statutory requirements; it is not to delve into the merits of the stratagem proposed in the element or the underlying wisdom of the municipality's determination of policy."

However, the appellate court stayed Judge Peterson's order to require CUP approval — thus permitting the city to revise the housing element without a gun to its head. ❑

■ The Case:
Hoffmaster v. City of San Diego, No. D02596, 97 Daily Journal D.A.R. 7586 (June 17, 1997).

■ The Lawyers:
For Hoffmaster (poverty advocates): Timothy D. Cohelan, Cohelan & Khoury, (619) 239-8148.
For City of San Diego: John P. Mullen, Deputy City Attorney, (619) 533-5800.

ENDANGERED SPECIES

State Erred in De-Listing Squirrel, Supreme Court Rules

The Fish & Game Commission can follow its own equivalent procedures rather than the California Environmental Quality Act in "de-listing" an endangered species, the California Supreme Court has ruled. But in a split decision, the court concluded that the Fish & Game Commission violated its own procedures in de-listing the Mohave Ground Squirrel in 1991.

The decision has been hailed as a victory by both environmentalists, who are pleased that the squirrel's de-listing has been overturned, and by state officials, who say they are vindicated that the California Endangered Species Act does not fall completely under CEQA jurisdiction. The ruling also has the effect of taking the California species law on a different path than the federal law.

The Supreme Court's ruling would appear to clarify longstanding questions about the relationship between CEQA and the state endangered species law, commonly known as CESA. The majority concluded that CESA and CEQA can be reconciled and that a "certified regulatory program" such as the listing and de-listing of endangered species under CESA is exempt from CEQA because CESA provides a "functional equivalent". The two-justice minority concluded that CEQA and CESA cannot be reconciled and found no fault with the Fish & Game Commission's actions in de-listing the squirrel.

Under state law, the Fish & Game Commission — an independent body separate from the state Department of Fish & Game — acts on petitions to list and de-list species. The commission took the unprecedented action of de-listing the Mohave Ground Squirrel in 1993 after receiving a petition to do so from the Kern County Department of Planning & Development Services. A group of environmental organizations led by the Mountain Lion Foundation then sued, claiming that the commission had violated both CESA and CEQA in de-listing the squirrel.

On appeal, Kern County and property-rights groups argued that the Supreme Court should follow the same reasoning that the Sixth Circuit Court of Appeals followed in *Pacific Legal Foundation v. Andrus*, 657 F.2nd 829 (1981), a case involving the relationship between the federal Endangered Species Act and the National Environmental Policy Act. In that case, the Sixth Circuit concluded that the federal government was not required to file an environmental impact statement under NEPA when listing a species. In the Mohave Ground Squirrel case, the county and the property-rights groups argued that, as CEQA was patterned after NEPA and the state species law was patterned after the federal species law, the same reasoning should apply.

However, the Supreme Court majority rejected this argument. Among other things, Justice Janice Brown, writing for the majority, stated: "[A]lthough Andrus's observation — that a listing serves the same environmental protection goals of NEPA — arguably supports the proposition that preparation of an EIR for a listing under CESA would be an unnecessary exercise, the same cannot be said with respect to de-listing. A de-listing by definition withdraws existing environmental protections from the affected species." Thus, Brown and the majority concluded: "Unlike the *Andrus* court's determination that preparation of an impact statement for a listing under ESA would be a 'waste of time', we find a de-listing decision under CESA that is made in accordance with CEQA would serve an important purpose in helping to shape and inform the Commission's exercise of discretion."

In addition, the Supreme Court majority also rejected the argument of Kern County that the commission's actions must be exempt from CEQA because there are irreconcilable differences between the two laws. In essence, the county and the property-rights groups argued that listing and de-listing actions are not discretionary actions but, rather, "nondiscretionary biological determinations" — in other words, a ministerial action. CEQA applies only to discretionary actions, not to ministerial actions.

The Supreme Court majority rejected this argument, concluding that "the procedural facts of this case provide ample evidence of the commission's exercise of discretion." In particular, the majority pointed to the fact that the Fish & Game Department concluded that de-listing was not warranted because the species was likely to become endangered in the foreseeable future, but the Fish & Game Commission chose not to accept this recommendation and voted to delist the species anyway.

Having concluded that the de-listing is subject to CEQA, the Supreme Court majority then concluded that the Fish & Game Commission improperly claimed the de-listing was categorically exempt from CEQA — but also ruled that CESA's procedures constitute a "certified regulatory program" that serves as the functional equivalent of CEQA. Having made this determination, the court then concluded that the Fish & Game Commission did not correctly follow its own procedures, thereby making the de-listing legally vulnerable.

Under CEQA, categorical exemptions apply to categories of projects that the resources secretary determines will not have a significant effect on the environment. The Supreme Court concluded that a de-listing may have a significant effect on the environment and therefore cannot be categorically exempt.

The commission claimed that the de-listing fell within an exempt category of "actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of natural resources where the regulatory process involves procedures for protection of the environment." But the majority concluded that this class of actions cannot be stretched to include a de-listing under CESA. "The delisting of a species withdraws a number of statutory protections," Justice Brown wrote. "Because a delisting removes rather than secures these protections, the categorical exemption for actions assuring the maintenance, preservation, or enhancement of a natural resources set form in [the CEQA Guidelines] does not apply."

The Supreme Court majority overturned the Court of Appeals' ruling that an environmental impact report under CEQA should have been prepared for the de-listing action. Instead, the majority concluded that CESA procedures constitute a functional equivalent of CEQA. But, the court said, the de-listing must be set aside because the Fish & Game Commission did not follow those procedures.

State actions do not have to follow CEQA procedures if they are subject to a "certified regulatory program" that serves as CEQA's functional equivalent. The Court of Appeal ruled that the Fish & Game Commission's "certified regulatory program" was limited only to hunting and fishing licenses and related actions. In part, this decision was based on the fact that the Fish & Game Commission's regulatory program had been certified by the resources secretary in 1976, eight years before CESA became law.

But the Supreme Court disagreed. The environmental groups, Justice Brown wrote, "point to nothing that suggests the Legislature intended the Commission to refrain from applying the review procedures of its existing regulatory program to a delisting decision. We may presume that when it enacted CESA the Legislature was aware of the regulations adopted to satisfy the requirements of certification pursuant to [CEQA]. Indeed, as we concluded, the review procedures established by the Commission for certification of its regulatory program both complement and enhance the statutory framework of CESA."

In addition, the court majority concluded that the resources secretary could have circumscribed the scope of the certified regulatory program to hunting and fishing — as he has done in a number of other instances — but chose not to do so in this case.

Having concluded that the commission could use its own procedures as a substitute for CEQA, however, the Supreme Court majority concluded the commission botched those procedures in this case, thereby making the de-listing vulnerable. The court's main rationale for this conclusion was the commission's decision to regard the de-listing as categorically exempt. "It follows," Justice Brown wrote, "that the Commission did not faithfully follow the procedures of its certified regulatory program when evaluating the delisting petition."

Among other things, the Supreme Court criticized the commission for failing to respond to significant environmental opposition, as its own procedures call for; nor did it assess feasible alternatives and mitigation measures. "Because the ground squirrel shares its habitat with other species of plants and animals, some of which are not protected by CESA, it is possible the removal of protections from the one species will have a significant, adverse effect on others," Justice Brown wrote. "Carrying out a delisting in accordance with CESA thus does not eliminate the need for the Commission to consider and adopt feasible mitigation measures that would lessen or avoid the identified significant environmental impacts of the de-listing."

In dissent, Justice Marvin Baxter criticized Justice Brown's "strained effort to fit a square peg into a round hole." He concluded that CEQA cannot be reconciled with CESA and therefore the Fish & Game Commission did nothing wrong in following CESA but not CEQA in the de-listing. Baxter was joined in his dissent by Justice Ming Chin.

Baxter said he could not agree with Brown's decision to reconcile CESA, which requires focus only on the species in question, with CEQA, which requires a broader analysis of environmental impacts. "The majority ... imply the need for two simultaneous and parallel proceedings," Baxter wrote. "One proceeding, under CESA, must determine narrowly whether a listed species should be delisted on the basis of its own ecological status. Another equally elaborate proceeding, under CEQA, must identify and mitigate any and all adverse 'incidental' effects of the delist decision on plants and animals whose status is not under formal consideration." Thus, Baxter claimed, Brown's decision wants the CEQA "tail" to wag the CESA "dog".

But Baxter disagreed. CESA, he said, "mandates a focus on the status of that species alone. The statute does not contemplate that a proceeding to consider whether one species is threatened or endangered shall become a forum for debate about the status of others." So, he concluded, "the majority has provided no justification for 'grafting' an EIR requirement onto a CESA list/delist proceeding." ❑

- The Case:
  Mountain Lion Foundation v. Fish & Game Commission, No. S05350897 Daily Journal D.A.R. 9909 (August 1, 1997).
- The Lawyers:
  For Mountain Lion Foundation: Joseph J. Brecher, (510) 272-0433.
  For Fish & Game Commission: John Davidson, Deputy Attorney General, (916) 356-6365.
  For Kern County: Charles F. Collins, Deputy County Counsel, (805) 861-2326.

ZONING

City Can Declare Adult Store As Public Nuisance, Court Rules

The City of Los Angeles's public nuisance ordinance is constitutional and may be applied to curtail the operations of an adult book and video store in the San Fernando Valley, the Second District Court of Appeal has ruled.

The constitutionality of the ordinance was challenged by Erotic Words/Pictures Inc., or EWAP, which operates Le Sex Shoppe in Canoga Park. The store was open 24 hours per day for more than 20 years. However, in 1994, the Los Angeles Police Department asked city zoning administrators to revoke the business's conditional use permit. Voluntary agreements with the business, police said, had been ineffective in curbing lewd conduct and other undesirable activities around the store.

Subsequently, the city's zoning administrator found the store to be a public nuisance. Among other things, the zoning administrator noted that the store was located within one block of a library used by children and that more than 100 arrests had been made in the vicinity of the store in the previous three years.

The zoning administrator imposed 20 operating conditions on the store, including a required closure from 2 to 6 a.m. The store appealed the decision to the City Board of Zoning Appeals, which adopted most of the zoning administrator's recommendations but expanded the required hours of closure to 9 p.m. to 10 a.m. Subsequently, the Los Angeles City Council denied a further appeal.

After issuing a preliminary injunction against the city pending a decision, Los Angeles Superior Court Judge Robert O'Brien ruled in favor of the city and dissolved his injunction.

On appeal, the Second District Court of Appeal affirmed O'Brien's ruling and permitted the city to move forward.

Most significantly, the court concluded that the public nuisance section of the Los Angeles Municipal Code does not violate the First Amendment of the U.S. Constitution, which protects Le Sex Shoppe's right to sell books. "[T]he ordinance impacts directly on the nuisance activities," the court concluded, "and only indirectly upon appellant's First Amendment rights."

EWAP also argued that the ordinance was too vague and gave too much discretion to the zoning administrator to alter the conditions contained in the conditional use permit if a public nuisance was found. But the court disagreed. "[N]uisance activities are specifically defined in [the municipal code] and it is clear that the precise conduct which is proscribed by the ordinance occurred here," the court wrote. The court further stated that the activities in the store's vicinity clearly fall "within the ambit of the ordinance" — and, while the ordinance might be vague as applied to a business without First Amendment protection, EWAP cannot sue on those grounds because they do not apply to its business.

EWAP also argued that it had been denied a fair trial and that the Board of Zoning Appeals had improperly relied on new evidence offered at its hearing, rather than on evidence that had been presented to the zoning administrator. In both cases, the court relied on a recent previous L.A. zoning case, *Mohilef v. Janovici*, 51 Cal.App.4th 267 (1996) — a case involving a property owner's high-density ostrich farming — in which the appellate court ruled that a formal hearing, with cross-examination, was not required.

"The court in *Mohilef* recognized that the value of cross-examination is diminished where numerous witnesses testify to the same basic experience, such as smelling a foul odor or seeing bird features collecting on the ground. Similarly here, the record is replete with reports, letters and testimony as to the litter, noise, sexual activity and harassment, such that the value of cross-examination is questionable," the Second District wrote.

The Second District also ruled in the city's favor on the question of whether the findings were supported by the weight of the evidence, and whether Judge O'Brien correctly applied the substantial evidence test in determining the outcome of the case.

- The Case:
  EWAP Inc. v. City of Los Angeles, No. B102861, 97 Daily Journal D.A.R. 8821 (July 9, 1997).
- The Lawyers:
  For EWAP: Roger Jon Diamond, (310) 399-3259.
  For City of Los Angeles: Claudia McGee Henry, Senior Assistant City Attorney, (213) 485-5419.

OUTDOOR ADVERTISING

Federal Consent Decree Can't Override State Billboard Law

A federal consent decree cannot prevent the construction of billboards near the Century Freeway in Los Angeles if they are permitted under the California Outdoor Advertising Act, the Ninth U.S. Circuit Court of Appeals has ruled.

The ruling is a victory for billboard developer Robert Kudler, who has been fighting with Caltrans to put billboards along Interstate 105 ever since it opened in 1993. In making the ruling, a unanimous three-judge panel overruled Judge Harry Pregerson, who oversaw litigation surrounding the Century Freeway for some 20 years prior to and during its construction. Though Pregerson is himself a Ninth Circuit judge, he has continued to preside over the Century Freeway litigation in a District Judge capacity. He was not a member of the Ninth Circuit panel that ruled on this case.

Community activists agreed to a federal consent decree on the Century Freeway in 1981 after almost a decade of litigation. Among other things, the consent decree called for the construction of the Century Freeway as "a landscaped freeway". (Under California law, a landscaped freeway is "improved by the planting at least on one side of the freeway right-of-way of lawns, trees, shrubs, flowers, or other ornamental vegetation.) In addition, the 1977 environmental impact statement called for the construction of the Century Freeway with full landscaping to create "a visually oriented park-like atmosphere".

After being rebuffed by Caltrans, Kudler filed suit in Los Angeles County Superior Court, asking preemptory writs of mandate to require Caltrans to reclassify sections of the freeway as non-landscaped — specifically, those areas where landscaping is absent for more than 200 feet — and to provide him with permits to place billboards in those sections. In 1996, Judge Robert O'Brien granted Kudler's requests for writs. He asserted his right to the permits under the California Outdoor Advertising Act, which permits standards for landscaped freeways on which billboards are prohibited.

Subsequently, however, the original plaintiffs in the Century Freeway lawsuit — including the NAACP, the Sierra Club, and other civil rights and environmental groups — sought an "order to show cause" with Judge Pregerson seeking a temporary restraining order blocking O'Brien's writs. Pregerson ruled in favor of the plaintiffs, and Kudler appealed to the Ninth Circuit.

On appeal, the Ninth Circuit panel ruled that a federal consent decree cannot overrule a state statute. The judges acknowledged that the intent of the consent decree was to prohibit billboards along the entire length of the Century Freeway. However, the court overturned Pregerson because he had not pointed to a specific federal statute in issuing the injunction against the billboard advocates.

"The district court did not confront the fact that its interpretation of the Consent Decree and resulting injunction had the effect of overriding California's valid outdoor advertising law," the Ninth Circuit wrote. "Put simply, state law, as interpreted by the California courts, will govern whether Kudler may erect his advertising displays. The district court correctly interpreted the Consent Decree as purportedly banning the displays but it ultimately concluded, improperly, that the decree prevailed over state law."

The Ninth Circuit went on to say: "Here, there simply was no federal law to justify the district court's superseding of state law. Although the court referred to 'the important federal policies vindicated by the [Consent] Decree', the court failed to identify a single federal law that would justify its overriding the state law. The best the district court could do was to rely vaguely on the 'policy concerns' and 'aesthetic concerns' of the National Environmental Policy Act of 1969. ... NEPA imposes only procedural requirements." ❑

- The Case:
  Keith v. Volpe, No. 96-56437, 97 Daily Journal D.A.R. 8805 (July 9, 1997).
- The Lawyers:
  For Century Freeway plaintiffs: Carlyle W. Hall, (310) 441-8300.
  For Caltrans: O.J. Solander, (916) 654-2630.
  For billboard developer Robert Kudler: Wayne W. Smith, Gibson Dunn & Crutcher, (213) 229-4764.

PENDING CASES

State Supreme Court Will Hear Controversial Species Case

The California Supreme Court has granted review to an important appellate ruling on state conservation planning permits, while rejecting an appeal in a second case challenging the City of Los Angeles's demolition permit regulations. Meanwhile, the Ninth U.S. Circuit Court of Appeals has agreed to rehear the important Del Monte Dunes case, which ruled that a regulatory takings case can be decided by a jury rather than a judge.

The California Supreme Court has agreed to hear *Planning & Conservation League v. Department of Fish & Game*, No. S061521, the controversial case which challenges the authority of the Fish & Game Department under the California Endangered Species Act to issue "incidental take" permits to landowners who participate in broad-based conservation plans. The issue may be resolved by changes in statute before the summer is over.

The "incidental take" issue began last year, when the Fourth District Court of Appeal called into question Fish & Game's power to permit incidental take as part of a conservation plan — meaning, in most cases, the power to permit developers to proceed with projects that will destroy some specimens of an endangered species if they participate in a conservation plan that is supposed to benefit the species in the long run. The state has used Section 2081 to allow such take, believing that it is analogous to federal law, which explicitly permits such activity.

In dicta — that is, comments that did not bear directly on the case at hand — the court suggested that the "incidental take" provisions of the California Endangered Species Act were meant to apply to such situations as scientific experiments and did not extend to conservation plans. (*San Bernardino Audubon Society v. City of Moreno Valley*, 44 Cal.App.4th 593; *CP&DR Legal Digest*, May 1996.)

Earlier this year, the First District Court of Appeal picked up on the Fourth District's reasoning. Overturning the state's use of the incidental take provisions in the aftermath of the 1995 flooding, the First District said: "We find no reason to depart from [Moreno Valley's] basic reasoning or to attempt to distinguish that case from the one before us." (*Planning & Conservation League v. Department of Fish & Game*, 97 Daily Journal D.A.R. 4725; *CP&DR Legal Digest*, May 1997.)

Meanwhile, the court declined to hear *L.A. Lincoln Place Investors. v. City of Los Angeles*, 54 Cal.App.4th 53 (1997). In that case, the Second District Court of appeal ruled that the City of Los Angeles's process for issuing demolition permits on rental apartment properties violates the state's Ellis Act, a law which permits apartment owners to go out of business without interference from the local government.

The ruling was the latest in a lengthy dispute between the property's owner, the city, and some apartment dwellers on the property over the owner's attempt to redevelop the property. A substantive challenge to the project's denial — involving interpretation of the city's general plan — is still pending.

(*CP&DR Legal Digest*, May 1997).

Meanwhile, the Ninth Circuit agreed to re-hear one issue in the controversial *Del Monte Dunes* case. In a ruling last year, the Ninth Circuit ruled that plaintiffs who bring inverse condemnation actions against government agencies are entitled to a jury trial. (*CP&DR Legal Digest*, October 1996.) It was apparently the first time any appellate court has answered this question definitively. The case had the effect of upholding a $1.45 million damages ruling in favor of a developer against the City of Monterey.

The ruling came in a case filed by Del Monte Dunes at Monterey, a development company seeking to build homes on a 37-acre oceanfront site in Monterey. The city rejected four development proposals between 1981 and 1986. Del Monte Dunes then sued for inverse condemnation, but the city argued the case was not ripe because a "final determination" had not been made by the city. In 1990, the Ninth Circuit disagreed and ordered a trial. *Del Monte Dunes at Monterey, Ltd., v. City of Monterey*, 920 F.2d 1499. (*CP&DR*, February 1991.)

Subsequently, a jury concluded that the city had violated Del Monte Dunes' equal protection claims and awarded the developer $1.45 million. (Substantive due process claims were deemed to be purely legal and therefore not subject to a jury trial.)

On the rehearing, the court agreed to listen to arguments only on the limited issue of whether the specific question of whether the city's actions substantially advanced a public purpose could be heard by a jury rather than a judge. The court ordered no additional briefs prepared and scheduled an oral argument for early August. ❑

NEPA

Re-Issued Telecom Permit Doesn't Require New EA

The U.S. Forest Service's decision to re-issue an identical permit after the original permit expired — and request that the proposed facility be moved 15 feet — does not trigger a new review under the National Environmental Policy Act, a panel of the Ninth U.S. Circuit Court of Appeals has ruled.

The case began when the Forest Service granted Slater Communications a special-use permit in 1992 to construct a telecommunications tower on Gray Butte in Ochoco National Forest in Oregon. The Slater site was located only 200 feet from the site of a similar telecommunications tower owned by Western Radio Services Co.

Issuance of this permit reopened an old dispute between Western and Slater. In July of 1994, the Forest Service announced that it would construct an access road along the east side of Gray Butte to provide access to the Slater site — a proposal that the Service had specifically rejected in a 1992 environmental assessment on the area. Only a few days later, the Forest Service informed Western that it would not consider the company's application for a special-use permit to build additional antennas until the Slater facility had been built.

Meanwhile, Slater did not complete its new antenna before the expiration of the original special-use permit on December 31, 1994. So the Forest Service reissued an identical special use permit on January 11, 1995. Slater began construction in May of 1995. At the Service's request, Slater moved the location of the tower approximately 15 feet, but still within the permit area, to accommodate the location of the proposed new access road.

Western and its president, Richard Oberdorfer, then sued the Forest Service on a variety of issues, including the claim that the re-issued permit should have been accompanied by a new environmental assessment under the National Environmental Policy Act.

U.S. District Court Judge Malcolm Marsh dismissed the case based on the legal principle of res judicata, claiming that they had already been dealt with in the so-called *Western Radio I* case (*Western Radio Serv. Co. v. Espy*, 79 F.3d 896, cert denied, 117 S.Ct. 80 (1996).) On appeal, the Ninth Circuit agreed that most of Western's claims were barred by *res judicata*. However, the court concluded that two claims associated with NEPA could be dealt with on their merits.

The first was that NEPA and other federal laws had been violated because Slater constructed its telecommunications facility in a manner that was supposedly inconsistent with the supplemental environmental assessment and the amended site plan. However, the Ninth Circuit agreed with Judge Marsh that the plan is not violated because the Slater tower will be 194 feet from the Western Tower, whereas the site plan calls for it to be located "approximately 200 feet away".

On the broader issue of whether the reissuance of the special permit required a new environmental assessment, the Ninth Circuit again ruled in favor of the Forest Service. Western argued that because the Forest Service proposed construction of a new access road between issuing the first permit and the second permit, it was required to conduct a new environmental assessment taking the effects of the road into account. Western argued that failing to do so constitutes an improper "segmentation" of the project. Western argued particularly that because the tower was moved 15 feet to accommodate the possibility of the road's construction, the two actions are connected.

Noting that the Forest Service has declared its intention to conduct an environmental assessment for the access road itself, the court concluded that there is no inherent connection between the road and the tower. "We find ... that slightly modifying an existing project, in order to keep open a possibility of future action, does not make the two projects 'connected actions'. The road is not necessary to the operation of the tower."

The Ninth Circuit also rejected Richard Oberdorfer's attempt to bring a NEPA claim individually on the argument that the 15-foot move injured his aesthetic interests. The court concluded that "moving the tower 15 feet one way or the other within the permitted area does not entitle Oberdorfer to demand a new process under NEPA".

The court added: "Oberdorfer, though bringing his claim personally, cannot by this ruse avoid the bar of *res judicata*. As president of Western, Oberdorfer was deeply involved and fully informed as to the terms of the original special use permit. ... He could have and should have raised in *Western Radio I* any claims that certain areas within the scope of the permit had some special aesthetic and spiritual significance." ❑

- The Case:
  Western Radio Services Co. v. Glickman, No. 95-36004, 97 Daily Journal D.A.R. 7796 (June 20, 1997).
- The Lawyers:
  For Western Radio Services: Ralph A. Bradley, Eugene, Oregon.
  For U.S. Forest Service: Tamara N. Roundtree, Department of Justice, Washington, D.C.
  For Slater Communications (Intervenor): Rose M.Z. Freeby, Evans, Freeby & Jennings, Salem, Oregon.

DEALS
Morris Newman

Environmentalism or NIMBYism?

Little seemed remarkable about the news last month from San Mateo County that a nonprofit homebuilder started construction on 80 units of very low income housing for local farm workers. The event seemed far more remarkable, however, when we learned it took 14 years for the homebuilder to overcome a series of political obstacles to obtain all the necessary water and sewer hookups that made construction possible.

The San Mateo story is a case of how some very small public agencies attempted to block a public policy initiative supported by the local congresswoman and county government. The story is also a case history of NIMBYism that has taken the sheep's clothing of environmentalism to wage war against affordable housing.

San Mateo County is an affluent county. A major source of its wealth is a $200 million flower-growing industry that is concentrated along a 40-mile coastline near the cities of Half Moon Bay, Montara, and El Grenada. An estimated 4,000 farmworkers work year-round in the labor-intensive floriculture businesses. Those workers usually live in crowded and inadequate housing near the job sites, including old trailers and trucks, or are forced to commute up to 90 minutes from the inland.

> *"An attempt to preserve upper-middle-class exclusivity to the peninsula coastline hid itself under the benign cloak of environmentalism."*

In 1983, Anna Eshoo — then a San Mateo County supervisor, now a member of Congress — spearheaded the housing effort after touring deplorable farmworker housing in the county. The county selected a homebuilder, Joe Simitian, who later became a supervisor in Santa Clara County. Starting in 1985, Simitian put together a project for 160 units on 42 acres of land just south of Half Moon Bay. (The developer had considered building on land further inland, outside the jurisdiction of the California Coastal Commission, only to find that most of those lands are in active agricultural use and under Williamson Act protection.) Simitian first contemplated manufactured housing, but changed his mind when he found that such housing offered no real cost savings above conventional, "stick-built" housing. He managed to rezone the land and obtain approval to build four dwelling units per acre. The stringent California Coastal Commission approved the project in 1989.

But the site had a big drawback: it lacked virtually all infrastructure, including water and sewer hookups. The developer applied for water from the Coastside County Water District. That effort was stopped by protest from coastal environmental watchdog groups, including Sierra Club, the Committee for Green Foothills, and the Open Space Committee, which argued that adding the farmworker subdivision to the existing wells would overdraft the local aquifer and hasten salinization of the coastal water table. The water district created a new pipeline from the Crystal Springs Reservoir into Half Moon Bay, with added capacity to serve the farmworker project. The new pipeline became operative in 1992.

By this time, Simitian had quit the project, which was taken over by the Mid-Peninsula Housing Coalition of Redwood City. The homebuilder applied for sewer hookups, and received a "will- serve" letter from the San Mateo Sewer District. The same group of environmentalists, however, called for a determination by the state Water Resource Control Board to determine whether the sewage plant had adequate capacity; the state board ruled that the sewage treatment facility must be expanded before new projects could receive hook ups. After some study, Mid-Peninsula decided to build its own sewage treatment plant, the cost of which was roughly equal to the cost of buying hook ups for the entire project.

In 1995, the Montara Sanitation District (which was not the district of service for the housing project) challenged the project in court on the grounds that the county's local coastal program required all projects to be serviced by municipal sewage districts. (The apparent fear here was that private sewage treatment plants would encourage development). The agency dropped its plans for a private treatment plant, and asked the sanitation districts of the cities of Half Moon Bay, El Granada and Montara to find some capacity among themselves for the project. With pressure from Rep. Eshoo and local agri-business, the three districts reached an accord in July.

Completion on the first phase of 80 units is expected in September 1998. The housing will consist of two-, three- and four-bedroom units, as well as playing fields, a community center, laundry facilities, community classrooms and a computer-learning center. Monthly rents will range from $200 to $500, depending on need.

The total budget of the project, known tentatively as Coastside Farmlabor Housing, is $16 million. Federal low-income housing tax credits are expected to contribute $9.6 million to the first phase, while the second and third phases expect to receive most of their funding from the Department of Agriculture rural housing funds (formerly known as the Farmers' Home Administration). Additional funding sources of equity funding include Wells Fargo Bank, the California Equity Fund, SAMCO, Federal Home Loan Bank and Peninsula Community Foundation. The first phase will be built for cash, without debt financing.

I usually end these columns with a joke, but this story does not leave me in a joking mood. The notion that small public agencies — such as sanitation districts of the three San Mateo County cities — could frustrate the agenda of larger agencies makes a laughingstock out of the notion of a powerful government consistently guided by public policy.

Why was the housing so long delayed? A friend of mine recently observed that "environmentalists are rarely liberals in the old sense, that is, of being pro-labor." That's a rather sweeping statement, but it does give us one way to look at the San Mateo experience. In this case, an attempt to preserve upper-middle-class exclusivity to the peninsula coastline hid itself under the benign cloak of environmentalism.

Don't mistake me for a environmentalist-basher. I just don't accept that it is appropriate to use tools of environmentalism to freeze out housing for working people and to promote exclusive neighborhoods. It is tempting to fantasize that when the people who control the water and the sewage boards of San Mateo County meet their final reckoning, they will be required to live 14 years in a purgatory of run-down trailers and trucks before being admitted to the Kingdom of the Just. ❑